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REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 5, 1964 and JULY 8, 1965

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM 1964 and JANUARY TERM 1965

VOLUME CLXXVIII

WALTER D. JAMES
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By WALTER D. JAMES, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

SUPREME COURT

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[1] Term expired January 6, 1965
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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1964

DARREL F. PARKER, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

131 N. W. 2d 678

Filed December 11, 1964. No. 35673.

1. **Criminal Law: Coram Nobis.** The common law writ of error coram nobis exists in this state under section 49-101, R. R. S. 1943.
2. ———: ———. The purpose of the writ of error coram nobis is to bring before the court rendering the judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. It enables the court to recall some adjudication, made while some fact existed which, if before the court, would have prevented rendition of the judgment and which, through no fault of the party, was not presented.
3. ———: ———. The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the plaintiff. The alleged error of fact in a criminal proceeding must be such as would have prevented a conviction. It is not enough to show that it might have caused a different result.
4. **Judgments: Coram Nobis.** All presumptions exist in favor of the regularity and correctness of the judgments of courts of general jurisdiction. The burden is on the plaintiff in a proceeding for a writ of error coram nobis to produce substantial and credible evidence sufficient to overcome the presumption that the judgment of conviction was correct.
5. **Criminal Law: Coram Nobis.** Ordinarily, the writ of error coram nobis does not lie to test the credibility of witnesses in a criminal trial and cannot be invoked upon the ground that an important witness testified falsely about a material issue in the case.
6. **Coram Nobis: Appeal and Error.** The writ of error coram

nobis is not a substitute for a writ of error brought to correct errors of law apparent on the record. It does not permit a defendant to retry his case again and again.

Appeal from the district court for Lancaster County: JOHN L. POLK, Judge. Affirmed.

Warren C. Schrempp and Richard J. Bruckner, 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.

BOSLAUGH, J.

The plaintiff, Darrel F. Parker, was convicted of first degree murder in the district court for Lancaster County, Nebraska, and sentenced to life imprisonment. The judgment was affirmed by this court in Parker v. State, 164 Neb. 614, 83 N. W. 2d 347.

The plaintiff brought this proceeding to obtain a writ of error coram nobis and an order granting a new trial. After a hearing upon the merits, the trial court denied the writ and dismissed the action. The plaintiff's motion for new trial was overruled and he has appealed.

The common law writ of error coram nobis exists in this state under section 49-101, R. R. S. 1943. Carlsen v. State, 129 Neb. 84, 261 N. W. 339. The purpose of the writ of error coram nobis is to bring before the court rendering the judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. It enables the court to recall some adjudication, made while some fact existed which, if before the court, would have prevented rendition of the judgment and which, through no fault of the party, was not presented. Swanson v. State, 148 Neb. 155, 26 N. W. 2d 595.

The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the plaintiff. Hawk v.

State, 151 Neb. 717, 39 N. W. 2d 561. The alleged error of fact must be such as would have prevented a conviction. It is not enough to show that it might have caused a different result. See, 24 C. J. S., Criminal Law, § 1606 (7), p. 691; Hysler v. Florida, 315 U. S. 411, 62 S. Ct. 688, 86 L. Ed 932.

The plaintiff was charged with and convicted of the murder of his wife, Nancy Parker, on December 14, 1955. The principal allegations contained in the petition filed in this proceeding and most of the evidence introduced or offered by the plaintiff relate to the plaintiff's contention that Nancy Parker was killed by someone other than the plaintiff. The following is a summary of the principal evidence offered by the plaintiff in support of this contention.

The plaintiff offered the testimony of one of his attorneys that in 1956, Wesley Peery, then a prisoner in the Nebraska State Penitentiary, said that if the attorney or plaintiff's parents would guarantee Peery's bond, Peery would tell where Nancy Parker's wristwatch and a suitcase taken from the Parker home on the day of the murder were; that the plaintiff did not kill Nancy Parker; that Peery drove by the Parker home on the morning of the murder; and that when asked if he had stopped in the Parker home that morning Peery answered, "Maybe I did. I don't know for sure."

The plaintiff offered his own testimony that in June 1956, Peery told the plaintiff that if his parents would guarantee Peery's bond, Peery would tell the plaintiff where Nancy Parker's wristwatch and the suitcase were, and the name of the person who killed Nancy Parker.

The plaintiff offered the testimony of Kenneth Hamilton, a former prisoner in the Nebraska State Penitentiary, that in 1956 and 1957, Peery told Hamilton on several occasions that he killed Nancy Parker and described in detail how the crime was committed.

The plaintiff offered the testimony of Charles Sedlacek, a former prisoner in the Nebraska State Penitentiary,

that in 1956 and 1957, on a number of occasions Peery discussed the Nancy Parker murder case with him; that Peery stated that he became acquainted with Nancy Parker, had been in her house, and had lunch with her; that Peery said that on December 14, 1955, he parked his black 1949 Ford near the Parker home, waited for the plaintiff to leave, and then entered the Parker home and killed Nancy Parker; and that Peery said that he took her wristwatch, a suitcase, some sofa pillows, and other property with him when he left the house.

Sedlacek testified that he was released from the penitentiary in June 1957; that in August 1957, he helped furnish a bond for the release of Peery from the penitentiary; that several days after Peery had been released from the penitentiary, he and Ray Dillard came to Sedlacek's house in Crete, Nebraska; and that Peery left a wristwatch, two suitcases containing men's shirts and other clothing, three sofa pillows, and some other items at Sedlacek's place. The plaintiff offered the testimony of Sedlacek that Peery offered to sell the "outfit" for $50 and that Peery said that it came out of the Parker house. Sedlacek identified exhibit 28 as the suitcase and exhibits 30, 30-A, and 30-B as the sofa pillows brought to his house by Peery.

The plaintiff offered in evidence a document identified as exhibit 23, which purports to be a typewritten letter signed by Peery dated August 8, 1957. Exhibit 23, with profanity deleted, is as follows:

"August 8, 1957.

"Dear Charlie .

"I have seen and heard what a hard time the Lincoln cops have given to you since you have left here, and ido not have no use for the chief of Lincoln police nor for any one under him, and the same goes for the sheriffs andall of his depities ,and the same goes for Elmer Schiell and Dale Farbrock; . And if you can help me get out on abail bond,I will help you any way posible , you just name who

you wish bumped off , as I have the guts to do the job 100%; just like took care of old * * * Nancy Parker,I can assure you I doneit ok;

"And if Ineed any help, I can whistle , and my Buddy Ronald W. Brewer will be johnny on the job;

"I sure made amonkey out of them when they gave to me the so called lie detecter test, all a person has to do is to know how to react and one has it made,Ha ha heho , Savvy? you do your part of the bargion,and I will do just what I have said I will do .

"Hope to see you real soon, so Please don't let me Down.

"Please do destroy this letter,as I am having it sent out by a Good Pal of mine,.

"Best of good luck to you Old Buddie Charlie , Hope to see you in the very near futher . Don't let me down PLEASE.

"I remain your old faithfull Buddy .

Wesley H. PEERY.

/s/ Wesley Peery"

The evidence does not show how or when the plaintiff came into possession of exhibit 23. The record indicates that much of the evidence offered by the plaintiff in this proceeding was obtained by Ralph Peterson, a private investigator from Red Oak, Iowa. Peterson did not testify in the proceeding.

Ed W. Johnson, a retired furnace salesman from Red Oak, Iowa, and an uncle of Peterson, testified that he was with Peterson on March 30, 1961, when he saw exhibit 23 on a dining room table at the Sedlacek home in Crete, Nebraska.

The addressee of exhibit 23, "Dear Charlie," is not otherwise identified in the record in this case. The witness Sedlacek was not examined by either party concerning exhibit 23. Peery testified by deposition that he had never seen exhibit 23 before; that he did not type it; and that he did not sign it. Peery also testified

that Peterson offered Peery $25,000 if he would sign a confession to the murder of Nancy Parker.

As a foundation for the admission of exhibit 23 into evidence, the plaintiff produced the testimony of Winsor C. Moore, an examiner of questioned documents. Moore testified that he had examined exhibit 23 and had compared it with five other exhibits written by Peery and that it was his opinion that the same person had written exhibit 23. The opinion was based upon certain "traits" which Moore observed which consisted of the use, or misuse, of punctuation marks in the documents examined. Moore had no opinion concerning the signature which appears on exhibit 23 and explained that he found characteristics of both forgery and genuineness in the signature. The trial court sustained an objection to the offer of exhibit 23 on the ground that it was hearsay and that there was insufficient foundation.

As a part of its case, the defendant produced the testimony of Frederick E. Webb, a special agent for the Federal Bureau of Investigation. Webb testified that he was assigned to the documents section of the FBI laboratory and had been doing this work for 21 years. Webb testified that he had examined exhibit 23, had compared it with known signatures of Peery, and that it was his opinion that the signature on exhibit 23 was an obvious, simulated forgery. Webb further testified that it is not possible to accurately identify a typewritten document with an individual and that the use of punctuation marks is not considered to be an individual characteristic. The foundation for admission of exhibit 23 was not sufficient, and the objection to its offer in evidence was properly sustained.

Peery testified, by deposition, that he is now serving a sentence of from 30 to 75 years in the Ohio State Penitentiary; that he was given seven or eight lie detector tests in Lincoln, Nebraska, in connection with the Parker case and released after the tests; that he told one of the plaintiff's attorneys that he knew an individual

who had Nancy's wristwatch and suitcase because he was trying to get out on bond, but that these statements were false; that he told the plaintiff that if the Parkers would help Peery get out on bond, he would tell them where some of the property was that had been stolen from the Parker home; and that these statements were false and were made because Peery was trying to get help to get out of the penitentiary.

Peery further testified, in his deposition, that he had never talked with Sedlacek about the Parker case; that he had never been to Sedlacek's home in Crete, Nebraska; that he did not know Nancy Parker and had never seen her; that he had never parked his car in the area of the Parker home; that he did not kill Nancy Parker; that he did not know who did kill Nancy Parker; and that he had no personal knowledge about the Nancy Parker murder.

All presumptions exist in favor of the regularity and correctness of the judgments of courts of general jurisdiction. Mitchell v. State, 159 Neb. 638, 68 N. W. 2d 184. The burden is on the plaintiff in a proceeding for a writ of error coram nobis to produce substantial and credible evidence sufficient to overcome the presumption that the judgment of conviction was correct. People v. Boehm, 285 App. Div. 245, 137 N. Y. S. 2d 400, affirmed 309 N. Y. 362, 130 N. E. 2d 897.

With the purported written confession of Peery eliminated, the plaintiff's evidence consists largely of testimony concerning alleged oral declarations of Peery. Under oath, Peery either denies that the declarations were made or testifies that the declarations were false when made. Peery, Hamilton, and Sedlacek are all convicted felons. Sedlacek has a history of mental illness and a criminal record which dates back to 1931.

Without further discussion or analysis, we think that it is apparent that the evidence in this case is, for the most part, not substantial or credible. It does not establish that Nancy Parker was killed by someone other than

the plaintiff and that the judgment in Parker v. State, *supra,* is based upon errors of fact. The evidence is not sufficient to entitle the plaintiff to relief in this proceeding.

In reaching this conclusion we have considered the evidence which was offered by the plaintiff but excluded by the trial court as well as the evidence which was admitted. Therefore, it is unnecessary that we consider the plaintiff's assignments of error relating to the exclusion of evidence offered by him.

On April 13, 1956, at the original trial upon the information, Dr. Victor E. Levine, a biological chemist, testified for the State that he had examined the contents of a glass jar which contained a portion of the contents of the stomach of Nancy Parker; and that it was his opinion that death had occurred within 15 to 25 minutes after the food had been eaten. The plaintiff offered evidence to the effect that in 1957, Dr. Levine had stated publicly that it is necessary to examine the entire contents of a stomach in order to ascertain the time of death.

The evidence which the plaintiff offered, if true, would have tended to rebut or impeach the testimony of Dr. Levine, and would have been proper evidence to develop on cross-examination. The evidence offered is not a basis for relief in this proceeding. Ordinarily, the writ of error coram nobis does not lie to test the credibility of witnesses in a criminal trial and cannot be invoked upon the ground that an important witness testified falsely about a material issue in the case. Hawk v. State, *supra.*

The remaining contentions of the plaintiff relate to the original trial upon the information. The plaintiff alleges that his confession was illegally obtained and should not have been received in evidence, and that the prosecuting attorney was guilty of misconduct in his closing argument which prevented the plaintiff from receiving a fair trial. These allegations relate to facts

which were known to the plaintiff at the time of the original trial. Such facts do not constitute grounds for relief in a proceeding for a writ of error coram nobis. A petition for a writ of error coram nobis is insufficient if it states only facts which were known to the petitioner before the judgment attacked was rendered. State v. Boyd, 117 Neb. 320, 220 N. W. 281, 58 A. L. R. 1283.

In reality, these allegations raise questions of law and the plaintiff is attempting to relitigate questions which were determined in the original trial. The writ of error coram nobis is not a substitute for a writ of error brought to correct errors of law apparent on the record. Hawk v. State, *supra*. It does not permit a defendant to retry his case again and again. Carlsen v. State, *supra*. The allegations relating to the original trial do not require further consideration at this time and in this proceeding.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION OF THE GREYHOUND CORPORATION. THE GREYHOUND CORPORATION, APPELLEE, V. AMERICAN BUSLINES, INC., ET AL., APPELLANTS.

131 N. W. 2d 664

Filed December 11, 1964. No. 35688.

1. **Public Service Commissions: Motor Carriers.** The burden is on an applicant for a certificate of public convenience and necessity to show that the operation under the certificate is and will be required by the present or future public convenience and necessity.
2. ———: ———. In the determination of whether or not an applicant has sustained the burden imposed reference must be had to the evidence, and this court will not disturb an order of the Nebraska State Railway Commission granting a certificate of public convenience and necessity based on evidence unless the evidence shows that such order is unreasonable or arbitrary.
3. ———: ———. An important factor in the determination of

whether or not an application for a certificate of public convenience and necessity should be granted is evidence relating to competition with other service and the effect thereon.

4. ———: ———. A declaration of policy contained in section 75-222, R. R. S. 1943, is to regulate transportation in the public interest and to promote efficient service without undue preferences or advantages and without unfair or destructive competitive practices.
5. ———: ———. A certificate of public convenience and necessity for regular route transportation of passengers is improperly issued in the absence of proof of both public convenience and necessity.
6. ———: ———. A certificate of public convenience and necessity may not properly be granted over an existing route until on notice, hearing, and order of the Nebraska State Railway Commission the existing carrier has refused or failed to provide adequate service.
7. ———: ———. Reasonable and necessary interchanges of transportation and transfers do not afford a basis for a claim of inadequacy of service such as to permit the valid issuance of a competitive certificate of public convenience and necessity.
8. **Public Service Commissions: Appeal and Error.** The issuance of a certificate of public convenience and necessity based on evidence is ordinarily binding on appeal to this court, but the failure of an applicant to sustain the burden of showing that the issuance of the certificate was not arbitrary and unreasonable destroys its validity.

Appeal from the Nebraska State Railway Commission. Reversed.

Bert L. Overcash, Robert E. Powell, Warren A. Goff, John L. Riddell, Charles F. Adams, Lansing Anderson, and George E. McNally, for appellants.

James E. Ryan, for appellee.

Heard before WHITE, C. J., CARTER, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and DIERKS, District Judge.

YEAGER, J.

This is an action commenced before the Nebraska State Railway Commission wherein The Greyhound Corporation, a corporation, which will be hereinafter referred to as appellee, filed an application seeking au-

thority to operate as a motor common carrier of passengers for hire over regular routes in Nebraska intrastate commerce in the transportation of passengers, baggage of passengers, mail, express, and newspapers between Lincoln, Nebraska, on the one hand, and Grand Island, Nebraska, on the other hand, via U. S. Highway No. 34 to its junction with U. S. Highway No. 281, then via U. S. Highway No. 281 to Grand Island, using the same route on return to Lincoln, with no service to be rendered to intermediate points.

In simple terms, which will be employed hereinafter in this opinion, the request is for permission to perform the described service nonstop in both directions over U. S. Highways Nos. 34 and 281 between Lincoln, Nebraska, and Grand Island, Nebraska.

The application contains a request for an alternate route over which to perform this service but this requires no further description since its disposition depends upon the disposition of the other part of the application which is primary.

This application was duly filed on June 20, 1962, and on October 3, 1962, American Buslines, Inc., a corporation, which will be referred to at times by its name and at times as an appellant, filed a formal protest to the application. On October 4, 1962, the Nebraska State Railway Commission, which will be referred to as the commission, gave notice to all persons interested of hearing on the application which had been filed by the appellee.

In addition to the protest of American Buslines, Inc., a number of other protests and a petition of intervention were filed but it is not deemed necessary to name these. These protesting parties however are, along with American Buslines, Inc., appellants in the action in this court.

A hearing was had on the application of the appellee and the protests of the appellants, and a bill of exceptions containing a record of the evidence taken at the

hearing consisting of more than 2,000 pages was prepared and presented to this court.

On August 28, 1963, after the hearing had been concluded, the commission made findings and rendered an order granting the application of the appellee. Prior to the order of August 28, 1963, the appellee had no right to and did not perform any such service between Lincoln and Grand Island, Nebraska, as was requested by its application and which was granted by the order. The American Buslines, Inc., had the right to and did perform service over the described route.

At the time of the order the appellee, as the findings indicate, operated from Omaha to the Nebraska-Wyoming state line over U. S. Highway No. 275 to Fremont and over U. S. Highway No. 30 to the state line, with alternate authority over U. S. Highway No. 30A between Omaha and its junction with U. S. Highway No. 30. It was previously authorized to and did operate between Omaha and Lincoln over U. S. Highway No. 6, but not beyond Lincoln westward.

The commission found that American Buslines, Inc., was the only carrier authorized to perform single line service between Lincoln and Grand Island over the highways involved, which are U. S. Highways Nos. 34 and 281, and it serves all intermediate points. There are three schedules westward daily and four eastward. Two of those going westward move in single line service to points on U. S. Highway No. 30 west of Grand Island. The departure times of these schedules appear in the findings.

The findings contain a recital of numerous starting and arrival times to and from points west of Grand Island and Lincoln which do not require specific mention at this point. These findings detail the American Buslines, Inc., schedules from Lincoln to and beyond Grand Island and these will not be repeated here. It will be said only that time and frequency of operation is pointed out.

As to this it is found that the proposed operations of the appellee would be more advantageous to and from points west over U. S. Highways Nos. 34 and 281 than the schedules of American Buslines, Inc.

In summary, to the extent necessary to state here, the commission found that the appellee was fit, willing, and able properly to perform the service offered by its application; that present and future public convenience and necessity required the service; that this service would not likely result detrimentally to service being performed by American Buslines, Inc., between Grand Island and Lincoln and intermediate points; that the granting of the application would be in accord with the mandate contained in section 75-222, R. R. S. 1943; and that the granting of the application might well result in popularization of bus travel in the territory involved.

By the order of the commission the application in its major and also its minor aspect was granted, and from this order the appeal herein was taken.

It is clear that a motor common carrier, as is the appellee herein, must operate intrastate in the State of Nebraska under a certificate of public convenience and necessity issued by the commission. §§ 75-228, 75-229, and 75-230, R. R. S. 1943. Section 75-230, R. R. S. 1943, has been amended but in no particular of importance here. By the provision referred to an applicant must be qualified, fit, willing, and able to perform the service required in the area, and it must appear that public convenience and necessity does or will in the future require this service. If there is any lack of such a showing the application shall be denied.

The burden is on the applicant to show that he has met or will meet these requirements. The rule is stated as follows in Edgar v. Wheeler Transport Service, Inc., 157 Neb. 1, 58 N. W. 2d 496: "The burden is on an applicant for a certificate of convenience and necessity to show that the operation under the certificate is and will be required by the present or future public conven-

ience and necessity." See, also, Ferguson Trucking Co., Inc. v. Rogers Truck Line, 164 Neb. 85, 81 N. W. 2d 915; Young v. Morgan Drive Away, Inc., 171 Neb. 784, 107 N. W. 2d 752; Denver Chicago Transp. Co., Inc. v. Poulson, 172 Neb. 862, 112 N. W. 2d 410.

In the determination of whether or not an applicant has sustained the burden imposed reference must be had to the evidence. In Burlington Truck Lines, Inc. v. Brown Transfer, 170 Neb. 331, 102 N. W. 2d 450, it was said: "This court will not disturb an order of the Nebraska State Railway Commission based on evidence unless the evidence shows that such order is unreasonable or arbitrary."

An important factor in the determination of whether or not an application for a certificate of public convenience and necessity should be granted is the evidence relating to the question of competition with other service and the effect thereon.

In Ferguson Trucking Co., Inc. v. Rogers Truck Line, *supra*, it was said: "The declared policy of section 75-222, R. R. S. 1943, is, in part, to regulate transportation 'in the public interest,' and to promote 'efficient service' without 'undue preferences or advantages, and unfair or destructive competitive practices.' The declared policy does not condemn competition. It does condemn 'unfair or destructive competitive practices.'" See, also, Young v. Morgan Drive Away, Inc., *supra*.

In large measure the decision here must turn upon, as will be hereinafter made clear, the question of whether or not the certificate of public convenience and necessity involved here was an arbitrary and unreasonable grant of authority to the appellee to compete with American Buslines, Inc., in the manner described in the application and in the order from which the appeal was taken. There are of course other questions which require consideration.

From the evidence which was adduced it was made to appear that the appellee is a part of a system engaged

in the transportation, as common carriers, of passengers by motor bus over public highways, for hire, baggage of passengers, mail, express, and newspapers, generally stated, from across the United States with operations intrastate over certain highways in the State of Nebraska. The intrastate operation is between Omaha on the east and the Nebraska-Wyoming state line on the west. One right of the appellee is from Omaha northwestward over U. S. Highway No. 275 to Fremont, thence generally westward over U. S. Highway No. 30 through Grand Island, Nebraska, and thence on that highway and through the cities and villages thereon to the state line. Another right of appellee is to operate with closed doors from Omaha westward on U. S. Highway No. 30A to the point where this highway joins Highway No. 30, thence westward to Grand Island and the state line. This second or alternate route is a considerable distance south of the other and doubtless operates in less time between Omaha and Grand Island since it is shorter and the operations are nonstop. Still another right of the appellee is to operate from Omaha to Lincoln, but not westward beyond that point.

Over this route from Omaha to Lincoln the appellee operates and maintains a number of schedules in both directions.

American Buslines, Inc., like the appellee, is in the same business and, like it, is part of a system that operates across the United States with operations intrastate over certain highways in the State of Nebraska. Its intrastate operation extends, to the extent necessary to state here, over U. S. Highway No. 30 to and through Grand Island and thence on that highway through the cities and villages thereon to the state line. It also has the right to operate out of Omaha to Lincoln and thence over U. S. Highway No. 34 to Grand Island and westward to the state line. The distance between Lincoln and Grand Island is approximately 90 miles.

As becomes apparent, except for this distance, prac-

tically speaking, the overall operations of the two systems are coincident.

The appellee substantially contends that over this mileage public convenience and necessity require that it be given authority to operate closed buses on schedules proposed by it, this in view of the assertion that the schedules of American Buslines, Inc., were not sufficient in number, that the schedules were ill-timed, and most of all that they operated locally and not on a closed-door basis which resulted in inconvenience to those who used or would use the transportation otherwise. There was no substantial showing of insufficiency of capacity or lack in quality of service.

The appellee, to correct this, proposed the transfer of all of its closed-door schedules from Omaha to Grand Island over its alternate route over Highway No. 30A, through Lincoln thence to Grand Island, to accomplish this end.

The only reasonable effect of this would be to permit passengers and shippers of express going westward from Lincoln to Grand Island and beyond a choice between transportation schedules from Lincoln westward. Since the American Buslines, Inc., operated over this distance only local schedules to Grand Island which were slower than those of the appellee, this would give rise to a conclusion that patrons and shippers would ordinarily and reasonably resort to the facilities of the appellee. A further reasonable conclusion would be that if these were using the services of the appellee they would select for their purposes the facilities of the appellee and its affiliate westward from Grand Island rather than those of American Buslines, Inc.

These incidents could not well be considered as anything less than unfair and destructive competition within the meaning of the legal principles set forth herein. This is true since the evidence discloses preponderantly that the facilities of American Buslines, Inc., were good,

the operating conditions satisfactory, and that the capacity was more than sufficient.

While the evidence leaves in doubt the question of whether or not American Buslines, Inc., could continue its operation between Lincoln and Grand Island if the appellee became a competitor, it is clear that a severe loss of revenue would be sustained if it did so become.

The only real complaint about this west-bound service was that the schedules were not timely and not as rapid as those offered by the appellee.

It may well be said that the traffic situation westward from Lincoln to Grand Island presented elements of inconvenience, but not, in the light of the evidence of conditions and circumstance, of true necessity as that term must be applied to common carriers on public highways.

Turning now to the situation involved from Grand Island eastward to Lincoln and westward from Grand Island, the matter of whether or not public convenience and necessity reasonably required the offered new schedules and through transportation is of great importance.

It may well be said that in this area there is evidence that the issuance of a certificate and operation thereunder would make a contribution to convenience which leaves for consideration the question of whether or not, within a proper interpretation of the facts and the application of appropriate legal principles, necessity has been shown.

Lincoln is the capital of the state and the center of state government and state activities. It is also a large and important location of business and commercial enterprises and educational facilities. Many occasions do arise when people are required to and desire to travel from Lincoln to points beyond Grand Island and from points beyond Grand Island to Lincoln. Witnesses testified that in their opinion if schedules which were offered by the appellee were available there would be a greater use of bus service for the purpose of travel and

express transportation. What this prospective increase would be was a matter of surmise and conjecture. It is made clear that as conditions obtained space on vehicles was not a problem. The evidence discloses that except on a few rare occasions the buses operated well below capacity. It is estimated that private automobiles carry around 90 percent of the traffic and whether or not more people would use buses if schedules were changed amounted to, as the findings disclose, only a hope.

There is evidence suggesting that on occasions emergencies arise which might be averted if there were more timely schedules. The only emergencies suggested however are such as were not and could not be anticipated. There is no evidence of a constant and continuous emergency condition which would be benefited by new and different scheduling of buses. It may not reasonably be said that this described situation extends beyond the field of convenience and into the realm of necessity.

From what has been set forth herein it becomes apparent that the decision herein must turn upon the question of whether or not the appellee has sustained the burden, which has been generally defined herein, of showing that public convenience and necessity required the certificate which was issued to it by the commission. Elements which must be satisfied before it may be said by this court that the burden has been sustained appear in the decisions of this court which have been cited and in others.

One of these elements relates to regular route transportation of passengers by bus and its effect is to say that a certificate shall not issue in the absence of proof of both public convenience and necessity. See, Young v. Morgan Drive Away, Inc., *supra;* Moritz v. State Railway Commission, 147 Neb. 400, 23 N. W. 2d 545; In re Application of Moritz, 153 Neb. 206, 43 N. W. 2d 603; In re Application of Effenberger, 150 Neb. 13, 33 N. W. 2d 296.

Another is that the commission has no valid right to

issue a certificate over an existing route until the existing carrier refuses or has failed to provide adequate service on notice, hearing, and order of the commission. In the case here there is no evidence of service of notice, hearing, and order of the commission, or even of any type of formal complaint to American Buslines, Inc. As to this element see, In re Application of Effenberger, *supra;* In re Application of Moritz, *supra;* Black Hills Stage Lines, Inc. v. Greyhound Corp., 174 Neb. 425, 118 N. W. 2d 498.

Another element is that reasonable and necessary interchanges of transportation and transfers do not afford a basis for a claim of inadequacy of service such as to permit the issuance of a competitive certificate of public convenience and necessity. See, In re Application of Effenberger, *supra;* In re Application of Moritz, *supra.*

Another element is that the duplication of lines of transportation by common carriers is ordinarily incompatible with the public interest and will be authorized only for compelling reasons. See, In re Application of Moritz, *supra;* In re Application of Effenberger, *supra.*

Still another element is that the issuance of a certificate by the commission is binding on this court on appeal if the commission had jurisdiction of the subject matter and the holding of public convenience and necessity was not arbitrary or unreasonable. See, In re Application of Effenberger, *supra;* In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507.

In the light of the record made and the controlling legal principles the conclusion reached here is that the commission did have jurisdiction of the subject matter. The further conclusion is that the commission was in error in its effectual finding that the appellee sustained its burden of showing that the order granting a certificate of public convenience and necessity was not arbitrary and unreasonable.

In this light the order of the Nebraska State Railway Commission granting to the appellee the certificate of

public convenience and necessity is vacated and set aside and the judgment is reversed.

REVERSED.

DIERKS, District Judge, not participating.

MARY FULMER, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

131 N. W. 2d 657

Filed December 11, 1964. No. 35715.

1. **Constitutional Law: Eminent Domain.** By the declaration of Article I, section 21, of the Constitution of the State of Nebraska, the property of no person shall be taken or damaged for public use without just compensation therefor.
2. **Eminent Domain.** In an action in condemnation where an easement, as distinguished from property, is taken the owner thereof prior to the taking is entitled to compensation or damages in the amount of its value, if value is proved, and the failure to so instruct the jury is prejudicial error.
3. ———. The free use of land is a property right, and whatever infringes on that must be paid for as damaging the land.
4. ———. Anything connected with the land which would influence the market value thereof in the mind of a good faith intending purchaser would be an element for consideration in determining damage.
5. ———. This rule does not apply to an instance where the damage is to a peculiar value for special reasons to the owner, but it does apply to all instances of uses which follow the property taken or damaged.
6. **Trial.** Instructions to a jury should state clearly and concisely the issues of fact and principles of law which are necessary to enable it to properly and efficiently consider and make a determination upon the questions presented.

Appeal from the district court for Cass County: JOHN M. DIERKS, Judge. Reversed and remanded.

Carl D. Ganz and Flansburg, Mattson, Field, Ricketts & Sorensen, for appellant.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., James J. Duggan, and James M. Winter, for appellee.

Clarence A. Davis, for amici curiae.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. SMITH, District Judge.

YEAGER, J.

This is an eminent domain action originally instituted in the county court of Cass County, Nebraska, by the State of Nebraska, Department of Roads, in proceedings in condemnation of a permanent easement "to certain property" owned by Mary Fulmer, for the control of outside advertising on land lying within 660 feet of the controlled access lines of an interstate highway right-of-way with the measurement to be made at right angles from the centerline of the highway. The area involved is 17.8 acres out of a farm belonging to Mary Fulmer. For the purposes of this case it appears that a more extended description of the land and its boundaries is not required.

The action was instituted and prosecuted in accordance with the powers granted to the state by the Constitution and the statutes. As to this there is no controversy presented by the record. The right of the state to condemn and the manner pursued for that purpose are specifically agreed to by the parties. The right to condemn, and to condemn a right of the character involved here, is contained in section 39-1328, R. R. S. 1943, and section 39-1320.01, R. S. Supp., 1963. Special attention is directed to the relation between section 39-1320.01, R. S. Supp., 1963, and subdivision (m) of subsection (2) of section 39-1320, R. S. Supp., 1963.

It follows of course that nothing said in this opinion may be treated as any kind or character of determination of constitutionality of the legislation or of the stat-

utes to which reference may be made, or to legality of the procedure employed.

The proceedings here were commenced on January 8, 1963, by the State of Nebraska, Department of Roads, condemner, against Mary Fulmer, owner, by the filing with the judge of the county court of Cass County, Nebraska, a petition for the appointment of appraisers to appraise the value of a permanent easement which did not contemplate an actual taking of anything of a tangible character, but only a preventive right which would prohibit the use of this area of land for outdoor advertising. The purpose of the appraisal was to ascertain the value of the easement, if it had value.

A board of appraisers was duly appointed and qualified, and after investigation on January 28, 1963, it made a return fixing the value of the easement at $100.

On February 23, 1963, Mary Fulmer gave notice of appeal to the district court from the report and award of the appraisers. The appeal was perfected and on April 10, 1963, a petition on appeal was duly filed. By this appeal Mary Fulmer became plaintiff in the action and the State of Nebraska, Department of Roads, became defendant.

The substantial basis of the petition of plaintiff is that she was damaged by the taking of the easement in an amount in excess of the $100 fixed by the board of appraisers and prayed in the alternative that the original action in condemnation of the defendant be dismissed, or that the plaintiff recover damages in the amount of $5,000.

The action was, on appeal to the district court, tried to a jury which returned a verdict on the issues presented in favor of the defendant and by it denied any right of recovery of damages by plaintiff. Judgment was rendered on the verdict. From this judgment the appeal herein was taken. As ground for reversal plaintiff charges that the failure of the jury to return a verdict in her favor for damages was prejudicially erroneous.

She also contends that the judgment rendered is contrary to law and the evidence. Other assignments assert error which appeared in certain instructions given. The assignments of error relating to instructions, except as to instruction No. 5, are not comprehensibly argued in the briefs, and therefore they will not be discussed herein.

It is true that a verdict was returned in favor of the plaintiff for $25 but the record discloses that the parties have agreed that this was not related to plaintiff's claim in the action for compensation or damage. As agreed and as stated in the verdict it was for the cost of an abstract of title and has no significance in a consideration of the issues involved herein.

No question is presented herein as to the amount of damage to plaintiff or of compensation to the plaintiff, if any, but only one of whether or not she is entitled to make a substantial recovery.

Returning then to a consideration of instruction No. 5, it declared as follows: "This case involves the taking of a permanent easement for the control of outdoor advertising and does not involve the actual taking of land. The measure of damages in such a case is the difference in the reasonable market value of plaintiff's property before and after the taking of such easement."

This instruction, as is clearly declared, states that if there was allowable damage it was limited to the difference between the reasonable value of plaintiff's property before and after the taking of the easement. The value of the easement as such and of itself is not in this instruction or elsewhere in the instructions made a basis of a measure of damage or right of recovery by the plaintiff.

Article I, section 21, of the Constitution of the State of Nebraska, is the following: "The property of no person shall be taken or damaged for public use without just compensation therefor." This provision contains a measure of right of recovery. It does not however contain

any method for ascertainment or restriction upon method of ascertainment of what may be recovered pursuant to this constitutionally declared right of recovery by one whose property has been taken or damaged by a taking under the power of eminent domain.

Instruction No. 5 limits the right to recover, where as here there was no taking of property or right of use by the taker, but only the prohibition of use by the plaintiff for a particular purpose, to the difference between the reasonable market value of plaintiff's property before and after the taking of the prohibitory easement. This instruction and no other contains any exception thereto.

The question here is not that of whether or not the instruction thus limited is fully applicable in a situation such as this where no real property or tangible personal property was taken, but there was only a restriction upon use. It is of course applicable where the only question is that of the actual taking or damaging of property.

The substantial contention of the plaintiff is that in the instance here the use which was the basis of the condemnation had a value all its own, which value was proved, in consequence of which she was entitled to compensation therefor, and that the court erred in its failure to so instruct the jury in instruction No. 5 or elsewhere.

On the trial of the case the plaintiff did make proof independent of and in addition to the actual value of the land before and after the condemnation of the value of a use of the easement taken. And it is pointed out here that this evidence is in nowise controverted or denied. This proof was of a contract for the erection and maintenance of advertising signs for a period of 5 years at the rate of $40 a year, with the prospect of renewal for a longer period thereafter.

In the light of this established fact and the decisions of this court it became the duty of the court to instruct

the jury that the plaintiff was entitled to receive as damages or compensation the proved value of the easement which was taken, and in this light the plaintiff was entitled to a verdict in her favor in at least the amount undisputedly proved. Instead the verdict was totally in favor of the defendant.

Requests for instruction to the jury covering this phase of the plaintiff's right and interest were duly made but they were refused.

In Dunlap v. Loup River Public Power Dist., 136 Neb. 11, 284 N. W. 742, 124 A. L. R. 400, it was said: "The free use of that land is a property right, and whatever infringes on that must be paid for as damaging the land."

In Wahlgren v. Loup River Public Power Dist., 139 Neb. 489, 297 N. W. 833, it was said: "Anything connected with the land that would influence the market value of the land in the mind of a good faith intending purchaser would be an element for consideration in determining damage."

The principle announced and declared in these cases has been reannounced and redeclared in the following cited cases and others not cited: Quest v. East Omaha Drainage Dist., 155 Neb. 538, 52 N. W. 2d 417; Sump v. Omaha Public Power Dist., 168 Neb. 120, 95 N. W. 2d 209; Graceland Park Cemetery Co. v. City of Omaha, 173 Neb. 608, 114 N. W. 2d 29; Johnson v. Airport Authority, 173 Neb. 801, 115 N. W. 2d 426.

There are two cases containing language which on its face appears to be in conflict with the rule to which reference is made in these cited cases, but when examined it becomes apparent that there is no conflict. The language appears in Wiles v. Department of Public Works, 120 Neb. 689, 234 N. W. 918, and is quoted in Wahlgren v. Loup River Public Power Dist., *supra*. It is as follows: "The compensation for land taken by right of eminent domain is measured by its market value at the time

taken, and no evidence is admissible of its peculiar value for special reasons to its owner."

From an examination of the opinions in these and the other cases it appears that the limitation applies only to uses which were for special reason available to the owner at the time of condemnation, and which uses did not follow the land. In other words, the limitation has application to the right of a person and is not an interest which follows property.

The applicable rule as stated in Lynn v. City of Omaha, 153 Neb. 193, 43 N. W. 2d 527, which was a condemnation case, is as follows: "The purpose of instructions is to furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict; and, with this end in view, they should state clearly and concisely the issues of fact and the principles of law which are necessary to enable them to accomplish the purpose desired."

In this case, as pointed out herein, the plaintiff requested instruction in the area omitted by the instructions given which request was denied. In Hyndshaw v. Mills, 108 Neb. 250, 187 N. W. 780, it was said: "It is error to refuse a proffered instruction which is warranted by the evidence and correctly states the law of the case, unless the principles involved are covered by other instructions given." This principle was reannounced in Snyder v. Lincoln, 153 Neb. 611, 45 N. W. 2d 749.

The conclusion reached is that the court failed to fully and properly instruct the jury as to the issues which were presented to the jury and supported by evidence on the basis of which evidence the plaintiff was conclusively entitled to recover damages or compensation in some amount, and that this was prejudicial error.

The further conclusion is reached that the failure of the jury to, in its verdict, award damages or compensation to the plaintiff in the light of the undisputed evidence of recoverable damage or compensation was prejudicial error.

It must be said therefore that the judgment is contrary to law and that it is not sustained by the evidence.

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

REVERSED AND REMANDED.

CARTER, J., concurring in the result.

The petition filed in this case is in the form of a condemnation action under the power of eminent domain for the taking of an easement by the State on specifically described property adjacent to the interstate highway for the control of outdoor advertising thereon. The original petition of taking alleges that such taking is in accordance with the provisions of Chapter 39, article 13, R. S. Supp., 1959, and sections 76-704 to 76-724, inclusive, R. R. S. 1943. Chapter 39, article 13, R. S. Supp., 1963, provides in substance that the Department of Roads is authorized to acquire property, or an interest in property, by gift, agreement, purchase, exchange, condemnation, or otherwise, for highway purposes, including the control of outside advertising within the area adjacent to and within 660 feet of the edge of the interstate highway. The authority is to be exercised in the manner set forth in sections 76-704 to 76-724, R. R. S. 1943, the general law providing for the condemnation of private property for public use under the power of eminent domain.

The record shows that the interstate highway crosses the lands of the plaintiff, the right-of-way having been obtained from plaintiff's predecessors in title. The present action is a separate and distinct proceeding completely disassociated from the original taking for highway purposes.

The question arises as to whether or not the claim of the plaintiff is based on the taking of an easement by condemnation under the power of eminent domain or whether or not it is a claim for damages resulting from an exercise of the police power for which the Legislature has authorized a recovery.

In the instant case there is no property taken for public use nor any damage resulting from the taking of any property for such use. What we have here is a restriction on the private use of property under the police power. 1 Lewis, Eminent Domain (3d ed.), § 6, p. 13; 1 Nichols, Eminent Domain (3d ed.), § 1.42(2), p. 95, and § 1.42, p. 87; 29 C. J. S., Eminent Domain, § 7, p. 789. It is not a taking of property under Article 1, section 21, of the Constitution of Nebraska. If it is an eminent domain proceeding, as the majority opinion indicates, the enactment of sections 39-1320 to 39-1320.03, R. S. Supp., 1963, would have been wholly unnecessary to afford a basis of recovery. It is the difference in eminent domain and police power that should be made clear and strictly followed in the instant case.

"A proper exercise of the police power by the sovereign does not require the payment of compensation. Compliance with an enactment of the legislature in the exercise of the police power for purposes of health, morals, safety or welfare without compensation does not constitute a damaging or taking of property without just compensation within the meaning of the law of eminent domain. It follows, therefore, that the constitutional provisions which limit the exercise of the power of eminent domain, so that just compensation must be provided for, have no application to and impose no limitation upon the proper exercise of the police power." 1 Nichols, Eminent Domain (3d ed.), § 1.42(3), p. 100.

In Beisner v. Cochran, 138 Neb. 445, 293 N. W. 289, this court said: "A legislative enactment under the police power of the state which is regulatory in character is not violative of the due process clauses of the state and federal Constitutions because it reduces or destroys the value of property acquired under a former law.

"Neither does such an act amount to the taking or damaging of private property for public use without just compensation within the meaning of constitutional provisions on the subject."

The regulation of billboards and signs is generally conceded to be an exercise of the police power. In Gibbons v. Missouri, K. & T. Ry. Co., 142 Okl. 146, 285 P. 1040, the court said: "It is well settled that the regulation of the subject of signboards, as in the instant case, is an exercise of the police power and not an exercise of the power of eminent domain. (Citing cases.) * * * It is a well-settled principle of constitutional law that all property in the jurisdiction of a state, however unqualified may be the title of the owner, is held on the implied condition or obligation that it shall not be injurious to the equal rights of others to the use and benefit of their property, and is held subject to the general police power of the state to control and regulate its use in proper cases so as to secure the general safety, the public welfare, and the peace and good order and morals of the community (6 R. C. L. 194); and, having held the regulation of the subject of signboards to be an exercise of the police power and not an exercise of the power of eminent domain, the fact that the statute does not provide compensation to the owner does not render the same unconstitutional. * * * 'Hence, it is held that acts done in the proper exercise of the police power, which merely impair the use of property, do not constitute a taking within the meaning of the constitutional requirements as to the making of compensation for the taking of property for public use, and accordingly do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action for the injuries sustained.'" See, also, City of Chicago v. Gunning System, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230; St. Louis Gunning Adv. Co. v. City of St. Louis, 235 Mo. 99, 137 S. W. 929; City of St. Louis v. Galt, 179 Mo. 8, 77 S. W. 876; Thomas Cusack Co. v. City of Chicago, 267 Ill. 344, 108 N. E. 340, Ann. Cas. 1916C 488; General Outdoor Adv. Co. v. City of Indianapolis, 202 Ind. 85, 172 N. E. 309, 72 A. L. R. 453.

Nothing was taken for a public use in this case. The

majority opinion is written on the theory that an easement was taken. I assert that there was no easement taken. If the majority opinion be correct that the limitation of the use of billboards on plaintiff's property is an easement put to a public use, then such easements exist where limitations are imposed by zoning restrictions, health and safety ordinances, and other limitations imposed upon private property under the police power. Such has never been the law of this state.

The power exercised in this case is the police power and not that of eminent domain. The basis for a recovery is solely the statutory authorization contained in Chapter 39, article 13, R. S. Supp., 1963.

The statute is in derogation of the common law. The procedure provided for the statutory recovery of damages is a part of the right and must be followed. But the fact that the procedure provided was that provided in condemnation under the power of eminent domain does not change the nature of the statutory wrong sought to be remedied. The right to recover is based solely on the statute and is in no way influenced by Article 1, section 21, of the Constitution.

The power of eminent domain is a sovereign power which the Legislature may delegate but not expand. The constitutional provision providing for compensation for taking or damaging property taken for a public use is a limitation on the exercise of the power. Likewise the procedure to be followed in the exercise of the power is a limitation upon the power. The power of eminent domain is the power of the state to take property for public use as limited by constitutional and statutory provisions. But here there was no taking for a public use or damaging because of such a taking; it is nothing more than a limitation of an owner's use. Any attempt to expand the power beyond the fundamental basis of the sovereign power would be in violation of this sovereign right of necessity, and consequently void. See May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448.

I agree with the result reached in the majority opinion. I submit, however, that the rationale of the opinion should be that the reasonable regulation of billboards and signs is an exercise of the police power for which a statutory remedy has been provided for the payment of damages to the owner that otherwise would be non-compensable. For the reasons stated, I concur in the result.

BROWER, J., and ROBERT L. SMITH, District Judge, join in this concurrence.

MELVON VOLLBRECHT, APPELLEE, V. VIOLA VOLLBRECHT, APPELLANT.
131 N. W. 2d 651

Filed December 11, 1964. No. 35740.

1. **Divorce.** Extreme cruelty, whether practiced by using personal violence, or by any other means, is a statutory ground for divorce.
2. ———. Whether accusations of infidelity made by one spouse against the other constitute extreme cruelty within the meaning of the statute must be determined by the facts of each particular case. In no case will they be given that effect unless they are shown to be either unfounded or malicious.
3. ———. Where the evidence in a divorce suit sustains a finding of cruelty on the part of the wife toward the husband, and is corroborated as required by law, the action of the district court in granting a divorce to the husband is proper and ordinarily will not be interfered with by this court on appeal.
4. **Appeal and Error.** When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
5. **Divorce.** In a divorce suit in which the custody of minor children is involved, the rule is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents.
6. ———. In determining the question of alimony or division of property as between the parties the court, in exercising its

sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired and the contributions each has made thereto, and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just.

Appeal from the district court for Stanton County: FAY H. POLLOCK, Judge. Affirmed as modified.

Bernard A. Ptak, for appellant.

T. L. Grady, for appellee.

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

DIERKS, District Judge.

This is a divorce action commenced on April 19, 1963, by the husband, Melvon Vollbrecht, plaintiff-appellee, against the wife, Viola Vollbrecht, defendant-appellant. The ground for divorce alleged by plaintiff was extreme cruelty. Defendant originally cross-petitioned for divorce on ground of physical cruelty and on October 22, 1963, amended such cross-petition to also charge that plaintiff committed adultery with a certain named woman.

The trial court granted an absolute divorce to plaintiff husband and awarded to him custody of the three minor children of the parties and allowed reasonable visitation privileges between defendant wife and said children. The cross-petition of defendant was dismissed. Defendant was awarded alimony of $4,000, payable in annual installments of $500 each, commencing January

1, 1964, without interest, except any delinquent installments were to draw interest as provided by law, and she was also awarded her personal effects. All other property, real and personal, was awarded and assigned to plaintiff, and costs were taxed against plaintiff, including a fee of $400 for services of defendant's attorney and a fee of $20 to one Dennis L. Poeschl, who made an appraisal of the property and testified on behalf of defendant with reference thereto.

Defendant appeals and assigns various errors, all of which will be considered under the following contentions: In awarding the divorce to plaintiff and in not granting the divorce to defendant for the husband's alleged adultery, in not giving custody of the youngest child, JoAnn, to defendant, and for the insufficiency of alimony awarded to defendant.

Plaintiff and defendant were married February 4, 1942. Four children were born to the marriage. They are Roseann, born September 19, 1943; Arnold, born March 18, 1946; Nancy, born August 2, 1950; and JoAnn, born May 1, 1957. Roseann is now married and resides with her husband, Terry Daniel, and is no longer dependent on her parents. The three younger children still resided at home with their father at the time of trial. The defendant has been working full time at the Hilltop Cafe for about 3 months. The record reflects that plaintiff was 44 years old at the time of trial, but it does not reflect defendant's age.

During the entire marriage the plaintiff has farmed and at times has fed a few cattle and hogs that he raised. In the early years of the marriage the defendant helped with the actual field work, when necessary, until the son, Arnold, was old enough to help his father, which he did soon after attaining school age. In 1946 plaintiff bought the farm where they have since lived and reared their children. It comprises 240 acres, situated in Stanton County, Nebraska, with approximately 80 acres of farm ground and balance in pasture. He has for many

years also rented an additional 80 acres of farm ground.

Even the early years of the marriage were not entirely free of family arguments and name calling between the parties, but it was not until the last 10 years before final separation that, according to plaintiff's testimony, it was horrible. Plaintiff testified that defendant accused him constantly of going out with other women, but that he never went near another woman as long as he lived with her. Such accusations would be made in front of the children. In 1959 plaintiff and the boy were farming 400 acres and defendant accused them of running after women instead of working. Defendant would sleep all day and yell all night. The boy and plaintiff had to sleep in the barn to get any rest.

The defendant's stepfather and mother, Mr. & Mrs. George R. Hall, lived in Norfolk, Nebraska, and plaintiff testified that defendant would leave home and stay a couple of days. She usually went to her folks and then plaintiff would go get her. A lot of times she would get mad on the farm and leave the house at night and plaintiff would go out and hunt for her practically all night. The youngest daughter, JoAnn, stayed with her grandmother, Mrs. Hall, after she was about 4 months old until the spring of 1958, but after that plaintiff and Roseann took care of her. The defendant's screaming would make the child cling to him like he was her last hope. The mother resented her and every 2 or 3 weeks she would lock the child out, tell her to go out with her dad, and then plaintiff would take her with him on the tractor to the field. She was scared to death of her mother.

Defendant started to work at the Lazy L Restaurant in Norfolk in August 1961. For the first 4 months she stayed with her folks in Norfolk, but after that she stayed at home and drove plaintiff's car back and forth to work. Out of her wages she bought Roseann's wedding dress, a suit for Arnold, and a rug for the house that cost about $30. She left the family home permanently

in early September 1962. Before leaving she accused plaintiff of putting his arm around another woman 20 years ago, plaintiff called her a liar, and she got mad. She was still mad when Roseann came over the next day to can tomatoes. Plaintiff was on the porch fixing Nancy's bicycle tire when Roseann and Terry came. Defendant came out of the house yelling, threw a ketchup bottle and plate at plaintiff, and broke the plate. He and Terry went up in the yard and defendant came up there with the broken half of the plate and was going to slice him with it, but he took it away from her. She grabbed the pitchfork and took after him and he ran. On September 8, 1962, defendant left with her folks and stayed away until after Easter 1963. The family did not know where she was. Plaintiff tried to locate her by checking different employment offices in Nebraska. Her folks said they did not know where she was and even went to Columbus with plaintiff to try to find her.

The three oldest children corroborated the plaintiff's testimony with reference to specific instances occurring in their presence of arguments between the parents leading to attempted violence by the mother on the father. The oldest daughter, Roseann Daniel, verified the incident that occurred the day she went over to can tomatoes when the father was fixing the innertube on the porch and the mother came flying out of the house, threw the ketchup bottle and Melmac plate with such force that the plate broke, and that he ran when she threw the pitchfork. Roseann further testified that her mother had the idea her father was stepping out on her and that he was having affairs with other women and meeting them in the cornfield or on the road or in town. It would start an argument and she would attack him with some object, anything near, lamps, skillets, baseball bats, and he would try to wrestle the object away from her and then it would be a fight. He never hit her the first blow but he had defended himself. The mother's loud talking

and yelling at the father really began about the time she found out she was pregnant with Joanie (JoAnn). Roseann further testified: "I've seen her try to stab him with butcher knives and one time try to ax him with an axe and there would be a fight when he tried to take it away from her."

The daughter Nancy testified on rebuttal that she heard her mother accuse her father about every other night of going out with other women, and that when she threw things at him he would only fight back in self-defense. The son Arnold testified on rebuttal to verify an incident when he and his dad were watching T-V and defendant came in yelling and hollering, grabbed a heavy wooden lamp, and tried to hit plaintiff with it. Terry Daniel testified on rebuttal to verify the incident of defendant throwing the pitchfork at plaintiff.

Defendant acknowledged on direct examination that she accused her husband of running with other women. Such accusations of infidelity were completely unfounded during all the years these parties lived together as husband and wife. The evidence shows there were many physical encounters and violent arguments, which each party blamed the other for starting. She admitted throwing the plate and picking up the pitchfork, but generally denied throwing other things at plaintiff or trying to hit him with objects. This opinion need not be extended with further details regarding the physical encounters of the parties. Defendant finally admitted after much evasiveness that during the period of over 7 months from the time she left the farm until April 1963, she did not communicate with her family or make any inquiry whatsoever as to the health, education, or welfare of the children.

Defendant's contention of plaintiff's adultery is based upon activities and conduct of defendant occurring long after her own disappearance and within the last few months before the trial herein, consisting largely of plaintiff being seen occasionally at public dances in the

company of another woman (a divorcee), at whose home plaintiff's car was frequently seen and he was observed entering or leaving at times by defendant's parents, for all of which plaintiff gave a reasonable explanation; and that they, together with the woman's children and his own daughter Nancy, then 13 years old, had taken a few days trip to Colorado in July 1963, plaintiff to visit his sister and she and her children on vacation.

With reference to defendant's contention of plaintiff's adultery there is no unexplained evidence or circumstance of any real significance that would lead to any overt act of an adulterous relationship between plaintiff and any other woman while this marriage subsisted. There is no merit to such contention of defendant and the trial court properly dismissed her cross-petition.

Extreme cruelty, whether practiced by using personal violence, or by other means, is a statutory ground for divorce. § 42-302, R. R. S. 1943. Whether accusations of infidelity made by one spouse against the other constitute extreme cruelty within the meaning of the statute must be determined by the facts of each particular case. In no case will they be given that effect unless they are shown to be either unfounded or malicious. Meredith v. Meredith, 148 Neb. 845, 29 N. W. 2d 643.

Where the evidence in a divorce suit sustains a finding of cruelty on the part of one spouse toward the other, and is corroborated as required by law, the action of the district court in granting a divorce to the aggrieved spouse is proper and ordinarily will not be interfered with by this court on appeal. In effect such was the holding of this court in Kramer v. Kramer, 171 Neb. 128, 105 N. W. 2d 741, wherein the wife was the aggrieved spouse to whom the divorce was granted. There is no sound reason why the same rule should not apply where the husband is the aggrieved spouse in such a case as is here involved and the divorce is granted to him.

When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining

the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Lichtenberg v. Lichtenberg, 154 Neb. 278, 47 N. W. 2d 575; Meredith v. Meredith, *supra*.

The trial of this case extended over one full day and a portion of another day and the trial court did observe the witnesses, their demeanor and conduct, both on and off the witness stand, and, in fact, was obliged at different times to admonish each of the principal parties as to their conduct and decorum during the trial. From our examination of the record herein the judgment of the trial court in awarding the plaintiff an absolute divorce and in dismissing defendant's cross-petition is amply supported by sufficient competent evidence, duly corroborated, and is not contrary to law, and it should be affirmed in that regard.

In a divorce suit in which the custody of minor children is involved, the rule is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents. The evidence shows the close attachment of the youngest child, JoAnn, for the father and the care and attention he devoted to her from the time she was 2 years old. The undisputed evidence shows that the mother left the farm home and her whereabouts were unknown to the family for over 7 months prior to the commencement of this action, during which period she clearly demonstrated her utter disregard for the health and welfare of her minor children and cannot now rightly claim any superior right over the father to the custody of JoAnn. There was no error in awarding the custody of said child to the father and the trial court's judgment should also be affirmed in that respect.

There remains for consideration the adequacy of the alimony awarded to defendant. This court has repeat-

edly held that in determining the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife probably would have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired and the contributions each has made thereto, and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just. Schwarck v. Schwarck, 175 Neb. 560, 122 N. W. 2d 489; Kramer v. Kramer, *supra*. The briefs of both parties cite only these two cases on the question of an alimony award. In both of these cases it was pointed out that the foregoing rule provides no mathematical formula by which an alimony award can be exactly determined, but generally speaking, awards of this court in cases of this kind vary from one-third to one-half of the value of the property, depending on the facts and circumstances of the particular case.

There is no dispute as to what the property comprises. Plaintiff testified as to the purchase of the farm, comprising 240 acres, in 1946 for $9,800, but could not state a current market value thereon. He testified there were about 80 acres of farm ground and the balance was in pasture; that his farming equipment consisted of two tractors, a cornpicker, combine, plow, harrow, rotary hoe and grinder, and some wagons; that his livestock consisted of 17 stock cows, 6 milk cows, 15 spring calves, and about 50 pigs, that weighed about 60 pounds each;

that he had a 1961 Ford car, 1,000 bushels of corn and 10 tons of hay on hand, and a couple hundred dollars in the bank; that he was feeding the calves and pigs and would have to buy another $800 to $1,000 worth of feed to finish them for market; and that he owed $1,200 on the farm mortgage, $720 on the car mortgage, $1,000 on a bank note, $300 on a feed account, $100 on his oil account, and $150 personal taxes. The foregoing items of indebtedness, including an estimated $1,000 for additional feed, total $4,470. Plaintiff did not purport to state a current market value for any of the foregoing items of personal property.

Dennis L. Poeschl of Stanton, Nebraska, made an appraisal of the property and testified on behalf of defendant that he was a licensed real estate agent, clerked many farm sales and public auctions in the community, and had an adjoining farm listed for sale; that he was generally familiar with the land in that area; that the Vollbrecht farm was of poor quality, sandy, and pretty well cut by ditches, ravines, and a creek through the middle; that the buildings consisted of a house, barn, double crib, and garage, all in poor condition; and that from clerking farm sales he was well acquainted with the values of livestock and farm machinery in and about Stanton County. Mr. Poeschl valued the farm at $80 per acre, or $19,200, and stated that the Wilkins appraisal for the county taxing authorities, in 1955 or 1956, was near $16,000 and was pretty close to actual value at that time; he valued one tractor at $1,700, the other tractor at $700, a four-row John Deere corn planter (picker) at $225, the combine at $225, a wagon and gear at $185, the Ford car at $1,575, the 17 stock cows at $165 per head, or $2,805, one holstein milk cow at $185 and the other milk cows at $150 each, which for the remaining 5 would be $750; and he saw only one calf and a few pigs and did not attempt to value them or the feed on hand. The foregoing values together with the $200 in the bank account total $27,750, without taking into ac-

count the other items of farm machinery, livestock, and feed on hand as enumerated by plaintiff. Deducting the indebtedness listed by plaintiff leaves a net value of such assets in the sum of $23,280. At the time of the marriage the plaintiff had been farming some rented land for 2 years, and he had some horses, hogs, cattle, and machinery. Nothing is shown in the evidence as to the number of head of livestock and amount of machinery or values thereof. The defendant had no property other than wedding gifts at that time.

The alimony award of the trial court in the amount of $4,000 appears to be inadequate under all the circumstances and should be increased. The defendant contends that the wages, amounting to $1,500, earned by her while working at the restaurant in Norfolk during the last year before the final separation, should be restored to her because she paid for Roseann's wedding dress, bought a suit for Arnold, a rug, some end tables and what-nots for the house, and otherwise contributed to general household expenses. There would be no more reason to reimburse defendant for said contribution of her earnings as such, than to reimburse plaintiff for the value of his farm labor during a like period. Contributions of each party to the acquisition of property accumulated is simply one of many factors taken into account, but not considered separately, in the application of the rule hereinbefore stated in making an alimony award that is just and equitable. Considering all the facts and circumstances in this particular case we conclude that the alimony award to defendant should be increased to the sum of $7,500, payable in annual installments of $500 each, as determined by the trial court, commencing on January 1, 1964, without interest, except any delinquent installments shall bear interest as provided by law. The installment due January 1, 1964, shall draw interest at 6 per cent per annum from said date until paid. As so modified by the increase of alimony awarded to defendant, the judgment and decree of the trial court is in all

respects affirmed. Costs on this appeal are taxed to plaintiff, including a fee of $350 for the services of defendant's attorney in this court.

AFFIRMED AS MODIFIED.

Opinion in this case adopted by the Supreme Court prior to the death of District Judge JOHN M. DIERKS.

CLYDE L. MENTZER ET AL., APPELLEES, V. PHYLORY R. DOLEN, APPELLANT, IMPLEADED WITH FRANCIS S. DOLEN ET AL., APPELLEES.

131 N. W. 2d 671

Filed December 11, 1964. No. 35742.

1. **Adverse Possession.** The claim of title by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years.
2. ———. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted.
3. ———. The law does not require that possession shall be evidenced by a complete enclosure nor by persons remaining continuously on the land and constantly performing acts of ownership thereon.
4. ———. What is sufficient to meet the requirements for actual possession depends upon the character of the land and all of the circumstances of the case.
5. ———. Acts of dominion over land must, to be effective against a true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another. A mere temporary use of property by a trespasser at intervals, whether remote or frequent, is not enough.
6. **Appeal and Error.** While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.

7. **Boundaries: Adverse Possession.** Where one, by mistake as to the boundary line, constructs upon and takes possession of land of another, claiming it as his own to a definite and certain boundary by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession.
8. **Adverse Possession.** The fact that one claiming title by adverse possession never intended to claim more land than is called for in his deed is not a controlling factor. It is the intent with which possession is held, rather than the intention to hold in accordance with the deed, that is controlling. The claim of adverse possession is founded upon the intent with which the occupant has held possession, and this intent is ordinarily determined by what he has done in respect thereto.

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

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellant.

Davis, Thone, Bailey & Polsky and Frank C. Sidles, for appellees Mentzer.

C. M. Pierson, for appellees Dolen.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. SMITH and ROBERT L. FLORY, District Judges.

SPENCER, J.

This is an action in equity brought by Clyde I. Mentzer and Bernice I. Mentzer, husband and wife, plaintiffs and appellees, hereinafter referred to as plaintiffs or by their given names where necessary, against Phylory R. Dolen, defendant and appellant, hereinafter referred to as defendant, to quite title in the plaintiffs to the south 2 feet of Lot 1, Block 1, Ellendale addition to Lincoln, Lancaster County, Nebraska. The trial court quieted title in the plaintiffs, and defendant has perfected an appeal to this court. A mortgagee and the tenants in possession of Lot 1, Block 1, Ellendale addition, hereinafter referred to as Lot 1, were also made parties defendant, but are

not parties to this appeal and are not referred to further herein.

Plaintiffs are the owners of Lot 2, Block 1, Ellendale addition to Lincoln, Lancaster County, Nebraska, hereinafter referred to as Lot 2, which came to Clyde by inheritance in 1949. Previously it was owned by his parents. The house on Lot 2 was built in 1911 and 1912 by the father of Clyde. Clyde was born in the house in 1914 and lived therein until 1923 when the family moved next door, where he lived until he was married in 1940. The plaintiffs moved into the house on Lot 2 in 1941 and lived there continuously thereafter to the time of the trial.

Defendant became the owner of Lot 1 in 1917. She has never lived on the property but has held it as a rental unit over the years. The house on Lot 1 and the house on Lot 2 were both in existence when defendant acquired Lot 1, and both have remained in the same position since they were constructed, although improvements have been made on them. The two houses are approximately 8 ½ feet apart.

The plat shows both lots to be 40 feet north and south, and 128 feet east and west. A situation survey of Lot 2, made in November of 1963, discloses that the northeast corner of the house on Lot 2 is .05 feet north of the north lot line, or that it encroaches .05 feet on Lot 1. The northwest corner of the house is .35 feet north of the lot line. There are four window wells on the north side of the house. The east three are 1.35 feet, and the west one is 1.30 feet north of the lot line. The northwest corner of the garage, which is 3.85 feet from the west boundary of the lot, is .15 feet north of the lot line. A fence on the north, extending from the house to the garage, a distance of approximately 54 feet, is 1.95 feet north of the lot line. The seam line in the sidewalk in front of Lot 2, which has been in existence for more than 30 years, is 2.07 feet north of the lot line.

Clyde testified that previous to 1942 there were three

old buildings situated at the rear of Lot 2, which he wrecked and built the present garage. He set the present garage 2 feet south of the north line of the old buildings, and connected the fence to the garage with a 2-foot piece of wire. In 1945 he replaced an old wire fence extending from the house to the garage and which had been up for many years with a wooden picket fence. He replaced the picket fence between 1949 and 1952 with an ornamental iron fence which is still standing, although in 1957 he put cement blocks 2 blocks high under the fence, making a retaining wall to keep water from the north from running onto his property. These various fences were all in exactly the same location. In 1945 he replaced the north wall of the foundation of his house, and at that time constructed the window wells. In 1951 he installed a television ground 2 feet north of the house and approximately 12 feet east of the southeast corner of the house. He has always considered the sidewalk seam line as his north property line, and has maintained and used the property to a point even with that seam line. The present eaves have been on the house since 1911, and, with the gutter, extend out 24 inches from the house. Exhibits Nos. 30 and 32, which are photographs of portions of the house, clearly indicate the protrusion of the eaves and the gutter.

A neighbor, who has lived in the same block and directly west of the plaintiffs' property since 1929, testified to the existence of a 2-foot jog in the fence from the house to the garage for the last 20 years. Two friends, who helped during the time the foundation was relaid in 1945, testified to the installation of the window wells at that time. They also testified that they became acquainted with the plaintiffs in 1940, and that a jog of 2 feet has existed in the fence since that time.

Defendant's son, Leo F. Dolen, testified in substance that he has been familiar with Lot 1 since its acquisition by the defendant. The house thereon was remodeled in 1955 by and under his direction. The space between

the houses and up to the plaintiffs' house, has always been used and maintained by the defendant or the defendant's tenants. Previous to the installation of the cement blocks by the plaintiffs in 1957, there was no jog in the fence. Prior to 1957, the fence had no jog but was attached directly to the house and the garage. During the remodeling of the house on Lot 1 in 1955, the fence was not in existence, and the property between the two houses was used by the witness and his workmen for the remodeling purposes. This testimony was corroborated by witnesses who had assisted in the remodeling. Defendant's son also testified that any window wells which may have existed in 1955 must have been extended and squared subsequently, because they were then not as large as they are at the present time. He did not realize that the plaintiffs were encroaching on Lot 1 until his attention was called to some survey stakes on the property directly west of Lot 2. He called this information to his mother's attention, and she had a survey made in July 1962, which disclosed the encroachments by the plaintiffs.

Defendant called as a witness a party who had been a tenant on her property from 1943 to 1953. The testimony of this witness tended to corroborate in many particulars that of the plaintiffs. He testified to the improvements made on plaintiffs' property in 1945 and the installation of the window wells at that time. He remembered that the fence was a little to the north of the improvements, and that the picket fence was put in before he moved from the premises. He also recalled the planting of trees by the plaintiffs shortly after he moved onto Lot 1, as testified to by the plaintiffs.

The foregoing brief résumé of the pertinent evidence is sufficient to point up the problem herein. Defendant is the record title owner of the strip in question. The plaintiffs, who claim 2 feet of Lot 1 by adverse possession, have the burden to prove their allegations by a preponderance of the evidence. Fitch v. Slama, 177 Neb.

96, 128 N. W. 2d 377. The statutory period for the establishment of title to real estate by adverse possession in Nebraska is 10 years. § 25-202, R. R. S. 1943. The claim of title by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted. Krimlofski v. Matters, 174 Neb. 774, 119 N. W. 2d 501.

Defendant concedes that as to the area actually occupied by the house and garage, the evidence sufficiently shows adverse possession. With reference to the area enclosed by the fence between the house and the garage, and the area occupied by the window wells, while defendant disputes the evidence, she recognizes that a conflict existed to be resolved by the trial court, and that conflict was resolved in favor of the plaintiffs. It is our considered judgment that the weight of the evidence preponderates in favor of the plaintiffs to establish the use of and adverse possession to the area enclosed by the fence and the window wells for more than the statutory period.

Defendant seriously argues, however, that, in any event, the court erred in extending the plaintiffs' north lot line 2 feet, or in effect transferring from the defendant to the plaintiffs an east to west strip continuous and straight, constituting the entire south 2 feet of Lot 1. Defendant contends that no sufficient evidence was adduced to show the use of portions of said area, particularly the area between the window wells, the area north of the garage and west of the fence, which is an area approximately 22 feet by 2 feet, and the area north of the lot line and east of the east window well to the east property line, which would be considered as a part of the front yard area and would be approximately 20 feet by 2 feet.

The law does not require that possession shall be evi-

denced by a complete enclosure nor by persons remaining continuously on the land and constantly performing acts of ownership thereon. Lantry v. Parker, 37 Neb. 353, 55 N. W. 962. What is sufficient to meet the requirements for actual possession depends upon the character of the land and all the circumstances of the case. Olson v. Fedde, 171 Neb. 704, 107 N. W. 2d 663.

The evidence is undisputed that previous to the erection of the present garage in 1942, one of the old buildings it replaced occupied the disputed 2-foot area north of the garage. The plaintiffs also testified to the maintenance of a drainage ditch in the area north of the garage, since the construction of the garage. It is also undisputed that a television ground is in the area north of the house. There is no question but that the eaves of the house overhang the window wells and the area claimed north of the house, and that this would at least give a prescriptive use for the purposes of the eaves. It is the plaintiffs' claim that they have always considered the sidewalk seam line to be the north boundary of Lot 2. This seam line is 2.07 feet north of Lot 2. The present action is to quiet title to only the north 2 feet, and the judgment entered by the trial court is so limited.

Possession is not established by merely showing an intention to possess, because the whole doctrine of title by adverse possession rests upon the acquiescence of the owner and the hostile acts and claims of the party in possession. As we said in Fitch v. Slama, 177 Neb. 96, 128 N. W. 2d 377: "Acts of dominion over land must, to be effective against a true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another. A mere temporary use of property by a trespasser at intervals, whether remote or frequent, is not enough."

Is there in this record more than a mere temporary use of property by a trespasser sufficient to indicate a claim to the property? We believe there is. The evi-

dence of the plaintiffs is to the effect that they have always maintained their yard to the sidewalk seam line. They planted grass in the area involved, and put a lilac bush in the 2-foot area north and east of the house, which in 1949 they replaced by an evergreen tree. In 1957, when they remodeled the porch, they removed the evergreen tree and put a flower garden in part of the old porch area and the area occupied by the tree. It was the fencing of this area north and east of the house by the defendant which resulted in this action. We hold these acts to be sufficient to show an open, notorious, and hostile use of the area sufficient to put an ordinarily prudent person on notice of the fact that the area was in adverse possession of the plaintiffs.

It is true that there is a conflict in the evidence on the use of the disputed areas, particularly as respects the elements of exclusive use. We find, however, that the evidence is sufficient to sustain the plaintiffs' position. We also observe that while the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying. Walkenhorst v. Apolius, 175 Neb. 583, 122 N. W. 2d 875.

Defendant puts considerable stress on the fact that plaintiffs did not realize they were encroaching on defendant's property until the survey disclosed the encroachments. The rule is well settled that if one, by mistake as to the boundary line, constructs upon and takes possession of the land of another, claiming it as his own to a definite and certain boundary by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title there-

to by adverse possession. See Konop v. Knobel, 167 Neb. 318, 92 N. W. 2d 714.

The fact that one claiming title by adverse possession never intended to claim more land than is called for in his deed is not a controlling factor. It is the intent with which possession is held, rather than the intention to hold in accordance with the deed, that is controlling. The claim of adverse possession is founded upon the intent with which the occupant has held possession, and this intent is ordinarily determined by what he has done in respect thereto. See Vrana v. Stuart, 169 Neb. 430, 99 N. W. 2d 770.

Applying these rules, there can be little question herein. The house on Lot 2 was built in 1911 and 1912 approximately on the lot line, with the eaves extending approximately 2 feet north of the lot line. Improvements on the rear of the lot extended approximately 2 feet north of the lot line. This was the situation at the time the defendant acquired Lot 1. The improvements made by the plaintiffs subsequent to 1941 are consistent only with a belief and claim of ownership to this area. The seam line of the sidewalk would appear to the naked eye to be approximately 2 feet north of the plaintiffs' house, and in line with the north edge of the eaves and the gutters. The plaintiffs did not make the encroachments on the 2-foot strip because they claimed ownership only in those specific areas occupied by the improvements, but because they considered the lot line to extend 2 feet north of the house. It is also evident, although this fact is disputed by the testimony of the defendant and her son, that the actions of the parties would indicate that until the defendant's survey even the defendant considered the lot line to be approximately where the trial court placed it.

For the reasons given above, we find the evidence of the plaintiffs establishes a use showing actual, open, exclusive, and continuous possession of the south 2 feet of Lot 1 for more than the statutory period of 10 years.

It is, therefore, sufficient to sustain a claim of title by adverse possession. The trial court having arrived at a like conclusion, the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HOWARD LEROY SEAGER, APPELLANT.
131 N. W. 2d 676

Filed December 11, 1964. No. 35799.

Intoxicating Liquors: Automobiles. There is nothing in the statutory conditions relative to implied consent (section 39-727.03, R. R. S. 1943, as amended), which has the effect of changing the foundation requirements of the statutes (sections 39-727.01 and 39-727.02, R. R. S. 1943, as amended), for the admission of the results of tests of body fluids to determine intoxication that are performed pursuant to the express consent of the accused.

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

Kelly & Kelly, for appellant.

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

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. FLORY and ROBERT L. SMITH, District Judges.

WHITE, C. J.

Defendant appeals from a conviction and sentence for motor vehicle homicide arising out of an automobile accident occurring on July 28, 1963, about 2 miles east of Wood River, Nebraska, on U. S. Highway No. 30. The issue presented is whether the result of a blood alcohol test showing 0.20 percentage of alcohol in the blood was admissible in evidence.

Defendant was taken by ambulance from the scene of the accident to a hospital in Grand Island, Nebraska.

At the hospital, patrolman Osterholm asked the defendant if he would be willing to give a blood sample, and the defendant agreed to do so. He said, "go ahead." This was corroborated by one Ferguson, a properly registered technologist, who was present and overheard the conversation. Ferguson withdrew the blood sample, and it was tested by another properly qualified technologist in conformity with the statute and the methods approved by the Department of Health.

Defendant contends that he was not arrested or taken into custody prior to the test as required by section 39-727.03, R. R. S. 1943, as amended, and that therefore, under our holding in Otte v. State, 172 Neb. 110, 108 N. W. 2d 737, the result of the test is inadmissible. This case holds that for the *implied consent* of a person to be effective, he must have been arrested or taken into custody. The statute, by its terms, applies to situations where there is no actual consent. It is the use of the public roads and highways that is deemed as a matter of law to imply the consent, and the voluntary assent of the defendant is not required. The special requirements of the statute which authorizes the taking of a test even when the defendant is unconscious (section 39-727.05, R. R. S. 1943), are meant to apply when there is no actual consent. The statutes now in force that generally govern the admissibility of such tests were first enacted in 1949 (sections 39-727.01 and 39-727.02, R. R. S. 1943, as amended). There is nothing in the present statutory conditions relative to implied consent which has the effect of changing the foundation requirements of the statutes for the admission of tests performed pursuant to the consent of the accused. These are that they shall be performed by an individual possessing a valid permit and according to the methods approved by the Department of Health (section 39-727.02, R. R. S. 1943). The evidence in this case is undisputed that such requirements were satisfied. The result of the test showing 0.20 percentage of alcohol in the blood was

properly admitted and was competent evidence to sustain the conviction.

This conclusion renders it unnecessary to consider other matters argued in defendant's brief. The judgment of the district court is correct and is affirmed.

AFFIRMED.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SARPY, NEBRASKA, APPELLEE, V. CLIFFORD W. SCOTT, APPELLANT.

131 N. W. 2d 711

Filed December 18, 1964. No. 35743.

1. **Injunctions.** When the circumstances and situation of the parties have changed so that it would be just and equitable to vacate or modify a permanent injunction, the court which granted the injunction may vacate or modify it upon motion.
2. **Judgments.** When a question in controversy has been once finally decided, it becomes the law of the case and is binding on the parties in all subsequent stages of the litigation.

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

Pilcher, Howard & Hickman, for appellant.

Dixon G. Adams, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. SMITH and ROBERT L. FLORY, District Judges.

BOSLAUGH, J.

This is an appeal from an order of the district court for Sarpy County, Nebraska, overruling a motion to vacate a permanent injunction.

The defendant, Clifford W. Scott, is the owner of the Riverview School Building located at 7509 Bellevue Boulevard in Sarpy County, Nebraska. In 1959, the

defendant was engaged in remodeling the building for use as an apartment house.

On April 15, 1959, the county board of Sarpy County, Nebraska, adopted zoning regulations which became effective on April 17, 1959. Under these regulations the defendant's property was zoned "R-2," a single family residence use district. Thereafter an action was commenced by the Board of County Commissioners of the County of Sarpy, Nebraska, to enjoin the defendant from using the property as a multiple family dwelling.

On July 9, 1959, after a trial upon the merits, the district court found that the defendant had performed a substantial amount of labor and had expended a substantial amount of money for labor and material in remodeling the first floor of the building into three apartments, described as the northwest, southwest, and southeast apartments; that the defendant was entitled to complete the construction of these three apartments and use and occupy them as a nonconforming use; that the defendant should be enjoined from using the center entrance apartment on the first floor and the basement of the building as apartments; and that the defendant's nonconforming use should be limited to the three described apartments upon the first floor of the building. The judgment permanently enjoined the defendant "from completing the construction of or maintaining and operating the center or entrance apartment on the first floor of said premises and the basement apartments of the said premises." The defendant did not appeal from the judgment.

The motion to vacate the injunction was filed on September 26, 1963. An amended motion to vacate the injunction was filed on November 8, 1963. As grounds for relief the defendant alleged that there had been a change in circumstances since the date of the judgment. When the circumstances and situation of the parties have changed so that it would be just and equitable to vacate or modify a permanent injunction, the

court which granted the injunction may vacate or modify it upon motion. Lowe v. Prospect Hill Cemetery Assn., 75 Neb. 85, 106 N. W. 429, affirmed on rehearing, 75 Neb. 100, 108 N. W. 978.

The change of circumstances alleged in this case was the adoption of new zoning regulations by the plaintiff on December 10, 1959. The new zoning regulations did not change the zoning of the defendant's property in any way. The property remained zoned "R-2," single family residence use district. The provisions in regard to nonconforming uses in the new regulations are identical with those in the former regulations. The evidence fails to show a change in circumstances which would provide a basis for vacating the injunction.

The defendant further alleged that the district court's interpretation of the nonconforming use provisions of the original zoning regulations may have been erroneous and that the judgment of July 9, 1959, was, therefore, contrary to law. These allegations do not afford a basis for relief in this proceeding.

When a question in controversy has been once finally decided, it becomes the law of the case and is binding on the parties in all subsequent stages of the litigation. Lowe v. Prospect Hill Cemetery Assn., *supra*. A motion to vacate made after the time for appeal has expired is not a substitute for review upon appeal.

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

AFFIRMED.

DOROTHY ROTH SWANSON, APPELLEE, V. HARLEY A. DALTON ET AL., APPELLANTS.
131 N. W. 2d 704

Filed December 18, 1964. No. 35752.

1. **Waters: Boundaries.** Where the general course of the river is much curved either outwardly or inwardly, or where the general

course of the original bank is likewise irregular, the boundary lines within which the riparian owner is required to confine himself in reaching the thread of the stream must necessarily be either divergent or convergent, according as the river boundary is longer or shorter than the original river bank line. In such cases the better rule is that the frontage of each riparian owner on the new river bank should be divided in proportion to his frontage on the original bank.

2. ———: ———. Two adjoining property owners may agree upon their respective interests in accretion adjoining their lands and fix the boundary lines by agreement, regardless of their exact legal rights.
3. **Boundaries.** In order that a boundary line may be established by a parol agreement, a mutual intention of the parties to determine the boundary line must be shown.
4. ———. Under the statute, section 34-301, R. R. S. 1943, a boundary line may be established by mutuality of recognition and acquiescence of the parties, but such mutuality of recognition and acquiescence must exist for a period of 10 consecutive years.
5. **Estoppel.** Ordinarily, title to real estate may not be created by estoppel.
6. **Adverse Possession: Estoppel.** The mere failure to dispute the use of the land or bring an action to eject an adverse possessor is not sufficient to defeat title, or to bring into operation the doctrine of estoppel.
7. **Estoppel.** Ordinarily, estoppel must arise as the result of misrepresentations of the party against whom the estoppel is claimed.

Appeal from the district court for Knox County: GEORGE W. DITTRICK, Judge. Affirmed.

Merritt C. Warren and Jewell & Otte, for appellants.

Duane K. Peterson and Henry F. Reimer, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. FLORY and ROBERT L. SMITH, District Judges.

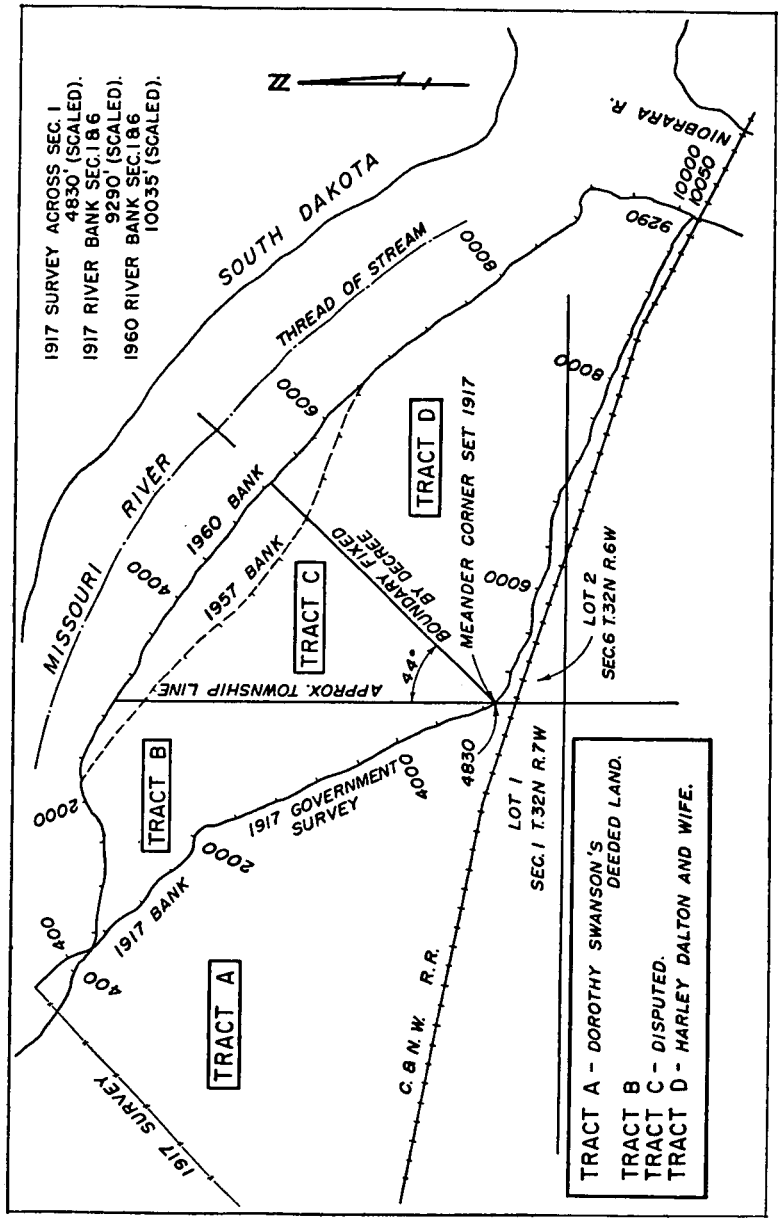
WHITE, C. J.

This is an action to establish boundaries, under section 34-301, R. R. S. 1943, between adjoining riparian owners of accretion land along the Missouri River in

Knox County, Nebraska. The land in dispute is a short distance west of the confluence of the Niobrara and the Missouri Rivers.

Aerial photographs, surveys, and plats prepared from the records were introduced in evidence. From them an approximate composite picture may be put together as to the development of the accretion land involved since 1863, the time of the original government survey. This includes the results of a government survey of 1917 which established the shoreline and the extent of the development of deeded accretion land to that date.

A sketch, prepared from the various exhibits and the evidence, is included herein for illustrative purposes and appears on the following page. The railroad track gives a rough approximation of the shoreline of the Missouri River in 1863 at the time of the original survey. Bluffs and high ground are generally parallel and south of these tracks. The plaintiff's deeded land, including the triangular Tract A of deeded accretion land, is in Section 1, Township 32 North, Range 7 West. The defendants' deeded patented and deeded accretion land lies in Sections 6 and 7, Township 32 North, Range 6 West, immediately to the east. It appears from the evidence that at the time of the original survey in 1863, the river frontage in these adjoining sections was approximately equal. The 1917 survey established that the Missouri River had moved gradually north. The shoreline had become irregular. This movement north, until 1917, was almost entirely in Section 1, the plaintiff's land. An inspection of the 1917 shoreline shown on the sketch will demonstrate this. After the 1917 survey, the plaintiff's predecessors in title became the owners of deeded accretion land shown as triangular Tract A on the sketch. Defendants' predecessors in title also became the owners of deeded accretion land in Sections 6 and 7 immediately to the east. The issues in this case arise from a dispute as to the division of the land accreting to the north and the east since these acquisitions. This is the land in


1917 SURVEY ACROSS SEC. 1
4830' (SCALED).
1917 RIVER BANK SEC. 1 & 6
9290' (SCALED).
1960 RIVER BANK SEC. 1 & 6
10035' (SCALED).
SOUTH DAKOTA
NIOBRARA R.
10000
10050
9290
THREAD OF STREAM
8000
6000
4000
2000
MISSOURI RIVER
1960 BANK
1957 BANK
TRACT C
TRACT D
BOUNDARY FIXED BY DECREE
MEANDER CORNER SET 1917
44°
APPROX. TOWNSHIP LINE
LOT 2
SEC. 6 T. 32 N. R. 6 W.
TRACT B
1917 GOVERNMENT SURVEY
4000
4830
LOT 1
SEC. 1 T. 32 N. R. 7 W.
1917 BANK
TRACT A
1917 SURVEY
C. & N. W. R.R.
TRACT A - DOROTHY SWANSON'S DEEDED LAND.
TRACT B
TRACT C - DISPUTED.
TRACT D - HARLEY DALTON AND WIFE.

Tracts B, C, and D as shown on the sketch. This land has accreted since the 1917 government survey. The 1957 bank of the Missouri River is shown on the sketch as scaled from exhibit 3 which is an aerial photograph. The 1960 bank shown on the sketch roughly parallels the bank as shown in exhibit 6, a plat, and exhibit 10, an aerial photograph of the bank in 1961.

The issues were narrowed further by the parties. Defendants concede the ownership in plaintiff of the accretion land in Tract B on the sketch which comes east to the section or township line. The accretion land in Tract D is conceded to belong to the defendants. The disputed Tract C is approximately 76 acres in area. The east line of this disputed area in Tract C is a line drawn from a point on the 1957 river bank. This point represents and fixes the same proportionate ownership on the new bank (1957), that existed on the 1917 shoreline which was the border of the deeded accretion land. This point was joined to a meander corner on the section line forming the original boundary between the parties and marked "meander corner set 1917," as seen on the sketch. This line runs 44 degrees, no minutes, north and east of the section or township line. As seen from the sketch, this estabilshed a boundary line dividing the property based upon a proportionate ownership in the plaintiff of 4830/9290 of the 1917 shoreline of the property and 4460/9290 of the 1917 shoreline in the defendants. We note that this line establishes an approximately equal division of the shoreline and, although no precise measurements are available, appears to be fairly close to the division of the shoreline as it existed in the 1863 government survey.

The plaintiff's petition alleged and sought to establish the boundary line above described and indicated on the sketch. The district court in its decree so established the boundary line. In so doing, it followed substantially the rule laid down by this court for the division of ac-

cretion land set out in Conkey v. Knudsen, 143 Neb. 5, 8 N. W. 2d 538.

The defendants, on appeal, contend: (1) That the method of division of the accretion land involved in this appeal should be by extending the section lines between the property, (2) that the boundary on the section line was established in about 1955 by consent and agreement of the owners, (3) that the mutual recognition and acquiescence in that line has been the boundary since 1955, and (4) that the plaintiff is estopped from asserting rights to the accretion land in question by reason of laches or otherwise.

We think the apportionment rule applied by the district court was correct. Defendants dispute the method or principle used in accomplishing the division and not the selection of points or the measurements made if the rule followed is applicable. In Conkey v. Knudsen, *supra,* this court had quite a similar situation with reference to accretion land on the Missouri River before it. Therein we said: "Where the general course of the river is much curved, either outwardly or inwardly, or, where the general course of the original bank is likewise irregular, the boundary lines within which the riparian owner is required to confine himself in reaching the thread of the stream must necessarily be either divergent or convergent, according as the river boundary is longer or shorter than the original river bank line. *In such cases the better rule is that the frontage of each riparian owner on the new river bank should be divided in proportion to his frontage on the original bank.* This is the method the trial court attempted to apply, and we think it is correct. * * * 'The new lines, thus formed, it is obvious, will be either parallel, or divergent, or convergent, according as the new shore line of the river equals, or exceeds or falls short of the old.' * * * The trial court complied substantially with this rule in dividing the accretive lands in the instant case. The result was that, in determining the respective interests

of the parties to the accretive lands, *the boundary lines of the high bank owners were extended to the present west bank of the Missouri river at an angle of 47 degrees and no minutes east.*" (Emphasis supplied.)

