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REPORTS OF CASES

DECIDED BETWEEN

FEBRUARY 1, 1978 and MAY 16, 1978

IN THE

Supreme Court of Nebraska

JANUARY TERM 1978

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MARVIN L. GREEN

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By Marvin L. Green, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1978

DERALD PRATHER ET AL., APPELLEES, V. DON EISENMANN ET AL., APPELLANTS.

261 N. W. 2d 766

Filed February 1, 1978. No. 41203.

1. **Waters: Statutes.** Preference in the use of underground water shall be given to those using the water for domestic purposes. They shall have preference over those claiming it for any other purpose. Those using the water for agricultural purposes shall have the preference over those using the same for manufacturing or industrial purposes.
2. _____: _____. Domestic use of ground water shall mean all uses of ground water required for human needs as it relates to health, fire control, and sanitation and shall include the use of ground water for domestic livestock as related to normal farm and ranch operations.
3. _____: _____. As between domestic users of ground water there is no preference or priority. Every overlying owner has an equal right to a fair share of the underground water for domestic purposes.
4. **Torts: Damages.** The measure of recovery in all civil cases is compensation for the injuries sustained.
5. **Property: Waters.** A possessor of land who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability to preferential users unless the withdrawal causes unreasonable harm through lowering the water table or reducing the artesian pressure in existing wells having a preferential use.
6. **Property: Waters: Statutes.** Under our preference statute an irrigation appropriation can never obtain a right superior to overlying owners to the use of underground water for domestic purposes.

Appeal from the District Court for Madison County: MERRITT C. WARREN, Judge. Affirmed.

Thomas H. DeLay of Mueting, DeLay & Spittler, for appellants.

George H. Moyer, Jr., of Moyer, Moyer & Egley, for appellees.

Deutsch, Jewell, Otte, Gatz, Collins & Domina, for amicus curiae.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

SPENCER, J.

This is an action brought by domestic well owners to enjoin the pumping of ground water from an irrigation well owned by defendants, and for damages. The District Court found defendants' withdrawal caused a loss of artesian pressure in plaintiffs' wells, interfering with their domestic appropriation. The court found the water was sufficient for all users if plaintiffs lowered their pumps to below the aquifer and defendants did not lower their pump. It permanently enjoined defendants from lowering their pump and from pumping for the period of time reasonably required by plaintiffs to lower their pumps. The court awarded plaintiffs the necessary costs of providing an assured alternative method of water supply, or a total recovery of $5,346.58. We affirm.

Plaintiffs Prathers are the owners of a 9-acre tract upon which they maintain their residence. The residence is supplied with water by an artesian well located on the premises. The artesian pressure was normally sufficient to force water in the well to a level 5 to 6 feet above the ground. The well was 121 feet 10 inches deep and 2 inches in diameter.

Two other landowners, Furleys and Zessins, assigned their claims to Prathers. Unless designated by name hereafter, they are included in the title "plaintiffs." The Furleys are the owners of a 2-acre tract. The residence on the premises is supplied

with water from an artesian well 111 feet deep and 2 inches in diameter. The artesian pressure was sufficient to raise the water above the ground.

The Zessins are the owners of a tract of land in the same area which is occupied by their daughter. The residence upon the premises is supplied with water by a 160-foot well with 4-inch casing and a submersible pump. The water in the Zessin well did not rise above the surface of the ground.

Defendants Eisenmanns purchased a 90-acre tract of land in the area in March of 1976. On July 9, 1976, they completed an irrigation well on the premises. The well was 179 feet deep and had a capacity of 1,250 gallons per minute on a 2-hour test.

On July 9, 1976, Eisenmanns commenced pumping from the well at an estimated rate of 650 gallons per minute. Prathers and Furleys lost the use of their wells on July 10, 1976. Zessins lost the use of their well between the evening of July 12 and the morning of July 13 when the water level dropped below the level of the submersible pump. Because of the loss of water, the Zessins' pump overheated and welded itself to the casing. Zessins were unable to dislodge the pump and were forced to drill a new well to a depth of 164 feet.

Following a stipulation by the parties, a temporary injunction was issued on July 20, 1976, to permit the University of Nebraska Conservation and Survey Division to conduct certain tests on the wells. The tests consisted of pumping the irrigation well at a rate of 375 gallons per minute for 3 days, then measuring the draw down of the Eisenmanns' well and a number of other observation wells which included the three domestic wells. At the end of the pumping period the measured draw down on the Prathers' well was 61.91 feet; the Furleys' well, 65.45 feet; and the Zessins' well, 65.6 feet. The draw down of the Eisenmanns' well was 97.92 feet. All the wells recovered to the prepumping level within 11

days after cessation of pumping from the irrigation well.

The two hydrologists who conducted the tests made certain findings: (1) The irrigation well and the domestic wells were drawing from the same aquifer. (2) The aquifer could be defined with reasonable scientific certainty. (3) The pumping by Eisenmanns depressed the artesian head of the domestic wells. (4) The cone of influence caused by Eisenmanns' pumping intercepted or affected the plaintiffs' wells. (5) The common aquifer from which the domestic and irrigation wells draw water is sufficient to supply both domestic and irrigation needs. (6) For plaintiffs to obtain water from their wells during periods when Eisenmanns were pumping, they would have to pump water from the top of the shale.

Section 46-635, R. R. S. 1943, defines "ground water" as: "* * * that water which occurs or moves, seeps, filters, or percolates through the ground under the surface of the land." The existence of ground water in any particular area is dependent not only on the source of the water but also on the geologic formation of the earth. The earth materials with sufficient porosity to contain significant amounts of ground water and sufficient permeability to allow its withdrawal in significant quantities are called "aquifers." The upper surface of the water-saturated material is called "the water table."

Aquifers are almost always underlain by an impervious layer which prevents the water from percolating and seeping downward to such a level that it would be beyond economical reach. Two of the domestic wells involved were dependent upon artesian pressure. This results when ground water is not only underlain by impervious material but is confined between or underneath impervious layers as well. A well penetrating through one of the sur-

rounding impervious layers provides an escape valve through which water will flow without external force so long as sufficient artesian pressure exists.

Before restating the current Nebraska law, it is well to note the various common law views concerning rights to ground water. The nonstatutory theories are classified as: (1) The common law, or English rule; (2) the reasonable use, or American rule; and (3) the correlative rights doctrine, or California rule.

Under the English or common law rule, a landowner had absolute ownership of the waters under his land. He could, therefore, without liability, withdraw any quantity of water for any purpose even though the result was to drain all water from beneath surrounding lands.

The American rule of reasonable use also recognized a proprietary interest of an overlying owner in the waters under his lands. " ' "The American, as distinguished from the English rule, is that, while the owner of the land is entitled to appropriate subterranean or other waters accumulating on his land, which thereby becomes a part of the realty, he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land he owns, unconnected with the beneficial use of the land, especially if the exercise of such use in excess of the reasonable and beneficial use is injurious to others, who have substantial rights to the water." ' " Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N. W. 2d 626 (1966). There is no preference as to use under the American rule.

The California or correlative rights rule essentially provides the rights of all landowners over a common aquifer are coequal or corelative and one cannot extract more than his share of the water even for use on his own land where others' rights are injured thereby.

Nebraska has had few decisions dealing with un-

derground water problems. In Olson v. City of Wahoo, 124 Neb. 802, 248 N. W. 304, our court, in 1933, enunciated a modified reasonable use rule. It said: "The American rule is that the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, *and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole,* and while a lesser number of states have adopted this rule, it is, in our opinion, supported by the better reasoning." (Italics supplied.) The portion emphasized was not a part of the American rule as enunciated in a majority of the states. Nebraska, in Olson, adopted the rule of reasonable use with the addition of the California doctrine of apportionment in time of shortage.

In the subsequent case of Luchsinger v. Loup River P. P. Dist., 140 Neb. 179, 299 N. W. 549 (1941), the court's attention was directed to the fact that the Olson enunciation was dicta. The contention was made it was not binding on the defendants in that controversy. The court answered the suggestion of dicta as follows: "Whatever may be thought of its applicability to the case in which the rule was adopted, it answers for itself as a sound proposition of law essential to the protection of property rights of private individuals and is consistent with the Constitution and with morality and justice."

In Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N. W. 2d 626 (1966), this court said: "The rule in this state as to the rights of riparian owners is that, while the owner of land is entitled to appropriate subterranean or other waters accumulating on his land, which thereby becomes a part of the realty, he cannot extract and appropriate them in excess of a reasonable and beneficial use

upon the land he owns, unconnected with the beneficial use of the land, especially if the exercise of such use in excess of the reasonable and beneficial use is injurious to others who have substantial rights to the water." This statement, which was the reasonable use doctrine, led some commentators to question whether the omission of proportionate use was intentional. It was not. Proportional use was not involved in that case. Our law remained as it was enunciated in Olson v. City of Wahoo, 124 Neb. 802, 248 N. W. 304 (1933).

The question the instant case presents is one of first impression in this state. The three domestic wells of the plaintiffs do not contribute significantly to a reduction in the artesian pressure or water level of the underground aquifer. It was not until the defendants subsequently sunk and operated their irrigation well that plaintiffs lost the artesian pressure and the use of their wells.

The evidence indicates defendants had a runoff of approximately 15 to 25 gallons of water per minute above the water utilized on their land. The trial court found this was in excess of a reasonable and beneficial use on their own land. It is not necessary for us to reach this issue. We do not deem it material in view of the decision we reach herein. This case must be analyzed in reference to section 46-613, R. R. S. 1943, the preferential use statute.

Under the reasonable use doctrine, two neighboring landowners, each of whom is using the water on his own property overlying the common supply, can withdraw all the supply he can put to beneficial and reasonable use. What is reasonable is judged solely in relationship to the purpose of such use on the overlying land. It is not judged in relation to the needs of others. Harnsberger, Oeltjen, & Fischer, Groundwater: From Windmills to Comprehensive Public Management, 52 Neb. L. Rev. 179 at p. 205 (1973).

Our preference statute points the way to a solution of the present controversy. It is apparent the trial court used it with an adaptation of the rule proposed in the Tentative Draft No. 17 of section 858A of Restatement, Torts 2d (1971). That rule provides in part: "§ 858A. Non-liability for use of ground water — exceptions. A possessor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless (a) the withdrawal of water causes unreasonable harm through lowering the water table or reducing artesian pressure, * * *." The District Court found defendants' appropriation of water "caused unreasonable harm to plaintiffs by lowering the water table and reducing artesian pressure."

The comment in Restatement, Torts 2d, suggests the tentative rule is the American rule with its protection broadened. It is not so broad, however, as the Nebraska rule. As the comment notes, it gives more or less unrestricted freedom to the possessor of overlying land to develop and use ground water. It does not attempt to apportion the water among users except to the extent that special conditions permit it to be done on a rational basis. It gives the protection of the American rule to owners of small wells harmed by large withdrawals for use elsewhere, but extends that protection in proper cases to harm done by large withdrawals for operation on overlying lands.

Much of the litigation involving users of ground water has involved the collateral effects of a withdrawal of the water rather than a division of it. There was no problem here with the artesian pressure until defendants withdrew in excess of 350 gallons per minute and lowered the water beyond the reach of the domestic wells.

There is sufficient water in the aquifer for all the parties if defendants' irrigation well remains at its

present level and the domestic wells are lowered to the top of the shale. The trial court found plaintiffs had been damaged to the extent of the expense necessary to lower their wells to the shale.

The term reasonable use, as contemplated in the American rule, relates to the manner in which water is used upon the land of the appropriator. The interests of adjacent landowners are in issue only when the appropriator uses water in excess of the reasonable and beneficial use of it upon his land, and that excess use is injurious to the adjacent landowner.

The term "reasonable use" as defined in the correlative rights doctrine means reasonable share of the whole. Under the correlative rights doctrine, the overlying owners have no proprietary interest in the water, and in times of shortage each overlying owner has an equal and correlative right to make beneficial use of his proportionate share of the water.

Reasonable use, as defined in the proposed Restatement doctrine, means a balancing of the equities between the use made of the water by the subsequent appropriator versus the injury caused by that use to the prior appropriator.

The Nebraska rule, as previously pointed out, is a combination of the American and the correlative rights doctrine. It must be construed, however, in the light of our preference statute, section 46-613, R. R. S. 1943. This statute provides as follows: "Preference in the use of underground water shall be given to those using the water for domestic purposes. They shall have preference over those claiming it for any other purpose. Those using the water for agricultural purposes shall have the preference over those using the same for manufacturing or industrial purposes.

"As used in this section, domestic use of ground water shall mean all uses of ground water required for human needs as it relates to health, fire control,

and sanitation and shall include the use of ground water for domestic livestock as related to normal farm and ranch operations."

It is our statute which distinguishes the Nebraska rule from other rules. Under the statute, the use of underground water for domestic purposes has first preference. It takes priority over all other uses. As between domestic users, however, there is no preference or priority. Every overlying owner has an equal right to a fair share of the underground water for domestic purposes. If the artesian head in the present situation had been lowered by other domestic users, plaintiffs would be entitled to no relief so long as they still could obtain water by deepening their wells. If the water became insufficient for the use of all domestic users, each domestic user would be entitled to a proportionate share of the water. All domestic users, regardless of priority in time, are entitled to a fair share of the water in the aquifer.

That, however, is not the present problem. We are dealing with plaintiffs who have preferential rights. We are confronted with the situation where the appropriation by the defendants rendered the plaintiffs' well useless during the pumping period and the period of time after the pumping ceased to recharge the area so the water again reached plaintiffs' pumps. In the case of the 3-day test conducted by the hydrologists, this recharge period was 11 days. In the case of the Zessin well, the appropriation by defendants also froze the pump to the pipe and required the drilling of a new well.

Plaintiffs can still obtain sufficient water for domestic purposes by drilling wells to the shale. It would not have been necessary for them to incur the necessary expense to do so except for the action of defendants. Without question, plaintiffs have been damaged by the operation of defendants' well. As the trial court found, defendants' withdrawal of water caused unreasonable harm to plaintiffs by

lowering the water table or reducing the artesian pressure. Plaintiffs had obtained a property right in that use so they should have a remedy for their damage.

The remedy devised by the trial court presents a very equitable solution. It reimburses the plaintiffs only for the expense they were forced to incur because of the action of the defendants. Plaintiffs' wells were very adequate for their own purposes. Their use of water for domestic purposes took precedence over the appropriation for agricultural purposes by the defendants. Plaintiffs had a valuable property right in the extraction of water for domestic purposes. It was solely defendants' action which deprived them of their right. Defendants, by pumping large quantities of water from the same aquifer, destroyed the artesian pressure for two of the wells. For the other well, which was deeper and used a pump, defendants' action lowered the water below the reach of the pump and the resultant heat froze the pump to the pipe. The only way plaintiffs could be assured of water for domestic purposes was to drill wells to the shale. This expense was thrust upon plaintiffs solely as a consequence of defendants' action in destroying plaintiffs' artesian pressure and lowering the water below the reach of their domestic wells. Plaintiffs' right to the extraction of water from their existing wells was appropriated or destroyed by the action of defendants. What should be the extent of plaintiffs' damage? Certainly it should be the cost of restoring or obtaining what plaintiffs had before it was appropriated by defendants' action.

The measure of recovery in all civil cases is compensation for the injury sustained. Abel v. Conover, 170 Neb. 926, 104 N. W. 2d 684 (1960). We hold the defendants are liable for the necessary and reasonable expense to restore what plaintiffs lost by de-

dants' action. This is the result reached by the trial judge, and we affirm the judgment rendered.

The solution devised by the District Court is the correct one. The judgment is affirmed.

AFFIRMED.

FIRST STATE BANK, A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. PRODUCERS LIVESTOCK MARKETING ASSOCIATION NON-STOCK COOPERATIVE, A CORPORATION, ET AL., APPELLANTS AND CROSS-APPELLEES.

261 N. W. 2d 854

Filed February 1, 1978. No. 41269.

1. **Uniform Commercial Code: Words and Phrases.** Under the Uniform Commercial Code, goods are classified as consumer goods, equipment, farm products, or inventory.
2. **Uniform Commercial Code: Words and Phrases: Livestock.** Livestock used or produced in farming operations and in the possession of a debtor engaged in raising, fattening, grazing, or other farming operations are farm products. If goods are farm products they are neither equipment nor inventory.
3. **Uniform Commercial Code: Words and Phrases.** Goods which are held for sale or lease are classified as inventory. The principal test to determine whether goods are inventory is whether they are held for immediate or ultimate sale.
4. **Uniform Commercial Code: Words and Phrases: Livestock.** Cattle purchased and held for immediate sale by a cattle trader and speculator are inventory and not farm products.
5. **Uniform Commercial Code: Security Agreements: Livestock.** A security agreement between a bank and a farmer and rancher, who is also a cattle trader or speculator, which grants a security interest in livestock used for farming operations, does not cover cattle purchased and held for immediate sale and not intended for use in any farming operation.
6. **Uniform Commercial Code: Security Agreements.** A financing statement which has been properly recorded is binding on a marketing agency.
7. **Suretyship: Indemnity.** A surety who has been adjudged liable to a creditor of the principal is entitled to a declaration of his right to indemnity in the event of payment to the creditor.

Appeal from the District Court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded.

Leonard Kovarik of Holtorf, Hansen, Kovarik & Nuttleman and Loren G. Olsson of Olsson & Olsson, for appellants.

George P. Burke of Van Steenberg, Myers & Burke, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BOSLAUGH, J.

This case involves a controversy concerning a security interest in cattle owned by James W. Faden. Faden, who died on January 12, 1971, was a farmer and rancher who lived in southern Banner County, Nebraska. On November 8, 1965, he executed and delivered a financing statement and security agreement to the plaintiff, First State Bank at Kimball, Nebraska. On that date he borrowed $12,200 from the bank. His total indebtedness to the bank was then $38,360. The financing statement and security agreement was filed in Banner County on November 9, 1965, and a continuation agreement was filed on August 14, 1970. At the time of his death Faden owed the bank nearly $150,000.

The security agreement secured future advances and granted a security interest in "livestock" including any "increase, additions, accessions and substitutions thereto." The agreement further provided:

"If marked here ☒ Debtor grants a security interest in all similar property owned by Debtor during the time the obligations are outstanding, although such property may be acquired or be natural increase after the date hereof.

"If marked here ☒ the security interest shall attach to all product and proceeds of Collateral, but Secured Party does not hereby consent to the sale of the collateral.

"If marked here ☐ Debtor shall, so long as no event of default has occurred, have the right in the regular course of business, to process and sell inventory and farm products only, but the security interest shall attach to all product and proceeds of all Collateral. * * *

"Debtor warrants that unless marked otherwise the Collateral is used or being bought primarily for personal, family or household purposes; but if marked here ☒ for farming operations, if marked here ☐ for business operations, and if marked here ☐ the Collateral is being acquired with the proceeds of the note or notes, which Secured Party may disburse directly to the seller of the Collateral."

The defendant Producers Livestock Marketing Association Non-Stock Cooperative, hereinafter referred to as Producers, operates a livestock auction business in Gering, Nebraska. In a series of six transactions between February 1, 1969, and March 28, 1970, Faden sold 112 head of cattle at the auction in Gering and deposited the proceeds in the Scottsbluff National Bank at Scottsbluff, Nebraska. The plaintiff claims these cattle were covered by the security agreement and that Producers is liable to the plaintiff for the proceeds from the sale of the cattle.

The defendant National Livestock Producers Association, hereinafter referred to as National, was a clearing agency for Producers and had furnished a bond as required by the regulations under the Packers and Stockyards Act. The defendant Fireman's Insurance Company of Newark, New Jersey, was the surety on the bond. The plaintiff's first cause of action sought to recover against all the defendants on the bond. The second cause of action was against Producers for conversion.

National and its surety filed a cross-petition against Producers for indemnity in the event the plaintiff obtained a judgment against National and

its surety. By agreement of the parties the issues on the cross-petition were tried separately.

The trial court found generally for the plaintiff on its petition and against all defendants. The trial court found specifically that the plaintiff had a security interest in all the livestock owned by Faden and involved in this action. The defendants have appealed.

The first transaction which is in dispute took place on February 1, 1969. On that date Faden sold 2 head of cattle at Gering, through Producers for net proceeds of $719.35.

On May 17, 1969, Faden sold 5 head of cattle at Gering, through Producers for net proceeds of $1,199.55. The evidence does not show where the cattle sold on these two dates originated.

On December 19, 1969, Faden purchased 47 head of cattle at the Torrington Livestock Commission Company at Torrington, Wyoming, for $9,464.19 and paid for them with a check on the plaintiff bank. The cattle were shipped to Gering, Nebraska, and sold through Producers on December 20, 1969, for net proceeds of $8,326.88. Two days later Faden borrowed $9,500 from the plaintiff to cover his December 19, 1969, check.

On January 16, 1970, Faden purchased 37 head of cattle at Torrington for $8,079.77. The cattle were shipped to Gering and sold through Producers on the following day, January 17, 1970, for net proceeds of $7,496.72. Three days later, Faden borrowed $8,000 from the plaintiff bank to cover his check of January 16, 1970.

On February 20, 1970, Faden purchased 9 head of cattle at Torrington for $2,054. The cattle were shipped to Gering and sold the following day, February 21, 1970, through Producers for net proceeds of $1,883.48. On February 26, 1970, Faden borrowed $2,100 from the plaintiff bank to cover his check of February 20, 1970.

On March 26, 1970, Faden purchased 21 head of cattle at Torrington for $5,697. Twelve of these cattle were shipped to Gering and sold through Producers on March 28, 1970, for net proceeds of $2,850.65. On March 31, 1970, Faden borrowed $5,700 from the plaintiff bank to cover his check of March 26, 1970.

The defendants contend that the security agreement did not cover the cattle sold through Producers in the transactions described above because they were not "farm products." The defendants claim that Faden was actually engaged in two occupations and that in addition to being a farmer and rancher he was a cattle trader or speculator.

Under the Uniform Commercial Code, goods are classified as consumer goods, equipment, farm products, or inventory. Livestock used or produced in farming operations and in the possession of a debtor engaged in raising, fattening, grazing, or other farming operations are farm products. If goods are farm products they are neither equipment nor inventory. § 9-109 (3), U. C. C.

Goods which are held for sale or lease are classified as inventory. § 9-109 (4), U. C. C. The Comment to section 9-109, U. C. C., states that the classifications are mutually exclusive and that the principal test to determine whether goods are inventory is whether they are held for immediate or ultimate sale. In borderline cases the principal use to which the property is put should be considered determinative.

As to the cattle which were sold on February 1, 1969, and May 17, 1969, there is no evidence as to their origin. In the absence of any evidence to show affirmatively that these cattle were not a part of the farming and ranching operation of Faden the trial court could have concluded that they were farm products.

As to the cattle which were sold on December 20,

1969, January 17, 1970, February 21, 1970, and March 28, 1970, the evidence shows affirmatively and without dispute that they were purchased in Torrington, Wyoming, 1 or 2 days before they were shipped to Gering, Nebraska, for sale. These cattle were goods held for immediate sale and there is nothing to indicate they had any connection whatsoever with Faden's farming and ranching operation in Banner County. Under the facts in this case these cattle were inventory as a matter of law.

It is clear from the terms of the security agreement that the plaintiff and Faden intended to create a security interest in livestock used or bought primarily for farming operations and not business operations. The bank may not have been aware of Faden's activities as a cattle trader but the record establishes that the transactions involved in this case were not isolated instances.

First State Bank v. Maxfield, 485 F. 2d 71, decided by the United States Court of Appeals, 10th Circuit, involved a very similar factual situation. That case involved the same debtor, the same bank, the same security agreement, but a different livestock auctioneer and a different group of cattle.

The Maxfield case involved four transactions in which Faden had sold cattle through the Torrington Livestock Commission Company at Torrington, Wyoming. In one of the transactions Faden had purchased 79 head of cattle in Scotts Bluff County, Nebraska, and had sold them that same day in Torrington. In another transaction Faden had purchased cattle from a different commission company at Torrington and had then sold the same cattle on the following day through the Torrington Livestock Commission Company.

The federal court held the security agreement was not effective as to the cattle in question because they were sold pursuant to Faden's activity as a dealer. The court said: "But on its face the security agree-

ment provided that the debtor granted a security interest in livestock for farming operations rather than for 'personal, family or household purposes,' or for 'business purposes.' Thus, the security agreement evidences the intent of the parties to create a security interest in the livestock used in farming operations as opposed to 'inventory.' See § 9-109. It is obvious that the Bank wished to take advantage of § 9-307 which provides that a buyer in the ordinary course of business takes free of a security interest created by the seller except where purchasing farm products from a person engaged in farming operations.

"Here the Bank officer testified that the Bank believed that the purchased cattle in each instance were to be transferred to Faden's ranch for fattening. Thus, it was anticipated that the cattle pledged would become farm products. It becomes clear therefore that the cattle in controversy would not come within this category; these were not subject to the security agreement."

The evidence in this case does not support the finding of the trial court that the plaintiff had a security interest in all the livestock owned by Faden and involved in this action. The judgment must, therefore, be reversed and the cause remanded to the District Court for further proceedings.

With respect to the cross-petition of National and its surety, the trial court made no finding other than that the cross-petition should be denied.

At the hearing on the cross-petition it was stipulated that all evidence which had been received in the trial on the plaintiff's petition would be considered as admitted for the purpose of the trial on the cross-petition. In addition thereto, a copy of the agreement between Producers and National and an affidavit as to the reasonable value of the services of counsel for National and its surety were received in evidence.

Under the facts of this case it is clear that as to Producers, National was a surety obligated to respond in the event Producers failed to pay when due to the person or persons entitled thereto the gross amount, less lawful charges, for all livestock sold by Producers. Firemen's Insurance Company was in turn a surety for National on its obligation.

National and its surety rely upon a provision in the regulations issued under the federal act which requires market agencies to account to consignors, shippers, or other interested persons "of whom they have knowledge." 9 C. F. R., § 201.41. The trial court found that Producers had no actual knowledge of any security interest of the plaintiff but did have constructive notice of the financing statement and security interest. The cases which have considered this question appear to hold that constructive notice is sufficient. See, United States v. Sommerville, 211 F. Supp. 843; United States v. Pirnie, 339 F. Supp. 702, affirmed 472 F. 2d 712; Oss v. Hartford Acc. & Ind. Co., 130 Neb. 311, 264 N. W. 897.

As sureties for Producers, National and Firemen's Insurance Company were entitled to a declaration of their right to indemnity from Producers in the event of payment to the plaintiff. The judgment of the District Court dismissing the cross-petition must be reversed and the cause remanded for further proceedings.

The judgment of the District Court on the petition of the plaintiff and on the cross-petition of the defendants is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CLARK BILT, INC., APPELLEE, V. WELLS DAIRY COMPANY, APPELLANT.

261 N. W. 2d 772

Filed February 1, 1978. No. 41282.

1. **Negligence: Evidence.** It is the rule in Nebraska that the violation of a safety regulation, established by statute or ordinance, is not negligence as a matter of law, but is evidence of negligence which may be considered in connection with all the other evidence in the case in deciding that issue. Similarly, the violation of a statute is not negligence per se, but only evidence of negligence.
2. **Trial: Evidence: Verdicts.** In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the party against whom the motion is directed. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference which may be drawn therefrom.
3. **Motor Vehicles: Highways: Negligence.** A driver having the right-of-way may not, on that account, proceed in disregard of the surrounding circumstances and potential dangers, and is not thereby relieved from the duty of exercising ordinary care to avoid accidents. Although a driver may have the right-of-way, if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way.
4. _____: _____: _____. Where two vehicles, traveling in opposite directions, approach a bridge on a public highway, it is the duty of each driver to keep on the right of the center if the bridge is a safe, two-way drive. In approaching a bridge too narrow to permit the vehicles to pass each other, however, a driver should exercise due care to avoid being on the bridge simultaneously with the other vehicle.
5. **Trial: Instructions.** Error cannot be predicated on a failure to instruct the jury on some particular aspect of the case unless a proper instruction has been requested by the party complaining.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed.

Robert E. Otte of Deutsch, Jewell, Otte, Gatz, Collins & Domina, for appellant.

Magnuson, Magnuson & Peetz, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BRODKEY, J.

Wells Dairy Company, defendant and appellant herein, appeals from a jury verdict and judgment in favor of Clark Bilt, Inc., plaintiff and appellee herein, in a negligence action arising out of a motor vehicle accident which occurred on September 26, 1974, in Holt County, Nebraska. The plaintiff was the owner of a modular home which was being transported by truck to an installation site in northeast Nebraska. Defendant's ice cream truck collided head-on with a portion of the modular home which was extending over the centerline of the roadway when plaintiff's truck was crossing a bridge on U. S. Highway No. 275 near Ewing, Nebraska. The plaintiff alleged that the accident was caused by the negligence of the defendant for the reason that defendant's driver failed to keep a proper lookout, to apply his brakes, to yield the right-of-way to plaintiff's vehicle, and to heed the warnings given by an escort car, which preceded plaintiff's truck to warn oncoming traffic of a "wide-load."

Defendant denied plaintiff's allegations of negligence, and filed a cross-petition in which it was alleged that plaintiff's driver was negligent in failing to keep a proper lookout, stop, yield the right-of-way to defendant's vehicle, and properly warn oncoming traffic of a "wide-load." Defendant also alleged that plaintiff's driver was driving across the centerline, and was driving upon a highway for which he had no permit to transport a "wide-load." The issues of negligence, as raised by the pleadings, were submitted to the jury, which returned a verdict in favor of the plaintiff. Defendant has appealed to this court, contending that the trial court erred in overruling its motions to direct a verdict in its favor and to dismiss plaintiff's petition; in submitting to the jury the issue of whether the defendant was negligent for failing to yield the right-of-way to the plaintiff; and in failing to adequately instruct the

jury with respect to the statutory definition of the term "right-of-way." We affirm the judgment of the District Court.

The accident in question occurred on the Cash Creek Bridge on U. S. Highway No. 275 approximately 2½ miles east of Ewing. The bridge is 120 feet long and 24 feet wide, with a road surface width of approximately 22½ feet. Plaintiff's modular home, which was 14 feet wide, was being transported on a semitruck driven by Jack Wyckoff. The truck was equipped with "wide-load" signs on both the front and back. It was preceded by an escort car which had a flashing, amber dome light, a wide-load sign on the roof, and red flags on all four fenders. The escort car went across the bridge and slowed down to warn oncoming traffic. As Wyckoff approached the bridge from the east, he reduced his speed to approximately 15 to 20 miles per hour, and observed the driver of the escort vehicle waving a flag out his window to warn oncoming traffic as Wyckoff's truck entered the east end of the bridge. Wyckoff acknowledged that about 2½ to 3 feet of the modular home were over the centerline of the roadway as he crossed the bridge, even though he attempted to stay as close as possible to the right side of the bridge. It is undisputed, given the dimensions of the bridge and the modular home, that Wyckoff's truck could not cross the bridge without the home protruding over the centerline of the roadway. Wyckoff observed the defendant's vehicle, approaching from the opposite direction, by the escort car when Wyckoff entered the bridge at its east end. He testified that the defendant's vehicle proceeded onto the bridge and struck the modular home when Wyckoff's truck was only 2 feet from the west end of the bridge.

Defendant's driver, Richard Jeager, stated that he observed the escort car and plaintiff's truck when he was a mile from the bridge. Jaeger was traveling

50 miles per hour, and slowed down to 40 to 45 miles per hour as he approached the escort car. He stated that plaintiff's truck was still on the other side of the bridge as he went past the escort car, and that Wyckoff came onto the bridge at the same time Jaeger did. Jaeger acknowledged that he did not reduce his speed after passing the escort car, and continued to travel 40 miles per hour until he struck the modular home. Jaeger testified that he remained to the right as far as possible at all times. A state patrolman testified he questioned Jaeger after the accident, and that Jaeger said he "had apparently underestimated the distance of the (plaintiff's) vehicle, and thought that he could make it across the bridge."

Finally, plaintiff's permit to transport a wide-load over Nebraska highways was admitted in evidence. U. S. Highway No. 275 was not listed on the permit as one of the highways over which plaintiff had requested authority to travel. There was not, however, any specific evidence indicating that any violation of the rules and regulations of the Department of Roads pertaining to permits for overdimensional loads was the proximate cause of the accident.

Defendant first contends that it was entitled to a directed verdict because plaintiff's modular home was extending over the centerline of the roadway at the time of the accident, in violation of section 39-620, R. R. S. 1943; and because plaintiff's driver was on a highway over which his permit to transport a wide-load did not authorize him to travel, in violation of section 39-6,177, R. R. S. 1943, and rules and regulations of the Department of Roads. The thrust of defendant's argument is that its driver had the right to proceed on his side of the road, and that plaintiff's driver was negligent as a matter of law because the modular home protruded approximately 2½ to 3 feet over the centerline of the roadway. In a related argument, defendant contends that it was er-

ror for the trial court to submit to the jury, plaintiff's claim that defendant's driver was negligent in failing to yield the right-of-way to plaintiff's vehicle when it was crossing the bridge.

It is the rule in Nebraska that the violation of a safety regulation, established by statute or ordinance, is not negligence as a matter of law, but is evidence of negligence which may be considered in connection with all the other evidence in the case in deciding that issue. Similarly, the violation of a statute is not negligence per se, but only evidence of negligence. See Krehnke v. Farmers Union Co-op. Assn., 199 Neb. 632, 260 N. W. 2d 601 (1977). The jury was so instructed in the present case. Therefore, violation of a statute or regulation by plaintiff's driver, standing alone, is not sufficient to sustain a directed verdict in favor of the defendant. This court must look at the evidence in its entirety to determine whether defendant's motion for a directed verdict should have been sustained. In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the party against whom the motion is directed. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference which may be drawn therefrom. Treffer v. Seevers, 195 Neb. 114, 237 N. W. 2d 114 (1975).

Section 39-620, R. R. S. 1943, provides that upon all roadways of sufficient width, a vehicle shall be driven upon the right half of the roadway. Section 39-621, R. R. S. 1943, provides that passing vehicles proceeding in opposite directions shall each keep to the right side of the roadway, passing left to left. The bridge, in the present case, was of sufficient width to permit normal sized vehicles to pass each other, each on the right side of the road. Under ordinary circumstances, therefore, defendant is correct in stating that its driver had the right to proceed on his side of the road without interference

from other vehicles traveling in the opposite direction.

A driver of a motor vehicle, however, has the duty to keep a proper lookout and watch where he is driving, even though he has the right-of-way. Hayes v. Anderson Concrete Co., Inc., 186 Neb. 771, 186 N. W. 2d 477 (1971). Although a driver may have the right-of-way, if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way. Brugh v. Peterson, 183 Neb. 190, 159 N. W. 2d 321 (1968); Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571 (1957). One having the right-of-way may not, on that account, proceed in disregard of the surrounding circumstances and potential dangers. One having a right-of-way is not thereby relieved from the duty of exercising ordinary care to avoid accidents. Laux v. Robinson, 195 Neb. 601, 239 N. W. 2d 786 (1976); Malcom v. Dox, 169 Neb. 539, 100 N. W. 2d 538 (1960). The jury was advised of these rules of law in the trial court's instructions.

In the present case, we believe the facts were such that a jury question was raised concerning whether defendant's driver exercised ordinary care to prevent an accident by yielding the right-of-way, even though he remained on his side of the road and plaintiff's modular home protruded on defendant's side of the road. It is the general rule that where two vehicles, traveling in opposite directions, approach a bridge on a public highway, it is the duty of each driver to keep on the right of the center if the bridge is a safe, two-way drive. In approaching a bridge too narrow to permit the vehicles to pass each other, however, a driver should exercise due care to avoid being on the bridge simultaneously with the other vehicle. See Chana v. Mannlein, 141 Neb. 312, 3 N. W. 2d 572 (1942). See, also, Pospichal v. Wiley, 163

Neb. 236, 79 N. W. 2d 275 (1956). The evidence at trial indicated that plaintiff's modular home extended over the centerline of the roadway by necessity because plaintiff's driver could not cross the bridge unless he moved his truck slightly to the left to avoid colliding with the right side of the bridge. There was evidence from which the jury could find that plaintiff's truck entered the bridge first, and that it was almost to the point of leaving the bridge at the time defendant's driver entered the bridge and struck the modular home. Defendant's driver admitted seeing both the escort car and plaintiff's truck, yet did not reduce his speed after going by the escort car. He knew he was approaching a vehicle transporting a wide-load over a bridge, and told a law enforcement officer that he had "underestimated" the distance of plaintiff's vehicle and thought he could make it across the bridge.

Under the particular facts of this case, we conclude that it was proper for the trial court to submit to the jury the issue of whether defendant's driver acted as an ordinarily careful and prudent person in proceeding onto the bridge and in failing to yield the right-of-way to plaintiff's truck, despite his knowledge of the warnings and the circumstances in general. Therefore, it was not error for the trial court to overrule defendant's motion for a directed verdict and motion to dismiss plaintiff's petition, nor to submit to the jury plaintiff's claim that defendant's driver was negligent in failing to yield the right-of-way to plaintiff's driver.

Defendant also contends that the trial court erred in failing to advise the jury of the statutory definition of the term "right-of-way." Section 39-602 (80), R. R. S. 1943, defines that term as follows: "Right-of-way shall mean the right of one vehicle or pedestrian to proceed in a lawful manner in preference to another vehicle or pedestrian approaching under such circumstances of direction, speed, and prox-

imity as to give rise to danger of collision unless one grants precedence to the other." In Johnson v. Griepenstroh, 150 Neb. 126, 33 N. W. 2d 549 (1948), this court held that the term "right-of-way" required no definition in instructions to a jury because it was an expression of common usage, generally understood by everyone of ordinary intelligence. That case, however, was decided prior to the enactment of section 39-602 (80), R. R. S. 1943.

Although it would have been preferable for the trial court to instruct the jury with respect to the statutory definition of "right-of-way," we conclude that its failure to do so in the present case was not reversible error. The defendant did not request the trial court to so instruct the jury, nor did it object to any instruction in which the term "right-of-way" was used on the ground that the term needed clarification. Error cannot be predicated on a failure to instruct on some particular aspect of the case unless a proper instruction has been requested by the party complaining. See Krehnke v. Farmers Union Co-op. Assn., *supra*. Furthermore, it would not appear that the failure to define the term in the present case generated any confusion. We find no reversible error.

We have examined the contentions of the defendant and find them to be without merit. Therefore, the judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., concurs in the result only.

STATE OF NEBRASKA, APPELLEE, V. STEVEN R. STROUD, APPELLANT.

261 N. W. 2d 777

Filed February 1, 1978. No. 41444.

1. **Criminal Law: Probation and Parole: Notice.** Where an individual signs a document which outlines his conditions of parole and

which contains a clause stating that violation of the conditions is cause for parole revocation, he is held to have notice of such conditions.

2. **Criminal Law: Probation and Parole: Presentence Reports.** Whether successive presentence investigations are necessary, before the revocation of an order of probation is entered, rests in the sound discretion of the sentencing judge.
3. **Criminal Law: Sentences.** Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Affirmed.

Joseph N. Bixby of Gewacke & Bixby, for appellant.

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. THOMAS, J.

The defendant pled guilty to a charge of statutory rape under former section 28-408, R. R. S. 1943. Statutory rape is now defined as first degree sexual assault under section 28-408.03, R. R. S. 1943. The defendant was placed on probation for a term of 3 years on January 9, 1976. On February 14, 1977, the defendant was charged in the District Court for Thayer County, Nebraska, with violation of the terms of his probation. Hearing was held there on the 29th day of April 1977. The court, upon finding defendant had failed to file written, monthly reports, as ordered by the terms of his probation, ordered the defendant's probation revoked. After affording the defendant an opportunity to present evidence with respect to the sentencing, the court sentenced the defendant to a term of 18 months to 3 years in the Nebraska Penal and Correctional Complex. The defendant appeals.

The defendant assigns as error: (1) Failure by the State to show sufficient evidence that the defendant did knowingly and, in fact, violate his probation by failing to file monthly reports; (2) failure of the court to order the probation officer to prepare a new presentence investigation report before sentencing the defendant; and (3) that the sentence was excessive. We will discuss the defendant's assignments in order.

The probation order which was signed by the defendant was introduced in evidence. No. 3 of the order provides: "That he shall report to the probation officer as directed by the court or the probation officer. He is hereby ordered to make written monthly reports on the first day of each month and to present these reports in person to the Chief Adult Probation Officer between the 1st and 10th day of each month." The evidence indicates that the defendant was first under the supervision of the probation officer assigned to the District Court for Thayer County, Nebraska. At the request of the defendant, the probation was reassigned to Lincoln, Lancaster County, Nebraska, on May 3, 1976. The witness Earl Houck, a deputy adult probation officer, testified that he took supervision of the defendant on June 6, 1976, and maintained that supervision until November 1, 1976. During that period of time Houck received only two written reports from the defendant. The defendant changed his address twice without notice and did not inform the probation officer of his occupation. In contacts the probation officer had with the defendant, the defendant was advised he was in arrears in filing his reports; and that it was necessary he report his correct address.

Roberta Dixon, a deputy probation officer and witness, of Lincoln, Nebraska, testified she took over the supervision of the defendant in early November 1976. She immediately wrote a letter to the defendant at the last address shown in his file and the letter

was returned undelivered. She contacted the defendant's brother and sent a letter to the defendant at that address. The letter was returned undelivered. She had received no written reports at the time she met the defendant on February 11, 1976. She informed the defendant on February 11, 1976, she had filed the noted violation of probation and the formal violation of probation was filed on February 14, 1976. The record shows that after February 14, 1976, the defendant had resumed working in Lincoln, Nebraska; that he had made monthly reports as required; and was living with his wife.

The defendant introduced no evidence, but argues on appeal that since the record does not show the court went over the report with him, that the defendant could not be shown to be in deliberate violation of the order of probation. As stated before, the order of probation was introduced into evidence and bears the signature of the defendant. Above the signature is the following caption: "Received a copy of the above order this 9th day of January, 1976, and I understand that the violation by me of any of the above conditions is cause for revocation of probation and sentence to confinement; and I do hereby waive extradition to the State of Nebraska in the event a charge of violation of probation is filed herein if at the time of my apprehension I am in another state." The defendant's contention is frivolous and does not merit further discussion.

This court said in State v. Snider, 197 Neb. 317, 248 N. W. 2d 342: "We hold that whether successive presentence investigations are necessary before the revocation of an order of probation is entered rests in the sound discretion of the sentencing judge." We do not find any abuse of discretion in the failure to order a further presentence investigation. The facts of the case were presented and the violation was apparent.

Defendant's final assignment of error is that the

sentence of the trial court was excessive. We disagree. At the time the offense was committed and the defendant was placed on probation, the offense for which the defendant stood charged could have been punishable by a term of from 3 years to 20 years in the Nebraska Penal and Correctional Complex. After the passage of section 28-408.03, R. R. S. 1943, the penalty was changed from not less than 1 year nor more than 25 years. The sentence of from 18 months to 3 years is well within the statutory perimeters and will not be disturbed on appeal absent an abuse of discretion. See State v. Gundlach, 192 Neb. 692, 224 N. W. 2d 167 (1974).

The offense for which the defendant stood charged was a serious one. The defendant was fully and completely advised that his violation of the terms of probation could likely result in this sentence. The defendant, in effect, argues to this court that the continuation of probation for the offense of first degree sexual assault is a matter of right. It is not.

The judgment and sentence of the trial court are correct in all respects and the same are affirmed.

AFFIRMED.

OMAHA PAPER STOCK COMPANY, APPELLEE AND CROSS-APPELLANT, V. CALIFORNIA UNION INSURANCE COMPANY, APPELLANT AND CROSS-APPELLEE.

262 N. W. 2d 175

Filed February 8, 1978. No. 41109.

1. **Insurance: Contracts: Fraud.** A misrepresentation by an insured in a proof of loss or deposition may void an insurance policy only if the misrepresentation is material.
2. **Contracts: Fraud: Damages.** In determining whether a misrepresentation is material, reliance and resulting injury are essential elements to be considered.
3. **Contracts: Fraud.** When one in possession of any right secured by contract does something inconsistent with the existence of his right or with his intention to rely upon it, he is precluded from afterwards claiming anything by reason of it.

4. **Insurance: Fraud: Trial: Evidence.** Existence of fraud or false swearing with respect to a fire loss represented to an insurer to have been sustained is for the trier of facts.
5. **Trial: Judgments.** The judgment of a trial court in an action at law where a jury has been waived has the effect of a jury verdict and will not be set aside on appeal unless clearly wrong.
6. **Trial: Evidence: Appeal and Error.** It is not within the province of the Supreme Court to resolve conflicts in or to weigh evidence and it will be presumed that controverted facts were decided by the trial court in favor of the successful party.
7. **Trial: Evidence: Damages.** When it has been proven that damage has resulted and the only uncertainty is the exact amount, it is sufficient if there is evidence from which the amount of the damages can be ascertained with reasonable certainty.
8. **Trial: Evidence: Damages: Witnesses.** The rule concerning ascertainment of damages with reasonable certainty is not peculiar to cases against insurance companies. In all cases the law requires, not mathematical certainty, but merely the best evidence obtainable under the condition existing, and some reliance must be placed upon the integrity and good faith of witnesses and the discretion of the jury.
9. **Trial: Insurance: Attorney's Fees: Appeal and Error.** In an action where a plaintiff prevails against an insurance company, the court shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings.
10. **Trial: Attorney's Fees: Appeal and Error.** The amount of an award of an attorney's fee is largely within the discretion of the trial court. While trial courts and appellate courts equally are regarded as experts on the value of legal services, a trial court ordinarily has a better opportunity for practically appraising the situation, and an appellate court will interfere only to correct a patent injustice where the allowance is clearly excessive, or insufficient.
11. **Estoppel: Words and Phrases.** The essential elements of equitable estoppel are: As to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position

or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

12. **Estoppel.** Equitable estoppel operates where a party is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith, relied thereon.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

William J. Brennan, Jr., and C. L. Robinson of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellant.

Abrahams, Kaslow & Cassman, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ.

WHITE, C. THOMAS, J.

Omaha Paper Stock Company, plaintiff and appellee herein, initiated this action to recover on an insurance contract issued by the defendant insurer. Claiming an actual loss of $347,525, the plaintiff attempted to recover the $250,000 policy limit. Trial by jury was waived. The District Court entered judgment in favor of plaintiff in the amount of $121,806.25. The sum of $102,000 of this amount was to cover the actual cash value of the inventory lost, while the remaining $19,806.25 was the cost of removal of damaged inventory. Plaintiff was also awarded attorney's fees in the amount of $21,000. Defendant appeals to this court contending that plaintiff is not entitled to recover under the policy due to plaintiff's fraudulent misrepresentations both in the proof of loss submitted to the defendant and in false testimony during discovery. Defendant also contends the trial court erred in its determination of the amount of damages and its awarding of attorney's fees. Plaintiff cross-appeals contending the judgment should have been the maximum amount allowable under the policy, $250,000.

Plaintiff operates two plants in Omaha where reusable wastepaper is processed and marketed. Plaintiff has been engaged in this business for over 55 years. Paper is collected by plaintiff or brought to the plant for processing, which processing consists of sorting the paper according to various grades and then running it through a machine which assembles it into baled form. The baled paper is then sold to mills.

Following an all-time high in demand and price in 1973 and early 1974, the wastepaper market began a sharp decline in 1974. As the market price declined, the number of processors and brokers competing for the paper declined, resulting in the availability of greater volumes of wastepaper at reduced prices. Plaintiff, believing the depressed market conditions were temporary, began to stockpile large quantities of baled paper in inventory outside its plant, known as the Roundhouse. To process the increased volume of incoming paper, the plaintiff employed an additional shift of employees from October 1974 to January 1975.

On February 13, 1975, defendant issued its fire insurance policy insuring the plaintiff's outside inventory of baled paper against loss in the amount of $250,000. A fire occurred at the Roundhouse plant on April 20, 1975, which fire substantially destroyed the company's outside inventory. Following the fire, both the plaintiff and defendant hired public adjusters to evaluate the loss. Removal of the damaged paper bales that remained was necessary because they continued to smolder for weeks and were a potential fire hazard. Defendant did not advise the plaintiff on what steps should be taken to dispose of these bales despite plaintiff's request for assistance in this matter. On June 17, 1975, plaintiff notified the defendant that it was commencing to dispose of the paper. The burial of the paper was completed on July 30, 1975.

The plaintiff submitted a timely proof of loss to the defendant on June 18, 1975. At that time, the total of the damages submitted was $394,725. The actual cash value of the property was stated to be $347,525. Plaintiff's itemization of the property included the four grades of paper destroyed, the total tons of each grade, and the cost per ton. The remainder of the damages was to be the cost of removing the paper. The defendant rejected this proof of loss on the general ground that loss had not been demonstrated according to the policy requirements.

Plaintiff submitted a supplemental proof of loss on July 15, 1975. The total loss figure was reduced because of the decision to bury the paper rather than remove it; however, the value of the property remained the same. The plaintiff also included general statements as to ownership and the nonexistence of any other insurance contracts covering the same property. On July 21, 1975, the defendant rejected this proof of loss stating that: "The insured has not complied with *Requirements in the Event of Loss,* lines 84 through 116 of the policy * * *." Lines 84 through 116 list a broad range of requirements concerning notice of loss, itemizations of value, ownership, and discovery by the defendant. The defendant did not mention a particular requirement in its rejection.

Defendant's principal contention is that the proofs of loss greatly exaggerated the quantity and quality of inventory and that the plaintiff made false statements as to plaintiff's method of record keeping. A ledger book containing a weekly compilation of plaintiff's inventory formed the basis for the tonnage figures contained in the proofs of loss. As such, the book was plaintiff's principal record to support its loss. Other company records could not establish the quantity of paper that existed as inventory since continuing decline of market conditions enabled the plaintiff to obtain paper from its suppliers without

payment. Correspondingly, no invoices were prepared for such transactions and no record entries were made. At trial, the ledger book was received as evidence for the limited purpose of showing what had been presented to defendant.

Testimony surrounding the method of attaining the figures found in the ledger book, and the time of their transcription, form the basis of defendant's argument of material misrepresentation. Robert Epstein, president of plaintiff company, was asked about the production records kept by the plaintiff. In a sworn statement taken on August 19, 1975, he responded that: "The manager, during the time that this inventory was accumulated from October 1 through April 20th, kept track, bale by bale, of what he stored out in the yard. At the end of the week, this figure was handed into the office." Epstein was then asked by his attorney to whom the figure was handed. He responded the figure was handed: "To Wilma Pedersen, and was written in a journal on a weekly basis, in tons, of the net inventory that was kept in the yard. The balance of the production would be sales." Wilma Pedersen is plaintiff's bookkeeper. Essentially, the same response was given in the answers to interrogatories filed on February 26, 1976.

Plaintiff then filed a supplemental answer to the interrogatories which stated the baler operator kept a record of the number of bales processed daily on a record form located adjacent to the baler. Each week the sheet was given to the plant manager, who then computed the actual number of bales placed in inventory by subtracting the bales shipped and adding bales delivered in baled form and placed in inventory. The plant manager then conveyed this information to Epstein, usually on a weekly basis. Epstein, in turn, listed the number and grade of bales on a yellow pad in his office. It was only after the fire that the yellow pad notes were handed to

Wilma Pedersen who then entered the figures by week in the ledger book at issue.

At trial, Robert Conant, plaintiff's public adjuster, testified that he was responsible for the existence of the ledger book. He identified the book as a "recap of the notes that Mr. Epstein or his office had from calling in. In other words, I advised Mr. Epstein to recap it in a presentable form so that I could submit it to Mr. Morgan" (defendant's adjuster). Mr. Conant said he knew from the very beginning that the ledger book was prepared all at one time and had informed Morgan, defendant's adjuster, of the fact.

Plaintiff contends that the supplemental answer to interrogatories was made to clarify an ambiguity in the initial testimony concerning the ledger book. We cannot subscribe to plaintiff's argument. The initial statements of Epstein in the depositions and interrogatories convey the inescapable impression that entries in the ledger book were made each week by Wilma Pedersen before the fire. When contrasted to the later admission of Epstein, his initial statements are clearly a misrepresentation of fact.

A clause in the insurance policy issued by the defendant to plaintiff reads: "This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto." The insurance policy, as well as the statements of Epstein in the depositions and interrogatories, were in evidence. The defendant contends that it is probable the trial court found the statements were misrepresentations, but did not hold the policy to be voided by such misrepresentations because it failed to correctly apply the law. We disagree with the defendant. While we certainly do not condone the action of the plaintiff's agent, we cannot find, under the law as applied to

the facts of this case, that such conduct was so significant in nature as to void plaintiff's recovery.

Firemen's Ins. Co. of Newark v. Smith, 180 F. 2d 371, was an action to recover on a fire insurance policy. The insurance company contended that the policy was void because of the false swearing by the insured in the proof of loss and in depositions. The court held that following such an assertion the issue becomes "whether the alleged false swearing by the insured related to any material fact or circumstance concerning the insurance or the subject thereof." The court held that the insured's repeated statements that the destroyed premises were used only as a residence and restaurant, when, in fact, they were also used for public drinking and gambling, were immaterial to the insurer's risk or the loss.

In Nebraska, reliance and resulting injury are essential elements of materiality. This court held in Havlik v. St. Paul Fire & Marine Ins. Co., 87 Neb. 427, 127 N. W. 248: "Many authorities hold that false statements in the proof of loss will forfeit the policy, whether or not the company is in any way injured by such statement, but a contrary rule has been established in this state. Unless such false statements affect the risk they are not cause for declaring the policy void. Springfield Fire & Marine Ins. Co. v. Winn, 27 Neb. 649 (43 N. W. 401). It follows from this principle that it must appear that the defendant acted upon such false statements, or was in some manner prejudiced or affected by them."

