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REPORTS OF CASES

DECIDED BETWEEN

NOVEMBER 23, 1963 and APRIL 24, 1964

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM 1963 and JANUARY TERM 1964

VOLUME CLXXVI

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

SEPTEMBER TERM, 1963

MERRILL W. WILLAN, APPELLANT, V. WALLACE B. FARRAR ET AL., APPELLEES.

124 N. W. 2d 699

Filed November 29, 1963. No. 35336.

1. **Mines and Minerals.** An oil and gas lease, providing that, unless work is commenced by a certain time, or unless the lessee pay a rental stated to renew the lease, it shall terminate, confers an optional right upon the lessee and should be strictly construed in favor of the lessor and against the lessee.
2. ———. Such a delay rental clause is a special limitation, time is of the essence of the contract, and failure of the lessee or his assigns to tender or pay rentals within the specified time automatically terminates the lease without any affirmative action by the lessor, or any one else, for that purpose.
3. ———. The acceptance of delay rentals by the lessor in an oil and gas lease containing an "unless" provision after the date they were due or an extension of payment thereof by such lessor do not continue the lease in force as against subsequent lessees and purchasers.
4. **Banks and Banking.** When a bank receives an instrument for collection and remittance, it becomes the agent of the sender for such purpose, and in absence of other controlling facts is without authority to accept for its principal anything but that which the law declares to be legal tender or which is by common consent considered as money and passes as such at par.
5. **Bills and Notes: Payment.** The delivery to, or acceptance by, the creditor of a debtor's check, as distinguished from the actual payment of the check, is not absolute payment of the obligation for which the check is given in the absence of any agreement or consent to receive it as payment.

6. ———: ———. A creditor who has accepted paper, such as a check, bill, or note, in conditional payment of a debt may ordinarily, if such paper has not been paid, rescind the conditional payment and sue on the original indebtedness.
7. **Mines and Minerals.** When an unless oil and gas lease terminates by its own terms the equitable rules as to relieving against forfeitures do not apply.
8. **Estoppel.** The essential element of estoppel is a representation relied upon by the party claiming the benefit of the estoppel, which induced him to act, or refrain from acting to his prejudice.

Appeal from the district court for Grant County: DONALD H. WEAVER, Judge. On reargument. See 174 Neb. 826, 119 N. W. 2d 686, for original opinion. Former opinion vacated. Affirmed.

Van Steenberg, Myers & Burke, for appellant.

Reddish, Fiebig & Curtiss, Gantz, Hein & Moran, Duane L. Mehrens, and Howard R. Williams, for appellees.

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

BROWER, J.

Plaintiff and appellant Merrill W. Willan brought this action against Wallace B. Farrar and Helen Farrar, husband and wife, and Hemisphere Oil Company, a corporation, defendants and appellants, to quiet title to certain oil and gas leases covering land in Grant County, Nebraska. The trial court dismissed the action. Plaintiff's motion for a new trial being overruled, he has appealed.

The cause was previously heard herein. Our former opinion in Willan v. Farrar, 174 Neb. 826, 119 N. W. 2d 686, reversed the judgment of the trial court and directed it to enter an order quieting title in the plaintiff. The parties will be designated as they were in the previous opinion. The plaintiff Merrill W. Willan will be referred to as plaintiff or Willan; the defendant Wal-

lace B. Farrar as Farrar, and he and his wife Helen as the Farrars; and Hemisphere Oil Company will be called Hemisphere and its president, W. Bonner Brice, who owns 99 percent of its stock, as Brice.

On June 15, 1960, three oil and gas leases were given by the Farrars to Willan under his trade name of Sandhills Petroleum Company. They covered in all more than 22,000 acres of land in Grant County. These leases were given to replace three previous leases given by the Farrars to Forrest Whetstone and by him and his wife sold and assigned to Willan, reserving an over-riding royalty. The leases of June 15, 1960, were given apparently because of a slight error in the description in the Whetstone leases. Brice and Company, the predecessor of Hemisphere, was the drawee in the drafts drawn by Farrars to pay for the Whetstone leases which were taken up by Willan on receiving the assignment from Whetstone. Brice had full knowledge of the Willan leases. Aside from the description there is no significant difference in the provisions of the three leases of June 15, 1960, involved herein. All three contained a provision for termination on June 15th on each succeeding year, unless drilling operations were commenced or delay rentals were paid on or before that day. No drilling operations ever took place.

In April 1961, Brice secured leases on the same lands for oil and gas from the Farrars for Hemisphere, which are referred to as "Top Leases." They were to be effective if the Willan leases were terminated.

Our previous decision held that Farrar had accepted and retained a personal check of Willan for the delay rentals after June 15, 1961, the day the leases would terminate, unless paid. It further held the acceptance and retention of the check and failure to present it for payment operated as a waiver by Farrars of strict performance and estopped them to claim a termination of the lease.

Our former opinion did not discuss the rights of

Hemisphere except to state they were entirely dependent upon the Willan leases. That aspect of the case will be taken up first herein.

In Fritsche v. Turner, 133 Neb. 633, 276 N. W. 403, an early case dealing with a delay rental clause similar to the one involved herein, this court held: "An oil and gas lease, providing that, unless work is commenced by a certain time, or unless the lessee pay a rental stated to renew the lease, it shall terminate, confers an optional right upon the lessee and should be strictly construed in favor of the lessor and against the lessee."

In Valentine Oil Co. v. Powers, 157 Neb. 71, 59 N. W. 2d 150, we held: "Such a delay rental clause is a special limitation, time is of the essence of the contract, and failure of the lessee or his assigns to tender or pay rentals within the specified time automatically terminates the lease without any affirmative action by the lessor, or any one else, for that purpose."

In the case of Long v. Magnolia Petroleum Co., 166 Neb. 410, 89 N. W. 2d 245, decided subsequently to Fritsche v. Turner, *supra,* and Valentine Oil Co. v. Powers, *supra,* those cases were cited and approved. Its discussion extended these rules further as follows: "As stated in Hannah v. American Live Stock Ins. Co., *supra* (111 Neb. 660, 197 N. W. 404): ' "Forfeitures are looked upon by courts with ill favor, and will be enforced only when the strict letter of the contract requires it; * * *." Haas v. Mutual Life Ins. Co., 84 Neb. 682.' However, it is also true that forfeit and terminate are not synonymous. See, Schneider v. Springmann, 25 F. 2d 255; Kugel v. Young, 132 Colo. 529, 291 P. 2d 695; Woodson Oil Co. v. Pruett (Tex. Civ. App.), 281 S. W. 2d 159; Gillespie v. Bobo, 271 F. 641; Baldwin v. Kubetz, 148 Cal. App. 2d 937, 307 P. 2d 1005. As stated in Kugel v. Young, *supra:* 'While Appellate courts, through the use of inaccurate terminology, have frequently referred to the termination of an unless lease as a "forfeiture," there actually is no element of forfeiture involved. The lessor

is not required to do anything, but the lessee's failure to meet the conditions of the contract automatically terminates it. The interest created in the lessee by such lease does not become forfeited upon failure to comply with its conditions; it simply expires.' When a lease terminates by its own terms the equitable rule as to relieving against forfeitures is not applicable thereto."

Many courts of other jurisdictions have held that the acceptance of delay rentals by a lessor after the date for payment specified in such a lease operates as a waiver of strict performance and estops the lessor to claim a termination of the lease as far as he is concerned. 3 Summers, Oil and Gas (Perm. Ed.), § 452, p. 130.

The question before us now however concerns the rights of Hemisphere under its top leases. We find no decisions of this court in regard to the rights of intervening purchasers.

Courts of last resort in states whose decisions were cited and followed in Long v. Magnolia Petroleum Co., *supra,* hold that the acceptance of delay rentals by the lessor in an oil and gas lease containing an "unless" provision after the date they were due or an extension of payment thereof by such lessor do not continue the lease in force as against subsequent lessees and purchasers. 3 Summers, Oil and Gas (Perm. Ed.), § 452, pp. 131 to 134.

The case of Rorex v. Karcher, 101 Okl. 195, 224 P. 696, was quite similar to that before us now. The facts and the law applied plainly appear from a syllabus prepared by the court. "A landowner executed an oil and gas lease to defendants on November 1, 1913. On December 11, 1917, and while defendants' lease was still in force, the landowner executed a lease to plaintiff for a period of one and a half years. Defendants' lease would have expired on November 1, 1918, but on September 26, 1918, the defendants procured an extension of the lease for a period of one year. Held, the lease executed by the owner of the fee to the plaintiff was a

valid lease, although executed while there was a valid lease on the property, and the defendants' rights under the extension agreement were subject to the superior rights of the plaintiff under his lease."

The case of First National Bank in Santa Ana v. Coast Consolidated Oil Co., 84 Cal. App. 2d 250, 190 P. 2d 214, cites Rorex v. Karcher, *supra,* with approval and considered it authority for holding an extension agreement under an oil and gas lease, waiving defaults by the lessee, did not affect the rights of a subsequent mortgagee. See, also, to the same effect Lewis-Goodwin Oil & Gas Co. v. Holmes, 171 Ark. 844, 286 S. W. 961; Harrell v. Saline Oil & Gas Co., 153 Ark. 104, 239 S. W. 731.

In the case before us Hemisphere's top leases covered the premises involved before the rental payments provided in the "unless clause" of Willan's leases became due. According to the authorities cited any extension granted by Farrars alone or any waiver caused by their acceptance of the rentals could not affect the rights of Hemisphere. If the rentals were not paid on time the leases expired according to their terms and were at an end. The authorities also appear based on sound reasoning. If Farrars could extend the leases or waive payments of delay rentals for 10 days they could do so for 6 months or any extended period. The top leases were expressly given to be in force on the termination of the prior ones because of nonpayment of the rentals. The Farrars evidently desired that their premises remain under lease if Willan's delay rentals were not paid. Though Willan had an option by which he could continue the leases by paying the rentals when they became due, he was under no obligation to do so. Farrars having given the top leases to Hemisphere owed a duty not to render their provisions ineffective. The purpose of Hemisphere's leases should not be permitted to be defeated by the actions of the lessors at will.

Any estoppel or waiver applicable to Hemisphere would of necessity have to flow from something attribut-

able to it. Hemisphere knew about the agreement discussed later herein between Farrar and Willan to accept payment of the delay rentals on or before June 26, 1961. Hemisphere neither objected nor agreed to the negotiations or the contemplated arrangements. It did nothing to assert its rights under the top leases during the period. Nothing is shown in the record to indicate Hemisphere said or did anything that Willan relied or acted on to his disadvantage. In such a situation Willan's claim of an estoppel against Hemisphere cannot be asserted. The sole question, as far as the rights of Hemisphere as top lessee as against Willan is, did the latter pay his delay rentals on the unless leases on or before June 15, 1961? The evidence is plain he did not and the top leases thereupon fell into place according to their terms.

Though what has been said disposes of the case, as far as Hemisphere is concerned, we shall now discuss it with respect to the rights between Willan and Farrars.

On June 13, 1961, Willan had a conversation with Farrar at Searles Garage in Ogallala, Nebraska. There he asked Farrar for a 30-day extension of payment of the delay rentals. This Farrar refused to grant but did agree to a 10-day extension. Willan thereupon prepared a sight draft in duplicate which reads as follows:

> "Bank of Hyannis Hyannis Nebraska June 13 1961 Name of forwarding Bank City State Date Subject to the conditions hereof,
> PAY TO THE ORDER OF Wallace B. Farrar $11,-335.00 Eleven Thousand Three Hundred Thirty Five - - - Dollars This draft, when paid, is payment in full for lease rentals covering the following described land: Description Attached Forwarding and collecting banks are made agents of all parties hereto and of the grantor (s) of such lease or conveyance, and are directed to observe the conditions and agreements hereof. The payor shall have 12 days after the receipt of this draft by the collecting

bank, whether accompanied by other papers or not, for title examination. Neither forwarding bank nor payee(s) nor the grantor(s) of such lease or conveyance may demand return of this draft or any accompanying papers prior to expiration of the time fixed. Upon payment hereof Escrow Agent shall deliver this draft and any accompanying papers to payor and remit payment to forwarding bank. *In case payment is not made before expiration of the time fixed Escrow Agent shall return this draft and any accompanying papers to forwarding bank and no liability for payment or otherwise shall be attached to any of the parties hereto.*

To: W. W. Willan
of Rapid City S. Dakota
Care Bank of Hyannis
Hyannis Nebraska
Collecting Bank

Wallace B. Farrar
Drawer" (Italics supplied.)

A typewritten description of the real estate leased, previously procured by Willan, was attached to each draft. The draft prepared by Willan had his name thereon as drawee written thereon by him. It was presented to Farrar who signed both copies. Willan mailed one copy to the Bank of Hyannis which received it June 14, 1961. The other he kept.

It is obvious that this draft embodied the agreement for any extension made at that time and could not be varied by parol testimony as to what transpired before. Lefferdink v. Schmutte, 149 Neb. 695, 32 N. W. 2d 194.

Apparently it is argued by counsel for Willan that it could be and was modified by subsequent agreement. In what respect it was modified is not particularized. No subsequent written correspondence is involved. Willan and Farrar met and conversed only once thereafter. Their testimony is summarized hereafter and extended at considerable length in our previous opinion. There is

nothing therein contained that can be construed as an assent by Farrar to any such modification.

An examination of the draft shows certain provisions thereof are clear and unambiguous. It provides that the draft is to be collected by the Bank of Hyannis within 12 days from receipt. It states if payment is not made within that time it is to be returned to the forwarding bank. The Bank of Hyannis was not the forwarder as shown by the evidence. It was not forwarded by a bank. It was apparently ambiguous in this respect. The instrument being an extension of time of oil leases prepared by Willan, it is to be construed in favor of Farrar in that respect as to ambiguities. 2 Summers, Oil and Gas (Perm. Ed.), § 372, p. 485. It is however clear that after the 12 days if no payment was made, no liability for payment or otherwise shall attach to any of the parties thereto.

Willan went to Hyannis on Sunday, June 25, 1961. According to his testimony his purpose was to take up the sight draft for the delay rentals. The bank was closed and he went to the home of the banker, but the banker was not there so he went to Farrar's home. The subsequent conversation, as testified by both Willan and Farrar, is set out in our previous opinion in Willan v. Farrar, *supra*. Willan says he told Farrar he had come to take up the sight draft but couldn't locate the banker and brought the check to him. They were conversing out-of-doors. Willan testified he laid the check drawn on the Central Bank and Trust Company of Denver, Colorado, for the delay rentals in the amount of $11,-335, made to Farrar as payee, on a retaining wall beside Farrar. Farrar told him Brice was coming the next day and asked Willan to call him. Willan testified Farrar said he didn't know whether he should take the check. Farrar says he told Willan he did not want the check, that it should be paid to the bank, and that the bank did the business. Willan testified, "I said, Wally, you and I are the ones doing business and under the

terms of *it, it* can be paid to the bank at Hyannis or can be paid to you, I am considering it payment to you." (Italics ours.) What Willan referred to as "it" is not explained further. Willan does not mention any reply or statement by Farrar thereafter.

At any rate Farrar took the check to the house and laid it on the table. Willan attempted to call Brice but couldn't get him and left without contacting him. He did not again take the check but left it on the table and Farrar did not then attempt to return it to him.

On Monday, June 26, 1961, Farrar took the check to the bank at Hyannis. Brice and W. D. Stroud, the vice president and cashier of the bank, were there. He showed the check to Stroud. Stroud called The Central Bank and Trust Company of Denver on which the check was drawn, and talked with the head bookkeeper. He asked her if the check drawn on Willan for $11,335 was good. She answered that such a check *would not clear*. The sight draft was returned to Farrar after 4 o'clock. The check was retained by him at that time.

"When a bank receives an instrument for collection and remittance, it becomes the agent of the sender for such purpose, and in absence of other controlling facts is without authority to accept for its principal anything but that which the law declares to be legal tender or which is by common consent considered as money and passes as such at par." State ex rel. Sorensen v. Nebraska State Bank, 120 Neb. 539, 234 N. W. 82. Under the circumstances existing at that time the bank was not only justified but required to refuse to accept the same. Especially is this true in view of the specific instructions in the draft that it must be collected within 12 days or returned. The 12 days having elapsed and no collection having been made by the acceptance of Willan's check or otherwise, the draft was given to Farrar and all liabilities of the parties with respect thereto or to the agreement evidenced thereby were, according to its express provisions, ended.

Plaintiff maintains however that in any event the Farrars were bound because of the alleged acceptance of the check under the leases. Farrars quote the provisions of oil and gas leases given them which provide, "All rental payments which may fall due under this lease may be made to Wallace B. Farrar one of the above named lessors, in the manner herein stated."

On June 27, 1961, Farrar's attorney wrote Willan, stating the check had been delivered by Farrar to the attorney. The attorney's letter is set out in full in our previous opinion in Willan v. Farrar, *supra*. Its substance was that Farrar did not consider the check performance of the 10-day extension of the delay rentals; that the draft given to Farrar designated the bank as collecting agent; that under either the lease or draft, it should have been paid to the bank; and that payment was not had within the period of the lease or draft. It explained that Stroud had called the bank at Denver and was advised there were not sufficient funds in the bank at that time.

A photographic copy of Willan's bank statement at The Central Bank and Trust Co., of Denver, Colorado, is in evidence. It shows Willan did not have an amount in his account sufficient to pay the check given to Farrar from June 15, 1961, until July 6, 1961.

An arrangement for credit to Willan however was shown by the separate depositions of Walter W. Pailing, president of the American National Bank of Rapid City, South Dakota, and Marvin Owens, a vice president of The Central Bank and Trust Company at Denver.

Owens stated he had a conversation with Willan in the latter part of May 1961, in which Willan had advised him that he was issuing a check "in the 10 to 12 thousand dollar range"; *that if the check came to let Willan know in time to obtain funds through the American National Bank of Rapid City, South Dakota;* and that on previous occasions Pailing had called him from Rapid City and asked him to cash checks for Willan from funds

of the American National Bank on deposit in The Central Bank and Trust Company. Owens said if Pailing telephoned and advised him to deposit $11,500 in Willan's account he would have done so. The check was never presented and Pailing never called. Owens said he agreed to notify Willan if such a check appeared, "If at all possible for me to, I agreed to do it. However, I did not take the complete responsibility of guaranteeing that I would, but I told him I would if I could." Owens made no written memorandum of the conversation with Willan available to other officers or agents of the bank. On recross-examination he was asked if he had been ill or out of the bank for any reason, the fact that such a check had been presented would not have been called to anyone's attention. He answered, that he couldn't make an absolute statement as to such a case; and that it could have been returned for the reason of insufficient funds.

Pailing, president of the American National Bank of Rapid City, South Dakota, testified that prior to June 12, 1961, he thought early in that month, Willan had asked that a credit of $11,500 be advanced to him; that he had authority to extend such credit; and that he agreed to do so. Willan's proposed use of the credit either was not disclosed or not remembered by him. He said the bank at Rapid City had at all times a deposit at The Central Bank and Trust Company at Denver with whom they corresponded. Such balance was seldom less than $50,000. The method to be employed if Willan desired the Rapid City bank to take up his check at the Denver bank would be for Pailing to telephone the Denver bank and have it pay the check and contact Willan and ask him to sign a note or deposit the funds thereafter if there were not sufficient funds in Willan's account; that in June 1961, Willan did not have a sufficient amount in his account with the Rapid City bank to pay the check, but that the credit had been extended to him.

The plaintiff still contends however that it was the duty of Farrar to present Willan's check to the Denver bank or return it at once, and that the keeping of the check constituted its acceptance as payment of the delay rentals at least as far as Farrars were concerned. It is apparent however that presentment could not have been made within the 10-day extension granted by Farrar.

The delivery to, or acceptance by, the creditor of the debtor's check, as distinguished from the actual payment of the check, is not absolute payment of the obligation for which the check is given in the absence of any agreement or consent to receive it as payment. 70 C. J. S., Payment, § 24, p. 233. This rule applies to the acceptance of all commercial paper as shown by the annotation in 85 A. L. R. 1057. Hockert v. New York Life Ins. Co., 224 Iowa 789, 276 N. W. 422; Young v. Hibbs, 5 Neb. 433; Chamberlain Banking House v. Woolsey, 60 Neb. 516, 83 N. W. 729; Gilland v. Honeywell, 103 Neb. 50, 170 N. W. 357.

"A creditor who has accepted paper, such as a check, bill, or note, in conditional payment of a debt may ordinarily, if such paper has not been paid, rescind the conditional payment and sue on the original indebtedness." 70 C. J. S., Payment, § 42, p. 247.

"A creditor rescinding a conditional payment ordinarily may not recover on the original debt if he fails to account for the paper received, and the necessity for so accounting is not removed by a release from liability on such paper." 70 C. J. S., Payment, § 43, p. 247. The annotation at 85 A. L. R. 1057 cites many cases applying this rule.

Practically all the cases cited in the texts referred to are in regard to rescinding conditional payment by the acceptance of commercial paper involving checks that were not paid on presentation either by failure of the bank or the insufficiency of funds to pay the checks on presentation and an attempt is made to collect on the original obligations. Here Farrar is not attempting

to collect any past indebtedness but seeks to assert his rights on the premises covered by the "unless" oil and gas leases because of nonpayment of the delay rentals. The principle remains the same.

No question arises as to the nonproduction of the check asserted by Willan to have been accepted in payment. The check was presented at the trial and introduced in evidence.

It is obvious the check could not operate to pay the delay rentals in any event. There were no funds of the drawer in the bank upon which it was drawn or the bank from which the credit was extended with which to pay it. There was no agreement worthy of reliance at the drawee bank or with its officers that it would be paid. Farrar had been informed that if it was presented it would not clear. The bank officer who had extended the credit had not conferred with the officer who was to pay the check. It is not shown that Willan had instructed them to confer in this instance. Neither officer knew the check was issued. No steps had been taken to inform others in either bank of the arrangement. According to Willan's instructions if the check was presented at the Denver bank, Owens, if he could, would have notified Willan if he could have been contacted. Willan presumably would have told him to phone Pailing. Why this circuitous line of credit was set up by Willan is not explained. In fact he does not allude to the arrangement in his testimony. He came from Rapid City the day the check was given to Farrar with the purpose in mind of taking up the sight draft. Why he did not use a check on the bank at Rapid City with which he had been and was a customer and complete the credit arrangement himself in Rapid City before going is not shown.

Indeed even in those states whose courts have applied the rules of forfeiture to the rights of lessees in an "unless" lease, Willan's action concerning the alleged payment by check would have defeated his contentions by

reason of his own negligence in not providing assurance of its being honored.

The situation is somewhat similar to that in Gillespie v. Bobo, 271 F. 641, where the lessee in an unless case by mistake sent a check to the wrong address for rentals to a lessor within time. The check was sent to the lessor by name at an address, Box 43, Fort Worth, Texas. Her true address was Box 43A, Fort Worth, Texas, which was entered correctly on the books of the lessee. The "A" omitted from the address designated rural mailbox and the check was not received. The trial court held forfeiture applied because of the negligence of the lessee. The Circuit Court of Appeals held that there might have been sufficient evidence to sustain the trial court's ruling but forfeiture did not apply and that the lease had simply terminated. The opinion stated: "There was no forfeiture within the meaning of the equitable rule or doctrine on that subject. A result of a forfeiture is a loss or divestiture of something previously acquired or vested conditionally. 10 R. C. L. 329. The consequence of a failure to do what is required to acquire a right or thing is not a forfeiture of it. A forfeiture by a debtor is frequently prescribed or provided for as a means of securing the payment of the debt, the subject of the forfeiture being of greater value than the amount of the debt. In such case, equity, recognizing that the main purpose is to afford security to the creditor, relieves the debtor from the forfeiture upon his paying the debt, with interest; the payment of interest being full compensation for the debtor's failure to pay the debt when it was due. 1 Pomeroy's Eq. Jur. (4th Ed.) § 381. It was not part of the purpose of the above set out provision of the lease to secure the payment of any sum due to the appellees or either of them. The appellant was under no obligation to pay the $80. There was no debt to be secured. The quoted provision stated the condition to be complied with by the lessee to obtain an extension of the time allowed for beginning drilling

operations. Compliance with that condition would have been the exercise of an option given to the lessee. * * * The evidence did not show that the appellant did what was required to constitute an exercise of this option within the time allowed by its terms. The court properly ruled against the claim he asserted." Texas decisions are quoted, and the principles therein announced are adopted with respect to unless leases in Long v. Magnolia Petroleum Co., *supra,* by this court in which it held that when an unless oil and gas lease terminates by its own terms the equitable rules as to relieving against forfeitures do not apply.

There are of course certain instances where a lessor in an "unless" lease by his actions in retaining an uncashed check received after due date may be estopped to assert that the lease has terminated. In such cases the essential element of estoppel is a representation relied upon by the party claiming the benefit of the estoppel, which induced him to act or refrain from acting to his prejudice. Woodside v. Lee (N. D.), 81 N. W. 2d 745. Generally in cases involving unless oil leases such estoppel arises where the lessee commences drilling operations or otherwise incurs great expense relying on the retention of the uncashed check by the lessor. Such a situation does not exist here.

Certain cases are cited by counsel for Willan in urging the contention that the check in this instance should have been presented by Farrar for payment. Included within these is Millett v. Miller, 135 Neb. 123, 280 N. W. 442. It was a case where a debtor gave a check to his creditor to pay his obligation. The check was drawn against funds in the bank. The creditor and payee neglected for 6 days to present the check. The bank closed toward the end of the 6-day period. It was held the delay was unreasonable and the check should have been presented. Under the circumstances the debt for which the check was given was discharged. The case and other similar ones cited have no application here.

There was no debt owed by Willan to Farrar. Farrar was lessor in both the unless leases of Willan and the top leases of Hemisphere. He had given a 10-day extension on the leases to Willan at that time evidencing a desire not to give more. On the day the check was left on the table he had expressed doubt as to whether he should take it and asked that the holder of the top leases be contacted. The sight draft was to be paid the next day at which time the 10-day extension was ended. He took the check to the bank where he received information which gave him good reason to believe it would not be honored if presented.

He caused notice to be given that he would not accept the check as payment of the rentals within 2 days of its receipt and within 1 day of the conclusion of the period of the extension in the sight draft which was to have been paid. The notice was given with reasonable promptness.

From what has been said it follows that our previous opinion should be vacated, and the judgment of the trial court affirmed. The money paid into court by the plaintiff as a tender of the delayed payments should be restored to him.

FORMER OPINION VACATED.
AFFIRMED.

SPENCER, J., dissenting.

I dissent from the majority opinion for the reasons stated in the previous opinion in 174 Neb. 826, 119 N. W. 2d 686. I believe the result reached therein is more in harmony with equitable principles as well as with the majority of other jurisdictions which have passed on analogous situations.

STATE OF NEBRASKA, APPELLEE, V. RICHARD EBERHARDT, APPELLANT.

125 N. W. 2d 1

Filed November 29, 1963. No. 35490.

1. **Intoxicating Liquors: Infants.** A minor, in order to be guilty of the offense of possession of alcoholic liquor within the meaning of section 53-180.02, R. R. S. 1943, must have known or been conscious of actual or constructive possession thereof with his consent.
2. **Intoxicating Liquors: Evidence.** The offense of unlawful possession of alcoholic liquor within the meaning of section 53-180.02, R. R. S. 1943, may be proved by circumstantial evidence.
3. ———: ———. In a case where circumstantial evidence is relied upon to prove the offense of unlawful possession of alcoholic liquor within the meaning of section 53-180.02, R. R. S. 1943, the circumstances proved must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion.

Appeal from the district court for Saline County: JOSEPH ACH, Judge. Reversed and dismissed.

Joseph J. Cariotto, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

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

YEAGER, J.

This is a criminal action prosecuted in the name of the State of Nebraska, plaintiff, appellee here, against Richard Eberhardt, defendant, appellant here, who was originally charged in the justice of the peace court of Melvin R. Cornell in and for Saline County, Nebraska, with the offense of a minor in possession of alcoholic liquor in violation of section 53-180.02, R. R. S. 1943. The appellant was convicted in the justice of the peace court and from the conviction he appealed to the district court for Saline County. On appeal he was tried to a jury and there was convicted of the offense. He filed a motion

for new trial which motion was overruled. He was sentenced to pay a fine of $35 and the costs of prosecution, and to be confined in the county jail until the fine and costs were paid. In addition he was sentenced to serve a term of 5 days in the county jail. From this judgment and the order overruling the motion for new trial he has appealed to this court.

The statutory provision which it is contended that the appellant violated is the following:

"No minor may sell or dispense or have in his possession or physical control any alcoholic liquor in any tavern or in any public place including public streets, alleys, roads, highways, upon property owned by the State of Nebraska or any subdivision thereof, or inside any vehicle while in or on any public place including but not limited to the public streets, alleys, roads, highways, or upon property owned by the State of Nebraska or any subdivision thereof." § 53-180.02, R. R. S. 1943.

The brief of appellant contains numerous assignments of error as grounds for reversal most of which relate to admissibility of evidence. One however charges, in effect, that assuming the admissibility of the evidence admitted, it was insufficient as proof of guilt of the crime charged against the appellant. This one will be considered first, since of course if the proof is insufficient it will not be necessary to consider the other assignments of error.

The determination depends of course upon whether or not there was evidence to sustain the charge of possession within the statutory meaning of that term. At the outset it will be said that alcoholic liquor was found in an automobile which was at the time in the possession and under the control of the appellant. The question is therefore limited to that of whether or not the evidence was sufficient upon which to base a finding that the liquor was, within the meaning of the statute, in his possession or physical control.

The evidence bearing on this question discloses that

in the early evening or late afternoon the appellant, of the age of 17 years, with a friend of the same age, drove from Friend, Nebraska, to Crete, Nebraska, in an automobile belonging to the mother of appellant which she had allowed him to take and use. In Crete they went to a show. After the show they had something to eat and then drove back to Friend. About 11:30 p.m. they were parked in Main Street. Two other automobiles were parked alongside. The appellant was in the driver's position and the other person was on the other side. At this time a night police officer, who designated himself as chief of police, drove around the corner and the other two automobiles moved away. The appellant did not move away. The officer drove up, stopped, and asked to see the driver's license of appellant. This was turned over to him.

The officer testified he observed the driver's license, and further testified: "I could get the odor of beer, and I asked the boys to get out of the car. I asked them to step out of the car." There is no evidence as to the source of the beer odor or the direction from which it came. He said that the appellant stepped right out, but the other didn't want to until he was asked a second time and he, the officer, had walked around to the other side.

The officer testified that after the two boys got out he found on the floor of the automobile in the front two bottles of beer which he picked up. He asked the appellant about the beer. As to the conversation, the following appears in the bill of exceptions: "Q What did he answer? A He said, 'I have just got it.' And he asked me if I couldn't give him a break. And I said, 'No, I can't. I have to take you up to the police station.' * * *." In response to a question the officer testified as to the bottles: "They were cold." He testified that the bottles were in plain view and he did not see them until he went to the passenger's side of the automobile.

This includes a résumé of the entire pertinent evi-

dence of the State including all statements purporting to have been made by the appellant relative to his possession, knowledge, or use of the beer.

Inez Eberhardt, the mother of the appellant, was called as a witness for the appellant. She testified that the automobile the appellant was driving belonged to the Friend Auto Exchange which was a partnership belonging to her and her husband, and that the appellant had her permission to use the automobile on this occasion.

Donald Murphy, the other occupant of the automobile in question, was called as a witness on behalf of the defendant. The evidence indicates that he was a codefendant with the appellant in the justice of the peace court but the disposition of the case as to him is not disclosed. He testified that prior to the arrest he knew that the beer was in the automobile and that he pushed it back under the seat where it could not be seen without a search. He was never asked by the attorney for the State or for the appellant if he knew how the beer happened to be in the automobile, and he did not volunteer any such information.

The appellant testified as a witness in his own behalf and described the occurrence, the events of the evening prior thereto, the use and ownership of the automobile, and the incidents involved in the arrest and discovery of the beer.

As has already been indicated the question is that of whether or not the evidence was sufficient to sustain a finding by a jury that the appellant was, within the meaning of the statutory provision quoted herein, guilty of the offense charged against him. Attention has already been called to the evidence of the State bearing on that question. In the testimony of the appellant appear the following questions and answers relating to what occurred at the arrest: "Q What did he say? A He asked for my driver's license." "Q Richard, then what happened? A He told me to get out of the car, so I got out." "Q All right. Then what happened? A.

So Don just got out and walked away. And he bent down and reached underneath the seat and he pulled out some beer that was under there. Q Had you seen that beer before? A No. I hadn't. Q Richard, there has been testimony here that you told Mr. Widick that it was your beer and you just got it. What did you tell Mr. Widick? A I don't remember for sure. I was so scared. I never even knew it was under there. It was kind of a remark I had, I guess. I didn't know what to say." "Q Well, did you tell Mr. Widick that you just got the beer there? Did you say, 'Well, I guess I just got it' Or, 'I didn't know it was here?' Or just what did you say? Just tell us what you told him. A I might have said 'I just got it.' I don't remember for sure, but that could have been what I said."

The foregoing is a summary of the evidence upon which the determination in this case must depend.

This court has never directly passed upon the question of what is embraced in the meaning of unlawful possession as the term is employed in the statutory provision. Reference however to texts and the decisions of the courts of other jurisdictions indicates that evidence of mere possession is not sufficient as proof of the commission of an offense. A rule applicable here is stated in 48 C. J. S., Intoxicating Liquors, § 222 (b), p. 353, as follows: "Whether the possession is actual or constructive, however, it must be conscious; and a possession unknown to accused, or not consented to by him, is not within the statutes." This principle finds support in State v. Johnson, 39 Idaho 440, 227 P. 1052; Malich v. State, 201 Ind. 587, 169 N. E. 531; State v. Wheeler, 216 Iowa 433, 249 N. W. 162; Wells v. Commonwealth, 221 Ky. 796, 299 S. W. 975; Glowaski v. State, 20 Ohio App. 112, 153 N. E. 157; State v. LaBine, 119 Or. 583, 250 P. 738; State v. Muetzel, 121 Or. 561, 254 P. 1010; State v. Salte, 54 S. D. 536, 223 N. W. 733; Grady v. State, 133 Tex. Cr. 617, 113 S. W. 2d 913. Attention has not

been called to any cases or statement contrary to this rule.

It follows from this that the conviction of appellant was erroneous unless there was evidence sufficient to prove that he was conscious of and knew that he was in possession of this beer.

It requires no citation of authority to permit it to be said this element was capable of proof by either direct or circumstantial evidence which of course would include admissions, if any were made. Here there was evidence of the location of the beer at the time of its seizure and the arrest of the appellant. There was no evidence that prior thereto the appellant knew or was conscious of its presence in the automobile. There is evidence of what might be regarded as somewhat equivocal responses to questions asked by the police officer, but none of them could be regarded as admissions of consciousness or knowledge theretofore that the beer was in the automobile.

That as a circumstance could not be properly resolved against the appellant. In Reyes v. State, 151 Neb. 636, 38 N. W. 2d 539, in dealing with the principle involved here, this court said: "Circumstantial evidence should be weighed and acted upon cautiously, and a conviction should not be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained."

No such material circumstance is apparent on the face of the record to which attention has not been called, except one, and it, if pertinent at all, does not favor the State. As to it the other person in the automobile was called as a witness and testified as to the hiding by him of the beer and its finding. The State made no inquiry of him as to his knowledge or ownership or possession. It is true also that no such inquiry was made on behalf of the appellant.

There was never any departure by the appellant from his insistence that he had no knowledge that the beer was in the automobile until the search and seizure. It follows that only evidence of circumstances or circumstantial evidence was adduced as proof of guilt against the appellant. The evidence was insufficient as proof of the crime charged against him. The rule applicable in this instance is as follows: "Where circumstantial evidence is relied upon, the circumstances proven must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion." Reyes v. State, *supra*.

The motion of the appellant made at the conclusion of the evidence to dismiss the complaint should have been sustained. The conviction and sentence of the appellant should be and are set aside, and the complaint is dismissed. This determination renders unnecessary a consideration of the other assignments of error.

REVERSED AND DISMISSED.

CARTER, J., dissenting.

I find no fault with the summary of the evidence as stated in the majority opinion. I do contend that the evidence presents a jury question.

There is evidence in the record that the two bottles of beer were in plain sight in the automobile which the defendant was driving. The arresting officer testified that when he asked the defendant about the beer he responded "I have just got it." Defendant then asked the officer if he could not give him a break, to which the officer responded that he could not. The officer also testified that the beer was cold, which is some evidence it had not been long in the car. To me the evidence is sufficient to sustain a finding of possession and knowledge within the meaning of the statute. In my opinion it is sufficient to sustain the verdict of the jury. I would affirm the judgment of the district court.

WHITE, C. J., joins in this dissent.

KENNETH MOORE, APPELLEE, V. NATIONAL DEVELOPMENT OF OMAHA, INC., APPELLANT.
ROBERT MEHRING, APPELLEE, V. NATIONAL DEVELOPMENT OF OMAHA, INC., APPELLANT.
ROBERT MEHRING, APPELLEE, V. NATIONAL DEVELOPMENT OF DOUGLAS COUNTY, INC., APPELLANT.
KENNETH MOORE, APPELLEE, V. NATIONAL DEVELOPMENT OF DOUGLAS COUNTY, INC., APPELLANT.

125 N. W. 2d 9

Filed November 29, 1963. Nos. 35492, 35493, 35494, 35495.

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.

Appeals from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Crossman, Barton & Norris, for appellants.

Crawford, Garvey, Comstock & Nye, for appellees.

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

BOSLAUGH, J.

These cases originated in the district court for Douglas County, Nebraska, as separate actions for an accounting. They were consolidated for trial in that court. The district court found generally for the plaintiff in each action. The defendants' motions for new trial were overruled and the actions were brought to this court for review.

In this court the actions were consolidated for briefing and argument. There is but one bill of exceptions and the evidence may be considered in any of the actions in which it is applicable. We dispose of the appeals in the four actions by this opinion.

There are two plaintiffs, Kenneth Moore and Robert Mehring, and two defendants, National Development of Omaha, Inc., and National Development of Douglas County, Inc. The defendants are corporations engaged in the business of developing real estate. The plaintiffs formerly were employed as salesmen and managers by the defendants.

The contracts of employment, which were oral, provided that the plaintiffs were to be compensated upon a commission basis. Where property was sold upon an installment basis, a part of the commission due the salesman would be paid from the downpayment. The balance of the commission due the salesman, and the commission due the manager, would be paid from the installment payments as they were received by the defendant. The parties are in agreement as to the amounts due the plaintiffs from the defendants except that the defendants claim that the plaintiffs have forfeited any unpaid commissions by reason of provisions in the contracts of employment providing that an employee who voluntarily leaves the employment or who enters into direct competition with the defendants forfeits unpaid commissions. The defendants seek recovery of commissions which they alleged were paid or credited to the plaintiffs by mistake. A counterclaim which the defendant National Development Company of Omaha, Inc., asserts against the plaintiff Moore will be discussed separately.

Moore was employed as a salesman from July 1957 until November 1958. He was employed as a manager from January 1959 until March 1960. From March 1960 until August 1961, Moore was employed by Western Securities Company. In August 1961, Moore was employed by the American Development Company, a corporation which was engaged in the business of developing real estate in a similar manner to that of the defendants.

Mehring was employed as a salesman from May 1958 until November 1958, and as a manager from March

1960 until March 1961. After his employment by the defendants had been terminated, Mehring was employed by the American Development Company.

The defendants contend that the evidence shows that plaintiffs agreed to the forfeiture provisions at the time they were hired, or that they agreed to the forfeiture provisions at a later date. The evidence relating to this question is, for the most part, in irreconcilable conflict. When the evidence is in irreconcilable conflict this court will 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. Beebe v. Reichert, 172 Neb. 172, 108 N. W. 2d 804.

Both Moore and Mehring were originally hired by Richard L. Erkenbeck. Erkenbeck did not recall what he told Moore, but testified that he explained the forfeiture provisions to Mehring. Mehring denied that Erkenbeck said anything about forfeiture of commissions.

The defendants produced evidence that the forfeiture of commissions was discussed at conferences and training sessions held at the defendants' office. Bill Hale, a former salesman for the defendants at Omaha, testified that he was present during a conversation in which Robert Sabinske, the president of the defendants, talked with Moore about the forfeiture of commissions. Sabinske also testified that he had discussed the forfeiture of commissions with the plaintiffs on several occasions.

The plaintiffs testified that they had never been advised about the forfeiture of commissions, and that they, as managers, had never talked to any of the salesmen about the forfeiture of commissions. The plaintiffs produced several other salesmen who testified that they had not been advised about the forfeiture of commissions.

Any provision in a contract of employment which may result in a forfeiture of the compensation earned by the employee is of extreme importance to both parties. This is especially true where the entire compen-

sation consists of commissions paid upon sales, most of which are made upon an installment basis, and payable over a period of several years following the sale. Such a provision must be understood by both parties and be agreed upon in order to be enforceable.

In January 1961, Sabinske prepared a letter or memorandum (exhibit 7), which was addressed to "ALL OFFICES—ALL PERSONNEL." The memorandum was devoted largely to a discussion of the forfeiture of commissions, also referred to as debit. The memorandum stated that, in the future, commissions would not be paid to ex-employees except under certain circumstances. The memorandum then stated: "In all cases, the company will decide whether debit is to or not to be paid to no longer employed people. This is the method that was originally set up when debit was first offered as a bonus but down through the years it has grown into something else and in many cases, the company was bitten severely with the debit proposition. This is rather a difficult thing to explain in a letter but I wanted to get it on the record at the beginning of the new year. We have talked about it for years but have not outlined it on paper for everybody.

"Make a copy of this and keep it in your office so that all new employees may read and sign, as well as current employees. I will be happy to discuss it with any of you personally when I am at your office in case I have not made the point clear. In case any employee is not happy with this arrangement, he may resign at this time and receive past debit accrued. This should keep anyone from feeling that they have been sacked up in the past and that we may be trying to take advantage of him. It will also allow us all to get off to a fresh start with a clear understanding."

The memorandum was received in the office of the defendants in Omaha in January or February of 1961. Mehring made no sales after the memorandum was received, and his employment was terminated on March

23, 1961. Moore had left the employment of the defendants during the previous year.

We think that exhibit 7 shows that the defendants realized that confusion and misunderstanding existed among its employees concerning the forfeiture of commissions. The purpose of exhibit 7 was to establish a policy which, in effect, amounted to a new or different policy. The fact that the defendants extended to each employee the right to resign at that time and receive past debits accrued suggested that the defendants thought that it would be unfair to attempt to enforce the policy against any employee without his further assent.

From our examination of the record we conclude that the evidence does not establish that the contracts of employment between the plaintiffs and the defendants provided for the forfeiture of unpaid commissions of an employee who voluntarily left the employment of the defendants or who entered into direct competition with the defendants.

The counterclaim of the National Development Company of Omaha, Inc., against Moore arises out of the purchase of 800 feet of 4-inch plastic pipe in April 1959. Apparently, the defendants installed water service lines on the property which they sold when the service was required by their customers. The defendant contends that the purchase of the pipe was not authorized and that, contrary to the instructions of Sabinske, the pipe was left in the open and a large quantity of it was damaged or carried away.

Moore left the employment of the defendant in March 1960. If the defendant had any claim against Moore, it existed at that time. Yet, nothing was said about the claim until more than 2 years later. Moore continued to receive commissions from the defendants until September 1961. Sabinske admitted that nothing was said about the claim concerning the pipe until the defendant's answer was filed in this litigation in December 1962.

We conclude that the National Development Company of Omaha, Inc., is not entitled to recover upon its counterclaim against Moore.

The judgment of the district court in each action is correct and is affirmed.

AFFIRMED.

VINCENT CASTER, APPELLANT AND CROSS-APPELLEE, V. DALLAS MOELLER, APPELLEE AND CROSS-APPELLANT.
125 N. W. 2d 89

Filed December 6, 1963. No. 35453.

1. **Negligence: Trial.** Where the negligence of the plaintiff is shown to be more than slight as a matter of law by the evidence adduced by the plaintiff, it is the duty of the trial court to direct a verdict for the defendant.
2. **Trial.** Where there is any evidence which will support a finding for a party having the burden of proof, the trial court may not disregard such evidence and direct a verdict against him.
3. ———. A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence.
4. **Damages.** Damage which is uncertain, conjectural, or speculative as to the existence, nature, or proximate cause thereof is not the basis of a recovery.
5. ———. 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.
6. ———. A person to whom another has tortiously caused harm is entitled to compensatory damages therefor if he establishes by proof the extent of such harm and the amount of his damage with reasonable certainty.
7. **Trial.** Where different minds may reasonably draw different conclusions from the evidence in a law action the question to be decided is for the jury.
8. ———. When the evidence is conflicting as to whether physical

conditions existing some time after a personal injury were caused or affected by such injury, the question should be submitted to the jury upon all of the evidence.

Appeal from the district court for Cuming County: FAY H. POLLOCK, Judge. Affirmed in part, and in part reversed and remanded with directions.

John McArthur, for appellant.

Thomas E. Brogan, for appellee.

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

BROWER, J.

This action was brought by Vincent Caster, plaintiff and appellant, against Dallas Moeller, defendant and appellee, to recover damages for personal injuries sustained in a collision between two trucks which occurred on U. S. Highway No. 275 at a point a little more than 2 miles west of West Point, Nebraska. The accident took place at about 11 o'clock on the night of June 29, 1960.

A trial to a jury resulted in a verdict and judgment in favor of plaintiff in the sum of $2,000.

Plaintiff filed a motion for new trial and defendant, who had made motions for a directed verdict at the close of plaintiff's evidence and after both parties had rested, made a motion for judgment notwithstanding the verdict.

The trial court overruled both motions. The plaintiff has appealed and the defendant has cross-appealed.

The plaintiff assigns error by the trial court in withdrawing from the jury the question of loss of earnings and the question of permanent injury as elements of damage. He also alleges error in the court's giving instruction No. 3 on its own motion, this being the instruction by which those issues were withdrawn.

The defendant alleges there was error in overruling

his motions for a directed verdict and the motion for judgment notwithstanding the verdict.

The defendant urges the plaintiff was guilty of contributory negligence more than slight as a matter of law. That question will be discussed first since if true it would dispose of the case. Certain aspects of defendant's contention relate to damages and will be discussed on considering plaintiff's assignments of error.

The defendant invokes the rule set forth in the case of Malcolm v. Dox, 169 Neb. 539, 100 N. W. 2d 538, that: "Where the negligence of the plaintiff is shown to be more than slight as a matter of law by the evidence adduced by the plaintiff, it is the duty of the trial court to direct a verdict for the defendant."

In considering the contention of the defendant in the present case we must be governed by the usual rules. "In an action wherein 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." Bland v. Fox, 172 Neb. 662, 111 N. W. 2d 537.

"A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence." Bland v. Fox, *supra*.

No extended recitation of the evidence is necessary in considering this aspect of the case. The collision occurred in the nighttime when the truck being driven by the plaintiff was struck on its rear left end by the defendant's truck which had followed it as the defendant driver attempted to pass the truck driven by the plaintiff. The plaintiff was driving his employer's truck in a westerly direction on U. S. Highway No. 275. He was having some difficulty because it had been heating

and steam was escaping from the radiator. Immediately preceding the accident in order to procure water from the road ditch, plaintiff was preparing to stop. The plaintiff testified his foot was released from the accelerator but he had not applied the brake, the truck had not stopped, and its movement was merely slowing.

There was a dispute as to whether plaintiff's truck was properly lighted. The plaintiff and two other witnesses testified that the truck had proper clearance lights, a tail light, and red reflector lights. It is conceded it had no turn signal light but there was evidence that the plaintiff's truck was driven straight ahead and its course never varied.

There was evidence that the plaintiff's truck was stopped or nearly stopped without any lights or without being properly lighted; that no signal had been given of his intention to slow down or stop; and that no flare or other warning was provided at its rear.

It seems clear that the jury might have inferred from this disputed evidence that the defendant was negligent in following the truck driven by plaintiff so closely he could not bring his truck to a stop or turn to the left of the plaintiff's vehicle and avoid the accident, or that he did not maintain a proper lookout or have his truck under proper control. The jury might also have inferred the plaintiff was guilty of contributory negligence in stopping his truck which was unlighted and without proper warning signals.

We cannot however on this disputed evidence conclude that the plaintiff was guilty of contributory negligence more than slight as a matter of law.

The issues of the defendant's negligence and the plaintiff's contributory negligence were all properly submitted to the jury and were determined in the plaintiff's favor by the verdict.

We find the contentions of the defendant in assigning error to the trial court in not sustaining the motion

for judgment notwithstanding the verdict to be without merit.

We next consider the plaintiff's contentions that the court erred in withdrawing from the consideration of the jury the issue of damages for loss of earnings, future loss of earnings, and future injuries or damages, together with the defendant's claim that any damages to the plaintiff arose wholly from a congenital defect and were not attributable to the accident.

At the time of the accident plaintiff was 20 years of age. He was employed by Grain Storage Construction Company of Council Bluffs, Iowa. His work consisted of building and repairing grain elevators and previous to the accident he was engaged in work on a grain storage facility at Wayne, Nebraska. He testified he received $1.75 base hour pay and on a regular week he earned $128.50.

The only evidence with respect to the injuries to the plaintiff is that related by the plaintiff himself and Doctor Stone who attended him and who was called to testify on his behalf, and a Doctor Wilke, who was called by the defendant. Their evidence in this respect will now be reviewed.

On direct examination the plaintiff testified his truck was turned around and thrown into the north road ditch. The impact threw plaintiff and his companion out of the cab and into the ditch in which there were 2 feet of water. The plaintiff landed partly on the ground and partly in the water. His passenger, a fellow employee of the same company, was still in the water and plaintiff picked him up and carried him to the side of the road. Prior to the accident he had never had any back difficulty or any pain of any kind in his back, nor had he had any unusual sensations in it. Although he had been in an accident in Colorado, he was not hurt at that time. After the accident described he was pretty sore and had considerable pain in his back which he first realized when he carried Tompkins, his companion, to the side

of the road. It felt like someone had hit him pretty hard on the back just above the hipline and it never went away.

Plaintiff continued to work for the same company after the accident but lost about a week's time right after the accident because of the condition described. After that he worked 2 or 3 weeks during which time his back was "pretty sore." At the end of this period it got worse one day and he missed 2 days of work. It was more than 9 months before he consulted a specialist and during that period if he did too much work or lifting, his back started bothering him and he would miss 2 or 3 days in a row. This happened 2 or 3 times a month.

At the expiration of the 9-months' period he went to Dr. Troester in Hampton, Nebraska, who referred him to Dr. Stone at Lincoln, Nebraska. Dr. Stone examined him first in the forepart of April 1961, and put him in a brace with steel bars running up and down each side of his backbone with a steel strap around the top and one around the hips. This brace was worn 15 months during which period he saw Dr. Stone from time to time. In July 1961, he went to a hospital and was in traction 4 days. This consisted of putting a belt around his hips and a weight over the foot of the bed to try stretching his backbone. In September 1961, he had a spinal fusion on his back which was done at the hospital by Dr. Stone. After his release he did not feel good and had considerable pain in his lower back and hip. He followed the doctor's advice and did not return to work until June 1962, during which time he was under the care of Dr. Stone. He returned to work as soon as the doctor would permit. At the time of the trial he was engaged in light carpenter work. It is not shown what he was then earning. The company he was working for at the time of the accident had gone out of business. At the time of the trial his lower back was stiff and he leaned forward somewhat. If he straightened up it felt

rather uncomfortable. He also said he could not bend over as "good" as formerly.

On cross-examination, plaintiff testified he was taken to the hospital at West Point on the night of the accident in an officer's car, but was not confined there. He went to Hampton, his permanent home, for the Fourth of July during the time he was off work after the accident. At the time of the accident he had been working in Wayne for 3 weeks and that job was nearly completed. After that he continued to work for the same company, doing the same type of work. He was a carpenter and cement finisher. The work depended somewhat upon the type of weather. From Wayne he went to Blencoe, Iowa, and continued to work there the rest of the season. His first consultation with a doctor was the following April.

Dr. Frank P. Stone who testified on behalf of the plaintiff is an orthopedic physician and surgeon licensed and practicing in Lincoln, Nebraska. Besides general practice he is examiner for the rating board for the Veterans Administration at Lincoln and consultant in orthopedic surgery for the Air Force Base, the University of Nebraska, and the Lincoln school board. Dr. Stone saw plaintiff for the first time on April 5, 1961, when plaintiff was referred to him by Dr. Troester of Hampton. He took a history of plaintiff at that time which told him of the accident. Plaintiff related that thereafter he had continued to have a certain distress, pain, and aching through the lower or lumbar portion of his back. The doctor examined his build, development, gait, and actions upon making various movements required of him. His back was examined with reference to any deformities or curvature or evidence of straining, twisting, or muscle spasms. At that time he did not appear in acute pain. The doctor speaks of the examination as though made by several persons, speaking in the plural. As they ran their hands down along the spine they came onto an area which the doctor referred to as a "step off defect." This made them suspicious at once of a condition known

in medical terms as spondylolisthesis. This is the forward displacement of a lumbar vertebra and in this case of the fifth lumbar vertebra. They thought they could prove this by further X-rays. The X-ray tests were made and revealed that he did have a true spondylolisthesis. Certain special right and left oblique views indicated there was a lack of bony formation or fusion on both the right and left side of the fifth lumbar vertebra which would permit this to slip forward. They noted and indicated to the patient that what they were seeing was something that probably had been present for many years, as a matter of fact probably since birth. Without X-rays previous to the accident they could not determine whether or not any slipping had taken place at the time of the alleged accident or whether it had been present for many years. As far as they were concerned it didn't make any difference, as he definitely had what they called a congenital anomaly or defect. This is a lack of bony fusion or the coming together of certain parts of the fifth lumbar vertebra which permits the body of the vertebra to slip forward on certain occasions. In the plaintiff's case this space that should be filled with bone consists of either fibrous or cartilaginous tissue and is not expected to maintain body weight and the thrusts and twists that the normal vertebral body should be able to take. It was the opinion of orthopedic surgeons that this was congenital and that the die was cast "when the baby is born."

This condition is not unusual. In making examination for sports at the University of Nebraska they probably pick up 15 or 25 of such "backs" every year. These persons are turned down for participation in most strenuous sports. This is because such a back is more subject to being damaged than a normal back. If such a person was never hurt or X-rayed, he would have no way of knowing his condition unless a physician examining him became suspicious by reason of the step-off condition.

On completion of the examination and on the basis

of the anatomical findings, the doctor concluded plaintiff had an acute lumbosacral strain. He then prescribed a low-back brace to see if the condition improved, this being the more conservative treatment. This brace was fitted on April 10, 1961. On the May 5th following, though he was somewhat improved, padding on the brace was added because of his having bony prominences making it uncomfortable. On July 17, 1961, he stated to the doctor that his condition had not improved greatly. He was advised to go the hospital and be placed in traction which he did on July 25, 1961, and so remained until July 29, 1961. On August 12, 1961, plaintiff said he felt pretty well as long as he had the brace on but the old pain and aching occurred whenever it was off. An operation was then discussed and plaintiff was admitted to the hospital on September 8, 1961, and an operation was then performed. He was dismissed after surgery on September 17, 1961. The surgery consisted of putting the patient under an anesthetic; making an incision along the midportion of the back at the level of the fifth lumbar vertebra and sacrum; exposing the area to the bone and roughing it with an osteotome, similar to a chisel; placing some bone taken from the patient's hip into the exposed area; and allowing the muscles to come back and be sewed around it. When successful, as in this case, a solid bony mass is formed at the level of the fourth and fifth vertebrae and sacrum which eliminates pain. After discharge he wore a low-back brace constantly and was advised to do nothing strenuous and no unusual turning, bending, stooping, or lifting, and this was to continue 6 months. He was seen again November 1, 1961, when he was getting along well. X-rays were taken March 14, 1962, which disclosed an excellent bony fusion. He was then advised he might go without a brace part-time as he could tolerate it. On May 7, 1962, he was doing quite well and was not complaining of unusual pain. The doctor then fitted him with a corset to assist him in gradually getting away

from the brace. When last seen on September 19, 1962, he appeared to be doing well and was not wearing a brace although he occasionally put it on in heavy lifting or working. He was advised to do the work he could tolerate thereafter.

The doctor gave it as his opinion from his examinations and the history given by the patient, which he said was based on reasonable medical certainty, that the patient's back disability had its onset at the time of the accident in June 1960. The doctor explained that the patient had told him he had never had any back trouble until involved in this car accident; and that the patient's age was that in which this condition can most often be brought to the forefront by unusual strain or trauma. He considered the plaintiff to have a permanent injury as a result of the surgical spine fusion that was necessary to relieve pain. The doctor stated that two X-rays of the plaintiff in evidence taken after the accident at the hospital at West Point, Nebraska, made him suspicious that the patient had this congenital anomaly present but it could only be proved, and was proved, by the subsequent X-rays taken by him when the plaintiff came to consult him; and that the later X-rays were taken at an angle of 45 degrees from the front side which disclosed the condition.

On cross-examination the doctor reiterated that the congenital anomaly existed in the plaintiff at or prior to birth. The defect in plaintiff's back discussed by him was that instead of there being a bony growth, there was other material between the vertebrae, either flesh, muscle, or cartilage. The 15 to 25 athletes whom he had testified as having this defect came from a group examined out of approximately 135 persons. This condition exists among the general public, but the doctor did not know the percentage of individuals who were so affected. He had observed them in examinations at the Veterans Administration and among his patients. In some instances the condition is first found on an examination

of the back where the "step off" is noticed, in others only through X-ray, and sometimes the X-ray of the step-off showed it was not a spondylolisthesis. He would not say spondylolistheses in the spinal column could have developed without trauma but it might be possible. In his opinion there would have to be some strain to cause it to slip out. It could however have occurred from other accidents, but this accident was the only one given by the patient in his history to him. The X-rays or examinations revealed no fractures or curvature of the spine. He could not tell whether the slipping forward existed from birth, but the condition of the lack of fusion had so existed in his opinion.

On redirect-examination the doctor stated in his opinion the disabling symptoms would have to coincide with the accident that produced what the patient was complaining of when he came for treatment. If the plaintiff was in another accident and felt nothing wrong with his back until the accident of 1960, that would not change his opinion that the 1960 accident was the precipitating cause of his disability. The doctor further stated manual labor or strenuous physical exercise would aggravate the condition.

Dr. Louis J. Wilke, a physician and radiologist of Omaha, Nebraska, testified for the defendant. The doctor testified as to his conclusion drawn from an examination of exhibits Nos. 22 and 23, the X-ray films of the plaintiff taken at the West Point hospital on the day after the accident. He identified exhibit No. 22 of the films as one taken of the lower part of the spine and sacrum of the plaintiff. He described it as a front view, the film being placed at his back and the X-ray taken at right angles; and that you obtain therefrom a view of the patient's bones and soft tissues. From his examination of exhibit No. 22 of these films he stated a minimal curvature of the spine could be seen. No fracture could be identified and there were no other significant comments or readings that could be made therefrom.

Exhibit No. 23 was the mate to exhibit No. 22. It was taken by placing the film on one side of the patient and the X-ray on the other so a lateral view was obtained. This revealed a little exaggerated curvature of the lumbar spine which is called lordosis. One is born with this curve, although in this case it is a little more than you normally see. He said he failed to see any other abnormality or sign of fracture or dislocation. There appeared from the X-rays no evidence of traumatic injury to the spine in the area involved, no fracture, dislocation, or bone pathology, and no abnormal readings, except the curvature and the lordosis, and that such conditions would be considered normal.

On cross-examination the doctor said his testimony was confined simply to these two X-rays; and that he never examined the plaintiff. His specialty was not orthopedics but included obtaining and interpreting X-ray film in all specialties of medicine; that orthopedists and radiologists assist one another; and that each is a specialist in the field of diagnosis and they consult one another but the orthopedist prescribes the treatment. He explained spondylolisthesis much as explained by Dr. Stone. He said there is no evidence of it on the film.

On redirect-examination he reiterated that there was no evidence of spondylolisthesis whatever; and that spondylolisthesis could either appear by a development or due to other causes. One is trauma.

The instruction No. 3 which withdrew from the jury its consideration respecting loss of earnings, either past or future, together with all future disability, reads as follows: "The Court withdraws from your consideration all claims of the plaintiff relating to loss of earnings, future loss of earnings, future disability or other future damages, for the reason that his evidence is insufficient to prove the amount of such damages."

A consideration of the questions before us requires the application of the following rules of law as set forth in the case of Johnsen v. Taylor, 169 Neb. 280, 99 N. W.

2d 254: "Damage which is uncertain, conjectural, or speculative as to the existence, nature, or proximate cause thereof is not the basis of a recovery.

"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.

"A person to whom another has tortiously caused harm is entitled to compensatory damages therefor if he establishes by proof the extent of such harm and the amount of his damage with reasonable certainty."

In Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N. W. 2d 627, it is stated: "Where different minds may reasonably draw different conclusions from the evidence in a law action the question to be decided is for the jury."

In Struble v. Village of DeWitt, 89 Neb. 726, 132 N. W. 124, this court said: "When the evidence is conflicting as to whether physical conditions existing some time after a personal injury were caused or affected by such injury, the question should be submitted to a jury upon all of the evidence."

The plaintiff contends that the testimony given by Dr. Stone and himself shows that the spondylolisthesis which developed and entailed the subsequent treatment was caused by the accident and that the same evidence is sufficient to show loss of earnings by him both previous to the trial and in the future, as well as permanent disability.

It is apparent from the evidence of Dr. Stone that he based his opinion that the plaintiff's ailments were attributable to the accident on the fact that the initial pain and discomfort in plaintiff's back coincided with his being thrown from his truck. The doctor further stated that plaintiff was at an age when unusual stress or strain would cause the congenital condition in his back to develop into a true spondylolisthesis. His examina-

tion of the X-rays taken at the hospital at West Point after the accident aroused his suspicions that such a condition existed which was proved upon taking further X-rays from a different angle. His opinion, based on the examination and the related history was that the slipping of the vertebra in plaintiff's back arose from the accident. This he said was based on reasonable medical certainty. He further stated he could not say this condition could develop without trauma, but it might be possible. Though there may be certain conflicting statements in the doctor's testimony, the plaintiff is entitled to have it considered in the light most favorable to his contentions. The trial court evidently considered this testimony sufficient to submit the question of recovery for plaintiff's pain and suffering and the ensuing doctor bills to the jury, but withdrew from its consideration any resulting loss of earnings by the plaintiff. We think the evidence was sufficient to submit to the jury the question of whether the plaintiff's injury was the result of the accident and the cause of any resulting damages of which there was adequate proof.

With respect to the sufficiency of proof of loss of earnings the plaintiff's hourly base pay and average weekly income were shown. There was evidence here summarized which if given credence by a jury would show loss of earnings. He continued to work for the same company after his injury. One week's time was lost immediately after the accident. Two days' work was lost 2 or 3 weeks thereafter. Thereafter until consulting the specialist 2 or 3 days were lost 2 or 3 times a month. Plaintiff was hospitalized in traction 4 days and under the doctor's advice did not work until June 1962, after his spinal fusion on September 8, 1961. Some of the evidence as to this loss of time is not as definite as might be desired. We think however the evidence was sufficiently certain for the jury to consider and determine plaintiff's loss of earnings while he worked

for the same company. Also after it went out of business the earnings he had previously received might be considered by the jury as a measure of compensation he might be expected to have earned for his work after hospitalization, when he could not work at all.

In the case before us the rule set out in Colvin v. Powell & Co., Inc., 163 Neb. 112, 77 N. W. 2d 900, is applicable: "Where it has been proved that damage has resulted and the only uncertainty is the exact amount, it is sufficient if the record shows data from which the extent of the injury can be ascertained with reasonable certainty." See, also, Roberts Constr. Co. v. State, 172 Neb. 819, 111 N. W. 2d 767. The issue as to damages in regard to loss of earnings up to the time of trial should have been submitted to the jury.

With respect to future earnings however the plaintiff was last seen by the doctor on September 19, 1962, when he appeared to be doing well and was advised to do work he could tolerate. What he could be expected to do or tolerate thereafter is not shown although Dr. Stone did say manual labor or strenuous exercise would aggravate the condition. Plaintiff testified he was doing light carpenter work. What his earnings then were is not shown from the evidence. Whether he could have done other work is not indicated. What, if any, loss of earning power might result in the future is not shown and cannot be inferred from the record. There is a corresponding lack of proof with respect to the plaintiff's condition in regard to pain at the time of trial. Indeed Dr. Stone testified that on May 7, 1962, the patient had no unusual pain and when last seen on September 19, 1962, he was doing well. The purpose of the operation was to eliminate pain and it appears to have been successful. The trial court did not err in withdrawing the issue of future pain and suffering from consideration by the jury. Johnsen v. Taylor, *supra*.

The plaintiff testified that at the time of the trial his lower back was stiff and he leaned forward some-

what. If he straightened up it felt rather uncomfortable. He said he could not bend over as "good" as formerly. Dr. Stone's testimony describing the operation shows that the plaintiff's fourth and fifth vertebrae and sacrum following the operation were one solid bony mass. This condition would be aggravated on strenuous exercise. It would seem clear the jury could infer from the evidence with reasonable certainty that there would be some permanent disability irrespective of whether pain was involved. The issue of future disability should have been submitted to the jury regardless of whether that disability affected the future earnings of the plaintiff or whether or not future pain and suffering were involved.

From what has been said it appears that the issues with respect to liability have been properly submitted to and determined by the jury and need not again be tried.

The judgment is affirmed in part and in part reversed, and the cause is remanded to the trial court with directions to ascertain the amount of the plaintiff's damage by a new trial of that issue only.

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

FIRST NATIONAL BANK OF OMAHA, APPELLEE, V. PROVIDENT FINANCE COMPANY, APPELLANT.

125 N. W. 2d 78

Filed December 6, 1963. No. 35461.

1. **Automobiles.** The Certificate of Title Act was enacted for the protection of owners of motor vehicles, those holding liens thereon, and the public.
2. ———. One holding a lien upon a motor vehicle must, insofar as he can reasonably do so, protect himself and others thereafter dealing in good faith, by complying and requiring compliance with applicable laws concerning certificates of title to motor vehicles.
3. **Sales.** An innocent purchaser is one who buys property for a present valuable consideration without knowledge sufficient to

charge him in law with notice of any infirmity in the title of the seller.

4. **Estoppel.** Where one of two innocent persons must suffer by the acts of a third, he whose conduct, act, or omission enabled such third person to occasion the loss must sustain it if the other party acted in good faith, without knowledge of the facts, and altered his position to his detriment.
5. **Replevin.** The plaintiff in a replevin action has the burden of proof and must recover on the strength of its or his right in or to the property and not upon any weakness of the interest of the defendant therein.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Reversed and dismissed.

Edward Shafton and Bernard E. Vinardi, for appellant.

Finlayson, McKie & Kuhns, for appellee.

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

MESSMORE, J.

The First National Bank of Omaha filed an action at law against Monte White Leasing Company, Monte White Motors, Inc., and Provident Finance Company, defendants, to obtain possession of a 1960 Chevrolet station wagon, the possession of which is alleged on information and belief to be in the Provident Finance Company, or, in the alternative for damages for the value of the 1960 Chevrolet station wagon if it could not be returned. The action was dismissed as to Monte White Leasing Company and Monte White Motors, Inc., and trial proceeded between the First National Bank of Omaha and the Provident Finance Company, based upon a stipulation of facts and oral testimony. Jury trial was waived. The trial court rendered judgment in favor of the plaintiff, the First National Bank of Omaha, that it was entitled to the immediate possession of the 1960 Chevrolet station wagon, and if delivery thereof could not be made, the First National Bank of Omaha recover from the Provident Finance Company the sum of

$1,404.25, the value of the said property. Provident Finance Company filed a motion for new trial which was overruled. The Provident Finance Company perfected appeal to this court.

The First National Bank of Omaha is a corporation organized and existing under and by virtue of the laws of the United States pertaining to national banks, with its principal office and place of business in the city of Omaha. The Monte White Leasing Company is a corporation organized and existing under and by virtue of the laws of the State of Nebraska, with its principal office and place of business in the city of Omaha. Monte White Motors, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Nebraska, with its principal office and place of business in the city of Omaha. The Provident Finance Company is a corporation organized and existing under and by virtue of the laws of the State of Nebraska, with its principal office and place of business in the city of Omaha.

For convenience the First National Bank of Omaha will be referred to as the Bank; Provident Finance Company will be referred to as Provident; Monte White Leasing Company as the Leasing Company; and Monte White Motors, Inc., as White Motors.

The allegations of the Bank's petition and the answer of Provident need not be set forth in view of the stipulation of facts and the oral testimony in addition thereto.

The stipulation of facts may be summarized as follows. After identifying the corporate capacity of the Bank, Provident, the Leasing Company, and White Motors, it was stipulated that on or about July 11, 1960, White Motors and the Leasing Company entered into a certain conditional sales contract by which White Motors sold to the Leasing Company one 1960 Chevrolet station wagon, serial No. 01135S173915. This station wagon was titled to the Leasing Company by a Nebraska certificate of title No. 1-1242328. An exhibit attached to the Bank's petition contains the conditional sales contract, also titled

retail installment contract, showing a total balance of $3,064.50, payments to be made in 36 monthly installment payments of $85.12 each, beginning August 25, 1960, also a certificate of title to a motor vehicle dated July 12, 1960, showing the owner to be the Leasing Company, and noted thereon a first lien of the Bank under date of March 2, 1962.

On July 11, 1960, the conditional sales contract was assigned and transferred by White Motors, by Monte White president, to the Bank, and the aforesaid certificate of title was delivered to the bank. The same was from said date held by the Bank.

On March 2, 1962, the Bank filed the conditional sales contract in the office of the county clerk of Douglas County, and the same was on said date, by the county clerk, noted on the certificate of title.

On July 20, 1961, Monte White, as president of the Leasing Company, without knowledge of the Bank or Provident, executed an application for certified copy of the certificate of title under oath, and delivered the same to the county clerk of Douglas County, stating that the aforesaid certificate of title had been lost or destroyed and requesting the issuance of a certified copy of the said certificate of title. Said application was by the county clerk of Douglas County forwarded to the Motor Vehicle Department of the State of Nebraska. Thereafter, on July 21, 1961, the Motor Vehicle Department of the State of Nebraska transmitted to the county clerk of Douglas County, authorization to issue duplicate certificate of title. On July 24, 1961, a duplicate certificate of title No. 1-24527 was issued by the office of the county clerk of Douglas County, and received from said clerk by the Leasing Company, said duplicate certificate of title being an exact duplicate, and so marked, of the aforesaid certificate of title No. 1-1242328, covering the same motor vehicle. No lien was noted on the duplicate certificate of title.

On October 3, 1961, Monte White, as president, for and

on behalf of the Leasing Company, transferred the aforesaid motor vehicle to White Motors by executing the appropriate transfer in due form on the reverse side of the aforesaid duplicate certificate No. 1-24527. Thereafter, and also on October 3, 1961, pursuant to due and appropriate application on the back of certificate No. 1-24527, certificate of title No. 1-1342625 was issued by the county clerk of Douglas County in the name of White Motors for the 1960 Chevrolet station wagon, serial No. 01135S173915, showing that White Motors was the sole owner of such motor vehicle without any lien noted on the said certificate of title.

On November 24, 1961, White Motors, by its president Monte White, executed and delivered to Provident its promissory note in the principal sum of $1,308.58, dated November 24, 1961, due and payable 1 month thereafter. As security for the promissory note White Motors, by its president Monte White, executed and delivered to Provident a chattel mortgage on the 1960 Chevrolet station wagon, serial No. 01135S173915. Simultaneously with the delivery of the aforesaid note and mortgage White Motors, by its president Monte White, delivered to Provident the aforesaid certificate of title No. 1-1342625, dated October 3, 1961, evidencing title to the Chevrolet station wagon in White Motors, free and clear of any liens, and said certificate of title was at all times in the possession of Provident.

Provident filed the aforesaid chattel mortgage in the office of the county clerk of Douglas County on March 12, 1962, and the same was noted on the aforesaid certificate of title by the county clerk of Douglas County.

Provident had no knowledge of the existence of the aforesaid conditional sales contract and certificate of title relating to such motor vehicle held by the Bank, on November 24, 1961, or any time prior thereto.

Provident, in accordance with the customs and practices in the trade, permitted such motor vehicle to be

placed on the used car sales lot of White Motors for sale, until taking possession as hereinafter stated.

White Motors defaulted in the payment of the promissory note and, in accordance with the terms and conditions of the aforesaid chattel mortgage, Provident took possession of the aforesaid motor vehicle and continued to maintain possession thereof.

At no time did the Bank have possession of the said motor vehicle.

Provident called as a witness a vice president of the Bank who testified that he had been employed by the Bank for 26 years and had been in charge of the installment loan department of the Bank for about 10 years; that the installment loan department does both wholesale and retail business; that on July 11, 1960, this witness acquired the retail installment contract for the Bank as specified in the stipulation of facts; and that the Bank's lien was recorded on March 2, 1962, under his direction. This witness further testified that he knew the procedure for recording such conditional sales contracts; that he knew of the statute providing for the recording of conditional sales contracts and noting them on the certificates of title, and knew there were risks and hazards involved in failing to do so, stating: "The risk would be basically fraud or bankruptcy"; and that it had been an established plan of the Bank, applied in the present matter, not to file conditional sales contracts and not to have them shown on the title certificate.

On cross-examination this witness testified that mortgages and conditional sales contracts were not recorded as a matter of convenience for the Bank, and the volume of business in this section would require much more work in running to the courthouse to file and then to release them; and that the Bank obtains and retains a certificate of title in accepting a mortgage or a conditional sales contract on an automobile which it retains in its possession, which is the usual custom of banks and finance companies. On redirect examination this wit-

ness testified that the convenience of nonfiling was the convenience of the Bank and not any convenience to the dealer.

The Bank called the vice president of Provident who had supervision over the making of mortgages on motor vehicles who testified that exhibit A attached to the answer of Provident is a promissory note which, as shown by the exhibit, on or about November 24, 1961, White Motors executed and delivered to Provident in the amount of $1,308.58. He identified another exhibit attached to the answer of Provident, stating that it was a chattel mortgage covering the note and the motor vehicle in question, and securing the note; that at the time Provident made the loan and secured the mortgage it obtained a certificate of title to the motor vehicle which was recorded on March 12, 1962; that Provident held the certificate of title without causing the mortgage to be recorded on the certificate of title from the date it took the note and mortgage until March 12, 1962; that it was the usual practice and custom of Provident not to cause its mortgages to be recorded on the certificates of title, which was generally true in the trade; and that the reason for doing so is to avoid bookkeeping and the running around to the courthouse to have the mortgage recorded and then when the mortgage is paid off, executing a release which has also to be recorded.

On cross-examination this witness testified that certain risks and hazards are connected with such operation, which is part of the business risk; that Provident ran the risk of another mortgage following duplicate titles that can be obtained; that he was acquainted with the provisions of the statutes of this state relating to the filing of chattel mortgages and conditional sales contracts; and that notwithstanding such provisions, Provident and other companies engaged in the small loan business or installment loan business adopt a plan of not filing such instruments.

Provident poses several questions which it considers

to be involved in this appeal. We deem it unnecessary to set forth the same for the reason that such questions amount to an assignment of error that the judgment rendered is contrary to the evidence and to the law in this case.

The defendant Provident contends that a lien against a motor vehicle is invalid as to a subsequent lienholder, and cannot be recognized by any court, when the first lienholder fails to file said lien, as provided by Chapter 60, article 1, R. R. S. 1943, until after the subsequent lien has been acquired by an innocent purchaser; and that such rule applies where the subsequent lienholder has obtained possession of the motor vehicle and the prior holder of the lien has never had possession of the motor vehicle.

The Bank contends that one who claims an interest in a motor vehicle under a duplicate certificate of title, falsely obtained, has no right as against the holder of the original certificate of title; and that the making of a false affidavit to obtain a duplicate certificate of title is a crime punishable by a fine or imprisonment. See § 60-116, R. R. S. 1943.

The following statutes are applicable.

Section 60-105, R. S. Supp., 1961, provides in part: "No court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any motor vehicle, * * * sold or disposed of, or mortgaged or encumbered, unless evidenced by a certificate of title or manufacturer's or importer's certificate duly issued, in accordance with the provisions of this act."

Section 60-110, R. R. S. 1943, provides in part: "Any mortgage, conveyance intended to operate as a mortgage, trust receipt, *conditional sales contract or other similar instrument* covering a motor vehicle, if such instrument is accompanied by delivery of such manufacturer's or importer's certificate and followed by actual and continued possession of same by the holder of said

instrument or, *in the case of a certificate of title, if a notation of same has been made by the county clerk on the face thereof, shall be valid as against the creditors of the mortgagor, whether armed with process or not, and subsequent purchasers, mortgagees and other lienholders or claimants but otherwise shall not be valid against them.* * * * The holder of a chattel mortgage, trust receipt, *conditional sales contract or similar instrument,* upon presentation of such instrument to the clerk of the county where such certificate of title was issued together with the certificate of title and the fee prescribed by this act, *may have a notation of such lien made on the face of such certificate of title. The county clerk shall enter said notation and the date thereof over the signature of such officer or deputy and the seal of office, and also note such lien and the date thereof on the duplicate of same on file and on that day shall notify the Department of Motor Vehicles, which shall do likewise.* The county clerk shall also indicate by appropriate notation and on such instrument itself the fact that such lien has been noted on the certificate of title." (Emphasis supplied.)

The following cases are applicable.

In the case of Securities Credit Corp. v. Pindell, 153 Neb. 298, 44 N. W. 2d 501, a summary of facts is as follows: On August 5, 1948, Walker purchased an automobile from a dealer at Sterling, Colorado. On the same day he executed a note and chattel mortgage to the dealer, which constituted a lien upon the automobile purchased from the dealer. On the same day this note and mortgage were assigned by the dealer to the Securities Credit Corporation. The dealer issued a bill of sale to Walker. This bill of sale did not show any lien on the automobile. On August 11, 1948, the Securities Credit Corporation mailed a letter to Pindell, the county clerk, enclosing the note and mortgage and a check to cover filing fees, and requesting Pindell to note the lien on the certificate of title when Walker came in to the

county clerk's office for his new title. On Saturday evening, August 14, 1948, Walker contacted Pindell with reference to procuring a certificate of title to the automobile, and presented Pindell with the bill of sale upon which no liens were noted. Pindell then filled out an application for a certificate of title which was signed by Walker and which did not show a lien on the automobile. Thereafter Walker accompanied Pindell to his office where a certificate of title to the automobile was issued by Pindell to Walker. The lien of the Securities Credit Corporation was not noted on the certificate of title. This court said: "We construe the act to definitely declare that no valid lien can be asserted against a motor vehicle unless it is disclosed by a valid certificate of title regularly issued by the Department of Roads and Irrigation, * * *.

"In Nichols v. Bogda Motors, Inc., 118 Ind. App. 156, 77 N. E. 2d 905, it was held that the statute relating to certificates of title to motor vehicles was enacted for the protection of owners of such vehicles, those holding liens thereon, and the public; and that one holding a lien upon a motor vehicle must, insofar as he can reasonably do so, protect himself and others thereafter dealing in good faith, by complying and requiring compliance with applicable laws concerning certificates of title to motor vehicles.

"This court said in Snyder v. Lincoln, 150 Neb. 580, 35 N. W. 2d 483, that the very purpose of the law is to protect ownership against fraud, quoting from Mock v. Kaffits, 75 Ohio App. 305, 62 N. E. 2d 172. The Certificate of Title Act in Ohio is very similar to the act in this state. * * *

"A holder of a mortgage lien on an automobile owes a duty to see that the mortgagor has complied with the Certificate of Title Act in order to protect such lien, as well as innocent purchasers of automobiles. * * * An automobile mortgage lien, not shown in the title certificate, *is not valid* against a subsequent innocent purchaser

of an automobile or holder of a mortgage lien shown in the certificate nor enforceable against the automobile in such purchaser's possession. An automobile mortgage lien, not shown in the chain of title to the automobile, does not prevail over the title to and lien on an automobile claimed by a subsequent purchaser and mortgagee without knowledge of the previous lien. * * *

"The plaintiff was in a position so that it could reasonably protect its lien and others dealing in good faith by complying with the Certificate of Title Act." (Emphasis supplied.)

Terry Bros. & Meves v. National Auto Ins. Co., 160 Neb. 110, 69 N. W. 2d 361, was an action in replevin brought by the plaintiff against the defendant National Auto Insurance Company to secure possession of a Mercury coupé automobile. On January 4, 1950, Gibreal Auto Sales, Inc., intervener in the case, sold the automobile to Bethke under a conditional sales contract, retaining the certificate of title but delivering possession of the automobile to Bethke. On January 24, 1950, Bethke told Gibreal that he was stopped by a policeman for not having proper license plates on his automobile and the car was impounded. He requested the certificate of title to enable him to buy his license and get the automobile from the police station. Gibreal transferred the certificate of title to Bethke. The certificate of title had no lien noted thereon. Bethke transferred the certificate of title to Bilyeu. Gibreal obtained the automobile from the police garage. On February 20, 1950, Gibreal sold the automobile to Slayman, delivering possession of the automobile but advising that he was having difficulty with the certificate of title. The automobile was sold under a conditional sales contract which in turn was sold by Gibreal to the Live Stock National Bank. On March 13, 1950, the automobile was stolen from Slayman. On March 13, 1950, Bilyeu sold the automobile to the plaintiff, delivering the certificate of title showing the automobile to be free and clear of liens.

On March 20, 1950, the plaintiff sold the automobile to Guzinski who obtained title thereto. On May 3, 1950, National Auto Insurance Company, which had issued a policy to Slayman, took possession of the automobile from Guzinski. Thereafter the plaintiff obtained an assignment of the certificate of title from Guzinski. On May 17, 1950, the plaintiff filed an action to replevin the automobile from the National Auto Insurance Company, and Gibreal intervened, claiming the right to possession of the automobile. Section 60-105, R. R. S. 1943, as heretofore set forth, was cited in the opinion. This court said: "The possession by Bilyeu of a Nebraska certificate of title was evidence of ownership of the automobile. The certificate was in his name and conclusive of his ownership under the circumstances of the instant case, and appellee (Terry Bros. & Meves) was justified, under the circumstances, in treating him as the owner thereof. * * *

"In the light of the facts as shown by the record, the following its applicable: When personal property is obtained from its owner by a sale induced by the fraud of the buyer, and as a result thereof title passes to the party guilty of the fraud, *an innocent purchaser of the property from the fraudulent buyer or from one to whom he has surrendered it, for value and without knowledge of the fraud, takes the title thereto free from the equity of the original seller* to rescind the sale and reclaim the property. In other words, if after seller delivers possession to the buyer pursuant to a sale induced by the buyer's fraud the property has passed into the hands of a bona fide purchaser for value, the right of the original seller to recover the property is lost. * * * (Cases are cited.)

"An innocent purchaser is one who buys property for a present valuable consideration without knowledge sufficient to charge him in law with notice of any infirmity in the title of the seller. * * * (Cases are cited.)

"*The appellee* (Terry Bros. & Meves) *was not in a posi-*

tion to know or have knowledge of an alleged fraud, nor was the appellee in a position to know or have knowledge that any person claimed ownership or a lien on the automobile for the reason that the certificate of title disclosed the seller to be the owner of the automobile. The certificate showed that Bilyeu acquired the title from Bethke who was present at the time the appellee purchased the automobile. * * *

"It is a general rule that where one of two innocent persons must suffer by the acts of a third, he whose conduct, acts or omissions enables the third person to occasion loss must sustain it if the other party acted in good faith, without knowledge of the facts, and altered his position to his detriment. * * * we deem it applicable when applied to the appellee's contention." (Emphasis supplied.)

The foregoing authorities need no explanation as to the obligations and duties of a person holding a lien upon a motor vehicle, and indicate clearly that under the statutes and the authorities cited, such lien must be noted.

As shown by the facts, the Bank acquired its assignment of the conditional sales contract on July 11, 1960, obtained a certificate of title, and kept possession of it. After a year and 9 days elapsed, the Leasing Company, on July 20, 1961, made application for a duplicate certificate of title. Had the Bank recorded its lien, as provided for by statute, no duplicate certificate of title would have been issued. The duplicate certificate of title did not show the notice of any lien held by the Bank. The Bank, by its conduct, made possible the conduct of the Leasing Company to obtain the duplicate certificate of title. Because the Leasing Company was able to obtain a duplicate certificate of title in view of the failure of the Bank to record its lien, the Leasing Company was able to transfer title to White Motors on October 3, 1961, almost 15 months after assignment of the conditional sales contract to the Bank. Failure of

the Bank to record its lien and protect itself and others, as required by law, caused Provident, in good faith and without knowledge of the facts, to rely upon the certificate of title presented and delivered to it which was issued by the county clerk of Douglas County in accordance with the provisions of the governing and applicable law. Provident altered its position to its detriment because of the failure of the Bank to record its lien. The Bank did record its lien on March 2, 1962, on the certificate of title which had been in the Bank's possession since July 11, 1960. Provident recorded its lien on March 12, 1962. It is immaterial that a recording by the Bank on an earlier certificate of title predated the recording by Provident, because section 60-110, R. R. S. 1943, constitutes an unrecorded lien invalid as to a subsequent purchaser or lienholder and the Bank is not subsequent to Provident, so the Bank's lien is the invalid one, and because possession of the motor vehicle was actually in Provident as the subsequent lienholder. Accordingly, the circumstances of this case require application in favor of Provident under the general rule that where one of two innocent persons must suffer by the acts of a third, he whose conduct, act, or omission enabled such third person to occasion the loss must sustain it if the other party acted in good faith, without knowledge of the facts, and altered his position to his detriment. See Terry Bros. & Meves v. National Auto Ins. Co., *supra*. There are many cases holding the same principle which need not be cited.

The Bank argues that one who claims an interest in a motor vehicle under a duplicate certificate of title, falsely obtained, has no rights as against the holder of the original certificate of title, and cites as authority the latest case in this state on the subject, Allstate Ins. Co. v. Enzolera, 164 Neb. 38, 81 N. W. 2d 588.

In citing the above case, the Bank argues that a certificate of title is essential to convey the title to a motor vehicle; that the Leasing Company could not legally

transfer the title to the motor vehicle to White Motors without the certificate of title; that it required the commission of a criminal act to enable the Leasing Company to transfer title to the motor vehicle to White Motors; and that as long as the Bank retained possession of the certificate of title it was impossible for the Leasing Company to sell the motor vehicle because it could not present indicia of title.

In the cited case, Allstate Ins. Co. v. Enzolera, *supra,* one Matha sold a motor vehicle in California to Richter, delivering a bill of sale, a Delaware certificate of title, and possession of the motor vehicle. Richter obtained a California certificate of title. The motor vehicle was stolen from Richter's garage. His insurance carrier, Allstate Insurance Company, paid the loss and a certificate of title was assigned to it. After the theft of the motor vehicle Matha, who had sold the automobile in California to Richter, obtained a Nebraska certificate of title based upon a duplicate certificate of title he had obtained in Ohio. Then Matha sold the motor vehicle to Enzolera. Allstate Insurance Company, as assignee of the certificate of title from Richter, was granted a writ of replevin and the right of possession. Neither Richter nor Allstate Insurance Company, his insurance carrier, had in any way failed to record either the ownership or a lien as the plaintiff Bank did in the instant case. The facts in the cited case do not present an issue of superior lien rights when a lien has not been recorded, as here required by statute, before the subsequent lienholder acquired its lien, as is presented in the instant case.