In 1917 the river border was irregular and concave. This, of course, roughly and approximately marked the border of the original deeded accretion land about which there is no dispute. The issue is drawn as to the accretion land that has developed since by the outward movement of the river. The river, by gradual and imperceptible changes in the shoreline, has gone to the north and east and now has a slight convexity as it flows to the southeast. Following the principle above announced in Conkey v. Knudsen, *supra,* the accretion land forming in between should be divided in proportion to the ownership on the old bank. No decided projections or indentations appear that should alter the application of the rule. We point out that in this case that the final result reached gives both parties approximately equal ownership on the shoreline.

Defendants argue for an extension of the section line boundaries and an equal division of accretion acreage. They complain of the fact that the plaintiff acquires a total of 403 accretion acres since the time of the original 1863 survey and the defendants are left with only 137 acres. But, 256 acres of plaintiff's land is deeded accretion land that she became the owner of and occupied pursuant to the 1917 government survey. The defendants do not question the ownership of the plaintiff to this property. The situation that arose here came about because the river happened to move to the north of the plaintiff's land much further and at an earlier time leaving the situation shown on the sketch by the 1917 government survey line. An equal division of all accretion acres would result in a situation where the defendants would be the owners of a portion of the plaintiff's deeded accretion land and result in the practical elimination of the plaintiff's shoreline on the Missouri

River. Such a result, of course, would obviously be inequitable. There are many rules for the division of land accreting to a shoreline. But, one basic principle is that no regard is necessarily to be paid to the direction of preexisting side lines between contiguous proprietors, the reference is ordinarily entirely to the shoreline. See 56 Am. Jur., Waters, § 494, p. 906. An inspection of the sketch will further show that the application of a rule to extend the section line would reduce plaintiff's shoreline to a very short frontage on the river. This again would not be equitable. It is conceded that no precise rule has ever been developed that will accomplish complete justice in any mathematical sense. The evidence here gives a general picture of the historical development of the river and the accretion land. There is uncertainty as to a number of different points. An attempt to recapture this history in any precise sense is impossible. The application of the rule in Conkey v. Knudsen, *supra,* gives the parties substantially comparable and equal portions of the shoreline, which is about what they had originally under the 1863 government survey. We think the trial court was substantially correct in selecting the principle of division applied in this case. The application of the principle, as to the points selected and the measurements involved, is not questioned in this appeal. There is no merit to the first contention of the defendants.

Defendants contend that there was an oral agreement in February 1955 between the owners fixing the boundary on the section line. The parties may agree upon their respective interests in accretion adjoining their lands and fix the boundary lines by agreement, regardless of their exact legal rights. Conkey v. Knudsen, 135 Neb. 890, 284 N. W. 737, citing McCoy v. Paxton, 156 Iowa 194, 135 N. W. 1091. But, in order that a boundary line may be established by a parol agreement, a mutual intention of the parties to determine the boundary line must be shown. Kennedy v. Gottschalk, 138

Neb. 842, 295 N. W. 813. See, 11 C. J. S., Boundaries, §§ 68, 69, p. 642; 8 Am. Jur., Boundaries, § 73, p. 797; 12 Am. Jur. 2d, Boundaries, § 78, p. 614.

In February 1955, Charles Dalton, now deceased, the then owner and defendants' predecessor in title, had a survey made of the section line between Sections 1 and 6 at his own expense. At that time, the plaintiff and Otto Swanson, her husband, were the joint owners of plaintiff's land in Section 1. Otto Swanson and Charles Dalton were both dead at the time of the trial. Neither Otto Swanson or the plaintiff were present or participated in the survey in February 1955. The record is entirely void of any proof of a parol agreement as to a boundary line or a survey as between the owners at that time. On the morning of the survey, there was a conversation between Charles Dalton and Otto Swanson. There is no evidence as to the nature of that conversation. Later on, when the survey was being made by one Chester Anderson, there is testimony that the sons of the plaintiff, Jerre and Richard Swanson, were present at least a part of the time. Whether they were onlookers or participated in the survey is not certain from the record. Neither one of the sons testified as to any agreement as to a boundary line or as to a survey. We summarize this testimony by saying that the only inference that could be drawn from it is that the then owners of the property knew that a survey was being made and that they probably knew that the sons were present. It is true that there is evidence that Charles Dalton's purpose in making the survey was to establish a boundary line between the properties. The trial court heard the testimony, saw the witnesses, and specifically found in its decree that there was no agreement between the parties as to the accretion land or a boundary line. This finding is not only supported by the evidence but we feel the evidence would be insufficient to support a contrary finding.

The defendants argue that the plaintiff by her con-

duct assented to and acquiesced in the boundary line as being the section line, and that she is estopped to deny otherwise. After the survey of 1955, Charles Dalton, the then owner, built a fence part way down the section line from the Missouri River shore. Jerre Swanson told the defendant, Harley Dalton, that he would not complete this fence because they should have more land. It was completed in 1959 by Harley Dalton. It is true that the plaintiff or her predecessors in title never farmed east of the section line. But, until the fence was completed they pastured cattle in that area. Through the years preceding 1957, this land was generally full of willows, and vegetation, and was marshy. In 1957, the defendants leased the disputed acreage to one Owen Coutts to clear and farm, but the agreement provided that this was to be done at Coutt's own risk as to title. Defendants placed a shack on the property. Jerre Swanson sold them seed corn for use on the property and there is much other evidence as to acts that the defendants performed by which they asserted ownership and title in this property. We summarize this evidence by stating that its effect is to show that defendants occupied the disputed acreage exclusively as their own since 1955, and that they did so to the plaintiff's full knowledge. This would be for a period of about 6½ years prior to the bringing of this action. It is clear that title by adverse possession could not have been acquired. Did the defendants acquire title by acquiescence and recognition under the statute? The statute by its terms declares: "* * * that such (boundaries) have been recognized and acquiesced in by the parties or their grantors *for a period of ten consecutive years.*" See § 34-301, R. R. S. 1943. In Hakanson v. Manders, 158 Neb. 392, 63 N. W. 2d 436, where a party occupied land up to a row of trees that he had planted, this court said: "It will be noted from the foregoing that recognition of and acquiescence in a boundary line to be binding, in the absence of an agreement determining the same, re-

quires mutuality of recognition and acquiescence by the parties. *It partakes of the nature of an estoppel* and, under our statute, *it must exist for a period of 10 consecutive years.*" (Emphasis supplied.) See, also, Kennedy v. Gottschalk, *supra.* The evidence in this case does not establish mutual recognition and acquiescence, and if it did, it has not existed for a period of 10 consecutive years. The most that it shows is knowledge of adverse possession for about 6½ years. The trial court found that no boundary line was established by acquiescence or recognition, and we agree.

Defendants assert that, even if the statutory period has not run, plaintiff is estopped from asserting her title and is guilty of laches. This contention overlaps the previous ones. The testimony herein establishes the adverse possession and enjoyment of the disputed acreage by the defendants. It establishes a failure of the plaintiff to dispute the use of the land. It does not establish any false statements or concealment of the plaintiff owner or her husband predecessor in title, Otto Swanson. The defendant, Harley Dalton, in making the lease of this land to Owen Coutts recognized the uncertainty of the title. Coutts was told he made the improvements (clearing the land) at his own risk. The evidence shows that the defendants were aware of the uncertainty of their title but were aggressive in asserting it. They did not rely on it even when they made the lease to Coutts. Title to real estate may not be created by estoppel ordinarily. The mere failure to dispute the use of land or bring an action to eject an adverse possessor is not sufficient to defeat title, or to bring into operation the doctrine of estoppel or laches. Lehman v. Smith, 40 S. D. 556, 168 N. W. 857; 11 C. J. S., Boundaries, § 76, p. 649. The statutory periods may not be shortened. Silence or acquiscence does not shorten the required period. And, as we have already pointed out, our court has said that if an estoppel occurs by mutual recognition and acquiescence, it must be in

existence for 10 years. Hakanson v. Manders, *supra*. Defendants cite Roll v. Martin, 164 Neb. 133, 82 N. W. 2d 34. This case is not in point because there the owner positively misrepresented a boundary line, and the misrepresentation was relied upon by a third party. A party may not base a claim of estoppel in his favor on his own wrongful acts or derelictions of duty or on acts or omissions induced by his own conduct. Estoppel must arise as the result of misrepresentations of the party against whom the estoppel is claimed. Armbruster v. Stanton-Pilger Drainage Dist., 169 Neb. 594, 100 N. W. 2d 781; 11 C. J. S., Boundaries, § 72, p. 646.

On a review of the evidence we can find nothing in this case to bring the plaintiff's actions and conduct within the actionable principles of estoppel. Plaintiff may not be denied her rights simply by reason of her failure to object to the defendants' aggressive assertion of their claim of ownership. The judgment of the district court is correct and is affirmed.

AFFIRMED.

VICTOR GRUENEMEIER ET AL., APPELLANTS, V. THE COMMONWEALTH COMPANY, A CORPORATION, APPELLEE.

131 N. W. 2d 713

Filed December 18, 1964. No. 35753.

1. **Interest.** Industrial loan and investment companies, under the provisions of sections 8-401 to 8-433, R. R. S. 1943, are empowered to make unlimited loans at a rate of interest of 9 percent per annum or below.
2. ———. The right of an industrial loan and investment company to make separate loans at a rate of interest of 9 percent per annum or below is not limited by sections 8-418 to 8-433, R. R. S. 1943, which regulate the power of such companies to make installment loans.
3. **Interest: Usury.** The prohibition of the statute relating to multiple loans, section 8-419, R. R. S. 1943, is not that there

shall not be more than one loan during any period of time. It is that the excess charges above a rate of interest of 9 percent per annum permitted by section 8-418, R. R. S. 1943, shall not be charged on more than one loan at the same time.

4. ———: ———. Under the Industrial Loan and Investment Company Act, sections 8-401 to 8-433, R. R. S. 1943, there may be as many contracts of loan at the same time as the parties desire, but the several loans when considered together, must not violate section 8-419, R. R. S. 1943.
5. ———: ———. Section 8-419, R. R. S. 1943, requires consideration of the loans as a consolidated loan only for the purpose of determining if the splitting of the loans at the same time was for the purpose of exacting a higher rate of charge.
6. **Statutes.** Legislative prohibition or regulation should not be extended beyond the evils intended to be prevented by the Legislature.
7. **Interest: Usury.** The restrictive provisions as to equal payments provided for in section 8-429, R. R. S. 1943, were intended to apply to those portions of the loan which bore interest at a rate in excess of 9 percent per annum.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

Kier, Cobb & Luedtke and Janice L. Gradwohl, for appellants.

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. FLORY and ROBERT L. SMITH, District Judges.

WHITE, C. J.

On May 19, 1959, plaintiff Victor Gruenemeier executed a note to the defendant for $17,700 at 9 percent interest payable in 30 days. Expected funds to pay this note not being available, the plaintiffs, on June 10, 1959, executed two new notes and mortgages to pay this original note. The first was a note for $11,700 payable in 36 months at $385 per month, the interest rate being 1½ percent per month on the first $1,000, 1 percent per month on that part in excess of $1,000 up to $3,000, and

¾ of 1 percent (9 percent per annum) on the amount in excess of $3,000. At the same time, the plaintiffs executed another note for $6,000 at 9 percent interest payable in 6 months on December 10, 1959. The record shows numerous subsequent transactions with respect to payments on the notes of June 10, 1959, and notes for additional loans. No question arises as to the validity of these transactions providing the transactions of June 10, 1959, were not tainted with usury, and so they will not be considered in this opinion.

The plaintiffs brought this action to declare the notes of June 10, 1959, invalid and recover back all payments with interest. The defendant cross-petitioned for judgment on the notes and foreclosure of the mortgages securing them. The trial court found for the defendant, entered judgment on the notes for the balance due, and granted foreclosure. The plaintiffs appeal.

The plaintiffs contend that the obligation of $17,700 was split into two separate notes at the same time, on June 10, 1959, for the purpose of obtaining a higher rate of interest, and that the notes were therefore void. Did the defendant have the power to execute each of these loans? The power to make the installment loan of $11,700 is expressly granted by section 8-418, R. R. S. 1943, of the Industrial Loan and Investment Company Act. The defendant is an industrial loan and investment company organized under the provisions of this act. The exactions of interest and the inclusion of an amount at 9 percent per annum above $3,000 is expressly authorized by the statute. Turning to the $6,000 loan at a rate of interest of 9 percent per annum executed at the same time, plaintiffs seem to contend that there is no authorization or power in the defendant to execute this note. First, we note that nothing in the whole act, sections 8-401 to 8-433, R. R. S. 1943, limits the amount of money that can be loaned at a rate of interest of 9 percent per annum. Even the installment loan section, section 8-418, R. R. S. 1943, puts no limits on install-

ment loans of amounts above $3,000 but provides that any such amounts may draw only an interest rate of 9 percent per annum. Does the installment loan provision of the act, section 8-418, R. R. S. 1943, limit the power to make independent loans at a rate of interest of 9 percent per annum? We think not. The original Industrial Loan and Investment Company Act was enacted in 1941. Section 8-407, R. R. S. 1943 (Laws 1941, c. 13, § 6, p. 89), confers the general powers of corporations upon the defendant except those by the act specifically limited. We can find nothing in this act that places any limitation on the powers of industrial loan and investment companies to make single payment 9 percent per annum loans or any number of them. There was no regulation of installment loans or grant of powers to collect interest charges beyond 9 percent per annum in the original act of 1941.

Were these powers changed or limited by the enactment of sections 8-418 to 8-433, R. R. S. 1943, regulating installment loans by such companies and providing for the right to make additional charges on the first $3,000 of money loaned? We think not. The purpose of this act, it appears to us, was plain. The inception of these provisions, sections 8-418 to 8-433, R. R. S. 1943, was in Laws 1943, chapter 18, page 96. The title to this act expressly provided that it was: "* * * *to prescribe regulations for the making of installment loans.*" Nothing contained in the title or in the other provisions of the act mentions or inhibits any powers with reference to single payment 9 percent per annum loans. It is clear that the purpose of sections 8-418 to 8-433, R. R. S. 1943 (Laws 1943, chapter 18, page 96), was to grant additional powers to collect interest charges in excess of 9 percent per annum on the first $3,000 of a loan and providing that if such excess charges were enacted, that the loan had to be repaid in 36 months and in approximately equal payments (section 8-429, R. R. S. 1943). There is nothing in the substance of the act or the de-

clared purpose of the act as expressed in the title to warrant any inference that there was any intention to interfere with or to regulate other types of loans than installment loans made for the purpose of collecting excess charges on the first $3,000 of the loan. Nor do we find any subsequent legislative history, after the 1943 grant embodied in this act, that would indicate any attempt to comprehensively regulate or control all loans made by the industrial loan and investment company. Confusion arises because of the construction placed upon similar inhibitory provisions in the Installment Loan Act. But, the Installment Loan Act, sections 45-114 to 45-158, R. R. S. 1943, comprehensively regulates and limits all loans made by such a licensee to small borrowers. Constructions and interpretations under that act are not applicable to the precise situation as to industrial loans and investment companies. Similar inhibitory provisions cannot be applied beyond their express purpose and intent in their inclusion in the act regulating *installment loans of industrial loan and investment companies*. The legislative prohibition or regulation cannot be extended beyond the evils intended to be prevented by the Legislature. So, we come to the conclusion that both of the loans made here can be made independently and are valid loans; and that there is nothing in the Industrial Loan and Investment Company Act which prohibits making single payment 9 percent per annum loans, as well as exercising the power to make installment loans for the purpose of exacting excess charges above a rate of interest of 9 percent per annum up to $3,000.

Plaintiffs next contend that the making of the two loans or multiple loans at the same time was in violation of the statute. We find nothing in the statutes or the law that prohibits multiple loans at the same time, except where they are used as a devise to cloak usury. The only prohibition that the statute, section 8-419, R. R. S. 1943, makes on the splitting of loans is "for the

purpose of obtaining a higher rate of charge," than if the loans were consolidated as one. No other purpose is included in this statute. From this statute, we gather no intent to prohibit the parties from splitting a loan so that one portion of it could be an installment loan, subject to the provisions of the statute in that respect, and another for a fixed amount for a fixed period at a rate of interest of 9 percent per annum. We cannot read into the statute a prohibition that was not expressly declared therein. The splitting statute was directed alone at the evil therein intended to be prevented, namely, the exaction of a higher rate of charge. All of this is made clear in Jourdon v. Commonwealth Co., 170 Neb. 919, 104 N. W. 2d 681, which involved a series of loans bearing interest at the maximum rate. The court said: "If appellee had desired a proper arrangement it could have provided for *9 percent interest on any note executed by appellant during the time a previous note of his was unpaid.* The prohibition of the statute is not that there shall not be more than one loan during any period of time but it is that there shall not be charged 36 percent on the first $50 of unpaid principal and 18 percent on the next $500 of unpaid principal *on more than one loan at the same time.* § 8-418, R. R. S. 1943. There may be as many contracts of loan at the same time as the parties desire but the several loans when considered together must not violate section 8-419, R. R. S. 1943. * * * The statute does not prevent the making of more than one loan to a borrower at the same time. *It does condemn charging maximum interest prescribed by section 8-418, R. R. S. 1943, on the unpaid principal of more than one loan* made to a borrower and existing at the same time for the purpose of obtaining a higher rate of charge. The prohibition of the statute is that the loan company shall not permit any person to become obligated on more than one contract of loan at the same time if the purpose therefor is a

higher charge than if there was only a single obligation." (Emphasis supplied.)

The requirements of section 8-419, R. R. S. 1943, are met if the rate of charge on all outstanding contracts is no higher than would be permitted if all contracts were consolidated in one obligation. We assume therefore that this obligation was one in the sum of $17,700. No matter what mathematics are used the plaintiffs pay no more than the statutory rates of interest on the amounts up to $3,000 permitted by section 8-418, R. R. S. 1943, and a rate of interest of 9 percent per annum on all of the balance. There could be no purpose to secure higher charge. If the loan was split and the excess charges applied to the $3,000 portions of both separate loans, we would have a different result. It was the evil such as present in this type of situation that the statute was intended to prevent and not the situation present here.

Plaintiffs contend that the $6,000 payment on the 9 percent loan at the end of 6 months was a "balloon" payment and prohibited by section 8-429, R. R. S. 1943, providing for approximately equal payments on installment loans. Such an argument could only be considered providing we were required to consider the loan as a consolidated one. The argument then runs that the $6,000 payment in 6 months is unequal and therefore in violation of the statute. What we have said heretofore in this opinion concerning the character and nature of powers to make separate loans disposes of this argument. The validity of each loan may be considered separately except and unless it comes within the prohibition of the multiple loan section, section 8-419, R. R. S. 1943. That section requires consideration as a consolidated loan only for the purpose of determining if the splitting of the loans at the same time was to exact a "higher rate of charge." Further, section 8-429, R. R. S. 1943, which requires equal payments is, by its terms, applicable only to loans "made under this act." The act (Laws 1943, chapter 18, page 96, now sections 8-418

to 8-433, R. R. S. 1943), provides and regulates *installment* loans which contain charges therein in excess of a rate of interest of 9 percent per annum on amounts up to $3,000. The installment loan made in this case of $11,700 fully complied with these provisions. The act was intended to apply to those portions of the loan which bore interest at a rate in excess of 9 percent per annum. Again, confusion arises from the construction of a similar provision in the Installment Loan Act. However, in that act, section 45-138, R. R. S. 1943, carries the equal payment provision, among others, over into all loans and makes it a comprehensive inhibitory provision on a licensee under that act. A 9 percent interest loan by a nonlicensee is not subject to these inhibitory provisions of the Installment Loan Act. Pattavina v. Pignotti, 177 Neb. 217, 128 N. W. 2d 817. An industrial loan and investment company stands in the same position as a nonlicensee. And, the Industrial Loan and Investment Company Act requires no interpretation that these provisions apply to 9 percent interest loans.

One other contention of the plaintiffs deserves mention. They claim usury in the original transaction as to the $17,700 note of May 19, 1959, because the proceeds were not paid out until May 25, 1959. However, the money was kept available for the plaintiffs and could not be paid out until the seller of the trailers brought in the certificates of title. There was no delay or device for the purpose of exacting a higher rate of interest. In such a situation the fact the money was not paid out until after the time interest began to run does not render the contract usurious. Rose v. Munford, 36 Neb. 148, 54 N. W. 129.

It becomes unnecessary to examine various other contentions of the parties. The notes and mortgages executed on June 10, 1959, in the total sum of $17,700 are valid and binding obligations. Insofar as the decision and holding in this case conflict with Dougherty v. Com-

monwealth Co., 172 Neb. 330, 109 N. W. 2d 409, that opinion is overruled. The judgment of the district court is correct and is affirmed.

AFFIRMED.

VERA G. DAVIS, APPELLANT AND CROSS-APPELLEE, V. CLEMENT A. WIRTH, APPELLEE AND CROSS-APPELLANT.
131 N. W. 2d 718

Filed December 18, 1964. No. 35759.

1. **Wills.** The cardinal rule of testamentary construction is to ascertain the intention of the testator as expressed in the will.
2. ———. In construing a will the court should give effect to the true intention of the testator as shown by the will itself in the light of the attendant circumstances under which it was made, if that intention is consistent with the applicable rules of law.
3. ———. In the absence of other provisions in the will to the contrary, a remainder devised to the children of a life tenant, with a limitation over in the event of the death of the life tenant leaving no child, is a vested remainder subject to defeasance.

Appeal from the district court for Otoe County: JOHN M. DIERKS, Judge. Affirmed as modified.

Hotz, Hotz & Taylor, for appellant.

John Spiller and Moran & James, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. SMITH and ROBERT L. FLORY, District Judges.

BOSLAUGH, J.

This is an action to construe the will of Joseph T. Wirth, deceased, who died on November 9, 1961. His will was admitted to probate and his estate administered by proceedings in the county court of Otoe County, Nebraska.

The testator was survived by a daughter, Vera G.

Davis, and a son, Clement A. Wirth. Theresa Wirth, the wife of the testator, died on January 29, 1957.

Vera G. Davis, the plaintiff, has two children, Wirth P. Davis and John P. Davis, who were 18 and 13 years of age, respectively, at the time of the death of the testator. Clement A. Wirth, the defendant, is a member of the Monastic Community of Saint Martin's Abbey at Olympia, Washington. The defendant is under a vow of poverty and all of his property will devolve upon the abbey of which he is a member.

The will is dated January 18, 1957. The first paragraph directs the executor to pay the debts and funeral expenses. The second paragraph is a bequest of the personal property to the wife of the testator. The third and fourth paragraphs of the will are as follows:

"THIRD: I give, devise and bequeath to my wife, Theresa Wirth, all of the use, rents and income from all of my real estate for and during the term of her natural life. However, I give to said Theresa Wright the right to sell and convey, and in her own name to make, execute and deliver good and sufficient conveyance or conveyances for the Northwest Quarter of Section 3, Township 7, Range 13, in Otoe County, Nebraska any time during her life time and to receive the purchase price therefor and to use all or any part of said purchase price and she shall not be required to make an accounting of said purchase price, and any sum that may be remaining from the sale of said land after her death, I, give, devise, and bequeath to my son, Clement A. Wirth.

"FOURTH: After the death of my wife, Theresa Wirth, I give, devise and bequeath to my daughter, Vera G. Davis, the use, rents and income during her natural life from the North Half of the Northeast Quarter and the Southeast Quarter of the Northeast Quarter of Section 11 and the West Half of the Northwest Quarter of Section 12, all in Township 8, Range 13, in Otoe County, Nebraska, and my residence in Nebraska City, Nebraska; it is further my will and I so order that my said daughter,

Vera G. Davis, shall in no manner whatsoever sell, convey, mortgage or encumber such premises; at the death of my said daughter, Vera G. Davis, I give, devise and bequeath the real estate in this paragraph described to her children and the children of any deceased child by right of representation and in the event that no children or the children of any deceased child survive her, my said daughter, Vera G. Davis, then I give, devise and bequeath said real estate in this paragraph described to my son, Clement A. Wirth."

For convenience, the real property described in the third paragraph of the will is referred to as the Heng farm. The real property described in the fourth paragraph of the will is referred to as the other real estate.

The controversy in this case concerns the third and fourth paragraphs of the will. The plaintiff contends that the deceased died intestate as to the property known as the Heng farm, and that the title to the other real estate is vested in her children, free of any interest of the defendant and subject only to her life estate. The defendant contends that the title to the Heng farm is vested in him and that he has a remainder interest in the other real estate in the event that no child or child of a deceased child survives the plaintiff.

The district court found that the deceased died intestate as to the Heng farm and that the defendant has a remainder interest in the other real estate in the event that no child or child of a deceased child survived the plaintiff. Both parties filed motions for a new trial which were overruled. The plaintiff has appealed and the defendant has cross-appealed.

The cardinal rule of testamentary construction is to ascertain the intention of the testator as expressed in the will. First Nat. Bank & Trust Co. v. Oeltjen, 175 Neb. 345, 121 N. W. 2d 816. In construing a will the court should give effect to the true intention of the testator as shown by the will itself in the light of the attendant circumstances under which it was made, if that

intention is consistent with the applicable rules of law.

The testator's wife, Theresa Wirth, was living at the time the will was executed. The will gave her the personal property, a life estate in all of the real property, and the power to sell the property known as the Heng farm and consume the proceeds. Any sum remaining after her death from the sale of the Heng farm was bequeathed to the defendant.

The testator's wife died 11 days after the will was made. Since there is no residuary clause in the will, the deceased died intestate as to any personal property.

Because the testator's wife predeceased the testator, there was no sale of the Heng farm by her and no sum remaining from the sale of the land to go to the defendant. The defendant argues that the words actually used in the will should be subordinated to the controlling intention or dominant purpose of the testator which, according to the defendant, was to provide for the defendant out of the Heng farm. We do not agree that the intention or purpose of the testator included a devise of the Heng farm to the defendant.

The first purpose of the testamentary plan in this case was to provide for the widow as long as she lived. In addition to the bequest of the personal property and the life estate in all of the real property, the will authorized her to sell the Heng farm and use the proceeds without any accounting. The second purpose of the testamentary plan in this case was to preserve the other real estate for the benefit of the grandchildren of the testator. The plaintiff was given a life estate in the other real estate after the death of the widow, but with no right to sell or encumber the property.

Upon the death of the plaintiff, the other real estate was devised to the children of the plaintiff, and the children of any deceased child. In the event that no child or child of a deceased child survived the plaintiff, the other real estate was devised to the defendant. Since the plaintiff had two children in being, the possibility

that the defendant would receive any interest in the other real estate was remote.

The bequest of the sum remaining from the sale of the Heng farm was the principal provision in the will for the defendant. We think that at the time the will was made, the testator believed that his widow would find it necessary to sell the Heng farm. Consequently, the testator intended a bequest of personalty to the defendant which, probably, would have amounted to something less than the entire value of the Heng farm. We conclude, as did the trial court, that the testator died intestate as to the property described in the third paragraph of the will, and that the plaintiff and the defendant each take an undivided one-half interest in this property as heirs of the deceased.

The petition in this case asked that the court find that the remainder interest in the property described in the fourth paragraph of the will was vested in the plaintiff's children free of any interest of the defendant. The district court found that the remainder interest of the children of the plaintiff was contingent. The briefs of the parties are devoted largely to a discussion of whether the remainder interest devised to the children of the plaintiff is to be classified as vested or contingent.

The language used in the fourth paragraph of the will in this case is very similar to that which was involved in Baldwin v. Colglazier, 173 Neb. 775, 114 N. W. 2d 890. The applicable rules are discussed fully in the opinion in that case.

In the Baldwin case, the land was devised to a daughter for life; in the event of her death, to her children; and in the event of no issue or children surviving the daughter, it reverted to the heirs of the testator. We held that the children of the life tenant had a vested remainder subject to defeasance. The same rule is applicable in this case. The children of the plaintiff have a vested remainder subject to defeasance as distinguished

from a contingent remainder. The judgment of the district court is modified accordingly.

The title to the property described in the fourth paragraph of the will is vested in the plaintiff for life, with the remainder vested in her children or the children of any deceased child by right of representation. In the event that no child or child of a deceased child shall survive the plaintiff, the title to the property described in the fourth paragraph of the will will then vest in the defendant.

The judgment of the district court, as modified, is affirmed.

AFFIRMED AS MODIFIED.

FATHER FLANAGAN'S BOYS' HOME, A CORPORATION, ET AL., APPELLEES, V. MABEL E. GRAYBILL, APPELLANT, IMPLEADED WITH CHANNING J. LEWIS, EXECUTOR OF THE ESTATE OF GUSTAF HERBERT JOHNSON, DECEASED, ET AL., APPELLEES.
132 N. W. 2d 304

Filed December 18, 1964. No. 35769.

1. **Courts: Wills.** A county court has jurisdiction to construe wills when necessary for the benefit of the executor in carrying out the terms of the will.
2. ———: ———. The district court has exclusive jurisdiction to construe wills to determine the rights of devisees or legatees as between themselves, or between the executor and persons claiming adversely to the estate.
3. **Actions: Venue.** The Uniform Declaratory Judgments Act is procedural and the venue of a declaratory judgment action is governed by the rules relating to venue of civil actions generally.
4. ———: ———. The venue of a declaratory judgment action brought in the district court for the sole purpose of construing a will is in the county in which the defendant, or some one of the defendants, resides or may be summoned as provided by section 25-409, R. R. S. 1943.
5. **Equity.** Where an owner of real estate entered into a binding contract for the sale thereof prior to his death, equity will treat the realty as personalty in distributing his estate.

6. Wills. In construing a will, effect must be given to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with rules of law. In arriving at the intention of the testator and the meaning of the language used in his will, it is the duty of the court to take into consideration all the facts and circumstances surrounding the testator at the time of the making of the will.
7. ———. A will, which gives to a devisee specific real estate, as to which testator had entered into a binding contract of sale, will pass the interest of the testator in the contract with all the rights incidental thereto, unless the intent of the testator as demonstrated by the will and the attendant circumstances is shown to be otherwise.

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

Johnson, Kelly, Evans, Johnson & Spencer, for appellants.

Monsky, Grodinsky, Good & Cohen, Finlayson, McKie & Kuhns, and Schaper & Schaper, for appellees Father Flanagan's Boys' Home et al.

Roy E. Blixt and Robert E. Roeder, for appellees Lewis et al.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. SMITH and ROBERT L. FLORY, District Judges.

CARTER, J.

This is an action for a declaratory judgment commenced in the district court for Logan County by the plaintiffs as beneficiaries under the will of Gustaf Herbert Johnson, deceased, for a construction of the will and a determination of their interests in the estate. The defendants answered and a trial was had. The trial court found for the plaintiffs and the defendant Mabel E. Graybill has appealed. Other defendants below are shown as appellees but have filed no briefs in this court.

The evidence shows that Gustaf Herbert Johnson executed his will on January 1, 1961. He died as a resi-

dent of Custer County on April 17, 1962, and his will was admitted to probate by the county court of Custer County. The will contained two paragraphs which are the subject of the present litigation. These two paragraphs provided:

"3ed-If Mrs. Mabel E. Graybill is still with me when I pass on, I give, devise and bequeath to her all my personal property, furnitue, house hold goods, car, tools, garden and lawn equipment chickens and feed. After taxes, insurance and upkeep has been taken care of, she is to have the income from the home and two farms for as long as she lives.

"4th-After she has passed on or left then I give, device and bequeath $I,000.00-(One Thousand dollars) to the Finch Memorial Library in Arnold, the ballance one half to each-The Flanninga n's Home for Boys, and the Omaha Home for Boys."

There is no question as to the descriptions of the two farms which are specifically set out in the pleadings and the applicability of the will thereto. One farm is in Custer County and the other is in Logan County. On November 1, 1960, prior to the execution of his will, the deceased entered into an executory contract of sale of the Logan County farm with Richard N. Jensen for the sum of $19,775, which contract was not in default at the time of his death. The legal title to the land was in the name of deceased at the time of the execution of his will and also at the time of his death.

It is the contention of Mabel E. Graybill that the trial court erred in holding that it had jurisdiction of the subject matter of the action and in holding against her contention that the payments of principal due under the contract passed to her as personal property of the estate by paragraph 3 of the will.

It is contended that the county court of Custer County has original jurisdiction to construe the will of the deceased and that the district court has jurisdiction only on appeal. By a long line of cases this court has held

to the contrary. The rule is: The probate court has jurisdiction to construe wills when necessary for the benefit of the executor in carrying out the terms of the will. It has no jurisdiction to construe wills to determine the rights of devisees or legatees as between themselves, or between the executor and persons claiming adversely to the estate. Such latter jurisdiction is in the district court. Merrill v. Pardun, 125 Neb. 701, 251 N. W. 834; DeWitt v. Sampson, 158 Neb. 653, 64 N. W. 2d 352; Lutcavish v. Eaton, 166 Neb. 268, 89 N. W. 2d 44; Brown v. Applegate, 166 Neb. 432, 89 N. W. 2d 233.

The action in this case is one to construe the will of Gustaf Herbert Johnson and nothing more. It is not a case of general equity jurisdiction in which the construction of the will is incidentally involved. Objection to the jurisdiction of the district court for Logan County over the subject matter of the action was made by special demurrer. All necessary parties were either served personally with summons, or a general appearance made. The issue is, therefore, the question of venue of an action for the construction of a will.

In this connection we point out that the deceased was domiciled in Custer County at the time of his death, and his will was admitted to probate in that county. This action was brought in Logan County. The question is whether or not an original action for the construction of a will must be brought in the district court for the county where the will is probated, or may it be brought in the district court where real estate passed by the will is situated, or is it a transitory action that may be brought where service of process upon the defendants may be obtained.

The petition filed in this case prays for nothing but a construction of the will, and is in fact a suit brought for no other purpose than to obtain a construction of the will and a determination of plaintiffs' relation to it. It has been held in a number of states that the equitable jurisdiction to construe wills is simply an incident of the

general jurisdiction of a court of equity and that a court of equity will not entertain jurisdiction of a suit brought for no other purpose than to obtain a construction of a will without a prayer for any other relief. 96 C. J. S., Wills, § 1075, p. 741; 57 Am. Jur., Wills, §§ 1023 and 1024, pp. 662 and 663. The Uniform Declaratory Judgments Act of this state authorizes courts of record to construe wills. §§ 25-21,150 and 25-21,152, R. R. S. 1943. The act, however, does not fix the venue of the action. Under the case law of this state, as we have hereinbefore pointed out, the district court and not the county court has the exclusive power to construe wills to determine the rights of devisees or legatees as between themselves, or between the executor and persons claiming adversely to the estate.

There can be no question that the district courts of this state have the exclusive power to construe wills except for the limited power of the county court to construe a will for the benefit of the executor in carrying out the terms of the will.

We have found no case in this jurisdiction which determines the venue of an action to construe a will where no other basis of equitable jurisdiction exists. A dearth of cases on this precise point appears to exist in other jurisdictions.

In the holdings of this court in dealing with the propriety of construing wills in district courts other than in the county where the will was or is being probated, the jurisdiction was sustained on the theory that it was incidental or ancillary to the attaching of the general equity jurisdiction of the court on other grounds. See, Hahn v. Verret, 143 Neb. 820, 11 N. W. 2d 551; Mohr v. Harder, 103 Neb. 545, 172 N. W. 753; Klug v. Seegabarth, 98 Neb. 272, 152 N. W. 385; St. James Orphan Asylum v. Shelby, 75 Neb. 591, 106 N. W. 604. From this it might be inferred that the jurisdiction of a district court other than in the county where the will was or is being probated rests solely on its being incidental or

ancillary to the general equity jurisdiction of that court. This is not necessarily so. The fact that a court may see fit to sustain venue and jurisdiction on one ground does not have the effect of excluding any other basis for sustaining venue or jurisdiction under different circumstances, particularly when the grounds stated are not held to be exclusive.

The Uniform Declaratory Judgments Act is a procedural act. Graham v. Beauchamp, 154 Neb. 889, 50 N. W. 2d 104; Rohn v. Kelley, 156 Neb. 463, 56 N. W. 2d 711. Venue in a declaratory judgment action is governed by the rules relating to venue of civil actions generally. 9A Uniform Laws Annotated, Declaratory Judgments, § 1, Note 120, Venue, p. 76.

The venue of an action is the place of trial of an action, the place where the power to adjudicate is to be exercised, the place where the suit may or should be heard. See Lewin v. Lewin, 174 Neb. 596, 119 N. W. 2d 96. In this state venue is fixed by statute. We have no statute which specifically fixes the venue of an action which was brought for the sole purpose of construing a will. Section 25-409, R. R. S. 1943, contains a residuary venue provision which provides in part: "Every other action must be brought in the county in which the defendant, or some one of the defendants, resides or may be summoned." While this provision appears in a section of the statute dealing with tort actions, it has been applied by this court to other actions. See, Parker v. Luehrmann, 126 Neb. 1, 252 N. W. 402; Abbott v. Wagner, 108 Neb. 359, 188 N. W. 113; Nebraska Nat. Bank v. Parsons, 115 Neb. 770, 215 N. W. 102. The action is therefore transitory as distinguished from a local action. We conclude, for the foregoing reasons, that the venue of the present action was properly determined by the trial court to be in Logan County.

It is the contention of Mrs. Graybill that all the personal property of the deceased was bequeathed to her by paragraph 3 of the will and, since the executory con-

tract of sale of the Logan County farm is personalty, the proceeds of the sale of the farm pass to her by the will. We are in accord with the foregoing contention that the contract of sale is personalty as declared in Buford v. Dahlke, 158 Neb. 39, 62 N. W. 2d 252, in substance as follows: Where an owner of real estate entered into a binding contract for the sale thereof prior to his death, equity will treat the realty as personalty in distributing his estate.

It is the contention of the plaintiffs, however, that it was the intention of the testator, as gleaned from the will and the attendant circumstances, that the sale contract, although personalty, was to pass as real estate under the will and that the provisions of paragraph 4 of the will had the effect of passing to plaintiffs any interest the testator had in the Logan County farm.

"Under our statute and decisions of this court, it is the rule that in the construction of a will we must give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with rules of law, and as stated in Fisher v. Fisher, 80 Neb. 145, 113 N. W. 1004: 'In arriving at an understanding of the intention of the testator and the meaning of the language used in his will, it is the duty of the court to take into consideration all the facts and circumstances surrounding the testator at the time of the making of the will.' " Hahn v. Verret, *supra.*

Immediately prior to the time the testator entered into the sale of the Logan County farm with Jensen, he was the owner of a residence and farm in Custer County and the farm in Logan County. He owned no other real estate. Two months prior to the execution of his will he entered into the contract with Jensen for the sale of the Logan County farm. Testator retained the legal title to the farm, the equitable title passing to Jensen. With this situation existing, testator, by paragraph 3 of the will, bequeathed to Mrs. Graybill the income from the home and the two farms for her life-

time. By paragraph 4 of the will testator gave the balance of his estate to the plaintiffs subject to a bequest of $1,000 to the Finch Memorial Library in Arnold, Nebraska.

It seems clear to us that testator, under such circumstances, intended that his interest in the Logan County farm, subject to the payment of the income to Mrs. Graybill and the $1,000 bequest, was to pass to the plaintiffs under the will. The fact that he believed that his retention of the bare legal title and its device by the will would accomplish his purpose will not operate to defeat his intent to devise and bequeath his interest in the Logan County farm to the plaintiffs.

The case is similar in principle and is controlled by Battey v. Battey, 94 Neb. 729, 144 N. W. 786. In that case the court adopted the holding of the court in Woods v. Moore, 4 Sandf. (N. Y. Super. Ct.) 579, which stated: "The rule established is very plain that, where it is clear that there was an intent that the property in question should pass, it will be held to pass, notwithstanding a misdescription, so long as there is enough of correspondence to afford the means of identifying the subject of the gift. The rule comes to this that, where it is necessary to carry out the intent that the will shall operate on the real estate, it will be held so to operate, although the object is not thus described, and vice versa. So when the devise is of land, and it turns out that the testator's interest was a mortgage upon the same land, the law may pass his estate as mortgagee, such as it actually existed, with all his rights and interests in the debt, and in the land itself growing out of that relation to it."

Applying the foregoing rule to the instant case, the devise of the land, subject to the payment of its income to Mrs. Graybill during her lifetime, was effective to pass the interest of the testator in the land under the executory contract of sale, subject to the payment of the income to Mrs. Graybill during her lifetime, from the principal amount due under the contract of sale.

A general or specific devise of land passes the interest of the testator in the land which he had contracted to sell, unless the intent of the testator as demonstrated by the will and the attendant circumstances is shown to be otherwise.

The trial court came to this same conclusion and its judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. PEARLE F. FINIGAN, DIRECTOR, DEPARTMENT OF AGRICULTURE AND INSPECTION, STATE OF NEBRASKA, APPELLANT, V. NORFOLK LIVE STOCK SALES COMPANY, INCORPORATED, A CORPORATION, APPELLEE.
132 N. W. 2d 302

Filed December 31, 1964. No. 35632.

SUPPLEMENTAL OPINION

Appeal from the district court for Madison County: FAY H. POLLOCK, Judge. On rehearing. See 177 Neb. 31, 128 N. W. 2d 130, for original opinion. Affirmed.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellant.

Jewell & Otte, for appellee.

Barney, Carter & Buchholz, for amicus curiae.

Heard before WHITE, C. J., MESSMORE, YEAGER, SPENCER, BOSLAUGH and BROWER, JJ., and DIERKS, District Judge.

BROWER, J.

Our former opinion in this cause is in 177 Neb. 31, 128 N. W. 2d 130, where the facts and issues are set forth. A reargument was granted and had and the case has been given further consideration.

The previous decision held that the defendant Norfolk Live Stock Sales Company, Incorporated, a corporation,

was exempt from the provisions of the Nebraska Auction Livestock Development Act, Chapter 54, article 11, R. S. Supp., 1961, herein referred to as the act, and consequently it was unnecessary to consider the plaintiff's assignments of error further.

The section of the act which we held conferred the exemption is section 54-1129, R. S. Supp., 1961, which provides in part: "This act shall not be construed to include: * * * (4) Any presently existing livestock market, stockyards, or facilities commonly known as a central public livestock market or a terminal livestock market *and regulated under the provisions of the federal Packers and Stockyards Act, 1921, and amendments thereto.*" (Italics supplied.)

The contentions of the parties in regard to this section as set forth in our previous opinion were: "The defendant contends that subsection (4) of section 54-1129, R. S. Supp., 1961, creates three exempt classifications, one of which is divided into two subclassifications. The defendant argues that the exempt classifications are: (1) Any existing livestock market regulated under the provisions of the federal Packers and Stockyards Act; (2) stockyards regulated under the provisions of the federal Packers and Stockyards Act; and (3) facilities commonly known as a central public livestock market or a terminal livestock market and regulated under the federal Packers and Stockyards Act. * * *

"The plaintiff contends that subsection (4) of section 54-1129, R. S. Supp., 1961, creates only one exempt classification. The plaintiff argues that the Legislature did not intend to exempt a livestock market or stockyards unless it was also a central public livestock market or a terminal livestock market. The plaintiff's theory of the statute is that the word 'or' as it appears in subsection (4) of section 54-1129, R. S. Supp., 1961, is used to indicate an appositional relation of thought, and that the alternatives mentioned are similar or equivalent in meaning instead of different or distinct."

Our opinion further stated the plaintiff's theory of the exemption statute was dependent upon the meaning of the terms "a central public livestock market or a terminal livestock market" as used in subsection (4) of section 54-1129, R. S. Supp., 1961. Because the terms were not defined in the act under consideration and the plaintiff neither in his brief nor argument of counsel suggested a definition of either, this court concluded that the terms had no well-established meaning and accordingly adopted the defendant's construction holding the defendant exempt from the provisions of the act.

On reargument plaintiff and the brief filed by the friend of the court cited authorities to the effect that "central public market" and "terminal market" are common and synonymous terms in the livestock business and connote markets connected with "public stockyards" doing business through an exchange; that this court should take judicial notice of the meaning of those terms; and that as so defined the only "central public market" and "terminal market" in the State of Nebraska is the Union Stock Yards at Omaha, Nebraska.

The plaintiff next contends again that the word "or," when used not to connect two distinct facts of different natures but to characterize and include two or more phases of the same fact attended with the same result, states but a single ground and not the alternative. In such case it may be construed as meaning "alias," "being," "otherwise called," and words of similar import.

Conceding for the purposes of this supplemental opinion that the suggested meaning of the terms "central public livestock market" and "terminal livestock market" are as claimed, a careful study of that portion of the exemption section under consideration does not, in our opinion, authorize the construction urged thereon for the following reasons: First, although "or" is not always used in the disjunctive, it is usually so considered and that is its commonly accepted meaning. Second, the

word "Any" at the beginning of subsection (4) is suggestive that more than one entity was intended. Third, the words "livestock market" and "stockyards" are not joined by "and," or by "or," but are separated by a comma, a circumstance which renders the reading of the section quite awkward if the construction of the plaintiff is adopted. Fourth, it would appear that the closing words of the paragraph, "and regulated under the provisions of the federal Packers and Stockyards Act, 1921, and amendments thereto," relates and refers to each and all of the terms previously mentioned and that the construction suggested disregards the words and phrases used and the order of those words and phrases.

Generally speaking, a statute should be construed so that an ordinary person reading it would get from it the usual accepted meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not of creating it. 50 Am. Jur., Statutes, § 226, p. 209. An ordinary person reading the paragraph containing these exceptions would not consider it ambiguous but would construe it as the defendant contends. When language of a statute is unambiguous, there is no necessity for construction; courts have no jurisdiction to change the language of a statute. Wessel v. City of Lincoln, 145 Neb. 357, 16 N. W. 2d 476; Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N. W. 2d 75, 88 A. L. R. 2d 1055.

It follows that our decision in the former opinion should be and is adhered to, and the judgment of the trial court affirmed.

AFFIRMED.

DIERKS, District Judge, not participating.

BETTY JO HALL, APPELLANT, V. HERBERT RICHARD HALL, APPELLEE.

132 N. W. 2d 217

Filed December 31, 1964. No. 35735.

1. **Divorce: Appeal and Error.** In an appeal to this court in a divorce action the cause is tried de novo.
2. **Divorce.** In a divorce suit in which the custody of a minor child is involved, the rule is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents.
3. ———. Where in an action for divorce both parents are found to be unfit or unsuitable to have the care and legal custody of the minor child of the parties, the welfare and best interest of the child will constitute the sole consideration in determining the right of custody.
4. ———. Under the provisions of section 43-236, R. R. S. 1943, where the parents of a minor child are unfit or unsuitable to have its custody, the separate juvenile court may properly place its legal custody in the chief juvenile probation officer on such terms and conditions as the court may prescribe.
5. ———. In a case where the fixing of the custody of a minor child is concerned, the wishes of the child are not controlling, but if the child has reached sufficient age and has the ability to express an intelligent preference, such an expression is entitled to consideration.
6. ———. The court in determining the amount of alimony or in making a division of property in a divorce case will consider the age of the parties, their earning ability, the duration of and the conduct of each during the marriage, their station in life, the circumstances and necessities of each, the physical condition of each, the property owned by them and whether or not it was acquired by their joint efforts, and any other pertinent facts.

Appeal from the separate juvenile court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed as modified.

Donald R. Grant, Kier, Cobb & Luedtke, and Janice L. Gradwohl, for appellant.

Ginsburg, Rosenberg & Ginsburg and Marti, O'Gara & Dalton, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, YEAGER, BOSLAUGH, and BROWER, JJ., and DIERKS, District Judge.

MESSMORE, J.

Betty Jo Hall, plaintiff, brought this action in the district court for Lancaster County against Herbert Richard Hall, defendant, to obtain an absolute divorce, the custody of a 9-year-old daughter of the parties, child support, alimony, costs, and attorneys' fees.

A motion was filed by the defendant that the issues in this case be transferred to the separate juvenile court of Lancaster County. By order of the district court, the case was transferred to the separate juvenile court of Lancaster County as provided for by law.

The trial judge of the separate juvenile court made findings as follows: That the plaintiff and defendant were married on May 29, 1953; that one child was born to this marriage, Courtney Lynne Hall, on August 11, 1954; that the care, custody, control, and support of this child were the issues in this case; that the defendant had been guilty of extreme cruelty to the plaintiff to such an extent that the legitimate objects of matrimony had been defeated and destroyed which entitled the plaintiff to an absolute divorce; that neither the plaintiff nor the defendant was a proper person to have the care, control, and custody of the minor child, which care, control, and custody of the child should be awarded to Mr. and Mrs. Mark M. Baldwin of Omaha, Nebraska, an uncle and aunt of the child, who offered to take such custody; that Mr. and Mrs. Mark M. Baldwin were fit and proper persons to have the care and custody of Courtney Lynne Hall, a minor child; that it was in the best interests of the minor child that her custody be given to Mr. and Mrs. Mark M. Baldwin subject to reasonable rights of visitation by the plaintiff and the defendant; that child support should be paid by the defendant in the amount of $100 a month commencing forthwith until the child reaches 21 years of age, dies, or until further order of the

court; that the personal clothing and personal effects of the plaintiff should be awarded to her and the personal clothing and personal effects, including insurance policies of the defendant, should be awarded to him; that the household furniture and furnishings should be awarded to the plaintiff; that the 1959 Ford automobile should be awarded to the defendant subject to any encumbrance against the same; that the described real estate owned by the parties should be sold and, after paying the balance due on the first mortgage at the First Federal Savings and Loan Association and the expenses of the sale, the balance should be divided equally between the parties as a division of property and alimony; that any lien resulting from this proceeding should be released in order that the property might be sold; and that the defendant should pay the costs of the action and reasonable attorneys' fees in the amount of $1,200. The decree was entered in accordance with the above findings.

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

The plaintiff's petition set forth certain acts of extreme cruelty on the part of the defendant to the plaintiff which embarrassed and humiliated the plaintiff to the extent of destroying the objects and purposes of matrimony, and particularly this marriage relationship; alleged that the defendant was employed by the Goodyear Tire and Rubber Company as an engineer and earned in excess of $600 a month, and that the parties had accumulated certain real estate; and further alleged the birth of the minor child of the parties. The plaintiff prayed for an absolute divorce from the defendant, the custody of the minor child of the parties, reserving reasonable rights of visitation to the defendant, and for an award of child support, alimony, costs, and attorneys' fees.

The defendant's answer admitted the residence of the parties, the date of their marriage, and the birth of the

minor child of the parties; generally denied all other allegations of the plaintiff's petition; specifically alleged that the plaintiff was not a fit and proper person to have the care and custody of the minor child of the parties; and prayed for a dismissal of the plaintiff's petition and that the care and custody of the minor child be vested in the defendant.

The plaintiff has set forth many assignments of error, in substance as follows: That the trial court erred in finding that the plaintiff was not a fit and proper person to have the care, control, and custody of Courtney Lynne Hall, minor child of the parties; in failing to award the home of the parties to the plaintiff; in failing to require the defendant to pay the balance due on the mortgage on the home of the parties, which was a lien against such home; and in receiving evidence which was too remote in time, hearsay, incompetent, irrelevant, and immaterial to the issues in this case.

There are certain rules of law that are applicable to a determination of this appeal.

In an appeal to this court in a divorce action the cause is tried de novo. See Waldbaum v. Waldbaum, 171 Neb. 625, 107 N. W. 2d 407.

In a divorce suit in which the custody of a minor child is involved, the rule is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents. The care, custody, and control of a child of tender years is almost uniformly awarded to the mother if she is a fit and suitable person to have its custody. See Campbell v. Campbell, 156 Neb. 155, 55 N. W. 2d 347.

Where in an action for divorce both parents are found to be unfit or unsuitable to have the care and legal custody of the minor child of the parties, the welfare and best interest of the child will constitute the sole consideration in determining the right of custody. Under the provisions of section 43-236, R. R. S. 1943, where the

parents of a minor child are unfit or unsuitable to have its custody, the separate juvenile court may properly place its legal custody in the chief juvenile probation officer on such terms and conditions as the court may prescribe. See Beck v. Beck, 175 Neb. 108, 120 N. W. 2d 585.

In a case where the fixing of the custody of a minor child is concerned, the wishes of the child are not controlling, but if the child has reached sufficient age and has the ability to express an intelligent preference, such an expression is entitled to consideration. See Waldbaum v. Waldbaum, *supra.*

The record discloses that the plaintiff and the defendant were married in Lincoln, Nebraska, on May 29, 1953. One child was born to this marriage on August 11, 1954, and named Courtney Lynne Hall, hereafter referred to as Courtney. During the marriage the parties accumulated real estate at 1834 North Sixty-seventh Street in Lincoln. The defendant is a project engineer employed by the Goodyear Tire & Rubber Company, and his income is about $700 a month. The plaintiff was 32 years of age and the defendant 42 years of age at the time of trial.

The evidence is replete with facts which show that the defendant drinks intoxicating liquor to excess; stays away from home and when he does come home is in a drunken condition and abusive to the plaintiff; that when he drinks he becomes boisterous, loud, uses filthy language, makes himself obnoxious, and embarrasses the plaintiff and others; and that such condition has continued during the 10 years of the marriage of the parties. There is no question but that the plaintiff was entitled to an absolute divorce from the defendant.

This was the second marriage of the plaintiff and the first marriage of the defendant. The plaintiff had been previously married to Marvin E. Copple. Two children were born to this marriage, Nancy Lee Copple and Steven E. Copple. The first marriage was dissolved

in 1951. Nancy and Steven remained living with their mother, the plaintiff, until 1959, at which time they commenced living with their father. At that time Nancy was 12 years of age and Steven 9 years of age.

The principal issues in this case relate to the care, control, and custody of Courtney, the minor child of the parties, and the sufficiency of the alimony awarded to the plaintiff.

The evidence in behalf of the plaintiff involving the issue of the custody of Courtney discloses that the principal of an elementary school testified that she had been acquainted with Courtney during all of her school years; that Courtney had always been a good student with average or above grades; and that she had noticed that Courtney's clothing was always clean and neat and her hair combed.

The plaintiff's mother testified to the quality and wholesomeness of the meals served by the plaintiff, the neat and clean appearance of the home, and a like neat and clean appearance of Courtney.

Another witness testified that she had never seen the plaintiff behave in any other manner than that of a lady; that the plaintiff's home was clean, and a normal family home with children; that the plaintiff was a good housekeeper, prepared good meals for the family, and did much sewing for herself and Courtney; and that the plaintiff and Courtney had a normal affectionate relationship as a mother and daughter.

There is much evidence given by witnesses for the plaintiff who are friends and acquaintances of hers which corroborated the testimony relating to the plaintiff being a very good housekeeper, having a clean home, as to her good conduct, that the plaintiff's treatment of Courtney has been good, that the plaintiff always took pride in her home, and that the relationship between the plaintiff, Courtney, and the other children was good.

Courtney testified that her mother was good to her; that if her parents were separated, she wanted to live

with her mother; and that her mother did spank her if she needed it. Courtney further testified that the defendant visited her every Saturday, which she thought was about the right amount of time, and that she agreed with her mother with reference to this matter.

The plaintiff testified that she did drink, and at times got "high," but not very often.

A witness testified that he had known the Halls for the last 5 years and had been a neighbor to them. His testimony related to neighborhood parties which the Halls had attended and where drinking was going on. He testified that sometimes these parties would last until 3 or 4 o'clock in the morning, and that the plaintiff drank her share of intoxicating liquor.

A friend of the Halls testified that she had known them ever since they moved into the neighborhood; that the Halls had attended two parties in her home and the plaintiff "drank right along with the rest of them"; and that the plaintiff was pretty well "looped" at one of the parties and had difficulty in keeping her elbow on the table.

Sumner E. Copple, the grandfather of Nancy and Steven Copple, testified that he and his wife had frequent contact with the plaintiff, the defendant, Nancy, Steven, and Courtney until the time that Nancy and Steven went to live with their father in 1959; that on many weekends he and his wife took care of the children; that when Courtney was a baby and still in diapers, on several occasions his wife called his attention to Courtney's condition when her diapers were changed; that there were sores on her buttocks much worse than an ordinary diaper rash; and that at times there were black marks on her back and buttocks, and welts and skin breaks extending from her buttocks to her neck. He further testified to seeing black marks on Steven once or twice a month, and similar marks on Nancy; that the plaintiff usually slapped Courtney when she was about 2 years of age if she spilled any

food; that he had seen the plaintiff strike Steven lots of times, either on the face, the back, or the top of his head; and that in March 1959, he talked to the plaintiff about the manner in which she treated the children and her response was that she should not have done it. He further testified that in 1959 Steven and Nancy came into the custody of their father and he had no grandchildren at the Hall home thereafter.

Mrs. Sumner E. Copple, the grandmother of Nancy and Steven Copple, testified that she babysat with Nancy, Steven, and Courtney on occasions once or twice a week. She told of Courtney's skin condition which she noticed when she changed her diapers, and testified that it was a common thing to see bruises on Courtney's back, shoulders, buttocks, and sometimes on her arms; and that she observed bruises, lacerations, and some abrasions on Steven. She related certain instances disclosing what she believed to be hard and unusual discipline meted out by the plaintiff to the children. She further testified that she had never seen the plaintiff hug or kiss any of the children; and that the plaintiff was always impatient and intolerant.

The defendant testified that he and the plaintiff owned the home they lived in; that he drinks too much, but not too frequently; that the plaintiff drinks and at times he had seen her drunk; that one time the plaintiff drank so many martinis that when her meal was served she was unable to eat it; that on another occasion, after drinking at the Esquire Club, the plaintiff had to be awakened and he had to escort her home; and that on another occasion the plaintiff became angry with him because he was drinking nothing but coffee. He described the way in which the plaintiff disciplined the children and testified that the plaintiff would start to give them a verbal reprimand and before she was through she would be so worked up that she would start flailing away, and that was the way she was with all of the children; and that such discipline could happen every

day or every couple of weeks, or every other week, depending upon the plaintiff's attitude and how she felt at the time. He then recited an incident relating to the plaintiff's discipline of Nancy which he thought was unmerciful and not as discipline should be given a child. He further testified that he saw the plaintiff slap Courtney and knock her out of a kitchen chair when Courtney was 4 years old; and that the plaintiff used a bowling shoe and a belt to whip the children.

Nancy Lee Copple, the 16-year-old daughter of the plaintiff, testified that she was Steven's sister and Courtney's half-sister; that she had lived with the plaintiff until she was 12 years old; that when she was living with her mother, Courtney slept with her in her room; that on numerous occasions she or one of the other children were disciplined by the plaintiff when the plaintiff would use a bowling shoe, holding the toe of the shoe and striking with the heel; and that the plaintiff used the shoe on all of the children, striking them over the back, the head, the shoulders, the legs and arms, and anywhere she could come in contact with the person of the children. She also testified that the plaintiff used a belt on all three of the children, and a board which she kept in the broom closet; that the plaintiff never used the board on this witness, but she had seen the plaintiff use it on Steven and Courtney; that the plaintiff would strike Courtney with her fist on Courtney's back, shoulders, or head, whichever happened to come in contact with the plaintiff; that the plaintiff would become extremely excited and use her fist, the bowling shoe, a belt, or a board on the children; that this discipline by the plaintiff would occur when the children would spill milk; and that she hated her mother, for the reason that her mother showed no affection for her, for Steven, or for Courtney.

The defendant's mother, a retired schoolteacher, testified that she spent considerable time with the Halls during the summer and on weekends prior to her retirement, and often babysat with Courtney after Steven

and Nancy no longer lived in the Hall home. She recalled an occurrence when the plaintiff lost her temper, grabbed a shoe off the kitchen floor, followed Courtney down the hall, and struck her five or six times across the shoulders with the shoe. She testified that Courtney was 6 or 7 years old at that time; and that the plaintiff would slap the children if they spilled anything on the kitchen floor or at the table.

There is no question but that Mr. and Mrs. Mark M. Baldwin of Omaha, Nebraska, bear a good reputation, have good accommodations for children in their home, are church-going people, have one daughter 19 years of age enrolled in Omaha University and another 14 years of age in junior high school, and would take Courtney into their home.

The plaintiff was recalled on redirect examination and testified that she did hold Courtney on her lap and kiss her and hug her because she was a very lovable child; that she had been a room mother every year that her children were in school; that she sponsored the Campfire Girls when Courtney was a member; and that she took the children swimming every Wednesday. She denied knocking Courtney off of a chair onto the floor. She said that she did use a stick or a paddle to strike the children on occasions as a matter of discipline and that she probably did use a bowling shoe on three or four occasions; that she had observed no abrasions or broken skin on the children; and that she did have trouble with diaper rash which affected all of her children, but secured medication which relieved this situation. She denied striking Courtney on the ear when she had an earache, and denied and refuted the evidence of the witnesses for the defendant and the defendant and his mother relating to the discipline of the children as being too severe.

The testimony of the Copple family relates to occurrences prior to the spring of 1959, or 4 years prior to the time this case was commenced.

There are many pictures in evidence showing the plaintiff with Nancy, Steven, and Courtney together, and with Courtney alone at different places; pictures of the plaintiff and the defendant with the children; a picture of a dog of Courtney's; and a picture of a tea party she had with a playmate. These pictures clearly indicate the love and affection manifested by this plaintiff for Courtney.

The following are also applicable to the instant case. In Young v. Young, 166 Neb. 532, 89 N. W. 2d 763, custody of the children was given to the welfare department of Lincoln County by the trial court. It appears that there was evidence that the mother drank alcoholic liquor, primarily beer. There was also evidence that on occasions she had possibly consumed more than ordinarily would be proper and desirable. There was evidence that on one or possibly two occasions a party of friends, who had brought their own liquor, became noisy while in her home. This court said: "While we do not approve such conduct on her part, however, we do not think it was of such a character that it completely destroyed her right to raise her children." The custody of the four children was awarded to the mother. See, also, Beck v. Beck, *supra.*

In the instant case the plaintiff has been employed at different times during the period of her marriage to the defendant. The last time the plaintiff started to work was in the spring of 1959, and she has been employed since that time. During the times that she has been employed she has had a good friend, a neighbor, who is a good housekeeper and a person of good reputation, who babysat with Courtney.

There is nothing in the record that attacks the plaintiff's morality. It is true that at times she has been to different clubs with a group of persons, her friends, and has had a few drinks of intoxicating liquor. We do not condone this action on her part.

We direct that the legal custody of the minor child in

the instant case be placed in the chief juvenile probation officer of Lancaster County, with instructions to leave her physical custody with the mother, Betty Jo Hall, under the supervision of such probation officer, during such time as she shall properly care for the child under an environment that is not inimical to the child's best interests and welfare. If and when Betty Jo Hall fails in her obligation to act in accordance with the best interests and welfare of the child, the matter shall be called to the attention of the court for such further disposition as the court deems necessary and proper under the law and the evidence.

As to the question of alimony, in Abel v. Abel, 168 Neb. 488, 96 N. W. 2d 276, we said: "The court in determining the amount of alimony or in making a division of property in a divorce case will consider the age of the parties, their earning ability, the duration of and the conduct of each during the marriage, their station in life, the circumstances and necessities of each, the physical condition of each, the property owned by them and whether or not it was acquired by their joint efforts, and any other pertinent facts."

The defendant borrowed $2,000 from his mother to make a downpayment on the real estate of the parties. The total price of the property was $12,500, and the indebtedness against the property was $6,426.61 as of September 1963. At the time of trial, the defendant was making payments of $98.50 a month on this real estate.

The only item of property in the instant case of significant value is the equity in the real estate, which appears to be the upper amount that can be considered in making a division of the property. There is evidence in the record that the property is of a higher value than it was at the time it was purchased by the parties. The record also shows that the net salary of the defendant for the first 9 months of 1963 amounted to $4,869.80, or an average monthly salary of $541.08.

It is apparent that according to the trial court's judg-

ment the plaintiff receives 50 percent of the proceeds of the sale of the property, after discharging the indebtedness due a building and loan association and other matters of indebtedness which the defendant is required to pay, as heretofore shown.

The judgment of the trial court should be affirmed in all respects, except the decree of the trial court is hereby modified with reference to the custody of the minor child.

AFFIRMED AS MODIFIED.

DIERKS, District Judge, not participating.

GEORGE W. CAVES, APPELLEE, V. MAX O. BARNES ET AL., APPELLANTS.
132 N. W. 2d 310

Filed December 31, 1964. No. 35746.

1. **Trial.** Where, from the evidence before the jury, different minds may draw different conclusions, or where there is a conflict in the evidence, the matter at issue must be submitted to the jury.
2. **Witnesses: Appeal and Error.** Whether a witness' qualification to state his opinion is sufficiently established rests largely in the discretion of the trial court, and its ruling thereon will not ordinarily be disturbed on appeal unless there is a clear showing of abuse.
3. **Witnesses: Evidence.** Testimony of witnesses must be confined to concrete facts perceived by the use of their senses as distinguished from opinions and conclusions deducible from evidentiary facts.
4. ———: ———. While an expert will be permitted to express his opinion, or even his belief, he cannot give his opinion upon the precise or ultimate fact in issue before the jury, which must be determined by it.
5. **Automobiles: Damages.** When, at reasonable cost, a damaged automobile can be repaired and restored to substantially its original condition, such cost is a proper measure of damages in an action for negligence.
6. ———: ———. The reasonable value of the use of a motor vehicle for commercial purposes is the reasonable net rental value upon the market at the place in question of the vehicle involved or a vehicle of like capacity and performance, the

lessee bearing all such expenses as he would have to bear in the operation of his own vehicle.

7. **Automobiles.** The doctrine of sudden emergency may not be successfully invoked by a litigant unless there is evidence that such an emergency existed, that the party seeking the benefit of the doctrine did not cause the emergency, and that he used due care to avoid it.

Appeal from the district court for Saunders County: H. EMERSON KOKJER, Judge. Affirmed.

Robert C. Oberbillig, Herbert E. Story, and Robert E. Sullivan, for appellants.

Haney, Walsh & Wall, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. SMITH and ROBERT L. FLORY, District Judges.

FLORY, ROBERT L., District Judge.

This is an action by George W. Caves, plaintiff and appellee, against Max O. Barnes and Barnes Oil Company, a corporation, defendants and appellants, for personal injuries, property damage, and incidental expenses resulting from a motor vehicle collision. Defendant Max O. Barnes cross-petitioned for personal injuries and defendant Barnes Oil Company, a corporation, cross-petitioned for property damages and subrogation rights under the Nebraska Workmen's Compensation Law. The jury returned a verdict for the plaintiff in the amount of $8,866. After motions for judgment notwithstanding the verdict or for a new trial by both defendants were overruled they both perfected this appeal.

The accident happened at approximately 11:15 a.m., on September 17, 1962, near Linoma Beach approximately 2½ miles east of Ashland, Saunders County, Nebraska, on U. S. Highway No. 6. The highway in the area of the collision was straight and level and although it does not run truly east and west, for the sake of brevity and clarity, we will use those directions. The hard-surfaced

portion of the highway was 24 feet wide, marked with a centerline, and had shoulders approximately 8 feet wide. On the north side of the highway was an access road to a cottage area. Across the highway to the south were the main beach facilities and tower area. There were two entrances to this area approximately 108 feet apart, one to the east and one to the west of the road to the cottage area. Approximately 600 feet east of the east edge of the easterly entrance to the tower area was a gravel road running southerly to the clubhouse area.

Plaintiff, operating his 1959 Diamond T tractor and pulling a 1961 Trailmobile semi-trailer loaded with bagged fertilizer, was traveling west enroute from Omaha to Lincoln. When plaintiff was some 700 or 800 feet east of the road to the clubhouse area Max O. Barnes, hereinafter referred to as defendant, operating a 1959 Ford gasoline truck owned by his employer, Barnes Oil Company, a corporation, entered U. S. Highway No. 6 enroute from the clubhouse to the cottage area. There is no dispute as to the above facts.

Plaintiff's testimony is that when defendant's truck entered U. S. Highway No. 6 he had been going 60 miles per hour; that he coasted through the intersection losing speed; that after defendant's truck had entered U. S. Highway No. 6 he saw its left-hand turn indicator operating and defendant's truck moved into the left-hand lane; and that when defendant's vehicle was approximately 50 feet in front of him it turned suddenly and without warning to the right across the highway in front of him as he was preparing to pass it on the right. Defendant's testimony is that as he was entering U. S. Highway No. 6 with his left-turn indicator on he noticed plaintiff's rig some distance to the east; that he proceeded to the west in the right-hand lane; that upon his straightening out his turn indicator went off automatically; that he never crossed the centerline; and that he signaled a right turn with the turn indicator before turning at the

entrance to the cottage area. This evidence is in direct conflict and is a question of fact for the jury.

There is also conflicting evidence as to the location of the impact. Without dispute it occurred opposite the entrance to the cottage area and was between the left front of plaintiff's tractor and the right front of defendant's truck. The plaintiff's evidence is that the impact occurred when defendant's right front wheel was still on the pavement and the plaintiff's left wheels were on the pavement with the right wheels about 3 feet on the shoulder. Defendant's evidence is that the front of his truck was 12 feet north of the north edge of the pavement. The investigating officer testified that the normal debris following such a collision was all on the pavement and identified a gouge mark, visible in the photographs in evidence, approximately 2 feet north of the north edge of the pavement traceable to a broken part of the front assembly of defendant's truck. He also testified as to tire marks leaving the north edge of the pavement in a gradual course and traceable to the right wheels of plaintiff's tractor. The vehicles had not been moved when he made his investigation and he found the defendant's truck headed west with the left wheels on the pavement and the right wheels on the shoulder, and the plaintiff's rig in the ditch on the north side of the highway beyond defendant's truck. His testimony and the photographs in evidence tend to corroborate plaintiff's version as to location of the impact.

Professor W. F. Weiland, an engineer who was qualified as an expert, testified in answer to hypothetical questions based on a plat drawn to scale of the area and photographs of the vehicles and the area that, in his opinion, the angle of impact between the vehicles was close to 90 degrees or a little less; that the vehicles could not have been at a narrow angle of impact; that considering the gouge mark, the front of defendant's truck was barely off the north edge of the pavement at the moment of impact; that if the defendant's truck were in

that position he would expect the debris to be on the pavement; and that if the front end of defendant's truck had been 12 feet north of the pavement he would expect the gouge mark to be that far north also.

Because of the direct conflicts in the evidence it was not error for the trial court to submit the case to the jury as contended by the defendants. The rule that where, from the evidence before the jury, different minds may draw different conclusions, or where there is a conflict in the evidence, the matter at issue must be submitted to the jury is elemental and needs no citation of authority.

Defendants contend that Professor Weiland should not have been allowed to testify. This contention is based on an interrogatory, directed to the plaintiff, filed January 14, 1963, as follows: "State the names and addresses of all persons you or your representatives, whose knowledge is imputed to you, have interviewed relative to the facts of this accident out of which this suit has arisen." This was one of the 24 specific interrogatories and the following provision was included after the last specific interrogatory. "Each of the foregoing Interrogatories shall be deemed continuing and if you discover additional information as to any of the matters inquired of in these Interrogatories between the date when your answers are made and the date of trial, supplemental answers should be made informing the defendants or their attorneys as to the newly discovered information prior to trial." The interrogatories were answered and filed on March 11, 1963, and did not include Professor Weiland's name. Professor Weiland was first contacted by plaintiff's attorney on November 11, 1963, and the trial commenced the next day. In refusing to exclude the testimony on the basis of the continuing provision in the interrogatories the trial court stated in substance that while it probably would have been better to have advised the defendants of the expert witness he would overrule the objection. He also indicated some question

in his mind as to whether or not the interrogatory literally covered the situation. Trial courts have broad discretion in the general conduct of a trial and we do not believe it was abused in this instance.

Defendants also timely objected to Professor Weiland's giving the answers to the hypothetical questions, previously referred to, for lack of foundation. "Whether a witness' qualification to state his opinion is sufficiently established rests largely in the discretion of the trial court, and its ruling thereon will not ordinarily be disturbed on appeal unless there is a clear showing of abuse." Flory v. Holtz, 176 Neb. 531, 126 N. W. 2d 686. Testimony of witnesses must be confined to concrete facts perceived by use of their senses as distinguished from opinions and conclusions deducible from evidentiary facts. While an expert will be permitted to express his opinion, or even his belief, he cannot give his opinion upon the precise or ultimate fact at issue before the jury, which must be determined by it. Stillwell v. Schmoker, 175 Neb. 595, 122 N. W. 2d 538; Danner v. Walters, 154 Neb. 506, 48 N. W. 2d 635. The witness did not testify as to the point of impact. His answers were limited to the character of contact of the vehicles and to certain results following the contact. See Barry v. Dvorak, 176 Neb. 375, 126 N. W. 2d 226. The trial court did not err in admitting the answers to the hypothetical questions. As to damages, the jury was instructed that if it found for the plaintiff it should consider the fair and reasonable expense of repairs and the fair and reasonable value of loss of use while repairs were being made. There was competent evidence as to both repairs and rental value. " 'When, at reasonable cost, a damaged automobile can be repaired and restored to substantially its original condition, such cost is a proper measure of damages in an action for negligence.' " Wylie v. Czapla, 168 Neb. 646, 97 N. W. 2d 255. See, also, Thrapp v. Meyers, 114 Neb. 689, 209 N. W. 238, 47 A. L. R. 585. "The reasonable value of the use of machinery for commercial purposes

is the reasonable net rental value upon the market at the place in question of the machine involved or machinery of like capacity and performance, the lessee bearing all such expenses as he would have to bear in the operation of his own machine." Kunkel v. Cohagen, 151 Neb. 774, 39 N. W. 2d 609. The trial court's instructions to the jury with respect to plaintiff's measure of damages were proper, despite defendants' contentions to the contrary.

Finally, defendants contend that the trial court erred in instructing the jury on the sudden emergency doctrine. "The doctrine of sudden emergency may not be successfully invoked by a litigant unless there is evidence that such an emergency existed, that the party seeking the benefit of the doctrine did not cause the emergency, and that he used due care to avoid it." Stanley v. Ebmeier, 166 Neb. 716, 90 N. W. 2d 290. See, also, Brazier v. English, 177 Neb. 889, 131 N. W. 2d 601. From the evidence the jury could have found that the defendant was signaling a left turn, that he crossed into the left lane, and that as plaintiff was about to pass on the right the defendant suddenly and without warning turned to the right in front of him. This would clearly raise the issue of sudden emergency.

For the reasons given, we conclude that the judgment should be and hereby is affirmed.

AFFIRMED.

LILLIAN STASTNY, APPELLEE, V. WILLIAM TACHOVSKY ET AL., APPELLANTS, IMPLEADED WITH FRANK M. CHAB ET AL., APPELLEES.

132 N. W. 2d 317

Filed December 31, 1964. No. 35760.

1. **Discovery.** Discovery is the disclosure of facts, deeds, documents, or other things in the exclusive knowledge or possession of one party, which are necessary to the party seeking discovery

as a part of a cause of action or defense in an action pending, or to be brought in another court, or as evidence of his rights or title in such proceedings.

2. **Actions: Discovery.** An equitable action, sometimes referred to as a "pure bill of discovery," may be brought which seeks no relief in consequence of the discovery, but seeks the disclosure of facts resting in the knowledge of defendant, or of deeds, writings, or other things in his custody or power, merely in aid of the prosecution or defense of some other proceeding, usually at law, pending or about to be brought.
3. **Dead Bodies.** The quiet of the grave, the repose of the dead, are not lightly to be disturbed. Good and substantial reasons must be shown before disinterment is to be sanctioned.
4. ———. The right to have a dead body remain unmolested is not an absolute one; it must yield where it conflicts with the public good or where the demands of justice require such subordination.
5. ———. The exhumation or the autopsy of a corpse, when useful to ascertain facts in litigation, should be performed.
6. **Courts: Dead Bodies.** The orders of a court of justice, exercising the power of the state in the communal interest, are not to be placed on the same level with the acts of an unlicensed and self-seeking intruder upon hallowed ground.
7. ———: ———. The exhumation of a corpse, often a material assistance in insurance or inheritance cases, is demandable on this principle, subject of course to the trial court's discretion as to necessity and propriety.

Appeal from the district court for Saline County: JOSEPH ACH, Judge. Affirmed.

Clarence C. Kunc, for appellants.

John E. Dougherty and Stanley Bartos, for appellee Stastny.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. FLORY and ROBERT L. SMITH, District Judges.

BROWER, J.

This action was an equitable one in the nature of a bill of discovery brought by Lillian Stastny as plaintiff against William Tachovsky, Bessie Chab, and Elsie Kovar, individually, and Frank M. Chab and Milo S.

Stastny as special administrators of the Estate of Alfred Tachovsky, deceased, defendants, in the district court for Saline County. The plaintiff is the sole heir-at-law of Ida D. Tachovsky, deceased, and the defendants are all the heirs as well as the personal representatives of the Estate of Alfred Tachovsky, deceased.

Plaintiff's petition sought the judgment and order of the court directing the bodies of Alfred Tachovsky and Ida D. Tachovsky be exhumed and an autopsy be performed by at least two pathologists appointed by the court and directed to report in writing to it with reference to their findings. The petition makes clear its purpose was to determine from an examination of the decedents' wounds which died first in order to show in which estate the property owned by them should descend.

At the conclusion of the trial, the district court found that there was probable cause that by disinterment of the bodies and autopsies, certain facts relevant to the issues may be revealed and that justice demands said disinterment and autopsies. The judgment ordered that three acting and qualified pathologists be appointed, one by each party and a third by the court. It named and nominated a chairman of the board of pathologists who should designate the place of the autopsies. The court gave directions as to the disinterment, care, and reburial of the bodies, and required joint or several reports to be filed. It directed the plaintiff to file a bond in the sum of $1,000 conditioned that all costs of the disinterment, autopsies, and reburial be paid if finally adjudged against the plaintiff.

A motion for new trial having been overruled, the heirs-at-law of Alfred Tachovsky, hereinafter called the defendants, bring the matter to this court on appeal.

The errors assigned by the defendants as far as they are pertinent will be stated hereafter as they are discussed.

The decedents, Alfred Tachovsky and Ida D. Tachov-

sky, were married in the 1920's and then moved onto a farm located 1 mile east and a half mile south of Swanton, Nebraska, where they resided the rest of their lives. No descendants or parents survived them and their only heirs-at-law are the parties as set out. From outward appearances at least, they had always lived together in harmony. They had prospered and it is stipulated that the value of their estates amounted to $200,000 or more. Both of them had an 80-acre farm in their own name. They both were in measurably good health although both had to some degree high blood pressure which each had been able to control.

The decedents' farmstead was located on the west side of a north-south public road about 100 feet therefrom. The front of the house faced the east and the back porch was to the west. There was a fence west of the house with a gate separating the yard about the home from that around the other buildings. A cement walk about 2 feet wide led from the house to a gate in the fence, a distance of about 20 feet. The driveway from the public road to the homestead was a short distance south of the house.

About half a block south of the driveway into the decedents' farmstead is a private lane extending east and west and opening onto the public road. On this lane about a quarter of a mile west is the farmstead of Stanley Jiskra who had rented the farmland of the decedents as Alfred Tachovsky had ceased operating it personally.

The day of the tragedy, May 3, 1962, was a nice sunny day with the temperature about 55 or 60 degrees. About 7:15 or 7:20 a.m., Jiskra started to drive his tractor down the lane on his way to work because Alfred Tachovsky had requested that he discontinue using a gate between farms and come by the road. Turning into the driveway at the Alfred Tachovsky farmstead he proceeded west thereon. As he reached a point south of the house he observed Alfred Tachovsky lying on the side-

walk mentioned not far from the gate. Beside him was a .16 gauge Winchester pump gun and an empty cartridge. Another empty shell and a loaded one were later found in the gun's chamber. The body laid in a diagonal direction across the cement sidewalk. His feet were about 18 inches from a large catalpa tree south of the walk and his head was on or across the walk to the northeast. A hammer was lying near the tree and later a nail partially driven in the tree was found protruding from it.

Jiskra jumped off the tractor, "grabbed" Alfred Tachovsky by the arm, and saw he was dead. His arm was warm. The body was dressed in a short-sleeved shirt, bibbed overalls, and stockings but no shoes. Jiskra went at once to the house, opened the screen door, and "hollered" in a loud voice three times. There was no answer. Neither the homes of Alfred Tachovsky or Jiskra had telephones so he rode the tractor back to his farm and got his car. He then went to Swanton to get help to ascertain the cause of death and the whereabouts of Ida D. Tachovsky. There he called the sheriff at Wilber who was out but communicated with his wife. He also phoned Milo Stastny, the husband of the plaintiff. He stopped at the elevator for help but it was not open. Driving back he went to the home of Lester Tachovsky, a nephew but not an heir of Alfred Tachovsky, who lived about a quarter of a mile south across the road from the latter's farm. Lester had gone about 30 minutes before to assist another farmer but his wife, Jean Tachovsky, was there and she rode back with him to the scene of the tragedy. No one else had come meantime. Jean Tachovsky, after viewing the body of Alfred Tachovsky, went into the house and upstairs into the west bedroom where she was the first to discover the body of Ida D. Tachovsky. On coming down, Jiskra testified she exclaimed, " 'My God, everything is covered just with blood.' " When he asked her, " 'Is she

living?' " she answered that, " 'She looks like dead to me.' "

Milo and Lillian Stastny were next to appear on the scene. They stayed but a short time. Lillian was upset and at the invitation of Jiskra, Milo drove her to Jiskra's home. Milo returned at once. Both of them were back at different times during the day but do not appear to have examined the wounds of the decedents.

The undertaker, Glenn Zajicek, was notified by the sheriff's wife that a body had been found. He picked up his assistant, Frank Bartos, and Robert Shestak, deputy sheriff of Saline County, and all proceeded to the farm in an ambulance. They found the body of Alfred Tachovsky lying as described. Being informed that Ida D. Tachovsky was lying dead upstairs, about 15 minutes later they went upstairs and viewed her body where it lay in the west bedroom. In this room there were two windows to the west with a door between opening on an upstairs veranda. The deceased, dressed in her nightclothes, was lying on her stomach on the bed, the head of which was against the north wall. The undertaker testified she was then dead. Her head was on the pillow. There was blood in her hair, about her head, on the pillow, and some on the wall. There was a wound in the back of her head, the exact location and extent of which is in considerable dispute, which will be discussed later. There was no evidence of a struggle. A search of the entire house by several witnesses failed to disclose any suicide note.

When sheriff John Tesar later learned two bodies had been discovered with signs of violence, he hurried to the Tachovsky farmstead. He viewed the bodies and thereafter released them to the undertaker who took them to the mortuary at Wilber, Nebraska, about 10 or 10:30 o'clock. They were viewed by the sheriff, county attorney, and his deputy about noon that day and the undertaker was then authorized to prepare them for burial.

Both bodies were embalmed by the undertaker in-

jecting embalming fluid into the carotid artery, and the jugular vein was raised and drainage took place through it. Two hours after this process was complete he expirated the abdominal and thoracic cavities. This procedure was done with a trocar which was inserted into the body and a hydro-aspirator took out the liquids. The undertaker cleaned out the wound on the scalp of Ida D. Tachovsky. He put about half a cup of sealing powder, a kind of pack, into the wound to keep it from leaking and some cellucotton into the cavity. The scalp being flexible he gained enough material to sew it over the wound. He put a little sealing powder in the wound of Alfred Tachovsky and sewed it up. There was no trouble getting circulation of the embalming fluid in the case of Alfred Tachovsky. Neither was there difficulty in the case of Ida D. Tachovsky. The embalming fluid reached her head and a portion oozed out of the wound. The undertaker gave it as his opinion that both bodies were properly embalmed.

Both bodies were placed in 16-gauge metal sealer-type caskets in perfect condition which would completely seal off air and moisture when closed. After the service the caskets were placed in a Wilbert concrete burial vault lined with asphalt which is likewise sealed, and they were interred in the Bohemian Cemetery west of Wilber in a location where there is good drainage.

After the bodies were taken from the house, Stanley Jiskra and John Essman, also a neighbor, on May 3, 1962, bundled up the bedding on Ida D. Tachovsky's bed in the mattress, tied it with baling wire, took it out behind the out-buildings, and burned it.

Shortly after the funeral a safe in the decedents' farmhouse was taken to Wilber and opened. In it was found a will of Alfred Tachovsky made in 1929. It left all his property to his wife, Ida D. Tachovsky.

A petition was filed to probate the will of Alfred Tachovsky. It was admitted to probate, however no appointment was made of an administrator with the

will annexed but the special administrators who are parties were appointed. There is no evidence from the county court of Saline County bearing upon the time of the respective deaths.

The events hitherto described, except as especially noted, are essentially undisputed. There are certain matters, however, concerning which there is a conflict in the evidence, or which although not in great conflict, the inferences drawn therefrom by the plaintiff or defendants are in conflict.

There is testimony concerning reports of shots heard by others as throwing light on the time of the deaths and the interval of time elapsing between the two deaths. Both Lester Tachovsky and Jean Tachovsky, living east across the road about a quarter of a mile, were called by the plaintiff to testify concerning what they had heard. Lester testified he was doing chores early in the morning on May 3, 1962. He said some time after 6 a.m., but how much after he did not know, he heard a shot, or what could have been a shot, and later said he thought there could have been what sounded like two shots. He denied that he had told anyone he heard two shots about 6:30 a.m., that morning and that they were about 3 minutes apart. He denied making statements that it sounded as if his uncle Alfred was hunting coons. Jean Tachovsky testified she saw the pigs crawling under the fence and came out to help keep them in. She heard one shot but never told Jiskra or anyone about hearing two shots, but told him she heard one and said, "I told him I thought maybe he was out hunting squirrels." Thereafter Jiskra testified when he first took Jean to the scene of the tragedy, she told him she went out to milk, Lester was chasing cattle, and they both heard two shots and that "she said, 'Well, Uncle Alfred must have been shooting coons again.' That is what she said. 'There was one shot and like you walk around a tree there was another shot.' That is what she told me." Milo Stastny and Lillian Stastny testified that while

the relatives were gathering up the chickens for disposition at the Alfred Tachovsky place about sundown on May 3, 1962, Lester Tachovsky stated in their presence and in the presence of William Tachovsky, Jiskra, and others, that while he was close to the house while getting his stock back he had heard two shots about 3 minutes apart. Jiskra testified to his giving a somewhat similar statement on the same occasion.

Another conflict concerns whether both shots could have been heard. It relates to whether or not a window in the bedroom where Ida D. Tachovsky was found was partly open. This varied between testimony that the lower part of the window was open from 6 to 8 inches and that which stated it was entirely closed, or raised to a lesser extent. Jiskra did not hear any shots. Adolph Pivonka, who was fishing three-fourths of a mile west, was called by the defendants and said he heard only one shot which was to his east a few minutes before 7 o'clock.

There was a wound in the chest of Alfred Tachovsky the size of a gun barrel. The shot did not go through the body. The wound did not bleed. There was some conflict in the evidence as to its precise location. The undertaker said it was in the middle of the chest. The deputy sheriff said he had to look a little while to find it and that it was in the chest below the lower rib a little toward the left of center. Sheriff Tesar said this wound was a shotgun wound at close range showing powder burns. He placed it about 3 inches to the left side in the second rib from the bottom up.

The testimony relative to the wound in the head of Ida D. Tachovsky is not in harmony. The undertaker, Glenn Zajicek, with 14 years experience, testified there was a wound in the back of the head more to its left side going from the back to the front at an angle from the left side of the head to the front. It was not to the face but just a little above the ear which was not damaged. Some of it went above the ear at an angle from the back up to the side. It was the size of a bigger orange

and its edges were irregular. The sheriff, John Tesar, said it was between the ears and a jagged wound. It was all torn up. The wound was 2½ inches wide and 4 or 5 inches long. It was lower than the ears starting next to the left ear but went past the center of the head towards the right. Jiskra said the wound was near the center of the head. Shestak, the deputy sheriff, from a rather superficial examination at the mortuary located the wound at the left rear of her head right behind the ear in the lower brain.

With respect to the warmth in the two bodies, Jiskra said when he took Alfred's arm it was warm. The undertaker said Ida's body was still warm when he went upstairs 15 minutes after he arrived about 8 o'clock. She was partly covered with bedclothes, however, but her whole body was warm. He stated it would be hard to compare the warmth of the two bodies, that Alfred's body was warmer under his clothing but the outside temperature would lower his arms and face. The deputy sheriff said Alfred Tachovsky's arms were cold, and he went up twice where Ida's body was and her arm was turning cool but was still a little warm. Her left arm was covered but not her right.