While we are concerned here with a misrepresentation in a supporting record rather than in the proof of loss, the same standard applies. Defendant neither relied on nor was prejudiced by plaintiff's misrepresentations. The evidence shows defendant rejected both proofs of loss. There is no evidence that defendant was influenced in any way by the ledger book, whether it be an ongoing business record or not. The ledger book was introduced at trial only

for the limited purpose of showing what plaintiff presented to defendant.

Defendant's second assignment of error is related to the first in that it is alleged the trial court erred in failing to determine that the proofs of loss were knowingly false and fraudulent. The trial court could have found from the substantial amount of conflicting evidence that the figures in the proofs of loss were not false and fraudulent. The statements of Epstein which we have found to be misrepresentations are limited to the time and manner of compilation of the ledger book. These misrepresentations do not, in and of themselves, make the proofs of loss fraudulent misrepresentations as defendant contends. The central issue at trial was the determination of the amount and value of paper destroyed. The record does not show any singular piece of conclusive evidence on those issues. An examination of the record does not disclose that plaintiff submitted knowingly false figures in his proofs of loss.

What the record does show is that the attitude and attendant conduct of the defendant were not conducive to establishing conclusive evidence that the proofs of loss were fraudulent. The remains of the baled paper stayed at plaintiff's plant over 3 months. During this time the defendant made no attempt to examine the remains to possibly ascertain the amount of paper burned. The defendant contends it did not attempt to physically verify the inventory since such a task would be futile. However, one of defendant's expert witnesses, Donald Wandling, a mechanical engineer, testified that it would have been easier to compute total tonnage while the product was still on the ground. When one in possession of any right secured by contract does something inconsistent with the existence of his right or with his intention to rely upon it, he is precluded from afterwards claiming anything by reason of it. Jensen v. Palatine Ins. Co., 81 Neb. 523, 116 N. W. 286.

Defendant relies primarily on Home Ins. Co. of New York v. J. W. Winn & Co., 42 Neb. 331, 60 N. W. 575, and Homes Ins. Co. v. Hardin (Ky. App.), 528 S. W. 2d 723. In Home Ins. Co. of New York v. J. W. Winn & Co., *supra*, the insured admitted at trial that he knowingly and deliberately altered his records to show the substantially exaggerated inventory reflected in the proof of loss. In Home Ins. Co. v. Hardin, *supra*, the insured had moved to another home with most of his furnishings before a fire destroyed his former home. It was undisputed that the insured claimed on the proof of loss a number of items which had been moved before the fire. These cases are distinguishable from the present case. In each of these cases, the evidence before the court on appeal had clearly established that the proofs of loss were fraudulent.

In the present case we have a disputed question of fact as to quality and quantity. Existence of fraud or false swearing with respect to fire loss represented to insurer to have been sustained is for the trier of facts. See Joseph Supornick & Son, Inc. v. Imperial Assur. Co. of New York, 87 F. Supp. 232, affirmed 184 F. 2d 930. The judgment of a trial court in an action at law where a jury has been waived has the effect of a jury verdict and will not be set aside on appeal unless clearly wrong. See Mickelson & Mickelson Hay Contractors v. Christensen, 197 Neb. 34, 246 N. W. 2d 655. We cannot say under the facts and evidence that the trial judge was clearly wrong. Even if defendant proved the proofs of loss contained fraudulent misrepresentations, there would still remain the issue of reliance which we discussed earlier.

The third assignment is that the trial court erred in determining the amount of damages. The difficulty of ascertaining the value of the loss is readily apparent from the evidence. As has been noted, the quantity of paper on hand could not be determined

from company records. The plaintiff attempted to establish quantity by several other methods. The plant manager testified he took a physical inventory each month. Based upon his own observations, he testified there were approximately 17,000 tons of baled paper in outside storage on April 20, 1975. Of this amount he estimated one-half was corrugated; and news, doubleline, and mixed comprised one-sixth each of the remaining amount.

Sorensen Construction Company, the firm which buried the paper, kept a daily count of the number of bales buried. Using the figure 1,700 pounds for large bales (those baled by plaintiff) and 700 pounds for small bales (those baled by suppliers), it was estimated there had been 15,584 tons of paper. Plaintiff hired the engineering firm of Lamp, Rynearson & Associates, Inc., to survey the area where the paper had been stored. Using information supplied by plaintiff, the firm computed there were 15,568.28 tons of paper prior to the fire.

The defendant disputed the accuracy of the information supplied by plaintiff as well as maintaining the number of bales could not be determined with any accuracy. The mechanical engineer called by defendant testified that he estimated only 2,407.31 tons of paper could have been buried in the trenches as they were described and with a post-burial elevation of 4 feet. This witness also attempted to compute the potential output of plaintiff's baling machine. Assuming the baler operated at 75 percent efficiency on an 8-hour day, 5½ days per week, from October 1, 1974, to April 20, 1975, he estimated only 11,399.4 tons of product could have been produced. Plaintiff's plant manager testified the baler had a greater output and evidence was introduced that a second shift was employed until January 1975.

Richard Hanousek, who had 10 years experience as a scrap-paper dealer, testified for defendant. Basing his testimony on an examination of plaintiff's

sales records for a period of 7 months before and after October 1, 1974, he stated plaintiff could have only had 9,322 tons of product at the time of the fire. Plaintiff claims such a computation is inaccurate since it does not account for increased production after October 1, 1974.

Plaintiff and defendant both called certified public accountants. Defendant's accountant challenged the average bale weights based on his examination of several invoices. Plaintiff's accountant substantiated the weights.

Plaintiff's witness, Robert Mendelson, a paper broker and mill owner, testified that there always has been a market for wastepaper and there was one in April 1975. Paper mill market prices, F.O.B. dealer's plant, are quoted in the "Official Board Markets," "The Yellow Sheet." For the week ending April 26, 1975, the prices per ton in the Chicago or Midwest area were as follows:

Mixed	$ 5 - $ 10
News	18 - 25
Corrugated	15 - 20
Doubleline	22 - 30

Plaintiff also introduced evidence of its own sales during the months of March and April 1975.

Defendant alleges the paper had no value because of the depressed state of the market. Several letters were written by plaintiff to its suppliers in which it was stated there was no market for the paper and that plaintiff would not pay for any paper it collected. Also, one of defendant's expert witnesses, Richard Hanousek, stated that in his opinion an inventory of 16,000 tons of paper would have no market value.

There was sufficient evidence from which the trial court could conclude that plaintiff was entitled to compensation for a loss under the terms of the insurance policy. It is not within the province of the Supreme Court to resolve conflicts in or to weigh evi-

dence and it will be presumed that controverted facts were decided by the trial court in favor of the successful party. See Lewis v. Hiskey, 166 Neb. 402, 89 N. W. 2d 132. The finding of the trial court as to damages was within the range of evidence. Where it has been proven that damage has resulted and the only uncertainty is the exact amount, it is sufficient if there is evidence from which the amount of the damages can be ascertained with reasonable certainty. See Roberts Constr. Co. v. State, 172 Neb. 819, 111 N. W. 2d 767. The rule is not peculiar to cases against insurance companies. In all cases the law requires, not mathematical certainty, but merely the best evidence obtainable under the conditions existing, and some reliance must be placed upon the integrity and good faith of witnesses and the discretion of the jury. See Jensen v. Palatine Ins. Co., *supra*. We find no error in the trial court's determination as to the amount of recovery awarded.

Defendant's fourth assignment of error is directed to the trial court's awarding to plaintiff attorney's fees in the amount of $21,000. Under section 44-359, R. R. S. 1943, in an action where a plaintiff prevails against an insurance company: "* * * the court, * * * shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, * * *. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings; * * *." This litigation involved a substantial amount of time and work. The plaintiff's attorney substantiated his time through records showing the amount of hours spent on the case. We cannot say the amount awarded was unreasonable. The amount of an award of an attorney's fee is largely within the discretion of the trial court. While trial courts and appellate courts equally are regarded as experts on the value of legal services, a trial court ordinarily has a better opportunity for practically appraising the sit-

uation, and an appellate court will interfere only to correct a patent injustice, where the allowance is clearly excessive, or insufficient. Junker v. Junker, 188 Neb. 555, 198 N. W. 2d 189.

On cross-appeal, the plaintiff alleges that it is entitled to receive the $250,000 policy limit since the conduct of the defendant, in failing to inspect the damaged inventory, constitutes estoppel and the defendant is thereby foreclosed from challenging the quantity of inventory. Plaintiff bases his claim on the doctrine of equitable estoppel. The essential elements of equitable estoppel are: As to the party estopped, " * * * (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts." As to the other party, " * * * (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice." Pester v. American Family Mut. Ins. Co., 186 Neb. 793, 186 N. W. 2d 711.

In Pester, this court held that nonpayment of a periodic premium would not bar recovery by the insured in the absence of notice by the insurer that the premium was due. The evidence showed that the insurer had given such notice in the past, although it was not required to do so, and the insured had come to rely on such notices. Plaintiff also cites additional cases from this jurisdiction to support his proposition. In each of these cases the insurance

company notified the insured that it was rejecting its claim for a particular reason. When the matters came to trial, the insurance companies then asserted different grounds for their denials of recovery. This court held that the insurer is estopped from raising the issue at trial. See, From v. General American Life Ins. Co., 132 Neb. 731, 273 N. W. 36; Hamblin v. Equitable Life Assurance Society, 124 Neb. 841, 248 N. W. 397; Yates v. New England Mutual Life Ins. Co., 117 Neb. 265, 220 N. W. 285.

This court's application of the estoppel doctrine in the above cases was in situations clearly distinguishable from the present one. An affirmative act or actions constituting estoppel were involved in the above cases. Here, the defendant neither misled the plaintiff through a course of conduct conducive to reliance nor raised a differing reason for its denial of proof of loss at trial than in its initial contacts with insured. The defendant did not attribute to a particular reason its initial denial of proof of loss. We are concerned with the single event of defendant's failure to inspect the damaged inventory.

We have voiced earlier our disapproval of defendant's conduct. While we feel inspection may have facilitated adjustment of the claim and added weight to the evidence defendant presented in support of its contention of an exaggerated and fraudulent claim, we cannot say that it should constitute an estoppel to any challenge of plaintiff's claim. The evidence does not show that if the defendant had attempted to make calculations after inspecting the premises it would have established conclusive proof of quantity. It may have been helpful, but not decisive. Defendant's action affects only the strength of its argument as to the fraudulent claim and not the proof of the claim. There is also no evidence of reliance by the plaintiff on defendant's failure to act. Equitable estoppel operates where a party is held to a representation made or position assumed, where otherwise

inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has in good faith relied thereon. See May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448.

The judgment of the trial court is affirmed with $3,000 attorney's fees allowed to plaintiff on this appeal.

AFFIRMED.

MODERN SOUNDS & SYSTEMS, INC., A CORPORATION, ET AL., APPELLANTS, V. FEDERATED MUTUAL INSURANCE COMPANY, A CORPORATION, APPELLEE.

262 N. W. 2d 183

Filed February 8, 1978. No. 41178.

1. **Insurance: Contracts: Time.** An insurance policy should be interpreted in accordance with reasonable expectations of the insured at the time of the contract.
2. **Insurance: Contracts.** A contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally construed in favor of the insured.
3. _____: _____. In an insurance policy an exclusion is a provision which eliminates coverage where, were it not for the exclusion, coverage would have existed.
4. **Insurance: Contracts: Motor Vehicles: Words and Phrases.** In an automobile insurance policy providing coverage against theft, in which the term is not defined, the term "theft" will be construed broadly to include loss caused by any unlawful or wrongful taking of the insured vehicle with criminal intent.

Appeal from the District Court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded.

Wright & Simmons, for appellants.

Holtorf, Hansen, Kovarik & Nuttleman, Byron J. Brogan, and James W. Ellison, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

McCOWN, J.

The corporate plaintiff, Modern Sounds & Systems, Inc., and its president, Roy John Reid, brought this action to recover for the theft of an automobile owned by Reid and insured under an insurance policy issued by the defendant, Federated Mutual Insurance Company. The case was tried to the District Court sitting without a jury. The court found generally against the plaintiffs and in favor of the defendant and dismissed plaintiffs' petition.

There is no substantial dispute as to the facts in this case. The plaintiff Reid purchased a new 1975 Lincoln Continental automobile in the fall of 1974 in Scottsbluff, Nebraska. Approximately a year later Reid decided to sell the automobile. He believed the Denver area might be the best market for the automobile and arranged with Arthur Jay, an experienced automobile salesman in Denver, Colorado, and the father of one of Reid's employees, to advertise the automobile and show it to potential buyers. The automobile was driven to Colorado and delivered to Jay in September of 1975. The certificate of title remained in Nebraska.

In early October 1975, Jay advised Reid that a potential buyer, F. Jerrold McMillon, had offered $10,200 for the automobile, a price which was acceptable to Reid. On October 10, 1975, Reid went to his bank in Lyman, Nebraska, which held a lien on the title and arranged to have the lien discharged. Reid then signed the certificate of title in blank and mailed it to Jay. On October 14, 1975, Jay took the automobile and the title to McMillon's place of business, Discount-Rent-A-Mini-Car. Jay delivered the automobile to McMillon in exchange for a Discount-Rent-A-Mini-Car printed business check for $10,200 signed by McMillon. Jay then forwarded the check to Reid, who deposited the check in his bank in Lyman, Nebraska. Later the check was returned marked "Insufficient funds." After some telephone

conversations, the check was sent through once more and this time returned marked "Account closed." Reid was advised of the return by his bank on November 3, 1975. McMillon again assured Reid that he would make the check good, and on November 5, 1975, McMillon sent a second Discount-Rent-A-Mini-Car business check drawn on a different Denver bank in the sum of $10,200. That check was also deposited in Reid's bank in Lyman, Nebraska, and returned unpaid by the Denver bank for "Insufficient funds" on November 17, 1975. Neither check was ever paid.

On October 14, 1975, McMillon obtained the automobile and title in exchange for his check. Sometime between that date and October 20, 1975, McMillon delivered the car and the title to a Denver used car dealer. The title was the original Nebraska title signed by Reid in blank, and McMillon's name did not appear on it. On October 20, 1975, that used car dealer transferred the car and title to a second dealer, and on the same day the second dealer sold the car to a retail buyer, who applied for and obtained a Colorado certificate of title.

On January 2, 1976, Reid made claim against the defendant insurance company under the policy coverage for a loss caused by theft or larceny. The defendant denied coverage and this action followed. The District Court found in favor of the defendant and dismissed the plaintiffs' petition.

Two provisions of the insurance policy are relevant here. The policy provided that the defendant would pay for any loss "caused by theft or larceny." Neither of the two words is defined in the policy. The exclusion provisions of the policy provide that the insurance did not apply "(g) under the Comprehensive and Theft coverages, to loss or damage due to conversion, embezzlement or secretion by any person in possession of a covered automobile under

a bailment lease, conditional sale, purchase agreement, mortgage or other encumbrance."

The District Court found that the loss was not covered by the policy of insurance and that exclusion (g) specifically excluded the loss.

The critical issue on this appeal is whether the loss here was caused by a theft or larceny within the meaning of this insurance policy. Reid contends that the term "theft" in the insurance policy should be broadly defined to include any unlawful or wrongful appropriation of property. The defendant insurance company contends that the term "theft" should be restricted to its common law definition or interpreted to exclude a case in which the insured voluntarily parted with title and possession of the automobile, even though induced to do so by fraud, false pretenses, misrepresentation, or deception.

We examine the insurance policy in the light of two basic rules of interpretation. An insurance policy should be interpreted in accordance with reasonable expectations of the insured at the time of the contract. A contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally construed in favor of the insured. Neal v. St. Paul Fire & Marine Ins. Co., 197 Neb. 718, 250 N. W. 2d 648.

There is no definition of either theft or larceny in the policy itself, but a reading of the policy provisions makes it clear that the term "theft" is much broader in meaning than common law larceny. In Raff v. Farm Bureau Ins. Co., 181 Neb. 444, 149 N. W. 2d 52, this court said: "In popular usage, the word 'theft' is another name for 'larceny.' As a general rule, however, the term as used in an insurance policy is not necessarily synonymous with larceny, but may have a much broader and more inclusive meaning. It could cover pilferage, swindling,

embezzlement, conversion, and other unlawful appropriations as well as larceny."

The defendant obviously considered the term "theft" to be much broader than larceny because it specifically excluded from the theft coverage of the policy "loss or damage due to conversion, embezzlement or secretion by any person in possession of a covered automobile under a bailment lease, conditional sale, purchase agreement, mortgage or other encumbrance." In an insurance policy an exclusion is a provision which eliminates coverage where, were it not for the exclusion, coverage would have existed. See Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co., 195 Neb. 658, 240 N. W. 2d 28. The explicit exclusion of those enumerated acts, none of which would have been larceny at common law, indicates that the term "theft" was used in a broad sense. Except for cases where insurance policies specifically exclude coverage where there was a voluntary parting with title and possession, most courts have concluded in recent years that an insured who is fraudulently and wrongfully induced to accept a worthless check in exchange for his automobile has suffered a loss due to theft. See, Munchick v. Fidelity & Cas. Co. of New York, 2 Ohio 2d 303, 209 N. E. 2d 167; Rudolph v. Home Indemnity Co., 138 N. J. Super. 125, 350 A. 2d 285; Farm Bureau Mut. Ins. Co. v. Carr, 215 Kan. 591, 528 P. 2d 134.

This court has denied recovery for theft under automobile insurance policies which specifically excluded losses where the owner "voluntarily parted with title to or possession of any automobile" covered by the policy. Implicit in those holdings is the conclusion that but for the policy exclusion in those cases, the losses would have been covered under the theft provisions of the policies. Rolfsmeier v. Implement Dealers Mut. Ins. Co., 182 Neb. 150, 153 N. W. 2d 367; Boyd v. Travelers Fire Ins. Co., 147 Neb. 237, 22 N. W. 2d 700.

It should be noted also that the insurance policy involved here provided multiple coverages in separate sections. Under the general personal property section of the policy, which did not cover automobiles, the policy specifically excluded from theft coverage any loss caused by "voluntary parting with title or possession of any property by the insured or others to whom the property may be entrusted if induced to do so by any fraudulent scheme, trick, device, or false pretense." No such exclusion is contained in the policy section which provides automobile theft coverage. Instead, that section provides that none of the provisions of other parts of the policy should apply to the automobile coverage except specified clauses which have no application here.

While not directly applicable because it is not operative until July 1, 1978, it is relevant to note that the recently adopted Nebraska Criminal Code provides that conduct denominated "theft" in nine specific sections of the statutes constitutes a single offense embracing the separate offenses heretofore known as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like. See § 28-510, R. S. Supp., 1977.

The critical issue in this case concerns the intent of McMillon at the time he took the title and automobile in exchange for his check. Automobile theft insurance is uniformly viewed as furnishing protection only against losses arising from criminal takings of the insured vehicle and there is apparently no judicial dissent from that proposition. See Annotation, 48 A. L. R. 2d 8, § 9, p. 21. There can be no recovery under such a policy for a loss asserted to amount to a theft in the absence of proof of the existence of a criminal intent on the part of the taker. See, Annotation, 48 A. L. R. 2d 8; Nelson v. National Auto. Ins. Co., 113 Neb. 553, 204 N. W. 55.

Most courts have also taken the view that the fe-

lonious or criminal intent, proof of which is necessary to support a judgment for the insured under an automobile theft policy, must be shown to have been at the time of the taking. See, cases cited in Annotation, 48 A. L. R. 2d, § 10 p. 28; Nelson v. National Auto. Ins. Co., *supra*.

We hold that in an automobile insurance policy providing coverage against theft, in which the term is not defined, the term "theft" will be construed broadly to include a loss caused by any unlawful or wrongful taking of the insured vehicle with criminal intent.

The insurance company contends, and the District Court found, that exclusion (g) specifically excluded the loss here. That exclusion was: "This insurance does not apply: * * * (g) under the Comprehensive and Theft coverages, to loss or damage due to conversion, embezzlement or secretion by any person in possession of a covered automobile under a bailment lease, conditional sale, purchase agreement, mortgage or other encumbrance." That exclusion is clearly not applicable here. The transaction with McMillon was complete upon the contemporaneous exchange of his check for title and possession of the car. The exclusion clause is aimed at persons in possession under executory contracts and agreements in which two or more persons have concurrent legal interests in a car and not at a buyer in a completed sale. See, Farm Bureau Mut. Ins. Co. v. Carr, *supra*; Great American Ins. Co. v. Gusman, 80 Ga. App. 471, 56 S. E. 2d 319.

Since the trial court erroneously determined that exclusion clause (g) was applicable, the court did not consider or make any finding as to McMillon's criminal intent or lack of it at the time he took title and possession of the car in exchange for his check. The plaintiff must establish the existence of McMillon's criminal intent by a preponderance of the evidence only and not beyond a reasonable doubt. See

Annotation, 48 A. L. R. 2d, § 14, p. 51. The fact that the buyer of an automobile issues and delivers an insufficient funds check in payment of the purchase price does not of itself establish criminal intent in a case such as this. On the evidence in this case, however, the fact finder could reasonably have found either that there was, or that there was not, the requisite criminal intent at the time of the taking. That issue cannot be determined as a matter of law and the judgment must, therefore, be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. STEVE AUGER, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. JAMES UITTS, APPELLANT.

262 N. W. 2d 187

Filed February 8, 1978. Nos. 41229, 41230.

1. **Criminal Law: Evidence: Witnesses.** An in-court identification may properly be received in evidence when it is independent of and untainted by illegal pretrial identification procedures.
2. _____: _____: _____. A primary factor in determining whether an independent basis for an in-court identification exists is the opportunity afforded the witness to observe the defendant in circumstances free from taint.
3. **Criminal Law: Evidence.** In determining whether photographic identification procedures have been impermissibly suggestive, the question must be determined by an evaluation of all the surrounding circumstances.
4. **Criminal Law: Attorney and Client: Proof.** The person challenging competency of counsel has the burden of proof to establish counsel's incompetence.
5. **Attorney and Client.** Trial counsel's performance in a particular case is measured against that of a lawyer with ordinary training and skill in the criminal law in his area, as well as a showing of conscientious protection of the interests of his client.

Appeals from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Steve Auger and James Uitts, pro se.

Paul L. Douglas, Attorney General, and Judy K. Hoffman, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. J.

The defendants each were charged with three counts: (1) Robbery; (2) assault with intent to inflict great bodily harm; and (3) auto theft. Following a consolidated trial, both defendants were found guilty by a jury on counts I and II. The defendant Auger was found guilty on count III which was dismissed against the defendant Uitts. Motions for a new trial were overruled. The District Court sentenced each defendant to a term of not less than 5 years nor more than 10 years imprisonment on count I, not less than 5 nor more than 10 years imprisonment on count II, and the defendant Auger to 1 year imprisonment on count III. The sentences for counts I and II were to be served consecutively and Auger's sentence for count III was to be served concurrently with the sentences on counts I and II. The defendants appeal. We affirm the judgments and sentences of each defendant.

On appeal the defendants raise three contentions. They first argue that the District Court committed error when it failed to grant their motions to suppress the identification made by the victim. An in-court identification may properly be received in evidence when it is independent of and untainted by illegal pretrial identification procedures. State v. Goodloe, 197 Neb. 632, 250 N. W. 2d 606 (1977). A primary factor in determining whether an independent basis for an in-court identification exists is the opportunity afforded the witness to observe the defend-

ant in circumstances free from taint. State v. Pratt, 197 Neb. 382, 249 N. W. 2d 495 (1977). In determining whether photographic identification procedures have been impermissibly suggestive, the question must be determined by an evaluation of all the surrounding circumstances. State v. Huerta, 191 Neb. 280, 214 N. W. 2d 613 (1974).

In overruling the defendant's motions, the District Court concluded that the identification procedure used was not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification and that identification of the defendants was based upon evidence of independent origin. The victim testified that his in-court identification of the defendants as his assailants was based solely upon his observations of the defendants shortly before they assaulted him and was not from police photographs. The record shows the victim had ample opportunity to observe his assailants. This contention is without merit.

Defendants next contend that they were represented by incompetent counsel. The person challenging competency of counsel has the burden of proof to establish counsel's incompetence. State v. Kelly, 190 Neb. 41, 205 N. W. 2d 646 (1973). Trial counsel's performance in a particular case is measured against that of a lawyer with ordinary training and skill in the criminal law in his area, as well as a showing of conscientious protection of the interests of his client. State v. Bartlett, 199 Neb. 471, 259 N. W. 2d 917 (1977); State v. Leadinghorse, 192 Neb. 485, 222 N. W. 2d 573 (1974).

When asked if photographs shown to the victim had been taken the day the defendants were arrested, Omaha police officer Edward Haley responded: "A. Probably. It could have been a previous mug shot of them." The sole basis for defendants' claim of ineffective assistance of counsel is the

failure of their counsel to object to this statement by officer Haley.

In State v. Holloman, 197 Neb. 139, 248 N. W. 2d 15 (1976), we held that a similar reference in testimony by an Omaha police officer to mug shots of the defendant was, under the circumstances, harmless error. We held that the single, isolated reference to mug shots in that case was a mere inadvertent slip by the testifying officer and did not appear to be the result of deliberate action by the prosecution or of very careless procedures. In light of the total evidence any prejudice resulting to the defendant was found to be harmless error.

The failure of defendants' counsel to object to the single reference to mug shots by officer Haley does not rise to the standard enunciated in State v. Bartlett, *supra*, and State v. Leadinghorse, *supra*, so as to constitute ineffective assistance of counsel. This contention is without merit.

Lastly, defendants argue that the District Court erred in overruling their motions to dismiss or in the alternative for a directed verdict. It is not error to refuse to direct a verdict for a defendant in a criminal prosecution, at the close of the testimony for the State, where the evidence before the jury would warrant a conviction. Hornberger v. State, 47 Neb. 40, 66 N. W. 23 (1896). Defendants offered no evidence in their behalf. There was ample evidence, if believed by the jury, to sustain the defendants' convictions on all three counts. This contention is without merit.

The judgments and sentences of the District Court are correct and are affirmed.

AFFIRMED.

MARCOS GARCIA, APPELLANT, V. KEITH LEROY HOWARD, APPELLEE.

262 N. W. 2d 190

Filed February 8, 1978. No. 41334.

1. **Trial: Evidence: Verdicts.** The party against whom a motion for a directed verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Trial: Evidence: Negligence: Verdicts.** Ordinarily the questions of negligence, contributory negligence, and assumption of risk are for the jury, but where the facts adduced with respect to those questions are such that reasonable minds can draw but one conclusion therefrom, a directed verdict is proper.
3. **Negligence.** One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid obvious dangers is negligent or contributorily negligent.
4. **Negligence: Damages.** If a person, knowing and comprehending the danger, voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury therefrom.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Louis M. Leahy of Leahy, Washburn & Render, for appellant.

John R. Douglas and Terry J. Grennan of Cassem, Tierney, Adams & Gotch, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BRODKEY, J.

Marcos Garcia, plaintiff and appellant herein, filed this action against Keith Leroy Howard, defendant and appellee herein, alleging that the defendant had negligently backed his automobile into a parking space and struck the plaintiff, proximately causing injuries to the plaintiff. The plaintiff alleged that the defendant was negligent in failing to keep and maintain a proper lookout as he backed his vehicle; in failing to yield the right-of-way to the plaintiff; in failing to keep his vehicle under reason-

able and proper control; and in backing his vehicle at an excessive rate of speed.

In his answer, the defendant denied plaintiff's allegations of negligence, and set forth the defenses of contributory negligence and assumption of risk. At the close of plaintiff's evidence to a jury, defendant moved for a directed verdict or a dismissal of the action on the grounds that plaintiff's evidence failed to establish a cause of action against the defendant; that plaintiff had failed to prove by competent evidence that any negligence on the part of the defendant was the proximate cause of the accident; that plaintiff was guilty of negligence more than slight, when compared to the negligence of the defendant, as a matter of law; and that plaintiff had assumed the risk of injury to himself at the time and place of the accident. The trial court sustained defendant's motion on all the grounds stated above. Plaintiff has appealed to this court, contending that the trial court erred in sustaining defendant's motion. We affirm the judgment of the District Court.

Plaintiff's automobile was parked in a parallel parking space on the south side of Howard Street, between 18th and 19th Streets, in Omaha, Nebraska. Defendant's car was parked in the parking space directly in front of plaintiff's car, both vehicles facing to the east. Plaintiff had procured new license plates for his vehicle at the City-County Building, and had returned to his car and immediately began to affix the new plates to his car while it was still parked on Howard Street. Plaintiff had difficulty with the front license plate because of a defective bolt, and spent approximately 25 minutes trying to affix the front plate to his car.

Defendant returned to his automobile while the plaintiff was still attempting to put the front plate on his vehicle. Defendant testified he approached his car from the east and got in, unaware that the plaintiff was between the rear of his car and the front of

plaintiff's car. The defendant started his car and let the motor idle approximately 15 seconds. He stated that he then looked in his inside, rearview mirror, saw nothing behind his car other than plaintiff's car, and slowly backed his car in the parking space, looking in the mirror continuously. The defendant testified that he did not see the plaintiff in his mirror until the plaintiff's head suddenly rose above defendant's trunk lid, at which time defendant's vehicle had already struck the plaintiff and momentarily pinned him between the two cars. The defendant stated that his rear window is a little over 4 feet above the ground.

The plaintiff, age 44, is 5 feet, 6 inches tall. He stated he was bending or crouching in front of his car, facing his car, and working on the license plate, when he was struck on the left shoulder by the rear bumper of defendants car. Plaintiff stated he did not hear the defendant get in his car, start his car, idle the engine, or begin to back his car in the parking space. The plaintiff testified that he believed his head was higher than the trunk of defendant's car at the time he was struck, but also stated that he did not believe the defendant could see him. The plaintiff acknowledged that he was crouching down with his knees just inches off the ground at the time he was struck, and that he was not looking at or paying attention to defendant's car. Plaintiff stated he knew that a person normally must back his or her car to leave a parallel parking space, and that defendant's car was parked directly in front of his vehicle.

We review this case in conformity with the rule that the party against whom a motion for a directed verdict is directed 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. Waegli v. Caterpillar Tractor Co., 197 Neb. 824, 251 N. W. 2d 370 (1977).

Ordinarily the questions of negligence, contributory negligence, and assumption of risk are for the jury, but where the facts adduced with respect to those questions are such that reasonable minds can draw but one conclusion therefrom, a directed verdict is proper. See, McCready v. Al Eighmy Dodge, 197 Neb. 684, 250 N. W. 2d 640 (1977); Jeffrey v. Retzlaff, 187 Neb. 372, 191 N. W. 2d 436 (1971); Anthony v. Poppert, 186 Neb. 509, 184 N. W. 2d 648 (1971); Lyon v. Paulsen Building & Supply, Inc., 183 Neb. 365, 160 N. W. 2d 191 (1968).

Plaintiff contends there was a conflict in the evidence with respect to the issue of whether the defendant saw, or should have seen, the plaintiff before the accident occurred. He argues that a jury could have inferred from the evidence that the plaintiff was visible from defendant's position before the accident, but that the defendant either negligently failed to see the plaintiff, or backed into him after seeing him. Finally, plaintiff contends that the case should have been submitted to the jury because reasonable minds could disagree as to whether the defendant was negligent and whether plaintiff's negligence, if any, was slight and the negligence of the defendant was gross in comparison. See § 25-1151, R. R. S. 1943.

We agree with the plaintiff that a driver of an automobile must exercise ordinary care in backing his machine so as not to injure others. See Taulborg v. Andresen, 119 Neb. 273, 228 N. W. 528 (1930). It is doubtful that the evidence presented by plaintiff in this case was sufficient to permit a finding that defendant breached his duty of care in this respect. Even assuming, however, that there was evidence from which a jury could infer the defendant was negligent in some manner, we believe plaintiff's own evidence established, as a matter of law, that he was either guilty of contributory negligence more than slight when compared to any possible negligence on

the part of the defendant, or that plaintiff assumed the risk of injury by voluntarily placing himself in a position of known danger.

One who is capable of understanding and discretion, and who fails to exercise ordinary care and prudence to avoid obvious dangers, is negligent or contributorily negligent. Krehnke v. Farmers Union Co-Op. Assn., 199 Neb. 632, 260 N. W. 2d 601 (1977). "We have held many times that to constitute want of due care it is not required that a person should have anticipated the exact risk which occurred or that the peril was a deadly one; it is sufficient that he places himself in a position of a known danger where there was no need for him to be or that he knew or should have known that substantial injury was likely to result from his act." Jensen v. Hawkins Constr. Co., 193 Neb. 220, 226 N. W. 2d 346 (1975). See, also, Lorence v. Omaha P. P. Dist., 191 Neb. 68, 214 N. W. 2d 238 (1974).

With respect to the issue of assumption of risk, if one, knowing and comprehending the danger, voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom. See, Circo v. Sisson, 193 Neb. 704, 229 N. W. 2d 50 (1975); Jensen v. Hawkins Constr. Co., *supra*. "The defense of assumption of risk is not inconsistent with the defense of contributory negligence. It is essential to the defense of contributory negligence that negligence of the plaintiff be a proximate cause or a proximately contributory cause of the injury while assumption of risk is a defense when one voluntarily exposes himself to injury, although it plays no part in causing the injury." Kaufman v. Tripple, 180 Neb. 593, 144 N. W. 2d 201 (1966). The two defenses may coexist when the plaintiff makes an unreasonable choice to incur the risk. See Prosser, Law of Torts, § 68, p. 441 (4th Ed., 1971).

In the present case, the plaintiff voluntarily crouched between two parked vehicles on a public street for a substantial period of time, apparently oblivious to surrounding events. He did not, despite his obviously precarious position, notice the defendant getting into his automobile, starting it, running the motor for 15 seconds, and beginning to back the car in the parking space. Plaintiff was aware that defendant's car was parked immediately in front of his car, and that ordinarily cars must be backed in order to leave a parallel parking space. There can be no question in this case that the plaintiff placed himself in a position of obvious danger when he knew or should have known that substantial injury was likely to result if the defendant returned and backed his car to leave his parking space. This is a case where the defenses of contributory negligence and assumption of risk overlap. See Prosser, Law of Torts, § 68, p. 441 (4th Ed., 1971). Under either theory, plaintiff was barred from recovery as a matter of law under the evidence he presented.

The judgment of the District Court was correct, and is hereby affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL MOROSIN, APPELLANT.

262 N. W. 2d 194

Filed February 8, 1978. No. 41431.

1. **Criminal Law: Trial: Evidence.** As a general rule evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution.
2. **Criminal Law: Trial: Evidence: Intent.** Evidence of other crimes similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged.
3. _____: _____: _____: _____. Evidence of similar offenses is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge.

4. _____: _____: _____: _____. Evidence of other similar offenses may be admissible to show intent where there is, or may be, from the evidence, an inference of mistake, accident, want of guilty knowledge, lawful purpose, or innocent intent.
5. **Criminal Law: Convictions: Evidence.** A conviction may rest upon circumstantial evidence if it is substantial.
6. **Criminal Law: Verdicts: Evidence.** In a criminal case where there is sufficient evidence to justify the verdict, the verdict will not be set aside unless clearly wrong.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

James M. Kelley of Kelley & Thorough, for appellant.

Paul L. Douglas, Attorney General, and Robert F. Bartle, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

MCCOWN, J.

Upon trial to the District Court, a jury having been waived, the defendant was convicted of assault with intent to inflict great bodily injury upon a 7-month-old child. The District Court sentenced defendant to 4 to 6 years imprisonment and defendant has appealed.

Jolene Stroud, age 21, and recently divorced, moved from Humboldt, Nebraska, to Lincoln, Nebraska, on July 29, 1975, accompanied by her infant daughter, Terri. Jolene and her baby moved into defendant's house with an arrangement that the defendant would provide food and lodging for them in exchange for Jolene's services as a housekeeper and in helping to take care of defendant's 3½-year-old son, when he was present, and of Herman Tapp, a 75-year-old man. The defendant was then 27 years old and employed as an attendant at a home for the elderly. Defendant had arranged through his employer to keep Herman Tapp in his house and to take care of him. During the period from July 29, 1975, to

August 16, 1975, these persons were the occupants of defendant's house.

Approximately a week after Jolene and her daughter had moved into defendant's house, Jolene began to notice injuries to her daughter. The injuries were inflicted during a 10 to 12 day period ending on August 15 or 16, 1975. On August 16, 1975, Jolene's parents took Jolene and the child to Humboldt, Nebraska, where the child was taken to the doctor who had previously attended her. He immediately took her to the hospital in Lincoln. There she was examined and X-rays were taken. The child had multiple bruises over her body; four small burns; a badly lacerated tongue; a severely burned hand; serious ulcerations of both eyes; four fractured ribs; and fractured right foot, right lower leg, and right forearm.

The pediatrician who initially examined the child at the hospital testified that in his opinion the bruises were 2 to 5 days old; the small burns were probably caused by cigarettes; the burned hand was probably caused by dipping the hand in a chemical or hot liquid; and the injury to the tongue was not more than 24 hours old, and could have been caused only by a sharp instrument. The fracture in the right foot was probably less than a week old. The fractures in the forearm and right leg were 2 to 3 weeks old. He could not express an opinion as to the age of the rib fractures. In the doctor's opinion, none of the injuries could have been self-inflicted. In his opinion, the injuries were not accidental, and any adult would have had the strength to inflict them.

Jolene Stroud's testimony was that the first time she noticed injuries to her daughter was approximately August 3 or 4, 1975, when she observed the baby's leg and wrist were swollen. When she inquired of the defendant whether he knew anything about the injuries, he told her that the baby "could have got her arm and leg twisted around the crib

railings." On August 12, 1975, the defendant brought the baby into the kitchen where Jolene was working and showed Jolene the baby's burned hand. Jolene put salve on the hand, wrapped it in gauze, and asked the defendant how the injury occurred. He responded that "maybe she got into some Vanish or something." On approximately August 14, 1975, the defendant was in the bedroom with the baby and Jolene was in the kitchen, when she heard the baby suddenly start to cry. The defendant came into the kitchen, threw something wrapped in Kleenex into the trash can, and said the baby had bitten her tongue. Jolene went into the bedroom, found fresh blood on the baby's sleeper and blankets, and discovered the injury to the tongue, although she could not see it very well. Jolene testified she never actually saw the defendant injure her daughter, but that neither she nor Herman Tapp were responsible for the injuries.

Herman Tapp testified that on one occasion he saw the defendant "stick the baby's leg through the rails on the bed and twist them." On other occasions he had seen the defendant bending over the crib and heard the child scream, but had not been able to see what the defendant was doing. Tapp also testified he had never seen Jolene injure the child and he himself had never done anything to harm the child.

The evidence indicates that both Tapp and Jolene were afraid of the defendant. Jolene testified that after her discovery of each injury to the child, the defendant urged her not to get medical treatment for the child, and that her fear caused her to wait. She admitted she did not go out or make a telephone call to seek medical aid for her daughter. She also testified the defendant told her she should not get medical care for the child because, if she did, the authorities would take her child from her. The evidence also shows Jolene Stroud's parental rights

were terminated on September 12, 1975, and she also served a sentence for child neglect.

The State called a child protective service worker for Lancaster County as a witness. Over objections that her testimony was incompetent and immaterial, she testified about an incident on June 18, 1975, when she was called to the LOMAR Human Development School in Lincoln, Nebraska, to examine some bruises on the back, buttocks, and legs of the defendant's 3½-year-old son, Michael Morosin, Jr. The child is deaf, blind, and unable to speak. The social worker was not able to determine the cause of the bruises, but she took a photograph of them, which was admitted in evidence over objections as to materiality and relevance.

The social worker also testified Michael, Jr., went back to stay with his father on August 1, 1975. On August 5, 1975, she went to the defendant's residence to make a home visit and, on that day, found Michael, Jr., with two black eyes and a scrape mark across his forehead. In answer to her question as to the cause of those injuries, the defendant said he thought Michael, Jr., had pulled some barbells down on top of him and caused the injury. The social worker at that time again removed Michael, Jr., from the defendant's home. On that visit, she also observed Terri Stroud, who appeared to have an injured leg.

The case was tried to the court without a jury. The court considered the testimony of the social worker as to Michael Morosin, Jr., and the photograph of him only as evidence of motive and intent. The court found defendant guilty and sentenced him to 4 to 6 years imprisonment.

The defendant's assignments of error are primarily directed to the admission of the testimony of the social worker as to the injuries to Michael Morosin, Jr., and the admission of the photograph of the injuries to Michael, Jr. The basis for defendant's objec-

tions is the assertion that the purpose of the evidence was to establish the bad character of the defendant, rather than for any limited purpose of establishing intent, or the absence of mistake or accident. The defendant argues that the evidence tended to prove the commission of other crimes by the defendant, and was, therefore, inadmissible under the rule which makes evidence of other crimes generally inadmissible in a criminal prosecution.

Rule 404 (2) of the Nebraska Evidence Rules, codified as section 27-404 (2), R. R. S. 1943, provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Rule 404 (2) is simply a restatement of previous Nebraska law. In State v. Casados, 188 Neb. 91, 195 N. W. 2d 210, this court stated the general rule that evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. We said: "One basic reason for the rule is that such evidence is apt to be given too much weight, rather than too little, by the jury, thus resulting in the conviction of a defendant because he is a bad man and not because of his specific guilt of the offense with which he is charged." In that case we also reaffirmed the rule that evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged.

In State v. Ray, 191 Neb. 702, 217 N. W. 2d 176, we held evidence of similar offenses is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge. We quoted

with approval from 1 Wharton's Criminal Evidence (11th Ed.), § 350, p. 520: " ' "Testimony of other similar offenses has been admitted to show intent where there is or may be, from the evidence, an inference of mistake, accident, want of guilty knowledge, lawful purpose, or innocent intent. Where an act is equivocal in its nature, and may be criminal or honest according to the intent with which it is done, then other acts of the defendant, and his conduct on other occasions, may be shown in order to disclose the mastering purpose of the alleged criminal act." ' "

The principle reflected in that statement is peculiarly applicable to child abuse cases. Evidence of intent, in such cases, is ordinarily circumstantial, and injuries to children are ordinarily claimed to be accidental and unintentional. That was the case here.

In child abuse cases the relevance of evidence of prior similar acts is obvious, and the prejudicial effect of such evidence is equally obvious. Section 27-403, R. R. S. 1943, provides that, although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Under balancing tests frequently employed under modernized or codified rules of evidence, the evidence in this case was admissible for the limited purpose for which it was considered. See 2 Weinstein's Evidence, United States Rules, § 404 (10), p. 404-66. This case was not tried to a jury and there were therefore no instructions. The record specifically shows, however, that the court treated the challenged evidence as admissible only for the limited purpose of proving motive and intent. That action was correct.

Defendant also asserts that because the evidence was circumstantial, it was insufficient to establish defendant's guilt beyond a reasonable doubt. A conviction may rest upon circumstantial evidence if it is

substantial. Here the evidence of the State was substantial and, if believed, was sufficient to sustain a finding of guilt beyond a reasonable doubt. In a criminal case it is not the province of this court to determine the credibility of witnesses or weigh the evidence. Where there is sufficient evidence to justify the verdict, the verdict will not be set aside on appeal unless clearly wrong. See, State v. Davis, 198 Neb. 823, 255 N. W. 2d 434; State v. Von Suggs, 196 Neb. 757, 246 N. W. 2d 206.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLARENCE HANKINS, APPELLANT.

262 N. W. 2d 197

Filed February 8, 1978. No. 41526.

1. **Criminal Law: Trial: Time.** The primary burden is upon the State to bring an accused person to trial within the time provided by law.
2. _____: _____: _____. Upon a motion for discharge, the burden is upon the State to prove by a substantial preponderance of the evidence that one or more of the excluded periods is applicable, if the trial is not commenced within 6 months after the filing of the information. The trial court is required to make specific findings as to the cause of any extension and the period of extension attributable to such cause.

Appeal from the District Court for Hall County: LLOYD W. KELLY, JR., Judge. Remanded with directions.

Gerald B. Buechler, for appellant.

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

PER CURIAM.

The defendant was convicted of obtaining money under false pretenses and sentenced to imprisonment for 18 months to 3 years. The defendant, in this appeal, contends the evidence was not sufficient to support the judgment and that his motion to dismiss under section 29-1208, R. R. S. 1943, should have been sustained.

The offense arose out of a loan transaction with the Grand Island Finance Company on November 18, 1974. On that date the defendant and Larry Brand, who were then residents of Lincoln County, Nebraska, borrowed $2,974.96 from the finance company. As security the defendant and Brand pledged a 1955 White tractor and a 1973 Chevrolet pickup truck. The pickup truck was the principal security for the loan. When the pickup truck was repossessed in April of 1975, the finance company discovered that the truck described in the security agreement had been wrecked and that the defendant and Brand had exhibited a similar but different truck to the president of the finance company on November 18, 1974.

The defendant claimed that the truck listed in the security agreement had been repaired before it was shown to the finance company, and then wrecked a second time, and denied that a different truck had been used to obtain the loan. The evidence of the State, although partly circumstantial, was substantial and was sufficient to sustain a finding of guilty beyond a reasonable doubt.

The original complaint was filed in the county court of Hall County, Nebraska, on February 7, 1975. A warrant was issued and the defendant was brought before the court on February 14, 1975. A preliminary hearing was held on May 29, 1975, and the defendant was bound over to the District Court.

An information was filed in the District Court on May 30, 1975. An unsuccessful effort was made to

serve the information on the defendant in Buffalo County, and in Sherman County. A second information was filed on June 26, 1975, which was served on David T. Schroeder, the defendant's attorney, on July 1, 1975.

On August 8, 1975, the defendant's bond was forfeited and a bench warrant issued which was returned November 19, 1976. The defendant was arrested in Wyoming in October 1976, and returned to Nebraska by extradition in November 1976. He appeared in the District Court on November 23, 1976.

The motion to dismiss was filed on March 28, 1977. The motion was overruled on April 4, 1977, and the case set for trial on April 13, 1977.

Section 29-1207, R. R. S. 1943, provides that every person informed against for any offense shall be brought to trial within 6 months from the date the information is filed. Excluded from the computation is any period of delay resulting from the absence or unavailability of the defendant or other periods of delay which the court finds are for good cause.

Under section 29-1208, R. R. S. 1943, the defendant is entitled to an absolute discharge if not brought to trial within the 6-month period as extended by excluded periods.

The procedure to be followed upon a motion to discharge was considered in State v. Alvarez, 189 Neb. 281, 202 N. W. 2d 604. In that case we said that the primary burden is upon the State to bring an accused person to trial within the time provided by law. Upon a motion for discharge, the burden is upon the State to prove by a substantial preponderance of the evidence that one or more of the excluded periods is applicable, if the trial is not commenced within 6 months after the filing of the information.

In the Alvarez case we further stated that the trial court is required to make specific findings as to the

cause of any extension and the period of extension attributable to such cause.

The original information was filed in this case on May 30, 1975. The trial did not commence until April 13, 1977, approximately 22½ months later.

The defendant was in custody under the bench warrant from November 19, 1976, until the trial commenced, April 13, 1977, a period of 4 months and 24 days. In order to comply with the statute, the State would have had to prove that all but 1 month and 6 or 7 days of the period from May 30, 1975, to November 19, 1976, was excludable. The State failed to prove that 16½ months of the time that elapsed between May 30, 1975, and April 13, 1977, was excludable under section 29-1207, R. R. S. 1943, and the trial court did not make specific findings as to the cause of the delay in accordance with the rule announced in the Alvarez case.

At the hearing on the motion to dismiss, the defendant testified that prior to August 1975, he was in Lincoln County, Nebraska. On or about August 12 or 15, 1975, he went to Iowa where he had a job driving a truck in Nebraska, Iowa, Colorado, and Wyoming. In January of 1976 he went to Wyoming. He further testified that between the time he was released from jail in Grand Island, which apparently was March 13, 1975, until about the middle of July he was in weekly contact with his lawyer Schroeder. He also testified that Schroeder did not tell him that he was required to appear in District Court in Hall County on August 8, 1975; that his bond had been revoked on that date; or that Schroeder intended to withdraw his appearance.

There is no evidence which would sustain a finding that the period from May 30, 1975, to July 15, 1975, should be excluded even if it be assumed that the defendant was absent from the state and unavailable for trial from July 15, 1975, to November 19, 1976.

There was evidence that the president of the

Grand Island Finance Company was out of the state from around January 10, 1977, to April 10, 1977. However, the case was never set for trial at any time prior to April 13, 1977, and there was never a motion for a continuance with a showing as to the unavailability of this witness or a showing as to why the case could not have been tried prior to January 10, 1977.

The record does not support the ruling on the motion to dismiss. The cause is, therefore, remanded to the District Court with directions to hold a new hearing on the defendant's motion to dismiss in accordance with the procedure set out in State v. Alvarez, *supra*. In the event the District Court finds the defendant was brought to trial within the 6-month period, as extended by excluded periods, as prescribed by section 29-1207, R. R. S. 1943, the judgment shall stand affirmed. In the event the District Court finds the defendant was not brought to trial within the period prescribed by law, the judgment shall be vacated and the defendant be discharged.

REMANDED WITH DIRECTIONS.

SPENCER, J., dissenting.

I respectfully dissent from the Per Curiam opinion herein. From May 30, 1975, defendant could not be found for the service of the information, which was subsequently served on his attorney. His appearance bond was forfeited August 8, 1975, and a bench warrant issued. Defendant was extradited from Wyoming in November 1976.

For the purposes of this appeal he was a fugitive during that entire period. The opinion ignores this period of time and states that the burden was on the prosecutor to prove that all but 1 month and 6 or 7 days of that period was excluded.

While I do not condone the delay of 4 months in bringing the defendant to trial, I would sustain the decision of the District Judge and affirm the conviction herein.

JERRY E. ANDERSON, APPELLEE, V. SYLVIA M. CLAUSSEN ET AL., APPELLANTS.

262 N. W. 2d 438

Filed February 15, 1978. No. 41207.

1. **Deeds: Undue Influence.** To set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that she could not understand and comprehend the purport and effect of what she was then doing.
2. _____: _____. A prima facie case of undue influence is made out in case of a deed where it is shown by clear and satisfactory evidence (1) that the grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence.
3. **Undue Influence: Statutes: Words and Phrases.** The so-called "presumption of undue influence" is not a presumption within the ambit and meaning of section 27-301, R. R. S. 1943.
4. **Undue Influence: Trial: Proof.** In an undue influence case the burden of proof, or the risk of nonpersuasion on that issue, is on the plaintiff and remains there throughout the trial.
5. _____: _____: _____. In an action based on undue influence, when a confidential relationship exists between the parties, and a prima facie case is established, the burden of proof remains on the plaintiff, but the burden of going forward with the evidence shifts to the defendant.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, for appellants.

Thomas P. Leary and Robert G. Grove, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

MCCOWN, J.

The plaintiff, Jerry E. Anderson, brought this action in equity to set aside a deed to a tract of land in Douglas County, Nebraska. The District Court

found that the grantor was incompetent to execute the deed, and that the grantee of the deed, defendant Sylvia M. Claussen, had exerted undue influence on the grantor. The District Court canceled and set aside the deed, together with a subsequent deed from the grantee defendant to herself and her husband. The defendants have appealed.

Nellie Dillon Anderson was born August 13, 1881. She married Alfred M. Anderson in 1902 and they had two children, a son, Sidney, and a daughter, Sylvia. The family lived on a farm owned by Nellie located northwest of Omaha, Nebraska. That farm is the tract described in the deed involved here. In 1934 Sidney married and had a son, Jerry, the plaintiff in this action. Sylvia was married to Erwin J. D. Claussen, and they are the defendants in this action. Nellie and her husband, Alfred, continued to live on the farm. On August 5, 1943, Nellie Anderson executed a will in which she left her property to Sidney and Sylvia equally, or to their children if either of them predeceased her. This will was ultimately admitted to probate after a will contest between the parties involved in this case. A 1969 will executed by Nellie was declared invalid for lack of testamentary competency and undue influence. See Anderson v. Claussen, 196 Neb. 787, 246 N. W. 2d 586.

In February 1960, Nellie's husband, Alfred, died. Following the death of her husband Nellie's mental and physical health began to deteriorate. She became disoriented and suffered from delusions. On May 16, 1960, she was admitted to the hospital. Dr. Robert Wigton, a psychiatrist and neurologist, diagnosed and treated her illness as an involutional depression resulting from organic brain syndrome, or cerebral arteriosclerosis and senile degenerative changes. Nellie was released from the hospital on June 2, 1960, but returned to the hospital on August 21, 1960, when her delusions and depression re-

curred. She again received treatment, improved significantly, and then returned home.

In the meantime guardianship proceedings were instituted, and on June 1, 1960, after notice and hearing, the county court of Douglas County found Nellie to be incompetent and appointed her son, Sidney Anderson, guardian of her person and estate.

During the years between 1960 and 1964 Nellie lived alone on her farm and took care of herself. Both Sidney and Sylvia, and their families, visited her and helped care for her by running errands and doing various small chores. On November 3, 1964, Nellie attempted to have her guardianship terminated, and filed an application with the Douglas County court. Hearing was set but never held since Nellie returned to the hospital later in November 1964.