The principal rule applied in Allstate Ins. Co. v. Enzolera, *supra,* pertains to the inability of a thief to pass title, an issue that is not presented between the parties in the instant case. The court said: "In the light of these facts and well-established principles of law neither the thief nor anyone taking through him took or could take any title to the automobile. Richter remained the

owner with the right to recover possession of it wherever found, subject however to the right of a transferee to take it instead, in case Richter had transferred his title and interest."

The rule applicable is stated in State ex rel. Sorensen v. Nebraska State Savings Bank, 127 Neb. 262, 255 N. W. 52: "Generally, a thief can acquire no title to stolen property, nor can title to personal property be acquired through another's larceny or theft."

As stated in Snyder v. Lincoln, 150 Neb. 580, 35 N. W. 2d 483: "It was the larceny, and not a sale by or any negligent act of plaintiff, which was the proximate and effective cause of injury to the parties."

The cited case is distinguishable from the instant case. In the case of a theft of a motor vehicle and a subsequent sale, the owner generally has not directly or indirectly aided, abetted, or assisted and done nothing to enable the theft to take place. In the instant case, clearly the failure of the Bank to record its lien aided, abetted, and assisted in the issuance of the duplicate certificate of title from which was obtained the next original certificate of title upon which Provident properly relied. The Nebraska law regarding motor vehicle titles and liens was designed to prevent such issuance of certificates of title by providing that liens must be recorded, and if such had been recorded no such certificate of title could have been issued as was issued in this case. The record indicates that the vice president of the Bank was well aware of the risks and hazards, including the risk of fraud relating to the filing of liens. Provident was also well aware of the same facts.

The custom indulged in by banks, finance companies, and others in withholding notation of chattel mortgages on the certificates of title to a motor vehicle is not a wholesome procedure. In the light of the statutes and the cited cases, it must be concluded that any such holder of a chattel mortgage should note the same on the cer-

tificate of title in order to avoid just what happened in the instant case.

The plaintiff in a replevin action has the burden of proof and must recover on the strength of its or his right in or to the property and not upon any weakness of the interest of the defendant.

Under the facts in the instant case, the Bank failed to fulfill its burden of proof to establish a valid claim as against Provident, an innocent purchaser for value, which obtained possession of the motor vehicle upon default under the terms of a chattel mortgage held by it.

It must be conceded that the making of a false affidavit is a crime under section 60-116, R. R. S. 1943. Nevertheless, it is a crime which would not have been effective in obtaining a new certificate of title had the Bank recorded its lien. The Bank was required by statute to record its lien, not only to protect others but also to preserve its lien as against subsequent lienholders.

We conclude, for the reasons given in this opinion, that the judgment of the trial court should be reversed and the plaintiff's action dismissed.

REVERSED AND DISMISSED.

YEAGER, J., concurring.

I voted for and fully agree with the foregoing opinion and decision. I have the opinion, however, that to it should be added something so that confusion may not flow from it because of at least one earlier decision of this court which is contrary to it and is effectually overruled but to which no reference is made. This I think should have been pointed out in the opinion herein.

To make the matter clear it becomes necessary to first refer back to the case of Blixt v. Home Mutual Ins. Co., 145 Neb. 717, 18 N. W. 2d 78. In that case, with reference to the subject of certificates of title to automobiles as evidence, this court said:

"This provision is part of an act the design of which is to control within fixed limits the use and operation

of motor vehicles and to establish methods and means for conveyance of title in order that the provisions for control and use may be made effective. It is a regulatory act under the police power. As such, no doubt, it is a valid exercise of the police power.

"The provision goes far beyond a mere regulation under the police power. It amounts to an invasion of the right of contract, the impairment of rights of property and a restriction upon the right of the courts to weigh and consider evidence and to make determinations with regard to title and ownership of property and contractual rights and obligations.

"The plaintiff has cited no case and we have found none the effect of which is to say that the legislature is empowered, under the guise of a police regulation, to validly invade the field of contract and property rights and to restrict the courts in the exercise of their proper functions.

"We must therefore hold that this statutory provision may not be considered as in aid of plaintiff's cause of action. The case must turn on other considerations."

What was said there was directly and specifically overruled by the opinion in Loyal's Auto Exchange, Inc. v. Munch, 153 Neb. 628, 45 N. W. 2d 913. With specific reference to the second paragraph quoted above from the opinion in Blixt v. Home Mutual Ins. Co., *supra,* it was said: "Insofar as the last statement is concerned we think we were in error. After a further study of the law, particularly in view of the holdings of other states under like or comparable statutes together with our previous holdings, we are now of the opinion that the act represents an authorized exercise of the police power by the Legislature to regulate the transfer of title and ownership of automobiles, which is a matter of public concern. As such it is not violative of any part of the organic law of either the State of Nebraska or the United States especially with reference to the right of contract.

the delegation or restriction of judicial powers, and due process of law."

The effect of the opinion in this case is to overrule what was said in Loyal's Auto Exchange, Inc. v. Munch, *supra*, and to return to the holding in Blixt v. Home Mutual Ins. Co., *supra*. This change of position of the court, in order to avoid confusion and misunderstanding for the future, should have been pointed out in the opinion which has been adopted.

CITY OF VALENTINE, NEBRASKA, APPELLANT, V. VALENTINE MOTEL, INC., A CORPORATION, APPELLEE.
125 N. W. 2d 98

Filed December 6, 1963. No. 35489.

1. **Municipal Corporations.** A resolution of annexation by a city or village must be adopted by a two-thirds vote of all of the members of the council or board, and the resolution and the vote thereon must be spread upon the records of the council or board.
2. ———. The requirement of the statute providing that the resolution of annexation and the vote thereon should be spread upon the records of the council or board is a condition precedent to the filing of the petition for annexation in the district court.
3. ———. The provisions of the statute of annexation relating to the calling and recording of the vote on the passage of an annexation resolution must be strictly complied with.
4. ———. The provisions of such a statute requiring the spreading upon the record of the council of the vote thereon were intended to require an indisputable record of the action actually taken, and so that the public might have an opportunity to know how the elected officials voted thereon.
5. ———. A requirement that the record be kept and that it be spread upon the records of the council at the time of its voting on the resolution thereon is mandatory and jurisdictional in character and constitutes a condition precedent to the validity of proceedings for annexation.
6. ———. A city council may, under some circumstances, correct its own record, nunc pro tunc, to show the adoption of a resolution or ordinance and to record the truth of how it was voted upon. It may not, however, by such action show that the

separate requirement that these actions be spread upon the record of the minutes of the council was performed prior to the time that the spreading upon the minutes actually took place.

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

Healey & Healey, Harvey L. Goth, and W. Gerald O'Kief, for appellant.

John C. Coupland and Lane, Baird, Pedersen & Haggart, for appellee.

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

WHITE, C. J.

This is an annexation case brought by the City of Valentine against the defendant. From the sustaining of a motion for summary judgment against it, the City of Valentine appeals. The general question involved in this case centers around the power of a city council to amend its minutes nunc pro tunc, after the commencement of litigation, for the purpose of complying with requirements of the applicable annexation statutes.

Section 17-407, R. R. S. 1943, insofar as pertinent here provides: "When any city or village shall desire to annex to its corporate limits any contiguous territory, * * * and if a resolution to annex such territory, describing the same in general terms, be adopted by a two-thirds vote of all the members-elect of such council or board of trustees, *the resolution, and the vote thereon, shall be spread upon the records of the council or board.*" (Emphasis supplied.)

Upon performance of these conditions, the next succeeding statute, section 17-408, R. R. S. 1943, provides authority for the city filing a petition for annexation in the following language: "The city or village *may thereupon* present to the district court of the county in which such territory lies, a petition praying for the annexation of such territory, * * *." (Emphasis supplied.) This

statute further provides that the petition must set out the resolution of annexation and, in substance, must declare compliance with the conditions set out above in section 17-407, R. R. S. 1943.

We go now to the undisputed evidence supplied by the affidavits and exhibits offered by both parties. The minutes of the December 11, 1961, meeting of the Valentine city council, as actually recorded at the time and approved by the council as then written on January 8, 1962, show that a resolution for the annexation of defendant's property was offered and seconded. Although these minutes "spread upon the records of the council" the name vote by yeas and nays on many other official actions, both before and after the offer of this resolution, they are silent as to such action with respect to the resolution of annexation. No vote was called for or recorded, and there was no declaration of the passage of the resolution. The mayor did not sign the resolution or the minutes. At this point, we observe that an inspection by an interested party of the minutes spread upon the record would have revealed a failure of legal adoption of the resolution. As hereafter pointed out, this condition of the minutes remained the same until July 2, 1962, over 6 months later.

On December 12, 1961, the plaintiff filed the petition in this case, which stands unamended, alleging the resolution, its adoption, the vote by name, and that the resolution together with the vote thereon was "duly spread upon the records of said council." On May 25, 1962, defendant filed a motion for summary judgment, supported by the clerk's affidavit showing the actual minutes of December 11, 1961, and their approval by the council as then written on January 8, 1962.

During the pendency of this motion and while it was being set for hearing, the city council on July 2, 1962, passed a resolution (exhibit 4) ordering a nunc pro tunc amendment to its previously approved minutes of December 11, 1961, which amendment adds the following:

"On roll call vote, the following was the result: YEAS: Richardson, Flynn, Chicoine, Miller, Thompson NAYS: None The President declared the motion carried." It omitted from the former record the words: "Approved: ----------."

Mayor

Proof of this action by the council, taken without leave of the court, was presented to the court by affidavits received in evidence in the hearing on the motion for summary judgment. These affidavits show an informal agenda that the clerk had prepared for the December 11, 1961, meeting, her handwritten notes made at the meeting, and her recital that the additional minutes referred to above were not spread upon the record due to an inadvertent typing oversight.

The trial court sustained the defendant's motion for summary judgment, and the plaintiff appeals, asserting the validity of the purported nunc pro tunc order to supply the missing statutory requirements of the original minutes.

The facts are not in dispute. The case presents solely a question of law as to the retroactive validity of the nunc pro tunc resolution and order of the city council on July 2, 1962. The plaintiff asserts, citing many cases, that if the minutes were defective as the result of an inadvertent error, the council as an administrative body could amend the minutes to reflect the truth of the passage of the resolution and the vote thereon; that such amendment relates back to the time of the making of the originally defective record; and that, therefore, in law the statutory requirements have been met. The position of the appellant assumes that if the record now demonstrates the passage of the resolution and the recording of the votes by name, then the requirements of the statute, section 17-407, R. R. S. 1943, have been met. The statute, quoted above, requires passage of the resolution by a two-thirds vote, the recording of the vote, and that such action be "spread upon the records," all

prior to and as a condition precedent to the filing of the petition in district court for annexation. Beyond the mandatory requirement of adoption, is there a special significance and purpose to the provision requiring *the vote by name to be spread upon the record prior to the filing of the petition?* We think there is. In construing a similar statute, our court passed on this question in Payne v. Ryan, 79 Neb. 414, 112 N. W. 599. There the statute was worded in less explicit language than the one before us. It provided that ordinance adoption should be:. "* * * by the council or board of trustees, the yeas and nays shall be called and *recorded.*" In the present case the statutory requirement is stated: "* * * shall be spread upon the records of the council or board." In the Payne case, *supra,* it is said: "The language of this statute is clear and explicit, and leaves no doubt in the mind that it is mandatory, and that the provisions of the statute relating to the *calling* and *recording* of the yeas and nays on the passing of an ordinance *must be strictly complied with.* The object of the statute is to require that a record shall be made and kept of all proceedings by which an ordinance is passed and becomes valid. The provisions of the statute requiring the calling of the yeas and nays were made that there might be no doubt that the requisite number had voted for the passage of the ordinance, *and the provisions requiring the recording of the yeas and nays were intended to require an indisputable record of the necessary action in passing an ordinance, and that the public might have the opportunity to know how their councilmen had voted upon the passage of any given ordinance.* It was intended to avoid any reliance, *after the passage of years.* upon the *frailties of human memory to sustain the action of the council* or the board of trustees in its action in adopting or passing an ordinance." (Emphasis supplied.)

This holding giving special purpose and significance to the element of spreading upon the records of the

council is the general rule. See 5 McQuillin, Municipal Corporations (3d ed.), § 14.04, p. 12. Such statutes are generally held to be mandatory. In 37 Am. Jur., Municipal Corporations, § 144, p. 757, it is stated: "* * * and the requirement that the record be kept stands on no different footing from that relating to the manner of voting. The reason for such enactments is that the people generally, and particularly the constituency of an alderman, are *entitled to know how their representatives vote on important questions.*" (Emphasis supplied.)

In such a situation, there is no presumption of statutory compliance. Wightman v. City of Wayne, 144 Neb. 871, 15 N. W. 2d 78. Outside of this presumption, the very basis for passage of the nunc pro tunc order was that the statute was not complied with at the time or prior to the filing of the petition. In Beverly Land Co. v. City of South Sioux City, 117 Neb. 47, 219 N. W. 385, in condemning and nullifying a city council nunc pro tunc order amending its minutes 18 months later to show that the mayor signed an ordinance and the record of the yea and nay votes, our court said: "To permit the record *as made at the time* to be changed by parol testimony would amount to a judicial repeal of a legislative enactment. Farmers Telephone Co. v. Town of Washta, 157 Ia. 447. This very ordinance required, as a condition to its enactment, that the mayor should sign. The record of both requirements should be so plain that the interested citizens or successors in office could have no doubt of the action taken. It is to prevent just such a condition as we find in this case that the requirement of a complete record is made mandatory by the statutes." (Emphasis supplied.)

We point out that on January 8, 1962, the next council meeting following December 11, 1961, the minutes were recorded and approved "as written." Apparent is the square application of the principles above announced. A property owner in the area to be annexed, or any interested citizen inspecting this public record, would be

entitled to rely on the law and facts as then represented, and act accordingly on the basis that there was no legal adoption of the annexation resolution. To permit the *recording* of the fact of passage at a later time and for the purposes of litigation would be to permit the violation of the disclosure requirement of the statute as a condition precedent to annexation proceedings, would affect intervening rights of interested parties, and would open up an opportunity for fraud and uncertainty as to something that the very requirement of the statute was designed to prevent.

A case directly in point on the situation presented here is Steiger v. City of St. Genevieve, 235 Mo. App. 579, 141 S. W. 2d 233. The Missouri annexation statute required that "the ayes and nays be entered on the journal." This was not done but the minutes at the initial meeting did show that it was read three times and "was unanimously adopted." After litigation was started the board of aldermen ex parte at a special meeting amended the original minutes to show the ayes and nays in compliance with the statute. In declaring such action null and void, the court recognized the inherent power of a board to correct its records to speak the truth, nunc pro tunc, but made the same distinction with reference to the requirement that it be placed of record as we have discussed herein. Said the court: "Such a statutory requirement, being specifically designed and intended to *afford and enforce publicity as regards the votes of the individual members* of a board of aldermen upon a matter coming before them for their official action, is to be strictly observed, and, by reason of its *mandatory character,* constitutes *a condition precedent to* the validity of those actions or proceedings of the board which fall within the comprehension of the statute." (Emphasis supplied.) This case was further based on the holding that during the existence of the fatal defects and omissions in the record, that the public and interested parties had a right to rely thereon and

that intervening rights might accrue as a result thereof.

It is true here that the council passed the resolution of annexation unanimously and that it was voted on individually all as first revealed in the nunc pro tunc resolution and order of July 2, 1962. The plaintiff urges voluminous authority that the record may be corrected by ex parte proceedings to reflect the truth. It is not necessary or indicated that we should pass generally on the ambit of this power or whether it may be exercised ex parte and be effective at any particular stage of litigation without court permission or adjudication as to its propriety.

Assuming that it may correct the record to show adoption of the resolution and the recording of the name vote, it could not be amended on July 2, 1962, to show that such action was "spread upon the records" prior to the time that the spreading on the record actually took place, July 2, 1962. Or to put it conversely, if it were a fact that it was spread upon the record but that the record at some subsequent time through error or mistake did not reflect this truth, then the propriety of such an order could be considered. The mandatory jurisdictional requirement that these matters "shall be spread upon the records of the council," before and as a condition precedent to the filing of a petition for annexation has not been met. To hold otherwise would defeat the declared conditions set out in the statute and destroy the purpose of disclosure of the vote prior to the beginning of the proceedings. To hold otherwise would prejudice the possible intervening rights of property owners and citizens relying on the face of the record of the approved minutes, and lend temptation to officials to not disclose their vote until the exigencies of the litigation demanded it. The vote is to be disclosed *in advance* of petition filing, and not by proof of a retroactive order designed to meet the necessities of proof on trial. Under the applicable rule as to motions for summary judgment, this essential allegation of the plaintiff's petition

has been pierced to show conclusively the absence of compliance with the mandatory requirements for maintenance of this action under the applicable statute. The trial court came to the same conclusion, and its judgment dismissing the action is affirmed.

AFFIRMED.

KATHERINE SIMMONS, APPELLANT, V. NORMAN LINCOLN, DOING BUSINESS AS MIDTOWN MOTORS, APPELLEE.
125 N. W. 2d 63

Filed December 6, 1963. No. 35523.

1. **Judgments.** Section 25-2001, R. R. S. 1943, specifically grants the power to district courts to vacate or modify their own judgments after term time for the reasons stated therein, and this right is not affected in any way by the taking of an appeal.
2. ———. Within 3 days after the rendition of any judgment, the clerk of the court shall send a post card by United States mail to each party who has made an appearance in the action, or to his attorney or attorneys of record, advising that the judgment has been rendered and the date of rendition thereof. § 25-1301.01, R. S. Supp., 1961.
3. **New Trial.** If the court overruled plaintiff's motion for a new trial after having the motion under submission, and no attempt was made to notify the plaintiff or her counsel of the ruling thereon, and if plaintiff or her counsel did not learn of the ruling until after the time to file a notice of intention to appeal had passed, the order overruling the motion for a new trial should be vacated.
4. **New Trial: Judgments.** We construe the language "after the rendition of any judgment" in section 25-1301.01, R. S. Supp., 1961, to include a ruling on a motion for a new trial where such ruling is a prerequisite to an appeal, as well as to any other order finally disposing of an action.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. Reversed and remanded with directions.

Matthews, Kelley & Cannon, for appellant.

Wear, Boland, Mullin & Walsh, for appellee.

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

SPENCER, J.

This is an appeal from an order sustaining an alleged special appearance to a motion to vacate an order overruling a motion for a new trial.

Katherine Simmons, hereinafter referred to as plaintiff, filed an action against Norman Lincoln, doing business as Midtown Motors, hereinafter referred to as defendant, seeking damages for the conversion of an automobile. A jury was waived and trial was had to the court which, after plaintiff rested, sustained defendant's motion to dismiss. Plaintiff filed a motion for a new trial which was overruled on February 2, 1962. An appeal was attempted to this court in case No. 35275. We sustained defendant's motion to dismiss the appeal for the reason that notice of intention to appeal was not filed within 1 month from the overruling of the motion for the new trial. The mandate was filed with the clerk of the district court on July 11, 1962.

On July 13, 1962, plaintiff filed a motion in the district court for an order vacating and setting aside the order of February 2, 1962, overruling the motion for a new trial. This motion is as follows: "COMES NOW plaintiff, Katherine Simmons, and moves the court for an order vacating and setting aside its order of February 2nd herein, for the reason that there was a mistake, neglect and ommission (sic) by the Clerk, and irregularity in the obtaining of the judgment or order sought to be vacated, in the following particulars:

"1. The order was entered without the presence of counsel for plaintiff and without knowledge of counsel for plaintiff, and without his appearance or waiver of appearance, and without notice to plaintiff of its entry.

"2. The clerk omitted to notify plaintiff's counsel by postcard as required by NRS

"Plaintiff has a vaild (sic) cause of action in this case."

To this motion defendant filed a pleading entitled a special appearance but essentially attempting to set out a plea in bar. After a hearing, defendant's pleading was sustained and this appeal was perfected.

Plaintiff's motion is phrased in substantially the language of subdivision (3) of section 25-2001, R. R. S. 1943, which section authorizes a district court to vacate or modify a judgment or order after the term at which such judgment or order was made. Section 25-2003, R. R. S. 1943, provides that the proceeding to vacate a judgment or order to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, which are the grounds enumerated in subdivision (3) of section 25-2001, R. R. S. 1943, shall be by motion, upon reasonable notice to the adverse party or his attorney in the action.

Plaintiff's motion was a proper procedure to raise the question involved herein. The motion was filed during the May 1962 term of the district court. The order overruling the motion for a new trial, to which this motion is directed, was entered during the September 1961 term of the district court. It was therefore filed after the term in which the final order was entered. The record indicates that the attorney for the defendant received notice of the motion, as required by section 25-2003, R. R. S. 1943, and that the defendant appeared therein by filing the alleged special appearance.

Defendant's brief is premised upon the theory that because any rights plaintiff may have had under the provisions of section 25-2001, R. R. S. 1943, existed when her notice of intention to appeal was filed out of time, that by appealing she elected one of two inconsistent remedies. There is no election of remedies involved herein. In the appeal in case No. 35275, plaintiff was attempting to review the ruling on the case-in-chief. If the appeal had been perfected, the fact that there may have been irregularities or omissions on the part of court personnel would be immaterial. In this

proceeding, plaintiff is trying to get a hearing on a motion to vacate the order overruling the motion for a new trial by the court which entered it, alleging that the order was entered without notice and that she did not learn of it until the time to appeal had passed so that she was deprived of her rights to an appeal.

Defendant's special appearance urges that the appeal to this court divested the district court of any jurisdiction to hear a motion under section 25-2001, R. R. S. 1943. There is no merit to this contention. The statute specifically granted the power to the district court to vacate or modify its own judgment after term time for the reasons stated therein. This right is not affected in any way by the taking of an appeal.

It is apparent that the defendant was attempting to dispose of plaintiff's motion by a pleading, on the theory that even if the allegations were true plaintiff was entitled to no relief. While the point is not argued in the brief, we assume that the defendant was attempting to suggest that even if the clerk of the district court failed to comply with the provisions of section 25-1301.01, R. S. Supp., 1961, and the plaintiff was prevented from appealing thereby, this would not be sufficient to invoke the jurisdiction of the court under subdivision (3) of section 25-2001, R. R. S. 1943.

Section 25-1301.01, R. S. Supp., 1961, provides as follows: "Within three days after the rendition of any judgment, the clerk of the court shall send a post card by United States mail to each party who has made an appearance in the action, or to his attorney or attorneys of record, advising that a judgment has been rendered and the date of rendition thereof."

Plaintiff's motion specifically pleaded the omission of the clerk to notify plaintiff's counsel by post card of the disposition of her motion for a new trial which the court had under submission, as required by section 25-1301.01, R. S. Supp., 1961. If the court overruled plaintiff's motion for a new trial after having the motion

under submission, and no attempt was made to notify the plaintiff or her counsel of the ruling thereon, and if the plaintiff or her counsel did not learn of the ruling until after the time to file a notice of intention to appeal had passed, the order overruling the motion for a new trial should be vacated. This is the very vice the statute was enacted to eliminate.

The purpose of section 25-1301.01, R. S. Supp., 1961, was to require the mailing of a notice of the rendition of a judgment after a case had been taken under submission by the court. While the statute reads "after the rendition of any judgment," we construe it to include a ruling on a motion for a new trial as well as to any other order finally disposing of an action.

The plaintiff is entitled to an opportunity to prove the allegations of her motion. For the purpose of our discussion herein, we have assumed that the statements in the motion were true, that no attempt was made to notify the plaintiff or her attorney, and that plaintiff or her attorney had no notice of the ruling on the motion for a new trial until it was too late to perfect an appeal. Upon a proper showing, these assumptions may prove to be unwarranted.

We reverse the order sustaining the alleged special appearance, and remand the cause to the district court with directions to hold a hearing on plaintiff's motion.

REVERSED AND REMANDED WITH DIRECTIONS.

PROTECTIVE FIRE AND CASUALTY COMPANY, A CORPORATION, APPELLANT, V. GLENDA CORNELIUS ET AL., APPELLEES.
125 N. W. 2d 179

Filed December 13, 1963. No. 35486.

1. **Automobiles: Insurance.** Where a statutory omnibus provision requires coverage of additional insureds in automobile liability insurance policies, it will be treated as if expressly referred to and incorporated in the provisions of the policy.

2. ———: ———. Where such a statutory provision is in conflict with the provisions of the insurance policy, the statute and not the policy provision is controlling.
3. ———: ———. Section 60-534, R. R. S. 1943, is an omnibus provision providing that a person using an automobile with the express or implied permission of the owner is an added insured.
4. ———: ———. The omnibus statute making a person using an automobile covered by insurance with the express or implied consent of the owner an added insured excludes from the protection of the policy any person who takes the automobile and uses it without permission in the first instance.
5. ———: ———. Where the automobile covered by the policy is used by a person other than the owner with the permission of such owner, his subsequent use of it is with the permission of the owner within the meaning of the omnibus statute, regardless of whether the automobile is driven to a place or for a purpose not within the contemplation of the owner when the permission was granted.
6. ———: ———. Where a person uses an automobile of another with the permission of its owner, such person's use of the automobile makes the owner's insurer primarily liable for the negligence of the user under the omnibus provisions of section 60-534, R. R. S. 1943, and excludes application of the operator's automobile policy except for coverage in accordance with the terms of such policy.

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

Ivan A. Blevins, for appellant.

Perry & Perry, Wagener & Marx, Healey & Healey, and John McArthur, for appellees.

Wright, Simmons & Hancock, for amicus curiae.

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

CARTER, J.

This is an action under the Declaratory Judgments Act to determine the extent of liability on two automobile insurance policies alleged to cover the same auto-

mobile accident. The trial court found for the defendants and the plaintiff has appealed.

The evidence shows that on August 12, 1961, one Van Hoozer was an employee of Martin Swartzman, who was operating an establishment for the sale of used automobiles and automotive parts under the name of Marty's Auto Parts. At the close of business on the day in question, a Saturday, Van Hoozer indicated a desire to purchase a 1941 Chevrolet automobile from Martin Swartzman for the sum of $25. The terms of sale were agreeable with Swartzman. Because of the lateness of the hour no sale was completed. Van Hoozer requested permission, as he said, to try the car out over the weekend. Swartzman testified that permission was granted to Van Hoozer to take the automobile over the weekend for the purpose of working on it. A dealer's license plate was placed on the car so that Van Hoozer could take the car that evening.

Van Hoozer drove the automobile to the home of Glenda Cornelius, where he left it overnight. He returned the following morning, a Sunday, and tinkered with the car until about 11 a.m. At that time Van Hoozer and Glenda Cornelius went to the home of Van Hoozer's mother for the purpose of showing her the car, Van Hoozer doing the driving. When they left the mother's home Van Hoozer asked Glenda Cornelius if she would like to drive the car. She indicated a desire to do so and she proceeded to drive it back to her home. Van Hoozer occupied the front seat during the trip and gave directions as to the route to be taken, which directions Glenda followed. On the way she had an intersection accident with an automobile owned and operated by one Trenary, which gave rise to the present litigation.

The evidence showed that Van Hoozer and Glenda were engaged to be married. Glenda had become acquainted with Swartzman at his place of business and she was known to Swartzman as Van Hoozer's girl friend.

In the transaction leading up to the permission granted to Van Hoozer to take the car, the name of Glenda Cornelius was not mentioned and consequently no express permission was given by Swartzman for Glenda to drive the car.

The plaintiff, Protective Fire and Casualty Company, was the insurance carrier for Glenda Cornelius covering an automobile owned by her. The Empire Fire and Marine Insurance Company was the insurance carrier for Martin Swartzman, doing business as Marty's Auto Parts. The first question to be determined is whether or not liability exists on the part of Empire Fire and Marine Insurance Company under its contract of insurance with Swartzman.

The policy of Empire Fire and Marine Insurance Company defines the insured as follows: "With respect to the insurance under coverages A, B and D the unqualified word 'insured' includes the named insured and also includes (1) any partner, employee, director or stockholder thereof while acting within the scope of his duties as such, and any person or organization having a financial interest in the business of the named insured covered by this policy, and (2) any person while using an automobile covered by this policy, and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission."

It is provided by section 60-534, R. R. S. 1943, which we shall hereafter designate as the omnibus statute, in part as follows: "Such owner's policy of liability insurance: (1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted; and (2) shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, main-

tenance or use of such motor vehicle or motor vehicles * * *."

It is the law of this state that applicable statutes which exist at the time of making a contract of insurance enter into and form a part of it as if they were expressly referred to and incorporated therein. This principle embraces alike those laws which affect its validity, construction, discharge, and enforcement. Reinsch v. Pacific Mutual Life Ins. Co., 140 Neb. 225, 299 N. W. 632. See, also, Moore v. Washington Nat. Ins. Co., 135 Neb. 29, 280 N. W. 221; Wildman v. Government Employees' Ins. Co., 48 Cal. 2d 31, 307 P. 2d 359.

The omnibus statute provides a broader coverage than is contained in the Empire Fire and Marine Insurance Company policy. This is demonstrated in that the statutory provision fixes liability on one "using" the automobile with the express or implied consent of the named insured while the insurance policy provides liability by one using the automobile of the named insured provided the "actual use" of the automobile is by the named insured or with his permission.

The evidence shows that Van Hoozer testified that the permission granted by Swartzman was to try out the car, while Swartzman said that the permission was to work on it. In either event, the permission was to use the car, which is all that is required by the omnibus statute.

The statute is remedial in nature and has for its purpose the protection of the public against damages resulting from accidents arising because of the negligent use of automobiles by irresponsible and noninsured permittees. The statute should be construed to accomplish the purpose and policy of the legislation. We must therefore reject the contention that the language of the omnibus statute means that the permission to use the car in a specified manner or for a specified purpose only bears upon the liability where permission to use the car is in fact given. Under this rule as stated in 5A Am.

Jur., Automobile Insurance, § 99, p. 99, a deviation from the permitted use is immaterial, the only essential being that permission be given for use in the first instance.

In Dickinson v. Maryland Casualty Co., 101 Conn. 369, 125 A. 866, 41 A. L. R. 500, the court, in construing an omnibus clause in an insurance policy extending coverage to any person while riding in or legally operating the automobile described in the policy, and to any person legally responsible for the operation thereof, provided such use or operation is with the permission of the named insured, said: "The insurer desired to obtain insurance and for this object it extended in its policy the benefits of the policy to the guest riding in the insured's automobile, provided the guest was riding with the permission of the insured. If the insurer had intended by this proviso to restrict the permission to its specifically named objects, it would, in each case, be necessary to make inquiry into the purpose and extent of the permission, while by specific provision the insurer could readily have done this and avoided the inquiry. The result would have been a policy less acceptable to prospective insured. It would have invited in most cases an investigation as to whether the permission granted had been violated in a particular case or not. In place of a certain provision in the policy of definite meaning, it would have inserted a provision breeding uncertainty, inviting litigation, and making the defense of a departure from the permission an available and often used defense. This is exactly what the courts and legislature have frowned upon—uncertain and ambiguous provisions in contracts of insurance under which insurers seek an escape from the obligation of paying the insurance indemnity contracted for.

"The fact that the insurer in this case did not so restrict the term 'permission' is strong evidence that it did not by this provision intend this. To justify the strict construction claimed by the insurer, the terms of the

policy prepared by the defendant ought to specifically so provide. The construction claimed by the defendant would convert all cases of this character into a contest as to the exact words spoken when permission was secured, and to an attempt upon the trial to convert by refinement any use of the car into a departure sufficient to annul the permission granted. If the departure were from the place permitted, be it near or far, or from the purpose named, be it substantial or otherwise, the insured must fail in his recovery. The business of the insurance company was to sell its insurance under this policy. Indemnity for the guest or family of the assured riding in the car was a feature of the policy. What sort of an indemnity to them would it be if they were bound by the strict limitations of the permission of the insured? It would be necessary in advance of entering the car for them to ascertain these limitations and then to endeavor to see that the driver of the car enforced them. Is it likely that the insurer would insert such a provision leading to such consequences? And how could the insured ever be assured that he had secured the extension of the indemnity of this policy for his guest or family or the guest or family of him to whom the insured gave the permission, if any departure from that permission destroyed the indemnity?" See, also, Stovall v. New York Indemnity Co., 157 Tenn. 301, 8 S. W. 2d 473, 72 A. L. R. 1368; Annotation, 5 A. L. R. 2d, § 13, p. 629, and cases there collected.

The purpose of the omnibus clause is to fix the liability of additional insureds and to eliminate ambiguities and defenses with reference thereto as a matter of public policy. We conclude, therefore, that the omnibus clause imposes liability on the insurer for the negligence of any person using the insured's automobile with his permission.

The Empire Fire and Marine Insurance Company and Swartzman rely upon the former decisions of this court in support of a contrary view. We shall discuss the

principles involved in those cases. In State Farm Mut. Automobile Ins. Co. v. Kersey, 171 Neb. 212, 106 N. W. 2d 31, the court held that the automobile was being used at the time of the accident by a minor without permission, which would defeat a recovery under the provisions of the omnibus statute. In Turpin v. Standard Reliance Ins. Co., 169 Neb. 233, 99 N. W. 2d 26, the court imposed liability on the ground that general permission to use the automobile by the permittee had been granted by the owner. In Witthauer v. Employers Mutual Casualty Co., 149 Neb. 728, 32 N. W. 2d 413, the court denied recovery under a policy provision limiting additional insureds to persons using the insured car provided the actual use of the automobile is by the named insured or with his permission. The accident occurred on March 23, 1944, prior to the effective date of the omnibus statute on May 11, 1949. The case was correctly decided under the law existing when the accident occurred, but it is not authority in cases arising after the enactment of the omnibus statute.

We point out that in cases which arise under provisions limiting recovery to additional insureds using an automobile covered by the policy provided the actual use of the automobile is by the named insured with his permission are generally construed to mean that the coverage exists only when the automobile is being used within the range of the specific permission granted. The words "actual use" constitute a much greater limitation of coverage than do the words "use" or "using," found in the omnibus statute. See, Gulla v. Reynolds, 151 Ohio St. 147, 85 N. E. 2d 116; Laroche v. Farm Bureau Mutual Automobile Ins. Co., 335 Pa. 478, 7 A. 2d 361.

In the last-cited case the court said: "It is to be noted that in the present policy the phraseology employed is 'provided * * * the actual use is with the permission of the Named Insured.' Perhaps a better term for what evidently was intended by the use of this adjective would have been 'the particular use.' In Apple-

man on Automobile Liability Insurance, p. 110, the term 'actual use' is said to be designed to defeat the minority view that, if permission to use the car is given by the insured, the permission need not cover the specific purpose for which the car is being driven at the time of the accident. In the recent case of Haeuser v. Aetna Casualty & Surety Co., 185 So. (La. App.) 493, the phrase 'actual use' was so interpreted, and was held to relieve the company from liability where permission had been given for a certain purpose but the driver of the car was proceeding on a distinct errand of his own when the accident occurred."

While the language of the policy in the instant case used the term "actual use," the omnibus statute which supersedes the words "actual use" contained in the policy with the word "using" effectively changes the coverage of additional insureds in accordance with the legal meaning that the term implies. We must assume that it was the intention of the Legislature in enacting the omnibus statute to accomplish this result.

It is contended, however, that liability does not exist on the part of the Empire Fire and Marine Insurance Company, for the reason that Glenda Cornelius, and not Van Hoozer, was operating the car at the time of the accident. The terms "use" and "operation" are not interchangeable nor synonymous. They have separate meanings. Rose v. Gisi, 139 Neb. 593, 298 N. W. 333. In Woodrich Construction Co. v. Indemnity Ins. Co., 252 Minn. 86, 89 N. W. 2d 412, the court said: "The use of a motor vehicle does not require that the user, or the user's agent, be its actual operator. It is common knowledge that the use of a motor vehicle may be furnished by the owner to another with or without a driver. Many decisions have in effect recognized use as going beyond the narrow meaning of the direct mechanical operation performed by the driver and as encompassing the broader concept of employing or putting the vehicle into one's service by an act which assumes at any time—with the

consent of the owner or his agent—the supervisory control or guidance of its movements."

In the instant case Glenda Cornelius was operating the car at the time of the accident. The permittee, Van Hoozer, was riding in the car. Under such circumstances Van Hoozer was using the car within the meaning of the omnibus statute. Persellin v. State Automobile Ins. Assn., 75 N. D. 716, 32 N. W. 2d 644; American Employers' Ins. Co. v. Liberty Mut. Ins. Co., 93 N. H. 101, 36 A. 2d 284; Brown v. Kennedy, 141 Ohio St. 457, 48 N. E. 2d 857.

We conclude, under the foregoing authorities, that the Empire Fire and Marine Insurance Company is primarily liable for the damages sustained in the instant case. The employee, Van Hoozer, having permission to use the car and being a passenger in it at the time of the accident, even though the car was being operated by another, was using it within the meaning of the statute and was an additional insured under its terms.

A determination of the liability of plaintiff, Protective Fire and Casualty Company, for damages in the accident on its policy of insurance covering the automobile of Glenda Cornelius is also sought. The policy provided: "If the insured has other insurance against a loss covered by Part I of this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible insurance."

The liability of the Protective Fire and Casualty Company to its insured while driving a nonowned automobile is determinable from the terms of its contract of insurance. The quoted provision of the insurance contract plainly states that such liability is limited to lia-

bility over and above other valid and collectible insurance. The liability of the Protective Fire and Casualty Company in the instant case is therefore the excess liability over and above that of the Empire Fire and Marine Insurance Company within the financial limits of its policy.

Under the law declared by this opinion the issue was one of law and not of fact. The findings of fact made by the trial court were immaterial to the issue and are not therefore within the rule that findings of fact by the court in a law action have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.

Pursuant to the prayer of the petition we hold as follows: The insurance policy of the Empire Fire and Marine Insurance Company covered the operation of the Swartzman automobile at the time and place of the accident. The Empire Fire and Marine Insurance Company is obligated to defend all claims based upon the negligence of Glenda Cornelius and Jerry Van Hoozer. The Empire Fire and Marine Insurance Company is primarily obligated to pay any judgment that may be rendered against Swartzman, Cornelius, or Van Hoozer for their negligence, to the extent of its policy limits. The insurance liability of Protective Fire and Casualty Company is excess over and above the coverage of Empire Fire and Marine Insurance Company within the financial limits of the Protective Fire and Casualty Company's policy with Cornelius in accordance with its provisions.

For the reasons stated the judgment is reversed and the cause remanded with directions to the district court to enter a declaratory judgment in accordance with the views expressed in this opinion. The costs of this appeal are taxed to the Empire Fire and Marine Insurance Company.

REVERSED AND REMANDED WITH DIRECTIONS.

JOYCE LUMBER COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. CHARLES E. DJUREEN ET AL., APPELLEES AND CROSS-APPELLANTS, COMMERCIAL SAVINGS AND LOAN ASSOCIATION ET AL., APPELLEES AND CROSS-APPELLEES.

125 N. W. 2d 109

Filed December 13, 1963. No. 35498.

1. **Mechanics' Liens.** By statute, any person who shall furnish material for the construction of a house by virtue of a contract or agreement, expressed or implied, with the owner thereof or his agents, shall have a lien to secure the payment of the same upon such house.
2. ———. By statute, any person who shall furnish any material to the contractor and who shall desire to secure a lien upon a house may file a sworn statement of the amount due him from such contractor for such material, together with a description of the land upon which the same was used, within 3 months from the furnishing of such material.
3. ———. Failure to file a mechanic's lien within the time provided for by statute nullifies such a lien.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed in part, and in part reversed and remanded with directions.

Floersch & Floersch, for appellant.

Frost, Meyers & Farnham and John B. Abbott, for appellees Djureen.

Fitzgerald, Hamer, Brown & Leahy, Harold L. Rock, Virgil E. Northwall, Burbridge & Burbridge, Schmid, Snow & Ford, and William E. Seidler, for appellees Commercial Savings & Loan Assn. et al.

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

MESSMORE, J.

This is an action to foreclose a mechanic's lien brought by Joyce Lumber Company, a corporation, plaintiff, against Charles E. Djureen and Katherine J. Djureen, husband and wife, Commercial Savings and Loan Asso-

ciation, a corporation, Omaha Concrete Stone Company, a corporation, Seibler Heating and Air Conditioning, Inc., a corporation, Snell Sash and Door Company of Nebraska, Inc., a corporation, and Faur Electric Company, a copartnership, defendants. Defendants Omaha Concrete Stone Company and Snell Sash and Door Company of Nebraska, Inc., filed answers and cross-petitions but failed to appear for pretrial conference and trial, and their cross-petitions were dismissed for want of prosecution. The answer and cross-petition of Seibler Heating and Air Conditioning, Inc., was dismissed with prejudice after the entry of judgment appealed from herein on motion of said defendant, as was the answer of Faur Electric Company. The court reserved ruling on the claim of Commercial Savings and Loan Association in the judgment. The parties we are concerned with in this appeal are the plaintiff, Joyce Lumber Company, and the defendants Djureen.

The trial court found that with regard to the answer of the Commercial Savings and Loan Association, the answer of the Faur Electric Company, the answer and cross-petition of Seibler Heating and Air Conditioning, Inc., and the issues raised therein, the court was of the opinion that the judgment would permit such parties to conclude their differences without entry of judgment.

As to the plaintiff and defendants Djureen, the court found that the plaintiff furnished material for the construction of a residence on the real estate involved, substantially on the dates as shown, in the quantities, and of the fair and reasonable value reflected in the mechanic's lien; that such material was furnished by the plaintiff on an open account between the plaintiff and the contractor, Robert L. Carpenter, and not pursuant to any agreement or understanding between the plaintiff and the defendants Djureen, nor pursuant to any contract, agreement, or understanding between the plaintiff and the contractor, either for the furnishing of certain material in a gross amount or for all the material

of a nature handled by plaintiff to be used in said construction; that the material was furnished pursuant to 21 separate orders placed by the contractor with the plaintiff on or about the various dates shown in the mechanic's lien, each such order being for specific items and at specific amounts; that each such order constituted a separate transaction or contract between the plaintiff and the contractor, and particularly that the order shown on the mechanic's lien dated February 7, 1962, and annotated to invoice No. 05189, was a transaction separate from all the previous entries, whether they be considered 1 or 20 transactions; that this particular order was judicially admitted by the Djureens; and that the lien of plaintiff was filed of record on March 12, 1962, more than 3 months after the furnishing of any material except those items shown on the order dated February 7, 1962, which order may not be tacked onto the previous orders for the purpose of extending plaintiff's lien-filing time. Judgment was entered according to the above findings.

The plaintiff filed a motion for new trial which was overruled. The plaintiff appeals.

The pleadings of the respective parties to this action may be summarized as follows.

The plaintiff's petition alleged that the defendants Djureen were the owners as joint tenants and not as tenants in common of Lot 5, Keystone Valley, an addition to Omaha; that between September 22, 1961, and February 7, 1962, the plaintiff furnished lumber and material for the construction of a home on such premises in the amount of $3,266.93; and that the plaintiff filed a mechanic's lien with the register of deeds of Douglas County for such amount, no part of which had been paid. The plaintiff prayed judgment for the above amount, with interest at 6 percent per annum from February 10, 1962, and $9 filing fee for the mechanic's lien.

The defendants Djureen in their answer admitted the identification of the parties to this litigation as above

stated and that they were the owners of the property described in the plaintiff's petition; and denied every allegation contained in the plaintiff's petition except those which were in the nature of admissions against interest or admissions of matters contained in the defendants' answer and cross-petition.

These defendants, in their cross-petition, alleged that the plaintiff filed an affidavit and an account of materials supplied on March 12, 1962, in the sum of $3,266.93, in the office of the register of deeds of Douglas County, on the property of these defendants; that said lien was invalid for the reason that it represented material supplied under separate and distinct contracts; and that the affidavit relating to the mechanic's lien disclosed that the plaintiff supplied materials from September 22, 1961, to February 7, 1962. The cross-petition further alleged that the balance of the account, with the exception of materials supplied on February 7, 1962, did not operate as a lien on the property of these defendants and should be declared null and void.

The plaintiff denied all of the allegations contained in the defendants' answer and cross-petition which were not consistent with the plaintiff's petition.

The plaintiff assigns as error that the trial court erred in finding that the material furnished was not pursuant to any contract, agreement, or understanding between the plaintiff and the contractor, either for furnishing of certain material in a gross amount or of all materials of a nature handled by the plaintiff to be used in the construction of a house; that the trial court erred in finding that such material was furnished pursuant at 21 separate orders and that each such order constituted a separate transaction or contract between the plaintiff and the contractor, and particularly that the order of February 7, 1962, was a transaction separate from all previous entries, whether they be considered 1 or 20 transactions; that the trial court erred in finding that the lien of the plaintiff was filed more than 3

months after the furnishing of any material, except those items dated February 7, 1962; and that the trial court erred in failing to find that the plaintiff had a first lien on the premises involved and in dismissing the plaintiff's petition.

For convenience we will refer to the Joyce Lumber Company as plaintiff; to Robert L. Carpenter as Carpenter or contractor; to Charles E. Djureen and Katherine J. Djureen as defendants; and to Charles E. Djureen as Djureen.

The yard manager of plaintiff testified that he was acquainted with Carpenter, a homebuilder and contractor, and had transacted business with him for the past 5 or 6 years; that Carpenter had built a number of homes in Omaha; and that when Carpenter would start the construction of a new home, the plaintiff would set up a separate account for each home. This witness' attention was directed to a property located at 7322 Manderson Street. He testified that the plaintiff had an agreement with Carpenter who would call the plaintiff and inform it that he was starting the construction of a new home and would give the address to the plaintiff; that in most cases he would have the actual transactions with Carpenter concerning the furnishing of materials for houses that Carpenter was going to build; and that it was his decision as to whether or not the plaintiff would continue to furnish material to Carpenter. To the best of his knowledge there were five or six homes being constructed by Carpenter in the neighborhood where the defendants' house was being constructed. Carpenter had many lots upon which he was going to build houses, and as he progressed with the building, the plaintiff would set up the ledger sheets for the construction of each house, and each transaction was handled in the same manner. The plaintiff furnished material for the house at 7322 Manderson Street. With reference to the procedure, he testified that when an order was called in, a load ticket was made out which went to

the yard; and that the material was loaded and checked out, and the invoice was made in quadruplicate, listing all of the items that were to be delivered on the truck. The truckdriver took the third and fourth copies, leaving the fourth copy on the job with the materials, and the third copy was signed by the person who received the material and was returned to the plaintiff's yard where it was matched with the first and second copies. The prices were then entered, extended, and posted on the ledger account. After the second copy was priced it was sent to the customer. All of these records were kept in the ordinary course of business. The tickets were priced and posted the next day after delivery.

This witness identified exhibit No. 2, stating that it consisted of third copies of invoices of material delivered to 7322 Manderson Street, showing the materials delivered to that address; that these were duplicate copies; and that the posting was done from the original copy. He identified exhibit No. 3 as the ledger card on which is posted the entries shown on exhibit No. 2 as before stated. He further testified that the posting was done by a posting machine; that exhibit No. 3 represented both debits and credits to the account for delivery of materials to 7322 Manderson Street; that the materials furnished amounted to $3,275.93, which is posted on exhibit No. 3; and that he did not personally see these materials delivered. He identified exhibit No. 4 as a mechanic's lien filed against Djureens and Carpenter with reference to the materials furnished at 7322 Manderson Street. He testified that the statement attached to the mechanic's lien was the same as the general ledger sheet, except that each entry was itemized; and that he signed the affidavit and claim of lien on behalf of the plaintiff and it was filed with the register of deeds of Douglas County at 4:01 p.m., March 12, 1962. He further testified that there was due plaintiff $3,266.93; and that no payments had been made since the filing of the lien.

He testified on cross-examination that in regard to invoice No. 05189 charged to Carpenter, the duplicate showed delivery to 7328 Manderson Street which had been changed to 7322 Manderson Street; that there were two 4 x 4s 16 feet, one 36-inch aluminum threshold, and two 32-inch aluminum thresholds; that this invoice was signed "R. L. Carpenter By Don"; that the 4 x 4, 8 feet or 16 feet pieces of lumber could be used for pillars to support a roof; that the thresholds were used for the top of the sill for an outside doorframe over which the door closes and go on the bottom of the outside doorframe; and that the items delivered on February 7, 1962, were not for repair or replacement. This witness further testified that in his opinion the contract was substantially completed on November 13, 1961; that shortly thereafter the contractor was billed by the plaintiff; that the first material was furnished on September 22, 1961; that on November 13, 1961, there was due the plaintiff $3,251.78; and that he did not know if all the material was used on that particular lot and could not personally account for each delivery.

Detlef W. Staack, a truckdriver employed by the plaintiff, testified, with reference to deliveries, that the truckdriver's name appears on the ticket showing who delivered the materials and is placed there by the dispatcher who makes out the ticket. He further testified to certain invoices for materials which were delivered to 7322 Manderson Street. With reference to invoice No. 05189, he testified that he delivered the 4 x 4s to 7328 Manderson Street, or the house right next door to 7322 Manderson Street; that he delivered the thresholds to 7322 Manderson Street; that the 4 x 4s were put in the garage at Don's request; that Don was an employee of Carpenter; that Don took the thresholds to 7322 Manderson Street; that he saw Don go into the house at 7322 Manderson Street with the thresholds; and that when he returned to the office he told the dispatcher where he had delivered the order, which was

the customary procedure when the ticket showed a different address from which the material was delivered. At that time they were finishing the house at 7322 Manderson Street, putting in the cabinets and the finishing work.

The parties stipulated that the Commercial Savings and Loan Association of Omaha held a note and mortgage executed October 4, 1961, signed by the Djureens in the amount of $14,000, filed October 6, 1961, at 10:45 a.m., with the register of deeds for Douglas County.

Djureen testified that he was the owner of the property at 7322 Manderson Street, and described its location; and that there are aluminum thresholds in the house located at the front door, the garage door, and the side door leading out to the garage, which are now attached to the house and which were installed on or before December 17, 1961.

The record also discloses that previously 6 thresholds were delivered to 7322 Manderson Street on November 10, 1961; in addition two 4 x 4, 8-foot pieces of select Douglas fir were delivered on October 16, 1961; and invoice No. 05189 was directed to 7328 Manderson Street and receipted for there, but later was corrected at the plaintiff's yard to 7322 Manderson Street.

Section 52-101, R. R. S. 1943, provides in part: "Any person who shall perform any labor or furnish any material, * * * for the construction, erection, improvement, * * * of any house, * * * by virtue of a contract or agreement, expressed or implied, with the owner thereof or his agents, shall have a lien to secure the payment of the same upon such house, * * *."

Section 52-102, R. R. S. 1943, provides in part: "Any person or subcontractor who shall perform any labor for, or furnish any material, machinery, or fixtures, including gas and electric apparatus * * * for any of the purposes mentioned in section 52-101, to the contractor, or any subcontractor who shall desire to secure a lien upon any of the structures mentioned in said section, may file

a sworn statement of the amount due him from such contractor for such labor, material, machinery, * * * together with a description of the land upon which the same was done or used, within three months from the performing of such labor or furnishing such material, * * *."

This court, in York Brick & Tile Co. v. Ude Motor Co., 123 Neb. 154, 242 N. W. 361, a mechanic's lien case, said: "It is the duty of this court to retry the issues of fact involved in the findings of fact complained of on the evidence preserved in the bill of exceptions and upon a trial de novo of such questions of fact reach an independent conclusion as to what findings are required, and without reference to the conclusions reached by the lower court * * *."

The plaintiff asserts that the cross-petition of the defendants Djureen contains language with reference to the materials furnished prior to February 7, 1962, then states that the balance of the account, with the exception of the materials supplied on February 7, 1962, does not operate as a lien on the defendants' property and should be declared null and void.

As heretofore stated, there was evidence that the house of the defendants Djureen was substantially completed on November 13, 1961. The plaintiff asserts that the foregoing in said cross-petition constitutes an admission on the part of the defendants Djureen that items were furnished by the plaintiff on February 7, 1962, for use on their property, therefore, such defendants had judicially admitted such fact, and the case of Barkalow Bros. Co. v. English, 159 Neb. 407, 67 N. W. 2d 336, is applicable, wherein this court held: "The allegations of a pleading are always in evidence for all purposes of the trial. They are before the court and jury and may be used for any legitimate purpose." See, also, Kuhlmann v. Platte Valley Irr. Dist., 166 Neb. 493, 89 N. W. 2d 768; Johns v. Carr, 167 Neb. 545, 93 N. W. 2d 831.

If the language contained in the cross-petition be

considered a judicial admission, it is not conclusive on a trial de novo in this court.

The evidence as to whether or not the items under date of February 7, 1962, were delivered to the defendants' house at 7322 Manderson Street is in some degree of conflict, but there is lack of competent evidence that such items were so delivered. There is no competent evidence that such materials were used in the house of these defendants. The evidence is to the contrary. The trial court erred in failing to find that the items allegedly supplied on February 7, 1962, were in fact not delivered or used in the house of these defendants.

The trial court was correct in holding that the order dated February 7, 1962, could not be tacked onto the previous orders for the purpose of extending the plaintiff's lien-filing time.

We conclude that the mechanic's lien of the plaintiff was not filed within time as provided for by section 52-102, R. R. S. 1943.

The judgment of the trial court is affirmed in all respects except that noted above, and the cause is remanded with directions to the trial court to render judgment in conformity with this opinion.

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

AGNES T. FAIRCHILD, APPELLEE, V. ORVILLE H. FAIRCHILD ET AL., APPELLANTS.

125 N. W. 2d 191

Filed December 13, 1963. No. 35505.

1. **Contracts.** An express contract is proved by evidence of a definite offer and an unconditional acceptance. Where the offer requires a promise on the part of the offeree, a communicated acceptance is essential.
2. ———. Delivery is not an element of a simple or informal contract.

3. ———. **Parties may contract subject to a condition precedent by agreeing that their contract shall not become effective until the happening of a specified event or condition.**
4. ———. **It is the expressed intention of the parties which they manifest by their words and acts which is controlling.**

Appeal from the district court for Morrill County: JOHN H. KUNS, Judge. Affirmed.

Baskins & Baskins and Arthur R. Johnson, for appellants.

William P. Mueller and Frank B. Morrison, Jr., for appellee.

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

BOSLAUGH, J.

This is an action for specific performance brought by Agnes T. Fairchild, the plaintiff, against Orville H. Fairchild and Vida E. Fairchild, the defendants. The trial court found generally for the plaintiff and granted the relief requested. The defendants' motion for new trial was overruled and they have appealed.

Howard E. Fairchild died April 28, 1961. He was survived by the plaintiff, his widow, and Orville H. Fairchild, a son. Orville is a stepson of the plaintiff. Vida E. Fairchild is the wife of Orville. Upon the death of Howard E. Fairchild, the plaintiff and Orville succeeded to interests in land in Keith, Garden, and Morrill Counties, Nebraska.

On January 18, 1962, the plaintiff and Orville met at the office of the plaintiff's attorney in Ogallala, Nebraska. Both parties were represented by lawyers at this meeting. The purpose of the meeting was to discuss and negotiate a contract for the exchange of property interests. No agreement was reached at this meeting but the parties agreed to return on January 24, 1962, for another meeting.

On January 24, 1962, the plaintiff and Orville again

met at Ogallala, Nebraska. After further discussion an agreement was reached. A stenographer was called into the meeting and a contract was dictated in the presence of the plaintiff and Orville by their lawyers. The contract was then transcribed and, on the same day, was signed and acknowledged by the plaintiff and Orville. One copy was taken by the plaintiff. Another copy was taken by the attorney for Orville. The three remaining copies were taken by Orville so that they could be mailed to Vida in California. The remaining copies of the contract were signed and acknowledged by Vida in California on January 29, 1962, and then returned to Orville by mail.

The contract which was prepared on January 24, 1962, provided generally for the transfer of the plaintiff's interests in the Morrill County land to Orville; the transfer of Orville's interest in two school land leases and in the Keith and Garden County land to the plaintiff; and for the payment of $33,760.68 to the plaintiff. There were other provisions concerning mineral rights, a tract which was to be held jointly, crops then growing upon the land, taxes, revenue stamps, abstracts of title, water rights, and personal property then upon the land. The contract also provided that Orville would apply immediately for a Federal Land Bank loan upon the Morrill County land. When the loan funds became available the $33,760.68 was to be paid to the plaintiff, and the parties were to exchange deeds and assign the school land leases.

On February 9, 1962, the plaintiff and Orville met at the office of John Ross, a representative of the Federal Land Bank, in Oshkosh, Nebraska. The plaintiff's attorney asked Orville if Vida had signed the contract, and Orville said that she had. The plaintiff's attorney then asked if he could have a copy of the contract. Orville handed a copy of the contract to the plaintiff's attorney who examined it to ascertain that it had been signed and acknowledged by Vida. The contract was

then handed to the plaintiff who examined it and returned it to her attorney. The contract was then laid upon the table in front of Ross.

The purpose of the meeting on February 9, 1962, was to complete the transaction. At that time the contract had been signed and acknowledged by all of the parties and the loan application had been approved. It became apparent that the transaction could not be completed that day because of the absence of Vida. During the meeting Orville called Vida and advised her that it would be necessary for her to return to Nebraska to complete the transaction. During the conversation it was decided that Orville would go to California and bring Vida back to Nebraska. The parties agreed to meet at the Ross office again on February 15, 1962.

The meeting that had been planned for February 15, 1962, was postponed until February 26, 1962. On February 25, 1962, one of the lawyers representing the defendants notified the plaintiff's attorney that the defendants did not intend to perform the contract. This action followed.

An express contract is proved by evidence of a definite offer and an unconditional acceptance. Where the offer requires a promise on the part of the offeree, a communicated acceptance is essential. Wilkie v. Banse, 166 Neb. 138, 88 N. W. 2d 181. When one party sends a contract which he has signed by mail to a second party to be signed by the second party and returned to the sender, the deposit of the signed contract in the mail by the second party, with the proper address and postage, completes the contract. First Nat. Bank v. Ernst, 117 Neb. 34, 219 N. W. 798. See, also, Barnebey v. Barron G. Collier, Inc., 65 F. 2d 864.

The evidence in this case shows a definite offer and a communicated unconditional acceptance. When Orville advised the plaintiff and her attorney that Vida had signed the contract, the acceptance was communicated and the contract was then complete.

The defendants' theory of the case is that the contract is not enforceable because the evidence does not establish delivery. At common law, delivery was a requirement of a sealed contract and it is generally considered to be an element of a "formal" contract. Restatement, Contracts, § 95, p. 115. See, also, 1 Williston on Contracts (3d Ed.), § 205, p. 765; 1A Corbin on Contracts, § 244, p. 399. Delivery is an element of certain instruments, such as deeds and negotiable instruments, but it is not generally considered to be an element of a simple or "informal" contract.

In this jurisdiction delivery means an intention that the instrument be effective at once. Smith v. Black, 143 Neb. 244, 9 N. W. 2d 193. In that respect parties may contract subject to a condition precedent by agreeing that their contract shall not become effective until the happening of a specified event or condition. There is no contention that the contract in this case was made subject to a condition precedent and there is no evidence that the parties intended that it should be.

The defendants offered the testimony of Orville to the effect that he did not intend to place the contract beyond his control when he handed it to the plaintiff's attorney at the meeting on February 9, 1962. If the purpose of this evidence was to show that on that date Orville did not intend that the contract was to be effective, it was an attempt to prove a secret intention. Nothing which Orville said or did expressed or manifested such an intention. It is the expressed intention of the parties which they manifest by their words and acts which is controlling.

From our examination of the record we conclude that the contract is enforceable and that the plaintiff is entitled to the relief requested. The judgment of the district court is, therefore, affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. LUCILLE STOBEL, APPELLEE, V. GLEN STANEK, APPELLANT.

125 N. W. 2d 107

Filed December 13, 1963. No. 35508.

Children Born Out of Wedlock. The determination of the trial court in fixing the amount of a judgment against the father of a child born out of wedlock, and the manner and method of its payment, is largely a matter of discretion which will not be disturbed in the absence of a showing of an abuse of such discretion.

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

W. H. Kirwin, for appellant.

Robert M. Harris, for appellee.

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

CARTER, J.

Defendant was found to be the father of a female child born to the plaintiff out of wedlock. The trial court entered a judgment for plaintiff for the lying-in hospital expenses of plaintiff in the amount of $319.65 to be paid within 60 days, awarded $60 per month for the support of the child until she becomes 18 years of age, or sooner marries or dies, and entered judgment for the costs of this action. The defendant has appealed.

The only assignment of error is to the amount of the judgment and the method and manner of its payment. The evidence shows that plaintiff and defendant were 18 years of age. Neither had any financial resources. Defendant had earned some money as a part-time worker in the past in the performance of common labor. He remained in school and has been unable to find part-time employment that would fit in with his school work. Both parties and the child are in good health. The evidence of the cost of supporting the child is fragmentary.

The liability of the parents of a child born out of wed-

lock is fixed by section 13-102, R. R. S. 1943. It provides that such liability of the father to support the child shall be the same as that of the father of a child born in lawful wedlock. This court has said: "The construction uniformly given to similar statutes is, that the trial court, in fixing the amount in which the accused shall be charged, may take into consideration such facts as the health of the child and mother, the ability of the latter to care for the child, and the physical and financial ability of the accused; and in no reported case has a judgment been reversed on account of the amount of the judgment unless there appeared to be an abuse of discretion. * * * As said in the last named case (State v. Zeitler, 35 Minn. 238, 28 N. W. 501), no evidence seems to have been introduced bearing especially upon the subject of the amount of the judgment. We must presume the court acted according to its best information, from the facts proved at the trial and from all the circumstances surrounding the case. There being no apparent abuse of discretion, the amount fixed by the trial court is presumed to be reasonable and to present no ground for interference by us." Clark v. Carey, 41 Neb. 780, 60 N. W. 78.

In Gatzmeyer v. Peterson, 68 Neb. 832, 94 N. W. 974, this court said: "Finally, it is urged that the award made by the court is excessive. The amount of the judgment in such cases is largely in the discretion of the district court, and will not be reduced unless such discretion has been manifestly abused. * * * That court has a clear advantage over this one in that it sees the parties, and is able to form a better opinion as to their circumstances, and the expense of suitably maintaining the child in view thereof. In the case at bar, we see no reason to think that any wrong has been done." See, also, Race v. Mrsny, 155 Neb. 679, 53 N. W. 2d 88.

The evidence does not indicate any abuse of discretion in fixing the amount of the judgment and the manner and method of its payment. We therefore affirm the

judgment of the district court. The costs of the appeal are taxed to the defendant.

AFFIRMED.

LOUISE APPLEBY, APPELLEE, V. GREAT WESTERN SUGAR COMPANY, INC., ET AL., APPELLANTS.

125 N. W. 2d 103

Filed December 13, 1963. No. 35559.

1. **Workmen's Compensation.** In order to recover under the Workmen's Compensation Act, the plaintiff must prove that the death or disability of the workman was the result of an accident arising out of and in the course of the employment.
2. ———. The words "arising out of" and "in the course of" the employment are used conjunctively in the statute and both conditions must be established to satisfy the requirements of the Workmen's Compensation Act. The accident must occur not only in the course of the employment but the causative danger must also arise out of it.
3. ———. The words "arising out of" refer to the origin or cause of the accident and are descriptive of its character, while the words "in the course of" refer to the time, place, and circumstances of the accident.
4. ———. The term arising out of the employment in the Workmen's Compensation Act covers all risks of accident from causative acts done or occurring within the scope or sphere of the employment. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment.
5. ———. Acts of ministration by a servant to himself, such as quenching his thirst, relieving his hunger, protecting himself from excessive cold, performance of which while at work are reasonably necessary to his health and comfort, are incidents to his employment and acts of service therein within the Workmen's Compensation Act, although they are only indirectly conducive to the purpose of the employment. Consequently no break in the employment is caused by the mere fact that the workman is ministering to his personal comforts or necessities,

as by warming himself, or seeking shelter, or by leaving his work to relieve nature, or to procure drink, refreshments, food, or fresh air, or to rest in the shade.

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

Wright, Simmons & Hancock, for appellants.

Holtorf, Hansen & Fitzke and Alfred J. Kortum, for appellee.

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

BOSLAUGH, J.

This is a proceeding under the Workmen's Compensation Act brought by Louise Appleby, the plaintiff, against the Great Western Sugar Company, Inc., and the London Guarantee & Accident Co., Ltd., the defendants.

Robert L. Appleby died on November 19, 1961, as the result of injuries he sustained on that day when he fell from a conveyor at the Scottsbluff, Nebraska, plant of the Great Western Sugar Company, Inc. He was survived by the plaintiff, his widow, and Robert William Appleby, a minor son.

After the hearing before a single judge of the compensation court, at which the plaintiff recovered an award, both the plaintiff and the defendants filed applications for a rehearing before the compensation court. The compensation court sitting en banc found that Robert L. Appleby died as the result of an accident that arose out of and in the course of his employment by the Great Western Sugar Company, Inc.; that the defendants should pay $37 per week for 325 weeks from November 19, 1961, to the legal guardian of Robert William Appleby; and that the defendants should pay the ambulance expense and a part of the burial expense of the deceased. The compensation court entered an award to that effect. The defendants appealed to the district court for Scotts Bluff County which affirmed the award of the compen-

sation court. The defendants' motion for new trial was overruled and they have appealed to this court.

The defendants assign as error the finding that the accident arose out of and in the course of the employment of the deceased. This is the only issue between the parties in this court.

Robert L. Appleby was first employed by the sugar company several days before his death. On the day of the accident he was assigned to work in the warehouse. His job was to relay packages or bales containing six 10-pound sacks of sugar by removing them from the main conveyor and placing them on another conveyor. The second conveyor then moved the packages out of the warehouse and into a railroad boxcar where another employee, Ralph Hayes, handled them.

The main conveyor also carried packages containing twelve 5-pound sacks of sugar and 100-pound sacks of sugar. Another employee removed the packages containing the 5-pound sacks of sugar from the main conveyor and placed them on a conveyor known as a "stacker" which elevated them so that they could be placed in stacks about 45 feet high. At the time the accident happened William Florez was working on top of a stack being made out of the packages containing 5-pound sacks of sugar.

The accident happened on a very cold day. The temperature outside the warehouse was zero or below. Although the warehouse was heated, it was very cold on the floor because the doors were open to permit the loading of railroad cars. It was much warmer near the roof of the warehouse and a man working on a stack of packages would be able to work with his coat off. Approximately an hour and a half before the accident happened Hayes and Appleby went up on top of the stack where Florez was working to warm themselves. Hayes testified that the only way they could get up on the stack was on the conveyor.

Appleby was working under the supervision of Robert

L. Arends, a relief foreman of the warehouse. Arends testified that he assigned Appleby to relaying the packages containing 10-pound sacks of sugar and that he had not given Appleby any instructions about riding on a conveyor belt because his job did not pertain to being on the stacker at all. There is no evidence that Appleby was warned or cautioned by anyone in authority about riding on a conveyor belt. Arends testified that the company had a regulation that employees were not to walk up the stacker while it was running. However, Arends admitted that it was common knowledge that many employees went up on the stacker while it was moving. Arends also testified that when the employees were using a conveyor which was equipped with a belt without cleats, they would wait until there was a sack of sugar on the belt and then ride it up.

Florez is the only person who saw Appleby fall from the conveyor. Florez testified that he was working near the center of the stack; that the stack was then about 40 feet high; that he heard someone call his name; that he looked around and saw Appleby standing up on the conveyor; that when he turned around he saw Appleby fall; that he turned off the conveyor; and that he then crawled down the conveyor to the floor.

Florez also testified that he had mentioned to Appleby that he should not go up on the stacker when it was running; that this was after Appleby and Hayes had crawled up the stacker and had been on top of the stack where Florez was working; that it was common knowledge that many of the employees rode on the stacker while it was running; and that it was easier to go up on the stacker when it was running.

In order to recover under the Workmen's Compensation Act, the plaintiff must prove that the death or disability of the workman was the result of an accident arising out of and in the course of the employment. Cochran v. Bellevue Bridge Commission, 174 Neb. 761, 119 N. W. 2d 292. The words "arising out of" and "in

the course of" the employment are used conjunctively in the statute and both conditions must be established to satisfy the requirements of the compensation act. The accident must occur not only in the course of the employment but the causative danger must also arise out of it. The words "arising out of" refer to the origin or cause of the accident and are descriptive of its character, while the words "in the course of" refer to the time, place, and circumstances of the accident. Hammond v. Doctor's Hospital, 145 Neb. 446, 17 N. W. 2d 9.

It is clear that the accident in this case happened in the course of the employment of Appleby by the sugar company. The more serious question is whether the accident arose out of the employment.

The defendants argue that the accident did not arise out of the employment because Appleby's duties did not require that he be on the stacker or on the stack of packages where Florez was working; that Appleby was not at his duty station when he was injured; that he had not been instructed to leave his duty station; and that Appleby's conduct amounted to a disobedience of orders. This argument assumes that an employee cannot recover compensation unless he is injured while he is actually performing the precise task to which he has been assigned. The Workmen's Compensation Act is not that restrictive.

The term arising out of the employment in the Workmen's Compensation Act covers all risks of accident from causative acts done or occurring within the scope or sphere of the employment. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment. Hopper v. Koenigstein, 135 Neb. 837, 284 N. W. 346.

In the Hopper case this court quoted with approval

from 1 Honnold, Workmen's Compensation, p. 381, as follows: " 'Acts of ministration by a servant to himself, such as quenching his thirst, relieving his hunger, protecting himself from excessive cold, performance of which while at work are reasonably necessary to his health and comfort, are incidents to his employment and acts of service therein within the workmen's compensation acts, though they are only indirectly conducive to the purpose of the employment. Consequently no break in the employment is caused by the mere fact that the workman is ministering to his personal comforts or necessities, as by warming himself, or seeking shelter, or by leaving his work to relieve nature, or to procure drink, refreshments, food, or fresh air, or to rest in the shade.' "

In the Hopper case this court cited Moise v. Fruit Dispatch Co., 135 Neb. 684, 283 N. W. 495, as an illustration of the principle referred to. In the Moise case the plaintiff was allowed to recover compensation for the death of an employee who was killed in an explosion caused by his lighting a pipe in a room that had been filled with gas for the purpose of ripening fruit.

We think the evidence in this case supports an inference that Appleby was on the conveyor or stacker for a purpose that was reasonably necessary or incident to the performance of the work. We conclude that the accident arose out of his employment.

The judgment of the district court is affirmed. The plaintiff is allowed the sum of $500 for the services of her attorneys in this court to be taxed as costs as provided in section 48-125, R. R. S. 1943.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. VIRGIL O. KORTUM, APPELLEE.

125 N. W. 2d 196

Filed December 13, 1963. No. 35580.

1. **Courts: Judgments.** A district court has the inherent power in either a civil or criminal case to correct the record of its judgments, or other orders, so that they may properly reflect the truth of the order or judgment that was actually entered.
2. ———: ———. A nunc pro tunc order, otherwise proper, may be entered either at the term in which the judgment or order was entered or at a subsequent term.
3. ———: ———. While a court has the inherent power to correct its records to reflect the truth, such a power should not be exercised unless notice is given to all parties who may be affected by the entry of such order, if reasonably possible.
4. **Appeal and Error.** In the absence of a proper bill of exceptions, any assignment of error that requires an examination of evidence cannot prevail on appeal. In such a case, the only question presented to this court is the sufficiency of the pleadings to sustain the rulings of the trial court.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Clarence A. H. Meyer, Attorney General, Bernard L. Packett, and Richard L. Kuhlman, for appellant.

Paul E. Rhodes, for appellee.

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

WHITE, C. J.

The general question involved in this case is the validity of a nunc pro tunc order correcting a judgment and sentence in a criminal case.

The journal entry of judgment and sentence of the defendant, which was signed by the judge of the district court on September 27, 1958, and filed the same day, reflects and states that the defendant was sentenced "for a term of 11 years from date hereof for the crime

of Possession of Forged Instrument and Habitual Criminal, * * *."

On April 15, 1963, the district judge for Dodge County, Nebraska, signed and entered of record a "Journal Entry and Order Nunc Pro Tunc," correcting the original journal entry referred to above. It recites, in substance, that the defendant appeared by his counsel and applied for an order nunc pro tunc to correctly reflect the actual sentence ordered on September 26, 1958. It recites the reception in evidence of the shorthand notes of the court reporter as to the actual sentence pronounced in open court in the following language:

"The Court: I have to ask you, Virgil, if you have anything to say before sentence is pronounced.

"Virgil O. Kortum: No, sir.

"The Court: The sentence will be one year for the possession of a forged instrument and ten years as an habitual criminal to run consecutively, or a total sentence of eleven years."

The journal entry, in substance, then orders the previously recorded sentence of the defendant stricken, and the above sentence substituted as the actual sentence pronounced in open court upon the defendant.

On May 13, 1963, the State filed a motion in this case to set aside the nunc pro tunc order, directly attacking both the jurisdiction of the court to enter this order nunc pro tunc and asserting on the merits that the sentence recited in the first journal entry of September 27, 1958, was the true sentence. This motion requested the court to permit "additional testimony" to be introduced upon these issues and asked for a hearing thereon. The motion states:

"1. That no notice was given to the State of Nebraska of the time and place of hearing, prior to the hearing.

"2. That the hearing was an ex parte hearing and additional testimony should have been adduced in order for the record to reflect the whole 'truth'. That the

order as first entered herein was a correct reflection of the truth and that in the interest of justice the Order Nunc Pro Tunc entered herein must be set aside."

On May 24, 1963, upon notice served by the State on the defendant and his attorney, a full hearing on this motion to set aside the nunc pro tunc order was held. Evidence, both oral and written, was introduced. The court overruled the State's motion, and the record shows that in the journal entry overruling the State's motion that the court ordered the testimony and exhibits received in evidence at the hearing on the motion to be made a part of the record. The State filed a motion for rehearing which was overruled and now it appeals assigning as error only that the district court erred in entering the nunc pro tunc order correcting the sentence, on application by the defendant, without notice of hearing thereon being given to the State.

It is the State's contention that the entry of a nunc pro tunc order on the court's own motion, or on application of the defendant, without notice to the State is void, citing Wachsmuth v. Orient Ins. Co., 49 Neb. 590, 68 N. W. 935; Van Etten v. Test, 49 Neb. 725, 68 N. W. 1023; Hyde v. Michelson, 52 Neb. 680, 72 N. W. 1035, 66 Am. S. R. 533; Anderson v. McCloud-Love Live Stock Commission Co., 58 Neb. 670, 79 N. W. 613; Ex parte Wray, 61 Okl. Cr. 162, 66 P. 2d 965; Dees v. State, 151 Miss. 46, 117 S. 369.

We have examined these cases and they support the proposition that a court has inherent power in a criminal case to correct its records to reflect the truth, nunc pro tunc, and that notice of a proceeding by which such power is exercised should be served on the accused. We see no reason on principle why the State should not be accorded the same requisite notice. That this power of the court in a criminal case to correct its records nunc pro tunc existed both at the time of the journal entry of April 15, 1963, and on May 24, 1963, when motion of the State was heard, is well settled. In Quinton v.

State, 112 Neb. 684, 200 N. W. 881, a criminal case, our court said: "The court then on its own motion, the same judge presiding who declared the mistrial and discharged the jury, having in mind what took place on December 11, 1923, and also the clerk's entry appearing on the journal, entered a nunc pro tunc order, entering of record the judgment rendered December 11, 1923. The entry of this nunc pro tunc order on January 16, 1924, made the record show as of December 11, 1923, what in fact was done by the court on that date. Such orders are frequently made in the furtherance of justice and the due administration of the law, and may be made at the term or at a subsequent term. Error was not thus committed. 15 C. J. 972, sec. 386; State v. Moran, 24 Neb. 103; Van Etten v. Test, 49 Neb. 725; Central West Investment Co. v. Barker, 79 Neb. 47; Sutter v. State, 105 Neb. 144."

Although the Quinton case does not pass on or consider the question of notice, the general rule seems to support the requirement of notice, especially if the order is made, as here, at a subsequent term. See 24 C. J. S., Criminal Law, § 1597, p. 619, notes 72-78, citing Quinton v. State, *supra*.

But here the State, in a direct attack on the order nunc pro tunc, raised the factual issue of notice and also the issue of the validity and propriety of the nunc pro tunc order and whether, on the merits, it did actually correct the record to reflect the truth of the original sentence. These issues were tried by the court at the hearing of May 24, 1963, and its order refusing to vacate the nunc pro tunc order was based on the evidence introduced at that hearing and specifically incorporated by the court in the record of that hearing.

There is no bill of exceptions in this case, and the evidence taken at the hearing of May 24, 1963, is not before us for consideration. In the absence of a bill of exceptions, any assignment of error that requires an examination of evidence cannot prevail on appeal. In

such a situation, the only question before the court is whether the pleadings support the judgment. Hazelet v. Holt County, 51 Neb. 724, 71 N. W. 719; In re Estate of Abts, 122 Neb. 714, 241 N. W. 270; Lange v. Kansas Hide & Wool Co., 168 Neb. 601, 97 N. W. 2d 246; Hilligas v. Farr, 171 Neb. 105, 105 N. W. 2d 578. The appeal is from the order refusing to vacate the nunc pro tunc judgment and sentence. The State's motion to vacate affirmatively raised the issue of whether notice was given and, more importantly, raised the issue of the propriety of the nunc pro tunc order on its merits, and asked to introduce "additional evidence" on this issue. In substance, the State asks for a redetermination on the merits of the original issue as to the validity of the judgment and sentence entered nunc pro tunc. The State cannot now claim, in effect, that there was no notice of the very hearing in which, by its own pleadings, these issues were raised. The pleadings in the motion would have supported a finding either way. The finding was adverse to the State. Under the applicable rule set out above, it must be conclusively presumed that the court based the adverse rulings on sufficient competent evidence as to all issues raised.

The purpose of any requirement of notice in this situation would be to give the defendant or the State an opportunity to be heard on the merits of its contention as to the validity of the nunc pro tunc order. Such opportunity was granted the State on issues raised in its own motion. A hearing was held and evidence introduced. Error in the ruling on these issues presented by the State cannot be reviewed in this court, when the evidence on which it was based is not before it.

From the record before us, no error can be found in the judgment of the district court, and it is affirmed.

AFFIRMED.

BEN MISLE ET AL., APPELLANTS, V. FRANK J. MILLER, CITY TREASURER, CITY OF LINCOLN, STATE OF NEBRASKA, ET AL., APPELLEES.

125 N. W. 2d 512

Filed December 20, 1963. No. 35468.

1. **Taxation: Penalties.** A penalty statute must be strictly construed. It will not be applied to situations or parties not fairly or clearly within its provisions.
2. ———: ———. In construing a penalty statute nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute.
3. ———: ———. It is only when the taxpayer is at fault or to blame for failure to comply with the requirements of the statute that a penalty may be exacted.
4. ———: ———. Taxpayers who do not file a list, report, or statement of their taxable property within the time prescribed by statute are subject to a penalty for the failure to make such a list, report, or statement; but, where no time therefor is prescribed by statute, a taxpayer whose return, although delayed, is made before the end of the assessment year is not liable for the penalty.
5. **Taxation.** In the absence of statute, taxes voluntarily paid cannot be recovered back. When a tax imposed is illegal and unauthorized for any purpose, an original action may be brought to recover the tax only by virtue of statutory or constitutional authority.
6. **Schools and School Districts: Taxation.** One who seeks to avail himself of the statutory right to recover from a county or school district a tax voluntarily paid must show a substantial compliance with the statute.
7. **Statutes.** Ordinarily words used in the original act will be presumed to be used in the same sense in an amendment thereof.
8. ———. When a statute or a clause or provision thereof has been construed by a court of last resort, and the same is substantially reenacted, the Legislature may be regarded as adopting such construction.
9. **Taxation: Penalties.** Section 77-1735, R. R. S. 1943, provides a remedy for the recovery of penalties as well as taxes which have been illegally imposed on property.
10. ———: ———. The provisions of section 77-1735, R. R. S. 1943, are to be construed with section 77-1736.05, R. S. Supp., 1961, and their provisions are not in conflict with one another

and section 77-1735, R. R. S. 1943, was available as a procedure to recover the penalties illegally imposed in the year 1959.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Reversed and remanded.

Marti, O'Gara & Dalton, for appellants.

Paul L. Douglas, William D. Blue, Ralph D. Nelson, Henry L. Holst, Vincent D. Brown, Willis R. Hecht, and Max Kier, for appellees.

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

BROWER, J.

The plaintiffs and appellants, Ben Misle, Henry Misle, and Julius Misle, doing business as Misle Chevrolet Company, brought this action to recover penalties added to the taxes paid by plaintiffs which were alleged to be illegally levied and therefore void. It was brought against the defendant and appellee Frank J. Miller, as treasurer of the City of Lincoln, and by an amended petition the City of Lincoln was made a party defendant and is also an appellee herein. The City of Lincoln collects its own taxes under the provisions of Chapter 15, article 8, R. R. S. 1943.

A general demurrer was interposed by both defendants. The demurrer was sustained. The plaintiffs elected to stand on their amended petition and the case was dismissed by the trial court.

The plaintiffs thereupon have appealed to this court from the order of dismissal.

The plaintiffs' amended petition against the defendants set out that in the year 1959 the plaintiffs, who were all residents of Lincoln in Lancaster County, listed their inventory of property having an assessed value of $80,450, which list was filed as of April 20, 1959, with the county assessor of Lancaster County, Nebraska; that during the year 1959, after April 20, 1959, they filed

with the assessor additional lists of property having an assessed value of $116,360, being motor vehicles held on inventory and taxable as such; that the county assessor purportedly, pursuant to section 77-1235, R. R. S. 1943, added 50 percent of the value of the subsequently filed inventory as a penalty, making said additional property of the taxpayers assessed for taxation have a value of $174,530; that the penalty levied and assessed was levied without authority in law; that on June 16, 1961, the plaintiffs paid $1,029.73 to the city treasurer as the penalty levied and assessed purportedly pursuant to section 77-1235, R. R. S. 1943, by the addition of the 50 percent value thereof together with $36.04 interest thereon; and that the penalty so purportedly assessed was levied without authority of law.

The amended petition further alleged the Nebraska Legislature passed and approved on February 26, 1959, L. B. No. 48, Laws 1959, which amended section 77-1229, R. R. S. 1943, without the emergency clause, and which required listing personal property owned on January 1, 1959, with the county assessor on or before March 1st of each year. That by L. B. 68, Laws 1959, passed and approved on the same February 26, 1959, and effective that day because of the emergency clause, section 77-1229, R. R. S. 1943, as amended by L. B. 48, Laws 1959, was again amended. This amendment required the listing of personal property owned on January 1, 1959, with the assessor on or before February 15, 1959, a date 11 days before the passage of said act; and that under section 77-1229, R. R. S. 1943, as it existed prior to the passage of L. B. 68, such property was required to be listed on April 20th of each year. That L. B. 704, Laws 1959, was passed and approved on June 13, 1959, and became effective that day because of the emergency clause; and that by L. B. 704, said section 77-1229, R. R. S. 1943, as amended by said L. B. 48 and L. B. 68, Laws 1959, was further amended to require the listing of all personal property for taxation on or before March 1st

of each year, a date more than two months prior to the effective date of L. B. 704. That it was impossible to comply with the law relating to listing of personal property for taxation that existed from time to time in the year 1959. The law prior to February 26, 1959, required its listing on or before April 20, 1959, and the subsequent enactments by said L. B. 68 and L. B. 704, Laws 1959, required the listing of said property prior to the passage of the respective acts, and that consequently no penalty could lawfully be inflicted for failure to comply with said laws. That on July 12, 1961, after paying said sums to the city treasurer, plaintiffs made written demand on the city treasurer to refund the same with interest from the payment on June 16, 1961.

The prayer was for judgment for $1,065.77 and interest. The action was filed October 16, 1961.

An examination of the statutes in force throughout the year 1959 with respect to the time of filing of personal tax schedules makes it abundantly clear that the plaintiffs' contention that no timely compliance could be made thereunder is correct. Not only did section 77-1229, R. R. S. 1943, as it existed in the year 1959 prior to February 26, 1959, when L. B. 68, Laws 1959, became effective, provide the return of personal property should be made on or before April 20 of that year, but section 77-1201, R. R. S. 1943, prior to February 26, 1959, provided that the property owned on March 1st of that year should be so returned and this could not have been done before February 26, 1959, on which date L. B. 68, Laws 1959, required property to be returned for taxation 11 days prior to the effective date of the act. L. B. 704, Laws 1959, which amended L. B. 68, provided such property should be listed more than three months before its passage. This statute was in force the rest of the year. Timely filing was obviously impossible and the defendants make no claim to the contrary.

In the case of Johnson Fruit Co. v. Story, 171 Neb. 310, 106 N. W. 2d 182, this court said: "A penalty statute

must be strictly construed. It will not be applied to situations or parties not fairly or clearly within its provisions.

"In construing a penalty statute nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute."

In 85 C. J. S., Taxation, § 1025(c), p. 583, the text states: "The penalty imposed for the failure of property owners to make a list, report, or statement of their taxable property is imposed only for the breach of a duty by the taxpayer. It is only when the taxpayer is at fault or to blame for failure to comply with the requirements of the statute that a penalty may be exacted." Again the same text at page 584 states: "Taxpayers who do not file a list, report, or statement of their taxable property within the time prescribed by statute are subject to a penalty for the failure to make such a list, report, or statement; but, where no time therefor is prescribed by statute, a taxpayer whose return, although delayed, is made before the end of the assessment year is not liable for the penalty." See, also, State v. Page, 100 W. Va. 166, 130 S. E. 426, 44 A. L. R. 501. It is clear from the rules set out that the penalties purported to be exacted from the plaintiff taxpayers because of their alleged failure to timely file their return of personal property for taxation for the year 1959 could not be applied because at no time during that year did the statute fix a day for the filing of the return that could be complied with within the prescribed period.

In the subsequent case of Creigh v. Larsen, 171 Neb. 317, 106 N .W. 2d 187, decided November 30, 1960, this court held section 77-413, R. R. S. 1943, as amended by L. B. 51, Laws 1959, unconstitutional, basing its decision wholly on the illegality of certain penalties which the amended section greatly increased purporting to apply to the failure to list intangible property for taxation.

Indeed the defendants do not seriously contend that

the penalties were not added without authority of law. They maintain that the petition does not state facts sufficient to constitute a cause of action because they assert there is no provision of law under which a taxpayer may recover the penalties paid. Defendants cite Monteith v. Alpha High School District, 125 Neb. 665, 251 N. W. 661, where this court held: "In the absence of statute, taxes voluntarily paid cannot be recovered back. When a tax imposed is illegal and unauthorized for any purpose, an original action may be brought to recover the tax only by virtue of statutory or constitutional authority.

"One who seeks to avail himself of the statutory right to recover from a county or school district a tax voluntarily paid must show a substantial compliance with the statute."

Defendants urge that plaintiffs are without remedy either for the reason there is no applicable statute or that the plaintiffs are not proceeding under one.

Plaintiffs on the other hand contend that section 77-1735, R. R. S. 1943, is applicable and that their petition brings them squarely within its provisions. That section so far as it is significant to the decisions reads as follows: "If a person, who *claims a tax, or any part thereof*, to be invalid for any reason, shall have paid the same to the treasurer, or other proper authority, in all respects as though the same was legal and valid, he may, at any time within thirty days after such payment, demand the same in writing from the State Treasurer or the treasurer of the county, city, village, township, district, or other subdivision, for the benefit, or under the authority, or by the request of which the same was levied. If the same shall not be refunded within ninety days thereafter, he may sue such county, city, village, township, district, or other subdivision for the amount so demanded. Upon the trial, if it shall be determined that such tax, or any part thereof, was for any reason invalid, judgment shall be rendered therefor with in-

terest and such judgment shall be collected as in other cases; * * *." (Italics ours.)