The testimony fails to show that any rigor mortis had set in until the embalming of the bodies was started about noon at which time it had started on both bodies to the same extent.

In contrast to the body of Alfred Tachovsky which did not bleed externally, all the witnesses who viewed the body of Ida D. Tachovsky said there was a great deal of blood in her hair and on her head, pillow, and bedding. The sheriff testified to the blood and some brains on the bedding. Some others spoke of tissue but not of brains. The estimates of the blood ranged from a pint to two quarts. The undertaker testified, however, that he considered a normal amount of blood remained in both bodies. There was also a protrusion of one of Ida's eyes and it was black and blue which was testified to

by the undertaker who stated it indicated that from the blow, blood was pumped to the eye. During normal death there would be no protrusion.

The deposition of Dr. Henry Halley, a qualified pathologist, taken by the plaintiff was read in evidence. From his testimony it appears that an injury to the upper portion of the brain might not cause death for some time. He said persons have lived for a long time after portions of the upper brain were removed after injury. An injury to the lower portion of the brain, the medulla oblongata, and the ponds which connect with the spinal cord and control involuntary action such as the blood pressure, breathing, balance, walking, and so forth, would probably cause immediate death.

If a post mortem were performed he gave it as his opinion that it would be possible to determine the time each of the decedents survived their wounds although this depended on what was found. In the case of the woman, it would depend on the condition of the brain and lungs. The importance of the lungs arises because if one survives a serious wound for "say a period of five or ten minutes or longer," the lungs would tend to get convexed with blood and wet with edema fluid, and if a person lives long enough there often developes clear-cut hypostatic bronchial pnuemonia. Conclusions as to the time of survival may be drawn from the lungs' condition. It is the condition of the tissue in the lungs, not the fluid, that the pathologist takes into consideration. The length of survival in case of the woman would also depend on the extent of the damage to the brain and that portion damaged. If the brain is poorly preserved, a pathologist can still draw conclusions as to the force and direction of the gunshot from what has happened to the skull which would be well preserved. If the pellets, or shot, had been diverted from their course or pattern in passing through the brain, it would be shown on the skull.

His opinion about the time the man might have sur-

vived would depend upon whether the heart was involved in the blast, the extent of the damage to it and the aorta, and the loss of blood occasioned by the wound and whether it came from the heart, the aorta, or liver. One could detect whether the wound was instantly mortal, or mortal after a period of time.

He gave it as his opinion that in the absence of some observer to determine the precise moment when the pulse failed in these individuals, the only other way is by a post-mortem examination. Any examination based on external observation made could be misleading. He further stated that he saw no serious obstacle to a pathologist arriving at an opinion although the autopsy was postponed from the date of the tragedy to the trial or for a reasonable time thereafter. It would depend upon the evidence that was found as to whether he could give a clear-cut opinion. He stated further, "In my experience, neither kind of (arterial or cavity) embalming will alter or change that which existed, say at the time of death. However, it takes more skill to recognize the work after cavity work."

On cross-examination he said that hemorrhaging implies life but that if certain great veins inside the skull were torn there would be nothing to keep them from leaking and flowing by gravity up to the point that the blood clots. Further, that in some cases where a person developed a state of shock there was something that developed in the system to keep the blood from clotting. His testimony would indicate that conclusions to be drawn from the amount of blood lost would require careful consideration. He did not advise autopsies because he thought the time of death would be stated to the exact minute. That would be approaching the problem with misinformation. His opinion would be based on the evidence that he observed and he would try to put a minimum and maximum time on the period of survival. If he knew that a person's heart stopped like that, he would say that he died in a minute. In other cases the

evidence might justify an opinion that a person survived 10 to 30 minutes, or from 30 to 60 minutes, or some such period. There was no other testimony of a pathologist.

We find no case where this court has considered the exhumation of dead bodies for the purpose of discovering evidence. The question, however, has been discussed in texts and cases from other jurisdictions, and pertinent rules have been formulated.

In 27 C. J. S., Discovery, § 1, p. 6, there is a discussion of the nature of discovery in equity where it is said: "Discovery is the disclosure of facts, deeds, documents, or other things in the exclusive knowledge or possession of one party, which are necessary to the party seeking discovery as a part of a cause of action or defense in an action pending, or to be brought in another court, or as evidence of his rights or title in such proceedings."

Discovery may be invoked as an ancillary or auxiliary remedy, an equitable action, sometimes referred to as a "pure bill of discovery," which seeks no relief in consequence of the discovery, but seeks the disclosure of facts resting in the knowledge of defendant, or of deeds, writings, or other things in his custody or power, merely in aid of the prosecution or defense of some other proceeding, usually at law, pending or about to be brought. 27 C. J. S., Discovery, § 1, p. 7; Marshall v. Rowe, 126 Neb. 817, 254 N. W. 480; Mutual Life Ins. Co. of New York v. Griesa, 156 F. 398.

In 8 Wigmore on Evidence, McNaughton Revision, § 2221, p. 197, it is stated: "The exhumation or the autopsy of a corpse, when useful to ascertain facts in litigation, should of course be performed. Reverence for the memory of those who have departed does not require us to abdicate the high duty of doing justice to the living; and the orders of a court of justice, exercising the power of the state in the communal interest, are not to be placed on the same level with the acts of an unlicensed and self-seeking intruder upon hallowed ground." Section 2217, page 168, of the same volume

states: "The exhumation of a corpse, often a material assistance in insurance or inheritance cases, is demandable on this principle, subject of course to the trial court's discretion as to necessity and propriety." Other texts agree with that cited. 15 Am. Jur., Dead Bodies, § 19, p. 841; 25 C. J. S., Dead Bodies, § 4, p. 1019.

In Kusky v. Laderbush, 96 N. H. 286, 74 A. 2d 546, 21 A. L. R. 2d 536, the following rules were determinative of the court's decision: " '(T)he quiet of the grave, the repose of the dead, are not lightly to be disturbed. Good and substantial reasons must be shown before disinterment is to be sanctioned.' * * * However, 'the right to have a dead body remain unmolested is not an absolute one; it must yield where it conflicts with the public good or where the demands of justice require such subordination.' " The court also said: "If the interests of justice demanded it, the Trial Court had the authority in the exercise of a sound discretion to order an autopsy." An order for an autopsy upon motion of a party in a civil action is not necessarily precluded by the fact that other sources of evidence exist on the subject. The opinion cites cases in support of each proposition of law in this paragraph stated. It was held in the cited case that the trial court erred in not ordering an autopsy in a suit involving injuries to a deceased person where the plaintiff asserted the death was caused solely by an automobile accident and the defendant maintained it arose from cancer. There is an annotation appended to Kusky v. Laderbush, *supra,* in 21 A. L. R. 2d 538, where many cases are discussed concerning the power of a court to order disinterment and autopsy or examination for evidential purposes in civil cases. They include In re Percival, 101 S. C. 198, 85 S. E. 247, where the state sought to obtain property by escheat on the ground that a person died without heirs, and it was held the court had power to order exhumation and examination of the body for identification marks, at the instance of one who had produced prima facie evidence of her

claim that she was the mother of the deceased.

The defendants cite cases, some but not all of which are taken from the annotation at 21 A. L. R. 2d 538, where exhumation and autopsy were not permitted. Those that involve discovery are generally cases where the court considered under the evidence before it that an autopsy if performed would avail nothing. Such is the case of State ex rel. Meyer v. Clifford, 81 Wash. 324, 142 P. 472, Ann. Cas. 1916D 329, where exhumation was not permitted to show that the deceased was incapable of being the father of certain persons who claimed to be his children and heirs because it was asserted the deceased had been castrated. The court held if exhumed the condition of the body at the time of the conception of the children would not be shown and that he had admitted the paternity in writing in any event which was conclusive under a cited statute. A discussion of such cases would extend this opinion unnecessarily. In most all of such cases the court made it clear its ruling should not be construed as preventing exhumation and an autopsy in a case where justice would require it.

The defendants refer to other cases where exhumation was denied which do not involve discovery. These are contests wholly relating to the proper place of burial or the proper person to designate such burying place. Some of these apparently deny the right to have the body exhumed although the person seeking it was the proper one to have chosen the place of interment. These rulings are based on the sanctity and inviolability of the sepulcher. They are not applicable to the case before us involving discovery.

In Mutual Life Ins. Co. of New York v. Griesa, *supra*, it was determined that the federal statute then existing was not sufficient to authorize an exhumation and autopsy but it further held a court of equity had such power in a purely ancillary action for the purpose of obtaining evidence required in a law action.

The defendants assign error to the trial court in en-

tering judgment alleging it had no jurisdiction over the subject matter and no action was pending before it to which its findings would be relevant. They argue in their brief that the determination of heirship is wholly within the province of the county court and that in this state the county court has equitable powers and the action should have been brought in that court. The authorities previously cited clearly hold that a court of equity has authority to entertain an ancillary action for the purpose of discovery in such cases. In Mutual Life Ins. Co. of New York v. Griesa, *supra,* the circuit court of the district of Kansas held that under the Kansas law the county court had no such jurisdiction in a case involving exhumation. It is not necessary for us to determine whether our county courts have such jurisdiction. It affirmatively appears from the cases cited that courts of general equity jurisdiction have such power and it follows that it may be exercised by the district courts in this state. The assignment cannot be sustained.

The defendants further contend the trial court erred because it had no authority in law to order the exhumation of bodies or an autopsy. From the authorities cited the contention is also without merit.

Defendants further state that the trial court was in error in that the judgment was not sustained by the evidence. They argue the evidence clearly shows Ida D. Tachovsky suffered instant death and could not have survived Alfred Tachovsky, and that an autopsy would show nothing material or relevant concerning the relative time of death of the decedents. From the evidence it is obvious that Alfred Tachovsky murdered his wife, Ida D. Tachovsky, on May 3, 1962, and went downstairs and into the yard where he committed suicide. No person was present when either decedent died. They were both dead when their bodies were discovered. The exact time when the lethal shots were fired is not fixed with certainty. Whether their respective wounds resulted in immediate death is not shown. The under-

taker stated it would be difficult from the warmth of the bodies to estimate the relative time of the deaths. The evidence is not in harmony as to the exact location of the wound of Ida D. Tachovsky. A similar conflict exists as to the exact location of the wound in the chest of Alfred Tachovsky. There is no medical testimony by doctors who examined the bodies before burial. The plaintiff and her husband had little opportunity to examine the wounds. Several of the lay witnesses testified from viewing them in haste. The only expert evidence is that of a pathologist. From his testimony either of the decedents might have died immediately. His evidence on the other hand indicates that either one of them might have survived his wounds for some time depending upon the exact location of the injuries to the respective decedent. He states that a disinterment and autopsy at the time of the trial or for a reasonable time thereafter by a qualified pathologist would indicate whether either of them died instantly. It might also be determined therefrom that one of them survived for a certain interval of time which could be stated within certain expressed limits. He further indicates that embalming, whether of an arterial or cavity nature, would not prevent a qualified pathologist from making a finding as to the length of time the decedents survived their wounds although it would require more skill to do so. There is no contrary evidence by a qualified pathologist. There is evidence indicating that both of the lethal shots occurred within a space of 3 minutes, or a very short time. It follows that it might be determined that Ida D. Tachovsky survived her husband, or the contrary might be shown by an autopsy. Under the circumstances there is, in our opinion, evidence sufficient to sustain the trial court in finding that an exhumation and autopsy might present facts concerning the relative time of survival of the decedents and that justice requires the pertinent evidence be shown. The contention of the defendants that there is no evidence to support the judgment cannot

be sustained. We think there is such evidence in the record and that it is sufficient.

A considerable portion of the briefs are devoted to whether or not the evidence concerning the interval of time between the shots heard was admissible to impeach the testimony of Lester and Jean Tachovsky who were called by the plaintiff. Plaintiff claims they were hostile witnesses. This question need not be discussed. The evidence was repeatedly received without proper objection. Error in its reception was not asserted as a ground for new trial. The evidence is properly in the record.

The defendants assign error to the trial court's ruling in refusing to grant the defendants a continuance to procure the testimony of a pathologist. The trial court on its own motion set the case for hearing on September 6, 1963. By stipulation filed September 5, 1963, it was agreed it should not be tried on that date but was continued by consent of parties for 20 days, or such other time thereafter as the court should set it for hearing. On October 23, 1963, the deposition of the plaintiff's pathologist was filed. The case was set by the court to be tried commencing December 10, 1963. In his opening statement defendants' counsel stated he was giving notice that he intended to ask the court for continuance to obtain the deposition of certain qualified pathologists. At the conclusion of the defendants' testimony such a motion for a continuance was first made. It was objected to by the counsel for the plaintiff. The defendants at no time filed a written application and affidavit for continuance as provided in section 25-1148, R. R. S. 1943. The defendants gave no notice of any application for continuance until the morning of trial. They had ample time in which to procure such evidence and to prepare for trial. The ruling of the trial court with respect to the continuance was proper and the contention of the defendants is without merit.

A consideration de novo of the law and the evidence

by this court convinces us that the exhumation and autopsy should be performed in the interest of justice and that the judgment of the trial court should be and is affirmed.

AFFIRMED.

THOMAS GIBB, JR., APPELLEE, V. HIGHWAY G.M.C. SALES & SERVICE CORPORATION ET AL., APPELLANTS.
132 N. W. 2d 297

Filed December 31, 1964. No. 35903.

1. **Workmen's Compensation.** In order to entitle an employee to recover under the Nebraska Workmen's Compensation Act, he has the burden of establishing that the injury arose out of and in the course of his employment by the employer from whom he seeks recovery.
2. ———. For an injury to arise out of and in the course of the employment, the employee must be engaged in the work he has been employed to perform, within the period of his employment, and at a place where he may reasonably be in the performance of his duties or while doing something necessarily incidental thereto.
3. ———. Ordinarily a commercial traveler is regarded as acting in the course of his employment during the entire period of travel on the employer's business, and his acts in procuring food and shelter are considered, ordinarily, to be incidents of his employment.
4. ———. Where an employee deviates from the scope of his employment for purposes of his own, he is regarded as being outside the scope of his employment until he has returned either to the point of deviation from the path of duty, or to a point where in the performance of duty he is required to be.
5. ———. Where an employee has returned to the point of deviation and engages in the duties of his employment, or engages in acts reasonably incidental to his employment, which, but for the deviation, would have been performed, although at an earlier time, he is within his employment and the coverage of the Workmen's Compensation Act.

Appeal from the district court for Knox County: GEORGE W. DITTRICK, Judge. Affirmed.

Frederick M. Deutsch, William I. Hagen, and James P. Monen, for appellants.

McCormack, McCormack & Brown and Jewell & Otte, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and POLLOCK and SIDNER, District Judges.

CARTER, J.

This is a claim for compensation under the provisions of the Nebraska Workmen's Compensation Act. The case was tried on appeal from the decision of a single judge of the Nebraska Workmen's Compensation Court by the district court for Knox County. The district court found for the claimant and the defendants have appealed.

Claimant was employed by the Highway G.M.C. Sales & Service Corporation of Grand Island, Nebraska, which we shall designate as the employer. The employer was engaged in the business of selling new and used trucks and trailers, parts, and service. Claimant was employed as sales manager for the employer and had three salesmen under his supervision. The employer was not territorially restricted in its operations, nor were the salesmen restricted to specified areas in the performance of their duties. The assigned hours of the sales manager and salesmen were from 8 a.m. to 6 p.m., but they were expected to be available at all hours in the performance of the employer's business, when necessary. They were authorized to travel in the performance of their duties and vehicles were provided by the employer for this purpose. Traveling expenses were paid to these employees, including a limited amount for the entertainment of prospective customers.

On February 15, 1962, claimant and Joe Murphy, one of the salesmen, went to Creighton, Nebraska, pursuant to an appointment made by telephone by Murphy, in an attempt to close a trade of a new truck for a used one

with Merle Waldow, a truck operator. They drove a Suburban truck, a vehicle somewhat similar to a station wagon, which belonged to the employer. They left at midafternoon and were prepared to remain in Creighton overnight.

They arrived in Creighton about 5 p.m., and went to the Dawson Oil Station where they met Waldow pursuant to their appointment. They talked with Waldow and inspected the truck-trailer which Waldow proposed to trade. Some discussion was had with Danny Dawson, who operated a gasoline transport in addition to operating the oil station, concerning a trade. At or near 6 p.m., it was agreed that the negotiations would continue the next day.

Claimant and Murphy remained at the oil station until it closed at or near 7:30 p.m. They then went to Jerry's Bar in company with Fred Smith, the oil station attendant. The evidence is in conflict as to whether or not Waldow and Dawson accompanied them to the bar. Claimant and Murphy drank 2 or 3 tomato beers. During their stay in the bar, Smith was told that claimant and Murphy had no lodging for the night. Smith went to the only hotel in Creighton and was told that no rooms were available but that lodging in a private home could be provided. This was reported to Murphy in the presence of claimant, to which Murphy replied that they did not want to stay in a private home, which information Smith reported back to the hotel.

During their stay at Jerry's Bar it was suggested they get something to eat. Smith informed them that a "mountain oyster" feed was being staged at a bar in Brunswick. They decided to go to Brunswick. Smith went home, changed clothes, and met claimant and Murphy at the Dawson Oil Station. They proceeded to Brunswick in two vehicles, Murphy riding with Smith and claimant following in the Suburban. They proceeded 7 miles west of Creighton on Highway 59, then south 8 miles on Highway 14, then east 3 miles on High-

way 20 to the Brunswick Spur, and then 1 mile south into Brunswick.

It should be noted here that it was 9 miles east from the north end of the Brunswick Spur on Highway 20 to Plainview. The evidence shows that there had been talk in the bar at Creighton that claimant and Murphy would go to Plainview to obtain lodging for the night.

On arrival in Brunswick at 9:30 or 10 o'clock p.m., they went to the bar recommended by Smith where they drank 3 or 4 bottles of beer and ate 2 or 3 sandwiches. The place was crowded with men, women, and children. While there, claimant found a farmer and his wife who were old friends of his. They informed claimant that if he did not find lodging in Creighton, claimant and Murphy were welcome to stay at their farm home. The invitation was not accepted.

At or near 11 o'clock claimant and Murphy decided to leave. Claimant testified that Smith left with them and that they returned to Creighton over the same route they took in going to Brunswick, with Murphy riding with Smith and he following in the Suburban. Smith testified that claimant and Murphy left before he did and that he did not see them again that night. Claimant testified that on arrival back in Creighton Murphy inquired at the hotel about lodging, that he heard parts of the conversation, and that no rooms were available. This was disputed by the hotel operators who testified that no one inquired about rooms on that night. Claimant testified that he parked in front of the hotel and that Smith also parked and let Murphy out of his car.

Claimant testified that he and Murphy got in the Suburban to go to Plainview to obtain lodging for the night. He said that Murphy was driving and that he settled back in the right-front seat with his hat over his eyes, and relaxed. Claimant testified that he remembered nothing until he came to, in a field about 2 miles south of Creighton, where the Suburban was overturned and wrecked. The accident occurred at or near a cor-

rection line turn on Highway 13. There is some evidence in the record, although fragmentary, that after the accident Murphy was in the field and claimant in the car, indicating that claimant was the driver. As a result of the accident Murphy suffered fatal injuries and claimant suffered serious injuries.

It is on this state of facts that plaintiff contends that the accident arose out of and in the course of the employment. The defendants assert that the accident occurred during a deviation from the employment for which defendants are not chargeable.

The relationship of employer and employee is not questioned. It is not questioned that claimant's earnings were such as to warrant the maximum compensation rate if liability attaches. It is not contended that claimant or Murphy were intoxicated. The sole issue is whether or not claimant and Murphy were outside the scope of their employment because of a deviation therefrom.

We think the evidence shows conclusively that claimant and Murphy deviated from their employment from the time they left the Dawson Oil Company station at 7:30 p.m. until they returned to Creighton around midnight. During this period they were engaged in purposes of their own and were in no way acting within the scope of their employment. The issue in the case is whether or not they had returned to a place where their employment required them to be, and were within the scope of their employment when they left Creighton for Plainview to obtain lodging for the night, during the course of which trip the accident occurred.

It is the contention of the claimant that their deviation from the employment ended when they returned to Creighton around midnight and that they had in legal effect resumed their employment when they proceeded from Creighton to Plainview to obtain lodging for the night. It is the contention of defendants that before they went to Brunswick they had determined to spend

the night at Plainview, that two vehicles were taken so that Smith could return to Creighton and they could proceed to Plainview, that no reason existed for their return to Creighton, and that, in not proceeding on a direct route from Brunswick to Plainview, they were still engaged in purposes of their own in returning to Creighton and proceeding to Plainview by so circuitous a route.

The general rule applicable to such situations is: When an employee leaves a place where his duties are to be performed or where his service to his employer requires his presence, to engage in other objectives not incident to the employment, the relation of employee and employer within the meaning of the compensation act does not exist until he returns to a place where by the terms of his employment he is required to perform services. Luke v. St. Paul Mercury Indemnity Co., 140 Neb. 557, 300 N. W. 577; McNaught v. Standard Oil Co., 128 Neb. 517, 259 N. W. 517.

It is not contended here that claimant and Murphy, after discovering that lodging was not available in Creighton, were outside the scope of their employment in proceeding to Plainview to obtain lodging accommodations. Defendants contend that it is the route they took which prevents a finding that they had returned to their employment upon their return to Creighton at midnight a few minutes before the accident.

The evidence shows that it is 19 miles from Creighton to Brunswick on the route they used in going from and returning to Creighton. A shorter route of 13 miles, over hard-surfaced roads, could have been taken. No reason was shown why they chose the longer route. The fact that they traveled the longer route in going to and returning from Brunswick does not of itself appear important. Defendants contend that as they could have proceeded to Plainview by going 9 miles east from the Brunswick Spur on Highway 20, they were deviating from the employment when they traveled the 19 miles to

Creighton and commenced their 13 mile trip to Plainview from Creighton. The accident occurred about 2 miles south of Creighton on the most direct and best road from Creighton to Plainview. It is not questioned that, but for the deviation, claimant and Murphy would have traveled from Creighton to Plainview to obtain accommodations for the night.

It is the general rule that a commercial traveler is regarded as acting in the course of his employment during the entire period of travel on the employer's business and his acts in procuring food and shelter are ordinarily considered as incidents of the employment. When the employee deviates from the employment for his own purposes, he is still regarded as being in the accomplishment of his own purposes, even though engaged in returning to his employment, until he has returned either to the point of his deviation from the path of duty or to a point where he is required to be in the performance of duty. The reasons for a deviation are not of controlling importance. The important question is whether or not there has been a return to the employment under the foregoing rule. 7 Schneider, Workmen's Compensation Text (Perm. Ed.), § 1684, p. 403.

In the instant case the claimant deviated from his employment at Creighton. When he returned to Creighton and proceeded to Plainview to obtain lodging, he was back in the scope of his employment. He had returned to his employment at the point of deviation, the most acceptable point for reentering the scope of the employment. Since it was necessary to obtain lodging at a point other than Creighton, it is not of controlling importance whether the deviation ended at 6 or 9:30 p.m., or 12 midnight. It was a movement that was incident to the employment and must be treated as a return to the service of the employer. The accident having occurred while the claimant was in the service of the employer, more accurately in the performance of an incident to the employment, it is compensable under the

Nebraska Workmen's Compensation Act. The fact that claimant, during the period of his deviation, may have reached a place nearer the point to be reached is not a material factor.

Defendants cite a number of cases from other jurisdictions holding that liability does not attach where, after a deviation, the employee is returning to his employment. The cases are distinguishable from the present case. If the accident in the case at bar had occurred while claimant was returning to his employment, to wit, between Brunswick and Creighton, we quite agree that liability would not attach. But in the instant case the claimant had returned to the point of deviation and was performing an incident to his employment which, except for the deviation, he would have performed at an earlier time. Under such circumstances he had reentered his employment and was not merely on his way to reenter it.

We conclude that claimant suffered an accident arising out of and in the course of his employment and is entitled to the benefits of the Nebraska Workmen's Compensation Act. The trial court arrived at this conclusion and its judgment is affirmed.

AFFIRMED.

STORZ BREWING COMPANY, A CORPORATION, APPELLEE, V. R. N. KUESTER, APPELLANT.

132 N. W. 2d 341

Filed January 8, 1965. No. 35747.

1. **Trial: Judgments.** Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party.
2. **Affidavits: Notaries.** A notary public who is an attorney of record in a pending suit is not a proper officer to take an affidavit to be used as evidence on a hearing in the cause.

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

George B. Buechler, for appellant.

Fitzgerald, Brown, Leahy, McGill & Strom, Edgar R. Gessaman, and Joseph J. Barmettler, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. SMITH and ROBERT L. FLORY, District Judges.

SPENCER, J.

This is an action brought by Storz Brewing Company, a corporation, hereinafter referred to as plaintiff, against R. N. Kuester, hereinafter referred to as defendant, on an unconditional guaranty of payment of any credit ex-

tended Ware R. Christenson for the purchase of merchandise. The trial court sustained plaintiff's motion for summary judgment, and defendant has perfected an appeal to this court.

The action was filed in the district court for Hall County on April 29, 1963. On September 24 defendant filed an answer in the form of a general denial and a request that the plaintiff be put on strict proof. On September 27 plaintiff filed requests for admissions. Defendant filed his responses and objections to plaintiff's request for admissions on October 8. As to the plaintiff's request for admissions of the correctness of the debits and credits shown on the account, defendant gave reasons why he could not deny or affirm their correctness. The objections were heard on October 11. The request for admissions as to the correctness of the debits and credits shown on the account were waived. The objections to the rest were overruled, and the defendant was given until October 21 to respond. No response was ever made. On November 4 plaintiff filed its motion for summary judgment, supported by the affidavit of its credit manager. This motion was noticed for hearing on November 15 at 1:30 p.m. On that day, defendant, without leave of court, filed an amended answer out of time. At the time set, hearing was had on the motion for summary judgment. The bill of exceptions does not indicate any action of any nature on the amended answer. The defendant filed no affidavit and produced no evidence. The journal entry indicates that the amended answer was not considered by the court in the hearing on the summary judgment.

The defendant alleges six assignments of error. The only assignments we will consider pertain to the admission of evidence at the hearing and that the summary judgment entered is not sustained by sufficient evidence.

Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of

a genuine issue of material fact must be resolved against the moving party. See Illian v. McManaman, 156 Neb. 12, 54 N. W. 2d 244. Section 25-1332, R. R. S. 1943, requires the record before the court to show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The defendant assigns as error the overruling of his objection to admission of exhibits Nos. 1 through 16. Exhibits Nos. 1 through 15 are the purported ledger sheets showing the plaintiff's account with Ware R. Christenson, doing business as Grand Island Beer Company. Exhibit No. 16 is the affidavit of plaintiff's credit manager, which attempts to prove compliance with the requirements of section 25-12,109, R. R. S. 1943, to have exhibits Nos. 1 through 15 admitted as plaintiff's business records. The affidavit is sworn to before the attorney of record for the plaintiff, who was the attorney offering it at the hearing on the motion. Defendant objected to its introduction because of incompetency, no proper and sufficient foundation, and several other reasons not material herein.

It was the rule of common law that an affidavit taken before an attorney in a case could not be used in evidence if objected to. Collins v. Stewart, 16 Neb. 52, 20 N. W. 11. In 1887, the Legislature attempted to change this rule by amendment of section 118 of the Code of Civil Procedure (now section 25-829, R. R. S. 1943), by adding: "* * * and nothing herein shall be construed to prohibit an attorney at law, who is a notary public from swearing a client to any pleading or other paper or affidavit in any proceeding of the courts of the state." Laws 1887, c. 93, p. 646.

In Horkey v. Kendall, 53 Neb. 522, 73 N. W. 953, 68 Am. S. R. 623, this court held: "The amendment of 1887 to section 118 of the Code, notwithstanding its general language, cannot be held to apply to affidavits, other than those verifying pleadings, without giving

the amending act a construction which would render it violative of section 11, article 3, constitution."

In Maroosis v. Catalano, 98 Neb. 284, 152 N. W. 559, this court said: "A notary public who is an attorney of record in a pending suit is not a proper officer to take an affidavit to be used as evidence on a hearing in the cause."

The affidavit, exhibit No. 16, was not a pleading, but was offered as evidence. It is the only evidence offered by plaintiff in an attempt to secure the admission of exhibits Nos. 1 through 15. It was not admissible over objection.

Plaintiff attempts to use the defendant's statements as to why he could neither affirm nor deny the correctness of the debit and credit entries shown on the plaintiff's account with Ware R. Christenson to prove that the defendant had no defense thereto. Defendant, who was a guarantor, insisted he had no means of ascertaining the truth or falsity of the entries; that the business had been closed; and that the principal debtor, Ware R. Christenson, was out of the jurisdiction of the court and his whereabouts was unknown to the defendant.

In Smith v. Allen, 63 Neb. 74, 88 N. W. 155, this court dealt with the efficacy of an answer in which the defendant pleaded that he had no personal knowledge, and denied each and every allegation in the petition. In that case, we held that a denial, though coupled with an allegation showing a lack of knowledge of the matters denied, was sufficient to raise an issue. The following language is pertinent: "It will be seen that no specific provision is made for a denial, where the defendant lacks positive knowledge, or upon information and belief. However wise such provision might be, this court has no authority to supply it. Are we to infer then, from this, that the authors of the Code intended to force the defendant to the alternative of admitting allegations of the truth of which he had no knowledge, or to verify an unqualified denial of such matters? We think not.

It seems to us to be more consistent with the spirit of the Code to permit the defendant to spare his conscience by a disclaimer of knowledge, and at the same time enter a denial for the purpose of putting the plaintiff to the proof of his allegations." This is the interpretation which should be placed on defendant's original answer.

Plaintiff argues that discovery proceedings were available to the defendant. Under the particular facts presented in this case, we feel that what Judge Delehant said in Chenault v. Nebraska Farm Products, Inc., 107 F. Supp. 635, is applicable herein: "It is true that he has tendered no countershowing by way of affidavit, deposition or otherwise. But he is under no obligation to do so. His adversaries may not by showings in support of a motion for summary judgment cast upon him the obligation to try real and material factual issues in his case otherwise than by the ordinary methods of trial."

A decision in this case must be approached in the light of the admonition inherent in our cases that great care should be exercised in granting motions for summary judgment, and any doubt must be resolved against the granting of the motion. The defendant herein is a guarantor. We have a situation where the necessary facts are within the exclusive knowledge of the moving party. In some situations this has been held sufficient to warrant the denial of a motion for summary judgment. See 3 Barron and Holtzoff, Federal Practice and Procedure (Rules Ed.), § 1232.2, p. 111. While this is not the exact situation referred to in that text, a guarantor may be in a peculiar situation to warrant the same consideration.

There is an even more cogent reason why the order in this case must be reversed. Assuming the admissibility of the affidavit and the business records, we are still met with the rule that contracts of guaranty are strictly construed. Without further evidence, the guaranty under that rule must be construed as being limited to the guaranty of payment of credit extended for the purchase of merchandise. The affidavit of the credit

manager certifies the record pertains to all of the transactions between the plaintiff and Ware R. Christenson, but does not limit the debit entries on the ledger sheets solely to the purchase of merchandise. The limited information furnished by the entries would indicate that some of them are for truck repairs and painting, advertising, road signs, and the like. It is possible further evidence will explain these items but, on the record, sufficient doubt is created to require the denial of the motion for summary judgment.

For the reasons given above, the order sustaining the motion for summary judgment should be and hereby is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

JOE SCHOMMER, APPELLANT, V. CLIFFORD W. BERGFIELD ET AL., APPELLEES.

132 N. W. 2d 345

Filed January 8, 1965. No. 35773.

1. **Contracts: Evidence.** If negotiations between parties result in an agreement in reference to the subject matter thereof and if they reduce their agreement to writing, execute, and deliver it, the writing, in the absence of fraud, mistake, or ambiguity, is the only competent evidence of the contract.
2. ———: ———. Where the existence of a written contract has been induced by prior and contemporaneous oral agreements, parol evidence is not admissible to add to or contradict terms of the written contract.
3. **Specific Performance.** Specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right, but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust and may be denied when the party seeking it has failed to perform.
4. **Contracts: Escrows.** The placing of a downpayment in escrow by a buyer, when the written contract for the sale of real estate

provides that it shall be paid to the seller, ordinarily constitutes a material breach of the contract.

5. **Contracts.** Time is not of the essence of a contract unless so provided in the instrument itself or is clearly manifested by the agreement construed in the light of the surrounding circumstances. Where time is not of the essence, performance must be within a reasonable time.
6. **Vendor and Purchaser: Specific Performance.** Where failure to convey land under an executory contract of sale is due solely to the refusal of the purchaser to pay or tender the stipulated purchase price according to the terms of his agreement, he is not entitled to specific performance.
7. **Contracts: Evidence.** The acknowledgment of the receipt of consideration, in whole or in part, in a written contract, is a recitation of fact and may be explained or contradicted by parol evidence.

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

Fisher & Fisher, for appellant.

Edmund Hollstein, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, BOSLAUGH, and BROWER, JJ., and POLLOCK and SIDNER, District Judges.

CARTER, J.

This is a suit for specific performance of a contract for the sale of real estate. The trial court denied specific performance and the plaintiff has appealed.

The defendants were the owners of a ranch containing approximately 5,500 acres of land. They listed the land with Downing and Reed Agency, a real estate firm. Not being able to find a buyer for the whole tract, defendants agreed to sell it in three tracts, conditional on all three tracts being sold. The contract involved in this litigation involves the middle tract containing 1,440 acres, the legal description of which is set forth in the pleadings and will not be repeated here. The sale contract entered into was between the defendants as sellers and the plaintiff as the purchaser of the 1,440 acres.

The pertinent portions of the contract provided for the sale of the 1,440 acres for the sum of $43,200, payable $5,000 on or before the execution of the contract and the balance of $38,200 on January 2, 1963, upon delivery of a good and sufficient abstract of title and a warranty deed containing the common covenants of warranty. The sole issue is whether or not the plaintiff breached the contract by failing to make the $5,000 downpayment in accordance with the terms of the contract of sale.

The pertinent evidence is as follows: The real estate agent employed Gordon Shaffer, Jr., a lawyer at Chadron, Nebraska, to draft the contract of sale. After a conference with the parties, the contract was drawn and the parties notified to come to his office, which they did on October 5, 1962. Some changes, incidental only to the present litigation, were agreed upon and made. The sellers thereupon signed and acknowledged the contract. The plaintiff, Joe Schommer, did not sign the contract at that time, stating that he wanted to go to the bank for the $5,000 so that he could pay it at the time he executed the contract. He was informed that the money could be placed to defendants' credit at their bank. Defendants thereupon left. The plaintiff subsequently signed the contract, the time of signing not being clear from the evidence. The contract shows it was acknowledged on October 5, 1962, while the $5,000 cashier's check is dated October 11, 1962. Admittedly the contract was not signed by plaintiff in the presence of the defendants.

The evidence shows that, at the time plaintiff executed the contract and delivered the $5,000 cashier's check to Shaffer, he informed the latter that it was bad business to pay the money over and that he wanted Shaffer to hold it or put it in the bank in escrow. The result was that the $5,000 was never paid over or tendered to the defendants.

Plaintiff contends that the defendants agreed at the time they signed and acknowledged the contract that

the $5,000 was to be held in escrow. Both defendants deny that any such agreement was reached or even discussed. Shaffer testified that he heard nothing at that time about an escrow arrangement, although it could have been said outside his presence while he was completing the drafting of the contract. We think it is an important circumstance that other changes in the contract were made at that time before the defendants executed the contract and that no change was made concerning an escrow provision. The contract of sale was read over by the defendants and plaintiff, and nothing was said by any of them about an escrow provision. There was some evidence by one of the purchasers of the south tract, who was present, that there was an oral agreement that the $5,000 was to be held in escrow. The evidence, although in conflict, sustains the finding of the trial court that no oral agreement was established to the effect that the downpayment was to be held in escrow.

We are of the opinion, however, that the evidence of such an oral agreement varies the terms of the written contract and is incompetent under the parol-evidence rule. It is not disputed that the written contract of sale provided that the $5,000 was to be paid to the defendants on or before the execution of the agreement. It was not so paid. It was not paid or tendered prior to the commencement of this action. It is fundamental that if negotiations between parties result in an agreement in reference to the subject matter thereof and if they reduce their agreement to writing, and sign and deliver it, the writing, in the absence of fraud, mistake, or ambiguity, is the only competent evidence of the contract. Bitler v. Terri Lee, Inc., 163 Neb. 833, 81 N. W. 2d 318; Dorland v. Dorland, 175 Neb. 233, 121 N. W. 2d 28; Bishop Cafeteria Co. v. Ford, 177 Neb. 600, 129 N. W. 2d 581. The action of plaintiff in placing the downpayment in escrow instead of paying it to the defendants at the time of the execution of the contract, as the written

agreement provided, constitutes a material breach of the contract.

Plaintiff contends that time was not of the essence of the contract and that plaintiff was entitled to a reasonable time to perform. The contract of sale does not provide that time is of the essence. There is evidence that defendants needed the downpayment to meet obligations at their bank and that plaintiff agreed that the money would be placed to their account. Time was considered of the essence when he declined to sign the contract until he had the $5,000 to pay defendants. The refusal of plaintiff to pay the money to the defendants or to place it to their credit in the bank was not brought about by uncontrolled delay but by a deliberate attempt to unilaterally change a material provision of the contract. In any event, he was given a reasonable time to comply with the contract under the circumstances shown. On or after December 1, 1962, plaintiff was informed by the defendants that they would not perform because of the failure of plaintiff to make the downpayment of $5,000 as the contract provided. Under such circumstances, the failure to pay the $5,000 downpayment in accordance with the contract constitutes a material breach, and the notice by defendants as above stated operates as a forfeiture.

The defendants were ready, willing, and able to perform the contract until on or after December 1, 1962, when they informed plaintiff that they considered the contract at an end because of his failure to perform. "The specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust, and may be denied where the party seeking it has failed to perform. * * * Where failure to convey land under an executory contract of sale is due

solely to the refusal of the purchaser to pay or tender the stipulated purchase price according to the terms of his agreement, he is not entitled to specific performance or to damages for breach of contract." Kobza v. Spath, 166 Neb. 623, 90 N. W. 2d 246. See, also, Sofio v. Glissmann, 156 Neb. 610, 57 N. W. 2d 176; Dodge v. Galusha, 151 Neb. 753, 39 N. W. 2d 539.

Plaintiff contends there was a waiver of the contract provision as to the $5,000 downpayment. The evidence of waiver is substantially as follows: Mildred Castek, Shaffer's secretary, testified that she saw the defendant Lois Bergfield sitting in her truck in front of the bank on or about October 9, 1962. She informed Mrs. Bergfield that the money was in the file but had not been delivered to the bank because Shaffer was ill and had had not been able to deliver it. Mrs. Castek quoted Mrs. Bergfield as having stated that that was perfectly all right.

The evidence of Mrs. Castek is not inconsistent with the terms of the contract of sale in that it indicates a delay in depositing the $5,000 to defendants' bank account because of the illness of Shaffer. There is nothing to indicate a waiver of the payment to defendants of the $5,000 in favor of an escrow agreement. The evidence will not sustain a finding that the payment of $5,000 to the defendants on the execution of the contract was waived.

Plaintiff contends further that the defendants cannot show by parol evidence that the $5,000 downpayment was not paid because it varies the terms of the written contract. The contract provided: "The sum of Five Thousand Dollars ($5000.00), paid on or before the execution of this Agreement, payment of which is hereby acknowledged by the sellers." The acknowledgment of payment is a mere statement of fact and not a contractual provision of the agreement. Evidence disputing its correctness is not incompetent under the parol-evidence rule. This point has previously been decided by

this court. Wells v. Aufrecht, 96 Neb. 402, 147 N. W. 1125; Hartman v. Lipovsky, 122 Neb. 823, 241 N. W. 563; Barth v. Reber, 135 Neb. 25, 280 N. W. 219.

The plaintiff assigns as error the fact that the trial judge interrogated Joe Schommer after counsel for both parties had completed their questioning of the witness. It is the contention of the plaintiff that the court's examination adduced incompetent evidence. No objections were made to any of the questions asked by the court. In any event, the questioning by the court was to clarify the sequence of events testified to by Schommer. No incompetent evidence was adduced. While it is ordinarily the function of counsel for the parties to interrogate witnesses, a trial court may properly interpose questions to witnesses for the purpose of clarification of the facts. An examination of the court's interrogation reveals that it was solely for purposes of clarification of the facts and was in no manner prejudicial to the rights of the plaintiff.

The evidence sustains the following findings: The contract of sale was entered into after changes were made as agreed upon by the parties. No change as to the time of payment of the $5,000 was made. The contract was read by the parties before its execution. The evidence does not sustain a finding that the payment of the $5,000 at the time of the execution of the contract was waived. It does sustain a finding that Schommer decided on his own account to place the $5,000 in escrow and not to pay it in accord with the plain provision of the contract. The breach of the contract by Schommer not being waived, the defendants could properly treat the contract as having no force and effect. Under such circumstances, a right on the part of plaintiff to have the contract of sale specifically enforced does not exist. The trial court came to this conclusion and its judgment is affirmed.

AFFIRMED.

ROBERT RETZLAFF, JR., ET AL., APPELLEES, V. DARELL SYNOVEC ET AL., APPELLANTS.

132 N. W. 2d 314

Filed January 8, 1965. No. 35782.

1. **Schools and School Districts: Appeal and Error.** In a proceeding in error to review an order of a county superintendent upon petitions for a change in the boundaries of a school district, it is presumed that the evidence before the county superintendent was sufficient to support the order which was made if the evidence was not preserved in a proper bill of exceptions.
2. **Schools and School Districts.** Under section 79-402, R. S. Supp., 1961, a legal voter of a district affected may add his name to the petition at any time before the petition is filed with the county superintendent.

Appeal from the district court for Pierce County: GEORGE W. DITTRICK, Judge. Reversed and remanded with directions.

Beech & Webster, Hutton & Hutton, and Richard P. Garden, for appellants.

Bernard A. Ptak, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and POLLOCK and SIDNER, District Judges.

BOSLAUGH, J.

This is a proceeding in error to review an order of the county superintendent of Pierce County, Nebraska, merging school district No. 33 of that county into school district No. 6 of that county. The parties are residents and legal voters of the districts involved. The district court found generally for the petitioners in error and reversed the order of the county superintendent. The motion for new trial of the defendants in error was overruled and they have appealed.

Section 79-402, R. S. Supp., 1961, provides that the county superintendent shall change the boundaries of any district upon petitions signed by 55 percent of the

legal voters of each district affected. Where proper petitions are filed it is the mandatory duty of the county superintendent to order the changes in the boundaries requested in the petitions. Olsen v. Grosshans, 160 Neb. 543, 71 N. W. 2d 90.

The record in this case shows that petitions requesting that school district No. 33 be merged into school district No. 6 were signed by legal voters of the districts affected. A notice of the hearing before the county superintendent on the petitions on April 23, 1963, was published on April 18, 1963. Thereafter the county superintendent made the following order:

"Now on this 30th day of April, 1963, this matter came on for decision by the County Superintendent, the meeting for decision as to the sufficiency of the petitions having been continued to this date.

"The County Superintendent, having reviewed the entire matter, and examined the briefs submitted and sought advise (advice) of Counsel finds:

"1. That in the petition from School Dostrict (District) 6, the following are the facts;

"A. That there are 84 qualified voters in District. 6

"B. That there are 73 initial petitioners.

"C. That there are 12 signers of the petition whose names do not correspond to the voters list and must be deleted.

"D. That there are 17 persons who petitioned to have their names removed from the petition, but that four of same were deleted in 'C' above, leaving a balance of 13 more persons to be deleted.

"E. That there remains 48 qualified legal voters on said petition of a total of 84 voters in the District, or 57.1% of the qualified voters are petitioners, and, so far as District 6 is concerned, the merger should be made.

"2. That in the petition from School District #33, the following are the facts:

"A. That there are 43 qualified voters in District. 33

"B. That there are 28 initial petitioners.
"C. That one petitioner, Fred Staver, is not a qualified voter and his name should be stricken from the petition and the list of voters.
"D. That there are 8 persons who asked to have their names deleted from the petition; that one of the said persons name does not correspond with the voters list so must be stricken, leaving 7 to be deleted.
"E. That there are 7 persons who asked their names be added to said petition, one of whom is a questionable legal voter, so it must be omitted, leaving the addition of 6 names.
"F. That there remains on said petition 26 legal voters of said District of a total of 43 legal voters, or 60.4% thereof, and, so far as District 33 is concerned, the merger must be made.

"IT IS THEREFORE ORDERED, that School District #6 and School District #33 be and they hereby are merged and that from this date, School District #6, Pierce County, Nebraska, shall include all of its former territory and, in addition thereto, all of the territory embraced by District #33 Pierce County, Nebraska."

The transcript filed in the district court with the petition in error contains the order of the county superintendent, the petitions, the sworn list of legal voters, and certain other documents. The evidence before the county superintendent at the time of the hearing was not preserved in a bill of exceptions. Consequently, there can be no issue in this proceeding concerning the sufficiency of the evidence to sustain the findings of the county superintendent. In the absence of a proper bill of exceptions, it is presumed that the evidence before the county superintendent supports the order which was made. Dovel v. School Dist. No. 23, 166 Neb. 548, 90 N. W. 2d 58.

Since there is no proper bill of exceptions, the only questions which can be considered are alleged errors of

law that are shown by the transcript of the proceedings before the county superintendent. The petition in error alleged that the county superintendent had counted 6 legal voters of school district No. 33 who had not signed the petition. The district court found that the petition signed by the legal voters of school district No. 33 contained less than 55 percent of the voters of that district.

The order of the county superintendent shows that 6 legal voters who had asked that their names be added to the petition were counted as petitioners. If these names are not included, the petition does not have the required 55 percent.

Prior to 1953, the statute was silent as to the right of a petitioner to withdraw his name from the petition. However, in State ex rel. Glenn v. Bennett, 156 Neb. 258, 55 N. W. 2d 677, and other cases, this court recognized the right of a petitioner to withdraw his name at any time before the petition had been acted upon by the county superintendent. In Hoffman v. Nelson, 1 Neb. Unoff. 215, 95 N. W. 347, this court recognized the right of a petitioner to revoke the withdrawal of his signature before the petition had been acted upon. Although the Hoffman case involved a statute relating to a petition for an election upon the question of the relocation of a county seat, the principle involved is applicable in this case.

In 1953, the statute was amended to provide that: "A signing petitioner shall not be permitted, after the filing of the petition, to withdraw his name therefrom." Laws 1953, c. 295, § 1, p. 999. The purpose of this amendment was to fix the date after which petitioners could not withdraw their names from the petition.

Under section 79-402, R. S. Supp., 1961, a petitioner who had signed the petition at the time it was originally circulated, could ask that his name be withdrawn and then, at any time before the petition was filed with the county superintendent, restore his name to the petition by a revocation of the withdrawal. Thus, in effect,

signatures could be added to the petition after the time that it was originally circulated and before it had been filed.

We think that the intent of the statute was to fix the date of the filing with the county superintendent as the time when the determination should be made as to the legal sufficiency of the number of signatures upon the petition. We conclude that legal voters of school district No. 33 had the right to add their names to the petition at any time before the petition had been filed with the county superintendent.

There being no error apparent upon the record, the order of the county superintendent should have been affirmed. The judgment of the district court is reversed and the cause remanded with directions to enter a judgment affirming the order of the county superintendent.

REVERSED AND REMANDED WITH DIRECTIONS.

GEORGE N. CONVERSE ET AL., APPELLANTS, V. GUY E. KENYON ET AL., APPELLEES.

132 N. W. 2d 334

Filed January 8, 1965. No. 35796.

1. **Adverse Possession.** The claim of title by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years.
2. ———. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted.
3. ———. What is sufficient to meet the requirements for actual possession depends upon the character of the land and all of the circumstances of the case.
4. ———. Acts of dominion over land must, to be effective against a true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another.
5. ———. The fact that one claiming title by adverse possession never intended to claim more land than is called for in his deed

is not a controlling factor. It is the intent with which possession is held, rather than the intention to hold in accordance with the deed, that is controlling.

6. **Boundaries: Adverse Possession.** Where one, by mistake as to the boundary line, constructs upon and takes possession of land of another, claiming it as his own to a definite and certain boundary by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession.
7. **Adverse Possession.** After the running of the statute, the adverse possessor has an indefeasible title which can only be divested by his conveyance of the land to another, or by a subsequent disseisin for the statutory limitation period. It cannot be lost by a mere abandonment, or by a cessation of occupancy, or by an expression of willingness to vacate the land, or by the acknowledgment or recognition of title in another, or by subsequent legislation, or by survey.

Appeal from the district court for Brown County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Robert V. Hoagland, for appellants.

Farman & Cassel, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, BOSLAUGH, and BROWER, JJ., and POLLOCK and SIDNER, District Judges.

BROWER, J.

George N. Converse, Berlea D. Converse, Grace C. Blake, Roy A. Blake, James P. Converse, and Helen M. Converse, the plaintiffs herein, brought this action in the district court for Brown County, Nebraska, against the defendants Guy E. Kenyon, Edna Kenyon, Herbert Kenyon, and Ruth Kenyon, to correctly establish the corners and boundaries of Section 4, Township 30 North, Range 23 West of the 6th P.M., in Brown County, Nebraska, under section 34-301, R. R. S. 1943.

George N. Converse, Grace C. Blake, and James P. Converse are the record owners of the southwest quarter of said section and will be designated as plaintiffs. The other plaintiffs are their spouses and have only marital

interests therein. Guy E. Kenyon is the record owner of the east half of said section and when the context relates to one defendant the reference is to him. Edna Kenyon is his wife and her interest is only as a spouse also. Herbert Kenyon, a son of Guy E. Kenyon, is in possession of defendant's land under lease from him. Ruth Kenyon is his wife. The tenant and his spouse were dismissed from the action.

Plaintiffs alleged that some of the boundaries of the section mentioned became lost or destroyed and are presently in dispute between the parties, and that the fence dividing the east half from the west half of the section in controversy had been moved to the west of the true half-section line by defendants or their predecessors in interest resulting in the taking of 20 acres of land off the plaintiffs' southwest quarter and enclosing it with the defendants' southeast quarter. They further alleged a true survey had been made, a copy of which was attached to the petition. Plaintiffs asked that the court determine the correct boundaries and require the defendants to conform thereto and move their fence accordingly.

The defendant Guy E. Kenyon answered alleging he was the sole owner of the east half of the section; denying that the plaintiffs were owners of that part of the southwest quarter of the section east of the north and south fence thereon; and alleging that the fence between the two tracts had been in the same location for more than 21 years and the defendant and his predecessors in title, having been in actual, open, notorious, continuous, exclusive, and hostile possession of that portion of the southwest quarter lying east of the fence, had acquired title thereto by adverse possession. The prayer was that his title thereto be quieted and confirmed as against the claims of the plaintiffs.

The plaintiffs' reply consisted of what may be considered a denial of new matter in the answer and further alleging the plaintiffs had paid the taxes on the

entire southwest quarter and the defendants by their further acts have in substance made a disclaimer of title and barred themselves by estoppel in pais from claiming title to any part of the southwest quarter of said section.

A trial to the court resulted in a finding for the defendants on the issue of adverse possession and a determination that the fence in question was the line between the plaintiffs' and defendants' property. The judgment quieted the title to that portion of the southwest quarter that lies east of the fence in question in the defendant Guy E. Kenyon.

Plaintiffs' motion for a new trial having been overruled, they have appealed the cause to this court.

There is little if any dispute in the actual facts disclosed by the evidence. By patent from the United States the southwest quarter of the section was conveyed to James P. Nelson, and was later conveyed to Edward M. Converse. On his death in or shortly prior to 1952, the plaintiffs derived title from his estate to an undivided portion of the premises. They thereafter procured the remaining interest by conveyances from the other heirs and are now the owners of the record title.

Plaintiffs George N. Converse and James P. Converse are residents of the State of Ohio and Grace C. Blake resides in Denver, Colorado. George N. Converse saw the land in 1952 but did not then inspect or take measurements concerning it. In 1959 and 1960 he was in Nebraska. From viewing aerial photographs he observed a discrepancy in size between the southwest and southeast quarters of the section as divided by the fence. Further checking at the courthouse disclosed a material variance in the areas of the two quarters. This information was conveyed to the Blakes at Denver.

Conferences were arranged and resulted at the home of Guy E. Kenyon who lived in Denver also. There were three of such meetings. Guy E. Kenyon and George N.

Converse and wife were present each time, and Grace C. Blake and husband on the last two occasions. The consultations were in regard to moving the fence and running it on the correct line, and also concerned a proposed sale of the plaintiffs' land to the defendant. After one such meeting the defendant Kenyon in February 1962, wrote to George N. Converse in Ohio, the substance of the letter being that he had decided to move the fence but could not say when since it would involve a mile of fencing at a cost of perhaps $1,000. It also stated that it would require considerable investigation with the county surveyor and commissioners. He wrote that as soon as time and finances would permit, he would do something about it and would contact Converse again.

In the summer of 1962 the plaintiffs employed a surveyor who reestablished the corners of the land in question from the records at the courthouse showing the official plat and field notes of the original survey of the government land office in 1874. It was determined that the area between the fence in question and the north and south half-section line to its east was 20 acres and that the fence was 5 chains, or 330 feet, to the west of the true line on the road at the south side of the southwest quarter. The strip of land between the fence and half-section line tapered, becoming narrow to the north, and leaving a pie-shaped triangular strip which is the concern of this litigation. At one of the conferences defendant informed the plaintiffs they could measure all they wanted and tie a rag on the south fence where they thought the line should be. At the subsequent meetings the negotiations for the defendant to buy the plaintiffs' land fell through and the defendant being informed of the survey having been made told plaintiffs there was no occasion for such an expense. He then said that if or when the fence was moved, he was the one who would determine where it was to be placed. The negotiations thereupon terminated and this action ensued.

The evidence shows the plaintiffs and their predecessors had previously always paid the taxes on what the treasurer's receipts described as the southwest quarter of the section. The amounts of taxes so paid for any year or period are not shown. The defendant Guy E. Kenyon and his predecessors had paid the taxes on the east half of the section as described in the treasurer's records.

The record contains the following evidence concerning the claim of adverse possession of the defendant Guy E. Kenyon. Kenyon was 65 years of age and was born on the northeast quarter of this section. The entire east half of the section was patented by his grandfather who deeded it to his father in and prior to the year 1900. He lived on it and helped his father until the latter's death in 1934. He took over farming it in that year and acquired the interest of the other heirs of his father in 1940. Thereafter he continuously farmed it until 1956 when it was leased to his son who as his tenant continued to occupy it until the trial. The north-south fence in question runs entirely across the section. It is in line with the fences across the roads on the north and south sides of the section. Kenyon always considered the fence to be on the correct boundary line between the east and west half of the section. It is the same fence that has existed there for as long as he could remember although it has been repaired from time to time. He considered everything east of this fence to be his. Since 1940 he or his tenant have been in continuous possession of all the land east of the fence and he has claimed it to be his as against all persons and the world. Defendant and his tenant planted the land east of the fence to various crops and harvested them during all of this time. Its occupancy was at all times visible to those who had dealings concerning the land or inquired about it. The land to the west of the fence had been farmed by others, apparently tenants of the plaintiffs or their predecessors. No one else had ever

made claim to the land east of the fence prior to the plaintiffs in 1961. Defendant had not supposed, however, that land in the southwest quarter lay east of the fence but had nevertheless claimed to own and had farmed up to the fence.

His son, Herbert Kenyon, testified he was 32 years of age and had lived on the east half of the section with his father until 1956 except for 4 years while he was in the military service. Since 1956 he has farmed it as tenant of his father. He testified substantially the same with respect to the fence and to his and his father's occupancy and use of the land during his remembrance.

Three other persons, residents of the vicinity for long periods, in corroboration of defendant and his son testified to the use of the land by the defendant and his father and of the knowledge of its use by the community. There is no evidence disputing the possession of the defendant and his predecessors.

The plaintiffs contend: The court erred in finding that the defendant had acquired title to the strip of land in controversy by adverse possession; the court erred in failing to establish the correct section line according to the prayer of the petition; the court's judgment is so indefinite that it is impossible for anyone to ascertain the exact limits and the extent of the land quieted in the defendant; and the court erred in failing to require the defendant to reimburse the plaintiffs for the taxes paid thereon with interest during defendant's occupancy of said strip of land since 1940.

In the recent case of Mentzer v. Dolen, *ante* p. 42, 131 N. W. 2d 671, the syllabi by this court held: "The claim of title by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years.

"The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted. * * *

"What is sufficient to meet the requirements for actual

possession depends upon the character of the land and all of the circumstances of the case.

"Acts of dominion over land must, to be effective against a true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another. * * *

"Where one, by mistake as to the boundary line, constructs upon and takes possession of land of another, claiming it as his own to a definite and certain boundary by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession.

"The fact that one claiming title by adverse possession never intended to claim more land than is called for in his deed is not a controlling factor. It is the intent with which possession is held, rather than the intention to hold in accordance with the deed, that is controlling. The claim of adverse possession is founded upon the intent with which the occupant has held possession, and this intent is ordinarily determined by what he has done in respect thereto." See, also, Purdum v. Sherman, 163 Neb. 889, 81 N. W. 2d 231, a strikingly similar case involving farmland.

In 3 Am. Jur. 2d, Adverse Possession, § 240, p. 339, it is said: "After the running of the statute, the adverse possessor has an indefeasible title which can only be divested by his conveyance of the land to another, or by a subsequent disseisin for the statutory limitation period. It cannot be lost by a mere abandonment, or by a cessation of occupancy, or by an expression of willingness to vacate the land, or by the acknowledgment or recognition of title in another, or by subsequent legislation, or by survey."

In Martin v. Martin, 76 Neb. 335, 107 N. W. 580, 124 Am. S. R. 815, this court held: "One who has acquired absolute title to land by adverse possession for the statutory period does not impair his title by thereafter pay-

ing rent to the owner of the paper title." In the opinion of the cited case it was stated: "The law is well settled that recognition of title in the former owner by one claiming adversely, after he has acquired a perfect title by adverse possession, will not divest him of title."

The plaintiffs in the first assignment of error contend the defendant had not acquired title to the land in question by adverse possession. They argue that adverse possession cannot be established unless the defendant knew that he was occupying the land which was not included in his deed and chain of title. This contention cannot be sustained. Mentzer v. Dolen, *supra*. Further, they stress the fact that the plaintiffs paid the taxes on the land in dispute and that the defendant did not, and this is claimed determinative of the issue of adverse possession. The payment of taxes is an element or circumstance which may be considered with all other circumstances of the case with respect to the subject of adverse possession. Wells v. Tietge, 143 Neb. 230, 9 N. W. 2d 180. It is not determinative of the issue. Under the authorities cited there was nothing in the negotiations between the parties that would divest defendant of title previously acquired by adverse possession. Martin v. Martin, *supra*. It is obvious that the evidence in this case under the rules set forth herein clearly establishes that the defendant has been in actual, open, notorious, continuous, exclusive, and hostile possession of the land lying between the fence and the east line of the southwest quarter of the section involved and has acquired title thereto by adverse possession. The assignment of error is without merit.

This action was brought under the provisions of section 34-301, R. R. S. 1943. The purpose of the proceeding is set forth in the beginning of the section. As applied to this action its purpose is to establish corners and boundaries which are in dispute and is brought against the owner of the other tract which would be affected by the determination. The last portion of this section

reads as follows: "Either the plaintiff or defendant may, by proper plea, put in issue the fact that certain alleged boundaries or corners are the true ones, or that such have been recognized and acquiesced in by the parties or their grantors for a period of ten consecutive years, which issue shall be tried before the district court under its equity jurisdiction without the intervention of a jury, and appeals from such proceedings shall be had and taken in conformity with the equity rules." The defendant placed in issue his ownership of the land by adverse possession pursuant to the provisions of this section. The section specifically provides for the determination of a line recognized and acquiesced in by the parties or their grantors for 10 years. When as here a different boundary is shown to have existed for the statutory period, it is that boundary line that is to be determined between the disputed owners and not that of the original survey. There is no error in the trial court's judgment in this respect.

The plaintiffs argue that the description in the judgment is so indefinite that the limits and extent of the land quieted in the defendant are impossible of ascertainment. In Hallowell v. Borchers, 150 Neb. 322, 34 N. W. 2d 404, it is said: "The bulk of the Nebraska cases involve disputed boundaries, and in most of these cases the land claimed by the adverse possessor was enclosed by him or occupied by him up to a fixed monument, such as a road or a ditch." In 12 Am. Jur. 2d, Boundaries, § 4, p. 549, it is stated in part: "A 'monument,' when used in describing land, has been defined as any physical object on the ground which helps to establish the location of the line called for, and the term 'monument,' when used with reference to boundaries, indicates a permanent object which may be either a natural or an artificial one." Examples of artificial monuments are set forth in the same section and among them it is stated that an established fence may be such a monument. The evidence clearly shows the fence marked the boundary in this

case for many years. Indeed no other boundary could be established under the circumstances. The trial court committed no error in so doing.

The plaintiffs assign as error the failure of the court to require the defendants to reimburse plaintiffs for taxes paid. In support of this argument they cite in their brief section 76-301, R. R. S. 1943. The plaintiffs' petition contained no reference to taxes paid and asked no refunding of such taxes. The plaintiffs' reply to the defendants' answer did assert that plaintiffs had paid the taxes and the defendants and their predecessors had not, but nothing is said there as to the amount paid nor concerning reimbursement. It is apparent these allegations were made to refute the claim of adverse possession by the defendant in his answer. Although the evidence shows the taxes were paid by the plaintiffs on the land in dispute, there is a complete lack of evidence as to the amount of any such payments. If the plaintiffs sought a refund for taxes expended, the burden was upon them to plead and prove that issue. No claim of error was made in the motion for new trial because of the court's failure to order repayment of taxes paid. It appears to be asserted for the first time in this court. The plaintiffs' contention is without merit.

The judgment of the trial court in quieting title of the land in question in the defendant was proper and should be and is affirmed.

AFFIRMED.

RONALD ZAVORAL, APPELLANT, V. PACIFIC INTERMOUNTAIN EXPRESS, A CORPORATION, ET AL., APPELLEES.
132 N. W. 2d 329

Filed January 15, 1965. No. 35775.

1. **Appeal and Error.** For an error at law occurring at the trial to be considered by this court, the alleged error must be prop-

erly presented to the trial court and properly preserved, otherwise the defendant is ordinarily precluded from raising it on appeal.

2. **Trial.** It is the duty of the trial court without a request to instruct the jury as to each issue presented by the pleadings and supported by the evidence.
3. **Trial: Appeal and Error.** A litigant is entitled to have the jury charged as to his theory of the case as shown by the pleadings and evidence, and the failure in this respect is prejudicial error.
4. **Automobiles: Negligence.** Drivers approaching, entering, and crossing an intersection controlled by an automatic traffic signal have no absolute right to cross but must keep their vehicles under reasonable control and maintain a proper lookout such as a reasonably prudent person would under all of the circumstances.
5. ———: ———. The meaning and force to be given to electrically operated traffic control signals, in the absence of a statute or ordinance, is that meaning which a reasonably prudent operator of an automobile should and would understand and apply.
6. **Automobiles: Streets.** Usually a yellow light following the green at an automatic signal controlled intersection warns that the red light is about to appear, and its purpose is to permit the clearance of vehicles from the intersection so that cross traffic may proceed.
7. ———: ———. In the absence of an applicable legislative enactment, the display of a yellow light, following the green on an automatic traffic signal, requires that vehicular traffic should stop before the crosswalk on the near side of the intersection unless such stop cannot be made safely in which event the vehicle may be driven carefully through the intersection, as a prudent person would do.
8. ———: ———. A "go" or green signal at an automatic signal controlled intersection is a grant of permission to drivers to proceed lawfully and carefully.
9. **Automobiles: Trial.** The question of whether a driver should anticipate a change in lights as he approaches an intersection on a "go" or green signal generally is for the jury under all of the circumstances, evidence, and facts of the case.
10. **Trial.** Ordinarily, in instructions, a court is not required to define words that are of common use and understanding.

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

Van Steenberg, Myers & Burke, for appellant.

Holtorf, Hansen, Fitzke & Kortum and Torgeson, Hurlbut & Knapp, for appellees.

Heard before WHITE, C. J., CARTER, MESSMORE, SPENCER, and BOSLAUGH, JJ., and POLLOCK and SIDNER, District Judges.

WHITE, C. J.

Defendants' loaded 58,000 pound tractor-trailer combination, 49 feet 11 inches long, going west on U. S. Highway No. 30, about 12:30 a.m., on February 18, 1961, was in collision with plaintiff's southbound 1960 Oldsmobile. The collision occurred in the northwest quadrant of the automatic signal controlled intersection of U. S. Highway No. 30 and Chestnut Street (Highway 29) in the City of Kimball, Nebraska. Both streets and the intersection were "snow packed" and icy. The weather was clear and cold. Plaintiff brings this suit for personal injuries and property damage to his automobile. From a jury verdict and judgment for the defendants, plaintiff appeals. We reverse the judgment and remand the cause for a new trial.

Plaintiff contends that the defendant driver, Tinsley Naylor, was guilty of negligence as a matter of law and that the court should have so instructed the jury. Plaintiff did not, by motion or requested instruction, raise this issue in the trial in district court. It is first raised here on appeal. Unless the question is raised by appropriate motion or otherwise, the failure of the trial court to so instruct is not an "error of law" occurring at the trial and duly excepted to as required by section 25-1142, R. R. S. 1943. Robinson v. Meyer, 165 Neb. 706, 87 N. W. 2d 231.

We feel that the issues of negligence and contributory negligence presented a jury question on the record before us. The plaintiff's version of the accident is that he was traveling south at 15 miles per hour; that the traffic light changed to green when he was about 60 feet from the intersection; that he saw the defendants'

tractor-trailer about 100 feet to the east of the intersection and traveling 35 to 40 miles per hour; that he became aware that defendant driver wasn't going to stop; and that he applied his brakes, slid on the icy pavement into the intersection, and collided with the defendants' truck. They collided at a point just ahead of the rear dual tires about 10 to 12 feet from the rear of the truck. The defendant driver's testimony is that he slowed to 30 miles per hour on the east edge of Kimball; that he continued at that speed through the intersection; that the yellow light of the automatic signal came on just as he crossed the east crosswalk entering the intersection; that the lights had changed to green about a block to a block and a half to the east; that he saw plaintiff's car when he was 40 to 50 feet east of the intersection and his light was green; and that he was in the intersection and had passed in front of plaintiff's car when it was about crossing the south line of the crosswalk into the intersection. He estimated the speed of plaintiff's car at 25 miles per hour which did not slacken. The applicable posted speed limit under the statute (section 39-7,108, R. R. S. 1943), was 30 miles per hour on U. S. Highway No. 30 and 25 miles per hour on Chestnut Street (Highway 29). This was stipulated to by the parties. The light cycle on the automatic signal facing defendant driver was 24 seconds green, 3 seconds yellow, and 33 seconds red.

It is apparent that there is a direct conflict in the testimony which the jury must resolve. According to the plaintiff, the defendant driver ran a red light at an unlawful speed. According to the defendant driver, his speed was lawful and he would have cleared the intersection before the light was green for the plaintiff, and the jury could have found that the lights were changing as each entered and that each was then going too fast under the conditions then existing. A green light is a permission to proceed carefully and not an absolute right-of-way. Styskal v. Brickey, 158 Neb. 208, 62 N. W.

2d 854. The testimony as to speed and failure to reduce it under the conditions existing, in violation of the statute (section 39-7,108, R. R. S. 1943), does not show negligence as a matter of law but is evidence of negligence for the jury to consider under all of the circumstances. The questions of proper lookout and control were also for the jury. There is no statute or ordinance governing the duty of drivers to anticipate a change in lights when approaching an automatic signal. His actions and conduct in this respect are for the jury. The question is whether he exercised that degree of control and kept a lookout that a reasonably prudent person would under all of the circumstances.

The plaintiff contends that the trial court failed to submit the issue of the unlawful speed of defendant driver in violation of the statutory limit. The plaintiff pleaded, and there was evidence to support the allegation, that the defendant driver Naylor was driving in excess of the posted speed limit of 30 miles per hour on U. S. Highway No. 30 at the time and place of the accident. The trial court, in instruction No. 4, submitted for the jury's determination whether the defendant driver was negligent "in negligently driving at an unreasonable rate of speed." The court submitted the case to the jury for special findings. The first special finding limited the jury's consideration of speed to the above quoted material element as stated in instruction No. 4. The court did not submit the issue of negligence in driving in excess of the applicable posted statutory limit of 30 miles per hour. The same situation was presented to this court in Ripp v. Riesland, 170 Neb. 631, 104 N. W. 2d 246. Therein we said (at page 653), as follows: "The instruction of the trial court as to what appellants alleged as to the speed of the automobile of the deceased was that he operated his vehicle on a highway 'at a greater speed than was reasonable and proper under the conditions existing towards the east of the intersection * * *.' This was too restricted, general, and an unfair

representation of the allegations of the speed of the automobile of deceased. It was plainly alleged in the answer that the speed of the automobile of deceased was in excess of 65 miles per hour and there is evidence supporting that allegation. It is the duty of the trial court without a request to instruct the jury as to each issue presented by the pleadings and supported by evidence. A litigant is entitled to have the jury charged as to his theory of the case as shown by pleading and evidence and a failure in this respect is prejudicial error. McKain v. Platte Valley Public Power & Irr. Dist., 151 Neb. 497, 37 N. W. 2d 923; Maska v. Stoll, supra; Southwell v. DeBoer, 163 Neb. 646, 80 N. W. 2d 877; Phillips v. State, 167 Neb. 541, 93 N. W. 2d 635; Wischmann v. Raikes, 168 Neb. 728, 97 N. W. 2d 551." The court should have submitted the issue of speed in excess of the statutory limit and its failure to do so was prejudicial error.

Plaintiff also alleged that defendant driver Naylor failed to reduce his speed when approaching and crossing an intersection and that his speed was unreasonable considering the hazardous condition of the highway. There was evidence to support this allegation. The evidence also establishes that the intersection and the approaches to it were slick and icy. The statute (section 39-7,108, R. R. S. 1943) commands, among other things, that speed shall be decreased when approaching and crossing an intersection or when special hazards exist with respect to traffic or by reason of weather or highway conditions. The court failed to submit this material issue, pleaded and supported by the evidence, and the failure to do so was prejudicial error.

There is considerable argument in the briefs as to the duty of motorists with reference to the appearance of the yellow or amber light on the automatic signal. In this case, the yellow light was on for three seconds following the green during which time the light was red for cross traffic. Defendant driver Naylor testified he was at the crosswalk when the light changed from green to

yellow. He therefore entered the intersection on the yellow according to his own testimony. The trial court, in instruction No. 11, comprehensively instructed as to the duties of drivers approaching and crossing such signal controlled intersections. We have examined this instruction and it is in harmony with the rules announced as to such instructions in Styskal v. Brickey, *supra;* and Laurinat v. Giery, 157 Neb. 681, 61 N. W. 2d 251. However, these cases did not announce a rule applicable to the situation confronting a driver approaching and entering an intersection on a yellow light. There is no state statute or city ordinance applicable. The trial court, in a portion of instruction No. 11, told the jury as follows: "The yellow light is a signal indicating that the light is about to change to red. When the light changes from green to yellow an approaching driver should stop before entering the intersection unless such driver is so close to the intersection when the light changes to yellow, that he cannot safely come to a stop, and unless he reasonably believes that he can complete his crossing the intersection before the green light appears for the intersecting drivers."

Both parties assert error in this instruction, the defendants asserting that it favored plaintiff's theory of the case and therefore could not be error. Cases are cited from other jurisdictions and arising under different statutes and ordinances. There is a diversity of opinion in these authorities. See, 2 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. Ed.), § 1040, pp. 366, 367, notes 94b and 95, and cases cited in supplemental annotation. The question is whether a motorist facing a yellow light is required to stop and when is he permitted to carefully proceed across the intersection? It is clear that if the light changes to amber or yellow after he has entered the intersection he may proceed to cross and has the right-of-way over vehicles not already lawfully in the intersection. The purpose of the yellow light is to permit the clearance of vehicles from the in-

tersection so that cross traffic may proceed. At all times drivers have no absolute right to cross but must keep their vehicles under reasonable control and maintain a proper lookout as a reasonably prudent person would under all of the circumstances. We deem the following applicable from White v. Cothran, 260 N. C. 510, 133 S. E. 2d 132: "The meaning and force to be given to electrically operated traffic control signals, in the absence of a statute or ordinance, 'is that meaning which a reasonably prudent operator of an automobile should and would understand and apply. Coach Co. v. Fultz, 246 N. C. 523. Traffic signals of the kind here described are in such general use that it is, we think, well known by motor vehicle operators that a red traffic light is a warning that the highway is closed in order to permit those using the intersecting highway safe passage through the intersection. Hence, prudence dictates that he should stop. *The meaning of the amber light is likewise recognized. It cautions but not in the positive tones of the red light. It warns that red is about to appear, and that it is hazardous to enter. It affords those who have entered on the green light the opportunity to proceed through the intersection before the crossing traffic is invited to enter.*'" (Emphasis supplied.)

After examining the authorities we come to the conclusion, in the absence of applicable legislative enactment, that upon display of a yellow light following the green on an automatic traffic signal, vehicular traffic should stop before the crosswalk on the near side of the intersection unless such stop cannot be made safely, in which event the vehicle may be driven carefully through the intersection as a prudent person would do. See Landess v. Mahler, 295 Ill. App. 498, 15 N. E. 2d 13.

Plaintiff contends that the jury should have been instructed concerning the duty of the defendant driver to anticipate that the lights might change. We feel that the court properly instructed the jury in this respect when, in instruction No. 11, it told the jury that the

effect of a green light is to grant permission to drivers to proceed lawfully and carefully. Styskal v. Brickey, *supra;* Laurinat v. Giery, *supra.* The "go" signal at an intersection grants no absolute right to proceed to a motorist, but he must maintain a proper lookout and have his car under such control as a reasonably prudent person would under all of the circumstances of the case. The questions of whether he should have anticipated a change in lights, his duty to reduce speed in approaching and crossing the intersection, and the duty to maintain a proper lookout for traffic approaching, entering, or in the intersection, all are for the jury under all of the circumstances and evidence in the case. 2 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. Ed.), § 1040, p. 367; Styskal v. Brickey, *supra;* Laurinat v. Giery, *supra;* Rose v. Campitello, 114 Conn. 637, 159 A. 887; Landess v. Mahler, *supra;* Plunkett v. Heath, 1 N. Y. S. 2d 778. See cases cited under notes 95 and 96, 2 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. Ed.), § 1040, p. 367.

Plaintiff contends the court should have defined the word "safely." This is a commonly used and understood word and we do not think a further definition was necessary in light of the other instructions given. Johnson v. Griepenstroh, 150 Neb. 126, 33 N. W. 2d 549.

Plaintiff, citing authority, contends that the court should have informed the jury that it was the defendant driver's duty to stop on the appearance of the yellow light unless such stopping would have caused him to be struck from behind. We feel that the adoption of such an arbitrary rule would be an invasion of the jury's province. This court may not declare in advance all of the situations in which a driver would be reasonably justified in coming to the conclusion that he could not stop safely. This question is for the jury in applying the controlling rules as to control, lookout, and all of the circumstances of the case.

The judgment of the district court is reversed and

the cause remanded for proceedings in conformity with the opinion herein.

REVERSED AND REMANDED.

HENRY HELLMEIER, APPELLEE, V. LLOYD J. POLICKY, APPELLANT.
132 N. W. 2d 760

Filed January 15, 1965. No. 35800.

1. **Automobiles: Streets.** The driver of a motor vehicle entering an intersection of two streets is obligated to look for approaching vehicles and to see those within that radius which denotes the limit of danger.
2. **Automobiles: Negligence.** When the driver of a motor vehicle entering an intersection looks but fails to see an approaching vehicle not shown to be in a favored position, the presumption is that the driver of the approaching vehicle will respect his right-of-way, and the question of his contributory negligence in proceeding to cross the intersection is a jury question.
3. **Trial.** Exactness of statement in instructions is not required if the substance is a correct statement of the applicable law.

Appeal from the district court for Seward County: H. EMERSON KOKJER, Judge. Affirmed.

John E. Dougherty, for appellant.

Robert T. Cattle, Jr., for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and POLLOCK and SIDNER, District Judges.

CARTER, J.

This is an action for damages for personal injuries sustained in a collision of plaintiff's pickup truck and defendant's automobile. The jury returned a verdict for the plaintiff in the amount of $2,500 and defendant has appealed.

The accident occurred at the intersection of Sixth and Moffitt Streets in the city of Seward, Nebraska, on Jan-

uary 11, 1962, at about 4:45 p.m. There were a few icy spots on the streets involved, but their condition was otherwise good. Sixth Street runs north and south and was protected by stop signs. Moffitt Street runs east and west and was not a protected street. Visibility was good in all directions from the intersection.

The evidence shows that Lloyd Moyer, a police officer, was driving west on Hillcrest Street, a street a few blocks north of Moffitt Street, at about 4:45 p.m. on the day of the accident. As he approached Sixth Street and was slowing down for the stop sign at the intersection, he saw defendant going south in his automobile at a high rate of speed. He gave pursuit and clocked the speed of defendant's automobile at 70 miles per hour. When he was within a half block of defendant's automobile he saw what he described as a cloud of smoke in the intersection of Sixth and Moffitt Streets. He brought his car to a stop at the intersection and found that a collision had occurred in the intersection between defendant's speeding automobile and plaintiff's pickup truck. Defendant was accompanied by Dennis and Duane Otte. Plaintiff was accompanied by John Richmond. The police officer found a bottle of whiskey, three-fourths empty, in defendant's automobile and smelled the odor of liquor in defendant's automobile and on the persons of the three occupants. He also smelled the odor of liquor on the plaintiff.

The plaintiff testified that he left his work at 4 p.m., stopped for one glass of beer, and was on his way home when the accident happened. He approached Sixth Street from the west on Moffitt Street, stopped at the stop sign, looked both ways, proceeded to the curb line of Sixth Street where he looked both ways without stopping, and proceeded into the center of the intersection where he was hit by defendant's automobile. He said he did not see the car until the time of impact. He sold his damaged pickup truck for $65. He fixed its value before the accident at $350 to $400. His hospital bill was

$303.85 and his doctor's bill was $78. Plaintiff was a cement finisher by trade, earning $80 to $90 a week in the summer months and half that amount in the winter months. He suffered three and possibly four broken ribs and other superficial injuries. He was in a hospital for 8 days and it was 4 weeks before he was able to work. He was afflicted with arthritis before the accident, which became worse afterwards, but does not attribute its acceleration to the accident.

Plaintiff's evidence is not disputed, the defendant offering no evidence other than some pictures of plaintiff's truck, the intersecting streets, and the intersection. It was stipulated that the speed limit on Sixth Street was 30 miles per hour. Defendant contends that the trial court erred in not sustaining his motions for a directed verdict and his motion for judgment notwithstanding the verdict.

In the consideration of the foregoing assignment of error we point out that there is no evidence in the record that plaintiff's automobile was in the area of danger when plaintiff entered the intersection. The applicable rule is: "Whether one failed to look or looked and failed to see a vehicle when it was within the limit of danger is a question for the jury, except in those cases where the evidence is so conclusive that the approaching vehicle was within the limit of danger that reasonable minds could not differ thereon. * * * The driver of a vehicle is not required to notice every car that happens actually to be within his range of vision, but only those within that radius which denotes the limit of danger. Before a verdict can be properly directed in such a case the position of the oncoming vehicle must be definitely located in a favored position, that is, that it was within that radius which denotes the limit of danger, otherwise the question becomes one for the jury." Pupkes v. Wilson, 172 Neb. 15, 108 N. W. 2d 220. See, also, Hermansen v. Anderson Equipment Co., 174 Neb. 325, 117 N. W. 2d 791. Under the foregoing

rule the trial court did not err in overruling defendant's motions for a directed verdict and his motion for judgment notwithstanding the verdict.

Defendant assigns as error the giving of instruction No. 1 in that it includes as one of plaintiff's allegations of negligence that defendant did not grant the right-of-way to the plaintiff. The evidence is undisputed that defendant was driving his automobile at 70 miles per hour in a 30-mile-per-hour zone as he approached the intersection. He made little or no effort to reduce his speed. Under these circumstances the jury could find that plaintiff had the right-of-way over the defendant and that the latter had forfeited any right-of-way he may have had by traveling on a favored street. It was not error to submit the failure of defendant to grant the right-of-way to plaintiff as an allegation of negligence to be determined by the jury.

Defendant objects to instruction No. 4 in that it permits plaintiff to recover all damages he sustained "without any formulate or instruction" on hospital bills, medical bills, pain and suffering, and time lost. With reference to the hospital bill for $303.85, defendant's counsel, before a proper foundation was laid, said: "Offer it. There's no question about that." Defendant is in no position to question the propriety of its admission. Dr. R. Paul Hoff, the attending physician, testified to the reasonableness and correctness of the hospital and medical bills. They were properly admitted. Under the facts in this case the trial court properly instructed on the measure of damage to plaintiff's pickup. As to time lost, plaintiff testified as to the rate of pay of a cement finisher and stated he lost 4 weeks time because of injuries sustained in the accident. The court properly withdrew from the jury any damages resulting from plaintiff's arthritis and heart condition. With reference to pain and suffering, the court instructed that this was a matter for the jury, based upon all the facts in evidence. All the evidence of damage, the jury was told,

was to be considered in connection with the comparative negligence instruction. Instruction No. 4 is consistent with the holdings of this court and contains no error prejudicial to the defendant.

Defendant assigns as error the giving of instruction No. 12 dealing with motorists entering favored streets from nonfavored streets. Defendant concedes that the instruction is an accurate statement of the law but asserts that it has no application to the present case. The instruction is applicable to the facts in the instant case and correctly concludes "and it is for you to determine, under all the circumstances involved, whether or not he was negligent in this regard." The instruction contains no error.

The defendant complains of instruction No. 5 which in part states: "If the evidence is equally balanced on this defense, or if the greater weight of the evidence thereon is in favor of plaintiff, you cannot find plaintiff guilty of contributory negligence." He contends the instruction has the effect of a directed verdict for the plaintiff. All that the instruction states is that if the evidence on contributory negligence is evenly balanced or preponderates in favor of the plaintiff, the jury should find for the plaintiff on this issue. The language of the instruction is equivalent to that usually employed. Exactness of statement is not required if the substance is correct as it is in this instruction.

We find no error prejudicial to the defendant in the record. The case was fully and fairly submitted to the jury, and its verdict should not be disturbed.

AFFIRMED.

PEARL F. SEARS ET AL., APPELLEES AND CROSS-APPELLANTS, V. MID-CITY MOTORS, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE, IMPLEADED WITH SAMUEL I. ROTHENBERG ET AL., A COPARTNERSHIP, DOING BUSINESS AS SERVICE JUNK COMPANY, APPELLEES AND CROSS-APPELLEES.
132 N. W. 2d 361

Filed January 22, 1965. No. 35683.

1. **Negligence: Trial.** In an action for damages predicated on negligence the burden of proof is on the plaintiff to adduce evidence that the neglect charged either alone or in connection with other acts was the proximate cause of the damages.
2. **Negligence.** Negligence is never presumed, and it cannot be inferred from the mere fact that an accident happened.
3. **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.
4. ———: ———. 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.
5. ———: ———. If circumstantial evidence is susceptible of any reasonable inference inconsistent with an inference of negligence on the part of the party charged, it is insufficient to sustain the charge or to require submission of the issue to a jury.
6. **Negligence: Trial.** In a case where reasonable minds may draw different conclusions as to whether or not acts of negligence charged have been proved, a question for determination by a jury is presented.
7. **Witnesses: Trial.** It is not the office of an expert witness to give his conclusions of the ultimate fact to be determined, but it is for the court to decide whether there is sufficient evidence thereof to submit to the jury and for the jury to make its decision in case it is submitted to it.
8. **Evidence: Trial.** In absence of opposing evidence or in light of surrounding circumstances, admission against interest may be sufficient to establish fact admitted, but other evidence in the case may render the admission wholly insufficient to establish such fact.
9. ———: ———. To be competent as an admission against

interest a statement must be one of fact, and a statement which is a mere opinion or conclusion or a conclusion of law is as a rule inadmissible.

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

Abrahams, Kaslow, Story & Cassman and Robert C. Oberbillig, for appellant.

Gross, Welch, Vinardi, Kauffman & Schatz and Haney, Walsh & Wall, for appellees Sears et al.

Cassem, Tierney, Adams & Henatsch, for appellees Rothenberg et al.

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

BROWER, J.

This action was commenced by the plaintiffs, Pearl F. Sears and Ruth F. Burke, in the district court for Douglas County, Nebraska, to recover damages incurred in a fire which burned a building owned by them. The defendants in the action were Mid-City Motors, Inc., a corporation, lessee of the building, and Samuel I. Rothenberg and Jack Levey, a copartnership, doing business as Service Junk Company.

The plaintiffs will be so designated. The defendants will be referred to as Mid-City Motors and Service Junk Company, respectively.

The plaintiffs alleged that Mid-City Motors was liable because of negligence in the operation of an acetylene torch used in cutting pipes and fittings in a sprinkling system which was in the process of being removed from the premises. The acts of negligence which were in the plaintiffs' petition alleged to be the proximate cause of the fire and which were said to be joint and concurring negligence of both defendants may be stated as follows: In utilizing an acetylene torch in close proximity to the

false ceiling and failing to take precautions to prevent the flame, fire, and sparks from coming in contact therewith; in failing to inspect the area where the torch was used to determine whether or not it was safe to use the same and in using said torch in close proximity to said ceiling when the same was inflammable; and in failing to properly use hacksaws or other nonflammable cutting devices or to properly supervise the efforts of the workmen. It is alleged the Service Junk Company was the agent, servant, and employee of Mid-City Motors which had charge and exercised control and supervision over its action. Defendants each answered separately and for the purposes of this opinion the answers may be treated as general denials.

At the time of the fire, defendant's name was Meeks Rent-A-Car Company, a corporation, but its name had been changed to Mid-City Motors prior to the filing of the petition. At times it will be designated as its name was before the fire but in any event it is one and the same.

The matter was tried in the district court before a jury. At the conclusion of all the evidence, the court sustained a motion made by Service Junk Company for a directed verdict and it was dismissed from the action. The court overruled a similar motion on behalf of Mid-City Motors and submitted the action to the jury as to it. A verdict was returned for the plaintiffs in an amount stipulated to be the damage in case the defendants were found liable therefor.

The defendant Mid-City Motors filed a motion for judgment notwithstanding the verdict or for a new trial, and the plaintiffs filed a motion for a new trial assigning error to the court in sustaining the motion of Service Junk Company for directed verdict and dismissal. Both motions being overruled, the defendant Mid-City Motors has brought the matter to this court on appeal. The plaintiffs-appellees have cross-appealed both from the order dismissing the action against Service Junk Com-

pany and as to certain rulings of the court on the admission of evidence.

The defendant and appellant Mid-City Motors assigns as error to the trial court the overruling of its motion for a directed verdict or dismissal at the close of the plaintiffs' evidence, renewed at the close of all the evidence, and from the order overruling its motion for judgment notwithstanding the verdict or for a new trial.

The plaintiffs as cross-appellants assign error to the court in finding the evidence insufficient to submit to the jury the question of liability of the defendant Service Junk Company, and the defendant Mid-City Motors contends the trial court erred in submitting the cause against it to the jury. Therefore, we will first outline the evidence as it affects the cause of action the plaintiffs assert against both of said defendants.

The business of Mid-City Motors consisted of renting cars and trucks for the use of others, storage of those belonging to others, and washing and repairing cars of its own and for others.

The fire which caused the damage which was involved in this litigation was discovered a little after 1:30 on the morning of January 10, 1959. The building of the defendant Mid-City Motors in which it occurred is located at the southeast corner of the intersection of Sixteenth and Leavenworth Streets in the city of Omaha. It is a brick building 120 feet square with numerous frame partitions therein. Where it is located apparently the ground slopes rapidly to the south and there is a viaduct on the portion of Sixteenth Street used by the public to its west. Although it is a three-story building the top floor is even with Leavenworth Street on the north and is on an approximate level with the viaduct on the west. The lower floors are to the east of this viaduct and below it but can be reached by the roadway leading down to it from the west. The fire in question occurred on the top floor and apparently any damage to the lower floors was occasioned only by water

used in fighting it. This floor is designated generally in the evidence as the top floor and will be so designated herein although with respect to both Leavenworth Street and the viaduct to the west it is the ground floor.