Dr. Wigton again treated Nellie for the same problems as before. He testified that her arteriosclerosis was becoming progressively worse and that it was essentially an irreversible illness producing a degenerative change which affects memory, judgment, clarity of thinking, and intelligence. Dr. Wigton recommended nursing home care for Nellie when hospital treatment was completed.

On December 29, 1964, Nellie left the hospital and was placed in Florence Heights Nursing Center. She was examined there on January 23, 1965, by Dr. William F. Giles, a neuropsychiatrist. Dr. Giles interviewed and tested Nellie and determined that she was suffering from "chronic brain syndrome due either to moderate arteriosclerotic changes or early senility."

On July 9, 1965, Nellie's attorney sought and obtained an order authorizing another physical examination to determine whether the guardianship might be terminated. Dr. Giles examined Nellie again on July 14, 1965. He determined she was not competent to manage her own affairs and that it

would be necessary to continue a guardianship. On July 16, 1965, Dr. Wigton also examined Nellie. He confirmed his former diagnosis and determined that her ability to care for herself or her business affairs was significantly impaired. Following the examinations Nellie remained in the nursing home and Sidney continued to act as her guardian until he died on March 7, 1969. Sidney was survived by his son, Jerry Anderson, the plaintiff here. On April 4, 1969, Sylvia was appointed special guardian for Nellie, and on May 12, 1969, Sylvia was appointed successor guardian of the person and estate of Nellie.

On August 11, 1969, Sylvia removed Nellie from the nursing home and took her to Nellie's farm home. Sylvia also arranged to have a companion live with Nellie and take care of her. On September 22, 1969, without notice to any other parties, Sylvia filed a final report as guardian and moved to have the guardianship terminated. She was discharged as guardian on the same day.

On October 9, 1969, Nellie executed a new will which left the bulk of her estate to Sylvia. It was this will which was later invalidated in the prior action between the parties. See Anderson v. Claussen, 196 Neb. 787, 246 N. W. 2d 586.

Nellie lived in her farm home for approximately 3 years. For about 6 months a companion-housekeeper lived with her. Thereafter she lived alone. Sylvia called her three times a day and took her anywhere she needed to go. Sylvia took care of all her financial affairs and bank accounts, and, at Nellie's request, transferred all Nellie's bank accounts to joint accounts with Sylvia.

In August 1972, at Nellie's request, Sylvia's husband, Erwin, retained an attorney and instructed him that Nellie wanted a deed drawn conveying Nellie's farm to Sylvia and Nellie as joint tenants with right of survivorship. The attorney never met Nellie but drafted the deed. Sylvia and her husband,

Erwin, took Nellie to the attorney's office, and a secretary brought the deed out to the car to be signed. While seated in the car Nellie executed the deed on August 16, 1972. The deed was recorded the following day.

Nellie entered a hospital on December 6, 1972, where she was treated for a stroke until December 17, 1972, when she was taken from the hospital to Fontenelle Boulevard Home. She remained at the home until September 17, 1973, when she was again admitted to the hospital. She died on September 20, 1973, at the age of 92. The autopsy report indicated the lumen artery had been reduced in size by approximately 50 percent due to arteriosclerosis.

The testimony of lay witnesses for the defendants was that in their opinions Nellie was of sound mind and knew the nature and extent of her property. The contacts about which they testified were generally during the period from August 1969 until August 1972. The medical witnesses for the defendants were Dr. R. D. Glover and his associate, Dr. Henry J. Quiring, general practitioners, who had treated Nellie routinely for her physical ailments since 1969. Neither of them tested Nellie for any mental problems. In their opinions Nellie was well oriented, understood who the members of her immediate family were, and knew the nature and extent of her property.

Plaintiff's witnesses generally contradicted defendants' witnesses in all respects. Lay witnesses testified Nellie was confused and suffered from delusions and a loss of memory. Nurses at the Florence Home testified that, in their opinions, Nellie was not competent at the time she was taken from the Florence Home in August 1969. Dr. Wigton and Dr. Giles, the neuropsychiatrists who had examined and treated Nellie from 1960 to 1969, testified. In answer to hypothetical questions based on their examinations, the prior and subsequent medical his-

tory, and the autopsy report, they testified that on August 16, 1972, in all probability Nellie's mental capacity and intellectual functioning would have been impaired to a significant degree, and that she would have been unable to know the nature, extent, and value of her property. Both testified that the arteriosclerosis was progressive and that her mental condition had probably deteriorated rather than improved since 1965.

The District Court specifically found that on August 16, 1972, Nellie Dillon Anderson was incompetent to execute a deed, and that Sylvia M. Claussen exerted undue influence on her mother. The District Court then canceled and set aside the deed of August 16, 1972, together with a subsequent deed from Sylvia M. Claussen to herself and her husband.

The defendants contend that the District Court erred in failing to give sufficient weight to the testimony as to mental capacity and competency at the time of execution of the deed. It is defendants' position that medical and other evidence of mental competence, at a time or times prior to August 16, 1972, ought to be discounted. The defendants also contend that the District Court erroneously applied the presumption of undue influence and shifted the burden of proof on that issue to the defendants improperly.

To set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that she could not understand and comprehend the purport and effect of what she was then doing. Westerdale v. Johnson, 191 Neb. 391, 215 N. W. 2d 102.

A prima facie case of undue influence is made out in case of a deed where it is shown by clear and satisfactory evidence (1) that the grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to ex-

ercise it; and (4) that the result appears to be the effect of such influence. Guill v. Wolpert, 191 Neb. 805, 218 N. W. 2d 224.

On both the issues of mental competency and undue influence the circumstances tend to support the contentions of the plaintiff. There can be no real doubt that the grantor was mentally incompetent for a period of several years. The medical evidence is persuasive that her condition was progressive and irreversible and would, in all probability, deteriorate rather than improve. The evidence of undue influence is equally persuasive. The weight of the evidence sustains the findings that the grantor was not competent at the time of execution of the deed, and that undue influence had been exerted on her. In an equity case where the evidence on material issues of fact is in conflict this court will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Von Seggern v. Von Seggern, 196 Neb. 545, 244 N. W. 2d 166.

Defendants' contention that the District Court erroneously applied the presumption of undue influence and shifted the burden of proof to the defendants is not supported by the record. The so-called "presumption of undue influence" is not a presumption within the ambit and meaning of section 27-301, R. R. S. 1943. In an undue influence case the burden of proof, or the risk of nonpersuasion on that issue, is on the plaintiff and remains there throughout the trial. See McGowan v. McGowan, 197 Neb. 596, 250 N. W. 2d 234. In an action based on undue influence, when a confidential relationship exists between the parties, and a prima facie case is established, the burden of proof remains on the plaintiff, but the burden of going forward with the evidence shifts to the defendants. Golgert v. Smidt, 197 Neb. 667, 250 N. W. 2d 628.

In the case before us the record indicates that the trial court determined that plaintiff's evidence established a prima facie case of undue influence, and that the burden of going forward with the evidence shifted to the defendants. The burden of proof, however, was placed on the plaintiff and remained there throughout the trial. The evidence supports the determinations of the District Court.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

JOHN J. HANLEY ET AL., APPELLANTS AND CROSS-APPELLEES, V. NELLIE HOUSE MONTGOMERY CRAVEN ET AL., APPELLEES AND CROSS-APPELLEES, OLIVE SHOULTS ROSENBERGER ET AL., APPELLEES AND CROSS-APPELLANTS, IMPLEADED WITH ARTHUR F. MULLEN ET AL., APPELLANTS AND CROSS-APPELLEES.

263 N. W. 2d 79

Filed February 15, 1978. No. 41249.

1. **Wills: Remaindermen: Estates.** The law favors the early vesting of estates and a remainder will be declared a vested one unless a contrary intent is apparent from the will.
2. **Wills: Remaindermen: Estates: Words and Phrases.** It is not the certainty of possession or enjoyment which distinguishes a vested remainder, but the certainty of the right of future possession or enjoyment if the remainderman, who is ascertained, lives until the determination of the preceding estate. Where the devise is to the remainderman "from and after" or "after" or "at" or "on" the death of the life tenant, or words of similar import are employed, such expressions are construed as relating to the time of the enjoyment of the estate and not as to its vesting, and such remainder is a vested one. The uncertainty as to whether or not the remainderman will live to come into actual possession or enjoyment of the estate does not make the remainder contingent, for that is an uncertainty which attaches to all remainders.
3. **Wills: Intent.** In the construction of wills, the basic rule is that the testator's intent must be determined from the language used in the will, and, when so ascertained, that intent must be given effect, if it is not contrary to law.

4. **Wills: Estates: Words and Phrases.** Testators are ordinarily and primarily concerned in the commencement, continuance, and termination of the enjoyment of property by them devised and bequeathed. Apart from statute, the weight of authority recognizes this fact, and, when a contrary intent is not clearly expressed, construes such expressions as "upon the death of" as, in effect, relating to and affecting the enjoyment of property, rather than establishing and vesting technical estates and involved titles.
5. **Wills: Remaindermen: Estates: Words and Phrases.** If a person, to whom a prior interest in the subject matter of the conveyance has been given, is the sole heir of the designated ancestor at the death of such ancestor, there is an incongruity in also giving such person all the interest under limitation to "heirs" or "next of kin," or "heirs-at-law by blood relation," and thus to avoid the incongruity, the determination of the class of persons who qualify as such heirs is ordinarily to be made as of the death of the taker of the prior interest.
6. _____: _____: _____: _____. While ordinarily such words as "at her death" do not have the effect of postponing the vesting of an estate in remainder, this is not true if, when they are read in context, the intention of the testator would appear to be otherwise.

Appeal from the District Court for Thurston County: WALTER G. HUBER, Judge. Affirmed in part, and in part reversed and remanded with directions.

Edmund D. McEachen and Michael G. Lessman of Baird, Holm, McEachen, Pedersen, Hamman & Haggart, Bernard T. Pipher, Thomas C. Emery, and Kenneth H. Beckenhauer of Beckenhauer & Beckenhauer, for appellants and cross-appellees.

Warren S. Zweiback of Zweiback, Brady, Kasher, Festerson & Pavel, and Daniel J. Duffy of Cassem, Tierney, Adams & Gotch, for appellees and cross-appellees.

Warren S. Zweiback of Zweiback, Brady, Kasher, Festerson & Pavel, for appellees and cross-appellants.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and RONIN, District Judge.

SPENCER, J.

This is an action to quiet title in certain lands in Thurston and Cuming Counties; to establish the ownership of certain fractional interests in the land; and to enter a decree of partition. The case involves the validity of certain quit claim deeds given pursuant to contracts for attorneys' fees. Their validity in the first instance requires an answer to the question as to whether the remainder interest in the property vested at the time of the death of the testator in 1926, or at the death of the life tenant in 1974. The original action was filed September 19, 1974, more than 3 months prior to the death of the life tenant. Trial was had on an amended petition filed after her death.

The trial court determined the remainder interest in the real estate vested at the time of the death of the testator. However, the court held the deeds were unenforceable due to the failure of those claiming thereunder to prove enforcement would not be unfair or inequitable. We reverse the judgment of the trial court but sustain the dismissal of the plaintiffs' action.

John R. House died testate December 24, 1926, seized of the land in question, as well as other property. The other property not involved herein was devised to his wife Emma House, who survived him. The real estate involved herein was covered by paragraph Third of his will. So far as material, it provides as follows:

"Third, I give, devise and bequeath to my beloved daughter, Nellie House Montgomery Craven, all the income over and above the taxes, and necessary expenses or upkeep during her lifetime from the following described real estate: (legal description of the land involved here.)

"I give, devise and bequeath the land described in the foregoing paragraph to my executor in trust, to pay said income therefrom to my said daughter. If

my said daughter die without issue, then said real estate described in this pargraph shall descend at her death to my heirs-at-law, by blood relation. If my said daughter dies leaving issue then said real estate is to go to her issue absolutely. * * *

"* * * it being my intention hereby to convey and devise unto my executor the above described real estate from which my said daughter is to get the net income, in trust, for the payment of said income to my daughter during her life and at her death without issue surviving her, said real estate shall descend to my heirs-at-law who are related to me by blood, and that if she die leaving issue surviving her, then said real estate shall descend to her lineal heirs-at-law absolutely in fee simple."

At the time of his death, John R. House was survived by the following blood relatives: His daughter Nellie; his nephews, Arthur David House and John Jacob House, sons of his deceased brother Jacob House; his nephew Joseph E. House, son of his deceased brother Joseph House; and his nieces, Alice House Shoults and Lizzie House Shoults, daughters of his deceased brother Edward House. At the date of the death of John R. House, his only issue, Nellie House Montgomery Craven, was childless. She died without issue at 91 years of age, on December 29, 1974.

The will of John R. House was admitted to probate in the county court of Thurston County on February 28, 1927. The probate continued without incident until October 15, 1929. At that time, more than a year and a half after the will was admitted to probate, the daughter instituted an action in county court to revoke the order of probate. This began extended litigation over the probate of the will which finally brought the matter before this court in the case entitled In re Estate of House, 129 Neb. 838, 263 N. W. 389 (1935).

It was as the result of this will contest litigation

that ancestors of the plaintiffs acquired the deeds under which they are claiming an interest in the land. The plaintiffs are the devisees and grantees by mesne conveyances of James H. Hanley, John C. Mullen, and T. Joseph Byrth, who were the attorneys engaged by the remaindermen to resist the setting aside of the probate of the will. The Hanley-Mullen representation and appearances in the will contest litigation began with pleadings filed in the county court of Thurston County on December 11, 1929, on behalf of nieces Alice House Shoults and Lizzie House Shoults, resisting Nellie Craven's petition to revoke the order of probate. Pleadings were filed on behalf of the nephews Joseph E. House and Arthur David House by the Hanley-Mullen representation on January 7, 1930. No court appearances were made by the Hanley-Mullen representation on behalf of the nephew John Jacob House.

The fee contracts in evidence, providing for an interest in the remainder interest of the heirs, were drawn by James Hanley and are identical in terminology with the exception of the signature line, the gender, the date and place of execution, and except that the fee contract signed by Joseph E. House had varying provisions which will be hereafter noted. The basic contract in its relevant parts provided as follows:

"Whereas, the undersigned is a blood relation and one of the heirs of John R. House, deceased; and

"Whereas, the said John R. House, prior to his death and on or about the 23d of December, 1926, made a last will and testament, the third paragraph of which will is as follows: * * *

"Whereas, Nellie House Montgomery Craven, the daughter of said John R. House, mentioned in said paragraph three of said will is childless and will die without issue * * *

"Whereas, the purpose of the proceeding now pending in the County Court of Thurston County, Ne-

braska is to deprive the undersigned blood relation and heir of the said John R. House of the interest, right and title that she (he) has in and by virtue of the provisions of the will of the said John R. House; and

"Whereas, the undersigned is the niece (nephew) of the said John R. House, deceased, and is interested in said estate; * * *

"THEREFORE, it is agreed by and between the said (niece or nephew) of (city and state) party of the first part, and the said James H. Hanley of Omaha, Nebraska, party of the second part, WITNESSETH:

"That the party of the first part does employ and retain the party of the second part to act as attorney for the party of the first part * * * and the said party of the second part is to have full and complete control over said litigation; that no settlement or compromise shall be made, either by the party of the first part or by the party of the second part, without the written consent of the other.

"That the party of the first part is to pay to the said party of the second part, as fees for his services in the County Court of Thurston County, Nebraska, a sum equal to one-third of the amount received or recovered by the party of the first part under and by virtue of the provisions of the will of the said John R. House, deceased, and, in the event the said proceedings are appealed, transferred or removed from said County Court of Thurston County, Nebraska to another court or courts, then the party of the first part shall pay to the party of the second part, a sum equal to one-half the amount received by the party of the first part under the provisions of the will of the said John R. House, and that said fees shall be a lien upon whatever interest or rights the party of the first part has or may have in the property described in the third paragraph of the will of the said John R. House, deceased.

"* * * and that the said party of the first part does by these presents grant and confirm to the party of the second part an interest in and a lien upon the property described in the third paragraph of the will of the said John R. House, deceased, for the amount due to the party of the second part for services rendered as attorney for the said party of the first part.

"Dated this ____ day of _____, 19____, at _____.

"(signed by niece or nephew)
"Party of the First Part
"/s/ James H. Hanley
"Party of the Second Part."

The contract with Joseph E. House provided for a flat fee of: "a sum equal to one-half of the amount received or recovered by * * * (him) * * * by virtue of * * * the will * * *." It went on to provide that the fee was to be split "one-third of said fee to said T. Joseph Byrth and two-thirds of said fee to said James H. Hanley * * * regardless of the amount involved."

The dates the fee contracts were executed by each niece and nephew are as follows:

A.	Lizzie	November 29, 1929
B.	Alice	November 29, 1929
C.	Joseph	February 20, 1930
D.	Arthur	March 21, 1931
E.	John Jacob	December 17, 1933

Appellees urge the invalidity of the contracts because they were executed after the attorney-client relationship had commenced, and there was no compelling proof of their fairness.

Nellie's petition to revoke the probate was grounded on her allegation that the executor and his attorney intentionally and fraudulently concealed from her the mental and physical incompetency of the testator to make the will. The will was executed December 23, 1926, the day before his death. The nature of

the instrument indicates a death bed document. Nellie alleged she brought the action immediately upon the discovery of the facts as to the incompetency of the testator. The county court, on December 11, 1929, entered a decree revoking the order admitting the will to probate. It subsequently found the instrument was not the last will and testament of John R. House. The case was appealed to the District Court where it was tried twice. In the first trial the court ruled the case should be tried to the jury on the contest of the will. It was so tried, and the jury disagreed. In the second trial the judge followed the same procedure, and the jury returned a verdict finding the will to be the last will of John R. House, deceased. The judge ordered the will should stand as originally admitted to probate. That decision was appealed to this court. This court held the cause never reached the stage where it was necessary to submit any feature of it to the jury. The issue to be first decided in the District Court was whether the county court was justified in revoking the probate. This court affirmed the decision that the will should stand as originally probated.

After the decision of this court on November 15, 1935, certain of the nephews and nieces, and their respective spouses, executed the quit claim deeds which plaintiffs seek to enforce. Alice Shoults and Lizzie Shoults executed the same quit claim deed, dated and acknowledged January 17, 1936, conveying an undivided one-half of all right, title, interest, estate, claim, and demand both at law and equity in the real estate, to James H. Hanley and John C. Mullen.

Arthur executed and acknowledged a quit claim deed on May 20, 1939, conveying one-half of the right, title, interest, estate, or claim and demand, both at law and in equity of an undivided one-half interest in the real estate in question.

Joseph executed and acknowledged a quit claim

deed on January 15, 1936, conveying an undivided 2/6ths interest to James H. Hanley and Arthur F. Mullen, and an undivided 1/6th interest to T. Joseph Byrth "of all our right, title, interest, estate, claim and demand both at law and in equity, of, in, and to the * * * real estate" involved herein.

John Jacob House did not execute any deed in favor of the attorneys. By the quit claim deeds the attorneys ostensibly acquired a 35 percent interest in the remainder of the trust property. They acquired ½ of the purported interests of Alice and Lizzie; ½ of the interest of Joseph; and ¼ of the interest of Arthur, or 21/60ths of the interests of the nephews and nieces.

On July 2, 1936, Hanley and Mullen filed an action in the federal District Court at Omaha, Nebraska, for Alice House Shoults, Lizzie House Shoults, Arthur D. House, John J. House, and Joseph E. House, against Nellie House Montgomery Craven, Emma A. House, William T. Craven as administrator of the estate of John R. House, deceased, and Paul A. Pinion as executor and trustee of the estate of John R. House, deceased, defendants, seeking a judgment of $30,000 for expenses and attorneys' fees incurred by plaintiffs by reason of the fact that defendants attempted to set aside the probate of the will of John R. House, deceased. Based upon the 1926 expectancy tables, the remainder interest would have had a value of approximately $50,000. The plaintiffs alleged that in the event they did not survive the defendant Nellie House Montgomery Craven they would never receive any part of said estate and it would be inequitable and unjust for them to pay their attorneys for the services rendered as proponents of the will of John R. House, deceased. On March 29, 1937, Hanley and Mullen, joined by T. Joseph Byrth, filed a petition of intervention in the action, in which Hanley and Mullen were representing the plaintiffs, alleging that they were entitled to

compensation for their services in the full amount of the consideration stipulated in their several contracts of employment. The interveners prayed that a judgment be entered in their favor against defendants; that a lien be impressed upon the trust estate in an amount equal to the difference between the amount of judgment assessed against defendants and the full value of interveners' services as agreed upon by the plaintiffs and interveners.

Judgment was rendered against the defendants on August 12, 1937, in the amount of $19,179.75, or $17,500 plus costs incurred of $1,679.75. This judgment was appealed to the Circuit Court of Appeals, which on August 10, 1938, affirmed the judgment as to the court costs but found the fee allowed by the federal District Court to be excessive. The Circuit Court found a proper fee for the services rendered was $7,500. The Circuit Court specifically found the federal District Court had estimated the amount of property involved as being the value of the entire estate. This determination it held to be erroneous. It held the only property involved was the trust property. It found the value of the land at the death of the testator passing into the trust was about $106,000. Judgment was entered on the mandate on the 23rd day of September 1938, for $9,793.27, being $1,679.75 for expenses advanced by the plaintiffs, $7,500 attorneys' fees, and the sum of $613.52 as interest on the sum of $9,179.75 from August 12, 1937, to September 23, 1938. This amount was collected by the attorneys. Appellees argue this represented payment in full for the services rendered by the attorneys.

To put the case in proper perspective, it is now necessary to consider the exceptions of the plaintiffs-appellants who claim under the respective quit claim deeds. They assign as error: (1) The failure of the District Court to establish their claim of a 35 percent interest in the real estate; (2) the failure to hold that as against the successor in title under the

quit claim deeds the descendants of the grantors of the deeds were barred by the statute of limitations; and (3) the failure to find that even if it was appropriate to look behind the deeds to the contingent fee contracts and their execution and to place the burden of proof upon the successors in interest, the plaintiffs met their burden of proof on such issue.

The heirs of Alice House Shoults as a class allege the District Court decided all issues correctly.

Appellees Robert F. House and James Joseph House assign as error: (1) The failure of the court to hold title to the subject property vested only in the heirs-at-law by blood relation of John R. House, determined as of the date of the death of Nellie House Montgomery Craven, December 29, 1974; (2) the failure to hold the Hanley-Mullen-Byrth interests are barred from recovery by reason of the statute of limitations; (3) the failure to hold the Hanley-Mullen-Byrth interests had been paid everything properly due them; and (4) the failure to hold the grandchildren of deceased brothers of John R. House, who survived Nellie Craven, should take the property described in paragraph Third of the will of John R. House per capita to the exclusion of great grandchildren of deceased brothers.

The appellees, descendants of Lizzie House Shoults, filed a brief as appellees and a brief on cross-appeal. In their cross-appeal they assign as error the failure of the District Court: (1) To hold title to the subject property vested in the heirs-at-law by blood relation of John R. House, determined as of the date of December 29, 1974; (2) to hold the Hanley-Mullen-Byrth interests barred by reason of the statute of limitations; (3) to hold the Hanley-Mullen-Byrth interests have been paid everything properly due them; and (4) to hold the grandchildren of deceased brothers of John R. House, who survived Nellie Craven, should take the property described in paragraph Three of the will of John R.

House per capita to the exclusion of great grandchildren of deceased brothers.

The threshold legal issue presented herein is the date of the vesting of the remainder interest. The trial court found it vested on December 24, 1926, the date of the death of John R. House, in Arthur David House, John Jacob House, Joseph E. House, Lizzie House Shoults, and Alice House Shoults, each acquiring an undivided one-fifth interest on said date. This conclusion is erroneous and is reversed.

We have repeatedly held the law favors the early vesting of estates and a remainder will be declared a vested one unless a contrary intent is apparent from the will. Berning v. National Bank of Com. Tr. & Sav., 176 Neb. 856, 127 N. W. 2d 723 (1964). In this instance we believe a contrary intent is apparent.

Appellees argue it was the intention of the testator to provide for vesting at the death of his daughter. They argue that otherwise she would be his heir-at-law by blood relation. The appellants contend, by the terms of the will, the testator was excluding his daughter from the term "heir-at-law by blood relation." That contingency was only to be operative if the daughter died without issue.

In Wilkins v. Rowan, 107 Neb. 180, 185 N. W. 437, filed November 17, 1921, or 5 years previous to the will in question, this court said: "The policy of the law has always been to look with favor upon the early vesting of estates, and a remainder will never be held to be contingent if it can reasonably be held to be a vested remainder." The following quotations from that case are pertinent herein: "1 Schouler, Wills, Executors and Administrators (5th ed.) sec. 562, states: 'In short the law does not favor the abeyance of estates but estates by way of remainder vest at the earliest period possible, unless the will shows a contrary intention. And vested interests liable to devestment are preferred in construction to interests contingent.'

"2 Alexander, Commentaries on Wills, sec. 1005, states: 'It is not the certainty of possession or enjoyment which distinguishes a vested remainder, but the certainty of the right of future possession or enjoyment if the remainderman, who is ascertained, lives until the determination of the preceding estate. Where the devise is to the remainderman "from and after" or "after" or "at" or "on" the death of the life tenant, or words of similar import are employed, such expressions are construed as relating to the time of the enjoyment of the estate and not as to its vesting, and such remainder is a vested one. The uncertainty as to whether or not the remainderman will live to come into actual possession or enjoyment of the estate does not make the remainder contingent, for that is an uncertainty which attaches to all remainders.' "

Because the provision for the daughter involves a testamentary trust, appellees take comfort from a line of Nebraska cases involving testamentary trusts, such as In re Estate of Mooney, 131 Neb. 52, 267 N. W. 196 (1936). There, a testamentary trust was created for the benefit of the testator's son but the will made no provision for the disposition of the estate upon the death of the son. This court held the testator did not die intestate as to any of his estate and announced the rule that upon the failure of an express trust the trustee holds the trust estate upon a resulting trust for the heirs of the testator as of the date of the failure of the trust. This was the death of the son.

In Dennis v. Omaha National Bank, 153 Neb. 865, 46 N. W. 2d 606 (1951), the corpus was to vest absolutely in the issue or descendants of the children, all of whom died without issue. The court determined that the testator in establishing the trust devised all his estate, and the income therefrom as well, to the trustee, which of necessity vested in the trustee the whole estate or full title in fee simple, including the

title of the then uncertain and unascertained remaindermen until they were ascertained at the termination of the trust.

In Applegate v. Brown, 168 Neb. 190, 95 N. W. 2d 341 (1959), the will directed that the estate be reduced to cash and the trustees make investments and pay the income to certain beneficiaries. No provision was made for the disposition of the corpus of the trust. This court held the corpus passed to testator's heirs determined as of the date of the termination of the trust.

Abbott v. Continental Nat. Bank, 169 Neb. 147, 98 N. W. 2d 804 (1959), is closer on its facts to the present case. There the will set up a trust for the benefit of the testator's wife and directed the trustee to pay the income of the trust fund to her during life "and upon her death to pay the principal thereof to my legal heirs." The wife brought an action to determine her interest in the corpus of the trust. The author of this opinion, who was then the trial judge in Abbott, held she had no interest in the corpus of the trust; and that on her death it would pass to the testator's brothers and sisters in whom it vested at his death. This court affirmed the portion of the judgment holding she had no interest in the corpus, but reversed the trial court on the time of vesting. This court held the heirs of the testator were to be determined at the death of the wife and the termination of the trust. Appellees House argue Abbott is controlling herein.

Appellants take comfort from and rely on Goodrich v. Bonham, 142 Neb. 489, 6 N. W. 2d 788 (1942). There testator devised certain real estate to his son in trust to pay the income to his daughter, subject to the payment of certain expenses. Upon the death of his daughter, title to the property was to vest in fee simple in his son, the trustee. In case of the death of his son before his daughter, he requested the appointment of some suitable person as trustee to con-

tinue the trust. The son predeceased the daughter, but prior to his death had been adjudged a bankrupt. In the bankruptcy proceedings he scheduled as real estate owned by him the "reversionary interest" in the property in question. Defendant Bonham purchased the son's interest from the trustee in bankruptcy and received a deed for it. The plaintiffs, testator's heirs, brought an action to construe the will and to quiet the title to the property in them, contending that when the son predeceased the daughter his contingent interest lapsed and that Bonham took nothing under the deed from the trustee in bankruptcy. Bonham's demurrer was sustained and the judgment of dismissal affirmed in this court.

This court in Goodrich followed certain rules for the construction of wills: "* * * the basic rule is that the testator's intent must be determined from the language used in the will, and, when so ascertained, that intent must be given effect, if it is not contrary to law.

"In construing a will, it is presumed that the testator intended to dispose of his entire estate, unless the contrary is apparent from the will itself."

In Goodrich, this court held it was clear from an analysis of the will as a whole that testator intended to create a life estate in trust for his daughter and a remainder in fee simple to the son in the lot in question. It followed the policy that the law looks with favor upon the early vesting of estates and a remainder will never be held to be contingent if it can reasonably be held to be a vested remainder. Goodrich, however, is distinguishable from the present case on the fact that the son was specifically named as the remainderman and was the trustee. There was no question as to the intent of the testator. The court quoted the following from DeWitt v. Searles, 123 Neb. 129, 242 N. W. 370 (1932): " 'Testators are ordinarily and primarily concerned in the com-

mencement, continuance and termination of the enjoyment of property by them devised and bequeathed. Apart from statute, the weight of authority recognizes this fact, and, when a contrary intent is not clearly expressed, construes such expressions as "upon the death of" as, in effect, related to and affecting the enjoyment of property, rather than establishing and vesting technical estates and involved titles.' "

Testator's will was made in his last illness, the day before his death. It was written in longhand on a will form, with an attached sheet, apparently by one of the witnesses, one of whom was an attorney. It made ample provision for testator's wife. It then gave, devised, and bequeathed to the daughter all the income over and above taxes and necessary expenses or upkeep during her lifetime from certain specifically described property. It then gave, devised, and bequeathed that income-producing property to his executor in trust to pay the income to the daughter.

We are concerned with the following provisions: "If my said daughter die without issue, then said real estate described in this paragraph shall descend at her death to my heirs-at-law by blood relation. If my said daughter dies leaving issue then said real estate is to go to her issue absolutely." Later in the will he stated: "* * * it being my intention hereby to convey and devise unto my executor the above described real estate from which my said daughter is to get the net income, in trust, for the payment of said income to my daughter during her life and at her death without issue surviving her, said real estate shall descend to my heirs-at-law who are related to me by blood, and that if she die leaving issue surviving her, then said real estate shall descend to her lineal heirs-at-law absolutely in fee simple."

We conclude Goodrich is not controlling on the facts herein. It is further distinguishable upon an

aspect of the case which, although mentioned by the appellees, was neglected in their research of the authorities. This aspect is one of first impression in this state. We refer to the fact that Nellie, the daughter of the decedent, was his sole issue at his death and under our statute was the sole heir-at-law related to him by blood.

Determining the time of the vesting of the remainder in this instance is a difficult problem. If we distinguish the Abbott case, which appellees House argue is controlling, it is possible to find authority going either way in other jurisdictions. However, Restatement on the Law of Property has adopted the rule that an incongruity in this situation is present if we follow the rule applied by the trial court. Restatement, Property, § 308, comment k, p. 1715, states in part: "k. Contrary intent — Postponing time of statute's application — Prior interest in sole heir or next of kin. If a person to whom a prior interest in the subject matter of the conveyance has been given is the sole heir of the designated ancestor at the death of such ancestor, there is incongruity in also giving such person all the interest under the limitation to 'heirs' or 'next of kin.' The incongruity is especially great when a will conveys property 'to B and his heirs but if B dies without issue to my heirs' and B is the sole heir of A. The incongruity is almost as great when A, by will, conveys property 'to B for life then to my heirs' and B is the sole heir of A. Thus, the fact that in such cases, B is the sole heir of A at the death of A tends to establish that A intended his heirs to be ascertained as of the death of B, so that B is prevented from sharing in the limitation to the heirs of A."

The Maine court, in a case closely analogous on the facts to the instant one, in spite of its early vesting rule, held the determination of heirship was to be made at the death of the life beneficiary. In that case, Merrill Trust Co. v. Perkins, 142 Me. 363,

53 A. 2d 260 (1947), testator devised the residue of his estate in trust for the benefit of his granddaughter. He provided if she should die leaving issue then the remaining trust estate was to go to such issue. If she left no issue, then the remainder should go to those persons to whom it would be distributed and to whom it would pass by descent under the statutes of the State of Maine regulating descent and distribution of intestate estates. The granddaughter died in 1945 without issue. The Maine court made no reference to the Restatement rule or the possible incongruity. It cited English cases, as well as prior decisions of its own, in support of the principle that in such situation it is the intent of the testator that the heirs who take such contingent remainder be determined as of the date of the death of the life tenant.

The same rule was applied in an analogous Missouri case, Irvine v. Ross, 339 Mo. 692, 98 S. W. 2d 763 (1936). The testator in effect bequeathed to his daughter property for her life and upon her death, without issue surviving, the property would go to the heirs of the testator. The court stated that since the daughter was the sole heir apparent at the time the testator made his will, it seemed clear that he had intended her to take a life estate and the remainder to go to her descendants if she had any, but if not, to the heirs of the testator taken as of the time of her death and hence his intention as gathered from all the dispositive clauses of the will was not to use the word "heirs" in its technical sense as meaning those living at the decease of the testator.

In Jones v. Petrie, 156 Kan. 241, 132 P. 2d 396 (1943), testator devised land to his widow for life with the remainder at her death to be divided among the other heirs "of my wife and myself, the heirs of my wife to take a one-half (½) interest and my heirs to take the other one-half (½) interest, and I give and bequeath such remainder to such heirs of myself and my wife." In a partition action to deter-

mine the rights of the parties, the court held that the testator intended to create only one remainder estate vesting at the death of his wife, one-half in her heirs and one-half in the testator's heirs at said time. It reasoned the testator must have known that his wife was his heir if she survived him, and that he did not intend the remainder to vest until the death of his wife.

In a Wisconsin case, In re Latimer's Will, 266 Wis. 158, 63 N. W. 2d 65 (1954), the will provided for a limitation over to the heirs of the testatrix and the heirs of her deceased husband following the expiration of a life estate. The granddaughter, who was the life beneficiary, was also the sole heir-at-law of testatrix' husband. The Wisconsin court held: " 'If a person to whom a prior interest in the subject matter of the conveyance has been given is the sole heir of the designated ancestor at the death of such ancestor, there is an incongruity in also giving such person all the interest under the limitation to 'heirs' or 'next of kin.' " Thus to avoid the incongruity, the determination of the class of persons who qualify as such heirs is ordinarily to be made as of the death of the taker of the prior interest.

The Wisconsin court quoted Restatement and made the following observation: "Professor Lewis M. Simes, author of The Law of Future Interests, and one of the advisors on Property to the American Law Institute, is in agreement with the principle adopted by the Restatement. See 2 Simes, Law of Future Interests, p. 234, sec. 422, wherein Simes states: 'Where the donee of the possessory interest is the sole heir of the testator and there is a future interest to the testator's heirs, the situation is more difficult of solution. Here the heir cannot be excluded if we determine the testator's heirs as of the testator's death, since, if that were done, there would be no one but the sole heir to take the future interest; and, if he is excluded, no one is left. The

only way to exclude him is to determine heirship as of a time subsequent to the testator's death and thus include a different group of persons in the class.' "

As this court has said many times, the first consideration in construing a will is to determine the testator's intent and a basic rule in this connection is that the intent must be determined from the language used in the will. See Goodrich v. Bonham, 142 Neb. 489, 6 N. W. 2d 788 (1942).

In this will, the testator set up a testamentary trust for his daughter, who was then 42 or 43 years of age, with a life expectancy of approximately 28 to 30 years. She was married but had no children. However, the possibility she could still have issue was present. If she died leaving issue, testator wanted that issue to take the property in fee simple. This was the first contingency and necessarily would have to be determined at the date of the death of the daughter. If she died without issue, testator wanted the property to go to his heirs-at-law by blood relation. At the time of his death, other than his daughter, his blood relatives were three nephews and two nieces. The testator would surely have known that these nieces and nephews were his sole blood relatives if his daughter were not considered. They were so few it would have been an easy matter to have said "nephews and nieces" if he was thinking in terms of the estate vesting at the time of his death. Rather, he used the term "my heirs-at-law by blood relation." On two different occasions he indicated he was thinking in terms of the property vesting at the time of his daughter's death. In one place, he said "shall descend at her death to my heirs-at-law, by blood relation." Where he explains his intention, he again says, "and at her death without issue surviving her, said real estate shall descend to my heirs-at-law who are related to me by blood."

While ordinarily such words as "at her death" do

not have the effect of postponing the vesting of an estate in remainder, this is not true, if when read in context, the intention of the testator would appear to be otherwise. Construed in the context of the contrary intent expressed by the Restatement rule, we hold the remainder interest herein vested at the date of the death of the daughter rather than that of the testator.

In the will under consideration, John R. House had made ample provision for his wife. It is obvious, he then had it in mind to provide definitely and immediately for the comfort and support of his daughter during her lifetime. His daughter was married and it appears obvious he did not want any spouse to control the property. His daughter was in his mind first and last as the principal person to be provided for. If she had issue, which at that time was still a possibility, he wanted that issue to take the property in fee simple absolute. It also appears obvious he did not want any spouse to succeed to any part of his estate. While the ages of the nieces and nephews is not a matter of record, their ancestors, who were brothers of the testator, had predeceased him. All the nephews and nieces predeceased the testator's daughter. From the way the will is drawn, it seems obvious to us the testator in this instance was thinking of blood relations as of the date of the death of his daughter without issue.

Commenting further on the intent of the testator, it is obvious he was particularly desirous that none of his estate pass to those who were not blood relatives at the time of the death of his daughter without issue. If we were to follow the rule applied by the trial court and vest the remainder in the two nieces and three nephews at the time of the death of John R. House, this intent could be thwarted. All the nieces and nephews died before his daughter. Any surviving spouses of those nieces and nephews would be included as their heirs-at-law. Applying the Re-

statement rule and vesting the remainder interest at the death of the life beneficiary rather than at the death of the testator will carry out the intent of the testator.

As suggested at the outset, there are decisions in other jurisdictions going both ways. There are decisions in jurisdictions other than those cited herein which follow the Restatement rule. There are other jurisdictions which hold that the Restatement rule in and of itself is not sufficient to show a contrary intent. Many of these cases are collected in an Annotation at 30 A. L. R. 2d 416. With the split in authority on this issue of first impression, we take cognizance of the Restatement rule, and apply it to the facts in this case.

The conclusion we reach makes it unnecessary to consider the validity of the contracts herein. It is also unnecessary to consider whether the judgment recovered in the federal court action satisfied the fee obligation. On the facts in this case, we hold the remainder interest vested at the termination of the trust, the death of the daughter, December 29, 1974.

We affirm the dismissal of the action of the plaintiffs for the reasons given herein, rather than those given by the trial court. We reverse the judgment of the trial court insofar as it vested the remainder interest in the heirs of the testator determined as of the date of his death. We remand the cause to the District Court with directions to enter judgment in accordance with this opinion; to determine the heirs of the blood of John R. House as of December 29, 1974; and to enter a decree of partition for said heirs.

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

D. W. TROWBRIDGE FORD, INC., APPELLANT AND CROSS-APPELLEE, V. JAMES W. GALYEN ET AL, APPELLEES AND CROSS-APPELLANTS.

262 N. W. 2d 442

Filed February 15, 1978. No. 41293.

1. **Contracts: Consideration: Restraint of Trade.** The purchase of business property is a sufficient consideration for a contract by the seller that, for a reasonable time in a limited territory, he will not engage in the buyer's business.
2. **Contracts: Restraint of Trade.** Partial restraints are not unreasonable if they are ancillary to a purchase of property made in good faith and are necessary to afford protection to the purchaser. What is a reasonable restraint depends largely upon the facts of the particular case.
3. **Contracts: Damages: Restraint of Trade.** While the measure of damages in an action for the breach of an agreement by the seller not to reenter business in competition with the buyer is usually difficult of exact computation, he who is damaged will not be precluded from recovering because of that fact.
4. _____: _____: _____. In order to recover substantial damages, the plaintiff must furnish sufficient data to enable the court, with a reasonable degree of certainty and exactness, to estimate the actual damages.
5. _____: _____: _____. The amount recoverable for breach of an agreement by the seller of a business not to engage in competition with the buyer is the loss which the latter has sustained, naturally resulting from the breach.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed.

Edward E. Hannon of Cronin & Hannon, for appellant.

Donald H. Bowman of Peterson, Bowman, Coffman & Larsen, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BOSLAUGH, J.

This case involves a controversy concerning a contract for the sale of an automobile dealership. On

June 1, 1967, James W. Galyen and Delbert V. Robertson entered into an agreement to sell the corporate stock of the Robertson Motor Co., Inc., of O'Neill, Nebraska, to Douglas W. Trowbridge. Galyen owned over 80 percent of the stock of the Robertson Motor Co. and Robertson owned the balance.

Galyen also owned the Galyen Motor Co., Inc., of Atkinson, Nebraska. Both the Robertson Motor Co., Inc., and the Galyen Motor Co., Inc., were franchised by the Ford Motor Company. The contract provided that Galyen Motor Co., Inc., would immediately cancel its franchise with the Ford Motor Company and hold no other franchise for the sale of new automobiles in Holt County, Nebraska, for a period of 15 years. The contract further provided that Galyen Motor Co., Inc., and Galyen had the right to continue to sell new cars for a period of not to exceed 3 years after July 1, 1967, but all new automobiles and trucks were to be purchased from Trowbridge at net invoice cost plus $25 for pick-up trucks and net invoice cost plus $50 for new automobiles and trucks of F500 rating and larger. At a date not later than July 1, 1970, Galyen and Galyen Motor Co., Inc., were to discontinue the sale and distribution of new automobiles and trucks in Holt County, Nebraska, for a period of 15 years from the date of the contract.

This action was commenced in 1969 by D. W. Trowbridge Ford, Inc., the successor to Robertson Motor Co., Inc., against James W. Galyen and Galyen Motor Co., Inc. The plaintiff alleged that the defendants Galyen and Galyen Motor Co., Inc., had breached the contract by selling new automobiles and trucks which had not been purchased from the plaintiff as required by the contract. The plaintiff prayed for damages and injunctive relief. The petition was amended in 1975 to allege that the defendant had continued to sell new automobiles and trucks after July 1, 1970, in violation of the contract.

The plaintiff prayed for an interpretation of the contract, damages, and injunctive relief. The defendants denied the allegations of the petition, generally, and by cross-petition alleged that Trowbridge had breached the contract for which the defendants were entitled to damages.

The trial court found generally for the plaintiff and that it had been damaged in the amount of $14,814.12. The trial court further found the plaintiff was entitled to injunctive relief to enforce the covenant not to compete, but, because of the probability of further and extensive litigation between the parties and the difficulties of enforcing the covenant, it should be canceled and the plaintiff awarded damages in the amount of $5,000 in lieu of injunctive relief.

Both parties filed motions for new trials. The plaintiff has appealed and the defendants have cross-appealed.

The first issue that must be determined is whether the covenant not to compete was valid and enforceable. The defendants contend that the covenent was invalid because it was not necessary to prevent interference with good will and was not reasonable.

The general rule is that the purchase of business property is a sufficient consideration for a contract by the seller that, for a reasonable time in a limited territory, he will not engage in the buyer's business. Swingle & Co. v. Reynolds, 140 Neb. 693, 1 N. W. 2d 307. See, also, Wittenberg v. Mollyneaux, 60 Neb. 583, 83 N. W. 842. Partial restraints are not unreasonable if they are ancillary to a purchase of property made in good faith and are necessary to afford protection to the purchaser. What is a reasonable restraint depends largely upon the facts of the particular case.

The purchaser in this case was buying an automo-

bile dealership from an established and successful dealer. The restraint was limited to the sale of new cars for a period of 15 years within the county. The seller was given the option to continue the sale of new cars and trucks for the first 3 years of the contract, but was required to buy them from the purchaser.

The object of the restrictive covenant in this case was to protect the purchaser against the competition of Galyen in the new car field in Holt County, Nebraska, for the 15 year period. We think the restriction, which was limited as to both time and space, was reasonable. See, Swingle & Co. v. Reynolds, *supra;* Annotation, 45 A. L. R. 2d 77; Annotation, 46 A. L. R. 2d 119.

The evidence shows that Galyen Motor Co. sold 55 new cars and trucks during the 3 year period after July 1, 1967, which were not purchased from the plaintiff as required by the contract. After July 1, 1970, Galyen continued to sell new cars and trucks, principally, through Galyen Auto Sales, later Galyen Auto Sales, Inc. The evidence shows Galyen Auto Sales was in fact a device employed by Galyen in an effort to avoid the restrictive terms of the contract. Galyen Auto Sales was ostensibly an operation carried on by Richard Galyen, a son of the defendant, James W. Galyen, who was the party to the contract. Richard Galyen had been closely associated with his father in other business operations, and after the litigation commenced, Galyen Auto Sales carried on much of the business that had been conducted previously by Galyen Motor Co. The evidence shows, with reasonable certainty, that Galyen Auto Sales in fact had no substantial existence separate and apart from James W. Galyen and Galyen Motor Co.

The trial court found that the plaintiff had been damaged in the following amounts:

1. $2,050 by the sale of 55 new cars and trucks be-

tween July 1, 1967, and July 1, 1970, by the defendants, James W. Galyen and Galyen Motor Co., Inc., which had not been purchased from the plaintiff as required by the contract.

2. $12,764.12 by the sale or lease of 362 new cars and trucks between July 1, 1970, and March 9, 1976.

The plaintiff contends the damages awarded were inadequate. The defendants contend that the damages are excessive and not sustained by the evidence.

The matter of damages in a case such as this is at best an estimate or approximation. The applicable rule was stated in Gallagher v. Vogel, 157 Neb. 670, 61 N. W. 2d 245, as follows:

"In cases such as the instant case, damages are rarely susceptible of accurate proof; but the measure of damages, expressed generally, is the value of the business lost to the plaintiff — not the gain of defendant, which may be more or less than plaintiff's loss; though such gain may be considered in evidence, it should be shown to correspond in whole or in part with the loss of plaintiff. See, Gregory v. Spieker, 110 Cal. 150, 42 P. 576, 52 Am. S. R. 70.

"While the measure of damages in an action for the breach of an agreement by the seller not to reenter business in competition with the buyer is usually difficult of exact computation, he who is damaged will not be precluded from recovering because of that fact. But the plaintiff will be called upon, in order to recover substantial damages, to furnish sufficient data to enable the court, with a reasonable degree of certainty and exactness, to estimate the actual damages, and if he fails to do this he can recover only a nominal sum. See, Scotton v. Wright, 32 Del. 192, 121 A. 180; Salinger v. Salinger, 69 N. H. 589, 45 A. 558.

"The most that can be done is to adduce the pertinent facts and submit them to the trial court to estimate and determine the sum which will afford the

injured party reasonable compensation. See Galucha v. Naso, 147 Iowa 309, 126 N. W. 146.

"Speaking broadly, the amount recoverable for breach of an agreement by the seller of a business not to engage in competition with the buyer is the loss which the latter has sustained, naturally resulting from the breach.

"The general rule is that the party injured by a breach of contract is entitled to recover all of his damages, including gains prevented, as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach. See Western Union Tel. Co. v. Wilhelm, 48 Neb. 910, 67 N. W. 870."

Involved in the question of damages in this case is the meaning of the term "new" automobiles and trucks as used in the contract. The trial court held that a "new" unit was one sold under a manufacturer's statement of origin with a new car or truck warranty and less than 100 miles use. Since many new units were obtained from other dealers and then driven to the point of delivery, a 100 mile limit would seem too restrictive. A more reasonable figure would be 500 miles since this would allow for units obtained from dealers located more than 100 miles from Atkinson, Nebraska. Units which were titled only for the purpose of crediting another Ford dealer with the sale were treated as "new" units.

"Demonstrators" and "Executive Cars" with less than 6,000 miles use can be sold with a new car warranty. However, the contract contained a specific provision allowing Galyen to bid directly for "executive cars." Consequenty, these units were not "new" units within the meaning of the contract. With the minor exceptions noted we think the definition adopted by the trial court was generally correct.

Also involved in the matter of damages is the allocation of the item of "dealer hold back" for each

new unit sold. The invoice for each new unit sold by the Ford Motor Company includes an item known as the "dealer hold back" which is a part of the total charge made to the dealer for the unit. This amount, which is approximately 2 percent of the cost of the unit, is paid to the dealer by the manufacturer at a later time. The defendant claims that this item should be excluded in computing "net invoice cost."

The trial court found that the plaintiff was entitled to retain the "dealer hold back." The evidence indicates that the dispute about this item arose after the litigation had been commenced and that the hold back was treated as a part of the cost of new units purchased by the defendants from dealers other than the plaintiff. We think the evidence sustains the finding that the plaintiff was entitled to retain the "dealer hold back" on new units purchased by the defendants.

The trial court did not include the "dealer hold back" as an item of damage for the 55 new units that were sold by the defendants between July 1, 1967, and July 1, 1970. The evidence indicates that the "dealer hold back" on these units would amount to approximately $3,000. We find that this is a proper item of damages and that plaintiff should be awarded this amount in addition to the $2,050 awarded by the trial court for the period between July 1, 1967, and July 1, 1970.

In addition to the sale of new cars the defendant Galyen also operated a leasing business. The trial court included 71 leased "new" units in the computation of the 362 units for which damages were awarded between July 1, 1970, and March 9, 1976. The contract was very specific and prohibited only the sale and distribution of new units. Although leasing is a related activity carried on by many new car dealers, there are other related activities such as the sale of used cars and servicing which were not prohibited

by the contract. We interpret the contract as not prohibiting the defendants from leasing cars and trucks. When the 71 leased units are eliminated, the new units sold by the defendants between July 1, 1970, and March 9, 1976, total 291.

In awarding damages for new units sold by the defendants after July 1, 1970, the trial court determined that the plaintiff could have been expected to sell 50 percent of the units which the defendants sold in violation of the contract. We believe this was a realistic view of the situation and took into account the fact the plaintiff was a new dealer and there were other dealers operating in Holt County and surrounding counties.

The trial court awarded damages on a per unit basis by computing the average net profit per new unit sold from the financial statements and reports of the plaintiff which were in evidence. The trial court arrived at an average profit of $70.53 per unit sold. This figure appears to be reasonably accurate as a matter of computation. The plaintiff contends it is erroneous because it does not recognize the probability that overhead expense would not increase proportionately as the volume of new car business of the plaintiff would increase.

In the final analysis, the determination of damages in this type of a case is at best an estimate or approximation. Gallagher v. Vogel, *supra*. There is no way to prove how many more new units the plaintiff would have sold if Galyen had not continued to sell new units after July 1, 1970. There is no way to know what additional expenses would have been incurred because of the increased volume. Additional volume of trade does not always result in increased profits. On the basis of the entire record we believe the figure adopted by the trial court was a reasonable method to use in determining the damages.

When the 71 leased units are eliminated from the

computation, the plaintiff's damages amount to $10,360.66 for new units sold by Galyen after July 1, 1970.

The remaining issue concerns the trial court's denial of injunctive relief to enforce the restrictive covenant during the remaining years of the contract. The trial court found that the plaintiff had established a right to injunctive relief, but "the course of conduct of the defendants toward the plaintiff indicates that further and extensive litigation may result from leaving said covenant not to compete in effect and the court finds that payment of just compensation by defendants to plaintiff for the cancellation of said covenent not to compete effective March 10, 1976, would be in the interest of justice and equity between the parties, and the court does determine that just compensation therefor is in the amount of $5,000.00."

Specific enforcement of a contract may be refused if the performance is of such a character as to make effective enforcement unreasonably difficult or to unnecessarily require long-continued supervision by the court. Restatement of Contracts, § 371, p. 675. See, also, Gloe v. Chicago, R. I. & P. R. Co., 65 Neb. 680, 91 N. W. 547. Where specific enforcement of a contract is denied, the court may award damages in the same proceeding. See Restatement of Contracts, § 363, p. 657. See, also, 42 Am. Jur. 2d, Injunctions, § 306, p. 1106; 43 C. J. S., Injunctions, § 217, p. 951; 81A C. J. S., Specific Performance, § 202, p. 177; Weaver v. Snively, 73 Neb. 35, 102 N. W. 77; Robinette v. Olsen, 114 Neb. 728, 209 N. W. 614.

At the time this case was tried approximately 9 years of the contract had expired. The record demonstrates the probable difficulties which would be involved in effective enforcement of the contract during the next 6 years and the probability that there would be further and extensive litigation between the parties in the event the covenant was to

remain in effect. We think it was within the discretion of the trial court to cancel the covenant, effective March 10, 1976, and award damages in lieu of an injunction.

In determining the damages to be awarded, some consideration should be given to the experience of the plaintiff during the first 9 years of the contract. Also to be considered is the fact that the damages awarded are certain, they are awarded at this time, and the expense and uncertainty of future litigation is avoided. Upon a consideration of all of the facts and circumstances, we find the amount awarded by the trial court for the cancellation of the covenant was proper.

In the cross-petition the defendants alleged that the plaintiff breached the contract by refusing to deliver units on request, which were in stock at the plaintiff's garage, and by claiming that a deal was pending on the units in question. There is no evidence that the plaintiff ever refused to order a unit requested by the defendant during the 3 year period following the date of the contract.

A permissible inference from the evidence is that, in each instance in question, a customer had contacted both dealers separately about a possible purchase. The evidence concerning these matters was in conflict and we consider the fact that the trial court heard and observed the witnesses and resolved the issue against the defendants. We find the defendants are not entitled to recover damages on the cross-petition.