The defendants urge this statute is not applicable. Their first contention is that the statute applies to the recovery of taxes only and that the word "tax" as contained in the statute cannot be broadened to include interest or penalties. As authority for their contention they cite Steinacher v. Swanson, 131 Neb. 439, 268 N. W. 317, and Tukey v. Douglas County, 133 Neb. 732, 277 N. W. 57, both of which held that a penalty was not part of the taxes within the meaning of Article VIII, section 4, of the Constitution of the State of Nebraska, which prohibits the remission of taxes and that the constitutional provision did not apply to the remission of penalties.

The plaintiffs cite School District of the City of Omaha v. Adams, 147 Neb. 1060, 26 N. W. 2d 24, which held that the penalties collected pursuant to section 77-318, R. S. 1943, should not be paid to the school district under the constitutional provision requiring fines, penalties, and certain other money to be appropriated to the support of the schools. In that case the court held: "In the absence of statute to the contrary, interest, penalties, and costs collected on delinquent taxes follow the tax, and go to the state or its governmental subdivisions according as the one or the other is entitled to the tax itself. * * *."

It would seem therefore, though a penalty is not a part of the tax within the provision of Article VIII, section 4, Constitution of Nebraska, preventing their remission by the Legislature, such penalties do have some of the attributes of the tax at least with respect to their distribution.

The statutory history preceding section 77-1735, R. R. S. 1943, under which the plaintiffs seek to predicate their action reaches back through amendments over a long period of time. It is apparent on tracing its history that what is now that section was a part of the

Revenue Act of 1879, being section 144 of that act which appears in Compiled Statutes of 1901 as section 4427, containing a similar procedure for the recovery of taxes paid for an illegal or unauthorized purpose. That section in referring to that which may be recovered speaks of the "tax or any part thereof" as it does at present. The Revenue Act of 1879 also contained section 182 which appeared as section 4465, Compiled Statutes 1901. The last-mentioned statute defined the word tax as used in the Revenue Act of 1879 as "any tax, special assessments, or costs, interest, or penalty imposed upon property." Thereafter it was held that special assessments could be so recovered by the decision of this court in Wilson v. City of Auburn, 27 Neb. 435, 43 N. W. 257. In the case of City of Omaha v. Hodgskins, 70 Neb. 229, 97 N. W. 346, it was again held that the provisions of section 144 of the Revenue Act of 1879, as contained in article 1 of Chapter 77, Compiled Statutes 1901, applied to special assessments as well as to taxes levied for general purposes. In the case of City of Omaha v. Hodgskins, *supra,* the court cited the definitions set out in Compiled Statutes 1901, Chapter 77, article 1, section 182, taken from the Revenue Act of 1879 as a compelling reason for stating that special assessments were included in the words any tax as used in section 144 of that act.

In 1903 the Revenue Act of 1879 was largely repealed and replaced by a new statute. This statute, chapter 73, Laws 1903, containing section 162 which set out in substance the same procedure governing the recovery of invalid taxes paid as was described in the Revenue Act of 1879 but the provisions defining the word "tax" set out in section 182 of the Revenue Act of 1879, were not reenacted.

It is now argued by the defendants that the omission of the section defining the word "tax" in the act of 1903 restricted the meaning of that word as it was used in section 162, chapter 73, Laws 1903, to a narrow connotation of the word and that illegal penalties or interest

paid could no longer be recovered thereunder. This though they point out no other provision of chapter 73, Laws 1903, from which a change in the legislative intent may be inferred and in spite of a rule of construction that ordinarily words used in the original act will be presumed to be used in the same sense in an amendment thereof. 82 C. J. S., Statutes, § 384, p. 899; State ex rel. Buerk v. Calhoun, 330 Mo. 1172, 52 S. W. 2d 742, 83 A. L. R. 1393; State v. End, 232 Minn. 266, 45 N. W. 2d 378; Gimble v. Montana-Dakota Utilities Co., 77 N. D. 581, 44 N. W. 2d 198.

Section 162, chapter 73, Laws 1903, later was contained in the various revisions and compilations of our statutes as follows: R. S. 1913, § 6491; C. S. 1922, § 6018; C. S. 1929, § 77-1923; R. S. 1943, § 77-1735. The case of Hayman v. City of Grand Island, 135 Neb. 873, 284 N. W. 733, decided that section 77-1923, Comp. St. 1929, authorized the bringing of an original action to recover a special assessment paid where the taxpayer claimed the tax was levied or assessed for an illegal purpose. The case cited City of Omaha v. Hodgskins, *supra,* as authority. It was followed by Loup River Public Power Dist. v. County of Platte, 144 Neb. 600, 14 N. W. 2d 210, where it was held that the second procedure in section 77-1923, Comp. St. 1929, gave the taxpayer the right to maintain an action at law to recover an illegal special assessment paid, and made it the duty of the courts to determine whether any part of the special assessment then in controversy was illegal, unauthorized, or invalid and to render judgment for the taxpayer for the amount so determined. It is apparent that this court considered that the word "tax" as used in section 77-1735, R. R. S. 1943, providing for the recovery of those illegally assessed included special assessments. It would appear that this court has based its subsequent opinions throughout the years on the original meaning of the word as defined in the Revenue Act of 1879. That act defined taxes as "any tax, special assessments, or costs,

interest or penalty imposed upon property."

In 1955, section 77-1735, R. R. S. 1943, was again amended by Laws 1955, c. 297, § 2, p. 931, to provide one method or procedure for the recovery of taxes or any part thereof that for any reason were invalid. It is the present section in force. There is nothing in this amendment to show the Legislature intended any different meaning to be applied to the word tax as used in that section than formerly. It is a settled rule of statutory construction that when a statute or a clause or provision thereof has been construed by a court of last resort, and the same is substantially reenacted, the Legislature may be regarded as adopting such construction. 50 Am. Jur., Statutes, § 442, p. 461. See, also, Kendall v. Garneau, 55 Neb. 403, 75 N. W. 852. We conclude that section 77-1735, R. R. S. 1943, provides a remedy for the recovery of penalties as well as taxes which have been illegally imposed on property.

The defendants' last contention is that the Legislature of 1961, by enacting section 1, L. B. 166, Laws 1961, which statute is 77-1736.05, R. S. Supp., 1961, provided an exclusive remedy for the recovery of the particular penalties which were thus illegally assessed on personal property in the years 1959 and 1960. They claim the plaintiffs have not brought themselves within the purview of that act and hence cannot have the benefit thereof. Section 77-1736.05, R. S. Supp., 1961, is as follows: "*Notwithstanding like provisions* of section 77-1735, if a person claims a penalty on a tax, or any part thereof, which penalty was levied during the calendar years 1959 and 1960, to be invalid for the reason that it was an illegal or void penalty, and the county treasurer so finds, then the treasurer shall correct his record to show only such penalty as may be legal and proper, and when the claimant shall have paid the illegal or void penalty within the period of July 1, 1959, to December 31, 1960, to the treasurer, or other proper authority, in all respects as though the same was legal and valid, he

may, at any time within nine months after March 20, 1961, demand the same in writing from the treasurer of the county where paid, and if the same shall not be refunded within nine months thereafter, may sue such county for the amount so demanded; Provided, that there shall be deducted from the claim or judgment, as the case may be, an amount equal to the penalty and interest which could have legally been assessed for the year or years in question. Upon the trial, if it shall be determined that such penalty, or any part thereof, was levied or assessed illegally, or was for any reason invalid, judgment shall be rendered therefor with interest and the same shall be collected as in other cases." (Italics ours.)

This statute must be considered in the light of the defects in the law the legislation sought to remedy. It was passed and approved, and became effective March 20, 1961. On November 30, 1960, this court in Creigh v. Larsen, *supra,* had held that the statute providing the new penalty for failure to list tangible property was unconstitutional. Moreover, other taxpayers should have then realized that the Legislature had provided no date on which a personal property tax return could possibly have been timely filed as pointed out herein, and that any penalties imposed because of failure to return tangible personal property before a particular date were also illegal.

It is apparent that many taxpayers had paid these illegal penalties within the period between July 1, 1959, and December 31, 1960, which later date was a month after the decision in Creigh v. Larsen, *supra.* It is likewise obvious that those who had paid them could no longer demand the same in writing from the treasurer to whom they had been paid within 30 days of their payment as required by section 77-1735, R. R. S. 1943. Taxpayers who had made payment after December 31, 1960, however, should have been apprised of the decision of this court rendering invalid the penalties sought to be

imposed. They could have demanded their repayment and proceeded under section 77-1735, R. R. S. 1943.

Section 77-1736.05, R. S. Supp., 1961, appears to be remedial in its nature. It does not purport to impose new penalties nor do its provisions appear to limit rights of recovery. The section begins with the words "Notwithstanding like provisions of section 77-1735." It is apparent the Legislature had in mind that demands were being made to recover these penalties at that time. The new act, section 77-1736.05, R. S. Supp., 1961, granted to those who had paid illegal penalties a right to demand refund thereof within 9 months after March 20, 1961. The only substantial function of the act seems to be to extend the time for serving notice and demand for refund to those who had lost their rights to do so.

The section does not purport to repeal or otherwise affect section 77-1735, R. R. S. 1943. It recognizes by inference not only that it exists but that the Legislature considered it applied to the collection of penalties illegally paid. If section 77-1736.05, R. S. Supp., 1961, was construed as contended by the defendants it would result in penalizing those who were attempting to protect their rights by refusing to pay illegal exactions instead of only granting additional relief to those who could no longer avail themselves of the usual existing remedies. It would moreover prevent the recovery of such penalties paid after December 31, 1960, altogether.

We cannot infer such result was intended by the Legislature. We hold that the provisions of section 77-1735, R. R. S. 1943, are to be construed with section 77-1736.05, R. S. Supp., 1961, and that their provisions are not in conflict with one another and section 77-1735, R. R. S. 1943, was available as a procedure to recover the penalties illegally imposed in the year 1959.

It follows that the trial court erred in sustaining the defendants' demurrer and dismissing the action. Therefore the judgment of the trial court is reversed and the

cause is remanded for further proceeding in accordance with this opinion.

REVERSED AND REMANDED.

BEN MISLE ET AL., APPELLANTS, V. CARL E. BERG, TREASURER OF SANITARY DISTRICT NO. 1 OF LANCASTER COUNTY, ET AL., APPELLEES.

125 N. W. 2d 519

Filed December 20, 1963. No. 35469.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Reversed and remanded.

Marti, O'Gara & Dalton, for appellants.

Paul L. Douglas, William D. Blue, Ralph D. Nelson, Henry L. Holst, Vincent D. Brown, Willis R. Hecht, and Max Kier, for appellees.

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

BROWER, J.

This action was consolidated in the trial court with Misle v. Miller, *ante* p. 113, 125 N. W. 2d 512. In turn it was consolidated in this court for briefing and hearing.

It was to recover the penalties sought to be imposed by the assessor of Lancaster County on the same return for taxes made by the plaintiffs Misle in 1959.

The two actions were necessary because the city of Lincoln collects its own taxes under the provisions of Chapter 15, article 8, R. R. S. 1943.

This action was against the defendants Carl E. Berg in his capacities as treasurer of Sanitary District No. 1 of Lancaster County and treasurer of Lancaster County, and Frank J. Miller as treasurer of School District No. 1 of Lancaster County.

The subdivisions of which they were treasurers were also made parties defendant by an amended petition.

The amended petition contains three causes of action, two against Berg and one against Miller as treasurers of said subdivisions, the several causes including as defendants the corresponding subdivisions of which Berg and Miller were such treasurers.

Each cause, aside from the parties defendant and the amount of the penalty payment to each treasurer, is in substance the same as set out in Misle v. Miller, *supra*. Similar demurrers filed by all parties defendant were sustained by the trial court and the several causes were dismissed from which judgment the plaintiffs appealed.

The same questions are involved and the decision in Misle v. Miller, *supra*, is controlling herein.

For the reasons set out in the cited case the judgment of the trial court in sustaining the demurrers and dismissing the causes set out in the amended petition is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. THEODORE CHARLES PAULSON, APPELLANT.

125 N. W. 2d 194

Filed December 20, 1963. No. 35500.

1. **Names.** The doctrine of idem sonans applies to both civil and criminal proceedings.
2. **Criminal Law: Names.** The general rule is that a variance in names alleged in an information and proved by the evidence will not be regarded as material unless it shall appear to the court that the jury was misled by it or that the defendant was otherwise prejudiced.
3. **Criminal Law: Indictments and Informations.** A defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads to the general issue, provided the information contains no jurisdictional defect and is sufficient to charge an offense under the law.

4. ———: ———. A variation between the wording of a verdict and the language of the information is immaterial where the meaning of the verdict is clear and unambiguous and responds to the charge contained in the information. It is only when prejudice to the defendant can be shown that a variance will invalidate the verdict.

Appeal from the district court for Douglas County: ROBERT L. SMITH, Judge. Affirmed.

Ralph R. Bremers and Thomas D. Carey, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, SPENCER, BOSLAUGH, and BROWER, JJ., and LYNCH, District Judge.

CARTER, J.

Defendant was convicted of the crime of fleeing in a motor vehicle in an effort to avoid arrest for operating it while his motor vehicle operator's license was revoked, contrary to the provisions of section 60-430.02, R. R. S. 1943. Defendant seeks a review in this court.

On July 10, 1962, defendant approached the intersection of Tenth and Douglas Streets in the city of Omaha on his motorcycle. Two motorcycle patrolmen observed him make an unlawful right turn at this intersection and undertook to apprehend him. The two patrolmen testified that they followed the defendant east on Douglas Street and that they were unable to overtake him, although they attained a speed of 80 miles an hour. Defendant was halted by traffic on the Ak-Sar-Ben Bridge over the Missouri River and the patrolmen caught up with him. One of the patrolmen testified that defendant asked: "How in the world did you ever catch me?" He also quoted the defendant as saying: "I didn't think police motorcycles would run that fast." Subsequently, at the police station defendant told the same patrolman that his driver's license was suspended in Nebraska.

Evidence was offered showing that driver's license of defendant was revoked in Nebraska by the Director of Motor Vehicles for a period of 1 year commencing on March 28, 1961. Notice of the revocation was given the defendant by certified mail, as the statute requires. Defendant admitted receiving the notice. Defendant's license had not been reinstated nor a new license issued. Defendant denied any intent to avoid arrest or that he drove his motorcycle at an excessive speed. The evidence was clearly sufficient to sustain the verdict of the jury.

The defendant's name is Theodore C. Paulson. The order of the Director of Motor Vehicles revoking his operator's license bore the name of Theodore P. Paulson. The letter informing defendant of the action taken by the Director of Motor Vehicles was addressed to Theodore C. Paulson. It is contended by defendant that the variance in the middle initial of his name in the revocation order is fatal to the validity of his conviction. This question was determined in Strasser v. Ress, 165 Neb. 858, 87 N. W. 2d 619, wherein we held that the doctrine of idem sonans applied to both civil and criminal proceedings and a variance in names alleged in an information and proved by the evidence will not be regarded as material unless it shall appear to the court that the jury was misled by it or that the defendant was otherwise prejudiced. The record clearly shows that no prejudice to the defendant resulted in the present case.

It is provided in part by section 60-430.02, R. R. S. 1943: "It shall be unlawful for any person operating any motor vehicle to flee in such vehicle in an effort to avoid arrest for operating a motor vehicle while his motor vehicle operator's license has been suspended or revoked, or after such suspension or revocation but before reinstatement of his license or issuance of a new license."

The defendant complains of the insufficiency of the information. No error is assigned in this respect. The record indicates that the sufficiency of the information was questioned for the first time on appeal. An exam-

ination of the information reveals that it is sufficient to sustain the conviction under the foregoing circumstances. The general rule is that a defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads to the general issue, provided the information contains no jurisdictional defect and is sufficient to charge an offense under the law. Hunt v. State, 143 Neb. 871, 11 N. W. 2d 533. The language of the information clearly indicates that defendant was charged under section 60-430.02, R. R. S. 1943. This is sufficient when the information is belatedly attacked.

Error is assigned as to the form of the verdict returned by the jury. The questioned part of the verdict states: "* * * do find the said defendant Guilty of the crime of unlawful flight, while operating a motor vehicle, to avoid arrest for operating a motor vehicle while license revoked and not reinstated, as charged in the information." The objection goes to the words "and not reinstated" which were not contained in the information. The information charged but a single offense. In such a case a verdict finding the defendant guilty as charged is sufficient. The other language used in the instant case, of which complaint is made, was surplusage and not prejudicial to the rights of the defendant. The meaning of the verdict is clear and unambiguous. It responds to the charge contained in the information. The surplusage contained in it in no way affects the result, nor operates to the prejudice of the defendant. The error assigned going to the form of the verdict cannot be sustained.

Error is assigned to the giving of instructions Nos. 4, 5, and 10. To quote these instructions would unduly extend this opinion. It is contended that they restrict the function of the jury to determine the credibility of the witnesses and the weight of the evidence. The instructions have been generally used in this state and conform with the holdings of this court. We find noth-

ing in them that is prejudicial to the rights of the defendant.

Other assignments of error are either not argued or are obviously without merit. Finding no prejudicial error in the record, the judgment of the district court is affirmed.

AFFIRMED.

ERNEST W. TAYLOR ET AL., APPELLEES, V. PAUL RHODES, APPELLANT, IMPLEADED WITH AUGUSTINE J. RHODES ET AL., APPELLEES.

125 N. W. 2d 200

Filed December 20, 1963. No. 35511.

1. **Appeal and Error: Pleading.** In the case of an appeal to the district court from the county court, the rules of pleading are the same as in an action in a justice of the peace court.
2. **Appeal and Error.** As a general rule a case must be tried in the district court on appeal upon the issues presented in the lower court.

Appeal from the district court for Morrill County: JOHN H. KUNS, Judge. Affirmed.

Paul Rhodes, pro se.

James L. Macken, for appellees Taylor.

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

YEAGER, J.

This is an action by Ernest W. Taylor and Evelyn Taylor, plaintiffs and appellees, against Paul Rhodes, Augustine J. Rhodes, Mutual Life Insurance Company of New York, and The Federal Land Bank, defendants. The defendant, Paul Rhodes, is the only appellant in the action here on appeal. By the pleadings no claim is made for affirmative relief against Mutual Life Insurance Company of New York or The Federal Land Bank

and none awarded either for or against them, hence no further reference will be made to them except to say that they were holders of liens on real estate which is a subject of controversy in this action. The defendant Augustine J. Rhodes is the wife of the defendant, Paul Rhodes, and although interests of hers are involved, she is not a party to this appeal.

The action here is one in equity instituted by the plaintiffs who are appellees here to set aside two separate transfers of title to real estate made by the appellant to the defendant, Augustine J. Rhodes, his wife. The purpose of the action was to have these transfers set aside so as to permit action to have the interest of the appellant subjected to the payment of a money judgment obtained in another action by the appellees here against the appellant together with interest on that judgment and the costs.

The judgment in the action here was in favor of the appellees and against the appellant and Augustine J. Rhodes. By the judgment in the case, the deeds were not set aside. They were not set aside by reason of the fact that the appellant voluntarily deposited with the clerk of the district court a sufficient amount of money with which to satisfy the money judgment with interest and costs in the other action. By the terms of the deposit, it was made a trust, to abide the ultimate decision as to the validity of the judgment which the appellees had obtained against the appellant in the action here.

Following a hearing, a motion for summary judgment made by the appellant was overruled and a motion for summary judgment in favor of appellees was sustained. By the judgment which was rendered a cross-petition which had been filed by appellant was dismissed; the fund which had been deposited by the appellant was ordered applied to the payment of the judgment, interest, and costs in the other action; the issue of invalidity of the conveyances made by the appellant to Augustine

J. Rhodes was dismissed; and it was provided that if the deposit made by appellant was insufficient to pay the judgment, interest, and costs in the other action, the appellees were declared to have the right to take further proceedings to recover the difference in that action.

Thereafter, the appellant filed a motion for new trial which motion was overruled. From the judgment and the order overruling the motion for new trial the appellant has taken this appeal.

The brief of appellant contains seven separate assignments of error which he contends are grounds for reversal, but there is a supplemental transcript which must be regarded as controlling and in it is contained an adjudication which fixes the issues triable in the district court and of course which defines the issues which are here for consideration and determination. This renders these assignments of error inapplicable.

The decision herein however requires a review of the procedures involved in actions by the appellant against the appellees and of appellees against the appellant and in particular an action which was commenced by appellant in the county court.

In that action, the appellant here, as plaintiff there, filed an action in the county court of Morrill County, Nebraska, against the plaintiffs and appellees here who were defendants there, for the recovery of judgment for $532.15. The record here shows service of summons on the appellees. In response the appellees filed a special appearance in which they asserted that the service of process was not sufficient. In it they asked for no relief. The action was filed December 29, 1958, and the service of process was made the same day. The special appearance was filed February 2, 1959. On June 22, 1959, the appellant moved for judgment because of default in which he asserted that the appellees had entered a general appearance and had failed to answer within the time required by law. On that date the motion for de-

fault was sustained and judgment was rendered in favor of appellant and against the appellees for $532.15 with interest.

On June 25, 1959, and within the same term, the appellees filed a motion to set aside. Grounds asserted in the motion were that the special appearance was filed before answer day; that they had entered no general appearance; that the attorney for appellees was under the impression that no action would be taken on the matter of judgment until the question of whether or not the appellees had entered a general appearance had been decided which had been taken under advisement; and that the appellees had a defense and counterclaim to and against the claim of appellant for all of which reasons they asked leave to plead to the petition and to file their counterclaim.

On June 27, 1959, the county court overruled the motion to set aside the default and judgment and the included motion for leave to plead.

From this judgment and order, the appellees took an appeal to the district court. On that appeal to the district court, the default and judgment were vacated and set aside and the appellees were given permission to answer in the district court the petition of appellant filed in the county court and also to file a cross-petition. The case was presented for trial to the district court on the issues presented by these pleadings. The adjudication which has been described as having been made by the appeal here was the result.

The journal entry describing and awarding judgment herein in favor of appellees recites that a hearing was had on a motion for summary judgment in favor of appellant; and that evidence was taken on a motion by the appellees for summary judgment and the parties rested.

Of this hearing there is a bill of exceptions. It contains no record of testimony of witnesses taken, but contains a large number of exhibits none of which is identified as supporting any practical phase or issue of the litiga-

tion in the case here. It should be said however that the authenticity of none of the exhibits is brought into question. It is the bill of exceptions of the appellant.

In any event, the bill of exceptions is of little, if any, moment in the light of what in analysis is involved and what was considered. Involved in actuality for the most part is a question of whether or not in the event a county court enters a default and renders judgment pursuant thereto and the default and judgment are vacated on appeal by the district court, may the district court, over objection, try the case from which the appeal was taken on issues not presented to the county court. The reason for this is that the appellant contends that new issues were presented to the district court by cross-petition.

The appellant contends that in such an event it is the duty of the district court to return the case to the county court for the trial of the new issues.

The district court did retain the case, permitted defensive pleadings and a counterclaim, and rendered judgment in favor of the appellees, which action the appellant insists was without jurisdiction and rendered the judgment void and subject to collateral attack.

In the case of an appeal to the district court from the county court, the rules of pleading are the same as in an action in a justice of the peace court. Strine v. S. Kingsbaker & Brother, 12 Neb. 52, 10 N. W. 534; Clarine v. Nelson, 15 Neb. 440, 19 N. W. 684.

It is a rule that a case must be tried in the district court upon the issues presented in the lower court. First Nat. Bank v. Carson, 30 Neb. 104, 46 N. W. 276; Lee v. Walker, 35 Neb. 689, 53 N. W. 597; Jacob North & Co. v. Angelo, on rehearing, 75 Neb. 381, 110 N. W. 570; Weideman v. Estate of Peterson, 129 Neb. 74, 261 N. W. 150.

This cross-action was not amendatory of anything which had been pleaded by the appellant against the appellees in his action in the county court, and neither was it germane to any defense available to the appel-

lees in this action on the basis of pleadings. This is made conclusively clear by the pleadings, affidavits, and exhibits which were before the district court which are now before this court.

The entire pertinent substance was that of whether or not the appellees who had recovered a money judgment against the appellant had a valid judgment, and were entitled to have it satisfied out of the money which had been deposited conditionally by the appellant to satisfy it in case the appellees should prevail in this their action to set aside the deeds of the appellant to his wife.

By the judgment, the court determined that they had such a valid judgment. There is no evidence in the bill of exceptions on this subject, therefore the adjudication must be accepted as final. It was ordered that the money which had been deposited should be applied to the payment of the judgment to which attention has been called in accordance with the previous order of the court made pursuant to agreement of the appellant. There was nothing more which related to issues actually involved.

In the light of this, the question of whether or not the cross-action was proper does not require consideration further herein. The cross-action and that part of the record relating thereto had no relation in the light of the record presented, to any pertinent matter presented by the record. While it may well be said academically that the appellees were insistent upon something to which they were not entitled, it was not harmful to the appellant and that the relief granted to appellees was proper.

This is true since the record discloses by judicial determination and declaration as has already been indicated, that the appellant agreed on September 25, 1961, that "only issues relating to validity of the judgment herein in Case No. 4739 in the District Court for Morrill County, Nebraska, and that the fund which he has

heretofore deposited in court may be used to satisfy judgment in the event said issues are adjudicated adverse to defendant Paul Rhodes in these proceedings," were presented for determination.

The issue involved in case No. 4739 was finally adjudicated in favor of appellees. All in actuality that the court did by its judgment was to vacate the default, as it had a right to do, in the exercise of its discretion; adjudicate in accordance the declared tender of defensive issues made by the appellant; and implement the appellant's agreement to satisfy the judgment mentioned.

The judgment is correct and it is therefore affirmed.

AFFIRMED.

VINCENT J. COSTANZO, APPELLANT, V. TRUSTIN MANUFACTURING CORP., A CORPORATION, ET AL., APPELLEES.

125 N. W. 2d 556

Filed December 20, 1963. No. 35525.

1. **Negligence: Trial.** In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury.
2. **Automobiles: Negligence.** The speed of an automobile is unlawful if it is found to be unreasonable or imprudent under the existing circumstances, even though it may not exceed the applicable statutory or ordinance limits.
3. ———: ———. Before a verdict can be directed against a motorist for failing to see an approaching automobile at a nonprotected intersection, the position of the approaching automobile must be undisputedly located in a favored position.
4. ———: ———. When a motorist enters an intersection of two streets, he is obligated to look for approaching automobiles and to see those within that radius which denotes the limit of danger.

5. ———: ———. If a driver fails to see an automobile not shown to be in a favorable position, the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is for the jury.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Reversed and remanded.

Morgan, Carnazzo & Todero and Walsh & Walsh, for appellant.

Stoehr, Rickerson, Sodoro & Caporale and Frank Meares, for appellees.

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

WHITE, C. J.

Plaintiff appeals from a verdict directed against him in a negligence case arising out of a nonarterial intersection automobile accident at Twenty-sixth and Marcy Streets, Omaha, Nebraska. The question is whether there was sufficient evidence on the pleaded issues of negligence and contributory negligence to require the court to submit these issues to the jury. In resolving this question, we test the evidence against the rule that all conflicts in the evidence are resolved in favor of the plaintiff, that he must have the benefit of every reasonable inference to be deduced from the evidence, and that if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of the plaintiff, the issues of negligence and contributory negligence should be submitted to the jury. Sekora v. Mangers, 171 Neb. 868, 108 N. W. 2d 240; Hammond v. Morris, 147 Neb. 600, 24 N. W. 2d 633; Koutsky v. Bowman, 157 Neb. 919, 62 N. W. 2d 114.

Plaintiff's car, on the left of the defendant driver and going north, collided with defendants' station wagon, on the right and going west, at about 8 a.m., April 1, 1959, near the center of the dry, paved intersection of

Twenty-sixth and Marcy Streets, Omaha, Nebraska. Both Marcy and Twenty-sixth Streets are about 23 feet wide and parked cars continuously lined both sides of each street from which the drivers approached, leaving one lane of traffic open for approaching the intersection.

Was there sufficient evidence to submit the issue of negligent speed as to the defendants? The applicable speed limit at this intersection was 25 miles per hour. § 39-7,108, R. R. S. 1943. Within the applicable statutory or ordinance limit, the speed of an automobile is unlawful if it is found to be unreasonable or imprudent under the existing circumstances. § 39-7,108, R. R. S. 1943. See, also, Hilferty v. Mickels, 171 Neb. 246, 106 N. W. 2d 40; Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499.

Reduction of speed when crossing an intersection, when traveling on a narrow road, or when special hazards exist with respect to the condition of the roadway is demanded by the statute. See § 39-7,108, R. R. S. 1943. Plaintiff's car, about 17 feet long, was stopped on Twenty-sixth Street at the south curb line of Marcy Street, and the lane of travel between the parked cars to the east on Marcy Street was free of vehicles for about a half a block or 140 feet. Plaintiff's evidence is that he looked at the time he stopped, both to the right and to the left, and that he could observe if there were approaching vehicles in the one-half block to the right or east from which the defendants' car approached. He saw no vehicle approaching at that time or any other time. Marcy Street is only 23 feet wide. The point of impact was very close to, and slightly to the east of, the center of the intersection, the impact of the defendants' car being from near the center to the right rear of plaintiff's automobile. It is reasonably inferable that the plaintiff traveled 20 to 25 feet at a speed accelerating from a stop to not over 10 miles per hour, while the defendant driver would have traveled a distance of at least 140 feet in a narrowed one lane

of traffic between parked cars on Marcy Street. A comparison of the time-distance proportions could lead to a conclusion that the defendant driver was traveling over 30 miles per hour depending on a determination of the average speed of the plaintiff's vehicle from his stopped position up to impact. There is also evidence of defendants' car laying down 18 to 20 feet of skid marks, and the force of the impact knocked plaintiff's car diagonally northwest into a utility pole over the curb line on the northwest corner of the intersection. Since there is no testimony of the defendants, the verdict being directed at the close of plaintiff's evidence, and since plaintiff never saw defendants' station wagon, the testimony as to speed is circumstantial in nature. It is well settled that circumstantial evidence is sufficient to sustain a charge of unlawful speed, and may be sufficient to overcome direct evidence, which is usually based on opinion estimates. See Hilferty v. Mickels, *supra.* It seems to us there was ample circumstantial evidence to require the submission of the issue of negligence as to speed to the jury. By this holding, we do not limit the range of submissible issues of negligence as there is no evidence on behalf of the defendants in the record before us.

The defendants contend that the plaintiff was guilty of contributory negligence as a matter of law. This contention is based essentially on the proposition that the two vehicles were approaching the intersection "at approximately the same time," § 39-728, R. R. S. 1943; that the plaintiff was on the left at a nonfavored, unprotected intersection; and that his failure to see the defendants' vehicle on the right and in the favored position bars his recovery as a matter of law. Cappel v. Riener, 167 Neb. 375, 93 N. W. 2d 36; Gernandt v. Beckwith, 160 Neb. 719, 71 N. W. 2d 303; Kohl v. Unkel, 163 Neb. 257, 79 N. W. 2d 405. Our recent decisions in Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496, and Gernandt v. Beckwith, *supra,* have attempted to reduce to clarity

the principles upon which may be resolved the familiar and often irreconcilable conflict of who reached the intersection first in a physical or mathematical sense, and therefore was in the favored position under section 39-728, R. R. S. 1943.

It is true that plaintiff did not see defendants' vehicle at all and that the collision was almost at the center of this nonprotected intersection. Without further evidence, the failure to look or to see in this situation bars recovery. Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596; Gernandt v. Beckwith, *supra;* Cappel v. Riener, *supra.* But before a verdict can be directed against a motorist for failing to see an approaching vehicle at a nonprotected intersection, the position of the approaching vehicle must be undisputedly located in a favored position. Whitaker v. Keogh, *supra;* Gorman v. Dalgas, 151 Neb. 1, 36 N. W. 2d 561; Elliott v. Swift & Co., 151 Neb. 787, 39 N. W. 2d 617; Sekora v. Mangers, *supra.* In this determination, unlawful speed forfeits an otherwise favored position. § 39-751, R. R. S. 1943; Thomas v. Owens, 169 Neb. 369, 99 N. W. 2d 605. The jury here, as we have pointed out, could have found an unlawful speed on the part of the defendant driver in approaching the intersection. The defendant driver, therefore, was not undisputedly located in a favored position within the meaning of the rules announced. Outside of the question of right-of-way, however, the defendants contend that it is conclusively established from plaintiff's own testimony that he did not see defendants' vehicle within the radius which denotes the limit of danger and, therefore, under our decisions is guilty of contributory negligence as a matter of law. The proper interpretation of the rule requiring seeing a vehicle within the limits of danger, as it relates to the direction of a verdict against a party not seeing a vehicle, is stated in Sekora v. Mangers, *supra,* at p. 877: " 'The rules in this state are: "* * * when a person enters an intersection of two streets or highways he is obligated to look

for approaching cars and to see those within that radius which denotes the limit of danger. * * * If he fails to see an automobile not shown to be in a favorable position, the presumption is that its driver will respect his right of way and the question of his contributory negligence in proceeding to cross the intersection is a jury question. * * * Before a verdict can be properly directed in such a case the position of the defendant's car must be definitely located in a favored position, otherwise the question becomes one for the jury. * * * Where he looks and does not see an approaching vehicle, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes that he can proceed and avoid a collision, the question is usually one for the jury." Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596.' See, also, Elliott v. Swift & Co., 151 Neb. 787, 39 N. W. 2d 617; Ripp v. Riesland, 170 Neb. 631, 104 N. W. 2d 246."

In this case, there is no evidence as to the location of the defendants' vehicle at any time prior to the collision. Because of the evidence as to speed, no inference as to the range of danger may be drawn from the fact the vehicles collided at or near the center point of the intersection. It may not be said that it is conclusively established that the defendants' vehicle was within the limit of danger. The position of the oncoming vehicle must be definitely located within the radius that denotes the limit of danger before a verdict can be directed. Whitaker v. Keogh, *supra;* Pupkes v. Wilson, 172 Neb. 15, 108 N. W. 2d 220. The factual determination of the radius of the range of danger under the circumstances, whether defendants' car was within it, the speed of the defendants' car, and whether the resolution of these questions placed the defendant driver on the right in a favored position are all questions for the jury.

We realize that, under our decisions construing the right-of-way statute, section 39-728, R. R. S. 1943, the mathematical determination of who reaches an inter-

section first by a few feet should not be controlling. Gernandt v. Beckwith, *supra;* Long v. Whalen, *supra.* The true test is whether, considering the elements of speed, lookout and control, and the particular circumstances of the case, there is imminent danger of collision if the car on the left proceeds into the intersection. The statute contemplates that the driver on the left entering first has the right-of-way when outside the range of "at approximately the same time." According to plaintiff's testimony, he stopped, made the proper required observations, and proceeded into the intersection first at a time when there was no reasonable chance of collision. Under this set of facts, he would be in a favored position and entitled to have the very principles of law contended for by the defendants applied to the conduct of the driver of the defendants' vehicle. The evidence as to speed negatives the drawing of any conclusive inference from the positioning of the cars in the center of the intersection at impact. Whether the testimony of the plaintiff is true, and if true, whether his conduct was careful within the meaning of the comparative negligence statute, are questions for a jury to decide. The force of the defendants' contention is directed towards the credibility and the weight of the plaintiff's evidence, but does not destroy its legal sufficiency to warrant a jury determination. The judgment of the district court in directing a verdict is in error and is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

HARRY GRIMMINGER, APPELLANT, V. WALTER M. CUMMINGS ET AL., APPELLEES.
125 N. W. 2d 613

Filed December 27, 1963. No. 35499.

1. **Attorney and Client: Trial.** The question of the value of an

attorney's services is ordinarily a question of fact for the jury and the verdict thereof will not be disturbed unless clearly wrong.

2. **Trial: Appeal and Error.** A verdict of the jury based upon conflicting evidence will not be set aside unless it is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record.
3. **Witnesses: Attorney and Client.** Opinion evidence of expert witnesses as to the value of an attorney's services is not conclusive, nor is it binding upon the trier of facts.
4. **Witnesses: Evidence.** The weight and credibility to be given opinion evidence of expert witnesses is the sole province of the jury.
5. **Trial: Evidence.** Triers of fact are not generally bound by opinion evidence as to value even when it is not met by opposing proof.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

John A. Wagoner, William P. Mullen, and Vogeltanz & Grimminger, for appellant.

Gerald B. Buechler, for appellees.

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

WHITE, C. J.

From a jury verdict and judgment in the sum of $2,684.09 in a suit for attorney's fees and legal services, plaintiff appeals, asserting inadequacy of the verdict and judgment.

The evidence shows that the plaintiff was employed by the defendants in a legal capacity to assist them in a series of negotiations as to the lease or sale of a downtown business property in Grand Island, Nebraska, to the Boss Hotels Company. The negotiations lasted from February 1958 to March 1960 and resulted in a sale of the property for $125,000. The evidence is voluminous in this case, and we will review it in this opinion, since we do not determine the issues de novo, only insofar

as necessary to discuss the issue of inadequacy. Although the plaintiff kept no record of the time he spent, there is evidence to support a finding that he spent something over 200 hours all devoted to the services rendered in defendants' behalf. This service included advice about the proposed sale, a study of the tax problems involved at different stages of the negotiations, legal services in connection with a lease of the property to the Texas Company, arrangements for numerous conferences with officers or attorneys for the prospective purchaser, the Boss Hotels Company, attendance at these conferences, correspondence incidental to the negotiations, the preparation of the completed contract and an amendment to it, and the further drafting of the usual and necessary papers to consummate the transaction. Out of pocket expenses of the plaintiff were about $60. The record of this case fails to disclose any new, peculiar, or uniquely difficult legal problems as to any phase of the negotiations or the final sale. That the plaintiff fully participated in the conferences and rendered valuable legal services cannot be denied. But, there is nothing in the picture presented that would warrant a conclusion that the legal services were beyond those usually rendered by a competent attorney in the negotiation and completion of a real estate sale.

The main thrust of plaintiff's contention is that the evidence shows he was entitled to a substantial fee for services, outside of those purely legal in nature, in the sale of the property for the admittedly advantageous sale price of $125,000. There were several conferences between the parties with the plaintiff participating. Just what contribution plaintiff made to either the setting of the price of $125,000 or the maintenance of it is not clear. The evidence and the inferences that may be drawn from the oral testimony are in conflict. In any event, there is evidence in the record to sustain a finding that the sale price of $125,000 was determined and set by the defendants themselves long before the plaintiff was em-

ployed. Different conclusions could also be drawn from the evidence as to the plaintiff's importance in maintaining the price level of $125,000 in the various conferences that ensued. Weight and credibility of the different witnesses' testimony were vital to this determination, were solely within the province of the jury, and therefore such an argument will not support a conclusion that its verdict was clearly wrong as a matter of law. From the plaintiff's expert real estate witnesses and his own testimony, it is clear that the elements of finding a buyer, advertising and listing for sale, contacting other prospective purchasers and the expense and time risked incident thereto, and other incidental services ordinarily performed by a real estate broker are missing in this case.

Plaintiff's petition alleges a cause of action for the reasonable value of professional legal services. The jury was instructed properly as to the different elements of legal services it should consider in arriving at the amount of its verdict. No objection was or is made to these instructions or the theory upon which this case was tried. Nevertheless, the plaintiff testified that the prayer of his original petition of $6,250 was computed on the basis of "the total fee for everything I had done on the basis of what a real estate man alone would have charged, * * *."

At the time of trial, plaintiff amended the prayer of his petition by adding $2,000. He testified in this connection as follows:

"Q. Did you subsequent to this time change the amount of the prayer of your petition?

"A. I did.

"Q. What was the amount it was changed to?

"A. The amount I added was $2,000 for the purely legal work connected with the drawing of the contracts and escrow agreement and all the other things I did to close the transaction.

"Q. Does this amount or fee you just stated include

all of your services—legal services to the Cummingses?

"A. All except the out-of-pocket expenses that has been testified to here."

Further, plaintiff testified he was not hired as a realtor, that no request to sell the property was made to him, that he "did not act as a real estate man," and that his services were legal in nature all the way through. The question of the value of an attorney's services is ordinarily a question of fact for the jury and the verdict will not be disturbed unless clearly wrong. Neighbors & Danielson v. West Nebraska Methodist Hospital, 162 Neb. 816, 77 N. W. 2d 667; Tidd v. Stull, 128 Neb. 506, 259 N. W. 369. Circumstances and the testimony of nonexpert witnesses may form a basis for the fact determination of reasonable values of an attorney's services. Prince v. Pathfinder Life Ins. Co., 133 Neb. 705, 276 N. W. 661. The jury verdict was for $2,684.09, about $600 above what the plaintiff testified to himself was the value of his purely legal services. The significance of the help to the clients in consummating the real estate sale was for the jury to determine, and it could reasonably be inferred that it did allow an additional sum of about $600 in its verdict even though the framed issue in the case from the petition and the unchallenged submitted instructions is solely one for professional legal services. It cannot be said that the verdict is against the weight of the evidence, or is so clearly wrong as to induce the belief that it was the result of passion, prejudice, mistake, or some other means not apparent from the record which is the ambit of the rules correctly stated by the plaintiff. Garfield v. Hodges & Baldwin, 90 Neb. 122, 132 N. W. 923; Nebraska Mutual Ins. Co. v. Borden, 132 Neb. 656, 272 N. W. 767; Bentley v. Hoagland, 94 Neb. 442, 143 N. W. 465.

Plaintiff contends the undisputed expert testimony as to value ranging from $6,500 to $10,000 establishes the inadequacy of the verdict. Expert testimony as to the value of legal services is not conclusive nor is it bind-

ing upon the trier of facts. Prince v. Pathfinder Life Ins. Co., *supra.* Such expert testimony is advisory, not prescriptive in nature, its weight and credibility are solely for the jury, the value fixed may be below the range testified to by the experts, and it is not required that there be opposing proof of an expert nature. Prince v. Pathfinder Life Ins. Co., *supra;* Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168; Lincoln Land Co. v. Phelps County, 59 Neb. 249, 80 N. W. 818. The jury was free to accept any portion or all of the expert testimony or to reject it, and a jury verdict may not be said to be inadequate as a matter of law when it appears that it did not accept the value fixed by some particular expert. There is no merit to this contention.

Error is claimed because of misconduct of counsel. No objection to the claimed misconduct was made at the time of its alleged occurrence in the trial, nor can we find from the record before us sufficient facts upon which a valid objection could be predicated.

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

AFFIRMED.

ELDON CAWTHRA, APPELLANT, V. VILAS SHACKELFORD ET AL., APPELLEES.

125 N. W. 2d 186

Filed December 27, 1963. No. 35504.

1. **Negligence: Trial.** Negligence as a cause of action or as a defense must be proved by the party alleging it, and the burden does not shift during the trial.
2. ———: ———. Contributory negligence is ordinarily an affirmative defense and the burden of proving it is on the party asserting it.
3. ———: ———. The rule with reference to whether or not evidence of negligence shall be submissible to a jury is that where the evidence is in conflict and is such that reasonable

minds may draw different conclusions therefrom the questions of negligence, of contributory negligence, and of comparative negligence are for determination by a jury.

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

5. ———: ———. Whether a party 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.

Appeal from the district court for Dundy County: VICTOR WESTERMARK, Judge. Reversed and remanded.

Daniel E. Owens, for appellant.

Russell & Colfer, for appellees.

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

YEAGER, J.

This is an action for damages filed in the district court for Dundy County, Nebraska, by Eldon Cawthra, plaintiff and appellant, against Vilas Shackelford and Plains Oil Company, a copartnership, defendants and appellants, growing out of a collision between an automobile operated by Vilas Shackelford and a tractor owned and operated by Eldon Cawthra. The action is based on a charge of negligence on the part of defendant, Vilas Shackelford, while engaged in the service of the copartnership of the defendant Plains Oil Company of which he was a partner. By answer the defendants charged that the collision was caused by the negligence of the plaintiff.

The negligence charged against the defendants was that the defendant, Vilas Shackelford, carelessly drove

a 1960 Chevrolet sedan into the left rear wheel of a tractor operated by the plaintiff.

By the answer the collision was admitted but negligence on the part of Vilas Shackelford was denied. Affirmatively it was alleged that the collision was solely and proximately caused by the negligence of the plaintiff in that he made a left turn not at an intersection, without looking to the rear for overtaking traffic; that he made a turn out of an arterial highway without ascertaining that the movement could be made with reasonable safety; that he made a turn not at an intersection but out of an arterial highway without giving any signal to traffic overtaking him from the rear of his intention to do so; and that he drove his tractor at an abnormally slow speed on an arterial highway without keeping a proper lookout for vehicles approaching from the rear.

The answer was generally denied by the plaintiff.

The case was tried to a jury and at the conclusion of the evidence of the plaintiff the defendants moved for a directed verdict in their favor on the ground that the evidence failed to establish the cause of action pleaded by plaintiff in his petition, and on the further ground that the plaintiff's evidence affirmatively showed that he was guilty of negligence which as a matter of law precluded a recovery.

This motion was overruled and the defendants adduced their evidence, after which the parties rested. After the parties rested the defendants renewed their motion for directed verdict which motion was sustained and the petition of the plaintiff was dismissed. The plaintiff duly filed a motion for new trial which was overruled, whereupon the plaintiff appealed from the judgment and the order overruling the motion for new trial.

Two pertinent questions are presented, the answers to which must be considered in the disposition of this appeal. The first is that of whether or not it may be said as a matter of law that the defendant Shackelford

was guilty of negligence which caused or proximately contributed to the accident.

The other is that of whether or not it may be said that the plaintiff was guilty of negligence which proximately caused the accident or contributed to it in a degree sufficient as a matter of law to defeat a right of recovery in his favor.

It is of course true that negligence as a cause of action or as a defense must be proved by the party alleging it, and the burden of proof does not shift during the trial. Knies v. Lang, 116 Neb. 387, 217 N. W. 615, 57 A. L. R. 1022.

It is also true that contributory negligence is ordinarily an affirmative defense and the burden of proving it is on the defendant. McCulley v. Anderson, 119 Neb. 105, 227 N. W. 321.

The rule with reference to the question whether or not evidence of negligence or of contributory negligence shall be submissible to the jury is that where evidence is in conflict and is such that reasonable minds may draw different conclusions therefrom, the questions of negligence, of contributory negligence, and of comparative negligence are for determination by a jury. Parks v. Metz, 140 Neb. 235, 299 N. W. 643; Gross v. Johnson, 174 Neb. 273, 117 N. W. 2d 534.

In order for the plaintiff to have the benefit of these rules and to have the judgment rendered herein set aside, he had the burden on the trial of adducing sufficient proof for submission to a jury the question of negligence of the defendants.

On the other hand the defendants had the burden, in order to retain the judgment, either to defeat the proof of plaintiff that Vilas Shackelford was guilty of any actionable negligence, or to prove that as a matter of law the plaintiff was guilty of negligence or contributory negligence in a degree which would deny to him a right of recovery.

The determination of these questions depends upon the

evidence adduced by the parties on the trial and the reasonable conclusions and inferences which may be said to flow therefrom. In certain areas the facts are not in dispute and in others the evidence is conflicting.

Facts which are not in dispute are that on April 18, 1961, the plaintiff was a tenant farmer who lived on a farm about 4½ miles east of Benkelman, Dundy County, Nebraska, which farm lay to the north of U. S. Highway No. 34, which highway extends eastward past the farm. The highway has black-top paving with a white line extending down its center. The width of the highway is not disclosed by the record. The highway is practically level over the portion which is of concern in this case. The farm buildings used by plaintiff are about 900 feet to the north of the highway. There is a lane or driveway leading southward from the farm buildings. The view from the farm buildings is in the general easterly and southerly direction to all points involved in this case. It is open to view from the east side of the buildings except for a tree or trees the location and number of which are not made clear. The location of the collision was about ¼ mile east of the entrance to the lane leading to the farm buildings. At the time both vehicles were in eastward movement on U. S. Highway No. 34. The collision took place to the north of the centerline of U. S. Highway No. 34. The weather was in good condition and there was nothing except the trees to obstruct the view from the farm buildings. The collision took place at about 2 o'clock p.m.

The plaintiff was injured as a result of the collision. He has had since no recollection of what occurred at the time. He was rendered unconscious and so remained for some considerable period of time.

Marlene Cawthra, the wife of the plaintiff, was a witness in behalf of the plaintiff. She testified that the accident happened about ¼ mile east of the lane or driveway which has been mentioned; that the plaintiff was operating the John Deere tractor which was green

with yellow wheels; that she saw the accident from a distance of 2½ or 3 blocks; that the plaintiff drove down the driveway and she next saw him on the highway going east on the south side thereof about 3 blocks away when he stood about halfway up on the tractor and looked back to the right, then stood up and looked forward to the east; and that as he sat down he pulled the throttle with his right hand, made a motion with his left hand and began turning, and then he proceeded across the highway and she went back to her wash.

She further testified that at the time she observed no automobile on the highway but as she turned back to her wash she heard a sound which sounded like wind and tires and the motor of a car coming from the west. When she looked she saw it just clearing the Guernsey place which is about ½ mile west of the lane or driveway to the plaintiff's place, and she saw a black car with a white or cream line down the middle of it and it was going at such a rate of speed that it was just a blur. After she first saw the automobile she saw that the tractor had crossed to the left side of the road and its front tire bounced off the oil mat onto the shoulder and at that time the Shackelford car hit the tractor. After the collision the tire took off, the plaintiff flew off to the southeast, and the Shackelford car flew and didn't touch the ground until it landed in the borrow pit ditch. She drove to the scene which took 4 or 5 minutes. She gave it as her opinion that at the time she saw the automobile before the collision it was moving at a speed of from 80 to 90 miles an hour. She testified that when she first saw the plaintiff after he entered the highway he was more than halfway between the driveway and the scene of the accident, the total distance which as she said was about ¼ of a mile. She testified that when she saw the automobile it was on the north or left-hand side of the highway.

It is pointed out here that the turn by the plaintiff from his right-hand side of the highway to the other

side is not explained by any evidence in the record. The record discloses that he had in a bag for disposition some dead kittens and chickens and a conjecture appears that the movement was made for the purpose of disposing of them. At this point there was no road or lane or anything else indicating a point to leave or a reason for leaving the highway in that direction at that time.

One Robert Merklin testified on behalf of the plaintiff that Vilas Shackelford passed him going east at an intersection at the edge of Benkelman. He followed in the same direction at about 50 miles an hour and that when he got to the Guernsey crossing, which was about ¾ of a mile west of the scene of the collision, he could see the Shackelford car on the shoulder of the road and could also see the tractor. He thought Mrs. Cawthra was at the scene of the collision when it came into his view.

Richard A. Wagener also testified on behalf of the plaintiff. He said that when he got to the Guernsey driveway he saw there had been an accident ahead. He saw Mrs. Cawthra going to the scene. When he first saw her he was west of her driveway.

Vilas Shackelford testified on behalf of the defendants. He said that the improvements on the property where the plaintiff lived were about 900 feet to the north of the highway; that he saw the tractor moving on the south side of the highway; that at the time he was traveling about 65 miles an hour and the tractor was moving from 8 to 10 miles an hour; that he remained on the south side of the highway until he was within about 50 feet of the tractor at which time he had slowed down to about 50 miles an hour; that at this time and within this distance from it he turned left to pass the tractor and increased his speed to about 65 miles an hour; and that at this time the tractor was turned left onto the north side of the highway and was struck by the automobile which he was operating. He testified that he first

saw the tractor when he was about at the Guernsey crossing and the tractor was probably at a point about halfway between the driveway of the plaintiff and the scene of the collision. He said that when he pulled out to pass the plaintiff was fiddling with gadgets on the tractor.

The evidence discloses that after the collision the tractor was upside down in the middle of the highway and was 40 feet 5 inches from the point of impact. The automobile was 42 feet 9 inches east and north of the point of impact. The left rear wheel was torn off the tractor. There were skidmarks for a distance of 79 feet 9 inches on the north side of the highway made by the automobile. The left side of these marks was 18 inches south of the north edge of the oil mat. These were west from and extended to the point of impact. The highway to the west is plain and open for a distance of ¾ of a mile.

It is on the evidence which is summarized herein, and the inferences and conclusions capable of flowing from it, that the question of whether or not the court erred in sustaining the motion of defendants for a directed verdict and in dismissing the petition of the plaintiff is based.

The testimony of the wife of the plaintiff is capable of an inference that the plaintiff saw and observed Shackelford coming from his rear on the same side of the highway and at a high rate of speed, and that up to a distance of about 50 feet Shackelford gave no evidence of attempt or intention to turn aside to avoid striking the tractor from behind, in the light of which the plaintiff suddenly turned to the left to avoid being struck. This was an inference of course which required consideration along with all the facts bearing on the question of negligence of both the plaintiff and the defendants.

The testimony in the case is capable of a conclusion and inference that the plaintiff saw the automobile approaching at a distance and assumed, but mistakenly,

that he had time to move safely over to the left side of the highway. This required consideration in the light of all disclosed facts and circumstances on the question of negligence of the plaintiff and of the defendant driver.

The testimony is capable of a conclusion and inference that the plaintiff was heedless and therefore ignorant of the approach of the automobile and that he moved into a place of danger which would and should have been avoided by the exercise of ordinary care. In such an event of course no liability would attach to the defendants.

The testimony is capable of still another conclusion and inference, that is, that Vilas Shackelford drove the automobile at such a rate of speed and in such manner as not to permit the plaintiff time and opportunity, in the exercise of good judgment, properly to protect himself from danger which was not of his own making. This of course relates to the question of liability of the defendants for negligence.

This capability of conclusion and inference has its foundation in evidence adduced by the plaintiff where it was testified that Shackelford was traveling at a high rate of speed, that is from 80 to 90 miles an hour; that the plaintiff was traveling at 8 to 10 miles an hour; that Shackelford traveled about ¾ of a mile to the scene of the accident while the plaintiff traveled about ½ of a total distance which the evidence indicates was about ¼ of a mile; and that Shackelford took no step with a view to passing until he was within 50 feet of the tractor going then at about 50 miles an hour, which speed he had increased to 65 miles an hour by the time the collision took place.

The rule which is applicable in instances such as this has been stated by this court as follows: "In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and prudence required of him under the circumstances of the particular situation the issue

of negligence on the part of the operator is one of fact to be determined by a jury." Miers v. McMaken, 147 Neb. 133, 22 N. W. 2d 422. See, also, Fulcher v. Ike, 142 Neb. 418, 6 N. W. 2d 610; Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355; Hermansen v. Anderson Equipment Co., 174 Neb. 325, 117 N. W. 2d 791.

In Hermansen v. Anderson Equipment Co., *supra,* with reference to failure to look or looking and failure to see a motor vehicle when it was within the limit of danger, it was said: "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."

In the light of these principles it may not well be said that the evidence was so clear and conclusive that the court could say that the plaintiff was guilty of such negligence as to require the direction of a verdict in favor of the defendants and a dismissal of the action. In the light of the rules cited there was evidence which required that a question of negligence on the part of the defendants and also on the part of the plaintiff should have been submitted to the jury under proper instructions.

The judgment of the district court is therefore reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

ROBERT W. EVANS ET AL., APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.
125 N. W. 2d 541

Filed December 27, 1963. No. 35534.

1. **Witnesses.** It is the general rule that a witness need not be an expert to testify to the value of land.

2. ———. It is not essential that every witness qualified to express his opinion as to the value of real estate shall have all-inclusive information of every detail of the factors entering into market value.
3. **Witnesses: Trial.** The opinion of a witness as to the value of land will ordinarily be received if he is familiar with the property and its uses and is informed as to the state of the market, the weight and credibility of his evidence being for the jury.
4. **Witnesses: Appeal and Error.** Whether or not a witness is qualified to give an opinion as to the value of real estate is ordinarily within the discretion of the trial court. Whether or not such discretion has been abused is reviewable on appeal.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, A. A. Christensen, James J. Duggan, and William J. Orester, for appellant.

Barlow Nye and Dewayne Wolf, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, SPENCER, BOSLAUGH, and BROWER, JJ., and ZEILINGER, District Judge.

CARTER, J.

This is a condemnation proceeding. The property taken is 16 city lots and 1½ vacated streets in the city of Kearney, more particularly described in the petition. Each of the lots had a 50-foot frontage on Second Avenue and a depth of 150 feet to the west. The vacated streets were 80 feet in width. The lots and vacated streets adjoined and constituted one tract facing Second Avenue. The property was improved with a 1½-story house and some outbuildings. The property was wholly taken by the State for highway right-of-way purposes. The only question for determination is the value of the lands condemned. The jury returned a verdict for the condemnees in the amount of $13,500. The State has appealed.

The condemnees called four witnesses who testified

as to the value of the property taken. The condemner called but one witness, James L. Sawyers, on this issue. The sole question raised by this appeal is whether or not the trial court was in error in refusing to permit Sawyers to give his opinion of the value of the property taken.

The evidence shows that Sawyers is vice president of Farm Management and Appraisal Associates, of Kansas City, Missouri, and is a staff appraiser for this concern. He acquired a high school and college education. He successfully completed four courses required to obtain a professional appraisal designation, but had not met all requirements to obtain it. He is a licensed real estate broker in Nebraska. He stated that he had testified to values of several types of real estate in several states. He has appraised real estate numerous times, including about one-half of the appraisals made in connection with the new Interstate Highway in Buffalo County. He has made appraisals of rural lands in Buffalo County and city properties at the edge of the city of Kearney.

Sawyers testified that he had studied available records concerning the pattern of growth of the city and the direction of its growth from its financial and business section. He had found that its growth was toward the north, generally north of the Union Pacific Railroad and U. S. Highway No. 30. The industrial growth of the city was primarily along the railroad and highway, and at the airport.

He testified that he had examined the deeds to real estate on record at the courthouse which were in proximity to the lands taken and having similarity to such lands. He inquired of either the buyer or seller of such lands to determine the reason for sale, the sale price, the improvements thereon, the utilities available to it, and the uses to which it could be put. He stated that his purpose was to determine if the sellers and purchasers were willing purchasers and sellers who knew the uses to which the property could be put and whether

or not such sales were under compulsion by the sellers.

The witness testified to a careful inspection of the property and found it to be substantially as follows: The subject property consisted of 3.04 acres lying along and facing east on Second Street. There were improvements near the center of the tract consisting of a 1½-story frame house, a chicken house, an outdoor toilet, a wash house, and two sheds. The house had a brick foundation, lap siding, and wood shingles which he described as being in poor condition. The upstairs rooms and basement were in poor condition, the latter having a dirt floor. The old part of the house was lathed, plastered, and papered on the inside and was not in good condition. An added addition containing a kitchen and bathroom were newer and in better shape. The chicken house, wash house, and outside toilet were of some value but the two sheds had none. The lots not occupied by the improvements were not divided on the ground and were not in use for any purpose when viewed by the witness.

The city sewer was not connected to the residence, the closest point of connection being 2 blocks distant. There was no connection to the city water system, the closest connection point being 2 blocks distant. The house was electrically lighted. There was an open drain south of the house, evidently used to carry away wash water.

The witness was asked concerning the sale of a tract of similar land immediately across the street which was sold in 1958. The tract contained 8.06 acres and was unimproved. There was evidence that there had been no increase in value of this type of property between 1958 and 1962. It would appear that the sale price of this tract would bear upon the value of the subject tract. The evidence of other sales testified to by the witness was denied as being too remote in time or distance. We find no abuse of discretion in this.

The witness testified, in summary, to his experience as an appraiser generally, and that he had made numer-

ous appraisals in Buffalo County and in and around Kearney. His inspection of the improvements appears to have been a thorough one. He testified to special training in the appraisal field. He talked with realtors about general conditions affecting real estate values in and near Kearney. He had considered other sales of real estate in proximity to the subject property and had examined the public records with reference thereto. He had talked with parties to these land transactions to determine if the recorded sale prices reflected a market value. We think the witness, in the absence of any impeaching evidence, was qualified to give his opinion of the reasonable market value of the property taken.

It is fundamental that a qualified witness on the market value of real estate need not be a local resident, a real estate broker, nor have owned or sold land in the vicinity of the subject property. A professional appraiser of real estate may train himself for the purpose of determining the market value of real estate. He may learn from experience or by training the factors which influence buyers in purchasing real estate. The application of the yardstick thus learned may afford the necessary criterion for giving an opinion as to value. It is not necessary that a qualifying witness be familiar with every possible element that goes into the determination of market value. Medelman v. Stanton-Pilger Drainage Dist., 155 Neb. 518, 52 N. W. 2d 328.

In Wahlgren v. Loup River Public Power Dist., 139 Neb. 489, 297 N. W. 833, in dealing with a similar situation, this court said: "The correct rule as laid down by this court applicable in these circumstances is that, where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation."

The market value of real estate is almost always a matter of opinion. In determining market value, the courts are from necessity compelled to accept the opin-

ions of qualified witnesses as proof. Whether or not a witness is qualified to give an opinion as to value is a preliminary question for the court. Whether or not a witness is qualified to give an opinion is usually left to the discretion of the court. The discretion, however, is a legal one that is not absolute. Whether or not such discretion has been abused is reviewable on appeal. Wahlgren v. Loup River Public Power Dist., *supra*.

It is the general rule that a witness need not be an expert to testify to the value of land. Market value is not a question of science or skill upon which experts alone may give an opinion. Illinois Power & Light Corp. v. Talbott, 321 Ill. 538, 152 N. E. 486. It is necessary only to show that he has the means of forming an intelligent opinion derived from an adequate knowledge of the nature and kind of property in controversy, and of its value. City and County of Denver v. Lyttle, 106 Colo. 157, 103 P. 2d 1. It is not essential that every witness expressing an opinion shall have all-inclusive information of every detail of the elements entering into the value. Lebanon & Nashville Turnpike Co. v. Creveling, 159 Tenn. 147, 17 S. W. 2d 22, 65 A. L. R. 440. It is most difficult to state an all-inclusive rule fixing the qualification of witnesses to give their opinions as to the market value of land. Their testimony is ordinarily received if they show an acquaintance with the property and are informed as to the state of the market, the weight and credibility of their evidence being for the jury. Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168; Beebe & Runyan Furniture Co. v. Board of Equalization, 139 Neb. 158, 296 N. W. 764; 1 Orgel on Valuation Under Eminent Domain (2d Ed.), §§ 132 and 135, pp. 564 and 580, respectively.

We think that, on the basis of the qualifying testimony of the witness Sawyers, independent of any other considerations, the trial court abused its discretion in excluding the opinion of Sawyers as to the market value of the land taken. The error was prejudicial to the rights

of the State and requires a retrial of the case.

For the reason stated, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

BARBARA BEAVERS, APPELLANT, V. PETER O. CHRISTENSEN, APPELLEE.

125 N. W. 2d 551

Filed December 27, 1963. No 35536.

1. **Negligence.** A negligent act is not actionable unless it results in injury to another.
2. **Negligence: Damages.** Nominal damages to vindicate a technical right cannot be recovered in a negligence action where no actual loss has occurred.
3. **Appeal and Error.** To justify this court in interfering with the findings of a jury on a fact question, the preponderance of the evidence must be so clearly and obviously contrary to the findings that it is the duty of a reviewing court to correct the mistake.
4. **Trial: Evidence.** 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.
5. **Trial: Appeal and Error.** In reviewing the evidence where a jury has returned a verdict for the defendant, the defendant must have the benefit of any and all reasonable inferences deducible from the proof.
6. ———: ———. Instructions should be considered together in order that they may be properly understood, and when, as an entire charge, they properly submit the issue to the jury, the verdict will not be set aside.
7. **Appeal and Error.** If an examination of all of the instructions given by the trial court discloses that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon.

Appeal from the district court for Saunders County: JOHN D. ZEILINGER, Judge. Affirmed.

Haney, Walsh & Wall and Richard L. Walentine, for appellant.

Pilcher, Howard & Hickman, for appellee.

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

SPENCER, J.

This is an action by Barbara Beavers, plaintiff, against Peter O. Christensen, defendant, for personal injuries allegedly sustained when a stock truck owned by the defendant and driven by one James A. Easley, collided with the rear end of an automobile in which the plaintiff was riding as a passenger. The trial court instructed the jury as a matter of law that the negligence of the defendant's driver was the proximate cause of the collision and that the negligence of said driver was chargeable to the defendant.

The only fact question submitted to the jury was the extent and amount of the damages sustained by the plaintiff as the result of the collision, if any. The jury returned a verdict in favor of the defendant, and the plaintiff has perfected an appeal to this court.

Plaintiff assigns as error the overruling of her motion for a new trial, and the giving of instruction No. 3 by the trial court on its own motion.

On the first assignment, plaintiff urges that the verdict is not sustained by sufficient evidence; that the verdict is contrary to the evidence; and that the verdict is contrary to law.

We briefly set out only enough of the evidence to understand the plaintiff's position. Plaintiff testified that on April 10, 1960, in the vicinity of Yutan, Nebraska, the defendant's truck struck the rear end of a car driven by her husband in which she was riding as a passenger. At that time she was 7 months pregnant. Immediately after the impact, she felt a sharp pain in her neck and back. She was jarred in the collision, but her head did

not strike any object and her body was not thrown against the side of the car. She did not get out of the car until she arrived at her destination in Omaha. When she reached Omaha she left her 8-month-old child with her husband's parents and went to a dinner party. She stayed through the dinner hour but left right after the dinner. Her neck was stiff and she had difficulty turning her head. That night she slept on a heating pad. The next day she went to an orthopedic specialist who examined her and recommended heat, which she used every night and whenever she had a chance to use it during the day. When plaintiff's deposition was taken, she was asked if the pain she experienced after the impact was a sharp pain or just an ache, and her answer was "'Just an ache.'" Plaintiff continued to care for her daughter without help and has been able to do her own housework since the day of the collision. She gave normal birth to the child she was carrying.

After the visit to the orthopedist on April 11, 1960, plaintiff did not see another doctor until August 1960. At that time she made four or five visits to a doctor's office, but the only treatment she received was from the nurse who used a heat machine on her. She saw no other doctor until May 3, 1962, when she was examined by the orthopedic specialist who testified for her at the trial. He made a physical examination and took some X-ray pictures. In May 1962 she complained of a pain between the shoulder blades, predominantly on the right side, which plaintiff claimed had persisted pretty much since the collision. This doctor testified that in his opinion this was a residual of the injury she sustained, and that in his judgment she had a moderate muscle spasm.

Defendant's medical examiner, an orthopedist, testified that he examined the plaintiff on January 23, 1962. He found the range of motion of the neck area to be normal. There was no evidence of muscular atrophy or

weakness and no muscle spasm was present. It was his opinion that she had sustained a mild strain of the neck, but this was not shown by his testimony to have been sustained in the collision.

This sketchy résumé of the evidence is sufficient to point up the problem embraced in plaintiff's first assignment of error. It is plaintiff's contention that her evidence without a doubt establishes that she sustained personal injuries in the accident, and that the jury verdict is clearly against the weight of the evidence.

It is plaintiff's position that this case is controlled by Friesen v. Reimer, 124 Neb. 620, 247 N. W. 561. In that case the plaintiff was badly shaken and was thrown against the wheel and side of the car. She was 6 months pregnant, and labor pains began that night. A premature childbirth was avoided, but the plaintiff was compelled to remain in bed for 3 weeks and remained under the doctor's care until her child was born. The evidence indicated that the plaintiff had had two previous miscarriages but had subsequently given birth to two normal children. The jury returned a verdict for the defendant. In that case, we said: "In this case the defendant does not deny backing into the plaintiff's car. The evidence clearly proves that when she reached home she suffered severe pains, and while a premature birth was avoided by the treatment given her by her physician, yet for the pain and suffering, which the undisputed evidence shows she was subjected to by the negligence of the defendant, she was entitled to at least nominal damages, and because such damages were not awarded, the judgment is reversed and the cause remanded for a new trial."

It is true there is considerable fact similarity between the instant case and Friesen v. Reimer, *supra*. It is evident, however, that the proof of damages in that case was much stronger than in the instant case. Was the plaintiff entitled to at least nominal damages on the evidence adduced? On the facts in Friesen v. Reimer,

supra, we assume that the court found the verdict of the jury was obviously against the weight of the evidence and that plaintiff was entitled to damages. We so interpret that decision.

If, however, Friesen v. Reimer, *supra,* is cited as authority for the proposition that a verdict for at least nominal damages must be returned by a jury in every case in which there is a direction on liability, we would take issue with the holding. We do not recognize such rule in this state in negligence actions. Nominal damages will not be allowed in a negligence action unless actual damages have been proven.

We have said that nominal damages may be recovered where a cause of action for a legal wrong is established but there is no proof of actual damages. See Stewart v. Spade Township, 157 Neb. 93, 58 N. W. 2d 841. None of these cases, however, involve a negligence action. There is some conflict in the authorities on this point but we believe this to be the better rule. A negligent act is not actionable unless it results in injury to another. A negligence action is brought not to vindicate a right but to recover compensation for all damages sustained. Proof of actual damages should therefore be essential to a recovery. The reason for the rule enunciated in cases so holding in other jurisdictions is stated as follows: "Since the action for negligence developed chiefly out of the old form of action on the case, it retained the rule of that action, that proof of damage was an essential part of the plaintiff's case. Nominal damages to vindicate a technical right, cannot be recovered in a negligence action, where no actual loss has occurred." Prosser on Torts (2d Ed.), p. 165.

Whether or not plaintiff has sustained damage is a question of fact. Even though there is a direction on liability, the plaintiff must still prove that the negligence on which the direction is given was a proximate cause of the damages alleged to have been sustained

by the plaintiff, and must also prove the extent of the damages.

The jury is the sole judge on all fact questions. To justify this court in interfering with the findings of a jury on a fact question, the preponderance of the evidence must be so clearly and obviously contrary to the findings that it is the duty of a reviewing court to correct the mistake. See, Fried v. Remington, 5 Neb. 525; Bentley v. Hoagland, 94 Neb. 442, 143 N. W. 465.

The jury in this case was composed of eight married women and four men. The jury observed the witnesses and heard their testimony. A jury is not required to accept all testimony adduced at its face value even though that testimony may be undisputed. In Snowardt v. City of Kimball, 174 Neb. 294, 117 N. W. 2d 543, we said: "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." This jury was properly told that it could apply to the subject before it that general knowledge which any man must be presumed to have.

This record presented a fact question. The jury decided it against the plaintiff. It is not proper for this court to speculate on what evidence may have induced the jury to return a verdict for the defendant. It could have been influenced by the minor damage to the car; by plaintiff's actions, such as her attendance at a dinner party after the impact; by plaintiff's ability to do her own housework without help; by the normal birth of her child 2 months later; by the subjective nature of plaintiff's complaints; by the limited medical attention received by her; by the fact that plaintiff's only medical witness was the orthopedist who examined her more than 2 years after the impact; and by many circumstances of a like nature, all of which would entail speculation on our part.

In reviewing the evidence herein, we must do so in the light of the fact that the jury verdict was for the defendant. Therefore, the defendant must have the benefit of any and all reasonable inferences deducible from the proof. Graves v. Bednar, 171 Neb. 499, 107 N. W. 2d 12.

After reviewing the record, we cannot say as a matter of law that the verdict herein was clearly and obviously against the weight of the evidence, and that plaintiff should have had at least a nominal recovery.

Plaintiff's second assignment of error concerns the giving of instruction No. 3 which is as follows: "Before the plaintiff is entitled to recover from the defendant the burden of proof is upon plaintiff to prove by a preponderance of the evidence that she suffered damages by reason of the collision and the extent and amount of such damages. If the evidence is equally balanced or if the preponderance of the evidence is in favor of defendant upon the question of damages so required to be proved by plaintiff, then your finding and verdict must be for the defendant; on the other hand, if plaintiff has proven damages to your satisfaction by a preponderance of the evidence, then your finding and verdict should be for the plaintiff in some amount."

Plaintiff's objection to the instruction is that it does not tell the jury specifically that it is to consider all of the evidence submitted. Plaintiff contends the inference is that the jury should consider only the evidence adduced by the plaintiff. In other words, plaintiff contends the jury was not specifically told in this instruction that the plaintiff was to have the benefit of any admissions in the defendant's evidence.

If there was error in this instruction, it could not be prejudicial error. As we view the evidence, there was no testimony adduced by the defendant which could be construed as an admission against the defendant's interest. If, however, it could be argued that there was such admission, the jury could not have been mis-

led, for any defect was cured by the giving of instruction No. 6 which specifically told the jury that it was to consider any admissions as to any fact or facts.

Instructions must be considered together to determine if the issues are properly submitted. The rule is stated in Bezdek v. Patrick, 164 Neb. 398, 82 N. W. 2d 583, as follows: "Instructions should be considered together in order that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside. If an examination of all the instructions given by the trial court discloses that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon. See, Blanchard v. Lawson, 148 Neb. 299, 27 N. W. 2d 217; Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293; Griess v. Borchers, 161 Neb. 217, 72 N. W. 2d 820."

We find no merit in plaintiff's assignments of error. The judgment entered by the trial court is correct and should be affirmed.

AFFIRMED.

SKAG-WAY DEPARTMENT STORES, INC., A CORPORATION, APPELLANT, V. CITY OF GRAND ISLAND, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

125 N. W. 2d 529

Filed January 3, 1964. No. 35512.

1. **Notice.** Section 25-2228, R. R. S. 1943, which provides that the insertion of a matter required to be published in one regular issue of a legal newspaper in any week should be a legal and sufficient publication for that period without regard to whether the paper had one or more than one regular issue during that period, effectively abrogates the rule laid down in Union P. Ry. Co. v. Montgomery, 49 Neb. 429, 68 N. W. 619, and Union P. Ry. Co. v. McNally, 54 Neb. 112, 74 N. W. 390, and section 16-405, R. R. S. 1943.
2. **New Trial: Appeal and Error.** During the pendency of a motion for a new trial timely filed, no appealable order is con-

sidered as having been rendered until the motion for new trial is disposed of. This rule applies in an equity case as well as in an action at law.

3. **Municipal Corporations: Sunday.** A municipal corporation may legislate reasonably with respect to Sunday observance within its corporate area.

4. **Sunday: Constitutional Law.** A prohibition of activities on Sunday is for the promotion of health, peace, and good order of society by requiring a periodical day of rest and is generally sustained on the ground that it is within the domain of police power.

5. **Municipal Corporations: Constitutional Law.** A city ordinance to meet constitutional requirements must respond to the tests required of statutory enactments.

6. ———: ———. A legislative body may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated.

7. ———: ———. With respect to whether a classification made by a legislative body is unconstitutional, discrimination is the very essence of classification and is not objectionable unless founded upon distinctions which the court is compelled to find unreasonable.

8. ———: ———. A city ordinance providing for Sunday closing cannot prohibit that which is harmless in itself, or require that to be done which does not tend to promote the health, comfort, safety, or welfare of society.

9. ———: ———. A business or occupation which has no tendency to affect or endanger the public in connection with health, safety, morals, or general welfare is not within the police power.

10. **Sunday: Constitutional Law.** Exceptions to a general Sunday closing ordinance must, if the ordinance is to be valid, bear some relation to the public health, safety, morals, or general welfare.

11. ———: ———. The city ordinance considered in the instant case violates the Fourteenth Amendment to the Constitution of the United States and Article I, sections 1 and 3, of the Constitution of the State of Nebraska.

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

J. Taylor Greer, Woods, Aitken & Aitken, and William G. Blackburn, for appellant.

Franklin L. Pierce and Richard L. Huber, for appellees.

Herbert M. Fitle, Bernard E. Vinardi, Frederick A. Brown, Edward M. Stein, Sebastian J. Todero, Walter J. Matejka, and Frederick S. Geihs, for amici curiae.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, SPENCER, and BROWER, JJ., and RONIN, District Judge.

MESSMORE, J.

This is an action brought by Skag-Way Department Stores, Inc., a corporation, plaintiff, against the City of Grand Island, a municipal corporation, the Councilmen, Mayor, and Chief of Police of the City of Grand Island to temporarily and permanently restrain the defendants from enforcing the provisions of a city ordinance (hereinafter described) and to have the ordinance declared null and void. The trial court entered a temporary restraining order restraining the defendants from enforcing the ordinance. A stipulation was filed by the parties agreeing that the hearing on the application for temporary injunction be continued; that to conserve time and expense, the plaintiff's application for temporary injunction and permanent injunction be heard together; and that the restraining order previously issued remain in effect until further order of the court.

By order of the trial court, this case was consolidated for trial with three other cases wherein the plaintiffs sought to enjoin the enforcement of the ordinance here involved, which suits were filed subsequent to the instant suit. These suits are as follows: Grand Island Baking Co. v. City of Grand Island; James W. Bost, doing business as The Bost Pharmacy v. City of Grand

Island; and R. W. Crow, doing business as Top Hat TV v. City of Grand Island.

Trial was had to the court. The trial court found generally in favor of the defendants in each of the four cases. The trial court in each case held the ordinance valid, and concluded that the City of Grand Island, by its proper officials, was authorized to enact a regulatory ordinance affecting the welfare of the city and regulating its trade and commerce; that the city charter and applicable statutes were complied with; that the ordinance was legally and properly enacted and became effective October 13, 1962; that continued violation of a valid ordinance constitutes a nuisance; and that the City of Grand Island was authorized to abate such nuisance.

The plaintiff filed a motion for new trial on March 4, 1963. On March 20, 1963, the motion for new trial having not been heard or decided, the plaintiff filed a notice of appeal from the decree of the trial court, and on March 21, 1963, perfected appeal to this court. On April 5, 1963, the trial court heard arguments on the motion for new trial and overruled the motion. On April 5, 1963, the plaintiff filed in the trial court its notice of appeal from the order of the trial court overruling its motion for new trial and perfected appeal to this court. On April 18, 1963, the plaintiff filed an application in this court for injunctive relief pending appeal, together with an affidavit in support of the application. This court granted the plaintiff's application and entered a restraining order pending appeal which temporarily restrained and enjoined the defendants from enforcing the ordinance pending final determination of this action or until further order of the court.

The City of Grand Island is a city of the first class under the laws of this state, and is governed by a home rule charter.

For convenience we will refer to Skag-Way Department Stores, Inc., a corporation, as plaintiff or Skag-Way;

to the City of Grand Island as city or defendant city; and to the councilmen of the city, the mayor, and chief of police as defendants, and on occasions the names of persons here involved as may be necessary.

The plaintiff contends that the Sunday closing ordinance at issue in this appeal was published only once in the Grand Island Daily Independent on October 6, 1963; and that section 16-405, R. R. S. 1943, prescribes the requirements of publication of ordinances adopted by cities of the first class, and provides in part: "* * * and all ordinances of a general nature shall, within one month after they are passed, be published in some newspaper published within the city, or in pamphlet form, to be distributed or sold, as may be provided by ordinance; and every ordinance fixing a penalty or forfeiture for its violation shall, before the same takes effect, be published *for at least one week* in some manner above prescribed; * * *." (Emphasis supplied.)

The plaintiff further contends that article 4, section 5, of the home rule charter adopted by the citizens of the city in 1928, prescribes the identical requirements as stated in section 16-405, R. R. S. 1943, and requires that every ordinance fixing a penalty or forfeiture for its violation be published for "at least one week."

The ordinance in question does fix a penalty for its violation. It is an ordinance of a general nature, and its stated purpose is to establish a common day of rest for the citizens of the city.

The plaintiff relies on two cases, one of which is Union P. Ry. Co. v. Montgomery, 49 Neb. 429, 68 N. W. 619, wherein this court passed upon the language of chapter 14, article 2, section 51, Comp. St. 1889, which is, with one exception, identical with the language contained in section 16-405, R. R. S. 1943, and the language contained in article 4, section 5, of the home rule charter of the city. This court held in the cited case that an ordinance of the city of South Omaha which specified a speed limit for trains in the city and prescribed a

penalty for its violation, should not have been admitted in evidence because it was not a validly enacted ordinance. The cited case held that an ordinance which carried a penalty for violation of its provisions, before it becomes effective, must be published for at least one week in a newspaper published within such city, and if published in a daily paper, one insertion was not sufficient, but it must be published in each issue thereof for one week. To the same effect is the case of Union P. Ry. Co. v. McNally, 54 Neb. 112, 74 N. W. 390.

In the light of the foregoing authorities, the plaintiff asserts that the ordinance in question was not validly enacted and is void because it was not published in accordance with the law governing the publication of such an ordinance.

Section 25-2228, R. R. S. 1943, provides in part: "All legal publications and notices * * * that may by law be required to be published a certain number of days * * * shall be legally published when they have been published in one issue in each week in a daily, semiweekly or triweekly newspaper, such publication * * * to be made upon any one day of the week upon which such paper is published, except Sunday, * * *. Nothing in this act contained shall be construed as preventing the publication of such legal notices * * *. All legal publications and all notices of whatever kind or character that may be required by law to be published * * * shall be and hereby are declared to be legally published when they shall have been published once a week in a weekly, semiweekly, triweekly or daily newspaper * * *."

The purpose and intention of the Legislature were to provide that the insertion of the matter required to be published in one regular issue of a legal newspaper in any week should be a legal and sufficient publication for that period without regard to whether the paper had one or more than one regular issue during that period.

From the above it becomes apparent that section 25-2228, R. R. S. 1943, supersedes and effectively abrogates

the rule laid down in the two cases heretofore mentioned and cited by the plaintiff, and also section 16-405, R. R. S. 1943, and makes it clear that the publication of the ordinance of the city one time in the daily newspaper was sufficient. The plaintiff's contention is without merit.

The defendants contend that when the plaintiff filed a notice of appeal and deposited the docket fee in the office of the clerk of the district court as required by section 25-1912, R. S. Supp., 1961, this court had jurisdiction of the cause and all parties thereto, and the trial court was divested of such jurisdiction.

We have heretofore set forth the procedure which was taken by the plaintiff to perfect appeal to this court.

In the case of Brasier v. Cribbett, 166 Neb. 145, 88 N. W. 2d 235, this court said: "In Harkness v. Central Nebraska Public Power & Irr. Dist. (154 Neb. 463, 48 N. W. 2d 385), *supra,* the court went on to say: 'The general rule as stated by text writers is that a pending motion for a new trial seasonably filed keeps the cause in the trial court and so long as it remains undisposed of there can be no final judgment within the meaning of the statutes regulating appeals. As soon as a motion for a new trial is filed the district court's jurisdiction over the case is retained and continued. During the pendency of a motion for a new trial no appealable order is considered as having been rendered until the motion for a new trial is disposed of.' "

The rule is the same in an equity case wherein a motion for new trial is filed as in an action at law. We find no error in the plaintiff perfecting an appeal to this court on the overruling of the motion for new trial.

The ordinance in this case is designated as ordinance No. 3875. It provides in part as follows: "An Ordinance to prohibit on Sunday, or in lieu thereof, the seventh day of the week, the opening of any store, shop or place of business for the purpose of selling, or offering or exhibiting for sale, or the engaging in the business of selling or offering for sale, goods, wares or merchan-

dise, foods, flowers, trees or shrubs; to provide certain exclusions; to provide for construing of provisions of this ordinance; to provide a severability clause; to declare unlawful selling on Sunday to be a nuisance; to provide for injunction, and to fix penalties for the violation of the provisions of this ordinance.

"BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF GRAND ISLAND, NEBRASKA:

"SECTION 1. It is hereby declared by the Mayor and City Council that the intent and purpose of this ordinance is to promote the health and welfare of the people of the City of Grand Island, by establishing a common day of rest and recreation, and to designate and declare as public policy the first day of the week, commonly called Sunday, as the common day of rest and recreation for the residents of the City of Grand Island.

"SECTION 2. The word 'person' as used in this ordinance shall be construed to include any natural person, partnership, club, association or corporation. * * *

"SECTION 3. It shall be unlawful for any person or persons within the corporate limits of the City of Grand Island on the first day of the week, commonly called Sunday, to open any store, shop or other place of business for the purpose of selling or offering, or exhibiting for sale, or to engage in the business of selling, or offering for sale, therein or elsewhere, goods, wares or merchandise of whatsoever nature, or foods, flowers, trees, or shrubs, except: (1) Gasoline, oil, greases and other maintenance items used in servicing motor vehicles, boats, and aircraft; (2) Newspapers, books and periodicals, and radio and television broadcasts; (3) Beverages and refreshments; (4) Tobaccos, cigars and cigarettes; (5) Candies and confections; (6) Drugs and medicines, hygienic and sick room supplies; (7) Travel tickets, fares and trip insurance; (8) Postage, telegrams, cablegrams, telephone or other public utilities' commodities; (9) Admissions to, and fees charged at places of amusement, entertainment and recreation; (10) Meals prepared and

served for immediate consumption; (11) Natural and Artificial Ice. Provided, however, that nothing herein contained shall extend to those who conscientiously observe the seventh day of the week as the Sabbath, and in pursuance of such observance shall close and keep closed their store, shop or other place of business on the seventh day of the week, commonly known as Saturday; Nor is the same to be construed to prohibit (1) trade show or other like exhibitions held at hotels, fair grounds, auditoriums, or coliseums for the purpose of selling, offering, or exhibiting for sale, goods, wares or merchandise by wholesale distributors to retail establishments for the purpose of resale. * * *

"SECTION 6. It is hereby declared that the sale of any articles on Sunday prohibited by this ordinance, unless Saturday is conscientiously observed, shall be, and is declared to be a public nuisance, and any store or other establishment wherein such sales or offers of sales are made in violation of this ordinance is hereby declared to be a public nuisance, and any citizen of this City may enjoin said nuisance in the District Court of this district. The issuance of an injunction shall not relieve a person from criminal prosecution for violation of the provisions of this ordinance, but such remedy of injunction shall be in addition to liability to criminal prosecution.

"SECTION 7. Every person, association or corporation who shall violate this ordinance shall be guilty of a misdemeanor, and shall upon conviction thereof, for a first offense be fined a sum of not less than Twenty Five Dollars ($25.00), nor more than Fifty Dollars ($50.00), and for any subsequent offense shall be fined not less than Fifty Dollars ($50.00), nor more than One Hundred Dollars ($100.00). Each day on which the sale of a prohibited item is made, shall be deemed to constitute a separate offense.

"SECTION 8. This ordinance shall be in force and

take effect from and after its passage, approval and publication as provided by law.

"Passed and approved by a majority vote of the members of the City Council, this 3rd day of October, 1962."

The record discloses that the plaintiff operates a general, everyday, department store within the city limits; that the store has been in operation since October 1959; and that it is open from 9 a.m., seven days a week, until 9 p.m., except Sunday when it closes at 7 p.m. This store carries a general line of merchandise sold by an ordinary department store and grocery store, such as clothing, food which includes candy, nonalcoholic beverages, nonprescriptive drugs, sickroom supplies, newspapers, books, periodicals, oil, grease and other motor vehicle maintenance items, and tobacco products.

On Sunday, October 14, 1962, the chief of police of the city arrested the manager of the plaintiff for violating the city ordinance by selling to a customer a loaf of bread and a pair of gloves, and summoned him to appear in the police court of the city to answer the violation of the ordinance. The city officials stated that they intended to enforce the ordinance against the plaintiff unless restrained from doing so.

The manager testified on cross-examination that the store had 97 employees, 35 to 40 of which worked on Sunday; that the plaintiff had part-time and full-time employees, most of whom work a 42-hour week; and that at most, 900 cars are parked in the parking lot of the plaintiff's store on Sunday at one time, and probably 100 cars that could not get into the parking lot were parked in the street.

The Grand Island Baking Company operates two bakeries within the city, sells bakery products wholesale and retail, and operates four retail outlets from which it sells bakery products and dairy products. In addition, it operates a restaurant grill at one of the four retail outlets. One of the bakeries, all four of the retail outlets, and the restaurant grill are operated on Sunday and have

been for many years. The Sunday retail business produces $1,200 to $1,500 in sales, and Sunday is one of the company's better business days. The manager of the main bakery outlet was arrested on October 14, 1962, for selling bakery and dairy products in violation of the ordinance.