A considerable portion of the two lower floors and a small portion of the top one were occupied by other businesses. The lowest of the floors was used for storage of cars or trucks. The company had some cars for use of customers called U-Drive Cars, using generally 20 in the summertime and 14 in the winter.

At the northwest corner of the building, the top floor had a diagonal front facing the intersection of both streets. On this front was a large overhead door for the entrance of cars and trucks which was operated electrically from the office located on Leavenworth Street to the north on the top floor. A smaller door northeast of it opened into the office. Another small door to the south and west opened into the small portion of the top floor occupied by another business from which a door opened into the remainder of the top floor used by Mid-City Motors and referred to at times as the garage. The garage floor was of cement. The walls were of brick or concrete except the office where they were wood. The garage was separated from the office by a frame partition in which there were glass windows looking into the service area so that those in the office might supervise the operation of the garage. There was a ramp on the top floor leading to the washroom and car repair shop on the second floor and there was also some space on that floor for company trucks. On the second floor there was a heater for heating water for washing cars and a gas furnace for heating the building. There were also automatic gas heaters. Gasoline pumps were outside and inside the building on the top floor. There were storage facilities for cars and trucks on both floors and there were some 30 cars belonging to others in the building of which a considerable number were on the top floor on the night of the fire. The garage had fluorescent

lights, some drop cords in the shop washroom, and a skylight. On a balcony on the top floor reached by a hanging stairway were stored automobile tires, chains, and other articles.

On the top floor were rows of cement pillars which were 20 feet apart east and west and 16 feet apart north and south. They supported cement beams which ran east and west on the top of these rows of pillars, the beams being about 18 inches square. On the top of these beams were "rafters" to which the false ceiling composed of a celotex substance was nailed. The ceiling was 12 to 14 feet high. These beams also supported a wood and rubberoid roof above, although exactly how does not appear in the record. The roof slanted and in places there was room to stand between the roof and ceiling, and in other places the crawl space between was slight. The evidence fails to show what, if anything, was contained in this space.

In about the center of the top floor was a skylight 40 feet long east and west and 16 feet wide with a gabled roof, the upper portion of which was all glass. To the north of the skylight and about the center of its length was a vertical 6-inch steel pipe, the main water pipe of the sprinkling system, which came up through the cement floor from the second floor. The testimony is conflicting and confusing as to whether it went through the ceiling or only up to it. In any event at its upper end it was joined to a cast iron T-shaped coupling from which there were 4-inch pipes, one leading to the east and the other to the west. From these smaller pipes others ran to various parts of the top floor.

The inoperative sprinkler system was being removed because trucks were backing into the pipes at times. Also, the redecoration of the building was contemplated and the removal was desired to remedy that which was deemed an unsightly condition. Neither of the defendants consulted with the plaintiffs prior to the removal.

Myrll Meeks, who was the president and majority

stockholder of the Meeks Rent-A-Car Company prior to the change of its name and before the fire, had died prior to the trial of the cause in district court. He had made the arrangements with Jack Levey, a partner in Service Junk Company, for it to remove the sprinkler system. The work was actually performed by Morris Romero and one Johnson, both employees of the Service Junk Company which paid them for their labor. Romero was paid $1.25 an hour. Meeks Rent-A-Car was to pay nothing to the Service Junk Company for the removal of the system. Service Junk Company was to pay Meeks Rent-A-Car for the salvage dependent on the value of that which could be renovated for resale and the weight of the junk that was left, less, however, the cost of the labor incurred in its removal.

On Friday, January 9, 1959, the day before the fire, Romero and Johnson reported at the place of business of Service Junk Company. The partner Jack Levey took them to Mid-City Motors where they arrived about 6 a.m. He showed them what to cut and left them there. Levey said he told them to cut only what Meeks had specified. The workmen had the torch and necessary tools. Levey again came for them at the close of their work-day with a truck and helped them load the pipe and material they had cut down. Levey had been instructed by Meeks to get the men out of the building before the traffic came in because they would then need all available space. On the afternoon of January 9, 1959, Levey arrived for the men and materials about 2:30. He helped them load and left with truck and men between 3 and 3:30 o'clock. He testified he checked the work of the men before leaving and did not see any fire or smell any smoke.

Prior to January 9, 1959, Romero and Johnson had been engaged in removing this same sprinkler system from other floors of the building. They used an acetylene torch to cut pipe. This was the first day they had worked on the top floor. They were cutting pipes near

the center of the building. The work included the removal of the 6-inch vertical main water pipe to the north of the skylight that came from the floor beneath. Romero handled the torch where its use was necessary. Uncontroverted testimony shows that he was a skilled and experienced man in handling such equipment.

Romero himself testified he cut the large 6-inch pipe near the floor and cut it again twice making "one close to the floor, and two close to the ceiling; well, down from the ceiling." The torch melted the metal making the pipe "cherry red." He cut also a 4-inch pipe coming out from the 6-inch pipe. The closest he got to the ceiling in cutting with the torch was 18 inches. He testified the work near the ceiling was started at 11 a.m., and was finished about noon. The rest of the time they were cutting elsewhere. They cut some of the material as it lay on the floor. The torch was completely turned off between 2:30 and 3 o'clock. He had shielding material but he did not use it because it was unnecessary as he was directing the sparks towards the floor. None of it went to the ceiling or he would have used the shield. He did not examine the ceiling material nor go up and look as to the contents of the attic although he states Bill Johnson made inquiry about it. His boss came between 2:30 and 3:15 o'clock and they loaded the pipe and got out of there shortly after. Before going, Johnson and he walked about and checked for fire and found none.

There was testimony, however, from other witnesses to which the jury could have given credence that about 3 o'clock that afternoon the two men were still upon a scaffold cutting pipe. They were using a torch at that time and sparks were shooting out in all directions. It looked like a "Roman candle" and some sparks were thrown against the ceiling. They were then cutting, according to the testimony, a "nice size pipe" near the center of the building 4 or 5 inches from the ceiling.

There was testimony that the sparks at times were flying 10 to 20 feet.

The first fire alarm, according to the testimony of Walter Downey, assistant investigator of the Omaha fire department, was at 1:41 a.m., January 10, 1959. It was followed by a second alarm at 1:47 and a third at 1:55.

Fire captain James B. O'Brien testified on approaching the scene of the fire he first observed smoke and fire coming from behind a sign on the roof of the building, the smoke and fire being near its center. According to him the fire had been burning from half an hour to an hour. Other members of the fire department testified to the same observation made on approaching the burning building. The big door of the garage could not be opened but a small door was found unlocked by the first fireman who arrived there. The building, however, was so full of heavy smoke they could only enter 6 or 7 feet and by looking underneath they saw a red glow near the center of the garage.

Chief arson investigator Dan Mulcahey and Walter Downey, an assistant investigator, removed exhibits 30, 30A, 33, 34, and 34A, together with pieces of celotex ceiling material from the garage after the fire. Mulcahey testified that the large pipe, exhibits 30 and 30A, had been cut by an acetylene torch. Exhibits 33, 34, and 34A were brackets which this witness said he found in the center of the garage building after the fire. They are shown to have been attached to the ceiling and to have held up certain parts of the pipe belonging to the sprinkler system. He found also some screws in a piece of wood remaining after the fire in the center of the building, one of these brackets having been attached to the wood by the screws. The screws were not offered in evidence. The false ceiling material taken from the debris at the scene was tested by Mulcahey. He held a match under the middle of the piece he found for 2 minutes. He found it would burn slowly like "punk" com-

monly used on the Fourth of July. He used two or three matches and a lighter on different spots. It was not too hard to start with a match which they applied. In 2 minutes it burned an area of about 2 inches. The ratio of its burning was 2 inches to 2 minutes. It smoked very little but when burning it did give off a gas which you could smell. It left an ash.

A witness, Raymond R. Voycheske, ran a business known as Ray's Body Shop apparently on the second, or middle floor, of this building. The men were cutting pipe a few days before the fire on the lower floor of the building and he had noticed sparks coming up into his place of business through a 2¼-inch pipe with an elbow on it. He reported this to the men working and they said they were through with whatever they were then doing.

Professor W. F. Weiland, formerly an instructor in mechanical engineering at the University of Nebraska, testified the sections of pipe, exhibits 30 and 30A, and the brackets, exhibits 34 and 34A, had been cut by an acetylene torch. The distance from the top of exhibit 34A was a maximum 2⅝ inches and exhibit 34 was 2 5/16 inches. He likewise tested the ceiling material which he said resembled a type of celotex. He found it would not normally flame alone. If fire is held to it some flame will be noted. If the fire is removed it will continue to burn like punk until all the material is reduced to ashes. While burning, it generates heat and if the process continues until it comes in contact with dust, paint, or some such material you can occasionally get a burst of flame. Otherwise it will smoulder for a long time under right conditions. He was able to cause it to smoulder and occasionally to burst in momentary flame. A match and also a little propane torch were applied. In burning it leaves an ash and a smoke or gas is emitted.

Professor Weiland further testified that the flame of an acetylene torch might be as high as 5,000 degrees Fahrenheit; that the melting temperature of steel is

2,600 to 2,700 degrees; and that the ceiling material would ignite at less than 1,500 degrees and wood at around 700 degrees. When the flame of an acetylene torch contacts with steel, sparks which are bits of molten metal are emitted which can be directed for some distance depending upon the force of the pressure used in the cutting mechanism. The bits of molten metal will be equivalent in temperature to the steel being cut as they leave the metal. As long as these sparks can be seen and show their incandescence their temperature exceeds 1,400 degrees. The professor testified it was possible that on cutting the pipe with such a torch when held within 4 or 5 inches from this ceiling material that it could be ignited; that if the large pipe was being cut within a distance of 18 inches to 2 feet of the ceiling and material and sparks were being emitted in every direction that also would possibly cause it to be lighted and to smoulder; and that it is possible for such smouldering material to retain enough heat to ignite wood or other material almost indefinitely.

There is testimony wholly unrefuted that someone was present in the building on the top floor at all times from 3 p.m., on Friday, January 9, 1959, to 12:30 a.m., on Saturday, January 10, 1959. Frank Brady, the night manager, came to work at 3:05 p.m., and took charge of car and truck renting and storage. Generally the rental trucks went out from the time he came till as late as 7 o'clock. Some did not return until midnight. All cars except storage came in the big door on the top floor. He was all over the place including all three floors until 12:30. If cars came in late and the other floors were locked, he parked them on the top floor. They were quite busy. Vehicles were coming and going through the big door. The big door was being opened and shut constantly. Whenever it was opened there was a draft. The defendant Mid-City Motors lost nine cars and three trucks of its own in the fire. Five cars went out before and stayed out. A truck with a dolly on it came in at

11:30 or 12 o'clock. He was supposed to close up at 12 o'clock but a truck driver, Walter Haarstick, called from Glenwood, Iowa, at 11:30 wanting Brady to wait for him. Haarstick later testified he got there a few minutes after midnight, drove in, parked his own car, and walked out. Brady checked all the floors to see the doors were locked, as he says he always did, and there were no fires in any of the cars or trucks. After Haarstick left, Paul Peterson came unexpectedly while Brady was preparing to leave and he had to unlock the door to let him in. Peterson drove his own car inside and parked it. Haarstick's car had been put in Peterson's stall. Brady pulled Haarstick's car out so Peterson, who parked his own car, could place it there. They were to the north of the center of the building. Brady and Haarstick walked together to the front where Haarstick used the phone. When Peterson left, Brady replaced the padlock, unscrewed the fuses in the fuse box, and left, All of the doors were locked. Romero, who handled the torch, happened to have a job washing cars with Mid-City Motors. He came back in the evening at 6 o'clock before the fire. The wash racks on the second floor were within 40 feet of the large pipe which came through the floor. It is a closed room with a wide door to let cars in and out. The cars were returned to the main floor after washing. He parked them as he completed washing near the central area. At times he glanced up to the ceiling where he had been working. It took 45 minutes on an average to wash a car and he worked until 11:30 or 12 o'clock. He saw no fire, smelled no smoke, and saw nothing fall from the ceiling. All persons mentioned in this paragraph testified they did not see any fire or smell any smoke or gas. It is true that Haarstick and Peterson did not make any examination or pay particular attention, however, they would have both walked quite close to the central area on leaving.

The safe and the three front doors had been locked when Brady left after midnight. They had all been

checked by him before leaving. When he came back the next morning after the fire, the safe was open. He was called back at 3:45 to examine the safe's contents. He was unable to state whether anything had been taken. Part of the contents had been burned up. There was still money there, however, although some of it had been burned. The money had not been placed in the safe by him and he could not tell whether any had been taken.

This is the substance of the testimony that the plaintiffs contend shows that both of the defendants Mid-City Motors and Service Junk Company were negligent and that their negligence and the negligence of each of them caused the fire that destroyed their building.

There is evidence offered by the plaintiffs and the separate defendants which might go to show either that Mid-City Motors had charge of and really was directing the work and that the workmen might be its agents, or that the work was wholly undertaken by Service Junk Company as an independent contractor which has not been detailed here because it does not enter into our decision of the cause.

Both of the parties cite and discuss the case of Howell v. Robinson Iron & Metal Co., 173 Neb. 445, 113 N. W. 2d 584, in which the following rules are set forth that are applicable here: "In an action for damages predicated on negligence the burden of proof is on the plaintiff to adduce evidence that the neglect charged either alone or in connection with other acts was the proximate cause of the damages.

"Negligence is never presumed, and it cannot be inferred from the mere fact that an accident happened.

"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.

"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.

"If circumstantial evidence is susceptible of any reasonable inference inconsistent with an inference of negligence on the part of the party charged, it is insufficient to sustain the charge or to require submission of the issue to a jury.

"In a case where reasonable minds may draw different conclusions as to whether or not acts of negligence charged have been proved, a question for determination by a jury is presented."

In the cited case of Howell v. Robinson Iron & Metal Co., *supra,* this court reversed the judgment of the trial court in directing a verdict for dismissal of the action holding that the evidence in that case disclosed facts from which both an inference of negligence and inference that such negligence was the causation of the fire were shown sufficiently to present a question for the jury. The plaintiffs in the cause before us claim that the facts in the case before us are so similar to those in the cited case that a jury question is presented here also. We think, however, the facts are quite dissimilar and that the difference therein distinguishes the two cases. In the case of Howell v. Robinson Iron & Metal Co., *supra,* the defendant was removing pipe by means of an acetylene torch from one end of the building under the exclusive control of the defendant. The building was for the most part wood and the interior was lined with cardboard. The cutting was done generally throughout the interior and near the cardboard walls. The floors were unswept and littered with combustible materials which had not been wetted down. The personnel performing the work did not use baffle plates which would have arrested and contained the sparks from the torch. Those in

charge of the work, employees of the defendant, left the premises for the day at 5:10 in the afternoon without making any final inspection for smoke or fire. The fire was reported at 7:50, or 2 hours and 40 minutes later. It was then in an advanced stage. No one had been in the building or was about the premises during the hours between when the employees left and the fire broke out. All the doors and windows were barricaded with one exception.

The plaintiffs cite Behrens v. Gottula, 160 Neb. 103, 69 N. W. 2d 384, where this court stated: "It is sufficient if all the facts and circumstances in evidence fairly warrant the conclusion that the fire did not originate from some other cause, and the origin of a fire has generally been held sufficiently established by inferences drawn from circumstantial evidence." This was a case in which there was a cracked manifold and a broken exhaust pipe on a motor truck of the defendant, and there was testimony that it was probable that sparks would come out of the crack and be emitted through the muffler. There was testimony that about a quarter until 4, lunch was taken to the working men; that the truck was parked with corn husks under it; and that within a short time after taking lunch out to the men, a witness saw a fire underneath the cab of the truck. The truck was burning and the husks under it were afire. The truck's motor had been shut off only a minute or two before the fire and thereafter the fire spread to the buildings involved.

We are cited also to the case of Kearney County v. Chicago, B. & Q. Ry. Co., 76 Neb. 861, 108 N. W. 131, decided in 1906, where the county recovered judgment against the Burlington for the loss of a bridge by fire, and where this court held that the evidence was sufficient to allow the jury to determine the origin of the fire to have been the passing locomotive. The witness testified he saw the train passing over the defendant's line and about 5 minutes afterward discovered the fire

south of the railroad track about a quarter of a mile burning in the direction of the bridge, and it had burned to within 3 or 4 rods of the track. Another witness testified it burned over the ground within 2 or 3 rods of the track. There was no conflict in the evidence and no other theory of the origin of the fire was advanced except that the train which had passed so shortly before caused the sparks to be emitted which started it.

We do not think the facts in any of these cases are so similar to those before us as to be determinative of the present case. Neither are we required to discuss the evidence as to whether the persons operating the torch engaged in cutting the pipe and steel on the premises were negligent in its operation. We may assume for this opinion that negligence has been shown.

The real void in the asserted cause of action disclosed by the evidence in this cause is the failure, in our opinion, to show that any of the alleged negligent acts caused the fire which ensued. It seems unbelievable that a spark could set the ceiling afire at not later than 3:30 in the afternoon of the previous day and smoulder until after 12:30 the following morning, in all 9 hours, in the garage in question with people there constantly, none of whom saw any fire, smelled any gas or smoke, or saw any ashes. Particularly is this true in view of the testimony of Dan Mulcahey that the ceiling material which he lighted, while burning like punk, consumed an area 2 inches wide within 2 minutes. If indeed it had smouldered all this time, it would seem without question that a considerable area of the ceiling would have been burned, a considerable amount of gas would have been emitted, and ash would have resulted; and that a failure of someone to detect it would have been well nigh impossible. The evidence presented is not sufficient under the rules stated to show such an interrelation of circumstances that a conclusion fairly and reasonably arises that the proximate cause of the conflagration has been established.

Moreover, the evidence to the effect that the outside door which had been locked was unlocked and that the safe which had been closed was open are circumstances which are "susceptible of any reasonable inference inconsistent with an inference" that the negligence of the defendants was the proximate cause of the fire within the rules set out in Howell v. Robinson Iron & Metal Co., *supra*. The plaintiffs point out that they are not required to exclude the possibility that the damages flowed from some other cause. Still all inferences as to the cause of the fire disclosed from the evidence must be considered by the court in determining whether or not the evidence of proximate cause is sufficient to submit the case to the jury.

We believe the trial court did not err in sustaining the motion of the defendant Service Junk Company to direct a verdict or dismiss the case at the close of all the evidence.

The plaintiffs, however, contend that the trial court erred in excluding certain evidence which they sought to introduce and which they assert would have strengthened their case as against both of the defendants. Professor Weiland was asked the following question by plaintiffs' counsel: "Q. (by Mr. Walsh) Let me ask you this, Professor: Would you have an opinion if ceiling material of the nature that you removed from the Meeks building, once ignited by any source, once started to smoulder for any reason, if it could continue to smoulder and retain heat sufficient to cause fire for a period of twelve hours? MR. TIERNEY: Just yes or no. A. Yes." He answered that he had such an opinion. When asked what that opinion was, objections were made on behalf of both the defendants and sustained by the court. They included that there was no sufficient foundation, that it was incompetent, irrelevant, and immaterial, and did not correctly state the evidence. Counsel said that if permitted to answer he would have answered yes. The plaintiffs assign error to such exclusion. The professor

had fully testified as to the possibility that the fire could so smoulder for an indefinite period. The question of whether or not it could so smoulder undetected and cause the fire was first for the court to decide as to the sufficiency of the evidence to require the submission of the question to the jury, and if submitted, that conclusion was a question for the jury to ultimately decide. It is not the office of an expert witness to give his conclusions of the ultimate fact to be determined, but it is for the court to decide and for the jury to make its decision in case it is submitted to it.

In the case of Neal v. Missouri P. Ry. Co., 98 Neb. 460, 153 N. W. 492, this court stated: "Complaint is made because some of the firemen were not permitted to express an opinion stating where the fire started. On the record made, the determination of that fact settled the case. The issue did not call for the opinion of an expert. After the evidential facts were stated, the jurors were as competent as the firemen to draw a conclusion. Under the circumstances of this case, the opinion of experts on the ultimate facts to be determined by the jury was properly excluded." Cases were cited. The contention of the plaintiffs is without merit.

There was certain evidence admitted against the defendant Mid-City Motors alone which the court expressly and properly instructed the jury was not to be considered against Service Junk Company because they were admissions which affected the former only. It included exhibit No. 2, a petition filed on July 19, 1960, in the district court for Douglas County, Nebraska, by Meeks Rent-A-Car prior to the change of its name to Mid-City Motors, against Service Junk Company. In that petition the defendant Meeks Rent-A-Car alleged the negligent acts of the Service Junk Company using almost the same allegations as are now charged by the plaintiffs against both of the defendants, and further alleged that said negligent acts were the cause of the fire. It is the contention of the plaintiffs that the admission in this peti-

tion by the defendant Mid-City Motors under its previous name that the negligent acts of Service Junk Company and its employees were the cause of the fire, was sufficient to submit the issue of proximate cause as to it to the jury. A reading of the record indicates that the trial judge considered it sufficient.

Objections were made to the admission of the petition in evidence by Mid-City Motors. It objected at trial claiming there was no sufficient foundation laid for its admission. It urges there was no showing that identifies Meeks Rent-A-Car with the defendant Mid-City Motors in that instance because it was filed after the change of name, or that the attorney who filed the petition or the attorney who verified it on information and belief had authority to bind the corporation. The appellant Mid-City Motors assigns error to the trial court in admitting it in evidence. We do not think it necessary to determine the issues with respect to its admission but for the purpose of this opinion it will be considered in evidence.

In 31A C.J.S., Evidence, § 382, p. 939, the effect of admissions with regard to their sufficiency to establish a cause of action is considered: "In the absence of opposing evidence or in the light of the surrounding circumstances or other evidence in the case, an admission against interest may be sufficient to establish the fact admitted, or the cause of action or liability or defense resting on proof of such fact, and it has been considered that cogent or full and unquestioned proof is required to overcome the effect of a deliberate admission.

"Conversely, the circumstances or other evidence in the case may render the admission insufficient to establish that for which it was offered in evidence."

We are cited by the plaintiffs to the case of Paxton v. State, 59 Neb. 460, 81 N. W. 383, 80 Am. S. R. 689, affirmed on the rehearing, 60 Neb. 763, 84 N. W. 254. The case was a suit to recover against the bondsmen of one Bartley, State Treasurer of this state, who was found

to be a defaulter at the end of his second term. The bondsmen from whom recovery was sought had signed the bond given by Bartley on his second term. The bondsmen as defendants had introduced in evidence the transcript of the record of the district court for Lancaster County showing the State had instituted and there was still pending suit brought on behalf of the State by the Attorney General on his own motion and as requested by the Governor to recover a large sum of money because of an alleged shortage at the conclusion of Bartley's first term. The trial court had directed the verdict for the full amount of the shortage shown at the close of the second term. This court held the ruling was erroneous and prejudicial and that it required the submission to the jury the question of whether some of the money was taken by Bartley in his first term. It does not plainly appear in this case whether there was other evidence which might substantiate such taking in the first term but certainly there is nothing in the opinion to indicate that the other evidence before the court would refute these admissions.

Other cases have been before this court in which admissions have been held sufficient to make a prima facie case. In Orchard & Wilhelm Co. v. Petersen, 127 Neb. 476, 256 N. W. 37, the admissions of an employer made in a report of an accident to the compensation commissioner were held to be sufficient to prove how, when, and where the injury occurred. See, also, with the same effect, Meyer v. Platte Valley Construction Co., 147 Neb. 860, 25 N. W. 2d 412.

These cases quite clearly show that the rule in the first paragraph of the quotation taken from 31A C. J. S., Evidence, § 382, p. 939, has been adopted by this court but we think it by no means excludes the rule conversely set out in the second paragraph if it is applicable to the case at hand. We deem that also should govern in a proper case, and must be considered with respect to the one before us.

The decisions in the following cases lend support to the cited rule that circumstances or other evidence in the case may render such admissions alone insufficient to establish that for which they were offered in evidence. They all come from other jurisdictions.

The case of Phillipson v. Moore, 204 App. Div. 140, 198 N. Y. S. 290, was one to recover damages for personal injuries suffered by the plaintiff when he was run down by the defendant's automobile which was being operated by the defendant's chauffeur. The question to be determined was whether the automobile was being operated at the time of the accident for the benefit of the defendant, owner of the car, or whether it was being used on private business of the chauffeur. The court said: "On the issue thus presented the plaintiff rested his affirmative case, not upon the presumption that arises out of the ownership of the car (Potts v. Parde, 220 N. Y. 431), but upon the admission contained in the original answer that the car at the time of the accident was used in the defendant's business." There was evidence in the case by the defendant and by the defendant's chauffeur to the effect that the chauffeur was driving to meet his own brother and that his direction of travel and whereabouts at the time clearly showed that he was not in his employer's business. The plaintiff undertook to meet this evidence by testifying that the chauffeur told him that his boss had given instructions for him "to go up street" and that he supposed he was doing so for his boss. The court in considering this evidence stated: "It appears from the colloquy above detailed that the idea that McAuliffe was going up town on his 'boss's business' originated with counsel and that although the plaintiff swore that what the witness McAuliffe said, all he said, was, 'I had to go up street and that is how he hit me,' counsel persisted until his own phraseology was used. The plaintiff's evidence on the most vital issue in the case is so contradictory as to rob it of credibility. If we discard it as we think we

should there is nothing left but the admission in the original answer. We think in itself as evidence it is not of such substance as to make up the preponderance of the evidence and support alone the burden of proof cast upon the plaintiff. As between the plaintiff and defendant the evidence of McAuliffe is that of a disinterested witness. He is corroborated in his version that he was using the car on an errand of his own by the unshaken testimony of the defendant. Under such circumstances no liability rests upon the defendant for the plaintiff's injury. We think the verdict is clearly against the weight of the evidence and should be set aside and a new trial granted."

The case of Brooks v. Rubin (Mo.), 293 S. W. 2d 295, is an action for injuries sustained by the plaintiff, a minor of 15 years, when a railing on a stairway gave way, based on the theory that the landlord-tenant relation existed between defendants and the plaintiff's parents. It was held that the direction made by one of the defendants to fix the railing thereafter was insufficient under the plaintiff's evidence to constitute an admission from which the jury could reasonably find that the defendants retained control of the stairway. The court, in its opinion, stated: "Consequently the question is whether Rubin's direction to unknown persons, one of whom could have been Herman Strecker's brother, to fix the railing as best they could, was, considered in the light of all of plaintiff's evidence, sufficient to make a submissible case on the issue of retention of control. We have the view that it was not. That, for these reasons. It was admitted that defendants were the lessees of the entire premises and the lease under which they held was put in evidence by plaintiff. That lease showed that defendants as lessees had an obligation to the owners (irrespective of any obligation to plaintiff) to keep the entire building in good repair. Thus, Joseph Rubin had a duty to the owners to see that the stairway was repaired. Furthermore, as we have noted, plaintiff's evidence nega-

tived the proposition of the defendants' liability by virtue of any duty to maintain the common porch as plaintiff's landlord. Under those circumstances, we are of the opinion that defendant Rubin's direction to fix the railing was insufficient, under all of plaintiff's evidence, to constitute an admission from which a jury reasonably could find that defendants retained control of the stairway."

The case of United States v. O'Rourke, 125 F. Supp. 769, was a habeas corpus proceeding to obtain the release of a petitioner who was held under a warrant for his deportation as an alien. The government relied upon an admission in a statement given to an investigator in 1949 wherein the petitioner admitted that he was born in China. The court reviewed all the evidence and found that the opposing evidence in the light of surrounding circumstances indicated without doubt that the admission was not true. It laid down the following rule: "In absence of opposing evidence or in light of surrounding circumstances, admission against interest may be sufficient to establish fact admitted, but other evidence in the case may render the admission wholly insufficient to establish such fact."

The case of Giles v. Herzstein, 49 N. M. 41, 156 P. 2d 160, was an action to recover the sum of $1,950 alleged to be owing as one-half the profits made in a joint venture in buying and selling cattle. A judgment was entered upon the verdict of the jury for $775 in favor of the plaintiff and the defendant appealed. The court held the admission of the defendant that "these cattle made some $3,940.00," was without substantial support in the evidence and a judgment was ordered entered for the defendant.

The decisions in other cases which lend support to the same rules of evidence include: Skene v. Marinello Co., 270 F. 701; Engle v. Clarke (Ky.), 346 S. W. 2d 13; Potter v. Robinson, 233 Iowa 479, 9 N. W. 2d 457; Procell v. Peerless Insurance Co. (La. App.), 137 So. 2d 447.

We have hitherto determined that the evidence in the case aside from the admissions in this petition is insufficient to raise a reasonable inference that the alleged acts of negligence were the proximate cause of the fire. The trial was of considerable length. Testimony was had on behalf of the plaintiffs and the defendants and has been hitherto summarized by us. The petition was filed in another suit against the codefendant Service Junk Company in which it was alleged to be an independent contractor. We hold in the face of the other evidence presented that the admissions contained in this petition are not sufficient to make a prima facie case to show the causation of the fire under the circumstances disclosed. There is in the direct evidence concerning the fire nothing to sustain or strengthen the admission. It seems to be directly contrary to the inferences raised by the other evidence taken as a whole.

The plaintiffs in the cross-appeal assign error to the trial court in not receiving in evidence further admissions made by Myrll Meeks, president of Meeks Rent-A-Car prior to his death, in a statement given to arson investigator Mulcahey which were sought to be entered in evidence. The plaintiffs in their cross-appeal refer to some seven pages of evidence stating that they had made an offer separate as to each question and answer and contending that at least some of the statements should have been admitted.

The only objections to questions which were sustained by the trial court which are pointed out with any particularity as erroneous concern the statements of Meeks to Mulcahey giving his opinion as to the cause of the fire. It is quite plain that the statements Meeks gave were his opinions only in answer to questions as to what his opinion was in each case.

In Kellner v. Whaley, 148 Neb. 259, 27 N. W. 2d 183, it was said: " 'To be competent as an admission a statement must be one of fact, and a statement which is a mere opinion or conclusion or a conclusion of law is as

a rule inadmissible.' 31 C. J. S., Evidence, § 272, p. 1025." His opinion of the cause of the fire given solely as an opinion should not have been admitted and the contention of the plaintiffs is without merit.

We find that the evidence with respect to Mid-City Motors is also insufficient to show causation of the fire and its motions for dismissal made at the close of plaintiffs' evidence and at the close of all of the evidence should have been sustained and that the motion for judgment notwithstanding the verdict should have been granted.

It follows that the judgment dismissing the action as to the defendant Service Junk Company should be and is affirmed, and that the judgment recovered against the Mid-City Motors should be and is vacated and its motion for judgment notwithstanding the verdict should be and is sustained.

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

WHITE, C. J., dissenting.

I respectfully dissent from the majority opinion in this case. The evidence established that employees of the Service Junk Company were using an acetylene cutting torch, or torches, while cutting some steel pipe in close proximity to a false ceiling on the main or top floor of the building involved. There was evidence that the cutting took place as close as 4 or 5 inches to the celotex material in the false ceiling. There is further evidence that there were brackets that were holding the pipes and that these brackets were fixed to wood which was positioned above the ceiling material. It is undisputed that the ceiling material of celotex would, if touched by a spark, smolder. It clearly appears in the evidence that this material, once ignited, continues to burn like a punk material and would hold heat for a long period of time. The acetylene torch cutting operation took place as late as 3 p.m. on the afternoon prior to the fire. The fire occurred sometime later. The first alarm was turned

in at 1:41 a.m., about 10½ hours later. Members of the Omaha fire department first observed it confined to the roof of the center portion of the building at about the same location as the employees of the Service Junk Company were last seen working. One witness testified that when he first entered the building he saw the fire and "it was like a glow towards the ceiling of the building." The same witness, a retired captain of the fire department, when asked if he saw any fire down on the floor answered, "Not directly on the floor, I never; towards the ceiling, I did, it was glowing there." The flame of an acetylene torch may be as high as 5,000 degrees Fahrenheit. The melting temperature of steel as was present in the steel pipes is around 2,600 to 2,700 degrees Fahrenheit. The ignition temperature of the ceiling material, which could burn like a punk, was somewhere around 1,500 degrees Fahrenheit. The ignition temperature of wood is generally around 700 degrees Fahrenheit. Ignited steel sparks from the use of an acetylene torch have ample heat to ignite material such as the celotex material in the false ceiling. During the cutting operation, steel sparks were observed flying in all directions, from the point of cutting, like a "Roman candle." Material at a distance as far as 2 feet could be ignited by steel sparks as their temperature can be from 1,400 degrees Fahrenheit on up. The evidence shows that the workmen did not use a shield to protect the roof or the ceiling from sparks; that the pipe ran up through the false ceiling of celotex; that before starting to cut, the workmen made no examination of the ceiling material to determine if it were flammable; that no examination was made or ascertainment made as to what types of materials or what might be in the attic above the false ceiling; that they made at least two cuts in the pipe close to the ceiling; and that the cutting was within 4 to 5 inches of the celotex material in the false ceiling.

In evidence in this case are the following questions and answers given by an expert mechanical engineer:

"Q. Professor, going to this ceiling material that you removed from the Meeks building, did you make any tests on that material to determine if it was flammable, if it would burn? A. Yes, I did. Q. And what were your findings in that regard? A. That material normally will not flame, but under the right conditions it will smoulder; that is, you hold a fire up to it, and as long as the fire is up against it, you will note some flame, but if you remove that fire, *it will continue to burn like a piece of punk,* and occasionally if that burning process continues and comes into contact *with dust or paint or something on that order that may be on the surface of such material, you occasionally get a burst of flame. But otherwise under the right conditions it can continue to smoulder for long periods of time.*" (Emphasis supplied.)

The pipe that was being cut was fairly close to the center of the building. Fire captain James B. O'Brien, on arrival at the scene, observed that it seemed as though the blaze was toward the middle and upper area of the building. Another fire department employee also placed the fire in this area.

Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. The law does not require that other possibilities of causation be negatived. All the law requires is that the inferences from the facts shall indicate with reasonable certainty the negligent act charged. Howell v. Robinson Iron & Metal Co., 173 Neb. 445, 113 N. W. 2d 584; Gilliland v. Wood, 158 Neb. 286, 63 N. W. 2d 147; Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701. The pertinent rule as applicable to this case is stated in Howell v. Robinson Iron & Metal Co., *supra,* and was evoked with reference to the facts about as similar as one can find to those in the case at bar as to causation of a fire. Therein it was stated: "The true rule as applied to this case, as is made clear by the cases cited herein, is that if *different minds may draw different conclusions* or inferences from

the adduced evidence *as to whether or not it has been shown with reasonable certainty that the fire was caused* by the negligent acts charged, the matter at issue must be submitted to a jury." (Emphasis supplied.)

I will not burden this dissent with a close recital of all of the evidence in the Howell case, *supra*. It is a recent case and the opinion was written by Judge Yeager. In that case, the court held that there was no direct evidence as to what caused the fire and none whatever as to the specific location of its beginning. In this case, we have facts from which it can reasonably be inferred that the area in the building from which this fire was originated was the same area in which the cutting operation with the acetylene torches was performed. In the Howell case, *supra*, the fire was caused by the use of an acetylene torch in a wood and concrete building in Omaha, Nebraska. The walls were of cardboard material and the acetylene torch operation set the cardboard material on fire, or at least the court held that circumstantially the jury could infer such to be the fact. It seems to me, within the meaning of the above rule, that different minds could draw different conclusions from this evidence as to *whether or not it has been shown with reasonable certainty* that the fire was caused by the acetylene torch. It seems that the true purport of the majority opinion is to analyze the evidence and come to a conclusion factually upon the evidence presented that *the greater weight of the evidence* is with the inference that the fire must have been caused from some other unexplained and undefined possible source. The real point is that different minds, considering the common experience of mankind, could draw different reasonable conclusions or inferences as to *whether or not it has been shown with reasonable certainty* that the fire was caused by the acetylene torch operation happening at 3 p.m. the previous afternoon.

The only difference that I can see between the Howell case, *supra*, and the case at bar is the length of time

that elapsed, it being about 3 hours in the Howell case and approximately 12 hours in the case at bar. But, the evidence is that *the celotex material in the false ceiling could smolder for an indefinite period of time.* I fail to see where the exact point of time that it came into contact with other material that burst into flame could be particularly significant. The point is that there is a probable cause and connection between the two events because of the continued smoldering intensity of the temperature in the punk material. The significance of the time elapse is for the jury. The authorities support this course of reasoning. In 22 Am. Jur., Fires, § 47, p. 625, it is stated as follows: "Time, distance, and the fact that the fire burned over intervening tracts of land do not affect the question of the defendant's liability, except in so far as they relate to the probability of an intervening cause * * *. In the determination of the proximate cause, no arbitrary limits can be fixed as to nearness in point of time * * * from the original starting of the fire. Much more important are the closeness of causal connection, the natural sequence of the original wrongful act, and whether the resulting loss should or might have been anticipated."

The pertinency of the above language is apparent. The smoldering material, the negligent production of sparks in the operation of the acetylene torch in close proximity to the celotex material, set up a chain of causation. I do not think that the arbitrary selection of a time period should be the controlling consideration. If this be true, at what point of time then would we say that it was a short enough period that the jury would be allowed to come to the conclusion that the fire was started by the acetylene torch?

The majority opinion apparently holds that the fact that a door was unlocked and that a safe was open gives rise to a reasonable inference that the fire was caused by some other person or agency. I submit that this is speculation and conjecture and not the basis of reason-

able inference. The same argument was rejected in Howell v. Robinson Iron & Metal Co., *supra.*

The case should be submitted to the jury because of the admissions against interest made by the defendants. The defendant Mid-City Motors, Inc., in another action pleaded that the acetylene torch cutting operation caused the fire. This pleading was introduced in evidence as an admission against interest. Outside of the factual evidence introduced in the case, which has been discussed, this admission alone was sufficient to carry the case to the jury. The majority opinion discusses at length the significance of an admission against interest of this type. It is not questioned that the admission was properly admitted in evidence, and the majority opinion does not so hold. The quotations from Corpus Juris Secundum and the other cases cited in the majority opinion simply hold that an admission against interest of this type is not conclusive and it may be rebutted by other evidence. With this conclusion and the holdings of these cases, I do not disagree. But, the affirmative evidence introduced by the plaintiffs, as set out herebefore in this dissent, is certainly consistent with and supports the admission against interest that was offered and received against the defendants in this case. It surely does not serve to rebut it. But, even assuming that it does tend to rebut it, it would still be a question for the jury to weigh the admission against interest together with all of the other evidence as to determination of the negligence of the defendants and the proximate cause of the fire.

The majority opinion holds that the expert witness called by the plaintiffs could not answer a hypothetical question eliciting his opinion as to the cause of the fire. The sufficiency of the expert's foundation was not questioned. The testimony was rejected because the witness could not be permitted to testify as to an ultimate fact as this was an invasion of the province of the jury. I think that this testimony is admissible and the doctrine

announced in the recent case of Petracek v. Haas O.K. Rubber Welders, Inc., 176 Neb. 438, 126 N. W. 2d 466, applied. In that case, it was said: "Ordinarily it is error to permit an expert witness to give his opinion on the ultimate fact to be determined by the jury. * * * 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.*" (Emphasis supplied.)

This court is faced with a jury verdict finding causation in this case. It is not suggested that it was not properly instructed on the issue of circumstantial evidence.

It seems to me that we are substituting our judgment on the weight of the circumstantial evidence rather than a determination as to whether there is sufficient evidence for the jury to weigh.

I am authorized to state that Judge Spencer and Judge Boslaugh concur in this dissent.

BANKERS LIFE COMPANY, A CORPORATION, APPELLEE, V. RAYMOND L. PETERSON, APPELLANT, IMPLEADED WITH MARY J. PETERSON ET AL., APPELLEES.

132 N. W. 2d 377

Filed January 22, 1965. No. 35772.

1. **Mortgages.** The burden is on the mortgagee in a foreclosure action to make prima facie proof of a controverted allegation that no proceedings at law have been had for recovery of the indebtedness.
2. **Appeal and Error.** A motion to dismiss a cause is not a prerequisite to appellate review of the sufficiency of the evidence to sustain a decree.

Appeal from the district court for Dawes County: ALBERT W. CRITES, Judge. Reversed and remanded.

Charles A. Fisher and Charles F. Fisher, for appellant.

Bump & Bump, Gordon C. Shaffer, Jr., and John B. Henley, for appellee Bankers Life Co.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. FLORY and ROBERT L. SMITH, District Judges.

SMITH, J.

A decree foreclosed a real estate mortgage. On appeal we conclude that there must be a new trial because plaintiff has not proved that no proceedings at law for recovery of the indebtedness had been had.

Plaintiff's allegation that no proceedings at law had been had for recovery of the mortgage indebtedness was required, section 25-2142, R. R. S. 1943, and was denied. A mortgagee must establish this negative averment, United Benefit Life Ins. Co. v. Holman, 177 Neb. 682, 130 N. W. 2d 593, but he may do so by circumstantial evidence. Lyons v. Allen, 88 Neb. 41, 128 N. W. 652; Nielsen v. Central Nebraska Land & Investment Co., 87 Neb. 518, 127 N. W. 897.

The bill of exceptions contains only circumstantial evidence on this point. The promissory note is unblemished by filing marks or other indication of its merger in a judgment. The parties there are litigants here. Counsel stipulated the total sum due and owing on the note and mortgage at the time of trial. Defendants offered no evidence.

The absence of filing marks on a promissory note is not alone sufficient evidence. Woolworth v. Sater, 63 Neb. 418, 88 N. W. 682; Kirby v. Schrader, 58 Neb. 316, 78 N. W. 616. Add a stipulation of indebtedness and a deficiency in proof remains. See Great Western Commission Co. v. Schmeeckle, 99 Neb. 672, 157 N. W. 612. Prima facie proof was made in the Nielsen case, *supra*, but the result was influenced by the effect of the statute of limitations upon the remedy at law—an element not present here. Plaintiff has not satisfied its burden of proof.

Plaintiff urges us to ignore this error because at the trial in the district court defendants lodged a defective motion to dismiss the cause. Without reference to the motion we find no merit in the argument. On appeal the sufficiency of the evidence to sustain the decree is attacked. A motion to dismiss is not a prerequisite to review a failure of proof. See, Union Central Life Ins. Co. v. Burgess, 131 Neb. 20, 266 N. W. 898; State ex rel. Spillman v. Citizens State Bank, 115 Neb. 271, 212 N. W. 616.

The judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Note: Since this case was submitted, Robert L. Smith, District Judge, has become a Judge of this court.

IN RE LACINDA MARIE GREEN, A CHILD FIVE YEARS OF AGE. SHEILA ANNE GREEN, APPELLEE, V. THOMAS LEE GREEN ET AL., APPELLANTS.
132 N. W. 2d 380

Filed January 22, 1965. No. 35774.

1. **Habeas Corpus: Infants.** A writ of habeas corpus is a proper remedy to be used in determining the custody of an infant as between the mother and the paternal grandparents.
2. **Habeas Corpus.** Such proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice.
3. **Pleading.** While the amendment of pleadings is ordinarily a matter of discretion with the district court, the failure to permit the respondent to make a proper verification when permission is requested is an abuse of discretion.
4. **Habeas Corpus: Infants.** Once a proceeding for habeas corpus has been started for the custody of a minor child, it is an action in rem, and the natural father of the infant, whether or not he has the actual custody of said child, is a proper party, entitled to file pleadings and to be heard in said case.

Appeal from the district court for Dawes County: ALBERT W. CRITES, Judge. Reversed and remanded.

Charles A. Fisher and Charles F. Fisher, for appellants.

Reddish, Fiebig & Curtiss, for appellee.

Heard before WHITE, C. J., CARTER, MESSMORE, BOSLAUGH, and BROWER, JJ., and POLLOCK and SIDNER, District Judges.

SIDNER, District Judge.

Sheila Anne Green, appellee herein, instituted a habeas corpus action in the district court for Dawes County to obtain custody of her 5-year-old daughter, LaCinda. Appellants herein are Thomas Lee Green, father of the child and husband of the appellee Sheila Anne Green, and Foster Green, paternal grandfather of the child, and his wife, Dorothy Green.

The application for a writ alleged that a divorce suit was pending in Box Butte County between Sheila and Thomas; and that on the 28th day of December 1963, Sheila, who had had the exclusive custody of LaCinda for the last 2½ years, entrusted said child with Foster Green and his wife for a 2-day visit. This action also made Thomas Lee Green a respondent, and alleged that either Foster Green and wife, or Thomas Lee Green were holding said minor child, and that she was entitled to the immediate custody of her.

This petition was filed January 11, 1964, with return date January 15, 1964. The writ was served on Foster Green and wife, but was returned for lack of service on the respondent Thomas Lee Green.

On the return date, after various motions were filed and disposed of by the court on behalf of the respondents, they filed a return to the writ, which was verified by Foster Green and Dorothy Green, and, while it was signed on behalf of Thomas Lee Green, it was not verified by him. The child was also produced into court. The return alleged that the petitioner, Sheila Green, was an improper party to have the custody of said minor child, alleging, among other things, that she was

living in an adulterous relationship. At the time of the hearing the following coloquy took place:

"MR. FISHER: May the record show that Foster Green and Dorothy Green, and Thomas Lee Green brought the child to court.

THE COURT: Very well. The record shall so show.

MR. CURTISS: And Thomas Lee Green, Your Honor, is not in court.

MR. FISHER: Well, he is here, Your Honor—he is in —he has filed a return of the writ.

MR. CURTISS: To which we object, he did not make a return to the writ. He is not here. He could be here.

THE COURT: Put this all in the record. Now, you are making that in the form of a motion, Mr. Fisher?

MR. FISHER: Yes.

THE COURT: Overruled. It is the order of this court that the custody, the immediate custody of the child, shall be awarded to the relator or Sheila Anne Green.

MR. FISHER: Now, Your Honor, we ask leave, before you make your order to introduce proof in support of the return.

THE COURT: The return isn't any good, Mr. Fisher.

* * *

THE COURT: Now, it is in the same condition as though there had been a motion to strike the pleading from the file. Once you have done that if the—the ruling has been made that the writ is not proper then nothing remains to offer evidence in support of, and the petition stands unchallenged.

MR. FISHER: All right. You are so ruling—holding that this has the same effect as striking the writ—the return of the writ from the files.

THE COURT: Well, it has that effect. It is actually my holding that there is no proper return—that no proper return has been made to the writ.

MR. FISHER: And we are not permitted to amend?

THE COURT: I don't see it is proper to do so.

MR. FISHER: We ask leave to do so, and you so deny it?

THE COURT: That is correct. Let the record so show."

From this testimony, the only motion made, or apparently made, to the return of the writ was that Thomas Lee Green was not there. We therefore must assume that this constituted the basis for the ruling of the court that there was no proper return to the writ. This court has repeatedly held that the writ of habeas corpus is a proper proceeding for the deciding of controversy regarding the custody of infants. Osterholt v. Osterholt, 173 Neb. 683, 114 N. W. 2d 734. And particularly it has held in the case of Raymond v. Cotner, 175 Neb. 158, 120 N. W. 2d 892, that it is a proper place to determine this right, even between a parent and a grandparent. But, of course, these cases hold that the parent is ordinarily entitled to the custody, and to show that the parent is unfit rests heavily upon the person making such a claim, but the action is still one to be determined by the court from the evidence.

Since the father of the child would naturally be interested in the custody of the child, he was a proper party to be made respondent in this action, and although not served with summons, he had a right to be heard. The only defect appearing in the record as to his return was that it was not verified. In Osterholt v. Osterholt, *supra,* it is stated: "We have repeatedly held that the writ of habeas corpus may be used in controversies regarding the custody of infants. Such proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice. In re Application of Reed, 152 Neb. 819, 43 N. W. 2d 161."

In the case of Kleinknecht v. McNulty, 169 Neb. 470, 100 N. W. 2d 77, the following rules are set forth concerning the amendment of pleadings: "The refusal to permit an amendment which is proposed at an opportune time, and which should be made in the further-

ance of justice, is an abuse of discretion on the part of the trial court. * * * The law of amendments should be liberally construed in order to prevent a failure of justice. * * *."

We therefore hold that the district court should have permitted the amendment to the return on behalf of Thomas Lee Green from the record as shown. Also, the issues having been made by the return of Foster Green and his wife, they should have been permitted to introduce evidence in support of their return to the writ. Since an offer was made to do this, and refused by the court, this also constitutes error.

The judgment of the trial court is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

MESSMORE, J., not participating.

TODD BROTHERS, A CO-PARTNERSHIP, APPELLANT, V. FEDERAL CROP INSURANCE CORPORATION, APPELLEE.

132 N. W. 2d 778

Filed January 22, 1965. No. 35776.

1. **Contracts.** In the absence of fraud, a person who signs an instrument without reading it, when he can read and has the opportunity, cannot avoid the effect of his signature merely because he was not informed of its contents.
2. ———. A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration.
3. **United States: Principal and Agent.** The government is not bound by unauthorized acts of its agents.
4. ———: ———. Anyone dealing with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within the scope of his authority.

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

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellant.

John W. Douglas, Theodore L. Richling, Morton Hollander, David L. Rose, Duane L. Nelson, and William A. Geoghegan, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and POLLOCK and SIDNER, District Judges.

POLLOCK, District Judge.

This is an action to recover upon a corn crop insurance policy for drought damage claimed in excess of indemnity paid. The question is how to determine the amount of the loss.

The plaintiff Todd Brothers, a co-partnership consisting of Richard Todd and his brother Raymond Todd, seeks recovery based upon determination of the loss by the method provided in the policy. The defendant Federal Crop Insurance Corporation claims that the parties modified the insurance contract by entering into a "Soil Bank Agreement" wherein they agreed upon a different method of determining crop loss. The defendant claims it paid all indemnity due plaintiff. The parties waived a jury and the action was tried to the court. Plaintiff appeals from a judgment for the defendant.

The defendant, an agency of the United States Department of Agriculture, insured plaintiff's 1954 corn crop against loss due to drought and other unavoidable causes. The contract was "continuous," and provided that it should be in effect for each succeeding year until terminated by one of the parties. It provided that the insurer could release insured acreage to enable it to be put to other use. The amount of the coverage per acre was "progressive," depended upon whether the acreage was released, and, like the fixed price per bushel for

evaluating production, was to be "shown on the county actuarial table on file in the county office."

In 1956 the plaintiff insured 250 acres of corn crop and paid a premium of $800. It has been determined that plaintiff's coverage was $25.20 per acre on 137 acres of corn, and $28 per acre on 118.8 acres of corn, and that the total coverage was $6,778.80. The planted acreage exceeded the insured acreage, and the amount of the loss is reduced proportionately.

The Federal Soil Bank Act, a part of the Agricultural Act of 1956, became effective May 28, 1956. It recites that it was designed to assist farmers to divert a portion of their cropland from the production of excessive supplies of agricultural commodities. It authorizes the Secretary of Agriculture to enter into agreements with producers whereby they are compensated for taking out of production acreage previously devoted to producing corn or other commodities. 7 U. S. C. A., §§ 1821, 1831, pp. 443, 448.

The defendant adopted a policy of releasing insured acreage upon request, irrespective of crop damage, provided the insured agreed to an adjuster's appraisal of potential production. By a memorandum dated July 3, 1956, the defendant announced that the volume of such requests was burdensome to process because of unfavorable crop conditions in some areas, and it authorized release of insured acreage without actual inspection, provided the insured signed a preliminary inspection report on form 63 containing the following: "It is understood and agreed that the appraised potential production per acre for the acreage released for compliance with the Soil Bank * * * shall be the average production per acre (actual and appraised as provided in the contract) for the acreage on the unit not placed in the Soil Bank."

This is what the parties call the "Soil Bank Agreement." The defendant's district supervisor testified that the agreement was printed on form 63 by a print-

ing company, that a pad of four forms was run through the press at a time, and that the forms so printed came into common use around July 20, 1956.

Defendant's form 63 is entitled "Inspection Report and Claim." The words "Preliminary" and "Final" near the top of the form are each followed by a printed square to permit an indication of whether the form is being used as a preliminary or a final report. If the form is executed before the amount of the loss can be finally determined, it is preliminary, and does not constitute a claim for indemnity. If the report is executed after the amount of the loss is determined, it is a final one, and is a claim for indemnity.

On July 27, 1956, plaintiff complained to defendant that a drought was seriously damaging its corn crop, and it requested release of part of the acreage for inclusion in the Soil Bank program. An adjuster visited the farm on the same day, and prepared an inspection report and claim on form 63. Richard Todd executed it on behalf of the partnership.

The square after "Preliminary" is crossed, indicating that the parties intended it to be a preliminary report. The square after "Final" is blank, indicating that the parties did not intend it to be a final report or a claim for determinable indemnity. All spaces are blank in column F entitled, "Appraised Production per Acre," indicating that there was no attempt to make a final determination of actual production. The form was executed in a manner indicating that 150 acres of corn in fields "A," "B," "C," and "D" were released to be placed in the Soil Bank, that 8 acres were left in the middle of each of the four fields for "Harvest and Appraisal," and that 92 acres were released for "Feed," to be cut for ensilage.

Plaintiff notified defendant when harvest of the corn was complete. An adjuster visited the farm on November 24, 1956. The parties agree that 137 acres of corn released to the Soil Bank produced an average of 1.9

bushels per acre, and that the acreage not placed in the Soil Bank produced an average of 15.2 bushels per acre.

The defendant paid plaintiff indemnity of $1,104.60, which the parties agree is full payment if the amount of the loss is to be determined by the method provided in the Soil Bank agreement. They agree that plaintiff should be paid an additional sum of $2,759.14 if the damage to the released acreage should be determined by the method provided in the policy.

The statement of the facts contained in plaintiff's brief refers to the preliminary inspection report signed by Richard Todd on July 27, 1956. It says, "When the preliminary report, Exhibit 6, was executed the provision referred to as 'Soil Bank Agreement' was not on the instrument," and it cites testimony of Richard Todd. However, on cross-examination he admitted that this exhibit containing the Soil Bank agreement had been in his possession since he signed it, and "perhaps" it would have had to be there at the time. It is obvious that the agreement was on the instrument when he signed it.

The plaintiff asserts that it is not bound by the provisions of the Soil Bank agreement because its effect was not discussed with the partner who signed it, was never brought to his attention, and he "did not even know of its presence."

In the absence of fraud, one who signs an instrument without reading it, when he can read and has the opportunity, cannot avoid the effect of his signature merely because he was not informed of its contents. J. I. Case Co. v. Hrubesky, 125 Neb. 588, 251 N. W. 169. To permit a party to admit that he signed an instrument but did not read it or know its provisions, would absolutely destroy the value of contracts. Hoshaw v. Cosgriff, 247 F. 22. It would be a dangerous innovation of contract law to hold that one is not bound by what he signs, and that that which he fails to read or understand should be read out of contracts. Adolf v. Union Nat. Life Ins. Co., 170 Neb. 38, 101 N. W. 2d 504.

Plaintiff claims that there was no new consideration for the Soil Bank agreement, and that it was invalid because the defendant failed to give timely notice thereof in compliance with sections 9 and 11 of the policy, providing as follows: "9. Life of contract, cancellation or termination thereof. * * * Cancellation may be made by either party giving written notice to the other party on or before the cancellation date which shall be the March 31 preceding the planting of the crop * * *. * * * 11. Changes in contract. The Corporation reserves the right to change the premium rate(s), insurance coverage(s) and other terms and provisions of the contract from year to year. Notice of such changes shall be mailed to the insured at least 15 days prior to the cancellation date. Failure of the insured to cancel the contract as provided in section 9 shall constitute his acceptance of any such changes. If no notice is mailed to the insured, the terms and provisions of the contract for the prior year shall continue in force."

These provisions did not restrict the right of the parties to modify the contract by mutual assent, and without giving the notice required when one-party changes were made by the insured.

There was consideration for the Soil Bank agreement, although new consideration was not required. The original contract was executory since neither of the parties had fully performed its provisions. The terms of a written executory contract may be modified by the parties thereto in any manner they choose. 17A C. J. S., Contracts, § 377, p. 433. Such a contract may even be modified by a subsequent oral agreement of the parties, and with no new consideration. Swanson v. Madsen, 145 Neb. 815, 18 N. W. 2d 217; Personal Finance Co. v. Hynes, 130 Neb. 547, 265 N. W. 541. An executory written contract may be modified by the parties at any time after its execution and before a breach has occurred, without any new consideration. O. K. Door Co., Inc. v. Lincoln Eng. Constr. Co., 174 Neb. 682, 119 N. W.

2d 153; Moore v. Markel, 112 Neb. 743, 201 N. W. 147.

The plaintiff contends that the Soil Bank agreement does not govern the method of determining the crop loss because the "inspector went out and personally looked over the acreage and made an estimate of the appraised production." The evidence does not support this statement.

The defendant's district supervisor testified that the Soil Bank agreement was used in the absence of a complete inspection and appraisal, and that where an appraisal was made, it was required to be reported in column F of form 63. The form signed by Mr. Todd was a preliminary report and it did not record any appraisal. Mr. Todd did not testify that an appraisal was made.

The original contract of insurance specified that the determination of loss should be made on the basis of actual production. Then defendant permitted release of insured acreage to the Soil Bank if the insured agreed to an appraisal. This method was relaxed to waive actual inspection provided the insured agreed to a determination of loss by the method provided in the Soil Bank agreement.

It could not be urged that the adjustor agreed to any other method of determining loss since no other agreement was authorized or would be binding upon the defendant. The government is not bound by unauthorized acts of its agents. It was said in Federal Crop Ins. Corp. v. Merrill, 332 U. S. 380, 68 S. Ct. 1, 92 L. Ed. 10, 175 A. L. R. 1075: "* * * anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. * * * even though, as here, the agent himself may have been unaware of the limitations upon his authority."

We conclude that the contract of insurance was modified in the manner claimed by the defendant, and that the defendant has paid plaintiff all indemnity due under

the contract as modified. The decision of the trial court was correct and should be affirmed.

AFFIRMED.

W. E. W. TRUCK LINES, INC., A CORPORATION, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.
132 N. W. 2d 782

Filed January 22, 1965. No. 35786.

1. **Constitutional Law: Eminent Domain.** The right of a landowner or lessee to just compensation for property taken or damaged for public use is guaranteed by the Constitution. Art. I, § 21, Constitution of Nebraska.
2. **Eminent Domain: Highways.** An abutting landowner has no vested interest in the flow of traffic past his premises. Ordinarily the mere diversion of traffic alone, regardless of the fact that a part of condemnee's land is taken for which compensation is paid, will not support a judgment for consequential damages to the remaining land.
3. ———: ———. The fact that a property owner or those desiring to enter his property may have to travel a circuitous and longer route to reach certain points because of traffic regulations changing the direction of traffic does not give rise to an injury different in kind from that sustained by the general public, and affords no basis for an action for damages.
4. **Eminent Domain: Streets.** Incidental damages sustained by an owner of real property because a street was changed from a two-way street to a one-way street adjacent to condemnee's property are the result of the exercise of the police power, and are not ordinarily compensable in eminent domain proceedings.
5. **Constitutional Law: Highways.** The right of an owner of property abutting on a street or highway to ingress and egress to and from his premises by way of the street is a property right in the nature of an easement in the street which he cannot be deprived of without due process of law and compensation for his loss.
6. **Eminent Domain: Highways.** An abutting property owner is entitled to recover the damages resulting from the destruction or material impairment by the State of his right of access to an existing highway.
7. **Streets.** The measure of the right of the owner of property abutting on a street to access to and from it by way of the

street is reasonable ingress and egress under all the circumstances.

8. **Eminent Domain: Highways.** Whether the right of access to an existing highway has been destroyed or materially impaired is a question of fact which must be determined upon the particular facts in each case.
9. **Eminent Domain: Trial.** In a condemnation action, when the evidence is conflicting, the verdict of a jury will not be set aside unless it is clearly wrong.

Appeal from the district court for Hitchcock County: VICTOR WESTERMARK, Judge. Affirmed.

Bosley & Bosley, for appellant.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., W. L. Strong, and James J. Duggan, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and POLLOCK and SIDNER, District Judges.

BROWER, J.

This is an eminent domain action brought by the State of Nebraska, Department of Roads, condemner, for the condemnation of certain real estate for the purpose of reconstructing a highway. On appeal from the board of appraisers to the district court for Hitchcock County, the condemnee W. E. W. Truck Lines, Inc., was designated as plaintiff and the condemner as defendant. They will be referred to here as they were in district court.

The property of the plaintiff taken by condemnation is described by metes and bounds in the pleading. It will not be necessary to so describe it here. The plaintiff owned a tract of land situated at the north edge of Culbertson, Nebraska. It lies south of U. S. Highway Nos. 6 and 34, hereafter called Highway No. 6, which runs east and west and abuts it. The north line of the premises is about 677 feet long. It is bounded by State Highway No. 17 on the west, and by a street of Culbertson on the east. The testimony indicates the depth of

the property as it extends to the south is not uniform. The exact course of the southern boundary is not made clear and the plat to which the witnesses refer does not show the southern portion of the tract. It appears the whole premises before the taking included about 111,000 square feet. Of this, 11,787.05 square feet were condemned, consisting of an irregular tract along the south line of the old highway on the north. The tract is approximately 590 feet long east and west and irregular in shape. It is 54.2 feet wide on the extreme east of the premises and narrows as it extends westerly, at first by steps and thereafter gradually to a point.

Plaintiff owned and carried on a commercial truckline operation with facilities for servicing the trucks on the premises. It also owned and operated thereon a retail and wholesale lumber and building supply, or hardware business.

Located towards the north of plaintiff's land were three buildings, a hardware and supply store, a machine and repair shop, and a lumber storage shed. Further south was another large building used for lumber storage also. The plaintiff operated 10 or 11 large diesel trucks, some of which with their trailers were 60 feet in length, and other smaller trucks.

Before its reconstruction Highway No. 6 was a two-lane surfaced road. The driveway then used to reach plaintiff's premises from this highway was 140 feet in width and consisted of gravel and crushed rock. This driveway was in the approximate center of the north side of the premises and extended from the end of a fence maintained just south of the highway on the west portion of the north boundary to a point north of the east side of the hardware store. Previous to the reconstruction, trucks proceeding west could turn directly to the left into the plaintiff's premises and those going east could do the same by turning to the right.

On reconstruction Highway No. 6 was made a four-lane paved road. A median was placed in the center of

the highway extending the full length of the premises. The two lanes on its north were restricted to westbound traffic and the two on the south to eastbound traffic. The new paving in each direction was 25 feet wide past the center of the premises on the north although it widened near the intersection of State Highway No. 17 on the west. The northern portion of the median curved to the left further widening the pavement before reaching State Highway No. 17 to assist drivers of westbound vehicles in executing a left-hand turn. A similar reciprocal curve existed for eastbound traffic before reaching the street on the east.

A concrete curb about 8 inches in height was placed on the south side of the paved portion of Highway No. 6 as it went past the premises. A new cement driveway giving access to the premises was constructed in the approximate center of the old 140-foot entrance to the premises and the curb curved in on each of its sides. The entrance between curbs was 58 feet wide as it left the roadway and narrowed to 31 feet on entering the premises. The result was that only vehicles coming from the west could enter the premises directly.

During the trial the jury under instructions from the court viewed the premises involved in the litigation. The trial resulted in a general verdict assessing the plaintiff's recovery at $5,000. The jury further made special findings in answer to questions propounded by the court which stated this general verdict included $2,000 on account of the actual appropriation of the land taken and $3,000 for consequential damage to the remainder.

The plaintiff appeals from an order overruling its motion for new trial made after judgment.

The alleged errors of the trial court complained of by the plaintiff are its refusal to admit in evidence testimony proffered by the plaintiff and the giving of instructions Nos. 13, 14, and 15 defining the issues to the jury. It also contends the verdict was inadequate.

The statements of plaintiff's witness claimed to have been wrongfully excluded concerned the inability of the drivers of westbound trucks and other vehicles to turn them left and drive directly into plaintiff's premises from lanes to the north of the median, or to turn west on leaving the premises because of the required directional traffic. Plaintiff contends the resulting inconvenience to the right of ingress and egress constituted a substantial special damage to the remainder of the property which was compensable. The trial court held that the State had a legal right to control traffic on the highways for the purpose of promoting safety in their use under the police power and refused to admit such evidence. In the recent case of Painter v. State, 177 Neb. 905, 131 N. W. 2d 587, which involved the right of condemnation where the State had installed such a median, this court held: "An abutting landowner has no vested interest in the flow of traffic past his premises. Ordinarily the mere diversion of traffic alone, regardless of the fact that a part of condemnee's land is taken for which compensation is paid, will not support a judgment for consequential damages to the remaining land.

"The fact that a property owner or those desiring to enter his property may have to travel a circuitous and longer route to reach certain points because of traffic regulations changing the direction of traffic does not give rise to an injury different in kind from that sustained by the general public, and affords no basis for an action for damages.

"Incidental damages sustained by an owner of real property because a street was changed from a two-way street to a one-way street adjacent to condemnee's property are the result of the exercise of the police power, and are not ordinarily compensable in eminent domain proceedings."

It is obvious the trial court's rulings with respect to the admission of the evidence were in accordance with these holdings of this court and were not erroneous.

The plaintiff's complaints with respect to the three mentioned instructions given by the court to the jury relate to the issues as stated therein and not to the precise wording thereof. The instructions are long and will not be set forth but we will confine the opinion to the objections raised.

Plaintiff contends the trial court erred in stating in these instructions that the State had a right and duty to control traffic on the highway to promote safety and an abutting landowner is not entitled to compensation for the resulting inconvenience. This objection raises the same question as the plaintiff urged with respect to the exclusion of the proffered evidence. Painter v. State, *supra,* decided these questions adversely to the contentions of the plaintiff. There was no error on this phase of the instructions.

Plaintiff also urges that the court erred by instructing in substance that certain evidence had been received concerning "islands" or "medians" and that it was not admitted as an independent item of damage but solely for the purpose of assisting the jury in determining whether the plaintiff was denied reasonable ingress and egress to and from its property, and that an owner was not entitled as against the public to access at all points on the highway's boundary although entire access could not be cut off. The jury was instructed that if it found on consideration of the evidence that the proposed access at the location was reasonable under all the circumstances shown, the plaintiff was not entitled to damages. If it found the means of ingress and egress had been substantially interfered with and that it was not reasonable under all the circumstances, plaintiff would be entitled to damages it had sustained from loss of access, to be considered with other items of consequential damages therein mentioned, all of which consequential damages including loss of access were to be considered, not as independent items of damage, but as proper factors under all the circumstances in determining the value of the

remaining land. The term consequential damages was defined and explained in other instructions as to which no objections are made.

The plaintiff urges that there is an inconsistency in the court's exclusion of evidence relating to westbound trucks being unable to turn left from the north side of the median to enter the premises and its instructions which stated that the existence of the islands or median might be considered with respect as to whether reasonable ingress and egress to the property had been denied. An examination of the evidence, however, shows the trial court admitted evidence tending to show the drivers of the longer trucks had difficulty in executing a right-hand turn when eastbound because of the proximity of the median to the curb on the south. This instruction appears to have been given to explain the purpose of this evidence.

Plaintiff contends further it was an error to submit to the jury as a question of fact to be determined as to whether or not the proposed ingress and egress to the highway was reasonable, or to instruct that if it found the proposed access was reasonable the plaintiff was not entitled to damages therefor. Plaintiff urges that as a matter of law it was entitled to access to the highway along the entire border of its property, or at least to the full 140-foot entrance that it used before condemnation.

In the recent condemnation case of Balog v. State, 177 Neb. 826, 131 N. W. 2d 402, this court in its syllabi set out these rules: "The right of an owner of property abutting on a street or highway to ingress and egress to and from his premises by way of the street is a property right in the nature of an easement in the street which he cannot be deprived of without due process of law and compensation for his loss.

"The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the circumstances.

"The right of a landowner or lessee to just compensa-

tion for property taken or damaged for public use is guaranteed by the Constitution. Art. I, § 21, Constitution of Nebraska.

"An abutting property owner is entitled to recover the damages resulting from the destruction or material impairment by the State of his right of access to an existing highway.

"Whether the right of access to an existing highway has been destroyed or materially impaired is a question of fact which must be determined upon the particular facts in each case."

We find the foregoing instructions of the trial court on the question of damages with respect to any loss of access from the plaintiff's premises to the highway are in accordance with these rules and there was no error in their being given.

The plaintiff's last assignment of error is that the verdict is clearly inadequate. Testimony of witnesses for the plaintiff valued the land actually taken at $7,000 and $6,000, respectively, and the difference in value of the remainder before and after the taking as stated by them varied from $28,000 to $21,000. One witness for the defendant valued the land actually taken at $1,500 and the difference in value to the remainder $30. Another stated the value of the land taken was $1,050, and the difference in value $450. The jury viewed the premises and its verdict was well within the limits testified to by the witnesses of the parties both as to the land actually taken and the consequential damages to the remainder. Neither are the special findings inconsistent with the general verdict. In a condemnation action, when the evidence is conflicting, the verdict of a jury will not be set aside unless it is clearly wrong. State v. Dillon, 175 Neb. 444, 122 N. W. 2d 223.

The errors assigned by the plaintiff are without merit and the judgment of the trial court should be and is affirmed.

AFFIRMED.

CENTRAL SURETY AND INSURANCE CORPORATION, A CORPORATION, APPELLANT, V. ATLANTIC NATIONAL INSURANCE COMPANY, A CORPORATION, APPELLEE.
132 N. W. 2d 758

Filed January 22, 1965. No. 35788.

1. **Actions.** The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought.
2. ———. Where none of the extraordinary powers of a court of equity are required in order to give either party the relief he seeks, and a court of law can afford complete relief, the action is one at law.
3. **New Trial.** A new trial is a reexamination in the same court of an issue of fact after a verdict of a jury, report of a referee, or a decision by the court.
4. **Actions: Trial.** Where evidence is adduced in a law action, whether by stipulation or otherwise, issues of fact are tried and determined.
5. **Trial: Appeal and Error.** Unless a motion for a new trial is filed in an action at law, review of the judgment in this court will be limited to the sole question as to whether the pleadings support the judgment.

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

Eisenstatt, Lay, Higgins & Miller, for appellant.

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

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and POLLOCK and SIDNER, District Judges.

SPENCER, J.

This appeal involves the question as to which motor vehicle liability insurance carrier should bear the loss when a leased vehicle is involved in a collision: The one which issued a policy to the owner and lessor of the vehicle, which also covers the driver-lessee, or the one which issued a policy to the driver-lessee who is responsible for the collision.

The plaintiff, Central Surety and Insurance Corporation, the appellant herein, whose policy covered the driver-lessee of the car involved in the accident, and the defendant, Atlantic National Insurance Company, the appellee who had issued a policy to the Capitol Driv-Ur-Self, a corporation, the owner and lessor of the car, jointly contributed to the settlement of an action for personal injuries brought by a pedestrian struck by the leased vehicle. This was done under an agreement that either party could subsequently litigate the question as to the nature of the coverage. Each of the companies paid its own defense costs. The parties will hereinafter be referred to by their designations in the lower court.

Plaintiff brought this action against the defendant for reimbursement for the money expended in defending and settling the action. The defendant denied the liability and filed a counterclaim for its contributions to the settlement and for its expenses in defending the action.

The case was tried to the court on a stipulation of facts. The issue tried was whether one of the policies was primary and the other secondary, or whether or not the policies jointly covered the risk. The trial court, in a judgment filed February 17, 1964, adopted the latter construction, determined neither party was entitled to contribution from the other, and dismissed both the plaintiff's petition and the defendant's counterclaim. The trial court filed an extensive memorandum delineating his views on all applicable provisions of the policies. The plaintiff did not file a motion for a new trial, but on March 5, 1964, some 17 days after the judgment entry, gave notice of appeal. It is this appeal which is now before us.

Before considering the plaintiff's assignments of error, we are met by the question as to whether or not a motion for a new trial was necessary to review them. Is this an action at law or a suit in equity? The essential char-

acter of the cause of action and the remedy or relief it seeks, as shown by the allegations of the complaint, determine whether a particular action is one at law or in equity. See Mills v. Heckendorn, 135 Neb. 294, 281 N. W. 49.

The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought. Roy v. Bladen School Dist. No. R-31, 165 Neb. 170, 84 N. W. 2d 119.

The relief sought in both the petition and in the counterclaim is the recovery of a money judgment. Plaintiff argues the action is equitable because it seeks recovery of money paid by the plaintiff which should have been paid by the defendant. The money was paid under an agreement that either of the parties reserved the right to pursue its legal remedy to determine which of the contracts with the respective insureds applied to the evidence adduced. The action involved the construction of the contracts. Each claimed that its policy provided only excess coverage. The question presented was solely the legal construction of the two policies. Where none of the extraordinary powers of a court of equity are required in order to give either party the relief he seeks, and a court of law can afford complete relief, the action is one at law.

Plaintiff argues that the issues raised by the pleadings were strictly of an equitable nature, and contends that a motion for a new trial was not necessary and would be a foolish and redundant waste of effort, serving no purpose whatever.

Plaintiff relies on the following language in Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N. W. 2d 533: "A motion for a new trial is essential to a review of alleged errors and rulings occurring upon a trial of a cause, but this rule has not been extended to every order or decision and is indispensable only in cases where questions of fact are tried and determined. The pur-

pose of a motion for a new trial is to enable the court to correct errors that have occurred in the conduct of the trial." We might also add the line following the part quoted: "A 'trial' is a judicial examination of the issues, whether of law or of fact in an action."

Krepcik v. Interstate Transit Lines, *supra*, involved a special statutory procedure, sections 25-1315.02 and 25-1315.03, R. S. Supp., 1947, and has no applicability herein. The language referred to concerns decisions on motions, demurrers, or procedural points where evidence is not adduced by stipulation or otherwise.

Section 25-1142, R. R. S. 1943, defines a "new trial" as a reexamination in the same court of an issue of fact after a verdict of a jury, report of a referee, or a decision by the court.

It is plaintiff's contention that no issues of fact were tried in this case because all facts were stipulated to by the parties. The evidence before the court was the stipulation of facts; plaintiff's demand letter; plaintiff's policy; defendant's policy; and the lease agreement on the car. The situation is no different than if the evidence had been offered in the absence of a stipulation without objection. Where evidence is adduced in a law action, whether by stipulation or otherwise, issues of fact are tried and determined.

We determine the action herein to be one at law. Unless a motion for a new trial is filed in an action at law, review of the judgment in this court will be limited to the sole question as to whether the pleadings support the judgment. See Hungerford v. Knudsen, 171 Neb. 125, 105 N. W. 2d 568. The pleadings herein will support the judgment entered. The judgment of the district court must therefore be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT E. LAURITSEN, APPELLANT.
132 N. W. 2d 379

Filed January 22, 1965. No. 35804.

1. **Criminal Law.** That part of section 28-423, R. R. S. 1943, which prohibits keeping "for sale or gratuitous distribution any secret nostrum, drug or medicine for the purpose of * * * procuring * * * miscarriage," is not violated if the nostrum, drug, or medicine is not secret.
2. ———. A penal law which is equally susceptible of more than one construction will ordinarily receive that construction which is more favorable to the accused.

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

Adolph Q. Wolf, for appellant.

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

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. FLORY and ROBERT L. SMITH, District Judges.

SMITH, J.

Robert E. Lauritsen was convicted of selling an alkaloid of ergot for the purpose of procuring a miscarriage of a pregnant woman.

Our decision hinges on the meaning of section 28-423, R. R. S. 1943, which defines this misdemeanor. The precise point is whether the drug must be secret, for the evidence compels the tacit admission by the State that Lauritsen did not sell a secret drug.

The statute generally prohibits: (1) Advertisement or distribution of "any secret drug or nostrum, purporting to be exclusively for the use of females"; (2) publication concerning "any drug, medicine, * * * or apparatus for the purpose of * * * procuring * * * miscarriage"; (3) circulation of "any obscene notice"; or (4) keeping "for

sale or gratuitous distribution any secret nostrum, drug or medicine for the purpose of * * * procuring * * * miscarriage."

We conclude that the attributive quality of the adjective "secret" in the last part of the statute extends to the substantives "drug" and "medicine." This construction fits ordinary meaning. Identical language has been said to require pleading and proof of a "secret drug, nostrum, or medicine; that is, the ingredients of it not being made known to the public." Warren, Ohio Criminal Law, p. 314.

In Gilbert v. State (in denying rehearing), 78 Neb. 637, 112 N. W. 293, the court considered a statute containing the words "any plain traveled road or track." It was said:

"It is unlawful to build a * * * fence across either a 'road or track' if that 'road or track' is plain traveled * * *."

Even if the language is equally susceptible of interpretation by deleting "secret" or by limiting its attributive quality to "nostrum," the result must be the same. In such cases that construction which is more favorable to the accused will ordinarily be adopted. See Gilbert v. State, *supra*. We find no room for an exception here.

The judgment is reversed and the cause is remanded to the district court with directions to dismiss the information.

REVERSED AND REMANDED WITH DIRECTIONS.

Note: Since this case was submitted, Robert L. Smith, District Judge, has become a Judge of this court.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS WORLEY, APPELLANT.
132 N. W. 2d 764

Filed January 29, 1965. No. 35789.

1. **Homicide: Trial.** It is the duty of the court, in a homicide case, to instruct only on those degrees of homicide as find support in the evidence.
2. **Homicide.** Manslaughter is the killing of another without malice, either upon a sudden quarrel or unintentionally while the slayer is in the commission of some unlawful act.
3. ———. Malice, intent, or purpose may usually be inferred from the shooting of another person with a deadly weapon.
4. ———. To come within the provisions of the manslaughter statute, there must be evidence that the killing was not intentional or with a design to effect death.
5. **Criminal Law: Evidence.** An incriminating statement or accusation, made in the presence of an accused, which he has the opportunity to deny, but does not, may be admissible as an exception to the hearsay rule.
6. ———: ———. Before an incriminating statement or accusation made in the presence of an accused is admissible, the evidence must establish that the defendant heard the incriminating statement.
7. ———: ———. A declaration to be competent evidence as a part of the res gestae must have been made at such a time and under such circumstances as to raise a presumption that it was the unpremeditated and spontaneous explanation of the matter about which made.

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

Young, Denenberg & Mullery, for appellant.

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

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and POLLOCK and SIDNER, District Judges.

WHITE, C. J.

On prosecution for second degree murder, the court submitted the issues of second degree murder and man-

slaughter to the jury. A conviction for manslaughter resulted and the defendant appeals.

The deceased, Ralph Gomez, died of multiple gunshot wounds in the chest inflicted about 5 p.m., April 21, 1963, in the living room of the residence of Lucille Hembertt at 1436 South Sixteenth Street, Omaha, Nebraska.

Since the fall of 1962 the defendant, single, had a continuing paramour relationship with Lucy (Lucille Hembertt). On the morning of April 21, 1963, at her residence, the defendant, Lucy, Joe Marino, Lucy's brother, and the deceased, Ralph Gomez, cooked a late breakfast or lunch and started drinking. The defendant said he consumed a fifth of whiskey during the day. Gomez was a former friend of Lucy's whom the defendant had met only once before at a tavern 3 or 4 months before. There is no evidence of any argument or trouble between the defendant and Gomez up until the time they left Lucy's house sometime in the afternoon. The defendant, Lucy, and Gomez left in Gomez' car, drove around, and then drove to an address "way out north" to visit Gomez' girl friend. Murdock Platner, an Omaha police officer, testified that the defendant told him, in a conversation the next morning, of the events preceding the shooting of Gomez. This version is substantially as follows: That Gomez, Lucy, and the defendant went to Gomez' girl friend's house who lived "way out north." At first defendant waited in the car, then went in the house, and after about 10 minutes wanted to leave. Gomez didn't want to leave but offered to drive them back home and then he (Gomez) was going to come back. The defendant said it was too far and he walked out. After awhile Lucy and Gomez drove up in the car and asked him to get in but he just kept on walking. He then took a cab to Lucy's house and laid down on the bed. He got up and took a pistol from the closet shelf, loaded it, and fired at some figurines above the window in the bedroom. He was reloading, or going to reload, the gun when he heard the doorbell ring. It was Gomez and

Lucy. He asked where they had been and said that they took long enough to get home. He sat down on the divan and was fooling with the gun. He said he thought it was jammed and that he was trying to fix it. He said he was mad, was fooling with the gun, looked up, and Gomez was standing right in front of him. Gomez came toward him, took a step toward him, and raised his hands. He said he turned around with the gun and it went off. He said he jumped off the divan, the gun went off again, and Gomez slumped down on the floor. He then called the police and an ambulance. Defendant said the gun fired twice.

The defendant's testimony on trial gave nearly the same version of the circumstances up until the time the doorbell rang when Lucy and Gomez were returning. He testified on trial substantially as follows: He remembers hearing the doorbell ring. After the doorbell rang, he got up and left the bedroom, laid the gun either on the coffee table next to the door or on the sofa in the front room, and then opened the door. Lucy and Gomez were at the front door. He didn't see Joe Marino anywhere around at that time. Gomez and Lucy came into the house, and defendant went back into the bedroom and laid down on the bed. The next thing he remembers was hearing a couple of shots—he thinks the gun fired twice and he got up and went into the living room. He saw Gomez lying on the floor in the front room and Lucy was standing above him crying. He observed the gun on the floor next to Gomez, ran over and picked the gun up, turned Gomez over a little to see what was the matter, and noticed blood running down his arm. He went to the phone and called for an ambulance and eventually the police came. He was holding the gun in his hand when the two armed officers came in the house so he ran into the bedroom.

Rodman and Sorys, two Omaha police officers, arrived at the residence in response to defendant's call. This was at about 5:30 p.m. They saw a man lying face

down in the center of the living room floor, saw Lucy standing next to the body, and saw the back of a man who ran into the bedroom to the northwest of the living room. Rodman ordered the defendant out of the bedroom, at first he refused to come out, then threw the gun out of the bedroom, and came out with his hands up. Another police officer, Hauger, testified that the defendant said in the living room as follows: "* * * she had nothing to do with it. He says, 'I did it.'" Police officer Mitchell corroborated this statement. Rodman and Sorys testified as to admissions of the defendant while they were taking him to the police station. Cartridge cases found next to Gomez' body were identified as having been fired from the gun that defendant had thrown out the door of the bedroom to the police officers.

The jury verdict acquitted the defendant of second degree murder and convicted him of the lesser included offense of manslaughter. He now makes the rather unique and novel contention that he was prejudiced because of the court's submission of the issue of manslaughter to the jury. He says he was either guilty of second degree murder or innocent. It is the duty of the court, in a homicide case, to instruct only on those degrees of homicide as find support in the evidence. Williams v. State, 103 Neb. 710, 174 N. W. 302; Garcia v. State, 159 Neb. 571, 68 N. W. 2d 151. Manslaughter is the killing of another without malice, either upon a sudden quarrel or unintentionally while the slayer is in the commission of some unlawful act. § 28-403, R. R. S. 1943. Defendant told police officer Platner that after he let Gomez and Lucy in the door that he asked, "Where you guys been, sure took you long enough to get home, * * *"; that he went over to the divan and sat down; that he was fooling with the gun, thought it was jammed and was trying to fix it; that he had some words with them; that he couldn't remember the words because he was mad; that Lucy walked past him into the bedroom; that he looked up, Gomez was standing in front of him,

took a step toward him, and raised his hands; that at that time he turned around with the gun and it went off; and that when he jumped off the divan it went off again and Gomez started slumping down and falling to the floor. We believe this evidence alone was sufficient for the jury to reach a conclusion that the killing occurred upon a sudden quarrel and in the heat of passion. The lack of intent, as well as intent itself, is a matter peculiarly within the jury's province. Its presence or absence usually must be inferred from all the circumstances. It is seldom susceptible to direct proof.

The court also instructed the jury that the defendant could be found guilty of manslaughter if he shot and killed Gomez while in the commission of an unlawful act of assault and battery. From the same circumstances set out above, the jury possibly could have found that the defendant assaulted Gomez with the weapon in his hand without necessarily rendering the commission of the homicide intentional. Malice, intent, or purpose may be inferred from the shooting of another person with a deadly weapon. But not every assault with a deadly weapon in hand is necessarily conclusive proof of intent or a design to effect death. To come within the provisions of the manslaughter statute, the killing must not have been intentional or with a design to effect death. See, 40 C. J. S., Homicide, § 67, p. 933. The evidence in this case would clearly sustain a verdict of second degree murder. But, this court cannot say as a matter of law, under the circumstances, that intent or a design on the part of the defendant to effect death existed. The question of whether he was engaged in an assault on the deceased, and whether it was done with the intent to kill, is peculiarly within the province of the jury. And, we fail to see how the defendant was prejudiced when the jury was given the opportunity to find that the deceased was killed by the discharge of the defendant's gun but without the intent or design to kill.

Police officers, Rodman and Sorys, arrived at the

scene about 5:30 p.m. When they came into the living room, the defendant was going into the bedroom to the northwest. Lucy was standing by the body in the living room. Officer Rodman was permitted to testify, over objection that it was hearsay, as follows: "Q. What did you observe about her? A. Well, she was standing there crying and I asked her what happened and she in turn says—Mr. Denenberg: Just a minute, object to any hearsay testimony. The Court: Overruled. Q. You may answer. A. I says, 'What happened?' and she says, 'He is in the bedroom.' At this time, my partner, I said to him, it was either the man who did this or the man who shot him, and she says, 'Yes,' and she pointed to the bedroom which I had seen the man running in."

At the time this statement was made defendant was in the bedroom to the northwest. The State admits that this testimony was hearsay, but says it is admissible as an admission against interest. An incriminating statement or accusation, made in the presence of accused, which he has the opportunity to deny, but does not, may be admissible as an exception to the hearsay rule. Pierce v. State, 173 Neb. 319, 113 N. W. 2d 333; Oakley v. State, 125 Tex. Cr. App. 258, 68 S. W. 2d 204. See, 40 C. J. S., Homicide, § 252c, p. 1199. But, there is no proof that the defendant heard this oral statement. We cannot infer it from his presence in an adjoining room. The distance between the parties, the direction Lucy was facing when she made the purported statement, and whether the door to the bedroom was closed or not are matters not established by the evidence. Lucy did not testify and the defendant was not cross-examined as to whether he heard this statement. We can only conjecture that he heard it and that therefore it was made in his presence. It was clearly inadmissible because of lack of sufficient foundation. Nor is it admissible as part of the res gestae. The statement was made after the police officers arrived. There was ample opportunity for reflection and formulation of the

content of the statement. The statement could not be considered as the act speaking through the person's words. The elements of lack of premeditation and spontaneity are absent. See Gain v. Drennen, 160 Neb. 263, 69 N. W. 2d 916. We conclude that the admission of this testimony was error requiring reversal of this judgment.

Defendant, citing Escobedo v. Illinois (June 22, 1964), 278 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, insists the conversation with police officer Platner the next morning, some 14 to 16 hours after the arrest, is inadmissible. He doesn't assert the admissions in this conversation were involuntary, but claims at this time he should have been advised of the right to assistance of counsel and of his right to remain silent. In Escobedo the "critical question" was whether, "*under the circumstances, the refusal by the police to honor petitioner's request to consult with his lawyer* during the course of an interrogation," constituted a denial of the constitutional right of counsel. (Emphasis supplied.) The circumstances were entirely different in Escobedo. Among other differences, in Escobedo, defendant had a lawyer and made repeated requests to consult him. The lawyer was present on the premises and made repeated requests to consult his client, all of which requests were denied. None of these controlling elements, present in Escobedo, are present in this case. It seems that the court in Escobedo emphasized the offensiveness of the aggregate particular circumstances as compelling the court's holding. Escobedo does not reach the present case. To hold otherwise would deny the State the right and opportunity to properly investigate the circumstances of a homicidal killing. We hold that there was no error in the admission of this testimony.

For the reasons given, the judgment is reversed and the cause remanded for a new trial on the original information for second degree murder.

REVERSED AND REMANDED.

DALE ELECTRONICS, INC., APPELLANT, V. COPYMATION, INC., ET AL., APPELLEES.
132 N. W. 2d 788

Filed January 29, 1965. No. 35827.

1. **Corporations: Process.** Before any state can subject a foreign corporation to the jurisdiction of that state such corporation must have either expressly consented to such jurisdiction or must have done sufficient business therein to constitute a submission to such jurisdiction.
2. ———: ———. No all-embracing rule can be laid down as to just what constitutes the doing of sufficient business in a state by a foreign corporation in order to subject it to process of that jurisdiction. Each case must necessarily be determined by its own facts.
3. ———: ———. The filling of orders solicited by an independent contractor does not bring a foreign corporation within the orbit of doing business in Nebraska sufficient to warrant service of process under section 21-1201, R. R. S. 1943.

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

Haney, Walsh & Wall, for appellant.

Robert L. Berry and Kennedy. Holland, DeLacy & Svoboda, for appellee Copymation, Inc.

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

SPENCER, J.