The judgment of the District Court should be modified to provide that the plaintiff should recover the sum of $15,410.66 for damages to March 9, 1976. The judgment as modified is affirmed.

AFFIRMED AS MODIFIED.

HOWARD L. BERKSHIRE, APPELLANT, V. DOUGLAS COUNTY BOARD OF EQUALIZATION ET AL., APPELLEES. JEAN S. ANDERSEN, APPELLANT, V. DOUGLAS COUNTY BOARD OF EQUALIZATION ET AL., APPELLEES.

262 N. W. 2d 449

Filed February 15, 1978. Nos. 41295, 41296.

1. **Trial: Parties.** When the question is one of a common or general interest to many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.
2. _____: _____. In determining whether a class action is properly brought, considerable discretion is vested in the trial court.
3. **Taxation: Property.** A corporation's tangible personalty is assessed in the taxing area of the corporation's principal place of business unless otherwise provided by statute or unless it has acquired an actual situs elsewhere.
4. _____: _____. Permanency of tangible personal property in a taxing area is determined by the ownership and use for which the property is designed and does not embrace the idea of a forever-fixed location or the thought that the owner bringing personal property into the area has no present intention of ever removing it; but it excludes the idea of mobile personal property which happens to be in the taxing area at the moment of the assessment of property which, for some definite purpose of the owner, has come to rest within the area for a limited time.
5. **Taxation: Administrative Law: Proof.** The burden of proof is upon a taxpayer to establish his contention that the determination of a tax situs by the board of equalization is discriminatory, unjust, or unfair.
6. **Taxation: Administrative Law.** The determinations of both the county board of equalization and the State Board of Equalization and Assessment are clothed with a presumption of validity.
7. **Taxation: Administrative Law: Appeal and Error.** A decision of the county board of equalization will not be disturbed on appeal unless clearly wrong.

Appeals from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Swarr, May, Smith & Anderson, for appellants.

McGrath, North, O'Malley, Kratz, Dwyer, O'Leary & Martin and Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. THOMAS, J.

These actions stem from taxpayers' appeals challenging determinations by the Douglas County Board of Equalization as to the situs of personal property. The actions, being directly related and involving the same issues, have been consolidated on this appeal. The taxpayers voiced their complaints before the Board of Equalization. Upon dismissal of the complaints by the Board, the taxpayers appealed to the District Court alleging that the Board abused its discretion. The District Court upheld the decision of the Board and we affirm.

One of the defendants, Xerox Corporation, reported its leased personal property for property-tax purposes at the principal place of business of Xerox, which is in School District No. 1, instead of at the actual physical situs of each item. Xerox Corporation leased personal property in School District No. 66, also located in Douglas County. The taxpayer-plaintiff appealed this action as a class action on behalf of himself and other similarly situated taxpayers of School District No. 66 against the Board of Equalization and Xerox Corporation. The plaintiff contends that the sanctioning by the Board of Xerox' reporting method results in School District No. 66 being denied the benefit of a substantial amount of personal property upon which taxes may be levied and results in other taxpayers in the district bearing a higher tax burden. The revenue involved is substantial.

Another of the taxpayers, International Business Machines Corporation (hereinafter referred to as I.B.M.), reported its leased personal property at the actual physical situs of each item, instead of its place of business, located in School District No. 66. Like Xerox, I.B.M. leases equipment in both districts. The reporting systems employed by Xerox

and I.B.M. allow more revenue to be generated into School District No. 1 than if the corporations both used the same manner of reporting. Plaintiffs allege that the approval by the Board of the different reporting methods results in a lack of consistency which is incorrect as a matter of law. It is further contended that the Board's action evidences an intent to allow corporations, such as I.B.M. and Xerox, to pick and choose the taxing district with the lower mill levy.

The plaintiffs' first assignment of error relates to the District Court's failure to allow the suit to be maintained as a class action. Section 25-319, R. R. S. 1943, provides: "When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." Plaintiffs contend that the taxpayers of School District No. 66 fulfill the statutory requirements in that they present a common question and the taxpayers are numerous parties. We agree that technically the plaintiffs meet the requirements. However, we do not believe the trial judge erred in disallowing the suits to be brought as a class action.

In determining whether a class action is properly brought, considerable discretion is vested in the trial court. See Gant v. City of Lincoln, 193 Neb. 108, 225 N. W. 2d 549. This rule applies to the District Court action hearing appeals from the county board of equalization since the appeals are heard de novo under section 77-1511, R. R. S. 1943. Here, we believe the trial judge could have properly determined that meeting with the technical requirements of section 25-319, R. R. S. 1943, is insufficient where no useful purpose is served by bringing a suit as a class action. The plaintiffs are seeking relief indirectly. The final result is the same whether the actions are class actions or individual actions. Correspondingly,

even if the trial judge erred we are unable to find how the plaintiffs are in any way prejudiced.

The plaintiffs' principal assignment of error relates to the District Court's failing to find an abuse of discretion by the Board because of its allowance of inconsistent practices as to the reporting of leased personal property. The District Court found that while the evidence showed the two corporations had similar business practices, there are differences in many respects.

A corporation's tangible personalty is assessed in the taxing area of the corporation's principal place of business, unless otherwise provided by statute or unless it has acquired an actual situs elsewhere. Ace Constr. Co. v. Board of Equalization, 169 Neb. 77, 98 N. W. 2d 367. The Board determined that I.B.M. acquired a reporting situs elsewhere; here, that situs is the actual location of the property under lease. The test of what characteristics such property must have to be removed from inclusion at the principal place of business was stated in Ace Constr. Co. v. Board of Equalization, *supra:* "Permanency of tangible personal property in a taxing area is determined by the ownership and use for which the property is designed and does not embrace the idea of a forever-fixed location or the thought that the owner bringing personal property in the area has no present intention of ever removing it; but it excludes the idea of mobile personal property which happens to be in the taxing area at the moment of the assessment of property which, for some definite purpose of the owner, has come to rest within the area for a limited time."

We recognize that the rule is broad in scope and its application must take into account the practices of a business, type of equipment it utilizes, and the mobility of that equipment if situated elsewhere than the principal place of business. The leasing of large equipment to other businesses for extended pe-

riods of time could conceptually allow such equipment to acquire a new situs for taxing purposes. It is common knowledge that, and as the evidence shows, I.B.M. leases data processing machines, copiers, and office equipment. Depending on the lease time for this equipment, the Board could have found that I.B.M. could report property at the local situs. The question becomes whether the Board, upon finding the standard applies to I.B.M., should also have applied it to Xerox.

The burden of proof is upon a taxpayer to establish his contention that the assessor's valuation, as affirmed by the board of equalization, is discriminatory, unjust, or unfair. See Hastings Building Co. v. Board of Equalization, 190 Neb. 63, 206 N. W. 2d 338. This same rule applies to a determination by the Board of the taxing situs. The plaintiffs contend the differences in the types of machinery leased and the leases used by I.B.M. and Xerox are not material enough to justify the different reporting of the situs of personal property. While the plaintiffs' complaint may be well-founded, they failed to sustain their burden of proof.

The evidence supports plaintiffs' assertion that the differences in the types of machinery leased by I.B.M. and Xerox are not material. I.B.M. has a greater amount of equipment available on a lease basis. Xerox leases only copy machines; I.B.M., in addition to copy machines, leases data processing equipment and smaller office equipment such as typewriters. The fact that I.B.M. has more varying types of equipment available for lease is not material. The accompanying data describing the available machines lists the weight and size of almost all the I.B.M. equipment. Among these listings, the maximum weight of a single item is 4,200 pounds. However, the rest of the equipment weighs significantly less, ranging in weight from 65 to 1,850 pounds. Most of the larger equipment listed is with-

in a range of 800 to 1,200 pounds. The descriptions of Xerox equipment list the weight of only two machines. One, a computer-forms printer, is listed at 1,700 pounds plus 100 pounds for each additional sorter. This evidence shows that Xerox has available for lease at least one machine comparable in weight to that offered by I.B.M.

The remaining evidence in the records concerns the lease terms of both parties. The evidence shows that certain lease terms are the same for both I.B.M. and Xerox. These include such items as customer payment of installation and removal, nonassignability, service provisions, risk of loss, computation of time used, and payment. What is lacking is evidence concerning the time provisions of the leases and the actual duration of time the equipment remains at one location. The length of time property remains at a situs, or in some cases, at least the intent that it remain, is an essential element in determining whether property acquires a local situs and is removed from inclusion with property at the principal place of business. Here, there is evidence of I.B.M. term leases. The leases provide for a base service of 12 months with extension plans of up to 48 months and purchase options. There are plans where equipment need only be rented for a minimum of 180 days. There is essentially no relevant evidence as to how Xerox leases its equipment. The only fact shown is that Xerox has leases that provide for notice terminations of 15, 30, and 90 days or 1 year, 81 percent of which are of the 30-day notice variety. This information only goes to the notice the lessee must give Xerox. We do not know what time periods the leases are issued for or if this is an open provision.

From the evidence we know only that Xerox and I.B.M. have equipment available through leasing. The only evidence which would show that either corporation actually leased equipment is evidence that

a small percentage of Xerox' equipment is leased in School District No. 66 and an even smaller percentage of the accompanying leases provide over 30-days cancellation notice. The time in which a lessee may give notice is, at best, indirect evidence to the issue of how long equipment remains at one situs. Absent here is any evidence as to how many customers availed themselves of I.B.M. and Xerox lease services and the duration of the service of at least a cross-section of the customers. In the absence of such evidence, it can not be concluded that Xerox and I.B.M. lease property for similar durations or that they are bound by like tax-reporting methods.

Section 77-1216 (1), R. R. S. 1943, provides: "Questions that may arise as to the proper place to list personal property shall be determined as follows: (1) If between several places in the same county, the place for listing and assessing shall be determined and fixed by the county board; * * *." A fundamental rule consistently followed by this court is that the determinations of both the county board of equalization and the State Board of Equalization and Assessment are clothed with a presumption of validity. County of Sioux v. State Board of Equalization & Assessment, 190 Neb. 198, 207 N. W. 2d 219.

A decision of the county board of equalization will not be disturbed on appeal unless clearly wrong. See, Ramm v. County of Holt, 172 Neb. 88, 108 N. W. 2d 808; County of Sioux v. State Board of Equalization & Assessment, *supra*.

From a review of the record, we cannot say the Board of Equalization was clearly wrong and, accordingly, affirm the decisions of the District Court.

AFFIRMED.

RICHARD FANGMEYER, APPELLEE, V. MARK REINWALD ET AL., APPELLANTS.

263 N. W. 2d 428

Filed February 22, 1978. No. 41127.

1. **Trial: Negligence: Evidence: Proof.** If the defendant in a negligence case pleads that the plaintiff was guilty of contributory negligence, the burden is upon him to prove that defense. If there is no competent evidence to support a defendant's plea of contributory negligence, it is prejudicial error to submit that issue and the issue of comparative negligence to the jury.
2. **Trial: Negligence: Evidence.** The question of the existence of negligence or contributory negligence is for the trier of fact whenever different minds may reasonably draw different conclusions from the evidence; it is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury.
3. **Trial: Verdicts: Evidence.** A motion for a directed verdict 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. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
4. **Trial: Verdicts: Evidence: Negligence.** Where the undisputed physical facts demonstrate that a party was not negligent in the operation of his automobile at the time of a collision, the evidence is not sufficient to support a verdict for the other party; and where contributory negligence is charged against a plaintiff but the physical facts disclose conclusively that he was not guilty, it is error for the court to submit that question as an issue to the jury. The physical facts, however, must indisputably demonstrate that the collision out of which the cause of action arose was not caused by the party charged with negligence or contributory negligence before a verdict should be directed in favor of that party.
5. **Joint Ventures: Words and Phrases.** To constitute a joint venture there must be an agreement to enter into an undertaking in the object of which the parties have a community of interest and a common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control of the agencies used therein, although one may entrust performance to the other.
6. **Joint Ventures: Intent.** The relationship of joint venturers depends largely upon the intent of the alleged parties as manifested from the facts and circumstances involved in each particular case.

Appeal from the District Court for Thayer County: WILLIAM B. RIST, Judge. On reargument. Reversed and remanded for proceedings not inconsistent with this opinion.

Leonard J. Germer and Baylor, Evnen, Baylor, Curtis & Grimit, for appellants.

Leroy P. Shuster, Richard L. Schmeling, and William R. Thierstein, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BRODKEY, J.

In an amended petition filed in the District Court for Thayer County, Richard Fangmeyer, plaintiff and appellee herein, alleged that he and his wife had suffered personal injuries and property damage as a result of a motor vehicle collision caused by the negligence of defendant Mark Reinwald. Henry Virus was also named as a defendant on the grounds that he and Reinwald were engaged in a joint farming venture; that the pickup truck driven by Reinwald when the accident occurred was owned by Virus and used in the joint farming venture; that Reinwald was conducting farm business at the time of the accident; and that Reinwald's negligence could be imputed to Virus. Fangmeyer prayed for general and special damages.

In their answer, defendants admitted the occurrence of an accident involving the vehicles operated by Reinwald and Fangmeyer, but denied the allegations of negligence and imputed negligence, and alleged that the accident was proximately caused or contributed to in a degree more than slight by the negligence of Fangmeyer.

Trial before a jury commenced on June 3, 1976. The trial court determined as a matter of law that Fangmeyer was not negligent, and so instructed the jury. The court did not submit the issue of contribu-

tory negligence to the jury, but did submit the issue of imputed negligence in regard to persons engaged in a joint venture, overruling defendant Virus' motion for a directed verdict on that issue. The jury returned a verdict in favor of Fangmeyer against both defendants, and awarded him $47,958 in damages.

In support of motions for new trial, defendants presented affidavits of jurors indicating that one juror, contrary to the trial court's instructions, had told the other jurors of his personal knowledge of the accident site during deliberations. The trial court overruled the motions for new trial, and also overruled defendants' motions for judgment notwithstanding the verdict.

Defendants have now appealed to this court, contending that the District Court erred (1) in failing to submit to the jury the issue of contributory negligence on the part of Fangmeyer and in instructing the jury that Fangmeyer was not negligent as a matter of law; (2) in submitting to the jury the issue of imputed negligence in regard to persons engaged in a joint venture and overruling defendant Virus' motion for a directed verdict on that issue; (3) in overruling defendant Virus' motion for judgment notwithstanding the verdict; and (4) in overruling defendant Reinwald's motion for a new trial.

We first discuss whether the trial court erred in holding that Fangmeyer was not negligent as a matter of law. The evidence adduced at trial in regard to that issue was as follows. On October 4, 1969, at approximately 9 a.m., pickup trucks driven by Fangmeyer and Reinwald collided on a gravel road, known as Stoddard Road, in Thayer County. Fangmeyer was traveling east, Reinwald was traveling west, and it was a head-on collision. The accident occurred approximately 35 to 40 yards east of a crest of a hill. Stoddard Road was approximately 20 to 24 feet wide at the accident site, and the pickup trucks

of the parties were each 80 inches wide. Several witnesses testified that the road was relatively flat where the accident occurred, although they acknowledged that the road may have sloped slightly to the south. Reinwald stated that the road definitely sloped to the south.

Fangmeyer testified that as he came over the crest of the hill, at a speed of 30 miles per hour, he saw Reinwald approaching him on the wrong side of the road. Fangmeyer stated that the closer he came to Reinwald, the further he drove over to the right side of his lane, and that he had slowed almost to a stop when the Reinwald vehicle collided head-on with his truck. Fangmeyer stated that his right front wheel was off the road when the collision occurred, and that he was on his side of the road at all times.

Witnesses for Fangmeyer testified as to the location of the trucks after the collision. Their testimony, supported by a photograph and diagrams, indicated that the Fangmeyer vehicle was on the south side of the road at an angle, its right front wheel on, or just off, the edge of the road. The Reinwald vehicle, according to those witnesses, was also on the south side of the road, facing toward the southwest. There were skid marks behind both vehicles, but testimony in regard to these marks was not dispositive as to the precise location of impact, nor was the evidence clear as to whether the trucks slid to the south after the impact. Photographs of the trucks indicated that the place of impact on Fangmeyer's vehicle was in the area of the left headlight, while the place of impact on Reinwald's vehicle was the center of the hood and grill. One witness testified that he saw antifreeze or fluid on the south side of the road, although he could not state the precise location of the fluid.

Reinwald testified that he was traveling at a speed of about 40 miles per hour immediately prior to the

accident. He stated that he was hugging the center of the road, and saw Fangmeyer's truck as it came over the hill, right "in front of" him. Reinwald stated that Fangmeyer was "more in the center of the road," right in front of his truck. Reinwald immediately applied his brakes and cramped his wheels to the north. He could not remember sliding on the gravel, but thought he could have done so.

As previously stated, the trial court refused to submit the issue of contributory negligence on the part of Fangmeyer to the jury, and instructed the jury as follows: "The court has determined as a matter of law that the plaintiff was not negligent in the operation of his vehicle as respects the collision involved in this case and you must accept such determination by the court."

Several principles in regard to a trial court holding a party to be negligent or not negligent as a matter of law are well-established in this state. "In every case, before an issue may be submitted to a jury, there is a preliminary question for the court, not whether there is literally no evidence, but whether there is sufficient evidence upon which a jury can properly proceed to find a verdict for the party upon whom the burden is imposed." Jensen v. Shadegg, 198 Neb. 139, 251 N. W. 2d 880 (1977). If the defendant pleads that the plaintiff was guilty of contributory negligence, the burden is upon him to prove that defense. Oberhelman v. Blount, 196 Neb. 42, 241 N. W. 2d 355 (1976); Giebelman v. Vap, 176 Neb. 452, 126 N. W. 2d 673 (1964). If there is no competent evidence to support a defendant's plea of contributory negligence, it is prejudicial error to submit that issue and the issue of comparative negligence to the jury. Oberhelman v. Blount, *supra*; Giebelman v. Vap, *supra*. It is clear, however, that the question of the existence of negligence or contributory negligence is for the trier of fact whenever different minds may reasonably draw different conclusions

from the evidence, and a directed verdict is proper only when reasonable minds cannot differ. Jensen v. Hawkins Constr. Co., 193 Neb. 220, 226 N. W. 2d 346 (1975); Oberhelman v. Blount, *supra*; Treffer v. Seevers, 195 Neb. 114, 237 N. W. 2d 114 (1975); Neimeyer v. Tichota, 190 Neb. 775, 212 N. W. 2d 557 (1973); Schmidt v. Orton, 190 Neb. 257, 207 N. W. 2d 390 (1973). It is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury. Huskinson v. Vanderheiden, 197 Neb. 739, 251 N. W. 2d 144 (1977). Finally: "A motion for a directed verdict 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. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence." Jensen v. Shadegg, *supra*. See, also, Waegli v. Caterpillar Tractor Co., 197 Neb. 824, 251 N. W. 2d 370 (1977); Laux v. Robinson, 195 Neb. 601, 239 N. W. 2d 786 (1976); Treffer v. Seevers, *supra*. If there is any evidence which will sustain a finding for the litigant having the burden of proof in a cause, the trial court may not disregard it and decide the case as a matter of law. Ripp v. Riesland, 170 Neb. 631, 104 N. W. 2d 246 (1960).

Under the above principles, it is a general rule that where the two parties involved in an automobile accident give conflicting versions of how the accident occurred, the questions of negligence and contributory negligence must be submitted to the jury. It is also the rule, however, that where the undisputed physical facts demonstrate that a party was not negligent in the operation of his automobile at the time of a collision, the evidence is not sufficient to support a verdict for the other party; and where

the evidence essential to recovery by a party is clearly disproved by the physical facts and conditions, the trial court should direct a verdict against him. See, Miller v. Arends, 191 Neb. 494, 215 N. W. 2d 891 (1974); Buick v. Stoehr, 172 Neb. 629, 111 N. W. 2d 391 (1961); Hessler v. Bellamy, 128 Neb. 571, 259 N. W. 514 (1935); Elwood v. Schlank, 126 Neb. 213, 252 N. W. 828 (1934). As stated in Southwell v. DeBoer, 163 Neb. 646, 80 N. W. 2d 877 (1957): "* * * where contributory negligence is charged against a plaintiff but the physical facts disclose conclusively that he was not so guilty it is error for the court to submit that question as an issue to the jury." The physical facts, however, must "indisputably demonstrate" that the collision out of which the cause of action arose was not caused by the party charged with negligence or contributory negligence before a verdict should be directed in favor of that party. Meyer v. Lang, 187 Neb. 202, 188 N. W. 2d 692 (1971); Riekes v. Schantz, 144 Neb. 150, 12 N. W. 2d 766 (1944). See, also, Lord v. Wilkerson, 542 F. 2d 1034 (8th Cir., 1976). The physical facts relied on by this court in the above cases included location of the vehicles after the collision, skid marks, location of antifreeze spots on the road after the collision, location of debris after the collision, and point of impact on the vehicles.

In the present case, it is clear that there is a conflict between the testimony of the parties as to whether Fangmeyer was on his side of the road shortly before and at the time of the collision. Fangmeyer stated that he was on his side of the road at all times, and that he drove further to the right side of the road as his vehicle approached Reinwald's truck. Reinwald testified that when Fangmeyer's truck appeared over the crest of the hill it was more in the center of the road, and that it was right in front of his vehicle, which was hugging the center of the road. Reinwald stated that both he and Fangmeyer were hugging

the center of the road as the two trucks approached each other.

In an attempt to minimize the significance of Reinwald's testimony, Fangmeyer argued that Reinwald was vague as to the point of impact, and that he placed Fangmeyer in the middle of the road only before, and not at the time of, the collision. In so arguing, he relies on the rule that the facts and circumstances proven, together with the reasonable inferences that may be drawn from them, must indicate with "reasonable certainty" the negligent act complained of in the cause of action. See, Vietz v. Texaco, Inc., 189 Neb. 514, 203 N. W. 2d 513 (1973); Barry v. Dvorak, 176 Neb. 375, 126 N. W. 2d 226 (1964); Southern v. Willis Shaw Frozen Express, Inc., 185 Neb. 117, 174 N. W. 2d 90 (1970). Fangmeyer's reliance on this rule is not persuasive in this case. The reasonable, and only, inference to be drawn from Reinwald's testimony is that both he and Fangmeyer were hugging the center of the road at the time of the collision. Reinwald stated that he immediately cramped his wheels to the north (his right side of the road) upon seeing Fangmeyer's truck. In light of the fact that the drivers of the trucks came within each other's vision 35 to 40 yards from the point of collision, a distance permitting very limited reaction time considering the combined speed of the trucks of approximately 70 miles per hour, a reasonable interpretation of Reinwald's testimony is that both parties were hugging the center of the road at the time of the collision, since Reinwald placed Fangmeyer in the center of the road as Fangmeyer came over the hill.

In light of the fact that the testimony of the parties was conflicting, the ruling of the trial court that Fangmeyer was not negligent as a matter of law can only be sustained if the physical evidence "indisputedly demonstrates" that Fangmeyer was not negligent. Meyer v. Lang, *supra*. The physical

facts in this case consist of skid marks, location of the vehicles after impact, location of antifreeze spots on the south side of the road, and point of impact on the vehicles. The skid marks are not conclusive, as the sheriff who observed them and measured them was unsure which tires on the vehicles caused the marks. Although the skid marks were on the south side of the road, if the skid mark behind Fangmeyer's vehicle was made by his right tires, his vehicle would have been hugging the center of the road. Although it would appear that two skid marks would have been made, one by each wheel, there was no evidence on this point.

The location of the antifreeze spots is also not dispositive, as the witness who observed them could not pinpoint their location on the road, and it can not be assumed that they indicate the point of collision rather than a point where the trucks rested after the collision. The point of impact on the vehicles would also not appear to be conclusive as to where the collision occurred, as both vehicles could have been struck in the front, in the same manner as they were, if Fangmeyer was hugging the center of the road.

The physical fact which most strongly suggests that Fangmeyer was on his own side of the road when the collision occurred is the location of the trucks after the collision. It appears from a photograph taken after the accident that both trucks were on the south side of the road. Although Reinwald's truck may have been moved slightly before the photograph was taken, the Fangmeyer vehicle was not moved. The Fangmeyer truck rested at an angle to the southeast, its right front wheel on the edge of the road, and its rear near the center of the road. The Reinwald truck rested at an angle to the southwest.

Although the photograph and the testimony in reference to it suggest that Fangmeyer was on his side

of the road at the time of the collision, they do not "indisputedly demonstrate" that fact. It should be noted that the rear of Fangmeyer's truck rested at the center of the road. It is certainly possible to conclude that the collision occurred at the center of the road; and that the force of impact, since Reinwald was traveling at a faster rate of speed than Fangmeyer, drove the front end of the Fangmeyer vehicle to the south side of the road. The point of impact on the trucks is indicative that the front of Fangmeyer's vehicle would be driven to the south, while the rear would not. Furthermore, if Fangmeyer, as he testified, was already on the shoulder of the road at the time of impact, it is unlikely that his truck would have rested in the position it did, as depicted in the photograph.

Although the facts presented by Fangmeyer are possible of interpretation as indicating that he was on the right side of the road at the time of the collision, the physical evidence does not indisputedly demonstrate that he was. We note that the jury, after being instructed that Fangmeyer was not negligent as a matter of law, returned to the court to ask "how and why has the court determined (Fangmeyer's) non-negligence?". Apparently the facts adduced at trial were not so conclusive as to make the jury believe that there was clearly no negligence on the part of Fangmeyer, as it was confused as to how the court determined that Fangmeyer was not negligent. It would appear that the issue of contributory negligence on the part of Fangmeyer should have been submitted to the jury, as different minds could reasonably draw different conclusions from the evidence. Jensen v. Hawkins Constr. Co., *supra*. Although the issue is a close one, we must conclude that the trial court erred in holding Fangmeyer not negligent as a matter of law because there was a conflict in the testimony of the parties, and the phys-

ical facts do not indisputedly demonstrate that there was no negligence on the part of Fangmeyer.

We turn now to defendant Virus' contention that the evidence was insufficient to submit to the jury the issue of imputed negligence in regard to persons engaged in a joint venture, and that the claims against him should have been dismissed. The evidence relevant to this issue was as follows. Reinwald has worked on Virus' farm since he was 13 years old, at which time he went to live with the Viruses because his parents were unable to take care of him. Although not legally adopted by Virus, Reinwald regarded him as his father. Reinwald and Virus reached an unwritten agreement in regard to farming, and this agreement has continued for at least 10 years. Reinwald has received one-third of the crops grown on the farm, while Virus has received two-thirds. Both worked full time on the farm, and Reinwald has continued to live on the Virus farm since his marriage.

Virus owns almost all the equipment used on the farm, although Reinwald owns two or three machines. Virus bears all expenses such as fertilizer and seed. Although Virus generally makes decisions in regard to the farming operation, Reinwald makes some decisions on his own, and both confer on farming matters. Each owns his own animals on the farm and owns his own feed, although the feed is stored in a common bin. They have never established a formal partnership, and each has filed separate tax returns. It was stipulated that there are no assets or property held under a joint enterprise or partnership between the defendants. Reinwald stated that he was a tenant and sharecropper.

The truck driven by Reinwald on the day of the accident was owned by Virus at that time. Reinwald had previously owned an interest in the truck, but sold his interest to Virus in the spring of 1969, when Reinwald purchased his own truck. Reinwald

usually used his own truck when farming, but the Virus truck was available for his use whenever he needed it for farming purposes. He did not need Virus' permission to use the truck, but usually told Virus if he was going to use it. Reinwald's own truck was available on the day of the accident, but he used the Virus truck because it got better gas mileage.

On the morning of the day of the accident, Reinwald and Virus agreed that Reinwald should go to the farm of Virus' brother to make arrangements for shelling corn, and then go to Deshler to inquire about repair on a tractor which was used for farming purposes. Reinwald was on his way to Deshler to inquire about the tractor when the accident occurred.

The leading Nebraska case on what constitutes a joint venture is Soulek v. City of Omaha, 140 Neb. 151, 299 N. W. 368 (1941), in which this court stated that: "* * * to constitute the relationship there must be an agreement to enter into an undertaking in the objects of which the parties have a community of interest and a common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control of the agencies used therein, though one may entrust performance to the other." The relationship of joint venturers depends largely upon the intent of the alleged parties as manifested from the facts and circumstances involved in each particular case. The mere pooling of property, money, assets, skill, or knowledge does not create the relationship; there must be something more than mere sharing of profits, some active participation in the enterprise, and some control of the subject matter thereof or property engaged therein. "Each member of a joint adventure has a dual status — that of principal for himself, and as an agent for the others." Soulek v. City of Omaha, *supra*. See, also, Frisch v. Svoboda,

182 Neb. 825, 157 N. W. 2d 774 (1968); Gardner v. Kothe, 172 Neb. 364, 109 N. W. 2d 405 (1961); Carey v. Humphries, 171 Neb. 578, 107 N. W. 2d 20 (1961); Anderson v. Evans, 164 Neb. 599, 83 N. W. 2d 59 (1957).

The jury in this case was instructed in regard to the issue of joint venture under NJI No. 6.40, which follows the language of Soulek v. City of Omaha, *supra*, quoted above. It should be noted that this instruction is a general one, and that the Nebraska Jury Instructions do not reflect the distinction between a "joint enterprise" (an association of persons for social or other nonbusiness purposes) and a "joint adventure" or "joint venture" (an association of persons for business purposes). See 46 Am. Jur. 2d, Joint Ventures, § 1, pp. 21, 22. Although an instruction on joint ventures could, and perhaps should, be more precise in cases such as the present one, where an alleged joint business venture is involved, Virus does not contend that the instruction was erroneous, but contends that the evidence showed as a matter of law that he was not engaged in a joint venture with Reinwald. The rules in regard to directed verdicts have already been set forth in this opinion. See Jensen v. Shadegg, *supra*.

The relationship between Reinwald and Virus is admittedly difficult to characterize. There can be no doubt the evidence was sufficient to permit the jury to find that the two entered into an agreement with respect to farming, and that they had a common purpose and a community of interest. Virus contends, however, that the evidence did not show they had an equal right to control the manner of performance of the undertaking. Although there was evidence that it was Virus who made the decisions in regard to the farming operation, there was also evidence that Reinwald made decisions, and that the two defendants conferred when making decisions. Under the circumstances of this case, where the informal relationship between two persons involved in

a business operation makes it difficult to characterize the relationship, we believe that a question of fact was raised in regard to the right of each person to control the manner of performance of the undertaking. Although the facts of this case indicate that the relationship between the defendants could properly have been found to be that of employee and employer, or landowner and sharecropper, we do not believe that it can be said as a matter of law that the relationship did not constitute a joint venture. The testimony of Reinwald was conflicting as to how much control he had over the performance of the undertaking, and the inferences to be drawn from his testimony were for the determination of the jury. Therefore, it was not error for the trial court to submit the issue regarding a joint venture to the jury.

In light of the conclusions reached, we need not consider Reinwald's contention that a new trial is required because one of the jurors, during deliberations, told the other jurors of his personal knowledge of the accident site, as we have already determined that Reinwald is entitled to a new trial on the issues of negligence and contributory negligence.

REVERSED AND REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

BOSLAUGH, J., dissenting in part.

There is a preliminary question for the court to decide before submitting any issue to the jury; not whether there is literally no evidence, but whether there is sufficient evidence to support a finding on that issue in favor of the party who has the burden of proof.

The only specification of contributory negligence that was of any importance in this case was the defendants' allegation that the plaintiff was on the wrong side of the road. Although there was some evidence to that effect, there was no substantial evidence to support that allegation.

The plaintiff's testimony was corroborated by the

physical facts which strongly indicated the impact occurred on the south side of the road. Defendant Reinwald's testimony that he was "hugging the center of the road" when he saw the plaintiff "right in front of him," and that the plaintiff "was more in the center of the road" was, in my opinion, not sufficient to overcome the evidence as to skid marks, the damage to the vehicles, and where they came to rest after the accident. When the evidence is considered as a whole, it seems to me there was no substantial evidence upon which the jury could have found that the plaintiff caused the accident in part by driving on the wrong side of the road.

SPENCER, J., dissenting in part, and concurring in part.

I dissent from that portion of the opinion which holds that the evidence presented a jury question as to the contributory negligence of the plaintiff, for the reason set out by Judge Boslaugh in his dissenting opinion.

I concur in that portion of the opinion which holds that the question of the imputation of negligence to the defendant Virus was for determination by the jury. This was no ordinary landlord and tenant relationship. The Viruses had been interested in Reinwald for many years, and considered him as a foster son. They farmed together, each devoting full time to the operation. They combined their assets with one furnishing the land and a major portion of the farm equipment and operating expenses, and the other the remaining portion of the farm equipment and operating expenses. They consulted one another about the operation of the farm and divided the crops according to an agreed formula. At the time in question, Reinwald was using the automobile owned by Virus on their joint business.

MCCOWN, J., concurring in part, and dissenting in part.

In concur in that portion of the majority opinion

which holds that the evidence presented a jury question as to the contributory negligence of the plaintiff.

I dissent from that portion of the majority opinion which holds that there was sufficient evidence of a joint venture between Reinwald and Virus to submit the issue of joint venture to the jury and thus permit the jury to impute the negligence of Reinwald to Virus.

The majority opinion concedes that the relationship of joint venturers depends largely upon the intent of the parties to the alleged venture. The undisputed evidence in this case was that Reinwald was a sharecropper tenant who lived on the farm and received one-third of the crops. Virus owned virtually all the equipment and bore all the expenses and both parties contributed labor. Each also had separate individual livestock operations on the farm. There was clearly no true sharing of profits or losses, but only a sharing of the crops.

The majority opinion concedes that in a joint venture each of the parties must have *equal* voice in performance and control of the operation and that there must be at least a sharing of profits. See Soulek v. City of Omaha, 140 Neb. 151, 299 N. W. 368. Other jurisdictions generally include the concept of losses as well as profits among the requirements of a joint venture. See, Vern Shutte & Sons v. Broadbent, 24 Utah 2d 415, 473 P. 2d 885; Hayes v. Killinger, 235 Ore. 465, 385 P. 2d 747.

I have found no case which holds that an ordinary crop share farm lease constitutes a joint venture. In 46 Am. Jur. 2d, Joint Ventures, § 19, p. 41, it is stated: "A contract which is nothing more than a lease of premises for rent payable in a share of the crops does not establish a joint venture. On the other hand, an agreement for carrying on farming operations which provides for a sharing of the expenses and of the profits is generally regarded as creating a joint venture." The parties to the in-

formal oral agreement here, Reinwald and Virus, intended a share crop lease arrangement. The fact that it was informal was not unusual in view of the close relationship of the parties, which was almost that of father and son.

The majority opinion holds that where the informal arrangement for a farm operation makes it difficult to characterize the relationship as that of an employee and employer, or landowner and sharecropper, or as joint venturers, the jury may be permitted to determine whether there was a joint venture in spite of the fact that the parties did not intend it and the evidence does not support it. The only factual dispute of any sort as to the arrangement here was as to the extent or right of control of the farm operations as between Reinwald and Virus. The parties simply handled that by agreement. The right of control was not equal but it was not spelled out because there was no formal agreement. The evidence was insufficient to submit the issue of joint venture to the jury as a matter of law.

I have found no case holding that a landlord and tenant under a crop share lease are engaged in a joint venture and each vicariously liable for the negligence of the other in operating an automobile on any errand connected with the farm operation. Hundreds of farm families in Nebraska have similar informal arrangements of various kinds based on crop shares. This case is the first one to permit the extension of the doctrine of imputed negligence to such operations.

CLINTON, J., joins in concurring in part and dissenting in part.

STATE OF NEBRASKA, APPELLEE, V. LINDSAY A. FRENCH, APPELLANT.

262 N. W. 2d 711

Filed February 22, 1978. No. 41212.

1. **Evidence: New Trial.** A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown its determination will not be disturbed on appeal.
2. _____: _____. New cumulative evidence tendered in support of a motion for a new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict.
3. **Witnesses: Evidence: New Trial.** A new trial will not ordinarily be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at the trial.
4. **Trial: Evidence: New Trial: Witnesses.** The newly discovered evidence must be of such a nature that if offered and admitted at the former trial it probably would have produced a substantial difference in result. Such evidence must be competent, material, and credible, and not merely cumulative. It must involve something other than the credibility of witnesses who testified at the former trial.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, JUDGE. Affirmed.

Kirk E. Naylor, Jr., of Naylor & Naylor, for appellant.

Paul L. Douglas, Attorney General, and Judy K. Hoffman, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

SPENCER, J.

Appellant, Lindsay A. French, appeals from the denial of his motion for a new trial on the ground of newly discovered evidence under section 29-2101 (5), R. R. S. 1943. We affirm.

French was originally charged with four counts of delivery of a controlled substance. Two of the counts involved morning sales and two involved evening sales. Alibi evidence was adduced as to the

latter. The same undercover agent, Dennis Landrie, a convicted felon, testified to all the sales. The jury convicted French on the two morning sales but returned a verdict of not guilty on the evening sales. The conviction was affirmed by this court on December 24, 1975. State v. French, 195 Neb. 88, 236 N. W. 2d 832.

Subsequent to the affirmance by this court, defendant filed a motion for a new trial on the ground of newly discovered evidence under section 29-2101 (5), R. R. S. 1943. Defendant's motion is premised on Dennis Landrie's involvement with one Bruce Bamford.

In support of his motion for new trial the defendant offered: (1) Transcript of preliminary hearing in the case of State v. Bruce Bamford, held on June 18, 1975, where Dennis Landrie testified at preliminary hearing that Landrie bought amphetamines and cocaine from Bamford on December 20 and 28, 1974; (2) affidavit of Bruce Bamford denying the sales on said dates; (3) affidavit of Jerry Davis that he was the individual who sold Landrie the 4,000 amphetamine tablets for which Bamford was charged; and (4) other affidavits in support of Bamford's alibi defense as to both dates.

The trial court denied the motion for a new trial. It concluded defendant's evidence would not be admissible in the event of a retrial herein. It further found in any event it was not of such a character as to probably result in a different verdict for the defendant.

We have repeatedly held a motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown its determination will not be disturbed on appeal. State v. Evans, 187 Neb. 474, 192 N. W. 2d 145 (1971).

The proposed newly discovered evidence which defendant offers as justification for a new trial con-

sists solely of affidavits used in an attempt to discredit the testimony of witness Dennis Landrie in a subsequent preliminary hearing in another matter. That defendant was bound over to District Court after the hearing. No trial was had therein because that case was subsequently dismissed by the court on motion by the county attorney for the reason that the memory of the key and principle witness for the State had dimmed sufficiently that the likelihood of a conviction had been appreciably altered.

We have held on numerous occasions that evidence which only tends to discredit a witness who testified at trial is not sufficient to justify a new trial. State v. Wycoff, 180 Neb. 799, 146 N. W. 2d 69 (1966). In Wycoff, the conviction was based partially upon the testimony of a witness who stated that the defendant was in fact in a tavern when he claimed not to be. In support of his motion for a new trial, Wycoff produced affidavits which challenged the credibility of the witness. What we said on that occasion is dispositive of the present case: "This court, in construing this statute (§ 29-2101, R. R. S. 1943), has laid down several rules applicable to this case. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown its determination will not be disturbed. * * * New cumulative evidence tendered in support of a motion for a new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. * * * A new trial will not ordinarily be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at the trial."

French attacked the credibility of Landrie in his own trial. In this respect the alleged new evidence, even if we were to assume it to be admissible, would be cumulative. The jury chose to believe Landrie

on two of the counts. It held for French on the other two. We affirmed that judgment over French's argument the jury should have accepted all his evidence rather than only part of it. We held: "In jury cases, the jurors are the judges of the credibility of the witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment."

In Finnern v. Bruner, 170 Neb. 170, 101 N. W. 2d 905 (1960), this court said: "The law does not, however, favor new trials on the ground of newly discovered evidence. * * * The newly discovered evidence must be of such a nature that if offered and admitted at the former trial it probably would have produced a substantial difference in result. Such evidence must be competent, material, and credible, and not merely cumulative. It must involve something other than the credibility of witnesses who testified at the former trial."

In reviewing the record, we cannot say the trial judge abused his discretion in holding the evidence, even if admissible, would not be so potent as to probably result in a different verdict. The burden was on defendant to show the alleged newly discovered evidence was of such substantial nature that if it had been received in the original trial, it would probably have changed the result. No such showing was made. The trial court, after a full hearing, came to the conclusion that the defendant's motion for a new trial was not meritorious. We cannot say he was wrong in this conclusion.

The judgment is affirmed.

AFFIRMED.

BRODKEY, J., dissenting.

I must respectfully dissent. I believe that the majority opinion, although it correctly sets forth several general principles of law, misapplies those prin-

ciples to the facts of this case, and ignores other applicable law. Under the particular facts of this case, it was error for the trial court to overrule defendant's motion for new trial.

Section 29-2101, R. R. S. 1943, provides that a new trial may be granted to a defendant for "any of the following reasons affecting materially his substantial rights: * * * newly discovered evidence material for the defendant which he could not with reasonable diligence have discovered and produced at the trial." See, also, State v. Atkinson, 191 Neb. 9, 213 N. W. 2d 351 (1973). There is no dispute whatsoever in this case that the evidence on which defendant relies was newly discovered evidence which he could not with reasonable diligence have discovered and produced at the trial. Therefore the only question presented is whether the new evidence was material and of sufficient importance and weight to warrant a new trial.

It will be helpful to scrutinize more closely the evidence on which defendant relies. In summary, the new evidence was that the informant Landrie had falsely accused, or attempted to "frame," one Bruce Bamford, an accused in a case analogous to the defendant's case. The evidence in question was presented in the form of affidavits in connection with defendant's motion for new trial. Those affidavits set forth the following facts. At a preliminary hearing in the Bamford case, Landrie testified under oath that Bamford had sold him 4,000 amphetamine tablets on December 20, 1974; and that Bamford had sold him ½ ounce of cocaine on December 28, 1974. The sales were allegedly made at a trailer court in Kearney, Nebraska. In Bamford, as was true in the present case, Landrie was the sole witness to the alleged crimes, and was working as a paid informer for the State Patrol.

Bamford contradicted Landrie's accusations with respect to both alleged sales. As to the first, Bamford stated that he was at his home at the relevant

time, and not at the trailer court. Three witnesses, as well as a telephone company record, supported Bamford's assertion. In addition, one Jerry Davis stated that it was he who sold 4,000 amphetamine tablets to Landrie on December 20, 1974, at the trailer court, although Davis was never charged with a criminal offense for that act.

As to the second alleged sale, Bamford stated that he had been in Colorado on the relevant date. Three witnesses and a motel receipt signed by Bamford supported this assertion. Furthermore, one Danny Anderson stated that on December 28, 1974, he delivered ¼ ounce of cocaine to Landrie, and one Pat Gifford stated that on the same date he observed Landrie adding ¼ ounce of baking soda to what Landrie represented to be cocaine. As noted previously, Landrie had accused Bamford of selling him ½ ounce of cocaine on December 28, 1974. On May 21, 1976, the charges against Bamford were dismissed by the District Court on motion by the county attorney.

The above evidence was such that a jury could reasonably conclude that Landrie had falsely accused, or attempted to "frame," another defendant in an analogous case, during a relevant time period, while Landrie was employed as a paid informer. In the majority opinion this evidence is characterized as "cumulative," and also as evidence that would " 'merely impeach or discredit a witness who testified at the trial.' " I disagree. I believe that the new evidence was relevant to the issue of bias, a partiality of mind on the part of Landrie, and not merely to the issue of Landrie's reputation for truth and veracity or his credibility in general. The defendant did not attempt to attack Landrie for bias at trial by showing that he had falsely accused another defendant in a parallel case, but sought only to impeach Landrie's credibility in general. Therefore the new evidence is not simply cumulative.

Support of this position is found in Johnson v.

Brewer, 521 F. 2d 556 (8th Cir., 1975), a case on which defendant relies, but which is not referred to in the majority opinion. In Johnson, the defendant made an offer of proof at trial to show that the sole witness against him, a professional informant, attempted to "frame" another defendant in an analogous case. The trial court denied the defendant the opportunity to adduce such evidence at trial, and the defendant was convicted. The Court of Appeals for the Eighth Circuit granted a writ of habeas corpus and vacated the defendant's conviction.

The court first noted that the use of paid informants by the government, although perhaps necessary, is an "inherently dangerous procedure" to the extent that extensive precautions must be taken to insure that an innocent man should not be punished. The court noted that a variety of motives exist on the part of a paid informant to " 'produce as many accuseds as possible.' " 521 F. 2d at p. 560. In characterizing the evidence refused by the trial court, the court stated: "The offer here made was thus to show that the informant before the court and jury was completely insensitive to the obligations of his oath and that from motivations the origin of which we can only surmise, but nevertheless apparently existent, he had, as demonstrated in a parallel case, neither compunction nor scruple against 'framing' a man. We have difficulty in envisioning a situation responding more completely to the orthodox test of *bias*, the quality of emotional partiality." 521 F. 2d at pp. 560, 561. (Emphasis supplied.)

The court also found that the exclusion of evidence as to the attempt by the informant, the only witness to the alleged crime, to frame another defendant in a precisely parallel case, went beyond mere error with respect to rules of evidence, but was error of constitutional dimension. The essential point was that the jury must be given an opportunity to assess the evidence of the "frame-up" in the prior case in

whatever manner it wished. The court noted in conclusion that it was not passing upon the truth or falsity of the matters set forth in the offer of proof, but that they were neither immaterial nor collateral, and that the defendant was entitled to put them before the jury. See, also, Steinmark v. Parratt, 427 F. Supp. 931 (Neb., 1977), a case in which the court followed Johnson and found that it was error to deny a defendant the opportunity to present evidence from which the jury could conclude that a professional informant, the same Dennis Landrie, had falsely accused another person in a similar case.

Under these cases, the conclusion is inescapable that had the evidence at issue in the present case been available to the defendant and offered by him at the time of trial, it would have been reversible error for the trial court to exclude it from evidence and deny the defendant the right to impeach Landrie for bias. Furthermore, there can be no question that the evidence would have been admissible. Not only would the defendant have been able to attack Landrie for bias on cross-examination, he would not be bound by Landrie's answers, and could prove the alleged bias by extrinsic evidence. See, Johnson v. Brewer, *supra*, 521 F. 2d at 562; Smith v. Hornkohl, 166 Neb. 702, 90 N. W. 2d 347 (1958); Johnson v. Griepenstroh, 150 Neb. 126, 33 N. W. 2d 549 (1948); 3 Weinstein's Evidence, § 607 (03), at p. 607-17; McCormick, Evidence, § 40, at p. 81 (2d Ed., 1972); 3A Wigmore, Evidence, § 948, at p. 783 (Chadbourn Rev., 1970). Evidence indicating that a witness was consciously willing to falsify his testimony is always admissible to prove bias. 3 Weinstein's Evidence, § 607 (03), at p. 607-29.

As stated in Vassar v. Chicago, B. & Q. R. R. Co., 121 Neb. 140, 236 N. W. 189 (1931): "Cross-examination of a witness to show bias, hostility, or that he is actuated by a spirit of revenge is entirely distinct from impeachment, which is governed by its own

rules of evidence. * * * '* * * A jury would scrutinize, more closely and doubtingly, the evidence of a hostile than that of an indifferent or friendly witness. * * * Generally, on cross-examination of a witness, any fact may be elicited which tends to show bias or partiality, and if the witness denies the fact showing the bias or interest, the cross-examining party may call other witnesses to contradict the witness.' "

Significantly, the evidence of the kind at issue in the present case has been characterized in the above cases as so material and important that its exclusion at trial constitutes error of constitutional dimension.

The general rules on which the majority opinion relies do not satisfactorily dispose of this case, and simply gloss over the fundamental issues. Landrie, an admitted convicted felon and a paid informant, was the sole witness to the alleged crimes. He testified that the defendant made sales to him both on the morning and the evening of January 7, 1975, yet witnesses, some of whom could be fairly characterized as disinterested, corroborated defendant's alibi with respect to the evening sales, and the jury acquitted the defendant on the charges arising from the alleged evening sales. Although the jury had the right to credit or reject the whole or any part of the testimony of Landrie in its role as the trier of fact, the verdict of acquittal alone, at least in the context of this case, raises a most serious doubt as to Landrie's credibility and lack of impartiality. See Steinmark v. Parratt, *supra*, 427 F. Supp. at p. 934. The credibility which the jury attached to Landrie's testimony must inevitably have determined the guilt or innocence of the defendant, but, at the time of trial, evidence of bias on the part of Landrie was not available to the defendant. In my opinion, had the evidence in question been presented to the jury, which apparently rejected Landrie's testimony with respect to the alleged evening sales, it would have affected the jury's conclusion with respect to the al-

leged morning sales, and probably would have produced a substantial difference in result. The materiality and importance of the new evidence under the particular and unusual facts of this case cannot be denied.

I recognize that the general rule is that a "new trial will not *ordinarily* be granted for newly discovered evidence which, when produced, will *merely* impeach or discredit a witness who testified at the trial." (Emphasis supplied.) State v. Wycoff, 180 Neb. 799, 146 N. W. 2d 69 (1966). This, however, is not an ordinary case, and the new evidence is material to the issue of Landrie's possible bias, not merely to his credibility in general or to his general reputation for truth and veracity. See Johnson v. Brewer, *supra*. This case is not analogous to the cases on which the majority opinion relies. In State v. Evans, 187 Neb. 474, 192 N. W. 2d 145 (1971), the evidence on which the defendant relied in moving for a new trial was only that which would have impeached one of several prosecuting witnesses. In State v. Wycoff, *supra*, the new evidence related only to a collateral matter not material to the guilt or innocence of the defendant. In the present case, both the evidence at issue, as well as its materiality and probable impact on the jury, are substantially different.

Since exclusion of the evidence, had it been available to and offered by the defendant at trial, would have constituted reversible error, I find no rational or consistent basis for concluding that no error occurred simply because defendant's only alternative was to move for a new trial because he did not discover the evidence until after his trial. In this case the jury's determination of the defendant's guilt or innocence inevitably rested on the credibility which it attached to the testimony of a paid informant, who was an admitted convicted felon. Such testimony is not necessarily false, nor is it necessarily true. The

essential point, however, is that in such a situation the jury must be given an opportunity to assess all material evidence before it reaches its decision. The only fair and just result is to grant the defendant a new trial and permit him the opportunity to present to the jury the evidence from which it could conclude that the informant was biased. I would reverse the judgment of the District Court and remand the cause for a new trial.

McCOWN and WHITE, C. Thomas, JJ., join in this dissent.

CLINTON, J., concurring.

I write this separate concurrence for two reasons: (1) Although I agree with the majority opinion, I do not believe it, in light of the dissent, adequately presents the issues involved, and (2) the dissenting opinion makes some assumptions that the affidavits make a prima facie case of a "frame up" when in fact at most the so-called newly discovered evidence simply presents questions of the relative credibility of various persons, including Bamford, as against the credibility of the witness Landrie, as to matters none of which are directly relevant in the case against French.

I would agree with the dissenting opinion if the showing made by French in support of his motion for a new trial on the ground of newly discovered evidence actually showed that Landrie had "framed" Bamford, or had lied under oath in a similar proceeding.

I do not believe that the dissent fully or fairly reflects the substance of the affidavits because, as noted above, the dissent assumes that which must be at least prima facie established. The case against Bamford was never tried. It was dismissed by the court on motion of the prosecution after the preliminary hearing.

The dissent makes the statement that in both the Bamford and the French cases, "Landrie was the

sole witness to the alleged crimes." This does not correctly reflect the record. It is true that at the preliminary hearing in the Bamford case Landrie was the only witness called. However, his testimony was that several other persons were present at the December 20, 1974, transaction, one of them being Jerry Davis, whose affidavit is one of those upon which French relies to support his claim of newly discovered evidence. Davis, in his affidavit, claims that he (Davis) is the one who, on December 20, 1974, delivered 4,000 amphetamine tablets to Landrie. We make note of this because it would indeed be strange for Landrie to place Davis and other witnesses at the scene if they were in fact not there, for to do so would simply supply the defense with a witness or witnesses who could contradict him.

It is elemental, of course, that "newly discovered evidence" must be both material and competent. Let us now examine some of the affidavits of Bamford's witnesses. As to both crimes charged, Bamford's defense would apparently be alibi, i.e., he was not present at the time and place the transactions are alleged to have occurred. As to the December 20, 1974, transaction, the affidavits of Ann Erickson and her mother, Jo Erickson, are plainly hearsay, consisting, in the case of Ann, of her testimony as to what Bamford, in a telephone conversation, told her of his whereabouts. The affidavit of Jo is to the effect that on the occasion in question Ann did have a telephone conversation with someone. Testimony of these two witnesses as demonstrated by affidavits is neither material nor competent.

The affidavit of Jerry Davis contains an acknowledgment that on December 20, 1974, he committed the felony of delivering a controlled substance. This admission in the affidavit cannot be used to establish the corpus of that crime. On the other hand, if he were called by Bamford as a witness (or by French in this case), he could refuse to testify at

all simply by exercising his Fifth Amendment right to remain silent.

The affidavit of Danny Anderson relative to the transaction of December 28, 1974, is similar to that of Davis. He swears that on December 28, 1974, he delivered cocaine to Landrie. Here again his affidavit cannot be used to establish the corpus of the crime which he acknowledges he committed. If he were called by Bamford (or by French in this case) as a witness, he could refuse to testify simply by taking the Fifth Amendment.

The remaining affidavits as to the December 28, 1974, transactions simply tend to establish the alibi of Bamford.