James W. Bost testified that he operated the Bost Pharmacy and had operated it in its present location since the latter part of April 1960. He is a registered pharmacist. He further testified that the store is a general drugstore wherein prescriptions are filled and such items as toiletries, drugs, sundries, miscellaneous items such as tobacco products, flashlights, greeting cards, toys, and gift items are sold. The store also operates a soda fountain. This witness further testified that Sunday sales were from 150 to 165 percent better than weekday sales. On Sunday, October 21, 1962, he was arrested for selling a child's toy and a greeting card in violation of the ordinance.

Mr. Crow, who operated and owned the Top Hat TV store, testified that he had operated this business since 1955. The business consists of the sale of various items of furniture, television sets, sewing machines, washing machines, refrigerators, home freezers, air conditioners, and other appliances, and the servicing of such appliances, together with the sale of any parts and supplies required in servicing work. He further testified that he had kept his place of business open on Sunday since 1955, for the sale and servicing of merchandise; that during the 12 months of 1961, this business made in excess of $17,000 in sales of appliances on Sundays; and that during the first 9 months of 1962, made in excess of $20,500 in appliance sales on Sunday. He was arrested on Sunday, October 21, 1962, for selling merchandise in violation of the ordinance.

The business of the plaintiff on Sunday constitutes the third largest selling day in a normal week. The overhead on Sunday is the same as other days, except that

on Sunday the plaintiff has been paying its employees time and a half.

The pertinent assignments of error contended for by the plaintiff are as follows: The trial court erred in holding that the ordinance was constitutional as against the various grounds of unconstitutionality raised by the plaintiff, namely, unreasonable classification of businesses and commodities granting special privileges and immunities to one class not granted to another; and that the ordinance is unreasonably discriminatory.

The following applies to the city in the instant case. It does have the police power to enact a Sunday closing ordinance, as shown in the case of Arrigo v. City of Lincoln, 154 Neb. 537, 48 N. W. 2d 643. This case also bears on other matters pertinent to a determination of this appeal. This court said: "A municipal corporation by virtue of its police power may legislate reasonably with respect to Sunday observance within its corporate limits, and such an ordinance is valid if it does not violate any constitutional guarantee or does not conflict with the general laws of the state. The prohibition of specified acts on Sunday is for the promotion of health, peace, and good order of society by requiring persons to have a periodical day of rest and is generally sustained on the ground that it is within the domain of the police power. Such a regulation is essentially civil and not religious. Stewart Motor Co. v. City of Omaha, 120 Neb. 776, 235 N. W. 332; State v. Somberg, 113 Neb. 761, 204 N. W. 788; Liberman v. State, 26 Neb. 464, 42 N. W. 419, 18 Am. S. R. 791; Ernesti v. City of Grand Island, 125 Neb. 688, 251 N. W. 899; * * * 50 Am. Jur., Sundays and Holidays, § 7, p. 805, § 10, p. 809.

"An ordinance of the character of the one involved in this case must be based upon a classification which is not unreasonable or arbitrary. It cannot be class legislation. The demand of the organic law is that all similarly situated must be included and none may be excluded whose relationship to the subject matter can-

not by reason be distinguished from that of those included. There is a legal presumption in favor of the reasonableness of a city ordinance unless the contrary inheres therein or is shown by evidence. It is competent for a city by ordinance to make a classification, but to be valid it must rest upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified. A city ordinance to meet constitutional requirements must respond to the same tests as are required of statutory enactments. Webber v. City of Scottsbluff, 141 Neb. 363, 3 N. W. 2d 635."

The ordinance in question in the above case required the closing of business houses generally, including grocery stores and meat markets; prohibited the sale of groceries and articles ordinarily sold in a grocery store, and meats and other products ordinarily sold in meat markets, from such stores; but permitted other business houses to be open on Sunday for necessary purposes and to sell fresh fruits, ice, bread, and milk, even though such food items were products ordinarily sold in a grocery store or meat market. This court said: "The effect and result of these provisions are that the places of business excepted from the ordinance may be open on Sunday and may transact with the public business 'for necessary purposes,' and any or all of them may on Sunday without restriction sell as they do on any other day 'fresh fruits, ice, bread and milk.' The privileges and rights conceded to them are denied to grocery stores and meat markets. The places of business exempted and grocery stores and meat markets are shown by the record in competition in areas conceded to the former and prohibited to the latter. The businesses favored by the ordinance affect the permissible subject matter of this legislation in very much, if not in identically, the same way as the business activities of appellants. The keeping open and operation of each requires like atten-

tion and efforts, and each furnish to the public in many instances similar or identical items of merchandise. Reason cannot explain how the health, peace, and good order of society is promoted by permitting the sale on Sunday of articles and items usual to a cigar store 'for necessary purposes' and by prohibiting the sale thereof on Sunday upon the same qualification by and in grocery stores. It is unreasonable and arbitrary to allow the unrestricted sale on Sunday by fruit stores and the other exempted places of 'fresh fruits, ice, bread and milk' and to deny this privilege and right to grocery stores or meat markets. There is no reason that justifies the regulation of grocery stores and meat markets in this regard which does not apply in equal force to the businesses exempted from the ordinance. They are, within the showing made in this case, similarly situated with reference to the permissible subject matter sought to be dealt with by the ordinance. Legislation involving similar improper classification has been condemned by this court."

In considering the ordinance in the instant case it is noted that it only proscribes some retail and wholesale business activities which sell any commodities coming within the eleven general categories of commodity exceptions, and those retail and wholesale businesses which conscientiously observe Saturday as their Sabbath, and those wholesale businesses (but not retail businesses) which sell through a trade show or other like exhibitions are exempted from the provisions of the ordinance and permitted to engage in business on Sunday.

The record discloses that many retail businesses that are permitted by the ordinance to continue to sell commodities on Sunday are in competition with the plaintiff's general department and grocery store, the Bost Pharmacy, the Top Hat TV appliance and service store, and the Grand Island Baking Company retail stores in the commodities that are sold. The record shows that many filling stations within the city limits, which are

allowed to remain open on Sunday, offer for sale on such day various items prohibited under the terms of the ordinance, such as flashlight batteries, sunglasses, charcoal lighter fuel, dinnerware sets, toy firetrucks, and scotch tape. At a bus depot there are offered for sale camera films, balloons, various types of toys, fountain pens, ballpoint pencils, toilet soap, pocket knives, shampoos, hairnets, playing cards, razors, razor blades, and combs. There is also a hotel within the city limits where there are offered for sale a variety of curios, ashtrays, belts, and pennants. There is also a filling station which offers some of the items mentioned above, and also fertilizer. Another filling station carries some of the items offered for sale above, and in addition shaving cream, nail clippers, and other items which are prohibited by the ordinance and which are sold by retail businesses permitted to be open on Sunday.

A great part of the business activity in the city on Sunday in terms of employees employed and business transacted is not prohibited by the ordinance, such as manufacturing, warehousing, transportation, building and highway construction, all types of personal and professional service businesses such as laundries and dry cleaning establishments, and all types of mechanical and artisan labor.

Businesses observing Saturday as their Sabbath are required to stay closed on Saturday and are not permitted to sell the excepted goods and merchandise on Saturday while every other business covered by the ordinance may at least sell the excepted goods on Sunday, as shown in the ordinance.

It is obvious that classifications have been set up by the city council in the enactment of this ordinance and that discrimination has been exercised in the establishment of such classifications. In one class are businesses which sell commodities as compared to a class of businesses which do not sell commodities but manufacture, warehouse, transport, or perform services on or with re-

spect to such commodities. A second classification exists, with one class established being businesses which sell the proscribed commodities, as compared to businesses which sell the excepted and therefore permitted commodities.

In the case of Gronlund v. Salt Lake City, 113 Utah 284, 194 P. 2d 464, which we deem applicable to the instant case, the court considered a closing of business on Sunday ordinance which provided: "It shall be unlawful for any person to offer or expose for sale, or sell in or from a place of business located in Salt Lake City, any commodity upon the first day of the week, commonly called Sunday; excepting that foods may be sold to be eaten on the premises where sold; fruits and vegetables sold by the producer on the premises where produced; and drugs, medicines, surgical appliances; fresh milk; ice cream and soda fountain dispensations; candy and confections; bottled soft drinks; bread and bakery products; ice; gasoline and oil; tobacco and cigars; dentifrices and toiletries; newspapers and magazines; sporting equipment (but not including sports clothing); beer; nursery products, such as trees, shrubs, flowers, plants, and bedding plants; and parts and equipment for automobiles and other vehicles which are necessary to be installed for repair purposes on Sunday, may be sold."

The analysis of the discrimination issues made by the Utah Supreme Court is worthy of consideration. The court said: "Such being the case, the narrower question confronts us: Is the ordinance of Salt Lake City adapted to accomplish the objects or some of them for the accomplishment of which the power is granted, or is it rather an arbitrary exercise of the assumed grant of power and hence not within the intendment of the legislative grant of power and therefore violative of constitutional guarantees against unreasonable discrimination?

"In seeking the answer to the question thus stated, it may be helpful here to reassert certain guiding con-

cepts voiced by this court in Broadbent v. Gibson (105 Utah 53, 140 P. 2d 939), *supra*. In determining constitutionality, statutes are presumed to be constitutional until the contrary is clearly shown. The constitutionality of general Sunday closing laws is no longer to be doubted. The purpose of such statutes is to protect society by establishing a compulsory day of rest. In determining whether or not a classification made by a legislative body is unconstitutional it must be remembered that discrimination is the very essence of classification and is not objectionable unless founded upon distinctions which the court is compelled to find unreasonable. In 12 Am. Jur., p. 217, sec. 521, the following rule is enunciated: 'Before a court can interfere with the legislative judgment it must be able to say that there is no fair reason for the law that would not require with equal force its extension to others which it leaves untouched.'

"In State v. Mason, 94 Utah 501, at page 508, 78 P. 2d 920, 923, 117 A. L. R. 330, we stated: 'In order to see whether the excluded classes or transactions are on a different basis than those included, we must look to the purpose of the act. The objects and purposes of a law present the touchstone for determining proper and improper classifications.'

"With these criteria in mind, we address ourselves to the provisions of the ordinance. First to be noted is that it is not a general Sunday closing law in the sense that it prohibits the performance of labor and the pursuit of gainful occupation—works of charity and necessity excepted—on Sunday. It has reference only to mercantile pursuits, indirectly limiting those pursuits by preventing the sale on that day of all commodities with specified exceptions. Nothing in the ordinance prohibits manufacturing, transportation, personal service, warehousing, or the pursuits of the mechanics and the artisans. Building contractors and the artisans employed by them may carry on Sunday work. Banks, pawn shops,

laundries, and cleaning establishments, automobile and appliance repair shops, barber shops and beauty parlors, to mention but a few of the commercial activities which it is common knowledge are carried on within the corporate limits of Salt Lake City, may operate in the usual manner on Sunday.

"Whether the purpose of the ordinance in question be conformable to the original purpose of such acts, to protect religious observance of the Sabbath or that of the protection of society by establishing a compulsory day of rest, it is not clear why the prohibition of the sale of commodities is in furtherance of such purpose or object and the prohibition of the various permitted commercial activities is not. It is difficult to conceive why it is promotive of the health, safety, morals, peace, good order, comfort and convenience of the inhabitants of Salt Lake City to prohibit in effect the working of a salesman or saleswoman on Sunday, while permitting the employment of common laborers, artisans, stenographers and laundresses. * * *

"The principal attack upon the ordinance in question * * * is directed at the exceptions in the enactment from the general prohibition against sale and offering for sale of commodities on Sunday. In view of what we have said hereinabove as to the ordinance not being a general Sunday closing law designed to accomplish the purposes it purports to effect, we shall devote little space to the argument made as to discrimination between the sale of commodities. Even bearing in mind the rule that the classification upon which a Sunday closing law is based is within the discretion of the legislative branch and hence will be upheld unless clearly arbitrary, it is difficult to conceive of a fair reason for some of the items excepted. It is readily apparent that some of the exceptions are clearly based on necessity. But as to others, even considering the desirability of promoting recreational activity on Sunday, no fair reason suggests itself as to why their sale should be permitted on Sunday

while the sale of other commodities is prohibited. Neither sporting equipment nor nursery products are such from the standpoint of the buyer or seller that they cannot be purchased on a week day, though it is the intention of the buyer to use the equipment and plant the tree or flowers on a Sunday. Neither is likely to deteriorate over Saturday night or be depleted during Sunday. Boxing gloves and baseball bats are at least as staple as butter and bananas. The same may be said of dentifrices and toiletries, tobacco and beer. The classification being on a commodity basis, it is arbitrary to permit the sale of a can of beer on Sunday and prohibit the sale of a can of orange juice or a can of coffee."

In Ernesti v. City of Grand Island, 125 Neb. 688, 251 N. W. 899, quoting from State v. Farmers & Merchants Irr. Co., 59 Neb. 1, 80 N. W. 52, the court said: " 'The rule established by the authorities is that while it is competent for the legislature to classify, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified. See Cooley, Constitutional Limitations (5th ed.) 481.' " See, also, City of Mt. Vernon v. Julian, 369 Ill. 447, 17 N. E. 2d 52, 119 A. L. R. 747; Pacesetter Homes, Inc. v. Village of South Holland, 18 Ill. 2d 247, 163 N. E. 2d 464.

In Pacesetter Homes, Inc. v. Village of South Holland, *supra,* the court held in effect that a city ordinance providing for Sunday closing cannot prohibit that which is harmless in itself, or require that to be done which does not tend to promote the health, comfort, safety, or welfare of society; and that a business or occupation which has no tendency to affect or endanger the public in connection with health, safety, morals, or general welfare is not within the police power.

In City of Mt. Vernon v. Julian, *supra,* the court held that exceptions to a general Sunday closing ordinance

must, if the ordinance is to be valid, bear some relation to the public health, safety, morals, or general welfare.

We conclude, from a review of the ordinance and the authorities applicable thereto, that such unequal and unfair treatment of businesses and persons employed by such businesses is patently unreasonable, arbitrary, and discriminatory, and violates the constitutional provisions contained in the Fourteenth Amendment to the United States Constitution, and Article I, sections 1 and 3, of the Constitution of the State of Nebraska.

The Fourteenth Amendment to the Constitution of the United States is in part as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, section 1, of the Constitution of the State of Nebraska, refers to equal rights, and provides: "All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty and the pursuit of happiness. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed."

Article I, section 3, of the Constitution of the State of Nebraska, provides: "No person shall be deprived of life, liberty, or property, without due process of law."

Reason cannot explain how the sale of a loaf of bread, a pair of gloves, a child's toy, or a greeting card on Sunday affects the health, peace, and good order of society.

In the light of the evidence adduced and the authorities heretofore cited, we conclude that the judgment of the trial court should be reversed and the cause remanded with directions to render judgment declaring the ordinance void and of no effect, in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CHARLES J. STAHLHUT, APPELLANT, v. COUNTY OF SALINE, APPELLEE.

125 N. W. 2d 520

Filed January 3, 1964. No. 35479.

1. **Trial.** A general verdict will not be vacated on the ground of irregularity if a construction is possible which will make it effective rather than void.
2. ———. 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.
3. ———. 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.
4. ———. Instructions should be considered together in order that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside.
5. **Trial: Appeal and Error.** If an examination of all the instructions given by the trial court discloses that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon.
6. **Pleading: Trial.** The allegations of a pleading are always in evidence for all purposes of the trial. They are before the court and jury and may be used for any legitimate purpose.
7. ———: ———. A party may at any and all times invoke the language of the pleading of his adversary on which the case is tried, on a particular issue, as rendering certain facts indisputable; and in doing this he is neither required nor permitted to offer the pleading in evidence.
8. **Trial: Appeal and Error.** Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defects.
9. ———: ———. Where an instruction is given to a jury, which it is claimed did not fully state the rule of law upon the subject involved therein, but did not misstate any rule to be applied, the attention of the court should be called to the omission, as claimed, by an instruction containing the alleged omission. If not, there can be no ground for reversal therefor.

Appeal from the district court for Saline County: JOSEPH ACH, Judge. Affirmed.

Chambers, Holland, Dudgeon & Hastings and Thomas J. Dredla, Jr., for appellant.

Steinacher & Vosoba and Stanley Bartos, for appellee.

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

MESSMORE, J.

Charles J. Stahlhut, plaintiff, brought this action at law in the district court for Saline County, against the County of Saline, defendant, to recover damages for personal injuries sustained by the plaintiff and damage to his automobile due to the negligence of the defendant in failing to properly maintain a bridge which collapsed while the plaintiff was driving over it. The case was tried to a jury, resulting in a verdict for the defendant on its counterclaim in the amount of $8,500. The plaintiff filed a motion for new trial or in the alternative a motion for judgment notwithstanding the verdict. This motion was overruled. The plaintiff appeals.

The County of Saline is a governmental subdivision of the State of Nebraska, charged by the laws of the State of Nebraska with the construction and maintenance of certain county roads within its boundaries. The accident herein involved occurred on or about January 1, 1961, upon a bridge and roadway which the County of Saline constructed and erected and was liable to maintain and keep in repair. This bridge was located at a point approximately 200 feet west of the corporate limits of the city of Crete, for the use and convenience of automobiles and other traffic using the county road crossing the bridge. It is admitted that the bridge fell or collapsed about January 1, 1961.

So far as necessary to consider on this appeal, the pleadings reflect the following: The plaintiff alleged

in his amended petition that the proximate cause of the plaintiff's damages was the negligence and carelessness of the defendant County of Saline in the care and maintenance of the bridge which it was required to maintain, in that the defendant negligently permitted all of the struts of the bridge to become rusted, worn, and weakened; in that the defendant failed to repair the struts of the bridge when it knew, or should have known, that such struts were rusted and worn out to the point where the bridge would not carry ordinary traffic; and in continuing to maintain the bridge when the defendant knew, or should have known, that the entire structure of the bridge had become old, obsolete, deteriorated, and rusted and therefore unfit for use by modern traffic.

The defendant, in answer to the plaintiff's amended petition, alleged that the collapse of the bridge and whatever damage, if any, resulted therefrom was occasioned solely by the plaintiff's own negligence and without any fault or negligence on the part of the defendant or its employees. The defendant, for counterclaim against the plaintiff, alleged that on or about January 1, 1961, at about 12:30 a.m., the plaintiff went upon the bridge from the west, proceeding east, in his automobile; that he operated the same while on the bridge in a careless and negligent manner; and that he permitted the automobile to strike the truss uprights, railing, and lower chord of the bridge on the north side thereof with such force as to cause the bridge to collapse and fall into the river below, pulling with it a part of the west and east abutments and approaches thereto. The specific acts of negligence on the part of the plaintiff in the operation of his automobile which constituted the sole proximate cause of the collapse of the bridge and the resulting damages, were alleged as follows: That the plaintiff failed to have his automobile under proper and reasonable control; failed to maintain a proper lookout; failed to keep his automobile on the right side of the bridge; operated his automobile at a speed greater

than was reasonable and prudent under the conditions then existing; and operated his automobile carelessly and recklessly and drove it with such force and speed against the north side of the bridge as to cause the superstructure of the bridge to weaken and the entire bridge, except the approaches thereto, to collapse. It was further alleged that the part of the bridge struck by the plaintiff's automobile was about the center of the lower chord, truss, and railing; and that due to the carelessness and negligence of the plaintiff as above set forth the bridge became worthless and unfit for travel so that it would have to be wholly rebuilt by the defendant at great cost and expense. The defendant prayed for judgment against the plaintiff for damages.

The plaintiff's reply to the defendant's answer to the plaintiff's amended petition and to the counterclaim of the defendant was a general denial of new matter contained therein.

The plaintiff filed an answer to the counterclaim of the defendant wherein the plaintiff specifically denied any negligence on his part in the operation of his automobile; and alleged that the bridge had become worthless and unfit for travel, had no value whatever, and was actually a hazard to the traveling public.

The plaintiff assigns as error that in view of the amount of the verdict based upon comparative negligence of the parties and upon instruction No. 14, the verdict reflected that the jury had to have found the defendant guilty of more than slight negligence; that the court erred in giving instruction No. 14 in that the instruction did not limit the negligence of the plaintiff to that charged by the defendant and counterclaimant in the pleadings, and authorized a recovery for negligence generally; and that the instruction was further erroneous in that it allowed a recovery by the defendant and counterclaimant for the reasonable cost of replacing the bridge with one of like kind and quality with no mention

of a deduction for what had been recovered by way of salvage.

The plaintiff testified that he lived in Crete, was 41 years old, and worked in his father's drugstore; and that at about 12:30 a.m., January 1, 1961, he had an accident while he was driving his automobile in an easterly direction at a point approximately 200 feet outside the city limits of Crete and at a point where a bridge, owned and maintained by the defendant, crosses the Blue River. When he arrived at the bridge, there was no traffic coming toward him. He went onto the bridge at an approximate rate of speed of 35 to 40 miles an hour. The roads were dry and the floor of the bridge was dry. As he started across the bridge, his first sensation was a weightless feeling, and he felt like his "stomach went up in the air a little bit." The next thing he remembered he was trying to crawl out of the debris. He was out of his automobile, but did not know what had happened to it. The bridge had collapsed, and he believed that he was down below on some of the planks of the bridge. He could feel blood on his face. He did not know where his automobile was. He heard people calling, and he started to walk. He found his automobile had crossed the bridge. Up to the time he experienced the "up and down" feeling in his stomach, his automobile had not struck the bridge. He further testified that he believed his car must have struck something.

On cross-examination the plaintiff testified that he was familiar with the bridge and had crossed it at times for 31 years; that he never made any complaint about the bridge; that at about 12:10 or 12:15 a.m., January 1, 1961, he went across the bridge to the west going to Tuxedo Park; that the bridge had been closed but was opened the afternoon of December 31, 1960; that he did not know what happened; that the right rear fender of his automobile had been mashed in a little bit; and that the center part of the front end of his automobile was

bent in a "V" shape, like it had struck something.

An engineer who qualified as an expert relating to designing, constructing, and inspecting bridges testified that on the day following the accident, at the request of an attorney, he went to the scene of the accident and inspected the bridge to determine the cause of its collapse. He visited the scene of the accident on January 6 and 7, 1961, spending a good portion of the 2 days in making his investigation. Certain exhibits, being pictures of the scene of the accident, were received in evidence. This witness testified in detail about these exhibits. This witness testified that the deterioration of the steel portions of the structure which he examined disclosed that the entire bridge was deteriorated insofar as the steel work was concerned, and pointed out the various portions which were deteriorated and rusted as shown by the exhibits. He gave as his opinion that the bridge collapsed without any vehicle contacting it, and that the collapse would have to have been caused by a failure of some member of the bridge caused by either the weight of the vehicle coming onto the bridge or the element of time and deterioration of the steel; and that in his opinion the lifespan of the bridge was up, and that it failed at that particular time. On cross-examination this witness testified that from an examination of certain pieces of the bridge, he believed that such pieces could have come in contact with an automobile.

The county surveyor, called as a witness for the plaintiff, testified that his duties had to do with the maintenance and inspection of the county bridges; that he inspected the bridge here involved in the latter part of 1960; and that he gave the orders on what maintenance the bridges needed. In December 1960, he thought a new floor should be put on the bridge in question. He made an inspection of the condition of the structure, and while the bridge was not new, it was a pretty fair structure at the time he inspected it, however there was some

evidence of deterioration in the steel structure of the bridge.

A witness for the defendant testified that he knew the location of the bridge; that he had crossed the bridge regularly for the first 40 years of his life, and the last 4 or 5 years had crossed it at least twice a month; and that he had noticed no defect in the bridge while passing over it the afternoon of December 31, 1960.

A state trooper testified that his area of operation included parts of Lancaster, Gage, and Saline Counties; that he received a call at 1:03 a.m., January 1, 1961, over the radio, reporting an accident; and that he proceeded to the scene of the accident, arriving there about 1:30 or 1:45 a.m. He noticed a trail of antifreeze from the automobile back 269 feet to the intact edge of the bridge, plus a distance on the collapsed part of the bridge. He examined the automobile which showed that the front center of it was pushed back like it had struck something. There was rust on the hood, chrome, grille, and bumper of the automobile. He had crossed the bridge proceeding west about 10:30 p.m., on December 31, 1960.

The sheriff of Saline County testified that he received a call the morning of January 1, 1961, and went immediately to the scene of the accident; and that the bridge was down in the river. He identified pieces of the plaintiff's automobile rammed into the bridge railing and paint from the plaintiff's automobile on a bent piece of bridge railing.

The county commissioners who testified stated that no complaint had ever been made to them about the bridge.

The county surveyor, who is also the bridge foreman for the county, testified for the defendant that he was involved in the construction of new bridges and culverts and the inspection of bridges in the county to ascertain the general condition and need of repairs of the bridges; and that the bridge in question was a high-truss bridge.

In inspecting steel bridges of the type involved, he looked for missing bolts, rusted or bad parts of the bridge, and also to see whether or not the piling was in good condition. He also looked for deterioration of any parts of the bridge. He had inspected this bridge several times, and examined it once or twice a year. The bridge had been repaired several times. He further testified that the cost of replacing the whole bridge would be around $17,000; that salvage plank and scrap iron from the bridge was sold for $500; and that the defendant had recovered planks from the bridge which he estimated to be of the value of $1,646, and iron of the value of $684.80. On cross-examination he admitted that he was not a mechancial engineer, and the only training he had was actual experience working for the county, first as a helper and then as bridge foreman.

An expert engaged in the engineering field was called by the defendant and testified that he noted some deterioration of the bridge, but found the members to be basically sound. He gave as his opinion that an impact caused the bridge to collapse, and concluded that the car hit a specific part of the structure knocking it out and causing stresses and rupture of other parts. In his opinion the structure was in place when struck by the automobile, and the impact would have collapsed the bridge, no matter what its condition.

The plaintiff contends that the damages in this action are not in dispute; that the bridge foreman for the defendant testified that to replace the bridge would cost around $17,000; that the jury returned a verdict of $8,500; that it is undisputed that the defendant received salvage in the amount of $2,830.80, leaving the undisputed damage in the amount of $14,169.20; and that, therefore, it is evident that the jury must have found the defendant guilty of more than slight negligence which would bar recovery on the part of the defendant on its counterclaim.

The plaintiff cites Guerin v. Forburger, 161 Neb. 824,

74 N. W. 2d 870. In that case the executrix of the estate of James J. Guerin, deceased, brought the action to recover damages for herself as the widow of the decedent who was killed in an accident involving an automobile and a truck, also for decedent's burial expenses, and for damages to decedent's car. The funeral director fixed the expenses of decedent's burial at $830. The jury returned a verdict therefor in the amount of $456.50 or 55 percent of the amount. In support of the third cause of action it was stipulated by the parties that the reasonable value of the property damage to the decedent's car was $1,250. The jury returned a verdict on this cause of action for $687.50 or 55 percent. Thus it was self-evident that the jury reduced the amount of the plaintiff's recovery to the extent of 45 percent. This clearly indicated that the jury found decedent to have been guilty of more than slight negligence and in a degree sufficient to defeat any right of recovery therein.

Applying the reasoning of the above-cited case, the plaintiff states that the verdict of $8,500 in the instant case amounted to almost 60 percent of the undisputed damages which reflects that the jury must have found the defendant guilty of more than slight negligence and sufficient to bar recovery on the part of the defendant.

Although the case of Ireland v. Stalbaum, 162 Neb. 630, 77 N. W. 2d 155, is not exactly in point, it is however applicable to the instant case. It was stipulated that the manager of a motor company, if present, would testify that it would require the sum of $2,570.37 in labor and parts to restore the tractor involved to its condition as nearly as possible prior to the accident, and that the fair and reasonable cost of restoring the trailer to the same condition would amount to $349.07, making a total amount of $2,919.44. The parties did not stipulate that the amount was the cost of repairs, but only that the witness, if called, would so testify. The jury returned a verdict of $1,853.66. There was evidence of damage, other than that contained in the stipu-

lation, which consisted of photographs and testimony as to physical injury. The court said: "Under the rules stated the jury had the right to consider this evidence along with the evidence contained in the stipulation and in the light of all of it determine for itself the true amount of the plaintiff's damages.

"In this light the jury with perfect propriety and in valid performance of its function could have arrived at $1,853.66 as the true and full amount of the plaintiff's damage. If it did so, it performed its duty as that duty was outlined in the instructions. Again if it did so it must be said that the verdict was valid. * * *

"The correct rule to be applied in situations such as this is that a general verdict will not be vacated on the ground of irregularity if a construction is possible which will make it effective rather than void. It will be declared void only where it is so uncertain that it cannot be clearly ascertained what, if any, issues were passed upon by the jury. Abrams v. Lange, 158 Neb. 512, 63 N. W. 2d 781."

In the instant case the jury did not have to accept the bridge foreman's opinion. As a matter of fact, the bridge foreman testified that from his experience as a helper and subsequently a bridge foreman, he believed that to replace the bridge would cost around $17,000. In addition to the bridge foreman's testimony there was evidence, both direct and circumstantial, for the consideration of the jury. There was a model of the bridge; there were no less than 27 photographs relating to the bridge and its condition; there were three pieces of the bridge admitted into evidence; and two qualified engineers gave the jury the benefit of their descriptions of the bridge and its component parts and their functions. In addition, there was testimony of eyewitnesses as to the condition of the bridge before and after it collapsed.

In Klein v. Wilson, 167 Neb. 779, 94 N. W. 2d 672, this court said: "It was the duty of the jury to consider

and weigh all of the evidence and, with regard to testimony, to give it such weight as in its judgment it was entitled to receive. * * * The controlling principles are contained in the following stated rules:

" 'It is the province of the jury to harmonize the testimony in so far as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses.' Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168. * * *

" '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.' Patrick v. Union Central Life Ins. Co., 150 Neb. 201, 33 N. W. 2d 537. * * *

"The jury had the right to cause the amount of the verdict to depend upon the application of either or both of these rules."

We conclude that the plaintiff's contention above raised cannot be sustained.

The plaintiff next contends that instruction No. 14 given by the trial court constituted prejudicial error. This instruction is as follows: "On the defendant's counterclaim, if you find by a preponderance of the evidence that the bridge collapsed by reason of the negligence of the plaintiff and further find that the said bridge was injured or damaged beyond repair, that is, that it could not be repaired and made as good as it was before it collapsed by replacing injured or damaged parts with new parts of like character, then you will find for the defendant on its counterclaim. The amount of its damages will be such a sum as you find from a preponderance of the evidence would be the reasonable cost of replacing said bridge with one of like kind and quality to take the place of the one injured or destroyed by such negligence.

"However, if you also find that the defendant was guilty of contributory negligence as defined in Instruc-

tion No. 10 then and in that event you will be governed by said Instruction No. 10 and reduce the amount of defendant's recovery accordingly."

The plaintiff's objection to the instruction is that it did not confine the defendant's right to recover for negligence alleged in the counterclaim of the defendant but permitted the jury to find for the defendant for negligence generally.

The plaintiff cited Styskal v. Brickey, 158 Neb. 208, 62 N. W. 2d 854, which holds: "An instruction which does not limit negligence to that charged in the plaintiff's pleading, but authorizes recovery for negligence generally, is objectionable." See, also, Ellis v. Union P. R. R. Co., 148 Neb. 515, 27 N. W. 2d 921; Norfolk Beet-Sugar Co. v. Hight, 56 Neb. 162, 76 N. W. 566; 38 Am. Jur., Negligence, § 370, p. 1090; 53 Am. Jur., Trial, § 574, p. 452.

The plaintiff further objects to instruction No. 14 for the reason that nowhere was the jury instructed to make any deduction for the salvage received by the defendant in the amount of $2,830.80 for portions of the bridge that collapsed.

The defendant asserts that instructions should be considered as a whole and if they fairly submit the case the instructions should be approved. Failure in an instruction on damages to refer to the allegations of negligence is not erroneous where other instructions properly set forth the allegations and elements of negligence, and further instruct the jury to consider the instructions as a whole.

In instruction No. 9, the court stated in part: "In order for the defendant to recover on its cross-petition the defendant must prove by a preponderance of the evidence the following necessary elements and allegations * * *." Then is set forth the specific allegations of negligence which are identical with the negligence charged in the defendant's counterclaim. The court stated further in instruction No. 9: "(2) That the negli-

gence of the plaintiff was the direct and proximate cause of the collapse of said bridge. (3) The amount of damages suffered by the defendant by the loss of said bridge."

The rule is stated in Bezdek v. Patrick, 164 Neb. 398, 82 N. W. 2d 583, as follows: "Instructions should be considered together in order that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside. * * * If an examination of all the instructions given by the trial court discloses that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon."

Instruction No. 9 given by the trial court required the jury to limit its consideration of the plaintiff's negligence to that alleged in the defendant's counterclaim. In considering the instructions as a whole, we do not believe that the jury was misled by the failure to include in instruction No. 14 the specific allegations of negligence pleaded by the defendant in its counterclaim. The following rule is applicable.

In Benedict v. Eppley Hotel Co., 161 Neb. 280, 73 N. W. 2d 228, this court said: "In determining whether or not there is error in a sentence or clause of an instruction it will be considered with the instruction of which it is a part and the other parts of the charge to the jury and the true meaning thereof will be deduced not from the sentence or phrase alone but by a consideration of all that it said on the subject. Instructions should be considered as a whole and if they fairly submit the case the instructions will be approved."

As to the plaintiff's objection to instruction No. 14, it appears to be that the instruction should have permitted the jury to deduct any salvage value from the amount found for the defendant.

The defendant's counterclaim contained the following language: "That due to the carelessness and negligence of the plaintiff as above set forth the said bridge became worthless and unfit for travel, so that it will

have to be wholly rebuilt by the defendant, Saline County at great cost and expense to said county."

The plaintiff's answer to the defendant's counterclaim specifically denied that there was any negligence on the part of the plaintiff in the operation of his automobile, and alleged that the bridge had become so worthless and unfit for traveling that it had no value whatever and was actually a hazard to the traveling public. There was no reply to the plaintiff's answer to the defendant's counterclaim.

In the case of Barkalow Bros. Co. v. English, 159 Neb. 407, 67 N. W. 2d 336, this court held: "The allegations of a pleading are always in evidence for all purposes of the trial. They are before the court and jury and may be used for any legitimate purpose." The court further said, quoting from 2 Wigmore, Evidence (2d ed.), § 1064, p. 536: " 'Thus, any reference that may be made to them (meaning the allegations), where the one party desires to avail himself of the other's pleading, is not a process of using evidence, but an invocation of the right to confine the issues and to insist on treating as established the facts admitted in the pleadings. * * * This much being generally conceded, it follows that a party may at any and all times invoke the language of his opponent's pleading on that particular issue as rendering certain facts indisputable; and that, in doing this, he is on the one hand neither required nor allowed to offer the pleading in evidence in the ordinary manner, nor on the other hand forbidden to comment in argument without having made a formal offer; for he is merely advocating a construction of the infra-judicial act of waiver of proof.' "

In Bonacci v. Cerra, 134 Neb. 476, 279 N. W. 173, the court quoted from 1 Phillips, Evidence (4th Am. ed.) 795, as follows: " 'In fact admissions in the pleadings cannot be either proved or disproved on the trial, but must be accepted for whatever they amount to in legal

effect, without reference to any other evidence that may be adduced.' "

Considering the state of the pleadings as to salvage value, it appears that such need not be made a part of the instruction for the reason that the affirmative pleadings of the parties to this action allege that the property destroyed had no value. While the instruction is not as comprehensive and definite as might be wished, we think in the absence of any proper request by the plaintiff for further instruction, the giving of this instruction was not prejudicially erroneous.

As stated in 88 C. J. S., Trial, § 393, p. 1073: "If a correct instruction, as far as it went, on the question of damages has been given, a party who desires a more complete charge should request it, * * *."

The requested instructions made by the plaintiff contained nothing relating to the measure of damages and nothing relating to the issue of salvage.

In Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612, this court said: "It may be conceded that the instruction of itself was not sufficiently explicit, but defendants made no request for any instruction upon the issue. In that connection, the rule is that: ' "A party desiring a more explicit instruction than that given should offer such an instruction." ' * * * As held in Christensen v. Tate, 87 Neb. 848, 128 N. W. 622: 'Instructions must be considered and construed together. If they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. And, unless this is done, the judgment will not ordinarily be reversed for such defects.' Likewise, in Edwards & Bradford Lumber Co. v. Lamb, 95 Neb. 263, 145 N. W. 703, this court held: 'Where an instruction is given to a jury, which it is claimed did not fully state the rule of law upon the subject involved therein, but did not misstate any rule to be applied, the attention of the court should be called to the omission, as claimed, by an instruction containing the alleged

omission. If not, there can be no ground for reversal therefor.' "

In the instant case it was agreed that the instructions be read to the jury prior to argument. The plaintiff had ample opportunity to offer a requested instruction which might or would have been more explicit had the plaintiff so desired. See Dorn v. Sturges, 157 Neb. 491, 59 N. W. 2d 751.

For the reasons given in this opinion, we conclude that the judgment of the trial court should be affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I dissent from the majority opinion herein for the reason that I believe instruction No. 14 given by the trial court was prejudicially erroneous. This instruction is set out in the majority opinion. I call specific attention to the only portion of that instrucion covering the amount of damage, which is the following: "The amount of its damages will be such a sum as you find from a preponderance of the evidence would be the reasonable cost of replacing said bridge with one of like kind and quality to take the place of one injured or destroyed by such negligence."

Defendant's bridge foreman, who was the only witness to testify to the extent of the damages to the bridge, injected the element of salvage into the case by testifying that the salvage recovered from the old bridge totalled $2,830.80. This evidence adduced by the defendant in its proof on the damages sustained under its counterclaim is undisputed in any way. It became an element to be considered in determining the extent of the damage sustained by the defendant on its counterclaim. The instruction clearly ignores the evidence on salvage, and under the instruction the jury would not be permitted to consider it. We must therefore assume that it was not considered by the jury in the verdict it returned for the defendant.

I would remand the cause to the district court with

directions to require the defendant, County of Saline, to remit the sum of $2,830.80 from its judgment within 30 days, otherwise to grant a new trial.

CARTER, J., joins in this dissent.

ROBERT L. KRIZ ET AL., APPELLANTS, V. REX KLINGENSMITH ET AL., APPELLEES.

125 N. W. 2d 674

Filed January 3, 1964. No. 35503.

1. **Municipal Corporations: Constitutional Law.** Section 17-201, R. R. S. 1943, providing for the incorporation of villages by the county board upon the petition of a majority of the taxable inhabitants is not an unlawful delegation of legislative power or a taking of property without due process of law.
2. **Municipal Corporations.** The incorporation of a village by the county board under section 17-201, R. R. S. 1943, is a ministerial act and is subject to review in a direct action brought for that purpose.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Carl E. Willard, for appellants.

John A. Wagoner and Richard L. DeBacker, for appellees.

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

BOSLAUGH, J.

On or about September 19, 1961, a petition for the incorporation of the Village of Parkview was presented to the county board of Hall County, Nebraska. On October 19, 1961, the county board adopted a resolution which, in effect, declared the village incorporated and designated the metes and bounds of the village.

On December 4, 1962, this action was brought to enjoin the levy or collection of any tax for the use of the

village; to enjoin the officers and trustees of the village from exercising any governmental functions; and for a declaratory judgment determining that section 17-201, R. R. S. 1943, is unconstitutional and that the village does not legally exist. The plaintiffs are residents and owners of property within the village. The defendants are the village; its officers and trustees; and the board of supervisors, the board of equalization, and the county treasurer of Hall County.

Motions for summary judgment were filed by the plaintiffs and by the village and its trustees. The trial court found that no issue of fact was presented, that section 17-201, R. R. S. 1943, was constitutional, and sustained the motion for summary judgment filed by the village and its trustees. The plaintiffs' motion for new trial was overruled and they have appealed.

The sole issue which is presented to this court is the constitutionality of section 17-201, R. R. S. 1943, which provides in part as follows: "Whenever a majority of the taxable inhabitants of any town or village, not incorporated under any laws of this state, shall present a petition to the county board of the county in which said petitioners reside, praying that they may be incorporated as a village, designating the name they wish to assume, and the metes and bounds of the proposed village, and such county board or majority of the members thereof shall be satisfied that a majority of the taxable inhabitants of the proposed village have signed such petition, and that inhabitants to the number of one hundred or more are actual residents of the territory described in the petition, the board shall declare the proposed village incorporated, and enter the order of incorporation upon its records, and designate the metes and bounds thereof. Thereafter the said village shall be governed by the provisions of law applicable to the government of villages."

The statute appears to have had its origin in Laws of Nebraska, 1856. See Laws 1856, c. IV, § 1, p. 40. The pro-

cedure prescribed in section 17-201, R. R. S. 1943, is substantially that which has been prescribed and followed during the history of this state for the incorporation of villages.

The plaintiffs contend that section 17-201, R. R. S. 1943, is unconstitutional because it permits private individuals to fix the boundaries of the village without affording property owners the opportunity to be heard by a competent tribunal as to whether their property has been arbitrarily or unjustly included within the village and, therefore, is an unlawful delegation of legislative power and a taking of property without due process of law. The plaintiffs rely upon Anderson v. Carlson, 171 Neb. 741, 107 N. W. 2d 535, 83 A. L. R. 2d 831; Summerville v. North Platte Valley Weather Control Dist., 170 Neb. 46, 101 N. W. 2d 748; and Elliott v. Wille, on rehearing, 112 Neb. 86, 200 N. W. 347.

The Anderson, Summerville, and Elliott cases each involved a statute providing for the formation of a district upon a petition which fixed the boundaries of the district. Section 17-201, R. R. S. 1943, provides that the petition shall designate the metes and bounds of the proposed village, but it further provides that the county board shall designate the metes and bounds of the village. The provision which requires the county board to designate the boundaries of the village distinguishes section 17-201, R. R. S. 1943, from the statutes considered in the Anderson, Summerville, and Elliott cases. This distinction has been recognized in the decisions of this court.

In McClay v. City of Lincoln, 32 Neb. 412, 49 N. W. 282, this court said: "Where municipalities are obliged to be organized under general statutes, no expression of the legislature as to the exact boundaries incorporated can be made. The boundaries must be set by another method, and by a local government provided by statute. Unless constitutionally restrained, the legislature of a state may delegate this power to commis-

sioners, supervisors, or trustees; but it has been questioned how far this power, essentially political and administrative, may be conferred upon judicial courts. We think that the courts ought not to borrow a power not plainly conferred, and not necessary to the just administration of the laws."

In Commonwealth Real Estate Co. v. City of South Omaha, 78 Neb. 368, 110 N. W. 1007, in referring to the statute as it then existed (§ 40, art. I, ch. 14, Comp. St. 1905), this court said: "The authority thus delegated to county boards is ministerial, and may be exercised only in strict accord with the letter of the statute, and where the proper petition is presented, complying with the jurisdictional provisions, the county board has no discretion, and a failure on their part to act would justify the interference of the courts by mandamus to compel the performance of this statutory duty. * * * Construing the provisions of section 40, art. I, ch. 14, supra, it was held, in State v. Dimond, 44 Neb. 154, that the word villages, as there used, applies to villages in the ordinary and popular sense of the term, and that it was not intended to clothe large rural districts with extended municipal powers or subject them to special taxation for purposes to which they are in nowise adapted; that lands adjacent to the town or village might be incorporated therewith, provided they were in such close proximity thereto as to be suburban in character and have some unity of interest with the platted portion in the maintenance of municipal government, but that the statute did not contemplate the incorporation of remote territory, having no natural connection with the village and not adapted to municipal purposes. Other cases holding substantially the same are Village of Hartington v. Luge, 33 Neb. 623; State v. Mote, 48 Neb. 683; Village of Osmond v. Smathers, 62 Neb. 509; State v. Clark, 75 Neb. 620.

"The principle underlying these decisions is that county boards have not, by the legislature, been invested with

power to include in incorporated cities or villages property not urban in character. It follows that when a county board exceeds its powers in that respect its acts in excess of its authority are voidable, and it is the duty of the courts, upon complaint of the person aggrieved, in the absence of grounds constituting an estoppel, to restore the parties to their rights, and it was held in State v. Dimond, supra, that the courts are vested with power to inquire into the procedure leading to the incorporation of cities and villages, independently of the provisions of section 101, supra, and that the owner of the land illegally inclosed within the corporate limits of a city or village might proceed by quo warranto to test the right of a municipality to exercise jurisdiction over his property. * * * It may be conceded that, where a county board in the incorporation of a town or village acts within the scope of its delegated power, the courts would be powerless to interfere, and the rule announced in City of Hastings v. Hansen, supra, is to that extent correct, and not in conflict with the conclusion here reached."

In Elliott v. Wille, *supra,* the court noted that "the boundaries of a city or village are not fixed and determined by private individuals, and, moreover, provisions are made for the exclusion of lands that are wrongfully included within a city or village."

There is a further important distinction between section 17-201, R. R. S. 1943, and the statutes considered in the Anderson, Summerville, and Elliott cases. Section 17-201, R. R. S. 1943, contemplates an existing but unorganized village. The purpose of the statute is to provide a method whereby the taxable inhabitants of the village can organize and establish a government for the village.

In Elliott v. Wille, *supra,* mention is made of the necessity for determining whether the particular district is for the public health, convenience, or welfare. Such questions are not involved in the incorporation of

villages. In effect, the Legislature has determined such questions in advance by providing that villages shall be incorporated when the conditions set out in section 17-201, R. R. S. 1943, have been met. Thus, the action of the county board is ministerial in nature as held in Commonwealth Real Estate Co. v. City of South Omaha, *supra.*

So far as the requirements of notice and hearing are concerned, we think that the situation is analogous to the creation of a paving district upon the petition of 60 percent of the resident owners whose property directly abuts upon the street which is to be improved, as provided in section 17-510, R. R. S. 1943. In Elliott v. City of Auburn, 172 Neb. 1, 108 N. W. 2d 328, this court held that a property owner has no constitutional right to a notice and hearing upon the formation of such a district. In that case we said: "As stated in Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397: 'In Utley v. St. Petersburg, 292 U. S. 106, 54 S. Ct. 593, 78 L. Ed. 1155, it was said: "There is no constitutional privilege to be heard in opposition at the launching of a project which may end in an assessment. It is enough that a hearing is permitted before the imposition of the assessment as a charge upon the land * * * or in proceedings for collection afterwards." '

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

passage of the ordinance authorizing the work did not include any assessment, or necessitate any assessment, although they laid the foundation for an assessment, which might or might not subsequently be made. Clearly all this might validly be done without hearing to the landowners, provided a hearing upon the assessment itself is afforded." ' "

A landowner who is aggrieved may litigate the question of whether the county board had the right to include a particular tract of land within the boundaries of the incorporated village. State ex rel. Hammond v. Dimond, 44 Neb. 154, 62 N. W. 498; State ex rel. Loy v. Mote, 48 Neb. 683, 67 N. W. 810; State ex rel. Pond v. Clark, 75 Neb. 620, 106 N. W. 971; Commonwealth Real Estate Co. v. City of South Omaha, *supra*. See, also, State ex rel. Schoonover v. Crabill, 136 Neb. 819, 287 N. W. 669. To that extent, a property owner has a right to be heard before a competent tribunal as to whether his property has been arbitrarily or unjustly included within an incorporated village.

We conclude that section 17-201, R. R. S. 1943, is constitutional. The judgment of the district court is correct and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. MARCILINO N. BRITO, APPELLEE AND CROSS-APPELLANT, V. STEVE WARRICK, SHERIFF OF SCOTTS BLUFF COUNTY, NEBRASKA, APPELLANT AND CROSS-APPELLEE.

125 N. W. 2d 545

Filed January 3, 1964. No. 35516.

1. **Divorce: Parent and Child.** Where a divorced mother who has custody of children establishes a new domicile in Nebraska, that domicile becomes the domicile of the children.
2. **Parent and Child: Criminal Law.** The venue under section 28-449, R. R. S. 1943, where the father is a nonresident of Nebraska, is the county in which the children are domiciled.

3. **Constitutional Law: Parent and Child.** Section 42-705, R. R. S. 1943, which is section 5 of the Uniform Reciprocal Enforcement of Support Act, is a constitutional exercise of power.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded with directions.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellant.

Bertrand V. Tibbels, for appellee.

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

SPENCER, J.

This is an appeal by Steve Warrick, sheriff of Scotts Bluff County, Nebraska, hereinafter referred to as respondent, from a judgment of the district court for Scotts Bluff County in a habeas corpus proceeding wherein the court discharged Marcilino N. Brito from custody.

The petitioner, Marcilino N. Brito, relator and appellee, hereinafter referred to as relator, alleged that he was unlawfully deprived of his liberty by being detained in the Scotts Bluff County jail by the respondent; and that he was detained by virtue of an information charging him with the crime of nonsupport of his minor children committed in the county of Scotts Bluff from the 15th day of May 1961, to the 2nd day of July 1962. Relator also alleged that during that time and until after his arrest in Texas he was not in the State of Nebraska but was living in and was a resident of the State of Texas which was the marriage domicile. Relator was extradited under the provisions of the Uniform Reciprocal Enforcement of Support Act from the State of Texas to the State of Nebraska on the nonsupport charge.

It is relator's contention that the Scotts Bluff court does not have jurisdiction to try him on the charge of nonsupport because he was not in Nebraska at the time of the alleged commission of the offense charged. He

also contends that he can only be prosecuted in the county in which the crime was committed, which he asserts would have to be the county of his residence in Texas. He further maintains that if the various statutes should be interpreted as permitting his prosecution in Nebraska under these circumstances, they are unconstitutional and void.

The district court found the relator's detention unlawful and ordered his discharge. It held that the court was without jurisdiction to determine the guilt of the relator and that the warrant issued was void. It also held that section 42-705, R. R. S. 1943, is unconstitutional, null, and void as a contravention of Article I, section 11, Constitution of Nebraska, insofar as it authorizes trial of an accused in a county other than that in which the offense charged is alleged to have been committed. Respondent assigns each of these findings as error. We sustain the assignments of error on each point.

This is a habeas corpus proceeding, so we are here concerned solely with the jurisdictional question and not with the sufficiency of the evidence which may be adduced when the writ is denied and the relator stands trial.

The mother of the children secured an uncontested divorce from the relator in the district court of Midland County, Texas, on July 11, 1960. Sometime thereafter she moved the children to Nebraska. The trial court did not permit the relator to prove that he did not consent to his family's migration from Texas and that he was not willing for them to come to the State of Nebraska. He has filed a cross-appeal herein to present this point. We hold this to be immaterial but for the purpose of our discussion herein we will consider the evidence as having been received, and decide this case on the premise that the relator was opposed to the removal of his family from the State of Texas to the State of Nebraska.

Relator is being prosecuted under section 28-449, R. R. S. 1943, which provides, insofar as material here, as follows: "Whoever willfully fails, refuses, or neglects to provide proper food, clothing, shelter, or in case of sickness to care for his wife, wife and minor child, or minor child, * * * shall, upon conviction thereof, * * * (2) if the violation shall have continued for a period of thirty days or more be deemed guilty of a felony and be punished by imprisonment in the penitentiary for a period of not less than one year nor more than three years."

The statute is silent as to venue. It is, however, the settled law of this state that for a resident of the State of Nebraska, the county which is the matrimonial domicile fixes the venue. Preston v. State, 106 Neb. 848, 184 N. W. 925. As between counties in Nebraska there may be ample reason for this rule, but we see no reason to extend it further than the law now requires. In Schmidt v. State, 110 Neb. 504, 194 N. W. 679, we recognized an exception in a situation where the father had sent his family into another county and thereafter failed to provide either support or transportation home.

Here, however, the father is not a resident of the State of Nebraska. A divorce has terminated the marriage in the state of the marriage domicile. The mother who had the custody of the children, for reasons which do not appear but which are immaterial herein, found it necessary to move them to Nebraska, and they now are residents of this state and entitled to its protection. What should be the venue where the father is a nonresident of the State of Nebraska, and the mother who has their custody is a resident of this state? Section 28-449, R. R. S. 1943, was enacted for a wise purpose. We should not construe it so narrowly that we defeat that purpose. In Preston v. State, *supra,* the domicile of the father was the domicile of the child. Here, the mother had a right to establish a separate domicile and that domicile became the domicile of the children.

Section 29-1301, R. S. Supp., 1961, provides that the trial of criminal cases shall be in the county where the offense was committed. We have no hesitancy in holding that the offense herein was committed at the place where the children reside. The statute covers not the commission of an affirmative act but rather the omission to perform a parental duty, that of providing for the necessities of minor children. As relator points out, in Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N. W. 2d 227, we said: "In this state all public offenses are statutory, and no person can be punished for any act or omission which is not made penal by the plain import of a properly enacted statute." Here the plain import of the statute specifically makes the omission to support a penal act. It is the duty of the state to protect the lives and persons of its citizens and others temporarily resident therein. The compelling interest of the state in the welfare of children certainly includes the duty to require those who are obligated to do so to provide maintenance for their minor children.

There is great confusion among the various states as to whether a criminal charge for nonsupport of a child is affected by the nonresidence of the father. However, this confusion can be considerably reduced by an analysis of the specific statutory provisions involved and by a determination as to whether the case actually involves abandonment or desertion or whether it involves nonsupport. Abandonment and desertion involve the commission of an affirmative act at a specific time and place. Nonsupport, however, involves a continuing omission to act wherever the child is located.

As we interpret section 28-449, R. R. S. 1943, it was passed for the purpose of enforcing the natural duties of a father to his minor children. It is for the benefit of the children. It is a duty owing to the children wherever they may be or wherever, in disregard of his parental duty and the obligation inherent therein, the father permits his children to remain without proper

support. It is the omission to provide this support which constitutes a violation of the statute. Where the father might be at the time is a matter of no consequence. The omission occurs at the place where the children reside. That is the point at which the father has neglected to provide for their maintenance and where an action should lie. This holding finds support in cases from other jurisdictions which represent the majority view considering only cases involving nonsupport. See, State v. Wellman, 102 Kan. 503, 170 P. 1052, L. R. A. 1918D 949, Ann. Cas. 1918D 1006; Osborn v. Harris, 115 Utah 204, 203 P. 2d 917; Ex Parte Heath, 87 Mont. 370, 287 P. 636; State v. Tickle, 238 N. C. 206, 77 S. E. 2d 632; State v. Haworth, 66 Wyo. 238, 208 P. 2d 279.

In a state which does not recognize the Uniform Reciprocal Enforcement of Support Act, or those states which do not include the section on criminal enforcement in their act, it might be difficult to get jurisdiction of the person of the father to subject him to punishment, but this fact does not affect his guilt or his liability to punishment if he can be brought to trial. Texas does recognize the act, and granted extradition.

It is apparent that the relator is questioning the validity of the proceedings by which he was extradited from Texas. The following from State v. Wellman, 102 Kan. 503, 170 P. 1052, L. R. A. 1918D 949, Ann. Cas. 1918D 1006, is a complete answer to this contention: "* * * where a nonresident of the state has broken its criminal laws, its right to punish him ought not to be dependent on the regularity of the proceedings by which he was surrendered to its officials. In Re Moyer, 12 Idaho 250, 85 Pac. 897, 12 L. R. A. (N. S.) 227, 118 Am. St. Rep. 214 (affirmed in Morey v. Whitney, 203 U. S. 222, 27 Sup. Ct. 111, 51 L. Ed. 148, 7 Ann. Cas. 1047), the authorities on the subject are collected, and the grounds of this view are well stated in this language:

" 'We are of the opinion that after the prisoner is within the jurisdiction of the demanding state, and is

there applying to its courts for relief, he cannot raise the question as to whether or not he has been, as a matter of fact, a fugitive from the justice of the state within the meaning of the federal constitution, and the act of Congress. A careful and diligent examination of the many authorities touching upon this subject, and the reasons that exist for invoking the aid of the writ in such cases, convince us that the question as to whether or not a citizen is a fugitive from justice is one that can only be available to him so long as he is beyond the jurisdiction of the state against whose laws he is alleged to have transgressed. It is a remedy which does not go to the merits of the case, and does not involve the inquiry as to whether or not he is in fact guilty or innocent of the offense charged. It is a remedy that merely goes to the question of his removal from the jurisdiction in which he is found to the jurisdiction against the laws of which he is charged with offending. If these views be correct, and we believe they are, it follows that so soon as the prisoner is within the jurisdiction of the demanding state, both the reason and object for invoking this principle of law have ceased and can no longer have any application. * * * The warrant of the chief executive of the state surrendering the prisoner, whether issued lawfully or unlawfully, has accomplished its purpose and becomes functus officio, as soon as the prisoner is delivered into the jurisdiction of the demanding state, and its validity and the regularity of its issuance thereupon cease to be questions open to the consideration of the courts of the demanding state. * * * One who commits a crime against the laws of the state, whether committed by him while in person on its soil or absent in a foreign jurisdiction, and acting through some other agency or medium, has no vested right of asylum in a sister state (citing cases), and the fact that a wrong is committed against him in the manner or method pursued in subjecting his person to the jurisdiction of the complaining state, and that

such wrong is redressible either in the civil or criminal courts, can constitute no legal or just reason why he himself should not answer the charge against him when brought before the proper tribunal.' "

The trial court ruled that section 42-705, R. R. S. 1943, was unconstitutional and void as in contravention of Article I, section 11, Constitution of Nebraska, insofar as it authorized trial of the relator in a county other than that in which the offense charged is alleged to have been committed. What we have said above as to venue is a sufficient answer to this holding. The pertinent question relator is attempting to raise by attacking venue is the right of a state to enact legislation which permits the extradition of persons who, while resident in that state, are alleged, constructively or by omission, to have committed an act within the demanding state at a time when they were never within the demanding state, which act is a crime in the demanding state.

Relator here is questioning the constitutionality of section 5 of the Uniform Reciprocal Enforcement of Support Act, which in our statute is section 42-705, R. R. S. 1943, and reads as follows: "The Governor of this state (1) may demand from the Governor of any other state the surrender of any person found in any such other state who is charged in this state with the crime of failing to provide for the support of any person in this state, and (2) may surrender on demand by the Governor of any other state any person found in this state who is charged in such other state with the crime of failing to provide for the support of a person in such other state. *The provisions for extradition of criminals not inconsistent herewith shall apply to any such demand although the person whose surrender is demanded was not in the demanding state at the time of the commission of the crime and although he had not fled therefrom.* Neither the demand, the oath nor any proceedings for extradition pursuant to this section need state or show that the person whose surrender is demanded

has fled from justice, or at the time of the commission of the crime was in the demanding or the other state." (Italics supplied.) This is the section under which relator was extradited and which the trial court held to be unconstitutional.

The part italicized above is the part questioned. This statute was undoubtedly patterned after section 6 of the Uniform Criminal Extradition Act, which is found in our statute as section 29-706, R. R. S. 1943, and which provided that extradition would be permitted notwithstanding the fact that the accused was not in the demanding state at the time of the commission of the crime and had not fled therefrom.

We assume it is relator's contention that it is beyond the power of a state to deal with the subject of extradition except within the area permitted by federal legislation because the Constitution put the entire subject of extradition under exclusive federal control. We cannot accept this premise. The Constitution does not purport to cover the entire field of extradition but is expressly limited to one class.

Article IV, section 2, Constitution of the United States, covers the extradition of a person "who shall flee from Justice." In accordance with this grant of power, Congress has legislated but has failed to extend the federal statute to the full limit of its constitutional power. In an area embraced within the constitutional grant but not specifically covered by the federal legislation, Innes v. Tobin, 240 U. S. 127, 36 S. Ct. 290, 60 L. Ed. 562, held that a state could act to the extent that Congress has failed to extend the statute to the full limit of its constitutional power. The federal constitutional provision, however, covers only persons "who shall flee from Justice." Since Congress may legislate only on subjects authorized by the Constitution, and since powers not expressly delegated to the United States by the Constitution are reserved to the states, it should follow that if a person has not fled from the demanding state, this field

is left to the states. In any event, Congress has not attempted to legislate in this area, and at least 44 of our states have done so by the adoption of section 6 of the Uniform Criminal Extradition Act. Section 6 of the Uniform Criminal Extradition Act has been before some of the courts of other states and has been found to be a constitutional exercise of power by those states passing upon the question.

We hold that section 5 of the Uniform Reciprocal Enforcement of Support Act, which in our statute is section 42-705, R. R. S. 1943, is a constitutional exercise of power. For analogous holdings referring to section 6 of the Uniform Criminal Extradition Act, embracing essentially the same point, see In re Morgan, 86 Cal. App. 2d 217, 194 P. 2d 800; Morgan v. Horrall, 175 F. 2d 404, on which certiorari was denied by the United States Supreme Court at 338 U. S. 827, 70 S. Ct. 76, 94 L. Ed. 503; Culbertson v. Sweeney, 70 Ohio App. 344, 44 N. E. 2d 807; Cassis v. Fair, 126 W. Va. 557, 29 S. E. 2d 245, 151 A. L. R. 233, and the Annotation at 151 A. L. R. 239.

For the reasons given, we find that the judgment of discharge entered by the trial court should be and hereby is vacated and set aside and the court is directed to order relator returned to jail until he makes bond, as previously provided by the court.

REVERSED AND REMANDED WITH DIRECTIONS.

EDWIN PAUL GARRELTS, APPELLANT, V. DEPARTMENT OF MOTOR VEHICLES ET AL., APPELLEES.

125 N. W. 2d 678

Filed January 3, 1964. No. 35535.

1. **Insurance.** A policy of insurance will be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning.
2. ———. A policy of insurance should be considered as any

other contract to give effect to the intention of the parties at the time it was made as expressed therein.

3. ———. The language of a policy of insurance should be considered not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of the insured would have understood them to mean.

4. ———. In giving effect to these rules, it is equally important that the contract made by the parties shall be enforced, and that a new contract will not be interpolated by construction.

5. ———. The parties to an insurance contract may make the contract in any legal form they desire and, in the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed.

6. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have adopted one version of the facts rather than the opposite.

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

Dryden & Jensen, for appellant.

Tye, Worlock, Knapp & Tye, for appellee Capital Mut. Ins. Co.

Heard before WHITE, C. J., CARTER, MESSMORE, SPENCER, BOSLAUGH, and BROWER, JJ., and ZEILINGER, District Judge.

MESSMORE, J.

Edwin Paul Garrelts, plaintiff, brought this action for a declaratory judgment against the Capital Mutual Insurance Company, defendant. The purpose of the action was to determine the liability of the defendant on an insurance policy carried by the plaintiff with the defendant company. The Department of Motor Vehicles,

Ted Cash, and Manuel Rivera were made parties. Ted Cash was removed from the case by order of the court. The Department of Motor Vehicles and Manuel Rivera, insofar as this appeal is concerned, have no interest therein.

The trial court rendered judgment in favor of the defendant and against the plaintiff. The plaintiff filed a motion for new trial which was overruled. The plaintiff perfected appeal to this court.

The plaintiff's amended petition alleged, in substance, that he was the owner and operator of a 1950 Buick automobile, the title of which was in the name of his ex-wife, Mildred Garrelts; and that on July 5, 1962, he was driving the Buick in Kearney, Nebraska, and was involved in an accident with another automobile operated by Teddy Cash. The plaintiff further alleged that he had reason to believe that he had insurance with the defendant under policy of insurance No. A 256630; that after the delivery of the policy covering a 1950 Chevrolet automobile, the same was junked and he purchased a Dodge automobile; that he advised the agent of the defendant, Rex Gray, that the insurance from the Chevrolet should be transferred to the Dodge automobile and was advised by Rex Gray that the insurance had been transferred to the Dodge automobile; that he drove the Dodge until June 18, 1962, at which time he disposed of it; that from June 18, 1962, to June 21, 1962, the plaintiff or his wife did not own any automobile covered by a policy of insurance; that on June 21, 1962, he purchased a Buick automobile which he placed in the name of his wife; and that this automobile replaced the Dodge, and under the provisions of section 4, subsection 4, of the insurance policy, the replacement automobile was covered by the policy of insurance, but that through mistake a change of automobile endorsement was placed on the policy covering a Ford automobile. The plaintiff further alleged that repeated demands had been made upon the defendant through Rex Gray and its attorney

to assume liability and responsibility for the accident, but defendant had refused to do so, failing to file proof of financial responsibility in accordance with the request of the plaintiff, resulting in notice of cancellation of plaintiff's registration certificate and operator's license.

The defendant's answer admitted that the title and ownership of the Buick being driven at the time of the accident was titled and belonged to the plaintiff's ex-wife; denied specifically that the plaintiff carried public liability or property damage insurance with the defendant on the Buick that he was driving at the time of the wreck referred to in his amended petition; denied each and every allegation contained in the plaintiff's amended petition except such as were admitted to be true; and prayed that the plaintiff's amended petition be dismissed.

Inasmuch as several different automobiles are involved in this case, we will refer to the same by their trade names; to Rex Gray as Gray; to the Capital Mutual Insurance Company as defendant; and to Edwin Paul Garrelts as plaintiff.

The record discloses that the plaintiff purchased a policy of insurance, No. 3912-15, from the defendant, showing coverage from April 18, 1960, to April 18, 1961, on a 1950 Chevrolet 4-door sedan. This was the first insurance policy received from the defendant. A Chevrolet 4-door sedan registration slip shows an automobile to be covered by this policy. The plaintiff never received any other registration slip in any year for the Chevrolet, and he never got more than one license plate for that automobile. After the expiration of the above policy, the plaintiff secured another policy of insurance from the defendant, the coverage commencing April 18, 1961, which he was unable to find.

The plaintiff testified that he got his first insurance policy from Gray who was taking care of his insurance business; that he always paid Gray the premiums for the policies and the money was mailed to the defendant

by Gray; and that he had three policies of insurance with the defendant over a period of time. On February 4, 1963, the defendant, by its secretary, informed the plaintiff that he had completed 3 years of coverage under the provisions of the Nebraska automobile assigned risk plan, that he was eligible to secure insurance elsewhere with whatever company might wish to accept his application, and that defendant was not issuing a renewal of the current policy. The last policy of insurance the plaintiff had with the defendant was policy No. A 256630, from April 18, 1962, to April 18, 1963, covering a 1950 Chevrolet 4-door sedan, under the automobile assigned risk plan. There was a change of car endorsement dated August 14, 1962, which the plaintiff received sometime after August 27, 1962, this endorsement being made to cover a 1954 Ford 4-door sedan and ceasing to cover the 1950 Chevrolet 4-door sedan.

The Chevrolet was demolished sometime in 1961. It was pulled over to the side of the garage and let sit, then in December 1961, it was junked and hauled into a draw behind the house where it remained. Just the body of the Chevrolet remained after it was junked, there were no wheels on it and no motor in it. The various parts taken off of it were sold as junk.

The plaintiff further testified that he had a conversation with Gray in his office sometime in 1961. At that time the plaintiff had the second insurance policy that he had received from Gray. The substance of the conversation related to transferring the insurance to another automobile. Gray told the plaintiff it had to be sent to the defendant.

The assigned risk automobile liability policy endorsement effective April 18, 1962, a part of the policy No. A 256630, provided in part: "Newly Acquired Automobile—an automobile, ownership of which is acquired by the named insured or his spouse if a resident of the same household, if it replaces an automobile owned by either and covered by this policy and the named insured or

such spouse notifies the company within thirty days following the date of its delivery. The insurance with respect to the newly acquired automobile does not apply to any loss against which the named insured or such spouse has other valid and collectible insurance. The named insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile."

There were no further conversations with Gray about transferring the policy of insurance from one automobile to another.

The plaintiff bought a 1953 Dodge in May 1961. After he bought the Dodge he saw Gray, probably in June 1961, at his office, and his wife was present. He talked about buying a second car for his wife, and Gray told him that he would have to issue another policy. The plaintiff went across the street to get his registration off his car and bring it back to Gray's office. Gray copied it and told the plaintiff that he had to have another policy for his wife to have a car. The plaintiff stated that he was going away to work and wanted the Dodge with him. He believed that Gray had at one time sent him endorsement papers stating that the Dodge was transferred, and he thought that it was, but he could not produce the paper showing this fact. The plaintiff put the Dodge in his name. In June 1961, the Dodge was repossessed after it had caught on fire about June 18, 1961. During this entire period the plaintiff's Chevrolet was in the yard by his shop where it had been junked. The plaintiff then purchased a 1950 Buick, on June 21, 1962. The plaintiff never talked to Gray after he disposed of the Dodge, until he purchased the 1950 Buick on June 21, 1962. On July 6, 1962, the plaintiff went to see Gray to make out a report of an accident he had with the Buick on July 5, 1962. The plaintiff made out a notice or report of the accident and gave it to Gray.

On August 7, 1962, the plaintiff received a letter from

the defendant in which the defendant told the plaintiff: "We have now completed our investigation in connection with the coverage on a 1950 Chevrolet which you had insured under policy A256630 effective April 18, 1962. Prior to this policy, we carried another policy for you, also on the 1950 Chevrolet 4-dor Sedan.

"Our investigation reveals that you operated this automobile up until about seven or eight months ago. You purchased a 1953 Dodge 4-dor the first of August, 1961, which you drove from then until December of 1961 or January of 1962. As of the date your policy went into effect, April 18, 1962, you still had possession of the 1950 Chevrolet which was insured under a Capital Mutual Automobile policy.

"On or about June 18, 1962, you sold the Dodge and on the 21st of June, 1962, you purchased a 1950 Buick 4-dor Sedan so on the 21st of June you had in your possession a 1950 Buick and a 1950 Chevrolet.

"On the date of the accident, July 5, 1962, you were not driving a 1950 Chevrolet which we had insured under the above captioned policy. You were driving a 1950 Buick, owned by you, but not insured by this company. Since you failed to notify the company within thirty days following delivery date of this automobile and did not replace the automobile covered by this policy, there is no insurance afforded you under the above captioned policy which would provide protection for any claims presented as a result of the accident which occurred on July 5, 1962."

The Buick purchased in June 1962, was titled in the name of plaintiff's wife, although it was originally in his name. The plaintiff did not notify the company or anyone about the purchase of the Buick until after the accident.

On August 9, 1962, the plaintiff received another letter from the defendant, in which the defendant advised that it understood that the plaintiff did not have the 1950 Chevrolet insured under his assigned risk policy,

and suggested that he terminate his coverage, or if he had another automobile, advise as to the motor and serial number and defendant would transfer the coverage.

The plaintiff further testified that he had received a letter in 1960, telling him to go to Gray about his policy. This was in the latter part of May of that year. He further testified that he purchased a 1954 Ford on the policy upon which this suit was brought, about July 15, 1962, after he had had the accident. He went to Gray and secured the endorsement representing the change of automobiles as heretofore mentioned. When he talked to Gray about the accident and gave him a statement, Gray told the plaintiff that he had ample time, that the policy had not lapsed from the other automobile, and he could still transfer it regarding the accident.

On cross-examination the plaintiff testified that at the time of the accident he had been separated from his wife but was still living with her; that the divorce was granted on July 25, 1962, and he was living with his wife just prior to the divorce; that he stayed with his family before the divorce; that on September 5, 1962, he filed a motion to set aside the divorce; that he was living with his wife before the divorce decree was taken; that at the time of the accident he was living in a cabin which he rented, but was not living there continuously; and that his wife and children were living in his house. The plaintiff further testified on cross-examination that the reason he obtained insurance from the defendant was that the State Farm Insurance Company had canceled his insurance which he had procured from Gray before he got the policy of insurance involved in this case; that he demolished the Chevrolet around Christmas in 1961, and quit driving it in the middle of 1961, in June or July; and that he talked to Gray about changing his insurance from the Chevrolet to the Dodge about 2 weeks after he bought the Dodge.

On redirect examination the plaintiff testified that he talked to Gray about the Chevrolet in May of 1961;

that Gray told him he would send in a request for a transfer; that he received a transfer, but could not find it; that this transfer was to the 1953 Dodge; and that at the time of the accident with the Buick, the Chevrolet was not in condition that it could be used.

Rex Gray testified that the plaintiff at no time made any request that the insurance on the 1950 Chevrolet be transferred to the 1953 Dodge; that no notice was ever given to the defendant requesting such a transfer; that on July 6, 1962, the day after the accident, Gray forwarded a letter to the defendant stating that the plaintiff had traded the 1950 Chevrolet for the 1950 Buick on June 21, 1962; that this information was given to Gray by the plaintiff on July 6, 1962; that there would be an additional premium on the 1953 Dodge over the 1950 Chevrolet; and that prior to the accident on July 5, 1962, the plaintiff talked to Gray in April 1962, about insurance on his wife's car, but did not want to pay the extra premium.

The plaintiff was recalled and testified that he told Gray about July 6, 1962, that the Dodge had burned up, that the Chevrolet had been junked, that the Buick had been put in his wife's name, and Gray said it would not make any difference as long as they had just one automobile; and that he had become reconciled with his wife and the decree of divorce was set aside within the 6-month period.

The plaintiff's assignments of error may be summarized as follows: The judgment of the trial court is not sustained by the evidence and is contrary to law.

The plaintiff contends that under the evidence adduced, and under the provisions of the policy of insurance issued to the plaintiff by the defendant, the defendant insured the Buick under the terms of the policy when the accident occurred within 30 days after the acquisition of the Buick.

In this connection, the plaintiff cites several cases from foreign jurisdictions. The closest in point is the case

of Kaczmarck v. LaPerriere, 337 Mich. 500, 60 N. W. 2d 327. This was a garnishment proceeding brought to determine defendant insurance company's liability, as carrier of the public liability risk on principal defendant's automobile, to plaintiff on a judgment secured by him against principal defendant for damages arising out of the latter's negligent operation of that automobile. The policy had a provision relating to newly acquired automobiles similar to that in the instant case. The court held that where an insured who traded insured car for a second car without notifying insurer of such trade and then traded second car for a third car and notified insurer within time prescribed by policy after last trade made automatic insurance clause effective on the third car; and that assignment of automobile insurance policy at time insured traded insured car to assignee and received a second car which was later traded for a third car, of which last acquisition insurer was given notice pursuant to policy, did not relieve insurer from liability to plaintiff who was injured in an accident with the third car before insurer consented to assignment, hence, insurer was subject to garnishment by the injured party. This is the only case found in our research that apparently supports the plaintiff's position in the instant case.

The following are applicable to this case.

This court, in Preferred Risk Mutual Ins. Co. v. Continental Ins. Co., 172 Neb. 179, 109 N. W. 2d 126, said: "A policy of insurance will be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning."

In Koehn v. Union Fire Ins. Co., 152 Neb. 254, 40 N. W. 2d 874, this court held: "A policy of insurance should be considered as any other contract to give effect to the intention of the parties at the time it was made as expressed therein. The language of it should be considered not in accordance with what insurer intended the words

to mean, but what a reasonable person in the position of the insured would have understood them to mean. * * * In giving effect to this rule, it is equally important that the contract made by the parties shall be enforced, and that a new contract will not be interpolated by construction." See, also, 44 C. J. S., Insurance, § 289, p. 1136, § 297, p. 1166; 29 Am. Jur., Insurance, § 245, p. 627, § 246, p. 628, § 247, p. 638; Peony Park, Inc. v. Security Ins. Co., 137 Neb. 504, 289 N. W. 848.

"The parties to an insurance contract may make the contract in any legal form they desire and, in the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed." Lonsdale v. Union Ins. Co., 167 Neb. 56, 91 N. W. 2d 245. See, also, 29 Am. Jur., Insurance, § 264, p. 650.

In the instant case the evidence is in clear conflict. This is true as to whether or not the plaintiff and his wife resided in the same household at the time the Buick was acquired. The policy in question required membership in the same household in order for the Buick to constitute a newly acquired automobile, since the title to the Buick was placed in the name of the plaintiff's wife. However, even if the plaintiff and his wife were living together at the time of the acquisition of the Buick, the plaintiff is not entitled to protection under the policy of insurance. The evidence shows that the 1950 Buick did not replace the 1950 Chevrolet under the terms of the insurance policy. The 1950 Buick replaced a 1953 Dodge. The plaintiff's testimony shows that the Chevrolet may have been in condition to operate at the time the Dodge was purchased. The Chevrolet was not junked until the latter part of December 1961. The plaintiff's position seems to be that he

operated the Chevrolet until it broke down and the Dodge until it became useless, then operated the Buick. It appears by the evidence that the Buick could not replace the Chevrolet; that under the plaintiff's evidence the Chevrolet was junked over a year before the purchase of the Buick; and that the Dodge was purchased to replace the Chevrolet. It is obvious that the policy of insurance was violated and that no liabilty could attach to the defendant under such conditions.

Gray was not the agent of the defendant. He merely acquired an assigned risk policy with the defendant for the plaintiff, and the evidence of the plaintiff and Gray is in direct conflict. Gray insists that no request was ever made by the plaintiff to transfer the insurance from the Chevrolet to the Dodge. To say the least, the plaintiff's testimony is confusing and inconsistent, and it is difficult to ascertain just what position the plaintiff wishes to take with reference to any conversation with Gray.

There is another rule that applies to this case. Actions in equity are triable de novo on appeal to the Supreme Court, subject to the rule that when evidence on material questions of fact is in irreconcilable conflict, the Supreme Court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have adopted one version of the facts rather than the opposite. See, Dartmouth College v. Rose, 172 Neb. 764, 112 N. W. 2d 256; Schepers v. Lautenschlager, 173 Neb. 107, 112 N. W. 2d 767.

In the light of the evidence and the authorities from this jurisdiction heretofore cited, we conclude that the judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1964

CONSTANCE JOANNE RIPP, ADMINISTRATRIX OF THE ESTATE OF RICHARD F. RIPP, DECEASED, APPELLANT, V. CHARLES RIESLAND ET AL., APPELLEES.

125 N. W. 2d 699

Filed January 10, 1964. No. 35432.

1. **Automobiles: Negligence.** The driver of a motor vehicle should have his car under such reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof are exercising due care.
2. ———: ———. Reasonable control is such control as will enable drivers to avoid collision with other vehicles operated without negligence in streets and intersections, and with pedestrians in the exercise of due care.
3. **Trial.** It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence.
4. **Negligence: Trial.** It is the uniform and proper practice in this state that where specific acts of negligence are charged and supported by the evidence, the trial court instructs as to the specific acts so alleged and supported. The failure to do so, whether or not requested to do so, is error.
5. ———: ———. The enumeration of specific acts of negligence should state the ultimate acts of negligence and not a conclusion of the pleader.
6. ———: ———. The burden of proving contributory negligence is always on the defendant alleging it and does not shift during the trial.
7. ———: ———. A defendant is entitled to receive the benefit of plaintiff's evidence tending to prove contributory negligence.
8. **Negligence.** Contributory negligence is conduct for which plain-

tiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause.

9. **Trial: Appeal and Error.** It is error for a trial court to instruct a jury that it should proceed upon the theory that all witnesses have tried to testify truthfully.

10. **Trial: Evidence.** 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.

Appeal from the district court for Hall County: WILLIAM F. MANASIL, Judge. Reversed and remanded.

John A. Wagoner and Baylor, Evnen, Baylor & Urbom, for appellant.

Luebs, Elson, Tracy & Huebner, for appellees.

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

SPENCER, J.

This is an action by Constance Joanne Ripp as administratrix of the estate of Richard F. Ripp, deceased, hereinafter referred to as plaintiff, to recover for the alleged wrongful death of her husband in the collision of his automobile and one operated by Charles Riesland at an unprotected county intersection in Hall County. The jury returned a verdict for the defendants and the plaintiff has perfected an appeal to this court.

This is the second appearance of this cause in this court. See Ripp v. Riesland, 170 Neb. 631, 104 N. W. 2d 246. Therein, we vacated a verdict in favor of the plaintiff, reversed a judgment entered thereon, and remanded the cause for a new trial.

The defendants are Charles Riesland and Elmer H. Riesland, his father. They will be hereinafter referred to collectively as defendants, and individually by their respective names. By virtue of the law applicable to

the circumstances herein, any negligence of Charles Riesland is imputed to his father, Elmer Riesland.

The facts which were adduced at the second trial are substantially the same as those adduced at the first trial. Inasmuch as the facts necessary to understand the problems involved are adequately set out in our first opinion in 170 Neb. 631, 104 N. W. 2d 246, they will not be set out herein.

Plaintiff in her first assignment of error complains among other things of the alleged failure of the trial court in instruction No. 1 to submit to the jury the issue of reasonable control when such issue was presented by the pleadings and the evidence. Plaintiff in her petition sets out the following specific allegation of negligence on the part of the defendants: "That the defendant Charles Riesland failed to have and keep the said Ford automobile under reasonable and proper control as he approached and reached said intersection; when, by the exercise of ordinary care, he knew or should have known that he was going to collide with an automobile driven by Richard F. Ripp."

In its instruction No. 1, in which the trial court set out the acts of negligence alleged by the plaintiff, the court omitted any reference to the alleged failure of Charles Riesland to keep his automobile under reasonable control. This would have the effect of eliminating this specification from the consideration of the jury.

We have repeatedly reiterated the rule that the driver of a motor vehicle should have his car under such reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof are exercising due care. See Paddack v. Patrick, 163 Neb. 355, 79 N. W. 2d 701. We have defined reasonable control to be such control as will enable drivers to avoid collision with other vehicles operated without negligence in streets and intersections, and with pedestrians in the exercise of due care. See Spomer v. Allied Electric & Fixture Co., 120 Neb. 399, 232 N. W. 767.

The defendants concede the correctness of the rule of law urged by the plaintiff, but dispute its application herein. Defendants urge that the portion of the allegation, "when, by the exercise of ordinary care, he knew or should have known that he was going to collide with an automobile driven by Richard F. Ripp," is a part of the allegation and limits the balance of it. Defendants contend that the trial court did not have a duty to include any part of the allegation unless the whole allegation was supported by the evidence, which defendants urge is not the case. There is no merit to defendants' position. There is evidence which, if believed, is sufficient to sustain plaintiff's allegation.

The trial court did give instruction No. 5 which set out the duty of a driver to have his vehicle under reasonable control, but, as suggested, omitted it as a specification of the negligence alleged by the plaintiff. Under the pleadings and the evidence, plaintiff was entitled to the enumeration of this specific allegation. Instruction No. 5 did not cure its omission. The failure to include it was prejudicial error.

In Krepcik v. Interstate Transit Lines, 153 Neb. 98, 43 N. W. 2d 609, we said: " 'It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence.' Dunlap v. Welch, 152 Neb. 459, 41 N. W. 2d 384. * * * It is the uniform and proper practice in this state that where specific acts of negligence are charged and supported by the evidence, the trial court instructs as to the specific acts so alleged and supported. * * * To fail to do so, whether or not requested to do so, is error."

Plaintiff's first assignment of error is also directed to the inclusion in instruction No. 1 of defendants' allegation that plaintiff's decedent "failed to exercise ordinary and reasonable care while approaching and entering an intersection where his view was obstructed." Plaintiff prior to the trial moved to strike the allega-

tion as a conclusion of the pleader and not a specific act of negligence. This was overruled. Plaintiff's motion pointed up the vice of the allegation. What is the ultimate act of negligence alleged? Is it failure to maintain a proper lookout, failure to have his car under reasonable control, excessive speed under the circumstances, or what? The jury at best is left to speculate on what act or acts plaintiff's decedent failed to do which would be required by the exercise of reasonable care, or what acts he may have done which would not constitute ordinary and reasonable care. The questioned pleading was nothing more than a conclusion of the pleader constituting a very general allegation of negligence. This type of pleading has been condemned by this court on many occasions. The enumeration of specific acts of negligence should state the ultimate acts of negligence and not a conclusion of the pleader. See, Bezdek v. Patrick, 170 Neb. 522, 103 N. W. 2d 318; Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436; and page 424 of Chief Justice White's article, "Some Approaches to the Instructional Problem," in 40 Neb. Law Rev. 413.

In the third assignment of error, plaintiff suggests the similarity of the facts herein to the facts in Malcom v. Dox, 169 Neb. 539, 100 N. W. 2d 538, and urges that she was entitled to an instruction that the defendants were guilty of negligence as a matter of law. The plaintiff not only did not request such instruction, but actually submitted an instruction, given in essence by the trial court, which told the jury that the burden was on the plaintiff to establish by a preponderance of the evidence that the defendant was negligent in one or more of the respects charged. Further, while it is true there is a striking similarity between the facts in the two cases, here the jury could and, considering the verdict, must have found that Charles Riesland was actually in the intersection at the time he saw the decedent's car 75 feet down the road, that he had the right-of-way, and that he acted as a reasonably prudent man under the cir-

cumstances. Plaintiff's first analysis of the facts is the correct one. Defendants' negligence is a question of fact for the jury.

Plaintiff's fourth assignment of error involves instruction No. 3 given by the trial court, which is as follows: "You are instructed that the defendants in their answer deny the material allegations of plaintiff's petition wherein they charge negligence on the part of Charles Riesland, and also in said answer allege negligence on the part of Richard F. Ripp. The charge of negligence on the part of Richard F. Ripp pleaded in the answer of the defendants is an affirmative defense and, *unless such contributory negligence is disclosed by plaintiff's own evidence,* then before the defendants can avail themselves of that defense they must have proved, by a preponderance of the evidence, that, (1.) said Richard F. Ripp was guilty of negligence in one or more of the particulars set out in their answer, and (2.) that such negligence on the part of Richard F. Ripp, if any, was the proximate cause of the accident, or if not the sole proximate cause of the accident, was nevertheless a cause which proximately contributed to said accident, and that such contributory negligence on the part of the said Richard F. Ripp was more than slight when compared with the negligence, if any, of the defendants." (Italics supplied.) We cannot say that the italicized portion of the instruction might not be misleading. The jury could conclude from the instruction that defendants only had the burdens enumerated if no contributory negligence is disclosed by plaintiff's evidence. The burden of proving contributory negligence is always on the defendant alleging it and does not shift during the trial. A defendant is entitled to receive the benefit of the plaintiff's evidence tending to prove contributory negligence. See McGahey v. Citizens Ry. Co., 88 Neb. 218, 129 N. W. 293. The instruction should be so phrased that there can be no question that while de-

fendant is entitled to the benefit of plaintiff's evidence, he still must meet the burdens imposed.

Plaintiff's sixth assignment of error alleges that the trial court's definition of contributory negligence as " 'Contributory negligence' consists of doing the wrong thing at the time and place in question, or it may arise from doing nothing when something should have been done," placed a heavier burden upon the plaintiff than the burden of care relating to the ordinarily prudent person. Standing alone, this is true. In any event, the definition is not very enlightening. On many occasions we have defined the term as follows: " 'Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause.' Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144." Edmunds v. Ripley, 172 Neb. 797, 112 N. W. 2d 385. Essentially "contributory negligence" means any negligence of the plaintiff directly and proximately contributing to cause the accident.

Plaintiff's assignment of error No. 7 involves the first sentence in the last paragraph of the trial court's instruction No. 26, which is as follows: "In determining the facts, Ladies and Gentlemen of the Jury, *you should proceed upon the theory that all witnesses have tried to testify truthfully.*" (Italics supplied.) The trial court in this sentence is actually passing upon the credibility of witnesses. He is informing the jury that in his judgment the witness is trying to testify truthfully. The jurors are the judges of the credibility of the witnesses. Instruction No. 25 given by the trial court correctly instructed them in that regard. The questioned sentence should not have been given. We said in Snowart v. City of Kimball, 174 Neb. 294, 117 N. W. 2d 543: "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."

Plaintiff's ninth assignment of error was directed to the permitting of an expert to base an opinion in part upon facts not supported by the evidence. There is a question as to whether plaintiff's objection of "no sufficient foundation" fully raised the point in question, which was the assumption in the hypothetical question of facts not in evidence. Because reversal here is necessary for other errors, we need not determine this point. We do note, however, that it is obvious that the hypothetical question assumed facts not in evidence.

There are other errors assigned. They either have no merit or we believe they will not reoccur in another trial of this case. It will serve no useful purpose to extend this opinion by discussing them herein.

For the reasons enumerated, the judgment should be and it is reversed, and the cause is remanded to the district court for Hall County for further proceedings according to law.

REVERSED AND REMANDED.