The sole question involved in this appeal is whether the district court erred in sustaining a special appearance filed by Copymation, Inc., an Illinois corporation.

The appellant, Dale Electronics, Inc., hereinafter referred to as Dale, brought this action against Copymation, Inc., hereinafter referred to as Copymation, and Standard Blueprint Company, a Nebraska corporation, hereinafter referred to as Standard, to recover damages for alleged breach of warranty of fitness of use of a copy machine manufactured by Copymation and sold to Dale by Standard. Service was had on Copymation under

the provisions of section 21-1201, R. R. S. 1943, by service on the Secretary of State. Copymation filed a special appearance which was sustained by the district court.

Copymation is engaged in the business of manufacturing and distributing certain jobbed items in the technical reproduction field. It has never qualified and is not licensed to do business in Nebraska as a foreign corporation, and has never appointed a resident agent or designated a registered office in the state. Copymation sells copy machines which it manufactures to users as well as to retail dealers who in turn sell them to users. It maintains a sales force on both the east and west coasts and in the southwest, but does business in the midwest only through dealers to whom it sells at wholesale. Standard is such a dealer in the State of Nebraska. Copymation maintains no office of any nature in Nebraska. Its salesmen do not call on Standard or on any prospective user in Nebraska. It has never had a show, exhibition, or demonstration of its products in Nebraska. The only advertising it does is through trade publications on a national basis. It does not participate in any advertising on a local level anywhere in the country, by sharing expenses, or otherwise.

The copy machine which is the subject of this litigation was sold to Dale at Columbus, Nebraska, by a Standard salesman on a Standard sales order. Standard, which is located in Omaha, then sent a purchase order on its own form to Copymation, with directions to ship the machine direct to Dale at Columbus. The machine was shipped by common carrier, as per instructions. When it arrived at Columbus, Standard was notified, and the machine was installed for Dale under the direction of an employee of Standard. Standard paid Copymation the wholesale price for the machine and billed Dale for the agreed price. Payment to Copymation was in no way dependent upon collection. In the event Dale did

not pay Standard, the latter was still obligated to pay Copymation.

Once a machine is sold to a dealer, Copymation maintains no control over the resale of such machine at retail, and has no connection or responsibility for its installation. The Standard employee who installed the machine had spent 5 days at the Copymation factory school to familiarize himself with the product. His transportation to the factory was paid by Standard but his expenses at the factory were paid by Copymation. This, however, is a purely voluntary service provided by Copymation to familiarize dealer servicemen with the operation and construction of its machines. Copymation exercises no control of any nature over the servicemen.

Standard does not maintain a stock of Copymation equipment, nor has it ever displayed any Copymation machines or any placards or signs pertaining to Copymation. Standard has never advertised Copymation products in the newspapers. Standard salesmen are full-time Standard employees, and sell copy machines made by other manufacturers as well as those of Copymation. They also sell all other items handled by Standard, including materials for copy machines. They have no connection with and receive no remuneration of any nature from Copymation. The copy machine sold to Dale was only the second sale of a Copymation machine in the State of Nebraska.

We have detailed the course of dealings at length to show that the transaction involved herein is a sale by a dealer or jobber who purchased a machine from Copymation after the dealer or jobber had found a purchaser. Does this type of transaction constitute doing business in Nebraska on the part of Copymation sufficient to authorize service of process under section 21-1201, R. R. S. 1943?

Historically, the jurisdiction of courts to render judgments in personam was grounded on their de facto power

over the defendant's person. Presence within the territorial jurisdiction of a court was prerequisite to the rendition of a judgment personally binding the defendant. Now, however, as capias ad respondendum has given way to personal service of summons or other forms of notice, due process requires only that to subject a defendant to a judgment in personam if he be not present within the territory of the forum, he have certain minimum contacts with it such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. See International Shoe Co v. Washington, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A. L. R. 1057. In that case, the defendant, a nonresident corporation, employed 11 to 13 salesmen to solicit business. These salesmen lived in the state, solicited business solely in the state, and worked under the direct supervision and control of a sales manager located at the home office of the corporation in another state. Process for the corporation was served on one of these salesmen, and the court held that the requirements of due process were satisfied.

In Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N. W. 2d 151, we held: "Before any state can subject a foreign corporation to the jurisdiction of that state such corporation must have either expressly consented to such jurisdiction or must have done sufficient business therein to constitute a submission to such jurisdiction.

"No all-embracing rule can be laid down as to just what constitutes the doing of sufficient business in a state by a foreign corporation in order to subject it to process of that jurisdiction. Each case must necessarily be determined by its own facts."

In that case, the defendant, a Texas corporation, handled the sale of its products in Nebraska through four wholesalers. While it had no resident agent or place of business in Nebraska, it did employ a traveling salesman who worked on a salary and commission,

and who solicited retail outlets in Nebraska, including 300 to 400 druggists. All the orders he received he sent to one of the four wholesalers who would fill the order from the stock it had purchased from the defendant. In that case we held the defendant was doing business in Nebraska sufficient to authorize service under section 21-1201, R. R. S. 1943.

A more recent case, Berg v. Midwest Laundry Equipment Corp., 175 Neb. 423, 122 N. W. 2d 250, involved the question as to whether a foreign corporation, Industrial Credit Company, by purchasing retail installment contracts executed in Nebraska by residents of Nebraska, was doing business in Nebraska. The contracts were obtained in Nebraska by Midwest Laundry Equipment Corporation, and were purchased from it at the home office of the Industrial Credit Company in St. Paul, Minnesota. The contract involved in that case was refused by the Industrial Credit Company when first offered, and was later accepted after it had been rewritten in Nebraska to meet objections. We held the evidence adduced was not adequate to show that Industrial Credit Company was doing business in Nebraska sufficient to authorize service under section 21-1201, R. R. S. 1943.

Dale contends that essentially the present case is very similar to the facts in Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N. W. 2d 151. It is to be noted that Globe employed its own salesman to solicit orders in Nebraska. Dale argues that this is immaterial because in the present case Copymation is actually utilizing the entire sales force of Standard to sell its products. We cannot accept the inference that Dale draws. In any event, we suggest that there are many other distinguishing characteristics. Suffice it to say that Copymation did no sales promotion of any nature in Nebraska; it had no control or supervision of any nature over Standard sales force; and Standard salesmen were at all times employees of Standard, and accountable only to Standard.

The relation of Standard to this transaction is that of an independent contractor and not as an agent of Copymation. Standard was in business for itself. It could buy Copymation machines at wholesale, but was under no obligation to buy or to sell the products of Copymation. In dealing with Dale, Standard was dealing on its own account. We do not feel that the filling of orders solicited by an independent contractor brings Copymation within the orbit of doing business in Nebraska sufficient to warrant service of process under section 21-1201, R. R. S. 1943.

It does seem, as a minimal requirement, that the manner and extent of doing business in this state must be such as to warrant the inference of an actual as distinguished from a merely fictitious or constructive presence in the state, and such that it may be said that the corporation itself, through the representative capacity of its agents, is in the state. To hold that a foreign corporation is doing business in Nebraska merely because it fills an order received by mail from a Nebraska resident without more appearing, is to extend the doctrine of doing business in the state for the purpose of constructive service too far.

There was no proper service of process on Copymation. Its special appearance was properly sustained, and the order sustaining it is affirmed.

AFFIRMED.

PATRICIA CAMPBELL, APPELLANT AND CROSS-APPELLEE, V. CITY OF NORTH PLATTE, LINCOLN COUNTY, NEBRASKA, APPELLEE AND CROSS-APPELLANT.
132 N. W. 2d 876

Filed February 5, 1965. No. 35758.

1. **Pensions.** Under section 35-202, R. R. S. 1943, of the Firemen's Pension Act a fireman receives injuries while in the line of duty if he contracts disease while in the discharge of duty.

2. **Witnesses: Evidence.** In questioning an expert witness on an appropriate subject, a party may choose a hypothesis based upon his theory of evidence which raises an issue of fact.
3. ———: ———. An opinion responsive to a proper hypothetical question will ordinarily sustain a jury verdict on that issue of fact unless probative value is destroyed by impeachment.
4. ———: ———. A trial court exercises a discretion in overruling a general objection to a hypothetical question, and abuse may not be predicated solely upon minor inaccuracies in the hypothesis.

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

Maupin, Dent, Kay & Satterfield, Clinton J. Gatz, and Donald E. Girard, for appellant.

Halligan & Mullikin and Baskins & Baskins, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. FLORY and ROBERT L. SMITH, District Judges.

SMITH, J.

A fireman died of coronary artery disease. His widow laid this action under that part of section 35-202, R. R. S. 1943, which provides for a pension in case "death is caused by or is the result of injuries received while in the line of duty." The record shows a judgment on a jury verdict for plaintiff, a judgment notwithstanding the verdict, this appeal by plaintiff, and a cross-appeal from denial of its alternative motion for a new trial.

The controversy is presented in two main parts: Existence of a fact question whether the disease was contracted in the line of duty, and the propriety of plaintiff's hypothetical question concerning medical causation.

On the first part we sketch evidence favorable to the verdict. See Wessel v. City of Lincoln, 145 Neb. 357, 16 N. W. 2d 476. From 1948 to his death at the age of 56 years, Walter J. Campbell was a full-time paid member

of the fire department of defendant, and served as assistant chief from 1951 through 1962. He also worked part time for land surveyors from 1960 to 1963.

The total number of fire alarms, other fire calls, and emergency calls for an ambulance during Campbell's shift was approximately 140 annually, but he did not answer all of them. From 1948 to 1958 he attended a mean of 42 alarm fires per year; from 1959 to 1962, 27. As assistant chief, he was the first to enter a flaming structure when the cost of delay was high. Witnesses described him as a perfectionist in performance of obligation to city as well as family.

We turn to the subject of his health. Temperance in eating and drinking and moderation in smoking are undisputed. Findings on medical examinations in 1948, 1951, and 1955 were essentially negative. In the fall of 1959 and later he complained of severe chest pain and pressure in his throat occurring mostly upon his return to the fire station from a call. In December 1961, a physician diagnosed coronary arteriosclerosis.

Campbell worked for a land surveyor on July 5 and 6, 1962. The following day—his third consecutive day off duty and the fifteenth day since his last call—symptoms of a coronary occlusion hospitalized him. When he returned to duty in October, he was assigned tasks limited to the fire station.. On March 11, 1963, he worked at the station from 2 to 4 p.m., and died at home at 9:30 p.m.

At the trial plaintiff called three expert medical witnesses, defendant called none. An internist found on hypothesis a direct causal relation between duty and disease. He depreciated the effect of physical exertion alone, but emphasized emotional stress, emotional - physical strain, and toxic effects. Indeed they constituted his frame of reference for diagnosis.

The internist explained that emergency responses of the body to stimuli push a substance through the coronary arteries. Repetition frequently thickens the in-

side lining and narrows the passages. Chest pain is the primary symptom. Later occlusion of an artery may occur when the substance slides or breaks loose from the lining.

The statute embraces disease contracted by a fireman while in the discharge of duty. Evans v. City of Lincoln, 147 Neb. 163, 22 N. W. 2d 565; Elliott v. City of Omaha, 109 Neb. 478, 191 N. W. 653. No complaint is made that a direct causal relationship in medicine will not permit an inference which meets this standard. To refine further is to mistake one science for another. When the question is medical, medicine must give us the answer. See, McNaught v. New York Life Ins. Co., 145 Neb. 694, 18 N. W. 2d 56; Long v. Railway Mail Assn., 145 Neb. 623, 17 N. W. 2d 675.

The law declines to say that Campbell died in the common struggle for existence, that the design for disease and death cannot be fairly traced in his calling. Duty brought peril—not only the obvious flame and smoke but also the subtler stress and strain. Precedent has not been oblivious. See, Wessel v. City of Lincoln, *supra;* Elliott v. City of Omaha, *supra;* Town of Cicero v. Industrial Commission, 404 Ill. 487, 89 N. E. 2d 354.

We are told that this assault on his emotions was only a feint. The jury heard that he was cool and efficient in fire fighting and seldom experienced visible bodily injury. But it also heard that ambulance calls disquieted him and that firemen of defendant experience stress and strain. We pass permissibility of an inference that in 1959 the first symptoms of disease were demonstrated in line of duty. Other considerations are not amiss. Alarms and calls themselves may have activated his emergency mechanism. Self-control may have belied readiness for action. We suggest the possibilities only to demonstrate the difficulties of an uninformed venture into medicine.

The feint is said to be patent from a gap in medical causation. The disease struck hard only during leisure.

The first attack in time was remote from duty to city but not far distant from service to surveyor. Plaintiff failed to explore other aspects of Campbell's emotional life. At best the argument accepts the hypothetical opinions of two general practitioners and rejects the hypothetical opinion of the internist. The assumptions which were material to the conclusion of the internist are supported by evidence. Plaintiff bridged the gap.

A questioner on an appropriate subject may choose a hypothesis based on his theory of evidence which raises an issue of fact. See Vanderheiden v. State, 156 Neb. 735, 57 N. W. 2d 761. The answer of the expert witness will ordinarily sustain a verdict unless probative value is destroyed by impeachment. See, McNaught v. New York Life Ins. Co., *supra;* Longe v. Railway Mail Assn., *supra.*

The second part of the controversy originates in the overruling of defendant's objection to this hypothetical question concerning medical causation between duty and disease.

Plaintiff fashioned her hypothesis by condensing evidence of events which we have recounted. The question contains trifling inaccuracies. Defendant objected generally to insufficient foundation and assumption of facts not in evidence or contrary to the evidence. The first time, plaintiff requested defendant to particularize its objection. Arguments to the court were not reported. The objection was sustained, and the question was restated with minor amendments concerning the type of calls which Campbell had answered and the visible bodily injuries which he had received. Thereafter defendant interposed the general objection which is the basis of the present complaint.

Review is limited where a general objection has been overruled. It reaches only an obvious flaw; otherwise, specification is required. The purpose is to ease the burden on the trial court and to permit correction by the questioner. See Chicago, R. I. & P. Ry. Co. v. Archer,

46 Neb. 907, 65 N. W. 1043. A trial court possesses a discretion. See Metropolitan Life Ins. Co. v. Armstrong, 85 F. 2d 187. It was not abused.

We conclude that the evidence was sufficient to sustain the verdict of the jury. There being no error in the record prejudicial to the defendant, the order of the district court vacating the judgment for the plaintiff and dismissing her cause of action notwithstanding the verdict is reversed, and the cause is remanded to the district court with directions to reinstate the verdict and judgment in favor of the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

Note: Since this case was submitted, Robert L. Smith, District Judge, has become a Judge of this court.

SPENCER, J., dissenting.

I do not concur in the majority opinion. To do so is to interpret the provision of section 35-202, R. R. S. 1943, "In case of the death, while in the line of duty," as though it read "In case of death while in the employ." It is true the opinion is premised on and is an extension of the holding in Elliott v. City of Omaha, 109 Neb. 478, 191 N. W. 653, which interpreted the phrase where " 'death is caused by or is the result of injuries received while in the line of duty' " to include disease contracted in the line of duty (in that case pneumonia). There is a distinction, however, between contracting a disease which disabled the fireman immediately and resulted in his death 10 days later and this case where the fireman had a heart attack sitting in the living room of his home off duty and during a period when he had been under no special stress. The heart attack occurred on his third consecutive day off and 15 days after his last fire call. It is also pertinent to observe that for the past 5 years the fireman had been moonlighting. He had worked with a surveyor from 1 or 2 hours to 8 hours a day.

The medical expert did testify that firemen are subjected to special stress which could develop coronary

artery disease. He testified, however, that this is also true of physicians, attorneys, and businessmen. Stress is not peculiar to the occupation of a fireman. It is equally present in many other endeavors of life, including the various duties incident to employment as a surveyor.

I am in accord with the thought that ample provision should be made for the protection of the families of public employees engaged in hazardous occupations. It should, however, be initiated by the legislative process and not accomplished by judicial legislation.

BROWER, J., and ROBERT L. FLORY, District Judge, concur in this dissent.

LANGEMEIER, INC., APPELLANT, V. ROBERT PENDGRAFT, APPELLEE.
132 N. W. 2d 880

Filed February 5, 1965. No. 35768.

1. **Landlord and Tenant.** Where the tenant has actually abandoned the premises, the landlord is entitled to reenter and take charge and possession even where he acts too hastily, but in good faith and under circumstances justifying a belief that the premises have been abandoned, he is guilty of only a technical violation of the tenant's contractual rights under the lease. The question of whether a lease has been abandoned so as to confer a right of reentry is one of fact to be determined from the acts and intentions of the parties.
2. **Trial.** A mere scintilla of evidence is not enough to require the submission of an issue to the jury.
3. ———. In every case before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
4. ———. It is the duty of a trial court to direct a verdict at the close of the evidence where the evidence is undisputed, or where evidence, though conflicting, is so conclusive that it is insufficient to sustain a verdict and judgment.

Appeal from the district court for Madison county: GEORGE W. DITTRICK, Judge. Affirmed in part, and in part reversed and remanded.

Olds & Reed, for appellant.

Mueting & Ellwood, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and ROBERT L. SMITH and ROBERT L. FLORY, District Judges.

FLORY, ROBERT L., District Judge.

This is an action by plaintiff, Langemeier, Inc., a corporation, against defendant Robert Pendgraft to recover unpaid rent on two gasoline stations in Norfolk, Madison County, Nebraska. Both leases provided for fixed monthly rentals and in addition thereto defendant was to pay for gasoline sold by him, which was purchased from the plaintiff, every week. One of the stations operated 24 hours a day. The defendant admitted owing plaintiff certain sums of rent and gasoline payments but denied that he was in default when the action was commenced due to plaintiff's previous course of conduct in accepting late rental payments, and cross-petitioned against the plaintiff for damages for wrongful eviction by plaintiff. A jury trial was had. After the evidence of both parties was adduced the trial court directed a verdict for plaintiff and against the defendant for the amount admittedly owing by defendant and submitted the defendant's cross-petition against the plaintiff to the jury. The jury returned a verdict for defendant against the plaintiff for damages. Plaintiff moved for judgment notwithstanding the verdict on defendant's cross-petition or in the alternative for a new trial. From the order overruling that motion this appeal was taken by plaintiff.

Evidence adduced by both plaintiff and defendant was undisputed that defendant was chronically late in monthly rental payments; that in late January or early February 1963, Roy Langemeier, president of plaintiff, had

told defendant he would like to have the rent caught up; that during the night of February 27, 1963, defendant left the city of Norfolk taking with him his automobile, a motorcycle, some clothes, a case of oil, some of his tools, and $500 from his business; and that he told no one where he was going but told his wife he would be gone for a week or 10 days. Defendant's wife testified that she expected him back the next day and when he did not return, she contacted the county attorney; and on March 4, 1963, reported him as a missing person to the Nebraska Highway Patrol, subsequently making several inquiries as to its success in locating him. On February 28, 1963, plaintiff learned of the situation and that night took possession of the station without objection, and filed this action on March 1, 1963. No word was had of or contact made with the defendant until March 19, 1963, when a telephone contact was made in the State of Illinois. Defendant was also indebted to Roy Langemeier, president of plaintiff, and his wife in the approximate amount of $2,600 which was secured by a chattel mortgage on equipment. Defendant's wife had taken care of the books of the business but had not worked around the stations. Defendant testified that he intended to return and that he did not worry about the stations too much.

"Where the tenant has actually abandoned the premises, the landlord is entitled to reenter and take charge and possession; and, even where he acts too hastily, *but in good faith and under circumstances justifying a belief that the premises have been abandoned,* he is guilty only of a technical violation of the tenant's contractual rights under the lease. The question of whether a lease has been abandoned so as to confer a right of reentry is one of fact to be determined from the acts and intentions of the parties." (Emphasis supplied.) 52 C. J. S., Landlord and Tenant, § 717, p. 581.

A mere scintilla of evidence is not enough to require the submission of an issue to the jury. In every case

before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. It is the duty of a trial court to direct a verdict at the close of the evidence where the evidence is undisputed, or where evidence, although conflicting, is so conclusive that it is insufficient to sustain a verdict and judgment. Fairmont Creamery Co. v. Thompson, 139 Neb. 677, 298 N. W. 551. See, also, Swink v. Smith, 173 Neb. 423, 113 N. W. 2d 515, where defendant testified in the form of his own conclusion.

Considering the facts and circumstances of this case we hold that there was an abandonment by the defendant so that the plaintiff was within its rights in making a reentry and taking possession of the stations; and that the trial court should have sustained plaintiff's motion for judgment notwithstanding the verdict on defendant's cross-petition. The judgment is therefore affirmed as to the directing of a verdict for plaintiff against the defendant and reversed in accordance with the above holding, and the cause remanded with directions to the trial court to dismiss defendant's cross-petition.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

TRANSPORT INDEMNITY COMPANY, APPELLEE, V. JOHN SEIB, APPELLANT, IMPLEADED WITH JOHN SEIB, DOING BUSINESS AS SHIPPER'S MOTOR EXPRESS, ET AL., APPELLEES.
132 N. W. 2d 871

Filed February 5, 1965. No. 35787.

1. **Evidence.** Under section 25-12,109, R. R. S. 1943, a business record of an act, condition, or event is competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the

regular course of business at or near the time of the act, condition, or event, and if, within the sound discretion of the court, the sources of the information, method, and the time of preparation were such as to justify its admission.

2. ———. The purpose of the statute, section 25-12,109, R. R. S. 1943, was to permit the admission in evidence of systematically entered records made in the usual course of business, without the necessity of identifying, locating, and producing as witnesses the individuals who made the original entries in the records.
3. ———. No particular mode or form of record is required, and a record prepared by electronic equipment and stored on tape, if it complies with the requirements of the statute, is as admissible as a book account or record recording the same information and calculations.
4. ———. The business record statute, section 25-12,109, R. R. S. 1943, was intended to bring the realities of business and professional practice into the courtroom and the statute should not be construed narrowly to destroy its usefulness.
5. **Contracts.** The law presumes that parties understand the import of their contracts and that they had the intention which the contract terms manifest.
6. **Pleading.** A court may, either before or after judgment in the furtherance of justice, and on such terms as may be proper under the circumstances, permit an amendment to the pleadings when the amendment does not change substantially the claim or defense.

Appeal from the district court for Lancaster County: JOHN L. POLK, Judge. Affirmed.

Nelson, Harding & Acklie, Charles J. Kimball, and Charles F. Noren, for appellant.

Perry & Perry, for appellee Transport Indemnity Co.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and POLLOCK and SIDNER, District Judges.

WHITE, C. J.

This is an action for insurance premiums. From a jury verdict and judgment for the plaintiff in the sum of $6,639.46 John Seib, hereinafter referred to as defendant, appeals.

The defendant operated a fleet of trucks in various states. The plaintiff writes retrospective insurance. By the terms of the contract, exhibits 1 and 2, the defendant pays an advance premium based on a percentage of his gross monthly receipts. The insurance covers bodily injury, property and material damage, and cargo liability. As the losses are reported to the plaintiff, it processes and pays them. The defendant is given a quarterly report of his loss experience. The defendant pays all losses and expenses up to $1,000 and the plaintiff pays all over that sum. According to the formula agreed to by the parties, the earned premium is calculated retrospectively. The loss experience of other operators is not a factor. Each loss has added to it certain investigation, overhead, taxes, fees, and management costs, and the net sum is charged back against the defendant as earned premium. The sum, so computed on each loss, cannot be more than $1,000. The plaintiff pays the balance of the loss. If the advance premiums exceed the losses, the defendant gets a refund; if they are less, he is obligated to pay the balance as an earned premium. The object of the insurance is to give an operator the opportunity to take advantage of a good safety record in his insurance costs. The contract and policy may be canceled at any time by either party. The insurance went into force in April 1960 and was canceled on May 16, 1961.

To establish the amount of premium due, the plaintiff, whose home office is in Los Angeles, California, offered in evidence exhibit 14 which was received over objection as to foundation. Its admission is now assigned as prejudicial error.

The evidence supports the following summary of the nature of exhibit 14 and the foundation for its admission. Exhibit 14 is prepared and printed by electronic equipment. It was prepared by, and under the direction of, Leland S. Thomas, a director of the company, who is director of accounting for plaintiff, and whose testimony

is the foundation for the admission of exhibit 14. Records, such as exhibit 14, are under the custody and control of Thomas. A fair inference from the record is that the figures reported and the computations made are accurate calculations within his personal knowledge. On direct examination, this witness, Leland S. Thomas, testified: "Q. (BY MR. ACKLIE) Mr. Thomas, was Exhibit 14 computed, say, by an I.B.M. or other tabulating machine? A. Those calculations are prepared by machine, yes. They are all electric computers. We have our formulas set out, first, as to the type of policy this is. There are different plans of insurance which you can pursue, on all retrospective policies, so you have to have a formula in order to feed this particular information into the machine, and each time you have a case, we feed that formula into the machine, and the machine does the calculating work, whether multiplying or subtracting the premiums. It just does what used to be done by keeping books. We feed the formulas, and the machine will do that, and keep them on tape."

The information as to the losses is fed into the machine, the machine records them, makes the necessary formula calculations, and it is stored on tape. On four of the large pages of this exhibit is recorded each accident by date, name of driver, type of accident (coded), amount and type of loss, allocated expenses according to the policy contract, and other information from which the premium can be computed. The total of the paid losses chargeable as premiums for policy year is found on the first two pages of exhibit 14. There is recorded the amount of advance premiums paid. The individual loss records on the last four pages support the figures in the calculation of premiums owed and due on pages 1 and 2. On pages 1 and 2, the machine takes the composite totals of the losses allocated to premiums, subjects them to the formula of the contract (exhibits 1 and 2), computes the total premium owed for the year, deducts the payments made, and enters the total due. It is a book-

keeping record made in the usual course of business. It was sent quarterly to the insured, Seib, and it is a cumulative record. The information is stored on the tape and at any time the machine can retrieve a record such as exhibit 14 giving the losses paid to date and the premium paid and due according to the formula. Thomas testified that the calculations on exhibit 14 are made exactly in conformity with the defendant's premium formula in the contract. This witness, Thomas, made a detailed explanation of each item on exhibit 14. He took the entire list of claims shown on exhibit 14, computed the amounts charged and due according to the contract formula, and reconciled these figures with the machine-produced results on exhibit 14. This witness' testimony, mostly as to foundation for exhibit 14, stretches across 141 pages of this record. All of it cannot be summarized. It shows that this record and computation were made as the usual part of plaintiff's business operation, that the keeping of this record was an indispensable part of the business, and that the record was kept separate for the insurance contract of the defendant. This exhibit shows $39,828.50 paid claims for the policy year April 1, 1960, to April 1, 1961. After processing through the contract formula, it shows a total earned premium charge of $10,301.45, with payments of $3,046.18 by defendant as advance premiums and a payment of $2,069.03 on the deficit, leaving a balance due of $5,186.24. The same process applied to the year April 1, 1961, to April 1962, results in a net due the plaintiff of $1,453.22 or a total due of $6,639.46. This is the verdict the jury returned.

Section 25-12,109, R. R. S. 1943, is as follows: "A record of an act, condition, or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the

sources of information, method, and time of preparation were such as to justify its admission."

In construing this statute, our court said in Higgins v. Loup River Public Power Dist., 159 Neb. 549, 68 N. W. 2d 170, as follows: "The purpose of the act is to permit admission of *systematically entered records* without the necessity of *identifying, locating, and producing as witnesses the individuals who made entries in the records in the regular course of the business* rather than to make a fundamental change in the established principles of the shopbook exception to the hearsay rule." (Emphasis supplied.)

It seems to us that the foundation testimony here follows the statute and is directly in the scope of the purpose of the statute as stated in the Higgins case, *supra*. It was not necessary to produce and identify the witnesses who originally supplied the information as to losses that is recorded on the tape.

The defendant has failed to point out to us wherein the foundational requirements of this statute have not been met. Identification and the mode of its preparation, and that it was made in the regular course of business, were fully testified to. A complete and comprehensive explanation of its meaning and "identity" were given. As we see it, defendant's objections go only to the weight and credibility of exhibit 14 and not its admissibility. Exhibit 14 constitutes the accounts receivable record of the plaintiff as to defendant. It responds to the reports as to gross receipts and claims furnished by the defendant himself. It was fed into the electronic equipment, processed as to the formula agreed upon, all as a part of the usual and necessary business operations and record of the plaintiff company. The calculations were authenticated by the testimony of the witness, Thomas, which reconciled the figures of the original losses with the calculation of the final amount due. This procedure fits squarely that approved in United States v. Olivo, 278 F. 2d 415, wherein it was said: "The

witness testified to a well-established business procedure not only in the trade, but specifically in the very company which had prepared the document. All the hallmarks of authenticity surround this document, since it was made pursuant to established company procedures for the systematic, routine, timely making and preserving of company records."

No particular mode or form of record is required. The statute was intended to bring the realities of business and professional practice into the courtroom and the statute should not be interpreted narrowly to destroy its obvious usefulness. United States v. Olivo, *supra.*

The machine here performs the bookkeeping task in the usual course of business. Instead of on paper, the information and calculations are stored on tape, and may be retrieved and printed at any time. The taped record furnished a cumulative record based on information flowing into the office of the plaintiff company day by day and fed into the machine in response to a systematic procedure for processing each insured's account.

In the terms of the statute, we are of the opinion that the "sources of information, method, and time of preparation" were such as to justify its (exhibit 14) admission. To hold otherwise would require the production of the original claim files and reports, which in turn would probably be inadmissible under a strict application of the hearsay rule.

Defendant was sent a quarterly report in the same form as exhibit 14, and prepared from the same tape, showing his loss experience and expense, and the calculation of his premium due. During the period of his business with plaintiff he did not question the accuracy of this record. Exhibit 14 is merely cumulative of these quarterly reports. The original sources came from the defendant himself. The amounts and the character of the payments on the losses are not questioned. This situation bears on the authenticity and probative source of

the document and aids the conclusion that, "the sources of information, method, and time of preparation were such as to justify its admission." § 25-12,109, R. R. S. 1943.

Defendant argues exhibit 14 is inadmissible because it was prepared for use in this litigation and trial, citing Higgins v. Loup River Public Power Dist., *supra*.

This argument exalts the form over the substance. The retrieval from the taped record (exhibit 14) was made for the purposes of the trial. But, the taped record and the information and calculations thereon were made in the usual course of business and for the purpose of the business alone. There is no merit to this contention.

Defendant assigns as error the giving of instruction No. 4. In instruction No. 4, the court told the jury that in the construction of a contract it must be construed as a whole and "that the law presumes that the parties understood the import of their contracts and that they had the intention which the contract terms manifest." This is a well-settled and fundamental statement of the substantive law. See Frentzel v. Siebrandt, 161 Neb. 505, 73 N. W. 2d 652. It is simply an accurate abstract statement of the law to aid the jury in its determination of the meaning and scope of the contract. It did not declare any presumption of the existence of an ultimate fact, such as negligence, which would aid the burden of proof and might require the court to state that such a presumption is rebuttable. The cases cited in defendant's brief are to the latter effect and are not in point. The court used the word "presumes" but it was not used in the sense of creating a presumption of fact in favor of the plaintiff in meeting its burden of proof. The presumption referred to is properly limited by its language so as to not be misleading to the jury. There is no merit to this contention.

To conform to the proof, the trial court permitted the plaintiff, at the close of its case, to amend the prayer of its petition as to amount. This is assigned as error.

This is essentially an accounting case for premiums due. The proof as to the total amount due as premiums and the allowable credits varied from those alleged in the pleadings. But the cause of action was not changed nor was the theory of the plaintiff's case. At issue from the original pleadings were the amounts due from a series of transactions stretching over a period of about 2 years. The trial court is vested with a wide discretion in this matter in the furtherance of justice. The amendment here simply changed the amount prayed for to conform to the proof which was in the sum of $6,-639.46. The amendment of the prayer, within the language of the applicable statute (section 25-852, R. R. S. 1943), "does not change substantially the claim or defense." This contention is without merit.

The assignments of error are not sustained. The judgment of the trial court is correct and is affirmed.

AFFIRMED.

ROBERT W. HOFFMAN, APPELLANT, V. JORGENSEN AWNINGS, INC., A CORPORATION, ET AL., APPELLEES.
132 N. W. 2d 867

Filed February 5, 1965. No. 35811.

1. **Trial.** A motion for directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed.
2. **Automobiles: Highways.** A left-hand turn across a public highway between intersections is fraught with danger and one making such a movement is required to exercise a degree of care commensurate with the danger.
3. **Negligence.** Actions which were a normal response to the stimulus of a situation created by the defendants' negligent conduct are not a superseding cause of harm to the plaintiff, which the defendants' conduct was a substantial factor in bringing about.
4. **Automobiles: Negligence.** The negligence of the driver is ordinarily not imputed to the guest.

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

Swenson, Erickson & Nelson, for appellant.

Cassem, Tierney, Adams & Henatsch, for appellees.

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

MCCOWN, J.

This is an action for damages for personal injuries to a passenger in an automobile which went off the road in passing defendants' truck and struck a driveway and culvert. There was no physical contact between the automobile and the truck. At the conclusion of the evidence, the district court sustained defendants' motion for a directed verdict and the plaintiff has appealed.

The questions presented involve the sufficiency of evidence of the defendants' negligence; whether defendants' negligence, if any, was the proximate cause of the accident; and whether the plaintiff is chargeable with contributory negligence.

The accident occurred on Bellevue Boulevard in suburban Omaha in midafternoon of a dry, clear day in June 1961. Plaintiff Hoffman was a passenger in an automobile driven by George C. Belek, Jr. The truck of defendant Jorgensen Awnings, Inc., was driven by defendant, James Kay, an employee acting in the course of his employment. Both vehicles were proceeding south on Bellevue Boulevard, the asphalt surface of which varies in width from 20 to 22 feet at the points in question, with a sloping shoulder and drainage ditch along the east side. While there is a slight curve some distance north, the street is fairly straight and almost level in the area of the accident, and there was no other traffic involved. The truck was a 1949 Diamond T pickup and carried two extension ladders in 4 sections, extending from the front to the rear of the pickup. The ladders extended approximately 12 inches from the body of the

truck on the driver's side and were mounted at the height of the driver's window. The pickup was not equipped with directional signals. At a point north of a private driveway on the east side of the street described as the Madsen driveway, the car was behind the truck and the plaintiff told Belek to go ahead and pass the truck if the road was clear. Belek found no on-coming traffic; pulled left into the passing lane; started around the truck; went across a portion of the Madsen driveway, down along the east shoulder and drainage ditch; and struck a driveway and culvert at the Cole driveway which was 78 feet south of the middle of the Madsen driveway. Plaintiff's injuries resulted from this collision. When Belek was commencing to pass, the truck was moving 5 to 10 miles per hour. Belek did not sound his horn. Defendant Kay, the driver of the truck, was intending to turn left into the Madsen driveway. The speed limit on Bellevue Boulevard at this point was 35 miles per hour.

There is a sharp conflict in the evidence as to what occurred immediately prior to and during the time Belek was in the process of passing. Defendant driver and another employee in the truck both testified that the driver of the truck gave a left-turn signal for 75 to 100 feet before reaching the Madsen driveway by extending his left arm through the ladders. Defendant Kay estimated that his hand extended about 10 inches past the ladders. He testified he first saw the car driven by Belek when it was approximately 16 feet behind him and rapidly overtaking him. When he saw it, he immediately put on his brakes and stopped the truck. He says he had not started to turn and that no portion of the truck was across the centerline when he came to a stop, approximately 4 or 5 feet north of the Madsen driveway. The two employees in the truck testified that the Belek car was going 45 to 50 miles an hour when it passed them. There was testimony that the wheels of the Belek car were spinning as it went along the ditch, with its front end toward the road and its back end in

the ditch, and that it then headed into the culvert.

Belek, the driver of the car, the plaintiff, and another passenger, James Hurt, all of whom were riding in the front seat, testified that the car had followed the truck for some distance at a speed of around 15 to 20 miles per hour; that the truck had made no unusual movements prior to their commencing to pass; that none of them had seen any left-turn signal; that while they were in the act of passing, the truck turned left into their lane of traffic and had moved over into the left lane 2 to 4 feet when the automobile reached the edge of the Madsen driveway; and that Belek went to the left and off the road to keep from hitting the truck. Belek testified that when he started to pass he shifted into second gear; that when he pulled to the left to avoid the truck he did not put on his brakes; that he went along the ditch without putting on brakes or throttle; that he was trying to steer out of the ditch; and that the car seemed to be coming out, but then the front end slid back down into the ditch, and struck the driveway and culvert at a speed of 15 to 20 miles an hour.

A motion for directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. This principle is well settled in this court. It is clear that the defendant driver intended to turn to the left into the Madsen driveway, although defendants contend he had taken no action to accomplish it. A left-hand turn across a public highway between intersections is fraught with danger and one making such a movement is required to exercise a degree of care commensurate with the danger. Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355.

Section 39-7,115, R. S. Supp., 1961, provided in part:

"No person shall turn a vehicle from the direct course upon a highway unless such movement can be made with reasonable safety * * * and after giving an appropriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement; * * *." Where such a driver looks but does not see an approaching motor vehicle, or sees the approaching vehicle and erroneously misjudges its speed or distance, or for some other reason assumes he could safely complete the movement, the question of negligence is usually for the jury. Petersen v. Schneider, *supra*. There is ample evidence on which the jury might have found that the defendant driver was making a left turn between intersections without giving an appropriate signal. The testimony is sharply in conflict and the conclusions to be drawn from, and the appropriate weight to be given to, such testimony and any proper inferences therefrom are clearly questions within the province of the jury.

The defendants contend the accident was caused solely by the negligence of Belek, the driver of the car in which the plaintiff was riding, and that any alleged negligence on the part of the defendant driver was not the proximate cause of the injuries to the plaintiff.

Apparently the defendants' position is that Belek's negligence was an intervening force operating independently of any situation created by the negligence of defendant driver. Actions of Belek which were a normal response to the stimulus of a situation created by the negligent conduct of defendant driver are not a superseding cause of harm to the plaintiff, which the conduct of defendant driver was a substantial factor in bringing about. Restatement, Torts, § 443, p. 1189.

The comment on this section of Restatement at page 1190 is also enlightening. It reads in part as follows: "It is not necessary that an act which is done by the person harmed or by a third person should be 'reasonable'; that is, that the act should be one which a rea-

sonable man would regard as not involving an unreasonable risk to himself or others. It is enough that the act is a normal response to the stimulus of the situation created by the actor's negligence. * * * The word 'normal' is used as the opposite of 'highly extraordinary' and not in its more customary sense of 'standard' or 'usual.' It denotes the fact that the court or jury looking at the matter after the event and therefore knowing the situation which existed when the intervening act was done, including the character of the persons or animals subjected to the stimulus of the situation, does not regard its intervention or the effect thereof as extraordinary. In order that the reaction of human beings to the stimulus of a situation should be normal it is not necessary that the situation should be such as to make it justifiable or reasonable."

The case of Stenson v. Schumacher, 234 Wis. 19, 290 N. W. 285, is very much in point. In that case, a truck turned left in an intersection without giving a signal, and the driver of the automobile preparing to pass lost control of his car, traveled along a ditch, and collided with a culvert. Plaintiff was a passenger in the car. The court held that although the driver of the car was guilty of negligence as a matter of law, the negligence of the truck driver was a cause of the plaintiff's injury, and reversed the part of the judgment dismissing plaintiff's complaint as to the truck driver.

There is insufficient evidence to establish any joint enterprise between the plaintiff and Belek, and the negligence of the driver is ordinarily not imputed to the guest. Kleinknecht v. McNulty, 169 Neb. 470, 100 N. W. 2d 77; Pearson v. Schuler, 172 Neb. 353, 109 N. W. 2d 537.

Upon the conclusions reached, this case should have been submitted to the jury.

The judgment of the district court is reversed and the cause remanded for further proceedings in conformity with the opinion herein.

REVERSED AND REMANDED.

ZELMA MARIE OVERTON, APPELLANT AND CROSS-APPELLEE, V. IRA PARKER OVERTON, APPELLEE AND CROSS-APPELLANT.
133 N. W. 2d 7

Filed February 5, 1965. No. 35815.

1. **Divorce.** Divorce cases are tried de novo on appeal to this court, subject to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
2. ———. There is no exact mathematical formula by which property division or alimony can be determined. As a general rule in cases of this type, awards vary from one-third to one-half of the value of the property, depending upon the facts and circumstances of each particular case.
3. ———. In determining the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto, and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just.
4. ———. The district court has authority to make temporary allowances in divorce cases pending appeal, and anything to the contrary in Schlueter v. Schlueter, 158 Neb. 233, 62 N. W. 2d 871, is expressly overruled.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

Healey, Healey & Goth, for appellant.

Max G. Towle, Perry & Perry, and Earl J. Witthoff, for appellee.

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

SPENCER, J.

In this action, Zelma Marie Overton, plaintiff, filed a petition for divorce from Ira Parker Overton, defendant. Defendant filed an answer and cross-petition, seeking a divorce from the plaintiff. After a trial extending over three different days, a decree was entered awarding plaintiff a divorce and settling the property rights of the parties. Plaintiff prosecutes an appeal to this court on the inadequacy of the award of property. Defendant prosecutes a cross-appeal, attacking the order for temporary support pending appeal.

The parties, who were married in 1925, have one child who is of legal age. They have been residents of Lincoln, Nebraska, except for short periods, since 1925 but continuously since early in the 1940's. The parties do not question the granting of an absolute divorce, and from the record it is evident that there is no possibility of a reconciliation. It will serve no useful purpose to describe the many incidents of their tumultuous marriage. While the corroboration herein is extremely thin and some of the uncorroborated testimony of the plaintiff tests credulity, and even if true has long since been condoned, we find there is sufficient evidence to sustain a decree awarding an absolute divorce. While the plaintiff was not without fault, we affirm the action of the trial court in awarding her the divorce.

Since their marriage, the parties have accumulated real and personal property consisting of a residence at 1121 Sumner Street, hereinafter referred to as Sumner property; a residence at 810 West Stockwell Street, hereinafter referred to as Stockwell property; and a commercial building at 616 South Street, hereinafter referred to as commercial building, all in Lincoln, Nebraska; some cemetery lots; motor vehicles; household goods; furniture; and furnishings.

Plaintiff worked as a saleslady during the early period of the marriage. Between 1944 and 1957 plaintiff helped on occasions in the sheet metal business of the parties as a bookkeeper or office assistant but received no salary. There can be little question the property accumulated by the parties is due to the joint efforts of both of them. It is also apparent that the defendant, with the help of his father and members of his family, is responsible for remodelling the Sumner property and building the other two properties owned by the parties.

There is a direct conflict in the medical evidence as to the plaintiff's physical condition. Her own doctor thought she was unable to work away from home. Defendant's doctor believed her to be as physically able to work as any woman 57 years of age. It is undisputed that the defendant has had one kidney removed. While there is no direct evidence on his exact age, an affidavit on file indicates defendant is past 60. At the time of the trial, defendant was employed by the Nebraska Neon Sign Company, earning between $600 and $700 per month. Subsequent to the trial, defendant filed an application to modify a temporary support order entered pending appeal, which required him to pay the plaintiff $125 per month to supplement the rental income of $106 from an apartment in the home she was occupying, which was also assigned to her. His application is supported by an affidavit that he was discharged by the Nebraska Neon Sign Company August 1, 1964, because of age, and that he has been unable to obtain other employment. The same contention was made on oral argument.

The Sumner property was purchased in 1943, but was completely remodeled either by or under the direction of the defendant. From an examination of an exhibit in evidence, it is a frame two-story house, with a cement drive leading to a double garage at the rear. It was plaintiff's testimony that the C. C. Kimball Real Estate Company had appraised the property 2 years before the trial at $10,500 to $11,000. Defendant testified

the appraisal was either for $13,000 or $13,500. No witness was called nor was any other evidence offered to verify the accuracy of either figure. This property has an apartment which with a garage stall rents for $106 per month. Plaintiff was living in the property at the time of the trial and was collecting the rent from the apartment. The decree sets this property off to her.

The Stockwell property, except for the framing and the pouring of some concrete, was built by the defendant with the help of his father and brother, upon an acre of ground purchased by the parties in 1954. It was built out of lumber and siding from the old gymnasium at Nebraska Wesleyan University. The property from an examination of an exhibit appears to be a two-story structure with a paved driveway leading to a double garage. The plaintiff testified the appraisal figure for this property was $18,000, and that approximately $3,000 additional was expended on it subsequent to the appraisal. The defendant testified that at the time of the trial the lower portion of the house was still unfinished, and that if he could get $16,000 for the house it would be a good price. The property at the time of the trial was subject to a $4,500 mortgage. This property was set off to the defendant.

The commercial building was built by the defendant and his father about 1945-1946 for the operation of a sheet metal business which was discontinued in 1957. Plaintiff testified the appraisal on this building was $15,000. The defendant testified if he could get $14,000 for it that would be tops. The trial court fixed the value of this property at $12,000 and gave the defendant the option of paying the plaintiff the sum of $6,000 within 90 days and taking the property, or to sell the property at public auction and to divide the proceeds equally with the plaintiff. The decree further provided that until defendant exercises one of the options, the rental income, which amounts to $135 per month, shall be divided equally between the parties.

The plaintiff was also awarded all of her personal belongings, and all the furniture and household goods at the Sumner property, which was the home of the parties until their separation, as well as a 1955 Buick automobile valued at $250. Included in the personal belongings was a diamond ring purchased for $500. Included in the furniture and household goods were furniture and drapes and other items purchased shortly before the separation of the parties, on which the defendant still owed $2,200. Plaintiff was also awarded the sum of $950 for the services of her attorney, and the defendant was directed to pay all debts of the parties, including the amounts enumerated above. The defendant, in addition to the real estate awarded to him, was given his personal belongings; a house trailer and contents, valued at $700; a 1954 G.M.C. pickup truck, valued at $500; the cemetery lots, valued at $800; and any equity in four insurance policies on his life, with a death value of $9,500 but on which there is no evidence of any nature in this record of their present value, if any.

Divorce cases are tried de novo on appeal to this court, subject 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. See Schlueter v. Schlueter, 158 Neb. 233, 62 N. W. 2d 871.

There is no exact mathematical formula by which property division or alimony can be determined. As a general rule in cases of this type, awards vary from one-third to one-half of the value of the property, depending upon the facts and circumstances of each particular case. See Kramer v. Kramer, 171 Neb. 128, 105 N. W. 2d 741.

Plaintiff, who was seeking all of the real property under some theory that it was accumulated mainly by her efforts, urges the recent decision of Loukota v. Lou-

kota, 177 Neb. 355, 128 N. W. 2d 809, as authority for her position. The decision in that case was based entirely upon the peculiar facts of that case, which are not analogous to those of the instant case.

Dependent upon whose figures are used, and considering the fact that the defendant must pay the debts of the parties, as well as costs and allowances for plaintiff's attorneys, the plaintiff herein received from approximately one-half to more than one-half of all of the net assets of the parties. In Schwarck v. Schwarck, 175 Neb. 560, 122 N. W. 2d 489, we enunciated in detail the proper rule to be followed in this case, which is as follows: "In determining the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto, and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just."

Using this criterion, we do not agree with the plaintiff that the award to her is wholly inadequate. On the record in this case, we find that the district court has been eminently fair with her.

Defendant by cross-appeal contests the allowance of temporary support to the plaintiff pending appeal. Plaintiff gave notice of appeal April 6, 1964. Four days later, the trial court entered an order assigning to the plain-

tiff the use of the Sumner property and the rent therefrom pending appeal, and directed the defendant to pay the plaintiff an additional sum of $125 each month, starting April 15, 1964, and continuing to the entry of the mandate from this court. The defendant was assigned the use of the Stockwell property and the rent from the commercial building which at the time of trial was $135 per month.

The defendant argues that the district court was without jurisdiction to make temporary allowances pending an appeal to this court, and cites as authority for his position Schlueter v. Schlueter, 158 Neb. 233, 62 N. W. 2d 871, which holds such an order to be void.

The question of temporary support was involved in the case of Hall v. Hall, 176 Neb. 555, 126 N. W. 2d 839. While in that case support was denied, we did recognize the right of the trial court to process the application. In that case, we held the enforcement of nonsuperseded orders and judgments is in the trial court and not in this court except on review. We find that the district court had the authority to make the temporary allowances pending the appeal herein. Anything to the contrary in Schlueter v. Schlueter, *supra,* is expressly overruled.

We are not disposed to question the temporary allowances herein, although they are on the generous side. All things considered, for the reasons given above the decree of the trial court should be and hereby is affirmed. Plaintiff is allowed an additional amount of $200 to apply on the services of her attorney in this court.

AFFIRMED.

INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION, APPELLANT, V. MAXIM'S OF NEBRASKA, A CORPORATION, APPELLEE.

132 N. W. 2d 885

Filed February 5, 1965. No. 35826.

1. **Garnishment.** Garnishment is an attachment by means of which money or property of a debtor in the hands of a third party, which cannot be levied upon, may be subjected to the payment of a creditor's claim.
2. ———. A garnishment proceeding authorized under section 25-1010, R. R. S. 1943, gives notice to the garnishee of the attachment authorized by section 25-1002, R. R. S. 1943.
3. ———. Sections 25-1002 to 25-1041, R. R. S. 1943, comprise a comprehensive act governing general attachment and attachment by way of garnishment before judgment.
4. ———. In garnishment proceedings brought under section 25-1010, R. R. S. 1943, a bond must be given as required by section 25-1003, R. R. S. 1943, and in an amount to be fixed as required by said section.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. Affirmed.

Haney, Walsh & Wall, for appellant.

Monsky, Grodinsky, Good & Cohen, Gross, Welch, Vinardi, Kauffman & Schatz, Gaines, Spittler, Neely, Otis & Moore, and Allen Jay Garfinckle, for appellee.

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

WHITE, C. J.

Plaintiff appeals from an order quashing a garnishment before judgment against Fireman's Fund Insurance Company, a corporation. The defendant, Maxim's of Nebraska, is a domestic Nebraska corporation. Plaintiff filed the affidavit required by section 25-1010, R. R. S. 1943. This affidavit contained the necessary allegations of an an affidavit of attachment as provided for by section 25-1001, R. R. S. 1943. The plaintiff filed no bond to protect against wrongful attachment as required

by section 25-1003, R. R. S. 1943. Plaintiff says that no bond is required because section 25-1010, R. R. S. 1943, does not specifically require it, that this statute stands by itself, and that compliance with the one requirement of an affidavit is sufficient. We do not agree.

Garnishment procedure provided for in section 25-1010, R. R. S. 1943, is not independent from the other sections of the attachment statute. By its terms it must contain the necessary allegations of an affidavit of attachment, "and in addition that the plaintiff has good reason to and does believe that any person, * * * has property of the defendant, describing the same, in his possession, * * *." Garnishment is a method of attachment designed to reach property of the defendant in the possession of a third party who is designated by the statute as a "garnishee." It seems clear that the affidavit required by the statute is simply a further and additional requirement, designed for the purpose of reaching property in the hands of third parties. Sections 25-1004 to 25-1041, R. R. S. 1943, in which the statute in question is included, comprise a comprehensive act governing general attachment and regulate attachments before judgment. Section 25-1055, R. R. S. 1943, so provides. These statutes, sections 25-1004 to 25-1041, R. R. S. 1943, must be construed in pari materia and in the light of their history and purpose. A review of the history of the statutes in question reveals that they have stood in the same interrelationship since their inception. As such, the scope of garnishment has been determined as a method of attachment applicable to property of the debtor in the hands of a third party. It is notice to the party in actual possession of the property of the debtor that it is to be held subject to the attachment. It simply notifies of the attachment authorized by sections 25-1002 and 25-1003, R. R. S. 1943. Mathews, Tootle & Maule v. Smith & Crittenden, 13 Neb. 178, 12 N. W. 821; Salyers Auto Co. v. DeVore, 116 Neb. 317, 217 N. W.

94, 56 A. L. R. 594; Crawford State Bank v. Murphy, 142 Neb. 795, 7 N. W. 2d 762.

We are dealing here with a proceeding before judgment in which there is no notice to a defendant. By its terms, the general attachment statute, section 25-1001, R. R. S. 1943, applies to all of the property of a defendant. It contains no exclusion as to property held by third parties. The statute in question, section 25-1010, R. R. S. 1943, requires the plaintiff to incorporate the allegations of section 25-1001, R. R. S. 1943, the general attachment statute, into the affidavit therein provided for. Section 25-1017, R. R. S. 1943, provides that: "An order of attachment binds the property attached from the time of service, and the garnishee shall stand liable to the plaintiff in attachment for all property, money, and credits in his hands, or due from him to defendant, * * *." Thus, by their terms, both sections 25-1010 and 25-1017, R. R. S. 1943, are designed to supplement and implement the general attachment statute, section 25-1001, R. R. S. 1943, as they relate to property in the hands of third parties. Section 25-1003, R. R. S. 1943, after excepting foreign corporations and nonresidents of the state specifically provides that, "In all other cases, the order of attachment shall not be issued by the clerk * * *," until a bond has been filed as provided therein. We think that it was the legislative intent, when the statute required the plaintiff to comply with the provisions of the general statute on attachment as to necessary allegations, that it must have therefore also intended that it comply with the bond provisions of section 25-1003, R. R. S. 1943. These statutes are a part of a comprehensive act. This interpretation harmonizes the meaning of the statutes, gives consistency to them, and achieves the clear legislative purpose of consistent protection for all of the defendant's property from wrongful attachment.

Vanburg v. Mauel, 131 Neb. 685, 269 N. W. 626, holds that a garnishment, for the purposes of a bond, is an attachment and that the provisions of section 25-1003,

R. R. S. 1943 (then section 20-1003, Comp. St. 1929), require a bond with properly qualified sureties. Garnishment is an attachment, species, or mode of attachment that reaches property in the hands of third parties. American Central Ins. Co. v. Hettler, 37 Neb. 849, 56 N. W. 711, 40 Am. S. R. 522; 6 Am. Jur. 2d, Attachment and Garnishment, § 3, p. 561.

The same conclusion follows from an analysis of the purpose of the statute. It could not have been contemplated by the Legislature, in enacting this comprehensive statute on attachment, that property of the defendant, merely because it was in the possession of a third party, was not to be protected by the bond requirement. This is particularly true because the writ may issue before judgment and without notice to the defendant. All of the bank account of a defendant, for example, could be tied up by a small claim without notice or protection to him.

By a parity of reasoning, we come to the conclusion that the amount of the bond also should be fixed in the manner provided by section 25-1003, R. R. S. 1943. This is to protect against the issuance of an attachment by way of garnishment for a wholly unrealistic amount and oppressively tie up an unnecessarily large amount of defendant's assets. The Legislature recognized the need for the protection of a defendant by the requirement of an endorsement of the amount by a judge.

We hold, therefore, that the bond required by section 25-1003, R. R. S. 1943, must be given in a garnishment proceeding before judgment and in an amount to be fixed as required by the same statute. The district court properly quashed the garnishment and its judgment is affirmed.

AFFIRMED.

HAZEL PRELL, APPELLANT, V. MICHAEL MURPHY, APPELLEE.
133 N. W. 2d 5

Filed February 5, 1965. No. 35831.

1. Trial. Ordinarily, a party cannot complain of the submission of an issue to the jury where the finding on that issue is favorable to him.
2. ———. A verdict will not be set aside as inadequate unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record or that the jury disregarded the evidence or rules of law.

Appeal from the district court for Lancaster County: JOHN L. POLK, Judge. Affirmed.

John McArthur, for appellant.

Ginsburg, Rosenberg, Ginsburg & Krivosha and Healey, Healey & Goth, for appellee.

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

BOSLAUGH, J.

This is an action for damages arising out of an automobile accident. The jury returned a verdict in the amount of $200 for the plaintiff, Hazel Prell. Her motion for new trial was overruled and she has appealed.

The accident happened at about 8:30 p. m. on April 10, 1960, on U. S. Highway No. 34, approximately 3 miles east of Lincoln, Nebraska. The weather was clear and the road was dry. Both automobiles were traveling at about 40 miles per hour.

The defendant, Michael Murphy, was driving west toward Lincoln, Nebraska. The plaintiff was a passenger in an automobile which was being operated in an easterly direction by her husband. Near the crest of a hill the plaintiff's husband observed the defendant's automobile which was then about 150 feet away and in the westbound lane of the highway. When the two

automobiles were 50 or 75 feet apart, the defendant's automobile crossed the centerline of the highway and then collided with the automobile in which the plaintiff was riding. The point of impact was approximately 6 feet south of the centerline. After the accident, the defendant stated that he was sleepy and must have "dozed off." The defendant did not testify and offered no evidence on the issue of liability.

The plaintiff did not move for a directed verdict on the issue of liability and that issue was submitted to the jury. The plaintiff contends that this was error because the evidence as to liability was undisputed and established that the defendant was negligent and that his negligence was the proximate cause of the accident which resulted in the plaintiff's injuries.

Ordinarily, a party cannot complain of the submission of an issue to the jury where the finding on that issue is favorable to him. In Klein v. Wilson, 167 Neb. 779, 94 N. W. 2d 672, this court said: "The plaintiff has set forth four assignments of error which he contends are grounds for reversal. The first which will be considered here is an assertion that the court erred in failing to sustain plaintiff's motion for directed verdict at the close of defendant's evidence and at the close of all the evidence in the case. The bill of exceptions indicates that such a motion was made only at the close of defendant's evidence. However this is of no importance. Even if the motion at the time made was validly based and erroneously overruled, that ruling may not be treated now as a ground for reversal of the judgment. The reason is that the plaintiff obtained from the jury by its verdict without direction precisely what he sought by his motion." See, also, Anderson v. Chicago, B. & Q. R.R. Co., 35 Neb. 95, 52 N. W. 840; Hauenstine v. Barnett, 98 Neb. 312, 152 N. W. 655; Weber v. Towle, 97 Neb. 233, 149 N. W. 406; Bartl v. City of New Ulm, 245 Minn. 148, 72 N. W. 2d 303; Schneider v. Keokuk Gas Service

Co., 250 Iowa 37, 92 N. W. 2d 439; 5A C. J. S., Appeal and Error, § 1758, p. 1121.

In this case there was no issue of contributory negligence or comparative negligence and the plaintiff was not prejudiced by the submission of the issue of liability to the jury.

The remaining assignment of error relates to the adequacy of the verdict. The plaintiff contends that the verdict of $200 is grossly inadequate, and that it should have been set aside and a new trial granted.

In this case the plaintiff did not claim any damages for hospital, medical, or similar expenses. The damages claimed were for injuries to her person and for pain and suffering. The amount to be awarded for such damages rests largely in the sound discretion of the jury, and courts are reluctant to interfere with verdicts so rendered.

The evidence shows that the plaintiff was taken to the hospital from the scene of the accident, and that she remained in the hospital 2 days. The plaintiff had a laceration on the back of her head which was approximately 2 inches in length and required stitches. The scar resulting from this laceration is concealed by her hair, but occasionally produces mild discomfort. The plaintiff had other lacerations upon her legs, some of which required stitches. She had numerous bruises and contusions as a result of the accident but no fracture or other bony abnormality. A hematoma or mass of localized blood that formed on one knee was drained by the plaintiff's physician at his office approximately 1 week after the accident. The plaintiff developed a swelling in both ankles which was treated by physiotherapy and bed rest. The plaintiff also complained of pain in her lower back about a week after the accident for which she received therapy.

On cross-examination of the plaintiff's physician, the defendant produced a report signed by the witness which listed the last date of treatment as May 6, 1960.

The report further stated that it was not anticipated that the plaintiff would require further treatment for her injuries. The defendant also produced the testimony of a physician who had examined the plaintiff in 1962 at the request of the defendant. This witness testified that he found a slight swelling on the lateral side or outside of both ankle joints; that there was normal motion in both feet and ankle joints and the circulation was normal; that swelling on the lateral side of the ankle joints is a common condition in women and is generally due to a physiological condition of the individual; and that he found no evidence of any permanent partial disability resulting from the accident.

The jury could find in this case that the plaintiff's injuries were of a temporary nature except for the scars which resulted from the lacerations. The members of the jury observed the plaintiff and thus were able to form their own opinion as to the extent to which the scars were disabling or disfiguring.

A verdict will not be set aside as inadequate unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record or that the jury disregarded the evidence or rules of law. Cover v. Platte Valley Public Power & Irr. Dist., 173 Neb. 751, 115 N. W. 2d 133.

Although the verdict in this case was for a nominal amount, and the evidence would have sustained a verdict for a larger amount, the evidence does not require that the verdict be set aside as inadequate.

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

AFFIRMED.

FLOYD MIDDLETON, APPELLEE, V. LLOYD NICHOLS ET AL., APPELLANTS, IMPLEADED WITH LOIS L. NICHOLS, APPELLEE.
132 N. W. 2d 882

Filed February 5, 1965. No. 35837.

1. **Trial: Appeal and Error.** In determining whether or not the trial court erred in refusing to sustain a motion for a directed verdict or a motion for judgment notwithstanding the verdict, the motion must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom it was made, and in considering it the party against whom it is made is entitled to have every controverted fact resolved in his favor and to have the benefit of every reasonable inference which may be drawn from the evidence resolved in his favor.
2. **Trial.** In a law action, where different minds may draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury. It is only where the evidence is undisputed, or but one reasonable inference or conclusion can be drawn from the evidence, that the question is one of law for the court.

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

Stubbs & Metz, for appellants.

Neighbors, Danielson & Van Steenberg and Bern R. Coulter, for appellee Middleton.

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

CARTER, J.

Plaintiff commenced this action to recover damages for personal injuries sustained in an automobile-pedestrian accident.

At the close of plaintiff's evidence defendants moved for a directed verdict, which was overruled except as to the defendant Lois L. Nichols. At the close of defendants' evidence plaintiff moved for a directed verdict which was also overruled. The case was submitted to a jury, which failed to arrive at a verdict and the jury was discharged. The remaining defendants then moved

for judgment notwithstanding the verdict, which was overruled. The plaintiff also moved for a judgment notwithstanding the verdict, which was overruled. The defendants Lloyd Nichols and Rolland Nichols have perfected an appeal to this court. No cross-appeal was taken by the plaintiff. The basic issue is whether or not the appellants were entitled to judgment as a matter of law.

The plaintiff Floyd Middleton will hereafter be referred to as Floyd. Floyd's brother, John Middleton, will be referred to as John. John's wife, Margaret Middleton, will be referred to as Margaret. The defendant Rolland Nichols will be referred to as Rolland, and his father, Lloyd Nichols, as Lloyd.

The accident occurred on March 4, 1961, at about 7 p.m. It was dark and automobiles were moving over the highway with their headlights burning. The accident occurred on a graveled country road north of Bridgeport, Nebraska. The surface of the road was dry and hard. The road was about 24 feet wide, straight, and practically level. The road was described as "washboardy."

At about 7 p.m., John was driving north in his pickup truck, followed by his brother Floyd, also driving a pickup truck. John drove off the road. John and Floyd drove Floyd's pickup to John's home and returned with his truck to pull the pickup out of the borrow pit. Margaret came back with them. In the first attempt to pull the pickup back on the highway, the chain was broken and the 2 or 3-foot section broken off was discarded. The chain was again fastened to the pickup and the pickup pulled from the borrow pit. The truck was stopped on the right side of the highway, 50 or 60 feet north of the point where the pickup had gone into the ditch. The pickup, also facing north, was behind the truck a distance of 7 feet 8 inches, its left rear corner extending over the center of the road approximately 1 foot. The headlights on the truck and pickup were burning.

Plaintiff's evidence shows that Floyd and Margaret were standing at the side of the pickup shortly before the accident. Margaret started north to close the left cab door of the truck. She observed the headlights of a car coming from the north. Realizing she had misjudged its distance or speed, she stepped between the truck and the pickup to permit the approaching car to pass. At the same time Floyd turned south to find the piece of discarded chain. He testified that he remembers little about the accident. There was evidence that the automobile struck Floyd with its left front fender and that it scooped him onto the fender and carried him some distance. He was 71 feet south of the pickup after the accident and 3 feet 6 inches from the east edge of the road. The car stopped from 100 to 125 yards south of the pickup. There is evidence that the car was traveling 50 miles per hour when it passed the pickup. Floyd's cap and glasses were found very close to the center of the road about 16 feet south of the pickup. There is evidence that tracks of the car after passing the pickup turned to the east across the center of the road.

Rolland was the driver of the car approaching from the north. There is evidence by Rolland and his witnesses which conflicts with that of plaintiff's witnesses. Rolland testified that he saw the headlights of the truck, that he slowed down to 20 or 25 miles per hour, that he saw the open door of the truck and observed Margaret standing between the truck and the pickup, and that he did not see Floyd until the instant of the impact. He does not know whether Floyd was walking or standing still, or where he was with reference to the center of the road except that he was in his direct line of vision. He said that the headlights were not burning on the pickup, and he does not know how close he was to the pickup when passing it. There is other disputed evidence in the record that bears little relation to the issue presented.

There are issues of fact, upon which the evidence is in conflict, that are for the determination of a jury.

It is for the jury to determine from all the facts and circumstances whether or not Rolland was driving at a speed that was reasonable and proper under the existing situation, whether or not he had his automobile under proper control, whether or not he kept a proper lookout, and whether or not he was negligent in driving to the east side of the center of the road while it was occupied by plaintiff.

In considering a motion for a directed verdict or a motion for judgment notwithstanding the verdict for the purpose of considering the correctness of the trial court's ruling thereon, the motion must 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 that 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. This is a long established rule of this court. Barry v. Dvorak, 176 Neb. 375, 126 N. W. 2d 226; Krepcik v. Interstate Transit Lines, 152 Neb. 39, 40 N. W. 2d 252; Parks v. Metz, 140 Neb. 235, 299 N. W. 643.

In cases where reasonable minds may differ as to whether or not the operator of a motor vehicle 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. Fulcher v. Ike, 142 Neb. 418, 6 N. W. 2d 610; Miers v. McMaken, 147 Neb. 133, 22 N. W. 2d 422.

The facts in this case require that the determinations made in the following cases be applied here: Nisi v. Checker Cab Co., 171 Neb. 49, 105 N. W. 2d 523; Anderson v. Nincehelser, 152 Neb. 857, 43 N. W. 2d 182; Floyd v. Edwards, 150 Neb. 41, 33 N. W. 2d 555.

We conclude that the evidence of the plaintiff, if believed by the jury, is sufficient to sustain a verdict for the plaintiff. In such a situation the question is for the

jury and defendants are not entitled to a directed verdict nor a judgment notwithstanding the verdict. The trial court having arrived at this same conclusion, its rulings denying plaintiff's motions for a directed verdict and for a judgment notwithstanding the verdict are correct. The orders of the trial court are correct and they are affirmed. The cause is remanded to the district court for further proceedings.

AFFIRMED.

CURRENCY SERVICES, INC. OF MINNESOTA, A CORPORATION, APPELLEE, V. EDITH PASSER ET AL., APPELLANTS.
133 N. W. 2d 19

Filed February 11, 1965. No. 35792.

1. **Contracts: Indemnity.** The general rules governing construction and interpretation of contracts other than indemnity contracts apply in construing indemnity contracts and in determining rights and liabilities of the parties thereunder.
2. ———: ———. If a contract of indemnity refers to and is founded on another contract, either existing or anticipated, it covenants to protect the promisee from some accrued or anticipated liability arising on the contract.
3. ———: ———. An indemnity contract should be construed so as to ascertain and give effect to the parties' intention, if that can be done consistently with legal principles.
4. ———: ———. In construing an indemnity contract, the terms and language used must be given fair and reasonable interpretation, the contract read in its entirety, and consideration given not only to the contract's language but also to the situation of the parties and circumstances surrounding them at the time of making of the contract.
5. **Contracts.** In construing a writing it is the duty of the court to give to words used their ordinary and popularly accepted meaning in the absence of explanation or qualification.

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

Abrahams, Kaslow, Story & Cassman and Robert C. Oberbillig, for appellants.

Carey & Phillips and John W. Delehant, for appellee.

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

BROWER, J.

The plaintiff and appellee Currency Services, Inc., of Minnesota is in the business of selling money orders through agents. It entered into an agency contract with the defendants and appellants Edith Passer and Stanley Passer, who operate a retail grocery store under the name of "E & P Store," located at 2409 Cumming Street, Omaha, Nebraska.

The contract was in writing and provided that the defendants, termed "Agent" therein, should sell to the public "Bondified" money orders on blank forms supplied by plaintiff, designated in the agreement as the "Operator." The orders were to be sold at the face amount thereof plus a fee in accordance with a schedule of rates specified in the agreement, the fee to be divided 60 percent to the plaintiff and 40 percent to the defendants.

The agreement required the defendants to hold the whole of the amounts collected, with the exception of the 40 percent of the fee going to the defendants, in trust for the plaintiff and remit the same to the plaintiff on Wednesday and Saturday of each week.

The last sentence of the printed form of the agreement states: *"The Agent agrees to unequivocally indemnify the Operator against all loss of trust funds held in the Agent's custody."* (Italics supplied.)

On March 13, 1961, the defendants had in their custody in their store, segregated, the sum of $1,734,69, representing the face amount of money orders previously sold during the period from March 3, 1961, to March 11, 1961, both inclusive, and the plaintiff's 60 percent of the fees thereon.

A robbery then occurred in which these trust funds as well as the general funds of the store were taken

by force from the custody of the defendants.

The facts related are all admitted by stipulation and there is no question of fact in dispute.

Plaintiff filed action against defendants to recover said trust funds in the municipal court of the city of Omaha where a trial resulted in a finding for the defendants and a dismissal of the plaintiff's petition. On the case being appealed by the plaintiff to the district court for Douglas County, a jury was waived and a trial to the court resulted in a finding and judgment in favor of the plaintiff in the amount of the principal of the funds in trust and interest to date. Defendants' motion for a new trial was overruled and they have brought the matter to this court by appeal.

The defendants assign error to the trial court claiming the judgment was not sustained by the evidence and was contrary to law, and that for that reason the trial court should have sustained their motion for a new trial.

Defendants contend that an agent is not liable to his principal for property stolen and that the quoted clause in the contract was an agreement for indemnity and not of insurance. They urge that such an agreement is usually construed strictly against the indemnitee in favor of the indemnitor, particularly so in this instance where the contract was prepared by the plaintiff. Defendants seem to construe the provision that, "The Agent agrees to unequivocally indemnify the Operator against all loss of trust funds held in the Agent's custody," as protecting the plaintiff against the negligent acts of the defendants and their employees only. They say the word "unequivocally" means "not doubtful or ambiguous" and adds nothing to the meaning of indemnify and, in fact, restricts it only to loss as to which there is no doubt. They assert the word *"all"* before "loss" refers to the extent of the loss or the full amount of the trust funds and not to various "kinds" of loss.

In First Trust Co. v. Airedale Ranch & Cattle Co.,

136 Neb. 521, 286 N. W. 766, this court held: The general rules governing construction and interpretation of contracts other than indemnity contracts apply in construing indemnity contracts and in determining rights and liabilities of the parties thereunder.

If a contract of indemnity refers to and is founded on another contract, either existing or anticipated, it covenants to protect the promisee from some accrued or anticipated liability arising on the other contract.

An indemnity contract should be construed so as to ascertain and give effect to the parties' intention, if that can be done consistently with legal principles.

In construing an indemnity contract, the terms and language used must be given fair and reasonable interpretation, the contract read in its entirety, and consideration given not only to the contract's language but also to the situation of the parties and circumstances surrounding them at time of making of the contract.

In this case the indemnity provision was a part of the agency contract itself. The trust funds which were to be collected by the sale of the money orders were wholly within the care of the agent until remitted. The plaintiff's place of business to which the funds were to be sent was in Minneapolis, Minnesota. The plaintiff could not protect the funds while they remained in the hands of its agents. No negligence on the part of the plaintiff is involved. Defendants could take any steps to safeguard them they saw fit. The importance of the safekeeping of the funds at once becomes apparent. It seems only natural that the plaintiff should desire assurance in the form of an indemnity to protect it from loss. Can it be said, as the defendants maintain, that the possibility of loss from theft or robbery by others in the defendants' store could not have been contemplated by the parties in view of the circumstances of the business contemplated? We think not. It would seem defendants would be liable for their negligence and that of their employees without any indemnity agreement. Nei-

ther are we convinced that the word "unequivocally" placed as it was in the agreement did not broaden the risk which was sought to be protected against by the indemnity provision. Some of its meanings as given in its definition in Webster's Third New International Dictionary at page 2494, include "clearly," "unambiguously," "unmistakably," and "conclusively." "All loss" would also appear to most persons to refer to all varieties of loss. In Long v. Magnolia Petroleum Co., 166 Neb. 410, 89 N. W. 2d 245, this court held: "In construing a writing it is the duty of the court to give to words used their ordinary and popularly accepted meaning in the absence of explanation or qualification."

We conclude from the foregoing rules that the indemnity contract in this case covered the loss incurred in operations contemplated by the indemnitors' contract, and under conditions controlled by the indemnitors. We find that the contract of the defendants to "unequivocally indemnify" the plaintiff for "all loss" clearly included and covered the loss incurred. The trial court committed no error in so holding and its judgment is affirmed.

AFFIRMED.

SKAG-WAY, INC., DOING BUSINESS AS O. P. SKAGGS, A CORPORATION, APPELLEE, V. PAUL L. DOUGLAS, COUNTY ATTORNEY OF LANCASTER COUNTY, NEBRASKA, ET AL., APPELLANTS, HARDY FURNITURE COMPANY ET AL., INTERVENERS-APPELLANTS.
133 N. W. 2d 12

Filed February 11, 1965. No. 35808.

Constitutional Law: Sunday. This case is controlled by the opinion in Terry Carpenter, Inc. v. Wood, 177 Neb. 515, 129 N. W. 2d 475.

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

Paul L. Douglas and Floyd A. Sterns, for appellants.

Woods, Aitken & Aitken, for appellee.

Nelson, Harding & Acklie and Charles J. Kimball, for interveners-appellants.

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

SPENCER, J.

This is an action filed in the district court for Lancaster County by Skag-Way, Inc., doing business as O. P. Skaggs, a corporation, against the county attorney and the sheriff of Lancaster County, Nebraska, to declare Legislative Bill 710, enacted by the Seventy-third Session of the Legislature of the State of Nebraska, Laws 1963, c. 392, p. 1242, hereinafter referred to as L. B. 710, void and unconstitutional, and to enjoin the defendants from enforcing its provisions against the plaintiff. Fifteen retail merchants were permitted to intervene in support of L. B. 710.

The trial court, on March 25, 1964, held L. B. 710 to be unconstitutional and void. Defendants and the interveners perfected this appeal.

Essentially, two questions are involved: First, is L. B. 710 a valid enactment; and second, if portions of L. B. 710 are found to be invalid, are such portions severable from the remainder of the act, thus leaving that valid remainder in force?

Both questions have heretofore been decided by this court. Pending this appeal, and on July 3, 1964, we filed the opinion in Terry Carpenter, Inc. v. Wood, 177 Neb. 515, 129 N. W. 2d 475, holding L. B. 710 to be null, void, and unconstitutional, and specifically holding that the invalid portions of the act were so interwoven with the rest that the doctrine of severability was not applicable. We adhere to that opinion, which is controlling herein.

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

AFFIRMED.

BOSLAUGH, J., not participating.

ALBERT J. PLUCKNETT, DOING BUSINESS AS FOUR STAR DRUG, A SOLE PROPRIETORSHIP, ET AL., APPELLEES, V. FRANK B. MORRISON, GOVERNOR OF THE STATE OF NEBRASKA, ET AL., APPELLANTS, HARDY FURNITURE COMPANY ET AL., INTERVENERS-APPELLANTS.

133 N. W. 2d 18

Filed February 11, 1965. No. 35809.

Constitutional Law: Sunday. This case is controlled by the opinion in Terry Carpenter, Inc. v. Wood, 177 Neb. 515, 129 N. W. 2d 475.

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

Paul L. Douglas and Floyd A. Sterns, for appellants.

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellees.

Nelson, Harding & Acklie and Charles J. Kimball, for interveners-appellants.

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

SPENCER, J.

This is a case filed in the district court for Lancaster County by Albert J. Plucknett, doing business as Four Star Drug, a sole proprietorship, and Four Star Drug of Lincoln, Nebraska, Inc., a corporation, against Frank B. Morrison, Governor of the State of Nebraska, and other state, county, and city officials, to declare Legislative Bill 710, enacted by the Seventy-third Session of the Legislature of the State of Nebraska, Laws 1963, c.

392, p. 1242, hereinafter referred to as L. B. 710, void and unconstitutional, and to enjoin defendants from enforcing its provisions against the plaintiffs. Fifteen retail merchants were permitted to intervene in support of L. B. 710, and they join in the appeal from the order finding L. B. 710 to be unconstitutional and void.

This case is a companion case to Skag-Way, Inc. v. Douglas, No. 35808, *ante* p. 290, 133 N. W. 2d 12. They were tried together in the district court and briefed and argued together in this court. As we said in the companion case, the questions involved were fully determined by Terry Carpenter, Inc. v. Wood, 177 Neb. 515, 129 N. W. 2d 475.

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

AFFIRMED.

BOSLAUGH, J., not participating.

RAYMOND A. BALLARD, ADMINISTRATOR OF THE ESTATE OF ANN JEAN BYRON, DECEASED, APPELLANT, V. RICHARD L. DAVENPORT, ADMINISTRATOR OF THE ESTATE OF IRVIN EATON, DECEASED, APPELLEE.

133 N. W. 2d 13

Filed February 11, 1965. No. 35817.

1. **Descent and Distribution.** Under subdivision (1) (a) of section 30-103, R. R. S. 1943, the title to all wearing apparel, ornaments, and household furniture of a deceased person passes immediately to the surviving spouse, or, if there be no surviving spouse, to the child or children of the deceased, if any.
2. **Descent and Distribution: Executors and Administrators.** Under section 30-404, R. R. S. 1943, wearing apparel, ornaments, and household furniture allowed by subdivision (1) (a) of section 30-103, R. R. S. 1943, to the surviving spouse, and, if there be no spouse surviving, to the surviving children of the deceased spouse, are not assets in the hands of executors or administrators when a described recipient survives the deceased spouse.
3. ———: ———. Where personal property allowed to a sur-

viving spouse or children by subdivision (1) (a) of section 30-103, R. R. S. 1943, passes to a survivor named therein, an executor or administrator has no ownership or interest in, or a right of possession in, such property sufficient to sustain an action in replevin.

Appeal from the district court for Cherry County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Dean L. Donoho, for appellant.

Spittler & O'Kief and Rush C. Clarke, for appellee.

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

CARTER, J.

The plaintiff sought to recover possession of certain clothing, jewelry, and furniture from the defendant by replevin. At the close of plaintiff's evidence the court directed a verdict for the defendant. Plaintiff has appealed.

The evidence shows that on June 21, 1958, Irvin Eaton and Ann Jean Byron were married by a ceremonial marriage in the State of Nevada. Thereafter they resided in Valentine, Nebraska, where they lived together as husband and wife until the marriage contract was terminated by the death of Ann Jean Eaton on August 20, 1960. Irvin Eaton died on April 28, 1961. Raymond A. Ballard is the duly appointed administrator of the estate of Ann Jean Byron (Eaton), deceased. Richard L. Davenport was appointed administrator of the estate of Irvin Eaton, deceased, and has been succeeded by Edward Greteman as such administrator pending the appeal in this court.

There is a suggestion in the briefs that the ceremonial marriage of Irvin and Ann Jean Eaton was void. This question is not supported by any evidence in the record. The presumption of the validity of the ceremonial marriage obtains insofar as this litigation is concerned. Allen v. Allen, 121 Neb. 635, 237 N. W. 662.

The action in replevin was commenced to obtain possession of 112 numbered items of personal property including two diamond rings, a wrist watch, a mink stole, a full-length beaver coat, and a washer and dryer. The sheriff's return to the order of replevin shows that 26 numbered items of personal property were taken into his possession and appraised at $9,247.25. The return then states that plaintiff failed to post the necessary bond in double the appraised value of the property within 24 hours and the property was returned to the administrator of the estate of Irvin Eaton, deceased. The action then continued as an action for damages. At the trial the plaintiff offered proof of value of some of the property, the amount of which is of no importance at the present stage of the proceedings.

The petition in replevin alleged that plaintiff is the owner and is entitled to the immediate possession of the personal property sought to be replevined. At the close of plaintiff's evidence, plaintiff sought to amend his petition to allege a special interest in the property as shown by the evidence. The trial court denied plaintiff's application to amend. Plaintiff asserts this is error. The defendant contends that if the trial court was in error it was without prejudice for the reason that plaintiff had no interest in the property and the amendment, if granted, would not have been sufficient to avoid a directed verdict. We shall first resolve this question.

The articles sought to be replevined consisted of household furniture, wearing apparel, and ornaments. The record shows that the rings and watch were removed from the body of Ann Jean Eaton at the mortuary after her death. The household furniture, wearing apparel, and other items were in the home of the Eatons after her death. It is the contention of defendant that the articles were set aside for the benefit of the surviving spouse under applicable statutes and became the property of the surviving spouse, and that the administrator of the estate of Ann Jean Eaton had no right

of possession thereto for any purpose. The evidence does not show that the estate of Ann Jean Byron (Eaton) was insolvent, or that there were any existing creditors. No contention is advanced to the contrary.

It is a fundamental rule in replevin that a plaintiff must recover on the strength of his right in or to the property and not upon any weakness of the interest of the defendant therein. State Farm Mutual Auto. Ins. Co. v. Drawbaugh, 159 Neb. 149, 65 N. W. 2d 542. Some contention is advanced that the allegations of the petition are insufficient to show that plaintiff brought the action in his capacity as administrator. Under the holding of Bennett v. Bennett, 65 Neb. 432, 91 N. W. 409, we hold that the petition was sufficient in this respect. The sole question is, therefore, whether or not the administrator had any general ownership or special interest in the described property that would support an action in replevin.

It is provided in part by section 30-103, R. R. S. 1943: "When any person shall die possessed of any personal estate or of any right or interest therein, not lawfully disposed of by his last will, the same shall be applied and distributed as follows: (1) The surviving husband or wife, if any, and if there be no surviving husband or wife, then the child or children, if any, of the deceased shall be allowed (a) all the wearing apparel and ornaments and household furniture of the deceased, * * *." Section 30-404, R. R. S. 1943, provides: "A separate and distinct inventory and appraisement shall be made and returned, as aforesaid, of all the household furniture and other personal property which may be allowed to the widow, pursuant to the provisions of section 30-103, but the same shall not be considered assets in the hands of the executors or administrators."

Section 30-103, R. R. S. 1943, insofar as it applies to the present case, has been the statutory law of this state since 1907. See § 3000, Comp. St. 1907. By the previous decisions of this court this section of the statute has

been construed to mean that title vested immediately in the surviving spouse to wearing apparel, ornaments, and household furniture of the deceased spouse, and that such property is not an asset of the estate in the hands of an executor or administrator. In re Estate of Fletcher, 83 Neb. 156, 119 N. W. 232; In re Estate of Leavitt, 85 Neb. 521, 124 N. W. 114; Judson v. Creighton, 88 Neb. 37, 128 N. W. 651.

In the case of In re Estate of O'Shea, 85 Neb. 156, 122 N. W. 881, it was held that: "* * * it seems to have been the purpose of the legislature to deprive a testator of the right or power to dismantle the home or any part thereof without the consent of the survivor." And in In re Estate of Leavitt, *supra,* the court said: "The courts will not inquire into the need of the recipient as to the specific property mentioned, and the statute operates to transfer the title of such articles to the widow (now the surviving spouse), irrespective of whether or not she possesses sufficient separate property and estate so that her necessities do not require the allowance." It is further held that an executor who inventoried household goods but did not take possession of them could not be charged with their value. Tunnicliff v. Fox, 68 Neb. 811, 94 N. W. 1032.

We necessarily conclude that title to wearing apparel, ornaments, and household furniture passes immediately to a surviving spouse on the death of the deceased spouse, and that such property is not an asset of the estate of the deceased spouse. Such being the case, the administrator of the estate of the deceased spouse has no right to possession of wearing apparel, ornaments, and household goods of the deceased as against a surviving spouse. The trial court having come to the same conclusion, its judgment is affirmed.

AFFIRMED.

LOUIS SANDERSON, APPELLEE, V. RALPH WESTPHALEN ET AL., APPELLANTS.

133 N. W. 2d 16

Filed February 11, 1965. No. 35823.

1. **Automobiles: Trial.** Before a verdict can be directed against a driver for his failure to see another vehicle approaching a nonprotected intersection, the evidence must show without dispute that the other vehicle was located in a favored position and within the radius of danger.
2. ———: ———. Where a driver looks but fails to see an approaching vehicle which is not shown to be in a favored position, his negligence is usually a question for the jury.

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

Kanouff & Fly, for appellants.

Lyle B. Gill, for appellee.

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

BOSLAUGH, J.

This is an action for damages arising out of an automobile accident brought by Louis Sanderson as plaintiff. The defendants are Ralph Westphalen, Floyd J. Johnson, and Betty E. Johnson. The jury returned a verdict in the amount of $12,833 for the plaintiff. The defendants' motion for judgment notwithstanding the verdict or for a new trial was overruled and they have appealed.

The defendant, Ralph Westphalen, was a farm laborer employed by the defendants, Floyd J. Johnson and Betty E. Johnson, and was driving a Chevrolet pickup truck owned by the Johnsons at the time the accident happened. The pleadings admit the agency, and there is no issue concerning the liability of the Johnsons if the evidence is sufficient to sustain a finding that Westphalen is liable for the damages to the plaintiff. For

convenience, Westphalen will be referred to as the defendant.

The accident happened at an intersection of county roads in Saunders County, Nebraska, at about 4 p.m., on December 6, 1961. It was a clear day and the roads were dry. Both roads were graveled. The traveled portion of the east-west road was 20 feet wide. The traveled portion of the north-south road was 18 feet wide.

The parties stipulated that E. Gerald Erickson, a qualified engineer, if called as a witness would testify that there is a hill or rise on the east-west road east of the intersection; that the distance from the center of the intersection to the bottom of the hill is 504 feet; that the distance to the top of the hill is 764 feet; that there is a knoll or hill on the north-south road south of the intersection; and that the top of the hill is 675 feet south of the center of the intersection.

A driver approaching the intersection from the east has a clear view of vehicles approaching from the south. A driver approaching the intersection from the south has a clear view of vehicles approaching from the east.

The plaintiff testified that he was driving his Chevrolet automobile west at about 35 miles per hour; that when he was at the bottom or close to the bottom of the knoll east of the intersection, "* * * which I'd say would be three or four hundred feet," he looked to the south and then to the north; that he did not see anything approaching the intersection from the south; that he did not look to the south again because it looked all clear to him; and that he did not see the defendant's truck before the impact.

The defendant testified that he was driving the pickup truck north at about 35 miles per hour; that when he was between 300 and 400 feet from the intersection he looked to the east and saw nothing; that he did not look to the east again; that he looked to the west and continued to look to the west because he did not have a good view of the road west from the intersection until

he was within 10 or 15 feet of it; and that he did not see the plaintiff's automobile before the impact.

The point of impact was near the center of the intersection. The front of the pickup truck collided with the left front fender and door of the plaintiff's automobile. The plaintiff's automobile came to rest in a plowed field 148 feet from the center of the intersection and 49 feet north of the east-west road. The defendant's truck came to rest near the northwest corner of the intersection 25 or 27 feet from the center of the intersection and headed to the northeast.

The assignments of error relate to the sufficiency of the evidence to support the finding for the plaintiff on the issue of liability. The defendants contend that the evidence establishes that the plaintiff was guilty of negligence as a matter of law which was sufficient to bar any recovery.

The defendants argue that the plaintiff's failure to see the defendant's truck and his failure to look to the south again as he approached the intersection was contributory negligence sufficient to bar his recovery. The defendants rely upon Nelson v. Plautz, 130 Neb. 641, 265 N. W. 885, and Evans v. Messick, 158 Neb. 485, 63 N. W. 2d 491, in which it was said that the failure of the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence, as a matter of law, and defeats recovery.

The jury in this case could find that the plaintiff looked to the south when he was between 300 and 400 feet from the intersection. At that time he would have a clear view of the road south from the intersection for a distance of 675 feet. The negligence of the plaintiff in this case lies in his failure to see the defendant's truck rather than a failure to look to the south at a

time when he was able to see the defendant's truck approaching the intersection.

In this case the plaintiff and the defendant approached and entered the intersection at approximately the same time. Gernandt v. Beckwith, 160 Neb. 719, 71 N. W. 2d 303. The plaintiff having approached the intersection to the right of the defendant, had the right-of-way and the right to assume that his right-of-way would be respected unless it would appear to an ordinarily careful and prudent person that to proceed would probably result in a collision. § 39-751, R. S. Supp., 1961; Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496.