Two affidavits would indicate that Landrie "cut" the cocaine (apparently that which is the subject of the December 28 transaction) with baking soda. This seems immaterial with reference to the French case, but would tend to establish that Landrie may have been cheating the State, or perhaps dealing in drugs himself on the side.

The State's opposing affidavits attest to the reliability and trustworthiness of Landrie, based upon his past performance. These include the results of polygraphic tests submitted to by Landrie and by other persons who openly acknowledged they had sold drugs to Landrie. Bamford also submitted to a polygraphic examination. However, the examiner, an out-of-state expert, indicated that Bamford was uncooperative and attempted to affect the results of the test by controlled breathing. Bamford also removed the polygraphic attachments from his body before the test was completed. In a preliminary interview with the polygraph expert, Bamford acknowledged that he was in Colorado on December 27, 1974, buying controlled substances. These buys were apparently made from two of his alibi witnesses as to the December 28, 1974, transaction.

The trial court certainly did not abuse its discre-

tion in refusing to permit the "trial" of the Bamford case, as a part of a retrial of French's case. What French seeks to do in this case is to test the credibility of the informant, Landrie, in the French case by incorporating the Bamford case into it. What the jury would have been confronted with in that event was simply a swearing contest between a paid informant on the one hand and self-admitted dealers in drugs on the other, all with reference to matters not directly relating to French's guilt or innocence.

Whether the use of paid informants such as Landrie, a convicted felon, is right as a matter of public policy must be determined by the executive branch of government.

We should not depart from established rules simply because Landrie has been the subject of much public discussion and of Legislative investigation. For reasons I have above delineated, I believe the majority opinion properly applies the appropriate and established rules.

DAVE KUHLMAN, APPELLEE AND CROSS-APPELLANT, V. EDWARD A. CARGILE ET AL., APPELLEES AND CROSS-APPELLEES, IMPLEADED WITH MOLLY LIND, APPELLANT AND CROSS-APPELLEE.

262 N. W. 2d 454

Filed February 22, 1978. No. 41322.

1. **Equity: Trial: Pleadings.** When a cause of action for equitable relief is stated and when the plaintiff prays for equitable relief, a jury trial cannot be demanded as a matter of right by the defendant, even if the defendant pleads legal defenses or files a counterclaim for damages.
2. **Equity: Trial: Judgments.** It is the general rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation.
3. **Equity: Trial: Trusts.** Actions to declare a resulting or constructive trust are equitable actions.

4. **Equity: Property: Trusts.** A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment. The existence of a constructive trust is to be determined on the peculiar facts, circumstances, and conditions presented in each case.
5. **Breach of Contract: Marriage: Damages.** In awarding compensatory damages for breach of promise to marry, the trier of fact may consider the injury to the plaintiff's health, the effect of the breach on the plaintiff's feelings, mental suffering, wounded pride, humiliation, pain, and mortification. Loss of pecuniary benefits of the promised marriage may be an element of damages, but the wealth of the defendant does not establish the measure of damages.
6. _____: _____: _____. In an action for breach of promise to marry, there are no precise rules for measuring damages, and the amount of recovery should be left to the sound discretion of the trier of fact.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Robert M. Brenner, for appellant.

George A. Sommer, for appellee Kuhlman.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BRODKEY, J.

Dave Kuhlman, appellee and cross-appellant herein, initiated this action in the District Court for Scotts Bluff County to declare a constructive or resulting trust with respect to certain property held by defendants Molly Lind, and Fern and Edward A. Cargile. The property in question consisted of Lot 2, Block 6, in the Swedell Subdivision of Scotts Bluff County, hereinafter referred to as "Lot 2," including a house which was built on the south 140 feet of Lot 2, and household goods within the house. Defendant Molly Lind held legal title to the south 140 feet of Lot 2, and the Cargile defendants held legal title to the remainder of Lot 2. The defendants denied the allegations in the petition, and also alleged that plain-

tiff's claim was barred by estoppel, laches, fraud, and misrepresentation. Defendant Lind filed a counterclaim against the plaintiff, alleging that she was entitled to damages as a result of plaintiff's breach of promise to marry her.

Defendant's request for a jury trial was denied by the trial court on the ground that the action was one in equity. After trial to the court, the District Court found that plaintiff was entitled to have a constructive trust declared with respect to the real property to which defendant Lind held title, and with respect to certain household goods contained in the house on that property. The court determined that Molly was entitled to certain personal property, and to a set-off of $9,000. Plaintiff's claim against the Cargile defendants was dismissed. The trial court also found that the plaintiff had breached a promise to marry Molly, but that she had not proven damages therefrom.

Defendant Lind has appealed to this court. The assignments of error which she discusses in her brief are, in summary, that the trial court erred (1) in refusing to grant her a jury trial; (2) in finding that a constructive trust should be declared for the benefit of the plaintiff with respect to that part of the property in question; and (3) in failing to award her damages for plaintiff's breach of promise to marry her. Plaintiff has cross-appealed, contending that the trial court erred in awarding defendant Lind a set-off of $9,000, and in dismissing his claim against the Cargile defendants. We affirm the judgment of the District Court.

We summarize the relevant facts in this case as follows. The plaintiff, who was 63 years of age at the time of trial, was divorced from his first wife in 1971 after a marriage of almost 40 years. He is a man with little formal education, and with a limited ability to read and write. He was a close friend of all the defendants for more than 25 years prior to

1971. Molly Lind is Fern Cargile's mother, and Edward Cargile's mother-in-law. The plaintiff and Edward Cargile have engaged in business dealings over the years, and at various times the plaintiff has loaned money to Cargile.

After his divorce in 1971, the plaintiff began to keep company with Molly, who is approximately the same age as the plaintiff, and he eventually lived with her. When plaintiff decided that he would build a new home, Edward Cargile suggested that the house be constructed on a lot owned by him. In May 1972, a building permit was obtained by Cargile for construction on Lot 2, referred to above. The permit indicated that it was "for Dave Kuhlman." The lot in question was one of two adjacent lots owned by the Cargiles.

There was a conflict in the testimony with respect to the intentions of Cargile when he told the plaintiff to build on the lot. The plaintiff testified he believed that Cargile was giving him the lot because of past favors and loans the plaintiff had made to Cargile, although plaintiff acknowledged that he and Cargile had no express agreement regarding substitution of the lot for debts owed to plaintiff by Cargile. Cargile testified that he was making a gift of the lot to Molly and the plaintiff because they were planning to marry. The evidence is undisputed, however, that at the time construction of the house was commenced, title to the lot remained in the Cargiles, and none of the parties concerned themselves with legal title to the property because they were on amiable terms.

On October 17, 1972, before the house was completed, the south 140 feet of Lot 2 was deeded to Molly by the Cargiles, the deed reciting a consideration of $1. The defendants testified that at the time the property was deeded, they discussed the matter with the plaintiff, who allegedly told them to put the title in Molly's name as he had "never had it so

good." The plaintiff denied this, stating that he knew nothing about the deed, and that he had paid no attention to legal title of the property.

The house was completed in December 1972, or January 1973. The Cargiles and their daughter assisted in the building of the house, and the plaintiff made some payments or gifts to the Cargiles in return for their work, although at least some of the work was done voluntarily and without expectation of compensation. The plaintiff, in large part, paid for the materials and labor involved in construction of the house. Voluminous evidence was introduced with respect to Molly's monetary contributions to the building of the house. There is no need to review this evidence. Construing it most favorably to Molly, her contribution in money was between $3,000 and $4,000. Plaintiff's contribution in money was in excess of $21,000.

The plaintiff and Molly moved into the house after its completion. The plaintiff paid the insurance and taxes on the house and property, and also paid most of the living expenses of the couple. No dispute arose concerning the property until 1975, at which time the plaintiff attempted to obtain a loan from a bank and to use the house as collateral. The plaintiff stated that it was at this time he became aware the lot had been deeded to Molly, and not to him. He testified Molly refused to permit the property to be used as collateral for the reason that she considered the house to be hers. Shortly thereafter, plaintiff filed this action. During this time, Molly had remained in the house and paid the insurance and taxes on the property. The parties stipulated the value of the house and lot was approximately $36,000 at the time of trial.

There was also evidence at trial that the plaintiff had promised to marry Molly at various times in 1971 and 1972, and that the marriage was to occur after the house was completed. The plaintiff denied

this. Molly testified that she suffered the loss of friends, ill health, and a lower standard of living as a result of plaintiff's breach of promise to marry her, although little evidence was adduced to support these assertions.

There was evidence that almost all of Lot 2, and not only the south 140 feet of that lot, had been improved by the installation of a sprinkler system and by sodding. Title to the northern part of Lot 2, excluding the south 140 feet which had been deeded to Molly and on which the house had been built, had been retained by the Cargiles.

The trial court found that the plaintiff had contributed $24,000 in labor and materials to construction of the house, and that Molly's contributions in material, labor, and maintenance was $6,000. The court found the property had appreciated in value by $6,000 since the construction of the house, and that this appreciation in value should be shared equally by plaintiff and Molly. The court determined that a constructive trust should be declared in favor of the plaintiff with respect to the south 140 feet of Lot 2, but that he should pay Molly a total of $9,000 as a set-off, whereupon she was ordered to convey the real property to him. The court also found that Molly was the owner of certain personal property which was located in the house, and that the plaintiff was entitled to other personal property such as a refrigerator and a television set. The trial court found no basis to declare a constructive trust in favor of the plaintiff with respect to the portion of Lot 2 not deeded to Molly by the Cargiles. It therefore dismissed plaintiff's claim against the Cargiles. Finally, the District Court concluded that the plaintiff had breached a promise to marry Molly, but that she had failed to prove damages therefrom.

The first issue is whether Molly was entitled to a jury trial in this case as a matter of right. Molly contends that she was, relying on Article I, section 6,

of the Constitution of the State of Nebraska, which provides that the right of trial by jury shall remain inviolate; and on section 25-1104, R. R. S. 1943, which provides that issues of fact arising in actions for the recovery of money or of specific real or personal property, shall be tried by jury unless a jury trial is waived. Molly argues that the nature of plaintiff's claim was legal, that the defenses and counterclaim were legal in nature, and that equitable relief was improper because plaintiff requested a legal remedy, or had an adequate remedy at law.

Her arguments are not persuasive. The rule is that when a cause of action for equitable relief is stated, and when the plaintiff prays for equitable relief, a jury trial cannot be demanded as a matter of right by the defendant. See, State Securities Co. v. Corkle, 191 Neb. 578, 216 N. W. 2d 879 (1974); Krumm v. Pillard, 104 Neb. 335, 177 N. W. 171 (1920); Sharmer v. McIntosh, 43 Neb. 509, 61 N. W. 727 (1895). Even if the defendant pleads legal defenses or a counterclaim for damages he is not entitled to a jury trial, as when a court of equity acquires jurisdiction over a cause for any purpose it may retain the cause for all purposes and proceed to a final determination on all matters put in issue in the case. Hull v. Bahensky, 196 Neb. 648, 244 N. W. 2d 293 (1976). It is the general rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation. See, Sechovec v. Harms, 187 Neb. 70, 187 N. W. 2d 296 (1971); Ready Sand & Gravel Co. v. Cornett, 184 Neb. 726, 171 N. W. 2d 775 (1969).

Actions to declare a resulting or constructive trust are in equity. See, Marco v. Marco, 196 Neb. 313, 242 N. W. 2d 867 (1976); Carey v. Humphries, 171 Neb. 578, 107 N. W. 2d 20 (1961); Restatement, Resti-

tution, § 160, p. 640. Plaintiff's action in this case was to declare a resulting or constructive trust with respect to property held by the defendants, and therefore the action was clearly in equity. The defendants did not plead or attempt to show that plaintiff's claim for equitable relief should be denied because he had an adequate remedy at law. It is apparent the contention that a jury trial should have been granted is without merit.

The second issue is whether the evidence was sufficient to establish a constructive trust for the benefit of the plaintiff with respect to property held by defendant Lind. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. Campbell v. Kirby, 195 Neb. 610, 239 N. W. 2d 792 (1976). A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment. See, Jenkins v. Jenkins, 151 Neb. 113, 36 N. W. 2d 637 (1949); Restatement, Restitution, § 160, p. 640; Nelson v. Rasmussen, 164 Neb. 274, 82 N. W. 2d 418 (1957). "A constructive trust is imposed to do equity and to prevent unjust enrichment." Vogt v. Town & Country Realty of Lincoln, Inc., 194 Neb. 308, 231 N. W. 2d 496 (1975). Each case involving the existence of a constructive trust is to be determined on the peculiar facts, circumstances, and conditions presented therein. Jenkins v. Jenkins, *supra*.

The situation in the present case is somewhat unusual, and is not one involving outright fraud or misrepresentations on the part of the defendants. In reviewing the evidence, however, we conclude that the imposition of a constructive trust for the benefit of the plaintiff with respect to the south 140 feet of Lot 2, and the house built thereon, is warranted to pre-

vent unjust enrichment on the part of Molly. The record establishes that the plaintiff was a man unfamiliar with real estate conveyances, and that he placed trust and confidence in both Molly and the Cargiles with respect to the property in question. The lot was of relatively little value, approximately $600, prior to the plaintiff expending the funds to construct the house and improve the premises. The vast majority of the funds required to construct the house were supplied by the plaintiff. The evidence does not support the view that the plaintiff intended the house be a gift to Molly, or that he and Molly had an agreement to jointly share the property. Both Molly and Edward Cargile were aware of plaintiff's trust and confidence in them. Under the facts of this case, as revealed by the record, we believe Molly would be unjustly enriched if we were to deny plaintiff relief and permit Molly to retain legal title to the south 140 feet of Lot 2.

It is also true, however, that Molly made contributions toward the construction of the house. Although the exact value of her contributions may be subject to dispute, the trial court's resolution of this issue appears to be fundamentally fair. The evidence supports the view that Molly contributed approximately $6,000 in money, labor, materials, and maintenance, and also supports the trial court's finding that the property appreciated in value by approximately $6,000 after the house was finished. We believe that division of the appreciated value between plaintiff and Molly was just under the circumstances, and that the total set-off of $9,000 was proper. Finally, the evidence supports the trial court's findings with respect to the personal property involved in this case. The result reached by the trial court, which we approve, was equitable under the particular facts of this case, and we find nothing in the record which persuades us to reach conclusions different from those reached by the District Court.

We also agree with the District Court that the evidence was insufficient to warrant the imposition of a constructive trust with respect to the portion of Lot 2 to which the Cargiles held title. The evidence shows that Edward Cargile never intended that this real estate be used for construction of, or in connection with, the house built by plaintiff. Plaintiff produced no clear and convincing evidence that unjust enrichment will occur if the Cargiles retain the property. Although the plaintiff did expend funds to improve this property by sodding part of it and installing a sprinkler system, we do not believe this fact warrants the imposition of a constructive trust.

The final issue is whether the trial court erred in failing to award Molly damages for plaintiff's breach of promise to marry her. In awarding compensatory damages for breach of promise to marry, the trier of fact may consider the injury to the plaintiff's health, the effect of the breach on the plaintiff's feelings, mental suffering, wounded price, humiliation, pain, and mortification. Harsche v. Czyz, 157 Neb. 699, 61 N. W. 2d 265 (1953). Loss of the pecuniary benefits of the promised marriage has also been held to be an element of damages, and evidence of the wealth of the defendant is admissible to show such loss. See, Fellers v. Howe, 106 Neb. 495, 184 N. W. 122 (1921); Stratton v. Dole, 45 Neb. 472, 63 N. W. 875 (1895); Annotation, Breach of Contract to Marry — Damages, 73 A. L. R. 2d 553, § 5, at p. 561. The wealth of the defendant, however, does not establish the measure of damages. See, 11 C. J. S., Breach of Marriage Promise, § 42, p. 811; Annotation, 73 A. L. R. 2d at 564.

Without reviewing the evidence in detail, we conclude it was not of such quantity or convincing nature to establish that the breach of promise to marry resulted in ill health, mental suffering, pain, or humiliation. Molly complains that the trial court excluded evidence with respect to plaintiff's financial

condition because it sustained an objection to a question regarding his income in 1976. The trial court did, however, receive in evidence plaintiff's income tax returns for the years of 1973 and 1974, and testimony with respect to his income in 1975. We do not believe the trial court abused its discretion in limiting such evidence. Plaintiff's income, as reported on his tax returns in 1973 and 1974, was approximately $5,000 each year. The evidence, with respect to plaintiff's financial situation, was sufficient to permit the trial court to make a determination to the extent that issue was relevant.

In an action for breach of promise to marry there are no precise rules for measuring damages, and the amount of recovery should be left to the sound discretion of the trier of fact. Musselman v. Barker, 26 Neb. 737, 42 N. W. 759 (1889); Annotation, 73 A. L. R. 2d, § 2, at pp. 557, 558. In the present case it cannot be said that the trial court abused its discretion on this matter. This case is unlike prior Nebraska cases involving awards of damages where, for example, seduction and possible deceit were present. See Ryan v. Oswald, 134 Neb. 265, 278 N. W. 508 (1938). Molly was a mature person who was clearly aware of the fact and possible consequences involved in the situation. We find nothing in the record which supports her assertion that the trial court abused its discretion in failing to award her damages.

We have carefully reviewed the record and find the assignments of error of both the plaintiff and Molly to be without merit. Therefore the judgment of the District Court must be affirmed.

AFFIRMED.

LAWRENCE PRIBIL, APPELLEE, V. BERTHA RUTHER ET AL., APPELLANTS, IMPLEADED WITH MARY C. MURPHY ET AL., APPELLEES.

262 N. W. 2d 460

Filed February 22, 1978. No. 41326.

1. **Contracts: Specific Performance: Proof.** A party who seeks to compel specific performance of a written contract has the burden of proving the contract.
2. **Contracts: Evidence.** An express contract is proved by evidence of a definite offer and an unconditional acceptance. Where the offer requires a promise on the part of the offeree, a communicated acceptance is essential.
3. **Contracts: Acknowledgments.** There must be some irrevocable element such as depositing the acceptance in the mail so that it is placed beyond the power or control of the sender before the acceptance becomes effective and the contract is made.
4. _____: _____. Where transmission by mail is authorized, the deposit of the signed agreement in the mail with the proper address and postage will complete the contract.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Reversed and remanded with directions.

Vincent J. Kirby, for appellants.

William W. Griffin and Deutsch, Jewell,, Otte, Gatz, Collins & Domina, for appellee Pribil.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BOSLAUGH, J.

This is an appeal in an action for specific performance of a real estate contract. The defendant Bertha Ruther owns a quarter section of land in Holt County, Nebraska. The defendant listed this property for sale with John Thor, a real estate broker, on January 20, 1976.

On April 12, 1976, the plaintiff Lawrence Pribil executed a written offer to purchase the property for $68,000. The offer to purchase was on a form known as a Uniform Purchase Agreement which included a

space for a written acceptance of the offer. The defendant and her husband signed the acceptance on the same day and handed an executed copy of the agreement to Thor for delivery to the plaintiff.

Thor returned to his office in Norfolk, Nebraska, and asked an office employee, Mrs. Kasebaum, to send a copy of the agreement to the plaintiff. Mrs. Kasebaum wrote a letter to the plaintiff, dated April 14, 1976, with a copy of the agreement enclosed, which was sent to the plaintiff by certified mail. The letter was postmarked "April 15, 1976 P.M." and was received by the plaintiff on April 16, 1976.

The defendant became dissatisfied with the transaction the day after she had signed the acceptance when she discovered a test well had been drilled on the property at the plaintiff's request and the driller had estimated a well would produce 500 to 800 gallons of water per minute. The defendant testified that she called the plaintiff's home at about 5 p.m., on April 13, 1976, and told the plaintiff's wife that she, the defendant, would not sell the property. The plaintiff's wife testified this conversation did not take place until some 10 days later, near the end of April 1976.

The defendant further testified that she called Thor the next morning, April 14, 1976, and said that she was going to "terminate the contract," because Thor had lied to her. According to Thor this conversation took place at 11:42 a.m., on April 15, 1976. Thor testified that immediately after receiving the call from the defendant he called the plaintiff and told the plaintiff that the defendant was not going to sell the farm.

The principal issue in this case is whether the defendant had effectively rejected the plaintiff's offer and revoked her acceptance of the offer before the acceptance had been communicated to the plaintiff. The trial court found that an executed copy of the purchase agreement had been sent to the plaintiff by

the defendant's agent on or before April 15, 1976, and that the plaintiff was entitled to a decree of specific performance. The defendant and her husband have appealed.

Since the plaintiff sought to enforce the contract the burden was on the plaintiff to establish that there was a contract. A party who seeks to compel specific performance of a written contract has the burden of proving the contract. Wilkie v. Banse, 166 Neb. 138, 88 N. W. 2d 181.

An express contract is proved by evidence of a definite offer and unconditional acceptance. Where the offer requires a promise on the part of the offeree, a communicated acceptance is essential. Fairchild v. Fairchild, 176 Neb. 95, 125 N. W. 2d 191; 1 Williston on Contracts (3d Ed.), § 23, p. 51, § 70, p. 230.

The signing of the acceptance on the Uniform Purchase Agreement by the defendant did not make the contract effective. It was necessary that there be some communication of the acceptance to the plaintiff. There must be some irrevocable element such as depositing the acceptance in the mail so that it is placed beyond the power or control of the sender before the acceptance becomes effective and the contract is made. Northwest Thresher Co. v. Kubicek, 82 Neb. 485, 118 N. W. 94. Delivery to the agent of the defendant was not delivery to the plaintiff and did not put the acceptance beyond the control of the defendant. See Smith v. Severn, 93 Neb. 148, 139 N. W. 858.

The plaintiff contends that the deposit of the acceptance in the mail satisfied the requirement that the acceptance be communicated. Where transmission by mail is authorized, the deposit of the signed agreement in the mail with the proper address and postage will complete the contract. Fairchild v. Fairchild, *supra*; Corcoran v. Leon's Inc., 126 Neb. 149, 252 N. W. 819. The difficulty in this case is that

there is no evidence that the acceptance was deposited in the mail before Thor called the plaintiff and informed him that the defendant would not sell the property.

The evidence is that Thor handed the purchase agreement to Mrs. Kasebaum with instructions to send a copy to the plaintiff. Mrs. Kasebaum did not testify. Thor testified, "I can't testify when she mailed it, except by reading the postmarks on the envelope and the return receipts." The postmark indicates only that the postage was canceled sometime during the afternoon of April 15, 1976. The telephone call from the defendant was received at 11:42 a.m. The call from Thor to the plaintiff was made immediately afterward.

If we assume that transmission by mail was authorized in this case, there is no evidence to show that the acceptance was deposited in the mail before the defendant's call to Thor, and Thor's call to the plaintiff notifying him that the defendant had rejected his offer. The evidence does not show that the acceptance was communicated to the plaintiff and thus became effective before the defendant changed her mind and rejected the offer.

It is unnecessary to consider the other assignments of error. The judgment of the District Court is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein. This appeal depends upon fact issues determined against the defendant by the trial court. I see no reason to deviate from our usual rule of affirming the judgment of the trial judge on disputed issues of fact unless he is clearly wrong. In my judgment, he was not clearly wrong in this instance.

CLEMENS MOBILE HOMES, INC., APPELLANT, V. LIBERTY HOMES, INC., APPELLEE, IMPLEADED WITH WESTERN NATIONAL BANK OF SCOTTSBLUFF, NEBRASKA, INTERVENER-APPELLANT.

262 N. W. 2d 463

Filed February 22, 1978. No. 41327.

Trial: Judgments: Verdicts. The judgment of the trial court in an action at law, where a jury has been waived, has the effect of a verdict of a jury and it will not be set aside on appeal unless clearly wrong.

Appeal from the District Court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

James R. Hancock of Hancock & Shaver and Richard S. Kleager, for appellants.

Wright & Simmons, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. J.

This is an action for damages resulting from an alleged breach of contract. In its amended petition the plaintiff alleged that the defendant breached its agreement by failing to deliver 27 mobile homes and that as a result the plaintiff was damaged in the sum of $8,775. The plaintiff alleged that it was entitled to set off this sum, and the sum of $6,000 representing back charges resulting from the defendant's alleged breach, against a sum which the plaintiff owed the defendant. The defendant answered that it had fully complied with the terms of its agreement with the plaintiff, and filed a cross-petition for the sum of $13,482, plus interest, against the plaintiff and the intervener, Western National Bank of Scottsbluff, representing the agreed price of three mobile homes delivered pursuant to the agreement but not paid for.

The case was tried to the court which, on January 4, 1977, found that the plaintiff had failed to sustain

its burden of proof as to the matters set forth in its amended petition. The court further found that the plaintiff and the intervener, Western National Bank, were indebted to the defendant in the amount of $13,482, with interest of 6 percent from September 9, 1972. Both the plaintiff and the intervener filed motions for a new trial which were overruled and now appeal. We affirm the judgment of the District Court.

In its amended petition, the plaintiff first alleged the terms of its agreement with the government and then alleged:

"At the time of said agreement between Plaintiff and the U.S.A., at Exhibit 'A', Plaintiff also entered into an agreement with the Defendant wherein the Defendant would furnish to the Plaintiff 200 mobile home units so that Plaintiff could fulfill it's agreement with the Government set forth in Exhibit 'A'. Defendant agreed to furnish such units and to deliver them to the site designated by the U.S.A. within the time scheduled that would be permitted by the U.S.A."

The plaintiff is a mobile home dealer with its principal place of business in Scottsbluff, Nebraska. The defendant is a manufacturer of mobile homes with its principal place of business in Goshen, Indiana. In the summer of 1972, there were two flood disasters, the first occurring at Rapid City, South Dakota, and the second in the Wilkes-Barre, Pennsylvania, area. As a result of these floods many people were left homeless. Consequently, under the Disaster Relief Act of 1970, the Department of Housing and Urban Development (HUD) entered into contracts with various mobile home dealers for the delivery of mobile homes to the disaster areas.

The plaintiff contracted with HUD to deliver homes to the Rapid City flood disaster area. In connection with this contract, Jerald Clemens, president of the plaintiff, contracted with the defendant,

dealing with its vice president, Ray Gans, to supply homes for plaintiff's government contract for the Rapid City area.

While the plaintiff and the defendant were working in the Rapid City area the Pennsylvania flood occurred. Clemens asked Gans if Liberty would be interested in filling contracts which the plaintiff might obtain from HUD for the Pennsylvania area. Liberty indicated that it would. Clemens then proceeded to secure for the plaintiff a government contract for the provision of mobile homes to the Pennsylvania flood disaster area.

On June 29, 1972, the plaintiff solicited HUD for a contract which was subsequently awarded to it. The plaintiff's contract with the government provided, under "Estimated Requirements":

"1. Upon award of a contract and for 90 days thereafter, the Government shall order and the Contractor shall furnish a minimum quantity of 25 mobile home units.

"2. In addition to the minimum quantity provided for herein, the Government, may, but shall not be obligated to, order and the Contractor shall furnish an additional quantity of 75 mobile home units for a total maximum quantity of 100 mobile home units with an optional 100% increase in the maximum."

The government contract further stated:

"2. Delivery Requirements

"Delivery of a minimum of 25 mobile home units shall be completed not later than 7 work-days after verbal notice to deliver. A delivery rate of five (5) per day shall be maintained thereafter."

Clemens indicated on the government contract that he desired the plaintiff to be considered as selling agent for 200 mobile homes, the maximum amount, at an FOB price of $4,399.

Prior to the government contract being actually awarded to the plaintiff, the plaintiff entered into a contract with the defendant to supply the mobile

homes which the plaintiff intended to sell to the government. Negotiations on this contract took place by telephone. Exhibit 14 was a letter from the defendant, signed by Ray Gans, and dated July 21, 1972. Gans testified that after he prepared this letter, he called Clemens and read the letter verbatim to him and that Clemens agreed to its contents. The letter, in part, stated:

"The following is intended to spell out our agreement regarding H. U. D.-Pennsylvania units and will provide the basis for our supply of mobile homes to you for this program. * * *

"B. Shipments can be made at a minimum rate of 5 per working day for a quantity of 200 homes.

"C. Complete price FOB Syracuse, Indiana, is $4074."

As it was anticipated that HUD would take considerable time to make its payments to the plaintiff, and the defendant did not want to wait, Western National Bank of Scottsbluff, Nebraska, guaranteed payment to Liberty within 15 days after acceptance of each home by HUD.

Exhibit 10 was a letter dated August 1, 1972, from the defendant, signed by Ray Gans, to HUD supplying information concerning shipments by Liberty of HUD disaster mobile homes. This letter listed the following:

"B. Williamsport, Pennsylvania deliveries

"1. For Clemens Mobile Homes - Contract No. H-3031, 200 homes at 5 per working day from our Syracuse, Indiana plant."

Clemens testified the plaintiff's HUD contract was entered into on July 18 or 19, 1972, and he gave Liberty oral notice then to commence delivery. Ray Gans testified that notice was given on July 21, 1972. The record indicates the first mobile homes from the defendant, 13 in number, were delivered on July 27, 1972. By July 31, 1972, 50 mobile homes had been delivered. A total of 173 mobile homes were de-

livered by the defendant as of September 8, 1972.

The plaintiff's contract with the defendant, as evidenced by exhibit 14, required delivery at a minimum rate of 5 per working day. If notice to commence delivery was given to the defendant on July 21, 1972, then as of September 8, 1972, 170 mobile homes would have been due (34 working days, Labor Day excluded, x 5 mobile homes).

On September 8, 1972, the plaintiff received a termination notice on its government contract "for failure to deliver the required contract units within the delivery schedule." The plaintiff's failure to deliver properly was found not excusable. The plaintiff did not appeal this decision. The record indicates that the government terminated all contracts for receipt of mobile homes from various dealers at the same time.

Clemens testified he told Gans that the plaintiff would accept delivery from any of the defendant's factories. He stated he discussed the government's requirements with Gans and was told by him that there would be no problem. Clemens further testified that his contract with the defendant for the Rapid City area was similar in its delivery requirements to the Pennsylvania one and that pursuant to the former, defendant delivered in excess of five per day. Regarding the Pennsylvania contract, he stated that Gans told him that he would deliver a minimum of five per day in accordance with the government requirements. Clemens testified that the terms of the government contract were thoroughly discussed.

Gans testified that from the very beginning Clemens wanted more homes. He stated, "I was aware that he was originally asked to deliver seven days a week, five a day and I told him that I could not do that. My commitment was five a day I had to take care of my dealers and I would do everything that I could to take care of him." Gans testified he never

read the plaintiff's Pennsylvania HUD contract and did not know its exact contents prior to the suit.

The record shows that the defendant, subsequent to the plaintiff's contract in Pennsylvania, entered into a direct contract with the government to provide 100 mobile homes to the Pennsylvania flood disaster area, supplying these homes from its factories in Pennsylvania. The plaintiff argues that this shows the defendant had the capacity to deliver more homes to the plaintiff than it did and that the defendant should have first fulfilled its contract with the plaintiff before entering into this direct contract.

On cross-examination Clemens testified that by August 5th for certain and probably in July he knew, from his close association with the government, that "they would terminate when they did terminate." He stated he was told the government would terminate in September. He further stated that before he signed the government contract he knew the government was going to terminate sometime in September but did not know the exact date.

The judgment of the trial court in an action at law, where a jury has been waived, has the effect of a verdict of a jury and it will not be set aside on appeal unless clearly wrong. Crane Co. v. Roberts Supply Co., 196 Neb. 67, 241 N. W. 2d 516 (1976).

There is ample evidence in the record to support a conclusion by the District Court that the contract between the plaintiff and the defendant was not as alleged by the plaintiff in its amended petition, but rather as contended by the defendant and evidenced by exhibit 14 to provide 200 mobile homes at a minimum rate of 5 per working day, and that as of September 8, 1972, the defendant was in full compliance with its agreement with the plaintiff.

If the plaintiff had desired delivery at a rate of 5 per day, 7 days per week, it could have specifically included this in an agreement. The defendant was not required to perform beyond the minimum re-

quirements of the contract, despite the fact that it may have elected to perform above the minimum standards on a separate and distinct prior contract; nor was the defendant precluded from later entering into a direct contract with the government.

The judgment of the District Court is correct and is affirmed.

AFFIRMED.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT, NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES, A CORPORATION, INTERVENER-APPELLEE.
NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES, A CORPORATION, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.

263 N. W. 2d 643

Filed March 1, 1978. Nos. 41179, 41180.

1. **Courts: Constitutional Law.** The courts of this state decide controversies and are not empowered to render advisory opinions.
2. **Constitutional Law.** The Constitution of Nebraska is a limitation of power and not a grant.
3. **Legislature: Constitutional Law: Court of Industrial Relations.** Since the recognition and creation of bargaining units within the executive departments are not prohibited by any Article of the Constitution of Nebraska, the Legislature possesses the authority to grant such powers to the Court of Industrial Relations.
4. **Administrative Law: Labor and Labor Relations.** Decisions under the National Labor Relations Act are helpful, but not controlling upon the courts of this state.
5. **Labor and Labor Relations: Court of Industrial Relations: Elections.** A run-off election is a continuation of an original election and is designed to carry out the purposes of the original election.
6. _____: _____: _____. The determination that a run-off election should be held is appropriate where a majority of workers in a unit desire representation but where a unit fails to get the required majority of votes.
7. **Governmental Subdivisions: Labor and Labor Relations: Elec-**

tions. It shall be presumed, in the case of governmental subdivisions such as municipalities, counties, power districts, or utility districts with no previous history of collective bargaining, that units of employees of less than departmental size shall not be appropriate.

8. **Labor and Labor Relations: Statutes: Elections.** The policy of section 48-838, R. R. S. 1943, is opposition to undue fragmentation of bargaining units.
9. **Governmental Subdivisions: Statutes: Elections.** Section 48-838, R. R. S. 1943, is not limited in applicability only to those governmental subdivisions enumerated.
10. **Court of Industrial Relations: Labor and Labor Relations: Appeal and Error.** Review by this court of an order or decision of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.

Appeal from the Nebraska Court of Industrial Relations. Affirmed as modified.

Paul L. Douglas, Attorney General, Warren D. Lichty, Jr., and Robert G. Avey, for appellant.

John B. Ashford of Bradford & Coenen, for appellee American Fed. S., C. & M. Emp., AFL-CIO.

Steven D. Burns, for appellee and intervener-appellee Nebraska Assn. of Pub. Emp.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. THOMAS, J.

This is an appeal from a Court of Industrial Relations' determination that the Department of Roads is subject to the jurisdiction of the Court of Industrial Relations; that the department should be divided into two separate units for bargaining purposes, namely, a construction unit and a maintenance unit; and, finally, that the Court of Industrial Relations has authority to order a run-off election when neither of the two organizations seeking to represent

the units received a majority of the votes cast, although a majority voted to be represented.

The State argues that sections 48-801 et seq., R. R. S. 1943, are unconstitutional insofar as they might apply to the Department of Roads.

The Department of Roads is not one of the executive departments named in Article IV, section 1, of the Nebraska Constitution. It was created by the Legislature, sections 81-701.01 et seq., R. R. S. 1943, and designated as an executive department pursuant to Article IV, section 1, and Article IV, section 27, of the Nebraska Constitution.

The State directs our attention to three related provisions of the Nebraska Constitution. Article II, section 1, reads: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person * * * shall exercise any power properly belonging to either of the others, * * *."

Article IV, section 1, states: "Subject to the provisions of this Constitution, the heads of the various executive * * * departments shall have power to appoint and remove all subordinate employees * * *."

Article IV, section 6, provides: "The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed and the affairs of the state efficiently and economically administered."

The State argues that the exercise of the executive power will be hampered by the action of the Court of Industrial Relations because the decisions of the court will infringe on the right of the various departments to hire and fire subordinates. We shall discuss this contention later.

The constitutional justification for the creation of the Court of Industrial Relations and its jurisdiction over governmental bodies and their employees has been the subject of litigation before this court on a number of occasions.

In School Dist. of Seward Education Assn. v. School Dist. of Seward, 188 Neb. 772, 199 N. W. 2d 752, the major issue was whether the Court of Industrial Relations violated the separation of powers provision of Article II, section 1, Constitution of Nebraska. A divided court determined that it did not, and affirmed. The rationale of the majority was that Article XV, section 9, providing: "Laws may be enacted providing for the investigation, submission and determination of controversies between employers and employees in any business or vocation *affected with a public interest,* * * *. An Industrial Commission may be created for the purpose of administering such laws, and appeals shall lie to the Supreme Court * * *," was intended to be an exception to Article II of the Constitution of Nebraska. (Emphasis supplied.) By implication the majority suggested that the phrase "employees in any * * * vocation affected with a public interest" included employees of the State of Nebraska. In two separate dissenting opinions, three judges of this court disagreed with that interpretation. Judge Clinton, in his dissent, said: "There would, however, seem to be no question that the Legislature may enact independently of Article XV, section 9, labor legislation applicable to public employees, but in so doing the provisions of Article II on the separation of powers must be observed." The Department of Education is not an executive department, but exists pursuant to present Article VII, sections 1 through 13, of the Constitution. The constitutional grant is dependent upon implementing legislative action. School Dist. No. 8 v. State Board of Education, 176 Neb. 722, 127 N. W. 2d 458.

In Orleans Education Assn. v. School Dist. of Orleans, 193 Neb. 675, 229 N. W. 2d 172, this court again passed on the constitutionality of the Court of Industrial Relations against the assertions that sections 48-818 et seq., R. R. S. 1943, delegated judicial pow-

ers to an administrative body in violation of Article II, section 1, and Article V, section 1, of the Nebraska Constitution, and that the act further delegated legislative authority in violation of Article III, section 1. Judge Clinton, writing for the majority, held that the jurisdiction of the Court of Industrial Relations is limited to clearly legislative concerns and the power to establish rates and conditions of employment in accordance with the standards prescribed by the act are not unconstitutional as violative of the last above-cited Articles of the Nebraska Constitution.

The majority opinion in Orleans Education Assn. v. School Dist. of Orleans, *supra,* proceeding from the rationale set out in Judge Clinton's dissent in School Dist. of Seward Education Assn. v. School Dist. of Seward, *supra,* declined to base its holding on Article XV, section 9. Relying on Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N. W. 2d 236, the court held: "The Legislature has plenary legislative authority except as limited by the state and federal Constitutions." Finding no barriers in the state and federal Constitutions subjecting the employees of the Orleans School District to the jurisdiction of the Court of Industrial Relations, and, finding no unlawful delegation of legislative and judicial power, the court affirmed. The majority, however, noted that since the Legislature had plenary power and control over school districts, " ' * * * it follows, by the enactment of L.B. 15, Laws 1969, chapter 407, page 1405 (section 48-810, R. R. S. 1943), it was exercising that control.' " See, also, School Dist. of Seward Education Assn. v. School Dist. of Seward, *supra.*

Judge Newton dissented, in Orleans, suggesting that an implied restriction existed in the state Constitution by reason of the deliberate refusal of the drafters to include employees of the government within the provisions of Article XV, section 9, Consti-

tution of Nebraska. Judge Boslaugh concurred in the result without an opinion.

In American Fed. of S., C. & M. Emp. v. Department of Public Institutions, 195 Neb. 253, 237 N. W. 2d 841, the court, in a Per Curiam plurality opinion, again upheld the constitutionality of sections 48-801 et seq., R. R. S. 1943, against an assertion that Article II, section 1, and Article IV, section 1, Constitution of Nebraska, prohibited the exercise of the power, granted to the Court of Industrial Relations, to certify a bargaining agent within the department. The Per Curiam opinion found that the words at the beginning of Article IV, section 1, " '*Subject to the provisions of this Constitution* * * *,' " qualified the power of the executive department in light of Article IV, section 19, which provides: " 'The general management, control and government of all state charitable, mental, reformatory, and penal institutions shall be vested *as determined by the Legislature.*' " (Emphasis supplied.) This court further said: "By delegating the actual day-by-day administration to the Department of Public Institutions, the Legislature did not lose its constitutionally mandated *power* to control all state charitable, mental, reformatory, and penal institutions. * * * It follows that if the Legislature in the exercise of its continuing control of the department wants to subject the Department of Public Institutions to the jurisdiction of the Court of Industrial Relations, it has the power under Article IV, section 19, of the Constitution of the State of Nebraska."

The Per Curiam opinion notes the argument that the provisions of Article XV, section 9, do not cover all public employees was "* * * correct in its interpretation."

Two judges concurred in that result and two judges dissented. As pointed out in the dissent, the Department of Public Institutions is an executive department. § 81-101, R. R. S. 1943.

This court has again been invited to base its judgment on the interpretation placed on Article XV, section 9, by School Dist. of Seward Education Assn. v. School Dist. of Seward, *supra,* and, if not on that basis, then on an alleged distinction between executive departments created by the Legislature and those specifically created by the Constitution. It is suggested that the creation by the Legislature somehow changes the character of control by the executive branch which is not possible with departments created by the Constitution. We decline the invitation.

While we have no doubt that a specific order of the Court of Industrial Relations might infringe on the separate powers of the executive and judicial branches of government, the State does not here point out how the recognition of bargaining units infringes on the executive power. The courts of this state decide controversies and are not empowered to render advisory opinions. On a case-by-case basis, should the need arise in the future, this court will examine orders of the Court of Industrial Relations and determine if authority of the executive has been infringed upon and, conversely, determine if the Court of Industrial Relations has exceeded its power.

The Constitution of Nebraska is a limitation of power and not a grant. Orleans Education Assn. v. School Dist. of Orleans, *supra.* Therefore, since the recognition and creation of bargaining units within executive departments are not prohibited by any Article of the Constitution of Nebraska, the Legislature possesses the authority to grant such power to the Court of Industrial Relations.

Does the Court of Industrial Relations have the authority to order a run-off election where, as here, a majority has clearly voted for inclusion in a bargaining unit, but neither of the proposed bargaining

agents has received a majority of the votes cast? We hold that it does.

Section 48-838, R. R. S. 1943, provides: "(1) The court shall certify the *exclusive collective bargaining agent* for employees * * * following an election by secret ballot, * * *. (3) * * * No election shall be ordered in one unit more than once a year." (Emphasis supplied.)

This court held in City of Grand Island v. American Federation of S. C. & M. Employees, 186 Neb. 711, 185 N. W. 2d 860: "In reaching its decision the Court of Industrial Relations found that decisions under the National Labor Relations Act were helpful but not controlling upon the court. We think this is a correct statement as to the consideration to be given to the decision under the federal law."

The National Labor Relations Act at 29 U. S. C., § 159 (c) (3), states: "No election shall be directed in any bargaining unit or subdivision within which in the preceding twelve-month period, a valid election shall have been held * * *. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election."

The National Labor Relations Board has consistently held that a run-off election is a continuation of an original election and is designed to carry out the purposes of the original election. Fedders Manuf. Co., 7 N. L. R. B. 817.

The purpose of sections 48-801 et seq., R. R. S. 1943, is the prevention of labor disputes. The determination that a run-off election is appropriate, where a majority of workers in a unit desire representation, is in accord with both the purpose of the act and similar federal law. The Court of Industrial Relations did not act in excess of its authority by ordering a run-off election.

The Court of Industrial Relations determined that the appropriate bargaining units were a unit consisting of maintenance personnel and one composed of engineers or road construction personnel. The court noted there is little contact between the two groups, little interchange of personnel, and each has differing working conditions. The heavy-work schedule for the road construction employees is during the construction season and is largely dictated by contractors. The maintenance employees have a more regular work schedule the year round. As a result of the elections, the common bargaining agent of the two units is the Nebraska Association of Public Employees. The interesting factor is that the proposal for two bargaining units originated in the application of American Federation of State, County and Municipal Employees, AFL-CIO. N.A.P.E. proposed a single bargaining unit for all employees of the department, except supervisory personnel. Section 48-838, R. R. S. 1943, provides in part: "The court shall also determine the appropriate unit for bargaining and for voting in the election, and in making such determination the court shall consider established bargaining units and established policies of the employer. It shall be presumed, in the case of governmental subdivisions such as municipalities, counties, power districts, or utility districts with no previous history of collective bargaining, that units of employees of less than departmental size shall not be appropriate."

The Department of Roads is a governmental subdivision within the meaning of the presumption described in the statute as "units of less than department size shall not be appropriate." The policy of section 48-838, R. R. S. 1943, is opposition to undue fragmentation of bargaining units. House Officers Assn. v. University of Nebraska Medical Center, 198 Neb. 697, 255 N. W. 2d 258. To effectuate this policy, the statute is not limited, in applicability, only to

those governmental subdivisions enumerated. The use of the words "such as" merely suggests examples of political subdivisions covered by the statute, rather than denoting an all-inclusive enumeration. Since the Department of Roads is a governmental subdivision with no previous history of collective bargaining, it is subject to the presumption of a single bargaining unit.

Review by this court of an order or decision of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. American Assn. of University Professors v. Board of Regents, 198 Neb. 243, 253 N. W. 2d 1. While there is evidence to support the conclusion of the Court of Industrial Relations, we do not agree that it is substantial in view of the evidence, introduced on behalf of the elected bargaining agent, that no conflict exists between the two categories which would prevent representation by N.A.P.E. It is our conclusion that the presumption against fragmentation has not been overcome and the appropriate bargaining unit shall consist of all nonsupervisory employees of the Department of Roads. Since N.A.P.E. has been elected singly to represent both units, no new election is necessary.

The decision of the Court of Industrial Relations is affirmed as modified.

AFFIRMED AS MODIFIED.

BOSLAUGH, J., concurs in the result.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein. The opinion cites American Fed. of S., C. & M. Emp. v. Department of Public Institutions, 195 Neb. 253, 237 N. W. 2d 841 (1976), a Per Curiam plurality opinion, to support its opinion herein. I joined in the dissent to that opinion, and suggest its

applicability to the opinion herein.

The Department of Roads has been designated as an executive department. In my judgment, the Department of Roads is not embraced within the language of Article XV, section 9, of the Constitution of Nebraska, which provides: "Laws may be enacted providing for the investigation, submission and determination of controversies between employers and employees in any business or vocation affected with a public interest, and for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare. An Industrial Commission may be created for the purpose of administering such laws, and appeals shall lie to the Supreme Court from the final orders and judgments of such commission."

I am now convinced this constitutional provision was not intended to bear upon or affect governmental units. In this respect, I am now in full agreement with the conclusion set out in the dissent in School Dist. of Seward Education Assn. v. School Dist. of Seward, 188 Neb. 772, 199 N. W. 2d 752 (1972). I authored that opinion. It was premised on the plenary power of the Legislature over school districts, as suggested by the following paragraph: "The Legislature has plenary power and control over school districts, including provision for the appointment or election of governing bodies thereof. Consequently, it may provide limitations on any authority to be exercised by a school board. If the Legislature has such complete control over public school districts, it follows, by the enactment of L. B. 15, Laws 1969, chapter 407, page 1405, it was exercising that control."

There is nothing in that opinion to suggest, even by inference, that the Legislature has the same power and control over executive departments. I am now convinced that in adopting Article XV, section 9, Constitution of Nebraska, the Constitutional Conven-

tion of 1920 clearly intended to exempt the state and its political subdivisions from the operations of the Court of Industrial Relations. We have opened a Pandora's box, by judicial construction, which can ultimately destroy and nullify Article II, section 1, Constitution of Nebraska, which reads: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person * * * shall exercise any power properly belonging to either of the others, * * *."

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

IN RE INTERESTS OF SHAWNTAYE WAREZ WILLIAMS AND LEANN WILLIAMS, CHILDREN UNDER THE AGE OF 18 YEARS. STATE OF NEBRASKA, APPELLEE, V. SUSIE WILLIAMS, APPELLANT, IMPLEADED WITH LARRY GORDON AND BUCK WALLACE, APPELLEES.

263 N. W. 2d 90

Filed March 1, 1978. No. 41225.

Courts: Statutes: Parent and Child: Infants. In a proceeding in juvenile court under section 43-202 (1) or (2) and section 43-209, R. S. Supp., 1976, to declare children to be neglected or dependent children, when the jurisdiction of the court to terminate parental rights has been properly invoked and appropriate service of summons has been had, the jurisdiction of the court to terminate parental rights continues until the matter is finally determined.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Michael C. Washburn of Leahy, Washburn & Render, for appellant.

Donald L. Knowles, Douglas County Attorney, and Francis T. Belsky, for appellee State.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

MCCOWN, J.

Susie Williams has appealed from a judgment of the Separate Juvenile Court of Douglas County terminating her parental rights with respect to her two minor children, Leann Williams and Shawntaye Warez Williams. The sole issue on appeal is whether the Separate Juvenile Court had power to terminate her parental rights.

On March 14, 1975, a petition was filed in juvenile court alleging that Shawntaye, age 2, and Leann, 7 months, born to the appellant Susie Williams out of wedlock, were without proper support through no fault of their parents; that the children had been substantially, continuously, and repeatedly neglected; and that Susie Williams was an unfit mother. The petition prayed that after notice and hearing the court make such orders as to the care, custody, and control of the children as might be appropriate, and that the parental rights be terminated. The minor children were placed in the temporary custody of the welfare department, counsel was appointed for the appellant, Susie Williams, and a guardian ad litem was appointed for the children.

Detention hearings were held on April 7, 1975, and April 14, 1975, and the court ordered the children placed in the temporary custody of the Douglas County social services, and set an adjudication hearing for June 11, 1975.

At the adjudication hearing on June 11, 1975, by stipulation of the parties, the counts of the petition alleging repeated neglect and that Susie Williams was an unfit parent were dismissed on motion by the county attorney; and Susie Williams stipulated to the truth of the allegations as to the parentage of her children and her inability, through no fault of her own, to support them.

The Separate Juvenile Court found that the minor

children were dependent children within the meaning of section 43-202 (1), R. R. S. 1943; ordered the children to remain in the custody of Douglas County social services; and set the matter for disposition within 90 days. At the close of the hearing the court advised Susie Williams that she might be required to take specific action in order to retain her parental rights, and that a failure to carry out the orders of the court at any time might require the termination of those rights and the placement of the children for adoption.

On August 6, 1975, a further hearing was held. The court ordered the appellant to participate in a specific rehabilitative plan, which included regular visits by the appellant to her children. Custody was retained in the Douglas County social services and the court again advised the appellant that her parental rights were subject to termination. The cause was continued for review in 6 months.

On February 9, 1976, another hearing was held. Reports to the court indicated that appellant's visits to her children had been irregular; that she had not found employment; and that she had not entered into additional programs as contemplated. The court at this time terminated the parental rights of the natural fathers of the appellant's two children but determined that appellant's parental rights should not be terminated at that time. The court continued the rehabilitative plan for the appellant, and ordered a further review in 4 months.

On July 6, 1976, a further hearing was had in the juvenile court. The court found that the appellant had failed to comply with the previous orders of the court and that it was in the best interests of the children that the parental rights of the appellant be terminated. The court then ordered the parental rights of Susie Williams terminated and ordered the minor children retained in the custody of Douglas County

social services pending adoptive placement investigation.

On this appeal Susie Williams does not challenge any of the factual findings of the juvenile court. She asserts only that at the adjudication hearing on June 11, 1975, when the stipulation was filed for dismissal of counts charging her with repeated neglect and unfit parenthood, the stipulation erroneously omitted an intended request that the prayer for termination of parental rights be deleted. The assertion is supported by an affidavit to that effect executed by the attorneys involved. The appellant contends that the agreement of counsel to strike the prayer for termination of her parental rights precluded the juvenile court from thereafter terminating her parental rights without the filing of supplemental or additional pleadings or motions. We disagree.

Section 43-209, R. S. Supp., 1976, provides in part: "Facts may also be set forth in the original petition, a supplemental petition, or motion filed with the court alleging that grounds exist for the termination of parental rights. After a petition, a supplemental petition, or motion has been filed, the court shall cause to be endorsed on the summons and notice that the proceeding is one to terminate parental rights, shall set the time and place for the hearing, and shall cause summons and notice, with a copy of the petition, supplemental petition, or motion attached, to be given in the same manner as required in other cases before the juvenile court." Those provisions of the statute were fully complied with in the proceeding involved here at the time it was originally commenced.

Section 43-209, R. S. Supp., 1976, also provides that "the jurisdiction of the court shall continue over any child brought before the court, or committed under the provisions of this act, and the court shall have power to order a change in the custody or care of such child, if at any time it is made to appear to the

court that it would be for the best interests of the child to make such change."

It is clear that in a proceeding in juvenile court to declare children to be neglected or dependent children when the jurisdiction of the court to terminate parental rights has been properly invoked and appropriate service of summons has been had, the jurisdiction of the court to terminate parental rights continues until the matter is finally determined.

The record in this case establishes that the jurisdiction of the court was properly invoked, both to declare the children neglected or dependent children and to terminate the parental rights of the appellant. Summons and notice were properly given and there was adequate notice of each hearing. The appellant was represented by counsel throughout the proceedings and there is no question that appellant had adequate notice and full and fair hearings. See Perkins v. Perkins, 194 Neb. 201, 231 N. W. 2d 133.

The evidence in this case establishes beyond question that the best interests of the children require that the parental rights of the appellant be terminated. The orders and judgment of the Separate Juvenile Court of Douglas County were in all respects proper and the judgment is affirmed.

AFFIRMED.

MARY J. CARADORI, SPECIAL ADMINISTRATRIX OF THE ESTATE OF AMY O. CARADORI, DECEASED, APPELLEE, V. JIMMIE F. FITCH, APPELLANT.

263 N. W. 2d 649

Filed March 1, 1978. No. 41267.