RALPH E. METSCHKE ET AL., APPELLANTS, V. LELAND MARXSEN, APPELLEE.

125 N. W. 2d 684

Filed January 10, 1964. No. 35478.

1. **Contracts.** Where a contract is executed but its effectiveness or fulfillment is dependent upon the doing of an agreed-upon condition before it shall become a binding contract, such contract cannot be enforced unless the condition is performed.
2. **Usury.** There can be no usury where a loan contract has not been entered into.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Kerrigan, Line & Martin, for appellants.

Sidner, Lee, Gunderson & Svoboda, for appellee.

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

CARTER, J.

This is a suit in equity to have a conditional sales contract declared null and void under the Nebraska Installment Loan Act, sections 45-138 and 45-155, R. R. S. 1943, and to recover payments made thereon. The defendant denied that a sale of the truck involved was consummated or that a loan was made. Defendant further alleged that he was engaged in the trucking business; that he was not engaged in the business of lending money within the provisions of the Nebraska Installment Loan Act; and that he was not therefore subject to its terms. Defendant filed a cross-petition seeking damages for the use of his truck for a period of 43 days and for damages sustained to the truck during the period of such use. The trial court found for the defendant, dismissed plaintiffs' petition, and entered judgment for the defendant on his cross-petition in the amount of $1,443.18. The plaintiffs appealed.

We shall hereafter refer to Ralph E. Metschke, the principal plaintiff, as Metschke, and to the defendant Leland Marxsen as Marxsen.

It is contended that the trial court erred in not finding that the contract was in violation of the Nebraska Installment Loan Act and subject to the penalties thereof. It is further contended that the trial court erred in not finding that Marxsen waived, or was estopped from asserting, the ineffectiveness of the contract by the acceptance of payments and the delivery of the truck into the possession of Metschke.

There is little dispute in the evidence as to the pertinent facts. They reveal the following situation. Marxsen was engaged in the transportation business and was

the owner of trucks used in the business, including a 1954 International truck tractor. Metschke was employed by Marxsen as a truck driver. Metschke desired to go into the transportation business on his own, and on or about November 8, 1962, entered into negotiations with Marxsen for the purchase of the International truck tractor. Marxsen offered to sell the truck tractor to Metschke for $6,000. Metschke attempted to finance the transaction through his bank in Fremont and a finance company in Omaha. He was unable to secure a loan and Marxsen suggested that Metschke try his bank, the First State Bank of Fremont. Credit references and financial statements were required and furnished to the bank. The latter bank agreed to make the loan for $3,500, provided a cash payment of $2,500 was made and a contract entered into with Marxsen for the purpose of assignment to the bank.

Metschke advised Marxsen that he did not have $2,500 in cash, but that he had a pick-up truck and some vending machines which he could sell within a week or so and raise the money.

The bank made up a conditional sales contract in the principal amount of $3,500 to which was added $185.76 for insurance and a time price differential of $442.24, a total of $4,128. The conditional sales contract was signed by Marxsen and Metschke and the latter's wife. The contract was not dated for the reason, as stated by Marxsen, that it was to be dated and become effective only on the payment of the $2,500 in cash as the down payment.

Metschke was unable to sell the pick-up truck or the vending machines. Metschke paid $300 of the down payment. Marxsen kept pressing Metschke for the balance, advising him that the truck tractor was mortgaged to the bank and that the note was due. Marxsen asked Metschke what his pick-up truck was worth. Metschke said $900. Marxsen offered to take the pick-up at $900 to be applied on the down payment for the

truck tractor. Metschke accepted the offer and delivered the pick-up truck to Marxsen, together with the certificate of title.

Marxsen thereupon permitted Metschke to use the International truck tractor with which to earn money to be applied on the balance of the cash payment. Metschke paid $300 to Marxsen out of the earnings made by the use of the truck tractor. He was also given credit for $96.20 for hauling performed for Marxsen during this period. Marxsen retained the certificate of title to the truck tractor during the period Metschke was using it. The truck tractor was covered by insurance provided by Marxsen, and the cargo insurance was provided by the Freeman Transportation Company, which was owned by Marxsen.

Metschke then returned the truck tractor to Marxsen's place of business, and without Marxsen's consent took the pick-up truck from in front of his place of business and the certificate of title thereto from Marxsen's desk. The next day Metschke informed Marxsen that he was unable to make the down payment and that he could not go through with the deal.

The evidence shows that Metschke understood that the $2,500 in cash had to be paid before the bank would make the loan. The record indicates that the bank would not release its mortgage on the International truck tractor until the $2,500 was received by it in reduction of Marxsen's note and mortgage for $17,000 on the International and other trucks. Upon the receipt of the $2,500 the bank would then take the assignment of the conditional sales contract from Marxsen for $3,500, which also was to be applied on Marxsen's loan from the bank.

The $2,500 down payment was not made and the bank advanced nothing that could be denominated a loan of money. No loan was ever made and consequently no interest, usurious or otherwise, was contracted to be paid.

The general rule is where a contract is executed but its effectiveness or fulfillment is dependent upon the doing of an agreed-upon condition before it shall become a binding contract, such contract cannot be enforced unless the condition is performed. Norman v. Waite, 30 Neb. 302, 46 N. W. 639; O'Brien v. Fricke, 148 Neb. 369, 27 N. W. 2d 403; Federal Reserve Bank v. Neuse Mfg. Co., 213 N. C. 489, 196 S. E. 848. In the last case cited the court said: "That a contract is not made so long as in the contemplation of both parties thereto something remains to be done to establish contract relations is too well established to require the citation of authority. * * * In negotiating a contract the parties may impose any condition precedent, a performance of which condition is essential before the parties become bound by the agreement. A promise, or the making of a contract, may be conditioned upon the act or will of a third person."

In the instant case the sale of the truck tractor and the making of the loan by the bank was dependent upon the payment of the down payment of $2,500. The payment was not made and the conditional sales contract did not become effective. The bank likewise was under no obligation to make the loan for the reason that the payment of the $2,500 was a condition precedent to its agreement to make the loan. Loucks v. Smith, 154 Neb. 597, 48 N. W. 2d 722.

It is asserted, however, that Marxsen waived, or is estopped to deny, the validity of the transaction by accepting payments in an amount less than the $2,500. The evidence hereinbefore recited shows that Metschke fully understood when the payments were made that the $2,500 had to be paid in full before the sale would be consummated by Marxsen, or the loan made by the bank. The conduct of Metschke in returning the truck tractor and tortiously repossessing the pick-up truck and the certificate of title thereto is proof enough of this fact. It was Metschke and not Marxsen who was in

default in the performance of the sales agreement. The use of the truck tractor by Metschke was nothing more than a bailment of the truck tractor, based on Marxsen's anticipation that Metschke would comply with his contract, which he failed to do.

Metschke assigns as error the allowance of damages to Marxsen for the use of the truck tractor during the period Metschke was attempting to raise the $2,500 down payment. The evidence shows that the use of the truck tractor permitted by Marxsen was on the assumption that Metschke would comply with his agreement and pay the $2,500. The partial payments made by Metschke indicated good faith on the part of Metschke. When Metschke failed to comply with his agreement, a part of the resulting damages to Marxsen was the loss of the use of the truck. There is evidence that the value of the use of the truck tractor was $50 per day and the period of the use was 43 days. The amount thus found, less the part payments on the sales contract, produces the $1,443.18 for which judgment was entered on Marxsen's cross-petition. The judgment is supported by the evidence.

The findings of the trial court are consistent with the holdings of this opinion and are in all respects correct. The judgment of the trial court is affirmed.

AFFIRMED.

FRED R. BLAIR, APPELLANT, V. KEITH B. KLEIN ET AL., APPELLEES.

125 N. W. 2d 669

Filed January 10, 1964. No. 35496.

1. **Actions.** All facts which, taken together, are necessary to fix the responsibility for an injury complained of constitute a cause of action.
2. ———. A cause of action alleged in an amended petition, although founded upon the same injury as that described in

the original, is a different cause of action if it is dependent entirely upon different reasons for holding the defendant responsible for the wrong alleged.

3. **Actions: Limitations of Actions.** Where the facts incorporated into a petition by way of amendment constitute a cause of action separate and independent from that stated in the original petition, the statute of limitations against the cause of action pleaded in the amendment runs until the filing of such amended petition.

4. **Appeal and Error.** Before error requires reversal, it must be prejudicial to the rights of the party against whom it was made.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. Affirmed.

William W. Graham, for appellant.

McCormack, McCormack & Brown, Wear, Boland, Mullin & Walsh, and A. Lee Bloomingdale, for appellees.

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

BROWER, J.

Plaintiff and appellant Fred R. Blair brought this action in the district court for Douglas County, Nebraska. Its object was to recover for the value of a Cadillac automobile owned and operated by the plaintiff which was destroyed, together with damages for personal injuries suffered by the plaintiff, his wife, and two other occupants of said car. The action was brought against the defendants Keith B. Klein and Preferred Risk Mutual Insurance Company of Des Moines, Iowa.

The plaintiff will be referred to as such; and the defendants as such, or as Klein or the insurance company, where it is necessary to distinguish between them.

Inasmuch as certain aspects of the case turn on the pleadings they will be here summarized.

Plaintiff's original petition was filed in the trial court on January 8, 1962. The original petition was amended instanter by the plaintiff by interlineation after re-

questing and receiving permission to do so from the trial court on December 18, 1962.

The original petition as so amended is here summarized. The italicized portions are the interlined amendments so made which occur in the paragraphs quoted.

The petition, in paragraph No. 1, alleged the corporate existence of the insurance company, and that Klein was its authorized agent with power to bind it in relation to the agreement therein set out.

The second and third paragraphs of the petition with the amendments of December 18, 1962, in italics, are as follows: "II. On or about the 11th day of September, 1958, defendants verbally promised and agreed to insure plaintiff against public liability for bodily injury and property damage, medical payments, collision, comprehensive, personal effects, fire, lightning, transportation, theft, combined additional coverage, towing and labor costs, and family protection, growing out of the ownership, use, and operation of one Cadillac Four Door Sedan, 1953 model, and agreed to furnish plaintiff with a written insurance policy providing for said coverage, at which time plaintiff was to pay the annual premium on said policy, but defendants *through their negligence* wholly failed to deliver said written policy of insurance, although plaintiff at all times since said agreement was made *relied thereon and* has stood ready and willing to pay said premium, *and do (sic) to said negligence of defendants the plaintiff suffered the injuries and damages hereinafter set forth.*

"III. On or about the 17th day of October, 1958, on highway No. 10, about 2 miles east of Weldon, Illinois, said Cadillac Automobile, then and there being operated by the plaintiff, was in collision with another vehicle; and, as a result thereof was damaged and wrecked beyond value; and plaintiff and his wife, Lois L. Blair, and Grover Goodwin and Stella Goodwin, husband and wife, all were passengers in said Cadillac Automobile at the time of said collision, and all received severe and serious

injuries, resulting in ambulance service, medication, first aid, surgical, nursing, and hospital treatment; and plaintiff was put to great expense for ambulance and towing services, transportation and other incidental expense; all of which was *to be* covered under the insurance policy set forth in paragraph II above; *upon which plaintiff at all times relied.*"

The fourth paragraph alleges the defendants were promptly notified of the loss and plaintiff promptly demanded payment therefor. It is followed by an itemized statement of losses, totalling $4,172.20, and a prayer for a judgment in that amount with costs.

After the amendments by interlineation were made the defendants, on December 20, 1962, were granted leave to plead instead of answering the amended petition. They thereupon filed a motion, first, to require the plaintiff to elect between an action for breach of contract and one based upon negligence because it was not clear whether the amended petition sounded in tort or contract; and, second, in the event plaintiff elected to base his action on tort to require him to set out the specific acts of negligence.

A journal of the court filed December 28, 1962, approved as to form by plaintiff's counsel, recites that at a hearing on December 27, 1962, plaintiff's counsel appeared in court and stated the action would be tried as a tort action based upon the alleged negligence of the defendants and that he was willing so to elect. The second portion of the motion to require the specific acts of negligence to be stated was then heard by the court. The court thereupon ordered that action be tried as a tort action based on negligence and not on contract and sustained the defendants' motion to require the specific acts of negligence to be set out and allowed the plaintiff until December 31, 1962, to file amendments.

On December 31, 1962, a supplemental amendment was filed setting out various specifications of negligence attributed to the defendants, consisting of failure

to use diligence in preparing, submitting, or passing on an application for insurance or in the issuance of an insurance policy, together with assurances by the defendants that plaintiff would be or was so insured, which acts, omissions, and assurances occurred between September 11, 1958, and the day of the accident on October 17, 1958, and on specified dates within said period; and that because thereof plaintiff was prevented from seeking other insurance and was placed in the position of using his automobile without formal insurance.

The defendants thereupon filed an amended answer to the plaintiff's petition, as amended, both by interlineation and by supplemental amendment. It consisted of a general denial, a plea of contributory negligence, and an allegation that the cause of action was barred by section 25-207, R. R. S. 1943.

At the conclusion of the plaintiff's evidence the defendants made a motion for a directed verdict in their favor, assigning several reasons among which were: "That the cause of action alleged in plaintiff's petition as amended is a new and different cause of action from that originally alleged in his petition and is barred by the Statute of Limitations, inasmuch as the original cause of action therein stated has been expressly abandoned by plaintiff through the plaintiff's election made in open court and appearing in the order of this Court dated December 28, 1962, * * *."

The defendants' motion for a directed verdict was sustained by the court and the cause was dismissed. Thereafter his motion for a new trial being overruled, the plaintiff has brought the cause to this court on appeal.

Plaintiff assigns error to the trial court in requiring him to elect whether to proceed on the tort action for negligence or on contract and in sustaining the defendants' motion for a directed verdict. He points out other alleged errors which in view of our decision have no significance.

A careful examination of the original petition of the plaintiff without the amendments in italics heretofore summarized herein, with pertinent portions thereof copied, shows quite clearly that it sought to recover on a contract of insurance. Paragraph I of the petition alleges that Klein had full power to represent the insurance company and bind it in relation to the making of the agreement set out. Paragraph II alleges that defendants verbally promised and agreed to insure plaintiff against the casualties therein listed and agreed to furnish plaintiff with a written policy of insurance which they failed to do. Paragraph III states the plaintiff incurred certain expenses as shown therein, all of which were covered under the insurance policy set forth in paragraph II above. Paragraph IV states the plaintiff promptly notified the defendants and demanded payment of the loss and damage, but they failed to pay the same.

The allegations added by the amendments by interlineation on December 18, 1962, and by the supplemental amendment of December 31, 1962, clearly show that the cause of action then pleaded was not based on a contract of insurance and that in fact there was no such contract. It was for negligence in failing to promptly prepare an application for or to issue such a policy. The first cause asserted was ex contractu, the second ex delicto.

The two causes involve distinctly different obligations owed by the defendants. In an action upon a contract of insurance the negligence of the defendants or contributory negligence of the plaintiff are not involved but the issues turn on the question of the existence of the contract and performance of its conditions. The cause of action asserted after the amendments is not based upon the contract but the neglect, delays, omissions, and assurances of the defendants relied on by the plaintiff, whereupon negligence and contributory negligence are the determining factors.

The plaintiff, to avoid the dilemma he faces upon the issue of the statute of limitations being raised by the answer and motion of the defendants, contends the allegations of the original petition sufficiently set out an action in tort for negligence in failing to issue the insurance policy. He calls attention particularly to the allegation in the original petition that defendants "failed" to deliver said written policy of insurance, maintaining that the word "failed" as defined by Webster is a falling short; a not doing; a neglect or omission or to be deficient in an obligation, duty or expectation; to neglect or omit. The amendments are urged to be simply an amplification or elaboration, clarifying the original petition.

We think however that whether an omission or "failure" constitutes negligence or a breach of contract depends upon whether the omission or failure arises out of a duty imposed by law measured by reasonableness and negligence or from such a duty imposed by an agreement resulting in a breach of contract. In the present case the defendants would have had a duty to deliver the written policy of insurance if there had been a contract of insurance between the parties. In the case before us we hold the allegations of failure to deliver the written policy are more consistent with an agreement of insurance than with an action for negligence in not preparing the application or the policy. Moreover, the rest of the original petition clearly sets forth an agreement of insurance.

In Johnson v. American Smelting & Refining Co., on rehearing, 80 Neb. 255, 116 N. W. 517, this court said: "All facts which, taken together, are necessary to fix the responsibility for an injury complained of constitute a cause of action.

"A cause of action alleged in an amended petition, although founded upon the same injury as that described in the original, is a different cause of action, if it is dependent entirely upon different reasons for hold-

ing the defendant responsible for the wrong alleged." The court in the cited case said: "It is the same injury, but a different liability is alleged against the defendant. It now appears that the failure to observe the distinction resulted in the erroneous conclusion reached at the former hearing. The injury, it is true, is the subject of the action. Had no injury been suffered, there would have been no cause of action. The cause of action in any case embraces, not only the injury which the complaining party has received, but it includes more. All the facts which, taken together, are necessary to fix the responsibility are parts of the cause of action." See, also, Westover v. Hoover, 94 Neb. 596, 143 N. W. 946, 48 L. R. A. N. S. 984; Streight v. First Trust Co., 133 Neb. 340, 275 N. W. 278.

The petition was first amended by interlineation on December 18, 1962, and the amendment setting out the specifications of negligence was filed December 31, 1962. These amendments were both made more than 4 years after the injuries complained of which occurred on October 17, 1958. The alleged acts of negligence occurred before that date. The cause of action stated in the petition so amended was barred by section 25-207, R. R. S. 1943.

"Where the facts incorporated into a petition by way of amendment constitute a cause of action separate and independent from that stated in the original petition, the statute of limitations against the cause of action pleaded in the amendment runs until the filing of such amended petition." Buerstetta v. Tecumseh Nat. Bank, 57 Neb. 504, 77 N. W. 1094. This rule has been approved by this court in its subsequent decisions. Tennyson v. Werthman, 167 Neb. 208, 92 N. W. 2d 559; Streight v. First Trust Co., *supra;* Westover v. Hoover, *supra.*

The plaintiff cites cases where the amendments to the petition were held not to state a different cause of action. One of the principal cases he relies on is Rhoads v. Columbia Fire Underwriters Agency, 128 Neb. 710,

260 N. W. 174, which does not involve the statute of limitations. It was with regard to a rider covering new improvements which was to be attached to a fire insurance policy. The petition alleged the facts involved in the transaction, including the execution of the application for the insurance and payment of the additional premium, and the assurance that the policy would be in effect the next day; that the policy, with the rider, was to be issued and was to be transmitted to the mortgagee; and that the plaintiff relied on the acts and representations of the defendants. The detailed allegations of fact set out in the opinion clearly stated facts constituting a cause of action in tort under the Code of Civil Procedure. This court held them sufficient in that respect and that they were sustained by the evidence; and that the issues should have been submitted to the jury notwithstanding the prayer for recovery under the insurance policy.

Other cases cited by the plaintiff are likewise cases where the cause set out in the original petition is but elaborated or amplified by amendment. They have no application. The distinction between them and the case at bar where a petition, alleging a wrong based upon a breach of contract, is changed to new cause based upon a wrong constituting a tort bottomed upon negligence, is clear.

The amendments to the petition constituted a new cause of action different from that stated in the original petition, and more than 4 years having expired between the injury to the plaintiff and the amendments to the petition, the cause of action was barred by the statute of limitations. § 25-207, R. R. S. 1943.

Plaintiff claims the trial court erred in requiring him to elect whether the action should proceed as one upon an insurance contract or upon tort based on negligence. It may first be said that the record does not sustain his contention that the court required or ordered him to make an election. The journal of the court, approved

as to form by plaintiff's counsel, recites that the attorney for the plaintiff appeared December 27, 1962, stated the action would be tried as a tort action based on negligence, and he was willing to so elect. Thereafter the motion to require the plaintiff to particularize the acts of negligence was submitted to and ruled on by the court. Moreover, it appears obvious from our examination of the bill of exceptions that there was no contract or agreement of insurance. The plaintiff's own testimony shows conclusively no such agreement was entered into. Under the circumstances no prejudice would arise if the election had been ordered. Before error requires reversal, it must be prejudicial to the rights of the party against whom it was made. Workman v. Workman, 174 Neb. 471, 118 N. W. 2d 764. The contention is without merit.

The action having been barred by the statute of limitations, it follows that the trial court was correct in its ruling sustaining the motion to direct a verdict and dismissing the action, and the judgment should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DELMAR LOOKABILL, APPELLANT.

125 N. W. 2d 695

Filed January 10, 1964. No. 35531.

1. **Municipal Corporations.** An ordinance of a city may by reference adopt the provisions of statutes or prior ordinances.
2. ———. A legislative body such as a city council may not delegate its power to enact or amend ordinances.
3. ———. A city council may not by ordinance make future amendments of a state statute enacted by reference into a city ordinance a part of such ordinance. Such action constitutes an unlawful delegation of legislative power.
4. **Constitutional Law.** When it appears that unconstitutional portions of an act can be separated from the valid portions and the latter enforced independent of the former, and it further

appears that the invalid portions did not constitute such an inducement to the passage of the valid parts that they would not have been passed without them, the former may be rejected and the latter upheld.

5. ———. It is within the power of the Legislature to provide that the trial of petty offenses in violation of a city or village ordinance shall be triable without a jury, when Article 1, section 6, of the Constitution is not violated. This is so even if the ordinance is a reiteration of a statute covering the same offense under which the defendant would be entitled to a jury trial.

6. **Automobiles: Municipal Corporations.** A conviction of an offense under a city or village ordinance will not authorize the suspension or revocation of a motor vehicle driver's license by a police or municipal court.

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

Dryden & Jensen, for appellant.

Ward W. Minor, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, SPENCER, BOSLAUGH, and BROWER, JJ., and ZEILINGER, District Judge.

CARTER, J.

The defendant was convicted of operating a motor vehicle upon the public streets of the city of Kearney while under the influence of alcoholic liquor, contrary to the ordinances of the city. The defendant brings the case here for review.

The only contention made is that the trial court erred in overruling defendant's motion to quash the complaint. Defendant asserted as grounds for quashing the complaint that (1) there was no ordinance making the charge an offense, (2) the ordinance purporting to invest the police court with jurisdiction to enforce any penalty is illegal, void, and unconstitutional, and (3) the complaint was filed by a person having no authority to do so.

The primary question raised is whether or not the

ordinance involved was a constitutional exercise of the city's police power. The pertinent part of ordinance No. 1681, here relied on, provides: "The traffic rules and regulations contained in Chapter 39, Article 7 of the Revised Statutes of 1943, Re-issue of 1960, as therein provided as may be amended and hereby adopted as the rules and regulations of the City of Kearney, Nebraska, except such penalties as provided for in said Chapter 39, Article 7, and except as may be specifically provided or modified by ordinance. The Police Court of the City of Kearney, Nebraska, is given jurisdiction over all complaints for violation of such rules and regulations, and for the imposing of penalties as provided in Section 1.7, 'General Penalty' of this code, which shall be the maximum penalty which for the purpose of this section shall supersede all other penalties."

Section 1.7, referred to in the ordinance, provides: "Whenever in this Code or in any other ordinance of the city, any act is prohibited or is made or declared to be unlawful or an offense, or the doing of any act is required or the failure to do any act is declared to be unlawful or an offense, where no specific penalty is provided therefor, any person upon the conviction of a violation of any such provision of this Code or any other ordinance of the city shall be punished by a fine not exceeding one hundred dollars for each offense; and such person shall stand committed to the city jail until such fine and costs of prosecution are paid, secured or otherwise discharged according to law."

Chapter 39, article 7, R. R. S. 1943, incorporated into the ordinance by reference, includes sections 39-701 to 39-7,135, R. R. S. 1943, and occupies some 92 pages of statutory provisions. The foregoing statutes include the rules of the road, the regulations of automobiles, trucks, and trailers, and the penalties for the violation of such which include penalties for both

misdemeanors and felonies. The statutes incorporated in the ordinance also provide for the suspension and revocation of drivers' licenses for certain specified violations.

It is a recognized rule that the law-making body of a municipality may enact laws of the state by reference. In City of Tucson v. Stewart, 45 Ariz. 36, 40 P. 2d 72, 96 A. L. R. 1492, the following is quoted with approval: "'An ordinance may by reference adopt the provisions of statutes or prior ordinances, and in such case the statute need not be set out in totidem verbis, and entered upon the minutes of the corporation. An ordinance establishing grades of streets may properly refer to maps and books on file in a public office, as a part thereof.' 2 McQuillin, Mun. Corps. (2d Ed.) § 710; Sloss-Sheffield Steel & Iron Co. v. Smith, 175 Ala. 260, 57 So. 29; Napa v. Easterby, 76 Cal. 222, 18 Pac. 253; Southern Operating Co. v. Chattanooga, 128 Tenn. 196, 159 S. W. 1091, Ann. Cas. 1914D, 720." See, also, City of Milwaukee v. Krupnik, 201 Wis. 1, 229 N. W. 43; City of Litchfield v. Thorworth, 337 Ill. 469, 169 N. E. 265; Greene v. Town of Lakeport, 74 Cal. App. 1, 239 P. 702.

The ordinance in question adopts only the rules and regulations contained in Chapter 39, article 7, R. R. S. 1943 (1960), which contains much that may not be denominated as rules and regulations. While the adoption of such a statute by reference may be subjected to criticism as a matter of policy, we cannot say that it is so indefinite and uncertain as to require a holding of unconstitutionality on that ground.

The defendant urges that the ordinance is unconstitutional in that it adopts the rules and regulations of Chapter 39, article 7, R. R. S. 1943, "as therein provided as may be amended." It is a general rule that a legislative body such as a city council may not delegate its power to enact ordinances. The general police power possessed by a city is one of which a city can-

not divest itself, by contract or otherwise. 62 C. J. S. Municipal Corporations, § 154b, p. 316; 11 Am. Jur., Constitutional Law, § 254, p. 983. The provision "as may be amended" is void and of no force and effect as an attempt to make future amendments of Chapter 39, article 7, R. R. S. 1943, amendments ipso facto of ordinance No. 1681 of the city of Kearney. A city council may not by ordinance make future amendments of a statute enacted by reference into a city ordinance a part of such ordinance. It constitutes an unconstitutional delegation of the legislative power of the city.

It is asserted that the inclusion of this invalid delegation of power has the effect of nullifying ordinance No. 1681. We had a situation similar in principle before us in Lennox v. Housing Authority of the City of Omaha, 137 Neb. 582, 290 N. W. 451. In that case we said: "When it appears that unconstitutional portions of an act can be separated from the valid portions and the latter enforced independent of the former, and it further appears that the invalid portions did not constitute such an inducement to the passage of the valid parts that they would not have been passed without them, the former may be rejected and the latter upheld."

A workable ordinance remains after the invalid portion is stricken out. It may not be said that the invalid portion of the ordinance was such an inducement to its passage that it would not have been enacted if it had not been included. The nature of the invalid part that has been nullified and the relation it bore to the remaining portions of the ordinance is such as to permit the remaining valid parts to remain in full force and effect. Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729. We think the foregoing rule controls the instant case.

The defendant contends that the failure of the police magistrate to grant him a jury trial upon his demand was such an error as to invalidate his conviction. The

controlling rule is stated in State v. Amick, 173 Neb. 770, 114 N. W. 2d 893, wherein it is said: "The constitutional provision that the right of trial by jury should remain inviolate has been construed by this court to mean that it should remain as it was at the time of the adoption of the Constitution. The offense involved in the present case did not exist at that time and, consequently, it being a petty offense, the right to a jury trial is not within the scope of the constitutional guaranty. Under such circumstances, the matter of a jury trial is a legislative matter. The Legislature, by section 26-183, R. R. S. 1943, has specifically provided for jury trial in all cases 'except criminal cases arising under city or village ordinances.' This is clearly within the province of the Legislature to do and controls the disposition of the present case." The defendant was not entitled to a jury trial in the police court on an offense charged under the city ordinance. This is so even though the person charged would be entitled to a jury trial if prosecuted under a state statute for the same offense.

Defendant assigns as error the order of the court suspending his driver's license for a period of 6 months. This question is controlled by Gembler v. City of Seward, 136 Neb. 916, 288 N. W. 545, wherein we said: "The right to operate a motor vehicle within the state of Nebraska is dependent solely upon the issuance of a driver's license by the state. It is a field over which the state has reserved exclusive control. No power has been conferred upon the city of Seward to suspend or regulate, by ordinance, any such license privilege which the state has granted. That, however, is the purpose and effect of the ordinance provision quoted, and it is therefore invalid, but without affecting the other provisions of the ordinance. It may be added that, even if no driver's license statute existed, the city of Seward could not exercise general police powers to prohibit the operation of a motor vehicle throughout the rest of the state for violation of one of its ordinances." We necessarily

hold that a conviction of an offense under a city or village ordinance will not authorize the suspension or revocation of a driver's license by a police or municipal court.

The judgment of the district court is accordingly modified to the extent of vacating the portion of the judgment suspending the driver's license of defendant for a period of 6 months. The judgment of the district court is otherwise affirmed.

AFFIRMED AS MODIFIED.

RUTH IRIS CROW, ADMINISTRATRIX OF THE ESTATE OF ALLEN B. CROW, DECEASED, APPELLANT AND CROSS-APPELLEE, V. THE AMERICANA CROP HAIL POOL, INC., APPELLEE AND CROSS-APPELLANT.

125 N. W. 2d 691

Filed January 10, 1964. No. 35543.

1. **Workmen's Compensation.** To warrant a recovery under the Nebraska Workmen's Compensation Act, the accident which caused the injury complained of must be one arising out of and in the course of the employment.
2. ———. Such compensation act does not authorize an award in case of injury or death from a peril which is common to all mankind, to which the public in general is exposed.
3. ———. Injuries resulting from exposure to the elements, such as abnormal heat, cold, snow, lightning, or storms, are generally classed as risks to which the general public is exposed, and as not coming within the purview of workmen's compensation acts, unless the record discloses a hazard imposed upon the employee by reason of the employment greater than that to which the public generally is subject.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Eisenstatt, Lay, Higgins & Miller, for appellant.

Webb, Kelley, Green & Byam, for appellee.

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

BROWER, J.

The plaintiff Ruth Iris Crow, as administratrix of the estate of Allen B. Crow, deceased, brought this action against the defendant The Americana Crop Hail Pool, Inc., in the Nebraska Workmen's Compensation Court to recover compensation for the death of her decedent under the Nebraska Workmen's Compensation Act.

Plaintiff's amended petition in the compensation court alleged the deceased, hereinafter at times designated as Crow, met his death on June 27, 1960, as a result of injuries sustained in an accident arising out of and in the course of his employment as a crop adjuster by the defendant and that Ruth Iris Crow was his sole dependent.

The defendant's answer was a general denial coupled with an affirmative allegation that the deceased was not an employee of the defendant but an independent contractor, and further stating that the deceased Allen B. Crow met his death as the result of a peril common to all mankind.

A trial was had before a single Judge of the Workmen's Compensation Court sitting at Omaha, Douglas County, Nebraska. Its decision held the plaintiff had failed to prove the deceased was defendant's employee at the time of his death and further that even if he had been an employee, his death was caused by a tornado and there was nothing in the nature of his employment that exposed the decedent to greater dangers than that shared in common by the community generally. It held his death was not compensable and dismissed the petition.

Plaintiff waived rehearing before the whole compensation court and appealed directly to the district court for Douglas County, Nebraska. The same issues being there presented and tried, that court held the deceased was an employee of the defendant and was engaged in such employment when the injuries causing his death occurred. Again, however, it found that the death was occasioned by the elements of nature and that the haz-

ards to which the deceased was subjected were no greater than those borne by the general public in the area where the accident occurred. Thereupon, the district court also entered its judgment dismissing the plaintiff's petition.

Plaintiff's motion for a new trial having been overruled she has brought the matter to this court by appeal, assigning error to the trial court in finding that the death of plaintiff's decedent did not arise out of his employment.

The defendant has cross-appealed from the finding of the district court that the deceased was an employee of the defendant, contending he was an independent contractor.

Our decision being based on our finding that the decedent's death did not arise from a hazard incident to his work, but from those common to mankind generally, the exact nature of the relationship created by the agreement between the defendant and the deceased is not required to be determined and will not be discussed.

The bill of exceptions consists of a stipulation of facts jointly offered by the parties and the only disputes arising are the inferences which flow therefrom.

Defendant operates a crop hail pooling business in a multistate area and maintains an office at Omaha, Nebraska. It issues policies of hail insurance and adjusts crop hail losses in which the defendant itself and some 20 other participating insurance companies are interested depending upon the amount of stock held respectively by the others in the defendant company.

In January 1960, defendant's manager engaged Crow as a crop hail adjuster to handle hail claims and losses during the ensuing crop hail season. A written agreement designated as an Independent Adjuster's Agreement was executed by the defendant and Crow. It stated Crow had been placed on defendant's list of qualified claim adjusters and provided for a per diem compensation for the actual time required to do the work

when additional aid was required, together with incidental traveling expenses.

Crow began handling such claims sent to him by the defendant in May 1960. Defendant's branch manager in the latter part of June 1960, requested one Richard Todd, another adjuster, to contact Crow and arrange a meeting between them that they might work together with respect to losses near Chappell, Nebraska.

Todd contacted Crow by telephone and the two arranged to meet at the Empire Motel in Chappell on June 27, 1960. After completing the adjustment of certain losses with which he was then occupied, Crow started for Chappell, Nebraska. While traveling on U. S. Highway No. 385 in Sedgwick County, Colorado, at a point approximately 21 miles southwest of Julesburg, Colorado, on June 27, 1960, his automobile was struck by a tornado and carried from the highway causing his death.

In Gale v. Krug Park Amusement Co., 114 Neb. 432, 208 N. W. 739, 46 A. L. R. 1213, this court had under consideration the death of a workman caused by a tornado at Omaha while employed by the defendant in the cited case. The following rules were set out and adopted by this court therein: "To warrant a recovery under our compensation act, the accident which caused the injury complained of must be one arising out of and in the course of the employment.

"Such compensation act does not authorize an award in case of injury or death from a peril which is common to all mankind, to which the public in general is exposed." The cited case discusses other cases from this and other courts, as well as texts applying these rules. Thereafter, in summarizing them, the opinion states: "Thus, we conclude that injuries resulting from exposure to the elements, such as abnormal heat, cold, snow, lightning, or storms, are generally classed as risks to which the general public is exposed, and as not coming within the purview of workmen's compensation acts, unless the record discloses a hazard imposed upon the

employee by reason of the employment greater than that to which the public generally is subjected."

The plaintiff seeks to avoid the application of the reasoning in the decision in Gale v. Krug Park Amusement Co., *supra,* to the case now before us. Her counsel cites City of Fremont v. Lea, 115 Neb. 565, 213 N. W. 820, where a fireman, an employee sent out in the streets to participate in a holiday celebration and killed by a toy cannon accidentally discharged by a third person, was held to be entitled to workmen's compensation benefits. Likewise, Ridenour v. Lewis, 121 Neb. 823, 238 N. W. 745, 80 A. L. R. 119, is discussed where this court upheld such a recovery where a workman who was employed to install, repair, and service radios and collect his employer's accounts, was beset upon and killed on the streets while pursuing his employment. In the opinion in Ridenour v. Lewis, *supra,* this court sufficiently distinguishes these cases involving ordinary street risks incident to one's employment from those risks incident to the elements and common to all mankind, stating: "This court is committed to the view that, when an employee is sent into the public street, under the circumstances detailed in this record, on his master's business, his employment necessarily involves exposure to all risks of the street, and injury from any such cause, not *involving what is often referred to in the* books as an '*Act of God*' (Gale v. Krug Park Amusement Co., 114 Neb. 432), arises 'out of the employment,' within the meaning of the workmen's compensation act." (Emphasis ours.)

Many cases from courts of last resort in other states construing statutes which in some respects may differ from our own are discussed by plaintiff's counsel. Others are cited where the peculiar circumstances of the work in which the employee was engaged subjected him to extra hazards from the elements. One of these is Pigford Brothers Construction Co. v. Evans, 225 Miss. 411, 83 So. 2d 622, where the workman, with a severe storm

impending, was beheaded by an object hurled through the air by a tornado while attempting to install a tarpaulin on top of a dragline located on an embankment requiring the employee to be stationed some 30 feet above ground. It is to be noted in the cited case the court in its opinion stated that the accident came within the universally recognized increased risk test. Another, American Shipbuilding Co. v. Michalski, 30 Ohio App. 80, 164 N. E. 123, allowed compensation where the plaintiff, a fireman, during a tornado was by the express order of the master directed to go to a place of increased danger to preserve the master's property and while obeying such order was injured. In the latter case the court, however, quoted from another Ohio case apparently with approval, stating: "In case an employee, in the discharge of the duties of his employment, is injured as a result of the unexpected violence of the forces of nature, to wit, 'a destructive tornado,' where his duties do not expose him to a special or peculiar danger from the elements which caused the injury, greater than other persons in the community, such employee is not entitled to compensation under the Workmen's Compensation Act." Thus the Ohio court clearly bases its decision on the special circumstances involved in the work undertaken by the employee at the time which increased the hazards. The statement in the opinion seems to agree with that portion of the opinion of this court herein quoted from Ridenour v. Lewis, *supra*.

Further discussion of the many cases referred to by the plaintiff from other jurisdictions would extend this opinion needlessly. Nor is it necessary to refer to the many others cited by the defendant from various states which appear to agree with those of this court.

We consider our decision in Gale v. Krug Park Amusement Co., *supra*, controlling in the present case. There is nothing in the stipulation of facts that shows the decedent was exposed to any different hazard than that which applied to all mankind in the area where his death oc-

curred. He was driving his own car on the highway and met his death by a tornado, a hazard any other person in that locality might have been subjected to, either upon the highway or elsewhere. He was not engaged in protecting the property of the defendant at that time. Indeed, in the instant case the defendant did not determine the manner or time or order of the adjustment of the losses by the deceased. His death resulted from a tornado of which the defendant knew nothing and concerning which it gave no directions to the deceased. Its course was unforeseeable by man and appears clearly to have been an act of God. To hold the defendant liable under the Workmen's Compensation Act in such cases would make the employer an insurer of risks having nothing to do with the employment and not arising therefrom.

It follows that the errors assigned are without merit and the judgment of the trial court was right and is affirmed.

AFFIRMED.

SHIRLEY D. ERPELDING, APPELLANT, V. BERNARD F. ERPELDING, APPELLEE.

125 N. W. 2d 688

Filed January 10, 1964. No. 35551.

1. **Divorce.** Proceedings to modify a divorce decree with regard to the care, custody, and maintenance of minor children are special statutory proceedings and in such cases jurisdiction must be proved or affirmatively shown on the record.
2. ———. While the court in a divorce decree may on its own motion modify its provisions as provided by section 42-312, R. R. S. 1943, regarding the care, custody, and maintenance of children, it has no authority to do so without notice to the parties and an opportunity given them to be heard.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded.

John McArthur, for appellant.

No appearance for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, BOSLAUGH, and BROWER, JJ., and ZEILINGER, District Judge.

CARTER, J.

This is a proceeding in a divorce action to determine the validity of an order modifying a child support decree entered against Bernard F. Erpelding. Shirley D. Erpelding, the divorced wife of Bernard F. Erpelding, brings the case to this court for review.

We shall hereafter designate Bernard F. Erpelding as Bernard, Shirley D. Erpelding, the first wife, as Shirley, and Josephine Erpelding, the second wife, as Josephine.

The evidence shows that on May 17, 1956, Shirley obtained a divorce from Bernard. The temporary custody of the six minor children was placed with St. Thomas Orphanage at Lincoln, Nebraska, at the expense of Bernard. On March 5, 1959, after notice and hearing, Shirley was given the custody of the six minor children and the question of child support was reserved. On October 30, 1959, after notice and hearing, Bernard was ordered to pay $100 per month for 2 months and $125 per month thereafter for the support of the children. On July 5, 1962, after notice and hearing, and the consent of the parties, it was ordered by the court that the proceeds of Bernard's interest in certain real estate inherited from his father, Lawrence Erpelding, then being partitioned and sold, be paid into court for application to the accrued and accruing child support payments in the divorce case between Shirley and Bernard. On January 29, 1963, the court entered an additional order finding that there are now four children to be supported and under the evidence in the hearing in the decree of July 5, 1962, fixed the support payments for the four minor children at $31.25 per child until each child becomes 18 years of age or is sooner emancipated. By the same order of January 29, 1963, the court found the amount of money impounded to be $17,249.73 and di-

rected that $4,825 thereof be paid to Shirley for the accrued and unpaid support payments. The court also directed that $500 of said impounded fund be paid to Bernard, free from the lien of any judgments. The court further directed the payment from the impounded fund of $31.25 per child per month for 1 year to Shirley and Josephine for the support of their respective children, each then having four children by Bernard. The court then ordered the balance of the impounded fund to be placed with the Guaranty Trust Company as trustee for investment. A motion for a new trial was duly filed to this order by Shirley. The motion for a new trial was overruled on May 11, 1963. It is from this order that Shirley has appealed.

The evidence shows that Bernard married Josephine on February 2, 1957, and has four children by this marriage. The statement of the court dictated into the record on January 29, 1963, indicates that Josephine and Bernard had a divorce suit pending and that a temporary child support order had been entered directing Bernard to pay $31.25 per month for each of the four children born to Bernard and Josephine. These amounts were ordered paid from the impounded fund.

Bernard had made no payments for child support. No issue is raised as to the impounding of the $17,249.73. No question is raised as to the allowance of $4,825 to Shirley from the fund. We assume, since the record does not show, that this is the sum of the support payments that had accrued and vested, and become final. The court directed the payment of $500 free from any judgment liens. The balance of the impounded fund was held for distribution by subsequent order of the court and is not involved in this litigation.

The primary question raised by this appeal is whether or not the decree of January 29, 1963, is valid. The record shows that on October 30, 1959, the trial court entered an order, after notice and hearing, fixing the child support money to be paid to Shirley at $100 per

month for 2 months and $125 per month until the children become self-supporting or reach the age of 21 years. The court reserved for future determination the liability for medical expenses for one of the children on application and notice. No appeal was taken from this decree and it became final.

On March 5, 1962, the application of Shirley was filed to require Bernard to furnish security for the payment of accruing child support payments and for the appointment of a receiver to take possession of Bernard's property, which included a one-sixth interest in land owned by his deceased father. The parties stipulated in open court that none of the child support money had been paid and that Bernard's interest in his deceased father's land then in partition should be paid into court to be applied to the payment of accrued and future child support allowances. It was ordered also that if the parties failed to agree on any details as to future payments, either party could apply to the court and, after notice and hearing, a disposition would be made. No appeal was taken from this order and it has become final.

On January 29, 1963, the court entered the order from which this appeal is taken. The order appears to have been entered in two separate cases, Shirley D. Erpelding v. Bernard F. Erpelding, the divorce case, and Marjorie Detter v. Shirley Erpelding, the partition action. It is the contention of Shirley in the present case that no hearing was held nor notice given of any hearing, in the case before us, on January 29, 1963, and that the court was without authority to make the order. A bill of exceptions was filed which contains the evidence taken at the hearing held on July 2, 1962, but contains no evidence taken on January 29, 1963. The bill of exceptions does contain a statement by the court on January 29, 1963, making findings which are incorporated in the order appealed from. The court reporter certified that the bill of exceptions contained all the evidence given, both oral and documentary, upon the trial of this

cause. The formal journal entry recites that the matter came on for hearing upon the application for modification of support provisions by Shirley and upon the petition of intervention filed by Josephine in the partition suit. It shows that Shirley appeared by her attorney, John McArthur. The order then found that the number of children had been reduced to four and fixed the support payments at $31.25 per month per child and reduced the period of payment from the time each child reaches 21 years to the time each child reaches the age of 18 years. In the same order the court fixed similar temporary child support payments for the children of Josephine to be paid from the impounded fund for one year "under the temporary support order issued by this court." It is evident that the order was intended to apply in two different pending cases, if not three. The mingling of orders in more than one case in the same journal entry, when the cases have not been properly consolidated, is most confusing and is a practice that is not to be condoned. On June 6, 1963, the court filed a journal entry denominated "Explanation of Order" in which it is stated that the order heretofore made provided for the payment to Shirley of child support during the pendency of appeal and is not to be considered as an acceptance of benefits of the decree. The appeal was perfected on May 23, 1963.

With reference to the decree entered on January 29, 1963, the evidence does not indicate that either of the parties had applied for a modification of the existing child support judgment. There was no pleading before the court on which to base any such modification. The court's reference to evidence and appearances could relate only to the application of Shirley which was finally disposed of by the order of July 5, 1962. The court's statement that evidence was adduced is made in a decree purporting to apply to both the divorce and partition suits. The bill of exceptions contains no evidence relating to a modification of the child support

order, although it does contain findings of the court under date of January 29, 1963. We can reach but one conclusion from the record before us, that is, that the hearing on January 29, 1963, was in the partition action and not in the divorce suit before us.

It is true that a district court has the power to modify a divorce decree so far as it concerns the care, custody, and maintenance of children on its own motion as provided by section 42-312, R. R. S. 1943. Proceedings to modify a divorce decree with regards to the care, custody, and maintenance of minor children are special statutory proceedings and in such cases jurisdiction must be proved or affirmatively shown on the record. The court, however, has no authority or jurisdiction to modify such a decree without notice to the parties and an opportunity given them to be heard. Morehouse v. Morehouse, 159 Neb. 255, 66 N. W. 2d 579.

We conclude that the trial court was without authority to enter the decree of January 29, 1963, for failure to give notice and afford a hearing to the parties in the case in which the modification of the child support judgment could properly have been heard and determined. The order of January 29, 1963, is vacated and set aside.

REVERSED AND REMANDED.

SPENCER, J., participating on briefs.

ENTERPRISE COMPANY, INC., A CORPORATION, APPELLEE, V. SANITARY DISTRICT NO. ONE OF LANCASTER COUNTY, NEBRASKA, A PUBLIC CORPORATION, APPELLANT.

125 N. W. 2d 712

Filed January 17, 1964. No. 35530.

1. **Trial.** In testing the sufficiency of the evidence to support a judgment, the evidence must be considered in the light most favorable to the successful party.
2. **Trial: Damages.** It is the duty of the trial court to instruct the

jury as to the proper basis upon which damages are to be assessed and to fully and fairly inform the jury as to the various items of damage which should be taken into consideration in arriving at the verdict.

3. **Trial.** It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and supported by the evidence.
4. **Eminent Domain.** General benefits are those which result from the enjoyment of the facilities provided by a public improvement. Special benefits are those which arise from the peculiar relation of the land in question to the public improvement and which are not shared by all other land within range of the public improvement.

Appeal from the district court for Lancaster County: JOHN L. POLK, Judge. Affirmed.

Kier, Cobb & Luedtke and Janice L. Gradwohl, for appellant.

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

Heard before WHITE, C. J., CARTER, MESSMORE, SPENCER, BOSLAUGH, and BROWER, JJ., and LYNCH, District Judge.

BOSLAUGH, J.

Sanitary District No. One of Lancaster County, Nebraska, commenced this proceeding to obtain an easement for the purpose of enlarging an existing drainage ditch. Enterprise Company, Inc., is the owner of the land involved in the proceeding. For convenience, Enterprise will be referred to as the plaintiff, and the Sanitary District as the defendant.

The plaintiff recovered damages in the amount of $13,005 in the trial court. The defendant appeals from that judgment. The assignments of error relate to the sufficiency of the evidence to sustain the judgment and the instructions to the jury.

The land owned by the plaintiff is an irregular tract lying east of the Chicago & North Western Railroad right-of-way and south of Adams Street in the City of

Lincoln, Nebraska. The land is in an industrial area and is used for industrial purposes.

In 1930, the defendant obtained an easement for a drainage ditch along the western boundary of the property. The easement obtained in this proceeding is adjacent to and along the east line of the 1930 easement. The taking which is involved in this appeal is an area 18 feet wide and 1,100 feet long. It amounts to .47 of an acre.

Prior to the taking the plaintiff had constructed a building on the property. The building is leased to Mapes Industries, Inc., and is used for manufacturing purposes. The building when constructed was 33 feet east of the east line of the 1930 easement. Since the easement obtained in this proceeding is 18 feet in width, the west line of the Mapes building is now 15 feet from the east line of the defendant's easement.

There was evidence that the land taken had a value of $4,000 per acre at the time of the taking. The defendant produced evidence that the land was of a lesser value, but in testing the sufficiency of the evidence to support a judgment the evidence must be considered in the light most favorable to the successful party. O'Neill v. State, 174 Neb. 540, 118 N. W. 2d 616.

There was evidence that the taking of the easement and the enlarging of the drainage ditch will require that the foundation of the Mapes building be protected and reinforced to prevent the collapse of the building; that the fair and reasonable value of this additional construction is $11,000; that prior to the taking the area between the west line of the Mapes building and the east line of the 1930 easement could be used for parking and similar uses; that the area remaining between the west line of the building and the east line of the new easement is so narrow that it cannot be used for parking and similar uses; and that the effect of the taking was to destroy the value of the 15-foot area west of the Mapes building.

The evidence which we have summarized was sufficient to sustain the judgment. Therefore, it is unnecessary to discuss the evidence relating to the other items of damage claimed by Enterprise. The assignments of error relating to the sufficiency of the evidence to sustain the judgment are without merit.

The defendant contends that the trial court should have instructed the jury that a landowner cannot recover damages that are uncertain, conjectural, or speculative. A landowner has no right to recover such damages. However, there is no duty upon a trial court to instruct the jury concerning damages that cannot be recovered.

It is the duty of the trial court to instruct the jury as to the proper basis upon which damages are to be assessed and to fully and fairly inform the jury as to the various items of damage which should be taken into consideration in arriving at the verdict. Zager v. Johnson, 174 Neb. 106, 116 N. W. 2d 1. The instructions given in this case relating to damages were adequate.

The defendant contends that the jury should have been instructed concerning the law of the second taking. The contention has reference to the rule that when a drainage ditch erodes beyond its easement, the encroachment upon the adjoining land constitutes a second taking for which damages may be recovered. McGree v. Stanton-Pilger Drainage Dist., 164 Neb. 552, 82 N. W. 2d 798.

The evidence in this case shows that the drainage ditch of the defendant has eroded and at many places now extends beyond the east line of the 1930 easement. This was a reason why the defendant wanted to obtain the additional easement. Instead of stabilizing the banks of its ditch, the defendant decided to obtain an additional easement.

The defendant did not allege that it had obtained any rights to the additional easement by prescription or purchase but proceeded upon the theory that the entire

property taken belonged to the plaintiff. In effect, this proceeding was the second taking. Thus, there was no issue in this case concerning a second taking.

It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and supported by the evidence. Stillwell v. Schmoker, 175 Neb. 595, 122 N. W. 2d 538. There is no duty to instruct in reference to a matter that is not an issue in the case. The instructions which were given by the trial court were adequate and proper and the trial court was not required to instruct concerning a second taking.

The defendant contends that the jury should have been instructed concerning the law of special benefits and the law of estoppel. The defendant argues that the plaintiff will receive a special benefit by reason of the ditch being available to carry away drainage from the plaintiff's land, and that this benefit should be set off against any damages which otherwise may be due the plaintiff. The defendant further argues that the plaintiff contributed to the erosion of the banks of the drainage ditch because surface water from the plaintiff's property drained into the ditch and a septic tank system installed by the plaintiff tended to saturate the soil and cause the east bank to slough off into the ditch.

General benefits are those which result from the enjoyment of the facilities provided by a public improvement. Special benefits are those which arise from the peculiar relation of the land in question to the public improvement and are not shared by all other land within range of the public improvement. Backer v. City of Sidney, 165 Neb. 816, 87 N. W. 2d 610, on rehearing, 166 Neb. 492, 89 N. W. 2d 592.

The evidence in this case does not show that any special benefit will accrue to the plaintiff's land by reason of the enlarging of the drainage ditch. The benefit which the plaintiff's land enjoys is from the existing ditch. It is a general benefit and one which accrued at the time the ditch was originally constructed. Consequently,

there was no duty upon the trial court to instruct concerning special benefits.

The defendant did not allege and the evidence does not show any act or conduct on the part of the plaintiff which would estop the plaintiff from recovering damages resulting from the taking. The defendant did not allege that the construction of the septic system was negligent or illegal or that the plaintiff was not entitled to drain its land into the ditch. There was no issue in this case with respect to estoppel and no instruction concerning it was required.

Idlewild Farm Co. v. Elkhorn River Drainage Dist., 114 Neb. 134, 206 N. W. 741, cited by the defendant, is not applicable to this case. The plaintiff here did not participate in the design, construction, or operation of the defendant's drainage ditch.

The judgment of the district court is affirmed.

AFFIRMED.

TERRI JOHNSON, BY HER FATHER AND NEXT FRIEND, GLENN R. JOHNSON, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT, APPELLEE.

125 N. W. 2d 708

Filed January 17, 1964. No. 35544.

1. **Trial: Julgments.** Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists.
2. ———: ———. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled.
3. ———: ———. In considering a motion for summary judgment the court views the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that reasonably may be drawn therefrom.
4. **Highways: Negligence.** One who places an obstruction upon a highway in such a manner that it is dangerous to others using

the highway has a duty to remove the obstruction or to use due care to warn others upon the highway of the danger incident to the obstruction.

5. Negligence. Two acts of independent source are not concurrent in causing an injury if one of them merely furnishes a condition by which such injury is made possible, and later such injury occurs through the efficient, self-acting, and independent operation of the other.

6. ———. The doer of an original wrongful act that should reasonably cause one to anticipate an injury therefrom is not relieved from liability for an injury immediately brought about by an intervening cause, wrongful or otherwise, that is set into operation by such original wrongful act, and that alone would not have caused the injury, but which with the aid of the original wrong does cause such injury.

7. ———. If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. Reversed and remanded.

Ross & O'Connor, for appellant.

George C. Pardee, G. H. Seig, and Harry H. Foulks, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, BOSLAUGH, and BROWER, JJ., and ZEILINGER, District Judge.

BOSLAUGH, J.

This is an action for damages brought by Glenn R. Johnson as father and next friend of Terri Johnson. Terri Johnson, who will be referred to as the plaintiff, was injured in an accident while riding in an automobile operated by her father. She was 14 months of age at the time the accident happened. The defendant is the Metropolitan Utilities District of Omaha, Nebraska.

The trial court sustained a motion for summary judgment filed by the defendant and dismissed the action. A motion for new trial filed by the plaintiff was overruled and the plaintiff has appealed. The assignments

of error relate to the sustaining of the defendant's motion for summary judgment.

Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled. In considering a motion for summary judgment the court views the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be drawn therefrom. Schlines v. Ekberg, 172 Neb. 510, 110 N. W. 2d 49.

The evidence consists of affidavits and a deposition of Glenn R. Johnson. The evidence shows that the accident happened at about 6 o'clock p. m., on September 12, 1960, in Omaha, Nebraska. Glenn R. Johnson was driving his automobile west on Blondo Street. The plaintiff and her sister, Renee Johnson, were riding in the back seat of the automobile. The accident occurred when the automobile collided with an International TD 9, front-end loader tractor owned by the defendant which was parked near the intersection of Seventieth Street.

At the place where the accident happened Blondo Street is paved. The distance between the north and south curbs is 18½ or 19 feet. There is a decline on Blondo Street from a point between Sixty-seventh and Sixty-eighth Streets to a point between Sixty-eighth and Sixty-ninth Streets which is equivalent to about a 4 percent grade. From the point between Sixty-eighth and Sixty-ninth Streets to the place where the accident happened there is a slight incline. The grade does not appear to be uniform and appears to increase slightly near the scene of the accident.

The front-end loader tractor with which the Johnson automobile collided is approximately 6 feet 4 inches in width and weighs about 18,000 pounds. It operates on

tracks instead of wheels and is sometimes referred to as a bulldozer, skid-shovel, or high-lift. At the time the accident happened the tractor was parked over the north curb of Blondo Street so that it extended into the traveled portion of Blondo Street a distance of slightly more than 2 feet.

Metropolitan Utilities District was then engaged in laying a water main along the north edge of Blondo Street from Sixty-sixth Street to Seventy-second Street. On September 12, 1960, the main had been laid to a point near Seventieth Street. Dirt was piled along the north edge of Blondo Street from east of Sixty-eighth Street to the Sixty-ninth Street intersection. Another pile of dirt extended west from Sixty-ninth Street for a distance of 75 feet to one-half of a block, or to a point approximately 50 feet east of the front-end loader tractor. The dirt was piled to a height of 3½ to 4 feet and extended onto the traveled portion of Blondo Street a distance of about 3 feet.

As Glenn R. Johnson drove west on Blondo Street he did not see any warning signs or barricades. While he was passing the pile of dirt he observed eastbound traffic approaching on Blondo Street. The sun at that time was near the horizon directly to the west and the eastbound traffic was silhouetted against the sun. As he passed the end of the pile of dirt west of Sixty-ninth Street he turned to the right to get back into the westbound traffic lane. At a point approximately 25 feet west of the pile of dirt, and as he neared the point of impact, the glare from the sun interfered with his vision and he failed to see the tractor before the impact.

This is a guest case in which we are not concerned with the negligence of Glenn R. Johnson. The negligence of the driver is not imputed to the guest. Pearson v. Schuler, 172 Neb. 353, 109 N. W. 2d 537. The inquiry here is whether there was any negligence on the part of the defendant which the jury could find was a proximate cause of the injuries to the plaintiff.

The petition alleged, in substance, that the defendant parked the tractor upon Blondo Street so that it protruded onto the traveled portion of the street and created an obstruction and that the defendant failed to give any signal or other warning of the obstruction. One who places an obstruction upon a highway in such a manner that it is dangerous to others using the highway has a duty to remove the obstruction or to use due care to warn others upon the highway of the danger incident to the obstruction. Simonsen v. Thorin, 120 Neb. 684, 234 N. W. 628, 81 A. L. R. 1000. See, also, Grantham v. Watson Bros. Transp. Co., 142 Neb. 362, 6 N. W. 2d 372, on motion for rehearing, 142 Neb. 367, 9 N. W. 2d 157; Kuska v. Nichols Constr. Co., 154 Neb. 580, 48 N. W. 2d 682.

The defendant's theory of the case is that the tractor which was parked so that it protruded into the traveled portion of Blondo Street was at most a condition and not a proximate cause of the injuries to the plaintiff. The defendant cites a number of cases, such as Knuth v. Singer, 174 Neb. 182, 116 N. W. 2d 291, in which this court held that an obstruction upon a highway was a condition and not a proximate cause of injuries to another.

There is, however, a group of cases in which this court has held that where a party creates an obstruction upon a highway and fails to use due care to warn others of its danger, his negligence may be a proximate cause of the injuries to another. These cases generally have involved situations where the object or obstruction in the highway was not readily visible or there was something which interfered with the vision of the persons approaching it. In these cases it was held that it is a question for the jury as to whether the original negligence was a proximate cause of the injuries.

Two acts of independent source are not concurrent in causing an injury if one of them merely furnishes a condition by which such injury is made possible, and later

such injury occurs through the efficient, self-acting, and independent operation of the other. But the doer of an original wrongful act that should reasonably cause one to anticipate an injury therefrom is not relieved from liability for an injury immediately brought about by an intervening cause, wrongful or otherwise, that is set into operation by such original wrongful act, and that alone would not have caused the injury, but which with the aid of the original wrong does cause such injury. Johnson v. Mallory, 123 Neb. 706, 243 N. W. 872.

If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence. In Kuska v. Nichols Constr. Co., *supra,* it was said: "Generally, it is the continuing duty of a road contractor engaged in constructing, grading, or graveling a highway, to use ordinary care and erect barricades or signs, or otherwise adequately warn the traveling public if the highway is dangerous to travel or if obstructions are placed thereon. A failure to so warn the traveling public is continuing negligence as distinguished from a condition, and if reasonable minds could conclude from the evidence that such negligence proximately caused an accident, then the issue should be submitted to a jury for its determination." See, also, Giles v. Welsh, 122 Neb. 164, 239 N. W. 813; Johnson v. Mallory, *supra;* Day v. Metropolitan Utilities Dist., 115 Neb. 711, 214 N. W. 647; Huston v. Robinson, 144 Neb. 553, 13 N. W. 2d 885; Miers v. McMaken, 147 Neb. 133, 22 N. W. 2d 422; Morse v. Gray, 166 Neb. 557, 89 N. W. 2d 842.

Although the accident in this case happened in daylight and the vision of the driver was not obstructed as he approached the tractor, the glare of the sun did interfere with his vision as he approached the point of impact and he failed to see the tractor before the colli-

sion. Upon the present state of the record we are reluctant to hold that the negligence of the defendant, if any, as a matter of law, was not a proximate cause of the plaintiff's injuries. We conclude that the defendant has failed to show conclusively that no issue of fact exists in this case.

A motion for a summary judgment is not a substitute for a demurrer or a motion for a directed verdict. We do not determine at this time that the plaintiff's evidence, whatever it will be, will present a jury question. We determine only that the record at this time does not show conclusively that there is no issue of fact in this case.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

SPENCER, J., participating on briefs.

FRED SCHILD, APPELLEE, V. WILLIAM SCHILD, JR., APPELLANT.

125 N. W. 2d 900

Filed January 24, 1964. No. 35532.

1. **Negligence.** An invitee on premises of another is a person who goes on premises of another in answer to express or implied invitation of the owner or occupant on the business of the owner or occupant or for their mutual advantage.
2. ———. In general a licensee on premises of another is a person who is privileged to enter or remain by virtue of the possessor's consent by invitation or permission.
3. ———. The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care.
4. ———. The owner or occupant of property owes to an invitee the duty to observe and exercise for his protection the degree of care, precaution, and vigilance which the circum-

stances justly and reasonably demand in order to protect him against injury or damage.

5. **Torts.** In a tort action an essential element is the existence of a duty imposed by statute or otherwise in favor of a party injured and on a party whose conduct produces an injury.
6. **Negligence.** Under the facts disclosed and the stated legal principles, the plaintiff was not a licensee, but was at the time an invitee.
7. **Torts.** The existence or nonexistence of a tort is ascertained by a determination of whether or not an ordinarily prudent person would have so acted, or so refrained from acting under the same or like circumstances.
8. **Trial.** In an instance where the evidence adduced to sustain an issue is 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 to submit it to a jury for determination.
9. **Negligence: Trial.** In an action grounded on negligence, in the ascertainment of whether or not there was evidence of negligence in the area charged against or attributable to the defendant it is necessary to examine the acts or failure to act and the knowledge on the part of the plaintiff himself.
10. **Negligence.** Actionable negligence does not exist even if no care is exercised to avert a risk to another person subject to such risk if such risk should have been reasonably apprehended by such other person himself.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded with directions.

Holtorf, Hansen & Fitzke and Alfred J. Kortum, for appellant.

Wright, Simmons & Hancock, for appellee.

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

YEAGER, J.

This is an action for damages for personal injuries sustained by Fred Schild, plaintiff and appellee, against William Schild, Jr., defendant and appellant, growing out of an accident which occurred on April 13, 1961, on a farm in Scotts Bluff County, Nebraska, operated by the

defendant. The case was tried to a jury and a verdict was returned in favor of plaintiff and against the defendant for $9,474.25. Judgment was rendered on the verdict. The defendant filed an alternative motion for new trial or for judgment notwithstanding the verdict. This motion was overruled. From the judgment and the order overruling the alternative motion for new trial or for judgment notwithstanding the verdict the defendant has appealed. The brief contains numerous assignments of error as grounds for reversal but attention will be directed only to those requiring consideration later herein.

There is no substantial dispute as to the facts which must be regarded as controlling in the determination which shall be made in this case.

The plaintiff and defendant are brothers who lived upon separate land areas not widely separated in Scotts Bluff County, Nebraska. To the extent necessary to state herein the plaintiff was engaged in farming and the raising of purebred cattle. The defendant was engaged in farming.

On April 13, 1961, the plaintiff came to the farm of the defendant for the purpose of having him cut some irons with an acetylene welder and cutting torch. After this and an additional cutting of metal had been accomplished, the defendant talked to him about a noise or vibration in a feed grinder of the defendant. On several earlier occasions he had discussed this noise or vibration with the plaintiff, which was heard when the grinder was in operation. After the cuttings of metal which have been mentioned had been completed the defendant asked the plaintiff if he had time to help find the cause of the noise. The plaintiff said he did have time.

The grinder was operated by a belt extending from a tractor located about 30 feet distant. Inside the grinder there was a fan having six blades which rotated when the grinder was in operation. The speed at which

the fan operated was not made certain but apparently it was at the same speed as the shaft of the grinder. The purpose of the fan was to expel ground grain from the grinder.

There had been examinations made from the outside of the grinder but the cause of the noise had not been discovered. The noise did not appear until high speed was attained. The noise had not interfered with the regular use of the grinder by the defendant prior to the accident.

For the purpose of attempting to ascertain the cause of the noise the plaintiff moved a truck to a point about 18 inches to one side of the grinder and took his position on the opposite side. The defendant then started the motor of the tractor and caused its speed to be increased to the maximum. During this interval the plaintiff was observing the grinder. When it reached the maximum speed the noise was heard. The motor was then stopped and the plaintiff of his own volition moved to the other side at a point between the grinder and the truck, and the defendant started the motor and again increased the speed to the maximum, when in a matter of seconds the noise was again heard, and almost at once there was a crash, the plaintiff threw up his hand, a hole was broken in the covering of the fan, something flew out, and the plaintiff was struck and sustained the injuries for which he seeks to recover damages in this action.

After the described incident, it was discovered that one blade of the blower fan had broken off and had disappeared. It was later discovered at a distance of about 43 steps from the grinder.

The contention of the plaintiff in his pleaded cause of action was that the defendant was guilty of negligence which was the proximate cause of the accident in that as the plaintiff was near to and listening to the grinder, the defendant negligently and carelessly increased the speed of the tractor so as to turn the grinder at a high, excessive, and dangerous speed and at a

speed greater than the grinder had been made to operate. This is the only charge of negligence made in the pleadings by the plaintiff against the defendant.

The legal status of the parties at the time of the accident requires consideration of the court in the determination of the question of whether or not there was, under the facts and circumstances, proof of the charge of negligence made against the defendant.

A theory of the defendant is that at the time the plaintiff was a licensee on the premises of the defendant, and on the other hand the theory of the plaintiff is that he was an invitee. The law imposes a duty of greater care for the protection of an invitee on premises than it does for a licensee.

Accuracy in definition does not flow from these words but in general it may be said that an invitee is 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. See Lindelow v. Peter Kiewit Sons', Inc., 174 Neb. 1, 115 N. W. 2d 776.

In general also it may be said that a licensee is a person who is privileged to enter or remain upon land by virtue of the possessor's consent, whether by invitation or permission. See Lindelow v. Peter Kiewit Sons', Inc., *supra.*

The owner of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care. Malolepszy v. Central Market, Inc., 143 Neb. 356, 9 N. W. 2d 474; Fentress v. Co-Operative Refinery Assn., 149 Neb. 355, 31 N. W. 2d 225; Wax v. Co-Operative Refinery Assn., 154 Neb. 805, 49 N. W. 2d 707.

The owner of property owes to an invitee the duty to observe and exercise for his protection the degree of

care, precaution, and vigilance which the circumstances justly and reasonably demand in order to protect him against injury or damage. Lindelow v. Peter Kiewit Sons', Inc., *supra.*

In the light of the evidence in the record and the decisions to which reference has been made herein, and the commonly accepted meaning of licensee and of invitee, it must be said that at the time of the accident the plaintiff was not a licensee. If he came within either classification it was that of an invitee. At the time he was engaged in action for and in behalf of the defendant at his instance and request.

The action here is of course one in tort and the rules relating to such actions are controlling. In a tort action an essential element is the existence of a duty imposed by statute or otherwise in favor of a party injured and on a party whose conduct produces the injury. 86 C. J. S., Torts, § 6, p. 926.

The gist of the tort action here is negligence on the part of the defendant. The negligence charged is that the defendant failed in the respect pleaded in his duty to observe and exercise the care, caution, and vigilance in the control of the speed of the grinder which the circumstances justly and reasonably demanded of him to protect plaintiff against injury and damage. This duty imposed upon the defendant the obligation to do that which an ordinarily prudent person would do, or to refrain from doing that which an ordinarily prudent person would not do under the same or like circumstances. Melcher v. Murphy, 149 Neb. 541, 31 N. W. 2d 411.

The burden was on the plaintiff to adduce evidence that the defendant failed to observe and exercise for the protection of the plaintiff the duty he owed to him as something more than a licensee. If there was not such evidence or not sufficiently such evidence then it was error for the court to fail and refuse to sustain the motion of defendant for judgment notwithstanding the verdict.

The rule applicable is as follows: "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." Kohl v. Unkel, 163 Neb. 257, 79 N. W. 2d 405. See, also, Lindelow v. Peter Kiewit Sons', Inc., *supra.*

In the ascertainment of whether or not there was evidence of negligence in the area charged against or attributable to the defendant it becomes necessary to examine the acts or failure to act in the premises on the part of the plaintiff himself. The following appears in 65 C. J. S., Negligence, § 1, p. 314: "There is negligence only where no care is exercised to avert a risk to others which reasonably should be apprehended."

In 65 C. J. S., Negligence, § 45, p. 521, the following appears with regard to the duty owed to an invitee: "The owner, occupant, or person in charge of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, commensurate with the particular circumstances involved, and is liable for injury resulting from breach of such duty although no element of lawlessness or wantonness enters into the act or omission complained of." This rule is adhered to in the decisions of this court. See, Long v. Crystal Refrigerator Co., 134 Neb. 44, 277 N. W. 830; Zimmer v. Brandon, 134 Neb. 311, 278 N. W. 502; Brown v. Davenport Holding Co., 134 Neb. 455, 279 N. W. 161, 118 A. L. R. 423.

In the instance here the evidence discloses nothing to indicate that there was a risk to the plaintiff of which the defendant knew or should reasonably have apprehended by causing or permitting the plaintiff to observe the grinder with the purpose of ascertaining the cause of the noise or vibration. There was nothing at all to indicate that a risk was involved in the inspection which was made by the plaintiff. The plaintiff had been in possession of knowledge of the situation as well as had the

defendant, and evidently by cooperation in the purposes of the defendant he made his inspection, and while so doing, this unforeseen and unanticipated event took place. The plaintiff was in possession of as much information at the time as was the defendant, and voluntarily, so far as the record discloses, took his position of his own accord and volition. Nothing had transpired which furnished an indication of danger. In truth no evidence appears the effect of which was to indicate or foretell the thing which happened. The defendant did nothing except that which he had been doing without incident, except for the creation of a noise and vibration in the grinder which had been true and known regularly for about 3 months. There is no evidence that the thing which happened could or should have been reasonably apprehended.

As pointed out the action is predicated upon excessive speed of operation of the grinder at the time. It is of course true that speed was an incident of the accident but there is no competent evidence of the rate of speed at the time. It was high but no satisfactory effort was made at its establishment.

By analysis it was made to appear that about 2 months earlier, with the motor used, it had a potential speed of 4,115 revolutions a minute, but there is no evidence as to potential speed at the time of the accident. It is argued that the speed was excessive because this was in excess of the designed speed. It is indicated that the appropriate or designed speed was from 3,000 to 3,400 revolutions a minute. The only evidence of this is testimony of the plaintiff that these speeds had been printed on the grinder and testimony of the defendant that they were covered up with paint before it was purchased secondhand by the defendant. There is no evidence that the defendant had any information of the speed prints. This evidence came into the record from the plaintiff and it appeared to be knowledge which he possessed before the accident, not from examination of this

grinder, but from what he observed on another like grinder long before this accident occurred.

The evidence discloses however that over the period of use before and up to the accident the operation was at high speed because of efficiency in performance, and that in such operation there was no indication that anything was wrong except that there was the noise or vibration which has been mentioned. The record indicates without controversy that the plaintiff was as fully informed as to cause as was the defendant. There is no evidence which could be regarded as a warning of the probability or possibility of danger or injury from the test and examination which resulted in the injuries the plaintiff sustained. There is no evidence that anything the plaintiff did was directed or commanded by the defendant, but on the contrary he apparently selected his own locations for observation.

In the light of the definitions of tort and negligence adverted to herein and the application of the undisputed evidence as to facts contained in the record here and the inescapable inferences to be drawn therefrom it must be said that the defendant was guilty of no act or failure to act which furnishes a basis of recovery of damages by the plaintiff from the defendant. The motion for judgment notwithstanding the verdict should have been sustained.

The judgment of the district court is reversed and the cause remanded with directions to sustain the motion for judgment notwithstanding the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

RICHARD R. BAKER, APPELLANT, V. RAYMOND C. ZIKAS ET AL., APPELLLEES.

125 N. W. 2d 715

Filed January 24, 1964. No. 35545.

1. **Attorney and Client.** A client has the absolute power and right

to discharge an attorney, with or without cause, subject only to the liability to compensate the attorney for the reasonable value of his services actually rendered up to the date of the termination of the employment.

2. ———. The right of a client to discharge his attorney is not affected by a previous arrangement between the parties giving the attorney a contingent fee interest in the results of the litigation.

3. ———. The right of a client to discharge his attorney is necessary in view of the confidential relationship between attorney and client.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. Affirmed as modified.

Abrahams, Kaslow, Story & Cassman and Robert C. Oberbillig, for appellant.

Haney & Walsh pro se.

Heard before WHITE, C. J., CARTER, MESSMORE, SPENCER, BOSLAUGH, and BROWER, JJ., and ZEILINGER, District Judge.

WHITE, C. J.

The question involved in this case is the amount of attorney's fees due the firm of Haney & Walsh from the proceeds of a personal injury judgment and settlement. A trial to a jury, in which the plaintiff Baker was represented by Robert C. Oberbillig, resulted in a verdict and judgment of $12,000, the case arising out of a claim for personal injuries received in an automobile accident. This judgment of $12,000 was settled by the plaintiff, represented by Oberbillig, for $10,000 which sum has now been paid into court. Attorneys' liens were filed by the law firm of Haney & Walsh and also by Robert C. Oberbillig. It is undisputed that the plaintiff Baker was the personal client of Oberbillig. The original contract of employment was entered into in February 1961. Oberbillig at that time was employed by the firm of Haney & Walsh under a contract of employment by which he received a stipulated salary and one-third of the

fees of any cases personally produced by him. The original contingent fee contract of employment signed in February 1961 provided for a contingent fee of 40 percent of the amount recovered and provided for the employment of Robert C. Oberbillig and Robert W. Haney as attorneys. It is agreed between the parties that the contract may be regarded as one entered into with the law firm of Haney & Walsh and Robert C. Oberbillig notwithstanding the fact that Robert W. Haney only was named. After trial of the issues presented by the lien claim of Haney & Walsh, the trial court enforced the original contingent fee contract referred to above and divided the $4,000 due under this contract according to the contract of employment between Oberbillig and Haney & Walsh. It allowed the firm of Haney & Walsh $2,666.66 plus about $70 in expenses. Oberbillig appeals.

The substance of Oberbillig's assignments of error is that the plaintiff Baker discharged Haney & Walsh as his attorney on October 4, 1961, soon after he (Oberbillig) terminated and left his employment by the firm, and that Haney & Walsh is entitled only to an allowance for fees and expenses for services rendered on a quantum meruit basis to the date Baker terminated the employment of Haney & Walsh in the case on October 4, 1961.

There is voluminous evidence in the record concerning the misunderstanding and discord surrounding Oberbillig's termination of his employment and relationship with the firm of Haney & Walsh. No issue with reference to this contract of employment is presented to this court. The only issue before the court was the amount, if any, that it was entitled to out of the proceeds paid into court in the settlement of this personal injury judgment. It is undisputed that Baker discharged Haney & Walsh as his attorney on October 4, 1961, and that this discharge referred to the original employment contract that was executed in February 1961. The law is

well settled that a client has the absolute power and right to discharge an attorney in his case, with or without cause, subject only to the liability to compensate the attorney for the reasonable value of his services actually rendered up to the date of the termination of the employment. Shevalier v. Doyle, 88 Neb. 560, 130 N. W. 417; Meagher v. Kavli, 251 Minn. 477, 88 N. W. 2d 871; Cole v. Myers, 128 Conn. 223, 21 A. 2d 396, 136 A. L. R. 226; Martin v. Camp, 219 N. Y. 170, 114 N. E. 46, L. R. A. 1917F 402; 7 Am. Jur. 2d, Attorneys at Law, § 138, p. 132.

The distinction between an ordinary contract liability and one for legal services and the reasons therefor is well set out in Meagher v. Kavli, *supra,* where it is said: " 'We think it is a misconception to attempt to force an agreement between an attorney and his client into the conventional modes of commercial contracts. While such a contract may have similar attributes, the agreement is, essentially, in a classification peculiar to itself. Such an agreement is permeated with the paramount relationship of attorney and client which necessarily affects the rights and duties of each. As we have seen, despite the agreement but as an incident to the relationship, a client has full power to discharge his attorney without cause at any time, being liable only in such event for the reasonable value of the services rendered.' "

The fact that the contract for services is contingent does not vest the attorney with an interest in the case or affect the right to discharge. In 7 Am. Jur. 2d, Attorneys at Law, § 138, p. 132, it is stated: "The right is deemed necessary in view of the confidential nature of the relation between attorney and client, and the evil that would be engendered by friction or distrust. * * * The right of the client to discharge his attorney is not *affected by a previous arrangement between the parties giving the attorney a contingent fee interest in the results of the litigation.*" (Emphasis supplied.)

Appellee recognized the application of the above principles in the determination of its own rights as to fees.

Responding to plaintiff Baker's discharge letter of October 4, 1961, Haney, senior member of Haney & Walsh, wrote Baker on October 16, 1961: "It is your privilege, if you wish, to secure other counsel to represent you in this action but before we withdraw as your attorneys of record, we must insist that you make suitable arrangements with this office to compensate it for the service which it has rendered to you, and the expenses which have been advanced by this office in your behalf." On October 13, 1961, Haney wrote Oberbillig as follows: "I have advised Mr. Baker of his right to obtain other counsel to represent him, but have further advised Mr. Baker that before this office will withdraw as attorneys of record in the matter, suitable arrangements must be made to compensate us for the services which we have rendered to date to Mr. Baker in this matter and for the expenses which this office has advanced in his behalf."

Pursuant to this declared and stated position, Haney stated to the court as follows: "* * * I will comply and withdraw; but then I would want my fee paid at the time for the value of my services which have been rendered up to this point based upon the contract." Later, in the same hearing on its lien claim, Haney stated: "* * * before counsel can be discharged or asked to withdraw, he should receive his fee based upon the value of his services up to that time."

At no point, it seems to us, was the right to discharge the firm of Haney & Walsh questioned. The fact is that it was discharged, and under the law the maximum reach of its right to fees is the reasonable value of its services actually rendered to date of discharge. The original contingent fee contract of February 1961 was no longer in effect after Baker's letter of discharge of October 4, 1961.

We have reviewed the record as to the services rendered by the firm of Haney & Walsh to date of discharge. We note the services rendered by Oberbillig on behalf of the firm in this case during the term of his

employment. Haney took the defendant's deposition on July 22, 1961, and appeared with Oberbillig at the same time when the plaintiff's deposition was taken. Various pleadings and motions had been filed, there were office conferences between counsel on the case, and one unsuccessful settlement conference with the insurance company adjuster. We feel the reasonable value of these services is in the sum of $400.

The trial court in effect in its order determined the compensation to be paid Oberbillig. There was no issue in this respect before the court nor was there any issue before the court as to any issue arising out of Oberbillig's and Haney & Walsh's contract during the period of time he was employed by it from January 1961, to September 20, 1961, when Oberbillig terminated his employment with it.

The judgment and order of the district court are modified by directing that it enter its order directing the clerk of the district court to disburse to appellee out of funds in its hands the sum of $400 plus $70.34 for expenses incurred, and to delete all orders with reference to payment to Oberbillig.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. EWTHER HALL, APPELLANT.

125 N. W. 2d 918

Filed January 31, 1964. No. 35502.

1. **Criminal Law: Trial.** 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.
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. **Trial: Appeal and Error.** Where the charge to the jury, considered as a whole, correctly states the law, the verdict and

judgment will not be reversed merely because a single instruction, when considered separately, is incomplete.

4. **Homicide.** A homicide committed in the perpetration of a robbery is murder in the first degree. § 28-401, R. R. S. 1943.
5. ———. In such a case, the turpitude of the act supplies the element of deliberate and premeditated malice.
6. ———. Evidence examined and *held* to support the verdict of guilty of first degree murder, but the sentence of death is reduced to imprisonment for life.

Appeal from the district court for Douglas County: ROBERT L. SMITH, Judge. Affirmed. Sentence reduced.

Adolph Q. Wolf, Edward T. Hayes, and Fred J. Montag, for appellant.

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

Heard before WHITE, C. J., CARTER, MESSMORE, SPENCER, BOSLAUGH, and BROWER, JJ., and LYNCH, District Judge.

MESSMORE, J.

This is a prosecution upon an information filed by the State of Nebraska against Ewther Hall, appellant, hereinafter referred to as defendant, that he did, while in the perpetration or attempt to perpetrate a robbery, kill Albert Alfred Anderson which constituted the charge of murder in the first degree. Another information charging the same crime was filed against Curtis Eugene Rowland. The State filed a motion requesting that the two cases be consolidated. This motion was sustained. The jury returned a separate verdict for each defendant. The defendant in the instant case was found guilty of murder in the first degree as charged in the information, and the penalty was fixed as death. Motion for a new trial on the part of the defendant Hall was overruled, and this defendant was granted leave to file a motion for rehearing within 1 week, which motion was overruled. The motion for new trial on behalf of defendant Rowland was sustained. Defendant Hall was sentenced

to suffer the death penalty. Defendant Hall brings the case to this court for review.

The defendant Hall moved for separation of the two cases because his counsel was informed by competent experts that this defendant was a person of very low mentality and that his right to have a fair trial might be prejudiced by the presence of the defendant Rowland. The defendant Rowland moved for a separate trial on the ground that the testimony of a psychiatrist, a witness for the defendant Hall, would be adverse to the interests of the defendant Rowland. The above motions were overruled.

In State v. Brown, 174 Neb. 387, 118 N. W. 2d 328, section 29-2002, R. S. Supp., 1961, is set forth and provides in part as follows: "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 court said: "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."

Defendant Hall contends that without the confession of Rowland the State had a doubtful, circumstantial case against him which would not prove his guilt beyond a reasonable doubt. This contention is without merit as a summary of the evidence will disclose.

With reference to the confession of the defendant Rowland, the trial court made clear and repeated admonitions to the jury at appropriate times that Rowland's statements were not to be considered in establishing guilt against defendant Hall, and that such evidence as to defendant Hall constituted hearsay evidence.

As stated in United States v. Kahaner, 203 F. Supp. 78: "The general rule is that persons jointly indicted should be tried together, particularly so where the indictment charges * * * a crime which may be proved against all the defendants by the same evidence and which results from the same or a similar series of acts." Many cases are cited to this effect. The court went on to say: " '* * * the defendant is entitled to a separate trial as a matter of right only upon a showing of prejudice * * *.' * * * The ultimate question is whether, under all the circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements and conduct. In sum, can the jury keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him? If so, though

the task be difficult, severance should not be granted." See, also, Wiley v. United States, 277 F. 2d 820.

In the instant case the trial court gave long-approved cautionary instructions to consider any statement or confession only as to the defendant making it. The record in this case does not establish that the trial court abused its discretion in overruling the motions of the defendants for separate trials. This contention cannot be sustained.

The widow of Alfred Anderson, the victim in the instant case, testified that her husband drove a cab for the Checker Cab Company, and was so employed on December 9, 1961. He came to her room in the hospital where she was a patient. He had on gray slacks, a shirt, and a gray jacket, and had his glasses on. He asked her if she needed money, and she saw the billfold which he carried. He left the hospital about 8:30 or 8:35 p.m., and the billfold at that time was in his pocket.

An employee of the Checker Cab Company on duty on December 9, 1961, whose duties required taking orders over the telephone from anybody who wanted a cab, testified that she would write the order out and turn it over to the dispatcher. On December 9, 1961, a telephone call was received for a cab. The request came from Twenty-fourth and Cuming Streets. The cab was to stop at the Thull drugstore on that corner. The name given was John, and the call came in right after 8:30 p.m. The order was given to the dispatcher.

The dispatcher took the order and dispatched a cab to Twenty-fourth and Cuming Streets, and gave the driver the name of John. The driver of the cab checked with the dispatcher by radio and indicated the number of the cab, which was cab No. 12. An exhibit shows this action took place on December 9, 1961, at 8:36 p.m.

A driver of a bus for the Omaha Transit Company was driving a bus the night of December 9, 1961, and stopped the bus at Twenty-fourth and Cuming Streets around

8:37 or 8:40 p.m. The bus was headed south. Thull's drugstore was on the northwest corner of the intersection and a service station on the northeast corner of the intersection. There was a public telephone booth on the driveway of the service station. This driver observed two persons crossing Twenty-fourth Street from the east to the west on the north side of Cuming Street. They crossed Twenty-fourth Street and stood on the curb. The bus was parked at the curb on the northwest corner. One of the persons was taller than the other, and they were colored male persons. When the bus moved on these persons were at the east wall of the drugstore. The bus left at about 8:40 p.m. At the trial this witness identified and pointed out these two persons, who were the defendants.

The manager of a cafe at 2403 Cuming Street near Thull's drugstore, testified that she was on duty on December 9, 1961; that she observed a Checker cab which came to the intersection of Twenty-fourth and Cuming Streets and stopped right beside Thull's drugstore on the Cuming Street side; that she was looking out of the window and saw two persons get into the cab; that these persons were colored; and that one was a little shorter than the other.

The defendant gave a statement which was read into evidence. He stated that he was 19 years old; that he was born in Stuttgart, Arkansas; and that he came to Omaha in 1955, and lived with his aunt. He had known the defendant Rowland for 2 years. Rowland talked to him about committing a robbery. The defendant told Rowland that he had never "pulled a job" and "wasn't for pulling the job." The evening the crime was committed, the defendant went to Rowland's house and Rowland asked him again about perpetrating a robbery. The defendant had been drinking. Rowland called a cab from a telephone booth at Twenty-fourth and Cuming Streets. The cab arrived, and Rowland and the defendant entered it. The cab stopped at 1510 North

Twenty-ninth Street. Rowland passed a hammer to the defendant. Rowland put a gun in the cabdriver's back and told the defendant to hit the driver with the hammer, which the defendant did, twice. The cabdriver was not "knocked out" and was begging. The defendant got out of the cab and told Rowland to come with him. When he left the cab the defendant heard a shot. He ran away and went to Rowland's house. Rowland had shown him the gun 2 or 3 weeks before, but the defendant did not know Rowland was going to use it. When he hit the cabdriver with the hammer he asked the cabdriver for money, and the cabdriver handed him about four dollars in change.

Later another statement was given by the defendant in which the defendant stated that Rowland used the hammer and the defendant shot the cabdriver and took his wallet from his pocket. The wallet contained $50. The defendant and Rowland divided the money in the basement of Rowland's house. Rowland told the defendant five or six times to put the gun on the cabdriver. The defendant further stated that he shot the cabdriver because he was nervous and upset and did not know what to do; and that Rowland told him to shoot the cabdriver but he did not want to do so.

A witness testified that he was in the vicinity of Twenty-ninth and Charles Streets on December 9, 1961, between 9 and 10 p.m., driving his car to his home. As he approached Charles Street the reflection of his car lights showed a person lying right by the sidewalk, face down. This witness attempted to assist such person, but was unable to move the body, so he went next door, told the people what had happened, and asked them to call the police and the emergency squad.

Another witness who was with this witness testified to substantially the same facts.

A police officer on duty on December 9, 1961, went to the vicinity of Twenty-ninth and Charles Streets in response to a radio call to pick up a man at that location.