The problem in this case is whether the evidence of negligence on the part of the plaintiff was sufficient to bar his recovery as a matter of law. We think that the correct rule is that before a verdict can be directed against a driver for his failure to see another vehicle approaching a nonprotected intersection, the evidence must show without dispute that the other vehicle was located in a favored position and within the radius of danger. Costanzo v. Trustin Manuf. Corp., 176 Neb. 136, 125 N. W. 2d 556. Where a driver looks but fails to see an approaching vehicle which is not shown to be in a favored position, his negligence is usually a question for the jury. Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596.

We think that the rule stated in Nelson v. Plautz, *supra,* and Evans v. Messick, *supra,* is applicable where the driver fails to look at all or fails to see another automobile which is shown to be in a favored position. Whitaker v. Keogh, *supra.* To the extent that the opinions in Nelson v. Plautz, *supra,* and Evans v. Messick, *supra,* are in conflict with this opinion, they are overruled.

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

AFFIRMED.

DAVID LORTSCHER, APPELLEE, V. KENNETH H. WINCHELL, APPELLANT.

133 N. W. 2d 448

Filed February 19, 1965. No. 35672.

1. **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 accepted one version of the facts rather than the opposite.
2. **Reformation of Instruments.** In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory; and until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties.
3. **Compromise and Settlement.** The law favors and encourages settlements, and in the absence of fraud, error, or mistake, they should not be set aside.
4. **Reformation of Instruments: Equity.** Equity will decree reformation of a contract only if the mistake is mutual, or for fraud or inequitable conduct.
5. **Contracts.** The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract. Ordinarily, such a construction of the contract should be enforced.

Appeal from the district court for Pawnee County: ERNEST A. HUBKA, Judge. Affirmed.

Richard H. Hansen, for appellant.

Dwight Griffiths and Robert S. Finn, for appellee.

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

BOSLAUGH, J.

This is an action for an accounting and other equitable relief brought by David Lortscher as plaintiff against Kenneth H. Winchell, the defendant. The action was brought to determine and recover amounts alleged to be due the plaintiff from the defendant as the

result of their operation of a grain storage business, to determine the rights of the parties in certain storage facilities purchased by them, and to partition the property.

The trial court found generally for the plaintiff. Both parties filed motions for new trial which were overruled. The defendant has appealed. There is no cross-appeal.

In 1954, the defendant entered into a lease with the Chicago, Burlington & Quincy Railroad Company for property located in Table Rock, Nebraska, and purchased a roundhouse structure located upon the property. The defendant then converted the roundhouse into a grain warehouse, obtained a license to operate a grain warehouse, and entered into a grain storage agreement with the Commodity Credit Corporation of the United States Department of Agriculture. The defendant was advised by both state and federal officials that it would be necessary for him to have a full-time manager at the warehouse who was a qualified and capable grain elevator man.

The plaintiff has been engaged in the grain storage business at Bern, Kansas, since 1948. On August 1, 1954, the defendant entered into a written contract with the plaintiff concerning the operation of the roundhouse at Table Rock, Nebraska, as a grain warehouse. The contract, which is identified as exhibit No. 1 in the record, provided generally that the defendant would furnish the warehouse at his expense. The plaintiff agreed to fill and remove grain in the warehouse at no expense to the defendant, care for the grain, and maintain it in a proper condition. The parties were to share equally the expense of the license, bond, insurance, utilities, fumigant, and other miscellaneous expenses.

The contract further provided that it should continue in full force and effect so long as the warehouse was used for the storage of grain for the United States Department of Agriculture "unless amended by agreement

of both parties." The contract also provided that it should not be construed to create a partnership or an employer-employee relationship between the parties.

The contract then provided: "Losses, if any, shall be borne by the parties in equal shares. Gross income shall be divided on or before the 30th day of June of each calendar year, two-thirds to First Party and one-third to Second Party. Where the warehouse is not emptied and refilled, and results in depriving First Party of two and one-half cents per bushel from the United States Department of Agriculture, then First Party shall receive one and two-thirds cents per bushel of grain stored before the division of two-thirds to First Party and one-third to Second Party is made. There shall be deducted from each party's share, any item of indebtedness required to be paid by him."

The following year defendant purchased two steel water tanks at Table Rock, two water tanks at Wymore, Nebraska, and leased the property at Wymore where the tanks were located. The warehouse and tanks at Table Rock and the tanks at Wymore are referred to in the record as "old storage."

In 1957, the parties purchased a 200,000-bushel capacity storage building from the Behlen Manufacturing Company which was erected at Table Rock. In 1960, the parties purchased a 20,000-bushel capacity bin, identified in the record as the "B. S. & B." bin, which was also erected at Table Rock. The Behlen building and the B. S. & B. bin are referred to in the record as the "new storage."

From time to time the parties met and entered into settlements in which they made a division of the income that had been received and reimbursed each other for expenses that had been paid. The last such settlement was made on August 23, 1960, and resulted in a division of income received for storage of grain to June 30, 1960. Both parties contend that there were mistakes in one or more of the settlements and the defendant

contends that the written contract entered into on August 1, 1954, should be reformed in part. There is an issue as to the right of the plaintiff to participate in the income received after November 15, 1960, and an issue as to the extent and nature of the interest of the plaintiff in the new storage facilities. These are the issues to which the assignments of error relate and the issues which will be considered in disposing of this appeal.

The record consists of over 1,000 pages of testimony and 97 exhibits, many of which consist of several pages. The evidence will be summarized only to the extent necessary to an understanding of the issues which will be considered in disposing of the appeal.

This is an action for equitable relief in which we are required to try the issues of fact complained of de novo and reach an independent conclusion without reference to the findings of the district court. The review, however, is subject 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 accepted one version of the facts rather than the opposite. Stibor v. Farrell, 177 Neb. 437, 129 N. W. 2d 449.

Much of the record consists of the testimony of the parties concerning the twelve settlements which they entered into between April 10, 1955, and August 23, 1960, and the division of the income from grain storage which they made. The principal dispute in this regard relates to the right of the defendant to receive 1⅔ cents per bushel of grain stored for a full year "before" the division of the balance of the income between the parties. This payment was computed only as to grain which remained in "old storage."

At the time the parties entered into exhibit No. 1, the Department of Agriculture paid a service charge of 2 cents per bushel for grain which remained in storage for a full year in addition to regular storage fees. When

grain was received or loaded out, there were handling charges paid which combined amounted to 4½ cents per bushel. Apparently, the provision in the contract for the payment of 1⅔ cents per bushel to the defendant before the division of the balance of the income was intended as compensation to the defendant for the reduction in revenue which resulted when grain remained in storage and the plaintiff did not have the responsibility and expense incident to receiving and shipping grain from the warehouse. In any event, the effect of this provision was to increase the defendant's share of the income when grain remained in storage.

Approximately 2 years after the parties entered into exhibit No. 1, the payment of the 2 cents per bushel service charge was discontinued. The defendant now contends that exhibit No. 1 should be reformed and the settlements recomputed so that the defendant will receive 3 cents per bushel for grain remaining in storage after the payment of the 2 cents per bushel service charge was discontinued, and the payment will be made "after" the division of income between the parties and paid entirely from the plaintiff's share of the income.

In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory; and until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties. Lincoln Equipment Co. v. Eveland, 173 Neb. 174, 112 N. W. 2d 755. There is no clear, convincing, and satisfactory evidence in this case to show that exhibit No. 1 should be reformed. We think the trial court was correct in refusing to grant this relief to the defendant.

The record shows that the parties made their settlements in the following manner. A written memorandum of each settlement was made and each of the parties received a copy of the memorandum. The income which the defendant had received since the date of the last settlement was listed and a computation made to divide

the income between the parties. The defendant then wrote a check to the plaintiff for his share of the income. The expenses that had been paid by each of the parties were listed. Each party then wrote a check to the other so that each party was reimbursed for one-half of the expenses he had paid.

The district court refused to set aside or recompute any of the settlements which the parties had made, and held that the settlements were binding on both parties and conclusive as to all matters covered in the settlements. We think this determination was correct. In a similar case this court said: "The parties agree that they met once a year, or thereabouts; that they had their accounts before them, and that debits and credits were demanded, given, and refused, resulting in the giving of a new note for the ascertained balance and the surrender of the old note. The law favors and encourages settlements, and in the absence of fraud, error, or mistake, they should not be set aside. The record conclusively shows a meeting of the parties, a presentation, examination and adjustment of their accounts, the making of new notes for the found balance and the surrender of the old ones. Such acts constitute settlements." Stuart v. Torrey, 106 Neb. 608, 184 N. W. 215.

It is apparent from the record that the parties did not follow a uniform basis in computing each of the settlements which they made. Thus, there is some basis for an assertion that there were mistakes made in one or more of the settlements. But this alone is not sufficient to entitle either party to reformation of any particular settlement.

Equity will decree reformation of a contract only if the mistake is mutual, or for fraud or inequitable conduct. Neary v. General American Life Ins. Co., 140 Neb. 756, 1 N. W. 2d 908. There is no clear, convincing, and satisfactory evidence of a mutual mistake as to any of the settlements which were made. There is no show-

ing of a mistake common to both parties, each laboring under the same misconception.

There is a further reason why the settlements which the parties made in this case should not be disturbed. Each settlement which the parties made was a practical interpretation of their contract. The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract. Lewis v. Gallemore, 173 Neb. 211, 113 N. W. 2d 54. Ordinarily, such a construction of the contract should be enforced. McLeod v. Crawford, 176 Neb. 513, 126 N. W. 2d 663.

The defendant contends that the plaintiff has no right to share in the income received after November 15, 1960. The defendant's theory is that he had the right to terminate the plaintiff's services at any time and that they were terminated as of November 15, 1960.

The written contract between the parties provided that it should continue in force so long as "said warehouse" was used for the storage of grain "unless amended by agreement of both parties." The contract did not give the defendant the right to terminate the plaintiff's interest in the contract at will and specifically provided that it did not create an employer-employee relationship between the parties.

There was grain in storage in some of the facilities operated under the contract until 1962, and the record does not show an agreement between the parties that the contract should terminate as of November 15, 1960. The parties discussed a termination of the contract and a settlement of their rights in November 1960, but they failed to reach an agreement. The evidence does not show that the plaintiff's right to participate in the income terminated on November 15, 1960.

The trial court found that the balance due the plaintiff from the defendant was $15,509.07 after dividing the income received and allocating the expenses and losses incurred, in accordance with the contract of the parties

as interpreted by them in the June 1960 settlement. The record supports this finding and we believe that it is correct.

The remaining issue relates to the ownership of the Behlen building and the B. S. & B. bin at Table Rock. Each of the parties signed the contract for the purchase of the Behlen building. They each paid one-half of the downpayment. The purchase order recited that the balance due was "to be financed." A controversy developed during the construction and completion of the building which resulted in a settlement with the Behlen Manufacturing Company that was made on October 9, 1959. The settlement was accomplished by executing a mutual release and delivering a promissory note in the amount of $36,500 signed by the plaintiff and the defendant.

The purchase order for the B. S. & B. bin was signed by the plaintiff, and the downpayment of $1,000 was made by him. The defendant later paid $3,200.87 on the contract. The parties reimbursed each other for one-half of these amounts in the settlement which they made on August 23, 1960. The balance of the purchase price was paid by the plaintiff.

The income received from the storage of grain in the Behlen building and the B. S. & B. bin was divided on a different basis from that prescribed in exhibit No. 1. The income from the storage of grain in the Behlen building and the B. S. & B. bin was divided equally and there was no payment to the defendant for grain which remained in storage in these facilities.

The defendant contends that he owns the Behlen building and the B. S. & B. bin, and that the plaintiff has no interest in these facilities other than repayment of the amounts advanced by him toward their purchase. The defendant further contends that one-third of the income received by the plaintiff from these facilities was intended as repayment of the amounts advanced by him and should be credited against the amounts ad-

vanced. The defendant claims that his testimony to this effect is corroborated by a letter dated October 22, 1958, signed by the plaintiff, which was sent to the United States Department of Agriculture.

The letter was prepared by a lawyer at the direction of the defendant and submitted to the plaintiff for his signature. It was sent in response to a demand by the Department of Agriculture that the plaintiff report in detail what arrangements and agreement he had with the defendant and what interest he had in the defendant's grain storage operation. At that time the plaintiff's license at Bern, Kansas, had been suspended and he had been ordered to ship out all of his grain. When it was determined that the plaintiff had the proper amount and quality of grain in storage, he was reinstated.

The letter itself is ambiguous. It contains language which tends to corroborate in part the defendant's theory of the facts. It also contains language which supports the plaintiff's contention. The letter recites that the plaintiff was "employed" as a supervisor-manager by the defendant and "subject to dismissal at his order"; that the plaintiff assisted the defendant "financially" in the purchase of the Behlen building by putting up one-half of the downpayment; and that the defendant had the option to "buy my one-half interest in the building at any time." The letter then stated: "This was really a loan to Winchell by me of one-half of the down payment money. I still own a one-half interest in the Behlen building, subject to the option of Winchell of paying me at any time and also subject to the payment to Behlen of the balance of the unpaid purchase price. I continued to manage and supervise the grain storage facility at Table Rock, Nebraska for Winchell as his manager and employee under the same general terms as our original agreement made in 1954, and he continued to be the owner of the entire operation and grain storage business, including the new (1957) building; at all times I

operated and I still operate under Winchell's direction and authority.

"I have neither had nor claimed any interest in the grain storage business of Kenneth H. Winchell, operated under his name at Table Rock, Nebraska, and the financial statement that you requested (copy enclosed) also states that I have no interest in that business, other than a working interest in a building used by him. My only interest at that place, other than manager, is the fact that I advanced for the accommodation of Kenneth H. Wichell (Winchell) one-half of the down payment money in the purchase of the Behlen Building which I consider only as a loan, since he can purchase my interest at any time by merely repaying me my down payment money."

The letter is inconsistent in that it refers to a "loan" to the defendant, and also to an option on the part of the defendant to "buy" the plaintiff's interest in the Behlen building. The inconsistency may be more apparent than real because the plaintiff's position has been that he would sell his interest in the Behlen building and the B. S. & B. bin for less than the amounts that he advanced.

The real controversy is over the defendant's claim that one-third of the plaintiff's share of the income from these facilities was to be credited against the amounts advanced by the plaintiff for the purchase of the facilities. There is nothing in the October 1958 letter which corroborates this part of the testimony of the defendant.

The settlement with the Behlen Manufacturing Company was made about a year after the October 1958 letter was signed. The plaintiff paid one-half of his share of the note to Behlen on October 13, 1959. In June 1960, the defendant paid the balance of the note and the plaintiff then reimbursed the defendant for the plaintiff's share of the balance of the note plus interest in the amount of $192.50. The B. S. & B. bin was not pur-

chased until 1960. The parties never executed any memorandum or other evidence of indebtedness and there is no reference in any of the settlements to such an indebtedness or an application of a part of the plaintiff's share of the income to the reduction of such an indebtedness. At about the time of the purchase of the Behlen building the defendant handed to the plaintiff a memorandum, exhibit No. 23, concerning five items that should be attended to. Items (3) and (4) were: "(3) Our business set up—Partnership, Corp., or what. (4) Throw bldgs. etc. together in business or keep seperated (separated) as is now."

We think the evidence as a whole supports the plaintiff's contention that he owns a one-half interest in the Behlen building and the B. S. & B. bin and that the finding of the district court on that issue was correct.

From our examination of the record we have arrived at the same conclusion as the district court concerning the issues presented by this appeal. The judgment of the district court is, therefore, affirmed.

AFFIRMED.

E. E. ERDMAN, APPELLANT, V. NATIONAL INDEMNITY COMPANY, A CORPORATION, APPELLEE.

133 N. W. 2d 472

Filed February 19, 1965. No. 35812.

Appeal and Error. An order sustaining an objection to personal jurisdiction is not appealable.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. Appeal dismissed.

Haney, Walsh & Wall, for appellant.

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

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

SMITH, J.

We dismiss this appeal for lack of an appealable order. In disclaiming jurisdiction over defendant, the district court did no more than sustain a special appearance and overrule a purported motion for a new trial.

The basis of the disclaimer was an objection by defendant, a Nebraska corporation with its home office in Omaha, that summons had been served on a person outside the class authorized by section 25-511, R. R. S. 1943.

An order sustaining an objection to personal jurisdiction is not final within the meaning of section 25-1902, R. R. S. 1943. See, Standard Distilling Co. v. Freyhan, 34 Neb. 434, 51 N. W. 976; Persinger v. Tinkle, 34 Neb. 5, 51 N. W. 299. That principle has been applied wherever the defect has been noted.

This action has not terminated. The ruling of the district court neither prevents a judgment nor affects a substantial right. See Persinger v. Tinkle, *supra*. We cannot consider at this time contentions not going to our appellate jurisdiction.

Plaintiff's appeal from the orders sustaining defendant's special appearance and overruling plaintiff's motion for a new trial should be and hereby is dismissed at plaintiff's costs.

APPEAL DISMISSED.

RASTUS V. REBMAN ET AL., APPELLANTS, V. SCHOOL DISTRICT NO. 1, HARLAN COUNTY, NEBRASKA, APPELLEE.

133 N. W. 2d 384

Filed February 19, 1965. No. 35816.

1. **Statutes.** In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a

reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.

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

3. ———. In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity.

4. **Schools and School Districts.** Under subdivision (4) of section 79-403, R. S. Supp., 1961, where the petitioners' residence is closer to the schoolhouse in their own district than that of the adjoining district and both districts maintain bus routes, the distance to the schoolbus route of the district to which the transfer is sought must be one-half mile closer to the petitioners' residence than the route in the petitioners' district to entitle the petitioners' land to be transferred.

Appeal from the district court for Harlan County: EDMUND NUSS, Judge. Affirmed.

Person & Dier, for appellants.

Samuelson & Samuelson, for appellee.

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

BROWER, J.

Appellants Rastus V. Rebman and Leona S. Rebman are the owners of 400 acres of land in School District No. 1, Harlan County, Nebraska, whereon they reside with their two children of school age. They petitioned the freeholders' board as provided in section 79-403, R. S. Supp., 1961, for the transfer of their land from School District No. 1, Harlan County, Nebraska, in which Republican City is located, to School District No. 2, Harlan County, Nebraska, which is hereafter referred to as the Alma district. The freeholders' board, consisting of the county superintendent, county clerk, and county treasurer of Harlan County, after a public hearing ordered the change in boundaries and attached the appellants' land to the Alma district.

The appellee herein, School District No. 1 of Harlan County, Nebraska, appealed the matter to the district court for Harlan County where the appellants were designated as plaintiffs and the appellee as defendant. The parties will be referred to hereafter as they were termed in district court except at times the defendant district will be called the Republican City district and the plaintiffs the petitioners. The district court for Harlan County found for the defendant. It found that all the requirements of section 79-403, R. S. Supp., 1961, had been met except that contained in subdivision (4) thereof which the trial court construed as requiring that the plaintiffs' residence be at least a half mile closer to the schoolbus line in the Alma district than the busline in the Republican City district before the transfer could be effected. It found plaintiffs had failed to show this fact and that the failure was fatal to their cause, and dismissed the petition.

Plaintiffs bring their case to this court on appeal after their motion for new trial was overruled. The only question presented is whether the trial court erred in its application of subdivision (4) of section 79-403, R. S. Supp., 1961, to the facts disclosed.

The evidence shows that the plaintiffs' home is 5.8 miles from the schoolhouse in the Republican City district and 8 miles from the schoolhouse in the Alma district. The distance from their residence to the Alma district's bus route is 3¼ miles. For 7 years the Republican City bus picked up plaintiffs' children at their residence, continuing to do so until the day their children were taken by the plaintiffs to the school in the Alma district, to which district they privately paid tuition. After the children entered the Alma school, the Republican City bus regularly stops with children 2¼ miles from their home and occasionally within 1¼ miles therefrom.

Prior to the amendment of section 79-403, R. R. S. 1943, in the year 1961, provisions for transferring land

from one district to another had existed since 1909. The previous sections of statute authorizing the transfer had been amended from time to time as set forth in the history appended to section 79-403, R. R. S. 1943, but previously to 1961 had always required that the residence of the parties be more than 2 miles distance from the schoolhouse in their own district and a half mile closer to the schoolhouse in the adjoining district, the distance to be measured by the shortest route possible upon section lines or traveled roads.

It is obvious that the changes in transportation throughout the years involving the employment of buses to bring the children to school led to the amendment of this statute in 1961. After the amendment the pertinent portion of section 79-403, R. S. Supp., 1961, now under consideration reads: "The petition shall state the reasons for the proposed change and show: * * * (4) that they (petitioners) are each more than two miles from the schoolhouse in their own district, and at least one half mile nearer to the schoolhouse *or a school bus route* of the adjoining district, which distance shall be measured by the shortest route possible upon section lines or traveled roads open to the public * * *." (Italics supplied.)

Plaintiffs maintain that under the wording of the quoted subdivision (4) of section 79-403, R. S. Supp., 1961, the only requirements for transfer are that their residence be more than 2 miles from the schoolhouse in their own district and at least one-half mile nearer to the schoolbus route of the adjoining district than the schoolhouse in their own district. They contend it is unnecessary to compare the distances between the schoolbus routes of the two districts and in this instance where it is shown the schoolbus route of the Alma district is closer to their residence than the schoolhouse of the Republican City district that is sufficient.

The statute before us as amended in 1961 was undoubtedly designed to meet several situations. In some

instances the adjoining district to which transfer is sought maintains the only schoolbus route involved. In other cases there are two schoolhouses wholly without buslines. Here both districts operate buses. The Legislature obviously was endeavoring to tailor the statute to fit the several conditions. It is not surprising, therefore, that the wording of the statute presents some ambiguities. In the present case where both districts maintain schoolbus routes our problem is to relate the meaning of the statute to that single situation.

We are not impressed by the plaintiffs' argument that a strict construction of the wording of the cited provision of section 79-403, R. S. Supp., 1961, be adopted in the present instance dispensing with the comparison of the distance between the schoolbus routes of the two districts and relating it wholly to the distance between the schoolhouse of the plaintiffs' district and the busline of the adjoining district. It would seem that here the distances should be applied from schoolhouse to schoolhouse and from schoolbus route to schoolbus route. Our adoption of the plaintiffs' construction would patently result in the dismemberment of many school districts at the will of freeholders and encourage unnatural and expensive competition between the adjoining districts with respect to buslines. We cannot think the Legislature intended any such result.

In Roy v. Bladen School Dist. No. R-31, 165 Neb. 170, 84 N. W. 2d 119, this court held: "In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. * * * Where the general intent of the Legislature may be readily ascertained, yet the language used in a statute gives room for doubt or uncertainty as to its application, courts may resort to historical facts or general information to aid them in interpreting its provisions."

Again in Hevelone v. City of Beatrice, 120 Neb. 648, 234 N. W. 791, it was said: " 'In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity.' Kelley v. Gage County, 67 Neb. 6."

It seems reasonable to assume the Legislature intended to allow a transfer only in case the adjoining district maintained facilities nearer and more convenient to the petitioners' residence. That was historically true in the previous statutes. We think in the present situation the Legislature by its amendment in 1961 intended to require the comparison of the distances from the petitioners' residence to the schoolbus routes of the two districts and made that comparison determinative of the issue.

We conclude that under subdivision (4) of section 79-403, R. S. Supp., 1961, where the petitioners' residence is closer to the schoolhouse in their own district than that of the adjoining district and both districts maintain bus routes, the distance to the schoolbus route of the district to which the transfer is sought must be one-half mile closer to the petitioners' residence than the route in the petitioners' district to entitle the petitioners' land to be transferred.

It follows that the ruling of the trial court was without error and its judgment should be and is affirmed.

AFFIRMED.

JAC LOFHOLM ET AL., APPELLEES, V. ELMER STOLTENBERG, DOING BUSINESS AS STOLTENBERG CABINET SHOP, APPELLANT, IMPLEADED WITH HOPPE LUMBER COMPANY, A CORPORATION, ET AL., APPELLEES.
133 N. W. 2d 387

Filed February 19, 1965. No. 35828.

1. **Mechanics' Liens.** A subcontractor who performs labor or fur-

nishes materials for any of the purposes mentioned in section 52-101, R. R. S. 1943, may file a mechanic's lien therefor within 3 months from the performance of the labor or the furnishing of the materials, as provided by section 52-102, R. R. S. 1943.

2. ———. The burden of proof is upon one claiming a mechanic's lien to show that the labor performed, or the materials furnished, were performed or furnished within 3 months prior to the filing of the claim of lien; otherwise the purported lien is void.

3. ———. Materials furnished a contractor for the purpose of replacing defective material previously furnished, or correcting construction defects, are the subject of a new and separate contract between the contractor and subcontractor, and do not operate to extend the time for filing a mechanic's lien.

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

McDermott & Burr, for appellant.

Harold A. Prince and Richard L. DeBacker, for appellees Lofholm.

James I. Shamburg, for appellees Hoppe Lumber Co. et al.

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

CARTER, J.

This is a suit to quiet title to a lot, upon which a new home had been constructed, as against seven mechanic's lien holders. The trial court determined the validity of the mechanic's liens and held in part that the claim of lien by Elmer Stoltenberg, doing business as Stoltenberg Cabinet Shop, was void. Stoltenberg is the only defendant who has appealed.

The evidence shows that Stoltenberg filed a mechanic's lien in the amount of $2,214.87 in the office of the register of deeds in Hall County on May 12, 1961. It is the contention of the plaintiffs that the mechanic's lien was not filed within 3 months after the completion of the work, as required by section 52-102, R. R. S. 1943, and that the purported mechanic's lien is therefore void.

The plaintiffs are the owners of the lot described in the petition. They entered into a contract with Leo Wissing to construct a house and garage thereon. Work was commenced in May or June 1960. They moved into the house on January 27, 1961.

Plaintiffs were in the place of business operated by Stoltenberg on at least three occasions prior to January 1, 1961, for the purpose of selecting certain equipment and materials to be used in the construction of the house. Delivery of such equipment and materials selected by them was to be made on the order of Wissing as it was needed. All other equipment and materials used were ordered by the general contractor, Wissing, or his employees.

A large number of sales tickets are attached to the claim of lien filed by Stoltenberg. Most of these sales tickets were dated prior to February 12, 1961, the same being 3 months prior to the date the claimed lien was filed. Three of the sales tickets were not dated and the evidence will not sustain a finding that the materials listed thereon were delivered to the premises and used in the construction of the house after February 12, 1961. The sales slips relied upon to prove that the claim of lien was filed within 3 months after the delivery of the goods to the property site are designated as Nos. 1055, 1074, 1262, 1286, 3465, and 3229. The nonconsecutive, numerical order of the numbers on the sales slips appears to have no relation to the time of the sale or the time of the alleged delivery or use of the materials described in them.

The two sales slips numbered 3465 and 3229 appear to be for ceramic tile used in repairing a defect in construction, where a bathtub did not properly set up against the wall of the bathroom. Wissing testified that it was the repair of a defect which was no part of the construction of the home. A contractor cannot extend the time for filing a mechanic's lien by substituting proper material for defective material previously furnished and

charged to the owner. Davidson v. Shields, 129 Neb. 877, 263 N. W. 490; Cady Lumber Co. v. Reed, 90 Neb. 293, 133 N. W. 424; Congdon v. Kendall, 53 Neb. 282, 73 N. W. 659. It would appear, therefore, that materials sold to Wissing in the instant case, to be used in repairing defects after the completion of the house, are the subject of a new and separate contract between Wissing and Stoltenberg, and may not operate to extend the time for filing a mechanic's lien.

The remaining four sales slips, dated subsequent to February 12, 1961, pose a different question. On each of these sales slips, Stoltenberg testified as follows: "Q. * * * did that go to the Lofholm construction? A. Yes." There is no proof as to the time when the materials were delivered to the premises, unless it can be inferred from the date on the sales slip. On this question the evidence shows that Lofholms moved into the residence on January 27, 1961. They and Wissing all testify that the house was then completed except for a few minor things such as the covering of cabinet tops with vinyl tile and the installation of eaves troughs and downspouts. They assert that none of the materials contained in these four sales tickets were installed in the house after they moved in. The evidence shows that Wissing, who ordered these materials, priced at a total amount of $45.24, was constructing two other houses and repairing one of his own during the period he was building the Lofholm residence. There is no evidence as to the time these materials were delivered to the Lofholm property and, in addition thereto, the evidence of the Lofholms shows that they were not delivered or used in the construction after January 27, 1961, the date they occupied the house. The evidence of Stoltenberg is deficient in establishing that the materials were delivered to the premises and used on or after February 12, 1961.

The testimony of the owners that they moved into the newly constructed home on January 27, 1961, and that none of the materials furnished by Stoltenberg were

used in the building after that date, makes a prima facie case that the mechanic's lien filed by Stoltenberg on May 12, 1961, was void and a cloud on plaintiffs' title. The burden of proof then was upon Stoltenberg to establish the validity of his claim of lien.

The burden of proof is upon one claiming a mechanic's lien to show that the material furnished by him was used in the construction of the building, or that he delivered the material to the construction site under an agreement with the building contractor that it would be used in the construction of the building on which the lien is sought. Rosebud Lumber & Coal Co. v. Holms, 155 Neb. 459, 52 N. W. 2d 313. The burden of proof is also upon the claimant of a mechanic's lien to show that the claim of lien was filed within 3 months from the furnishing of such material, as provided by section 52-102, R. R. S. 1943.

The evidence of Stoltenberg does not show that any of the materials were delivered and used within 3 months prior to the filing of the lien. The owners deny that any of such materials were delivered or used after January 27, 1961, the date they occupied the home. We necessarily find, as did the trial court, that the claim of lien was filed more than 3 months after the furnishing of the materials used in the construction of the home, if they were so used, and the mechanic's lien is therefore void. The judgment of the trial court is correct and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES SEDLACEK, APPELLANT.
133 N. W. 2d 380

Filed February 19, 1965. No. 35898.

1. **Criminal Law.** To sustain a conviction for a crime, the corpus delicti must be proved beyond a reasonable doubt.

2. ———. The corpus delicti is the body or substance of the crime, the fact that a crime has been committed, without regard to the identity of the person committing it.
3. **Burglary.** The lifting of a hook with which a door is fastened, or the opening of a closed door in order to enter a building is a "breaking" within the accepted definition of burglary.
4. **Burglary: Evidence.** Evidence that a burglary was committed, together with evidence that some of the property stolen in the burglary was discovered in the possession of the defendant, is not alone sufficient to make a prima facie case of burglary.
5. **Criminal Law.** The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of his guilt.
6. ———. In a criminal action, this court will not interfere with a verdict of guilty based upon conflicting evidence unless the evidence was so lacking in probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt.
7. ———. Where punishment of an offense created by statute is left to the discretion of a court within prescribed limits, a sentence prescribed within such limits will not be disturbed unless there appears to be an abuse of such discretion.

Appeal from the district court for Saline County: ERNEST A. HUBKA, Judge. Affirmed.

Clarence C. Kunc, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

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

SPENCER, J.

The appellant, Charles Sedlacek, who will hereinafter be referred to as defendant, was convicted of the crime of burglary and found to be an habitual criminal under section 29-2221, R. R. S. 1943. Defendant was sentenced to 14 years in the Nebraska Penal and Correctional Complex, and has perfected an appeal to this court.

The defendant owns and lives on an acreage in Crete, Nebraska. This acreage adjoins property owned by one

Albert L. Yant, hereinafter referred to as Yant. The houses on the respective properties are approximately 3 blocks apart and are separated by a creek and a wooded area. The Yant house consists of three rooms with a full basement and is entered through a door opening into a kitchen from a screened-in porch. The screened-in porch has an outside combination storm and screen door which is held closed by two door springs and is locked on the outside by the use of a hasp, shackle, and a padlock.

Yant testified that on the morning of January 18, 1964, when he left his home a shotgun owned by him and valued at $20 or $25 was in the corner of the kitchen behind the kitchen door. This kitchen door was closed but not locked. The porch door was closed with the lock through the shackle, but Yant did not remember whether he had actually locked the padlock. He did not return home until late that night. Early the next morning he noticed that the shotgun was gone and called the Crete police chief.

Yant and the defendant had been acquainted most of their lives, but became neighborly during the summer of 1963. Yant, who was a bachelor and lived alone, testified that he and defendant and defendant's wife went to Omaha on five or six occasions between that time and January 18, 1964. On these occasions, the defendant would drive Yant's car. Defendant testified the last trip was made on January 16, 1964. Yant testified that it was at least a week earlier. On this last occasion, Yant suggested that his car had a bad tire when the defendant asked him to go to Omaha. The defendant then furnished a tire, and, as the tire was a different size than the one being replaced, he also furnished a wheel for the car. Defendant, who was a mechanic, had on other occasions made minor adjustments on Yant's car. Yant also testified that over this same period the defendant had visited with him in his home on three or four occasions.

The defendant was seen on the Yant premises the afternoon of January 18, 1964, by two of Yant's neighbors. They observed him crawling around an old automobile in the yard. They did not see him take anything, and lost sight of him when he went behind the Yant house. One of the witnesses, however, did observe his shadow as he walked toward the creek through the trees behind the house. On January 23 or 24, the Crete police chief visited with the defendant in the presence of defendant's wife at defendant's home about the missing shotgun and some other missing property. On that occasion, the defendant said that he knew nothing about the shotgun, and that Yant was "trying to get something on him is the reason he accused him of maybe taking his gun." Defendant denies the shotgun was mentioned on this occasion, but does admit the police chief was asking about property Yant claimed was missing. On January 30, 1964, the shotgun was sold by the defendant to a pawnbroker in Omaha for $11.

The defendant admitted that he took the shotgun to Omaha on January 30, 1964; that he sold it to the Mid-City Jewelry and Loan Company for $11; and that he issued a required bill of sale for it. He also admitted that on January 18, 1964, the shotgun was the property of Yant. Defendant further admitted that he was on the Yant premises on January 18, 1964, while Yant was gone. He testified, however, that he was there to look at an old car Yant had told him was for sale. It was the same model as his own and he wanted to see if he could use some of its parts. He denied ever entering any portion of the house.

Defendant explained possession of the shotgun by testifying that Yant brought it to his home on January 18, 1964, and said that he was going to give it to him in exchange for the tire and wheel which had been put on his car and that he wanted another tire and wheel of the same size. It was defendant's testimony that his wife was present on this occasion. The wife did not testify

herein. The only testimony for the defense was that of the defendant himself. He later testified that he first learned that Yant claimed the gun was missing when he was picked up for burglary on February 18, 1964.

Yant testified that he never loaned, traded, sold, or gave the shotgun to the defendant. He testified he had not taken the shotgun out of the house, and that the last time he saw it was when he left on January 18, 1964, when it was behind the door in the kitchen of his home, and that it was gone the next morning. He also testified that on February 3, 1964, the defendant told him that he knew nothing about the shotgun. This would have been 4 days after the defendant sold the shotgun.

Defendant's seven assignments of error may be condensed to the following: (1) That the State failed to prove the corpus delicti beyond a reasonable doubt; (2) that the evidence was insufficient to sustain a verdict; and (3) that the sentence imposed is excessive.

To sustain a conviction for a crime, the corpus delicti must be proved beyond a reasonable doubt. Whomble v. State, 143 Neb. 667, 10 N. W. 2d 627. The corpus delicti is the body or substance of the crime, the fact that a crime has been committed, without regard to the identity of the person committing it. Wilshusen v. State, 149 Neb. 594, 31 N. W. 2d 544. As applied to the case at bar, the corpus delicti means the actual commission by someone of the crime charged, burglary. That there was sufficient evidence from which the jury could find the corpus delicti proved beyond a reasonable doubt is without question. If the jury believed the Yant testimony, the shotgun had to be taken from his premises by a felonious entry. This must follow since a shotgun has no locomotion of its own, Yant lived alone, and the house was locked, as described above. The lifting of a hook with which a door is fastened, or the opening of a closed door in order to enter a building is a "breaking" within the accepted definition of burglary. Ferguson v. State, 52 Neb. 432, 72 N. W. 590, 66 Am. S. R. 512.

The problem remaining is the identity of the person criminally responsible for the burglary. Is the evidence sufficient to sustain the verdict finding the defendant guilty of the crime? Possession of the stolen shotgun in and of itself is not enough. In Henggler v. State, 173 Neb. 171, 112 N. W. 2d 762, we held: "Evidence that a burglary was committed, together with evidence that some of the property stolen in the burglary was discovered in the possession of the defendant, is not alone sufficient to make a prima facie case of burglary." To sustain a conviction, the evidence must show beyond a reasonable doubt not only that the crime, as defined in section 28-532, R. R. S. 1943, was committed, but that the defendant was the person who committed it.

Defendant admits that he was on the Yant premises the day of the burglary, although he denies entering the house. If the defendant took the shotgun it was necessary to enter the house to do so. No one saw him enter the house, and no one saw him with the shotgun on that occasion. At most we have a circumstance indicating opportunity.

The damaging circumstances, as we view the evidence in this case, involve the statements and the conduct of the defendant after January 18, 1964, at a time when he admittedly had possession of the shotgun. When questioned he denied any knowledge of its whereabouts, and suggested that Yant was trying to get something on him by accusing him of taking the gun. Also, shortly after he was interviewed by the police chief, he took the shotgun to Omaha and sold it. Four days after selling the shotgun he told Yant, " 'I know nothing about it.' " At the trial, he explained the possession of the shotgun by saying that Yant brought it to his home the evening of January 18, 1964, and gave it to him.

These circumstances distinguish this case from one of mere possession of stolen property. We have inferences to be drawn from the conduct and the statements of the defendant which, taken together with the defendant's

possession of the stolen property, clearly presents a jury question. It is not the province of this court in a criminal case to resolve conflicts in the evidence or to pass on the credibility of the witnesses.

In Sedlacek v. State, 166 Neb. 736, 90 N. W. 2d 340, a case involving this same defendant, we said: "The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of his guilt." We find the evidence herein meets this criterion.

In a criminal action this court will not interfere with a verdict of guilty based upon conflicting evidence unless the evidence is so lacking in probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt. See State v. Nichols, 175 Neb. 761, 123 N. W. 2d 860.

Defendant, who is 64 years of age, contends that in view of his age, the sentence imposed upon him is excessive. Defendant was found to be an habitual criminal, and therefore subject to a sentence of not less than 10 years nor more than 20 years. The sentence imposed was for 14 years. While the information listed only two previous felony convictions, both of which were in Saline County, the county from which defendant was sentenced herein, and the defendant admitted three previous convictions on felony charges, the record indicates that defendant had at least four previous convictions, including the one referred to above and found in 166 Neb. 736, 90 N. W. 2d 340.

Where punishment of an offense created by statute is left to the discretion of a court within prescribed limits, a sentence prescribed within such limits will not be disturbed unless there appears to be an abuse of such discretion. State v. Neuman, 175 Neb. 832, 125 N. W. 2d 5. Clearly, the district court has not abused

its discretion. Section 29-2221, R. R. S. 1943, was intended for the protection of society from habitual criminals, and the sentence imposed herein may well be considered a minimum sentence when considered in the light of the defendant's record.

For the reasons given above, there is no merit to defendant's assignments of error, and the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

FRANK H. GIBSON, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. OMAHA COFFEE COMPANY, A CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS.
133 N. W. 2d 462

Filed February 26, 1965. No. 35793.

1. **Conspiracy.** Conspiracy to injure another's business when executed to its damage is actionable if induced by malice, without the justification of competition, the service of any lawful purpose, or if its object was accomplished by fraud or other illegal means.
2. **Torts.** One who causes loss of business to another merely by engaging in a business or occupation in good faith is not liable to the other for the loss so caused, even though he knows the loss will result.
3. **Monopolies.** A combination of individuals may perform acts themselves or cause other persons to do them, by reason of which rights of third persons will be injuriously affected, as long as there is lack of malice or ill will and so long as no definite legal right of such person is violated.
4. **Monopolies: Trial.** It is a question of fact to be determined by a jury whether or not there exists malice or ill will, if the evidence thereon is conflicting or of a doubtful character. If the evidence is of such a character that one conclusion can be reasonably drawn therefrom, the court alone should dispose of the question.

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

Pilcher, Howard & Hickman, for appellant.

Fraser, Stryker, Marshall & Veach, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and POLLOCK and SIDNER, District Judges.

SIDNER, District Judge.

Plaintiff Frank H. Gibson, Inc., is a corporation, which for many years had been engaged in selling tea and coffee to institutions in the Omaha area. The principal stockholder and president was Edgar J. Bellows. The defendant Kenneth Loseke was the owner of a small interest of stock in the company, and was the nominal secretary, although the record shows that he had no part in determining company policy. Loseke was in charge of a force of four salesmen who sold and delivered the coffee to the institutions. Plaintiff company in its sale to its various customers generally furnished the coffee-making equipment. Plaintiff company was engaged in a highly competitive business, and during 4 of the last 5 years had either shown no profit, or had lost money in its operations. The president, Edgar J. Bellows, was 74 years of age. He was desirous of selling the business of the plaintiff company and proceeded to negotiate the sale thereof through his accountant Rosenblum.

Rosenblum contacted two principal companies that might be interested in the purchase of the business. The first was the defendant E. C. Conroy Coffee Company of Kansas City, Missouri. Conroy was principally a supplier of coffee, and during the last 2 years was the sole supplier of coffee to the plaintiff company, with an annual gross business to plaintiff in the amount of $150,000. The second company contacted was the Continental Coffee Company of Chicago, which was a large dealer in institutional coffee on a nationwide basis, and which also had institutional coffee routes in Omaha.

After the original negotiations had been entered into by Rosenblum, both Conroy and Continental investigated the operations of plaintiff company, and both came to the conclusion that before the good will value of the business could be established, it would be necessary to determine whether or not Loseke would remain with the purchaser of the assets of the corporation. Also, all parties agreed that whatever Loseke did, the salesmen working under him would probably also do.

Conroy, in order to determine the bid it would make, contacted Loseke and the other employees. They secured from Loseke, with the consent of Bellows, a list of all the equipment owned, and its location, so that they might value it. It becomes evident from later evidence that they probably had assurance from Loseke and the other employees that if Conroy purchased the assets, they would go to work for the Conroy Company, and that Conroy would hire the whole group. Furthermore, if the business was sold to Continental the employees would not work for it if Conroy offered them jobs. In these negotiations, Conroy was represented by its officers, Ralph Clark and David Clark. There is no question here but that their acts were those of the Conroy Coffee Company.

The defendant Omaha Coffee Company was a corporation in the process of organization, set up by the Conroy Company through the Clarks, and the dealings between any of these parties are legally attributable to the Conroy Company so far as this opinion is concerned.

At no time while employed by plaintiff did Loseke or other employees have a contract of employment. Continental offered Loseke a favorable contract of employment as far as pay was concerned. It did, however, have a clause forbidding him for 1 year to participate in the only kind of work he knew if he ever left Continental's employment.

No firm contract of employment was ever offered any of the other employees by Continental.

On September 21, 1962, representatives of Conroy, having prepared an offer of purchase, met with Bellows and his attorney Pilcher in Pilcher's office. A proposed contract of sale of the business had been prepared. Bellows stated that the offer was far too low, and demanded much more. A Conroy Company representative then replied in substance that it was going to stay in Omaha, and that by Monday morning it would have plaintiff's employees working for it even if plaintiff did not sell the business to Conroy. Bellows then made the statement that he would sue and enjoin every party engaged in any such enterprise, whereupon the meeting broke up.

Subsequent to this date, negotiations were again opened up between Conroy and plaintiff, and were also continued with Continental. Pending the negotiations for sale, Bellows asked his employees to continue to work for plaintiff company until negotiations for sale were completed, and they did so continue work until the business was sold.

On September 27, 1962, plaintiff company had a meeting, at which Loseke was present, and Bellows was authorized to make the sale of the business to whom, and on whatever terms, he pleased in order to liquidate the corporation. On September 28, sale of plaintiff company was completed to Continental Coffee Company, under the terms of which it took over the business on Monday, October 1. The date of sale, September 28, was on Friday and the close of the work week for most of the employees. After announcement of the sale, Loseke left and did not return. Two other employees came to work on Saturday morning, but did not return on Monday. A third employee showed up on Monday morning, and on learning of the sale of the company, he left and did not return.

On the morning of Monday, October 1, 1962, the Omaha Coffee Company, a corporation, which had been formed prior to the meeting of September 21, opened for business. Its employees were the former employees of

plaintiff company. On that date they called on various customers and continued to do so until the date of trial. During this time they had retained for Omaha Coffee Company a very high percentage of the customers who were formerly those of the plaintiff company.

This action was instituted, in which it was alleged that plaintiff suffered damages as a result of decrease in the amount realized in the sale of the business because of conspiracy entered into betwen Conroy, Loseke, and the other employees. Before trial the other employees were dismissed from the lawsuit. In the petition plaintiff alleged, among other things, the existence of fraud in the sale of coffee to its former customers by the salesmen after they went to work for Omaha Coffee. The case was submitted to the jury, and it returned a verdict for the plaintiff. On a motion for new trial defendants set forth various errors in trial and instructions and in failing to sustain defendants' motion to dismiss at conclusion of evidence. The court set aside the verdict and granted a new trial. It is from this order that the plaintiff appeals; and the defendants cross-appeal from a denial of their motion for a dismissal.

In the case of Reid v. Brechet, 117 Neb. 411, 220 N. W. 590, it is stated that: " 'Civil conspiracy' is a combination of two or more persons to accomplish, by concerted action, an unlawful or oppressive object, or lawful object by unlawful or oppressive means."

In the light of this legal proposition we review the evidence, first as to whether there was an unlawful or oppressive object. The evidence as to the allegation of the petition as to fraud in dealing with customers after the employees went to work for the Omaha Coffee Company is not substantiated by any evidence found in the record. With regard to the so-called other illegal acts of taking the customer lists, there was no evidence from which this could be held to be an illegal act, for the reason that this information was furnished to the Conroy Company by the plaintiff, with the consent of plain-

tiff's president, so that the assets could be valued. This, therefore, eliminates any evidence as to illegal acts to be submitted to the jury.

The next question is whether the concerted action involved here was made in bad faith, with malice, or with evil intent, as these various terms are used in different cases. In this instance, it must be remembered that plaintiff itself, by negotiating for the sale of the properties, instituted the whole chain of events which led up to the actions taken by the various parties. The evidence shows that Conroy had a valuable business in the Omaha trade territory and had equally as much right to try to protect it as did the plaintiff to protect its business. As stated in Restatement, Torts, § 708, p. 519: "One who causes loss of business or occupation to another merely by engaging in a business or occupation in good faith is not liable to the other for the loss so caused, though he knows that the loss will result."

This same thought is stated in the case of Hompes v. B. F. Goodrich Co., 137 Neb. 84, 288 N. W. 367, as follows: "A person may do business with whomsoever he desires. He may likewise refuse business relations with any person whomsoever, whether the refusal is based on reason, whim, or prejudice."

Defendant Conroy Coffee Company had ample reason, and in the interest of good business, to take the action that it took in order to protect its business which would be lost to a competitor.

The defendant Loseke and other employees, having no contract of employment, could individually, without question, bargain for a contract of employment with whom they chose. This they could also do in concert with each other without it being illegal or for a wrongful purpose. The defendant Loseke had good reason to take action to secure his employment with whom he chose, inasmuch as the company for which he was an employee, and an officer, was going out of business. He had every reason to take what seemed to him to be the

best employment that he could. Furthermore, neither he nor any fellow-employees left the plaintiff company as long as it remained in business.

Therefore, this leaves no evidence in the record of any malice, evil intent, or lack of good faith by any of defendants. While it is ordinarily a fact question to be determined by the jury as to whether these elements exist in the absence of evidence to substantiate these elements, the court should have made the determination.

Finding no evidence of any illegal act or any legal act done by unlawful or oppressive means, the judgment is reversed and the cause remanded with directions to enter a dismissal of the action on defendants' cross-appeal.

In the light of this conclusion, it becomes unnecessary to discuss any of the questions raised by plaintiff as to the error of setting aside the verdict and ordering a new trial, and its appeal is dismissed.

REVERSED AND REMANDED WITH DIRECTIONS.

BERNARD J. GUYNAN, APPELLANT, V. LEWIS OLSON, APPELLEE.

133 N. W. 2d 571

Filed February 26, 1965. No. 35818.

1. **Automobiles: Negligence.** The general rule is that it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision.
2. ———: ———. The exceptions to this general rule embrace conditions under which reasonable minds may differ as to whether or not the driver was able to see in the exercise of ordinary care the situation with which he was confronted.
3. ———: ———. Exceptions to this rule do not extend to that which is clearly seen in time to avoid a collision or which, in the exercise of ordinary care, would or should have been seen.
4. ———: ———. Ordinarily, conditions such as frost, ice, snow, mist, or fog are not intervening causes excusing the exercise of

ordinary care by a driver but are conditions that require a driver to exercise a degree of care commensurate with the circumstances.

5. **Animals: Highways.** As a general rule, a person in charge of animals has a right to lead or drive them along the highway and is not negligent as a matter of law for so doing, but in doing so, he must exercise reasonable care to avoid injury from motor vehicles using the highway.
6. **Animals: Automobiles.** A person leading animals is entitled to assume that approaching motorists will use due care and obey the rules of the road.
7. **Animals: Negligence.** There is no duty as a matter of law on the part of a person driving or leading cattle to maintain an advance guard to herald the approach of cattle, but the question of his contributory negligence in not doing so is ordinarily for the jury under all of the circumstances.

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

McGinley, Lane, Mueller & Shanahan, for appellant.

Maupin, Dent, Kay & Satterfield, Clinton J. Gatz, Donald E. Girard, and Rady A. Johnson, for appellee.

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

WHITE, C. J.

Defendant driver ran into plaintiff, who was on horseback, and his herd of cattle, on a bridge spanning the South Platte River near Paxton, Nebraska, at about 6:50 a.m., mountain standard time, December 29, 1961. Plaintiff was thrown from his horse and sued for personal injuries and for property damage to the horse and the cattle that were struck. Defendant cross-petitioned for damage to his automobile. The court entered a judgment against both parties pursuant to special findings of the jury that the plaintiff was guilty of slight negligence and the defendant guilty of ordinary negligence. The plaintiff appeals.

The plaintiff's first contention is that the defendant was guilty of negligence as a matter of law, and that on

his motion, the jury should have been so instructed and the cross-petition dismissed. In determining this question, conflicts and inferences from the evidence must be resolved in favor of the defendant.

Plaintiff, with his son and several neighbors as drovers to assist him, was moving a herd of about 300 head of cattle to winter pasture. Plaintiff, who was on horseback, was riding about 2 or 3 feet ahead of the herd. The other drovers were behind and at the side. At about 6:50 a.m., they reached the bridge. The bridge was 500 feet long, its deck was 18 feet wide, and it had railings 35 inches high. It had a plank deck, a worn-oiled surface, and at the time of the accident had a heavy accumulation of frost on it. Plaintiff was on the right side of the road, was 2 or 3 feet from the west bridge railing, and was 2 or 3 feet ahead of the cattle. When he reached a point about 200 feet south on the bridge, the collision occurred.

Defendant was driving north toward the bridge and was due at work in Paxton at 7 a.m. He drove to work every morning, knew the road, and the evidence shows that he had knowledge that the bridge would have frost on it. It was a cold morning, and he had cleared frost from his windshield before starting. The conditions as to visibility are in dispute. The patrolman said that it was just at dawn. The headlights of the defendant's car were on, and on trial he testified that he could see objects at a distance of 300 to 400 feet. He testified that at this time of the day, when the light was changing, it was more diffcult to see objects than normally. He testified that he was traveling 45 to 50 miles per hour when he entered on the bridge. The defendant saw the plaintiff and his horse just as he drove onto the south end of the bridge. This was a distance of 315 feet from where the defendant's car came to rest after the accident. His brakes were in good condition, and he applied them hard. He started skidding about 56 feet later and skidded 259 feet to the place where his car stopped after

impact. He entered the bridge stradling the centerline with about half of his car on the wrong side of the road. The left skid mark at point of impact with the plaintiff's horse was 5 feet, 8 inches from the west bridge rail. The defendant tried to turn his automobile aside while skidding the 259 feet, but he could not. Defendant's testimony is that the plaintiff, who was on horseback, was 2 or 3 feet east from the west rail of the bridge. Defendant's automobile struck plaintiff's horse, which weighed more than 1,000 pounds, threw it over the bridge railing which was 35 inches high, and hurled it a total distance of about 60 feet north and west into the river. The horse was killed. The plaintiff was thrown in the air and landed about 8 feet behind where the defendant's automobile came to rest. The defendant's automobile, after impact with the plaintiff's horse, careened on, killing one cow and breaking the legs of several steers. The automobile came to rest against the dead cow, with its front over on the west side of the road. The evidence shows that there was extensive damage to the defendant's automobile, and the defendant testified that it was a total loss. Defendant had the bridge in view for about a mile from the south and the evidence as to the contour of the road shows that at no time did his line of sight drop beneath the floor of the bridge. The evidence shows that the railings of the bridge, 35 inches above the deck, must have been visible to the defendant at all times.

We believe applicable here is the general rule that it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572, 58 A. L. R. 1473; Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250; Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106; Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N. W. 2d 669; Guerin v. Forburger, 161

Neb. 824, 74 N. W. 2d 870; Dryer v. Malm, 163 Neb. 72, 77 N. W. 2d 804.

We have generalized the exceptions by stating that they embrace all those situations where reasonable minds might differ as to whether the operator was exercising due care under the particular circumstances. Fulcher v. Ike, 142 Neb. 418, 6 N. W. 2d 610; Miers v. McMaken, 147 Neb. 133, 22 N. W. 2d 422; Robins v. Sandoz, 175 Neb. 5, 120 N. W. 2d 360. In the application of this rule, we have applied the exceptions to the situations where the object, obstruction, or depression is of the same color as the roadway, and for that reason, or for other sufficient reasons, cannot be observed by the exercise of ordinary care in time to avoid a collision. Guerin v. Forburger, *supra;* Miers v. McMaken, *supra;* Adamek v. Tilford, 125 Neb. 139, 249 N. W. 300; Haight v. Nelson, 157 Neb. 341, 59 N. W. 2d 576.

We do not believe this case comes within the exceptions. They generally embrace factual situations involving various factors which might reasonably be considered to relieve a driver of the duty to see the object or vehicle in time to avoid it. They deal with situations in which the driver did not see the object ahead of him until a very short distance before he was upon it. The question is then presented as to whether a driver in order to escape the rule was excused from not seeing the vehicle or object in the road ahead of him sooner. We feel that if the rule applies at all, at a minimum it must be applicable to the situation present in this case. The defendant, by his own admission, saw the plaintiff and his horse at the entrance to the bridge 315 feet away. This was a greater distance than an ordinary city block. His speed was such, that on applying his brakes, he could not control his vehicle, could not turn it aside, or do anything to keep it from skidding helplessly into the plaintiff and his cattle. He was on the wrong side of the road and on a frosty and slick roadway known to him to be such, and was still traveling with sufficient

speed and force at the end of his skidding to throw a 1,000 pound horse over a bridge railing, kill a cow, and break the legs of several other animals. It is argued with much force that considering the testimony of the defendant himself and the conditions of visibility he should have seen the plaintiff and his cattle much sooner than he did. We point out that no matter what the conditions of visibility were, the defendant did discover the plaintiff and his cattle over a city block away. He was unable to avoid them and he struck them on the west and wrong side of the road. Nor does frost, ice, snow, mist, or fog excuse such action. These are conditions and not intervening causes and require drivers to exercise a degree of care commensurate with the circumstances. Guerin v. Forburger, *supra;* Bramhall v. Adcock, 162 Neb. 198, 75 N. W. 2d 696; Murray v. Pearson Appliance Store, *supra;* Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825; Fischer v. Megan, 138 Neb. 420, 293 N. W. 287. In Dryer v. Malm, *supra,* plaintiff, coming over the crest of a hill, saw sheep blockading a highway 400 feet away. In Hilferty v. Mickels, 171 Neb. 246, 106 N. W. 2d 40, the distance between the automobiles was 200 feet when the necessity for stopping was known to the driver. In both cases the driver was held guilty of negligence as a matter of law. The application of these cases to the present one is self-evident.

Although it is true that the jury, by special finding, found the defendant guilty of ordinary negligence, the failure of the court to instruct that the defendant was guilty of negligence as a matter of law and to dismiss the cross-petition was prejudicial error. Cappel v. Riener, 167 Neb. 375, 93 N. W. 2d 36; Stocker v. Roach, 140 Neb. 561, 300 N. W. 627; Bezdek v. Patrick, 170 Neb. 522, 103 N. W. 2d 318.

We turn now to the question of contributory negligence. Plaintiff asserts it was prejudicial error to submit this issue to the jury. He entered and was on the bridge at all times about 2 or 3 feet ahead of his cattle. There is

evidence that he saw the defendant's automobile approaching about a mile away just as he was entering the bridge. He continued on with the cattle packed solid between the rails of the bridge. It was dawn, and the jury could have found that visibility conditions were poor. One of the plaintiff's drovers had a jeep. Plaintiff sent no herdsman or driver ahead to warn of the cattle crossing. The cattle would be on the bridge for 500 feet plus the length of the herd. The defendant raised the issue of improper warning in his pleadings. There is no statute prohibiting or regulating plaintiff's right to move his cattle on a public road. They were under control and not running at large.

As a general rule, a person in charge of animals has a right to lead or drive them along the highway, and is not negligent per se from so doing, but in doing so, he must exercise reasonable care to avoid injury from motor vehicles using the highway. Sertic v. McCullough, 155 Or. 216, 63 P. 2d 884; Tabaka v. Gerard, 12 N. J. Misc. 110, 169 A. 722; Lawson v. Fordyce, 237 Iowa 28, 21 N. W. 2d 69; 61 C. J. S., Motor Vehicles, § 467, p. 26. Nor does the act of leading animals bring the person conducting them within the rules of the road applicable to motor vehicles. Such person is bound to use reasonable care but is not bound to have or keep the animals on the right half of the highway. 3 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. Ed.), § 1622, p. 11, 1964 Cumulative Pocket Part; Sertic v. McCullough, *supra*. A person leading animals is entitled to assume that approaching motorists will use due care and obey the rules of the road. Lawson v. Fordyce, *supra;* 61 C. J. S., Motor Vehicles, § 467, p. 26.

Whether this issue should have been submitted presents an extremely close question. Our research reveals no case in which the issue of contributory negligence has not been submitted to the jury in cases involving collision with cattle being driven or herded on a highway.

The available authority seems to support the conclusion that in the situation such as we have in this case, the issue of contributory negligence should be submitted to the jury. In Anderson v. Dail, 229 Mo. App. 272, 77 S. W. 2d 169, 224 Mo. App. 403, 21 S. W. 2d 496, it was held that there was no duty on the part of a person driving cattle to maintain an advance guard to herald the approach of cattle, but in this case, occurring at night, the court held that the question of the plaintiff's contributory negligence in driving the cattle without an advance guard was a question for the jury. A recent Washington case, Green v. Biles-Coleman Lumber Co., 58 Wash. 2d 307, 362 P. 2d 593, came to the same conclusion in a five to four decision.

This case is remarkably similar to the present case. The plaintiff was driving a herd of 59 cattle on an 18-foot highway around a curve. The defendant, coming down a grade in a logging truck at an excessive rate of speed, saw the plaintiff and the herd of cattle at least 200 feet away, lost control of his truck when the brakes were applied, the truck jackknifed, and the collision occurred. The road was slick as here, and it appears that the accident happened in the daytime. Said the court: "The question here is whether we can say, as a matter of law, that the plaintiff used reasonable care to protect his cattle from injury, while exercising his right to drive them on the highways, and, hence, was not contributorily negligent. * * * The defendants, a logging-truck driver and his employer, were concededly negligent because the driver was hurtling his thirty-ton juggernaut at a speed of thirty-five miles an hour down a grade on a road that was slushy and slippery, knowing that cattle might be on the road. * * * We must, however, agree that the trial court was entitled to conclude that for the plaintiff to attempt to move fifty-nine head of cattle for a 'mile and a half or three quarters' along a curving highway, which he knew was frequently used by logging trucks, without any assistance (when another man was

available to help him), constituted contributory negligence. * * * The trial court also concluded that a warning should have been given to approaching motorists. It is conceded that the plaintiff was not legally obligated to give advance warning of the herd's approach; the question is: Would a reasonable man, under the circumstances, have sent his employee (who was driving a truck) up the road a quarter or half a mile ahead of the herd to give approaching motorists, coming down the grade, warning that the cattle were on the highway?"

The pertinency of the above authorities is apparent. We point out that it was necessary to block this bridge for a period of time in which the jury could have found that the plaintiff should have reasonably known that automobile traffic would approach and attempt to cross. The jury could have found that the visibility of the roadway was affected under the conditions present, and that he could reasonably know that the blocking of the bridge should require him, in the exercise of reasonable care, to station a herdsman or take other proper means to herald the presence and approach of the cattle and advise travelers of the blocked condition of the bridge. Considering the further circumstances of the slick condition of the bridge, which was 18 feet wide, that it would be difficult to turn aside or control a car on, we cannot say as a matter of law that the jury could not determine that the plaintiff was guilty of some negligence and that it was a contributing proximate cause of the accident.

Plaintiff argues that the presence of the cattle could not have been the proximate cause of the accident and that the sole proximate cause of the accident was defendant's negligence as a matter of law. It is true that the defendant testified that he saw the plaintiff on his horse first, and then the cattle, but he saw both in a split second period of time. They were altogether, almost as a unit, and a jury could infer that the whole blocked highway confronted the defendant at one time and motivated the action that he took under the circumstances.

We cannot say as a matter of law that there was a sufficient intervening gap of time that would require us to hold that the presence of the cattle was merely a subsequent independent condition that could not have been a proximate cause of the accident. But, even if that were so, the jury could have found, under the above authorities covering the question of contributory negligence, that the plaintiff should have warned of the trapped condition on the 500-foot bridge at a point beyond where approaching drivers ordinarily would be required to observe conditions ahead of them on the road. Considering all of the circumstances, we conclude that the question of contributory negligence was properly submitted to the jury.

Defendant contends that the plaintiff should have filed a motion for judgment notwithstanding the verdict, under section 25-1315.02, R. R. S. 1943, prior to the filing of his motion for a new trial and that on appeal he cannot now review the court's ruling on the plaintiff's motion for a directed verdict. He says that a motion for new trial alone is insufficient. We have examined this contention and it is without merit. When a motion for a directed verdict is overruled at the close of the evidence and a judgment is entered on a jury verdict, the appealing party has alternative remedies. He may, as here, file a motion for a new trial which by the terms of the statute, asks that the judgment or verdict previously entered be set aside.

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

REVERSED AND REMANDED.

WILLIAM E. SEIDEL ET AL., APPELLANTS, V. THE CITY OF SEWARD, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
133 N. W. 2d 390

Filed February 26, 1965. No. 35822.

1. **Quieting Title.** In an action to quiet title a recovery by a plaintiff must be based upon the strength of his own title and not upon any weakness in the title of his adversary.
2. **Public Lands.** The public school lands of the State of Nebraska are a trust held by the state.
3. ———. Claimants of school lands are charged with knowledge of the trust obligations of the state.
4. **Municipal Corporations.** A city has no power to enter into contracts which curtail or prohibit its exercise of legislative or administrative authority.

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

Russell A. Souchek, for appellants.

Robert T. Cattle, Jr., and Ivan A. Blevens, for appellees.

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

SMITH, J.

An elusive street boundary is the object of search. Plaintiffs have pleaded two claims: The boundary is less than 50 feet from a 1/64th section line marking the center of the street, and their property was damaged by defendants in paving the street. After a trial the suit was dismissed.

The controversial line is common to the west side of Second Street in defendant City of Seward and the east side of land owned by plaintiffs and described in the deed to them as bounded by the 1/64th section line "subject to the public highway along the East line of said premises."

Early records indicate an overall width of 100 feet. February 1, 1883, the Commissioner of Public Lands and Buildings, as a member of the board of education ad-

ministering sales of public school lands, recorded an unscaled plat of a subdivision containing an unlabeled rectangular space of unspecified width in the location of the present street. The space divides numbered lots. See Laws 1877, § 33, p. 186. A distance of 100 feet appears on an old plat in the county records of irregular tracts.

Later events strengthened the earlier indication. In 1963 the street was paved by the city. Engineers laid out a right-of-way of 100 feet with its center on the 1/64th section line. Testimony correlated their survey and records "supposed to be official * * *." On the ground they discovered several property pins on or within a foot of these side lines.

Evidence of an 80-foot street consists of an old unrecorded map, testimony of one plaintiff, and a pleading of the city in the proceeding by which this area was annexed to the city. In spite of this evidence we are persuaded that the distance between the 1/64th section line and the western side line of the street is 50 feet.

Plaintiffs also challenge the power of the Board of Educational Lands and Funds. They declare that it could not dedicate roads over school lands and that therefore Second Street was established either by prescription or by dedication and prescription. In a similar vein they press a statute which provided: "All public roads shall have a width of sixty-six feet, * * *." Laws 1879, § 2, p. 120.

The condition of plaintiffs' title leaps to mind. Without explanation they have exhibited a 1949 deed to them with the phrase "subject to the public highway." The city introduced testimony concerning a deed from the state, dated June 16, 1883, and recorded November 20, 1883. It describes the land by lot numbers in the commissioner's plat, includes plaintiffs' property, and by silence excludes the unlabeled space.

At any rate no part went free of the highway. Hypothesize in their chain of title a conveyance from the

state containing a description identical with the one in the 1949 deed. The argument, then, amounts to this: "Highway" is to have one meaning in the dedication, another in plaintiffs' title, and that from a common source.

Board authority is an academic question. The school lands are held in public trust. State ex rel. Johnson v. Central Nebraska Public Power & Irr. Dist., 143 Neb. 153, 8 N. W. 2d 841. Claimants are charged with knowledge of the trust obligations of the state. State v. Platte Valley Public Power & Irr. Dist., 147 Neb. 289, 23 N. W. 2d 300, 166 A. L. R. 1196. The inquiry pertinent here is the action of the board, not its authority. Plaintiffs must look to their own title—not to weakness in an adverse one. Jones v. Schmidt, 170 Neb. 351, 102 N. W. 2d 640.

In view of our conclusion on the boundary dispute plaintiffs have no claim for direct harm from the paving project. However, they allege that the city breached an oral bargain between plaintiffs and a city councilman for location of the center of the pavement on the 1/64th section line. The consideration was withdrawal of plaintiffs' objections to annexation.

If made, the bargain is unenforceable. A city has no power to enter into contracts which curtail or prohibit its exercise of legislative or administrative authority. Bucholz v. City of Omaha, 174 Neb. 862, 120 N. W. 2d 270; City of Nebraska City v. Nebraska City Speed & Fair Assn., 107 Neb. 576, 186 N. W. 374.

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

AFFIRMED.

SPENCER, J., concurs in result.

AMERICAN PROVINCE OF THE SERVANTS OF MARY REAL ESTATE CORPORATION, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT, APPELLEE.

133 N. W. 2d 466

Filed February 26, 1965. No. 35825.

1. **Judgments.** The determination of whether one is a "party" for purposes of application of the doctrine of res judicata is not a question of mere form, but of substance.
2. ———. In order that parties for or against whom the doctrine of res judicata is sought to be applied may be regarded as the same in both actions, the general rule is that they must be parties to both actions in the same capacity or quality.
3. ———. The rules of res judicata are intended to give a person his day in court upon issues which are important to him in order that he may have an opportunity to present everything which is proper to be said from his point of view.
4. **Workmen's Compensation.** In an action by an employee against a third party for personal injuries, where an employer is joined as a defendant as required by section 48-118, R. R. S. 1943, for purposes of reimbursement of compensation paid to the employee, and where the workmen's compensation insurance carrier of the employer is beneficially entitled to such reimbursement, for purposes of the doctrine of collateral estoppel, the employer appears in a different capacity than as plaintiff in employer's separate cause of action for property damage against the same defendant arising out of the same occurrence.
5. ———. Under the facts of the particular case where an employee sues a third person for personal injuries, and the employer is joined as a defendant, as required under the provisions of section 48-118, R. R. S. 1943, the third person may be deemed to have knowledge that the employer's appearance is for the sole benefit of the workmen's compensation insurance carrier of the employer.
6. **Insurance: Parties.** A loan receipt is not such a payment of insurance as to make the insurer the real party in interest.

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

Haney, Walsh & Wall, for appellant.

George C. Pardee, Cecil S. Brubaker, Harry H. Foulks, and G. H. Seig, for appellee.

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

MCCOWN, J.

This is an action for property damage arising out of an explosion and fire in March 1960 allegedly caused by the negligence of the defendant.

The district court sustained the defendant's motion for summary judgment based on the affirmative pleading of collateral estoppel and res judicata. The plaintiff has appealed.

The fundamental question is whether the doctrine of res judicata applies to estop the plaintiff in this action from now litigating the issue of defendant's negligence where that issue was determined in a prior action against the same defendant, brought by an employee of the plaintiff for personal injuries arising out of the same explosion and fire. In the prior action, the present plaintiff was joined as a defendant for the purpose of protecting its rights of subrogation and reimbursement for amounts paid its employee under the Workmen's Compensation Act as required by section 48-118, R. R. S. 1943.

For purposes of clarity, Benjamin Allen Reed will be referred to hereafter as Reed; American Province of The Servants of Mary Real Estate Corporation as Province; Metropolitan Utilities District as Utilities District; and New Amsterdam Casualty Company as New Amsterdam.

In the prior case, on May 27, 1960, Reed filed his petition against Utilities District to recover for personal injuries received by him in the explosion referred to, joining as a defendant, his employer, Province, as required by section 48-118, R. R. S. 1943. This section required such joinder for the purpose of reimbursement under the right of subrogation for any compensation paid. An attorney representing New Amsterdam, the workmen's compensation insurance carrier of Province, entered a voluntary appearance for Province in this

action and filed an answer admitting that Province was the employer of Reed at the time of the explosion; that Reed, while acting in the course of his employment, sustained injuries as a consequence of an explosion and fire; that Province had expended money in the payment of medical bills, hospital bills, and other payments as required by the Nebraska Workmen's Compensation Law; and that under said law, it was entitled to be reimbursed for all payments made on behalf of Reed. This answer admitted that Reed sustained injuries, but alleged that the answering defendant did not have sufficient information to admit or deny the allegation of Reed's petition as to the extent and nature of the injuries received. The prayer was that Province, the answering defendant, be subrogated to the rights of Reed in any judgment received against the defendant, Utilities District, and that the court determine the amounts due or to become due in order that said amount be paid by Reed from any recovery derived in the action against Utilities District. The answer raised no other issues. The record does not show that Province or New Amsterdam took any part in the trial except the filing of the voluntary appearance and answer as set out.

In the present case, the petition was filed February 23, 1962, by Province against Utilities District to recover for damage to property owned by Province occasioned by the same explosion. Utilities District filed an amendment to its answer specifically pleading the prior Reed case and that the same items of alleged negligence were involved in the prior case as are alleged in the present case, and that said issues of negligence were resolved in favor of Utilities District in the Reed case; that by reason of the foregoing, Province is collaterally estopped from raising in this case any issues of negligence alleged in its petition herein; and that the cause of action is therefore res judicata.

Utilities District takes the position that since Province was a party of record as a defendant in the prior case, it is

a party for all purposes and is therefore collaterally estopped from relitigating issues of negligence determined in the prior Reed case and is bound under the doctrine of res judicata.

The doctrine of res judicata ordinarily is placed on two grounds: One, public policy and necessity which makes it to the interest of the state that there should be an end to litigations; and the other, the hardship on an individual that he should be vexed twice for the same cause. The law of res judicata is frequently treated as a branch of the law of estoppel and both terms have been used indiscriminately to indicate the force and effect of judgments and decrees. 50 C. J. S., Judgments, § 593, p. 13.

It has sometimes been stated that a party who has had his "day in court" should not be permitted to relitigate issues. Austin W. Scott, one of the reporters for the American Law Institute Committee which drafted the Restatement of Judgments, has stated the basic foundation of the doctrine as applied to collateral estoppel as being "a party who has once fought out a question in litigation with the other party is precluded from fighting it out again." 56 Harvard Law Review, p. 3. The same article, at page 29, concludes: "It will be seen that the effect of a judgment upon a subsequent controversy between the parties is much more limited where the controversy is based upon a different cause of action than where it is based upon the original cause of action. In many cases it is broadly stated that a judgment is conclusive not only as to matters actually litigated but as to all matters which might have been litigated. This is true only where the later controversy is based upon the original cause of action. The doctrine of collateral estoppel, which applies where the cause of action is different, has a much more limited application. In its limited application it is based upon a sound public policy. Care must be exercised in its application to see that it works no injustice."

The Utilities District takes the position that since Province was a named party in both cases, the principles of the doctrine of collateral estoppel and res judicata apply. However, the determination of whether one is a "party" for purposes of application of the doctrine of res judicata is not a question of mere form, but of substance. "* * * parties nominally the same may be, in legal effect, different; and parties nominally different may be, in legal effect, the same. * * * In order that parties for or against whom the doctrine of res judicata is sought to be applied may be regarded as the same in both actions, the general rule is that they must be parties to both actions in the same capacity or quality. Under this rule, a party acting in one right can be neither benefited nor injured by a judgment for or against him when acting in some other right." 30A Am. Jur., Judgments, §§ 397, 398, pp. 447, 448.

"In order to constitute a judgment an estoppel there must be a substantial identity of parties as well as of the subject matter, that is, it is necessary that the parties as between whom the judgment is claimed to be an estoppel must have been parties to the action in which it was rendered, in the same capacities and in the same antagonistic relation, or else they must be in privity with the parties in such former action." 50 C. J. S., Judgments, § 763, p. 289. See, also, 50 C. J. S., Judgments, § 775, p. 303.

Restatement, Judgments, section 79, page 353, states: "A person who at the time of the rendition of a valid judgment is a party to the action is bound by and entitled to the benefits of the rules of res judicata, except as stated in §§ 80-82." The comment appearing under this section states: "a. The general rule stated in this Section does not apply to a person who is a party only in a representative capacity (§ 80), or to one who is merely a formal party (§ 81); nor does the rule apply between parties who are not adversaries in the action (§ 82)."

Subsection (2) of section 80, page 360, of Restatement, Judgments, states: "Where a judgment is rendered for or against a person who is a party to the action solely in a representative capacity or who is otherwise acting solely for the benefit of another, of which fact the other party to the action has notice, the rules of res judicata do not apply in a subsequent action in which he is a party and is acting solely on his own account, except where he takes a position in the subsequent action inconsistent with that which he took in the first action." In the comment it is stated: "The rules of res judicata are intended to give a person his day in court upon issues which are important to him in order that he may have an opportunity to present everything which is proper to be said from his point of view." Restatement, Judgments, § 80, p. 362.

The subsection quoted above prevents a conflict of interest "by excluding from the operation of the rules of res judicata the interests of all persons whose interests are not in fact represented or considered in an action." Restatement, Judgments, § 80, p. 364.

"The results reached in that Section (section 80) are based upon the principle that a judgment does not affect those whose real interests are not involved." Restatement, Judgments, § 85, p. 403.

In the prior case, the action was brought by Reed against Utilities District, and Province was joined as a defendant because such joinder was required under the provisions of section 48-118, R. R. S. 1943, to protect a right to reimbursement under the subrogation created by the statute. New Amsterdam, its workmen's compensation carrier, answered in the name of Province and pleaded its subrogation and reimbursement rights. We do not agree with Utilities District that such pleading went beyond such subrogation and reimbursement rights and constituted an affirmative adoption of Reed's allegations of negligence against Utilities District. Even if it did so, the appearance of Province in the Reed case

was solely for the benefit of New Amsterdam, its workmen's compensation carrier, who would be affected by the rules of res judicata.

Section 48-146, R. R. S. 1943, of the Workmen's Compensation Act, provides in part that: "No policy of insurance against liability arising under this act shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to the same all benefits conferred by this act, and all installments of the compensation that may be awarded or agreed upon, * * *. Such agreement shall be construed to be a direct promise by the insurer to the person entitled to compensation enforceable in his name. Every policy * * * shall be deemed to be made subject to the provisions of this act. * * * All policies insuring the payment of compensation under this act must contain a clause to the effect (1) that as between the employer and the insurer the notice to or knowledge of the occurrence of the injury on the part of the insured shall be deemed notice or knowledge, as the case may be, on the part of the insurer, (2) that jurisdiction of the insured for the purpose of this act shall be jurisdiction of the insurer, and (3) that the insurer shall in all things be bound by the awards, judgments, or decrees rendered against such insured."

In at least four other portions of the act in effect in 1960, definitions or references are alternative as to the employer, or the insurance company carrying the risk. Section 48-118, R. R. S. 1943, in 1960, however, required the joinder of the "employer" for purposes of subrogation and reimbursement of compensation paid. Under such circumstances, under the Workmen's Compensation Act, Province appeared in the Reed case solely for the benefit of New Amsterdam, its compensation insurance carrier. Under all these circumstances, Utilities District is deemed to have knowledge that Province is not appearing as a party on its own account.

The general rule is set out in A. L. R. as follows:

"Stated in its broadest outlines, the general rule is that a judgment is conclusive for or against a party only in the capacity in which he litigated the matter. The basic principle requiring identity of parties as a condition of the application of the doctrine of res judicata includes a requirement of identity of capacities. * * * According to this rule, generally accepted by the courts, the fact that a person was a party to an action in a fiduciary or representative capacity and litigated to judgment questions relating to his rights, duties, or liabilities in that capacity, does not render the judgment conclusive in a subsequent proceeding with respect to his personal or individual rights connected with the same subject matter, and does not preclude him from asserting a personal or individual right or claim, unless such right or claim was actually adjudicated or necessarily involved under the issues in the former action, or the elements of estoppel are present." Annotation, 170 A. L. R. 1181, and the cases there cited.

Utilities District has cited the case of Rehn v. Bingaman, 152 Neb. 171, 40 N. W. 2d 673, to support its position that Province, even though it did not actually participate in the trial of the Reed case, had the authority and opportunity to do so, and therefore, should be collaterally bound by the issues as determined. The holding in the Rehn case was entirely correct as applied in that case, but it merely held: "One who is made a party defendant for the sole purpose of protecting a statutory right of subrogation is ordinarily not liable for costs other than his own; but where, as here, he adopts the position of the plaintiff and for all practicable purposes is a plaintiff, his liability for costs is the same as the plaintiff." That rule would also apply to res judicata. We do not pass upon the question of Province's or New Amsterdam's right to participate in the Reed case, but do call attention to the fact that there have been additional provisions added to section 48-118, R. R. S. 1943, subsequent to the Rehn case and to this case, which have

some bearing upon rights of participation arising subsequent to the amendments, as well as to identification as parties of the employer or his compensation carrier.

In an action by an employee against a third party for personal injuries, where an employer is joined as a defendant as required by section 48-118, R. R. S. 1943, for purposes of reimbursement of compensation paid to the employee, and where the workmen's compensation insurance carrier of the employer is beneficially entitled to such reimbursement, for the purposes of the doctrine of collateral estoppel, the employer appears in a different capacity than as plaintiff in employer's separate cause of action for property damage against the same defendant arising out of the same occurrence.

Under the facts of the particular case where an employee sues a third person for personal injuries, and the employer is joined as a defendant, as required under the provisions of section 48-118, R. R. S. 1943, the third person may be deemed to have knowledge that the employer's appearance is for the sole benefit of the workmen's compensation insurance carrier of the employer.

There is also an issue raised involving the question of the real party in interest in this case. Paragraph V of the answer of Utilities District alleges that any damage sustained by Province had been fully paid to it by its insurance company or companies; that said company or companies were in control of this litigation; and that Province is not the real party in interest entitled to the avails of the suit and has no interest therein beyond the amounts that said insurance company or companies have paid. Province moved for partial summary judgment on these allegations. Affidavits and copies of the loan receipts were filed. An order was entered overruling the motion and a later motion for reconsideration. The grounds for overruling the motion are not shown in the record. Province contends that this ruling was based on the ground that Province was not the real party in interest. The affidavit of Utilities District raised some

possible questions of fact as to whether additional documents may have been delivered and also allegations that discovery procedures might be required to obtain the facts. In view of the provisions of section 25-1335, R. R. S. 1943, and the present state of the record, it is not clearly shown on what grounds the motion for partial summary judgment was overruled. This court adheres to the rule that a loan receipt is not such a payment of insurance as to make the insurer the real party in interest. Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc., 162 Neb. 47, 75 N. W. 2d 366; Shiman Brothers & Co., Inc. v. Nebraska National Hotel Co., 143 Neb. 404, 9 N. W. 2d 807. See, also, Williams v. Union Pacific R. R. Co., 94 F. Supp. 174. On the state of the record, however, we find no error in the court's denial of plaintiff's motion for partial summary judgment under the circumstances shown in the record.

We conclude that in this case Province has not had its day in court nor fought out a question in litigation and that it did not appear in the two actions in the same quality, character, or capacity. The action of the trial court in sustaining Utilities District's motion for summary judgment was in error and the judgment is therefore reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

THE LINCOLN WOMAN'S CLUB, A CORPORATION, APPELLEE, v. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.
133 N. W. 2d 455

Filed February 26, 1965. No. 35833.

1. **Taxation.** Provisions exempting property from taxation are to be strictly construed; their operation should not be extended by construction; and the power and right of the state to tax are presumed and the exemption must be clearly granted.

2. ———. A liberal and not a harsh or strained construction is to be given to the terms "educational," "religious," and "charitable" in order that the true intent of the constitutional and statutory provisions may be realized.
3. ———. If property is, in fact, used for no other purpose than those which are educational, religious, and charitable, the conditions of the exemption have been strictly complied with irrespective of the proportion which any one of these distinctive purposes may bear to the others.
4. ———. It is the exclusive use of property which determines whether the property is exempt from taxation.
5. ———. The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation.
6. ———. It is the use of property as distinguished from the use of the income from the property that determines whether it is exempt from taxation.
7. ———. An incidental use of property which produces some funds from members does not make the use any less an incidental use, where such funds are devoted to the primary and dominant purposes of the organization.
8. ———. If property is actually used exclusively for educational, religious, or charitable purposes, the exemption is not lost because the use is for less than full time.

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

Ralph D. Nelson and Henry L. Holst, for appellants.

Marti, O'Gara & Dalton and Douglas Marti, for appellee.

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

MCCOWN, J.

This is an action brought by the Lincoln Woman's Club, a corporation, against the City of Lincoln, Nebraska, and certain of its officers, to enjoin the collection of 1962 taxes on certain real estate constituting the headquarters building of the club.

The district court entered a judgment finding such taxes void except as to the portion of the basement used as a caretaker's apartment, and enjoined the enforce-

ment of taxes against the real estate except the portion properly attributable to the apartment.

The Constitution of Nebraska provides in part: "The Legislature, by general law may exempt * * * property owned and used exclusively for educational, religious, charitable * * * purposes, when such property is not owned or used for financial gain or profit to either the owner or user." Art. VIII, § 2, Constitution of Nebraska. The Legislature has used this same language in exempting such property from taxation. § 77-202, R. R. S. 1943.

The property here involved is not owned or used for financial gain or profit to either the owner or user, and the sole issue is whether the property was owned and used exclusively for educational, religious, or charitable purposes within the meaning of the Constitution and statutes of Nebraska.

The operations of the plaintiff vary extensively from stereotype conceptions of club operations, and the evidence is uncontradicted. We therefore deem it advisable to outline the facts in rather extensive detail.

The Lincoln Woman's Club was formed in 1894 and incorporated in 1907 as a nonprofit corporation. Its articles of incorporation provide in part that: "The objects and purposes for which this corporation and club is formed and exists are educational, religious and charitable." The articles also provide that upon dissolution, the assets of the corporation are to go for educational or charitable purposes. The club has approximately 300 members of whom over 100 are life members, having paid $100 each; and approximately 200 who pay annual dues of $6, $5 of which goes to the local club and $1 to the general federation. There are no restrictions on membership based on race, creed, color, or age, and no formal application for membership is required. The club has no paid officers, and no member or officer receives any remuneration for any services performed. It has six departments: American citizenship, Bible,

bridge, fine arts, home, and kensington. Each department has the privilege of picking some particular charitable organization or other project for which it wants to work. The club, as a whole, also receives funds from a food booth at the state fair.

The building involved is the headquarters of the club in Lincoln, Nebraska. It has no facilities, as such, for reading or relaxation by the members, and is closed to all except certain officers except when some activity of the club is going on.

The building has a total square footage of 8,590 feet, equally divided between the main floor and the basement. The basement contains an auditorium, a furnace room, rest rooms, a small storage room, and the caretaker's apartment. The first floor contains an office, reception room, kitchen, restrooms, and an auditorium. Each auditorium is approximately 3,000 square feet. The basement auditorium is used about one-tenth as much as the main-floor auditorium. On the main floor, the reception room is used practically every day, usually to open the drapes, and each of the 6 departments uses it 10 or 12 times a year and it is not used the balance of the time. The kitchen is used about twice a week by department committees and is not used otherwise. The club expects to "clear at least half" from the sale of food to members and usually charges $1 for luncheons. One-half of the proceeds from food service to members goes to department projects. The auditorium on the main floor was used about 3 times a week for meetings and 12 times a year for project luncheons. There were also parties and teas held in the auditorium, but no tea, luncheon, or party was held that was not in connection with one of the programs. Otherwise, the auditorium was not used. Income from programs, luncheons, teas, and parties goes into the community for the chosen projects. Each general meeting is preceded by a worship service which lasts from 5 to 10 minutes.

The American citizenship department met approxi-

mately eight times in 1962, mostly in the upstairs auditorium, and the chief purpose of the department is to learn about civic, national, and world government. Speakers bring them educational lectures or programs. The members on many occasions go over to observe the Legislature in session.

Programs in the Bible department usually consist of talks by ministers of the community and the department had eight or nine meetings in 1962. The "pancake brunch" was the department's money making project. It also had programs called the "Bible's Music," the "Bible's Stories," and "The Bible as Psychology." It also had a book review "On Asia's Rim" and "Israel in Pictures." These programs were held in the main auditorium. The department's money, in the amount of $60 or $70, was sent to the Belmont Community Center, plus a donation of food.

The bridge department meetings and luncheons are generally held in the main auditorium. During 1962, the department had 16 meetings at which its members played bridge, 13 times with an instructor, and 3 times without an instructor. Funds for the department are raised by luncheons held in the building. The members pay a bridge instructor and they, in turn, take their instruction to the State Hospital and other hospitals, giving parties for the inmates. The club charges a 50-cent guest fee for outsiders who have bridge instruction. The bridge department project for several years has been Westview Rest Home and the wards at the State Hospital. The department has adopted three wards at the State Hospital, including a ward of boys. From the bridge department funds, the members remembered every child's birthday, having a party at the hospital for the whole group. The department has likewise sponsored a group of elderly ladies. The department's service to them has largely been to take them in the members' cars for outings and take them on shopping trips. Some were taken into the members' homes and taught or

helped in making their own clothing. The department also gave a sum of money to the convalescent ward of the General Hospital for books.

The fine arts department has been used largely to provide scholarships. It has given public concerts for the purpose of raising money to sponsor students of the community in the pursuit of education in the fine arts.

The home department stresses educational things pertaining to homemaking or foods, including sewing, hat making, nutritional values of foods, and lifesaving. The department sponsored the showing of cancer films at a local theater. In 1961-1962, the department contributed $1,500 to the Lancaster County Cancer Society and $1,500 to the Childrens Zoo. It helped finance the education of a student nurse. The department has a literature section which features book reviews. It has had lectures also on Alcoholics Anonymous and parliamentary procedure. The department also has a committee on "Magazines for Friendship" which screens magazines for propaganda and then sends them to foreign countries, hospitals, universities, etc. This committee works in the basement of the building.

The kensington department met once a month in 1962. It gave over 1,000 garments to the community emergency shop, the larger part of the garments being new and made by members either in the building or in their homes. Materials are distributed at the club house for garments made at home, and are sometimes taken to the members. When the clothing is finished, it is stored in the basement until it is delivered to the community emergency shop, Belmont Center, or to the Indian families of Lincoln. The department has also had programs from LARC School, the community emergency shop, the police department, and Tabitha Home.

This court on many occasions has passed upon the specific tax exemption provisions with which we are here concerned. It is well settled that provisions exempting property from taxation are to be strictly construed;

that their operation should not be extended by construction; and that the power and right of the state to tax are presumed and the exemption must be clearly granted. This does not mean that there should not be a liberal construction of the language used in order to carry out the expressed intention of the fundamental lawmakers and the Legislature but, rather, that the property which is claimed to be exempt must come clearly within the provisions granting such exemption. Doane College v. County of Saline, 173 Neb. 8, 112 N. W. 2d 248.