1. **Negligence: Infants: Minors.** A minor is held to the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use.
2. **Negligence: Evidence: Instructions.** Where there is evidence of a decedent's negligence, the instruction to the jury that the instinct of self-preservation and the disposition to avoid personal harm

may, in the absence of evidence, raise the presumption that the person killed was in the exercise of ordinary care is not prejudicial error if, as part of the same instruction, the jury is told that this presumption of due care arising out of natural instinct of self-preservation is not evidence but a mere rule of law, and obtains only in the absence of direct or circumstantial evidence justifying reasonable inferences one way or another upon the subject and then, when evidence is produced, the presumption disappears and cannot be considered.

3. **Negligence: Instructions: Wrongful Death.** The instruction that contributory negligence is not a defense to the criminal charge of motor vehicle homicide need not be given in a civil action, in which it is shown that the defendant had been convicted of a motor vehicle homicide charge.
4. **Negligence: Damages: Judgments.** Upon a finding of liability, the jury is required to fix damages in accordance with the instructions so as to reasonably compensate those entitled to recover.
5. **Trial: Attorneys at Law: Records.** While in the context of the entire closing argument, singular remarks of an attorney may be objectionable, this court cannot determine such remarks, standing alone, to be prejudicial in the absence of a complete record of the argument.
6. **Damages: Infants: Minors: Wrongful Death.** The measure of damages for wrongful death of a minor child includes the loss of society, comfort, and companionship of the child.
7. **Verdicts: Judgments: Juries.** A verdict may be set aside as excessive by the trial court or on appeal when, and not unless, it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Eugene P. Welch of Gross, Welch, Vinardi, Kauffman & Day, for appellant.

Raymond J. Walowski, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. THOMAS, J.

Plaintiff-administratrix brought this action in the District Court for damages for the wrongful death of Amy O. Caradori, age 11. The trial judge submitted

the case to the jury on the allegations of defendant's negligence and on the allegations of the decedent's contributory negligence. The jury returned a verdict for plaintiff of $40,000. Defendant appeals.

The defendant assigns as error: (1) The giving of and the refusal to give certain instructions; (2) the refusal to grant a mistrial on defendant's motion after admissions of the defendant were admitted into evidence and after remarks of plaintiff's counsel were made in final argument which, according to defendant, injected liability insurance into the jury's deliberations; and (3) the excessiveness of the verdict.

The decedent and a companion were riding bicycles on Q Street near Millard in Douglas County, Nebraska, at about 9 p.m. on April 29, 1975. The area was unlighted. The decedent's bicycle was equipped with reflector tape on the pedals and a reflector behind the rear seat. The girls were riding side-by-side on the road or partially on the shoulder when, according to a witness, the defendant's pickup truck struck the decedent, passed over her body, and left the scene. The witness, who was a passenger in a following vehicle, saw the decedent in the lights of the defendant's vehicle. The witness followed the defendant's pickup to his area farmstead, confronted him, and, after some delay, persuaded the defendant to return to the scene of the accident.

There was ample evidence from which the jury could have determined the defendant was negligent with regard to speed, lookout, and proper control.

The decedent was riding her bicycle alongside the companion's bicycle in violation of section 39-690 (2), R. R. S. 1943, and the companion's bicycle was not equipped with the light and reflector as required by section 39-6,138 (5), R. R. S. 1943. There was evidence from which the jury could have concluded that the decedent was contributorily negligent.

The defendant first objects to the instruction which

detailed to the jury the standard of care of a child. The instruction recited that a minor is held to the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use. The instruction was consistent with Nebraska law. See, Bear v. Auguy, 164 Neb. 756, 83 N. W. 2d 559; Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607.

The defendant urges that the riding of a bicycle on a city street is an adult activity and that a minor engaging in such activity should be held to the adult standard. See Dellwo v. Pearson, 259 Minn. 452, 107 N. W. 2d 859. The Dellwo case involved the negligent operation of a power boat. We are not prepared, even assuming the wisdom of the Minnesota rule, to place the activity of bicycling in the same category as power boating. The defendant's assignment is without merit.

Defendant further complains of the giving of instruction No. 20: "The instinct of self-preservation and the disposition to avoid personal harm may, in the absence of evidence, raise the presumption that a person killed was in the exercise of ordinary care.

"The presumption of due care arising out of natural instinct of self-preservation is not evidence, but mere rule of law and obtains only in absence of direct or circumstantial evidence justifying reasonable inferences one way or another upon that subject, and when evidence is produced, presumption disappears and cannot be considered." The defendant urges that since there was evidence from which the jury could have concluded the decedent was negligent, it was error for the instruction to have been given.

Sheets v. Davenport, 181 Neb. 621, 150 N. W. 2d 224, held that if evidence was introduced "sufficient to present a jury question, the presumption does not arise and the jury should not be instructed about it." It was further held: "The effect of the instruction

was to permit the jury to determine whether the evidence of negligence outweighed the presumption to the contrary. We regard this to be prejudicial error requiring reversal of the judgment and a new trial."

The instruction in Sheets v. Davenport, *supra,* reads: " 'There is a presumption that a driver of an automobile who was killed in an accident used due care in the operation of his automobile and operated it lawfully. The instinct of self preservation gives rise to such presumption.' "

The instruction in this case was a more complete exposition of the law than the instruction in the Sheets case. The court, in effect, told the jury to disregard the presumption if evidence was introduced. While we do not recommend the giving of the instruction, it was not an incorrect exposition of the law and could not operate to mislead the jury. Any error present was not prejudicial.

The defendant next assigns as error the trial court's refusal to submit a requested instruction that contributory negligence was not a defense to a prosecution for motor vehicle homicide.

Evidence was introduced that the defendant pled guilty to, and stood convicted of, the crime of motor vehicle homicide arising from the death of Amy O. Caradori. Defendant correctly points out that contributory negligence of the decedent is not a defense to the criminal charge of motor vehicle homicide. However, he fails to cite any authority for the proposition that where, in a civil action, it is shown that a defendant had pled guilty to and been convicted of a motor vehicle homicide charge, an instruction should be given informing the jury that contributory negligence was not a defense in the criminal action. The trial court quite properly set forth the allegations of negligence against the defendant and the allegations of contributory negligence against the decedent. The court instructed that evidence of a violation of a traffic law was evidence of negligence

only. The requested instruction was not proper in a civil case and the court did not err in refusing the defendant's request.

To understand the second assignment of error, it will be necessary to examine in some detail the nature of the pleadings and the conduct of the trial itself. In response to the plaintiff's petition, the defendant's attorney first filed an answer in which he denied that an accident had taken place and that the vehicle of his client had struck Amy O. Caradori. Subsequent thereto, the defendant amended his answer to admit that there had been a collision between the vehicle driven by the defendant and the bicycle of Amy O. Caradori which resulted in her death.

At trial, plaintiff's counsel sought to introduce as admissions against interest questions and answers given by the defendant Jimmie F. Fitch at a pretrial deposition. "Question: As you sit here today taking this Deposition is it your testimony then that you, to this day, do not know that anything odd, or different by way of an accident occurred in that area on the evening of April 29, 1975? *Answer:* No, Sir. *Question:* Did you plead guilty before Judge Grant, Judge Grant a Judge of the District Court of Douglas County as to the charge of misdemeanor motor vehicle homicide regarding the occurrence of April 29, 1975, did you plead guilty or not? *Answer: This was handled by my personal lawyer as I don't understand most legal terms. He handled that. I trusted his judgment. Question:* That was Mr. Bernard Walsh? *Answer:* Right. Question: Did you plead guilty to the charge of misdemeanor motor vehicle homicide before Judge Grant? Yes or No." (Emphasis supplied.) After a series of objections, and later a motion for mistrial, the court permitted the answer and the defendant's answer was: "Not to my recollection I did not. *Question:* Did your attorney plead guilty for you? Answer: I don't recall.

Question: You don't know whether you pled guilty to that charge, or you don't recall? Answer: That's right. Question: You just don't remember that day? Answer: That's right." (Emphasis supplied.)

At the conclusion of the reading of the portions of the deposition offered in evidence, the certified copy of the judgment of conviction of the defendant in the District Court for Douglas County, Nebraska, was offered and received in evidence. At trial, in spite of the answer and the stipulation of the defendant's counsel later entered at trial that the defendant did, in fact, operate the vehicle which struck and killed Amy O. Caradori, the defendant again denied that he was involved in an accident or struck Amy O. Caradori.

The final argument of the parties was not transcribed. The defendant however, at the conclusion of the argument, made a showing to the court in which he asserted that the plaintiff's counsel made the following statement: " 'Don't concern yourselves with who is going to pay this judgment.' " Defendant further asserts that plaintiff's counsel again reiterated a reference to Bernard Walsh who was with the defendant at the time the defendant pled guilty to the charge of motor vehicle homicide. It is the defendant's contention that the reading of the deposition in evidence and the remarks by plaintiff's counsel at the final argument were improper and were an impermissible reference to insurance. We disagree. Plaintiff's counsel was entitled to show the defendant's guilty plea to motor vehicle homicide and, with respect to the credibility of the defendant, his statements in the deposition which contradicted the fact of his plea of guilty and contradicted his own answer and the stipulation of his counsel. The reference to Bernard Walsh as a personal attorney does not in and of itself make any reference to the appearance of plaintiff's present counsel for and on behalf of an insurance company repre-

senting the defendant, nor necessarily imply the same. As we view it, the defendant took inconsistent positions in his pleadings and in his sworn testimony. Correspondingly, plaintiff was entitled to show that inconsistency and comment on it. Failure to declare a mistrial was not error.

As to the remark of plaintiff's counsel: "Don't concern yourselves with who is going to pay this judgment," at best, the remark is ambiguous. It is, however, elementary that the jury is required under the instructions, if the defendant is found liable, to fix damages in accordance with the instructions so as to reasonably compensate those entitled to recover. See Colvin v. Powell & Co., Inc., 163 Neb. 112, 77 N. W. 2d 900. We do not find any impermissible argument or any impermissible inference of insurance. The trial court in ruling on this motion stated: "The Court Reporter was available at all times herein if anybody wanted it written. * * * He would have had the exact import of every word that is spoken. No one chose to call the Court Reporter. So I do not know the full import. So all motions are overruled." It may be that, in the context of the entire statement, such remarks could have been held to be prejudicial. In the absence, however, of a complete record of the plaintiff's argument, we are unable to state that the remark standing alone is prejudicial or constituted an impermissible reference to insurance.

The defendant further assigns as grounds for mistrial statements made by the plaintiff in closing argument. He asserts plaintiff's counsel in his argument-in-chief alluded to the fact that no reasonable man would trade Amy's life for a Picasso which he had evaluated at a hypothetical figure of $1,500,000. Plaintiff's attorney further suggested to the jury that a defendant's verdict would not be justice in Omaha, Nebraska. He then prayed he would have had the "wisdom and eloquence" to express himself

to persuade the jury to render a verdict to right a wrong so the plaintiff would have no complaints. While the remarks are somewhat overblown and dramatic, we cannot hold, as a matter of law, that they constitute unfair argument or comment. The assignment is without merit.

The last assignment of error relates to the size of the verdict. Since Selders v. Armentrout, 190 Neb. 275, 207 N. W. 2d 686, the rule in this state is that the measure of damages for the wrongful death of a minor child includes the loss of society, comfort, and companionship of the child. In Vandenberg v. Langan, 192 Neb. 779, 224 N. W. 2d 366, we affirmed a verdict of $36,797.80. In the Vandenberg case, there was evidence that the child was a very unusual youth with great potential for a bright and promising future. The evidence in this case reflects that Amy O. Caradori was a normal, bright child, companionable and popular with her playmates and teachers, and loved by her parents. The jury was in a position to evaluate the care, companionship, and comfort that Amy O. Caradori would have given her parents, her brothers, and sister. We will not enter into a discussion in which we compare the relative accomplishments of deceased children in wrongful death actions. A verdict may be set aside as excessive by the trial court or on appeal when, and not unless, it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law. Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N. W. 2d 451. Here, the verdict is supported by the evidence and the rule we established in Selders v. Armentrout, *supra*.

The verdict was not clearly excessive and the defendant's assignments of error being without merit, the judgment of the trial court is hereby affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein because of the conscious effort of plaintiff's counsel to inject the element of insurance into the trial of the case.

Attorneys engaged in the trial of cases to a jury ought to know the proper procedures. When they depart from the legitimate purpose of properly presenting the evidence, and the conclusions to be drawn therefrom, they must assume the responsibility for such improper conduct. I disagree with the majority opinion. The plaintiff's attorney deliberately brought the inference of insurance to the attention of the jury. A case should be tried on its facts and not on whether or not the defendant has insurance to pay a judgment.

BOSLAUGH, J., dissenting.

It seems to me that this is a case where the errors assigned, if considered separately, might not be sufficient to require that the cause be remanded for a new trial. However, when considered together, and in view of the amount of the verdict, it is my opinion that the cause should have been remanded for a new trial.

I do not agree that it is necessary the entire argument be recorded in order to object to a particular statement of counsel.

ERNEST G. BAHM ET AL., APPELLEES, V. RALPH RAIKES, APPELLANT.

263 N. W. 2d 437

Filed March 1, 1978. No. 41281.

1. **Contempt: Courts.** The authority to punish for contempt is a power inherent in all courts of general jurisdiction such as the District Court of this state.
2. **Contempt: Words and Phrases.** Where a party to an action fails to obey an order of the court, made for the benefit of the opposing

party, the rule is well recognized that such act is, ordinarily, a civil contempt.

3. _____: _____. In civil contempt proceedings, willfulness is an essential element.
4. **Contempt: Proof.** In contempt proceedings, it is necessary to establish guilt beyond a reasonable degree.
5. **Trial: Witnesses.** This court on appeal will consider the fact the trial court saw and heard the witnesses and observed their demeanor, and will give great weight to the trial court's judgment as to credibility.
6. **Appeal and Error: Premises, View of.** This court on appeal will give consideration to the fact the trial court inspected the premises.

Appeal from the District Court for Saunders County: JOHN D. ZEILINGER, Judge. Affirmed.

John F. Kerrigan of Kerrigan, Line, Martin & Hanson, for appellant.

Edstrom, Bromm & Lindahl, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. J.

This is a contempt proceeding brought against the defendant for his alleged willful violation of a 1954 court decree. That decree required the defendant to perform certain acts and forbade other acts in relation to the flow of waters upon his land. The defendant appealed from the original decree. We affirmed the decree of the District Court. See Bahm v. Raikes, 160 Neb. 503, 70 N. W. 2d 507 (1955). Our decision there describes the lay of plaintiffs' and defendant's land and the various watercourses involved.

On June 26, 1967, plaintiff Alvina Wischmann filed a motion with the District Court to issue to the defendant a citation to show cause why he should not be punished for contempt. On October 13, 1967, plaintiff Wischmann filed an accusation alleging that after substantially complying with the 1954 decree, the defendant thereafter willfully and contu-

maciously violated the decree. The defendant filed an answer to the accusation and the matter proceeded to trial. Trial was held on a number of days between March 25, 1968, and July 10, 1968.

On March 1, 1974, the District Court entered its judgment, holding the defendant in indirect contempt, in that he knowingly and willfully violated the court's 1954 decree, after substantially complying initially with it, as alleged by the plaintiffs. The defendant was given 3 months to purge himself of the contempt as found.

On March 8, 1974, a motion for a new trial was filed by the defendant. A hearing was held on this motion and the court took it under advisement. On January 5, 1977, the defendant's motion for a new trial was overruled. The defendant appeals. We affirm the judgment of the District Court.

The authority to punish for contempt is a power inherent in all courts of general jurisdiction such as the District Court of this state. State ex rel. Beck v. Frontier Airlines, Inc., 174 Neb. 172, 116 N. W. 2d 281 (1962). "Where a party to an action fails to obey an order of the court, made for the benefit of the opposing party, the rule is well recognized that such act is, ordinarily, a civil contempt." McFarland v. State, 165 Neb. 487, 86 N. W. 2d 182 (1957).

In civil contempt proceedings willfulness is an essential element. Village of Springfield v. Hevelone, 195 Neb. 37, 236 N. W. 2d 811 (1975). The disobedience of an injunction must be willful before the breach thereof may be punished as a contempt. Kasparek v. May, 174 Neb. 732, 119 N. W. 2d 512 (1963). In contempt proceedings, it is necessary to establish guilt beyond a reasonable doubt. Whipple v. Nelson, 138 Neb. 514, 293 N. W. 382 (1940).

Under the 1954 decree, the defendant was required to:

"1. Restore the creeks and flood planes through and across his land in Sections 17 and 18, Township

13, Range 9, Saunders County, Nebraska, as hereinbefore described, to as near their natural condition as is possible, as of the time the defendant took possession of said lands.

"2. Do the above described work in such sequence as will best serve to allow the waters of Mosquito creek, Wahoo creek and Silver creek to flow in their natural flood channels and to allow the waters of Wahoo creek and Silver creek to flow in their natural courses.

"3. Remove the dikes along the east side of Mosquito creek commencing approximately 2400 feet south of Wahoo creek and extending to the junction of Mosquito creek with Wahoo creek.

"4. Remove the dikes along Wahoo creek, except that where the course of Wahoo creek has been straightened by the defendant, the dikes along the east bank of said new channel shall not be lowered to a level below the height of the east bank of the natural course of Wahoo creek as it was before the course was straightened, and except that the defendant need not remove the dikes along the present course of Wahoo creek from the point designated cross-section 3-3 on exhibit 30 to the south line of Section 17, if he makes an opening in the west dike opposite the point where Silver creek formerly flowed into Wahoo creek of the same size as the opening required to be made in the east dike to return the flow of Silver creek into Wahoo creek.

"5. Cut a channel for Silver creek from the north line of Section 18 to the point in Wahoo creek where Silver creek formerly flowed into Wahoo creek, this channel to be of the same depth at the entrance to Wahoo creek as Wahoo creek with a gradual grade upstream to the point where Silver creek enters said Section 18.

"6. Effectively plug the ditch which now allows Silver creek to flow into the railroad borrow pit.

"7. Fill and compact the cutoff ditch extending

from the old course of Silver creek into Ab's lake.

"IT IS FURTHER ORDERED that defendant be, and he hereby is, enjoined from maintaining the dikes along the present courses of Wahoo and Mosquito creeks which were ordered to be removed and from diverting the natural flow of Silver creek and from diverting the flow of flood waters of Wahoo creek, Mosquito Creek and Silver creek from the flood channels west and south of Wahoo creek as it flows through said lands of the defendant."

The District Court found that, after initially substantially complying with the decree, the defendant had thereafter violated the decree as follows: (1) By willfully and gradually raising the land level along the east side of Mosquito Creek on his land so as to now constitute a dike and by maintaining the same in violation of the injunction contained in the decree; (2) by diverting the waters of Wahoo Creek from their natural flood channel to the west and south through his lands by building dikes on the south side of Wahoo Creek and raising the land level north thereof; (3) that the defendant, as required by the decree, made an opening in the west dike erected by him on Wahoo Creek opposite the point where Silver Creek formerly flowed into Wahoo Creek and opposite the point where defendant reconnected Silver Creek to Wahoo Creek as required by the decree. The defendant raised and maintains such opening in the west dike at a height to prevent a normal flow of floodwaters of Silver Creek west onto defendant's lands in the natural flood channel; and (4) by again, and in violation of the decree, diverting the flow of flood waters of Wahoo Creek, Mosquito Creek, and Silver Creek from the flood channels west and south of Wahoo Creek as it flows through the lands of the defendant.

The District Court further found that the plaintiff Wischmann had sustained damage as a result of defendant's violations of the decree.

Witness Ralph Mason testified for the plaintiffs as follows: He inspected the Raikes' land in May or June 1957. Water in Wahoo Creek was about 3½ feet below the floor of the DeFoil Bridge. Water was moving out of Mosquito Creek to the southwest for quite a distance all along the creek and it was flowing southeasterly. The area was again observed by him on May 21, 1960. Water was coming out of Mosquito Creek. He observed fresh dirt along the south bank of Wahoo Creek west of the DeFoil Bridge. The fresh dirt extended about 600 feet and was substantially higher than the ground level where it was piled. The witness also observed fresh dirt on Mosquito Creek south about 200 feet from the junction with Wahoo Creek. On May 26, 1960, Mason observed several washouts leading from Silver Creek to the east toward Ab's Lake.

During May of 1960 the witness made further observations. New dirt along the south bank of Wahoo Creek had been tapered and there were Caterpillar marks on it. New dirt along the south side of Wahoo Creek started a couple hundred feet west of the DeFoil Bridge and extended about 600 feet. The new dirt along the east side of Mosquito Creek extended about 600 to 700 feet south from a point 200 feet from the junction with Mosquito Creek.

Observations were made by Ralph Mason in June of 1960. On June 20, 1960, there was flooding to the west and east of Mosquito Creek; however, the water appeared to have come up from the south. At this time the water in Wahoo Creek was about a foot below the girders on the DeFoil Bridge, the girders being about 2 feet beneath the floor of the bridge. The flood plain to the northeast of Wahoo Creek was inundated. There was a broad stream of water to the north of Raikes' land north of the DeFoil Bridge and a sheet of water going to the east. There was a smaller amount of water in the southwest flood plain.

On June 16, 1964, Ralph Mason again observed flood conditions in the area. Water in Wahoo Creek was even with the girders of the DeFoil Bridge. None of the Raikes' land was under water at the time, and there was no water coming out of the Wahoo or Mosquito Creek banks. The land directly north of Wahoo Creek, the northeast flood plain, was under water. Lots of water was flowing out of the new Silver Creek channel and across to Ab's Lake. Later the same day additional observations were made. There was just a small amount of overflow from the north part of Mosquito Creek and none over the south bank of Wahoo Creek. Practically no land of the southwest flood plain was under water. After a heavy rainfall on the evening of June 16, the same conditions were again observed.

In August 1964, the witness and others made observations. They observed more fresh dirt on the south bank of Wahoo Creek east of the DeFoil Bridge. West of the DeFoil Bridge, bank levels were higher than they had been in June. The witness estimated that the east bank levels on Mosquito Creek were about 3 feet higher than in 1960 when observations were made. The dirt on the south bank of Wahoo Creek, east of the DeFoil Bridge, was about 20 feet across on the top and 3 feet high, and extended for 60 rods.

In June 1967, the witness, Ralph Mason, made further observations. On June 10, 1967, water in Wahoo Creek was up to the girders on the DeFoil Bridge. There was heavy flooding on the north side of Wahoo Creek. There was no flooding whatsoever on the Raikes' land east of Mosquito Creek and south and west of Wahoo Creek. He observed the mouth of the new Silver Creek channel. Water was 2 or 3 inches from the top of the bank on the west. Mr. Raikes' Caterpillar was parked opposite the opening in the bank. On June 21, 1967, observations were again made by the witness. There was a lot of water to

the north of the DeFoil Bridge flowing from west to east. The floodwaters extended quite a wide distance to the north. There was no water south of Wahoo Creek on Raikes' land in Sections 17 and 18.

Bob Mason testified for the plaintiffs. He testified that the dikes on the Raikes' land, ordered removed, were taken down in the winter of 1956 and that he was along on an inspection trip made to the Raikes' land in June 1957. A flood was in progress at the time. Water was coming over the Mosquito Creek dikes. There were floodwaters on the southwest side of Wahoo Creek, quite extensive, and some water east of Mosquito Creek and north of Wahoo Creek. A second flood took place in early July 1957. There was a lot of water on the southwest flood plain. The whole field in the area east of Mosquito Creek and south of Wahoo Creek was full of water. Water was about 4 feet below the floor of the DeFoil Bridge. Bob Mason testified that after the second flood of 1957, he observed new dirt on the north side of Wahoo Creek east of the DeFoil Bridge for several hundred feet.

Bob Mason again observed the area in May 1960. On May 21, 1960, water was 1 foot below the DeFoil Bridge girders. The Raikes' land was not flooded as it had been in 1957. A ledge of new dirt, a distinct step-up about 18 inches high, was observed on the south side of Wahoo Creek west of the bridge. A tapered fill about 3 feet high was noticed on the east bank of Mosquito Creek commencing 200 feet south of the junction with Wahoo Creek and running about 600 to 700 feet south. On May 26, 1960, more observations were made. The fill on the south side of Wahoo Creek had been tapered and a crop planted. The flood plain north of Wahoo Creek was full of water. There was another flood in June 1960. Water in Wahoo Creek was about 3 feet under the floor of DeFoil Bridge. The water did not flood like it did in 1957.

Observations were made in August 1964 by this

witness. He observed a mound of dirt, and a Caterpillar and dragline in the area. The south bank appeared higher than the north bank of Wahoo Creek. There was evidence, such as erosion and washouts, that water had topped the north bank.

There were floods again in 1967. On June 10 and 15, water was up to the bottom of the girders on DeFoil Bridge. North of Wahoo Creek there was a lot of water. There was no water in the southwest flood plain. Again in the latter part of June observations were made. There was water on the northeast flood plain. There was no water south of Wahoo Creek and east of Mosquito Creek, just puddles that wouldn't drain, no floodwater was coming through. Wahoo Creek looked as if it had run out to the north. The witness also observed washouts on the east bank of Silver Creek.

Harvey Jacobs testified for the plaintiffs. He observed the area in 1956 and 1957. The witness used a piling in Wahoo Creek to measure the water levels. In the spring of 1956, Wahoo Creek was running pretty full and a little trickle of water was running over the opening in the Wahoo Creek dike opposite the mouth of Silver Creek. In 1957 the witness observed water coming out of Mosquito Creek.

Jacobs observed the area in 1960. Water was over the piling and no water was coming out of Mosquito Creek. Jacobs was along on an inspection trip on May 26, 1960. He observed dirt along the bank of Wahoo Creek west of the DeFoil Bridge. As he recalled there had been work all the way along the bank. The fill was 2 to 3 feet. Several days thereafter the witness observed a dike along the east side of Mosquito Creek. Water in Mosquito Creek had not topped the new fill. On May 26, 1960, no water was coming out of the opening in the dike opposite where Silver Creek joined Wahoo Creek. Jacobs testified that he observed new dirt in this opening. He also observed washouts from the east bank of Silver Creek.

The witness was on the inspection trip in August of 1964 with the others, and his testimony was the same as other witnesses regarding flood conditions and the observations of dirt along the Wahoo Creek banks.

Donald Wischmann, son of the plaintiff Wischmann, testified. He testified that the Wischmann land is in the flood plain of Stambaugh's Slough, a drainage ditch which comes out of Ab's Lake. Water from Wahoo Creek can reach their land if it flows north and east of Wahoo Creek and gets over to Ab's Lake. In June 1957, when the defendant's dikes were down, there was a flood. There was water on Raikes' land east of Mosquito Creek and south of Wahoo Creek. The Wischmann land did not get flooded, but did get some backup water from Wahoo Creek, which is a normal thing and which comes without appreciable force and does no significant damage. In the 1957 flood there was no flood damage from Stambaugh's Slough.

In May 1960, there was a flood and Wischmann inspected the Raikes' land. Fresh dirt was observed along the banks of Wahoo and Mosquito Creeks. On the south side of Wahoo Creek he saw about 2 feet of dirt which had been worked on and tapered away from the bank. There was no evidence that water had flowed out of Mosquito Creek. In the 1960 flood, Stambaugh's Slough was full and rushing with a rapid flow. It was faster and there was considerably more flow than in 1957. The floods of 1957 and 1960 were about the same general size. There was damage in 1960 such as washouts. There was a flood in June 1960. Water came down Stambaugh's Slough with great volume and velocity. Damage was done, fences washed out, ditches dug, and debris deposited.

In the 1967 flood, water again was in great quantity and rapidly flowing in Stambaugh's Slough. The 1967 flood did damage to the crops. The witness tes-

tified that in 1957 water did not come down Stambaugh's Slough very markedly or rapidly. Ralph Mason testified that he noticed a big difference in the amount of flooding down Stambaugh's Slough since 1960.

Defendant's evidence can be generally summarized as follows: (1) That while the defendant did on occasion place dirt along the banks of Wahoo Creek and Mosquito Creek, such was done to repair washouts and erosion and to restore the banks to their original levels, and not to raise the level of the banks so as to constitute a dike; (2) that the bank levels in question on Wahoo Creek and Mosquito Creek are presently at substantially the same levels they were when he was deemed to be in substantial compliance with the 1954 decree; (3) that at the times in question, his land in the area in question suffered from flood damage; and (4) that the level of the opening in the southwest bank of Wahoo Creek opposite the Silver Creek connection has never been raised by him in violation of the decree.

What we had to say in a recent case of similar nature is applicable here: "Much of the evidence before the District Court was conflicting and contradictory in nature. The trial court had the opportunity to view the parties and the witnesses. This court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor, and will give great weight to the trial court's judgment as to credibility. * * * the trial court personally inspected the area in question. This court will give consideration to the fact that the trial court inspected the premises." Paasch v. Brown, 199 Neb. 683, 260 N. W. 2d 612 (1977). We concur in the finding and conclusions of the District Court.

The judgment of the District Court is correct in all respects and it is affirmed.

AFFIRMED.

BONNY L. THEYE, APPELLEE, V. LARRY D. THEYE, APPELLANT.
263 N. W. 2d 92

Filed March 1, 1978. No. 41320.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed as modified.

L. William Kelly, III, of Kelly, Kelly & Kelly, for appellant.

Ross, Schroeder & Fritzler, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

CLINTON, J.

This is an appeal from a dissolution of marriage decree. Husband, respondent-appellant, prosecutes this appeal, attacking the award of permament custody of the children to the wife, the award of alimony, and the division of real and personal property. We affirm as modified.

The parties were married August 12, 1962. No children were born of the marriage although two children, ages 10 and 7 at the time of trial, were adopted by the parties during the course of their marriage.

Petitioner is a licensed practical nurse whose gross income for 1976 was $6,756. Respondent is an associate professor at Kearney State College whose gross salary for 1976 was $13,650. Respondent, who at the time of trial was very close to obtaining his Ph.D. Degree, has in the past supplemented his income by judging speech contests and teaching summer school. This additional income has amounted to between $1,000 and $1,500 in additional earnings on a yearly basis.

Petitioner worked full time during the first 5 years of the marriage. She quit working for about a year after the parties adopted their first child, and then

worked 2 days per week until 1976 when she resumed full-time employment. Respondent has taught at Kearney State College for 10 years. During the marriage he completed the remaining three-fourths of his Master's Degree work and started toward his Ph.D. The home which was shared by the parties during most of the marriage was built by respondent and his father in 1967. The house was appraised at $48,000 and is encumbered with a $13,133.51 mortgage, less $623.58 in escrow, or a balance of $12,509.93.

The trial court awarded custody of the two children to the petitioner and ordered respondent to pay $100 per month per child as child support. Respondent was also ordered to pay $125 per month for 84 months as alimony. Both parties were awarded personal property and certain bank accounts. The trial court awarded the home owned by the parties to the petitioner. It directed that the petitioner pay to the respondent the sum of $14,500, plus 8 percent interest per annum from the date of decree until paid, said sum being payable not later than 5 years from the date of decree, or upon sale of the house if it is sold before the lapse of 5 years.

Where the issue of child custody is involved, both the mother and father have an equal and joint right to the custody of their children. The test for determining custody, which has been reiterated by this court many times, is the best interests of the child. In the present case the fitness of either parent was not in issue. A report by a child welfare social worker found that both petitioner and respondent were good parents, but did recommend that petitioner would be better able to fill the role of a "whole parent." The trial court's determination on granting custody will not ordinarily be disturbed unless there is a clear abuse of discretion, or it is clearly against the weight of the evidence. Schinkel v. Schinkel, 199 Neb. 1, 255 N. W. 2d 851. Consider-

ing all the facts involved, we cannot say that the trial court abused its discretion in awarding petitioner custody of the children, nor that its decision is against the weight of the evidence.

Respondent's second assignment of error concerns the issue of alimony. Petitioner was awarded $125 per month for 84 months as alimony. The fixing of alimony rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. Hansen v. Hansen, 199 Neb. 462, 259 N. W. 2d 912. The record here establishes that unilateral acts of the petitioner were responsible for the irretrievable breakdown of the marriage and that the respondent made all reasonable efforts to save the marriage. Under the facts of this case we find that the grant of alimony to petitioner was excessive. We therefore modify the court's award of alimony to $125 per month for 2 years.

Lastly, respondent contends the court erred in the distribution of the real and personal property of the parties. On review this court will not disturb a division of property made by the trial court unless it is patently unfair. Edwards v. Edwards, 199 Neb. 581, 260 N. W. 2d 319. We find nothing patently unfair in the division of personal property made by the District Court.

The residence of the parties at the time of trial had a net value of approximately $36,000. Apparently, in lieu of a share of the residence, the court ordered that respondent be paid by petitioner the sum of $14,500, plus 8 percent interest, all payable no later than 5 years from the date of the decree, or when the home is sold if that should occur earlier. We assume there was a reason, perhaps related to the feasibility of refinancing the mortgage to pay this obligation, why the court awarded respondent an amount less than one-half the equity. Based on that assumption we do not modify that portion of the decree.

Each party will pay his own costs and attorney's fees in this court.

AFFIRMED AS MODIFIED.

WHITE, C. THOMAS, J., concurring in result.

I agree with the majority in the result. I disagree with any implication in the opinion that the result somehow follows a determination of responsibility for the initial breakdown of the marriage. The award of alimony and the division of property are determined by the circumstances of the parties at the time of dissolution of the marriage, the length of the marriage, the health, relative earning power, and education of the parties, and whether there are unemancipated children. See § 42-365, R. S. Supp., 1976. No case has said that the granting, denial, or reduction of alimony nor the division of property are to be considered punitive. I would not engraft any such provision on the law of this state.

WHITE, C. J., and MCCOWN and BRODKEY, JJ., join in this concurrence.

BOSLAUGH, J., concurring.

I concur in the opinion of Judge Clinton. In making an award of alimony and a division of property the court should consider more than just the circumstances of the parties at the time of the dissolution of the marriage. Not only the length of the marriage but the property of the parties at the time of the marriage, the income during the marriage, and how it was spent are important factors which should be considered. It would be totally unrealistic to disregard the circumstances of the parties during the marriage and assume that a fair and just division of property could be made without regard to what happened during the marriage.

SPENCER, J., joins in this concurrence.

MICHAEL WOROBEC, APPELLEE, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLANT.

263 N. W. 2d 95

Filed March 1, 1978. No. 41321.

Motor Vehicles: Insurance: Contracts: Waiver. This case is controlled by Hastings v. Fireman's Fund American Ins. Co., 193 Neb. 417, 227 N. W. 2d 418 (1975).

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Reversed and remanded with directions to dismiss.

Joseph K. Meusey of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, for appellant.

Matthews, Kelley, Cannon & Carpenter, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

SPENCER, J.

Both parties moved for summary judgment. The District Court sustained plaintiff's motion and entered judgment in the amount of $10,000. Defendant insurer appeals. The sole issue presented is whether plaintiff is barred from recovery because he violated the terms of his policy by an agreement that no action would be taken to enforce a judgment entered by agreement against the uninsured tort-feasor's property. We find this case to be controlled by Hastings v. Fireman's Fund American Ins. Co., 193 Neb. 417, 227 N. W. 2d 418 (1975), and reverse.

Plaintiff, Michael Worobec, was involved in an automobile accident with Thomas J. Fitzgerald. Fitzgerald's insurer denied coverage. Plaintiff filed suit against Fitzgerald in February 1974. On August 6, 1974, Fitzgerald's insurer filed a declaratory judgment action seeking a determination that Fitzgerald was not insured at the time of the accident. On September 31, 1975, judgment was entered in favor of

the insurer against Fitzgerald. On February 11, 1975, plaintiff Worobec, Fitzgerald, and Fitzgerald's insurer entered into an agreement whereby judgment would be entered against Fitzgerald in the amount of $10,000.

The settlement agreement, so far as material herein, provided: "(b) Notwithstanding the entry of said Judgment, Michael Worobec, for himself, his heirs, successors and assigns, hereby agrees that no action will be taken to enforce said Judgment against the property of Defendant Thomas J. Fitzgerald, whether that now owned or hereafter acquired, except to the extent that liability insurance coverage is afforded under the insurance policy more particularly described in the declaratory judgment suit described in paragraph 2. above or as coverage may be hereafter afforded by uninsured motorist coverage, if any, under any policy of liability insurance covering Michael Worobec.

"(c) The Judgment attached hereto shall not constitute a lien against any real property now owned or hereafter acquired by Thomas J. Fitzgerald and the execution of this Agreement constitutes a waiver of any such lien.

"(d) In the event that Michael Worobec, or any other person, firm or corporation shall attempt to enforce the proposed Judgment against the property of Thomas J. Fitzgerald, whether that now owned or hereafter acquired, Thomas J. Fitzgerald shall be authorized, and is hereby authorized, to file this Agreement in the Office of the Clerk of the Court wherein the attempt is then being made to enforce said Judgment and Michael Worobec agrees to hold Thomas J. Fitzgerald harmless of and from any and all costs and expenses arising out of any such attempt.

"(e) Nothing herein contained shall be construed as a limitation upon the enforceability of the Judgment attached hereto, when entered, against either

or both of the insurance carriers above described."

Worobec's insurance policy contained the following provisions: "This insurance (uninsured motorist coverage) does not apply: (a) To bodily injury to an insured * * * with respect to which such insured, his legal representative * * * shall, without written consent of the company, make any settlement with any person or organization who may be legally liable therefor: * * *.

"4. Subrogation. Upon payment under this policy, except under coverages C, M, S and T, the company shall be subrogated to all the insured's rights of recovery therefor and the insured shall do whatever is necessary to secure such rights and do nothing to prejudice them." (Uninsured motorist coverage is coverage U.)

Worobec's policy excluded coverage for unauthorized settlements only. Worobec agreed not to enter into any settlement without State Farm's consent. This agreement was plainly evident on the face of the policy and was written in unambiguous terms. Worobec, who had the advise of counsel, failed to obtain the consent of State Farm to the settlement agreement which did not preserve any of State Farm's rights against Fitzgerald.

Hastings v. Fireman's Fund American Ins. Co., 193 Neb. 417, 227 N. W. 2d 418 (1975), involved a very similar factual situation. The insured in that case commenced an action against an uninsured tortfeasor to recover damages for personal injuries sustained in an automobile accident. The tort-feasor agreed to forego an active defense in consideration of the insured's covenant not to levy against his property. Judgment was entered and the insured made a claim under the uninsured motorist's coverage of her insurance policy. The policy contained provisions identical to those involved herein. This court held the insured was barred from recovery, stating: "Under the terms of the policy, the defend-

ant was entitled to the proceeds of the judgment against Mills and the plaintiff was bound to do nothing to prejudice any right of recovery against Mills. The effect of the covenant not to levy was to render valueless the judgment against Mills in favor of the plaintiff. By the covenant not to levy the plaintiff made it impossible for her to perform the contract. The finding of the trial court that this was a valid defense to a suit under the policy was correct."

Worobec concedes State Farm did not have notice of the agreement. It did have knowledge, however, of the Worobec action against Fitzgerald. Worobec contends State Farm could have intervened in that action. Because it failed to do so, Worobec argues State Farm is bound by the judgment. This is not the issue herein. The issue is whether Worobec's agreement with Fitzgerald not to execute on his personal property violates the terms of Worobec's insurance policy and relieves State Farm from liability.

Worobec further argues the exception in paragraph 4 (b) of the agreement protects the rights of State Farm. We do not so construe it. The exception is as follows: " * * * except to the extent that liability insurance coverage is afforded under the insurance policy more particularly described in the declaratory judgment suit described in Paragraph 2. above or as coverage may be hereafter afforded by uninsured motorist coverage, if any, under any policy of liability insurance covering Michael Worobec."

As we interpret this reservation in context, it attempts to protect only the rights of Worobec and Fitzgerald, not those of their respective insurers. Fitzgerald is not a party to this action, and is not bound by any construction of the agreement made in this action.

Worobec also impliedly argues State Farm is protected by paragraph 4 (e) which provides: "Nothing

herein contained shall be construed as a limitation upon the enforceability of the Judgment attached hereto, when entered, against either or both of the insurance carriers above described." If we correctly interpret this reservation, it merely protects the rights of Worobec and Fitzgerald against their respective insurance carriers. It does not in any way protect the rights of State Farm. We realize the trial court concluded otherwise, but the agreement would be meaningless if his interpretation is correct. The language "against either or both of the insurance carriers" construed in context means enforceability *against* the insurance carriers, *not by them.*

We concede the language of paragraph 4 (e) of the agreement, coupled with language of the policy, indicates an attempt by Worobec to preserve his rights of recovery under his own uninsured motorist coverage, despite his agreement with Fitzgerald not to levy on Fitzgerald's property. The problem is, his agreement made without the consent of State Farm violates the express terms of the policy.

As we construe the agreement, there is nothing in it which would preserve State Farm's right of subrogation against Fitzgerald. The agreement prevents any levy on or recovery against Fitzgerald's property. The agreement is made binding on Worobec, his successors, or assigns. A covenant not to levy given to the tort-feasor by the insured destroys and prejudices the insurer's rights of subrogation against the tort-feasor. Stetina v. State Farm Mut. Auto. Ins. Co., 196 Neb. 441, 243 N. W. 2d 341 (1976).

We find no essential difference between this case and Hastings v. Fireman's Fund American Ins. Co., *supra.* In both, the controlling issue is whether the covenant not to levy executed by the plaintiff bars recovery from the defendant under the policy. In Hastings, we said it did. We see no reason to deviate from that opinion on the facts herein. This policy provision was plain and unambiguous. An in-

sured should not be permitted to enter into an agreement which will in any way prejudice the rights of his own insurer. The rights of insurers can never rise higher than the rights of the insured against the tort-feasor.

The judgment of the District Court is reversed and the cause is remanded to the District Court with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

IN RE ESTATE OF PAUL J. MOSS, DECEASED. ROMA MOSS, APPELLANT, V. JULIE ANN STUEVEN, APPELLEE.

263 N. W. 2d 98

Filed March 1, 1978. No. 41350.

1. **Husband and Wife: Contracts.** An antenuptial contract is valid if the formalities of the statute are met and it is fair and fairly made by persons legally qualified to contract. Such contracts are not against public policy and are enforceable if freely and intelligently made.
2. _____: _____. In determining whether an antenuptial agreement is valid, the basic issue is fraud or overreaching and not the absence of disclosure.
3. _____: _____. An apparently unreasonable provision for a wife, or a disproportion between what she is to receive and the value of the property of the husband does not in and of itself afford a basis for voiding an antenuptial contract. Unless there be fraud or overreaching the contract is valid.
4. **Husband and Wife: Contracts: Proof.** When each party to an antenuptial contract is chargeable with knowledge of the extent and value of the other's property, a disproportionate allowance for the prospective wife does not shift the burden of proof to the husband or to the representatives of his estate to sustain the contract.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Erickson, Sederstrom, Johnson & Fortune and Robert T. Fortune, for appellant.

Thomas L. Anderson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

BOSLAUGH, J.

Paul J. Moss, a resident of Hall County, Nebraska, died testate on June 24, 1976. He was survived by his widow, Roma Moss, and a daughter from a previous marriage, Julie Ann Stueven. His will, which was admitted to probate, devised and bequeathed all his property to his daughter. The widow filed an election to take her statutory share of the estate. The daughter filed objections to the election, alleging that the widow's right to a statutory share of the estate was barred by an antenuptial contract. The county court found that the widow was entitled to a one-fourth interest in all the property of the deceased except a quarter section of land. The quarter section was the farm where the deceased and his widow had lived. The deceased had owned this property since 1949.

The widow appealed to the District Court where the judgment was affirmed. She has now appealed to this court. There is no cross-appeal.

The appellant and the deceased were first married on June 1, 1952. That marriage lasted approximately 6 weeks. They were married again in August 1958. This marriage lasted for 3 or 4 months. They were married for the third time in 1965. The parties had separated before the will was made on June 3, 1976, but were still married when the testator died. The antenuptial contract which is in question was executed on July 2, 1965, a few weeks before the third marriage took place.

The agreement provided that the appellant and the deceased should each retain the property they then owned, and neither party should have any interest in the property of the other. The agreement did not apply to future property. The agreement specifical-

ly provided that each party waived any right of inheritance or statutory interest in the estate of the other. There was no schedule of property attached to the agreement and the evidence shows the deceased made no formal disclosure to the appellant of the property he then owned or its value.

The antenuptial agreement involved in this case satisfied all statutory formalities concerning its execution. Former § 30-106, R. R. S. 1943. The issue is whether the contract is invalid because the appellant received nothing under it and the deceased made no formal disclosure of his property to the appellant at the time the agreement was executed.

An antenuptial contract is valid if the formalities of the statute are met and it is fair and fairly made by persons legally qualified to contract. Strickland v. Omaha Nat. Bank, 181 Neb. 478, 149 N. W. 2d 344. Such contracts are not against public policy and are enforceable if freely and intelligently made.

In determining whether an antenuptial agreement is valid, the basic issue is fraud or overreaching and not the absence of disclosure. Strickland v. Omaha Nat. Bank, *supra*.

An apparently unreasonable provision for a wife, or a disproportion between what she is to receive and the value of the property of the husband does not in and of itself afford a basis for voiding the contract. Unless there be fraud or overreaching the contract is valid. Strickland v. Omaha Nat. Bank, *supra*.

When each party to an antenuptial contract is chargeable with knowledge of the extent and value of the other's property, a disproportionate allowance for the prospective wife does not shift the burden of proof to the husband or to the representatives of his estate to sustain the contract. Kingsley v. Noble, on rehearing, 129 Neb. 808, 263 N. W. 222; Wulf v. Wulf, 129 Neb. 158, 261 N. W. 159.

The facts in this case are somewhat unique. Since

the appellant was allowed a one-fourth interest in all the property of the deceased except the quarter section of land, the only property in controversy is the quarter section of land which was the farm where the deceased and the appellant lived.

In addition to the time they lived together while married, the appellant testified that after the first divorce she was the "wife" of the deceased every weekend for 25 years. There can be no doubt but that the appellant was very familiar with the farm which was owned by the deceased. As stated in Wulf v. Wulf, *supra:* "It was within the range of plaintiff's vision practically all her adult life. Its extent and value could not have been concealed from her."

Under the circumstances of this case, the failure of the deceased to make a formal disclosure that he owned the farm and its value, at the time the antenuptial agreement was executed, did not affect the validity of the agreement. The judgment of the District Court is affirmed.

AFFIRMED.

THEODORE E. LAUTS, REVIVED IN THE NAME OF KAREN A. KOPECKY, PERSONAL REPRESENTATIVE OF THE ESTATE OF THEODORE E. LAUTS, DECEASED, APPELLEE, V. JEROME E. PROKOP ET AL., APPELLANTS, IMPLEADED WITH GARY LAUTS ET AL., APPELLEES.

263 N. W. 2d 100

Filed March 1, 1978. No. 41382.

1. **Courts: Pleadings: Jurisdiction.** A trial court does not have jurisdiction to adjudicate matters outside the issues submitted by the pleadings.
2. **Courts: Jurisdiction.** When a court of competent jurisdiction has acquired jurisdiction over the subject of a controversy, no other court may acquire jurisdiction over it.

Appeal from the District Court for Boyd County:

HENRY F. REIMER, Judge. Affirmed as modified.

Robert T. Finn and Pierson, Ackerman, Fitchett & Akin, for appellants.

No appearance for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

KUNS, Retired District Judge.

This is an appeal from a judgment of the District Court for Boyd County, Nebraska, granting partition and dismissing a claim of adverse possession. Theodore E. Lauts, succeeded by his personal representative, the appellee, brought an action for the partition of real estate; in a separate action, Jerome E. Prokop sought to quiet title in himself to the same property, claiming that he had acquired it by adverse possession. The actions were consolidated for trial and judgment was entered finding the interests of the parties, granting partition, and dismissing the quiet title action. The judgment also contained findings that exhibit 13, a note executed by Bessie A. Lauts to appellant during her lifetime, was not barred by the statute of limitations, but had been satisfied by the application of rents retained by the appellant. The only assignment of error goes to the making of such findings and the portion of the judgment ordering that the note was discharged. We sustain the assignment of error.

Bessie A. Lauts and the appellant became tenants in common of the real estate sought to be partitioned by inheritance from their parents. On April 20, 1932, Bessie A. Lauts executed, and delivered to appellant, a promissory note for $1,388 due when appellant should purchase her interest in said real estate. The note was unsecured. Appellant never made the purchase. After the death of Bessie A. Lauts, and before the filing of either of these actions, appellant

duly filed a claim upon said note in the proceedings for the probate of the estate of Bessie A. Lauts; however, the record here does not show the disposition of such claim. No reference to the note is made in any of the pleadings in either action herein, and neither prayer seeks an adjudication of liability thereon. The note was introduced in evidence by appellant, who suggests it was material to the issue of adverse possession.

There are two reasons for the sustaining of the assignment of error. First, the finding of the court that the note was not barred by the statute of limitations, but that it had been satisfied by the application of rentals for which the appellant had not accounted, related to a subject not brought before the court by any pleading and which was foreign to the issues submitted for determination. The findings and order of the court as to the note were beyond the jurisdiction of the court and were void. Lincoln Nat. Bank v. Virgin, 36 Neb. 735, 55 N. W. 218; Branz v. Hylton, 130 Neb. 385, 265 N. W. 16; Alexander v. School Dist. No. 17, 197 Neb. 251, 248 N. W. 2d 335. Secondly, the appellant had previously filed a claim upon said note against the estate of Bessie A. Lauts, deceased. The probate court thereupon acquired jurisdiction to adjudicate all issues with reference to such note. Even though such previous filing may not have come to the knowledge of the trial court, nevertheless the prior jurisdiction of the probate court prevented the District Court from ever acquiring jurisdiction over the same subject matter. Terry v. State, 77 Neb. 612, 110 N. W. 733; Leigh v. Green, 62 Neb. 344, 86 N. W. 1093.

The findings and order of the trial court relating to exhibit 13, the promissory note, are hereby reversed and vacated; in all other respects, the judgment of the trial court, as thus modified, is affirmed.

AFFIRMED AS MODIFIED.

HAROLD W. SCHAEFFER, APPELLANT, V. B. K. HUNTER, APPELLEE.

263 N. W. 2d 102

Filed March 1, 1978. No. 41390.

1. **Courts: Judgments: Rules of Court.** Trial courts have the inherent power, independent of any statute or rule of court, to dismiss a case for failure to prosecute with due diligence. The exercise of this power rests in the sound discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of a showing of an abuse of discretion.
2. **Trial.** The responsibility rests on the plaintiff to prosecute his case with reasonable diligence.

Appeal from the District Court for Nemaha County: WILLIAM F. COLWELL, Judge. Affirmed.

Alfred A. Fiedler, for appellant.

Cline, Williams, Wright, Johnson & Oldfather, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

BRODKEY, J.

The question presented in this case is whether the District Court erred in dismissing plaintiff's petition for want of prosecution, and in overruling plaintiff's motion to rescind the order of dismissal. We affirm the judgment of the District Court.

Harold W. Schaeffer, plaintiff and appellant herein, filed this action to recover damages for the breach of an alleged oral agreement between himself and B. K. Hunter, defendant and appellee herein. The oral agreement was allegedly made in 1964 in connection with a lease of real estate under which the plaintiff was the lessee and the defendant was the lessor, and which lease was terminated by the defendant on July 16, 1969. Plaintiff filed his petition on July 6, 1973.

Between the filing of the petition and October 17,

1974, the defendant demurred to the petition, the demurrer was overruled, the defendant filed a motion to make the petition more definite and certain, and the plaintiff amended his petition. On February 25, 1975, the trial court noted that no action had been taken since October 17, 1974, and ordered the case stricken from the trial docket without prejudice unless good cause be shown why it should not be so stricken within 60 days. On motion of the plaintiff, the case was reinstated on the trial docket on September 9, 1975. The defendant filed an answer on October 1, 1975.

On March 2, 1976, the trial court again found that the case should be dismissed within 60 days unless good cause was shown why it should be retained on the trial docket. Apparently this order was made because the plaintiff's attorney did not appear at the court call on March 2nd. On April 23, 1976, the case was reinstated on the trial docket on motion of the plaintiff. The parties then continued with discovery proceedings. The last filing of papers in the court with respect to discovery was on June 9, 1976, when the defendant filed answers to plaintiff's interrogatories.

On March 15, 1977, neither the plaintiff nor the defendant appeared at the court call. The District Court noted that the petition was filed on July 6, 1973; that the answer was filed on October 1, 1975; and that two "60-day Dismissal Orders" had been entered previously. The court ordered that the petition be dismissed without prejudice. Plaintiff immediately filed a motion to rescind the order of dismissal, stating in support thereof that his counsel was unable to attend the court call on March 15, 1977, because of the conflict of a hearing in another court; that the case was ready for trial; and that a dismissal of the case would deprive the plaintiff of his substantive cause of action. The latter claim was based on the fact that plaintiff's claim would be

barred by the statute of limitations if his original petition were not reinstated and he were required to initiate a new action. On April 12, 1977, the trial court overruled plaintiff's motion to rescind the order of dismissal.

Plaintiff has appealed from the order of dismissal and the overruling of his motion to rescind that order. Plaintiff contends that the District Court had no authority under its own rules to dismiss the case; that the District Court may not exercise its power to adopt rules of procedure in such a manner as to arbitrarily deprive litigants of a judicial determination of substantive rights; and that dismissal for want of prosecution is improper in a case where the statute of limitations would bar the filing of a new action, and the dismissal has the effect of a final judgment.