He and his partner arrived at the scene 2 or 3 minutes after 9 p.m. This officer described where he found the body of this man and the man's condition, and stated that he called the rescue squad. He further testified that just north of the intersection there was a Checker cab the door of which was open, and the taillights and dome light were on. The fire department rescue squad came and removed the body shortly after 9 p.m.

A safety engineer employed by the Checker Cab Company on December 9, 1961, went to the scene of the crime and found the Checker cab at the intersection of Twenty-ninth and Charles Streets. He arrived at the scene of the crime between 9:15 and 9:30 p.m. He testified that the cab was number 12, and was issued to Albert Anderson. He identified a trip sheet which showed the point of origin of the last trip made by cab number 12 to be Twenty-fourth and Cuming Streets and also that the cabdriver received the call by radio. No destination was shown on the trip sheet. This witness went to the emergency room at the hospital and identified the body of cabdriver Anderson.

A doctor affiliated with the Douglas County Hospital on December 9, 1961, assigned to the emergency room, examined the body of a man brought in by the rescue squad at about 9:25 p.m. He determined that the man was dead, noticed lacerations on his head, and found a bullet hole just below the shoulder blade on the left side.

A physician performed an autopsy on the body of Anderson on December 10, 1961, at the Douglas County Hospital. He described the wounds received by the deceased and the gunshot wound. He testified that death resulted from hemorrhage caused by the bullet wound. He removed an oval metallic slug from the body of Anderson.

Suffice it is to say that the clothing worn by Anderson at the time of his death was identified; the revolver used in the robbery and killing of Anderson was identified as being in the possession of Rowland prior to the

commission of the crime; and the bullet which killed Anderson and was lodged in his body was positively identified as being fired from the revolver which was owned by Rowland.

We eliminate from the evidence any reference to statements made by Rowland for the reason that the trial court, as heretofore mentioned, properly admonished the jury that such statements pertained only to Rowland's guilt, if any, and was hearsay as to the defendant Hall's guilt.

A psychologist connected with St. Joseph's Hospital in Omaha testified that psychologists are concerned with measuring abilities, personalities, and aptitudes for various kinds of work. This doctor teaches individual mental tests and applied psychology at Creighton University and at the Creighton Medical School. He uses the Wechsler Adult Intelligence Test, which is a standard test. He explained that this test has eleven parts, and detailed each part of the test. He further testified that the defendant was given this test and scored 73 in the verbal scale, 56 in the performance scale, and had a full scale intelligence quotient, or I. Q. of 64, which placed the defendant in the defective classification of mental ability. This witness testified that the average human range on the Wechsler scale would be from 91 to 110; and that 2.2 percent of the population fall within the section of 65 or under. This is classified as mental defective or feebleminded. He further testified that 98 percent of the population in the defendant's age group excel him mentally; that the defendant was 19 years old, being born on October 28, 1944; that the tests took 2½ hours; and that the defendant's judgment is very low. He further testified that while the test is not particularly based on mental age, however the defendant's mental age was somewhere around the 8-year-old level. This witness further stated that a person like the defendant is easily led to do things, and easily influenced by other persons.

A psyschologist from New York University, a diplomat

in clinical psychology awarded by the American Board of Examiners in professional psychology, and now associate professor of psychology at the University of Nebraska, examined the defendant on September 7, 1962. He testified that he used the Wechsler, Bender Visuale Motor Gestalt, Stanford-Binet, and Rorschach tests; that the score on the Wechsler test was 64, which is within the mentally retarded range, and is poorer than 99 out of 100 people. The Stanford-Binet test scores mental age. The defendant, in this area, was below the mental age of 5 years. This condition had prevailed all of defendant's life. A normal I. Q. is 90 to 110. He further testified that the defendant falls within the mentally retarded range.

A licensed physician, chief of the psychiatric service at St. Joseph's Hospital, and physician member of the Board of Mental Health of Douglas County for over 10 years, examined the defendant on September 16, 1962. The defendant was unable to do simple problems in arithmetic, was unable to spell his name, and was unable to read or write. This witness testified that the defendant has a petit mal, a mild form of epilepsy; that the defendant's judgment is commensurate with his intellectual capacity; that the defendant is a high-grade idiot or low-grade moron; and that he has been defective all of his life. From clinical experience, this doctor would place the defendant in the I. Q. level of the 50's or 60's, a mental age from 6 to 8 years, and grossly retarded. The defendant gave a history of having fallen off the back end of a truck when he was 12 years of age, was sick about a week, and since that time has had blackouts.

A specialist in psychiatry and neurology examined the defendant on September 8, 1962. This witness testified that the defendant was unable to read or write, to do simple arithmetic sums, or to spell; that he was mentally defective, feebleminded; that this doctor frequently recommended persons being put in an institution for

the feebleminded who were smarter than the defendant; that the defendant had an I. Q. of about 60; that the defendant likely had a petit mal epilepsy; that there are times when his I. Q. might be at the level of about 40; that this is a positive diagnosis; that the defendant is a passive person who wants to please; that the doctor doubted that the defendant could earn a living; that an employer would have to stand over him in constant supervision; that the defendant's mental age is about 7½ years; that the average 7-year-old would do much better than the defendant; that in fact the defendant is closer to 5-year-old and is not as smart as his 65 I. Q. shows because his performance test was 51, which constitutes a closer evaluation of his ability; and that the defendant is a low-grade moron or a high-grade imbecile, and is feebleminded. The State cross-examined this doctor, over objections of the defendant, as to whether or not the defendant knew the difference between right and wrong on December 9, 1961. The doctor answered that the defendant would only know such difference between right and wrong as a 5 to 8-year-old person would know it.

An elementary school principal at Star City, Arkansas, since 1954, testified that he knew the defendant as a student and had known him since 1954; that he believed the defendant spent his entire years of education in this school; and that the defendant was present in school in 1954, 1955, 1956, and part of 1957 and 1958. Exhibits were received in evidence which were kept by this principal as a register of grades of students, and showed the grades that were given the defendant during the time he was a student at the school. Commencing with the fifth-grade records, the defendant had a "B" in deportment, but all other grades were "D". This witness testified that under the grading system used "D" indicated from 60 to 69, but does not properly reflect the defendant's grades; that the defendant was passed on what is known as a "social promotion" to keep him in

his age group, and the grades were given him for that purpose only; that the defendant could not recite in class; that the defendant seldom played and when he did he played with younger children; and that he was given the job of cleaning the buses. This witness further testified that he did not believe the defendant learned anything; that he was unable to learn to read, write, or spell; that the school was segregated; that it had no vocational counseling, medical facilities, or psychiatric facilities which were furnished in a Caucasian school; that the defendant was not a discipline problem; and that to his knowledge there was never a student like the defendant in the school, one who failed in every subject.

A doctor who had previously testified was recalled on rebuttal and, over objection, was asked if the defendant knew the difference between right and wrong on December 9, 1961. The doctor replied that he did, but then stated that the defendant knew the difference between right and wrong at about the level of a 6 to 8-year-old person.

The State called a psychiatrist in rebuttal who testified that the defendant knew right from wrong on December 9, 1961; and that the defendant could not do complex things such as arithmetic and things requiring complex mental activities. This doctor did not suspect a petit mal. He testified that he would not set a mental age for the defendant. He found no evidence of psychosis. He gave the defendant's I. Q. as about 80.

The defendant contends that the trial court committed prejudicial error by instructing the jury on the issue of insanity, which was not a defense raised by the defendant; and that the defendant in a criminal case has a right to have his theory of defense properly submitted to the jury.

The defendant relies principally upon the case of Washington v. State, 165 Neb. 275, 85 N. W. 2d 509, and also cites authorities from foreign jurisdictions and texts

such as 26 Am. Jur., Homicide, § 105, p. 228, and 41 C. J. S., Homicide, § 399b, p. 237, and note 31, which have been examined.

With reference to Washington v. State, *supra,* the defendant was found guilty of first degree murder and presented evidence of his low mentality. The trial court instructed the jury that the degree of defendant's intelligence was not a defense and could be considered by the jury solely in connection with the penalty to be imposed. This court held the instruction to be reversible error, and that the jury should be entitled to consider the level of mental capacity of the defendant in determining whether or not he had the necessary intent and deliberate and premeditated malice, elements of the crime of which he was charged. The situation is different in the instant case. The court, in clear and definite instructions, instructed the jury as to the necessary intent to commit the robbery which resulted in death, and gave the general instruction on intent that is given in criminal cases where intent is a necessary element of the offense charged. Washington v. State, *supra,* discloses nothing which states it is error to instruct on insanity when evidence of low mentality has been introduced. The fact is, the law is well settled that the test is whether or not the defendant knows the difference between right and wrong, or understands the nature and quality of his act, and not whether it is called insanity or feeblemindedness. See 40 C. J. S., Homicide, § 4c, p. 827.

In the case of People v. Perry, 195 Cal. 623, 234 P. 890, there is language applicable to the instant case, as follows: "It is urged by the appellants that the court erred in giving the jury any enlightenment whatever on the subject of insanity. None of the instructions is challenged as being incorrect statements of the law, but it is insisted that no instructions whatever should have been given defining mental unsoundness for the reason that no claim was made that any one of the defendants was insane. It is, perhaps, true that no specific use

was made of the word 'insanity' by counsel, but five alienists, or psychologists, were called by the defense and gave testimony bearing directly on the mental deficiency of * * * (one of the defendants). * * * The experts testified that his intellectual quotient, as gauged by the Binet-Simon test, Leland Stanford Jr. University Revision, was no higher than that which a normal boy should register at the age of 11 years. But the law does not substitute mental standardization in place of actual age as the sole test of responsibility for the commission of crime. * * * We know of no decision, and none has been cited, which holds, that if a person offers evidence in his own behalf as to his mental infirmity with the object of mitigating his punishment, the court thereby becomes powerless to instruct the jury as to the legal standard by which accountability is to be determined. Insanity is a broad subject and includes many forms of mental disorders and degrees of mental weaknesses, and the kind and degree that will excuse crime is definitely settled by many decisions of this court."

It appears that the instruction given by the trial court on insanity in no manner could have been prejudicial to the defendant, but gave him an opportunity to utilize this defense and have the same considered by the jury, and the possibility of its finding him not guilty by reason thereof.

As stated in State v. Easter, 174 Neb. 412, 118 N. W. 2d 515: "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's contention cannot be sustained.

The defendant contends that he was denied a fair trial by instruction No. 13 which instructed the jury to consider separately the guilt or innocence of each defendant, but failed to instruct that the matter of penalty to be imposed should also be considered separately.

Instruction No. 25 sets forth all of the alternatives in

the matter of penalty as to the defendant in the instant case separately, should the jury find him guilty, and the alternatives if they should find him not guilty. The same instruction then sets forth the alternatives as to the other defendant, Curtis Eugene Rowland, separately.

It is well established in this jurisdiction that where the charge to the jury, considered as a whole, correctly states the law, the verdict and judgment will not be reversed merely because a single instruction, when considered separately, is incomplete. See, Kirkendall v. State, 152 Neb. 691, 42 N. W. 2d 374; Garcia v. State, 159 Neb. 571, 68 N. W. 2d 151; Rains v. State, 173 Neb. 586, 114 N. W. 2d 399.

"Where the punishment is to be assessed by the jury, instructions clearly and concisely stating the law as to the power and discretion of the jury properly to assess the punishment should be given; * * *." 41 C. J. S., Homicide, § 399, p. 235.

In the instant case the court properly instructed the jury on this phase of the case. The defendant's contention is without merit.

The defendant contends that the facts and circumstances in the instant case disclose that the defendant is feebleminded and of an immature age, and taking these facts together they do not warrant the imposition of the death penalty.

Section 29-2308, R. R. S. 1943, provides in part as follows: "In all criminal cases that now are, or may hereafter be pending in the Supreme Court on error, the court may reduce the sentence rendered by the district court against the accused, when in its opinion the sentence is excessive, and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence."

The above section should be liberally construed in favor of justice. See Cryderman v. State, 101 Neb. 85, 161 N. W. 1045.

We have come to the conclusion, from a careful examination of the record, that there is no error prejudicial to the defendant. The defendant was guilty of first degree murder. There can be no question. This court has held many times, in conformity with section 28-401, R. R. S. 1943, that a homicide committed in the perpetration of a robbery is murder in the first degree, and in such a case the turpitude of the act supplies the element of deliberate and premeditated malice. See, Pumphrey v. State, 84 Neb. 636, 122 N. W. 19, 23 L. R. A. N. S. 1023; South v. State, 111 Neb. 383, 196 N. W. 684; Swartz v. State, 118 Neb. 591, 225 N. W. 766; Rogers v. State, 141 Neb. 6, 2 N. W. 2d 529.

We believe, from a review of the record, that the interests of society do not demand that the death penalty be inflicted. It appears to us that life imprisonment is adequate punishment for the offense. Consideration of all of the circumstances, that is, the age of the defendant, that he is a feebleminded person, a low-grade moron or a high-grade imbecile, passive in nature, possessed of a disposition to follow the lead of others, and who previously had no offense charged against him, indicates that the reduction of the death penalty to one of life imprisonment is warranted. See, Rogers v. State, *supra;* O'Hearn v. State, 79 Neb. 513, 113 N. W. 130, 25 L. R. A. N. S. 542; Wesley v. State, 112 Neb. 360, 199 N. W. 719.

We have no desire to criticize the jurors in any manner. They should be commended for fulfilling their duties in this case.

Having concluded that imprisonment for life should constitute the penalty in this case, we modify the judgment of the trial court to the extent of reducing the penalty from death to life imprisonment. In all other respects the judgment of the trial court is affirmed.

AFFIRMED. SENTENCE REDUCED.

JULIA DAWSON ET AL., APPELLEES, V. CITY OF LINCOLN, NEBRASKA, APPELLANT.

125 N. W. 2d 908

Filed January 31, 1964. No. 35526.

1. **Eminent Domain: Landlord and Tenant.** In a condemnation case, a lessee is entitled to recover on the same character and quality of proof as would entitle the condemnee owner to recover.
2. **Eminent Domain: Trial.** The owner of property, either real or personal, is qualified by reason of the ownership relation to give his estimate of the value of such property.
3. **Eminent Domain: Landlord and Tenant.** The volume of business done on any given leasehold has a direct relation to the value of the leasehold.
4. **Witnesses.** It is not necessary that a qualifying witness be familiar with every possible element that goes into the determination of market value.
5. **Eminent Domain: Trial.** The weight and credibility of conflicting testimony in a condemnation action are for the jury, and in testing such evidence, plaintiff condemnee is entitled to have all conflicts resolved in a light most favorable to him.
6. **Eminent Domain: Evidence.** Valuation testimony, from either expert or lay witnesses, is ordinarily received if the witnesses show an acquaintance with the property and are informed as to the state of the market, the weight and credibility of their evidence being for the jury.
7. ———: ———. The admissibility of valuation testimony of a lay witness rests in the sound discretion of the trial court, and where persons are shown to be familiar with the particular land or leasehold in question, they may be permitted to testify as to value before and after the taking.
8. **Eminent Domain: Damages.** Evidence examined, and the verdict and judgment of $10,000 held not to be excessive under the circumstances.

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

Ralph D. Nelson and Henry L. Holst, for appellant.

Joseph J. Cariotto, for appellees.

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

WHITE, C. J.

This is a condemnation case. From a jury verdict and judgment for plaintiffs in the sum of $10,000, defendant City of Lincoln appeals. Of the numerous errors assigned, the defendant city only argues in this court the excessiveness of the verdict and errors in the admission in evidence of certain testimony of four witnesses.

The plaintiffs owned a leasehold interest in property at 4400 O Street on which, at the time of the taking, they were operating the "Circle Drive-In" restaurant. The evidence shows that this operation depended on the free access to their leased premises from the flow of traffic on O Street. This condemnation proceeding took a temporary easement for construction purposes and appropriated a portion of the lot permanently for street purposes in connection with the construction of a new, widened arterial with a "median" in the center. The time of the taking was June 14, 1961. The lease expired on March 17, 1962, and the rent reserved was $75 per month, this lease stemming from an original leasing agreement with the owners dating back to 1950. The plaintiffs owned all of the buildings and equipment on the premises. The property had no business access except off of O Street. All access was destroyed by the construction from June to approximately November 1961. The only way to get on the premises during this period of time was to walk. The plaintiffs paid $30,000 for the lease originally. They made substantial improvements during their operation and had an investment of over $20,000 in furniture, fixtures, and equipment at the time of the taking. Their volume of annual business was about $75,000 to $80,000. The business is seasonal with the peak being from May until fall depending on the weather.

The board of appraisers in county court awarded the plaintiffs $10,000 and on appeal the jury verdict and trial court judgment were for $10,000. No challenge is made to the pleadings, the scope of the submission of the issues,

or the instructions as to the measure of damages by the trial court.

Error is assigned in permitting Julia Dawson, one of the owners and purchasers of the lease in question, to answer the following questions: "Based on your experience, Mrs. Dawson, have you an opinion as to the market value of that lease from the time that the City condemned the property until the expiration of the lease the following March 17, 1962? * * * And what was that value, Mrs. Dawson?"

It is argued that there was insufficient foundation for the admission of the answers to these questions which fixed the valuation as between $14,000 to $15,000. The evidence shows she was an owner; that she and her husband actually operated the business on the premises since April 1950; that she managed the business; that she knew of the volume of business done; that they owned all of the buildings and equipment on the land; that the rent reserved was only $75 per month; that the taking of June 14, 1961, completely destroyed the volume of business; and that extensive improvements had been made and equipment installed since 1950 at a cost of over $25,000. Beyond this, the record reveals in intimate detail, familiarity with the property, the development of it for drive-in restaurant purposes over a period of 10 years, and ample testimony of the effect of the taking by the defendant on the business and physical operation of the leasehold. In a condemnation case, a lessee is entitled to recover on the same character and quality of proof as would entitle the condemnee owner to recover. State v. Dillon, 175 Neb. 350, 121 N. W. 2d 798; James Poultry Co. v. City of Nebraska City, 135 Neb. 787, 284 N. W. 273, followed and amplified on rehearing in 136 Neb. 456, 286 N. W. 337. The owner of real estate familiar with its value can testify as to its value. State v. Wixson, 175 Neb. 431, 122 N. W. 2d 72. In Johnson v. City of Lincoln, 174 Neb. 837, 120 N. W. 2d 297, we said as follows: "As stated in Miller v. Drainage Dist.,

112 Neb. 206, 199 N. W. 28: 'The owner of personal property is qualified by reason of the ownership relation to give his estimate of the value of such property.' See, also, McGuire v. Thompson, 152 Neb. 28, 40 N. W. 2d 237; Borden v. General Insurance Co., 157 Neb. 98, 59 N. W. 2d 141."

This witness testified extensively as to the use of these premises as a drive-in restaurant, its availability and adaptability to such use, and *the volume of business accomplished* in their, the owners', operation. That this type of testimony is admissible as foundation for opinion valuation of a leasehold, and even may be admitted as direct testimony-in-chief, is apparent from James Poultry Co. v. City of Nebraska City, 135 Neb. 787, 284 N. W. 273, wherein it was said: "The value of a leasehold must be determined by consideration of the *uses to which the property is adapted.* All circumstances naturally affecting this value are open to consideration. Every legitimate use to which it may be applied may be considered. *The market value of the unexpired term should be taken into consideration,* also the situation, condition and use made, or that may be made, of the premises, and the nature and prosperity of the business carried on there, if it affects the value of the lease. Bales v. Wichita M. V. R. Co., 92 Kan. 771, 141 Pac. 1009, L. R. A. 1916C, 1090. As to the extent of proof of elements, not as independent items of damage, but as it affects the market value, see Pegler v. Hyde Park, 176 Mass. 101, 57 N. E. 327. * * * *The volume of business done on any given leasehold has a direct relation to the value of the leasehold, as volume is directly connected with the success of the business, and diminution of business means decrease in volume.* See Gillespie v. City of South Omaha, supra; City of Omaha v. Flood, 57 Neb. 124, 77 N. W. 379; Chicago, R. I. & P. R. Co. v. O'Neill, 58 Neb. 239, 78 N. W. 521; Des Moines Wet Wash Laundry v. City of Des Moines, supra." (Emphasis supplied.) This precise holding has been followed in Phillips Petroleum Co.

v. City of Omaha, 171 Neb. 457, 106 N. W. 2d 727, 85 A. L. R. 2d 570.

It is apparent from what has been said that there was ample foundation for her opinion, as an owner, of the valuation of $14,000 to $15,000 she placed on the value of this leasehold for the remaining term. Defendant argues she must testify as to familiarity with "the value of leaseholds." She was one of the owners, familiar with her own property, and as such competent to testify as to valuation. Defendant cites no case to support the proposition that, as a matter of foundation, an owner must be shown to be familiar with other leaseholds and their market value. It is not necessary that a qualifying witness be familiar with every possible element that goes into the determination of market value. Evans v. State, *ante* p. 156, 125 N. W. 2d 521; Medelman v. Stanton-Pilger Drainage Dist., 155 Neb. 518, 52 N. W. 2d 328. Defendant further argues that the foundation testimony of this witness was impeached and destroyed on cross-examination. The weight and credibility of such testimony in a condemnation action are for the jury, and in testing them, plaintiff is entitled to have conflicts resolved in the light most favorable to him. O'Neill v. State, 174 Neb. 540, 118 N. W. 2d 616; State v. Wixson, *supra;* Webber v. City of Scottsbluff, 150 Neb. 446, 35 N. W. 2d 110.

Error is assigned as to opinion valuation testimony of $10,000 given by the witness, Dan Foley, who was one of the original appraisers in county court. He had been in the real estate business since 1915, both commercial and residential, examined the premises and was familiar with the Circle Drive-In business at Forty-fourth and O Streets, ascertained the volume of business, was acquainted with the buildings and equipment, was acquainted with similar businesses in the community, determined the date of condemnation, took into consideration the period of the year drive-ins do the bulk of their business, had inspected the premises both in June and

September 1961, was familiar with commercial real estate values of property in the community, and checked other drive-in restaurants in the vicinity, McDonald's, King's, and Ken Eddy's. From this incomplete review of all of this witness' testimony, we think it is apparent that sufficient foundation was laid for an opinion as to valuation.

The rules controlling this question are succinctly stated in Evans v. State, *supra:* "It is necessary only to show that he has the means of forming an intelligent opinion derived from an adequate knowledge of the nature and kind of property in controversy, and of its value. City and County of Denver v. Lyttle, 106 Colo. 157, 103 P. 2d 1. *It is not essential that every witness expressing an opinion shall have all-inclusive information of every detail of the elements entering into the value.* Lebanon & Nashville Turnpike Co. v. Creveling, 159 Tenn. 147, 17 S. W. 2d 22, 65 A. L. R. 440. It is most difficult to state an all-inclusive rule fixing the qualification of witnesses to give their opinions as to the market value of land. Their testimony is ordinarily received if they *show an acquaintance with the property and are informed as to the state of the market, the weight and credibility of their evidence being for the jury.* Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168; Beebe & Runyan Furniture Co. v. Board of Equalization, 139 Neb. 158, 296 N. W. 764; 1 Orgel on Valuation Under Eminent Domain (2d Ed.), §§ 132 and 135, pp. 564 and 580 respectively." (Emphasis supplied.) From the above, it is clear that the discretionary power of the court in admitting this testimony was not abused. There is no merit in this assignment of error.

Defendant attacks the admissibility of the opinion evidence as to valuation of LeRoy Dawson, coowner and operator of the leasehold with Julia Dawson, his wife. His testimony shows the same familiarity with the property and business as that of his wife. Defendant

again asserts different admissions on impeachment on cross-examination of this witness, and the error in the admission of testimony as to volume of business, and therefore argues there is insufficient foundation. We have already disposed of these contentions as to Julia Dawson, and there is no need to further discuss them as they apply to this witness.

Defendant assigns error in admitting opinion valuation testimony of Eddie Gold, a drive-in restaurant operator for 11 years. This witness had made a study of drive-in restaurants in general and in the vicinity of Lincoln, had made an investigation of the Circle Drive-In business, and had observed and watched the Circle Drive-In operation for some time. The admissibility of valuation testimony of lay witnesses under these circumstances rests in the sound discretion of the court and the correct rule is that where persons are shown to be familiar with the particular land or leasehold in question, they may be permitted to testify as to value before and after the taking. Wahlgren v. Loup River Public Power Dist., 139 Neb. 489, 297 N. W. 833; Johnson v. City of Lincoln, *supra*. They need not be familiar with every element that goes into the determination of market value. Evans v. State, *supra*. Property owners who have lived in the vicinity and know the property are qualified to testify as to value. Johnson v. City of Lincoln, *supra;* 20 Am. Jur., Evidence, § 897, p. 755. Pertinent here also is the cited portion of Evans v. State, *supra*. The qualifications for this witness and his testimony are clearly within the range of the above rules and their application in the cited cases. The argument of the defendant, in essence, is a challenge to the form of words used by the witness and to his credibility. The weight and credibility of this testimony were for the jury. There is no merit to this objection.

Error is assigned in the excessiveness of the verdict. The applicable rule, not necessary to repeat here, is found in Twenty Club v. State, 167 Neb. 37, 91 N. W. 2d 64;

O'Neill v. State, *supra;* and State v. Wixson, *supra.* Defendant's argument in this respect is primarily predicated on the inadmissibility and lack of credibility of the testimony of the witnesses referred to previously in this opinion. As we have pointed out there is no merit in these contentions. Defendant further argues that the testimony as to value of the remainder of the lease furnishes no basis for the verdict, because "there is nothing to compare with it to determine damages, if any." The jury was properly instructed, to which no objection was or now is made, as to the measure of damages as the difference in value before and after the taking. The testimony, especially as to the period from June to about November 1961, of the complete destruction of the volume of business was highly pertinent to this ultimate fact determination by the jury. See, James Poultry Co. v. City of Nebraska City, *supra;* Phillips Petroleum Co. v. City of Omaha, *supra.* Whatever defendant's theory of market value may be, the undisputed evidence in this case shows a complete destruction of access to the business and use of the leasehold during the most productive months of their operation. Highly pertinent here is the observation that the plaintiffs were operating their business at a special and unique location peculiarly accessible to the special type of customers that they catered to. Availability of any other lease for the operation of their business during the short remainder period of time of the lease is practically a fiction. Their loss was substantial and could not be mitigated by them at any time. We have reviewed the evidence, and the amount of the verdict is clearly within the range of the valuation testimony and is amply supported by the direct testimony as to the substantial loss suffered by the plaintiffs. We cannot say that the verdict was excessive.

Defendant assigns errors in the admission of certain exhibits, but does not argue them. We have examined these exhibits and their admissibility is controlled by

the general rule that whenever photographs or exhibits are practically instructive to explain the evidence or aid in their interpretation or application by the jury, they may be admitted in the sound discretion of the court. 32 C. J. S., Evidence, §§ 709 and 713, pp. 611 and 618; Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200. The trial court committed no prejudicial error in the admission of these exhibits in evidence.

For the reasons given in this opinion, the judgment of the trial court is affirmed.

AFFIRMED.

HAROLD HAUSCHILD, APPELLANT, V. EMMA HAUSCHILD ET AL., APPELLEES.
126 N. W. 2d 192

Filed January 31, 1964. No. 35539.

1. **Wills.** The renunciation of a will by a widow will not be allowed to break the testamentary plan further than is absolutely necessary. If, after the widow's portion has been set aside, the estate of the decedent is left in such condition that the remaining provisions of the will can be carried out according to the testator's intent, the will will not be declared inoperative.
2. **Wills: Estates.** The devise of an interest in real estate to a trustee for the use of a child of the testator during his life, and upon the death of the child to his lineal descendants, creates a life estate in trust for the child and a remainder in his lineal descendants under the Uniform Property Act. § 76-113, R. R. S. 1943.
3. **Wills: Perpetuities.** The rule against perpetuities prohibits only the creation of future interests or estates which, by possibility, may not become vested within a life or lives in being and twenty-one years, together with the period of gestation when the inclusion of the latter is necessary to cover cases of posthumous birth.

Appeal from the district court for Cass County: JOHN M. DIERKS, Judge. Affirmed as modified.

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

James F. Begley, for appellees.

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

BOSLAUGH, J.

This is an action to construe the will of Harry Hauschild who died January 12, 1957. The will was admitted to probate in the county court of Cass County, Nebraska, on January 25, 1957.

The testator was survived by his widow, Emma Hauschild, and three children, Harold Hauschild, Charlotte Mohr Eilers, and Eileen Smith. Harold Hauschild is the plaintiff and appellant. The defendants and appellees are Emma; Charlotte, her husband and children; Eileen and her husband; the children of Harold; and the successor trustee under the will. All of the defendants defaulted except the trustee and the children of Harold and Charlotte who are represented by a guardian ad litem.

The controversy relates to paragraph 4 of the will which provides as follows: "4. I give, devise, and bequeath all of my real estate to Paul E. Fauquet as Trustee, for the following uses and purposes:

"(a) That he shall keep all of the rest of the lands rented and keep the buildings in repair and the land in conservation and in a high state of fertility so long as the funds for that purpose shall be adequate and still leave an adequate sum for the support of my wife.

"(b) That he shall permit my wife to occupy the residence on the home-farm, together with such ground as she shall require for her personal needs, so long as she shall desire the same, or for her lifetime.

"(c) That he pay the net rentals, after expenses, to my wife for her support, keeping a suitable reserve for any forseeable emergency.

"(d) That after the death of my wife, he make division of my estate among my children, as nearly equally as may be, with authority to sell all or any part of the real estate, as may in his judgment seem necessary or adviseable (sic), without the requirement of the approval of any Court, in order to effect such equal partition without imposing any undue or unnecessary hardship upon any of my children.

"(e) That for the protection of the share which is allotted to my daughter, Charlotte Mohr, it shall not be distributed to her in cash, nor placed in property that is disposable by her during her lifetime, but she shall be entitled to income from such property during her lifetime and at her death all of such property, in whatever form, shall descend to her lineal descendants by right of representation.

"(f) That for the protection of the share which is allotted to my son, Harold Hauschild, it shall not be distributed to him in cash, nor placed in property that is disposable by him during his lifetime, or shall either the property nor the income therefrom, during his lifetime, shall be subject to his debts whomsoever, but all of said property shall be held by the Trustee together with the income therefore, however, the Trustee shall have the right and authority in his discretion to distribute all or a part of the income therefrom to my said son, as in his judgment he sees fit, and at the death of my said son, all of which property together with any remaining income in the hands of the Trustee shall descend to his lineal descendants by right of representation.

"(g) That in order to effectuate the foregoing paragraphs, the Trustee shall have full power and authority to invest the proceeds of sale of real estate in securities approved by the laws of Nebraska for the investment of trust funds, or he may, if, in his judgment it is for the best interest of the beneficiaries of these funds, invest such funds in real estate, or he may buy and sell either securities or real estate and reinvest the proceeds there-

of as in his judgment is for the best interests of the beneficiaries thereof.

"(h) That my Trustee shall have discretion in determining the price to be set for the transfer of any of my real estate to any of my children in partition of my estate in that he is not required to obtain from him or them as high a price as might conceivably obtained upon a public sale."

At the time of his death, the testator owned 400 acres of land and an undivided one-half interest in another 120 acres of land in Cass County, Nebraska. The real estate was subject to a mortgage in the amount of $12,744.72.

The decedent left personal property in the amount of $16,587.50. Claims in the amount of $39,959.37 were filed against the estate. In order to raise funds with which to pay claims and expenses, the administratrix sold a 40-acre tract for $5,000 and placed a mortgage in the amount of $30,000 upon the other real estate.

Within the time provided by law, the widow elected to take under the statute instead of under the will. The widow also claimed her homestead rights in a 160-acre tract. Thus, the widow now has an undivided one-third interest in all of the land owned by the deceased together with a life estate in the 160-acre tract.

One of the contentions made by the plaintiff is that the election of the widow destroyed the plan and purpose of the testator and that as a result thereof the will should be declared inoperative. The rule is that the renunciation of a will by a widow will not be allowed to break the testamentary plan further than is absolutely necessary. If, after the widow's portion has been set aside, the estate of the decedent is left in such condition that the remaining provisions of the will can be carried out according to the testator's intent, the will will not be declared inoperative. In re Estate of Grobe, 101 Neb. 786, 165 N. W. 252.

The testamentary plan in this case was to give the

net income from the land to the widow for her use during her life. Upon the death of the widow, the property was to be divided equally among the children of the testator, but the shares of two of the children were to be held in trust. These two children were to receive only the income, or a part of the income, from their shares of the property. On their death their shares of the property were to descend to their lineal descendants by right of representation.

The election of the widow in this case had the effect of diminishing the amount of property in which the children will share, but the testamentary plan is not otherwise destroyed. Under the circumstances in this case the election of the widow did not destroy the testamentary plan and the will is operative upon the property remaining after the widow's portion of the estate is set aside.

The principal contention of the plaintiff is that Charlotte and the plaintiff are not restricted to the income, or a part of the income, from their shares of the property, but that they each take their shares of the property absolutely. In support of this contention, the plaintiff relies upon the Uniform Property Act, section 76-110, R. R. S. 1943, and the rule against perpetuities.

Section 76-110, R. R. S. 1943, provides as follows: "The creation of fees simple conditional as they existed under the law of England prior to the 'statute de donis' is not permitted. The creation of fees tail is not permitted. The use in an otherwise effective conveyance of property, of language appropriate to create such a fee simple conditional or a fee tail, creates a fee simple in the person who would have taken a fee simple conditional or a fee tail. Any future interest limited upon such an interest is a limitation upon the fee simple and its validity is determined accordingly. Nothing herein contained shall affect the operation of sections 76-111, 76-112 and 76-113 of this act."

The plaintiff argues that the devise of a life estate to

a child of the testator with a remainder to the lineal descendants of the child by right of representation would have created an estate in fee tail at common law and, because of the provisions of section 76-110, R. R. S. 1943, now creates an estate in fee simple in the child of the testator. A similar argument was made in Ellingrod v. Trombla, 168 Neb. 264, 95 N. W. 2d 635. In the Ellingrod case the devise was to a child of the testatrix "and her descendants." This court held that section 76-113, R. R. S. 1943, was controlling and prevented the child of the testatrix from taking an estate in fee simple under section 76-110, R. R. S. 1943.

Section 76-110, R. R. S. 1943, must be read and considered together with sections 76-112 and 76-113, R. R. S. 1943, which are part of the same act and which provide as follows: "Whenever any person, by conveyance, takes a life interest and in the same conveyance an interest is limited by way of remainder, either immediately or mediately, to his heirs, or the heirs of his body, or his issue, or next of kin, or some of such heirs, heirs of the body, issue, or next of kin, the word 'heirs,' 'heirs of the body,' or 'next of kin,' or other words of like import used in the conveyance, in the limitation therein by way of remainder, are not words of limitation carrying to such person an estate of inheritance or absolute estate in the property, but are words of purchase creating a remainder in the designated heirs, heirs of the body, issue, or next of kin. * * * When an otherwise effective conveyance of property is made in favor of a person and his 'children,' or in favor of a person and his 'issue,' or by other words of similar import designating the person and the descendants of the person, whether the conveyance is immediate or postponed, the conveyance creates a life interest in the person designated and a remainder in his designated descendants, unless an intent to create other interests is effectively manifested."

In the Ellingrod case this court held that the child of

the testatrix took a life estate under section 76-113, R. R. S. 1943, and that her descendants took a remainder interest. We reach a similar result in this case. The plaintiff's share of the property and Charlotte's share of the property shall each remain in trust subject to the provisions of the will during their respective lives. Upon their respective deaths each share shall be distributed to their lineal descendants.

The plaintiff argues that the testator's plan of distribution violates the rule against perpetuities because the determination of the persons who will take the remainder interests cannot be made until after the death of the widow, the plaintiff, and Charlotte.

The rule against perpetuities prohibits only the creation of future interests or estates which, by possibility, may not become vested within a life or lives in being and twenty-one years, together with the period of gestation when the inclusion of the latter is necessary to cover cases of posthumous birth. Gillan v. Wilson, 124 Neb. 893, 248 N. W. 646. In this case the testator's widow, the plaintiff, and Charlotte were all lives in being at the time of the death of the testator. Upon the death of the widow, the property was to be divided among the children of the testator. The shares taken by the plaintiff and Charlotte remained in trust and were to be distributed upon the death of the plaintiff and Charlotte. Thus, all classes of remaindermen would be determined within the period required by the rule against perpetuities.

The plaintiff further argues that the will gives the trustee discretion in regard to the method of effecting a division of the property and, for that reason, the shares do not vest upon the death of the widow. The plaintiff suggests that the trustee may take any number of years to sell the property, distribute the proceeds, and terminate the trust. We do not agree with that interpretation of the will.

The will provides that the trustee shall make an

equal division of the property among the children of the testator after the death of the widow. Although there might be some delay in making an actual distribution, the right to share in an equal division of the property accrues immediately upon the death of the widow. This is sufficient to comply with the vesting requirement of the rule against perpetuities.

The election of the widow to take under the statute had the effect in this case of accelerating the provisions of the will as to what was to happen upon her death. The property remaining after the share of the widow has been set aside should now be divided equally among the children of the testator. Eileen Smith is entitled to her share of the real estate subject only to the homestead estate of the widow. The plaintiff's share of the property and Charlotte's share of the property remain in trust subject to the terms of the will. This is the same conclusion that the district court reached. Its judgment as to the construction of the will is, therefore, affirmed.

The district court allowed the guardian ad litem a fee of $750 for his services in that court and taxed all of the costs of the action to the plaintiff. The plaintiff assigns as error the taxing of all costs to him and urges that the costs be taxed to the trust. The plaintiff contends that the construction of the will is for the benefit of all parties interested in the will and that the costs of the action should not be taxed to him.

We believe that the circumstances in this case are such that the costs in both courts should be taxed to the trustee and paid as an expense of the administration of the trust. See, § 25-1711, R. R. S. 1943; Cass v. Pense, 155 Neb. 792, 54 N. W. 2d 68; In re Clapham's Estate, 73 Neb. 492, 103 N. W. 61. The judgment of the district court is modified accordingly. The guardian ad litem is allowed a fee of $750 for his services in this court.

The judgment of the district court as modified is affirmed.

AFFIRMED AS MODIFIED.

JOSEPH BARKER, JR., EXECUTOR OF THE ESTATE OF ELIZABETH A. BARKER, DECEASED, APPELLANT, V. THE WARDENS AND VESTRYMEN OF ST. BARNABAS CHURCH, APPELLEE.

126 N. W. 2d 170

Filed January 31, 1964. No. 35548.

1. **Executors and Administrators.** Where letters testamentary have been issued to an executor named in the will and after his accounting and discharge personal property is subsequently found belonging to the estate, the proper practice is for the county court to reappoint the executor unless he is incompetent to act.
2. **Executors and Administrators: Judgments.** The citation or notice of hearing of application for letters of administration cannot be successfully attacked collaterally by one not interested in the estate or in a suit by the administrator against him.
3. **Executors and Administrators.** Letters testamentary, issued by a court which has jurisdiction to grant such letters, are valid unless and until revoked, notwithstanding there may be irregularities in the proceeding for which, in a direct attack, they might be revoked.
4. **Appeal and Error.** The decision of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case and for purposes of the litigation settles conclusively the matters adjudicated expressly or by necessary implication.
5. **Contracts: Subscriptions.** The general principles governing the performance of contracts apply to subscriptions. If a material change in the plan or purpose for which a subscription is made is effected without the consent of the subscriber, he is excused from performing his promise unless estopped to deny his consent to the change.
6. **Subscriptions.** A paid subscription may be recovered back on abandonment of the enterprise, or where the agreement expressly provides for recovery, or if the condition on which it was paid has not been fulfilled.
7. **Religious Societies: Subscriptions.** Where a religious society raises a fund by subscription for a particular purpose, it cannot divert the fund to another purpose, and, if it abandons such purpose, the donors may reclaim their contributions.
8. **Trial: Appeal and Error.** Where an action at law is submitted to the trial court without a jury for determination on an agreed statement of facts which presents to this court on appeal only questions of law applicable to those facts, this court in deter-

mining the law involved may direct the rendition of the appropriate judgment which should have been entered by the trial court.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. Reversed and remanded with directions.

Kennedy, Holland, DeLacy & Svoboda and J. A. C. Kennedy, Jr., for appellant.

Gross, Welch, Vinardi, Kauffman & Schatz and Richard J. Spethman, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, BOSLAUGH, and BROWER, JJ., and ZEILINGER, District Judge.

BROWER, J.

Joseph Barker, Jr., executor of the estate of Elizabeth A. Barker, deceased, plaintiff, brought this action against The Wardens and Vestrymen of St. Barnabas Church, defendant, in the municipal court of the City of Omaha, to recover the sum of $1,000, given by plaintiff's decedent to the "St. Barnabas Church New Building Fund" upon the donee having decided to abandon the project, sell the new site purchased by the funds contributed, return the contributions to those requesting them, and use the remainder for other purposes.

Plaintiff recovered the judgment prayed for in the municipal court. On appeal by the defendant to the district court for Douglas County that court sustained the motion of the defendant to dismiss the case, finding the action was one in equity and that the municipal court and the district court on appeal therefrom had no jurisdiction of the cause.

On a former appeal by the plaintiff to this court the judgment of the district court was reversed and the cause remanded for further proceedings, the former opinion appearing in Barker v. Wardens & Vestrymen of St. Barnabas Church, 171 Neb. 574, 106 N. W. 2d 858, which held that the petition stated a cause of action at law for money had and received.

It was thereafter again submitted to the district court without a jury on admissions contained in the pleadings and an agreed stipulation of facts. The district court again dismissed the petition and in its judgment gave its reason for so doing that the plaintiff as executor of the decedent's estate was not the proper party to bring the action but the proper parties were the residuary legatees of the estate of deceased. It also found the plaintiff had failed to prove his case by a preponderance of the evidence.

Plaintiff's motion for a new trial being overruled he brings the cause to this court by appeal for the second time.

The plaintiff assigns the following errors to the district court: (1) In holding that Joseph Barker, Jr., as executor of the estate of Elizabeth A. Barker, deceased, was not a proper party to bring this action; (2) in contravening the "law of the case" as determined on the prior appeal in Barker v. Wardens & Vestrymen of St. Barnabas Church, *supra;* (3) in holding that the plaintiff failed to prove and establish his case by a preponderance of the evidence; and (4) in dismissing the petition.

The substance of the facts agreed upon by the parties is here set out.

Elizabeth A. Barker died testate, a resident of Omaha, Nebraska, on April 21, 1953, and her will was probated in the county court of Douglas County, Nebraska. The will designated her son Joseph Barker, Jr., plaintiff herein, as executor of her estate. After certain bequests the remainder of her estate was left to her four surviving children, being her son Joseph Barker, Jr., and her three daughters. The executor was appointed as such by the county court of Douglas County. He paid the claims against the estate, distributed the assets then in the estate, and received his discharge December 9, 1955.

On September 22, 1958, following, on application of Joseph Barker, Jr., the county court of Douglas County entered an order which stated in substance that he

having represented that there were subsequent to his *dismissal* assets belonging to the estate for which claim must be asserted, his *dismissal* was vacated and set aside and he was reinstated as executor to assert and, if necessary, litigate any claims for assets belonging to the estate. On October 7, 1958, letters testamentary were again issued to him. Copies of this order reappointing him and of the letters are attached to and made a part of the stipulation. The action was instituted in the municipal court thereafter on December 16, 1958.

The defendant's legal entity was admitted and it was stipulated that a building fund drive was initiated by it in the years 1950 and 1951 for the purpose of acquiring another site and erecting a new church building; and that substantial contributions were received, among them $1,000 from plaintiff's testator. With part of the funds so raised a site was purchased.

It was stipulated a pledge card used in the campaign was signed by the deceased and the $1,000 paid thereunder and though her signed card could not be located the form thereof was set out as follows:

"St. Barnabas Church
Omaha, Nebraska

I hereby pledge to the St. Barnabas Church New Building Fund the total sum of $_____ to be paid in ( ) Monthly ( ) Quarterly ( ) Annual installments before December 31, 19____

Checks, payable to St. Barnabas Building Fund or payments may be deposited in the collection plate or sent to: Mr. Joe Thomas, 4715 Wakeley Street

Dated_____
Name_____
Address_____."

In the years 1956 and 1957, the Wardens and Vestrymen decided not to build the new church. At an annual parish meeting in January 1957, it was resolved that the new site be sold and that on request the contributors would be reimbursed their contributions and the re-

maining funds be spent (1) for necessary repairs and improvements of the present church building and (2) for establishing and maintaining a parochial mission of St. Barnabas Church. The sale was made at a profit of $24,000.

Certain contributors requested a return of their contributions pursuant to the resolution and they were returned to them. The funds raised in the drive and the profits from the sale of the lot, less only the funds returned to contributors on request, were used to rehabilitate the existing church.

The plaintiff as executor requested the return of the $1,000 contribution made by the deceased to said fund but the request was refused by the defendant and no refund was made to the decedent's estate, or the personal representatives thereof, or her residuary legatees.

The petition of the plaintiff was summarized in our previous opinion in Barker v. Wardens & Vestrymen of St. Barnabas Chuch, *supra,* and need not be further elaborated herein. Neither will it be necessary to set out the contents of the defendant's answer or plaintiff's reply thereto other than to state that the denials and affirmative allegations made by the parties in their pleadings after the cause was remanded by this court sufficiently raised the issues hereinafter discussed.

The trial court gave as its first reason for dismissing the petition that the plaintiff as executor was not the proper party to maintain the action, but that it should have been instituted by the residuary legatees of the deceased. This ruling is challenged by the plaintiff in his assignment of error. In Pinn v. Pinn, 108 Neb. 822, 189 N. W. 371, this court held that if a sum not administered is found belonging to an estate, the proper practice is to have a new administrator appointed in the county court and the fund administered. The defendant herein contends that the rule stated in Pinn v. Pinn, *supra,* permits the appointment of an administrator but not an executor. We consider this argument as tech-

nical in the extreme. The cited case involved an intestate estate and hence spoke only of an administrator.

In further support of this argument, defendant cites section 30-311, R. R. S. 1943, providing for the appointment of an administrator with the will annexed where the executor shall die or be removed or his authority extinguished, and contends this statute also requires the appointment of an administrator in the present case because the authority of the executor had been extinguished by his discharge. It would appear this section refers to those instances mentioned in section 30-310, R. R. S. 1943, immediately preceding it, which provides for the removal from office of the executor for the reasons therein stated. The defendant likewise cites 33 C. J. S., Executors and Administrators, § 88, p. 1030, stating that when letters of administration are revoked the former incumbent should not be reappointed. A perusal of this and the several preceding sections in the discussion in C. J. S. shows clearly that the text is considering instances where the executor or administrator was removed by the court either for shortcomings or other cause, rendering his continuance in that office improper under the circumstances. Cases are also cited which disclose the same situation. Patently these authorities have no application to the case before us. The defendant infers the plaintiff might have been dismissed because of the recitations heretofore italicized in the court's order reappointing him. This supposed inference however is in direct conflict with the stipulation of facts. It was stipulated the executor had paid the claims against the estate, rendered his accounts, made distribution of the assets, and had been discharged in 1955. Nothing in the stipulation indicates he was removed for cause. The defendant's decision not to build the new church was made in 1956 and 1957, thereupon for the first time giving rise to the cause of action asserted for return of the contribution.

By section 30-406, R. R. S. 1943, the executor or ad-

ministrator has a right to the possession of all the personal assets of a decedent's estate. Section 24-504, R. R. S. 1943, gives the county court power to appoint executors and administrators. Section 30-302, R. R. S. 1943, directs the court to issue letters testamentary to the person named as executor therein, if he is legally competent, and provided he shall accept the trust and give bond as required by law.

From what has been said it follows that where letters testamentary have been issued to an executor named in the will and after his accounting and discharge personal property is subsequently found belonging to the estate, the proper practice is for the county court to reappoint the executor unless he is incompetent to act.

The defendant raises objections to the appointment made in this particular instance, suggesting that proper notice was not given to those interested in the decedent's estate. Such objections cannot be raised by the defendant in this action. "The citation or notice of hearing of application for letters of administration cannot be successfully attacked collaterally by one not interested in the estate or in a suit by the administrator against him." Jackson v. Phillips, 57 Neb. 189, 77 N. W. 683. Indeed the several contentions of the defendant embodied in its objections to the plaintiff's appointment as executor and which appear to have entered into the trial court's decision might all be disposed of because the appointment was not subject to collateral attack. "Letters testamentary, issued by a court which has jurisdiction to grant such letters, are valid unless and until revoked, notwithstanding there may be irregularities in the proceeding for which, in a direct attack, they might be revoked." In re Estate of Hoferer, 116 Neb. 254, 216 N. W. 826.

The only other reason given by the trial court in its judgment for its decision in dismissing the cause was "that the plaintiff has failed to prove and establish his case by a preponderance of the evidence." The court

gives no further particulars showing in what respect the plaintiff had failed to prove and establish his case.

The defendant again argues as it did at the previous submission of the case in this court that the present action is an equitable one to establish a resulting trust to which the cy pres doctrine applies. It urges such an action could not have been maintained in the municipal court of the City of Omaha and that the district court had no jurisdiction thereof on appeal. These are the precise questions which were submitted to and determined by this court in our former opinion. We held in Barker v. Wardens & Vestrymen of St. Barnabas Church, *supra,* that: "Whenever one person has money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay it to the latter and the obligation may be enforced by assumpsit." We further held: "An action for money had and received is an action at law."

In the previous opinion this court stated the petition in the municipal court was not before us and the recitations in the transcript from municipal court were accepted by this court as to the nature of the case therein. The original petition from municipal court is now contained in the transcript. It appears therefrom that the petition originally filed in municipal court is in substance the same as that summarized in the previous opinion and upon which the cause was thereafter tried. Our previous opinion therefore has precluded the defendant from again litigating these same questions. "The decision of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case and for purposes of the litigation settles conclusively the matters adjudicated expressly or by necessary implication." Noble v. City of Lincoln, 158 Neb. 457, 63 N. W. 2d 475.

The defendant's argument seems based in part on a contention that the defendant being a charitable corporation plaintiff can in no event recover the amount of

his testator's contribution, but the defendant is entitled to apply it to another purpose as near to that for which the contribution was made as the circumstances admit. By this it again attempts to invoke the doctrine of cy pres. This may well be precluded by our previous decision in Barker v. Wardens & Vestrymen of St. Barnabas Church, *supra,* but inasmuch as that decision went primarily to the question of the sufficiency of the pleading while the present case is an appeal from a decision after the submission of the cause under a stipulation of facts, we will consider certain aspects of these contentions.

The case of In re Estate of Griswold, 113 Neb. 256, 202 N. W. 609, 38 A. L. R. 858, involved a claim filed in a decedent's estate by Nebraska Wesleyan University on a note given as a subscription to the endowment, building, and expense fund of the University. It resulted in a decision by this court holding the claim of the University had been properly allowed. The decision does throw some light on the consideration which this court has held as necessary to sustain such contributions. This court there stated: "While in the case of a mere promise to make a gift or donation to a college subject to no condition and imposing no obligation upon the college with respect thereto could not be enforced, we think that when, as in this case, the college is required to perform certain duties with respect to the specific fund, its acceptance thereof and reliance thereon and promise to carry out the wishes of the donor supply the consideration."

In the early case of Avery v. Baker, 27 Neb. 388, 43 N. W. 174, 20 Am. S. R. 672, this court stated: "Where a church edifice has been erected by voluntary contributions and upon the promise and agreement that the building is to be used for certain specified purposes, the contributors to the fund have a right to insist that the property be used for the purposes named, and may enjoin a sale of the building where no adequate cause is shown

and the effect would be to divert the funds from the use intended and apply them elsewhere." In that case the court in its opinion further stated: "A church organization, like any other, must act in good faith with those contributing to the erection of an edifice for its use. A church edifice is the result, ordinarily, of many voluntary subscriptions. It would be the property of those who contributed to its erection, but for the fact that it was made as a donation to a particular society. The donation, however, is for a particular purpose—the erection of a church edifice. The money so contributed cannot be diverted and applied to another use without the donors' consent—as the erection of a building for a college, however much the latter might be needed. If good faith requires the application of the money to the uses for which it was designed, the same rule would seem to apply after the building was erected."

The later case of Cotner College v. Estate of Hester, 155 Neb. 279, 51 N. W. 2d 612, was one where a claim was filed against the estate of a subscriber to the endowment fund of Cotner College. The trial court found that the educational facilities of Cotner College had been suspended and abandoned and disallowed the claim. On affirming the ruling of the trial court this court held: "The general principles governing the performance of contracts apply to subscriptions. If a material change in the plan or purpose for which a subscription is made is effected without the consent of the subscriber, he is excused from performing his promise unless estopped to deny his consent to the change.

"Where there is a total failure of consideration and defendant has derived no benefit from the contract, or none beyond the amount of money which he has already advanced, such failure of consideration may be shown in bar of the action.

"The doctrine of substantial performance has no application where the party obligated to perform deliberately and intentionally departs from the terms of the

contract and attempts to substitute another type of performance."

We are not cited to authorities from this court dealing with the precise question now before us involving the recovery of funds both subscribed and paid by the subscriber where the objects of the gift were not complied with. The general rule is stated in 83 C. J. S., Subscriptions, § 21, p. 752: "A paid subscription may be recovered back on abandonment of the enterprise, or where the agreement expressly provides for recovery, or if the condition on which it was paid has not been fulfilled, or if the subscription was fraudulently procured." We think the rule stated in First Church of Christ Scientist v. Schreck, 70 Misc. 645, 127 N. Y. S. 174, taken in turn from Rector v. Crawford, 43 N. Y. 476, is the correct one applicable to the case before us: "Where a religious society raises a fund by subscription for a particular purpose, it cannot divert the fund to another purpose, and, if it abandons such purpose, the donors may reclaim their contributions."

The defendant in an endeavor to defeat the plaintiff's action or to relegate him to one in equity cites several cases involving trusts. Most of them have no application to the case before us. The case of Hobbs v. Board of Education of Northern Baptist Convention, 126 Neb. 416, 253 N. W. 627, concerns certain funds held by the trustees of Grand Island College. That case discusses at length the several funds so held. Some of those funds were held to constitute a charitable trust, others were not, and certain rules were laid down distinguishing the one from the other. It was there said: "Donations to the endowment fund of a college, conditioned that the principal sum shall be 'invested and preserved inviolable as endowment for said college,' constitute a charitable trust." Such charitable trusts however were there clearly distinguished from the contributions such as that made in the present case, the court there holding: "Donations to a college without other condition than that they shall

be used for the purpose of erecting buildings and maintaining a college for education of the young do not constitute a trust, but are at most gifts upon condition."

In the present case the contribution was for the "New Building Fund" of the St. Barnabas Church. The subscription card so designated it. It was pledged and paid pursuant thereto in the course of a drive to procure such funds for building a new church. The plan was abandoned, the lot was sold at a profit, and the funds were diverted to another purpose. They were returned on request to certain contributors. The defendant's identity was admitted. The facts showing the plaintiff's appointment and the letters testamentary which issued to him were shown. Demand was made by the plaintiff for the return of the contribution and was refused by the defendant. All of these facts were pleaded by the plaintiff in his petition. All of the facts were admitted either by answer or the stipulation of the parties. We know of nothing more which is necessary to be pleaded or proved by plaintiff to sustain his cause of action or entitle him to judgment, and the defendant points out nothing further.

The contentions of the defendant that the plaintiff had no capacity to sue, that he had pursued the wrong remedy, or that he was entitled to no remedy were but conclusions of law maintained by the defendant, all of which have now been decided against it by this court.

The plaintiff filed a motion for a new trial, alleging that the judgment is not sustained by the evidence and is contrary to the evidence and the law. This raises in this court a question only of law applicable to the facts which were admitted.

Where an action at law is submitted to the trial court without a jury for determination on an agreed statement of facts which presents to this court on appeal only questions of law applicable to those facts, this court in determining the law involved may direct the rendi-

tion of the appropriate judgment which should have been entered by the trial court.

The judgment is reversed and the cause remanded with directions to enter judgment for the plaintiff for the relief prayed.

REVERSED AND REMANDED WITH DIRECTIONS.

SPENCER, J., participating on briefs.

SPENCER, J., concurring.

I concur in the result herein, but feel that the majority opinion has not sufficiently answered the contention that the executor was not the proper party to maintain the action and also that the statement derived from the case of Pinn v. Pinn, 108 Neb. 822, 189 N. W. 371, in the majority opinion, was dicta therein and is not an accurate statement of the law. The proper practice is *not* to appoint a *new* executor or administrator.

In Hazlett v. Estate of Blakely, 70 Neb. 613, 97 N. W. 808, we held that: "An executor or administrator may resign or may be removed for cause, but a county court has no authority to discharge such officer from his trust, merely upon the settlement of what is called a final account.

"The trust of such officer is a continuing one, and his formal discharge, in a decree upon final accounting, does not destroy the relation, but merely discharges him from liability for the past."

This holding is reaffirmed in Brownell v. Adams, 121 Neb. 304, 236 N. W. 750; Parker v. Luehrmann, 126 Neb. 1, 252 N. W. 402; and Columbus Land, Loan & Bldg. Assn. v. Wolken, 146 Neb. 684, 21 N. W. 2d 418, 165 A. L. R. 1285.

WHITE, C. J., joins in this concurrence.

PAULA BERG, A MINOR, BY JEAN BERG, HER MOTHER AND NEXT FRIEND, APPELLANT, V. WAYNE ALBERT RASMUSS ET AL., APPELLEES.

125 N. W. 2d 905

Filed January 31, 1964. No. 35553.

1. **Trial: Judgments.** In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom.
2. ———: ———. The purpose of the summary judgment procedure is not to require a plaintiff to reveal in detail the evidence he expects to produce to prove the allegations of his petition.
3. ———: ———. The summary judgment procedure was never intended as a substitute for a trial on the merits.
4. ———: ———. A motion for summary judgment is not a substitute for a demurrer, a motion to dismiss, or a motion for judgment on the pleadings.
5. ———: ———. Summary judgment is effective and serves a separate useful purpose only when it can be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged.
6. ———: ———. The evidence offered on a motion for summary judgment is for the purpose of showing that no issue of fact exists, not to try issues on pleadings, depositions, and affidavits which constitute only a part of the evidence available on a trial on the merits.
7. ———: ———. In order for the movant to obtain a summary judgment it must be shown first, that there is no genuine issue as to any material fact in the case and, second, that movant is entitled to judgment as a matter of law.

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

Kelly, Grant & Costello and Michael J. Dugan, for appellant.

Fraser, Stryker, Marshall & Veach, for appellees.

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

SPENCER, J.

This is an appeal from the sustaining of a motion for summary judgment and the dismissal of the action.

This action is one for damages brought by Paula Berg, by Jean Berg, her mother and next friend. Paula Berg, who will hereinafter be referred to as plaintiff, was injured when the car in which she was a passenger went over the north curb of Ames Avenue in the vicinity of Thirty-ninth Street in Omaha, Nebraska, and struck a light pole. The car, which is conceded to be a family-purpose automobile, was owned by the defendant, Albert F. Rasmuss, and at the time in question was being operated by his son, Wayne Albert Rasmuss, who will hereinafter be referred to as defendant. If the father is also intended, they both will be referred to as defendants.

Plaintiff's petition was filed August 9, 1962. Defendants filed an answer August 30, 1962. Plaintiff filed a reply September 4, 1962. Plaintiff's deposition was taken by the defendants on September 15, 1962. On October 29, 1962, defendants filed a motion for summary judgment, alleging that the pleadings, the deposition of the plaintiff, and the attached affidavit of the defendants' attorney show that defendant was in nowise guilty of gross negligence as a matter of law, and that no genuine issue exists as to any material fact.

In Schlines v. Ekberg, 172 Neb. 510, 110 N. W. 2d 49, we said: "In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom."

Applying this rule, plaintiff's deposition establishes that she and the defendant had been cruising around Omaha for about 1½ hours when defendant purchased a six-pack of beer. He consumed four of the bottles or cans and the plaintiff consumed two. During the course of the evening, he tried to kiss the plaintiff while driving.

Sometime before the accident plaintiff fell asleep and was not aware that she had been in an accident until she regained consciousness in the hospital. All she knows about the accident is what the defendant himself told her about it subsequently. No evidence was adduced in the deposition on defendant's admissions.

Plaintiff's petition alleged that defendant's vehicle went over the curb and into the light pole when he leaned over and attempted to kiss the plaintiff; and further specifically alleged the failure of the defendant to have his automobile under proper control, failure to keep a proper lookout ahead, and that the defendant was operating his automobile while in an intoxicated condition.

Plaintiff's counsel, in opposition to the motion for summary judgment, filed an affidavit that the plaintiff had evidence other than that elicited by the defendants' deposition of the plaintiff which would establish the negligence alleged in the petition. It specifically stated that the plaintiff had evidence of statements made by the defendant which admitted the kissing while driving. It also asserted that the police officer who investigated the accident would testify to the condition of the defendant at the time of the accident as well as to his admissions at the scene of the accident.

It is obvious that the defendants have an erroneous idea as to the purpose and function of the summary judgment proceeding. This is well illustrated by the following from defendants' brief: "If plaintiff had evidence of any kind or nature which would tend to support her contention that defendant Wayne Rasmuss was grossly negligent in the manner in which he drove and operated his vehicle, surely it was not brought to the attention of the trial court, although more than sufficient time and opportunity were available for its submission."

The purpose of the summary judgment procedure is not to require a plaintiff to reveal in detail the evidence he expects to produce to prove the allegations of his

petition. It was never intended as a substitute for a trial on the merits. As we said in Schlines v. Ekberg, 172 Neb. 510, 110 N. W. 2d 49: "A motion for summary judgment is not a substitute for a demurrer, a motion to dismiss, or a motion for judgment on the pleadings."

What we said in Fay Smith & Associates, Inc. v. Consumers P. P. Dist., 172 Neb. 681, 111 N. W. 2d 451, is applicable herein: "Summary judgment is effective and serves a separate useful purpose only when it can be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged.

"The evidence offered on a motion for summary judgment is for the purpose of showing that no issue of fact exists, not to try issues on pleadings, depositions, and affidavits which constitute only a part of the evidence available on a trial on the merits."

Defendants suggest that an attempt on the part of the defendant to kiss the plaintiff, causing him to lose control of his car, does not constitute gross negligence. This will depend entirely on the evidence adduced. It is a fact question. Whether gross negligence has been proved is a question which can be determined only when all of the evidence has been adduced.

A fact question is apparent herein. The following from Fay Smith & Associates, Inc. v. Consumers P. P. Dist., *supra,* is controlling: "In order for the movant to obtain a summary judgment it must be shown first, that there is no genuine issue as to any material fact in the case and, second, that movant is entitled to a judgment as a matter of law." Clearly, the defendants did not meet either of these two tests.

The motion for summary judgment should not have been sustained herein. We reverse the order sustaining the motion for summary judgment and dismissing the action, and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

LUELLA ISOM, APPELLEE, V. JESSIE J. ISOM, APPELLANT.
126 N. W. 2d 198

Filed January 31, 1964. No. 35565.

1. **Divorce.** The district court may at any time within 6 months of the trial and decision of a divorce case, if no appeal is taken therefrom, vacate or modify the decree therein.
2. ———. The right to vacate or modify a decree of divorce within 6 months of the trial and decision of the cause is not absolute but must be exercised within a sound discretion.
3. **New Trial.** Section 25-1143, R. R. S. 1943, provides that a motion for a new trial must be filed within 10 days after the judgment or decree.
4. **Divorce.** No decree of divorce and of the nullity of a marriage shall be made solely on the declarations, confessions, or admissions of the parties but must be supported by other satisfactory evidence.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Paul I. Manhart, for appellant.

Emmet L. Murphy and Raymond E. Gaines, for appellee.

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

SPENCER, J.

This is an appeal from an order sustaining a motion for a new trial in a divorce action.

Plaintiff and appellee, Luella Isom, hereinafter referred to as appellee, on May 1, 1962, filed a petition for an absolute divorce and for custody of four minor children, the youngest of whom at time of trial was about 1 year of age. Defendant and appellant, hereinafter referred to as appellant, filed an answer and a cross-petition. The case was heard on January 24, 1963. Appellee was unable to produce her witnesses at that time for reasons that are immaterial herein. Undoubtedly upon a proper showing, a continuance could have been secured. For some reason not apparent in the record,

her counsel saw fit to let the divorce action proceed to trial on the appellant's cross-petition, and the evidence of appellant and his sister was adduced in support thereof. The appellee did not testify.

On February 1, 1963, the trial court signed and filed a decree granting a divorce to the appellant on the cross-petition and awarding him the custody and control of the children, the real estate of the parties, and all the personal property, except appellee's personal possessions. On the same day the decree was filed, February 1, 1963, appellee, by counsel who had not been previously employed by her, filed a motion for a new trial specifying four of the grounds enumerated in section 25-1142, R. R. S. 1943, and supported by affidavit.

On May 17, 1963, appellant filed a showing in resistance to the motion for a new trial. The motion for new trial was heard on May 24, 1963, and was sustained on that date. Appellant has perfected his appeal to this court.

Appellant sets out five assignments of error, all of which may be summed up in the allegation that the trial court abused its discretion in sustaining the motion for a new trial.

Appellant premised much of his argument on the theory that this proceeding is governed by the provisions of section 42-340, R. R. S. 1943, which provides as follows: "A decree of divorce shall not become final or operative until six months after trial and decision, except for the purpose of review by appeal, and for such purpose only the decree shall be treated as a final order as soon as rendered; Provided, if appeal shall have been instituted within one month, such decree shall not become final until such proceedings are finally determined. If no such proceedings have been instituted, the district court may, at any time within said six months, vacate or modify its decree, but if such decree shall not have been vacated or modified, unless proceedings are then pending with that end in view, the original decree shall

at the expiration of six months become final without any further action of the court."

This procedure is the applicable one if no appeal is to be taken. we said in Firebaugh v. Firebaugh, 163 Neb. 79, 77 N. W. 2d 891: "The district court may at any time within 6 months of the trial and decision of a divorce case, if no appeal is taken therefrom, vacate or modify the decree therein.

"The right to vacate or modify a decree of divorce within 6 months of the trial and decision of the cause is not absolute but must be exercised within a sound discretion."

Section 25-1143, R. R. S. 1943, provides that a motion for a new trial must be filed within 10 days after the judgment or decree. The motion herein was filed the same day the decree was entered. As already noted, four of the eight grounds enumerated in the statute for the granting of a new trial were assigned to obtain the relief requested. It is apparent that the appellee was proceeding so that an appeal could be perfected to test the sufficiency of the evidence to support the decree rendered.

In the original hearing, appellant was permitted, without objection, to inject issues not apparent from the cross-petition. That, however, is immaterial, for the evidence adduced by the appellant on the cross-petition is clearly insufficient to justify the decree entered.

Section 42-335, R. R. S. 1943, provides: "No decree of divorce and of the nullity of a marriage shall be made solely on the declaration, confessions or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose."

The decree of divorce herein could only be sustained if the uncorroborated testimony of the appellant as to alleged admissions of the appellee were sustained by other sufficient evidence. There is no such evidence in this record. The trial court, when the matter was prop-

erly presented to him, undoubtedly recognized the applicability of the statute, and sustained the motion for a new trial. This was the only action that could have been taken under the facts presented by this record. The failure to do so would have been an abuse of discretion. The order of the trial court sustaining the motion for a new trial is hereby affirmed.

AFFIRMED.

EVELYN JEFFRIES, APPELLEE, V. SAFEWAY STORES, INC., A CORPORATION, APPELLANT.
125 N. W. 2d 914

Filed January 31, 1964. No. 35567.

1. **Negligence.** A person who enters a store for the purpose of making a purchase is an invitee and the owner of the store must use reasonable care to keep the premises reasonably safe for the use of the invitee.
2. ———. A storekeeper is not an insurer of the safety of customers who patronize his place of business.
3. ———. Where the evidence shows that a customer slipped on substances tracked into the store by customers after a snowfall, no liability attaches to the storekeeper unless he knew of the dangerous condition or that the condition had existed for such a length of time that he should have known of it and rectified it.
4. ———. Water, slush, and other substances tracked in on the floor of a store by customers because of weather conditions do not ordinarily constitute actionable negligence, even though they render the floor wet, dirty, and slippery, and result in injury to an invitee.
5. ———. Liability attaches in such a case when the storekeeper or his employees knew of the danger or that the condition had existed for such a period of time that he or they should have known of it and remedied the condition or warned invitees of the danger.
6. **Negligence: Trial.** In such a case where there is no evidence of knowledge on the part of the storekeeper or his employees, or of the period of time such dangerous condition had existed before the injury occurred, a directed verdict for the defendant is required.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Reversed and remanded with directions.

L. J. Tierney, Charles F. Gotch, and Cassem, Tierney, Adams & Henatsch, for appellant.

Marks, Clare, Hopkins & Rauth, for appellee.

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

CARTER, J.

This is an action to recover damages for personal injuries sustained by plaintiff on March 29, 1960, when she fell on the floor of defendant's store at Fifty-first and Leavenworth Streets in Omaha, Nebraska, while patronizing the store. The jury returned a verdict for the plaintiff in the amount of $25,000. The defendant has appealed.

The evidence shows that plaintiff drove to the store and parked her automobile in a parking space on the east side of the building. She walked to the sidewalk along the south end of the building, from which she entered the store by its main door. Plaintiff testified that she had proceeded north through the door and had taken a couple of steps when her left foot slipped and she fell to the floor with her right foot and leg twisted back behind her. She was able to get back on her feet without assistance, and informed the store manager upon his inquiry that she hoped she was not injured. She remained in the store about 30 minutes, after which she went home. She testified that she was badly shaken up and she hurt all over. Her pain continued to increase, and 10 or 12 days later she first saw a doctor. There is no question that plaintiff suffered serious injuries to her lower back, for which she was still being treated on April 9, 1963, the date of the trial of this case.

The evidence shows that March 28, 1960, was the last of 75 consecutive days with 1 inch or more of snow on

the ground in Omaha. It had snowed on the morning of March 29, 1960, but had apparently ceased about 11 a.m. Plaintiff went to defendant's store and entered it about 3 p.m. The snow had been scooped from the sidewalk in front of the store and a mixture of Zorball and calcium chloride had been applied by hand in a manner similar, as testified by the store manager, "like you would feed chickens corn."

Plaintiff testified that she was wearing low-heeled, flat shoes. She was not wearing overshoes. She was wearing a coat. She said she paid no particular attention to the floor as she came into the store and saw nothing on the floor prior to her fall. She did not stomp her feet as she came in, nor clean her shoes on material provided for that purpose. After her fall she observed what she described as a sandy grit under her feet and body. She said it was a gritty, round-shaped, dusty, dirty-colored substance which she asserts was slippery and caused her to fall. She further stated that she remained on the floor for about 3 minutes and then got up by herself. Her evidence is that there was an area about 4 feet by 4 feet that contained this gritty substance. She testified that the store manager at the scene of the accident in the presence of plaintiff said to one of the store employees: "You should have cleaned it up; get a broom and dustpan and clean it up." Plaintiff said the employee swept up the substance in an area 4 feet square or thereabouts, and that the dustpan was completely covered with the sweepings.

The evidence shows that this gritty substance was tracked into the store by customers and employees using the front door of the store. The store manager testified that a mixture of Zorball and calcium chloride was used by all the company stores on sidewalks in front of its stores when the sidewalks were snowy or icy. The calcium chloride was used to melt the ice and snow and Zorball, an absorbent, was used to absorb the moisture to prevent refreezing and a consequent slippery condi-

tion. He testified also that the Zorball was used to prevent slipping and skidding, and accidents that could result therefrom. It was used only on sidewalks and was not used on the interior floors of stores used by customers.

A bag of Zorball was offered and received in evidence. Plaintiff testified that it appeared to be the same as the substance on the floor, except the latter was discolored and mixed with dirt and moisture. An examination of the Zorball in its original package reveals that it is a coarse, hard substance. The surface of each component is not round and smooth, but is irregular and angular. It could be described as gritty, particularly by one walking on it. It appears to be a substance that would improve traction rather than increase any existing slipperiness.

The manager of the store testified that he had been doing book work in the back of the store when he was called to the scene of the accident. He testified that he saw no foreign substance on the floor at that time, that the floor was then swept, and an amount of sweepings which did not cover the bottom of the dustpan was picked up. He testified that the floors were swept each evening after the closing hour and such times during the day as was necessary. He was unable to recall what sweeping had been done prior to the accident because of the passage of time.

The evidence shows that there had been some tracking in of Zorball, dirt, and moisture. There is no evidence that Zorball is a dangerous substance, nor is there any evidence that the manager or any employee knew of the existing condition of the floor previous to the accident. We find no evidence in the record as to when the Zorball was tracked in and became a dangerous condition to the customers of the store.

The defendant asserts that the evidence thus summarized was insufficient to warrant the court in submitting the case to the jury, and that its motions for a

directed verdict made at the close of plaintiff's evidence and at the close of all the evidence, and its motion for judgment notwithstanding the verdict, should have been sustained.

Plaintiff as a customer of the store was an invitee. A storekeeper is not an insurer of the safety of his customers. His liability is for his own negligence. The question to be first determined is whether or not there was sufficient evidence of negligence on the part of defendant to sustain the action of the trial court in submitting the case to the jury. In determining this question we shall follow the familiar rule that, in testing the sufficiency of evidence to support a verdict, it must be considered in the light most favorable to the successful party.

This court has held the applicable rule in this class of cases to be: Where foreign substances on the floor of a store used by customers create a hazardous condition, the storekeeper is ordinarily liable if the condition was created by the storekeeper or his employees. When the condition results from the conduct of the public, a storekeeper can be held subject to liability only for a negligent omission on his part to remove the hazard created after he knows of it, or, by the exercise of reasonable care, should have known of its existence. The duty of a storekeeper to an invitee is to use reasonable care to keep the premises reasonably safe for the use of the invitee, but he is not an insurer against accident. An owner of a store is not required to follow customers around his store to gather up debris cast away or carried into the store by customers. To place such a burden upon a storekeeper would make him an insurer of the safety of his customers. His duty is to use reasonable care to keep the premises in a safe condition. Taylor v. J. M. McDonald Co., 156 Neb. 437, 56 N. W. 2d 610; Belder v. Omaha & C. B. St. Ry. Co., 132 Neb. 415, 272 N. W. 220. See, also, Crawford v. Soennichsen, 175 Neb. 87, 120 N. W. 2d 578.

This is not a case where it is contended that the defendant created a dangerous or slippery condition on the floor of the store by the use of a substance on the floor which he knew, or should have known, to be inherently dangerous. There is no evidence here that Zorball is a dangerous product to use on snowy and icy sidewalks, or that the manager and employees knew or should have known of any potential danger in its use.

It is established by the plaintiff's evidence that snow had fallen on the morning of the accident. Customers had frequented the store since it was opened at 8:30 a.m. It is evident that customers, and possibly employees as well, had tracked in snow, dirt, and Zorball near the entrance to the door. That this was a likely occurrence was known to all. For the purposes of this case we accept the statement of the plaintiff that she slipped on the tracked-in Zorball and was injured. It is not negligence per se on the part of a storekeeper if customers track in snow, mud, moisture, or Zorball. To impose such a liability upon a storekeeper would require constant sweeping and mopping in bad weather behind each customer as he enters the store. It would in effect require the storekeeper to insure the safety of every customer who enters the store. The liability of the storekeeper in such a situation arises when he knows that a potentially dangerous situation has been created, or that it had been upon the floor for such a period of time that the storekeeper in the exercise of ordinary care should have known of it and either removed the danger or warned the customer of it. This is the rule of this court and many other jurisdictions as well. See, Dudley v. Montgomery Ward & Co., 64 Wyo. 357, 192 P. 2d 617; Grace v. Jordan Marsh Co., 317 Mass. 632, 59 N. E. 2d 283; Castillo v. Baker's Shoe Stores, Inc. (Fla.), 115 So. 2d 427; Morgenstern v. F. W. Woolworth & Co., 186 N. Y. S. 2d 747, 19 Misc. 2d 739; O'Brien v. H. L. Green Co., 128 Conn. 68, 20 A. 2d 411.

There is no evidence in this case that the defendant

or its employees knew of the tracking in of snow, dirt, or Zorball in excessive quantities prior to the happening of the accident. There is no evidence as to the length of time the condition had existed from which the jury might infer negligence on the part of the storekeeper in not discovering it and taking steps to eliminate it, or warn of its existence. Assuming that plaintiff fell on the floor which was made slippery by Zorball tracked in by customers entering the store, it would be insufficient of itself to sustain a judgment. The evidence must show that defendant's employees or servants had knowledge of the condition prior to the time of plaintiff's fall, or that the condition had existed for such a period of time that they should have known of it and corrected it. In the absence of such evidence there is no negligence shown on the part of defendant.

Plaintiff cites Taylor v. J. M. McDonald Co., *supra,* in support of her position. This was an action for damages for injuries sustained in a fall in defendant's store. The evidence showed that plaintiff entered defendant's store as a customer. She slipped on a wad of gum on the floor of one of the aisles in the store. The gum had evidently been thrown on the floor by a customer. The evidence conclusively established that the gum had been on the floor more than 2 weeks. A verdict for plaintiff was sustained on the ground that, although the storekeeper did not know of the existence of the gum on the floor, the jury could properly find that it had been there for such a period of time that he should have known of it and removed it from the floor. The case is not only distinguishable on its facts, but it points up the proper rule to be applied in determining whether or not there was evidence of negligence in this class of cases.

We hold that there was no evidence that defendant failed in its duty to use reasonable care to keep its store in a reasonably safe condition. For the reasons stated, the judgment of the district court is reversed and

the cause remanded with directions to sustain defendant's motion for judgment notwithstanding the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

ERNEST R. LLOYD ET AL., APPELLEES, V. JOHN H. GUTGSELL, DOING BUSINESS AS JACK'S TRAILER SALES, APPELLEE, IMPLEADED WITH MOBILE HOME FINANCE COMPANY, A CORPORATION, APPELLANT.

126 N. W. 2d 224

Filed February 7, 1964. No. 35465.

Appeal from the district court for Lancaster County: PAUL W. WHITE, Judge. On motion for rehearing. See 175 Neb. 775, 124 N. W. 2d 198, for original opinion. Motion for rehearing overruled.

Crosby, Pansing, Guenzel & Binning and Donn E. Davis, for appellant.

Kerrigan, Line & Martin, for appellees Lloyd.

Paul E. Galter, for appellee Gutgsell.

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

CARTER, J., dissenting.

On October 18, 1963, this court decided this case on its merits. Lloyd v. Gutgsell, 175 Neb. 775, 124 N. W. 2d 198. The defendant Mobile Home Finance Company filed a motion for rehearing and a brief in support thereof. On February 7, 1964, this court by summary order overruled the motion for a rehearing. I am not in accord with the disposition made of the motion for a rehearing, and I deem it necessary to note my dissent thereto.

I am in full accord with the conclusion reached by the opinion of the majority in this case. This dissent is directed at paragraph 7 of the syllabus which states: "Where a time sale price is determined by applying a

certain schedule of rates or charges to the cash price, the resulting product is interest." I submit that this is not a correct statement of the law as demonstrated by the opinion itself and that the offending syllabus point should have been clarified or withdrawn on rehearing.

The statement appears in the body of the court's opinion. But there it is properly limited by the further statement that: "When we look through the form, can we come to any other conclusion but the one that the difference between the price and what the buyer finally pays is the cost of carrying the balance of the cash price?" The correct rule in a transaction of this kind is that the court will look through its form and if it finds from all the facts and circumstances that the transaction is in fact a device or artifice to escape the penalties of usury, the contract will be held to be usurious. If the statement in paragraph 7 of the syllabus and the identical statement contained in the opinion is to be given its literal meaning, a serious departure from our previous holdings has taken place without overruling or even criticising our previous decisions.

The difficulty will arise in future cases of this nature when the court finds after looking through the form that the schedule of rates or charges is not in fact interest in excess of 9 percent. A holding of this court based solely on the language of paragraph 7 of the syllabus might raise serious questions involving the impairment of the obligation of contract clauses of the state and federal Constitutions. This constitutional question is without foundation in the present case in view of its holding that after looking through the form of the transaction the rates and charges made are found to be interest in excess of 9 percent. But if the effect of our opinion is to hold that any time sale price is void if arrived at by a fixed schedule of rates or charges, we have impaired the validity of time sale contracts where the rates and charges are not in fact interest in excess of 9 percent.

The very point was correctly determined in Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122, wherein it is said: "It is also true that a time sale made in good faith at a price in excess of the cash price, even though the difference exceeds lawful interest for a loan, which price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not be regarded as being tainted with usury." This statement makes it clear that if the transaction is a bona fide time sale the use of a schedule of charges does not per se make it usurious. A schedule of rates and charges added to a cash price must be examined, together with all the circumstances of the case, to determine whether or not the transaction is in fact usurious. The offending paragraph of the syllabus states in definite and certain language that a schedule of charges in such a case is interest independent of the basic rule that every such transaction will be subjected to the scrutiny of the court by looking through the form to determine the substance.

I submit that a clarification of the opinion as misinterpreted by paragraph 7 of the syllabus should be made to avoid confusion in the future. It is the function of courts to correctly declare the law within the limits of human fallibility and to keep their holdings consistent as a means of avoiding misinterpretation or uncertainty on the part of those who seek to comply with them. The correction of error while the opportunity is present is much to be preferred over correction by subsequent opinion.

It is for the foregoing reasons that I voice my dissent to the overruling of the motion for a rehearing without a proper clarification of the rule announced in paragraph 7 of the syllabus. I can see no force in the argument that the retention of error will create less confusion than a corrected statement of the law involved.

STATE OF NEBRASKA, APPELLEE, V. RICHARD EBERHARDT, APPELLANT.

126 N. W. 2d 197

Filed February 7, 1964. No. 35490.

Appeal from the district court for Saline County: JOSEPH ACH, Judge. On motion for rehearing. See *ante* p. 18, 125 N. W. 2d 1, for original opinion. Motion for rehearing overruled.

Joseph J. Cariotto, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

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

WHITE, C. J., CARTER, and MESSMORE, JJ., dissenting.

We dissent to the overruling of the motion for rehearing in this case. In the previous dissent filed in this case by Carter, J., attention was called to the fact that there was ample direct evidence, flowing from the admissions of the defendant, to support the jury verdict of guilty. When the arresting officer asked the defendant about the beer, he responded, "I have just got it," and afterwards asked the officer to give him a break. However, it is not the purpose of this further dissent to elaborate this position.

It is true that knowledge and consciousness of possession are elements of the crime here charged. But, this court has many times said that knowledge and intent are hidden in the recesses of the mind and are not in most cases subject to direct proof. The facts in this respect are not in dispute. The defendant was rightfully in possession of the car and had it under his control. Intoxicating liquor was admittedly found in the car. The question in this case is not the elements of the crime but the sufficiency of the method of proof.

This case becomes vitally important because in the

event of denial of knowledge or possession, how then can the State make a case? We submit that the finding of the liquor in an automobile in the control and possession of a defendant makes a prima facie case for the jury. It is for the jury to determine, under the circumstances and evidence, whether there was knowledge or conscious possession. This is not only the overwhelming weight of authority, but we can find none to the contrary. Bilz v. State, 103 Neb. 15, 170 N. W. 167; Stumpff v. State, 122 Neb. 49, 239 N. W. 212; Grosh v. State, 118 Neb. 517, 225 N. W. 479; Cura v. State, 110 Neb. 476, 194 N. W. 472; Reynolds v. State, 92 Fla. 1038, 111 So. 285; State v. Schuck, 51 N. D. 875, 201 N. W. 342; State v. Salte, 54 S. D. 536, 223 N. W. 733; State v. Wyatt, 47 S. D. 576, 200 N. W. 1019; State v. Harrison, 239 N. C. 659, 80 S. E. 2d 481; Smith v. State, 21 Ga. App. 143, 94 S. E. 62; 33 C. J., Intoxicating Liquors, § 479, p. 744.

In this particular case, these facts, coupled with the direct admissions of the defendant, surely make a prima facie case. Conceding that there is other evidence in this case warranting an inference of innocence, are we to say, as a matter of law, that the evidence here is insufficient to sustain the guilty verdict actually rendered? To do so, in our opinion, is passing on the weight and credibility of the evidence and not its sufficiency.

HOWARD E. WOLSTENHOLM, EXECUTOR OF THE ESTATE OF ALICE H. WOLSTENHOLM, DECEASED, APPELLEE AND CROSS-APPELLANT, V. JANET A. KALIFF ET AL., APPELLANTS AND CROSS-APPELLEES.

126 N. W. 2d 178

Filed February 7, 1964. No. 35509.

1. **New Trial: Appeal and Error.** When the trial court gives no reason for sustaining a motion for a new trial the appellant meets the duty placed upon him when he brings the record

here for examination with his assignment of no prejudicial error.

2. ———: ———. The duty then rests on the appellee to point out the prejudicial error that he contends exists to justify the action of the trial court.

3. ———: ———. In review in this court of an order granting a motion for a new trial, there is no burden in the sense of a burden of proof upon either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented.

4. **Automobiles: Negligence.** In the absence of evidence to the contrary, there is a presumption that the deceased who had the directional right-of-way was exercising due regard for her own safety and the safety of others.

5. **Negligence.** Negligence is never presumed, and it cannot be inferred from the mere fact that an accident happened.

6. ———. Negligence must be proved by direct evidence, or by facts from which negligence can reasonably be inferred.

7. ———. Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. However the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicates with reasonable certainty the negligent act charged.

8. ———. Circumstantial evidence sufficient to submit an issue of negligence to a jury must be such that a reasonable inference arises showing that the person charged was negligent and that such inference is the only one that reasonably can be drawn therefrom.

9. **Automobiles: Negligence.** When one looks and does not see what is in plain sight he is in the same situation as one who does not look.

10. ———: ———. The driver of an automobile entering an intersection of two highways is obligated to look for approaching automobiles and to see any vehicle within the radius which denotes the limit of danger.

11. ———: ———. If the driver of an automobile entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law.

12. ———: ———. The operator of an automobile approaching or entering an intersection is required to see another automobile approaching or entering the intersection which has been favored with the right-of-way under the statutory rules of the road and a failure to see such favored automobile is negligence as a matter of law.

Appeal from the district court for York County: JOHN D. ZEILINGER, Judge. Affirmed as modified.

Wallace W. Angle and Herman Ginsburg, for appellants.

John R. Brogan and John E. Dougherty, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, SPENCER, BOSLAUGH, and BROWER, JJ., and LYNCH, District Judge.

SPENCER, J.

This is an action by Howard E. Wolstenholm as executor of the estate of Alice H. Wolstenholm, deceased, hereinafter referred to as appellee, to recover for the alleged wrongful death of his wife in the collision of an automobile being operated by her and the automobile owned by the defendants Janet A. Kaliff and Charles L. Kaliff, and being operated by Janet A. Kaliff. The Kaliffs are husband and wife. They will hereinafter be referred to collectively as appellants, or individually by their respective names.

The appellee sought recovery in three causes of action: First, for the wrongful death; second, for funeral expenses; and third, for hospital and medical expenses. The jury returned a verdict for the appellee on each of the three causes of action as follows: First cause of action, $6,970.67; second cause of action, $1,180.50; and third cause of action, $195. The appellee filed a motion for a new trial which was sustained. Appellants have perfected an appeal to this court. Appellee has also perfected a cross-appeal seeking to limit a new trial of the case to the amount of the damages.

The district court gave no reason for its decision sustaining the motion for new trial. In such situation, we have held that the appellant meets the duty placed upon him when he brings the record here for examination with his assignment of no prejudicial error. The duty then rests upon the appellee to point out the prejudicial

error that he contends exists to justify the action of the trial court. See Biggs v. Gottsch, 173 Neb. 15, 112 N. W. 2d 396. In that case we held: "On review in this court of an order granting a new trial, there is no burden in the sense of a burden of proof upon either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented."