The theory that the rule requiring strict construction of a tax exemption statute demands that the narrowest possible meaning should be given to words descriptive of the objects of it would establish too severe a standard. A liberal and not a harsh or strained construction is to be given to the terms "educational," "religious," and "charitable" in order that the true intent of the constitutional and statutory provisions may be realized. The judicial interpretation of such statute should always be reasonable. Young Men's Christian Assn. v. Lancaster County, 106 Neb. 105, 182 N. W. 593, 34 A. L. R. 1060. The term "religious" has been held to require neither the profession of a sectarian creed, nor the formal dedication or occupation of property to promote the objects and purposes of a faith thus expressed. This court has said that education "may be particularly directed to either mental, moral or physical faculties, but in its broadest and best sense it embraces them all, and includes not merely the instructions received at school, college, or university, but the whole course of training —moral, intellectual, and physical." Ancient and Accepted Scottish Rite v. Board of County Commissioners, 122 Neb 586, 241 N. W. 93, 81 A. L. R. 1166.

The word "charitable" has been held to mean something more than mere alms-giving or the relief of poverty and distress and it has been given a significance broad enough to include practical enterprises for the good of humanity operated at a moderate cost to those

who receive the benefits. Young Men's Christian Assn. v. Lancaster County, *supra.*

Within the guidelines previously established by this court, the facts of this particular case establish the aims and purposes of the Lincoln Woman's Club as religious, educational, and charitable.

It is argued that certain programs and activities of the woman's club should not be considered educational; that certain other activities of the club should not be considered charitable or religious; and that the Constitution and exemption statute should be construed to require for exemption that activities be either all religious, all educational, or all charitable. It is not essential that the use of property be exclusively for one of the three purposes. This court, as early as 1932, held that the word "or" could be construed to mean "and" when necessary to arrive at the true legislative intent. This court said: "Therefore, in the instant case, in view of the general purpose to be promoted, it may not be said that the right of exemption is dependent on the fact that the property involved was used for purposes exclusively educational, or exclusively religious, or exclusively charitable, construing the three conditions to be distinct and mutually exclusive. Reason would dictate that, if property is in fact used for no other purposes than those which are educational, religious, and charitable, it is plain that the conditions of the exemption have been strictly complied with, irrespective as to the matter of proportion which any one of these distinctive purposes may bear to the others." Ancient and Accepted Scottish Rite v. Board of County Commissioners, *supra.*

It is essential to determine whether the woman's club, not in its aims and purposes alone, but in what it actually does in its building to carry them out, is religious, educational, or charitable, before it can be determined that the uses to which the building was put partake of these characteristics.

It is the exclusive use of property which determines

whether the property is exempt from taxation. This court has been long committed to the principle that the primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation. Doane College v. County of Saline, *supra;* Ancient and Accepted Scottish Rite v. Board of County Commissioners, *supra.* From the uncontradicted record here, the primary and dominant use of the building is for religious, educational, and charitable purposes. The evidence is clear that no tea, luncheon, or party was held except in connection with one of the programs in the building. There is no evidence in the record that any social functions are more than incidental to the primary purposes and objectives of the club. The record also shows that the building involved has no facilities as such for reading or relaxation by the members and is closed except when some activity of the club is going on.

The City argues inferentially that since there is evidence that some activities are considered by some members to be "enjoyable" or "fun," such activities somehow cannot be religious, educational, or charitable. We cannot agree. There are many persons who enjoy education, many persons who find enjoyment in religion, and others who find fun in charity. The mental or emotional response of individuals to an activity certainly cannot be a judicial criterion in determining whether or not the activity is "religious," "educational," or "charitable."

There is no question but that it is the use of the property as distinguished from the use of the income from the property that determines whether it is exempt from taxation. It has been strenuously contended that since some of the incidental activities produced from the members a small amount of income, which is admittedly devoted to educational and charitable purposes, therefore, the use of the property was income producing, rather than religious, charitable, or educational. We cannot agree that an incidental use of property which produces some funds from members makes the use any less an

incidental use, where such funds are devoted to the primary and dominant purposes of the organization. Young Women's Christian Assn. v. City of Lincoln, 177 Neb. 136, 128 N. W. 2d 600. To so hold would necessitate the denial of tax exemption to a church because its women's society derived funds from a church supper.

There has been some emphasis placed on the fact that a portion of the charitable work of the woman's club is done by the members off the premises involved. While this is true, it does not in any way affect the primary or dominant use of the premises.

The City has pointed out that the building, and in particular certain portions of the building of the club, are used only a small fraction of the time. While this court has held that premises not used at all do not qualify for tax exemption under the applicable constitutional and stautory provisions, it does not follow that use of the premises must be continuous or daily or any major proportion or amount of the time. If the property is actually used exclusively for educational, religious, or charitable purposes, the exemption is not lost because the use is for less than full time.

The interpretations placed upon the exemption provisions of the Constitution and the applicable exemption statute referred to, over a period of many years, are decisive of this case. The determinations and decisions of this court have become a part of the law affecting the exemption of such properties of which we assume the Legislature is fully aware. If any change in the law regarding the exemption of such institutions and properties is to be made, it is not incumbent upon this court to take such action. While we do not slavishly adhere to precedent, nevertheless, a consistent line of decisions is entitled to great weight and should be adhered to unless the reasons therefor do not exist or are clearly erroneous or mischievous or unless more harm than good will result from doing so. Nebraska Conference

Assn. of Seventh Day Adventists v. County of Hall, 166 Neb. 588, 90 N. W. 2d 50.

The record in this case establishes that the property of the Lincoln Woman's Club, with the exception of the basement apartment of the caretaker as described, was owned and used exclusively for educational, religious, and charitable purposes within the meaning of the Constitution and exemption statute of Nebraska. The judgment of the district court was correct and should be and is affirmed.

AFFIRMED.

SPENCER, J., not participating.

JAMES M. HANSEN, APPELLEE, V. FRANK STROHSCHEIN, APPELLANT.
133 N. W. 2d 598

Filed March 5, 1965. No. 35807.

1. **Husband and Wife.** One who actively, purposely, and without privilege alienates a wife's affections from her husband is liable for that loss of consortium of which the actor's conduct is the controlling cause.
2. **Trial: Appeal and Error.** An ambiguous instruction on the risk of nonpersuasion is not prejudicially erroneous where other instructions definitely and correctly cover the subject.
3. ———: ———. A refusal of requested instructions is not erroneous where the instructions given by the court have the same effect.
4. **Husband and Wife.** In an action for alienation of affections an award of damages for loss of consortium will seldom be disturbed by a court on the ground of excessiveness.

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

John F. McCarthy, for appellant.

Vogeltanz & Grimminger, for appellee.

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

SMITH, J.

A jury has found that defendant alienated from plaintiff James M. Hansen the affections of his wife, Doris. Issues on appeal are sufficiency of evidence, instructions given or refused, and amount of award.

The Hansens were married in 1927. The ages of the parents and their minor children at the time of trial were: James, 65; Doris, 53; Jimmie, 16; Sharon, 14; and Gary, 7. In 1963 they were living on a farm near Ord, Nebraska.

We summarize evidence in support of the verdict. Early in 1963 defendant, an insurance agent, in the course of his business became acquainted with Doris. Subsequent association quickly transformed acquaintance into intimacy. Togetherness was sometimes innocuous, sometimes not.

One meeting was significant. On February 23, 1963, Doris and Sharon accepted defendant's invitation to accompany him on a visit to a prospect residing about 14 miles away. As they entered his car, Doris said, "I think you are going to run away with both of us." He and Doris were giggling. On the outgoing trip defendant drove and Sharon sat between them. She saw them holding hands behind her back.

The return trip was also eventful. Although the ground was covered with snow and Sharon had no operator's permit, upon defendant's suggestion she drove the automobile on a country road until they reached a main highway. Sitting in the middle, defendant put his arm around Doris and "kind of put his hand down her dress." She told him not to insult her. Thereupon defendant "kind of kissed her on the cheek and tried to laugh it off."

Without notice to James, Doris on March 14, 1963, abandoned her family. Her car was discovered on a street in Ord with a message that she had gone to Omaha. Instead she telephoned defendant at Albion for transportation from Ord to Grand Island. He complied.

A decree of absolute divorce was rendered June 27, 1963, in favor of James on his cross-petition; and he was awarded custody of the three minor children.

A post-decree investigation influenced an appraisal of the behavior in question. Trial commenced January 20, 1964. Doris had not remarried. Defendant was living in Grand Island in a home which he had purchased, and trailer number 55 at the Roush Trailer Courts was listed in his name on a directory board. The preceding January 9th, 10th, 11th, and 13th, a private investigator on two occasions each date saw an automobile registered to Doris at this address and parked next to the trailer. At the same times he saw defendant's automobile parked across the end of the trailer court. The hours varied from 10:15 p.m. to 3 a.m. Once the investigator observed a light in the trailer, but at no time did he see defendant, Doris, or anyone else there. She testified that she was a tenant.

Prior to the separation of the Hansens their marital relation was good. After separation James and the minor children worked together to maintain the home.

The evidence sustains the verdict. One who actively, purposely, and without privilege alienates a wife's affections from her husband is liable for that loss of consortium of which the actor's conduct is the controlling cause. See, Baltzly v. Gruenig, 127 Neb. 520, 256 N. W. 4; Sonneman v. Atkinson, 121 Neb. 752, 238 N. W. 532; Phelps v. Bergers, 92 Neb. 851, 139 N. W. 632; Trumbull v. Trumbull, 71 Neb. 186, 98 N. W. 683; Restatement, Torts, § 683, p. 469.

On the subject of instructions, complaint is made that defendant ran a risk of nonpersuasion because of instruction No. 10: "In determining whether a party has sustained the burden of proof placed upon him by these instructions, you are not limited to the evidence introduced by such party. Either party is entitled to the benefit of any evidence tending to establish his contentions, * * *."

All instructions are considered together. See In re Estate of Kinsey, 152 Neb. 95, 40 N. W. 2d 526. Defendant's answer is a general and specific denial. The instruction in which the court submitted the issues commences: "The burden of proof in this action is on the plaintiff * * *." Another instruction conveys a similar theme. In this setting, instruction No. 10 contains no prejudicial error. See Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry. Co., 105 Neb. 151, 179 N. W. 503.

Defendant points to the refusal of five instructions tendered by him. The court carefully, clearly, and correctly embodied in its instructions all applicable principles requested. Defendant was protected. See Sonneman v. Atkinson, *supra*.

The verdict of $5,000 is not excessive. It falls within the rule announced in Baltzly v. Gruenig, *supra:* "Courts will seldom interfere with the finding of the jury in such actions, for the reason that there is no method of determining exactly the proper pecuniary compensation which should be awarded."

The trial court correctly overruled defendant's motion for judgment notwithstanding the verdict or in the alternative for a new trial. The judgment on the verdict should be, and is, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRANK REED, APPELLEE, RESOLUTE INSURANCE COMPANY, OF HARTFORD, CONNECTICUT, SURETY FOR FRANK REED, APPELLANT.

133 N. W. 2d 591

Filed March 5, 1965. No. 35821.

1. **Bail.** If the surety on a bail bond fails to deliver his principal into the custody of a proper officer of the law or to procure his attendance in court as the bond requires, the liability of the makers of the bond for the penalty thereof becomes absolute and the bond should be forfeited.

2. ———. A bail bond is a contract between the surety and the State that if the latter will release the principal from custody, the surety will undertake that the principal will appear personally at any specified time and place to answer the charge made against him; and upon failure of the principal to so appear, the makers of the bond become absolute debtors of the State in the amount of the penalty of the bond.
3. ———. When a surety makes a bail bond it assumes the risk involved if its faith in the principal is misplaced.
4. **Bail: Appeal and Error.** The discretion implicit in section 29-1107, R. R. S. 1943, is committed to the district court and its exercise by that court will not be interfered with by this court unless the action of the former is arbitrary and capricious.
5. **Bail.** In a proceeding for the recovery of judgment on a bail bond, there is no duty on the part of the State to prove damages.
6. ———. Ordinarily an escape by the principal during the time for trial affords no excuse to the surety.
7. **Appeal and Error.** When jurisdiction of a cause becomes vested in this court on appeal, a bill of exceptions already filed may be amended by order of the district court in order to properly reflect the true status of the record, but it may not be amended to introduce new and additional evidence or to raise new issues in the case.
8. **Bail.** Generally relief or remission of a bail bond will be refused where the defendant is at large on the date of the default of appearance on the bond and then becomes arrested or imprisoned in another state after the default and the forfeiture of the bond.

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

O'Neal & Krause, for appellant.

Paul L. Douglas and William D. Blue, for appellee State of Nebraska.

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

WHITE, C. J.

The district court ordered forfeiture and subsequently entered judgment for the full amount of a bail bond in the sum of $5,000. The surety Resolute Insurance Company appeals. Frank Reed was charged with a felony, appeared on the first day of trial, September 30, 1963,

departed during the noon recess, and has never appeared or been returned to the jurisdiction of the court since. On the same date, September 30, 1963, pursuant to the requirements of section 29-1106, R. R. S. 1943, the bail bond was forfeited. A representative of the insurance company was present in court on September 30, 1963. On the motions of both parties, hearing was held and evidence adduced on November 26, 1963, on the issue of whether the insurance company was entitled to a remission of all or part of the amount of the bond under the terms of section 29-1107, R. R. S. 1943, which vests discretion in the district court to remit if it appears that the interests of justice do not require the enforcement of the forfeiture. The court refused remission, entered judgment for $5,000, and on the overruling of a motion for a new trial on March 10, 1964, the insurance company appeals.

The bond provided that Reed appear on September 30, 1963, at 9 a.m., and *from day to day,* and from term to term, until final judgment or as directed by the court, and *should not depart said court without leave.*

We examine the nature of this obligation, the liability imposed, and the reasons therefor. They are well stated in State v. Morse, 171 Neb. 87, 105 N. W. 2d 572, wherein it is stated: "If the surety on a bail bond fails to deliver his principal into the custody of the proper officer of the law or to procure his attendance in court as the bond requires, the liability of the makers of the bond for the penalty thereof becomes absolute and the bond should be forfeited. A bail bond is a contract between the surety and the State that if the latter will release the principal from custody, the surety will undertake that the principal will appear personally at any specified time and place to answer the charge made against him; and upon failure of the principal to so appear, the makers of the bond become absolute debtors of the State in the amount of the penalty of the bond. When a surety makes a bail bond it assumes the risk involved if its

faith in the principal is misplaced. State v. Honey, 165 Neb. 494, 86 N. W. 2d 187."

There is no duty on the part of the State to prove damages. State v. Konvalin, 165 Neb. 499, 86 N. W. 2d 361. The giving of the bond transfers custody to the surety who becomes the keeper or jailer of the accused, the surety's dominance is a continuation of the original imprisonment, the State may not interfere with the surety's control, and the surety may discharge itself from liability at any time by surrendering the accused. State v. Liakas, 165 Neb. 503, 86 N. W. 2d 373.

The obligation on the bond having become absolute, an allowable sound discretion is vested in the district court to remit in whole or in part. § 29-1107, R. R. S. 1943; State v. Konvalin, *supra*. It does not appear that the district court abused this discretion. On the record before us, there is an entire failure of justice solely because of surety's failure to perform its obligation. Its representative was in court when Reed appeared, did not surrender him up, the State had no authority to interfere, and the trial, Reed disappearing, became a nullity. His appearance at all times during this criminal trial was a necessity to the processes of justice. The breach was the substantial equivalent, or perhaps worse, than no appearance at all. The contract of the surety is identical with that of the principal. There is no showing here of a sufficient excuse for failing to keep the continuing condition of appearance in the bond or that there was no design to evade justice. The opposite appears. The principal became a fugitive from justice and has made a successful effort to evade the law. Mere hardship or expense to the surety will not excuse. The risk, with which the State may not interfere, is on the surety. State v. Liakas, *supra*. We point out that it is obvious that the State has been prejudiced and it does not appear when, if ever, a trial may be had. The difficulties arising from witness' vanishing and reviving the testimony are obviously prejudicial to the State's right in

any indefinite delay of a criminal trial. It defies common sense to remit part of this bond because of Reed's token appearance for trial for a few hours. The principal and the surety's breach in this case were total and not "partial." On the record before us, it would have been an abuse of discretion to relieve from the total violation of the clear and mandatory provision of the surety's obligation.

Surety cites no case supporting its position. In the Nebraska cases cited by surety, the defendant was produced and stood trial in a short period of time after the original default. The State had its trial and justice was served. No case is cited nor has our research produced a case where a defendant has absconded in the middle of a trial and became a fugitive from justice, and not reappeared, where relief or remission was granted. The general rule is that escape within the time for trial affords no excuse to the surety. 8 Am. Jur. 2d, Bail and Recognizance, § 99, p. 840.

The notice of appeal in this case was filed on April 9, 1964, vesting jurisdiction of the matter in this court. After briefs of both parties were filed in this court, surety filed a motion in the district court to amend the bill of exceptions already filed in this court under Rule 7e of this court. Its purpose was to include additional evidence as to the accused Reed's sentence to the Missouri State Penitentiary for 3 years for an offense committed in the State of Missouri. The district court properly rejected this application. The purpose of Rule 7e is to permit corrections by amendment to reflect the true status of the evidence in the record even after filing of the bill of exceptions in this court. The rule does not permit, for obvious reasons, the introduction of new issues in the case while on appeal by means of additional and new evidence. Such a construction would create chaos in appellate court jurisdiction. Parties cannot continue the litigation already ended and introduce new evidence on the issues or raise new issues which this

court can consider after the appeal is here on the record the parties actually made. The surety filed its motion to remit the forfeiture, introduced evidence, and had its day in court. No evidence of this nature was introduced at the trial nor did the surety assert it by affidavit or otherwise as newly discovered evidence in its motion for a new trial and to vacate the judgment which was overruled by the district court on March 10, 1964. It is elementary that our jurisdiction is confined to the record before us. This purported evidence is not nor ever was a part of that record and may not be considered by us on this appeal. We note in passing that the new issue raised by the surety must be resolved against it in any event. The rule is general that relief on a bond will be refused where a defendant was at large on the date of the default and was arrested or imprisoned in another state after the default and the forfeiture of the bond. 8 Am. Jur., Bail and Recognizance, § 187, p. 885; People v. Valvo, 265 App. Div. 722, 40 N. Y. S. 2d 627; State v. Pelley, 222 N. C. 684, 24 S. E. 2d 635; Wallace v. State, 196 Tenn. 577, 269 S. W. 2d 780; State v. Douglas, 91 W. Va. 338, 112 S. E. 584, 26 A. L. R 408. See, also, Annotation, 4 A. L. R. 2d 449; King v. State, 18 Neb. 375, 25 N. W. 519; State v. Altone, 140 Me. 210, 35 A. 2d 859 (quoted with approval in State ex rel. Smith v. Western Surety Co., 154 Neb. 895, 50 N. W. 2d 100).

The judgment of the district court is in all respects correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. CLARENCE A. H. MEYER, ATTORNEY GENERAL, APPELLEE, V. STUART P. KNUTSON, APPELLANT.
133 N. W. 2d 577

Filed March 5, 1965. No. 35841.

1. **Architects: Statutes.** The regulation and registration of per-

sons engaging in the practice of professional architecture is a proper exercise of the police power.

2. **Statutes.** Responsibility for statutory classification for purposes of legislation under a regulatory or licensing act rests primarily with the Legislature and will be held proper if classification reasonably applies to and embraces all who are similarly situated with respect to conditions or wants justifying appropriate legislation, and there is an evident connection between the distinctive needs peculiar to the class and the remedy or regulations therefor.
3. **Constitutional Law: Statutes.** The constitutional prohibition against special legislation does not prevent the Legislature from dividing a subject into classes, and a classification made pursuant to a public purpose which has a rational basis is not invalid.
4. ———: ———. A statute bearing alike upon all individuals of each class is not a discrimination forbidden by the state Constitution, nor by the Fourteenth Amendment to the Constitution of the United States.
5. **Statutes.** A statute, to be equal and uniform in its operation, need not extend the same privilege to every individual, but different, appropriate privileges and exceptions may be granted to different classes similarly situated.
6. ———. Where exemptions from the operation of a general law are made applicable to persons of the same class similarly situated, such provisions are not invalid as granting special privileges or immunities.
7. **Architects: Statutes.** A provision in a general statute exempting practitioners of professional architecture, practicing prior to the effective date of the act, is the grant of an exception or privilege not prohibited by the Constitution where it operates uniformly upon all alike in the same situation. The statute creating such an exception or privilege must be complied with, the statute being the source of the right or privilege.
8. **Injunctions: Statutes.** Injunction is a proper remedy to be used by the state in the protection of public rights, property, or welfare, whether or not the acts complained of violate a penalty statute and whether or not they constitute a nuisance.
9. **Estoppel: Statutes.** The doctrine of estoppel cannot be applied against the state in enforcing a criminal statute on the ground that the violation is of long duration.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Affirmed.

Joseph S. Goldware and Shrout, Hanley, Nestle & Corrigan, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

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

CARTER, J.

This is a suit commenced by the State of Nebraska on the relation of the Attorney General to enjoin Stuart P. Knutson from the practice of professional architecture until such time as he shall become registered as required by sections 81-839 to 81-856, R. R. S. 1943. The trial court enjoined the respondent as prayed and the respondent has appealed.

In 1937 the Legislature enacted a comprehensive registration act governing the practice of engineering and architecture in this state. Laws 1937, c. 153, p. 592. It is the contention of the respondent that the foregoing act is unconstitutional and, if constitutional, the respondent has grandfather rights to practice professional architecture under the provisions of the act.

Respondent asserts that a part of Laws 1937, chapter 153, section 14, page 600, now section 81-853, R. R. S. 1943, is unconstitutional and void in that it permits certain persons to practice professional architecture without registration who are wholly unqualified, that the provision is discriminatory and tends to defeat the very purpose of the act which was created to protect the health, safety, and welfare of the public, and that as a result the act is void for improper classification in accomplishing the purposes of the act. The provision complained of states: "Nothing in sections 81-839 to 81-856 shall (1) prevent persons, mechanics or builders from making plans, specifications for or supervising the erection, enlargement or alteration of buildings, or any parts thereof, to be constructed by themselves or their own em-

ployees for their own use; Provided, that the working drawings for such construction are signed by the authors thereof with a true statement thereon of their relation to such construction and that the makers are not architects; * * *." The purpose of this exemption from the act was to permit persons to do professional architecture in planning and constructing their own buildings, providing they correctly show their relation to the construction on the drawings or plans. This latter provision was undoubtedly for the purpose of calling the matter to the attention of the person authorized to issue a building permit. We point out that the exemption applies to all persons constructing their own buildings, including the respondent. There is no discrimination as to persons in the class exempted.

Respondent contends, however, that the purpose of the act is to protect the health, safety, and welfare of the public, and that to permit persons to practice professional architecture in their own affairs is a discrimination in the accomplishment of the act. But this is the province of the Legislature. It is the established law of this state that the Legislature may for purposes of legislation make classifications, but a classification to be valid must rest on some reason of public policy or some substantial difference of situation or circumstances that naturally suggest the justice or expediency of diverse legislation with regard to the subject classified. Blauvelt v. Beck, 162 Neb. 576, 76 N. W. 2d 738; Terry Carpenter, Inc. v. Wood, 177 Neb. 515, 129 N. W. 2d 475. But the Legislature may properly prescribe the limits of its regulation. Here the Legislature concluded to exempt all persons from the statute while engaged in construction work for themselves, in the construction of buildings covering less than 5,000 square feet and the construction cost is less than $20,000, and other similar exemptions. The exemptions are uniform as to class. The extent of the regulation under such circumstances is within the scope of the Legislature's prerogative.

It is further contended that the act is unconstitutional in that it permits registered engineers to practice professional architecture and registered architects to practice engineering. The respondent admits that engineering and architecture are proper objects of regulatory legislation. This being so, it is for the Legislature to define the professions and to prescribe the requirements for registration. The determination by the Legislature that these two somewhat similar professions may each practice in the field of the other is peculiarly a legislative prerogative. The fact that the requirements of the statute for registration are the same for the two related professions does not amount to an improper classification or discrimination, the fixing of requirements being legislative in character, unless such requirements are so unreasonable as to prohibit the practice of an otherwise legitimate and useful profession or business. While it is true that registrations are granted by a joint board of engineers and architects, and the statutory qualifications for each are the same, the evidence shows that the board gives suitable examinations for each profession as the statute permits. While the act makes it no offense for an architect to practice engineering, or an engineer to practice professional architecture, the measure of the regulation and the punishment for its violation is legislative and, when reasonably classified with uniformity of operation as to class, we cannot say that the Constitution has been transgressed.

Statutes which are reasonably designed to protect the health, morals, and general welfare do not violate the Constitution where the statute operates uniformly on all within a class which is reasonable. This is so even if the statute grants special or exclusive privileges where the primary purpose of the grant is not the private benefit of the grantees but the promotion of the public interest. Here the act was admittedly in the public interest. The extent of the regulation is left to the wisdom of the Legislature. The Legislature may likewise grant

exemptions from such a statute where they are made applicable to all persons of the same class and similarly situated. Under this rule the Legislature may exempt persons from the requirements of a professional registration statute who have been engaged in the lawful practice of the profession in the state before its passage. State v. Call, 121 N. C. 643, 28 S. E. 517; Louisiana State Board of Medical Examiners v. Charpentier, 140 La. 405, 73 So. 248. Other exceptions and exemptions contained are likewise valid under the same reasoning.

The respondent concedes that he has never been registered under the act as a professional architect. He contends, even if the act be constitutional, that he holds grandfather rights under the act, and that he is not required to register.

The evidence shows that at the time of the adoption of the act, respondent was 20 years of age. He testifies that he was then engaged in professional architecture. The evidence shows that he was engaged in such professional work from that time on and until he was enjoined in the present suit. There is no evidence of incompetency in any of the work that he has performed. He attended high school for 4 years but did not graduate. He has had no formal education in professional architecture. He became engaged in the contracting business with his father and commenced the doing of architectural work at that time. He testifies that he obtained and filled out an application blank for registration as a professional architect under the grandfather provision and mailed it to the Board of Examiners for Professional Engineers and Architects, accompanied by a check for the amount of the fee. There is no evidence that the check was cashed. He never received a certificate of registration. Upon inquiry he was told that it was not issued because of his age. He made no effort to compel the issuance of a certificate by legal action. The records of the board show no application or action thereon. In 1946 he was interviewed by

the board without resulting action. He made application and took the examination to qualify as a professional architect in 1954 and 1955, and failed both examinations. He continued to practice professional architecture until this suit was commenced.

Laws 1937, chapter 153, section 9, page 596, provided in part: "At any time within one year after this Act becomes effective upon due application therefor and the payment of a registration fee of Fifteen Dollars ($15.00) the Board shall issue a certificate of registration, without written or oral examination, in Engineering or Architecture, to any professional engineer or architect who shall submit evidence, under oath, to the Board that he is of good character, has been a resident of the State of Nebraska for at least one year immediately preceding the date of his application." The proof of attempted compliance by respondent is at least unsatisfactory. In any event, he did not obtain his certificate within the year. He had 1 year to enforce his right to a grandfather certificate. This he did not do. He failed to pursue his legal remedy. Downs v. Nebraska State Board of Examiners, 139 Neb. 23, 296 N. W. 151; State ex rel. Krieger v. Board of Supervisors, 171 Neb. 117, 105 N. W. 2d 721. He has lost any grandfather right he may have had to a certificate. Section 81-852, R. R. S. 1943, makes it unlawful for any person to practice professional architecture without being registered and provides a criminal penalty therefor. Having failed to secure a certificate of registration within the time provided for exercising his grandfather right, or in any other manner provided by the act, the respondent stands in violation of the act and is properly enjoined from continuing such violation. State v. Chicago & N. W. Ry. Co., 147 Neb. 970, 25 N. W. 2d 824. In the cited case this court said: "Injunction is a proper remedy to be used by the state in the protection of public rights, property, or welfare, whether or not the acts complained of violate a penalty statute and whether or not they constitute a nuisance."

The purpose of an exception or grandfather clause is to exempt from the statutory regulations imposed for the first time on a trade or profession those members thereof who are then engaged in the newly regulated field on the theory that they who have acceptably followed such profession or trade for a period of years, or who are engaged therein on a certain date, may be presumed to have the qualifications which subsequent entrants to the field must demonstrate by examination. It is within the province of the Legislature to provide how, in what manner, and in what period of time the grandfather right may be exercised. If the right is not exercised as the statute prescribes, the right, being an exception to the general provisions of the act, is lost by the failure of the holder of the right to exercise it in accordance with the terms of the statute.

Respondent next contends that the act is void for uncertainty. We find the meaning of the act to be sufficiently clear and certain to avoid a charge of such indefiniteness as to violate constitutional requirements.

The failure of the state to enforce the provisions of the act against respondent for 25 years is asserted as an equitable estoppel against the state. We point out that the practice of professional architecture without registration, as required by the act, is a criminal offense. Long-continued violations of the criminal law cannot become the subject of equitable estoppel. In Caroli v. Saxl, 192 Misc. 887, 81 N. Y. S. 2d 213, a somewhat similar case, the court said: "Lastly it is claimed that if these tenants are evicted a great hardship will be done them in that it is exceedingly difficult for them to find space to operate in. This is undoubtedly true. It is also claimed that many of these tenants have occupied their present quarters for many years without interference from the municipal authorities. And that others similarly engaged occupy buildings of like character with the one involved. The last arguments are of no avail. It is no defense to the violation of a statute that others are

violating it or that the particular violation is of long standing." There is a dearth of cases in this jurisdiction on this question. We think, however, that Warren v. County of Stanton, 145 Neb. 220, 15 N. W. 2d 757, charts the proper course. It is there said: "It is the general rule that the doctrine of estoppel cannot be applied as against a municipal corporation to validate a contract which it has no power to make, or where it was made in express violation of a prohibitory law."

We conclude that Laws 1937, chapter 153, page 592, now sections 81-839 to 81-856, R. R. S. 1943, as amended, is a lawful exercise of the police power, that the classifications contained therein are reasonable, that the exemptions provided are uniform as to class, and that the act grants no special privileges or immunities. In all respects persons in the same class and similarly situated are uniformly treated without discrimination. Indefiniteness and uncertainty are not found. The grandfather clause was available to every person claiming such right upon an equal basis. Since the respondent failed to assert his grandfather rights within the time provided by the act, such rights have become lost. The action of the trial court in permanently enjoining the respondent from practicing professional architecture of the type requiring registration by the act, until such time as he shall become registered under the terms of the act, is correct and the trial court's judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES B. MADARY, APPELLANT.
133 N. W. 2d 583

Filed March 5, 1965. No. 35875.

1. **Mental Health: Constitutional Law.** The statute regarding a criminal sexual psychopathic person is a valid and proper exercise of the police power of the state as a measure of public safety.

2. **Mental Health: Criminal Law.** A proceeding for investigation and for commitment of an alleged sexual psychopath is civil in nature, and the person committed is not confined for commission of a criminal offense.
3. **Mental Health: Constitutional Law.** The statute providing for commitment of sexual psychopaths does not deny equal protection of the laws.
4. ———: ———. The sexual psychopath statute providing for investigation and commitment does not deprive the accused of his liberty without due process of law.
5. ———: ———. A statute providing for detention, investigation, and commitment of alleged sexual psychopaths does not place the accused who has been previously convicted of sexual offenses in double jeopardy.
6. **Physicians and Surgeons: Evidence.** In diagnosing a subjective condition the physician must necessarily rely largely upon the history and symptoms described to him by the patient.
7. **Mental Health: Constitutional Law.** Section 29-2902, R. S. Supp., 1963, of the sexual psychopath law requires the person against whom the petition is filed to submit to an examination by physicians appointed by the court upon petition by the county attorney without notice or right to be heard at that examination, and such a provision does not violate the constitutional requirement of due process of law.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed.

Richard M. Duxbury, for appellant.

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

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

BROWER, J.

James B. Madary, hereinafter called the defendant, in a proceeding brought by the State of Nebraska as plaintiff and appellee, sometimes referred to as the State, at a trial had in the district court for Lancaster County, Nebraska, was found to be a sexual psychopath and was committed to the Lincoln State Hospital at Lincoln, Nebraska.

The proceedings were brought under Chapter 29, article 29, of the Reissue Revised Statutes of Nebraska, 1943, as amended, being section 29-2901, R. R. S. 1943, section 29-2902, R. S. Supp., 1963, and sections 29-2903 to 29-2907, R. R. S. 1943. These statutes provide a special procedure in cases of sexual psychopaths. Section 29-2901, R. R. S. 1943, defines a sexual psychopath as follows: "As used in sections 29-2901 to 29-2907, unless the context otherwise requires, the term sexual psychopath shall mean any person who, by a course of misconduct in sexual matters, has evidenced an utter lack of power to control his sexual impulses and who, as a result, is likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his uncontrolled and uncontrollable desires."

Section 29-2903, R. R. S. 1943, provides that one adjudged to be a sexual psychopath be committed to a state hospital and makes provision for his care and treatment while so committed.

Section 29-2904, R. R. S. 1943, provides among other things that competent evidence of defendant's prior conduct to show sexual psychopathy be received at trial and places the burden of proof to establish the allegations of the complaint beyond a reasonable doubt.

The procedure in the present case leading to the adjudication and commitment closely follows section 29-2902, R. S. Supp., 1963, which is quite long and will not be separately quoted or reviewed as it is not claimed that there was a departure therefrom.

The State filed a petition by the chief deputy county attorney of Lancaster County on April 24, 1964, alleging the defendant to be a sexual psychopath and seeking a determination of that fact. On the same day the trial court ordered the sheriff to hold the defendant in the county jail and appointed two doctors to examine him and report their findings not less than 10 days prior to a hearing to be held May 19, 1964. The defendant filed on April 27, 1964, an application for the appoint-

ment of counsel with an attached affidavit of indigency. The motion was sustained and counsel was appointed April 29, 1964. The physicians examined the defendant and made separate reports of their examinations which were served on the defendant's counsel on May 8, 1964.

Trial was had on May 19, 1964. A motion was made by the defendant immediately before trial to dismiss the proceeding and to grant the defendant a separate and preliminary hearing to establish by evidence the matters set forth in his oral motion. The motion was overruled and the case proceeded to trial to the court, a jury being waived by both parties.

Dr. Robert Johnston Stein, a consultant at the Lincoln Veterans' Hospital and Lincoln State Hospital, and Dr. Richard W. Gray, superintendent at the Lincoln State Hospital, both specialists in psychiatry with long experience in mental cases, each testified. Dr. Stein had examined the defendant on May 7, 1964, and Dr. Gray on May 4, 1964, at their respective offices. They each testified that the defendant had given them a long personal history admitting indecent exposures in the past and of being arrested on many occasions because thereof. This commenced in the year 1958 when he was in military service. Each doctor severally gave his opinion that the defendant evidenced an utter lack of power to control these sexual impulses and that he was likely to inflict injury, pain, or other evil on the objects of his uncontrollable desires. The written findings and reports of each doctor were admitted in evidence. Dr. Gray testified when the doctor asked the defendant if he cared to discuss the problem with him, the defendant answered, " 'Let's talk.' " There is no evidence of unwillingness to tell his story to either doctor.

On cross-examination each doctor stated that his findings and opinion were based primarily on what the defendant had told him in the examination. Each stated in substance that the defendant was passive in nature, and that it was his opinion that defendant would not at-

tack or hurt anybody. Dr. Stein stated he had seen a list of offenses of the defendant at the county attorney's office before the examination. He considered them part of the record and might have placed some reliance on these records but this would not have changed his subsequent and final diagnosis. Dr. Gray had not seen them until his findings and report had been made.

The defendant testifying on his own behalf stated he was arrested April 22, 1964, in the city of Lincoln and taken to the jail where he remained all night. The next morning he was brought to the county attorney's office and from there he was taken to the county jail where he remained until trial. He was refused permission to call an attorney shortly after going to jail and once or twice thereafter.

On cross-examination he stated he knew counsel had been appointed for him and had discussed the matter with his attorney several times after he was at the doctors. When asked if he was arrested on April 22, 1964, for indecent exposure he said he did not know what for at the time of apprehension but was later so told.

Eugene Robert Henninger, a captain in the Lincoln police department in charge of detectives who was called by the defendant, stated that the defendant was arrested at 9:30 p.m., on April 22, 1964, without a warrant by the Lincoln police department. Defendant was arrested because of a complaint of a lady but the witness was not permitted to state the nature of it.

After both parties rested the State was permitted to withdraw its rest and introduce a transcript of the county court of Lancaster County consisting of a complaint filed against the defendant therein on April 14, 1964, which charged him with willfully making an indecent exposure of his person, and a journal of a sentence thereon dated April 17, 1964, containing a finding that the defendant was guilty of the offense charged.

At the conclusion of the trial the defendant was found to be a sexual psychopath resulting in his commitment,

and his motion for a new trial having been overruled, he has brought the case to this court by appeal. The assignments of error will be set forth as discussed.

The defendant first assigns error to the trial court in overruling his motion made before trial to dismiss the proceeding and to grant a hearing to establish by evidence the matter set forth therein. In his motion defendant claimed he had been deprived of his rights under the Constitutions of the United States and the State of Nebraska by being denied due process of law, the equal protection of the law, and by being placed in double jeopardy. Further, that the sexual psychopath law unconstitutionally provides for self-incrimination.

The only case of this court touching any of the statutes under consideration is State v. Noll, 171 Neb. 831, 108 N. W. 2d 108, in which case the defendant admitted that the procedure for the commitment under these statutes was constitutional and the only question involved was the procedure for the release of the sexual psychopath after conviction. The case is of little assistance in the proceeding before us.

To support his contention defendant cites several cases from the various courts of the United States and from state courts including a decision of this court, State v. O'Kelly, 175 Neb. 798, 124 N. W. 2d 211, all involving the violation of constitutional rights of defendants in criminal cases. Defendant contends also his arrest was illegal because it was made without a warrant and that it was in the absence of evidence that a crime was committed and with reasonable grounds to believe that the person arrested committed it. Defendant contends the fruits of the illegal arrest, which in this case he claims consist of the admissions and statements given to the examining physicians, all flowing from the illegal arrest, were obtained in violation of the Fourth Amendment to the United States Constitution and Article I, section 7, of the Nebraska Constitution.

We think the defendant misconceives the nature of the

present proceeding. An extended annotation on statutes relating to sexual psychopaths is set forth in 24 A. L. R. 2d 350. The preliminary discussion on page 351 of the annotation states: "Statutes of the type under consideration are a recent development in the law—a development occurring mainly during the last two decades. They are especially designed to cope with sex offenders who, because of a psychopathic condition, commit or have a tendency to commit such offenses. They recognize that the sexual psychopath is neither normal nor legally insane and, for that reason, requires special consideration, both for his own sake and for the safety of society. Such statutes represent a new approach to an age-old problem of which the public has become increasingly aware—to the point of alarm in recent years—both because of the apparent increase in the number of sex crimes and because of the more widespread notoriety given such crimes in the public press. They represent a new approach, reflecting the thinking of modern psychiatry and psychology, in that they provide civil commitment, segregation, and treatment of the sexual psychopath rather than criminal punishment, whose ineffectiveness as a deterrent has been demonstrated by the number of sex offenders who have repeated their offenses after criminal conviction. The social objective of such statutes is twofold: (1) to protect by sequestering the sexual psychopath so long as he remains a menace to others, and (2) to subject him to treatment to the end that he might recover from his psychopathic condition and be rehabilitated. Fewer than twenty jurisdictions have enacted such legislation."

A general rule in section 2, Annotation, 24 A. L. R. 2d 352, states that: "Statutes providing for the commitment to a state institution for treatment of persons found to be sexual psychopaths have generally been held not to be criminal statutes." It is supported by the cases of State ex rel. Sweezer v. Green, 360 Mo. 1249, 232 S. W. 2d 897, 24 A. L. R. 2d 340, to which the annotation is

appended; In re Moulton, 96 N. H. 370, 77 A. 2d 26; and People v. Redlich, 402 Ill. 270, 83 N. E. 2d 736.

The constitutionality of a quite similar Minnesota statute was upheld in State ex rel. Pearson v. Probate Court, 205 Minn. 545, 287 N. W. 297. The exact constitutional objections advanced were not all set out by the Supreme Court of Minnesota in its opinion, where it is stated: "The final argument of the relator is that the act denies a 'patient' a jury trial and fails to secure certain other rights of defendants in criminal proceedings. Since the proceedings here in question are not of a criminal character, we will confine ourselves to consideration of relator's right to a jury trial." The decision was affirmed by the United States Supreme Court in Minnesota ex rel. Pearson v. Probate Court, 309 U. S. 270, 60 S. Ct. 523, 84 L. Ed. 744, 126 A. L. R. 530, where that court held that the statute did not deny the appellant therein the equal protection of the laws under the Constitution of the United States, nor was it invalid on its face as not setting up procedure which adequately safeguarded the fundamental rights embraced in the conception of due process.

In the case of In re Keddy, 105 Cal. App. 2d 215, 233 P. 2d 159, where after conviction of sexual offenses proceedings were instituted against the convicted defendant under a statute providing for the detention, investigation, and commitment of "sexual psychopaths," the court held: A proceeding for investigation and for commitment of an alleged sexual psychopath is civil in nature, and the person committed is not confined for commission of a criminal offense.

The statute providing for commitment of sexual psychopaths does not deny equal protection of the laws.

The sexual psychopath statute providing for investigation on affidavit of probable cause and commitment does not deprive the accused of his liberty without due process of law.

A statute providing for detention, investigation, and

commitment of alleged sexual psychopaths does not place the accused who has been previously convicted of sexual offenses in double jeopardy.

In People v. Chapman, 301 Mich. 584, 4 N. W. 2d 18, the Michigan court, construing a statute in many respects such as that before us, held that the proceedings under the statute are not criminal in nature and therefore are not circumscribed by the constitutional and statutory limitations surrounding a person accused of, or tried for, a crime. It further held the constitutional provision that no person shall be compelled in any criminal case to be a witness against himself is applicable only in a criminal case, stating the statute providing for a proceeding in the nature of civil inquest to determine whether an individual is a criminal sexual psychopathic person is not in conflict with constitutional provision against "self-incrimination," notwithstanding the statute provides for appointment of psychiatrists to make personal examination of such an alleged person. It held the statute regarding a criminal sexual psychopathic person is a valid and proper exercise of the police power of the state as a measure of public safety.

We think the rules previously quoted apply to similar provisions in the Constitution of the United States and the Constitution of Nebraska, and that the provisions of section 29-2902, R. S. Supp., 1963, are not unconstitutional because thereof.

We see no occasion to consider any constitutional question with respect to the defendant's arrest. He was arrested by a member of the Lincoln police department and taken to jail. Just why he was apprehended and taken to jail is not clearly shown. Nothing is shown to connect the county attorney who is by section 29-2902, R. S. Supp., 1963, given the responsibility of initiating proceedings under the sexual psychopath law with the arrest by a member of the Lincoln police department. The defendant had been charged and convicted of indecent exposure on April 14, 1964, 10 days before the

filing of the petition in the trial court. The defendant was taken from jail to the county attorney's office, insofar as can be inferred, for interrogation with respect to his physical and mental condition because of the record of his previous conviction. It was to inquire whether he should be committed and given treatment as a sexual psychopath for the protection both of himself and society and not for punitive incarceration. The examination by the doctors was pursuant to this proceeding instituted by the county attorney. As we view it, defendant's arrest by the Lincoln police department is not connected with and had nothing to do with the present proceeding. The trial court did not err in overruling the defendant's motion.

The defendant next contends the trial court erred in receiving in evidence the findings and opinions of Doctors Stein and Gray because they were based on the history given them by the defendant. The constitutional aspect concerning self-incrimination has hitherto been discussed. He further maintains that it is a rule of law that such opinions cannot be based at least wholly on the history of the defendant. He cites certain cases including Redding v. State, 165 Neb. 307, 85 N. W. 2d 647, from this court. The cited case was a criminal one involving a charge of manslaughter. Statements by the deceased not connected with the res gestae had been admitted in evidence as to past events. It was held by this court that as used against the defendant the statements were hearsay and inadmissible as such. This rule has no application in the present case where the testimony relates to admissions of the defendant made to the doctors upon examination. Defendant also cites other cases from the courts of last resort in other states including Estes v. Babcock, 119 Wash. 270, 205 P. 12, holding that the opinions of expert witnesses based on subjective symptoms obtained from a history given by the one examined outside of court are admissible only to determine the weight to be given to the physi-

cian's opinion but not as evidence to prove the actual condition of the plaintiff at the time. In 51 A. L. R. 2d 1051, there appears a long annotation concerning the admissibility of opinion of a medical expert as affected by his having heard the person in question give the history of his case. Some of the decisions there cited turn on the question of whether the history given was attempted to be used on behalf of the party giving them. In such cases they are clearly self-serving declarations. In other instances where the events related are regarded as admissions against interest some courts have admitted them. Another distinction made is whether the history is given to a physician who treats and attempts to cure the patient where some courts have admitted the statements on the theory the patient would tell the truth to the treating physician but have refused to receive it where the history is related to one who makes the examination solely for the purpose of qualifying as an expert witness. Defendant here maintains the examination in this case was solely to qualify the experts as witnesses, a premise which might well be disputed. The annotation here cited contains a labyrinth of decisions based on the precise situation as applied to the particular cases discussed. We deem it unnecessary to discuss these cases.

The basis of the decision in Kaufman v. Kaufman, 164 F. 2d 519, appears to be more applicable here. There the plaintiff sought annulment of her marriage to the defendant on the grounds of matrimonial incapacity and offered evidence of a psychiatrist who had examined both parties. He found the defendant suffering from a nervous disorder and from his history showed inability to have sexual relations with his wife although the doctor found the existence of no physical incapacity. The appellate court there said: "The courts have long recognized the fact that impotence is frequently the result of psychogenic causes. * * * In diagnosing such a subjective condition the physician must necessarily rely

largely upon the history and symptoms described to him by the patient." The appellate court in the cited case held the testimony based on the history should have been admitted. The physicians who testified in the present case were examining the defendant concerning a mental illness and an inability to control his sexual impulses. In such a case their testimony was properly based on the admissions made by the defendant in the history given. Only subjective symptoms were involved and in such case the doctors, of necessity, were testifying as to a purely mental disease which may be evidenced by defendant's history. The contention of the defendant is without merit.

The defendant further objects to the reception of the testimony and the reports of the doctors in the case because the defendant's counsel was not present at the defendant's examination by the doctors. He maintains this resulted in the denial to the defendant of the right of cross-examination and again asserts this resulted in a finding and commitment without due process of law. The New Hampshire court in passing upon that state's statute concerning sexual psychopaths which provided for an examination of the defendant by a board of medical experts quite similarly to that under consideration here in In re Craft, 99 N. H. 287, 109 A. 2d 853, said: "Such a procedure which requires the defendant to submit to an examination by a board of medical experts without notice or a right to be heard does not violate due process. See State v. Allen, (Mo. App.), 255 S. W. (2d) 144, 149. The act seeks not only to protect society but also to benefit those who are sexual psychopaths. In re Moulton, 96 N. H. 370, 373. * * * The examination required by § 4 may result in a discontinuance of further proceedings under the petition or in a hearing and judicial determination of the defendant's mental condition. The necessity for the summary nature of the order providing for it lies in the absence of any basis for judicial action until a medical opinion is available.

Such interference with the defendant's rights as occurs by reason of this procedure is reasonably required." The same reasoning applies to our own statute and the examination by the doctors appointed by the court thereunder. We conclude the provisions of section 29-2902, R. S. Supp., 1963, of the sexual psychopath law requires the person against whom the petition is filed to submit to an examination by physicians appointed by the court upon petition by the county attorney without notice or right to be heard at that examination, and such a provision does not violate the constitutional requirement of due process of law.

The defendant further objects to the testimony, findings, and reports of the doctors being received in evidence because Dr. Stein testified he had seen a list of past violations at the office of the county attorney before his examination and findings were made, and Dr. Gray had seen them thereafter. Again we think the defendant was under a misapprehension as to the office of these doctors and as to the proceeding itself. He has assumed at all times that the position of the doctors is the same as an expert witness who testifies in a lawsuit by the use of hypothetical questions premised on the evidence. We think the position of these doctors is entirely different. They were appointed by the court to conduct a sort of an inquest and report, their preliminary examinations being subject to later cross-examination by the defendant's attorney. We think they are given some latitude in the manner they ascertain information with respect to the defendant's condition. If on cross-examination their opinions and findings are to be set aside because they received some outside information, it would result in nullifying the action of the court in appointing them to make the inquest. We do not think such was the intention of the Legislature in enacting the present statute. At any rate, each doctor's testimony affirmatively shows his final opinion and findings would not be changed by the information re-

ceived. To warrant a reversal of the judgment it must affirmatively appear in the record the action with respect to which the error was alleged was prejudicial to the rights of the complaining party. Larsen v. Omaha Transit Co., 168 Neb. 205, 95 N. W. 2d 554. There is no merit in the contention of the defendant with respect to the admission of the doctors' testimony and findings, nor the absence of the defendant's attorney at the time of the examination.

The last assignment of error by the defendant is that the judgment is not supported by the evidence. No good purpose would be served by an extended review of the testimony of the doctors which plainly presents a history of repeated acts of indecent exposure on behalf of the defendant resulting in convictions therefor. It is sufficient to state it is shown that such conduct has continued over several years. Defendant makes reference to the testimony of both doctors that he was not dangerous in the sense of attacking or hurting others and maintains the judgment cannot be sustained under such circumstances. The evidence as plainly shows he was likely to make indecent exposures in the presence of women. It can be inferred this might occur in the presence of young girls because he is utterly unable to control his actions. Section 29-2901, R. R. S. 1943, provides such commitment and treatment should be given those "likely to attack or otherwise inflict injury, *loss*, pain, or other *evil* on the objects of his uncontrolled and uncontrollable desires." (Italics supplied.) Can it be said that such actions in the presence of women and young girls would not inflict evil upon them and result in a moral loss both to them and the community as a whole? We think not. The evidence is amply sufficient to sustain the judgment entered by the trial court.

We therefore conclude that the judgment of the trial court should be and is affirmed.

AFFIRMED.

MARGARET MURPHY, ADMINISTRATRIX OF THE ESTATE OF JOSEPH JOHN MURPHY, DECEASED, APPELLEE, V. HI-WAY G.M.C. SALES AND SERVICE CORPORATION, APPELLANT.
133 N. W. 2d 595

Filed March 5, 1965. No. 35933.

1. **Workmen's Compensation.** A workmen's compensation case is considered de novo upon the record in this court.
2. **Appeal and Error.** Ordinarily, alleged errors in the admission of evidence are not considered by this court where the review is de novo upon the record.
3. **Workmen's Compensation.** Ordinarily a commercial traveler is regarded as acting in the course of his employment during the entire period of travel on the employer's business, and his acts in procuring food and shelter are considered, ordinarily, to be incidents of his employment.
4. ———. Where an employee deviates from the scope of his employment for purposes of his own, he is regarded as being outside the scope of his employment until he has returned either to the point of deviation from the path of duty, or to a point where in the performance of duty he is required to be.
5. ———. Where an employee has returned to the point of deviation and engages in the duties of his employment, or engages in acts reasonably incidental to his employment, which, but for the deviation, would have been performed, although at an earlier time, he is within his employment and the coverage of the Workmen's Compensation Act.

Appeal from the district court for Knox County: GEORGE W. DITTRICK, Judge. Affirmed.

Frederick M. Deutsch, William I. Hagen, and James P. Monen, for appellant.

E. Merle McDermott and Flansburg, Mattson, Field, Ricketts & Gourlay, for appellee.

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

BOSLAUGH, J.

This is a proceeding under the Workmen's Compensation Act. The plaintiff is the administratrix of the estate of Joseph John Murphy, deceased, who died as the

result of injuries sustained in an automobile accident near Creighton, Nebraska, on February 16, 1962. At the time the accident happened Murphy was employed as a salesman by Hi-Way G.M.C. Sales and Service Corporation, the defendant.

The compensation court found that Murphy died as the result of an accident arising out of and in the course of his employment and entered an award for the plaintiff. The defendant waived rehearing before the compensation court and appealed directly to the district court. The district court found that Murphy died as the result of an accident arising out of and in the course of his employment and that the plaintiff was entitled to recover the benefits provided in the Workmen's Compensation Act. The defendant's motion for new trial was overruled and it has appealed.

The principal issue presented by the appeal is whether Murphy was injured in an accident arising out of and in the course of his employment. Most of the assignments of error relate to that issue. The defendant also contends that the trial court erred in overruling the objections of the defendant to certain evidence offered by the plaintiff.

A workmen's compensation case is considered de novo upon the record in this court. Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N. W. 2d 212. Ordinarily, alleged errors in the admission of evidence are not considered by this court where the review is de novo upon the record. Shevalier v. Stephenson, 92 Neb. 675, 139 N. W. 233. Accordingly, the assignments of error relating to the overruling of the defendant's objection to certain evidence are not discussed in this opinion, but our consideration of the record is limited to the evidence which was properly admitted.

The evidence shows that Murphy was employed as a full-time truck and trailer salesman by the defendant at Grand Island, Nebraska. He was paid on a commission basis and reimbursed for hotel, lodging, fuel, and

general traveling expenses. His territory included Kansas and Nebraska and he would go into any area where there were prospective customers. He did not have definite working hours and had a wide discretion as to where to go to contact customers.

On February 15, 1962, Murphy and Tom Gibb, the defendant's sales manager, went to Creighton, Nebraska, to see several customers. They talked with Merle Waldow and Dan Dawson at the Dawson Filling Station in Creighton that afternoon. They did not complete their business that day and planned to see Waldow and Dawson again at Creighton the next day.

At about 8:30 p.m., Murphy and Gibb went to Jerry's Bar in Creighton with Fred Smith, an employee of Dawson. While they were at the bar, Smith went to the hotel to inquire about rooms for Murphy and Gibb. The hotel was full but there were some private rooms available. Murphy and Gibb told Smith that they did not want a private room and said that they would go to Plainview, Nebraska. Smith also told Murphy and Gibb that there was a "mountain oyster" feed that evening at a bar in Brunswick, Nebraska. Murphy, Gibb, and Smith then decided to go to Brunswick.

Murphy rode with Smith in his car from Creighton to Brunswick. Gibb followed driving a carryall owned by the defendant that Murphy and Gibb had used to drive to Creighton from Grand Island. They spent the rest of the evening at the bar in Brunswick eating, drinking, and talking with the people who were there. There is some evidence that at Brunswick Murphy talked to a man about buying a truck.

At about 11:30 p.m., Murphy and Gibb left the bar in Brunswick. They told Smith that they were leaving to get a room and he understood that they were going to Plainview. Smith did not return with Murphy and Gibb.

Murphy and Gibb did not go directly from Brunswick to Plainview but returned to Creighton over the same

route that they had taken to Brunswick. They were observed in Creighton at about midnight. The accident happened shortly after midnight at a point 1¾ miles south of Creighton on State Highway No. 13.

The defendant contends that the accident which resulted in the death of Murphy did not arise out of and in the course of his employment by the defendant. The defendant's theory of the case is that Murphy deviated from his employment when he went to the bar at Creighton, Nebraska, with Gibb and Smith and that he could not return to his employment until the following morning when he was to meet Waldow and Dawson at Creighton.

The accident involved in this case is the same accident that was involved in Gibb v. Highway G.M.C. Sales & Service Corp., *ante* p. 127, 132 N. W. 2d 297. In that case we said: "Ordinarily a commercial traveler is regarded as acting in the course of his employment during the entire period of travel on the employer's business, and his acts in procuring food and shelter are considered, ordinarily, to be incidents of his employment. * * * Where an employee deviates from the scope of his employment for purposes of his own, he is regarded as being outside the scope of his employment until he has returned either to the point of deviation from the path of duty, or to a point where in the performance of duty he is required to be. * * * Where an employee has returned to the point of deviation and engages in the duties of his employment, or engages in acts reasonably incidental to his employment, which, but for the deviation, would have been performed, although at an earlier time, he is within his employment and the coverage of the Workmen's Compensation Act."

In the Gibb case we held that Gibb had deviated from his employment at Creighton but had returned to his employment when he returned to Creighton, the point of deviation. The trip to Plainview to obtain lodging

was incident to his employment and, therefore, in the service of the defendant.

The evidence in this case is such that we believe that the decision in the Gibb case is controlling. Thus, if it is assumed that Murphy deviated from his employment at Creighton, he returned to his employment when he returned to Creighton from Brunswick with Gibb at about midnight. The trip to Plainview was incident to the employment, and the accident which occurred south of Creighton arose out of and in the course of his employment.

The defendant places great emphasis upon the fact that Murphy and Gibb did not proceed from Brunswick to Plainview by the most direct route available. By returning to Creighton first before proceeding to Plainview they selected a route which was some 20 miles longer than the most direct route available. In view of the holding in the Gibb case, this is not a controlling circumstance. Under the rule of that case it is sufficient that Murphy had returned to the point of deviation before the accident happened.

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

AFFIRMED.

IN RE ESTATE OF JAMES W. HOUSER, DECEASED. WILBUR HOUSER, APPELLANT, V. THEODORE R. HOUSER, EXECUTOR OF THE ESTATE OF JAMES W. HOUSER, DECEASED, APPELLEE.

133 N. W. 2d 618

Filed March 12, 1965. No. 35798.

1. **Limitations of Actions.** Unless a statute provides otherwise, the general rule is that a cause or right of action accrues, so as to start the statute of limitations running, when the right to institute and maintain an action arises, and not before.
2. ———. Where there is an oral or implied promise to leave

property by will in consideration of services to be rendered during the promisor's life, on failure of the employer to carry out the promise, thereby remitting the promisee to a quasi contractual claim for the value of his services, the statute of limitations begins to run against such a claim for services, based upon a quantum meruit, not as the services are rendered, but at the death of the promisor, when the obligation matures.

3. **Work and Labor: Contracts.** The general rule is that if payment for services was to be made by a conveyance or devise of property by decedent, but he refused or neglected to perform the agreement in his lifetime, and the amount to be paid for such services was not agreed upon, then the person rendering the same is entitled to recover the reasonable value thereof.

4. ———: ———. The presumption of gratuity which is said to exist with reference to services rendered and received between closely related persons is entirely rebuttable by circumstantial as well as direct evidence, and such presumption diminishes in direct proportion to the remoteness of the degree and nature of the family relationship and the character of the duties performed.

5. ———: ———. Such presumption is not conclusive and recovery is permitted for services rendered if the evidence shows that they were rendered under an express contract, either written or oral, to pay for them, or where there was an implied agreement or contract to pay as when the circumstances are such that a mutual intention, understanding, or expectation that the services should be paid for is a reasonable and just conclusion established by clear and satisfactory evidence.

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

Clinton & McNish and Guy F. Bush, for appellant.

Martin, Davis, Mattoon & Matzke, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and POLLOCK and SIDNER, District Judges.

BROWER, J.

This action originated in the county court of Cheyenne County, Nebraska, by the appellant Wilbur Houser, hereinafter at times referred to as claimant, filing within

the time allowed by the court a claim in the Estate of James W. Houser, deceased, at times designated as the decedent, in the amount of $5,000 alleged to be the reasonable value of his services after allowing all credits thereon for assisting the decedent as a hired man in farming operations in Cheyenne County, Nebraska, during the period from 1941 to 1951.

The county court found that the claim was barred by the statute of limitations and disallowed and dismissed it. An appeal was taken by the claimant to the district court for said county. To the petition of the claimant filed therein, Theodore R. Houser as executor answered admitting that the claimant had rendered certain services for the decedent. He further alleged claimant had been fully compensated therefor, denied the other allegations of the petition, and alleged the claim was barred by the statute of limitations.

At the conclusion of the evidence offered by the claimant in a trial to a jury, the executor made a motion for a directed verdict and judgment which was sustained by the trial court and the claim was dismissed. The trial court gave as its reason for the ruling that the claim was barred by the statute of limitations. His motion for a new trial having been overruled, the claimant brings his case to this court by appeal.

The claimant Wilbur Houser was both a nephew and stepson of the deceased James W. Houser, the latter having married claimant's mother on the death of her first husband who was the brother of the decedent herein and the father of the claimant. The testimony on behalf of the claimant by his wife, Pauline Houser, shows that in 1942 they were residing at Rawlins, Wyoming, with their two children. At that time claimant was employed as a dishwasher and fry cook in a cafe for which he received $4 a day, 6 days a week, and his meals. The witness testified that between Christmas and New Year's in 1942, claimant and wife were on a vacation at the home of the claimant's mother and step-

father south of Sunol and Lodgepole, Nebraska. During this vacation on an occasion a conversation occurred in the living room of the home of James W. Houser between him and the claimant in the presence of the witness and Lena S. Houser, the wife of the decedent and mother of the claimant. James W. Houser said at that time: " 'I want you to come down and help me. If you don't, we are about to lose the farm. I need help because the boys are in Service or about to go to Service.' * * * 'We are about to lose this place. I can't give you much money now, but when I die, I will remember you; the more you put into the place in help, the more you will get when I am gone.' " He then stated that "Jimmy" would come along and help them move. Claimant then answered: " 'Well, Dad, I have been thinking about going on the railroad, because it pays good wages.' " The stepfather then said: " 'Well, you better come on down and help us, because I need your help.' " The claimant then talked with his wife and they decided to come under the terms that decedent would give them a decent living and remember the claimant in his will. "Jimmy" moved them down to a farm of the claimant's mother, Lena S. Houser, a few miles from the home of the decedent. It was a half-section with only 70 acres of rough and poor tillable ground. The decedent's farm was about 1,000 acres of tillable ground and a section of pasture. At that time the decedent had three children at home, "Jimmy" aged 18, and Ted and Paul, 10 and 8, respectively. During the whole period, 1942 to February 1951, the claimant did general farm work at his stepfather's farm. He did the chores in the morning and worked until everything was finished at evening. His hours were long, particularly during spring field work and fall harvest. He was a good mechanic and took care of the farm machinery.

In 1945 claimant started shearing sheep for others which took about a month or 6 weeks starting late in

April or early May from which he earned and kept about $700 a year.

The decedent during this time gave claimant and his wife the use of two cows to milk. As their finances increased they bought cows and on leaving the farm they had eight cows and eight calves. Claimant was not paid a regular wage and Pauline Houser went to work when they first came to the farm. She worked from February until after May for $9 a week, the savings from which she used to buy chickens, and they soon had a huge flock. The decedent gave them only a little money, generally a $10 bill. He did, however, give them 400 or 500 bushels of wheat when their daughter was born, $200 at Christmas the first year they moved, and $1,000 at one time to buy a new car when claimant's family had trouble all going to church or town in the old pickup. During a discussion concerning buying a car the decedent had said to them that he could not do anything then but they were improving the place and the more the claimant and his wife put into it, the more they were going to get when he was gone. In 1950 the claimant and his wife wanted to buy three quarter-sections of land. They needed $5,000 to pay down on it and asked decedent for a loan. He had then been abrupt with them and said: " 'You just can't wait until I am gone.' " The claimant had agreed to stay only until some of the boys came back from the service. They returned "around 1946" and by 1951 there was no shortage of labor and claimant was no longer needed to help out. They parted, however, in 1951 without animosity. The deceased left a will and codicil by which nothing was left to the claimant.

Paul Misegadis testified that he was farming in the same vicinity from 1942 to 1951. He testified he had occasion to hire farm help during this period and knew what the going rate of pay for hired men was in 1942. He stated it was $150 a month and that board and room were furnished in addition to the wage. Further, he said

he was acquainted with the claimant and had worked with him, and the claimant had worked for him and he was a real good worker.

The claimant assigns error to the trial court in ruling that his claim as a matter of law was barred by the statute of limitations. He contends that unless a statute provides otherwise, the general rule is that a cause or right of action accrues, so as to start the statute of limitations running, when the right to institute and maintain an action arises, and not before. 54 C. J. S., Limitations of Actions, § 109, p. 11; Bend v. Marsh, 145 Neb. 780, 18 N. W. 2d 106; Barney v. City of Lincoln, 144 Neb. 537, 13 N. W. 2d 870. The claimant therefore maintains the statute did not start to run until the death of the decedent in 1962.

The executor's position is that the promise of payment at death is only applicable to an action for specific performance to enforce the express contract. He maintains the claimant, by bringing action on the quasi contract implied by law, cannot attach to it the provisions of the express agreement with respect to the time of payment, particularly where as here the claimant concedes the express contract cannot be enforced because of the statute of frauds. The executor maintains that in quantum meruit an action on the implied contract accrues when the labor is furnished and is barred by the statute of limitations unless an action is brought within 4 years from the termination of the services, citing section 25-206, R. R. S. 1943, and In re Estate of Baker, 144 Neb. 797, 14 N. W. 2d 585, 155 A. L. R. 950. The executor says the claimant is straddling the fence and asserting a cause of action in quasi contract and applying the statute of limitations applicable to the express promise only available in an action thereon. It is to be noted that in the case of In re Estate of Baker, *supra*, the services continued until death. Neither was there an agreement to pay at death.

In 6 Williston on Contracts (Rev. Ed.), § 2028, p. 5693,

this precise question is discussed as follows: "The rule is the same where the express contract is within the Statute of Frauds and the plaintiff's only right is quasi contractual. Thus, where there is an oral or implied promise to leave property by will in consideration of services to be rendered during the promisor's life, on failure of the employer to carry out the promise, thereby remitting the promisee to a quasi contractual claim for the value of his services, 'the Statute of Limitations begins to run against such a claim for services, based upon a quantum meruit, not as the services are rendered, but at the death of the promisor, when the obligation matures.' "

The same rule is stated in 2 Corbin on Contracts, § 329, p. 173, and in section VII of the Annotation in 69 A. L. R. 166. It is supported by the following cases: Scott v. Walker, 141 Tex. 181, 170 S. W. 2d 718; Miller v. Lash, 85 N. C. 51, 39 A. 678; Costello v. Costello, 134 Conn. 536, 59 A. 2d 520. In the last of these cases the court, in its opinion, stated: "The claimed contract was an oral agreement to devise land in return for services and was unenforceable because of the Statute of Frauds. General Statutes, § 5982; Grant v. Grant, 63 Conn. 530, 538, 29 A. 15; Schempp v. Beardsley, 83 Conn. 34, 37, 75 A. 141; Schmidt v. Schaub, 115 Conn. 208, 212, 161 A. 98. Such a contract is not, however, a mere nullity. It may avail to avoid the defense of the Statute of Limitations. If there was such an agreement as was alleged, no right of action existed during the lifetime of the parents. Upon the death of the survivor one arose, not for damages measured by the value of the land, because no action on the special contract could be maintained, but for damages measured by the reasonable value of the services rendered. As a foundation for recovering these latter damages, the special contract was material, because proof of its existence and performance would furnish a sufficient answer to the defense of the Statute of Limitations by showing that no action brought

earlier could have been maintained, and would indicate that the services were rendered under circumstances which excluded the supposition that either party regarded them as gratuitous."

It appears obvious that the claimant could not have brought action against the decedent in the latter's lifetime under the promise made even though the services had been completed more than 10 years previously when claimant's services were no longer needed. We think the general rules set forth are sound and should be applied in the case before us. The trial court erred in holding the claim was barred as a matter of law by the statute of limitations and the claimant's assignment of error to its ruling must be sustained.

Counsel for the executor point out that this court has held that a judgment will not be reversed merely because the court gave the wrong reason for the rendition thereof. Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478. The executor maintains that the evidence is insufficient to show an implied contract to pay for the services performed by the claimant and for that reason the trial court should have directed a verdict in any event. The executor stresses the relationship of the claimant to the decedent. This court stated in In re Estate of Baker, *supra:* "The general rule is that if payment for services was to be made by a conveyance or devise of property by decedent, but he refused or neglected to perform the agreement in his lifetime, and the amount to be paid for such services was not agreed upon, then the person rendering the same is entitled to recover the reasonable value thereof.

"The presumption of gratuity which is said to exist with reference to services rendered and received between closely related persons is entirely rebuttable by circumstantial as well as direct evidence, and such presumption diminishes in direct proportion to the remoteness of the degree and nature of the family relationship and the character of the duties performed.

"Such presumption is not conclusive and recovery is permitted for services rendered if the evidence shows that they were rendered under an express contract, either written or oral, to pay for them, or where there was an implied agreement or contract to pay as when the circumstances are such that a mutual intention, understanding or expectation that the services should be paid for is a reasonable and just conclusion established by clear and satisfactory evidence."

The record here clearly shows that the decedent requested the claimant to leave the employment he was engaged in, forego that which he contemplated, and to come and assist him in his farming. He sent another son to move the claimant who came and worked for the decedent during the crucial period when he was short of help. It appears that the services were rendered under circumstances which would exclude the supposition that the decedent or the claimant would regard them as gratuitously rendered. The jury could conclude from the evidence before it the claim was not barred by the statute of limitations, and the record in the case as it now appears contains sufficient evidence to submit the questions concerning the decedent's liability for the claimant's services and the reasonable value thereof to the jury under proper instructions.

It follows that the judgment should be reversed and the cause remanded for a new trial in accordance with this opinion.

REVERSED AND REMANDED.

SIDNER, District Judge, dissenting.

At the close of the plaintiff's evidence herein the defendant moved for a directed verdict, setting forth several grounds. One ground was that the action was barred by the statute of limitations. The majority opinion holds that the action as brought was not barred. With this and all other statements of law in that opinion I concur.

It is with this in mind that a review of the evidence is necessary as presented in this case to determine

whether defendant's motion for a directed verdict on grounds that the evidence is insufficient to establish a legal contract upon which a claim can be based should be sustained.

Under the facts in this case, plaintiff, who is the nephew and stepson of decedent, was working in a cafe as a dishwasher. Decedent had a large family, consisting of children by a former marriage, children by his present marriage to the mother of the claimant, and a group of children that fell in the same class of the claimant, being nephews and nieces and stepchildren of the deceased.

There is only one piece of evidence to substantiate the claim of any contract. This is the statement of claimant's wife, and she is the only witness who testifies in the case as to any material element. She states that the decedent asked the claimant to come and help him operate his farms during the war years when he was short of help, and that on that basis he would promise to remember claimant in his will. Claimant moved onto his mother's farm and remained there for a period of 10 years from 1941 to 1951. During this time he maintained a living, educated his children, learned the trade of sheep shearing, and spent, during the last 5 years they lived on the place, much of his time on this occupation of his own. Only once during the time that they lived on the farm did the claimant ask for more money than had been given him by the decedent, and he was given the same answer, that he would be remembered in the will.

In 1951 claimant left because there were too many children back on the farm. He had enough cattle and was furnished enough machinery for his use by the decedent. He was able to commence his own farming operations. No claim was ever made from that date until decedent's death in 1962, and when claimant was left out of the will this claim was filed.

As stated in the syllabus in this case in the majority

opinion, there is a presumption of gratuity which is said to exist with reference to services rendered between closely related persons, and this is in proportion to the degree and nature of the family relationship. Also, that in order to overcome such presumption there must exist clear and satisfactory evidence. Starting with these legal propositions, and the facts as set forth above, the majority opinion cites the case of In re Estate of Baker, 144 Neb. 797, 14 N. W. 2d 585, 155 A. L. R. 950, in support of its conclusion. The Baker case differs from the one at hand in that as to the contract for services there was ample proof by letters, telegrams, and so forth of the promise to pay. Services were rendered up to the date of the death of deceased, the person rendering the services was a nephew who left a profitable business to operate a large business enterprise, and this was not a contract to will, it was a contract for pay for services.

We think that the facts in this case are much more similar to the case of In re Estate of Olson, 167 Neb. 799, 95 N. W. 2d 128. The court there states that where a claim was not made or presented until after the death of the person for whom the services were rendered, and a long period of time has elapsed, the claim should be viewed with suspicion, and evidence to establish a claim must be other than mere loose declarations and must clearly and distinctly establish a contract between the claimant and the decedent. Particularly strong and here is a relationship of father and son. We have a stale or either the services extended over a considerable period of time and no demand for compensation was ever made during decedent's lifetime.

What we seek to do here is to set aside a written instrument—the will of the decedent, and more especially, one which has been executed with formality. To do so, we need clear and convincing evidence. What we have here is a relationship of father and son. We have a stale claim. We have no supporting evidence by any outsider as found in the Baker case, *supra*.

As the legal proposition is stated in the Olson case, *supra,* before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

These facts would seem to bring this under the rule that there are literally no facts from which a jury could find that there was clear and convincing proof of the contract to will.

Therefore, it is my conclusion that the judgment of the district court is correct and it should be affirmed.

POLLOCK, District Judge, dissenting.

I respectfully dissent. It is a well-established rule that proof of the terms of an oral contract to devise or bequeath must be clear, satisfactory, and unequivocal. Dunbier v. Stanton, 170 Neb. 541, 103 N. W. 2d 797; Gerdes v. Omaha Home for Boys, 166 Neb. 574, 89 N. W. 2d 849; McLaughlin v. Heath, 164 Neb. 511, 82 N. W. 2d 533; Drew v. Hawley, 164 Neb. 141, 82 N. W. 2d 4; Wyrick v. Wyrick, 162 Neb. 105, 75 N. W. 2d 376; O'Neal v. First Trust Co., 160 Neb. 469, 70 N. W. 2d 466; Eagan v. Hall, 159 Neb. 537, 68 N. W. 2d 147.

There was no proof of mutual assent, of a meeting of the minds of the parties as to the exact terms and conditions of the contract. In my opinion, mere proof of an agreement to remember one in a will in an unspecified manner is too indefinite, and the trial court properly directed a verdict.

IN RE BARRY GENE MCCAULEY, AN INFANT.
EUGENE E. STEWART ET AL., APPELLANTS, V. ROBERT MCCAULEY ET AL., APPELLEES
133 N. W. 2d 921

Filed March 12, 1965. No. 35806.

1. **Infants: Parent and Child.** The jurisdiction of a state to

regulate the custody of infants found within its territory does not depend upon the domicile of the parents.

2. ———: ———. The jurisdiction of a state arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine the status and custody that will best meet its needs and wants, and residence within the county suffices even though the domicile of the parents may be in another county.

3. **Process.** The question whether process may be served on a nonresident party may be determined by the nature of the proceedings in which process was issued and its relation to the suit which the party or witness had been attending.

4. ———. The rule that suitors from a foreign jurisdiction are exempt from service of civil process while attending court and for such reasonable time before and after as may enable them to come from and return to their homes does not extend to process in an action or proceeding involving or connected with the subject matter of the litigation during attendance upon which the nonresident suitor is served.

5. **Pleading.** A motion to strike a petition from the files because the facts pleaded are insufficient is in effect a general demurrer and admits the truth of the facts well pleaded.

6. **Courts: Infants.** The juvenile court had its origin in the protection that is due the innocent or helpless. It was never intended that the method provided for its operation should be a trap to prevent such protection.

7. ———: ———. The juvenile court is a product of the solicitude of the law for the welfare of infants. Its powers and duties are prescribed more or less in detail in our statutes and because of their humanitarian and beneficient purpose, they should be liberally construed to the end that their manifest purpose may be effectuated to the fullest extent compatible with their terms.

8. **Officers.** The word "disability" in section 23-1205, R. R. S. 1943, includes a situation where the county attorney by reason of prior employment has disqualified himself to act.

9. ———. Where a county attorney had disqualified himself to act, the district court may appoint some suitable person as acting county attorney.

10. **Infants.** A child must in fact be dependent and neglected at the time proceedings are instituted to have it declared a neglected and dependent child, or it should be in danger of so becoming in the near future.

11. **Courts: Infants.** When the court takes jurisdiction of a child,

that child becomes a ward of the court, and the court's primary consideration will always be the best interest and welfare of the child.

Appeal from the district court for Dawes County: ALBERT W. CRITES, Judge. Reversed and remanded.

Merril R. Reller and John McArthur, for appellants.

Charles A. Fisher, Charles F. Fisher, Bump & Bump, and John B. Henley, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, and BROWER, JJ., and POLLOCK and SIDNER, District Judges.

SPENCER, J.

This is an action instituted in the district court for Dawes County to bring to the attention of that court as a juvenile court the need to provide for the welfare, custody, and control of a neglected and dependent child, where the county attorney by improperly accepting employment in a civil action has made it impossible to secure the consent of the county attorney which is required by section 43-205, R. S. Supp., 1963, for the filing of a petition.

The child is the same one involved in McCauley v. Stewart, 177 Neb. 759, 131 N. W. 2d 174, in which we reversed that portion of the decree which awarded custody of the child to its natural parents. This action was filed the day that case went to trial in the district court for Dawes County. The county attorney was one of the attorneys in that case for Robert McCauley and Bonnie McCauley, the natural parents of the child. For convenience hereinafter they will be referred to as the McCauleys.

The present action was filed by Eugene E. Stewart and Carolyn A. Stewart who were the appellants in McCauley v. Stewart, *supra*. They will be referred to herein as petitioners. The petition is titled, "In the Matter of Barry Gene McCauley, An Infant." Summons was

issued for the McCauleys, Bevin B. Bump, county attorney for Dawes County, and Mabel Knapp, director of the Dawes County division of public welfare and child welfare. The county attorney will hereinafter be referred to by that title. The parties summoned will be collectively referred to as appellees. The McCauleys filed a special appearance which was sustained. The county attorney, on his own behalf and that of the director of public welfare, filed a motion to strike the petition which was also sustained. From the overruling of a motion for a new trial on both orders, the petitioners have perfected an appeal to this court.

The petition referred to the then-pending adoption case, McCauley v. Stewart, *supra*; the refusal of the county attorney to protect the interests of the child, and his association in the pending action as attorney for the McCauleys; the reasons why the child would be dependent and neglected if the McCauleys obtained custody; and a copy of the written request to the county attorney to take action or to give his consent to some suitable person to do so. The letter itemized in detail those actions of the parents, including the criminal record of the father and demands for money for said child, which made it apparent the child would be a neglected and dependent one.

The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. The jurisdiction of the state arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine the status and custody that will best meet its needs and wants, and residence within the county suffices even though the domicile of the parents may be in another county. See Jones v. State, 175 Neb. 711, 123 N. W. 2d 633.

The McCauleys filed a special appearance in which they state that they are nonresidents of Dawes County;

and that they were personally served with summons in Dawes County while in attendance on an action in Dawes County in which they were parties. Without deciding petitioners' contention that summons was not necessary for the McCauleys but merely a notice of the action because they had never had the custody of the child, we note that the trial they were attending was McCauley v. Stewart, *supra,* in which they themselves were seeking custody and control of the child involved. This case, therefore, is controlled by Miller v. Miller, 153 Neb. 890, 46 N. W. 2d 618, in which we said: "The question whether process may be served on a nonresident party may be determined by the nature of the proceeding in which process was issued and its relation to the suit which the party or witness had been attending.

"The rule that suitors from a foreign jurisdiction are exempt from service of civil process while attending court and for such reasonable time before and after as may enable them to come from and return to their homes does not extend to process in an action or proceeding involving or connected with the subject matter of the litigation during attendance upon which the nonresident suitor is served." The special appearances should have been overruled.

The motion to strike lists three reasons. First, the petition was improperly filed and did not meet the statutory requirements, and the court therefore is without jurisdiction; second, the petition and exhibits attached contain inflammatory language, conclusions of fact and law, repetitions, criminal charges, and other extraneous matters having no legitimate relation to stating a cause of action under the juvenile court act; and third, the petition was filed during the trial of another action between the same parties (McCauley v. Stewart, *supra*) for the sole purpose of harassing the opposing parties and was an attempt to transfer the custody of the minor child to the juvenile court when that court was hearing litigation of the issues in another matter with the same

parties involved. The trial court sustained the motion to strike but gave no reason for its action.

The first reason listed above is the only one that merits extended discussion. As to the other two, we merely observe that at the start of the trial in McCauley v. Stewart, *supra,* the court ruled that it would not consider the question of fitness and suitability of the natural parents to have the custody, care, and control of the child. It also overruled a motion to appoint a guardian ad litem as well as a request for an investigation of the suitability of the natural parents. The letter to the county attorney, referred to above, was placed in evidence in that case in support of the motion for an investigation. The true question, as we view the record, is whether the petition filed states facts sufficient to state a cause of action. Our answer is in the affirmative.

For the purpose of discussion, we consider the motion to strike as a general demurrer. See Lewin v. Lewin, 174 Neb. 596, 119 N. W. 2d 96, in which we said: "A motion to strike a petition from the files because the facts pleaded are insufficient is in effect a general demurrer and admits the truth of facts well pleaded."

No purpose will be served by detailing the allegations made. We merely observe that they were sufficiently descriptive and of so serious a nature as to raise a question as to the motive of the county attorney in not cooperating with the parties to give them an opportunity to prove the allegations made.

This action is an attempt to invoke the jurisdiction of the juvenile court when the conduct of the county attorney made it impossible to comply with section 43-205, R. S. Supp., 1963, and therefore prevented any action to protect the welfare of the minor child. Stated in another form, can an irresponsible parent or one possibly much worse prevent action by a juvenile court to protect the welfare of an innocent child by the mere expedient of hiring the county attorney in a civil action involving that child? The answer must be obvious. When we are

dealing with this phase of the juvenile court act, we must not overlook the fact that the act had its origin in the protection that is due the innocent or helpless. Jones v. State, 175 Neb. 711, 123 N. W. 2d 633. It was never intended that the method provided for its operation should be a trap to prevent such protection. If it can possibly be avoided, this court should not adopt a construction which would have that effect.

The juvenile court is a product of the solicitude of the law for the welfare of infants. Its powers and duties are described more or less in detail in our statutes, and because of their humanitarian and beneficient purpose, they should be liberally construed to the end that their manifest purpose may be effectuated to the fullest extent compatible with their terms. As was said in State ex rel. Miller v. Bryant, 94 Neb. 754, 144 N. W. 804, the juvenile court law did not create a new court, it merely gave a court with general common law and equity jurisdiction new and additional powers. These powers do not supersede its original jurisdiction but are supplemental to it. Section 43-205, R. S. Supp., 1963, was not intended to make the county attorney the judge with the final decision, but was intended as a check on its indiscriminate exercise by the irresponsible. Inherent in the statute is the thought that every question of a doubt would be resolved by the county attorney in favor of consent.

Section 23-1205, R. R. S. 1943, gives the district court the authority to appoint an acting county attorney in the event of absence, sickness, or disability of the county attorney. As early as Gandy v. State, 27 Neb. 707, 43 N. W. 747, the word "disability" was interpreted to cover situations where the county attorney by reason of prior employment disqualified himself to act in the new case. We question the right of the county attorney to appear herein to file a motion to dismiss. The purpose of sections 23-1205 and 23-1206, R. R. S. 1943, is the protection of the public by making certain that a county attorney's duties shall not be influenced by private in-

terests. See Ress v. Shepherd, 84 Neb. 268, 120 N. W. 1132. Section 23-1205, R. R. S. 1943, should have been invoked because of the disability of the county attorney. The petition in this case should have been construed to be a request for such relief, for it sets out in detail the disqualifications of the county attorney and his refusal to act, and is a request to the court to protect the rights of the infant. As we view this record, the district court should appoint some suitable person as acting county attorney to consider the question of filing the petition or giving consent to some suitable person to file it.

Appellees argue that the child, because it was in the custody of the petitioners, could not be considered to be neglected or dependent at the time the petition was filed, and that the case is analogous to State v. Gross, 173 Neb. 536, 114 N. W. 2d 16. In that case, we held that a child may not be declared dependent or neglected for the sole purpose of facilitating adoption proceedings. We do not agree with the construction appellees place on the petition herein. On the facts, this case is more analogous to Jones v. State, 175 Neb. 711, 123 N. W. 2d 633, in which we said: "A child must in fact be dependent and neglected at the time proceedings are instituted to have it declared a neglected and dependent child, or it should be in danger of so becoming in the near future." Here, the McCauleys abandoned the child at birth and have never had its custody. From the allegations of the petition, which must be accepted as true, but which we suggest find support in the evidence adduced in the other case, the McCauleys are unfit to have custody of the child. It does not take a strained construction to infer that the McCauleys have been motivated by a desire to be paid for a relinquishment.

What we said in Jones v. State, *supra,* is applicable to the facts in this case. We determine that Barry Gene McCauley was in danger of becoming a dependent and neglected child in the immediate future if his custody

was given to the McCauleys, and that the court should take jurisdiction to protect his interests.

It is a fair inference from the record that the petitioners realized the possibility that the relinquishment in the adoption case was invalid. The McCauleys in that case were attempting to secure the custody and control of the infant and the court had determined that their fitness to have such custody and control could not be litigated in that case. Despite the argument of the McCauleys that this action was initiated solely to facilitate the adoption proceedings, it is apparent to us that it was instituted for the sole purpose of protecting the rights of the infant. When the court takes jurisdiction of a child, that child becomes a ward of the court, and it is the court which will determine what is for the best interest and welfare of the child. It is true the petitioners can show their interest in the child and this may coincide sufficiently with the welfare of the child to determine the issue, but the court's primary consideration will always be the best interest and welfare of the child.

For the reasons given, the special appearance of the McCauleys and the motion to strike the petition should have been overruled. The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED.

CARTER, J., dissenting.

Eugene E. Stewart and Carolyn A. Stewart brought this proceeding in the juvenile court for Dawes County alleging that Barry Gene McCauley, born on April 28, 1962, had been in their custody since a few hours after his birth, that they had furnished him adequate care, food, clothing, shelter, love, and affection, with the permission and consent of his parents, and that the child's parents are now threatening to take the custody of the child, which the Stewarts alleged would not be for the best interest of the child. The petition alleged the re-

fusal of the county attorney to bring the action, or to consent to its bringing by a reputable person within the county, as required by section 43-205, R. S. Supp., 1963.

Sections 43-201 to 43-220, R. R. S. 1943, as amended, constitute an exclusive act which authorizes proceedings thereunder only by the county attorney or a reputable person having the consent of the county attorney. Without such consent a private litigant has no authority to bring the action. The intention of the Legislature to so limit the bringing of such actions is made clear by section 43-201, R. S. Supp., 1963, wherein it is stated in part: "As used in sections 43-201 to 43-220, unless the context otherwise requires: (1) This act shall be construed as referring exclusively to sections 43-201 to 43-220; * * *." I submit that an action brought under this act by someone other than the county attorney in the absence of a pleading that it was consented to by the county attorney is fatally defective. The trial court so found and sustained the motion of the county attorney to strike the petition, the motion being properly treated as a demurrer, and dismissed the action when plaintiffs elected to stand on the petition. I submit that the action of the trial court was correct and that its judgment should be affirmed.

The plaintiffs contend that the county attorney was disqualified by interest, with which I fully agree. It is my position, however, that such a situation does not authorize the beginning of the action without compliance with the terms of the statute. The plaintiffs should have proceeded to obtain the consent of an acting county attorney and pleaded it in their petition, and, in failing to do so, a cause of action could not be stated. The statute does not contemplate the commencement of such an action and the obtaining of subsequent consent. The condition is precedent to the bringing of any action at all.

"One whose authority to prosecute an action is limited by statute must plead facts which bring him within such statutory limitations." Sommerville v. Board of

County Commissioners, 117 Neb. 507, 221 N. W. 433. The act before us was intended to authorize the state by the county attorney, or someone to whom he gave consent, to bring an action under this section. The action is granted by statute and was not existent at common law. In Duhrkopf v. Bennett, 108 Neb. 142, 187 N. W. 813, we said: "Where a right has been created by statute which did not exist at the common law, the legislature may impose restrictions thereon, and the conditions so imposed qualify and are an integral part of the act and must be fully complied with in the manner therein prescribed." In Swaney v. Gage County, 64 Neb. 627, 90 N. W. 542, we said: "It must be conceded that the legislative body, which created the right of action, had absolute power to determine the conditions under which it must be brought, * * *. As we have heretofore said, this was new and independent legislation, and the act was complete in itself. It established the rule for the class of cases to which it relates." In Clay County v. Bottorf, 166 Neb. 262, 88 N. W. 2d 898, we said: "The statute above quoted is indispensable to the cause of action asserted by appellee. It creates a right that did not exist at common law. It requires as a condition precedent to the existence and enjoyment of the right that the incompetent be possessed of an estate * * *. It is by the statute made a condition of the right and of the remedy. Appellee could only allege a cause of action by asserting that the requirements of the condition implicit in the statute did exist * * *." See, also, County of Keith v. Creamer, 170 Neb. 362, 102 N. W. 2d 632; County Board of Platte County v. Breese, 171 Neb. 37, 105 N. W. 2d 478.

Unless the statute is followed as enacted, the limitation imposed by the Legislature on the bringing of such actions becomes a meaningless restriction and opens the door to a multitude of unauthorized proceedings. It was the intent of the Legislature that the act was for the benefit of the state in protecting neglected, dependent,

or delinquent children, and not for the benefit of private litigants. To hold, as does the majority opinion, the statute is extended by judicial pronouncement to bring private litigants within its scope. It creates a class not authorized by the act.