Section 25-1149, R. R. S. 1943, authorizes the District Court to provide for dismissing actions without prejudice for want of prosecution. Rule X (11) of the Rules of Practice of the District Court for the First Judicial District provides that whenever the trial of an action is neglected or delayed the court may upon motion of a party or upon its own motion either dismiss the action, or strike it from the docket. In any event, trial courts have the inherent power, independent of any statute or rule of court, to dismiss a case for failure to prosecute with due diligence. See, Link v. Wabash Railroad Co., 370 U. S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962); Brown v. Lincoln, 157 Neb. 840, 61 N. W. 2d 836 (1954). The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the trial courts. See, Link v. Wabash Railroad Co., *supra;* Fanning v. Richards, 193 Neb. 431, 227 N. W. 2d 595 (1975). The exercise of this power rests in the sound discretion of the trial court, whose ruling will not be disturbed in the absence of a showing of an abuse of discretion. 24 Am. Jur. 2d, Dismissal, Discontinu-

ance, and Nonsuit, § 59, pp. 50, 51. There can be no question that the District Court had the power to dismiss plaintiff's petition for want of prosecution, and the issue on appeal is whether the court abused its discretion in so doing.

Plaintiff argues that dismissal in the present case constitutes an abuse of discretion because the statute of limitations bars the filing of a new action. In Flannagan v. Elton, 34 Neb. 355, 51 N. W. 967 (1892), the plaintiff filed an action in March 1888, and the case was set for trial in April 1889. The plaintiff failed to appear, and the case was dismissed for want of prosecution. The statute of limitations barred the filing of a new action. This court concluded that the trial court erred in overruling plaintiff's motion to reinstate the case, noting that the effect of the dismissal was a final judgment, and that the plaintiff was not guilty of willful neglect. We indicated, however, that a dismissal would be appropriate in other factual situations.

The entry of an order dismissing a case for failure to prosecute is not controlled by the fact that a new suit would be barred by the statute of limitations. See, Hoad v. Spier, 298 Mich. 462, 299 N. W. 146 (1941); Bernays v. Frederic Leyland & Co., 228 F. 913 (Mass., 1915); 27 C. J. S., Dismissal & Nonsuit, § 65 (1), pp. 427 to 429. The fact that a new suit would be barred is an important consideration, but in and of itself does not demonstrate that there has been an abuse of discretion. Under the foregoing authorities, other factors such as the length of delay, excuses therefor, and whether dismissals for want of prosecution have been entered previously, and then rescinded, are also important considerations. Each case must be looked at with regard to its own peculiar procedural history, and the situation at the time of the dismissal. 24 Am. Jur. 2d, Dismissal, Discontinuance, and Nonsuit, § 59, p. 50.

We cannot conclude in the present case that the

trial court abused its discretion. The order of dismissal was entered not only because plaintiff's counsel had failed to appear at the court call on March 15, 1977, but because the case had been filed in July 1973, and two orders of dismissal had been entered previously, and then rescinded. The case was reinstated for the second time on April 23, 1976, and the last filing of papers with respect to discovery was on June 9, 1976. The final order of dismissal was not entered until March 15, 1977, more than 9 months after the last filing, 1 year and 5 months after the answer was filed, and almost 4 years after the petition was filed. The responsibility rests on the plaintiff to prosecute his case with reasonable diligence. See, Cukrowski v. Mt. Sinai Hospital, Inc., 67 Wis. 2d 487, 227 N. W. 2d 95 (1975); 24 Am. Jur. 2d, Dismissal, Discontinuance, and Nonsuit, § 66, pp. 57, 58. The delay in this case was significant, two orders of dismissal for want of prosecution had been entered previously, and no justifiable excuse for the extent of the delay is shown in the record. Under the particular facts of this case, we find no abuse of discretion on the part of the trial court. Therefore, the judgment of the District Court is affirmed.

AFFIRMED.

WAYNE R. RICHARDSON, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

SHARON K. GILLISPIE, ADMINISTRATRIX OF THE ESTATE OF JUDITH ANN RICHARDSON, DECEASED, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

263 N. W. 2d 442

Filed March 8, 1978. No. 41235.

1. **Motor Vehicles: Highways: Negligence.** The duty of the State to use reasonable and ordinary care in the construction, maintenance, and repair of its highways extends to and includes the shoulders of a paved or hard-surfaced state highway.
2. _____: _____: _____. It is the duty of the State to use reason-

able and ordinary care in the construction, maintenance, and repair of the shoulders of a paved or hard-surfaced highway to keep them reasonably safe for ordinary and reasonably anticipated use by a traveler using the highway while in the exercise of due care.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Judgment vacated. Cause remanded with directions.

M. J. Bruckner and John V. Hendry of Marti, Dalton, Bruckner, O'Gara & Keating and Fredrick L. Swartz, for appellants.

Paul L. Douglas, Attorney General, and Harold S. Salter, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

MCCOWN, J.

These actions, one for property damage and one for wrongful death, were brought under the State Tort Claims Act to recover damages resulting from a one-vehicle accident allegedly caused by the negligent maintenance of a state highway. The cases were consolidated for trial. The District Court, sitting without a jury, found that the paved portion of the highway was in proper condition and properly maintained; that the State had no duty to maintain the shoulder of the highway; and that the proximate cause of the accident was the negligence of the driver of the vehicle, and dismissed the actions. The plaintiffs have appealed.

At approximately 6:30 p.m., on the evening of October 31, 1971, plaintiff, Wayne R. Richardson, his wife, Judith Ann Richardson, and their 18-month-old daughter, Cynthia, were proceeding west on State Highway No. 136 in a Kenworth tractor pulling a 40-foot commercial trailer loaded with household goods. The paved portion of the highway was dry but the shoulders were soft from previous rains. At a point approximately 3.8 miles east of Filley, Ne-

braska, while traversing a curve, the right front wheel of the tractor went off the paved portion of the roadway. Richardson was unable to get the vehicle back onto the paved highway or to regain control, and it went down the shoulder of the highway and struck a culvert approximately 15 feet from the north edge of the pavement. The tractor-trailer overturned, caught fire, and burned. Richardson and his daughter escaped but Mrs. Richardson was pinned underneath the cab and died in the fire.

A construction project involving 17.6 miles of State Highway No. 136 between Beatrice and Crab Orchard, Nebraska, which included the accident area, was completed in the early fall of 1971 and accepted by the State approximately 2 weeks prior to the accident. The project called for an asphaltic concrete overlay of approximately 4 inches on top of the old surface, shoulder work, and culvert extensions. At the point of the accident 4½ inches of asphaltic concrete had been placed on top of the old surface.

The evidence for the plaintiffs was that although the contract called for shoulder work and leveling to the new hard surface, there was a 4 to 6 inch dropoff at the point of the accident, and that the new shoulder had been negligently and improperly compacted. The State's evidence was that there was no dropoff at the point of the accident, and that the shoulder was level with the pavement.

The District Court determined that the State had no duty to maintain the shoulder of the highway, relying on the case of Farmers Co-op Co. v. County of Dodge, 181 Neb. 432, 148 N. W. 2d 922. The court therefore made no findings as to whether the shoulder was negligently constructed or maintained, nor, if so, whether such negligence proximately contributed to cause the accident. The District Court also found that the paved portion of the highway was in proper condition and properly maintained, and found that the proximate cause of the accident was the

negligence of Wayne R. Richardson in failing to keep a proper lookout and failing to have his vehicle under reasonable control. The District Court dismissed the petitions.

Plaintiffs' position is that it is the duty of the State to maintain the shoulders as well as the paved portion of state highways, and that the State's negligence in reconstructing the shoulder and leaving a dropoff at the point of the accident was a proximate cause of the accident.

The State contends that it had no duty to maintain the shoulder of the highway; that there was no negligence in the construction or maintenance of the shoulder, but that even if there were, the condition of the shoulder extended over the entire 17.6 miles of construction and was not "a spot or localized highway defect" within the meaning of statutory provisions.

The Nebraska State Tort Claims Act under which these actions are brought was adopted in 1969. Within the limits set out in that act the State waived its sovereign immunity from liability for negligence. Section 81-8,219(2), R. R. S. 1943, provides: "(2) With respect to any tort claim based on the alleged insufficiency or want of repair of any highway or bridge on the state highway system, it is the intent of the Legislature to waive the state's immunity from suit and liability to the same extent that liability has been imposed upon counties pursuant to section 23-2410, and only to that extent. The Legislature further declares that judicial interpretations of section 23-2410 governing the liability of counties on December 25, 1969 also shall be controlling on the liability of the state for the alleged insufficiency or want of repair of any highway or bridge. It is the further intent of the Legislature that the words insufficiency or want of repair shall refer to a spot or localized highway defect and shall not be construed to refer to the general or overall condition of a highway."

Since 1889 counties have been liable to travelers who sustained damages due to insufficiency or want of repair of a highway or bridge. As early as 1893 this court held that a county was liable for damages if it negligently failed to keep a highway or bridge in suitable repair so as to be in a safe condition for travel. The extent of the duty of maintenance was to be determined by the use which might be fairly anticipated for the proper accommodation of the public. By 1922 this court held that as the means and mode of travel changed, the duty of the counties to maintain highways changed accordingly. We said that the existence of a highway or bridge was "unless restricted in some way, a continuing invitation, not only as to a mode of travel prevalent and usual in its inception, but also as to any mode of travel which may be devised and developed into common use during its existence." Higgins v. Garfield County, 107 Neb. 482, 186 N. W. 347.

In King v. Douglas County, 114 Neb. 477, 208 N. W. 120, this court determined that the duty to maintain a highway extended outside the traveled portion of the highway. We said: "The duty of the county to maintain its highway in a reasonably safe condition for travel by persons using the same in a reasonably prudent manner is not discharged by keeping the traveled portions thereof free from obstructions and defects, but requires that ordinary care be used to protect such persons from the dangerous places near such traveled portions thereof outside of it, and so long as any portion of the traveled highway may be fairly said to be within a zone of danger it must be deemed insufficient, within the language of our statute, whether the primary cause of the danger be within the highway or outside thereof. The insufficiency of highways is to be determined from effects of causes, and not by the location of the same."

In Clouse v. County of Dawson, 161 Neb. 544, 74 N. W. 2d 67, this court held that when a source of dan-

ger situated outside the limits of the traveled portion of the highway is a direct menace to travel on the highway and susceptible to protection or remedial measures which can be reasonably applied within the boundaries of the highway, the failure to employ such measures will be regarded as an insufficiency or want of repair or a want of reasonable care for the safety of travelers. The court also held that it was the duty of the county to keep a highway safe for such use as should reasonably be anticipated, and that reasonable foreseeability of consequences was a necessary element of the county's liability for negligence.

In Farmers Co-op Co. v. County of Dodge, 181 Neb. 432, 148 N. W. 2d 922, relying on Kudrna v. Sarpy County, 125 Neb. 83, 249 N. W. 87, this court held that a county's duty is discharged if the traveled portion of a road is of a width sufficient for travel and maintained in a proper condition, and such county is not liable when a person suffers damage as a result of deviating from the traveled portion of the road. That opinion did not overrule or refer to cases previously discussed here. The District Court relied on the Farmers Co-op case in determining that the State had no duty to maintain the shoulder in this case.

In the Farmers Co-op case a truck struck a corner of a bridge as the vehicle left the bridge and the truck then proceeded in loose dirt along the shoulder of the road for some distance and overturned. The road was a graveled road rather than a hard-surfaced one. The cases in this court prior to Farmers Co-op Co. v. County of Dodge did not restrict the duty of maintenance to the traveled portion of the highway, but extended it to areas adjacent or in close proximity to the traveled portion of the highway where there was a reasonably foreseeable risk of harm to a traveler reasonably using the highway.

An application of those principles of prior cases to

the facts of the present case requires that the duty to maintain highways be interpreted to include the shoulders of paved or hard-surfaced state highways. That result is in accord with the great majority of modern court decisions in other states.

In Collins v. State Highway Comm., 134 Kan. 278, 5 P. 2d. 1106, the Supreme Court of Kansas stated: " * * * it is a matter of common knowledge that careful automobile drivers not only may on occasion, but frequently must, use the shoulders to some extent as a part of the highway, and a pitfall in a shoulder, adjoining or even adjacent to the slab may constitute a defect in the highway." See, also, Bixby v. City of Sioux County, 184 Iowa 89, 164 N. W. 641; Bunton v. South Carolina State Highway Dept., 186 S. C. 463, 196 S. E. 188; New Mexico State Highway Dept. v. Van Dyke, 90 N. M. 357, 563 P. 2d 1150.

We believe the proper rule to be that it is the duty of the State to use reasonable and ordinary care in the construction, maintenance, and repair of its highways, including the shoulders of a paved or hard-surfaced state highway. It is the duty of the State to use reasonable and ordinary care in the construction, maintenance, and repair of the shoulders of a paved or hard-surfaced state highway to keep them reasonably safe for ordinary reasonably anticipated use by a traveler using the highway while in the exercise of due care. The duty to keep highway shoulders safe for ordinary use does not require the State to protect against unusual or extraordinary occurrences. To the extent that Farmers Co-op Co. v. County of Dodge, 181 Neb. 432, 148 N. W. 2d 922, and Kudrna v. Sarpy County, 125 Neb. 83, 249 N. W. 87, are in conflict they are overruled. The determination of the District Court was erroneous on this issue, and the judgments must therefore be vacated.

The State also contends that if there was any defect in the shoulder at the point of the accident here it was a part of a general or overall condition of the

highway and not a spot or localized defect and was, therefore, excluded by the statute. That contention is not supported by the evidence.

The plaintiffs also contend that the design and reconstruction by the State of the curve at the location involved here was negligent. The District Court quite properly found that the decision to adhere to the former design involved a discretionary function or duty which fell within the statutory exceptions under the State Tort Claims Act.

The District Court erroneously determined that the State had no duty to maintain the shoulder of the highway here. The trial court, therefore, did not determine or make any findings as to whether or not there was a defective condition of the shoulder at the place of the accident, and did not determine whether or not there was any negligence on the part of the State in the construction or maintenance of the shoulder. Neither did the court make any determination or findings as to whether the negligence of the State, if any, proximately contributed, with negligence of Wayne R. Richardson, to cause the accident. While the trial court found that the plaintiff, Wayne R. Richardson, was negligent, the court made no determination or finding as to comparative negligence, and whether Richardson's negligence was more than slight in comparison to the negligence of the State, if any.

Even if the court's findings on remand were to determine that the negligence of Wayne R. Richardson was a bar to recovery for his own damages, that finding does not necessarily affect the issue of liability in the action brought by the administratrix of Judith Ann Richardson's estate, at least so far as the interest of Cynthia Richardson is concerned. Neither Judith Ann Richardson nor Cynthia Richardson are chargeable with contributory negligence in this case. The general rule in a wrongful death case is that although the action will not be barred by the

contributory negligence of one beneficiary, the amount of recovery will be reduced (if properly requested) to the extent of the contributorily negligent beneficiary's share in the recovery. See 1 S. M. Speiser 2d, Recovery for Wrongful Death, § 5:8, p. 593. See, also, Weber v. Southwest Nebraska Dairy Suppliers, Inc., 187 Neb. 606, 193 N. W. 2d 274.

This court cannot properly make findings of fact, and a new trial is unnecessary and inappropriate under the statutory provisions of the State Tort Claims Act. The judgment of the District Court is therefore vacated and the cause is remanded to the District Court with directions to make additional, supplemental, or modified findings based on the record and bill of exceptions herein and in accordance with this opinion, and enter judgment thereon.

JUDGMENT VACATED. CAUSE REMANDED WITH DIRECTIONS.

KIMBALL COUNTY GRAIN COOPERATIVE, APPELLANT, V. EARL YUNG, APPELLEE.

263 N. W. 2d 818

Filed March 8, 1978. No. 41330.

Contracts: Uniform Commercial Code: Words and Phrases. Receipt of a written confirmation of an oral contract more than 6 months after the oral contract was made was not a receipt "within a reasonable time" as required by subsection (2) of section 2-201, U. C. C.

Appeal from the District Court for Kimball County: JOHN D. KNAPP, Judge. Affirmed.

Fred J. Hurlbut, for appellant.

O'Brien & Huenergardt, for appellee.

Richard P. Nelson and William J. Morris, for amicus curiae.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BRODKEY, J.

Kimball County Grain Cooperative, plaintiff and appellant herein, brought this action against Earl Yung to recover damages for the breach of an oral contract to sell wheat. Plaintiff alleged that on July 26, 1973, the defendant orally agreed to sell it 15,000 bushels of wheat at the price of $3.10 per bushel for future delivery; that a written confirmation of the oral contract had been delivered to the defendant, who did not object thereto within 10 days; and that the defendant had breached the contract by failing to deliver the wheat on or before January 31, 1974. Plaintiff prayed for damages of the difference between the contract price and fair market price of 15,000 bushels of wheat on the date of the alleged breach. Defendant entered a general denial to the allegations of the plaintiff, and also raised the statute of frauds as a defense. Trial was had to the District Court for Kimball County, sitting without a jury.

The District Court found that the parties had entered into an oral contract as alleged by the plaintiff, but concluded that it was not enforceable under the statute of frauds applicable to sales of goods, under section 2-201, U. C. C. The findings of the trial court in support of this conclusion were that (1) the defendant had not signed any writing sufficient to indicate that a contract for sale had been made between the parties; (2) the defendant was not a "merchant" as defined in section 2-104, U. C. C., and therefore the "merchant exception" to the statute of frauds, subsection (2) of section 2-201, U. C. C., did not apply; and (3) even if defendant was a "merchant," the oral contract was not enforceable under subsection (2) of section 2-201, U. C. C., because the defendant had not received a written confirmation of the oral contract "within a reasonable time." The District Court dismissed plaintiff's petition. Plaintiff has appealed, contending that the trial court

erred in holding that the oral contract was not enforceable under the statute of frauds. We affirm the judgment of the District Court.

Plaintiff, a grain cooperative, is in the business of buying grain from farmers and selling it to terminal grain elevators. Approximately 80 percent of its purchases from farmers are made under oral contracts. The farmer usually telephones the plaintiff and inquires about price, and then agrees to sell a specified amount of grain at the quoted price. It has been plaintiff's practice to draft a written contract shortly after the oral agreement is made with the farmer, and hold it for signature. The farmer then signs the written contract the next time he comes to plaintiff's elevator. The plaintiff has had no practice of mailing or otherwise delivering written confirmations of oral agreements to farmers, but relies on them to come to the elevator and sign the written contract.

On July 26, 1973, the defendant telephoned the plaintiff and orally agreed to sell it 15,000 bushels of wheat at the price of $3.10 per bushel for delivery in January 1974. In accordance with its practice, the plaintiff drafted a written contract and held it for defendant's signature, but the defendant did not go to the plaintiff's elevator and sign that contract. Although the plaintiff attempted, unsuccessfully, to telephone the defendant several times between September 1973, and January 1974, and remind him of the contract, the plaintiff made no attempt to deliver the written contract or any other writing to the defendant during that period of time. On January 30, 1974, plaintiff's general manager did deliver the written contract to the defendant. The defendant neither signed it, nor did he object to its contents in writing within 10 days after he received it. The defendant ignored plaintiff's subsequent requests to deliver the wheat, and never did deliver any amount

of wheat to the plaintiff under the oral agreement of July 26, 1973.

Subsection (1) of section 2-201, U. C. C., provides that a "contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker." This provision applies to the contract in the present case because crops are included within the definition of "goods" in section 2-105, U. C. C., and the contract price exceeded $500.

Subsection (2) of section 2-201, U. C. C., which establishes an exception or modification to the rule set forth in subsection (1), provides: "Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received." The parties agree that unless the provisions of subsection (2) apply in this case, the oral contract in question is unenforceable under subsection (1). Under the facts of this case, subsection (2) can only apply if the defendant was a "merchant" when he entered into the oral contract, and if the written contract was received by the defendant "within a reasonable time."

The question of whether a farmer who sells his crop is a "merchant" as defined in section 2-104, U. C. C., has not been decided in this state. Courts in other jurisdictions are sharply divided on the issue. Cf. Sand Seed Service, Inc. v. Poeckes, 249 N. W. 2d 663 (Iowa, 1977); Decatur Cooperative Assn. v. Urban, 219 Kan. 171, 547 P. 2d 323 (1976); Lish v. Compton, 547 P. 2d 223 (Utah, 1976), with Nelson v. Union Equity Co-op. Exchange, 548 S. W. 2d 352 (Tex.,

1977); Sierens v. Clausen, 60 Ill. 2d 585, 328 N. E. 2d 559 (1975); Rush Johnson Farms, Inc. v. Missouri Farmers Assn., Inc., 555 S. W. 2d 61 (Mo. App., 1977). We need not resolve that issue in the present case, however, because even assuming, without deciding, that the defendant was a "merchant," the oral contract is unenforceable under the statute of frauds.

Subsection (2) of section 2-201, U. C. C., requires that a writing in confirmation of an oral contract be received "within a reasonable time." In the present case the oral contract was made on July 26, 1973. The defendant received no writing in confirmation thereof until January 30, 1974, more than 6 months after the oral contract was made, and only 1 day before the last possible delivery date under the oral contract.

Section 1-204, U. C. C., provides: "What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action." In Lish v. Compton, *supra*, the court held that a delay of 12 days between the oral contract and the receipt of a written confirmation was unreasonable. The court found no excuse for the buyer waiting 12 days before sending to a farmer a written confirmation of an oral contract for the sale of grain when the market price of the grain involved was constantly rising. In Cargill, Inc. v. Stafford, 553 F. 2d 1222 (10th Cir., 1977), a delay of approximately 1 month was held unreasonable.

There can be no doubt that the defendant in this case did not receive a writing in confirmation of the oral contract within a reasonable time. The plaintiff made no pretense of complying with subsection (2) of section 2-201, U. C. C., as its manager stated that it had no policy of sending written confirmations of oral contracts to farmers, but instead relied on the farmers to come to plaintiff's elevator and sign a contract. The delay, for which there was no adequate excuse, was more than 6 months, and the

written contract was delivered to the defendant only 1 day before the final possible date of delivery under the oral contract. The purpose of subsection (2) of section 2-201, U. C. C., was to put professional buyers and sellers on an equal footing by changing former law under which a party who received a written confirmation of an oral agreement of sale, but who himself had not signed anything, could hold the other party to the contract without himself being bound. See, 1 Hawkland, A Transactional Guide to the Uniform Commercial Code, § 1.1201, pp. 25 to 27 (1964); White & Summers, Uniform Commercial Code, § 2-3, pp. 47, 48 (1972). In view of the nature and purpose of this statutory provision and under the particular facts of this case, it cannot be said that the defendant received the written contract within a reasonable time. Therefore subsection (2) of section 2-201, U. C. C., is not applicable, and the oral contract is unenforceable under subsection (1).

The parties have raised other issues on appeal, including the sufficiency of proof with respect to damages. In view of our conclusion that the oral contract is not enforceable, we need not reach these issues. The judgment of the District Court is affirmed.

AFFIRMED.

BRODKEY, J., concurring.

Although authoring the majority opinion in this case, I do not believe it goes far enough, and I believe that this court should squarely face and resolve the question of whether the defendant was a "merchant" as defined in section 2-104, U. C. C. Logically, the question of whether the defendant was a "merchant" should be resolved before this court determines whether there has been compliance with other requirements in subsection (2) of section 2-201, U. C. C. More significantly, an important question of law has been left undecided, despite the fact that the question was properly raised, decided by the

trial court, and thoroughly briefed on appeal. In view of the controversy over this issue in other jurisdictions, this court should resolve the issue so that farmers and grain elevators know what is required with respect to contracts for the sale of grain in this state.

I believe that the defendant was acting as a "merchant" as defined in the code when he entered into the oral contract. Section 2-104, U. C. C., defines "merchant" as follows: " 'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." Under the facts of this case, the question is whether the defendant is either a person who "deals" in wheat, or is one who by his occupation as a wheat farmer holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction of selling wheat to a grain cooperative.

The question of whether a farmer who sells his crops is a merchant under the Uniform Commercial Code is one of first impression in this state, and courts in other jurisdictions are sharply divided on the issue. In five cases it has been held that a farmer who does nothing more than sell his crop annually is not a "merchant" with respect to annual sales. See, Sand Seed Service, Inc. v. Poeckes, 249 N. W. 2d 663 (Iowa, 1977); Decatur Cooperative Assn. v. Urban, 219 Kan. 171, 547 P. 2d 323 (1976); Lish v. Compton, 547 P. 2d 223 (Utah, 1976); Loeb & Co., Inc. v. Schreiner, 294 Ala. 722, 321 So. 2d 199 (1975); Cook Grains, Inc. v. Fallis, 239 Ark. 962, 395 S. W. 2d 555 (1965). The common element of these cases is that in each the courts relied on the Com-

ment, part 1, to section 2-104 of the code, in which it is stated that the provisions in Article 2 concerning merchants were intended to apply to "professionals" and not to a "casual or inexperienced seller or buyer." The courts in each case concluded, often summarily, that a farmer who only sells his crop annually is not a "professional" with respect to such sales, but is merely a "casual seller." Courts have reached the conclusion that a farmer is only a casual seller even in cases where the farmer in question had been in the business of growing and selling wheat for so long as 20 years, and was conversant with the grain market, grain prices, and the customary practices involved in selling grain to elevators. See, Decatur Cooperative Assn. v. Urban, *supra*; Lish v. Compton, *supra*.

In these cases the courts also emphasized the fact that the farmers in question sold only their own produce, and did not buy products from other persons and resell them. In stating that the term merchant refers primarily to one whose occupation is that of buying and selling, courts relied in part on dictionary definitions in which "merchant" is defined as one engaged in the purchase and sale of goods, or as a "trafficker" or "trader." See, Lish v. Compton, *supra*; Sand Seed Service, Inc. v. Poeckes, *supra*. In Cook Grains, Inc. v. Fallis, *supra*, the court referred to Words and Phrases and precode cases in an attempt to define the words "farmer" and "merchant," and concluded that a farmer was not a merchant in view of the "plain and ordinary meaning" of those two words. The need to resort to dictionaries or precode cases when the term "merchant" is defined in section 2-104 of the code is not explained in these decisions.

A final reason given for holding that a farmer is not a merchant is that the framers of the code did not so intend, or that the framers or legislators adopting the code should have used clear and ex-

plicit language if they had so intended. See, Cook Grains, Inc. v. Fallis, *supra*; Loeb & Co., Inc. v. Schreiner, *supra*. No citation of authority for this proposition is given in either case.

In eight cases, with facts similar to those in the present case, courts from other jurisdictions have held that a farmer is a merchant. See, Nelson v. Union Equity Co-op. Exchange, 548 S. W. 2d 352 (Tex., 1977); Sierens v. Clausen, 60 Ill. 2d 585, 328 N. E. 2d 559 (1975); Rush Johnson Farms, Inc. v. Missouri Farmers Assn., Inc., 555 S. W. 2d 61 (Mo. App., 1977); Currituck Grain Inc. v. Powell, 28 N. C. App. 563, 222 S. E. 2d 1 (1976); Ohio Grain Co. v. Swisshelm, 40 Ohio App. 2d 203, 318 N. E. 2d 428 (1973); Continental Grain Co. v. Brown, 19 U. C. C. Rept. Serv. 52 (W. D. Wis., 1976); Continental Grain Co. v. Martin, 536 F. 2d 592 (5th Cir., 1976); Continental Grain Co. v. Harbach, 400 F. Supp. 695 (N. D. Ill., 1975). The rationale for holding that an experienced grain farmer is a merchant when he sells his crop, as set forth in these cases, is as follows.

First, it has been noted that it is unnecessary and improper to look to a dictionary definition of the term "merchant" in resolving the issue because the term is specifically defined in section 2-104 of the code. See, Nelson v. Union Equity Co-op. Exchange, *supra*; Currituck Grain Inc. v. Powell, *supra*. It has also been stated that nothing in the code indicates that the framers contemplated exempting farmers from merchant status. See Continental Grain Co. v. Brown, *supra*. Therefore these courts have referred solely to the specific statutory definition of the term "merchant," and have not resolved the issue by reference to the "plain and ordinary" meaning of the term, or to unstated legislative intent.

Courts holding farmers to be merchants have rejected the view that a farmer is a simple tiller of the soil unaccustomed to the affairs of business and the market place. They have noted that the practices

involved in the marketing of crops are well known to, and widely followed by, farmers, and that the marketing of a crop is as important to the farmer as the raising of it. See, Sierens v. Clausen, *supra*; Rush Johnson Farms, Inc. v. Missouri Farmers Assn., Inc., *supra*; Currituck Grain Inc. v. Powell, *supra*; Ohio Grain Co. v. Swisshelm, *supra*. Viewing the farmer as an agribusinessman, these courts have concluded that a farmer is not a casual or inexperienced seller, but that he is a professional with respect to the sale of his crop.

Courts holding a farmer to be a merchant have also relied on the language in the Comment, part 2, to section 2-104 of the code. In that comment it is stated that four provisions applicable to merchants in Article 2 dealing with the statute of frauds, firm offers, confirmatory memoranda, and modification "rest on normal business practices which are or ought to be typical of and familiar to any person in business. For purposes of these sections almost every person in business would, therefore, be deemed to be a 'merchant' under the language 'who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . .' since the practices involved in the transaction are non-specialized business practices such as answering mail." Courts relying on this language have stated that holding the farmer to be a merchant, insofar as the statute of frauds is concerned, places no greater burden on him or her than to answer mail and object to a written confirmation of an oral contract. See, Nelson v. Union Equity Co-op. Exchange, *supra*; Continental Grain Co. v. Brown, *supra*; Rush Johnson Farms, Inc. v. Missouri Farmers Assn., Inc., *supra*. It has been held that a farmer is a merchant not only because he has knowledge or skill peculiar to the practices involved in selling his crop, but also because he "deals" in goods of the kind (the crop), and has

knowledge or skill peculiar to the goods involved in the transaction. See, Nelson v. Union Equity Co-op. Exchange, *supra*; Rush Johnson Farms, Inc. v. Missouri Farmers Assn., Inc., *supra*.

Commentators have been uniformly critical of the cases which hold that a farmer who has established himself in the business of raising a crop and selling it for profit is not a merchant. See, 1 Anderson, Uniform Commercial Code, § 2-104:6, p. 221 (2d Ed., 1970); Bender's U. C. C. Service, Duesenberg & King, Sales and Bulk Transfers, § 1.02, pp. 1-18 to 1-20, and p. 13, 1977 Cum. Supp.; Note, The Farmer as Merchant Under the U. C. C., 53 N. D. L. Rev. 587 (1977); John F. Dolan, "The Merchant Class of Article 2: Farmers, Doctors, and Others," 1977 Wash. U. L. Q. 1.

I believe that the more persuasive reasoning on the issue is found in those cases in which farmers have been held to be merchants. A farmer whose occupation is raising grain and selling it for a profit can hardly be considered a "casual" seller. Under the statutory definition, the term "merchant" includes almost every person in business insofar as the statute of frauds is concerned since the practices involved in the relevant transaction are nonspecialized business practices such as answering mail. See Comment, part 2, to section 2-104, U. C. C. The purpose of the merchant exception to the statute of frauds was to put professional buyers and sellers on an equal footing by changing former law under which a party who received a written confirmation of an oral agreement of sale, but who himself had not signed anything, could hold the other party to the contract without himself being bound. See, 1 Hawkland, A Transactional Guide to the Uniform Commercial Code, § 1.1201, pp. 25 to 27 (1964); White & Summers, Uniform Commercial Code, § 2-3, pp. 47, 48 (1972). Holding established grain producers to be merchants is consistent with this purpose.

This is not to say that farmers, as a class, are merchants as a matter of law. The inquiry in each case must be whether the farmer in question is in fact engaged in the business of raising and selling crops for a profit, as evidenced by his individual experience and prior activities. If the facts relevant to this question are undisputed, the trial court may properly determine whether the farmer in question is, or is not, a merchant as a matter of law. See, Nelson v. Union Equity Co-op. Exchange, *supra*; Decatur Cooperative Assn. v. Urban, *supra*. Otherwise it is a question of fact to be determined by the trier of facts. See Sand Seed Service, Inc. v. Poeckes, *supra*.

In the present case, the relevant facts are not in dispute. The defendant has been a wheat farmer for more than 30 years, and presently cultivates approximately 1,000 acres of land each year. He makes it his business to be conscious of wheat prices and changes in the market. He has sold his wheat to grain elevators many times, and sold more than 74,000 bushels of wheat to the plaintiff alone between 1967 and 1973. On these facts, I believe that the trial court erred in concluding that the defendant was not a merchant. Defendant's primary occupation was clearly raising and selling wheat for a profit, and therefore he was a person who, by his occupation, held himself out as having knowledge peculiar to the practices involved in the transaction of selling grain. See Nelson v. Union Equity Co-op. Exchange, *supra*.

Although I conclude that the defendant was acting as a merchant when he entered into the oral contract, I agree that the contract is unenforceable because the defendant did not receive a confirmation in writing of the oral contract within a reasonable time. Although it is possible to dispose of this case solely on that ground, I believe that this court should resolve the question of whether the defendant was a merchant and settle the law in this area.

SPENCER, J., concurring.

I fully concur with the opinion herein. I do disagree, however, with the concurring opinion of Brodkey, J., suggesting that the defendant was acting as a "merchant," as defined in the code, when he entered into the oral contract. I agree that courts in other jurisdictions are sharply divided on whether a farmer who sells the crop he raises is a merchant under the Uniform Commercial Code.

I am in full agreement with the five cases cited by the concurring opinion that a farmer who only sells his crop annually is not a professional with respect to such sales but is merely a casual seller within the meaning of the Uniform Commercial Code. I do not believe we should extend the Uniform Commercial Code by construction to cover an area which was not specifically considered by its drafters. I am certain it was not considered by our legislators when the Uniform Commercial Code was adopted in Nebraska.

Of the eight cases cited by the concurring opinion for the other view, I call attention to the fact that three of them are federal decisions, two from federal District Courts, and one from the Fifth Circuit Court of Appeals. I believe the cases denying the application of the term "merchant" to a farmer who sells his own products state the better rule for a farm state like Nebraska.

In Lish v. Compton, 547 P. 2d 223 (Utah, 1976), the Utah court, in passing on this point, said: " * * * we think it is neither consistent with the intent and purpose of the statute, nor with the ordinarily understood meaning of its language, to apply it (the term 'merchant') to anyone such as this defendant who simply sells his crops annually."

The Alabama Supreme Court reached a similar result in Loeb & Co., Inc. v. Schreiner, 294 Ala. 722, 321 So. 2d 199 (1975), where the court held that the framers of the Uniform Commercial Code did not contemplate that farmers should be included among

those considered to be merchants. The Alabama court relied heavily on the fact that the defendant sold only products which he raised. The court said: "Although there was evidence which indicated that the appellee here had a good deal of knowledge, this is not the test. There is not one shred of evidence that appellee ever sold anyone's cotton but his own. He was nothing more than an astute farmer selling his own product. We do not think this was sufficient to make him a dealer in goods."

In Cook Grains, Inc. v. Fallis, 239 Ark. 962, 395 S. W. 2d 555 (1965), the Arkansas court concluded that the statutory provision in question was not intended to include a farmer within the designation of "merchant." In that case the court relied heavily on the fact that the farmer dealt only in commodities which he had raised.

Another case supporting this conclusion is Decatur Cooperative Assn. v. Urban, 219 Kan. 171, 547 P. 2d 323 (1976). The Kansas court said: "The concept of professionalism is heavy in determining who is a merchant under the statute. The writers of the official UCC comment virtually equate professionals with merchants — the casual or inexperienced buyer or seller is not to be held to the standard set for the professional in business. The defined term 'between merchants', used in the exception proviso to the statute of frauds, contemplates the knowledge and skill of professionals on each side of the transaction. The transaction in question here was the sale of wheat. Appellee as a farmer undoubtedly had special knowledge or skill in raising wheat but we do not think this factor, coupled with annual sales of a wheat crop and purchases of seed wheat, qualifies him as a merchant in that field."

In Sand Seed Service, Inc. v. Poeckes, 249 N. W. 2d 663 (Iowa, 1977), the Iowa court held: " * * * we hold a farmer, in order to be held as a merchant, must be (1) a dealer who deals in the goods of the

kind involved, or (2) he must by his occupation hold himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction, or (3) he must employ an agent, broker or other intermediary who by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction." The Iowa court held that where the undisputed facts only showed that Poeckes was a farmer who annually sold what he himself grew, this would not bring him within the definition of the term "merchant" in the UCC.

The question as to whether or not a farmer in a particular instance is a merchant is a question of fact. If the farmer bought products only for his own use and sold only the products he raised himself, regardless of how much knowledge he might have in those two activities, I would not consider him a merchant. It would be in the instance where he was dealing with farm products raised by others that I would so consider him.

As our opinion notes, it was not necessary to reach this question in the opinion. The question should be reserved, as it has, for another day where the question is decisive of the appeal. We should not foreclose a full discussion of the issue by an advisory opinion in a case where the issue is not decisive.

DENNIS F. GOINGS ET AL., APPELLANTS AND CROSS-APPELLEES, V. LARRY GERKEN ET AL., APPELLEES AND CROSS-APPELLANTS.

263 N. W. 2d 655

Filed March 8, 1978. No. 41341.

1. **Contracts.** A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter, where the terms of the later are inconsistent with those of the former so that they cannot subsist together.

2. **Landlord and Tenant: Lessor and Lessee: Crops.** A tenant who plants crops knowing the terms of his lease will expire before they can be harvested loses all his interest in the crops upon the termination of the lease.

Appeal from the District Court for Grant County: ROBERT R. MORAN, Judge. Affirmed.

James E. Schneider and James R. Nisley, for appellants.

Maupin, Dent, Kay, Satterfield, Girard & Scritsmier, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

SPENCER, J.

This is an action for specific performance of an option agreement for the purchase of real estate. Plaintiff-purchasers appeal from the judgment of the District Court which denied specific performance and ordered them to pay rent for the period of March 1, 1976, to February 28, 1977. Sellers cross-appeal from that portion of the judgment which permitted purchasers to reenter the property and harvest wheat planted in the fall of 1976. We affirm.

The property involved consists of 1,040 acres of pasture and farm ground in Chase County, Nebraska. Plaintiffs have leased the land from defendants since March 1971. When the 1971 lease expired March 1, 1972, it was renewed for a period of 3 years.

In November 1974, defendants listed the farm for sale with Stockmen's Realty, Inc. Plaintiffs executed a purchase agreement for the property on December 6, 1974, and deposited $5,000 as downpayment to be held in escrow. Defendants signed the acceptance on December 8, 1974.

The agreement called for a purchase price of $165,000 conditioned upon plaintiffs being able to secure a loan from the Farmers Home Administration.

The agreement provided: "If said loan is not approved within 60 days from date of acceptance hereof, this offer to be null and void, and the money paid herewith to be returned to me. Provided, however, that if processing of the application has not been completed by the lending agency within the above time, such time limit shall be automatically extended until the lending agency has in the normal course of its business advised either approval or rejection." The agreement provided that closing was to be on or before March 2, 1975.

Plaintiffs applied to the Farmers Home Administration for a loan. They received a form entitled "Option to purchase real property." This form agreement was duly executed by the parties. The terms contained in the option were essentially the same as those in the purchase agreement except for the addition of the following provision: "The offer herein shall remain irrevocable for a period of 2 months from the date hereof and shall remain in force thereafter until one (1) year from the date hereof unless earlier terminated by the Seller. The Seller may terminate this offer at any time after the 2 months' irrevocable period provided herein by giving to the Buyer ten (10) days' written notice of intention to terminate at the address of the Buyer. Acceptance of this option by the Buyer within ten (10) days after such notice is received by him shall constitute a valid acceptance of the option." It is this option plaintiffs seek to enforce herein. The document was dated December 8, 1974. Although it recited as consideration the sum of $5,000, it is clear plaintiffs paid nothing additional to the amount already held in escrow.

The parties agree, the FHA loan was approved in March 1975, but no funds were available at that time. They were advised the funds probably would be available by July 1, 1975. In April 1975, the parties executed a third agreement for the sale of the

property, denominated as a "Lease with option to purchase agreement." This agreement provided for the rental of the property from March 1, 1975, the expiration date of the previous lease, until February 28, 1976. In addition, plaintiffs were given the option to purchase the land by July 1, 1975, for the sum of $166,500, or $1,500 more than the price stipulated in the preceding agreement. In the event the option was exercised, the contract provided for the application of $7,000 cash rent payment toward the purchase price.

After the new agreement, plaintiffs asked Stockmen's Realty, Inc., to return the $5,000 held in escrow. Stockmen's Realty, Inc., informed them a release from both parties would be required before the money could be returned, and the effect would be to cancel the purchase agreement. Plaintiffs decided to leave the money in escrow where it remained through the time of trial.

On August 8, 1975, defendants listed the real estate for sale with a different realtor. That listing agreement, however, recited that defendants had a pending offer until October 2, 1975. The purpose of that stipulation was to relieve defendants from the payment of a commission to the new broker if the land was sold to the plaintiffs by that time.

On August 26, 1975, defendants notified the plaintiffs in writing the land had been listed for sale and if sold plaintiffs' tenancy would be terminated February 28, 1976. The new realtor also testified he visited plaintiffs at the farm in August and October of 1975, and they had no objections to the showing of the property to other prospective purchasers.

FHA funds finally became available in October 1975. On October 13, 1975, defendants were requested by Stockmen's Realty, Inc., to have the abstract sent to an attorney preparing a title opinion for the FHA. Defendants telephoned the Federal Land Bank and directed that the abstracts be forwarded.

On October 16, 1975, the FHA mailed plaintiffs a form entitled "Acceptance of option." Plaintiffs signed the form and it was sent to Stockmen's Realty, Inc., on October 24, 1975. This attempted exercise of the option was made within the 1-year time limit provided in the FHA option agreement. Defendants, who had received three higher offers the previous week, refused to sign the option or to honor the agreement to sell the property to plaintiffs. This action for specific performance ensued.

While plaintiff-purchasers set out 14 assignments of error, the essential issue herein is whether the FHA option agreement was rescinded by the "Lease with option to purchase" agreement executed in April 1975. We agree with the trial court, it was. The pertinent rule is stated in In re Estate of Wise, 144 Neb. 273, 13 N. W. 2d 146 (1944): "A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter, where the terms of the later are inconsistent with those of the former so that they cannot subsist together." It is obvious the parties made a new agreement. The second option agreement varied material terms of time and price, created a new agreement, and discharged the previous one. The fact that defendants may have been willing to honor the new agreement as late as October 2, 1975, is immaterial. No attempt was made to consummate the sale by that date.

Plaintiffs were still in possession of the property at the time of trial, although their lease had expired February 28, 1976. In the judgment entered January 27, 1977, the District Court ordered plaintiffs to surrender possession February 28, 1977, and to pay an additional year's rent. The judgment also provided that plaintiffs would be allowed to reenter the property after February 28, 1977, for the purpose of harvesting the winter wheat they had planted in the fall

of 1976. Defendants cross-appeal from the granting of the right of reentry.

Defendants rely on the general rule that a tenant who plants crops, knowing the terms of his lease will expire before they can be harvested, loses all his interest in the crops upon the termination of the lease. See Peterson v. Vak, 160 Neb. 450, 70 N. W. 2d 436 (1955). Plaintiffs direct our attention to the recent decision in Schuler-Olsen Ranches, Inc. v. Garvin, 197 Neb. 746, 250 N. W. 2d 906 (1977). On the facts in that case, we determined a tenant had an interest in a growing wheat crop following the termination of his lease even though the lease contained no provision to that effect. That case was affirmed on the fact the District Court found under the lease agreement, and under the evidence of customary farm practices, the tenant had a valid interest in a tenant's share of the wheat crop which was growing on the Garvin ranch at the time it was sold to Schuler-Olsen.

In the present case no evidence was presented as to customary farming practices. The record, however, does show that under the first two lease agreements, plaintiffs were required to do summer fallow work and the right to reenter to harvest the wheat was expressly reserved. The lease executed in April 1975, was silent on this matter. However, the evidence establishes plaintiffs continued to operate as they had under the previous agreement. They planted 250 acres of wheat in the fall of 1975, and devoted approximately 100 acres to summer fallow. Plaintiffs harvested the crop following the expiration of the 1975-76 lease. They remained in possession after its expiration. In the fall of 1976, they planted 160 acres of wheat and there is nothing in the record to indicate defendants in any way objected to the planting. The judgment covers the rent from March 1, 1976, to February 28, 1977.

Under the facts of this case, we sustain the find-

ings of the District Court in permitting plaintiffs to reenter the land to harvest the 160 acres of wheat.

The judgment of the District Court is affirmed.

AFFIRMED.

FLORENCE M. PHILLIPS, APPELLANT, V. WILLIAM G. PHILLIPS, APPELLEE.

263 N. W. 2d 447

Filed March 8, 1978. No. 41351.

Divorce: Alimony: Property. The fixing of alimony or distribution of property rests in the sound discretion of the District Court, and in the absence of an abuse of discretion, will not be disturbed on appeal.

Appeal from the District Court for Adams County: FREDRIC R. IRONS, Judge. Affirmed.

Peter E. Marchetti of Nelson, Harding, Marchetti, Leonard & Tate, for appellant.

William M. Connolly of Conway & Connolly, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

BOSLAUGH, J.

This is an appeal in a proceeding for the dissolution of a marriage. The trial court dissolved the marriage, divided the property of the parties, and awarded alimony to the petitioner. Both parties filed motions for new trial. The petitioner has appealed and contends that the division of property and award of alimony to her was inadequate. There is no cross-appeal.

The petitioner is 59 years of age. The respondent is 56 years of age. The parties were married on December 11, 1942. They have four children, all of whom have reached their majority. The petitioner

is employed by an interior decorating firm at a salary of approximately $500 per month.

The respondent was formerly employed as a division manager and corporate officer by the Dutton-Lainson Company. This employment was terminated on October 13, 1975. The respondent now receives a salary of $750 per month from Ebko Industries, Inc. He also receives rental payments of $950 per month from Ebko for the use of buildings which he owns.

The trial court awarded approximately $63,000 of property to the petitioner which the parties agree was inherited by her. The trial court also awarded to the petitioner the residence property subject to delinquent taxes, the household goods, a 1974 Oldsmobile automobile, and $20,000 in cash. This property had a value of approximately $93,000. The petitioner was also awarded alimony at the rate of $250 per month for 122 months.

The trial court awarded to the respondent property having a value of approximately $234,000. The principal items of property included in the award were approximately $100,000 in cash, representing the proceeds from the sale of Dutton-Lainson Company stock, and the real estate and buildings occupied by Ebko which were valued at $69,500. The other property consisted of life insurance, capital stock of Ebko, and miscellaneous securities and property. The respondent was ordered to pay all the indebtedness of the parties except the taxes on the residence property.

The petitioner contends that the amount of property awarded to her was inadequate and that the award to the respondent was excessive. In determining whether the property division was fair it is necessary to consider the indebtedness of the respondent and what value should be assigned to the Ebko stock. In the valuation stated above no value was assigned to the Ebko stock.

The respondent owed approximately $26,000 in income taxes, approximately $27,000 in bank loans made directly to the respondent, and was liable on loans of approximately $141,500 made to Ebko. When this indebtedness is subtracted from the property awarded to the respondent the balance is $39,500.

Ebko Industries, Inc., is a corporation engaged in the manufacture of fiberglass boats. In 1967 the respondent purchased 66 shares of Ebko stock for $10,000 with funds which he had inherited. In April 1975 the respondent purchased 65 shares of stock in Ebko for $6,200. The remaining 66 shares outstanding are owned by William Evers, an employee of Ebko. The respondent holds promissory notes of Evers in the amount of $13,633.65 secured by a pledge of 36 shares of Ebko stock.

Because of past operating losses Ebko has a negative net worth and book value of $17,627. The respondent testified this deficit is understated because many of the items carried in the inventory of Ebko are worthless. The inventory was valued at $250,375 in Ebko's 1975 federal income tax return.

Ebko is indebted to the respondent in the sum of approximately $69,000. Apparently, this indebtedness represents funds borrowed by the respondent and then advanced to Ebko when Ebko was unable to borrow additional funds. Whether this debt is of any substantial value depends upon whether Ebko is able to continue in business and pay off its very substantial debt.

The petitioner called a security analyst who testified as an expert witness that Ebko had a value of between $163,750 and $232,700. This valuation was based upon what the witness thought a buyer might pay who was interested in the accumulated operating deficit of the corporation and upon the fact that Ebko had shown a taxable income of $28,211 in 1975 and a substantial increase in sales from 1973 to 1975.

There was no evidence that any prospective purchaser had shown an interest in buying Ebko.

It is apparent from the record that, under the management of the respondent, Ebko may develop into a successful and profitable company. However, it is not such a company at this time and it is impossible at this time to predict with certainty what its future will be. Although it is clear that the capital stock of Ebko had some value at the time the property division was made, that does not establish that the division which was made was not reasonable.

The fixing of alimony or distribution of property rests in the sound discretion of the District Court, and in the absence of an abuse of discretion, will not be disturbed on appeal. Schmer v. Schmer, 197 Neb. 800, 251 N. W. 2d 167. In addition to restoring her inheritance the trial court awarded $93,000 in property to the petitioner plus alimony in the amount of $30,500. As we view the record this award was adequate and reasonable under all the facts and circumstances.

The judgment of the District Court is affirmed. The petitioner is allowed the sum of $1,000 for the services of her attorney in this court.

AFFIRMED.

ROBERT D. ROBERTS, APPELLEE, V. BETTY J. ROBERTS, APPELLANT.

263 N. W. 2d 449

Filed March 8, 1978. No. 41392.

1. **Constitutional Law: Divorce: Due Process.** Nebraska divorce laws are not unconstitutional under the due process or equal protection clauses of the United States and Nebraska Constitutions.
2. **Marriage: Divorce: Words and Phrases.** When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together the marriage is irretrievably broken.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Richard Douglas McClain, for appellant.

Donald R. Hays, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

SPENCER, J.

This is an action for dissolution of marriage. The respondent-wife denied the marriage was irretrievably broken, and cross-petitioned for legal separation. The marriage was dissolved. Respondent appeals, assigning as error the unconstitutionality of sections 42-347 to 42-379, R. R. S. 1943; the marriage was not irretrievably broken; and the court failed to give proper consideration to relevant factors involving that question. We affirm.

The parties were married in 1954. Their only child is of legal age. In October 1975, petitioner-husband moved out of the family home and took up residence in the home of a Betty LaPierre. Also living in that home are Mrs. LaPierre's teenage daughter and the father of the daughter, who is not the husband of Mrs. LaPierre. Respondent filed a petition in the conciliation court December 1, 1975. Two conferences were held, but efforts at reconciliation proved to be futile. The petition for dissolution of marriage was filed July 20, 1976, following completion of the proceedings in conciliation court.

Petitioner has at all times insisted the marriage was irretrievably broken. He testified he is not interested in a reconciliation, and further attempts at counseling would not change his mind. He testified he does not and has not loved his wife for a long period of time.

Respondent alleges petitioner is a changed person since he moved to the LaPierre home. She claims

the marriage could be saved if he were removed from the LaPierre influence. This appeal appears to be premised on respondent's contention that the trial court should have delayed action on the petition for divorce until petitioner moved from the LaPierre home.

Whether or not petitioner's relationship is a meretricious one, it should be apparent the marriage is irretrievably broken. It is not within the province of the divorce court to exercise the powers sought by the respondent. If any criminal law is being violated, the matter should be processed by the proper authorities. Courts can not be involved until proper charges are processed and filed.

The constitutional issues were decided adversely to respondent's contentions in Buchholz v. Buchholz, 197 Neb. 180, 248 N. W. 2d 21 (1976). We specifically held the Nebraska divorce laws are not unconstitutional under the due process or equal protection clauses of the United States and Nebraska Constitutions. Reference to that case will answer all questions raised by the respondent.

Respondent's appeal borders on the frivolous. Her contentions merit little discussion. It is sufficient to say the record discloses a reasonable effort to effect reconciliation has been made and it is obvious the petitioner has no desire to continue the marriage relationship. The evidence clearly supports the trial court's finding, the marriage was irretrievably broken. As stated in Mathias v. Mathias, 194 Neb. 598, 234 N. W. 2d 212 (1975): "When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together the marriage is irretrievably broken."

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CRAIG A. OWEN, ALSO KNOWN AS CRAIG A. OWENS, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. TOMMY A. SWEET, APPELLANT.

263 N. W. 2d 451

Filed March 8, 1978. Nos. 41451, 41471.

1. **Trial: Evidence: Proof.** In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous and in so doing we will look to the totality of the circumstances.
2. **Criminal Law: Evidence: Judgments.** In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court on appeal to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence.

Appeals from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger, for appellants.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

CLINTON, J.

Appellants were convicted of robbery and use of a firearm in the commission of that robbery. Appellant Owen asserts three assignments of error on appeal: (1) Defendant's confession should have been suppressed; (2) the evidence was insufficient to support the verdict; and (3) defendant's motion for mistrial should have been granted. Appellant Sweet joins in the latter two assignments of error. We affirm.