To meet the burden imposed upon him, appellee alleges 20 assignments of error which for the purpose of our discussion herein, we condense to three: First, did the court err in submitting the issue of contributory negligence to the jury; second, did the court err in not finding the defendant Janet A. Kaliff guilty of negligence as a matter of law; and third, did the court err in not holding that the only issue to be submitted to the jury was the question of the amount of damages?

The collision occurred about 12:25 p. m., on the 25th day of February 1961, at a county road intersection in York County, known as the Maple Grove schoolhouse corner, which is approximately 3 miles south and east of the city of York, Nebraska.

Alice H. Wolstenholm, hereinafter referred to as the deceased, was driving a 1959 DeSoto automobile, hereinafter referred to as DeSoto, from the west and traveling to the east. Janet A. Kaliff was driving a 1961 Ford, hereinafter referred to as Ford, from the north and traveling to the south. A "Yield Right of Way" sign had been erected by the county on the north-south road, approximately in line with the fence running east and west. This sign was 36 feet 8 inches from the center of the intersection. The roads in question were gravel surfaced and were each 29 feet from shoulder line to shoulder line, but each had a graveled windrow, leaving a traveled surface of only 18 feet. The overall width of the intersection from fence line to fence line was 65 feet. The weather at the time in question was clear. The roads were dry and the sun was shining. It is un-

disputed that the view of the intersection from the direction each vehicle was traveling was unobstructed for at least a quarter of a mile.

Janet A. Kaliff testified that her vision was good and that as she approached the intersection there was nothing to distract her attention. She testified that she stopped back of the "Yield Right of Way" sign and looked both ways. She saw nothing and proceeded into the intersection at 5 miles per hour, which was her speed at the time of the impact. She looked to the east and to the west after she pulled into the intersection and saw nothing. She traveled south in a direct line to the point of impact. She does not know if she ever applied her brakes. She has a question about it because the leather was torn down on the instep of her slipper about an inch, and she believes this might have been caused by applying her brakes at the last instant. She testified that she was actually in the impact of the two automobiles before she saw the other vehicle.

There were no eyewitnesses to the impact. Three witnesses testified to seeing a cloud of dust 10 to 15 feet high, but none of them saw the impact or the movement of the cars. Two of these witnesses were driving south on the north-south road approximately ½ mile from the intersection. The other witness was proceeding west on the east-west road, but his distance from the intersection is not disclosed by the record.

When the cars came to rest, the Ford was in the east ditch of the north and south road, facing south, the same direction in which the car was being driven. The DeSoto was on the east and west road on its top in the south road ditch facing west, the direction from which it had been traveling. The front seat of the DeSoto, which had been bolted down with steel bolts, was out of and in front of the vehicle. The deceased was lying 20 feet east and in front of her vehicle.

There were scrape marks in the intersection, starting 2 feet south and 1 foot west of the geographical center

of the intersection. It was possible to identify these marks with the two cars, and they went side-by-side to the southeast corner. The start of the marks was 33 feet 6 inches from the back of the Ford where it came to rest, and 62 feet from the back of the DeSoto. There was blue paint on the fence post at the apex of the southeast corner, which indicates it made contact with the DeSoto. Exhibit No. 15 shows what appears to be the imprint of a fence post across the trunk of the DeSoto. This post is 46 feet 8 inches from the start of the marks in the intersection.

The force of the impact to the DeSoto was in the center of the car. The left side of the DeSoto was caved in from about the front door post on back to the back door. The steering wheel was pushed against the dash. The front seat, as mentioned, was thrown from the car. The frame of the car was bent toward the direction in which the Ford was traveling. There was no damage to the immediate front of the DeSoto. The damage to the Ford was to the direct front and both front fenders. The exhibits in evidence indicate that this damage was extensive, although there is no detailed description of the specific damage.

In the absence of other evidence, we assume the point of impact to be the point where the slide marks start in the intersection. This is 2 feet south and 1 foot west of the geographical center of the intersection. The photographs in evidence show that the left side of the DeSoto was struck by the front of the Ford at approximately the front door. There is no evidence in this record as to the speed of the DeSoto or as to its position at any time previous to the actual impact.

There is not a scintilla of evidence in this record that would support a submission of the issue of contributory negligence. There was no witness to the actual collision. The evidence herein is undisputed. Janet A. Kaliff did not see the vehicle being driven by the deceased. No evidence was adduced which would impose any duty on

the deceased to raise a question as to the right to proceed. The vehicle of the deceased did have the directional right-of-way, and, in the absence of evidence to the contrary, deceased was presumed to be exercising due regard for her own safety and the safety of others. See, Anderson v. Nincehelser, 152 Neb. 857, 43 N. W. 2d 182; Bailey v. Spindler, 161 Neb. 563, 74 N. W. 2d 344; Bell v. Crook, 168 Neb. 685, 97 N. W. 2d 352, 74 A. L. R. 2d 223. Deceased also had the right to assume that the driver of any other vehicle approaching the intersection in an unfavored position would take the steps necessary to permit her to clear the intersection.

To sustain appellants' contention that the deceased was guilty of contributory negligence, we must assume contributory negligence merely because a collision occurred. This we cannot do. Negligence is never presumed, and it cannot be inferred from the mere fact that an accident happened. Howell v. Robinson Iron & Metal Co., 173 Neb. 445, 113 N. W. 2d 584. Negligence must be proved by direct evidence, or by facts from which negligence can reasonably be inferred. In the absence of such proof, negligence will not be presumed. Price v. King, 161 Neb. 123, 72 N. W. 2d 603. There clearly is nothing in the position of the cars after the impact from which a sufficient inference could be drawn, in the absence of other evidence, to submit the issue of contributory negligence to the jury. We are met with two guiding rules which dictate this conclusion. The first is that negligence is a question of fact and may be proved by circumstantial evidence and physical facts. However, the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicate with reasonable certainty the negligent act charged. See Gilliland v. Wood, 158 Neb. 286, 63 N. W. 2d 147.

The second rule is that circumstantial evidence sufficient to submit an issue of negligence to a jury must be such that a reasonable inference arises showing that the

person charged was negligent and that such inference is the only one that reasonably can be drawn therefrom. Bedford v. Herman, 158 Neb. 400, 63 N. W. 2d 772. The physical facts and the inferences appellants would have us draw cannot meet either test.

Appellee made a motion at the close of evidence for a directed verdict on the issue of liability. This was overruled. Appellee also tendered an instruction to the effect that the appellants were guilty of negligence as a matter of law, and that the sole issue for the jury was the amounts to be awarded on the three causes of action. This instruction was refused.

Was Janet A. Kaliff guilty of negligence as a matter of law? We believe she was. The evidence is conclusive that the intersection was wide open, and that Janet A. Kaliff had an unobstructed view for a distance of a quarter of a mile. She testified that she looked but failed to see the car of the deceased, which had to be in plain sight. In Ring v. Duey, 162 Neb. 423, 76 N. W. 2d 433, we said: "When one looks and does not see what is in plain sight he is in the same situation as one who does not look."

Can one avoid the consequences of failure to yield right-of-way by merely stating he looked but failed to see a car which must have been there? Not unless some explanation for not seeing appears. In Nichols v. McArdle, 170 Neb. 382, 102 N. W. 2d 848, we stated the applicable rules as follows: "In Cappel v. Riener, 167 Neb. 375, 93 N. W. 2d 36, this court said: 'The driver of an automobile entering an intersection of two streets (or highways) is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger. * * * If the driver of an automobile entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law. * * * The operator of an automobile approaching or entering an intersection is required to

see another automobile approaching or entering the intersection which has been favored with the right-of-way under the statutory rules of the road and a failure to see such favored automobile is negligence as a matter of law.' "

In considering the speed of the appellants' automobile as testified by Janet A. Kaliff, and assuming the speed of deceased's automobile to be 50 miles an hour or less, as we are required to do under the situation existing in this case, it is clear that deceased's automobile was in the area of danger and was either seen or should have been seen by appellant Janet A. Kaliff before she entered the intersection. Appellee's tendered instruction to the effect that appellants were guilty of negligence as a matter of law reflected a correct appraisal of the record herein.

There being no evidence in this record sufficient to rebut the presumption of due care on the part of the deceased, and Janet A. Kaliff being guilty of negligence as a matter of law, appellee's motion for a directed verdict on the issue of liability should have been sustained. It is readily apparent from the amount of the verdict on the first cause of action that the jury must have applied the instructions of contributory and comparative negligence as given by the court, and the motion for new trial was therefore properly sustained.

It is apparent also from what we have said that appellee's cross-appeal must be sustained. The only issue upon the retrial of this case is the amount of the recovery.

The judgment of the trial court in sustaining the motion for new trial is affirmed. The trial court is directed to ascertain the amount of the appellee's damage by a retrial of that issue only.

AFFIRMED AS MODIFIED.

WHITE, C. J., concurring.

I concur in the above opinion as to the result reached and the analysis of the evidence supporting the holding. I do not agree with the statement in the opinion or the

syllabus relating to the applicable rule as to the sufficiency of circumstantial evidence to make a jury case.

The syllabus and opinion state that before a jury may consider an issue of negligence based on circumstantial evidence, not only the evidence must be such that a reasonable inference may be drawn showing negligence, but that "such inference is the *only* one that reasonably can be drawn therefrom." (Emphasis supplied.)

The rule stated and followed in this opinion comes originally from the pronouncement in Blid v. Chicago & N. W. Ry. Co., 89 Neb. 689, 131 N. W. 1027, wherein it was stated that circumstantial evidence, sufficient for jury determination, must be such that "the conclusion reached is the *only one* that can be fairly and reasonably drawn therefrom." (Emphasis supplied.) I submit that the above rule and holding in the Blid case were overruled and rejected in Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112. The court held that the rule followed in civil cases should be that stated in Rocha v. Payne, 108 Neb. 246, 187 N. W. 804; Markussen v. Mengedoht, 132 Neb. 472, 272 N. W. 241; Taylor v. J. M. McDonald Co., 156 Neb. 437, 56 N. W. 2d 610; Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701; and Griess v. Borchers, 161 Neb. 217, 72 N. W. 2d 820.

There was a diversity of opinion on this point in the cases before Davis v. Dennert, *supra,* as that opinion points out. And, admittedly, there has been some deviation since Davis v. Dennert, *supra.*

It is not the purpose of this concurrence to go into a full discussion of the conflict of the cases in this respect and the considerations that bear on the merits of it. See, 32 C. J. S., Evidence, § 1039, pp. 1102, 1103; 20 Am. Jur., Evidence, § 1189, p. 1043, notes 12 to 15, and also a fine annotation in 97 Am. S. R. 821 (1904).

The error of the stated rule is that it excludes from jury consideration every other rational inference that can reasonably be drawn from purely circumstantial evidence. It does not permit choice by the jury. We

have said many times that reasonable men may differ as to the reasonable inferences to be drawn from evidence, circumstantial or direct. I submit that after a determination on the part of the court that different reasonable inferences may be drawn from the evidence, it is then for the jury to determine, as weigher of the facts, by a preponderance of the evidence, which of the reasonable inferences is chosen. In a criminal case, this choice by the jury must be beyond a reasonable doubt and must exclude all other rational inferences or hypotheses.

If we apply the rule literally as stated in the majority opinion, what is there left for jury determination in a case where all of the evidence is undisputed and circumstantial? Is jury function eroded to mere credibility determination? We have said many times that where the facts adduced to sustain an issue, either by circumstantial or direct evidence, 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.

JAMES Q. HOSSACK, APPELLEE, V. MARJORIE A. HOSSACK, APPELLANT.

126 N. W. 2d 166

Filed February 7, 1964. No. 35527.

1. **Divorce: Appeal and Error.** An appeal of proceedings to modify a decree of divorce is triable de novo, and this court must reach a conclusion uninfluenced by what was done by the trial court, except if there is irreconcilable conflict in the evidence the court may consider that the trial court saw the witnesses and accepted one version of the facts.
2. **Divorce: Infants.** 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, provided she is a fit and proper person.
3. ———: ———. Custody of minor children awarded to their

mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree, unless by changed circumstances it is affirmatively shown that the mother is an unfit person to have their custody, or that the best interests of the children require such action.

4. ———: ———. Application for modification of divorce decree with respect to care, custody, and maintenance of minor children must be founded upon new facts and circumstances which have arisen since the entry of the decree.

5. ———: ———. In awarding or changing custody, the welfare of the minor children is the question of primary importance.

6. ———: ———. Conduct toward a child which tends to poison the child's mind against, and alienate his affection from, his mother or father, is so inimical to the child's welfare as to be grounds for a denial of custody to, or a change of custody from, the party guilty of such conduct. The conduct must consist of affirmative action tending to, and designed to, actually achieve the specific result of turning the mind of the child against some other person.

7. ———: ———. In a divorce action it is generally the best policy to keep minor children within the jurisdiction of the court. However, the welfare of the child should receive the paramount consideration in the determination thereof, and this policy should yield to the best interests of the child.

Appeal from the district court for Holt County: WILLIAM C. SMITH, JR., Judge. Reversed and remanded with directions.

Marchetti & Samson, for appellant.

Julius D. Cronin and Marks, Clare, Hopkins & Rauth, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, SPENCER, BOSLAUGH, and BROWER, JJ., and LYNCH, District Judge.

LYNCH, District Judge.

This is an appeal from an order of the trial court which modified a divorce decree by changing the custody of two minor children from the mother-appellant to the father-appellee, and denying the appellant's application to remove the children to her home in Illinois.

The father-appellee will hereinafter be referred to as the plaintiff and the mother-appellant as the defendant.

The legal background of this case includes the following: September 12, 1955, the plaintiff filed a petition for divorce and custody of the two minor children; June 24, 1958, defendant filed an answer and cross-petition; June 24, 1958, decree of divorce was entered awarding custody to the defendant; August 31, 1961, plaintiff filed an application to modify the decree as to custody; August 27, 1962, the issues were tried; August 31, 1962, the trial court awarded custody of the children to the plaintiff; April 1, 1963, defendant's motion for new trial was overruled; June 7, 1963, plaintiff's application to move the children to Iowa was granted by this court.

In the divorce decree the trial court found that the defendant was a proper person to have the custody of the two boys. The order modifying the decree included no findings relative to changed circumstances or the best interests of the children. There was never a contention that the defendant is not a fit mother.

The decree was modified pursuant to section 42-312, R. R. S. 1943, and the matter is in this court for trial de novo; therefore, the record must be examined to determine whether or not the changed circumstances of the parties warrant a modification of the divorce decree, or the best interests of the minor children demand a change of custody. It is agreed that the important consideration is the welfare of the minor children.

The plaintiff contends that the following changed circumstances justify a transfer of custody: (1) The advancing age of the minor sons since custody was originally granted to their mother; (2) the remarriage of both parents; and (3) the advantages accruing to the growing sons in their father's environment. In addition to the foregoing he urges that efforts of the defendant to alienate the love and affection which the children would naturally have for their father, and her contriving to prevent him from visiting the boys in the manner and spirit

provided for in the original decree, are such serious detriments to the welfare of the children as to constitute a legal basis for changing the custody.

The record reveals that when the divorce decree was entered on June 24, 1958, one son, David, was 7 years old, and the other son, Steven, not quite 5 years old. On the date the modification order was made, August 31, 1962, David was 11 years old and Steven was almost 9. At the time of the divorce in 1958, the plaintiff was living on a ranch with his father. Since then he has become a professor of engineering at the University of Omaha, has established a home in Omaha, and more recently leased a 67-acre farm in Iowa, just 12 miles from Omaha. The father remarried in 1958, and there have been no children of this marriage. There is evidence that he has maintained contact with the boys, that he has made contributions to their support and welfare not required by the divorce decree, and that he has made available to them the advantages of farm and ranch life during their summer vacations. It further appears that he could presently furnish them a better-than-average home from an intellectual as well as a physical standpoint.

The record also discloses that the divorce decree found that the defendant was the innocent party and that she was a fit and proper person to have the custody of the two boys until they reach 21 years of age; that the defendant actually had custody of the children from the time the divorce action was filed on September 12, 1955, until the trial court's order of August 31, 1962; that no claims were made that the children were neglected or mistreated or that the defendant was of questionable character or qualifications; and that the defendant remarried on July 28, 1962, and recently moved to the State of Illinois.

Both parties to this lawsuit are college graduates. The plaintiff is a graduate engineer and the defendant has a Bachelor of Science degree in Elementary Education from the University of Nebraska.

There is evidence that the plaintiff took the boys to a psychologist, Dr. Martin D. Haykin, and that he informed the doctor he was dissatisfied with their progress in school and intended to seek their custody. Dr. Haykin examined them and administered certain tests in August 1960, and August 1961, following their summer visitations with the plaintiff. The doctor stated that in his opinion David was emotionally upset but Steven was not disturbed; that the children were not intellectually stimulated at home; and that the defendant's home did not provide motivation for them to use their innate abilities. He also testified that he neither consulted with the defendant nor visited in her home. There was no affirmative showing by the plaintiff as to how he would accelerate the boys' progress in school or intellectually stimulate them in his home.

In the case of Anderson v. Wilcox, 163 Neb. 883, 81 N. W. 2d 314, this court restated the position that: "Custody of minor children awarded to their mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree, unless by changed circumstances it is affirmatively shown that the mother is an unfit person to have their custody, or that the best interests of the children require such action." The court commented as follows: "We have difficulty in determining the changed conditions upon which the appellee relied to secure a modification of the decree. He has a better house and furnishings, and more earning capacity than the appellant, but these are not controlling factors. * * * The evidence will not sustain a finding that the children are neglected, undernourished, or abused. The evidence indicates that appellant has a good reputation, is a good homemaker, and loves her children. The children have been raised together as one family since their births and get along together as normal children do. * * * She stands in the position of the innocent party. The court by its decree found the

appellant to be a fit and proper person to have the care and custody of the children."

From a consideration of the record in the instant case in the light of the prior decisions of this court, we find that the defendant is a fit and proper person to have the custody of the children; that the defendant has done nothing, nor has she failed to do something, that suggests a change of custody should be effected; and that it has not been affirmatively shown that changed conditions in the past or the possibilities for the future with their father warrant a change of custody. Such incidents of life as advancing age of minors, remarriage of parents, and particular advantages of one parent's environment do not constitute a legal basis for changing the custody of minor children from the mother to the father without an affirmative showing that the welfare of the children demands a change.

The plaintiff further contends that: "* * * the defendant engaged in a deliberate, calculated and essentially cruel campaign to estrange these growing boys from their father and to poison their minds against him." In support of this the plaintiff refers to the record wherein the defendant admitted she told the boys that the plaintiff was a mean and nasty man. The plaintiff also alleges that the defendant deprived him of visiting and communicating with his sons at times other than their summer vacations; that the defendant would not allow David to talk with him on the telephone or to visit with him during the school year; that David wished to converse with plaintiff more frequently; and that defendant resisted before this court the plaintiff's application to move the children to the plaintiff's farm in Iowa; all of which, he asserts, was destructive of the welfare of the minor boys.

The few incidents testified to by the plaintiff pertaining to thwarted efforts to visit and talk with his sons and the defendant's comments about his character occurred after the plaintiff commenced his move to ob-

tain custody of the boys. The defendant explained that her appraisal of the plaintiff to the boys and her efforts to limit his phone calls to them resulted from David's disturbed condition after the summer visitation with the plaintiff and her belief that the plaintiff's conversations with David and the continued efforts to talk to him about the pending custody hearing kept him upset. That David was being prepared for such a contest is confirmed by portions of his conversation with the trial judge and by the plaintiff's own testimony.

This court subscribes to the proposition of law set out in Annotation, 32 A. L. R. 2d 1005, as follows: "By the great weight of authority, conduct toward a child which tends to poison the child's mind against, and alienate his affection from, his mother or father, is so inimical to the child's welfare as to be grounds for a denial of custody to, or a change of custody from, the party guilty of such conduct." However, the record in this case fails to support a finding that the defendant's conduct comes within the alienation contemplated by this statement of the law. There is no adequate proof that the plaintiff was unreasonably restricted as to his communications and visits with his children and no evidence of a series of acts by the defendant that can be classified as a "contriving" or a "brain-washing technique" as argued by the plaintiff. As a matter of fact, the only planned course of conduct relative to this custody action seems to be that of the plaintiff which started with the examinations of the boys by the psychologist in August of 1960. This court cannot conclude from the record that the defendant initiated affirmative action designed to turn the boys' minds against their father. The evidence adduced by the plaintiff does not support a finding that the defendant has been influencing the boys against him, and that such has been of serious detriment to the children, hence it is not sufficient to order a change of custody.

"* * * it is generally the best policy in divorce actions

to keep minor children within the jurisdiction of the court." Syas v. Syas, 150 Neb. 533, 34 N. W. 2d 884. In the instant case the minor children will be outside the jurisdiction of the court whether with the plaintiff or defendant. Because of the circumstances previously discussed and the additional considerations that the mother's present husband appears to be suitable and acceptable in every respect, the mother's move to Illinois was occasioned by her husband's promotion and the demands of his employment, and the new home, surroundings, and conveniences seem to be on a par with the requirements of modern living and child-raising, we believe the welfare of the children will be best served by allowing the defendant to take them with her.

The order of the district court modifying the original divorce decree relative to the custody of the two minor children is reversed and the cause remanded with directions to enter an order overruling the plaintiff's application to modify the decree and granting the defendant's request to move the minor children to her new home in Illinois with the same visitation rights set out in the original decree of divorce. Appellant is allowed $250 for attorney's fees in this court.

REVERSED AND REMANDED WITH DIRECTIONS.

THOMAS E. BARRY, ADMINISTRATOR OF THE ESTATE OF LARRY THOMAS BARRY, DECEASED, APPELLANT, V. HUBERT DVORAK, APPELLEE.

126 N. W. 2d 226

Filed February 7, 1964. No. 35533.

1. **Automobiles: Highways.** By the terms of section 39-748, R. R. S. 1943, it was required that drivers proceeding in opposite directions should pass each other to the right, each giving to the other at least one-half of the main-traveled portion of the roadway as nearly as possible.
2. **Negligence: Trial.** A plaintiff in an action for damages, for

the purpose of decision by the court of whether or not the evidence of the plaintiff is sufficient to require submission of the issue of negligence to the jury for determination, is entitled to the benefit of his evidence together with all reasonable inferences which may flow from evidence adduced by the defendant.

3. **Trial.** In a case where a motion for directed verdict or for dismissal is made at the close of the trial on the ground that the evidence is insufficient to sustain a verdict in favor of the plaintiff, for the purposes of ascertaining whether or not the motion should have been sustained, the burden is on the plaintiff to demonstrate that there was competent evidence of probative value to sustain the cause of action alleged in the petition.

4. **Trial: Evidence.** The burden requires proof by physical facts, or direct or circumstantial evidence together with inferences that might be drawn therefrom, indicating with reasonable certainty the acts charged in the pleaded cause of action.

Appeal from the district court for Saunders County: H. EMERSON KOKJER, Judge. Affirmed.

Abrahams, Kaslow, Story & Cassman and Robert C. Oberbillig, for appellant.

Wear, Boland, Mullin & Walsh, Kanouff & Brown, and A. Lee Bloomingdale, for appellee.

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

YEAGER, J.

This is an action for damages by Thomas E. Barry, administrator of the estate of Larry Thomas Barry, deceased, plaintiff and appellant, against Hubert Dvorak, defendant and appellee, growing out of alleged negligence of the defendant occurring on June 27, 1960, at about 6 a.m., on a public highway in Saunders County, Nebraska, which caused the death of the decedent.

The case was tried to a jury and at the conclusion of plaintiff's evidence, a motion was made by the defendant to dismiss the action. This motion was overruled. The defendant adduced his evidence and at the conclusion

of the trial the motion to dismiss was renewed. It was at that time sustained and a judgment was rendered dismissing the action on the ground that there was a lack of competent evidence of negligence on the part of the defendant.

A motion for new trial was duly filed wherein it was stated that the decision of the court was not sustained by sufficient evidence, that the decision of the court was contrary to law, and that there were errors of law which occurred at the trial which were duly excepted to by the plaintiff. This motion was overruled and the plaintiff has appealed from this order and the judgment.

Facts in this case about which there is no material dispute are that on June 27, 1960, at about 6 a.m., the decedent was operating a 1948 Chevrolet automobile westward on a graveled road which road extended eastward from Prague, Nebraska. The traveled surface of the road at the time and place involved in this action was about 23 feet in width. There was no line in the road indicating directions for westbound and eastbound traffic. At the same time the defendant was traveling eastward in a 1956 Ford automobile. When the decedent and the defendant reached a point variously estimated at from one-half mile to three-fourths of a mile east of Prague a collision occurred between the left front ends of the two automobiles, and as a result the decedent was killed.

By his petition the plaintiff alleged that the cause of the collision with its consequences was negligence of the defendant in the following particulars: That the defendant failed to yield one-half of the roadway to the decedent when he knew or in the exercise of due care should have known of his approach; that he failed to have his vehicle under proper control; that he failed to keep a proper lookout; and that he drove his vehicle at an excessive and unreasonable rate of speed for the circumstances and conditions then prevailing.

There were no eyewitnesses to the collision of the two automobiles except the defendant. The only evi-

dence adduced by the plaintiff to support his charges of negligence was of physical facts and evidence circumstantial in character. There was nothing in the testimony of the defendant which could be said to support any of the charges of negligence made by the plaintiff. He testified that at all times he was operating his automobile to the south and right side of the center of the road. It was his duty to so operate. Section 39-748, R. R. S. 1943, provided: "Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one half of the main traveled portion of the roadway as nearly as possible." This possibility clearly existed in this instance. Since the accident this provision has been repealed.

At the point of collision with reference to the center of the road the defendant testified that as the decedent approached he was in part on the south side but just before the collision he appeared to be making an effort to move out of the south lane and was proceeding on an angle toward the north side.

There was evidence by opinion that the speed of the decedent's automobile as it approached the scene was from 40 to over 70 miles an hour. The only evidence of the speed of the defendant's automobile, which was given by him, was that it was about 40 miles an hour.

There is no evidence which locates the exact point of contact in the road of the two automobiles. After the collision the defendant's automobile, except the front end, was in the eastbound lane facing north. The front end was in the westbound lane. The decedent's automobile was about 47 feet west and north of the defendant's automobile. It was on the north shoulder facing southeast. There was debris underneath and to the west of the defendant's automobile some of which was under it in the eastbound lane and some to the west in the westbound lane, and there was a gouge in the graveled surface of the road. The gouge, according to plaintiff's evidence, was in the westbound lane at a point 10 feet south

from the north side. The gouge which is referred to was not in the evidence of the plaintiff described as to depth, length, or direction, or at what point in the course of events it came into being. It is inferable that it was caused by contact of some part of the automobile of the decedent with the road, probably the left front wheel which was broken.

The remainder of the evidence adduced on behalf of the plaintiff consists of photographs which were received in evidence, the information thereon appearing and the inferences, if any, of probative value flowing therefrom, and testimony as to the view ahead of the defendant as he was driving eastward. Some of the photographs were taken at or about the time of the accident and some many months thereafter. They were of the road, the vicinity of the accident, and of the automobiles after the accident. On their face there was nothing from which the point of contact of the automobiles in the road could be reasonably inferred.

The plaintiff called a witness who had heard all of the witnesses testify up to the time he was called and had examined the location where the accident occurred, and had also examined all of the photographs and particularly those of the automobiles and of the gouge in the highway. He was called to give his opinion as an expert. He was permitted to give his opinion as to the character of contact of the two automobiles and to certain results following the contact including an assertion that the gouge was in the westbound lane and that it was caused by decedent's automobile. He was asked his opinion as to the lane in which the collision occurred. Objection to this inquiry was sustained for lack of foundation. This was followed by offer of proof that it was in the westbound lane. The offer was rejected, and properly so. There was clearly no basis for any such opinion by the witness.

As to the view ahead there was evidence that the road ahead was clear, that there was an uphill grade over the portion of concern here of from 2 to 4½ percent, and

that the sun had risen and was directly ahead. It is inferred by the plaintiff that this caused interference with the view of the road ahead but the inference is not sustained by evidence.

This, it is believed, is a fair summary of the evidence of the plaintiff on which he relies as proof of the charge that the defendant negligently failed to yield one-half of the roadway, that he failed to have his automobile under proper control, that he failed to keep a proper lookout, or that he drove his vehicle at an excessive and unreasonable rate of speed for the circumstances and conditions then prevailing.

The defendant adduced evidence on his behalf and of course in the light of the motion to dismiss the plaintiff was for the purposes of the case entitled to have all questions of controverted fact resolved in his favor and to have the benefit of every reasonable inference to be drawn therefrom resolved in his favor, which included of course those which flowed from the evidence of the defendant. See, Krepcik v. Interstate Transit Lines, 152 Neb. 39, 40 N. W. 2d 252; Hamilton v. Omaha & C. B. St. Ry. Co., 152 Neb. 328, 41 N. W. 2d 139; Wagoun v. Chicago, B. & Q. R. R., 155 Neb. 132, 50 N. W. 2d 810.

The evidence adduced by the defendant fails to support either directly or by inference any of the charges of negligence made by the plaintiff. In truth, it unequivocally supports the view that there was no negligence on the part of the defendant. There is nothing in the entire record of the evidence from which a reasonable inference of negligence on the part of the defendant flows.

In this case, for the purposes of ascertaining whether or not the motion to dismiss should have been sustained, the burden was on the plaintiff to demonstrate that there was competent evidence of probative value that the accident happened in the manner alleged in the petition. See, Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112; Cox v. Babington, 166 Neb. 609, 90 N. W. 2d 64.

This burden required proof by physical facts, or direct or circumstantial evidence together with inferences that might properly be drawn therefrom which indicated with reasonable certainty the negligent act or acts charged.

In the case here there was a total failure of such proof. The court therefore properly sustained the motion to dismiss and properly rendered judgment for the defendant. The judgment is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HARRY DEAN TATREAU, APPELLANT.

126 N. W. 2d 157

Filed February 7, 1964. No. 35554.

1. **Criminal Law.** Penal statutes are inelastic and must be strictly construed. They are never extended by implication.
2. **Kidnapping.** "Imprison" as used in section 28-417, R. R. S. 1943, means the unlawful confinement of another person against his will within boundaries fixed by the actor for the purpose of extorting money, property, or a promise of the performance of an act.
3. ———. The dominating element of the offense of kidnapping is the intent with which the acts enumerated in the statute are committed.
4. **Statutes.** When a statute is required to be strictly construed such statute should have a sensible construction.
5. ———. A guide to the meaning of a statute is found in the evil which it is designed to remedy.
6. **Criminal Law: Evidence.** The evidence examined and the hair samples held to be sufficiently identified and a proper foundation laid for their admission.
7. **Courts.** It is the duty of a court to administer the law as it exists.
8. **Criminal Law.** The range of the penalty for any offense is a matter for legislative determination.
9. ———. The court exercises its discretion as to the penalty to be applied under any particular state of facts within the range provided by the law.
10. **Kidnapping.** The Legislature has fixed the public policy of

this state for determining what shall be done in kidnapping cases. It is a policy of long standing. It is a trite statement, but it is our duty to enforce the law.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Nanfito & Nanfito, for appellant.

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

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

SPENCER, J.

This is an appeal from a conviction on an information charging Harry Dean Tatreau with imprisoning three children for the purpose of extorting money from their father. Harry Dean Tatreau will be hereinafter referred to as defendant. The State of Nebraska will be referred to as State.

We determine the following to be the facts necessary to understand the problem herein. On July 21, 1962, at approximately 7 a. m., shortly after Harry Lewis had left his home at 5619 Western Avenue, in the city of Omaha, Nebraska, his son Gary, who was asleep in a downstairs bedroom, was awakened by a man standing over him with a gun in his hand, and was told, " 'Do as we tell you and you won't be harmed.' " The man was wearing a dark suit with a white shirt, and his head was covered by a silk stocking mask. Another man with a gun, similarly clothed and masked, stood in the doorway. Gary's hands were bound with adhesive tape and he was taken upstairs to his mother's bedroom. She was awakened and taped in a similar fashion. She likewise was told to do as she was told and she wouldn't get hurt. She reached for her glasses but one of the men, later identified as the defendant, grabbed them and threw them, saying: " 'You won't be needing these, you don't have to see.' " The commotion brought her two

other children, Dennis and Marshall, who were sleeping in another upstairs room, to her room. The three boys were taped together with their hands interlocked, and were taken to the basement of the house by the defendant. They were placed in an enclosed basement room, identified as the washroom, and were told that if they had untaped themselves when the defendant came back to check the tape, they would be knocked down. The door was then closed and a sofa was moved against it so that the door could not be opened from the inside. The boys remained confined in the room until they were released by the police.

When the defendant took the boys to the basement, his companion, Junior James Salanitro, hereinafter referred to as Salanitro, took Mrs. Lewis downstairs to the livingroom. She knew that the boys had been taken to the basement, but did not know where, or what had happened to them. When the defendant returned, Mrs. Lewis complained that her hands were tied too tightly, and the defendant, in response to Salanitro's question, said: "'It is not going to kill her.'" Mrs. Lewis was ordered to call her husband who was employed at Lewis Liquor Market, 818 North Sixteenth Street, Omaha, Nebraska. Because she could not see to dial the phone, she gave them the number. Salanitro dialed it and talked to her husband, then gave her the phone. The defendant went upstairs to an extension phone.

When his wife called, Harry Lewis, sensing something was wrong, started asking for information, and was told by one of the men on the phone: "'Damn it, keep your mouth shut, we will tell you what we want done.'" Mrs. Lewis visited with her husband who had a heart condition. She told him not to get nervous, and that the men were holding them and wanted money from the store. Salanitro took the phone from Mrs. Lewis. Harry Lewis recognized two different male voices on the phone. He pleaded with them not to harm his family, and assured them he would be cooperative. He was told to go

to the front door, admit a man in a black coat, and give him the receipts from the store. He went to the front door and saw no one near the premises, so he went next door and told one Dave Bernstein to notify the police, and then went back to the telephone and reported that no one was at the front door or in front of the store. He was then told to check the back door, which he did. He reported back that no one was there, and was told to stay on the phone and keep talking. He could hear the two men visiting between themselves as to what should be done. All of a sudden over the phone he heard someone holler, "'The police is here.'" Mrs. Lewis testified this had been precipitated by the ringing of the doorbell. The defendant dashed for the kitchen, and Salanitro dashed upstairs. Mrs. Lewis admitted the police. They found Salanitro under an upstairs bed, with his gun on his chest. The defendant escaped and was taken into custody at his attorney's office 3 days later.

Defendant urges six assignments of error, the first four of which essentially involve two issues: Was it necessary to remove the Lewis children from their place of abode to constitute imprisonment within the meaning of said section; and, if so, did the defendant imprison the Lewis children within the ambit of section 28-417, R. R. S. 1943?

The defendant was prosecuted under section 28-417, R. R. S. 1943, which is as follows: "Whoever shall kidnap or forcibly or fraudulently carry off or decoy out of this state any person or persons or shall arrest or imprison any person or persons, with the intention of having such person or persons carried out of the state, unless it be in pursuance of the laws thereof, shall be confined in the penitentiary not less than three nor more than seven years. *Whoever shall unlawfully carry off or decoy, entice away, secrete or imprison any person, for the purpose of extorting from such person or from his or her relatives or friends any money, property or promise, or for the purpose of compelling the perform-*

ance of any act by such person or by any other person, association or corporation, shall upon conviction be imprisoned in the penitentiary for the term of the natural life of such person so offending. Whoever, having for any of the purposes aforesaid unlawfully carried off or enticed away, decoyed, secreted or imprisoned any person, shall in furtherance of any such purpose, do or threaten to do any injury to the person so carried off, decoyed, enticed away, secreted or imprisoned, such person so offending shall upon conviction suffer death or be imprisoned in the penitentiary during the remainder of his natural life at the discretion of the jury. Whoever shall threaten to carry off, entice away, secrete or imprison any person for the purpose of extorting money from such person, or from his or her relatives or friends, shall upon conviction be imprisoned in the penitentiary not less than one nor more than twenty years." (Italics supplied.)

The aforesaid statute has four separate classifications. The first one is a restatement of the common law definition of kidnapping. The other three relate to offenses which constitute the crime, without the requirement for removal out of the state. The only difference in the last three is that no injury or threat need be present in the second classification. The one involved herein is the second classification, the one italicized. In this state, all public offenses are statutory; no act is criminal unless the Legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law. Lane v. State, 120 Neb. 302, 232 N. W. 96.

Do the facts herein bring this case within the ambit of the statute? Did the defendant imprison the Lewis children for the purpose of extorting money from their father?

Defendant argues that the State has failed to prove any imprisonment within the meaning of the statute, as intended by the Legislature when the present law was

enacted, because the three boys were not confined off the premises.

There is no question the present law was enacted after the Edward Cudahy kidnapping on December 18, 1900, because the law then in effect did not cover kidnapping if the victim was over 10 years of age unless the victim was to be transported out of the state. Chapter IV, section 18, of the Criminal Code, Compiled Statutes of Nebraska, 1889, was as follows: "Any person or persons who shall kidnap or forcibly or fraudulently carry off or decoy out of this state any person or persons, or shall arrest or imprison any person or persons, with the intention of having such person or persons carried out of the state, unless it be in pursuance of the laws thereof, shall be confined in the penitentiary not less than three nor more than seven years, and shall, moreover, be liable for the costs of prosecution." Section 20 of the same chapter was as follows: "Every person who shall maliciously or forcibly or fraudulently lead, take, or carry away, or decoy, or entice away, any child under the age of ten years, with intent unlawfully to detain or conceal such child from its parent or parents, or guardian, or other person having the lawful charge of such child, shall be imprisoned in the penitentiary not more than seven years nor less than one year."

Governor Dietrich, in his inaugural message of January 3, 1901, less than 3 weeks after the Cudahy kidnapping, directed the attention of the Legislature to this situation as indicated by the following paragraph: "Your attention is hereby directed to the inadequacy of the law applying to the crimes of kidnaping and child-stealing. I would recommend that the law be so amended as to make kidnaping or child-stealing a felony, punishable by imprisonment in the penitentiary for a period of not less than five years or more than thirty years, that the age limit be removed, and that the unlawful or forcible holding in capitivity of any

person at a place other than the natural or lawful domicile or abode of said person shall constitute the crime of kidnaping."

It is elementary that penal statutes are inelastic and must be strictly construed. They are never extended by implication. Weber v. State, 122 Neb. 369, 240 N. W. 429. From a reading of the act, however, it is apparent that the Legislature did not follow the Governor's recommendation. Rather, it broadened the scope of the legislation; made the penalties much more severe; and did not make it as restrictive as suggested by the Governor. The fact that this was done, and that none of the language suggested by the Governor with reference to restricting the crime to a situation where a person was held at a place other than his natural domicile or abode was used, would logically suggest that the Legislature did not so intend to restrict the act, which would negative the construction for which the defendant contends.

The controlling language of the statute in this case is: "* * * imprison * * * for the purpose of extorting * * * from his * * * relatives * * * any money * * *." We do not believe we should read into the act the requirement that the imprisonment must be at some place other than a domicile or abode of the party. Supposing a person were concealed in a little-used attic or in some recessed area not readily accessible on the premises. This might be a better place for concealment than any other spot in the neighborhood.

Did the confinement of the Lewis children constitute imprisonment? The trial court defined "imprison" as follows: "'Imprison,' as used in these instructions, means to confine another person against his will within boundaries fixed by the actor for any time no matter how short in duration. The confinement is complete although there is a reasonable means of escape unless the person confined knows thereof. If he is conscious of confinement, imprisonment exists even though he does

not know by whom or how the confinement is imposed. It is not necessary that actual physical force or violence should be employed. It is essential that the conduct of the actor amount to a coercion of the will of the other person." This definition appears to be based at least in part upon the rules enumerated in Restatement, Torts, §§ 35 and 36, pp. 66 and 69. While the definition is broader than was necessary under the facts in this case, it was in no sense prejudicial to the rights of the defendant. "Imprison" as used in section 28-417, R. R. S. 1943, means the unlawful confinement of another person against his will within boundaries fixed by the actor for the purpose of extorting money, property, or a promise of the performance of an act.

The language used by the trial court does find support in the following from Dillon v. Sears-Roebuck Co., 125 Neb. 269, 249 N. W. 604, which was a civil action for false imprisonment: "The test is that there not only must be restraint, but such restraint must be exercised by compelling the restrained party to occupy a place within the limits fixed by the restraining party. In order for a restraint to amount to imprisonment, such restraint must be unlawful. There must be some actual interference with one's freedom of physical action or locomotion. This may be accomplished either by physical contact in which the restrained party's bodily strength is overpowered, or from language or gestures from which the restrained party might have a reasonable apprehension that any attempt to depart from the obnoxious surroundings would result in some aggression against his physical powers of mobility. All restraint is not unlawful, and the rule seems to be that only a wrongful restraint can be the basis of an action for false imprisonment.

" 'The true test seems to be, not the extent of the restraint (where the interference amounts to a restraint), but the lawfulness thereof.' 11 R. C. L. 793, sec. 5."

Black's Law Dictionary (4th Ed.), p. 889, defines the

term "imprisonment" as follows: "* * * the restraint of a man's personal liberty; coercion exercised upon a person to prevent the free exercise of his powers of locomotion. State v Shaw, 73 Vt. 149, 50 A. 863."

We find the following definition in Norton v. Mathers, 222 Iowa 1170, 271 N. W. 321: " '3 Blackstone's Commentaries (2d Ed.) 127, says: "Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forceably detaining one in the public streets." ' "

Defendant suggests that the case of Macomber v. State, 137 Neb. 882, 291 N. W. 674, is authority for his view. With this we cannot agree. It is true we there held that considering the history of the enactment of section 28-417, R. R. S. 1943, we did not believe the Legislature intended to include the state of facts which existed in that case within the statute. This finding, however, is controlled by the specific facts of that case. As we said: "Again referring to the statute, it indicates clearly that the person perpetrating the act has the commission of a crime or an unlawful act in mind at the time." Can there be any doubt but that the defendant in the instant case had the specific act committed in mind at all times?

As we said in Macomber v. State, *supra:* "The dominating element of the offense of kidnapping is the intent with which the acts enumerated in the statute are done." We also said: "When a statute is required to be construed strictly, such statute should have a sensible construction. The general terms contained therein should be so limited in their construction as not to lead to injustice, oppression or an absurd consequence." We further said: " 'Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; * * *.' "

The purpose of kidnapping in every instance is to make it possible to extort money or property or compel the performance of some act. In its nature it embraces other crimes as well as that of kidnapping, the one de-

fined. Its penalties, however, are much more severe than the other crimes which may be included in its provisions because of the consequences which may result from its perpetration. The dominating element of the offense is the intent with which the acts enumerated in the statute are committed.

In Macomber v. State, *supra,* we stated that the purpose of the statute was to secure the personal liberty of citizens, to protect the custody of parents or guardians or other persons having lawful custody of children, and finally to protect the children themselves.

It is readily obvious that the Legislature intended to include the imprisoning of any person for the purpose of extorting money from the person himself or his relatives or friends within the statute. As suggested earlier, we do not believe there was any intention on the part of the Legislature to exclude the possibility of imprisonment within one's own abode. This seems evident from the fact that a more restrictive provision was suggested by the Governor and was ignored by the Legislature. In this case, the Lewis children were taken and confined out of the sight of their mother to force her to call her husband and to insure his compliance with the demands made upon him. Clearly, this is the exact evil the statute was passed to prevent. To construe these facts as outside the intent of the statute would be to ignore the obvious.

Defendant's fifth assignment of error is the overruling of an objection to the testimony of a FBI expert on hair and fiber. The objection is not to the qualification of the expert, but is based on defendant's contention that the chain or custody of evidence was not established and that there was no sufficient foundation that the evidence had not been tampered with.

Before considering this point, we note that the evidence otherwise that the defendant was at the scene of the crime is very convincing. The identification of the defendant is not dependent upon the similarity of de-

fendant's hair with that found in the clothes abandoned near the scene. Defendant's car was found parked in the Lewis driveway. While none of the Lewis family saw his face because of the mask, they were able to identify him from other characteristics, such as the coloring of his hands, his build, walk, and a slight slouch. He was identified by a neighbor who saw him unmasked when he crossed some adjoining yards escaping from the scene. He was also observed in the company of Salanitro about 6 a. m. that morning at 3431 Hawthorne Street in Omaha, Nebraska, and at that time he was wearing a dark suit.

Subsequent to the escape, a police officer found a dark suit coat and pants in a yard approximately a block from 5619 Western Avenue. These exactly fit the defendant. A comb and some human hair were found in one of the pockets. These were placed in two separate white unsealed envelopes, and some hair clipped from the defendant's head was placed in another white unsealed envelope. These envelopes were folded, were sealed in a larger brown envelope, and placed in the evidence vault at the police station. Another officer took the coat and pants and the large envelope from the police vault and put them in a box for mailing to the FBI labcratory in Washington, D. C. His testimony was that he thought the individual white envelopes were sealed as well as folded. The box was opened in Washington by the expert who testified at the trial. It was his testimony the white envelopes when received were folded but unsealed. He made tests on the hair samples and concluded the samples submitted matched hair known to be that of the defendant. Defendant objected to this testimony because the envelopes were unsealed and the State had not negatived or eliminated the possibility that someone might have tampered with the hair samples after they had been placed in the evidence vault at the police department. There is no merit to defendant's contention.

The samples were put in separate envelopes and were folded and sealed in a large brown envelope which was kept in the vault until the evidence was sent to the FBI laboratory. The evidence was sufficiently identified, and the chain of possession sufficiently described so that a proper foundation was laid for its admission. Defendant's argument goes to its credibility, not to its admissibility.

Defendant's sixth assignment of error is as follows: "That the evidence in this case does not warrant the imposition of a Life Sentence, but does warrant a lesser sentence." Unfortunately for the defendant, this is not a case where the trial court is given any discretion in the length of the sentence. The penalty imposed on the defendant is the only one provided by the Legislature in the portion of section 28-417, R. R. S. 1943, under which defendant was prosecuted and convicted. It is the duty of a court to administer the law as it exists. See Simmons v. State, 111 Neb. 644, 197 N. W. 398.

Kidnapping is a crime which involves great moral turpitude. The potential of harm to the victim as well as to the relatives is so great that the severest of penalties is warranted. The range of the penalty for any offense is a matter for legislative determination. The court exercises its discretion as to the penalty to be applied under any particular state of facts within the range provided by the law. What we said in Sundahl v. State, 154 Neb. 550, 48 N. W. 2d 689, is controlling herein: "The Legislature has fixed the public policy of this state and determined what shall be done in cases of this character. It is a policy of long standing. It is a trite statement, but it is our duty to enforce the law."

In any event, even if permitted, we find nothing in this record which could be urged in extenuation of the acts of the defendant and Salanitro. The actions of defendant showed no consideration for the sensibilities or welfare of his victims. The record discloses that the husband and father, Harry Lewis, had a heart condi-

tion. It is extremely fortunate that this experience did not precipitate a heart attack and result in a fatality.

As defendant's sixth assignment of error would suggest, his contention is not that he did not commit the acts complained of, but that the acts did not constitute kidnapping within the intent of the statute. It is clear to us that the defendant had the intent to imprison the Lewis children for the purpose of extorting money from their father, and that this constitutes kidnapping within the meaning of section 28-417, R. R. S. 1943.

The evidence herein sustains the verdict, and the judgment should be and hereby is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JUNIOR JAMES SALANITRO, APPELLANT.
126 N. W. 2d 164

Filed February 7, 1964. No. 35521.

1. **Criminal Law: Trial.** Error cannot be predicated on the failure to charge a defendant with a crime more favorable to the defendant as to penalty than the one with which he is charged.
2. ———: ———. To render the failure to give an instruction prejudicially erroneous, it is not sufficient that correct abstract propositions of law are therein embodied, but in addition it is requisite that such propositions be pertinent to the case being tried.
3. **Kidnapping.** This case is controlled by the opinion in State v. Tatreau, *ante* p. 381, 126 N. W. 2d 157.

Appeal from the district court for Douglas County: ROBERT L. SMITH, Judge. Affirmed.

Adolph Q. Wolf, for appellant.

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

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

SPENCER, J.

This case is a companion case to State v. Tatreau, *ante* p. 381, 126 N. W. 2d 157, although the two cases were separately tried. The appellant is Junior James Salanitro, who will hereinafter be referred to as defendant. The State of Nebraska will be referred to as State. No evidence was offered by the defendant at the trial. The jury returned a verdict of guilty, and, after the overruling of a motion for a new trial, defendant perfected an appeal to this court.

While the trials were separate, the evidence adduced herein is essentially the same as that in State v. Tatreau, *supra,* except for the witnesses needed to establish the identity of Tatreau. Salanitro is referred to by name therein, and the evidence delineated in that case will not be set out herein further than necessary.

Defendant, after the police arrived at 5619 Western Avenue, was found hiding under a bed in an upstairs bedroom on the premises. He was masked and in possession of a 38-caliber revolver. His mask was not removed until he was photographed at the police station. He was identified by Mrs. Harry Lewis and two of the three Lewis children as the shorter of the two masked men who perpetrated the offense described in State v. Tatreau, *supra.* Defendant admitted to the officers that he and another party had gone to 5619 Western Avenue with the intention of holding the family of Harry Lewis hostage to force him to give them money.

Defendant alleges four assignments of error. The first three are as follows: (1) The failure to sustain his motion for a directed verdict; (2) the verdict is contrary to the evidence; and (3) the giving of instruction No. 4, defining the term "imprison." His arguments are premised on the theory that the State failed to prove the essential elements of the crime charged against the defendant in that the State failed to prove any unlawful imprisonment within the meaning of the statute, as intended by the Legislature. What we have said

in State v Tatreau, *supra*, sufficiently disposes of these three assignments. It will serve no useful purpose to discuss them further herein.

The fourth assignment is as follows: "That the trial Court committed prejudicial error in refusing to give the following requested instruction to the jury: 'You are instructed that whoever, by threats, intimidation, coercion, extortion or conspiracy, obtains or seeks to obtain money or other valuable consideration, or whoever causes the same to be done directly or indirectly from any person, or compels him to perform any act not consistent with common law or equity, or whoever by such threats, coercion, intimidation, extortion or conspiracy, induces any person to surrender anything of value or relinquish any right guaranteed by the laws of Nebraska, in consideration of such threats, coercion, intimidation, extortion or conspiracy, shall be deemed guilty of blackmail.' "

Essentially, the only question raised by the defendant in his brief is the contention that he should have been tried for a different crime than that for which he was found guilty.

The tendered instruction is in the precise words of section 28-445, R. R. S. 1943, defining blackmail by threats. While the State may have had a choice of charges, which we do not pass on herein, error cannot be predicated on the failure to charge a defendant with a crime more favorable to the defendant as to penalty than the one with which he is charged.

As suggested in State v. Tatreau, *supra*, the crime of kidnapping in its very nature embraces other crimes than the one defined in the statute. The question involved herein is, does the evidence warrant conviction of the crime with which the defendant is charged, kidnapping, as defined in section 28-417, R. R. S. 1943? Our answer is that it does.

To render the failure to give an instruction prejudicially erroneous, it is not sufficient that correct ab-

stract propositions of law are therein embodied, but in addition it is requisite that such propositions be pertinent to the case being tried. The instruction tendered by the defendant was properly refused.

For the reasons set out in State v. Tatreau, *supra,* as well as herein, the evidence sustains the verdict. The judgment herein should be and hereby is affirmed.

AFFIRMED.

MARVEL CONRY, APPELLEE AND CROSS-APPELLANT, V. WILLIAM E. CONRY, APPELLANT AND CROSS-APPELLEE.
126 N. W. 2d 188

Filed February 7, 1964. No. 35557.

1. **Divorce.** Section 42-335, R. R. S. 1943, means that corroborative evidence is required of the acts or conduct asserted as grounds for a divorce.
2. ———. Corroboration of the acts of extreme cruelty testified to by a plaintiff in a divorce action is a basic essential for the right to a decree of divorce. The degree of corroboration required must be determined on the facts and circumstances of each particular case.
3. ———. A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties, and in all cases corroborative evidence of the facts alleged to constitute a ground for divorce is required.

Appeal from the district court for Madison County: FAY H. POLLOCK, Judge. Reversed and remanded with directions.

Thomas E. Brogan, for appellant.

Frederick M. Deutsch, William I. Hagen, and James P. Monen, for appellee.

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

MESSMORE, J.

The plaintiff, Marvel Conry, brought this action for

divorce against William E. Conry, defendant, on the grounds of extreme cruelty. The defendant denied the allegations of the plaintiff's amended petition, prayed that it be denied, and cross-petitioned for divorce charging the plaintiff with extreme cruelty and pleading that he be granted a divorce. The plaintiff's amended petition was filed on September 10, 1962. The defendant's answer to the amended petition and the cross-petition of the defendant were filed on September 27, 1962. The answer to the cross-petition by the plaintiff and her reply to the answer of the defendant were filed on October 2, 1962. The trial court granted the plaintiff an absolute divorce, a certain interest in defendant's land, subject to certain encumbrances, and other personal property; allowed the defendant certain personal property; required the defendant to pay attorneys' fees for the use and benefit of the plaintiff's attorneys; and taxed the costs to the defendant. The plaintiff filed a motion for new trial. The defendant filed a motion for new trial. The trial court overruled both of these motions for new trial. The defendant perfected appeal to this court.

The plaintiff and defendant were married on December 29, 1942, at Sioux City, Iowa. When they were married, the plaintiff was 29 years old and the defendant 41 years old. At the time of trial the plaintiff was 49 years old and the defendant was 61 years old. The defendant had a master of arts degree. He had been a farmer and schoolteacher. After the marriage, the defendant obtained a position teaching at Hurley, New Mexico. He was employed there from January 1943, until approximately the first 2 weeks in May 1943. They then went back to Kingsley, Iowa. The defendant secured a teaching position in Grand Meadow, Iowa, and taught school there until May 1, 1944. The defendant gave up teaching and they moved onto a farm in the spring of 1944. Later, the defendant taught school at Belden, Nebraska. This was in 1957 and 1958. He re-

turned to their home in Iowa on weekends by driving 75 to 80 miles. The defendant was trying to farm and teach school at the same time. The defendant secured a position teaching school at Meadow Grove, Nebraska, moving there in August 1961.

The plaintiff testified that the defendant struck her the first time on September 18, 1953; and that they had a quarrel prior to the assault about an electric motor that had burned out. The defendant told the plaintiff that he did not want her and desired a divorce. The plaintiff further testified that she had a breast cancer operation in 1954, at which time they quarreled and the defendant told her he wanted a divorce. He told her that after the operation. She further testified that when he visited her he said that he wished she had died, and that he would be rid of her. The plaintiff further testified that the defendant beat her up on September 21, 1957. On March 10, 1959, they quarreled about financial affairs, and at numerous other times they quarreled over different matters pertaining to their finances.

The record discloses that the extreme cruelty complained of by the plaintiff occurred in the State of Iowa. There is considerable evidence pertaining to the real estate of both parties, the manner in which it was managed, how it was farmed, and with reference to financial difficulties existing between the parties which need not be set forth.

With relation to the difficulties between the parties after they moved to Meadow Grove, Nebraska, in August 1961, the record discloses the following: That on June 3, 1962, the parties quarreled about the plaintiff working; that the defendant told the plaintiff he did not want her around any more and asked her to get a divorce; that he always asked her to get a divorce; that they generally quarreled over money that the plaintiff earned; and that the defendant did not want the plaintiff to spend her money, and most of all, not to spend his money. The plaintiff further testified that she left the house after

a quarrel about her working; and that the defendant told her to go and get an apartment in Norfolk and stay there, that he did not want her near him. The plaintiff told the defendant that her job would last but a little longer and he would have to support her. The defendant replied that he did not care what it cost him, he wanted to get rid of her. On June 4, 1962, the plaintiff asked the defendant if he really wanted her to leave, and he told her to go. The plaintiff then made arrangements to move on June 5, 1962. The defendant had instructed the bank not to honor any checks of the plaintiff on their joint account. Before the plaintiff left Meadow Grove she went to the bank and asked for money, and her check was honored in the amount of $50. There is evidence that the defendant paid some amounts to the plaintiff for her support after she left Meadow Grove. During the summer vacation the defendant was working on a construction job at Tilden, Nebraska. At that time the plaintiff took their 1956 Chevrolet automobile and the defendant kept a 1947 Chevrolet automobile, but in a week the defendant appeared at the plaintiff's apartment in Norfolk with a policeman and got the 1956 Chevrolet.

The defendant testified that they quarreled over the use of the car and the plaintiff told him she was going to leave him, that she had secured an attorney, and that she was taking all of the furniture, the car, and all the money in the bank. The defendant further testified that he did not strike the plaintiff or abuse her in any manner at that time; and that the plaintiff asked him if, under these conditions, he wanted a divorce and he said that he did. On June 5, 1962, the plaintiff was not up when the defendant went to work, but when he came home from Tilden certain furniture and one of the cars were gone. He obtained the 1956 Chevrolet and gave the plaintiff the 1947 Chevrolet to use. The defendant also testified that he never told the plaintiff that he

wished she would die when she was in the hospital or that he was happy that she was sick.

Mrs. Caroline Witt testified, in behalf of the plaintiff, that she was the hostess at the Hotel Madison coffee shop, and the plaintiff worked in the Lamp Room at the time she became acquainted with her. In June 1962, she went to Meadow Grove with the plaintiff, and used her own car for transportation. She was present at a conversation had between the plaintiff and the defendant, which conversation started in the schoolhouse. This witness walked out of the schoolhouse and the plaintiff and defendant came out and stood in front of the house and talked. This conversation took place after June 5, 1962. This witness further testified the defendant stated that the plaintiff had cost him $44,000, that he was "very much finished with her," that he wanted a divorce, and that if she did not go ahead and obtain one, he would. The plaintiff then said that she would like to come back because she had no money and did not know what she was going to do if she was laid off of her job. The defendant replied that he did not want her back, that he was better off without her, and that he wanted his furniture back. This witness further testified that the plaintiff asked the defendant for money and he said he did not have to give her any money because she had left. In September 1962, shortly after school started, this witness was present at a conversation between the plaintiff and defendant. She testified that the plaintiff and defendant went into the house to talk; that she could hear voices, and when they got louder she decided to go into the house and tell the plaintiff that they had better go; that she stayed in the car, and then went into the house, and by that time things had settled down; that the plaintiff then asked the defendant if she could come back and said that she did not know what she was going to do; and that the defendant told her that if she came back she would not get any money and could not use the car, and that he was

a better superintendent without her, and everyone in Meadow Grove thought he was better without her. On cross-examination this witness testified that before that day in June, she had never met the defendant and had never been in their home before that time.

This case is triable de novo in this court.

The following sections of the statute are applicable to a determination of this appeal.

Section 42-303, R. R. S. 1943, provides in part: "(2) No person shall be entitled to a divorce for any cause arising out of this state unless the petitioner or defendant shall have resided within this state for at least two years next before bringing suit for divorce, with a bona fide intention of making this state his or her permanent home."

The plaintiff's amended petition was filed on September 10, 1962, just over 1 year after the parties moved to Meadow Grove, Nebraska. The parties lived together at Meadow Grove until June 5, 1962. All of the acts of alleged physical cruelty conducted by the defendant toward the plaintiff took place in the State of Iowa, prior to April 24, 1959, and while the parties were residents of the State of Iowa. Therefore, the above statute is applicable as to the alleged extreme cruelty related by the plaintiff which occurred in the State of Iowa.

Section 42-303, R. R. S. 1943, also provides in part: "(1) No person shall be entitled to a divorce for any cause arising in this state who has not had actual residence in this state for at least one year next before bringing suit for divorce with a bona fide intention of making this state his or her permanent home, unless the marriage was solemnized in this state and the applicant shall have resided therein from the time of the marriage to filing the petition."

Section 42-335, R. R. S. 1943, provides: "No decree of divorce and of the nullity of a marriage shall be made solely on the declaration, confessions or admissions of the parties, but the court shall, in all cases, require other

satisfactory evidence of the facts alleged in the petition for that purpose."

The defendant contends that the evidence relating to the plaintiff's right to a divorce for acts committed by him against her in the State of Nebraska must be corroborated by competent evidence. The evidence relied upon in the instant case to corroborate the plaintiff's evidence is that of Caroline Witt heretofore set forth.

"Corroboration of the acts of extreme cruelty testified to by a plaintiff in a divorce action is a basic essential for the right to a decree of divorce. The degree of corroboration required must be determined on the facts and circumstances of each particular case. * * * Corroboration relied upon in a suit for divorce must be competent evidence of the acts and conduct asserted as a ground for divorce." Ross v. Ross, 174 Neb. 795, 119 N. W. 2d 495.

"A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties, and in all cases corroborative evidence of the facts alleged to constitute a ground for divorce is required. * * * The corroboration relied upon in a suit for a divorce must in itself be competent evidence of the acts and conduct asserted as a ground for divorce." Laughrey v. Laughrey, 171 Neb. 132, 105 N. W. 2d 576.

The burden of proof in this case was upon the plaintiff. The evidence indicates a degree of incompatibility between the parties. The evidence of Mrs. Witt is insufficient to constitute any corroboration of extreme cruelty as alleged by the plaintiff in her amended petition.

As stated in Brown v. Brown, 130 Neb. 487, 265 N. W. 556: "* * * mere incompatibility of temper is not a ground for divorce in this state." See, also, Smith v. Smith, 160 Neb. 120, 69 N. W. 2d 321. Nor does the fact that the defendant stated that he could not and would not live with the plaintiff entitle the plaintiff to a divorce.

The plaintiff cross-appealed on the ground that the

alimony allowed by the trial court and the division of property made by the trial court were grossly inadequate. This cross-appeal is denied.

Having concluded from the evidence and the authorities heretofore cited that the parties are not entitled to a divorce, the judgment of the trial court is reversed and the cause remanded with directions to dismiss the plaintiff's action.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE KAYKA SERAPHINE GRASS, LOUIS DEAN GRASS, AND LOIS GRASS, NEGLECTED CHILDREN.
MONA JANE GRASS MORIMOTO ET AL., APPELLEES, V. NEBRASKA CHILDREN'S HOME SOCIETY, APPELLANT, IMPLEADED WITH COUNTY OF SCOTTS BLUFF, NEBRASKA, APPELLEE, KAYKA SERAPHINE GRASS ET AL., INTERVENERS-APPELLANTS.

126 N. W. 2d 184

Filed February 7, 1964. No. 35558.

1. **Judgments.** The judgment of a court having jurisdiction of the parties and the subject matter is conclusive upon the parties thereto, even though erroneous, unless reversed in appellate proceedings.
2. **Appeal and Error.** The Supreme Court acquires no jurisdiction of an appeal where the notice of appeal was not filed in the district court within 1 month after the rendition of the judgment or the overruling of a motion for new trial. § 25-1912, R. S. Supp., 1961.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded with directions.

Tracy J. Peycke, for appellant.

Mathews, Kelley & Cannon, for interveners-appellants.

Wright, Simmons & Hancock, for appellees Morimoto.

Donald L. Wood, for appellee County of Scotts Bluff.

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

BOSLAUGH, J.

This is an appeal from a judgment of the district court entered upon the mandate of this court in a prior appeal. The opinion of this court upon the prior appeal appears as Morimoto v. Nebraska Children's Home Society, 175 Neb. 174, 121 N. W. 2d 26.

On September 5, 1961, the district court for Scotts Bluff County, Nebraska, adjudged that Kayka Seraphine Grass, Louis Dean Grass, and Lois Grass were neglected children and awarded the permanent care, custody, and control of the children to the Nebraska Children's Home Society.

On February 20, 1962, this action was brought by Mona Jane Grass Morimoto and Louis Morimoto, the parents of the children, to vacate the judgment of the district court entered on September 5, 1961, and to obtain a new hearing in that proceeding. On July 2, 1962, after a hearing on the merits, the trial court found that the petition should be denied and, in effect, dismissed the action. A motion for new trial filed by the petitioners was overruled on August 7, 1962. A notice of appeal to this court was not filed until September 10, 1962.

This court held that the judgment of the district court of September 5, 1961, was void and subject to a petition to vacate by Louis Morimoto, a person having custody of two of the children, because there had been no service of summons upon him as required by section 43-206, R. R. S. 1943. Morimoto v. Nebraska Children's Home Society, *supra*. The judgment of the district court was reversed and the cause remanded with directions to vacate the judgment of September 5, 1961.

The mandate of this court was filed in the district court on May 24, 1963. On that date the district court entered the following judgment: "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the man-

date of the Supreme Court is hereby spread upon the records of this court. Judgment herein is hereby entered in accordance with said mandate. All previous orders of this court are hereby vacated and held for naught and this proceeding is hereby dismissed. The County of Scotts Bluff, Nebraska and Nebraska Children's Home Society is hereby ordered to forthwith return the children involved herein to this county and to deliver the same to their parents forthwith."

On May 27, 1963, the Nebraska Children's Home Society filed a motion for new trial and the children, appearing by Martin A. Cannon as their next friend, filed a petition for leave to intervene and a motion for new trial. These motions and motions to restrain further proceedings and for supersedeas were all overruled on that same day. Notices of appeal were then filed by the Nebraska Children's Home Society and the children appearing by their next friend.

On June 11, 1963, a motion for supersedeas filed in this court by the appellants was sustained. Thereafter, a supersedeas bond was filed and approved.

On August 12, 1963, the children, appearing by their next friend, filed a motion in this court to recall the mandate issued in the prior appeal and to dismiss that appeal because this court had never acquired jurisdiction of that appeal. This motion was heard and submitted on September 16, 1963. It was apparent that this motion, if sustained, would be determinative of this appeal. Therefore, the ruling on the motion was reserved until a hearing could be had upon the merits of this appeal.

On October 4, 1963, this court appointed Martin A. Cannon as guardian ad litem for the children. Section 43-206, R. R. S. 1943, provides that "in any case the judge may appoint some suitable person to act in behalf of the child."

The judgment on the mandate, which the trial court entered on May 24, 1963, did not respond to either the pleadings or the mandate. The petition filed on Feb-

ruary 20, 1962, by Mona Jane Grass Morimoto and Louis Morimoto sought to vacate the judgment of September 5, 1961, and obtain a new hearing. This court directed only that the judgment of September 5, 1961, be vacated. The district court was not directed to dismiss the action and there was no reason to dismiss the action at that time.

The proceedings had in 1961 which resulted in the judgment of September 5, 1961, awarding the custody of the children to the Nebraska Children's Home Society, were defective only in that a summons had not been served upon Louis Morimoto. In all other respects the proceedings were regular and valid.

The proceedings had in 1961 were commenced by the county attorney filing a complaint alleging that the children were neglected. A summons was issued and served upon Mona J. Grass, now Mona Jane Grass Morimoto, who was the mother of the children and had one of the children in her custody. The children were placed in the temporary care and custody of the county welfare department pending the hearing and disposition of the case. The judgment of September 5, 1961, awarded the permanent custody of the children to the Nebraska Children's Home Society.

At the time the proceedings had in 1961 were commenced, two of the children were in the custody of Louis Morimoto, and he was the acknowledged parent of the third child. Section 43-206, R. R. S. 1943, provides that upon the filing of the complaint, a summons shall issue requiring the person having custody or control of the child to appear with the child at the time and place stated in the summons. The statute further requires that the parents of the child, if living and if their residence is known, shall be notified of the proceedings.

The failure to comply with the statutory requirements concerning a summons and notice to Louis Morimoto deprived the district court of jurisdiction to adjudicate any right Louis Morimoto may have had to the custody

of the children. Ex parte Mallory, 122 Va. 298, 94 S. E. 782; Jones v. Davis (Tex. Civ. App.), 203 S. W. 2d 943; People ex rel. Riesner v. New York Nursery & Child's Hospital, 230 N. Y. 119, 129 N. E. 341; Jensen v. Hinckley, 55 Utah 306, 185 P. 716; Bleier v. Crouse, 13 Ohio App. 69. Thus, the judgment of September 5, 1961, was subject to a petition to vacate by Louis Morimoto.

Although Louis Morimoto was entitled to have the judgment of September 5, 1961, vacated, that alone did not establish his right to the custody of the children. A complaint had been filed by the proper officer which alleged that the children were neglected and that their welfare required that their custody be awarded to a public agency. The right which Louis Morimoto had was to be heard with reference to his claim to the custody of the children. This was the relief which the petition requested, and it is the only relief that should have been granted in the judgment upon the mandate.

The motion to recall the mandate issued in the prior appeal remains to be considered. The record shows that the motion for new trial was overruled on August 7, 1962, a Tuesday. The last day on which a notice of appeal to this court could have been filed was September 7, 1962, a Friday. § 25-1912, R. S. Supp., 1961; Ruan Transp. Corp. v. Peake, Inc., 163 Neb. 319, 79 N. W. 2d 575. The notice of appeal was not filed until September 10, 1962. The result of the failure to file the notice of appeal within the time required by the statute is that this court did not obtain jurisdiction of the appeal and the appeal should have been dismissed. Bebee v. Kriewald, 173 Neb. 179, 112 N. W. 2d 764.

The judgment of September 5, 1961, was subject to a petition to vacate by Louis Morimoto. Such a petition was filed by Louis Morimoto on February 20, 1962, but that proceeding resulted in a judgment entered on July 2, 1962, which dismissed the action. The judgment entered on July 2, 1962, became final when the time for appeal expired. Although the judgment was erroneous

it was not void. Louis Morimoto invoked the jurisdiction of the district court and he is bound by the judgment. Stenberg v. State ex rel. Keller, 48 Neb. 299, 67 N. W. 190. The legal effect of the judgment entered on July 2, 1962, was to determine that Louis Morimoto had no right to the custody of the children as of September 5, 1961.

The judgment of the district court is reversed and the cause remanded with directions to vacate the judgment entered on May 24, 1963.

The guardian ad litem is allowed a fee of $100 for his services in this court.

REVERSED AND REMANDED WITH DIRECTIONS.

STANLEY A. ZOUCHA, FATHER AND NEXT FRIEND OF GERALD A. ZOUCHA, A MINOR, APPELLEE, V. NORTHWESTERN BELL TELEPHONE COMPANY, APPELLANT.

126 N. W. 2d 220

Filed February 14, 1964. No. 35569.

1. **Trial.** In testing the sufficiency of the evidence to support a jury verdict the plaintiff is entitled to have all conflicts resolved in his favor, and where different reasonable inferences may be drawn from the evidence, the case is for the jury.
2. ———. In testing the sufficiency of the evidence, it is the duty of the court to decide not whether there is literally no evidence, but any upon which a jury may properly predicate a verdict, and where the facts adduced are such that reasonable minds can draw only one conclusion therefrom, it becomes a matter of law for the court and is not for jury determination.
3. **Automobiles: Negligence.** Until the driver of an automobile has notice of the presence or likelihood of children near his line of travel, he is bound only to the exercise of reasonable care, and has the right to assume that others will do likewise; and until he has such notice the rule is the same as respects children and adults.
4. ———: ———. In the case where a plaintiff pedestrian rapidly crossing a street between intersections came into the line of vision or travel of a driver of an automobile, the rule

is if the situation is created so quickly that the driver has no opportunity to avoid doing injury, there is no liability, but if he has time within which an ordinarily careful and prudent person could and would avoid inflicting damage, the problem of whether or not his acts or omissions were negligent, or the proximate cause of the damage, is for a jury.

5. ———: ———. A driver of an automobile is not bound absolutely to avoid collision with other vehicles or pedestrians on streets or highways, but must maintain such lookout and control as will avoid collision with others exercising due care.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Reversed and dismissed.

Fraser, Stryker, Marshall & Veach, for appellant.

William M. Homan and Stoehr, Rickerson, Sodoro & Caporale, for appellee.

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

WHITE, C. J.

From a jury verdict and judgment for plaintiff, as father and next friend of a 5-year-old minor boy, in a truck-pedestrian collision on a village street, defendant appeals, assigning as error insufficiency of the evidence to support the verdict and error in instructions. The minor will be designated in this opinion as the plaintiff.

The plaintiff is a minor, 5 years old, and did not testify in the case. The accident happened between intersections on the main street of Cedar Rapids, Nebraska, on December 16, 1960, at 3:30 p.m. The street is 80 feet wide and hard-surfaced. The day was clear and dry. Cars were parked continuously in a diagonal manner on the north and south sides of the street. At the time of the accident, a car was illegally parked, facing west, close to the centerline of the street, and parallel to it. A heavy truck of the telephone company was being driven east on or close to the centerline of the street and was followed, by about a car's length, by a car driven

by the town marshal. At a point where the truck's left front fender was a few feet past the rear of the vehicle parked parallel near the center of the street, the plaintiff ran into or collided with the side of the left front fender of the truck. The evidence establishes that the point of contact was somewhere between a point even with the forward point of the left front wheel and a point even with the headlight. There is no evidence of damage to the fender. Just before contact, the boy slid and his right foot and leg went under the left front wheel which ran over it. Serious injuries were sustained to the right leg and foot. The undisputed evidence, testified to by all of the witnesses, is that the truck stopped within 12 to 16 inches after the collision. The truck skid marks confirm this. The truck had proceeded about three-fourths of a block east when the accident happened.

The plaintiff, together with his little sister, had been standing in front of a vacant lot or a hardware store on the north side of the street. They suddenly ran in a southeasterly direction between two diagonally parked cars. The plaintiff outdistanced his sister and, running at all times, went to the east of and in back of the stationary parallel parked car positioned close to the centerline, and just before impact he "slid," his right foot and leg going under the front of the left front wheel of the truck. The most accurate description of the point of impact comes from the plaintiff's eyewitness, Alfred Schuele, who testified:

"Q. Well, where with relation to the left front wheel, let's say, of the truck?

"A. Just a little to the front of the left front wheel.

"Q. On the side of the fender, or in front of the fender?

"A. It looked to me like he hit the side of the fender."

The above is a summary of the evidence from the testimony of the eyewitnesses to the accident. It is virtually undisputed, the only variation being the fact

that some of the witnesses testified as to certain facts or aspects of the evidence that the others did not see. No contention is raised as to the position of the truck and cars, including the parallel parked car as shown on exhibit 1. The defendant's driver, Anderson, and his companion, Lee, who were in the front seat of the truck testified to a speed of 5 miles an hour, and that just opposite the parallel parked car, Lee yelled, "Look out." Anderson saw the plaintiff at the some time darting out from behind the parallel parked car, he slammed on the brakes, the boy hit the left front fender, and the truck was stopped within 12 to 16 inches. The town marshal, Bowers, traveling immediately behind the truck, placed the speed of the truck at 5 miles an hour. He testified that the boy darted out and passed in back of the parallel parked car directly into the left front wheel of the truck.

One witness, Moore, saw the plaintiff standing on the sidewalk in front of the vacant lot. But, all of the witnesses agree no one saw the plaintiff in the street until he emerged from behind the diagonally parked cars and was running rapidly in a southeasterly direction. There were no adults or children observed by any one out in the main street at the time of the accident. Main Street of Cedar Rapids is also State Highway No. 56-52.

We test the evidence in light of well-recognized rules. The plaintiff is entitled to have all conflicts resolved in his favor, and where different reasonable inferences may be drawn from the evidence, the case is for the jury. On the other hand, it is the duty of the court to decide not whether there is literally no evidence, but any upon which a jury may properly predicate a verdict, and where the facts adduced are such that reasonable minds can draw only one conclusion therefrom, it becomes a matter of law for the court and is not for jury determination. Johnston v. Robertson, 171 Neb. 324, 106 N. W. 2d 192; Palmer v. McDonald, 171 Neb. 727, 107 N. W. 2d 655.

Plaintiff argues that there is sufficient evidence as to

speed to require jury submission. He bases this on the testimony of the witness Batenhorst, who first saw the truck 50 to 60 feet from the point of impact and testified as to a speed of 10 to 15 miles an hour, which was increasing. All of the other witnesses testified to a speed of about 5 miles an hour, but the evidence of all of the witnesses, including Batenhorst, is conclusive that the speed was such that after the driver saw the boy and applied the brakes, the truck was *stopped within 12 to 16 inches,* with the skid marks confirming this. No other reasonable conclusion could be drawn from the whole evidence than that the speed of the truck was such that it could be and was stopped almost instantly under the conditions then existing. The applicable speed limit in the village was 20 miles an hour. § 39-7,108 (3)(a), R. R. S. 1943. Speeds under this limit may be negligent if reasonable minds could draw the inference that they were imprudent under the conditions then existing. § 39-7,108 (1), R. R. S. 1943. In this connection there is an absence of any evidence of any pedestrians present in the street, and no evidence of any vehicle forward of the movement of the defendant's truck, except the parked vehicles. The defendant's driver could not be held negligent merely because he was moving. We come to the conclusion that there is no evidence as to speed that would warrant submission of this issue to the jury.

In a quite similar case involving a 9-year-old minor running into a car while crossing diagonally between intersections, we said, in Adams v. Welliver, 155 Neb. 331, 51 N. W. 2d 739, as follows: "There is no evidence that the defendant's car was not under control in the sense that the law requires. It was stopped within 5 feet after Pat was struck, a fact indicating that the driver was alert and acted in a prompt manner. See, De Griselles v. Gans, 116 Neb. 835, 219 N. W. 235; Trumbley v. Moore, 151 Neb. 780, 39 N. W. 2d 613."

The plaintiff, citing no cases, argues that there is sufficient evidence to submit the issue of improper look-

out by the truck driver. The duty of drivers under substantially similar circumstances involving children suddenly running or darting into collision with vehicles, has been stated in Adams v. Welliver, *supra:* "In De Griselles v. Gans, supra, it was held: 'Until a driver of an automobile has notice of the presence or likelihood of children near his line of travel, he is bound only to the exercise of reasonable care, and has the right to assume that others will do likewise; and until he has such notice the rule is the same as respects children and adults.' "

And as to the same issue, in Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607, this court said: "If the situation is created so quickly that the motorist has no opportunity to avoid doing injury, there is no liability, but if he has time within which an ordinarily careful and prudent person could and would avoid inflicting damage, the problem of whether or not his acts or omissions were negligent, or the proximate cause of the damage, is for a jury."

We think the evidence here is conclusive that the actions of the boy created the situation "so quickly that the motorist has no opportunity to avoid doing injury." That being true, there is no liability. Plaintiff argues the possibility of observation, from the time the boy emerged running fast from between the parked cars. The boy was running southeasterly *with* the direction of the defendant's truck and ran into the front side of the left front fender. Under the above rules, the defendant's driver was under no duty to anticipate the presence and actions of the plaintiff. The undisputed evidence is that the first time he knew of the plaintiff's presence was right at the point of impact. To hold the evidence as to failure of lookout sufficient here, we would have to hold that the defendant's driver was charged with the duty to anticipate, between intersections, a rapidly running pedestrian emerging unexpectedly from between parked cars on the other side of

the street on which he is traveling. We have said many times that a driver is not bound absolutely to avoid collision with other vehicles or pedestrians on streets or highways, but must maintain such lookout and control as will avoid collision with others exercising due care. He has a right to assume that others, children and adults, will do likewise. See, De Griselles v. Gans, 116 Neb. 835, 219 N. W. 235; Adams v. Welliver, *supra*. We are aware, under the pleadings and evidence in this case, that the plaintiff is not chargeable with contributory negligence and that such a finding would not bar recovery. But, where the only conclusion to be drawn from the evidence is that the actions of a minor are the proximate cause of the accident, and no violation of duty of the defendant is shown, there is no liability. See De Griselles v. Gans, *supra*.

Plaintiff argues that it was Santa Claus Day in Cedar Rapids on December 16, 1960, the day of the accident, and that children on the street and the volume of parked cars were evidence from which the jury could draw the inference that defendant's driver should have seen and anticipated the actions of the plaintiff. The evidence is conclusive that there were no pedestrians or children in the street at the time of the accident, 3:30 p.m. There was some testimony that there were perhaps five or six children on the sidewalks generally. The evidence is that the Santa Claus Day activities took place around noon and that at the time of the accident all of the children had gone to the movie. The defendant's driver knew nothing of this situation, and there is no evidence from which he could be charged with the duty to anticipate the presence of small children darting into his line of vision or travel.

This was an unfortunate accident, and the plaintiff's right leg was seriously injured. This affords no occasion for upholding a verdict based on conjecture, speculation, or sympathy. On review of the whole record and all of the evidence, they could lead to no other con-

clusion than that there has been no showing of negligence on the part of the defendant's driver, and that the proximate cause of this unfortunate accident was the headlong and unforeseeable conduct of the plaintiff in darting out into a street, between intersections, from behind parked cars, and running into the side of the defendant's truck.

REVERSED AND DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. DELMAR LOOKABILL, APPELLANT.

126 N. W. 2d 403

Filed February 21, 1964. No. 35531.

SUPPLEMENTAL OPINION

Automobiles: Municipal Corporations. Under the provisions of section 60-427, R. R. S. 1943, a city or municipal court is authorized to suspend a driver's license upon conviction of an offense under a city or village ordinance for operating a motor vehicle while under the influence of intoxicating liquor.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. On motion for rehearing. See *ante* p. 254, 125 N. W. 2d 695, for original opinion. Former opinion modified. Motion for rehearing overruled.

Dryden & Jensen, for appellant.

Ward W. Minor, for appellee.

Ralph D. Nelson, Henry L. Holst, Vincent D. Brown, and Arlyss W. Spence, for amici curiae.

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

CARTER, J.

In our former opinion in this case, State v. Lookabill, *ante* p. 254, 125 N. W. 2d 695, we held on authority of Gembler v. City of Seward, 136 Neb. 916, 288 N. W. 545,

that a conviction under a city or village ordinance will not authorize the suspension or revocation of a driver's license by a police or municipal court. We overlooked the fact that the applicable statute, section 60-427, R. R. S. 1943, was amended in 1941 after our opinion in the Gembler case was adopted on November 24, 1939. The 1941 amendment authorized a suspension of a driver's license upon conviction of an offense under a city or village ordinance pertaining to the operation of a motor vehicle while under the influence of alcoholic liquor, and other offenses as well. Laws 1941, c. 124, § 2, p. 470. Consequently this court was in error in holding that a conviction of an offense under a city or village ordinance will not authorize the suspension or revocation of a driver's license by a police or municipal court. The trial court suspended defendant's license as authorized by section 60-427, R. R. S. 1943. We now hold that the action of the trial court was in conformity with the statute and we affirm its action in so doing.

We withdraw that part of the former opinion in conflict with this opinion and substitute the latter for the former. The judgment of the district court is affirmed in toto and the motion for a rehearing is overruled.

FORMER OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

MAX D. HICKMAN, APPELLEE AND CROSS-APPELLANT, V. LOUP RIVER PUBLIC POWER DISTRICT, APPELLANT AND CROSS-APPELLEE, MIDDLE LOUP PUBLIC POWER AND IRRIGATION DISTRICT ET AL., INTERVENERS-APPELLEES AND CROSS-APPELLANTS.

126 N. W. 2d 404

Filed February 21, 1964. No. 35555.

1. **Waters. Under section 81-6313, Comp. St. 1929, now section 46-238, R. R. S. 1943, the Department of Water Resources is authorized to extend the completion date for construction, fixed**

by the order granting an application for an appropriation of water, when such extension is made necessary by temporary interruptions by some unavoidable and natural cause.

2. ———. The Department has authority to extend the time, if not beyond the final limit permitted by statute, although the application therefor was made after the time first fixed by it had expired.

3. ———. An order of the Department in a matter over which it has jurisdiction is clothed with the presumption of regularity and validity.

4. ———. The application of appropriated water to beneficial use operates as a condition subsequent which in fact fixes the extent of the right originally acquired.

5. ———. An appropriator will not be permitted to retain the right to water which he does not put to a beneficial use and thus deprive others of its benefits.

6. ———. The putting of appropriated waters to a beneficial use in an irrigation appropriation, where the requirements of beneficial use are spelled out in the statute, is ordinarily different than in an appropriation for power purposes where requirements constituting beneficial use are not specified.

7. ———. In determining when an appropriation of water for the generation of hydroelectric power for sale to the public has been put to a public use, the courts will not close their eyes to the realities of business life.

8. ———. In a consideration of applicable statutes, the history of the law of appropriation, and the public policy of the state, we hold that an appropriation of water for power for sale to the public is complete, and has been put to a public use, when the appropriator has fully complied with the controlling statutes, has constructed its power facilities and placed them in operation, and is ready and willing to deliver hydroelectric energy to users upon demand.

9. ———. A completed appropriation of water for power purposes remains a valid appropriation to the full extent of its granted right unless restricted by a finding of abandonment or nonuser in a proper proceeding commenced under sections 46-229 to 46-229.05, R. R. S. 1943.

10. ———. Limitations on an appropriative right in the waters of a stream restrict the appropriator only, and do not amount to a grant to a junior appropriator or one having no appropriation at all.

11. ———. Where the state has entered into leases with an appropriator of water for power purposes, and collected substantial annual payments thereunder for 25 years, based on the maximum rate of diversion and the maximum total head

permitted in the approved applications, it constitutes an administrative construction supporting the validity of the appropriation.

12. ———. An extension of time to put appropriated waters of a stream to beneficial use inheres in an extension of time to complete construction.

13. ———. The grant of an application by the Department to increase the total head of water at an appropriator's generating plants, without an increase in the rate of diversion from the stream, in no manner affects junior appropriators and they lack the legal capacity to raise the issue of its invalidity.

Appeal from the Department of Water Resources. Reversed and dismissed.

Neighbors, Danielson & Van Steenberg and Walter, Albert, Leininger & Grant, for appellant.

Monsky, Grodinsky, Good & Cohen, Hotz, Hotz & Taylor, John H. Evans, and Leo F. Clinch, for appellees.

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

CARTER, J.

This is an appeal from an order of the Director of the Department of Water Resources of the State of Nebraska in a proceeding brought by the petitioner Max D. Hickman to secure the cancellation and annulment of the appropriation rights of the respondent Loup River Public Power District arising out of application No. 2287 for 3,500 cubic feet of water per second of time from the Loup River for the development of power with a priority date of September 15, 1932, and application No. 2573 for an additional power head of 18 feet in using the water appropriated by application No. 2287, which was granted on April 21, 1936. Petitions of intervention were filed by the Middle Loup Public Power and Irrigation District, North Loup River Public Power and Irrigation District, and Paul H. Dean, receiver for North Loup River Public Power and Irrigation District. The final order of the Director of the Department of Water

Resources determined that the maximum amount of the water appropriation under application No. 2287 by virtue of the beneficial use made of water under its priority on or before August 24, 1937, was 506 cubic feet of water per second of time for the generation of hydroelectric power under a total head of water of 126 feet. The Loup River Public Power District has appealed to this court from the final order of the Director of the Department of Water Resources entered in the case on December 28, 1962.

We shall hereafter refer to the petitioner as Hickman, to the respondent Loup River Public Power District as Loup District, to the North Loup River Public Power and Irrigation District as North Loup District, to the Middle Loup Public Power and Irrigation District as Middle Loup District, and to the Department of Water Resources of the State of Nebraska and its predecessors as Department. The Director of the Department of Water Resources will be designated as director.

The case was previously before this court and the relationship of each of the parties to the litigation is set out in the opinion in that case. Hickman v. Loup River Public Power Dist., 173 Neb. 428, 113 N. W. 2d 617. We shall only refer to their relationship briefly in considering the issues on their merits on the present appeal.

Hickman is the owner of an appropriation of the public waters of the Middle Loup River for the purpose of irrigation for 1.28 cubic feet per second of time with a priority date of October 23, 1939, which is junior to the claimed appropriation rights of Loup District. He brings the proceeding as a class action on behalf of himself and all junior appropriators of water for irrigation purposes from the Loup River and its tributaries, whose points of diversion are upstream from the diversion point of the Loup District and whose priority dates are subsequent to September 15, 1932, the claimed priority date of Loup District.