The majority opinion states that section 43-205, R. S. Supp., 1963, was not intended to make the county attorney the judge with the final decision, but was intended as a check on its indiscriminate exercise. I submit that the statute is subject to no such construction. It means just what it says and nothing more. It in fact provides that no action may be brought unless the conditions precedent contained therein have been met. It authorizes the bringing of the action by the state through the county attorney or a reputable person to whom consent is given by the county attorney. Unless the conditions are met, no authority exists for bringing the action.

I am in accord with the statement of the majority that when the court takes jurisdiction of a child in a proceeding properly before it, the child becomes a ward of the court. But an infant cannot become the ward of a court where there is nothing before it, including a petition that does not state a cause of action under the applicable statutory authority. Such a situation is no different than where the court arbitrarily undertakes to deal with an infant without a pleading of any kind before it. The term "ward of the court" has been applied to many classes of people other than children, including Indians, seamen, incompetents, and others. But none becomes a ward of the court until the court's jurisdiction is invoked by a proper pleading. It is a fallacy, indeed, to contend in such cases that the jurisdiction of a court attaches ipso facto without a proper pleading and that a court may grant relief on some theory outside the usual methods of bringing issues before the court. The court may not exercise its powers over a ward of the court until such time as the ward has been brought within its

jurisdiction and its power to adjudicate properly invoked. Where an action grounded on statute is not in compliance with its terms, the power of the court to adjudicate does not exist and the action is for dismissal.

It seems clear that the district court for Dawes County has no pleading before it that states a cause of action, for the simple reason that it was not brought by the state in the manner and subject to the restrictions imposed by the statute. The majority opinion purports to supply a cause of action in a situation which the Legislature does not permit. The equities that may exist cannot be used to escape the limitations imposed by the legislative authority. The statute must be strictly construed and applied, since the statute is the right, it being in derogation of the common law.

The majority opinion purports to invest jurisdiction in the district court under a situation which the statute by plain language does not permit. Its conclusion appears to be based on the unsupportable theory that the end justifies the means. If such statutes are to be extended under the guise of judicial construction to mean something not authorized, the whole principle of statutory construction will be convulsed into inconsistency, instability, and chaos. The fact that a litigant chose a wrong remedy, or one not available to him, is no justification for creating a nonexistent remedy to meet the exigencies of the situation. It is the function of courts to declare the law as it is, not that which it wishes that it were.

POLLOCK and SIDNER, District Judges, join in this dissent.

STANLEY E. KASPAREK ET AL., APPELLEES AND CROSS-APPELLANTS, V. GEORGE E. MAY ET AL., APPELLANTS AND CROSS-APPELLEES.

133 N. W. 2d 614

Filed March 12, 1965. No. 35838.

1. **Costs.** Ordinarily, the successful party is entitled to a judgment for costs.
2. **Contempt: Costs.** Costs and expenses incurred by an injured party and which are essential to the litigation may be recovered from the contemner in a civil contempt proceeding.
3. **Attorney and Client: Costs.** Where a party is entitled to recover an attorney's fee to be taxed as costs, the amount to be allowed is within the discretion of the trial court.
4. **Contempt: Costs.** In the absence of the showing of an abuse of discretion, an allowance to the injured party for costs and expenses in a civil contempt proceeding will not be disturbed.

Appeal from the district court for Jefferson County: ERNEST A. HUBKA, Judge. Affirmed.

Ginsburg, Rosenberg, Ginsburg & Krivosha and Denney & Denney, for appellants.

Baumfalk & Dalke, for appellees.

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

BOSLAUGH, J.

The plaintiffs, Stanley E. Kasparek and Emma Kasparek, and the defendants, George E. May and Rose M. May, are adjacent landowners. In 1956, the plaintiffs recovered a judgment against the defendants which enjoined them from maintaining a dike upon their land and required them to remove a dike then existing.

In 1959, the plaintiffs commenced a civil contempt proceeding to require the defendants to comply with the 1956 judgment and to recover the damages and expenses which the plaintiffs alleged they had incurred because of the failure of the defendants to comply with the 1956 judgment. Upon the defendants' motion, the allegations relating to damages and expenses were stricken. The

trial court found that the defendants had failed to comply with the 1956 judgment but that the contempt was not willful or contumacious. The defendants were ordered to complete removal of the dike as required by the 1956 judgment within 60 days.

The plaintiffs then appealed to this court where the judgment was reversed and the cause remanded with directions. Kasparek v. May, 174 Neb. 732, 119 N. W. 2d 512. This court held that the issue as to the title to that part of the southwest quarter of Section 25 lying west of a fence constructed near the west boundary of the land was not a proper issue in a civil contempt proceeding and could not be determined in the contempt action; that the defendants had not complied with the 1956 judgment and that their contempt was willful; that the defendants should be required to comply with the 1956 judgment; that the plaintiffs' damages, if any, could not be recovered except in a separate action; and that costs and expenses incurred by the plaintiffs in the contempt action could be recovered in that action.

The plaintiffs then filed an application in the district court for judgment on the mandate and a determination of the expenses and fees which the plaintiffs should recover from the defendants. The application alleged that the plaintiffs should recover the sum of $3,330.74 from the defendants. The trial court found that the plaintiffs should recover the following amounts from the defendants: Engineers' expense, $315.27; attorneys' fees, $600; bill of exceptions, $600.50; transcript, $20.40; and all unpaid costs in the district court. Both parties filed motions for rehearing which were overruled. The defendants appeal and the plaintiffs cross-appeal.

The question presented by the appeal and the cross-appeal is whether the determination by the district court of costs and expenses that can be recovered in the contempt action is correct.

The opinion in Kasparek v. May, *supra,* taxed "all the costs in this proceeding to the appellees May, in-

cluding an attorneys' fee of $250 for Kasparek's attorneys." The costs so taxed consisted of the following: Appellants' docket fee, $20; appellees' docket fee, $5; transcript, $23.70; appellants' brief, $122.40; and appellants' attorneys' fees, $250. These were costs incurred in this court and, contrary to the contention of the defendants, did not include any costs or expenses incurred in the district court.

The plaintiffs were the successful parties in the litigation and, thus, were entitled to recover the expense of the bill of exceptions and the other costs in the district court. Tobas v. Mutual Building & Loan Assn., 147 Neb. 676, 24 N. W. 2d 870; Frese v. Michalec, 151 Neb. 57, 36 N. W. 2d 494.

The defendants contend that the plaintiffs have no right to recover attorneys' fees because such fees are taxable only where provided for by statute, or where the uniform course of procedure has been to allow the same. The effect of the holding on the former appeal was to recognize a course of procedure for the allowance of such fees. Kasparek v. May, *supra.*

There appears to be ample precedent for the allowance of attorneys' fees in civil contempt proceedings. "In a large majority of the cases in which the question has arisen it has been recognized that attorneys' fees may be allowed in civil contempt proceedings." Annotation, 55 A. L. R. 2d 979, at page 981.

There is also a statutory basis for the allowance of such fees in Nebraska. Section 25-1072, R. R. S. 1943, provides that a party who disobeys an injunction may be required, in the discretion of the court or judge, to make immediate restitution to the party injured. In Holloway v. Peoples Water Co., 100 Kan. 414, 167 P. 265, 2 A. L. R. 161, a similar statute was held to authorize an order requiring the defendants to pay a sum of money to the plaintiff " 'to compensate her for expenses incurred in the prosecution of her action.' "

The plaintiffs contend that the trial court should have

allowed the plaintiffs the sum of $1,375 as an attorneys' fee. The plaintiffs produced evidence that the fair and reasonable value of the services of their attorneys is $1,375.

It was the duty of the trial court to fix a reasonable fee. In the opinion upon the former appeal we noted that there were mitigating circumstances disclosed by the record. Kasparek v. May, *supra*. The plaintiffs' evidence was not binding upon the trial court, and the amount to be allowed was largely within the discretion of the trial court. See, 14 Am. Jur., Costs, § 77, p. 50; 20 C. J. S., Costs, § 218e, p. 462. We think the record fails to show an abuse of discretion and that the action of the trial court in fixing the amount to be allowed the plaintiffs as attorneys' fees should not be disturbed.

The defendants contend that the trial court had no authority to allow the plaintiffs $315.27 as expense for engineers. The defendants argue that the plaintiffs' recovery should be limited to the statutory witness fee because there is no authorization to tax an expert witness fee in excess of the statutory fee.

The costs and expenses which an injured party may recover in a civil contempt proceeding are limited to those which are essential to the litigation. It is apparent from the record in this case that the plaintiffs required the assistance of engineers to prepare and present their case. Although there is very little foundation evidence concerning this item of expense, the parties did stipulate that the charges made were fair and reasonable. The trial court could find that the engineering expense incurred by the plaintiffs was necessary to the litigation and should be recovered in the contempt proceeding.

The trial court found that the expenses claimed by the plaintiffs amounting to $474.56 should not be allowed. These expenses included an item of $216.34 for interest on money borrowed to finance the litigation; mileage in the amount of $217.34 for the plaintiffs and their attor-

neys; $27.75 for photographs; $12.39 for telephone calls; and 74 cents for postage. The plaintiffs contend that the trial court should have allowed the recovery of these expenses.

Under the facts and circumstances in this case, and in the exercise of its discretion, the trial court could find that the defendants should not be required to reimburse the plaintiffs for this expense. The expense in question tends to be incidental or personal in nature and within the control of the plaintiffs and their attorneys. This expense does not relate as directly and as proximately to the subject of the action as the expenses which were allowed. Under the circumstances of this case, we think these items were properly disallowed.

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

AFFIRMED.

JAMES JENSEN, APPELLEE, V. DODD BARNETT ET AL., APPELLANTS, IMPLEADED WITH JAKE EBERT, APPELLEE.
134 N. W. 2d 53

Filed March 12, 1965. No. 35844.

1. **False Imprisonment.** A private citizen who by affirmative direction, persuasion, or request procures an unlawful arrest and detention of another is liable for false imprisonment.
2. ———. If an informer merely states to a peace officer his knowledge of a supposed offense and the officer makes the arrest entirely upon his own judgment and discretion, the informer is not liable.
3. ———. If an informer knowingly gives to an officer false information which is a determining factor in his decision to make an arrest, the informer is liable.
4. **False Imprisonment: Damages.** The law does not prescribe a definite rule for the ascertainment of the exact amount recoverable for false imprisonment.

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

Donald H. Kelley and Merritt E. James, for appellants.

McGinley, Lane, Mueller & Shanahan, for appellee Jensen.

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

SMITH, J.

A hotel guest was lodged behind bars. False arrest and imprisonment by the hotelkeepers and damages of $2,500 were conclusions of a jury.

Errors assigned and discussed by defendants relate to sufficiency of the evidence. In their view these propositions are correct: (1) The arrest was made by a chief of police in the exercise of his independent judgment and not upon the persuasion of defendants; and (2) the verdict is excessive.

The evidence describes an unusual occurrence. The guest, James Jensen, was a contractor engaged primarily by telephone and power companies to clear their rights-of-way. En route to a job he arrived at Ogallala, Nebraska, on December 11, 1962, with four employees and some equipment.

At 3:35 p.m. an employee registered for Jensen at the hotel, paid in advance the daily rate of $3, and received a room assignment.

Jensen spent 5 hours at the Hi-Way Inn. He drank five or six glasses of beer and tomato juice, or three bottles of beer, and felt no effects. He also ate lunch. About 11:30 p.m. he left the Hi-Way Inn and went to the hotel.

At the hotel desk he conversed with the clerk, Jake Ebert, with whom he had become acquainted during previous stopovers. Trouble began. A regular request for a room key provoked a vulgar reply. An ejection order was accompanied by unfair accusations—use of an assumed name and failure to be registered.

Glen Livingston, a retired rancher wintering at the

hotel, was present during the first 10 minutes of the altercation. In his opinion Jensen, a stranger to him, was quiet and sober. Livingston walked behind the desk upon Ebert's invitation, located the registration card, and recommended delivery of the key. His service was acknowledged by an instruction to leave the desk. He left the scene.

At times Ebert was incoherent. Another sum of $3 was paid on his demand. The key remained undelivered. Registration was next demanded but refused. With Jensen's assent Ebert then telephoned the police.

One of two versions of the arrest was told by Jensen. Veldon Fuller, chief of police, entered the lobby and said to Ebert, "Which one is it?" A gesture identified Jensen. Without comment Fuller then started to take hold of him. Jensen turned away but peaceably walked out to the police car.

The other version was told by Fuller. In answer to a call at 12:56 a.m. from the hotel, he entered the lobby. Ebert directed the removal of Jensen, who was standing quietly near a wall. At the trial Fuller did not remember whether Ebert had said, "throw him in jail." After Jensen refused to leave the hotel, Fuller informed him that he was under arrest for intoxication, a condition seen by Fuller and later by a radio operator at the station.

Jensen was taken to the police station and imprisoned. At 8 a.m. he was arraigned and released on bond. Later the charge against him was dismissed.

The problem is not so much the governing rules as it is their application. A private citizen who by affirmative direction, persuasion, or request procures an unlawful arrest and detention of another is liable for false imprisonment. However, if he merely states to a peace officer his knowledge of a supposed offense and the officer makes the arrest entirely upon his own judgment and discretion, the informer is not liable. See, Edgar v. Omaha Public Power Dist., 166 Neb. 452, 89 N. W. 2d

238; Baker v. Coon, 102 Neb. 243, 166 N. W. 555; Van Dorn v. Kimball, 100 Neb. 590, 160 N. W. 593.

A corollary imposes liability upon an informer if he knowingly gives to an officer false information which is a determining factor in his decision to make an arrest. See 1 Harper & James, The Law of Torts, § 4.11, p. 339.

An informer's connection with an arrest may be inferred. Jonson v. Heller, 142 Neb. 380, 6 N. W. 2d 359. Procurement is inferable here. Not unreasonable in law are these findings: (1) Ebert knowingly conveyed to Fuller false information that a breach of the peace had been committed by Jensen; and (2) the false information was a determining factor in Fuller's decision.

One objection of defendants to the amount of the verdict is Jensen's failure to mitigate damages. Assuming that imprisonment was a consequence of the wrongful ejection instead of an independent tort, they argue that Jensen should have departed prior to the arrest.

One answer suffices. Implicit in the verdict is a finding that his presence was privileged. Skirting the problem of maintenance by force, we are satisfied that a baseless order of ejection does not put the privilege to flight. Compare, Erie R. R. Co. v. Winter, 143 U. S. 60, 12 S. Ct. 356, 36 L. Ed. 71; Barrett v. Sear, 128 Ind. 261, 27 N. E. 607; Hufford v. Grand Rapids & Ind. Ry. Co., 53 Mich. 118, 18 N. W. 580; Arnold v. Rhode Island Co., 28 R. I. 118, 66 A. 60, 125 Am. S. R. 721; 14 Am. Jur. 2d, Carriers, § 1096, p. 514; 13 C. J. S., Carriers, § 824, p. 1638.

To the other objection we apply the theory of the parties that in the cause of action under review the pecuniary losses resulting from the charge of intoxication are recoverable. There was evidence of substantial harm. Expenses and loss of profits were approximately $400. Embarrassment and business worry were shown. Telephone and power companies expected Jensen to maintain good public relations, for his was the duty of obtaining consents to clear rights-of-way. Company

representatives and others questioned him concerning the occurrences.

The amount of the verdict is within reasonable limits. "The law does not prescribe a definite rule for the ascertainment of the exact amount recoverable for false imprisonment." Doescher v. Robinson, 132 Neb. 299, 271 N. W. 784.

The judgment on the verdict should be, and is, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS DAY ARCHBOLD, APPELLANT.
133 N. W. 2d 601

Filed March 12, 1965. No. 35846.

1. **Homicide.** The intentional pointing of a loaded pistol at a person is ordinarily unlawful assault, and when under these circumstances the pistol is unintentionally discharged and a person killed, such acts constitute manslaughter.
2. ———. The bare belief of one assaulted that he is about to suffer death or great bodily harm will not of itself justify him in taking the life of his adversary. There must exist reasonable grounds for such belief at the time of the killing, and the existence of such grounds is a question of fact for the jury.
3. **Criminal Law: Trial.** If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issue from consideration of the jury, error cannot be predicated on failure to charge on some particular phase of the case, unless proper instruction has been requested by the party complaining.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Affirmed.

Crawford, Garvey, Comstock & Nye, Young, Denenberg & Mullery, and Richard L. Spaedt, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

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

SPENCER, J.

This is an appeal from a conviction by a jury on an information charging Douglas Day Archbold, hereinafter referred to as defendant, with manslaughter. Defendant, after the overruling of his motion for a new trial, was sentenced to imprisonment in the Nebraska Penal and Correctional Complex for a period of 5 years.

Defendant, with a friend John Allen, hereinafter referred to as Allen, spent about 2 hours the afternoon of January 4, 1964, target shooting with a .22 automatic pistol owned by defendant. They then spent the early evening visiting some Omaha taverns, and about 10 p.m. left one with the intention of going to another at Sixteenth and Cass Streets. Upon arrival in this vicinity, and while walking south on Sixteenth Street, they observed three men walking ahead of them. At this time the three men, Emmett Bunch, James Robertson, and Dale McCamley, the deceased, hereinafter referred to as Bunch, Robertson, and the deceased, were walking in the same direction about 50 feet ahead of the defendant and Allen. They were joking amongst themselves and making some loud remarks to a newspaper boy known to one of them. They had occasionally looked back because it appeared to them that defendant and Allen were following them. The defendant and Allen assumed they were talking about them, and they passed the bar they had been seeking. When one of the men stopped, Allen told defendant, " 'it looks like them guys are looking for trouble.' " Allen testified the defendant walked up to the one who had stopped and they started to scuffle right away. Allen then turned around and started to walk away.

Bunch and Robertson testified in substance that the defendant came up to the deceased, who had stopped when he thought they were being followed, and the

defendant said, " 'Which one of you has the big mouth,' " pulled a gun, and shoved the deceased up against the building. The deceased grabbed for the gun, a scuffle ensued, and the gun went off. Deceased obtained possession of the gun and used it to strike the defendant across the side of the head and mouth. The defendant regained possession of the gun, pointed it, and started backing away.

There are some variations in the testimony, but there is no question that in this portion of the encounter the defendant was clearly the aggressor. After the defendant backed away, it was Bunch's testimony that he and Robertson tried to get the deceased to go for some coffee, but deceased said, " 'Nobody shoves a gun in my guts and gets away with it,' " and started after the defendant, who by that time was approximately a half block ahead of them. The defendant turned west on Chicago Street and started running. The deceased started after him and Bunch and Robertson followed.

Defendant testified that when he ran about three-quarters of the block and deceased was gaining on him, he turned around and told deceased to stay away. Defendant then started walking backwards and deceased kept walking toward him. Defendant warned deceased about four or five times to leave him alone and stay away. Defendant testified he then started to run and put his hand on the gun and pulled it out and it just went off. Defendant admitted that at the police station after the incident he gave the following version: " 'he (deceased) said, "You got a gun use it," so finally I took it out of my belt and I was still walking backwards and he was walking towards me doubled up and he was walking towards me and he said, "Go ahead and shoot," and I just "Bam," and he spun around and grabbed himself and started running east on Chicago and I run down 17th Street.' "

Bunch testified that he was following some distance behind the deceased; that he saw the defendant and the

deceased about 15 or 20 feet apart. Defendant was walking backwards and defendant said, " 'Don't come any closer.' " The defendant shot the deceased in the chest and started running again. The deceased had closed in to where he was only 5 to 10 feet from the defendant at the time the deceased was shot.

We consider defendant's assignments of error as designated and in the order listed in his brief. Number I involves the giving of instruction No. 13, which reads: "You are further instructed 'the intentional pointing of a loaded pistol at a person is ordinarily an unlawful assault, and when under these circumstances the pistol is unintentionally discharged and a person killed, such acts constitute manslaughter'." Defendant does not deny that this is a correct statement of law, but insists that when it is applied to the facts in this case it is erroneous and prejudicial. This instruction is derived from Ford v. State, 71 Neb. 246, 98 N. W. 807, 115 Am. S. R. 591, which involved the accidental discharge of a gun intentionally pointed at the deceased. Self-defense was not an issue in that case. Defendant argues that in this case the instruction is equivalent to directing a verdict of guilty. It is a sufficient answer to defendant's contention to say that except for the issue of self-defense, the defendant would be guilty of manslaughter on his own testimony if the jury found that he intentionally pointed the gun at the deceased.

The issue of self-defense was fairly and adequately covered in the trial court's instruction No. 14, which concluded with the following paragraph: "It is necessary for conviction that the State prove beyond a reasonable doubt that the defendant, Douglas Day Archbold, was not acting in self-defense and there is no burden on the defendant to prove that he was acting in self-defense; and if the evidence in this case does not establish beyond a reasonable doubt that the defendant was not acting in self-defense, then you should find the defendant not guilty of manslaughter." In another in-

struction the jury was specifically told that it was to consider the instructions as a whole and could not pick out one instruction and disregard others. There is no merit to defendant's contention.

Assignment No. II complains that the court's instructions were conflicting and confusing. This is directed to the fact that in instruction No. 8 the jury was told: "The State must also prove beyond a reasonable doubt that the shooting did not occur accidentally and if it fails to sustain such burden, you should find the defendant not guilty." Defendant contends this instruction is proper but that it cannot be reconciled with instruction No. 13 above, which defines the accidental discharge of a gun to constitute manslaughter but this is only when it is intentionally pointed at another person. In this case, the defendant testified that he did not intentionally point the gun toward deceased. When instructions Nos. 8 and 13 are read with all the other instructions in the case, there is no conflict.

In assignments Nos. III and IIIa, defendant argues instruction No. 14, which submitted the issue of whether the force used was reasonable or excessive, is erroneous. It is the defendant's position that: "The Court erred in failing to instruct the jury that if defendant believed great bodily injury or death was imminent, it was not necessary for defendant to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than kill him; but that he could stand his ground and if he killed his assailant, he had not exceeded the bounds of lawful self-defense."

Defendant here is attempting to avoid the test of the reasonable man. He urges that a person has a right to kill if he has a subjective belief that he is in danger of great bodily injury or death, irrespective of whether a reasonable man would so conclude. This is not the rule in Nebraska. Defendant's argument is adequately answered in Housch v. State, 43 Neb. 163, 61 N. W. 571, in which this court said: "The bare belief of one as-

saulted that he is about to suffer death or great bodily harm will not of itself justify him in taking the life of his adversary. There must exist reasonable ground for such belief at the time of the killing, and the existence of such grounds is a question of fact for the jury." The following quotation from the same case is a particularly pertinent observation on defendant's contention: "The principle which underlies the rule there stated is that human life should not be made to depend upon conditions so unreliable and hazardous as the bare belief of any man that he is in danger of death or bodily harm; * * *."

Assignment No. IV relates to the admission into evidence of a description of the defendant's conduct and demeanor during the period at the police station immediately following his apprehension. The testimony elicited the conclusion of the officer rather than his observation and should have been stricken, but we find that this was not prejudicially erroneous when considered in the light of the entire record herein.

Assignment No. V is that the court erred in failing to dismiss the action at the conclusion of the State's case. There is no merit to this assignment, and it requires no discussion herein.

Defendant's assignment No. VI is also directed at instruction No. 14. Defendant complains the instruction was erroneous in that it drew the issue as to whether defendant's conduct was necessary to protect his person, or whether defendant was acting in a spirit of ill will or retaliation. This assignment is directed at the following portion of instruction No. 14: "In determining whether the alleged conduct of the defendant was committed in necessary defense of his person and in determining whether the amount of force or violence used was reasonable and apparently necessary for said purpose, you should consider all the acts and conduct of the defendant and Dale Theodore McCamley at the time in question; the means, nature and extent of any

force or violence, or threats of force or violence used or made by Dale Theodore McCamley toward the defendant, and all the facts and circumstances surrounding the occurrence, as shown by the evidence, bearing upon the question whether the conduct of the defendant was reasonably and apparently necessary, in good faith, to defend his person or whether the defendant was acting in a spirit of ill will or retaliation." The instruction is not erroneous and was proper herein. It apparently is an adaptation of an instruction from Standardized Instructions to Juries, 33 Nebraska Law Review, No. 25D, p. 137, adopted by the Association of District Judges of Nebraska.

Defendant's assignment No. VII complains that instruction No. 14 was too narrow in scope in that it was limited to fear of death or great bodily injury from the deceased, and did not include the two companions of the deceased. The companions of the deceased were not at any stage involved with the defendant. It is true that they were following some distance behind the deceased when he was shot, but they had not been participating during the previous encounter. If defendant wished a more specific instruction, he should have tendered one. "If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issue from consideration of the jury error cannot be predicated on failure to charge on some particular phase of the case, unless proper instruction has been requested by the party complaining." Cox v. State, 159 Neb. 811, 68 N. W. 2d 497, 66 A. L. R. 2d 293.

We find all of the defendant's contentions to be without merit, and therefore affirm the judgment of the trial court.

AFFIRMED.

IN RE PETITIONS FOR MERGER OF SCHOOL DISTRICTS NOS. 11 AND 26-R OF GOSPER COUNTY, NEBRASKA.
OSCAR HARNAPP ET AL., APPELLANTS, V. DORIS E. BIGELOW, COUNTY SUPERINTENDENT OF GOSPER COUNTY, STATE OF NEBRASKA, ET AL., APPELLEES.
133 N. W. 2d 611

Filed March 12, 1965. No. 35851.

1. **Schools and School Districts.** The renewal or continuance of a transfer to another school district for school purposes under section 79-482, R. R. S. 1943, is not subject to revocation or recall. Such a transfer when renewed is in existence for a period of 1 year and may not be recalled, revoked, or canceled.
2. **Schools and School Districts: Elections.** A legal voter within the meaning of section 79-402, R. S. Supp., 1961, is one who is eligible to vote at an election for school district officers in the district affected. § 79-101, R. R. S. 1943.
3. ———: ———. While a transfer for school purposes under section 79-478, R. R. S. 1943, is in effect, the parent of a pupil so transferred is not a legal voter of the district from which the transfer has been made within the meaning of section 79-402, R. S. Supp., 1961.
4. ———: ———. Under section 79-402, R. S. Supp., 1961, a legal voter of a district affected may add his name to the petition at any time before the petition is filed with the county superintendent.

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

Sherwood & Sherwood and James A. Lake, for appellants.

Cloyd E. Clark and Smith Brothers, for appellees.

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

BOSLAUGH, J.

This is a proceeding in error to review an order of the county superintendent of Gosper County, Nebraska, upon petitions filed under section 79-402, R. S. Supp., 1961. Section 79-402, R. S. Supp., 1961, was amended by chapter 471, Laws 1963, page 1511, which became effective

March 27, 1963. The amendment relates to the attachment of territory not in an organized school district to an organized district and is not involved in this case.

The petitions sought to merge school district No. 11 of Gosper County, Nebraska, into school district No. 26-R of that county. The county superintendent found that less than 55 percent of the qualified legal voters of district No. 26-R had signed the petition circulated in that district and denied the merger of the districts requested in the petitions.

Four of the petitioners who reside in the districts affected by the proposed merger then commenced this proceeding to review the order of the county superintendent. The defendants are the county superintendent, the board of education of the districts affected, the county committee for school district reorganization, and the other legal voters of the districts affected by the proposed merger.

The trial court sustained general demurrers to the petition and amended petition of the plaintiffs. The plaintiffs elected to stand upon their amended petition and the action was dismissed. The plaintiffs appeal.

The controversy concerns the petition signed by legal voters of district No. 26-R. The county superintendent found that there were 34 duly qualified electors residing within district No. 26-R who were entitled to vote on proposals to change the boundaries of the district at the time the petition was filed with the county superintendent; that only 17 valid signatures remained on the petition at that time; and that the petition was insufficient because it did not contain signatures of 55 percent of the legal voters of the district.

The transcript filed in the district court shows that the county superintendent counted Floyd C. Hughbanks, Melva R. Hughbanks, Raleigh D. Nott, and Eleanor C. Nott as legal voters in district No. 26-R. The plaintiffs contend that this was erroneous and that, con-

sequently, the petition circulated in that district contained sufficient signatures.

Mr. and Mrs. Hughbanks and Mr. and Mrs. Nott are residents of district No. 26-R. In 1959, Mr. and Mrs. Hughbanks requested and obtained a transfer for school purposes from district No. 26-R to district No. 30 in Gosper County. Thereafter they filed requests for continuance of the transfer which were approved each year, including 1963.

In 1962, Mr. and Mrs. Nott requested and obtained a transfer for school purposes to district No. 30. A request for a continuance of the transfer was filed and approved in May 1963.

On June 14, 1963, Mr. and Mrs. Hughbanks and Mr. and Mrs. Nott filed requests to withdraw the transfers which had been previously granted and asked the county superintendent to consider them as residents of district No. 26-R the same as though requests for transfer had not been filed by them.

In Farrell v. School Dist. No. 54, 164 Neb. 853, 84 N. W. 2d 126, this court held that there is no provision in the statute for the recall or revocation of the renewal or continuance of a transfer under section 79-482, R. R. S. 1943, and there can be no recall or revocation of the renewal of a transfer. A transfer when renewed is in existence for a period of 1 year and may not be recalled, revoked, or canceled. Consequently, the withdrawals of request for transfer which were filed by Mr. and Mrs. Hughbanks and Mr. and Mrs. Nott on June 14, 1963, were ineffective.

The question remains as to whether Mr. and Mrs. Hughbanks and Mr. and Mrs. Nott were legal voters of district No. 26-R within the meaning of section 79-402, R. S. Supp., 1961. Section 79-101, R. R. S. 1943, provides that, "As used in Chapter 79: * * * (3) the terms 'legal voters' or 'electors' mean all who are eligible to vote at an election for school district officers; * * *." Section 79-483, R. R. S. 1943, provides that the parents

of pupils so transferred shall have the right to vote in the district to which the pupils are transferred "on all school matters except those of issuing bonds, levying a tax for building purposes, contracting for instruction, and closing the district."

While the transfers for school purposes were in effect, Mr. and Mrs. Hughbanks and Mr. and Mrs. Nott were eligible to vote at an election for school district officers in district No. 30. They were legal voters of district No. 30 and should not have been counted as legal voters in district No. 26-R by the county superintendent in this case. The finding of the county superintendent that there were 34 legal voters in district No. 26-R was erroneous. With these 4 names eliminated the number of legal voters in district No. 26-R is reduced to 30.

The petition circulated in district No. 26-R originally contained 20 signatures. Thereafter 3 of the signers withdrew their signatures, 2 of the signers moved out of the district, and 2 legal voters requested that their names be added to the petition. At the time the petition was filed with the county superintendent it contained the names of 17 legal voters of district No. 26-R.

The defendants contend that the names added to the petition after it had been submitted to the county committee for school district reorganization should not be counted because the statute at that time did not provide for the addition of names to the petition. In Retzlaff v. Synovec, *ante* p. 147, 132 N. W. 2d 314, we held that under section 79-402, R. S. Supp., 1961, a legal voter may add his name to the petition at any time before it has been filed with the county superintendent. The finding of the county superintendent that the names which were added to the petition after it had been submitted to the county committee and before it had been filed with her should be counted was correct.

The defendants further contend that the order of the county superintendent was correct because the record shows that the petition signed by the legal voters in

district No. 26-R did not contain the signatures of 55 percent of the legal voters of that district at all times after the petition was submitted to the county committee for school district reorganization. The defendants argue that the list of legal voters which was attached to the petition at the time it was submitted to the county committee shows that the petition did not contain sufficient signatures.

Although section 79-404, R. R. S. 1943, requires that a list of the legal voters in each district affected be given to the county superintendent when the petition is presented, the validity or sufficiency of the signatures upon the petition is not determined upon the basis of this list alone. Section 79-402, R. S. Supp., 1961, requires the county superintendent to advertise and hold a hearing for the purpose of determining the validity and sufficiency of the petitions after they have been filed with the county superintendent. The determination as to validity and sufficiency is made as of the date that the petitions are filed with the county superintendent. Retzlaff v. Synovec, *supra*. Prior to that date signatures may be withdrawn, withdrawals of signatures revoked, and the names of legal voters added to the petition.

The list of legal voters in district No. 26-R which was attached to the petition contains 37 names and the county superintendent found that the petition was accompanied by a sworn list showing 37 legal voters in district No. 26-R. Notations reading "(Transferred out)", "(Moved out)", and "(Moved 4th week in April)" appear opposite 6 of the names on the list.

Although the list attached to the petition now contains 37 names, we think that the record shows that the list contained 33 names at the time the petition was submitted to the county committee and that 4 names were added to the list sometime after the petition had been considered by the state committee. The record does not contain any explanation as to how or why names were added to the list.

The record in this case shows that at the time the petition signed by the legal voters in district No. 26-R was submitted to the county committee, it contained the signatures of 55 percent of the legal voters in that district as shown by the list of legal voters attached to the petition. It is not necessary to determine whether a petition is valid if at the time it is submitted to the county committee it contains the signatures of less than 55 percent of the legal voters in the district, as shown by a list attached to the petition.

From our examination of the record in this case we conclude that it shows that the petition signed by the legal voters in district No. 26-R contained the signatures of 55 percent of the legal voters in that district at the time the petition was filed with the county superintendent. The finding of the county superintendent to the contrary was erroneous.

The amended petition of the plaintiffs states a cause of action and the demurrers of the defendants should have been overruled. The judgment of the district court is reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. STANLEY PUTNAM, APPELLANT.
133 N. W. 2d 605

Filed March 12, 1965. No. 35854.

1. Searches and Seizures. On a hearing on a motion to suppress evidence under sections 29-812 to 29-821, R. S. Supp., 1963, it is within the discretion of the trial court to permit a withdrawal of a rest to permit the taking of further evidence.
2. ———. A trial court may properly vacate an order entered pursuant to sections 29-812 to 29-821, R. S. Supp., 1963, and make a new and different order thereon over which it still has jurisdiction.
3. ———. The search of the premises of a defendant under a

void search warrant ordinarily constitutes an unreasonable search and the fruits of such a search are not admissible in evidence against the defendant.

4. **Arrest: Searches and Seizures.** Where a person is lawfully arrested, law enforcement officers may, without a search warrant, make a contemporaneous search of the person of accused for weapons, fruits of, or implements used to commit the crime.
5. ———: ———. Such right to search and seize without a search warrant when the person is lawfully arrested extends to things under such person's immediate control and, depending on the circumstances, to the place and time of arrest.
6. ———: ———. If knowledge of facts warranting the arrest of a person is gained from an independent source from that gained by an unlawful search, such facts may be proven the same as any other fact.
7. ———: ———. Where a person was arrested, his automobile taken into custody and searched, and stolen goods were found in it, the fact that law enforcement officers transported such person and his automobile to a convenient place and there removed the stolen property in the presence of the defendant, the search and seizure is not so remote from the arrest as to make the search and seizure unlawful.
8. **Criminal Law: Evidence.** It is a general rule that evidence of other crimes, even by the instrumentality of a confession, is not admissible to prove the guilt of the defendant of the particular crime charged.
9. ———: ———. There are exceptions to the foregoing rule, but in order for evidence of an independent offense to be admissible it must appear that the crime charged has an element of motive, criminal intent, or guilty knowledge necessary to be established.

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

Kerrigan, Line & Martin, for appellant.

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

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

CARTER, J.

Defendant was charged in the district court for Dodge County with the offense of breaking and entering a

building occupied by the Farmers Union Elevator, Nickerson, Nebraska, on September 10, 1963, with the intent to steal property of value contained in the building. By a second count defendant was charged with being an habitual criminal. Defendant entered a plea of not guilty. The jury found the defendant guilty as charged and defendant was sentenced to penal confinement for a term of 15 years. Defendant has appealed.

The evidence shows that during the early morning hours of September 10, 1963, a building occupied and operated by the Farmers Union Elevator, Nickerson, Nebraska, was broken into and a large amount of property, listed and valued at $605.15, was stolen. The property was loaded into a pickup truck belonging to the Farmers Union Elevator and hauled to an acreage near Kennard, belonging to one Craig. Craig drove the pickup truck back to Fremont and left it on the street. It was recovered about 8:30 a.m. the next day. Craig testified that he and defendant went to the building of the complaining witness after midnight on September 10, 1963, where entrance was gained. They loaded the pickup truck, belonging to the Farmers Union Elevator, and transported it to Craig's acreage, as heretofore stated. He describes the merchandise taken as funnels, squirt cans, hammers, augur bits, and antifreeze. He could not identify the articles as the specific ones taken. A former employee of the Farmers Union Elevator testified that the price markings on the stolen merchandise found were in his handwriting. The evidence is convincing that the defendant and Craig unlawfully and feloniously entered the building of the Farmers Union Elevator and took the merchandise as alleged. The sufficiency of the evidence is not questioned if it was properly admitted.

The defendant filed a motion to suppress the evidence obtained under a search warrant issued out of the county court of Washington County. After a hearing the trial court held the search warrant to be void as not being

in compliance with the authorizing statute, sections 29-812 to 29-821, R. S. Supp., 1963. The trial court's order, suppressing the evidence, sustained the motion as to items of personal property "taken under a purported search warrant and also as to items taken from defendant's automobile." Subsequently the trial court permitted the State to withdraw its rest and submit additional evidence. The trial court thereafter limited the evidence suppressed to that taken under the void search warrant and did not suppress that taken from the trunk of defendant's automobile. The defendant contends it was prejudicial error for the trial court to permit the State to withdraw its rest and offer additional evidence, and that the exclusion of the items taken from the automobile from the order to suppress was erroneous.

It is the contention of the defendant that the court's order, limiting the suppression of evidence to those items taken under the void search warrant and excluding the exhibits taken from defendant's automobile, is void because not authorized by sections 29-812 to 29-821, R. S. Supp., 1963. We do not deem this to be a controlling factor. This is a special statutory proceeding conducted prior to trial. The trial court may, in its discretion, vacate erroneous orders over which it still has jurisdiction. The statute is indicative of this conclusion in stating: "Issues of fact arising on motions to suppress shall be tried by the court without a jury, in a summary manner, on affidavits or otherwise, as the court may direct. No evidence shall be suppressed because of technical irregularities not affecting the substantial rights of the accused." § 29-823, R. S. Supp., 1963.

Defendant further contends that the trial court erred in permitting the State to withdraw its rest after the hearing on the motion to suppress and the entry of its subsequent order thereon. This is a matter within the sound discretion of the trial court. The rule is the same in this special proceeding as in civil cases. See Bartels v. Meyer, 136 Neb. 274, 285 N. W. 2d 698. Even in crim-

inal prosecutions the withdrawal of a rest in a trial on the merits is within the discretion of the trial court. Kurpgeweit v. State, 97 Neb. 713, 151 N. W. 172.

The defendant contends that the admission in evidence of items of merchandise taken from his automobile was prejudicial error. The evidence discloses that on September 17, 1963, sheriff Sutherland and deputy sheriff Spanton of Washington County and sheriff Brainard and deputy sheriff Parker of Dodge County proceeded to defendant's farm in Washington County to search for items of stolen merchandise with a search warrant subsequently held to be void. The defendant and his wife approached the farm while the search was being made, observed the officers, and took off to the south. The officers gave chase and apprehended defendant and his wife at a point 4¼ miles south and 2 miles east of defendant's farm. Both were immediately arrested. Spanton looked in the car and removed a loaded rifle and a shotgun from the trunk of the car. Parker also looked in the trunk and saw some hammers and oil cans in the trunk which he did not then remove. The officers then took defendant, his wife, and defendant's automobile back to defendant's farm, where the items of merchandise were removed from defendant's car in the presence of defendant. They were tagged, turned over to the authorities of Dodge County, and were admitted in evidence at the trial, over the objection of defendant that they were seized during an unlawful search and seizure.

The witness Parker testified that the officers had information warranting the arrests and search of the defendant's automobile wholly disconnected from the search of defendant's farm under the void search warrant. In this connection Parker testified that the officers had reports that defendant was selling tires and batteries from the two cooperatives in Nickerson and Scribner. They had further information that defendant was selling antifreeze for $1 per gallon which they had reason to believe came from the Farmers Union Eleva-

tor at Nickerson. On cross-examination Parker testified that on the day previous they had interviewed several employees in a manufacturing plant in Blair to whom merchandise had been sold by defendant, some at reduced prices. They had the names of persons who had bought merchandise from defendant similar to that stolen from the Farmers Union Elevator.

It is evident that when defendant and his wife approached the farm while the search was being conducted under authority of the void search warrant, the officers abandoned the search and pursued the defendant and his wife and, upon their apprehension, promptly arrested them. They then searched the car, removed the two guns, and observed the stolen merchandise which they did not then remove. They returned to defendant's farm. One of the officers drove the defendant's car back to the farm where the officers immediately removed the merchandise from the trunk of the car. The car was in the custody of the officers from the time of the arrest until the stolen merchandise was removed therefrom. It is true that Parker testified the arrest was the result of the unlawful search, but we do not deem this conclusion of the witness to be important if actual authority to search the automobile existed.

Conceding the validity of the arrest for the purpose of argument, the defendant contends the search of defendant's automobile was too remote from the arrest to base its validity on its being incidental to a valid arrest. Defendant relies on Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319, 24 A. L. R. 1426. In the instant case the officers had information to support the arrest, independent from that obtained by the unlawful search. Such was not the fact in the Silverthorne case. The court in its opinion in that case points out the difference in situation by saying: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before

the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." We think in the instant case the officers had information independent of that gained under the void search warrant to justify the arrest of the defendant within the meaning of the rule.

In contending that the search of defendant's automobile was too remote from his arrest, defendant relies upon Preston v. United States, 376 U. S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777. In this case the court stated the general rule to be: "Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. * * * But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." In the Preston case the search of the car was not undertaken until the defendant had been arrested and taken to the police station and the car had been towed to a garage. In the instant case a search was made at the place of the arrest, a loaded rifle and shotgun removed from the trunk of the car, and the fruits of the crime observed therein. For convenience the car was driven back to defendant's farm by an officer and the stolen merchandise removed in his presence. It was one transaction and the search was incidental to the arrest, and the evidence could properly be used against the defendant. Under the evidence adduced, the automobile was searched at the place of the arrest, and the fruits of the crime were found, conveyed to defendant's farm for purposes of convenience, and there

removed. The officers clearly had exclusive possession of the stolen merchandise from the time of defendant's arrest until it was removed from the automobile in the presence of the defendant. In Smith v. United States, 335 F. 2d 270; Stoner v. State of California, 376 U. S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856; and Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 84 A. L. R. 2d 933, the views expressed are similar to those in the Preston case on the point raised, and are likewise distinguishable. We conclude that the search of defendant's automobile contemporaneously with his arrest was reasonable and does not contravene the holdings in the cases cited by the defendant. The fact that they removed the defendant and the car to defendant's farm before removing the stolen property from the trunk of the automobile does not make the rule as to remoteness applicable under the circumstances shown.

Defendant contends that the trial court erred in permitting evidence of other offenses of a similar nature. The evidence shows that on September 25, 1963, the defendant, the county attorney, and Brainard, the sheriff of Dodge County, met in the office of the county attorney. At this stage of the trial a hearing was held outside the presence of the jury to determine if the confession was voluntary. During the course of the hearing before the court, Brainard testified that defendant stated he was not involved in the Nickerson break-in and that he was involved in only two break-ins in Dodge County. No objection was made to the evidence at this time. At the close of the hearing the trial court found that the statement was voluntary and without inducement or promise. The court then stated that ruling on admissibility of the evidence would be reserved.

Subsequently Brainard testified in the presence of the jury, in which he quoted defendant as denying any connection with the Nickerson robbery and further saying: "I was only involved in two break-ins in your county." Objection was made to the question which brought out

the answer complained of and a motion to strike the answer was made after it came into the record. The objection and motion to strike were both overruled. This was error. The contention of the State that the error was waived by the failure of defendant to timely object is without merit.

It is the general rule in this state that evidence of other crimes, even by the instrumentality of a confession, is not admissible to prove the guilt of the defendant of the particular crime charged. In Stagemeyer v. State, 133 Neb. 9, 273 N. W. 824, a breaking and entering case, this question was fully considered. It was there determined that other crimes: "* * * do not pertain to the offense here being presented, and their admission in evidence, even though through the instrumentality of confession, is a violation of the principles announced in Commonwealth v. Campbell, 155 Mass. 537, 30 N. E. 72. It is well said that where the evidence of the other crime relates to another and entirely different transaction, and in no way tends to prove the fact in issue, it is not admissible, even though it tends to prove that the defendant was bad enough to commit a robbery. * * * In this case the facts were such that the questions of particular intent or motive were not presented by the evidence." See, also, Peery v. State, 165 Neb. 752, 87 N. W. 2d 378; Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632; Sall v. State, 157 Neb. 688, 61 N. W. 2d 256.

To the foregoing rule there are exceptions, but in order for evidence of an independent offense to be admissible it must appear that it is within one of the recognized exceptions. Evidence of another crime, similar to that charged, is relevant and admissible if it tends to prove a particular criminal intent which is necessary to constitute the crime charged. Sall v. State, *supra*. In Henry v. State, 136 Neb. 454, 286 N. W. 338, this court said: "We are convinced that in prosecution for incest it is reversible error to receive evidence, over objection, of separate and distinct crimes committed by the ac-

cused against a female other than the prosecutrix. Except as to crimes having an element of motive, criminal intent, or guilty knowledge, evidence of separate and distinct crimes committed by the accused is not admissible." In Smith v. State, 169 Neb. 199, 99 N. W. 2d 8, we quoted the following with approval from Clark v. State, 102 Neb. 728, 169 N. W. 271: "To make evidence of other acts available in a criminal prosecution, some use for it must be found as evidencing a conspiracy, knowledge, design, disposition, plan, or scheme, or other quality, which is of itself evidence bearing upon the particular act charged."

We find nothing in the case at bar that permits the use of independent criminal acts as evidence against the defendant under any exception to the general rule. It was prejudicially erroneous for the trial court, over objection, to admit evidence of independent criminal acts by the defendant which have no relation to the offense charged.

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

REVERSED AND REMANDED.

IN RE HERBERT J. SHERDON, DIRECTOR OF COMMUNICATIONS OF THE NEBRASKA STATE RAILWAY COMMISSION.
HERBERT J. SHERDON, APPELLEE, V. AMERICAN COMMUNICATION COMPANY, BELLEVILLE, KANSAS, APPELLANT, IMPLEADED WITH DESHLER TELEPHONE COMPANY, DESHLER, NEBRASKA, APPELLEE.

134 N. W. 2d 42

Filed March 19, 1965. No. 35842.

1. **Constitutional Law: Public Service Commissions.** Where the Legislature enacts specific legislation implementing Article IV, section 20, of the Constitution, the Nebraska State Railway Commission is subject to and governed by the provisions of such enactment.

2. **Telecommunications: Public Service Commissions.** A telephone company must obtain a certificate of convenience and necessity before encroaching upon the territory of another company.
3. ———: ———. The grant of a certificate of convenience and necessity to permit one telephone company to invade the certificated area of another may be granted only upon application of the invading company for a certificate of convenience and necessity.
4. ———: ———. The Nebraska State Railway Commission has no power to order a telephone company to extend its service into the certificated service area of another company unless such telephone company has first applied for and received a certificate of convenience and necessity.

Appeal from the Nebraska State Railway Commission. Reversed.

Baylor, Evnen, Baylor & Urbom and J. Arthur Curtiss, for appellant.

Clarence E. Danley, for appellee Sherdon.

Arnold E. Rawn, for appellee Deshler Tel. Co.

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

MCCOWN, J.

This was an action before the Nebraska State Railway Commission instituted by a complaint filed by the director of communications of the commission, to establish a telephone service area boundary between the two defendants under the authority of Section 1.6, Article 3, Chapter V, of the rules and regulations of the commission. The commission entered an order sustaining the formal complaint, revising the service areas of the defendants, and ordering them to file revised telephone service area maps. The defendant, Deshler Telephone Company did not file an answer or otherwise respond and the defendant American Communication Company has appealed.

On June 9, 1956, the Nebraska State Railway Commission entered its order granting an application to trans-

fer the Byron Telephone Company properties to American Communication Company and approving an area map and granted a certificate of public convenience and necessity to American Communication Company to serve the area set forth in the map. At that time all seven subscribers in the area later to be disputed had Byron service. The service was "extended area service" to Deshler, sometimes called "free service." In the spring of 1958, the commission ordered that extended area service be discontinued upon conversion to dial operation. American Communication Company rehabilitated its lines and installed a new dial system at considerable expense in the spring of 1958. Upon actual conversion to dial service, "free service" between Deshler and Byron was discontinued as ordered by the commission. Some of the seven Byron subscribers involved here removed their telephones in preference to payment of the nominal toll charge for a Deshler call.

In 1959, the Legislature enacted section 86-214, R. S. Supp., 1959, now section 75-605, R. S. Supp., 1963, and the commission promulgated Chapter V, Article 3, section 1, of its rules and regulations, all relating to the requirement of commission approval of boundary changes and the filing of maps showing such changes. The American Communication Company and Deshler Telephone Company on March 27, 1961, and August 9, 1960, respectively, filed their territorial maps. The American Communication Company map was identical, as to the area now disputed, to that which had been approved by the commission upon transfer of the Byron Telephone Company properties some 4 years before. The commission had never changed the boundary, nor had American Communication Company ever requested any change. The Deshler Telephone Company filed a map showing a boundary which extended into the American Communication Company territory, and included the seven former Byron Telephone Company subscribers. The Deshler Telephone Company had never before

claimed the territory, nor had the matter been presented to the commission. The territory had never been requested by Deshler Telephone Company nor had any application for it ever been filed. The Deshler Telephone Company simply filed the map with knowledge that it was invading the Byron Telephone Company territory. American Communication Company had no knowledge that such a map had been filed. Although the disputed area became apparent to the commission on August 9, 1960, when the Deshler Telephone Company map was filed, no action was taken by the commission at that time. American Communication Company was not informed of the Deshler Telephone Company claim. The Deshler Telephone Company was not reminded nor asked to correct its encroachment. The matter lay dormant until May 8, 1963, when Mr. Kahle, one of the seven former subscribers of Byron Telephone Company, visited the commission. A field investigation was ordered and completed the following day with the assistance of Mr. Kahle, as a direct result of which the complaint was filed. There is no indication that either of the two defendants had any advance notice of the complaint nor that they were requested or given the opportunity to resolve the dispute by agreement. The hearing was held pursuant to the notice.

The disputed area was a rural area approximately three miles long by three-quarters of a mile wide plus the north half of Section 14, Township 1 North, Range 4 West of the 6th P.M. Of the seven persons living in the disputed area, two were receiving telephone service from the Deshler Telephone Company on lines which they installed themselves. The Deshler Telephone Company had no agreement with American Communication Company and had served one of the subscribers since 1960, but this service encroachment was not explained. Two of the subscribers were receiving telephone service from the American Communication Company and three did not have any telephone service at all, although

all seven had had Byron Telephone Company service prior to the transfer to American Communication Company of the Byron Telephone Company properties. Mr. Sherdon was a principal witness. He did not know whether or not any of the existing service was reasonably adequate, nor whether or not subscribers who have no phone would have reasonably adequate service if they requested it in the approved service area in which they were all situated. He testified that there would be no duplication of the existing Byron Telephone Company facilities if such facilities were removed and a Deshler Telephone Company line installed in their place. He stated that the boundary line proposed by him would be in the public interest because it was not contrary to the public interest and because it would enable the subscribers to call those with whom they transact business without paying a toll charge. His compromise boundary would put six of the seven people in the disputed area into the Deshler Telephone Company territory and leave only one subscriber in the Byron Telephone Company territory. The testimony of the individuals, who had signed a letter to the commission generally indicating that they desired to have telephone service from the Deshler Telephone Company, was essentially the same. They felt that the Deshler Telephone Company service would be more convenient than a Byron Telephone Company phone because they did more business and had more social and personal relationships in Deshler than in Byron. Essentially, however, it can reasonably be said that the 10 or 15 cent toll charge to call from the Byron exchange to Deshler was the inconvenience they were referring to. Only two witnesses made any reference to inadequacies of the Byron Telephone Company service. One of those was once unable to place a call from a booth in Chester, Nebraska, when the lines were wet. Chester is not in or near the disputed service area. The other witness complained of poor service at a time before American Communication Company acquired the

Byron properties. Witnesses for American Communication Company testified that the company was willing, able, and desirous of furnishing, upon request, the latest dial telephone service to subscribers in the disputed area. American Communication Company had never requested to be relieved of any of the disputed area nor had it acquiesced in the use or invasion of the territory, nor relinquished any part of it. They also testified as to the location of the existing facilities, the number of subscribers the circuit now served, and the number it is capable of serving; as to the decrease in income and in the rate of return resulting from the loss of four subscribers; and as to the cost of constructing the existing facilities.

The order of the commission revised the service areas of the two defendants in accordance with the prayer of the complaint and ordered the defendants to file revised service area maps. The necessary result of this order is to revoke in part American Communication Company's certificate of convenience and necessity granted to it by the commission in 1956 and also to enlarge the service area of the Deshler Telephone Company into the area formerly served by the Byron Telephone Company, now American Communication Company. This court has held that where the Legislature enacts specific legislation implementing Article IV, section 20, of the Constitution, the Nebraska State Railway Commission is subject to and governed by the provisions of such enactment. Neuswanger v. Houk, 170 Neb. 670, 104 N. W. 2d 235. Although that case involved a certificate of public convenience and necessity of a motor carrier, this court held that the applicable statute was specific legislation with regard to a particular subject and that the commission, in order to revoke, change, or suspend the certificate, must proceed in accordance with the statute.

Section 75-604, R. S. Supp., 1963, originally section 86-213, R. S. Supp., 1961, was enacted in 1951, except for subdivision (3) which was enacted in 1961. This is also

a specific statute which relates to a particular subject which, in its case, is the authorization of territorial boundaries between telephone companies. It provides as follows: "No person, firm, partnership, corporation, cooperative, or association shall offer telephone service or shall construct a new telephone line in or extend an existing telephone line into the territory of another telephone company without first making an application for and receiving from the commission a certificate of convenience and necessity, after due notice and hearing under the rules and regulations of the commission. Before granting a certificate of convenience and necessity, the commission must find that (1) the territory in which the applicant proposes to offer telephone service is not receiving reasonably adequate telephone service, (2) that the portion of the territory of another telephone company in which or into which the applicant proposes to construct new lines or extend its existing lines is not and will not within a reasonable time receive reasonably adequate telephone service from the telephone company already serving the territory, or (3) the application is agreeable to the subscriber or subscribers and to both telephone companies involved in the matter, will not create a duplication of facilities, and is in the interest of the public and the party or parties requiring telephone service." The statute serves two functions. The first is to provide that a company must obtain a certificate of convenience and necessity before encroaching upon the territory of another company. The second is to define the specific finding the commission must make before granting such a certificate of convenience and necessity. It is clear that the invasion by a telephone company of the territory of another telephone company, either in service or construction, was intended to be prohibited unless the invading company first applied for and received a certificate of convenience and necessity.

The cases in which the statute has been considered

reach the same conclusion. In the case of Kopf v. Public Telephone Co., 173 Neb. 96, 112 N. W. 2d 521, the petitioners were individuals who requested the commission to assign their area into the service area of the Northwestern Bell Telephone Company of Lexington. This court in considering section 75-604, R. S. Supp., 1963 (which was then section 86-213, R. R. S. 1943), reversed the commission order permitting the petitioners to obtain telephone service from any operating company of their choice within the area.

Buhr v. Glenwood Tel. Membership Corp., 177 Neb. 164, 128 N. W. 2d 607, involved a similar situation. The commission granted the request in that case and, as it did here, ordered both companies to file revised service area maps. In reversing the order of the commission, this court said: "We point out that under the quoted statute the grant of a certificate of convenience and necessity to permit one telephone company to invade the certificated area of another may be granted only upon the application of the invading company for a certificate of convenience and necessity." The court also held: "We hold that the commission was without authority in law to entertain an application by Buhr for the grant of a certificate of convenience and necessity to Lincoln Telephone. Any such authority to grant a certificate of convenience and necessity to invade the certificated area of another telephone company must be on the application of the invading company for a certificate of convenience and necessity in accordance with section 86-213, R. S. Supp., 1961."

In the two cases cited action was instituted by telephone subscribers and not by the application of either company involved. In this case it is clear that the complaint was initiated when one of the former subscribers visited the commission concerning his desire to receive telephone service from Deshler and the commission obtained the letter from the other subscribers. The filing of a complaint by the commission or by its director of

communications no more meets the statutory requirements of section 75-604, R. S. Supp., 1963, than the "request" in the Kopf case, *supra,* or the "letter" in the Buhr case, *supra.*

The Nebraska State Railway Commission has no power to order a telephone company to extend its service into the certificated service area of another company unless such telephone company has first applied for and received a certificate of convenience and necessity.

In this case, the Deshler Telephone Company filed no application or petition, did not answer nor file a pleading, and made no formal request that it be permitted to serve the area in question. It is clear the subscribers in the area initiated the request. In the Kopf case, *supra,* the court said: "These statutory provisions permit the extension of service by one company into the service area of another but they do not permit the commission to require such extension." The court also said: "No statute has been referred to which imposes any such requirement. Any effort of a telephone company to enter the territory of another is subject to action of the commission but the matter of compulsory entrance into occupied or unoccupied territory does not appear to have received legislative attention."

In the Buhr case, *supra,* this court stated: "Under section 86-213, R. S. Supp., 1961, the only way that a telephone company may properly invade the certificated area of another is by its filing of an application for a certificate of convenience and necessity, and establishing a right thereto in conformity with the provisions of the act. Such an invasion by a telephone company of the certificated area of another may not be granted on request of a user who prefers the service of the invading company. This is made abundantly clear by our holding in the Kopf case."

The commission in the case now before the court had no more authority to direct the Deshler Telephone Company to enter the disputed area than it did to order

American Communication Company to vacate the area.

Since the action of the commission was in violation of section 75-604, R. S. Supp., 1963, its order is void and of no effect. The order of the commission is reversed.

REVERSED.

MULLER ENTERPRISES, INC., APPELLEE AND CROSS-APPELLANT, V. SAMUEL M. GERBER ET AL., APPELLEES AND CROSS-APPELLEES, IMPLEADED WITH SAMUEL GERBER ADVERTISING AGENCY, INC., APPELLANT AND CROSS-APPELLEE.

133 N. W. 2d 913

Filed March 19, 1965. No. 35845.

1. **Contracts.** The law presumes that a person who makes a contract understands its meaning and effect and that he has the intention which its terms manifest.
2. ———. The interpretation given a contract by the parties themselves, while engaged in the performance of it, is one of the best indications of their true intent and courts should enforce such construction.
3. ———. It is sufficient if an instrument states the essential terms by which the parties intended to be bound with sufficient definiteness and clarity that a court by interpretation with the aid of the existing or contemplated circumstances may enforce it.
4. ———. Contracts to continue, not until a fixed date but until the happening of an event which is certain to occur sooner or later, are ordinarily enforceable and not void as to the uncertainty as to the time of performance.
5. ———. A contingent liability for payment of an obligation becomes absolute when the event fixed by the contract for its payment occurs.
6. **Appeal and Error.** While in an equity case this court is required to make independent findings of fact on the record, this court will consider when the evidence is in irreconcilable conflict that the trial court saw and heard the witnesses and that it accepted the version of one party on controverted issues of fact.
7. **Fraud: Trial.** Fraud and mistake are never assumed but must be proved by the party that alleges them.
8. **Trial: Judgments.** Issues to be tried must be formed by plead-

ings and a judgment rendered thereon must respond to the issues raised by the pleadings.

9. **Courts.** Courts of this state are not permitted to give advisory opinions but can only declare the law and its application to a given set of facts when a justiciable controversy is presented for the determination of the court.
10. **Interest.** Recovery of interest on an unliquidated claim, the subject of reasonable controversy, and incapable of being fixed by computation, may be had only from the date of determination of the right of recovery and the ascertainment of the amount.

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

Howard B. Westering, for appellant.

Haney, Walsh & Wall, for appellee Muller Enterprises, Inc.

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

WHITE, C. J.

This case is concerned with the validity of a "finder's fee" contract. Plaintiff, a corporation, and Robert Muller will be hereinafter referred to as plaintiff or Muller. Defendants Samuel M. Gerber and Samuel Gerber Advertising Agency, Inc., a corporation, will be hereinafter referred to as defendant or Gerber. Plaintiff, organized by Robert Muller and associates, introduced the Service Life Insurance Company to defendant, Samuel Gerber Advertising Agency, Inc., which thereafter, under an arrangement with Ajon Farber, executive vice president of Service Life, advertised a certain hospitalization policy (exhibit 20), in various magazines and news media. The advertising format agreed upon by Farber and Gerber contained a coupon for a reader to sign and send in with a $1 premium payment as an application for 60 days coverage. The acceptance by the company of the application and the issuance of a policy for 60 days constituted a "closure." For each closure,

Gerber received $10. If the policy was continued in force after 60 days by a renewal premium, this constituted a "renewal" and Gerber was to receive $5 for the first renewal, none thereafter. For introducing Service Life to Gerber, plaintiff claims 10 percent of the original $10 closure fees and 10 percent of the $5 renewal payment. Many thousands of closures were made as the result of Gerber's advertising. After paying plaintiff (Muller) $1,653 for closures, no renewals, for a period of 12 to 14 months, defendant Gerber ceased all payments and refused to make any payments to plaintiff on the finder's fee agreement of December 8, 1960. The trial court found there was a valid and binding agreement to pay 10 percent of the closure fees received by Gerber, none on renewals, and referred the matter to a referee for an accounting of the balance due on the closure fees received by Gerber. The referee's report found there was due plaintiff a balance of $10,926.80, being the closures from March 1961, through December 1963, and the district court entered judgment accordingly.

Plaintiff was a promoter of insurance merchandising ideas, and the defendant was an advertising agency. In a series of correspondence and a conference between September and December 5, 1960, Muller developed and tried to sell Ajon Farber and Service Life a scheme for Muller Enterprises, the plaintiff, to advertise its insurance. Farber rejected Muller's plan, but upon return to Omaha wrote Muller a letter on December 5, 1960, outlining a proposal in which Service Life would be interested. Muller learned that Service Life wanted to expand the advertising and sales of its standard hospitalization policy (exhibit 20), and that if anybody would finance the cost of such advertising the company would pay $10 when a policy was issued to a subscriber who clipped a coupon and sent $1 with it for 60 days coverage, and $5 if the policy so issued was renewed at the end of 60 days. In this letter, Farber stated: "If a mail order organization will solicit this policy, for each

bonafide application we receive along with an initial premium, we will pay $10.00. If the policy renews for two successive terms of coverage on a monthly premium plan or if the policy renews for one successive term on a quarterly semi-annual or annual plan we will pay an additional $5.00. It is as simple as that. * * * If you have people who are interested in this sort of venture who have the know-how and where-with-all, it is a fine opportunity for you to partake in a fair return and a profitable venture." During the period before this letter, Muller had contacted Gerber and discussed with him whether he would be interested in doing some advertising for an insurance company on a "per lead" basis. After the conversations of these parties, and with this background present and the proposal in Farber's letter, of December 5, 1960, Muller met with Gerber in Boston where they both lived and had offices. From these preliminary conversations, Muller's understanding with Gerber had reached the point where he and an associate took with them a proposed written contract covering what Muller was to receive if Gerber took on the project outlined in the letter of December 5, 1960. Muller had not disclosed the name of the insurance company in any of the preliminary conversations with Gerber. After discussion, Gerber rejected Muller's contract, personally drew and typed exhibit 2, leaving the name of the insurance company blank, signed it on behalf of the defendant, and handed it to Muller. This was on December 8, 1960. Muller then signed it for the plaintiff and *then filled in the name of the Service Life Insurance Company in the blank that Gerber had provided in the contract.* This was the first time Gerber knew the name of the company that was offering the proposal that had been generally discussed before. This instrument, exhibit 2, is is follows:

"It is my understanding that you will introduce this firm to a certain insurance company, (fill in name here

and initial), The Service Life Insurance Company of Omaha Nebraska, to set up a deal to secure leads or closures on a certain insurance program, namely, one in which this insurance company makes an offer of 60 days insurance with various coverages for $1.00., and should these materialize into further business for this insurance company, as renewing the policy for a year for $15.00 with similar coverages, as part of the promotion.

"Leads or closures is to be defined as customers sending in the one dollar for the 60 day package deal only, and as a result of delivering these types of orders, said insurance company will pay a certain amount of money for each lead or closure. As I understand it, said insurance company will also pay an additional sum for each subsequent renewal obtained from the original lead or closure.

"Muller Enterprises, Inc., will be paid a fee of 10% for introducing this agency to said insurance company. The 10% fee will be based on the amount said insurance company will pay for each lead or closure on the $1.00 deal, provided this deal can be worked and is acceptable to this agency and said insurance company, and the amount of money to be paid for each lead or closure is agreed upon.

"Payments for leads or closures are to be paid to this agency, who will in return pay Muller Enterprises, Inc., the standard fee agreed upon of 10%."

The above letter was signed and accepted by the defendant and was signed and accepted by the plaintiff.

On December 8, 1960, immediately after signing exhibit 2, Gerber and Muller talked to Farber in Omaha by phone in a three-way conversation. Gerber was satisfied by what Farber stated, which confirmed the general plan outlined to Muller in the letter of December 5, 1960. Other necessary details were discussed and Gerber and Farber "set up a deal" contemplated by the

language of exhibit 2. In the days following there were many conversations between Gerber and Farber concerning details and various phases of the set-up. An understanding was reached early in 1961 and Gerber commenced advertising in various magazines the policy coverage of exhibit 20, referred to in the record variously as DM37B. Approval of copy, Gerber's right to exclusive coverage, difficulties as to what states could be covered, where the money and coupons could be received under the law, and many other matters were ironed out with Farber entirely by phone.

Until March of 1962, but not thereafter, Gerber paid plaintiff monthly the 10 percent of the $10 "policy closure" payments, aggregating a sum of $1,653. About March 1962, after a dispute with Muller as to whether exhibit 2 called for payments to Muller of 10 percent of renewal commissions, Gerber refused further payment saying, " 'that's right, I am not making any money with Service Life; I was told I didn't have to pay you anything, anyway. * * * Besides that, I have sold the business.' " Gerber did continue advertising; receiving money for "closures," and the report of the referee, not challenged by either party here, shows a balance of $10,926.80 due on 10 percent of the "closures," without renewals.

Defendant's contention is two-fold. He claims that exhibit 2 does not constitute a contract and that if it did, he is entitled to rescind for fraud and mistake. There seems no dispute that this is a Massachusetts contract, and that the law applicable to the essentials of a contract is the same in both Massachusetts and Nebraska. In George W. Wilcox, Inc. v. Shell Eastern Petroleum Products, Inc., 283 Mass. 383, 186 N. E. 562, it is stated: "In order that the plaintiff may recover, the instrument relied on must be found to state the essential terms of a contract, by which the parties intended to be bound, with sufficient definiteness and clarity that a court, by interpretation with the aid of existing and

contemplated circumstances, may enforce it. Lyman v. Robinson, 14 Allen, 242, 254. Beach & Claridge Co. v. American Steam Gauge & Valve Manuf. Co., 202 Mass. 177, 182. Kaufman v. Lennox, 265 Mass. 487."

We have no difficulty in reaching the conclusion that exhibit 2 constituted a valid and binding contract between the parties. Gerber drew the instrument himself. It was not changed in a single respect by Muller. It was drawn from the mutual background of conversations and understandings referred to generally above in the review of the evidence. It reflected Gerber's intentions. Its fair, and we think, clear import was that if Gerber could set up a deal with the insurance company (name to be filled in) that was satisfactory to him as to advertising a specific type of policy, that Muller was to be paid for introducing or making the contact. By its terms Muller was to be paid his 10 percent *"for introducing this agency to said insurance company."* (Italics supplied.) There were no other services or work that Muller was to do.

Gerber himself, in drawing the contract, left the name blank, recognizing that when Muller supplied the name, he would then have performed and executed his part of the contract. Gerber himself had clear enough understanding of the deal to provide the method of computing the 10 percent fee. The type of policy (exhibit 20) was sufficiently described in the context as to occasion no difficulty or objection by Gerber during his successful "setting up" of the advertising program with Farber of Service Life. This instrument, exhibit 2, was an offer by Gerber setting up his own terms, which was accepted without change by Muller. Neither Muller or Gerber did know what specific arrangement or advertising program could be "set up" with Farber. The contract said so. Gerber was obligated to do nothing. If he did make a deal to advertise the policy described, he would be obligated to pay 10 percent for Muller introducing him to Farber and Service Life. That was the

intent of the contract as expressed, and which he himself drew and we can see no ambiguity or lack of mutuality in it.

But our determination in this respect does not rest on these grounds alone. The law of Massachusetts is substantially the same as we stated in McLeod v. Crawford, 176 Neb. 513, 126 N. W. 2d 663, wherein we said: "It is to be assumed that parties to a contract *know best what was meant* by its terms, and that whatever is done by the parties *during the period of performance is done as they intended it should be.* The interpretation given a contract, by the parties themselves while engaged in their performance of it, is one of the best indications of *their true intent,* should be given great, if not controlling influence, and the courts ordinarily should enforce such construction. Dunn v. Mutual Ben. Health & Acc. Assn., 135 Neb. 506, 282 N. W. 487; 12 Am. Jur., Contracts, § 249, p. 787; C. W. Hull Co. v. Westerfield, 107 Neb. 705, 186 N. W. 992, 29 A. L. R. 105; 4 Neb. Law Bulletin 149; Ord Hardware Co. v. J. I. Case Threshing Machine Co., 83 Neb. 353, 119 N. W. 682. Correlated to and following this basic principle is the rule that the assertion of the invalidity of a contract is nullified by the subsequent *acceptance of benefits growing out of the contract* claimed to have been breached. Wegner v. West, 169 Neb. 546, 100 N. W. 2d 542; Einot, Inc. v. Einot Sales Co., Inc., 154 Neb. 760, 49 N. W. 2d 625; Dakota County v. Central Bridge & Constr. Co., 136 Neb. 118, 285 N. W. 309." See, also, Atwood v. City of Boston, 310 Mass. 70, 37 N. E. 2d 131; Ryerson v. Fall River Philanthropic Bur. Soc., 315 Mass. 244, 52 N. E. 2d 688; Crowe v. Bixby, 237 Mass. 249, 129 N. E. 433.

At the time exhibit 2 was signed, Muller, Gerber, and Farber had a mutual telephone conversation. As a result of this and subsequent conversations with Farber, Gerber did "set up" a deal with Service Life. Difficulties were ironed out. Gerber, although not obligated, did advertise a policy (exhibit 20), in an increasing number

of magazines, received the $10 "closure" commission, and until March 1962, paid Muller 10 percent of the closure fees he received from Service Life. We will not review the evidence further. It shows that Gerber, by his performance, accepted benefits under the arrangement contracted for in exhibit 2, recognized his obligation by paying according to its terms, and increased the extent of the program and closures as time went on. In fact, the program was inviting enough that at about the time he cut off the Muller payments, he made arrangements with other parties so that he could enlarge the program and finance additional advertising. Under the evidence in this case, defendant is estopped by his own conduct in the performance of the contract to deny the validity and enforceability of the contract (exhibit 2), drawn by himself. Defendant argues extensively that the contract is uncertain because Muller demanded payment of renewal commissions in addition to the original closures. The fact that Muller misinterpreted the contract or claimed more than its terms provided does not affect the mutuality or validity of the original contract. The lower court rejected Muller's claim in this respect, held his recovery to 10 percent on the original closures as was correct according to the express terms of exhibit 2. Muller cannot be penalized for overstating his claim either to Gerber or in his pleadings in this case.

Defendant contends that the contract is void because of lack of mutuality and indefiniteness as to the termination date of the contract. Gerber's own wishes determine this. His only obligation is to pay Muller 10 percent for as long as he himself performs the contract. If it becomes unprofitable or onerous, all he has to do is quit. He reserved exclusive control of the time element himself when he drew the contract and he cannot be heard to complain of the fact that he himself did not terminate it. To hold otherwise would be to permit the receipt of continuous benefits under a contract without payment of the corresponding obligation. We point out

that the contract by its terms together with the conduct of Gerber in paying, conclusively show full performance by Muller. The contract is executory on Gerber's part and it seems to us that it clearly contemplates that the duration of the obligation is commensurate with Gerber's performance, which he may terminate at any time. Dispositive of this contention under Massachusetts law is the case of Phelps v. Shawprint, Inc., 328 Mass. 352, 103 N. E. 2d 687. In that case, the defendants promised to pay to the plaintiff $100 per month so long as a third party should be connected with one of the defendants, if the plaintiff would succeed in having the third party acquire stock in defendant corporation. Plaintiff thereafter performed but the defendants breached the contract contending, as here, lack of mutuality in the contract as to a termination date. The court said: "The contract was not silent on this aspect for it carried its own measure of time. It definitely specified that it was to continue so long as the Rosenbaums were connected with the corporation. Such a contract is not too indefinite or uncertain to be enforceable at least for partial breaches even though it is impossible to predict precisely when the contingency will occur that will bring the contract to an end. * * * Contracts to continue, not until a fixed date but until the happening of an event which is certain to occur sooner or later, have been enforced. * * * Where, as here, the contract has been fully performed on one side, 'the law will not permit the injustice of the other party retaining the benefit without paying unless compelled by some inexorable rule.' Silver v. Graves, 210 Mass. 26, 30. * * * In Raymond v. White, 119 Mich. 438, the defendants agreed to pay the plaintiff a stated sum each week so long as they used his patented devices. The contract fixed no definite time for its duration. The defendants were bound to pay in accordance with the contract so long as they used the plaintiff's devices. The plaintiff recovered a weekly payment due and un-

paid at the time he brought his action. The instant contract was fully executed upon the part of the plaintiff and the only portion remaining executory was that imposed upon the Rosenbaums. Their failure to make the stipulated payments constituted successive breaches of the contract." There is no merit to this contention.

Defendant by answer and cross-petition pleads fraud and mistake and asks rescission of the contract. Fraud and mistake are never assumed, but must be proved by the party that alleges them. Caruso v. Moy, 164 Neb. 68, 81 N. W. 2d 826.

Gerber testified as to representations by Muller that he controlled the advertising and promotional account of Service Life; that the policy to be advertised had a certain renewal premium; that all magazines could be advertised in; that there was a certain persistency percentage of renewals after the original closures; and that the money and responses to the ads would come to him in Boston, and various other statements too numerous to review in this opinion. The evidence shows that these claimed misrepresentations rest almost entirely on the uncorroborated testimony of the defendant. They are all denied by the plaintiff. Nothing was said about these matters in the contract Gerber himself drew. The scope of Muller's obligation and representations was to introduce Gerber to Service Life and then Gerber would make a deal about advertising a particular type of policy. This he did. Any claimed misunderstandings as to policies, premiums, renewals, or control of advertising were immediately cleared up with Farber of Service Life. His continuing and mutually satisfactory arrangement with Service Life and Farber, and his continuing performance of the advertising program and payments to plaintiff, are inconsistent with claimed misrepresentations. We feel further that the evidence fails to show the materiality of any of these representations or that they induced any of the defendant's acts. If there were any misrepresentations or misunderstandings, the scheme in the con-

tract defendant drew himself provided that he only had to rely on and be induced by whatever deal he could make with Farber that was satisfactory to himself.

The defendant has failed to meet his burden of proof as to the issues of fraud and mistake. Also, the trial court saw and heard the witnesses and this court will consider the fact that it accepted the plaintiff's version of the facts on this issue. Holbein v. Holbein, 149 Neb. 281, 30 N. W. 2d 899; Clough v. Clough, 132 Neb. 748, 273 N. W. 31. The trial court was correct in rejecting this defense and dismissing the cross-petition.

We therefore hold that the decree of reference of August 23, 1963, holding defendant liable for 10 percent of leads or closure fees received from Service Life but not for renewals or other advertising services rendered, is correct and should be affirmed. The judgment for $10,926.80 of April 13, 1964, based on the report of the referee as to amounts due for "closures" to the date therein indicated is affirmed.

We go to the issues raised on the cross-appeal. On February 27, 1964, after the decree and order of reference, Gerber and Service Life entered into a new advertising contract. On March 6, 1964, Gerber filed a motion in the action asking for approval of this contract and a finding that it excluded any further liability to plaintiff. The court partially sustained this motion, finding that any bona fide transaction entered into pursuant to the new agreement would not be subject to the original contract entered into and enforced in the original decree of August 23, 1963. This was error since there was no justiciable issue under the petition or pleadings in the case to determine the effect or validity of a subsequently drawn contract between Gerber and Service Life. This judgment as to the effect of this new contract, drawn designedly to terminate the liability substantively established in the decree of August 23, 1963, was purely advisory in nature, a judgment not responsive to the issues raised by the pleadings, inconsistent with the pre-

vious judgment of the court, and not within its jurisdiction. See, Noble v. City of Lincoln, 153 Neb. 79, 43 N. W. 2d 578; Bowman v. Cobb, 128 Neb. 289, 258 N. W. 535.

By cross-appeal, plaintiff alleges that it is entitled to interest from date due of each of the payments for leads or closures found due by the decree and final judgment. We hold this was an unliquidated claim and interest runs only from the date judgment is rendered fixing the amount due. From the inception of this dispute and throughout the litigation, the plaintiff has contended that he is entitled to 10 percent of renewal commissions and of all money collected by Gerber from Service Life for advertising. This dispute was unresolved until the court found that the plaintiff was entitled to recover only 10 percent of the payments for leads and closures, and not renewals. We think the following from Colvin v. John Powell & Co., Inc., 163 Neb. 112, 77 N. W. 2d 900, is applicable: " 'Recovery of interest on an unliquidated claim, the subject of reasonable controversy, and incapable of being fixed by computation, may be had only from the date of determination of the right of recovery and the ascertainment of the amount. National Fire Ins. Co. of Hartford v. Evertson, 157 Neb. 540, 60 N. W. 2d 638."

In light of our holding herein, we deem it unnecessary to discuss the other matters raised in the briefs of the parties.

The judgment is affirmed in part, and in part reversed and remanded for further proceedings in accordance with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

DEAN SCHMEECKLE, APPELLANT, V. CAROLYN J. PETERSON, APPELLEE.

134 N. W. 2d 37

Filed March 19, 1965. No. 35860.

1. **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.
2. **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.
3. **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.
4. **Automobiles: Negligence.** The failure of a driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence as a matter of law, and defeats recovery.
5. ———: ———. The drivers of vehicles approach an intersection at approximately the same time whenever the two vehicles are in such relative position that upon appraisal of all factors it should appear to a man of ordinary prudence that there is danger of collision if he proceeds.
6. ———: ———. When a collision occurs in the ordinary city or country intersection, unless there is evidence that one of the vehicles was traveling at a very much greater rate of speed than the other, it is self-evident that the vehicles were reaching the intersection at approximately the same time.

Appeal from the district court for Dawson County: ERNEST A. HUBKA, Judge. Affirmed.

William S. Padley, for appellant.

Smith Brothers, for appellee.

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

SPENCER, J.

This is an action brought by Dean Schmeeckle, hereinafter referred to as plaintiff, against Carolyn J. Peterson, hereinafter referred to as defendant, for personal injuries and property damage occasioned by a collision. Defendant cross-petitioned, alleging personal injuries and property damage. The jury returned a verdict against the plaintiff on his petition and for the defendant on her cross-petition. Plaintiff has perfected an appeal to this court.

The collision occurred shortly after 8 a. m., on June 15, 1962, at a county road intersection in Dawson County, approximately 1 mile east of Gothenburg on U. S. Highway No. 30, 3/10 of a mile north and 1 mile east. The road surface of both roads was gravel. There were no stop signs at any of the corners. The volume of traffic on both roads was about the same and for all purposes they could be considered equal with respect to each other. The terrain at the scene was level, with no obstructions of any nature for at least one-half mile. The roads were straight and at the time in question were dry, although the weather was cloudy and hazy. Plaintiff was driving a 1960 Corvair, approaching from the east. Defendant was driving a 1959 Chevrolet, approaching from the north.

The plaintiff was the only eyewitness to testify. The defendant sustained a concussion and could remember none of the details of the collision. We review the evidence in the light of the rule stated in Beavers v. Christensen, 176 Neb. 162, 125 N. W. 2d 551: "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."

Plaintiff testified that he approached the intersection at 45 miles per hour; that he observed the defendant's vehicle for about a quarter of a mile during which time he covered approximately the same distance; and that the last time he looked to the north and saw the defend-

ant's vehicle, which he placed 1,285 feet north of the intersection, he was 742 feet from the intersection. He then looked to the south and never again looked to the north until he was crossing the intersection. He did not slacken his speed. He did not put on his brakes. He did not see the defendant, and he never heard the impact. Long after the accident, and in preparation for the trial, he went to the scene and measured the distance to the intersection from the point where he thought his vehicle was when he last looked north, and also from the point where he thought the defendant's vehicle was at that time. It was in this manner that he determined the relative positions of 742 feet and 1,285 feet.

The investigating patrolman, called as a witness by the plaintiff, testified that when he interviewed the plaintiff at the hospital after the accident, the plaintiff told him that he remembered looking north but did not see anything. The defendant's husband testified that he called on the plaintiff at the hospital after the accident and that the plaintiff told him he didn't know what happened and that he didn't see the defendant's car.

There were skid marks 28 feet in length from the north which were laid down by the defendant's car before the impact. The defendant's car came to rest facing north in the west ditch on the road she was traveling, 77 feet south of the end of the skid marks. The plaintiff's car came to rest in the south ditch facing north on the road he was traveling, 60 feet southwest of the end of the skid marks. The defendant's Chevrolet was approximately 900 pounds heavier than plaintiff's Corvair.

Plaintiff assigns as error that the jury returned a verdict which is contrary to and not supported by the evidence. As will more fully appear hereinafter, there is no merit to this contention. We consider this case in the light of the rule enunciated in Beavers v. Christensen, 176 Neb. 162, 125 N. W. 2d 551: "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."

Plaintiff complains that the jury failed to follow the instructions of the court. Plaintiff here is arguing that the jury ignored instruction No. 15, which reads: "You are instructed that a vehicle which has entered an intersection and is crossing it at lawful speed has the right of way over a vehicle approaching the intersection from a different direction into its path." Plaintiff, however, ignores the fact that this instruction must be read in conjunction with all of the other instructions. The fact that plaintiff's car may have entered the intersection first is not the sole test. Here the defendant's car had the directional right-of-way, and in addition thereto laid down a skid mark of 28 feet to reach the point of impact.

In this same vein, plaintiff also complains that the jury ignored the portion of an instruction that a driver of any vehicle traveling at an unlawful speed shall forfeit any right-of-way which he might have. Plaintiff contends that his is the only testimony from which the speed of the vehicles could be determined, and that he placed the defendant's vehicle 500 feet further from the intersection than his own at the time he last saw it, and consequently insists defendant was exceeding the speed limit. There was testimony of two witnesses, one of whom plaintiff himself called, that immediately after the accident the plaintiff made the statement that he did not see the defendant's vehicle. Also, the jury could consider the fact that the measurements testified to were made long after the collision and for the purpose of testifying at the trial. The jury also had the testimony of the plaintiff that before he last looked north, defendant's car traveled one-quarter of a mile while he traveled approximately the same distance, which would indicate the same speed. We also call attention to the following rule: Triers of fact are not required to accept as absolute verity every statement of a witness not con-

tradicted by direct evidence. The persuasiveness of the evidence may be destroyed even though not contradicted by direct evidence. Beavers v. Christensen, 176 Neb. 162, 125 N. W. 2d 551.

Plaintiff also argues that the position of the vehicles after the collision supports his contention that the defendant was exceeding the speed limit. With this we cannot agree if his own speed was within the limit. Each of the vehicles after the impact continued in the same general direction in which it was traveling before the impact, although the plaintiff's vehicle was further off the line than the defendant's vehicle. Also, the fact that the defendant's Chevrolet was heavier than the plaintiff's Corvair could have some bearing on the position of the vehicles after the impact. There is nothing in the physical facts which will support plaintiff's position.

Plaintiff insists that the court erred in submitting the question of contributory negligence. It should be clearly evident that there is no merit to this contention. Plaintiff admits that he last looked to the north when he was more than 700 feet from the intersection when he knew that a car was approaching on his right at approximately the same speed he was traveling. While he might have misjudged the distance it had to travel, it did have the directional right-of-way. He had the absolute duty to maintain a proper lookout. He further testified that he drove through the intersection at the same speed he had been traveling, 45 miles per hour, raising the question as to whether he might not be in violation of the following portion of section 39-7,108, R. S. Supp., 1963: "(4) The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, * * *."

Ignoring the question of any duty to decrease speed, there is a serious question as to whether the plaintiff was not guilty of negligence more than slight as a matter of law. This point is immaterial herein because contribu-

tory negligence was submitted under proper instructions and the jury found against the plaintiff on his petition. This is not the case of the driver of a vehicle with the directional right-of-way looking and failing to see. It is the case of a nonfavored driver failing, for more than the last 700 feet, to look in the direction from which the favored driver was approaching. In Eden v. Klaas, 165 Neb. 323, 85 N. W. 2d 643, we said: "The failure of the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence as a matter of law and defeats recovery."

Plaintiff argues that although it is the duty of the driver of a motor vehicle to look in the direction of anticipated danger, he cannot be expected to maintain a constant lookout in one direction. In Gross v. Johnson, 174 Neb. 273, 117 N. W. 2d 534, we interpreted the word "constant" to mean continuous or steady, and in that respect the statement made is correct. However, we did not mean to imply that a driver is not required to look in the direction of anticipated danger while still close enough to the danger to avoid a collision. There is a difference between maintaining a lookout which the law requires and maintaining a continuous lookout in one direction. There is no basis on which this rule can be used to excuse plaintiff for failing to observe traffic from the right for more than 700 feet, particularly when he knew traffic was approaching from that direction.

The intersection involved was a nonprotected one, crossed by roads which could be considered equal as compared to each other. The view was unobstructed and free from interference for more than one-half mile. Assuming that the defendant's vehicle was further from the intersection than the plaintiff's vehicle the last time he looked, it was still on his right and if they were approaching at approximately the same time, the defendant's vehicle was the favored one and the one legally

entitled to proceed. The question then involved is whether the vehicles approached at approximately the same time, and what is meant by that phrase.

In Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496, we said: "A driver of a vehicle on the left is approaching an intersection at approximately the same time as a party to his right when there is such relative proximity of the vehicles to the intersection that, upon appraisal of all the factors in the situation it would appear to a man of ordinary prudence in his place that there is danger of a collision if he fails to yield or forego the right-of-way to cross the intersection. The statute giving the right-of-way to a vehicle coming to or entering an intersection from the right over another coming to it at approximately the same time imposes upon the driver from the left the duty of deciding as a man of ordinary prudence whether, under the circumstances, which includes a consideration of the relative distances of the approaching vehicles, their apparent speeds, and the probable conduct of the other driver, his arrival at the intersection will sufficiently precede that of the vehicle crossing his line of travel to warrant the reasonable belief that he can safely cross the intersecting road or highway ahead of it." The obvious answer in this case is that where the plaintiff failed to look to his right for a distance of more than 700 feet, he is not in a position to make the observations necessary to determine what a reasonable man would do.

Gernandt v. Beckwith, 160 Neb. 719, 71 N. W. 2d 303, is a sufficient answer to plaintiff's contention that his vehicle entered the intersection first. In that case we held as follows: "Section 39-728, R. R. S. 1943, provides that vehicles approaching an intersection from the right shall have the right-of-way over those approaching from the left when they reach the intersection at approximately the same time, and that in all other cases the vehicle reaching the intersection first shall have the right-of-way. This does not mean that drivers of motor

vehicles are permitted to race or to gamble on which vehicle may enter the intersection a few feet ahead of the other. When a collision occurs in the ordinary city or country intersection, unless there is evidence that one of the vehicles was traveling at a very much greater rate of speed than the other, it is self-evident that the vehicles were reaching the intersection 'at approximately the same time.' "

There is evidence from which the jury could find that the defendant was maintaining a proper lookout and that she is entitled to recover on her cross-petition. There is the skid mark of 28 feet from the north. If the speed of the two vehicles was approximately equal, as defendant's testimony at one point could indicate, or even if the speed of the defendant's vehicle was slightly in excess of the plaintiff's vehicle, the jury could find the vehicles were approaching the intersection at approximately the same time. The defendant then would have had the right-of-way and the jury could have determined that she acted as an ordinarily careful and prudent person in expecting the plaintiff to respect her right-of-way, and when it became evident to her that he would not do so, she attempted to avoid a collision by applying her brakes. § 39-751, R. S. Supp., 1963; Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496. It is obvious the jury determined that the plaintiff's failure to maintain a proper lookout was the proximate cause of the collision.

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

AFFIRMED.