The interveners, although barred by section 46-238, R.

R. S. 1943, from bringing action for the cancellation and annulment of the appropriation right of Loup District because of the 1-year limitation therein contained, were permitted to intervene because of the reasons stated in the former appeal. The primary issue raised is the validity of Loup District's appropriation right and, if valid, the extent thereof.

An application for the appropriation of the public waters of the Loup River for the purpose of generating power with a priority date of September 15, 1932, and with a diversion rate of 3,500 cubic feet per second of time was duly filed with the Department on behalf of Loup District. A corrected application was subsequently filed on June 12, 1933. On March 22, 1934, the application was granted. The terms and conditions of the appropriation as contained in the application are as follows: The amount of the appropriation is 3,500 cubic feet per second of time with a priority date of September 15, 1932. The capacity of the plant was to be 49,500 horsepower. The maximum head or fall that it is practical to maintain at the average low water stage of the stream is 126 feet. The plant was to be completed on or before June 30, 1935, and would be put in operation by that date. The order of March 22, 1934, approving the application provided that the water appropriated shall be used for the purpose of developing power and unless unforeseen accident or delay beyond applicant's control shall intervene, (a) excavation or construction shall begin on or before August 24, 1934, (b) applicant shall proceed with diligence and prosecute the work of construction continuously to completion, the period for completion to expire on August 24, 1937, and (c) the time for applying the water to the beneficial use indicated is August 24, 1937. The appropriation was subject to described appropriations of Middle Loup District and North Loup District, about which there is no issue in this case. A lease for the public waters was required to be filed with the Department requiring the payment to the state

of $10 for each one hundred horsepower for all water appropriated. The order lastly provided: "The breach of any of the conditions herein recited shall be ground for cancellation and revocation of this water right in the manner and upon the terms and conditions provided by law, and in the absence of such law, then such cancellation or revocation shall be declared and become effective following the procedural requirements of Section 81-6309 of the Compiled Statutes of Nebraska, 1929."

Section 81-6309, Comp. St. 1929, provided the method by which the Department, after notice and hearing, can forfeit and annul an appropriation of water not being used for some beneficial or useful purpose, or having been so used at one time has ceased to be used for such purpose for more than three years. No proceeding under this statute was ever instituted by the Department to forfeit, annul, or limit the appropriation of Loup District. It seems evident that under this statute the appropriation right, if once completed, remains valid unless and until the Department, by the procedure therein set out, enters its order forfeiting and annulling the appropriative right in whole or in part. Section 81-6309, Comp. St. 1929, as amended, now appears as sections 46-229 to 46-229.05, R. R. S. 1943.

The evidence shows that an application for an extension of time to complete the construction of the project was filed on August 20, 1937, and a further application in lieu thereof on November 15, 1937. On November 20, 1937, the extension was granted by the Department fixing the time for completing the construction under applications Nos. 2287 and 2573 as July 1, 1938. It is one of the contentions of Hickman and the interveners that the construction work was not completed nor the water put to a beneficial use on or before August 24, 1937, the original completion date, nor was the construction work completed and the appropriated water put to beneficial use on or before July 1, 1938, the extended date, if

the order of extension was valid, which Hickman and interveners deny.

It is the contention of Loup District that the terms of the grant of the appropriation right were complied with and that the appropriation of water for power purposes has become absolute and final. The Loup District has asserted the additional defenses of laches, estoppel, and the statute of limitations. It is upon the issues thus raised that the case must be determined.

The water appropriated under application No. 2287 is diverted on the north bank of the Loup River approximately 4 or 5 miles west of Genoa, Nebraska, at which point its diversion works have been constructed. The water is there diverted into a supply canal having a carrying capacity of 3,500 cubic feet per second of time. Approximately 2 miles from the diversion works a desilting basin about 10,000 feet in length has been constructed in the canal. At the lower end of the desilting basin the water passes over a skimming weir which has for its purpose the holding of sand from the river in the desilting basin. An electrically operated power dredge cleans the sand from the desilting basin and dumps it into a sand disposal facility. Fourteen miles down the canal from the diversion point the Monroe generating plant is constructed. After going through or bypassing the Monroe power plant, the water continues down the canal a distance of 17 miles to the Columbus power plant. Two miles or so west of the Columbus power plant the water passes through the Lake Babcock regulating reservoir which covers about 1,200 acres. From the Columbus power plant the water is returned to the Loup River by a tailrace which is approximately 6 miles in length. The Monroe plant is a three-turbine, three-generator plant capable of using a maximum head of water of 29 feet 9 inches. The Columbus plant is likewise a three-turbine, three-generator plant having the capacity to use a maximum head of water of 113 feet 8 inches. The capacity of the Monroe plant is 14,100 horse-

power, while that of the Columbus plant is 49,500 horsepower.

The record shows that the appropriation order on application No. 2287 permits a total head of water of 126 feet. The order of the Department on application No. 2573, authorizing the construction of the Monroe plant without any additional appropriation of water over that granted on application No. 2287, permitted an additional head of water in the amount of 18 feet. The total head of water authorized under applications Nos. 2287 and 2573 was therefore 144 feet.

The cost of construction of the 26-mile supply canal; the head works at the point of diversion; the desilting basin, skimming weir, and dredge; the regulating reservoir known as Lake Babcock; the plants at Monroe and Columbus, including the buildings, turbines, and generating equipment; and the substations adjacent to the power plants were financed by a loan of $6,847,000 by the Public Works Administration of the federal government and a grant of $1,850,000 by the same governmental agency. A second loan in the amount of $1,273,000 and an additional grant of $856,000 were subsequently secured from the Public Works Administration, which were used in part for the construction of transmission lines from Columbus to Lincoln, Fremont, Norfolk, and to a point of interconnection with the Polk County Rural Power District. These loans and grants total $10,826,000. It is stipulated that the Loup District expended $13,000,000 for construction prior to 1957, $9,295,000 of which remains unpaid.

The Loup District has been operating the Monroe and Columbus plants for many years. The amount of electric enegry generated has fluctuated from year to year. In 1961 the Columbus plant produced 126,069,600 kilowatt hours and the Monroe plant produced 30,293,700 kilowatt hours during the same year, a total of 156,363,300 kilowatt hours. The peak production year was 1951 when the Columbus plant produced 131,243,000 kilowatt

hours and the Monroe plant 33,281,330, a total of 164,-524,330 kilowatt hours. The yearly fluctuation can be accounted for on several grounds such as adverse weather conditions that would reduce the natural flow of the stream, unauthorized diversions above Loup District's diversion works, agreements for compensation for interference with its appropriation in lieu of condemnation, and hesitancy in contracting for the sale of the maximum capacity of its plants in view of the uncertainty of a maximum source of production. The evidence shows fluctuations in production over the years, a result that is reasonably to be expected.

The record further shows that Loup District entered into a lease with the state for the use of the public waters of the state for power purposes within the limit of its appropriation as required by section 81-6318, Comp. St. 1929, now section 46-236, R. R. S. 1943. The Department has demanded and the Loup District has paid the sum of $5,011.30 each year beginning with 1937 on application No. 2287, and the sum of $715.90 each year since 1937 on application No. 2573. The formula by which these amounts were calculated includes the rate of diversion as 3,500 cubic feet per second of time and a head of water of 144 feet. The Department did not collect for the year 1936, for the reasons given by the Chief of the Bureau of Irrigation, Water Power, and Drainage in a letter to the State Engineer under date of February 16, 1938, in which it is stated: "These figures are based on 3500 second-feet of water appropriated, measured at the diversion point, and a head of 144 second-feet. Charges for royalties for 1936 were omitted for the reason that no water was diverted from the Loup River by the Loup River Public Power District under Application 2287, for power. The water diverted in 1936 was not by virtue of any appropriation or permit from the State. It was taken and used to soak up the canal and Babcock Lake through tolerance on the part of the State."

The progress made in the construction of the project

was testified to by Paul M. Peterson, chief accountant and deputy treasurer of Loup District. He testified to records, most of which he personally made, which were required by the Public Works Administration and Loup District. The following is a summary of his testimony: Construction was commenced on July 31, 1934. Lake Babcock regulating reservoir was completed on September 8, 1936. The supply canal was completed on September 12, 1936. The tailrace was completed on September 30, 1936. The diversion works were completed on December 5, 1936. The generators and turbines were completely installed on March 31, 1937. The Monroe generating plant was completed on August 24, 1937. The electric power dredge was completed in late August 1937, and after a period of testing was certified as completed on October 31, 1937. The Columbus generating plant was completed on December 11, 1937. All electrical equipment was completely installed on March 15, 1938. Loup District entered into an agreement with Platte Valley Public Power and Irrigation District for the sale, interchange, and purchase of electrical energy on May 28, 1937. The transmission line to facilitate this agreement was built by the Platte Valley Public Power and Irrigation District and was completed in the late fall of 1936. Transmission lines from Columbus to Fremont, Lincoln, Norfolk, and the Polk County Rural Power District were completed by the Loup District on July 1, 1938, August 10, 1938, August 31, 1938, and May 10, 1938, respectively. Substations at Fremont, Lincoln, and Norfolk were completed on July 8, 1938, August 31, 1938, and August 31, 1938, respectively. Loup District commenced the diversion of water through its headgates on December 2, 1936, for the seasoning of the canal. Electrical energy was first generated at the Monroe plant on March 5, 1937, and at the Columbus plant on August 21, 1937. Continuous generation of electrical energy at the Monroe plant was commenced on August 6, 1937, and at the Columbus plant on October 20, 1937. The generation of

electricity was used for some time thereafter for station use and in dredging operations at the desilting basin. A part of the energy produced from October 20, 1937, to July 1, 1938, was sold to Platte Valley Public Power and Irrigation District and the Polk County Rural Power District. Electrical energy has been continuously produced by the Columbus and Monroe hydroelectric plants since July 1, 1938, and Loup District presently sells to Consumers Public Power District, 27 rural public power districts and membership cooperatives, 8 municipalities, and others such as ammunition depots and other governmental agencies.

The evidence shows that the Lake Babcock regulating reservoir enables the Columbus plant to generate electrical energy in excess of the amount carried in the canal above Lake Babcock for 3 or 4 hours because of its storage capacity. This enables the Columbus plant to pick up peak loads for 3 or 4-hour periods. During the periods when the demand is low the Columbus plant is able to relieve the thermal plants operated by Loup District and thereby reduce fuel costs in those plants. The Monroe plant has no regulating reservoir and no ability to increase its production during peak periods. Since the water used at Monroe is much less than the capacity of the supply canal, its production is limited by its generating capacity and not by its water supply, while the opposite is true within limits at the Columbus plant.

It is here contended by Hickman and the interveners that Loup District failed to construct its facility and put its appropriated water to public use on or before August 24, 1937. It is also contended that the purported extension granted by the Department to July 1, 1938, was unauthorized and void. It is further contended that if the extension was valid, Loup District failed to put its appropriated water to designated use within the extended time. It is necessary therefore to determine the date when construction was required to be completed and the

water put to the designated use. This in turn requires a determination of the validity of the order of the Department extending the completion date from August 24, 1937, to July 1, 1938, and if unauthorized, the effect thereof on the appropriation rights of Loup District under the existing facts and circumstances.

On August 20, 1937, Loup District filed an application for an extention of time of its completion date. On November 15, 1937, it filed a second application in lieu of the first application. The only change in the two appears to be the addition of a verification to the original application. The extension of time was granted by the Department on November 20, 1937. It is contended that the application was made out of time. In Pool v. Utah County Light & Power Co., 36 Utah 508, 105 P. 289, the court in passing on this question held that the state engineer could extend the time if not beyond the final limit fixed by the statute, although the application therefor is made after the time first fixed by him has expired. The applicable statute in the present case, section 81-6313, Comp. St. 1929, now section 46-238, R. R. S. 1943, provided that the completion date shall be fixed by the Department in the original appropriation and shall be final notwithstanding the ordinary delays and casualties that must be expected and guarded against, but, although the construction must proceed vigorously, diligently, and uninterruptedly to completion, such requirement is limited by the words "unless temporarily interrupted by some unavoidable and natural cause." The quoted words have been interpreted by this court to empower the Department to extend the completion date where the delay is the result of an unavoidable and natural cause. In re Application of Babson, 105 Neb. 317, 180 N. W. 562; North Loup River Public Power & Irr. Dist. v. Loup River Public Power Dist., 162 Neb. 22, 74 N. W. 2d 863. The effect of the statute is to fix the completion date as the designated date contained in the Department's order approving the application, plus any delays resulting from

unavoidable and natural causes. Since the Department, then as now, is given jurisdiction over all matters pertaining to water rights for irrigation, power, or other useful purposes, it is for the Department to determine if delays resulted from unavoidable and natural causes. While the statute does not require the filing of an application for an extension of time when construction is temporarily interrupted by some unavoidable and natural cause, this court in the cases above cited has recognized a written application for an extension of time as a means of invoking the powers of the Department in administering the statute. The order granting the extension of time in the present case states that upon examination of the petition for extension and the records on file regarding the progress and development of the project, it is ordered that the completion date be extended to July 1, 1938. This order is clothed with the presumption of regularity and validity. There is evidence in the record that after a proper installation of the turbines and generators in the Columbus plant, a settling of the concrete caused a misalignment of the vertical shafts between the turbine and the generator on each of the three units. Since the turbines and generators, and the shafts which transmit power from the turbines to the generators, all operate at high speeds, many weeks were required to correct and test the equipment before it could be operated under load. Loup District was advised by its consulting engineers that if these units were used before the corrections were made they would assume no responsibility for resulting damage. The delay resulting was without fault on the part of the Loup District and came within the statute authorizing additional time for temporary interruptions by some unavoidable and natural cause. We must assume that the Department was aware of conditions on this development from progress reports on file and the reports of its field representatives. While the regularity of the extension order must be presumed, the evidence in the record does dis-

close that adequate grounds actually existed which would sustain its issuance. We are of the opinion that the extension of time to July 1, 1938, for the completion of the construction of the project was authorized and valid, and that the director was in error in holding the extension to be void.

It is the contention of Loup District that the approval of application No. 2287 by the Department was a conditional grant in praesenti of 3,500 cubic feet of water per second of time subject to the conditions imposed which is divested for breach of condition if, but only if, the person having the power chooses to exercise it. It is then urged that as the Department has not chosen to exercise its authority to terminate the grant for breach of condition, there could be no forfeiture without judicial or legislative action. Admittedly no such action has been taken to forfeit the appropriation right and it is therefore contended by Loup District that, after construction and many years of operation, the right to forfeit is waived and lost. It is contended by Hickman and the interveners that the order approving the application for an appropriative right was contingent and subject to conditions precedent. It is asserted that the grant being thus limited, there is no vesting of a right until the limitations and conditions precedent have been met within the time specified. We do not deem it necessary to engage in a discussion of the nature of the appropriative right as to being a grant on condition subsequent or a limited grant on condition precedent, in view of our subsequent holding herein that all conditions and limitations contained in the orders approving applications Nos. 2287 and 2573 have been met within the prescribed time.

We think the evidence in this case previously recited in this opinion establishes that construction of the power facility, including the diversion works, supply canal, tailrace, power stations, and generating equipment, was completed on or before July 1, 1938, the extended date for the completion of such construction. It is true that due to

the lapse of time the records of Loup District must be relied upon to a great extent in determining this question. Hickman and the interveners rely largely upon alleged admissions by officers of Loup District to support their contention that construction was not completed on or before July 1, 1938. Most of the admissions go to the question as to whether or not construction was complete and the appropriated water put to a public use prior to August 24, 1937. These admissions lose their import with the upholding of the validity of the extension of time fixing the completion date as July 1, 1938. The evidence also shows a report by Loup District that construction in the amount of $496,227.34 remained to be performed on July 1, 1938, and $474,856.61 remained to be performed as of August 1, 1938. Hickman and the interveners made no attempt to show the nature of the construction remaining to be performed on and after July 1, 1938. The evidence of Loup District is that the construction remaining to to be performed on or after July 1, 1938, was transmission lines and other work incidental only to the production of power. The evidence of Hickman and the interveners will not sustain a finding that construction on the project was not completed prior to July 1, 1938, in accordance with the requirements of Loup District's appropriative grant and the plans and specifications submitted to and approved by the Department.

The finding that the construction was completed within the prescribed completion date requires the determination of a second question of equal importance, to wit, were the waters appropriated by application No. 2287 put to beneficial use within the time specified by law and the conditions of the grant? The question as to when an appropriation of the water of a stream for power purposes is put to beneficial use appears to present a case of first impression in this state. Its consideration requires an examination of the applicable constitutional and statutory provisions and the public policy of the state as revealed therein.

The Constitution declares the necessity of water for domestic use and for irrigation purposes to be a natural want. Art. XV, § 4, Constitution of Nebraska. It is the public policy of the state to maintain a rigid economy in the use of the public waters of the state. One of the primary purposes of the state in providing for its control and administration of public waters is to avoid waste and to secure the greatest benefit possible from the water available for appropriation for public use. The application of water to a beneficial use operates as a condition subsequent which in fact fixes the extent of the right originally acquired. State v. Birdwood Irr. Dist., 154 Neb. 52, 46 N. W. 2d 884.

The Department is given exclusive jurisdiction over all matters pertaining to water rights for irrigation, power, or other useful purposes. It is charged with the duty of administering the waters of streams in accordance with adjudicated appropriations of water in order of priority. In the granting of an application for the appropriation of water from a stream, the Department must fix the terms thereof. The statute requires that within 6 months from the grant of an appropriation right the applicant must commence the excavation or construction of the works in which it is intended to divert the water and that the applicant shall vigorously, diligently, and uninterruptedly prosecute such work to completion unless temporarily interrupted by some unavoidable and natural cause. These provisions require a prompt and economical use of appropriated water. An appropriator will not be permitted to retain the right to water which he does not put to beneficial use and thus deprive others of its benefits. Compliance with the conditions of the grant are enforced to require a prompt use of water or the loss of the right for the benefit of others.

Hickman and the interveners contend that the rule applied in North Loup River Public Power & Irr. Dist. v. Loup River Public Power Dist., 162 Neb. 22, 74 N. W. 2d 863, is applicable here and should be applied to de-

feat the appropriation right of Loup District for failure to put its appropriation of water to a beneficial use within the time specified. The cited case is one involving an appropriation of water for irrigation purposes. Such an appropriation right requires the fixing of the rate of diversion, the volume of water to be applied to the land, the description of the specific lands to which water is to be applied, and the application of water to the land within the time fixed. The statute then in existence did not authorize an extension of time. It did in effect provide for an extension for temporary interruptions of construction by some unavoidable and natural cause. There was no evidence warranting an extension on such ground in that case and consequently the application of water to the land described in the application had to be made within the time fixed. Water was not so applied to all of the described lands. The effect of our opinion was to reduce the appropriation of water to the amount used to irrigate the lands in the district to which water had been applied within the time fixed. In the case of an appropriation for irrigation, the beneficial use required is spelled out in the application and grant. Beneficial use in such a case culminates when water has been applied to land described in the application. The appropriation right is therefore limited to the lands described in the application to which water was beneficially applied within the time prescribed by the order approving the application.

On the other hand, an appropriation of water for power purposes requires the fixing of the rate of diversion only. There are no requirements for the fixing of the volume of water diverted under a power appropriation. There is no spelling out of any act beyond the completion of construction that must be performed to constitute putting appropriated waters to beneficial use, as in the case of an irrigation appropriation. The inherent differences in the two uses and the differences in statutory requirements necessitate a difference in result in determining

what constitutes putting to a beneficial use in the two instances.

The applicable statute, section 81-6316, Comp. St. 1929, now section 46-233, R. R. S. 1943, provided in part: "The application shall set forth the name and post-office address of the applicant, the source from which said appropriation shall be made, the amount thereof as near as may be, the location of any proposed work in connection therewith, the time required for its completion, which shall embrace the period required for the construction of the ditches thereon, the time at which the application of the water for the beneficial purposes shall be made, which shall be limited to the time required for the completion of the work when prosecuted with diligence, the purpose for which water is to be applied, and, if for irrigation, a description of the land to be irrigated thereby, and the amount thereof and any additional facts which may be required by the department of public works." A second applicable statute, section 81-6318, Comp. St. 1929, now section 46-234, R. R. S. 1943, provided in part: "In case of an application for an appropriation of water for the development of water power, the department shall promptly act upon such application *and limit the time within which such appropriation shall be perfected to the period within which the proposed power project can be completed by uninterrupted and expeditious construction.*" (Emphasis supplied.) The emphasized portion of the statute clearly states that the appropriation of water is completed when construction is completed.

It will be further noted that there is no requirement as to any amount of power to be produced to constitute beneficial use within the meaning of the statute; nor is there any requirement that a sale of electrical energy be had to the extent of the capacity of the facilities or any part thereof; nor is there any requirement that transmission lines be built and energized in whole or in part to establish the putting of the facility to a bene-

ficial purpose or use. In fact, there is no equivalent in the completion of a water power appropriation to the requirement in an irrigation appropriation that the land to be watered be described and water applied in beneficial quantities within the completion date. Considering the differences in the statutes as they relate to power and irrigation appropriations and the inherent difference in the purposes of each, we conclude that an appropriation for power purposes is perfected when the necessary facilities are constructed and the plants placed in operation. Unless this construction of the statutes be correct, the development of water power would contain elements of risk and uncertainty that would defeat the purposes of the controlling statutes.

Hickman and the interveners consider the problems involved here as though they relate to an appropriation of water to a body of specifically described lands. This is not a question involving any such situation. The problem here is the determination of the rule to be applied to an appropriator whose purpose is the generation of hydroelectric power for sale to the public. There is ample reason for holding in accordance with the statute that the appropriation is complete when the works are constructed and some water is diverted and converted into hydroelectrical energy. The law of this case is that the appropriated water shall be put to beneficial use on or before July 1, 1938. There is no statutory provision as to the amount that shall be put to such use. As stated in City & County of Denver v. Sheriff, 105 Colo. 193, 96 P. 2d 836: "Courts are not to shut their eyes to the realities of business life."

In a somewhat similar case involving an appropriation of water for sale to others, the Montana court stated as follows: " 'If the intended appropriator constructs the works and appliances necessary for the diversion of the water and the carrying of it to points where its use is desirable and profitable, and has actually carried it there, or is ready and willing to do so, and offers it to

all persons who are willing to pay for its use, we apprehend that his appropriation is complete, though the persons to whom it is thus offered refuse to receive or use it. They certainly cannot thus defeat the rights of the diverter.' To deny the right of a public service corporation to make an appropriation independently of its present or future customers, and to have a definite time fixed at which its right attaches, would be to discourage the formation of such corporations and greatly retard the reclamation of arid lands in localities where the magnitude of the undertaking is too great for individual enterprise, if, indeed, it would not defeat the object and purpose of the United States in its great reclamation projects, * * *. Respectable authority can be found holding contrary to our view; but upon a consideration of our statutes, the history of the law of appropriation, and the public policy of this state, we base our conclusion that, as to a public service corporation, its appropriation is complete when it has fully complied with the statute and has its distributing system completed and is ready and willing to deliver water to users upon demand, and offers to do so." Bailey v. Tintinger, 45 Mont. 154, 122 P. 575.

This conclusion is indicated in Kearney Water & Electric Powers Co. v. Alfalfa Irr. Dist., 97 Neb. 139, 149 N. W. 363, wherein it is stated: "The state board in this case was not called upon to grant water for power. Its duty was to determine the validity and extent of an alleged completed appropriation. Under the present statute appropriations may be abandoned, and the plaintiff's appropriation for power purposes should be regarded as abandoned, except so far as it had equipped itself to utilize it for that purpose when the act of 1889 took effect, or did so equip itself within a reasonable time thereafter."

Since the appropriation was complete on July 1, 1938, and no issue of abandonment or nonuser thereafter is made, the appropriation remains valid until the issue

of abandonment or nonuser is questioned by a proper proceeding commenced under sections 46-229 to 46-229.05, R. R. S. 1943. Loup River Public Power Dist. v. North Loup River Public Power & Irr. Dist., 142 Neb. 141, 5 N. W. 2d 240. It is fundamental that the limitations on Loup District's appropriative right restrict that district only and do not amount to a grant to Hickman or the interveners. Loup District derives its rights solely from its grant and, the grant having a priority as to time to the rights of Hickman and interveners, all its rights growing out of applications Nos. 2287 and 2573 are superior to those belonging to Hickman and interveners.

This conclusion appears to have been the one adopted by the Department since 1937. In 1937 the Department entered into leases with Loup District for the payment of $10 for each 100 horsepower for all water appropriated. Some water was diverted and used for the generation of electric energy during that year. For that year and each succeeding year since that time Loup District has paid a total of $5,727.20 based on a diversion rate of 3,500 cubic feet per second of time and a total head of 144 feet. During all the years that these payments have been made, the Department has in effect treated applications Nos. 2287 and 2573 as completed and valid. The Department has in effect treated the completion of construction and the use of some water for power purposes as a completed appropriation, including the putting of the appropriated waters to a beneficial use. This administrative construction, for a period of 25 years, supports the conclusion reached in this opinion that the completion of construction and the placing of the plants in operation, meet the requirements of the statute that the appropriation be put to a beneficial use.

Hickman and the interveners contend that the extension of time to July 1, 1938, extended the time only for purposes of construction and did not purport to extend the time in which the appropriation of water must be put to a beneficial use. We can find no merit in

this contention. It would appear most illogical to hold that the extension of time applied only to the completion date for the construction of the facility and at the same time hold in effect that the appropriation must be put to a public use almost a year before the construction was required to be completed. The extension of time to put to a beneficial use inheres in the extension of time to complete construction.

Loup District complains of the order of the director in reducing the total head of water that it could use at the Columbus and Monroe generating plants from 144 feet to 126 feet. The increase of the head by 18 feet by application No. 2573, duly granted, in no manner increased the rate of diversion of 3,500 cubic feet per second of time, approved in application No. 2287. Consequently it in no manner affected the rights of junior appropriators. Since Hickman and the interveners have suffered no injury nor damage by the grant of the additional head of 18 feet, they cannot raise this issue. The increase of the total head to use the same water in two plants instead of one, or even to make additional use of water in two existing generating plants, appears to be consistent with the policy of the state's appropriation laws to avoid waste and to secure the greatest benefit possible from the use of the public waters of the state. The Department was required, we think, to grant application No. 2573 unless its grant was not safe, feasible, or not in the public interest. No showing is made that the order granting the additional 18 foot head was in any manner an improvident one. The order granting application No. 2573 was a proper exercise of the powers lodged in the Department. The holding of the director, that the order granting the increase of total head by 18 feet was void, is consequently in error.

A cross-appeal has been taken in this case. The principle contention taken on cross-appeal is that Loup District's appropriation should have been held to be wholly void, and that the finding of the director that Loup Dis-

trict's claimed total head of water was valid to the extent of 126 feet was in error. All questions raised on cross-appeal are answered by what we have heretofore said. They have been answered adversely to the contentions of the cross-appellants and we therefore hold without further discussion that the cross-appeal cannot be sustained.

The order of the Director of Water Resources is reversed and the petition and petitions in intervention are dismissed. The costs are taxed to petitioner and interveners.

REVERSED AND DISMISSED.

LUMIR PETRACEK, APPELLEE, V. HAAS O.K. RUBBER WELDERS, INC., A CORPORATION, APPELLANT.
126 N. W. 2d 466

Filed February 21, 1964. No. 35561.

1. **Trial: Evidence.** The burden of establishing a cause of action by circumstantial evidence requires that such evidence, to be sufficient to sustain a verdict or require submission of a case to a jury, shall be of such character and the circumstances so related to each other that a conclusion fairly and reasonably arises that the cause of action has been proved.
2. **Trial: Damages.** The burden of a plaintiff relying on circumstantial evidence to sustain a cause of action for damages does not require him to exclude the possibility that damages flowed from some cause other than the one on which he relies.
3. **Negligence.** A party claiming contributory negligence as a defense has the burden of proving it.
4. **Witnesses: Trial.** Ordinarily it is error to permit an expert witness to give his opinion on the ultimate fact to be determined by the jury.
5. **Witnesses: Evidence.** It is not a valid objection to the evidence of an expert that the answer covers the whole ground the jury is to decide, if the case is one to be wholly resolved by such evidence.

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

Cline, Williams, Wright, Johnson, Oldfather & Thompson and Richard R. Endacott, for appellant.

Chambers, Holland, Dudgeon & Hastings, for appellee.

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

YEAGER, J.

This is an action for damages based upon alleged negligence filed in the district court for Lancaster County, Nebraska, by Lumir Petracek, plaintiff, against Theo O. Haas, doing business as OK Rubber Welders, and T. O. Haas Tire Company, defendants. After the action was instituted an amended petition was filed in which Theo O. Haas remained as a party defendant and Haas O.K. Rubber Welders, Inc., a corporation, was named as a party defendant. In this wise the case was presented to the district court and is presented to this court. The plaintiff is appellee here and Haas O.K. Rubber Welders, Inc., is appellant. The action as to the defendant Theo O. Haas was decided in his favor, hence he is not a party to the proceeding in this court.

The action was pleaded in three causes of action. The first cause of action was for damages on account of alleged personal injuries to plaintiff flowing from an accident occurring on August 4, 1961, which the plaintiff claims resulted from negligence attributable to the defendant.

The second cause of action is based on the alleged negligence contained in the first cause of action and it is for damage to an automobile belonging to the plaintiff. The third cause of action was dismissed and no appeal from the dismissal was taken. No further reference to it is required.

The case was tried to a jury and a verdict was returned in favor of the plaintiff on the first cause of action for $15,000 and on the second for $1,420. Judgment was duly rendered in favor of the plaintiff and against

the defendant for the amounts specified in the verdict.

At the conclusion of the evidence and prior to the submission of the case to the jury the defendant moved for dismissal of the action or in the alternative for a directed verdict. This motion was overruled.

After the verdict was returned the defendant moved for a judgment in its favor notwithstanding the verdict or in the alternative for a new trial, which motion was overruled. It is from the order overruling this motion and the judgment that the appeal herein was taken.

A brief recital of the pleaded facts relating to causation which are the basis of the action here is that the plaintiff on or about July 22, 1961, purchased from the defendant four new tubeless automobile tires which the defendant agreed to and by its employees did install upon the four wheels of a 1960 Ford Tudor Sedan; that thereafter the plaintiff on August 4, 1961, drove on U. S. Highway No. 77 with his family to a point in the State of Kansas about 4 miles south of Florence, Kansas; that at that time the automobile became unmanageable, pulled strongly to the right shoulder, then went into the ditch on the left-hand side and turned over three times; and that the plaintiff sustained severe, painful, and permanent injuries, all of which were proximately caused by the failure of the defendant to securely tighten the lug bolts on the left rear wheel of the automobile, as the result of which the lug bolts became loosened and worn and the wheel became dislodged from its normal position and ultimately became detached from the automobile.

It is pointed out here that the acts charged against the defendant were performed by employees, but the court instructed the jury that, if they constituted negligence, they were chargeable against the defendant, and to this instruction there is no objection.

By the petition injuries to the plaintiff are pleaded as are also damages to his automobile. These allegations do not require review herein since the defendant by

answer admits that there was an accident, injuries to the plaintiff, and damage to his automobile, and does not on this appeal raise any question as to the amount fixed by the jury as damages which plaintiff sustained. By the appeal it is contended only that there was no liability on the part of the defendant.

The defendant filed an answer in which it admitted the sale and installation of the tires as pleaded by the plaintiff but denied any improper and negligent installation. Further answering the defendant in the following words said: "The defendants allege that said accident was proximately caused or contributed to by the negligence and carelessness of the plaintiff." The answer also contained the following: "Said accident occurred in the State of Kansas and Kansas does not have a comparative negligence statute similar to the comparative negligence statute of the State of Nebraska." These allegations of the answer will be adverted to herein.

A review of the evidence on which the determination here must be made discloses that the plaintiff was the owner of a 1960 Ford automobile which he had purchased at about Thanksgiving Day of 1959; that he alone operated it and had operated it about 42,000 miles up to the time the new tires were purchased in July 1961; that after the change of tires until he started on the trip referred to he had driven it 50 to 60 miles; that thereafter on the trip and up to the time of the accident he operated it about another 200 miles; and that after he had traveled on the trip about 200 miles the automobile became unmanageable and the right wheels left the traveled portion of the right side of the road and moved forward on that side for a distance of about 249 feet, then came back and went forward about 129 feet when it left the road and turned over in the ditch about 500 feet from the point where it became unmanageable.

Returning to the incident of the change of tires and the connected subsequent event, the evidence discloses

that the plaintiff, at the place of business of the defendant, arranged for and purchased four new tires; that the old tires were removed and were replaced by the new tires; that the plaintiff did not participate in making the change of tires; that after the change was made he was informed his automobile was ready; and that he observed that the left rear hubcap had not been replaced whereupon he started to replace it, but an employee of the defendant intervened and replaced the hubcap. Immediately after this the plaintiff drove the automobile away and used it as has already been stated up to and including the time of the accident.

After the accident the automobile was removed by a tow car to which it was attached. After it had been removed a distance of about ½ mile the left rear wheel came off and the corner of the automobile dropped to the road. The hubcap was removed and inside were found the nuts from the five stud bolts which were necessary to hold the wheel in proper position for use. There was no appreciable damage to the threads of either the nuts or bolts. There was some enlargement in the holes through which the bolts passed which are not closely described. There were some metal particles found which probably were produced by the action which caused the enlargement of the holes which were for the passage of the bolts which secured the wheel to the hub.

These bolts were for the purpose of securing the wheel to the hub and to secure the wheel it was necessary that the nuts should be firmly tightened on the stud bolts which extended from the inner side of the hub outward to the outside of the attached wheel. This attachment properly involves the tightening of the nuts to the extent of the threads on the bolts. This involves about nine or ten turns. Usually approximately two turns are made by hand and the remainder by a mechanical device designed for that purpose. This was the practice employed in the business of the defendant, and the prac-

tice which the defendant urges was employed in this instance.

Liability here depends upon whether or not, from the evidence, it may be said that the wheel was properly, sufficiently, and safely installed before the automobile was removed, and if it may be said that it was not so installed, was that negligence the proximate cause of the accident and the injuries and damages sustained by the plaintiff?

The identity of the employee or employees who changed the tires is not certainly known, and this is also true as to the identity of the employee who replaced the hubcap before the automobile was taken away. There is no direct information as to the position of the nuts on the bolts at the time the hubcap was placed on the wheel. It is known that the other three hubcaps had been replaced but the one for the left rear wheel was lying on the floor under the wheel from which position it was picked up and put in place by an employee of the defendant. No one suggests that any duty devolved on the plaintiff to ascertain whether or not the wheel had been properly attached.

The plaintiff, to sustain his allegations of negligence, adduced evidence to prove that his automobile would not and could not have become unmanageable and the accident would not have happened if the wheel had been properly installed, and particularly if the nuts had been tightened on the bolts. This conclusion was based by witnesses on the evidence of findings which have been reviewed herein coupled with inferences arrived at by witnesses who disclosed a familiarity gained by general experience in the installation and observations thereafter of such matters, and on the testimony of an engineer who testified as an expert witness.

Without going into detail as to the testimony of these witnesses it may be said that the thus stated opinions and inferences were that failure to properly tighten the nuts on the lug bolts allowed and caused them to

drop off and that this was the cause of the loss of control of the automobile and of the accident in which the plaintiff was injured and damaged, or in other words was the proximate cause.

There was no competent evidence of probative value in the case supporting a reasonable inference other than the one contended for by the plaintiff. It is true that stud bolt nuts could be removed from bolts other than as the plaintiff contends, but nothing in the nature of a hypothetical situation or otherwise was advanced which embodied a situation such as was involved in this case.

It must be said therefore that the only reasonable inference which flows from the evidence in this case is the one contended for by the plaintiff.

It is of course true from what has been said herein that the proof of negligence is dependent upon circumstantial evidence. In this connection the defendant asserts that the evidence of causation is insufficient to satisfy the burden exacted by the circumstantial evidence rule.

To support its contention that here the circumstantial evidence rule was not satisfied by the evidence in the case the defendant cites Howell v. Robinson Iron & Metal Co., 173 Neb. 445, 113 N. W. 2d 584, and other cases. In that case it was said: "The burden of establishing a cause of action by circumstantial evidence requires that such evidence, to be sufficient to sustain a verdict or require submission of a case to a jury, shall be of such character and the circumstances so related to each other that a conclusion fairly and reasonably arises that the cause of action has been proved."

In the case it is also stated: "The burden of a plaintiff, relying on circumstantial evidence to sustain a cause of action for damages, does not require him to exclude the possibility that damages flowed from some cause other than the one on which he relies." See, also, Bedford v. Herman, 158 Neb. 400, 63 N. W. 2d 772; Baer v. Schaap, on rehearing, 171 Neb. 347, 106 N. W. 2d 468.

By the terms of these pronouncements this was a case which the court was required to submit to a jury for determination. There was no evidence which required submission under any other theory.

The defendant urges that the verdict should be set aside on the ground that the court instructed the jury erroneously and in a misleading manner on the question of contributory negligence. The contention however is without substantial merit. There was, in the light of the record, no basis for the giving of an instruction with relation to a defense of contributory negligence. There was no pleading of a specific act of contributory negligence. None was mentioned in the alternative motion for new trial or for judgment notwithstanding the verdict and none in the assignments of error, and from the record made it becomes clear that there was no competent evidence of probative value to sustain such a defense.

A party claiming contributory negligence as a defense has the burden of proving it. Mundy v. Davis, 154 Neb. 423, 48 N. W. 2d 394; Garska v. Harris, 172 Neb. 339, 109 N. W. 2d 529. In this case there was a total absence of proof.

In the light of the absence of proof of contributory negligence it was error for the court to instruct at all on contributory negligence, but this was in nowise prejudicial to the defendant. The total effect was to give the defendant by the instruction the benefit of a rule of law to which it was not entitled, which, if it had any effect at all, favored the defendant.

The defendant urges that it is entitled to reversal of the judgment on the ground that the court erroneously admitted in evidence the opinion of an expert witness as to causation of the accident and also the opinion of another witness not qualified as an expert as to causation.

As to the latter of these witnesses he did in a practical sense testify from past experience and knowledge as to the effect of improper tightening of nuts on lug bolts and in effect gave it as his opinion that the cause of the

accident was failure to properly tighten the nuts on the bolts. Whether or not he be denominated an expert, he demonstrated by his testimony expert knowledge in the field of inquiry. It appears that both of the witnesses should be regarded as within the classification generally known as expert witnesses.

Ordinarily it is error to permit an expert witness to give his opinion on the ultimate fact to be determined by the jury. Danner v. Walters, 154 Neb. 506, 48 N. W. 2d 635.

This however is not an invariable rule. In McNaught v. New York Life Ins. Co., on motion for rehearing, 143 Neb. 220, 12 N. W. 2d 108, a departure is contained. It is there stated: "It is not a valid objection to the evidence of an expert that the answer covers the whole ground the jury are to decide, if the case is one to be wholly resolved by such evidence." See, also, Medelman v. Stanton-Pilger Drainage Dist., 155 Neb. 518, 52 N. W. 2d 328; Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N. W. 2d 151. The case here is one which comes within the exception to the general rule. The court did not err in admitting the testimony of these witnesses.

The assignments of error as grounds for reversal are without substantial merit, and the judgment of the district court should be and it is accordingly affirmed.

AFFIRMED.

VINCENT CASTER, APPELLANT AND CROSS-APPELLEE, V. DALLAS MOELLER, APPELLEE AND CROSS-APPELLANT.

126 N. W. 2d 485

Filed February 28, 1964. No. 35453.

SUPPLEMENTAL OPINION

1. **Appeal and Error: New Trial.** Where the court is convinced upon a review of the whole case that the jury has settled the issue as to responsibility fairly and upon sufficient evidence, so

that dissociated from other questions it ought to stand as the final adjudication of the rights of the parties, and that there has been such error in the determination of damages as to require the setting aside of the verdict, a new trial as to damages alone may properly be ordered.

2. ———: ———. Where a judgment in favor of the plaintiff in a tort action is reversed, the practice is, where the requisite conditions for the limitation of a new trial to the issue of damages are satisfied, to direct the new trial to be so limited.

Appeal from the district court for Cuming County: FAY H. POLLOCK, Judge. On motion for rehearing. See *ante* p. 30, 125 N. W. 2d 89, for original opinion. Motion for rehearing overruled.

John McArthur, for appellant.

Thomas E. Brogan, for appellee.

Cassem, Tierney, Adams & Henatsch, for amici curiae.

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

BROWER, J.

Our opinion in this case is set out in Caster v. Moeller, *ante* p. 30, 125 N. W. 2d 89.

The defendant and appellee, Dallas Moeller, herein referred to as defendant, filed a motion for rehearing herein. He urges this court erred in remanding this cause for retrial on the issue of damages only contending the whole case should again be tried on all issues. His contention requires a clarification of our decision by supplemental opinion.

Defendant cites in support of this position the following prior decisions of this court, Cerny v. Paxton & Gallagher Co., 83 Neb. 88, 119 N. W. 14, and Harman v. Swanson, 169 Neb. 452, 100 N. W. 2d 33.

The first case so cited, Cerny v. Paxton & Gallagher Co., *supra*, decided in 1908, lends support to the defendant's position. Later however in the case of Harper v. Young, 139 Neb. 624, 298 N. W. 342, this court remanded

the cause for trial on the issue of damages only. The applicable rule of law stated in the syllabus in that case is there set out: "When error exists as to only one or more issues and the judgment is in other respects free from error, and it is clear that no injustice will result from so doing, the reviewing court may, when remanding the cause for a new trial, limit the new trial to the issues affected by the error whenever these issues are entirely distinct and separable from matters involved in other issues and the trial can be had without danger of complication with other matters."

This court has recently remanded a cause for trial as to damages only. McCarty v. Morrow, 173 Neb. 643, 114 N. W. 2d 512.

In the other case cited by the defendant, Harman v. Swanson, *supra,* the decision does not reach to the power of either the appellate or trial court to direct the retrial of a cause on the issue of damages only. The decision therein was that a motion for a new trial under our statute must be in the alternative or otherwise for a complete new trial. It held that such a motion must give the trial court, in terms, the opportunity to grant a new trial. The opinion says: "A motion which does not afford the trial court an opportunity, in terms, to grant a complete new trial, is not a motion for a new trial within the purview of the statute." The decision prevents a party seeking further relief while clinging to what has been given him and refusing to expose that portion to the judgment of the court. The earlier case of Cerny v. Paxton & Gallagher Co., *supra,* was cited by the court therein to show the necessity for the trial court to examine all the issues of the trial on the consideration of the motion. Its quotation from Cerny v. Paxton & Gallagher Co., *supra,* however continued and did cite portions thereof which might indicate this court had reapproved the portion of the ruling in that case which stated that a "new trial must be awarded upon all the issues of fact."

That the cases in most jurisdictions agree with the rule of law stated in Harper v. Young, *supra*, is made obvious by the large collection of citations in the recent note in 29 A. L. R. 2d 1199, on the propriety of limiting to an issue of damages alone the new trial granted on the ground of inadequacy of damages awarded, and a still later one on the "separate trial of issues of liability and damages in tort." 85 A. L. R. 2d 9. No good purpose would be served in reviewing the many cases cited.

In paragraph 13 of the note in 85 A. L. R. 2d, page 42, are grouped the cases with respect to the power of the trial court and it is stated that in most jurisdictions where it is permissible to limit the new trial to the issue of damages, the power to do so may be exercised by the trial court.

In paragraph 15 of this note on page 61, it is stated that in most jurisdictions where a judgment in favor of the plaintiff in a tort action is reversed, the practice is, where the requisite conditions for the limitation of a new trial to the issue of damages are satisfied, to direct the new trial be so limited, citing Harper v. Young, *supra*. The reason back of these rules is stated in 39 Am. Jur., New Trial, § 22, p. 46, thus: "The guiding principle is that although a verdict ought not to stand which is tainted with illegality, there ought to be but one fair trial upon any issue, and that parties ought not to be compelled to try anew a question once disposed of by a decision against which no illegality can be shown. Thus the parties and the state have been saved the expense, annoyance, and delay of a retrial of issues once settled by a trial as to which no reversible error appears."

A brief on the motion for rehearing filed by attorneys for amici curiae herein urges that even though the court in a proper case might possess the power to limit the new trial to the issue of damages, it cannot do so in the present case. It urges that in the case before us where the negligence of the defendant and the contributory negligence of the plaintiff are involved and contributory neg-

ligence has not been removed as an issue by this court in its opinion, the defendant is entitled to have the jury at the new trial pass on the issue of liability, comparing anew the respective negligence of the parties. It urges that to submit the sole issue of damages is at variance with the purpose and objective of our comparative negligence statute. This aspect of the question involved here does not purport to be covered as such by either of the notes referred to in A. L. R. The briefs on motion for rehearing cite certain cases where this court has discussed the submission to the jury of the issues of the question of liability and damages together where negligence and contributory negligence were involved. They do not include any discussion of the power or propriety of the appellate court to limit the retrial of a cause to damages only where liability has been determined by a jury. They have no significance in regard to the precise question before us.

We find no cases from this court which determine the problem before us and few from other jurisdictions. Those which we do find are not in agreement. In the case of Hanisch v. Body, 77 S. D. 265, 90 N. W. 2d 924, the court adopted the view urged by the defendant and the amici curiae. On the other hand other courts have submitted the issue of damages only to the jury even where the issue of comparative negligence with respect to damages remained. Vaughan v. Bollis, 221 Miss. 589, 73 So. 2d 160, was a case which was remanded for trial as to damages only but the appellate court stated: "We hold that upon a retrial of this case, all of the facts should be presented to the jury on the question of negligence of all parties, including appellant, and the jury will have the right to apportion damages under the comparative negligence statute." This case was thereafter approved and followed with respect to the same rule in the late case of Cherry v. Hawkins (1962), 243 Miss. 392, 137 So. 2d 815.

The judgment based on the verdict in the present case

was set aside because certain elements of damages were by the instructions of the trial court withdrawn from the jury when our review of the evidence convinced us they should have been submitted.

In 39 Am. Jur., New Trial, § 24, p. 48, in speaking of new trials granted on the issue of damages only, it is stated: "In most cases damages and other issues are so blended and interwoven as to make it improper for the court to restrict a new trial to the question of damages alone. The instances in which a new trial upon the issue of damages alone may be proper are comparatively infrequent. Where it appears that the verdict was the result of a compromise, such error taints the entire verdict and requires a new trial as to all of the issues in the case. And of course, where the existence of responsibility is not established, it is not proper for the court to grant a new trial solely on the issue of damages. Yet, where the court is convinced upon a review of the whole case that the jury have settled the issue as to responsibility fairly and upon sufficient evidence—so that dissociated from other questions it ought to stand as the final adjudication of the rights of the parties—and that there has been such error in the determination of damages as to require the setting aside of the verdict, a new trial as to damages alone may properly be ordered, although this cuts off evidence which, if introduced with respect to other issues, might mitigate damages, all such evidence being admissible on the issue as to damages."

In the present case we are convinced on reviewing the evidence that the jury has so settled the issue of responsibility fairly and on sufficient evidence. In such a situation we are justified in remanding the cause for a trial as to damages only. We think however on a retrial of such causes the rule adopted in Vaughan v. Bollis, *supra,* and Cherry v. Hawkins, *supra,* should be applied.

The decision in our previous opinion is adhered to. The case of Cerny v. Paxton & Gallagher Co., *supra,* insofar

as it conflicts herewith, is overruled. On the retrial of the case all evidence bearing on the negligence of the defendant and contributory negligence of the plaintiff will be received only on the issue of the amount of the damage.

MOTION FOR REHEARING OVERRULED.

JOHN M. GIEBELMAN, APPELLANT, V. FRED P. VAP, APPELLEE.

126 N. W. 2d 673

Filed February 28, 1964. No. 35517.

1. **Negligence: Pleading.** If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense.
2. **Negligence: Trial.** When contributory negligence is pleaded as a defense, and there is no evidence to support such defense, it is prejudicial error to submit that issue to the jury.
3. **Trial.** To justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury; it is sufficient if there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.
4. ———. 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.

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

Nelson, Harding & Acklie, Charles F. Noren, and Kier, Cobb & Luedtke, for appellant.

Healey & Healey, for appellee.

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

MESSMORE, J.

This is an action for damages arising out of an automobile accident which occurred on September 7, 1959,

at approximately 10:40 p.m., at the intersection of the State Highway No. 2 cutoff and the extension of South Fortieth Street in Lancaster County. The case was tried to a jury resulting in a verdict for the plaintiff and fixing the amount of damages to be allowed him. Judgment was entered on the verdict. The plaintiff filed a motion for a new trial which was overruled. The plaintiff perfected appeal to this court.

The plaintiff's petition alleged in substance that immediately prior to the accident the plaintiff was operating his 1957 Ford station wagon in a westerly direction on the State Highway No. 2 cutoff which was protected by stop signs, at 10:40 p.m., on September 7, 1959; that Gerald L. Vap, the defendant's son, was operating defendant's vehicle in a northerly direction on the extension of South Fortieth Street in Lancaster County; and that the car owned by the defendant was a family car, furnished by the defendant for the use of his son Gerald L. Vap who was 18 years of age and a member of his household, and was operated with his consent. The petition then set forth several acts of negligence alleged to have been committed by the defendant's son in the use of the defendant's car at the time of the accident.

The defendant's answer admitted the occurrence of the accident at the time and place and between the parties mentioned in the plaintiff's petition; admitted that the wife of the plaintiff was a passenger in his car at the time of the collision and suffered injuries as a result thereof; that the three children of the plaintiff also suffered minor injuries in the accident; and that the damages incurred by the plaintiff's wife and children have been disposed of in prior actions of each of said parties. The defendant's answer alleged that the plaintiff was guilty of contributory negligence; and that the accident and injuries to the plaintiff, if any, were proximately caused by the careless and negligent acts of the plaintiff, and set forth various acts of negligence alleged to have been committed by the plaintiff. The answer

then denied each and every allegation of the plaintiff's petition except as specifically admitted in the answer, and prayed that the plaintiff's petition be dismissed.

By reply the plaintiff denied each and every allegation of the defendant's answer except those which admitted allegations in the plaintiff's petition.

For convenience we will refer to John M. Giebelman as plaintiff. Although Fred P. Vap is the father of Gerald L. Vap and is the defendant, we will refer to the latter as Gerald Vap or Gerald. State Highway No. 2 cutoff will be referred to as the highway.

There is no question but that the car driven by Gerald was owned by his father, Fred P. Vap, and was given to Gerald for his use while he was attending the University of Nebraska.

Gerald Vap testified that on the night of the accident he was driving a 1957 white 2-door Ford owned by his father and with his father's permission; that the car was in good mechanical condition with good tires and brakes and a clear windshield; and that both headlights worked. On this evening he had a date with him and he was driving the car at the time of the accident. He further testified that when he and his date left a moving picture theater he drove out Sixteenth Street to South Street, then over to Fourteenth Street and south beyond the penitentiary where he made a left turn and proceeded east and later proceeded north; that the accident happened about 10:30 p.m., while he was driving north on Fortieth Street; that it was possible that he had been on that street once or twice before; that he assumed there were stop signs but did not know exactly what distance on the road they were located; that half a mile south of where the accident occurred the surface of the road was gravel and this continued up to the highway; that the graveled road was a normal two-lane road; and that the weather that evening was clear and dry but not dusty. It was dark and the headlights were on. He could see possibly around 150 feet ahead of him. The

road half a mile south of where the accident occurred is a gradual incline up hill going north. He further testified that he was traveling 40, 45, or 50 miles an hour; that he did not see any sign that said "Warning—Stop Ahead"; and that there was nothing to obstruct his vision as he came up the hill. He believed he saw a sign on the right side of the road. He did not know where it was with reference to the top of the hill. He got almost to the sign and noted that it said "Stop." He did not recall how far he was from the stop sign when he first saw it. He saw the sign as soon as his headlights hit it, when he was 150 feet from the sign, and he let up on the gas and decreased his speed to slow down possibly 5 or 10 miles an hour, or to approximately 40 to 45 miles an hour. He did not recall if he applied his brakes before that time. He did not see the headlights of a car approaching from the west or from the east. He had applied his brakes gradually and thought his wheels slid a little bit. The reason for applying the brakes was because he recognized the stop sign. He did not stop before he entered the highway at the time of the accident. He did not know how fast he was going, and he was not watching the speedomoter at that time. He imagined the car was going 30 miles an hour as he approached the top of the hill driving close to the center of the graveled road. He did not recall whether he veered to the right or the left. He did not see the lights of the plaintiff's car, nor did he remember seeing any lights. After the accident he noticed that the whole front of his car had been mashed in. It appeared that the car he was driving hit the plaintiff's car on the left side of it. The impact took place on the north half of the highway. He saw skid marks after the accident as described by a State Safety Patrol trooper. He did not recall that he told this trooper that he had "run the stop sign." He testified that he told the trooper that he did not mean to run into the plaintiff's car and did not mean to hurt anyone. He further testified that he did not run the stop

sign, but slid through it in his car. He recognized the stop sign about 150 feet away, but did not think that he could have stopped in that distance because he did not know his reaction time. As he approached the top of the hill his lights were beginning to level off. There was a milo field about 3 or 4 feet tall on the southeast corner of the intersection. He did not remember that there was a bank on the right or east side as he came up the hill, although an exhibit in evidence shows such a bank. There were no weeds or brush growing around the stop sign. He was not familiar with the highway in the area of the accident, nor did he know that there was a paved road from Forty-eighth Street over to U. S. Highway No. 77. He had been in that area once or twice before but did not recall that particular road.

On cross-examination Gerald Vap testified that he did not know on what street or road he was traveling before the accident; that as he was driving up the grade he had no knowledge that there was a stop sign at the top of that grade; that he might have been on that road once or twice with somebody else but was not driving on those occasions; that he was looking ahead as he drove along the road; and that when he became aware that there was a sign of some kind ahead he let up on the gas, and when he determined that it was a stop sign he applied the brakes immediately. He agreed with the state trooper that there were deep skid marks in the gravel. He further testified that the impact occurred in the intersection; that he did not see the plaintiff's car before the impact; and that the impact caused his car to spin around and come to rest facing east and balancing on a culvert in the northeast corner of the intersection.

The plaintiff testified that he lived in Scribner, Nebraska; and that at the time of the accident he lived at Crete, Nebraska, and owned a 1957 Ford 4-door station wagon. Referring to the date of the accident, he testified that he and his family, which consisted of his wife

and three children, came to Lincoln about 5 p.m., and went to his uncle's house where they stayed until 10 p.m.; that he drove down Fifty-sixth Street to Vine Street, then south on Forty-eighth Street to the highway; that his headlights were on; that he had been over this road before, anywhere from two to three times a week; and that this highway is protected by stop signs at all intersections. Just prior to the accident he was meeting a car coming from the west. He was on his own right side of the road, which would be the north side. His headlights were turned on low beam. He was traveling from 40 to 45 miles an hour and was going west. The other car was coming from the west going east. He saw the beam of the lights from that car. He dimmed his lights and all of a sudden there were two headlights coming at him from the left side. He was unable to do anything; he could not apply his brakes or turn his car. He testified: "It was there and that was it. Didn't have time. Didn't even see it." With reference to the point where the accident happened, he testified that he was about in the middle of the intersection at the time of the impact; and that he saw the car that collided with his car "just a split second before it hit." He further testified that there is a bank on the south side of the highway about car-top level, and there was a growing crop in that field; that the front end of the car Gerald Vap was driving hit the plaintiff's car broadside at approximately the front door; that he did not recall that he had time to swerve to the right or time to apply his brakes; and that his car was thrown upward, rolled over, and came to rest on its top facing west in the ditch. The record shows that this car was badly damaged. Immediately after the accident he was still in his car. He asked if everybody was all right and received no response. He crawled out and started to look for his family but could not find anybody. His wife and two children were thrown from the car and one of the children was in the car.

Elizabeth A. Rodgers testified that on September 7, 1959, about 10:30 p.m., she saw the accident at the corner of Fortieth Street and the highway while she was driving a 1954 Ford Mainliner. She and her two daughters came by way of U. S. Highway No. 77, then took the cutoff east toward Forty-eighth Street to go north from there to their home. The weather was hot, and there was a strong wind from the south that night. She was familiar with the point of Twenty-seventh Street and the highway which was paved with blacktop and runs east and west. She described the terrain as "hill and dale, up and down." She was driving east on the right or south side of the road with her headlights on. After she passed Twenty-seventh Street and reached the crest of a hill she noticed dust on the road at some distance in front and to the right of her. She did not know how far it was at that time. She observed a lot of dust on Fortieth Street south of the intersection and could see car lights reflected in the dust. As she started from the valley just below Fortieth Street and was part way up the hill, she could see the dust again, and told her children: "that fellow isn't going to stop." She took her foot off the gas and slowed her car enough to put her brakes on and come to a complete stop. Just about the same time the accident happened. She stopped about four car lengths from the intersection. With reference to the car that was coming north on Fortieth Street, she testified that that car was not going to stop so she stopped and just as she did the headlights came over the hill from the east and that was all she was aware of at the time, and that was all she could see. She could see the headlights of the car coming from the south on Fortieth Street, which kept coming up the hill, and coming quite fast. This car did not stop before entering the intersection and before the accident happened. This car was bouncing because of the type of road it was on. The accident happened directly in front of her while she was four car lengths west of the intersection. She was un-

able to recall what part of the two cars came together. She was familiar with the highway and knew that a person approaching the intersection of Fortieth Street on the highway from the east could not see Fortieth Street to the south because of the bank on the south side of the highway.

Lawrence Hanus testified that he was a member of the Nebraska Safety Patrol on September 7, 1959; that he went to the intersection of the extension of Fortieth Street and a road known as the State Highway No. 2 cutoff pursuant to a radio message; and that as he approached the intersection he observed two cars in the north ditch. One of these cars was a 1957 Ford station wagon which was upside down facing west. A woman was pinned underneath this car. He was unable to get to her. Trooper O'Neal arrived at the scene, and it was possible to remove the woman only after two wreckers arrived. The two wreckers were located in a prescribed manner because of the up and down contour of the ditch and to prevent the car, when it was lifted and moved, from going down on this woman. The ditch was 4 feet 10 inches deep. The banks on the ditch were rather steep. The 1957 Ford station wagon was lying upside down in the bottom of the ditch. There are several photographs in evidence relating to the scene at the time of the accident and the terrain of the area, some of which were taken the night of the accident and others the next day. There is also an exhibit showing the stop sign. This witness further testified that Gerald's car left skid marks which extended 35 feet south of the stop sign, continued 25 feet from the stop sign to the highway, and 15 feet on the highway, or a total of 75 feet. This witness further testified that he had a conversation with Gerald wherein Gerald told this witness that he ran the stop sign, that he was sorry he did it, and that he did not mean to. This witness also contacted Gerald at the hospital on September 8, 1959, and asked him what happened. Gerald said that he was going back to town on the

county road and started to go up hill; that he let up on the gas; that he saw the sign but did not know what the sign said, if it said to stop or to turn; that he could not read the sign; and that he put the brakes on and that was all he could remember. This witness further testified that there is a stop sign on Fortieth Street on the southeast corner of the highway intersection which applies to traffic proceeding north, and a stop sign on the northwest corner applicable to traffic going south on Fortieth Street. There is also a "Stop Ahead" sign on Fortieth Street down the hill south of the intersection.

V. R. O'Neal testified that he was a member of the Nebraska Safety Patrol and had occasion to go to the scene of the accident. He observed two cars, both of which were 1957 Fords, one a coach and the other a station wagon. The station wagon was west of Fortieth Street and north of the highway upside down in the the ditch. There was nothing to obstruct the view of the "Stop Ahead" sign on Fortieth Street applicable to traffic proceeding north on that street. This witness further testified that there are stop signs on both the north and south sides of the highway, and farther south there is a "Stop Ahead" sign; that the stop sign is octagon shaped, about 30 inches wide; that the warning sign to the south of the interesection is located on the east side of Fortieth Street along the edge of the gravel and is about 450 feet south of the intersection; that this sign is approximately 18 inches wide on the two points and probably 24 to 30 inches long on the two points; and that this sign is yellow with black trim and black letters and the stop sign is in the same colors. On redirect examination this witness testified that while they were waiting for the second wrecker to arrive Gerald Vap came up and said something about he did not mean to run the stop sign and did not mean to hit them, and a little later he heard Gerald say the same thing to trooper Hanus who was investigating the accident.

The plaintiff assigns as error that the trial court erred

in overruling the plaintiff's motion to instruct the jury that there was no evidence of contributory negligence on the part of the plaintiff as a matter of law.

If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense. See, Mundy v. Davis, 154 Neb. 423, 48 N. W. 2d 394; Garska v. Harris, 172 Neb. 339, 109 N. W. 2d 529. There are many other cases to the same effect.

The defendant relies upon Bell v. Crook, 168 Neb. 685, 97 N. W. 2d 352, 74 A. L. R. 2d 223. This is a case where the defendant went through a stop sign onto a highway and struck a truck. This court held that it was error for the trial court to submit alleged acts of contributory negligence in failing to decrease speed when approaching and crossing an intersection, and in failing to decrease speed as necessary to avoid colliding with another vehicle on or entering the highway. This court reversed the judgment of the trial court.

There is a distinct difference in the facts of the cited case and the instant case. In the cited case the accident occurred in broad daylight on a clear day. The intersection was known as Stone Corner, and it was level and free of obstructions to vision. Both vehicles involved in the accident were visible to each other at a distance of a quarter of a mile each way. There were no skid marks made by either vehicle concerned in the accident. At the intersection a stop sign had been installed on the west side, but had been mashed down and was displaced at the time of the collision of the vehicles.

Other cases are cited by the defendant wherein the factual situation is distinctively different from the facts in the instant case, and such cases are not applicable to the instant case.

We conclude the following to be applicable to the instant case.

In Arnold v. Lance, 166 Neb. 834, 90 N. W. 2d 814, this court held: "Where contributory negligence is pleaded

as a defense, but there is no evidence to support such defense, it is prejudicial error to submit that issue to the jury." See, also, Anderson v. Nielsen, 162 Neb. 110, 75 N. W. 2d 372; Fries v. Goldsby, 163 Neb. 424, 80 N. W. 2d 171.

With reference to a directed verdict, for which the plaintiff moved in the instant case, this court held in Farag v. Weldon, 163 Neb. 544, 80 N. W. 2d 568: "To justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury; it is sufficient if there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established." See, also, In re Estate of Frazier, 131 Neb. 61, 267 N. W. 181; In re Estate of Benson, 153 Neb. 824, 46 N. W. 2d 176.

In Mimick v. Beatrice Foods Co., 167 Neb. 470, 93 N. W. 2d 627, 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." See, also, Edgar v. Omaha Public Power Dist., 166 Neb. 452, 89 N. W. 2d 238.

From a review of the evidence and the authorities applicable heretofore set out, we conclude that the judgment of the trial court should be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

JOHN BRUNO, APPELLEE, v. GUNNISON CONTRACTORS, INC., ET AL., APPELLANTS.
126 N. W. 2d 477

Filed February 28, 1964. No. 35540.

1. **Highways: Negligence. It is the continuing duty of a contractor engaged in construction work on a public highway to erect barricades or signs, or otherwise adequately warn the traveling**

public if the highway is dangerous to travel on or if obstructions are placed thereon.

2. ———: ———. The duty to adequately warn the traveling public of obstructions placed thereon during the course of construction of public improvements is a continuing duty as distinguished from a mere condition, and if it can reasonably be found that a violation of this duty proximately causes an accident, the question is presented for jury determination.

3. Negligence. Two acts of independent source are not concurrent in causing an injury if one of them merely furnishes a condition by which such injury is made possible, and later such injury occurs through the efficient, self-acting, and independent operation of the other.

4. ———. Liability of the doer of the original act is limited to reasonably anticipated injuries immediately brought about by the later independent intervening cause, wrongful or otherwise.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Reversed and dismissed.

Kennedy, Holland, DeLacy & Svoboda and Robert A. Skochdopole, for appellants.

Schrempp, Lathrop & Rosenthal, for appellee.

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

WHITE, C. J.

This is an action for personal injuries growing out of an automobile collision between plaintiff's automobile and one being driven by Harry E. Kramer, the defendants being sued in this action for negligence in the maintenance of barricades guarding construction work near the scene of the accident on North Eleventh Street in Omaha, Nebraska. From a jury verdict for plaintiff and judgment accordingly, defendant contractors appeal, assigning as error insufficiency of the evidence.

The accident occurred about 8:45 p.m., February 13, 1961, in the 2400 block on North Eleventh Street in Omaha, Nebraska. The street was dry, paved, and 36 feet wide. Plaintiff's car, going north on the extreme east side of North Eleventh Street, and leaving about

15 feet of skid marks, collided directly head-on with the Kramer car coming south, leaving no skid marks, about 70 feet south of a partially constructed manhole erected by the defendants, who were building an interceptor sewer for the city that crossed North Eleventh Street at this point. The whole front of each car was pushed back, the impact throwing the front of each car into the air opposite each other, and they came to rest 2 or 3 feet apart and directly facing each other on the east side of the east driving lane on North Eleventh Street. Kramer, driver of the southbound car, was killed as the result of the accident.

The manhole extended from the west side of the street not over 6 or 7 feet. About 20 feet north of the hole was a pile of rock or dirt. Between 50 and 70 feet farther north stood a four-legged caution sign, about 3 feet high, with a scotchlite illuminated "caution," in large letters extending across the face of it, and with a battery-powered amber flicker light on the east end. It stood out from the curb about 3 feet and extended into North Eleventh Street from the west not over 8 or 9 feet. Between this northernmost barricade and south up to the excavation there were two other sawhorse barricades, one immediately adjacent to the manhole, both standing out in North Eleventh Street about the same distance from the west curb. It therefore appears without dispute that the defendants had blocked off a roughly rectangular portion on the west side of North Eleventh Street about 70 to 90 feet in length and not over 8 or 9 feet wide. As mentioned, the accident happened 70 feet further south from this area. The distance, by police measurement, from the intact northernmost barricade referred to above and the point of impact, was 150 feet. The street was 36 feet wide, and the undisputed minimum clear driving area on North Eleventh Street was 27 feet, the width of the colliding cars being about 5 to 6 feet.

There is some evidence of spattered dirt or mud on

the flicker light and on the scotchlite illuminated "caution," on the first and northernmost barricade. But, there is no evidence that it was not clearly visible at the time of the accident. The witnesses observed the barricade from points 50 feet to 300 feet north and none testified that it could not be seen in this range of distance north on North Eleventh Street.

Plaintiff Bruno testified he was going about 25 miles per hour as he approached the construction site; that he saw a pair of headlights in the distance on the west side of the road; that when the other car was 150 to 200 feet from him, it swerved into his lane on his (east) side of the street, came head-on at him, and Kramer never turned back (to the west); that at no time after it got into his lane, did it swerve; that Kramer was going over 40 miles per hour; and that he had applied his brakes, pulled to the right as far as possible, and braced himself for the impact which occurred when he was almost stopped. Kramer's car left no skid marks, and the testimony shows the plaintiff left about 15 feet of skid marks.

The questions are whether there was any violation of duty and whether any acts of the defendants could have been the proximate cause of the accident.

There was no negligence in obstructing the street and diverting traffic to the 27-foot strip to the east. The city and contractors under them are relieved of any duty in this respect during construction of public improvements. City of Lincoln v. Calvert, 39 Neb. 305, 58 N. W. 115; Conklin v. Lincoln Traction Co., 130 Neb. 28, 263 N. W. 674. But, it is the continuing duty of a contractor engaged in construction work on a public highway to erect barricades or signs, or otherwise adequately warn the traveling public if the highway is dangerous to travel on or if obstructions are placed thereon. It is a continuing duty as distinguished from a mere condition, and if it can reasonably be found that a violation of the duty proximately causes the accident,

the question is for the jury. Kuska v. Nichols Constr. Co., 154 Neb. 580, 48 N. W. 2d 682; Johnson v. Metropolitan Utilities Dist., *ante* p. 276, 125 N. W. 2d 708.

The continuing duty was performed in this case. The flare barricade and the others actually accomplished the diversion of the Kramer automobile to the safe and unimpeded 27-foot strip to the east of the construction work. It was their duty to warn and timely divert drivers to this section of the road. It is undisputed that this 27-foot area was ample in width and roadway conditions for safe travel. Plaintiff's own testimony is that Kramer, without swerving, came straight on and hit him head-on on the extreme east side of the 27-foot strip. The northern barricade was intact, and there was no contact by the Kramer automobile with any part of the construction work. Kramer was safely past the manhole about 70 feet when he ran into the plaintiff. The utmost reach of plaintiff's testimony is only to the effect that the maximum visibility of the barricade and flicker light was somewhat diminished by some accumulation of dirt. That it was visible and that it accomplished its purpose in this case is uncontroverted. The duty charged to the defendants was performed and there is no evidence to sustain a finding of its violation.

Fatal to plaintiff's case also is the lack of evidence as to proximate cause. Two acts of independent source are not concurrent in causing an injury if one of them merely furnishes a condition by which such injury is made possible, and later such injury occurs through the efficient, self-acting, and independent operation of the other. Johnson v. Metropolitan Utilities Dist., *supra;* Johnson v. Mallory, 123 Neb. 706, 243 N. W. 872. Liability of the doer of the original wrongful act is limited to *reasonably anticipated* injuries immediately brought about by the later independent intervening cause, wrongful or otherwise. The causative risk is limited by the maximum reach of what may be considered reasonably anticipated under the circumstances. See, Johnson v.

Metropolitan Utilities Dist., *supra,* at p. 281; Johnson v. Mallory, *supra;* and Knuth v. Singer, 174 Neb. 182, 116 N. W. 2d 291, where we held that an obstruction on a highway was a condition and not a proximate cause.

After being safely diverted to the 27-foot strip, Kramer drove 150 feet within the strip and to the east side of it, colliding with plaintiff 70 feet past the furthermost part of the hole obstruction. The position of the barricade 150 feet back was a condition. The failure of Kramer to either see what was in front of him or to properly control his automobile, with ample time and opportunity to do it, and to avoid the collision was a subsequent independent act of a third person and an efficient intervening cause, within the meaning of the above rules.

Plaintiff cites on the issue of proximate cause Grantham v. Watson Bros. Transp. Co., 142 Neb. 362, 6 N. W. 2d 372, on rehearing, 142 Neb. 367, 9 N. W. 2d 157; Kuska v. Nichols Constr. Co., *supra;* Johnson v. Mallory, *supra.* In the last two cases, as the court therein points out, the obstruction itself was run into because of a misleading act of the defendant or failure to warn, from which the defendant could reasonably anticipate acts, negligent or not, of third parties which would produce injury.

In Grantham v. Watson Bros. Transp. Co., *supra,* a truck and trailer without flares or warning was avoided by the driver of an automobile and a bystander nearby was struck. A defendant could reasonably anticipate that the truck and trailer would be hit, or that if missed by the swerving action of the driver, that the driver would have no time to avoid colliding with persons or objects such as were present in that case. These cases are clearly distinguishable.

The circumstances of this case bring it within the principles of Knuth v. Singer, *supra;* Steenbock v. Omaha Country Club, 110 Neb. 794, 195 N. W. 117; Jarosh v. Van Meter, 171 Neb. 61, 105 N. W. 2d 531, 82 A. L. R.

2d 714; and Ricker v. Danner, 159 Neb. 675, 68 N. W. 2d 338.

The evidence in this case shows that there was no violation of duty on the part of the defendants and that any act of theirs was not the proximate cause of the accident.

REVERSED AND DISMISSED.

WILLIAM N. METCALF, APPELLEE, V. HARTFORD ACCIDENT & INDEMNITY COMPANY, AN INSURANCE CORPORATION, APPELLANT.

126 N. W. 2d 471

Filed February 28, 1964. No. 35573.

1. **Automobiles.** The use of an automobile by a person involves its employment for some purpose or object of the user while its operation by him involves his direction and control of its mechanism as its driver for the purpose of propelling it as a vehicle.
2. **Insurance: Automobiles.** The words "use" and "actual use" when used in the omnibus clause of an insurance policy will ordinarily be treated as synonymous terms.
3. ———: ———. Where an omnibus clause in an insurance policy defines the word "insured" as including the named insured and any person while using an owned or hired automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission, a person who assists the user of the automobile in a permitted use by taking over the manual operation of the car is an additional insured within the meaning of the omnibus clause.
4. **Judgments.** Where a person is responsible over to another, either by operation of law or express contract, and he is duly notified of the pendency of the suit against the person to whom he is liable over, and full opportunity is afforded him to defend the action, the judgment, if obtained without fraud, collusion, or bad faith, will be conclusive against him, whether he appeared or not.
5. **Insurance: Attorney and Client.** Under section 44-359, R. R. S. 1943, when a beneficiary or person entitled thereto brings an action on an insurance policy, the court, upon rendering judg-

ment against the insurer, shall allow the plaintiff a reasonable attorney's fee to be taxed as costs and, if the cause is appealed, an additional attorney's fee shall be allowed by the appellate court for the appellate proceedings.

6. ———: ———. In allowing an attorney's fee in an action on an automobile liability insurance policy, the trial court may consider the amount involved, the responsibility assumed, the questions of law raised, the time and labor necessarily required in the performance of duties, the results of service performed, and the professional diligence and skill employed.

7. ———: ———. The allowance of a reasonable attorney's fee under section 44-359, R. R. S. 1943, is unaffected by the fact that plaintiff contracted to pay his attorney on a contingent fee basis.

8. ———: ———. An attorney's fee allowed under section 44-359, R. R. S. 1943, is taxable as costs and constitutes no part of the judgment. Interest may not be assessed on an attorney's fee which is no part of the judgment.

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

Cline, Williams, Wright, Johnson, Oldfather & Thompson and Charles E. Wright, for appellant.

Healey & Healey, for appellee.

M. M. Maupin and Clinton J. Gatz, Jr., amici curiae.

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

CARTER, J.

This is an action brought by the plaintiff on an automobile insurance contract issued by the Hartford Accident and Indemnity Company. A jury was waived. The trial court found for the plaintiff and entered judgment against the defendant in the amount of $6,423.52. The defendant appeals.

The defendant was the insurance carrier for the City Sanitary Exterminating Company. Its policy of insurance covered a 1958 Chevrolet station wagon belonging to the insured, providing liability coverage with limits of not less than $10,000 for bodily injury to each person

and not less than $5,000 for property damage for each occurrence arising out of the maintenance and use of the station wagon. By the terms of the policy defendant agreed to defend any suit alleging bodily injury or property damage payable under the terms of the policy and to pay all costs taxed against the insured and all interest accruing after the entry of judgment. On February 10, 1961, the station wagon, while driven by Robert A. Holder, was involved in an accident with the automobile of the plaintiff. Defendant was notified of the occurrence of damage. Plaintiff commenced an action against Holder for personal injury and property damage. Demand was made upon defendant to defend the action, which was refused. Holder employed counsel and defended the action. During the course of the trial the parties agreed upon a judgment in the amount of $4,500 and costs in the amount of $37.05, which was duly entered. No appeal was taken from this judgment and it has become final. Plaintiff commenced this action against the defendant insurance company to collect the judgment for $4,500 and the costs amounting to $37.05, and accrued interest thereon in the amount of $280.59. The foregoing facts are not in dispute.

The primary question is whether or not Robert A. Holder is an additional insured under the provisions of the insurance policy. The definition of the insured as contained in the insurance policy provides in part as follows: "The unqualified word 'insured' includes the named insured and also includes * * *, and (2) under coverages A and C, any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission, * * *."

The insurance policy was issued to the City Sanitary Exterminating Company, a corporation. Monroe Usher is the president of the corporation and the sole owner of its stock. The station wagon was described in the policy

as being used for pleasure and business. The term "pleasure and business" was defined by the policy as follows: "The term 'pleasure and business' is defined as personal, pleasure, family and business use."

The evidence shows that Monroe Usher used the station wagon daily for his personal use. He drove it to and from work, keeping it at his home at night. His wife drove the station wagon when she needed it, and it was driven by the sons of Monroe Usher on occasion. While owned by the corporation, it was used by Monroe Usher as a family-purpose car, a use within the purposes of use as defined in the insurance policy.

Monroe Usher had a son, Douglas, who was approximately 17 years of age on February 10, 1961. He had an automobile which was maintained for his use which was shopped for repairs on the above date. He requested permission of his father to use the station wagon during the evening of February 10, 1961, for the purpose of transporting Robert A. Holder and two young ladies to and from a basketball game. Permission to so use the station wagon was granted. Nothing was said about any restrictive use or operation of the station wagon that evening. There is evidence in the record that Monroe Usher had told Douglas on previous occasions that he was not to permit anyone else to drive the family cars while he was using them. There is evidence in the record that the automobile used by permission of the father was not to be driven outside the city of Lincoln. The latter evidence is not material here, for the reason that the accident did not occur during the period of the alleged deviation.

Douglas proceeded to take Holder and the two girls to the basketball game. Thereafter they proceeded north of Lincoln for several miles, Douglas doing the driving. Douglas developed a headache and he either requested or permitted Holder to assume the operation of the automobile. After their return to Lincoln, and while Holder was driving, the accident occurred which

became the subject of the present litigation.

It is contended by the defendant that the omnibus clause of the policy does not make Robert A. Holder an additional insured for the reason that he was not granted permission by the insurer or the named insured to operate the station wagon. The plaintiff contends on the other hand that permission was given to Douglas Usher to use the station wagon and that he was using it even though it was being operated by Robert A. Holder.

No issue is here made that there is any difference in meaning of the terms "use" and "actual use" that would affect liability under the omnibus clause of the policy. Some courts have made a distinction as an escape from the strict interpretations placed on the words "actual use." Protective Fire & Cas. Co. v. Cornelius, *ante* p. 75, 125 N. W. 2d 179. We think the effort to place different meanings on the two terms creates a distinction without a difference and that liability or nonliability does not depend upon which of the two terms are used in the language of the policy.

We think the correct rule is stated in Maryland Cas. Co. v. Marshbank, 226 F. 2d 637, wherein it is said: "As the basis for a contrary conclusion the plaintiff seeks to read the term 'use of the automobile' as contained in the policy definition as the equivalent of 'operation of the automobile' and on this premise it argues that Marshbank did not give permission to Charles to operate his automobile. We think, however, that the premise is unsound and that the plaintiff is attempting to create an ambiguity in the language of the policy definition in order by construction to resolve it in its favor. To us the language of the clause seems so clear as to require no construction. The fallacy in the plaintiff's position is that the words 'use' and 'operation', which it seeks to equate as synonymous, are in this setting words of quite different meaning. For the 'use' of an automobile by an individual involves its employment for some purpose or object of the user while its 'operation' by him involves

his direction and control of its mechanism as its driver for the purpose of propelling it as a vehicle. It is perfectly clear that an automobile is being used by an individual who is traveling in it regardless of whether it is being operated by him or by another. It is only the actual or particular use of the automobile at the time of the accident by the individual who is claiming to be an additional insured that he must show to have been with the permission of the named insured if he is to come within the definition of the policy here involved. Accordingly since it was proved that Charles had such permission it was unnecessary to show that he also had permission to act as driver of the automobile. This is the view taken generally in this country * * *." See, also, Johnson v. State Farm Mut. Automobile Ins. Co., 194 F. 2d 785; Persellin v. State Automobile Ins. Assn., 75 N. D. 716, 32 N. W. 2d 644; Schimke v. Mutual Automobile Ins. Co., 266 Wis. 517, 64 N. W. 2d 195.

Defendant asserts the result is controlled by Witthauer v. Employers Mut. Cas. Co., 149 Neb. 728, 32 N. W. 2d 413; State Farm Mut. Automobile Ins. Co. v. Kersey, 171 Neb. 212, 106 N. W. 2d 31; and Christensen v. Rogers, 172 Neb. 31, 108 N. W. 2d 389. We think these cases are distinguishable. In the Witthauer case this court said with reference to the alleged permittee: "His supervisors did not know that he was using the truck. He had not asked permission to take the truck that noon to go to lunch and hence specific permission was neither denied nor granted. He had never asked permission to take the truck to go to lunch. He had never used it for that purpose before. He took the truck without permission. He was not on any company business when making the trip. He had no specific authority to make the trip and it was contrary to his general orders." Under these findings of fact this court held under a similar omnibus clause that the actual use of the truck at the time of the accident was without the permission of the named insured. It is not, under the circumstances

shown, authority for denying liability in the instant case where it is admitted that permission was given.

In the Kersey case the court denied liability for the reason that the minor daughter of the insured had neither express nor implied permission to drive the automobile on the public highway. Without permission she was not an additional insured under the standard omnibus clause of insured's policy. The case is not authority for the contentions advanced by the defendant.

In the Rogers case there was no issue involving liability under an insurance policy. The question there raised was whether or not the family-purpose doctrine should be extended to include third persons not members of the owner's family who operated the family-purpose automobile with the son's permission but without the father's knowledge or consent. This court held: "We conclude that the initial permission of an automobile owner to members of his family to use a family-purpose car does not include authority to delegate the driving of the automobile to a third person not a member of the family." Such issue in no way bears upon the contractual liability assumed by a written insurance contract.

We conclude that the previous holdings of this court do not sustain the position of the defendant nor militate against that of the plaintiff on the question of additional insureds as defined in the omnibus clause contained in the policy.

Defendant further contends that the judgment obtained by the plaintiff against Holder did not create an obligation to pay on the part of Holder and does not therefore create a liability against defendant under the terms of the policy. It appears that during the course of the trial of plaintiff's case against Holder an agreement was entered into which permitted plaintiff to take judgment against Holder for $4,500 and costs, the plaintiff agreeing not to attempt collection from any assets of Holder other than any insurance policies in

which he was in any manner covered. The personal injury and property damage coverage provisions of the policy obligated the insurer "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages * * *." Defendant asserts that the judgment and agreement referred to create no legal obligation to pay on the part of Holder and, therefore, no obligation on the insurer to pay.

The defendant is obligated under its insurance policy to defend the suit brought against Holder, an additional insured. This it refused to do. Holder was thereupon required to engage an attorney and provide his own defense. With the insurance company denying liability, Holder was entitled to use all reasonable means of avoiding personal liability. It was to his personal interest to consent to the $4,500 judgment and accept an agreement from the plaintiff not to execute on his property other than any rights to indemnity he might have in the designated insurance policies. The matter is of no consequence to defendant if its claim of nonliability is correct. Since its claim of nonliability has no validity, and it having declined to defend the action when called upon to do so, the defendant is in no position to attack the judgment in the absence of fraud, collusion, or bad faith. If the judgment was obtained in good faith, the insured may not again litigate the issues that resulted in the judgment. City of Omaha v. Yancey, 91 Neb. 261, 135 N. W. 1044; Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N. W. 2d 623. In the last case cited we approved the following quote from Fullerton v. United States Casualty Co., 184 Iowa 219, 167 N. W. 700, 6 A. L. R. 367: "We are cited to a clause of the contract to the effect that the right of the insured to maintain an action against the company is limited to cases of 'loss actually sustained and paid in money in satisfaction of a judgment after trial of the issue,' and it is said that the payment to Mrs. Jacobson by plaintiff was by way of a settlement, and not in satisfaction

of a judgment. But this provision can avail the appellant nothing in this case. It repudiated its obligation to assume and carry the defense to final judgment; and, having abandoned the case, it left the assured at liberty to take up the defense and contest the claim to final judgment, or, if so advised, to make the most favorable settlement possible."

"It is a well-settled principle that where a person is responsible over to another, either by operation of law or express contract, and he is duly notified of the pendency of the suit against the person to whom he is liable over, and full opportunity is afforded him to defend the action, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he appeared or not." 27 Am. Jur., Indemnity, § 35, p. 478. See, also, 42 C. J. S., Indemnity, § 32, p. 613; 50 C. J. S., Judgments, § 811, p. 360; Hawkeye Casualty Co. v. Stoker, *supra;* Jones v. Southern Surety Co., 210 Iowa 61, 230 N. W. 381; American Fidelity & Casualty Co. v. Williams (Tex. Civ. App.), 34 S. W. 2d 396.

Fraud or collusion in the obtaining of the judgment against Holder was not pleaded nor proven in the instant case. Defendant asserts the unreasonableness of the judgment awarded plaintiff against Holder. Assuming that the unreasonableness of such a judgment bears upon the question of fraud or collusion, we point out that this case was tried to the court and that the judgment of the court has the effect of a jury verdict. There was evidence in the record that the judgment was reasonable and within the range of a possible jury verdict. The trial court's judgment was supported by evidence and, it not being clearly wrong, no basis exists for any interference by this court with the judgment entered.

We necessarily conclude that the judgment that plaintiff obtained against Holder created a legal liability within the meaning of the policy. The judgment, interest, and costs in the amount of $4,817.64 were properly in-

cluded in the judgment against the defendant.

The trial court allowed plaintiff an attorney's fee of $1,605.88. Defendant assigns this as error in that the allowance is unauthorized and, if authorized, it is excessive. Section 44-359, R. R. S. 1943, provides that in all cases where the beneficiary or person entitled thereto brings an action on an insurance policy, the court, upon rendering judgment against the insurer, shall allow the plaintiff a reasonable sum as an attorney's fee to be taxed as costs and, if the cause is appealed, an additional attorney's fee shall be allowed by the appellate court for the appellate proceedings.

In Andrews v. Commercial Cas. Ins. Co., 128 Neb. 496, 259 N. W. 653, the court dealt with this issue in the following language: "The statute authorizes a reasonable sum as an attorney's fee to be taxed as costs in addition to a judgment on a liability insurance policy. Comp. St. 1929, sec. 44-346. While the allowance is reviewable on appeal, the trial court, in view of all the facts and circumstances, determines in the first instance, in the exercise of sound discretion, what is a reasonable sum. An arbitrary percentage of the recovery on the policy is not necessarily the test. Among the factors in the problem, the court may consider the amount involved; the responsibility assumed; the questions of law raised; the time and labor necessarily required in the performance of duties; the result of service performed; professional diligence and skill. In re Estate of Rhea, 126 Neb. 571. Whatever is shown in these particulars or observed by the trial judge in the course of the proceedings is open to him for consideration. With these factors in mind, there does not seem to have been an abuse of discretion or an excessive allowance, when the entire record is considered."

The trial court in the case before us allowed an attorney's fee in the amount of 33⅓ percent of the judgment. There is evidence in the record that plaintiff's attorney was handling the case on a contingent fee

basis, although the percentage of the recovery to be retained as an attorney's fee is not stated. The allowance of a reasonable attorney's fee under section 44-359, R. R. S. 1943, has no relation to the fee contracted for on a contingency basis. The contingent fee involves risks that are not pertinent to a reasonable attorney's fee for services rendered. There is no evidence in the record as to what constitutes a reasonable attorney's fee for the services rendered in the case. The trial court in fixing the attorney's fee was governed solely by the proceedings had before him and what he observed therein. After considering all the elements to be considered in fixing an attorney's fee as herein stated, we think the amount allowed is excessive. We fix the amount of the attorney's fee in the district court at $1,000.

In the instant case the trial court included the attorney's fee allowed as a part of the judgment on which interest was allowed at 6 percent per annum from the date of the judgment. Defendant assigns this as error. An attorney's fee allowed under section 44-359, R. R. S. 1943, is taxable as costs and constitutes no part of the judgment. Wirtele v. Grand Lodge, A.O.U.W., 111 Neb. 302, 196 N. W. 510. Interest is properly chargeable on the judgment. § 45-103, R. R. S. 1943. We have found no authority for assessing interest on attorney's fees constituting no part of the judgment.

We modify the judgment by reducing the attorney's fee allowed by the trial court to $1,000 without interest. The judgment of the district court is otherwise affirmed. An attorney's fee of $400 is allowed for services in this court to be taxed as costs.

AFFIRMED AS MODIFIED.