Owen, at trial, denied he had made a confession. Apparently his position here is that if he did, it was

involuntary because at the time he was under the influence of drugs and alcohol, he was manhandled by the interrogating officer when the defendant attempted (as he admits) to destroy notes which the officer was making, and thirdly, that his responses to the Miranda warnings (which he does not deny were given) were equivocal. The evidence with reference to the third of these contentions as related by the interrogating officer and by a supporting exhibit was as follows: "A. Yes. The first question I asked him was: 'I would like to advise you that I am a police officer. Do you understand that?' His response was: 'Yes.' The second question was: 'You have a right to remain silent and not make any statements or answer any of my questions. Do you understand that?' To this he answered: 'Fifth.' The next question: 'Anything that you may say can be and will be used against you in court. Do you understand that?' His answer to this was: 'Fifth.' The next question: 'You have the right to consult with a lawyer and have the lawyer with you during the questioning. Do you understand that?' His answer was: 'Fifth.' The next question: 'If you cannot afford a lawyer, the Court will appoint one to represent you. Do you fully understand that?' His answer to this was: 'Fifth.' The next question: 'Knowing your rights in this matter, are you willing to make a statement to me now? His answer was: 'Yes.' "

Prior to trial the court held a separate hearing as required by Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A. L. R. 3d 1205; and specifically found that the Miranda warnings had been given, that the defendant understood them, and that the confession had been voluntarily made and was therefore admissible. The court made identical findings with reference to Sweet's confession. It would serve no useful purpose to recite the details of the evidence as they relate to the defendant Owen's

mental state and the effect of the scuffle upon him. It is clear that the evidence presented a question for the trial court's factual determination. The same is true of the answer "Fifth" to certain of the Miranda warnings. It is apparent that those answers could properly be determined to be affirmative answers, showing a degree of sophistication on the part of the defendant Owen and were indicative of the fact that he knew he was receiving the warnings required by the Fifth Amendment to the United States Constitution as interpreted in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694. We have said: "In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous and in so doing we will look to the totality of the circumstances." State v. Irwin, 191 Neb. 169, 214 N. W. 2d 595. At trial the jury was instructed in accordance with NJI Nos. 14.52 and 14.52A.

We now turn to the question of the sufficiency of the evidence to sustain the jury's finding of guilt. The only substantial question in this regard is the sufficiency of the identification of the defendants as participants in the robbery. On the day in question at about 11:15 p.m., four black males, wearing a variety of masks and disguises which included a wig and stocking or pantyhose masks, robbed the Sip'n-Chin Bar located in Omaha's north side. One of the robbers carried a can of mace, one a handgun, and a third a rifle. The fourth apparently was unarmed. The robbery took about 30 to 45 seconds. The bartender, who was called as a prosecution witness, could not identify any of the suspects, although he acknowledged that he was well acquainted with the two defendants here involved, who were frequent patrons of the bar. After the Sip'n-Chin robbery and later the same night, three unmasked black males

made an unsuccessful attempt to rob a jitney driver in the same general area where the bar was located.

Both incidents were reported to the police, together with information as to the disguises worn and the weapons used in the Sip'n-Chin robbery and some details as to clothing worn by two of the robbers in either the Sip'n-Chin robbery or the unsuccessful attempt to rob the jitney driver. The record is unclear on this last point.

At about 4 a.m., two police cruiser officers observed an automobile containing four black males traveling slowly north on 30th Street near Lake Street in Omaha. When this auto made a turn onto a side street, they decided to follow it. The automobile seemed to be following a circuitous route and the officers ultimately stopped the car for investigation at 30th and California Streets. When the officers approached the car, one of them noted that the trousers of one of the occupants and the coat of another met the description of clothing worn in one of the earlier incidents. The occupants were ordered out of the car. The officers then noted a black afro wig in the car and a partially hidden rifle. The men were placed under arrest. A further search disclosed a can of mace and that one of the parties, Sweet, had a handgun in his pocket. A pair of pantyhose was also found in the car.

Later, confessions were obtained from the two defendants here involved and they implicated two other persons who were not occupants of the car at the time of the arrests.

At trial the defendants took the stand in their own behalf. The defenses were alibi. Their explanations of their whereabouts and activities at the time of the Sip'n-Chin robbery and afterward until the time of the arrest raised questions of credibility which were for the jury to decide.

The evidence, including the confessions and the physical items found in the possession of the defend-

ants at the time of their arrest, was sufficient to support the jury finding of guilty. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court on appeal to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. State v. Edwards, 197 Neb. 354, 248 N. W. 2d 775.

The contention of the defendants that a mistrial should have been declared is founded upon three separate occurrences during the course of the trial. During the State's rebuttal testimony, a police officer was called for the purpose of corroborating the testimony as to the confession of Owen given to the interrogating officer. During this rebuttal examination the officer was asked a leading question as to whether he had heard Owen admit being involved in the Sip'n-Chin robbery. An objection on the ground that the question was leading was sustained. The prosecutor then asked the following question and received the following answer: "Q. . . . What did you hear Mr. Owen say while in the interview room? (DEFENDANT'S COUNSEL): Objection, leading and suggestive. BY THE COURT: Overruled. THE WITNESS: He admitted being in the robbery of the Sip 'n' Chin Bar along with another robbery that happened a few hours later of a jitney driver." The defendant's counsel objected, moved to strike the answer, and moved for a mistrial. The motion to strike was granted and the jury was admonished to disregard the answer. The motion for a mistrial was overruled. The prosecutor then asked the following question, to which no objection was made, and received the following answer: "Q. . . . Sgt. Gutchewsky, what, if anything, did you hear Mr. Owen say regarding the Sip 'n' Chin robbery that you were investigating? A. He admitted taking part in that robbery."

It would rather clearly appear from the above that the prosecutor sought to avoid bringing in the admission of the other crime. When the objection to the leading question was sustained for the first time, the officer evidently was led to believe that he should relate everything that he heard. Better witness preparation might have avoided the problem, but it rather clearly appears, it seems to us, that there was no deliberate attempt to inject the objectionable evidence.

During Sweet's direct examination he explained his reason for carrying the handgun which was on his person. This explanation included the statement that on the preceding evening while about to enter his home at around the hour of 5 p.m., some unknown person fired a shot at him, and that later that night, in the early morning hours, when he and Owen embarked on an errand to obtain from a female friend of Sweet's girlfriend a wig and some pantyhose which the former had borrowed, Sweet took the handgun with him for protection. On cross-examination with reference to the above matter, the prosecutor asked: "Q. Was this the first time you had ever been out early in the morning and carried your .32 pistol loaded? A. Yes. Q. Do you know that it's a felony to carry a weapon like that concealed on your person?" Objection was made and sustained.

The third occurrence was the following. As indicated earlier, Owen contended the confession that he denied giving was involuntarily made because he was under the influence of drugs. He explained that the drug was Valium which he had taken from a bottle of that drug which his wife had obtained by prescription from a physician. On cross-examination with reference thereto the following occurred: "Q. That is a prescription-type drug, isn't it? A. Yes. Q. Do you know that that's a felony to distribute that sort of thing?" Objection was made and sustained.

It is apparent that the last questions in each of the last two series were completely unwarranted. However, in the total context of the case where the defendant Sweet admitted carrying the weapon and when Owen had introduced the evidence of the use of the drug, we cannot see that any prejudice resulted to the defendants which would require declaration of a mistrial.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN A. SCOTT, APPELLANT.

263 N. W. 2d 659

Filed March 8, 1978. No. 41462.

1. **Trial.** When there are outbursts of emotion in the courtroom, it is within the sound discretion of the trial court to deal with them in such a manner as to best preserve the judicial atmosphere and insure a fair and impartial trial for the defendant.
2. **Criminal Law: Evidence: Confessions.** A voluntary confession is insufficient, standing alone, to prove that a crime has been committed; but it is competent evidence of that fact and may, with slight corroboration, establish the corpus delicti as well as the defendant's guilty participation. Where the crime involves physical damage to a person or property, the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur, and that some person was criminally culpable. In such a case there need be no link, outside the confession, between the injury and the accused who admits having inflicted it.
3. **Criminal Law: Evidence: Confessions: Instructions.** Where the question of the voluntariness of an oral or written confession is at issue, the court must properly instruct the jury, whether requested or not, as to what constitutes a voluntary confession and to disregard the alleged confession if it is found to be involuntary. The same rule, however, does not apply to the question of whether the defendant was advised of, and waived, his Miranda rights, before being questioned by police officers.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

BRODKEY, J.

John Scott, defendant and appellant herein, was charged with murder in the perpetration of, or attempt to perpetrate, a robbery under section 28-401, R. R. S. 1943; and with shooting with intent to kill, wound, or maim under section 28-410, R. R. S. 1943. A jury found the defendant guilty as charged, and his motion for new trial was overruled. He has appealed from his convictions to this court, contending that the District Court erred in failing to grant his motions for a mistrial and a directed verdict, and in failing to instruct the jury properly with respect to the issue of whether he effectively waived his constitutional rights before making statements to police officers. We affirm the judgment of the District Court.

At approximately 5 p.m., on February 18, 1977, an intruder entered the home of William and Bertha McCormic in Omaha and demanded money at gunpoint. A scuffle ensued, and Mr. McCormic was shot twice and killed, and Mrs. McCormic was shot twice and wounded. Mr. McCormic was 92 years of age at the time. Mrs. McCormic, age 83, has impaired vision and could not describe her assailant with any specificity.

The only clue to the identity of the perpetrator was an unusual shoeprint left at the scene of the crime. Police detectives ascertained that only two shoe stores in Omaha sold a brand of shoes which would make such a print, and police officers were advised to look for persons wearing that distinctive type of shoe. On February 22, 1977, the defendant was arrested after a police officer discovered him wearing

shoes which made prints similar to the one found at the scene of the crime.

The defendant was questioned twice on the night of February 22, 1977, and once on the morning of the following day. Before questioning the defendant on each occasion, police detectives advised the defendant of his right to remain silent and to have the assistance of an attorney as required by Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The police officers testified that the defendant waived such rights, and rights advisory forms signed by the defendant were received in evidence. In the initial interrogation, the defendant denied that he had committed the crimes. In the second, however, he admitted his guilt, took officers to the scene of the crime, and showed them a vacant lot where he stated he had disposed of the murder weapon. The police officers were unable to find the weapon. The confession and admissions of the defendant were detailed, and included descriptions of the scene of the crime, which were corroborated by the physical evidence discovered by the police.

At trial, an expert witness testified that the shoeprint found at the scene of the crime matched the design and size of a print made by a shoe the defendant was wearing when arrested, and that defendant's shoe could have made the shoeprint. He could not make a positive identification, however, as he could not find a sufficient number of "individual characteristics" on defendant's shoe, which had been purchased about 2 months before the crime.

Other evidence relevant to defendant's guilt was that he was with his mother a short distance from the scene of the crime shortly before 5 p.m., on February 18, 1977. He left his mother at that time, and returned to his home between 5:30 and 6 on that day.

At trial the defendant repudiated his confession, stating that he confessed because the police threatened to charge him with several robberies if he did

not confess to the shootings, and because he was frightened. The defendant admitted that he had been advised of his Miranda rights each time before the police questioned him, but stated he did not understand that he had the right to have a lawyer present at the interrogations if he desired. The rights advisory forms signed by the defendant and the testimony of police officers indicated that the defendant was specifically advised he had the right to have an attorney present during the questioning, and that a lawyer would be appointed if he could not afford to hire his own attorney.

Defendant's first contention is that the trial court erred in refusing to grant a mistrial because of prejudicial acts and statements of witnesses at the trial. When Mrs. McCormic left the witness stand she stumbled and began to weep because of an injury to her leg. Her granddaughter called for the assistance of a doctor at that time. Defendant moved for a mistrial on the ground that the incident was prejudicial to him because of the sympathy that the jury would have for Mrs. McCormic. The trial court overruled the motion, noting that the witness had shown no emotion during her testimony, and that her weeping was the result of her stumbling and hurting her leg, and was not related to her testimony in the case. The court admonished the jury to not consider the incident because it had no bearing on the guilt of the defendant.

It is apparent that the above incident was not ground for a mistrial. When there are outbursts of emotion in the courtroom, it is within the sound discretion of the trial court to deal with them in such a manner as to best preserve the judicial atmosphere and insure a fair and impartial trial for the defendant. Wamsley v. State, 171 Neb. 197, 106 N. W. 2d 22 (1960). In the present case, the weeping of the witness was not related to her testimony at trial, and the trial court properly admonished the jury to dis-

regard the incident because it had no bearing on the guilt of the defendant. The overruling of the motion for a mistrial was not error. Wamsley v. State, *supra.*

A second incident occurred when the prosecutor asked a police officer whether the defendant's shoes appeared to be in the same condition at trial as they were when taken from the defendant after his arrest. The police officer answered in the affirmative, except that there was "what appears to be blood on this shoe." The trial court overruled defendant's motion for a mistrial, and instructed the jury to disregard the statement concerning blood because there had been no showing that there was in fact blood on the shoe. An analogous incident occurred in State v. Escamilla, 187 Neb. 457, 191 N. W. 2d 548 (1971), where a police officer made improper comments about items of evidence, and where the trial court sustained an objection to the comments and instructed the jury to disregard them. We found no prejudicial error, and stated that if there was error, it was harmless, and was cured by the court's action. The same may be said in the present case. Although the comment of the police officer was improper, it cannot be considered prejudicial error in view of the remedial action taken by the trial court.

Defendant next contends that the evidence was insufficient to sustain his conviction because his confession was not sufficiently corroborated by other evidence. The rule is that a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, but that it is competent evidence of that fact and may, with slight corroboration, establish the corpus delicti as well as the defendant's guilty participation. See, State v. Moss, 182 Neb. 502, 155 N. W. 2d 435 (1968); Gallegos v. State, 152 Neb. 831, 43 N. W. 2d 1 (1950). Where the crime involves physical damage to a person or property, the prosecution must generally show that the

injury for which the accused confesses responsibility did in fact occur, and that some person was criminally culpable. In such a case there need be no link, outside the confession, between the injury and the accused who admits having inflicted it. Wong Sun v. United States, 371 U. S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); United States v. Stabler, 490 F. 2d 345 (8th Cir., 1974).

In the present case there can be no dispute that the evidence was sufficient to permit the jury to conclude that Mr. McCormic was killed, that Mrs. McCormic was shot, and that some person was criminally culpable. Defendant's confession, standing alone, was sufficient evidence to establish the link between the crimes and the defendant. In addition, the evidence concerning the shoeprint and the evidence that the defendant was in the vicinity of the scene of the crimes shortly before their commission was corroborative evidence of his guilt.

Defendant's final assignment of error is that the District Court erred in failing to instruct the jury that it should disregard the defendant's confession and admissions unless it found that the defendant had been advised of his Miranda rights and had knowingly and intelligently waived those rights before making statements to the police. The trial court did instruct the jury in accordance with NJI No. 14.52, advising the jury that it should disregard the defendant's confession or admissions if it found that such admissions or confession were not freely, voluntarily, and intelligently made by the defendant. This instruction was directed at the issue of whether the admissions or confession were procured or induced by promises, or obtained as the result of force, fear, oppression, or coercion. However, the trial court did not give an instruction in accordance with NJI No. 14.52A, which relates to the issue of whether a defendant has been advised of, and has waived, his Miranda rights prior to questioning by

the police. The defendant did not object to the proposed instructions on the ground that the instruction, NJI No. 14.52A, or a similar instruction, should be given.

In Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), the Supreme Court held that before an admission or confession of a defendant may be admitted in evidence, a hearing must be held outside the presence of the jury, and a finding made by the trial court that the confession or admission was voluntary. In Lego v. Twomey, 404 U. S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972), the Supreme Court held that there is no constitutional requirement that the jury decide anew the question of whether a confession was voluntary once the judge had already decided that issue after a Jackson v. Denno hearing.

States have adopted two different procedures with respect to the issue of whether a jury should ultimately determine the voluntariness of a confession. Under the "orthodox" rule, the trial judge rules on the voluntariness of the confession for the purposes of admissibility in evidence; the jury does not redetermine that issue, but considers the issue of voluntariness only as affecting the weight or credibility of the confession. Under the Massachusetts or "humane" rule, the judge rules on the voluntariness of the confession before allowing it in evidence, and if it is admitted, the jury is instructed that it must also find the confession to be voluntary before it may consider it. See, Jackson v. Denno, *supra*; Annotation, Constitutional Aspects of Procedure for Determining Voluntariness of Pretrial Confession, 1 A. L. R. 3d 1251.

Nebraska has followed the Massachusetts rule since at least 1910. See Heddendorf v. State, 85 Neb. 747, 124 N. W. 150 (1910). Since that time this court has repeatedly held that a defendant is entitled to have the jury determine whether his confession was voluntary, even though the trial court has already so

found. See, State v. Breaker, 178 Neb. 887, 136 N. W. 2d 161 (1965); State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66 (1965); State v. Ross, 183 Neb. 1, 157 N. W. 2d 860 (1968). In State v. McDonald, 187 Neb. 752, 194 N. W. 2d 183 (1972), where the trial court failed to instruct the jury in accordance with NJI No. 14.52, this court stated: "Where the question of the voluntariness of an oral or written confession is in issue, the court must properly instruct as to what constitutes a voluntary confession, whether requested or not. It is the duty of the court not only to instruct as to what constitutes a voluntary confession, but also to instruct the jury to disregard the alleged confession if found to be involuntary. * * * The failure of the trial court to give this instruction (NJI No. 14.52) amounted to a withdrawal of the issue of voluntariness from the jury's consideration and requires reversal." Defendant urges this court to adopt the same rule with respect to NJI No. 14.52A.

It is obvious that the Nebraska rule concerning an ultimate jury determination of the voluntariness of a confession was adopted long before Miranda. The question of whether a confession was made as the result of coercion, deception, or inducement by promises is, of course, quite different than the question of whether a defendant was advised of, and waived, his rights to remain silent and to have the assistance of an attorney before he is questioned by police. In People v. Sanchez, 65 Cal. 2d 814, 56 Cal. Rptr. 648, 423 P. 2d 800 (1967), vacated on other grounds, 70 Cal. 2d 562, 75 Cal. Rptr. 642, 451 P. 2d 74 (1969), the court noted this difference and found no reversible error where the trial court failed to give a Miranda instruction similar to NJI No. 14.52A, even though an instruction like NJI No. 14.52 was required. The same result was reached in State v. Hampton, 61 N. J. 250, 294 A. 2d 23 (1972); and State v. Perry, 14 Ohio St. 2d 256, 237 N. E. 2d 891 (1968). See, also, III Wigmore on Evidence, § 861a, pp. 593

to 596. Other courts have held that where the defendant does not request a Miranda instruction, or does not offer a proper Miranda instruction, it is not error for the trial court to fail to give such an instruction. See, United States v. Kress, 446 F. 2d 358 (9th Cir., 1971); Thessen v. State, 454 P. 2d 341 (Alas., 1969).

We conclude that the trial court did not err in this case by failing to give NJI No. 14.52A, or a similar instruction, particularly in view of the fact that the defendant did not request it. No prior Nebraska cases require that NJI No. 14.52A be given. In State v. Irwin, 191 Neb. 169, 214 N. W. 2d 595 (1974), on which defendant relies, both NJI Nos. 14.52 and 14.52A were given, and the issue was whether it was error for the trial court to admit the defendant's confession in evidence in the first instance. Notwithstanding a statement in a syllabus indicating to the contrary, which is not contained in the opinion itself, that case does not require that NJI No. 14.52A be given.

We have reviewed the contentions of the defendant and find them to be without merit. The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FLOYD M. WALKER, APPELLANT.

263 N. W. 2d 454

Filed March 8, 1978. No. 41584.

1. **Criminal Law: Indictments and Informations: Joinder.** Two or more offenses of the same or similar character which were committed 90 days apart may be charged in one information.
2. **Criminal Law: Indictments and Informations: Evidence: Joinder.** A defendant is not prejudiced by a joinder of two offenses in one information if evidence as to both would be admissible at a trial of either offenses separately.
3. **Criminal Law: Trial: Evidence.** Evidence which tends to show

a course of conduct, scheme, or design is admissible to prove identity although such evidence relates to other offenses.

4. **Criminal Law: Trial: Evidence: Intent.** Evidence of a similar offense is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

L. William Kelly, III, of Kelly, Kelly & Kelly, for appellant.

Paul L. Douglas, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

BOSLAUGH, J.

The defendant was charged in one information with sexual assault in the first degree and burglary. The first count alleged an assault that took place on October 8, 1976. The second count alleged a burglary with intent to commit rape on January 7, 1977. The jury returned a verdict of guilty on both counts. The defendant was sentenced to imprisonment for 3 years on each count, the sentences to run concurrently.

The defendant has appealed and contends that the trial court erred in overruling his motion to sever and that the evidence is not sufficient to support the convictions.

The evidence shows a man answering the description of the defendant entered a mobile home in Grand Island, Nebraska, on October 8, 1976, and forcibly had sexual intercourse with the complaining witness named in count I of the information. The defendant threatened to harm the complaining witness if she resisted him and held a pillow over her head during the act.

On January 7, 1977, the defendant was discovered in the bedroom of the complaining witness named in

count II of the information. The defendant was holding a pillow over the head of the complaining witness when the mother of the complaining witness entered the room and discovered the defendant. The defendant then fled from the scene. He was recognized because he and his wife had employed the complaining witness as a babysitter on a number of previous occasions.

After the defendant had been arrested for the January 7, 1977, offense, he was identified in a lineup by the complaining witness named in the first count. The identification was based largely on voice but the defendant was also identified by his profile and certain physical characteristics.

The defendant denied that he had been in the mobile home of the complaining witness named in count I and claimed that he was at home in bed at the time of that offense. The defendant admitted he had entered the home of the complaining witness named in count II but claimed he wanted to use the telephone and was trying to awaken the complaining witness when he was discovered by the mother of the complaining witness. The evidence of the State was substantial and, if believed, was clearly sufficient to support a finding of guilt beyond a reasonable doubt on both counts.

With respect to the motion to sever, section 29-2002, R. R. S. 1943, provides that two or more offenses may be charged in the same information if the offenses charged are of the same or similar character. The statute further provides that if it appears the defendant would be prejudiced by a joinder of offenses the court may order the charges be tried separately.

The offenses charged in this case were of a similar nature although charged under different sections of the statutes. Count I involved a completed sexual assault while count II involved an attempt. The fact that approximately 90 days intervened between the

two offenses is not controlling. In State v. Nance, 197 Neb. 95, 246 N. W. 2d 868, we cited State v. Baker, 49 N. J. 103, 228 A. 2d 339, in which the offenses had been committed nearly 2 months apart.

There was no prejudice to the defendant from the joinder in this case because evidence relating to both offenses would have been admissible in a trial of either offense separately. On count I there was an issue of identification. Evidence as to the method used by the defendant on the occasion of the offense charged in count II would have been admissible on the issue of identification. Evidence which tends to show a course of conduct, scheme, or design is admissible to prove identity although such evidence relates to other offenses. State v. Hoffman, 195 Neb. 200, 237 N. W. 2d 403; State v. Moore, 197 Neb. 294, 249 N. W. 2d 200. See, also, 22A C. J. S., Criminal Law, § 684, p. 756.

On count II there was an issue as to intent. Evidence of the previous sexual assault would have been admissible under the rule that evidence of a similar offense is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge. State v. Ray, 191 Neb. 702, 217 N. W. 2d 176.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH KELLY, APPELLANT.

263 N. W. 2d 457

Filed March 8, 1978. No. 41622.

Appeal and Error: Courts: Jurisdiction. An appellate court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Margaret Hornbeck of Hornbeck & Luther, for appellant.

Paul L. Douglas, Attorney General, and Gary B. Schneider, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

MCCOWN, J.

Almost 2 years after the District Court entered an order denying defendant's motion for post conviction relief, the defendant filed a motion for an order permitting him to file an appeal out of time. The District Court overruled defendant's motion to extend the time for appeal and defendant has appealed from that order.

In July 1974, the defendant was found guilty by a jury of the crime of forcible rape and sentenced to 8 to 15 years imprisonment. On direct appeal the conviction was affirmed on April 10, 1975. State v. Kelly, 193 Neb. 494, 227 N. W. 2d 848.

On August 25, 1975, defendant filed a motion for post conviction relief alleging that the enactment of new sexual assault laws, L. B. 23, Laws of 1975, had changed the penalty for the former crime of rape and that defendant was entitled to the benefits of that law. Defendant's conviction and sentence had become final on April 10, 1975, and the new sexual assault laws did not become effective until August 24, 1975. Although the new law decreased the maximum penalty for first degree sexual assault (formerly rape) to a period of not more than 25 years, the defendant's sentence was well within the statutory limits under either the old or the new law. Defendant's motion for post conviction relief also sought to raise objections to a police-conducted interrogation prior to trial, and, by an amendment, alleged a denial of the right to jury trial because the court failed to instruct on a lesser-included offense.

The public defender was appointed to represent the defendant on the post conviction motion on September 5, 1975. The District Court journal entry for September 29, 1975, states: "Hearing on defendant's motion to reduce sentence in accordance with new statute on Rape. Motion denied. Sentence to stay as is. Defendant's motion denied en toto."

On February 26, 1976, defendant filed a motion for a speedy hearing on his motion for post conviction relief which had been previously filed on August 25, 1975. On March 1, 1976, the District Court overruled defendant's motion for speedy hearing upon the ground that "it has already been ruled upon on September 29, 1975." The record shows that the District Court advised the defendant of that action by letter on March 1, 1976, and that defendant received that notice.

Some 16 months later, on July 7, 1977, defendant filed his motion for an order permitting him to file an out-of-time appeal to this court from the order of September 29, 1975. The defendant alleged that he had not been notified of the ruling of September 29, 1975; that he had not had notice of appointment of counsel; nor had he ever been advised by counsel of the pendency of the hearing or of the result. The motion was denied on the same day it was filed on the ground that the District Court had no jurisdiction to allow such an appeal. Counsel on appeal was appointed and this appeal followed.

This court has consistently held that it is mandatory and jurisdictional that notice of appeal be filed within the time required by statute. When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly. An appellate court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law. See, Morrill County v. Bliss, 125 Neb. 97, 249 N. W. 98; Friedman v. State, 183 Neb. 9, 157 N. W. 2d 855.

The argument that defendant has lost his right of appeal solely because of the action or inaction of the court or an officer of the court, and without fault on defendant's part, is without merit.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

ALFRED E. KRASKI ET AL., APPELLEES, V. DAVID BANWELL ET AL., APPELLANTS.

263 N. W. 2d 458

Filed March 8, 1978. No. 41632.

1. **Lessor and Lessee: Contracts: Options.** When a lease confers on the lessee an option to purchase the property at any time during the term of the lease, and the lease is thereafter extended in accordance with its terms, the option to purchase is also extended for the period of the extended term.
2. **Contracts.** It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of an agreement.
3. **Contracts: Intent.** A contract cannot be said to be ambiguous where the interpretation given appears to represent the true intention of the parties from the instrument itself.

Appeal from the District Court for Morrill County: ALFRED J. KORTUM, Judge. Reversed and remanded.

Ronald Rosenberg, for appellants.

Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, David T. Schroeder, and Padley & Dudden, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. THOMAS, J.

This is an appeal from an order sustaining appellees' motion for partial summary judgment and dismissing appellants' cross-petition requesting specific performance of an option to purchase land contained

in a lease. Appellants and cross-petitioners appeal. We reverse.

On March 27, 1976, appellants as lessees and appellees as lessors executed a lease agreement for certain real estate effective March 1, 1976, for a 1-year term with an option to extend the term for an additional year. The agreement also contained an option to purchase.

The parties concede that appellants properly exercised the option to renew the lease for an additional year. The appellants attempted to exercise the option to purchase by notice given to appellees' attorneys on March 30, 1977. The appellees contend that the option to purchase was not timely exercised according to its terms and the trial court agreed.

The language in dispute is as follows: "It is further agreed between the parties that at any time during the term of this lease, *or any extension hereof,* second party shall have the option to purchase all of said property covered by this lease agreement * * *. In the event party of the second part shall exercise its option to renew this lease, or to exercise its option to purchase the property covered herein, such option shall be made known to first party by written notice to first parties at least sixty (60) days prior to the expiration of the *current term* of this lease, or at any other time prior thereto." (Emphasis supplied.)

The appellants contend the court erred in granting partial summary judgment: (1) In failing to find that the contract provision relating to the exercise of the option to purchase was ambiguous and therefore not a proper subject for a motion for summary judgment; and (2) in construing the words *current term* to mean the first or initial year of the lease, limiting appellants' right to exercise the option to purchase to 60 days prior to February 28, 1977.

The appellees contend that the trial court correctly construed the words *current term* to mean the first

year of the lease and that no ambiguity existed in the paragraph granting the option.

The word "current" is defined in Black's Law Dictionary (4th Ed.), as "Running; now in transit; whatever is at present in course of passage; as 'the current month.' " The definition would seem to support the contention of appellees that the phrase "notice * * * prior to the expiration of the current term," meant exercise prior to 60 days before February 28, 1977. However, if this interpretation is adopted, the first sentence of the paragraph would be rendered meaningless, since the fair import of those words is to confirm the right to exercise an option to purchase "during the term of this lease, or any extension hereof."

Appellees urge us that in the interpretation of this contract, it ought to be construed most strictly against the drafters who, they assert, are the appellants. This fact, if it be one, is not shown in the bill of exceptions and cannot be considered by us.

"The general rule, supported by weight of authority, is that where a lease confers on the lessee an option to purchase the property at any time during the term of the lease, and the lease is thereafter extended in accordance with its terms, the option to purchase is also extended for the period of the extended term * * *." Shuford Development Co. v. Chrysler Corp., 449 F. 2d 429 (5th Cir., 1971). See, also, Klinger v. Peterson (Alas., 1971), 486 P. 2d 373; Slater v. Easter (Mass., 1975), 328 N. E. 2d 526. The parties here specifically provided for the option to continue to a renewal period of the lease. Such was the intent of the parties as is apparent from the instrument. The word "current," in the context of the document, must be taken to refer to the year of the lease in which the lessee exercises the option and not to limit the exercise to the first term of the lease.

As this court said in State v. Bartley, 39 Neb. 353, 58 N. W. 172: "The term 'current funds,' like many

other words in our language, is susceptible of more than one meaning * * * the sense in which it is used is to be gathered from the context. It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence * * *." In the construction we have adopted, the contract cannot be said to be ambiguous since the interpretation given appears to represent the true intention of the parties from the instrument itself. Master Laboratories, Inc. v. Chesnut, 157 Neb. 317, 59 N. W. 2d 571.

The granting of a partial summary judgment to the appellees was erroneous; the judgment is reversed and the cause remanded with directions to enter judgment for the appellants on their cross-petition.

REVERSED AND REMANDED.

SHARON L. SANDERS, APPELLEE, V. BOARD OF EDUCATION OF THE SOUTH SIOUX CITY COMMUNITY SCHOOL DISTRICT NO. 11, APPELLANT.

263 N. W. 2d 461

Filed March 15, 1978. No. 41266.

1. **Schools and School Districts: Contracts: Statutes.** At a hearing before a board of education to terminate the contract of a tenured teacher under section 79-1254, R. R. S. 1943, the evidence at the hearing must be sufficient to establish just cause for termination.
2. **Schools and School Districts: Contracts: Statutes: Words and Phrases.** Under section 79-1254, R. R. S. 1943, the term "just cause" means incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, or other conduct which interferes substantially with the continued performance of duty.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Affirmed.

Smith, Smith & Boyd, for appellant.

Mohummed Sadden and Phillip S. Dandos, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

MCCOWN, J.

This is an error proceeding to challenge the action of the defendant, Board of Education of South Sioux City, Nebraska, terminating plaintiff's teaching contract. The District Court found that the action of the defendant board was arbitrary and unreasonable, and that no just cause for termination existed. The District Court set aside the termination and ordered defendant to reinstate the teaching contract of the plaintiff.

The plaintiff, Sharon L. Sanders, after 3 years of teaching physical education in Colorado schools, was employed by the defendant school board commencing with the school year of 1969-70. She taught girls physical education in the junior high school for 3 years. She was transferred to the senior high school for the 1972-73 school year. She taught girls physical education and was director of the girls drill team.

On February 6, 1975, Mrs. Sanders' performance for the 1974-75 year was evaluated by the principal of the senior high school, James Deignan. His overall evaluation was "good" and he recommended that she receive regular salary advancement but no merit increase for the next year. On the instructor evaluation form, Principal Deignan rated Mrs. Sanders "good" or "excellent" on all 12 rating classifications for personal traits. Mrs. Sanders was rated "good" or "excellent" in 15 out of 18 rating categories for instructional methods, and was evaluated as "needs to improve" in 3 areas. These three were "care and appearance of room and equipment"; "definition of goals"; and "all pupil participation." In no area was she rated as nonacceptable.

On February 24, 1975, the school board voted to

continue Mrs. Sanders' employment for the 1975-76 school year, but placed her on probationary status. The record does not reflect the significance of that status, but it has no statutory basis. The record reflects that Mrs. Sanders requested, and apparently received, a hearing on the matter, but no record of the hearing was made. There is nothing in the record to reflect the grounds for the "probation" other than the evaluation report of Mr. Deignan. The "comments or suggestions to the instructor" section of that report stated that better organization and discipline were needed. Whatever the reason for the "probation," no suggestions or guidelines for improvement were given to Mrs. Sanders.

On March 22, 1976, Dennis Trump, the high school principal for the year, who had been assistant principal the preceding year, completed his evaluation report on Mrs. Sanders' performance for the 1975-76 school year. Mr. Trump gave Mrs. Sanders an overall rating of "good" and recommended renewal of her contract. His report stated that "improvement has been shown in cooperation and percentage of student participation." Mr. Trump rated Mrs. Sanders "good" or "excellent" in all rating categories except two in which he rated her as "needs to improve." Those two were "classroom control" and "all pupil participation." In the "comments or suggestions to the instructor" section of the report Mr. Trump noted "some time wasted prior to start of class activity. Improvement has been made in number of students participating."

On the same day Mr. Trump's report was made the defendant school board voted to consider terminating the plaintiff's contract at the end of the 1975-76 school year on the ground of "incompetency, neglect of duty, inability to control students, and poor preservation of class equipment." Mrs. Sanders requested a hearing, which was held on May 5, 1976.

The school board presented three witnesses at the hearing. Dr. Ralph Weaver, the Superintendent of Schools, testified that he did not visit individual teacher's classrooms, nor perform any classroom evaluations, and that the responsibility for the evaluation of individual classroom teachers rested with the various principals. He himself dealt with the principals and reports and recommendations from them. He testified, however, that on several occasions Mrs. Sanders was not present when the drill team was practicing, performing, or working out, and that he considered that a neglect of duty.

Mr. Dennis Trump, the principal of the senior high school for the 1975-76 school year, testified that he was primarily responsible for evaluating teachers and visits each classroom at least three times a year. He knew that Mrs. Sanders was on probation, but had not seen her evaluation report from the preceding year. He testified that on several occasions during the 1975-76 school year, students who should have been in Mrs. Sanders' classes, were, instead, outside the gymnasium classroom and in other places in and around the high school building. He also testified that on occasion Mrs. Sanders had not properly supervised or guarded gymnastic equipment for the safety of students, but acknowledged that he had not called the matter to her attention. Mr. Trump testified that on one occasion during Mrs. Sanders' maternity leave a substitute teacher, in his opinion, had done a better job than Mrs. Sanders. Mr. Trump noted also that on one occasion a drill team class taught by Mrs. Sanders was late in getting started, and that on occasion he had picked up volleyballs in the gymnasium which had not been put away after her classes. Mr. Trump was, nevertheless, of the opinion that Mrs. Sanders' performance had improved, and he recommended that she be retained.

The final witness for the school board was Fred

Colvard, the assistant principal of the senior high school. Colvard was in charge of discipline at the high school. He testified that several times he had had to discipline Mrs. Sanders' students for being out of class, and that on occasion Mrs. Sanders had requested his assistance with discipline problems. He testified that on one or two occasions he had seen students working on gymnastics equipment without proper guarding, but had not called it to Mrs. Sanders' attention. Essentially, his testimony as to Mrs. Sanders' conduct agreed with that of Mr. Trump, although Colvard testified that he had not made, or been called upon to make, an evaluation of Mrs. Sanders' teaching performance. He testified that on the basis of his informal observations he was not in a position to say whether she should be retained or terminated.

There were two witnesses for plaintiff. A former student of Mrs. Sanders, who had been in her physical education classes for several years in both junior and senior high school, testified that she had never noticed any discipline problems in class, nor any problems of an insufficient number of students guarding gymnastics equipment, and that Mrs. Sanders was better than the other physical education teachers she had had. She also testified that there were a few students who skipped class on occasion, but that they were people who routinely skipped other classes as well.

Mrs. Sanders herself testified that until the 1974-75 school year she had never had complaints about her teaching. She testified that in the spring of 1975, when she was placed on probation, she was given no specific instructions, suggestions, or guidelines to follow to correct whatever deficiencies there might have been in her teaching. She also testified that her probation was not discussed with her during the 1975-76 school year except in Feburary of 1976, when Mr. Trump indicated to her that he was going to rec-

ommend that she be taken off probation. It was her testimony that she did not have an unusual number of discipline problems and that those she had she either handled herself or referred to Mr. Colvard. Mrs. Sanders testified that on one occasion less than four student guards had been in place around the trampoline, and that she immediately corrected the situation when she noticed it. She denied any problem in losing students from her classroom, and explained that if students did not come down to the gymnasium level from the locker room, she had no way of knowing they were present, and she counted them absent. She also testified that all equipment she started the year with was accounted for, although she conceded that on occasion volleyballs would be stuck under the bleachers and she did not find them until later. She also testified that she had never received any complaints from parents about her performance.

At the conclusion of the hearing before the school board on May 5, 1976, the five members of the school board present unanimously voted to terminate Mrs. Sanders' contract.

This error proceeding was thereupon filed in the District Court. The District Court found that there was not substantial evidence sufficient to establish just cause for the termination of plaintiff's teaching contract, and that the termination was arbitrary and unreasonable. The District Court set aside the termination and directed the school board to reinstate plaintiff's teaching contract. The school board has appealed.

This case is one of first impression in interpreting some of the provisions of section 79-1254, R. R. S. 1943, which became effective February 26, 1975. That section deals with the continuation or termination of teachers' contracts and provides in relevant part: "Except for the first two years of employment * * * any contract of employment between an

administrator or a teacher who holds a certificate which is valid for a term of more than one year and a Class I, II, III, or VI district shall be deemed renewed and shall remain in full force and effect until a majority of the members of the board vote on or before May 15 to amend or to terminate the contract for just cause at the close of the contract period. The first two years of the contract shall be a probationary period during which it may be terminated without just cause. * * * The secretary of the board shall, not later than April 15, notify each administrator or teacher in writing of any conditions of unsatisfactory performance * * * which the board considers may be just cause to either terminate or amend the contract for the ensuing school year. Any teacher or administrator so notified shall have the right to file within five days of receipt of such notice a written request with the board of education for a hearing before the board. Upon receipt of such request the board shall order the hearing to be held within ten days, and shall give written notice of the time and place of the hearing to the teacher or administrator. At the hearing evidence shall be presented in support of the reasons given for considering termination or amendment of the contract, and the teacher or administrator shall be permitted to produce evidence relating thereto. The board shall render the decision to amend or terminate a contract based on the evidence produced at the hearing. As used in this section * * * the term just cause shall mean incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, other conduct which interferes substantially with the continued performance of duties * * *."

The parties have stipulated that only incompetency and neglect of duty are involved here, and none of the other statutory meanings of "just cause" are applicable. It should be noted also that the stat-

ute specifically requires that any decision to terminate a teacher's contract must be based only on the evidence produced at the hearing before the school board.

An error proceeding has for its purpose the removal of the record from an inferior to a superior tribunal to determine if the judgment or final order entered is in accordance with law. Dovel v. School Dist. No. 23, 166 Neb. 548, 90 N. W. 2d 58. The District Court and this court, on appeal, must determine if the evidence presented at the hearing before the school board on May 5, 1976, is sufficient, as a matter of law, to support the determination of the school board.

The critical issue here is what conduct is sufficient to constitute just cause for the termination of the contract of a tenured teacher under current statutory requirements. There are few, if any, objective criteria for evaluating teacher performance or for determining what constitutes just cause for terminating teaching contracts of tenured teachers. Each case must, therefore, be assessed on its own facts. In this case there is no evidence that Mrs. Sanders violated any directive, regulation, rule, or order given to her by any administrator or the board of education. There is no evidence that the conduct of Mrs. Sanders complained of by the board violated any specific rule or regulation of the school administration. In both of the detailed evaluations of Mrs. Sanders' performance, made by the person charged with that duty by the school administration, there were no areas of performance in which she was not acceptable, and out of almost 20 rating categories, only 2 or 3 were rated as needing improvement. Both of those official evaluations by the administration itself recommended retention. Both were made by professional administrators who presumably had ample knowledge of professional competence and the standards for performance of duty. The evi-

dence at the hearing reflected facts which were thoroughly known by the principal at the time he made his evaluation and report.

At a hearing before a board of education to terminate the contract of a tenured teacher under section 79-1254, R. R. S. 1943, the evidence at the hearing must be sufficient to establish just cause for termination. Under section 79-1254, R. R. S. 1943, the term "just cause" means incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, or other conduct which interferes substantially with the continued performance of duties.

Evidence that a particular duty was not competently performed on certain occasions, or evidence of an occasional neglect of some duty of performance, in itself, does not ordinarily establish incompetency or neglect of duty sufficient to constitute just cause for termination. Incompetency or neglect of duty are not measured in a vacuum nor against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties. The conduct of Mrs. Sanders complained of by the board might well be categorized as minimal rather than substantial evidence of incompetence or neglect of duty. However her performance of duty is classified, there is a complete absence of evidence that Mrs. Sanders' performance of her particular duties was below the standard of performance required of other teachers in the high school performing the same or similar duties. Neither is there any expert testimony that Mrs. Sanders' conduct was, or should be, sufficient evidence of incompetency or neglect of duty to constitute just cause for termination of her contract.

The District Court was correct in finding that there was no substantial evidence of incompetency or neglect of duty sufficient to establish just cause for the termination of plaintiff's contract. In the ab-

sence of just cause the defendant's action was arbitrary and unreasonable.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

PROGRESSIVE DESIGN, INC., APPELLEE, V. OLSON BROTHERS MANUFACTURING COMPANY, APPELLEE, SECURITY STATE BANK OF OXFORD, INTERVENER-APPELLANT.

263 N. W. 2d 465

Filed March 15, 1978. No. 41313.

Uniform Commercial Code: Assignments: Proof. The assignee of an account receivable has the burden of proving that the account-debtor received notification of the assignment and that the notification reasonably identified the rights assigned.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed.

Magnuson, Magnuson & Peetz, for appellant.

Duane L. Stromer, for appellee Olson Brothers Manuf. Co.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

MCCOWN, J.

This is an action by Security State Bank of Oxford, Nebraska, against Olson Brothers Manufacturing Company to recover money allegedly due under an assignment of the proceeds of a contract between Olson Brothers and Progressive Design, Inc. A jury trial was waived and trial was had to the court. At the conclusion of the bank's evidence the District Court held that the evidence did not show a sufficient notice of the assignment, and dismissed the petition of the bank. The bank has appealed.

On March 31, 1970, Progressive Design, Inc., with

its principal place of business in Douglas County, Nebraska, near Omaha, executed a written contract with Olson Brothers Manufacturing Company, a corporation, whose principal place of business was in Atkinson, Holt County, Nebraska, under which Progressive agreed to manufacture and sell hydraulic valves to Olson Brothers. The contract provided that Progressive might assign the performance of the contract to a subsidiary or related corporation, and that the proceeds of the contract might be assigned as security for working capital loans.

On April 29, 1970, Progressive assigned the performance of the contract and all the proceeds to be received under it to a wholly owned subsidiary of Progressive, Kiddie Karousel, Inc., whose principal place of business was in Oxford, Furnas County, Nebraska. On April 29, 1970, Kiddie Karousel, Inc., as borrower, and Progressive, as guarantor, assigned all claims for money due and to become due under the contract, and all proceeds and accounts receivable arising therefrom, to Security State Bank of Oxford, Nebraska. Kiddie Karousel, Inc., as debtor, and Progressive, as guarantor, also executed a security agreement to the bank on the same date, covering all accounts, contract rights, and general intangibles. Progressive also guaranteed prompt payment of any loans made by the bank to Kiddie Karousel, Inc. On May 14, 1970, Kiddie Karousel, Inc., executed a promissory note to the bank for $17,000, due on demand, for "operating materials inventory."

Howard D. Huff, the president of the bank, testified that on May 14, 1970, he called Olson Brothers and talked to one of the Olson brothers. He could not recall the exact conversation or which brother he talked to, but he testified that he identified himself as president of the bank and stated that the bank had advanced $17,000 for materials for the manufacture of hydraulic valves, and that the bank would ex-

pect payments, when due, to be made to the bank. Mr. Huff testified that after the telephone conversation he wrote and mailed a letter to Olson Brothers conveying the same information he had given them by telephone. He did not make a copy nor send the letter by certified mail, and did not receive any correspondence or communication from Olson Brothers.

The president of Progressive, Mr. Walter Azaroff, testified that shortly after the contract of March 31, 1970, was signed, he discussed the project with Carroll Olson of Olson Brothers, but could not recall whether he specifically told Olson of the assignment of the contract.

Ted Olson testified that neither of the Olson brothers could remember receiving any telephone call or letter from Mr. Huff. He also denied ever discussing the assignment with the president of Progressive, and stated that he was not even aware that Progressive did business with Security State Bank of Oxford, Nebraska.

During the summer of 1970 there were many disagreements between Progressive and Olson Brothers over the quality of the valves being produced, and a great many, if not the majority, of the valves were returned to Progressive for reworking. Apparently no payments were being made.

On August 14, 1970, an attorney for the bank wrote to Olson Brothers stating: "You are herewith notified that default exists in the performance by Progressive Design, Inc., and Kiddie Karousel, Inc., of the terms and conditions of a certain assignment of your contract with them and that said corporations are now in default on the contract.

"As attorney for the Security State Bank, we earlier demanded direct payment on this contract be made to the bank, and we will expect to hold you liable to the extent that any funds have been or will be paid by you to anyone other than the bank."

The letter was sent by certified mail and Ted Olson signed the receipt. Mr. Olson's testimony was that the letter did not identify any contract and meant nothing to him, and that he made no reply. He also testified that he did not have any conversations with the attorney who wrote the letter.

Mr. Huff, the president of the bank, testified that he called Olson Brothers once on August 25, 1970, and once on September 2, 1970, and told one of the Olson brothers that there was money due on the manufacturing contract, and that Olson told him there probably would not be any proceeds because the valves were defective. Ted Olson denied that either he or his brother ever talked to Mr. Huff on the telephone.

On November 27, 1970, Progressive filed an action in the District Court for Holt County, Nebraska, against Olson Brothers to recover damages for breach of the contract. Neither Kiddie Karousel, Inc., nor Security State Bank of Oxford were made parties to the action. The pleadings contained no reference to either of them, nor to any assignment.

On May 29, 1971, Progressive and Olson Brothers entered into a written agreement settling their dispute over the March 31, 1970, contract and their disputes over several other transactions. The agreement settled and released all present and future claims of either party against the other under the contract of March 31, 1970; provided that Olson Brothers would pay $7,000 to Progressive on the date of execution; and provided that Progressive would dismiss the action then pending in the District Court for Holt County. Olson Brothers paid $7,000 to Progressive by check dated May 29, 1971. Thereafter Progressive dismissed the action against Olson Brothers with prejudice.

On June 1, 1971, the Security State Bank of Oxford filed a petition in intervention alleging the execution of the contract of March 31, 1970, and its assignment.

The petition, as amended, alleged that Olson Brothers was notified of the assignment by telephone and by written correspondence. Olson Brothers moved the court to dismiss the petition in intervention. The grounds were that all issues between Progressive and Olson Brothers raised in the pleadings had been settled and the action dismissed with prejudice; that the original issues were moot; and the petition in intervention raised no issues against the defendant. The District Court for Holt County dismissed the petition in intervention and the bank appealed that dismissal to this court. In Progressive Design, Inc. v. Olson Bros. Manuf. Co., 190 Neb. 208, 206 N. W. 2d 832, this court held that the dismissal of plaintiff's cause of action does not affect an intervening petitioner's right to proceed and obtain a determination of his claim to affirmative relief.

Upon remand, jury trial was waived and trial was had to the court. The evidence outlined above was presented by the intervener Security State Bank of Oxford. At the conclusion of the bank's evidence the District Court held "that the intervenor has failed to make showing of a sufficient notice of the assignment, and the petition in intervention be and is dismissed." The bank has appealed.

The bank contends that adequate notification of the assignment was given, and that the notification reasonably identified the rights assigned, but that even if the notification did not reasonably identify the rights assigned it was, nevertheless, sufficient to put a reasonable man on inquiry, and Olson Brothers should be held to have received actual notification.

The District Court, as fact finder, concluded that the letter of August 14, 1970, was the only notification received by Olson Brothers. That letter referred only to performance by Progressive and Kiddie Karousel, Inc., of the terms of "your contract with them."

At the time Olson Brothers had several contracts with Progressive in addition to the one of March 31, 1970. Some were oral, some were on purchase orders, and some were letter agreements of various dates. These transactions involved machinery components, pipe welding equipment, metal dies, flanges for irrigation pipe components, furnishing of professional services in the design and production of equipment, and fabrication of sundry parts or other devices. Olson Brothers had no contracts or transactions with Kiddie Karousel, Inc. There is no evidence that Olson Brothers knew that Kiddie Karousel, Inc., was a subsidiary of Progressive. Ted Olson did not know that Progressive did business with Security State Bank of Oxford, Nebraska. The letter of August 14, 1970, did not identify the contract by date, or by the type or kind of contract, nor did it refer to the product or services contracted for, nor even the amount of money involved. It did not indicate whether performance or only payment had been assigned.

The District Court not only determined that the letter of August 14, 1970, did not reasonably identify the rights assigned, but specifically found that the letter was not sufficient to put Olson Brothers on inquiry about the assignment. The District Court also made a factual finding that no actual notice was given to Olson Brothers at any time before the petition in intervention was filed. At that time all amounts due under the contract of March 31, 1970, had been paid, and all rights and claims under it settled and released.

Section 9-318, U. C. C., is applicable. Subsection (1) of that section, with exceptions inapplicable here, provides that the rights of an assignee are subject to all the terms of the contract between the account-debtor and assignor and any defense or claim arising therefrom; and any other defense or claim of the account-debtor against the assignor which ac-

crues before the account-debtor received notification of the assignment.

Subsection (3) of section 9-318, U. C. C., provides: "The account debtor is authorized to pay the assignor until the account debtor receives notification that the account has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor."

Comment 5 to section 9-318, U. C. C., states in part: "Subsection (3) requires reasonable identification of the account or contract right assigned and recognizes the right of an account debtor to require reasonable proof of the making of the assignment and to that extent validates such requirements in contracts or purchase order forms. If the notification does not contain such reasonable identification or if such reasonable proof is not furnished on request the account debtor may disregard the assignment and make payment to the assignor."

The assignee of an account receivable has the burden of proving that the account-debtor received notification of the assignment and that the notification reasonably identified the rights assigned. See, § 9-318, U. C. C.; Bank of Salt Lake v. Church of Latter Day Saints, 534 P. 2d 887; People's Finance & Thrift Co. v. Landes, 28 Utah 2d 392, 503 P. 2d 444; Pillsbury Inv. Co. v. Otto, 242 Minn. 432, 65 N. W. 2d 913.

The District Court, as the fact finder here, specifically held that the intervener "failed to make showing of a sufficient notice of assignment." There is evidence in the record to support that determination. Unless this court can say, as a matter of law, that the determination of the trial court was clearly

wrong, that action must be affirmed.

AFFIRMED.

ARNOLD C. JENKS, APPELLANT, V. DOROTHY L. JENKS, APPELLEE.

263 N. W. 2d 469

Filed March 15, 1978. No. 41363.

Divorce: Alimony. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed as modified.

Arnold C. Jenks, pro se.

Philip M. Bowen of Riedmann & Welsh, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

WHITE, C. THOMAS, J.

This is an appeal from a property division and alimony award entered by the District Court. Appellant-husband appeals alleging that the trial court abused its discretion in the property division and in ordering alimony in the amount of $150 per month until the appellee-wife dies or remarries. Appellant also assigns as error the award of attorney's fees in the trial court.

The parties were married in 1948. At the time of the marriage the parties had essentially no property but both had jobs and income. The appellee worked for the Union Pacific Railroad as a clerk and did so for 7 years until the birth of the parties' first child.

The appellant is a real estate agent with his office at the parties' home. Three children, all of whom have become emancipated, were born of the marriage.

The trial court awarded to the appellant the parties' residence, which the court found worth $38,000, less an encumbrance of $7,800. The court further awarded the appellant furniture valued at $2,000, one-half of a certificate of deposit of which appellant's share would be $3,000, and cash in the business account of the appellant of $2,500. Appellee was awarded two rental properties of the total value of $24,000, subject to encumbrances of $2,000. She was further awarded one-half of the interest of the certificate of deposit for $3,000, and furniture valued at $2,000. The court awarded to the parties their own personal effects and clothing. The appellant assigns a value to the appellee's clothing of $10,000 and to his own clothing a value of $1,000 and indicates that the court abused its discretion by not taking into account these values in apportioning the property of the parties. There is no evidence of the value of the clothing other than the value assigned by the appellant himself. We are unable to state that the trial court abused its discretion in disregarding those estimates of value.

The total value of the property awarded appellant was $37,700 while appellee received property valued at $28,500. In addition, the appellee received $14,000 she inherited from her mother shortly before the separation and dissolution.

After the hearing on the dissolution, the appellant was still engaged in the real estate business. Appellant's approximate income from his business as a real estate agent was $12,580 in 1971, $14,590 in 1972, $6,000 in 1973, and $3,700 in 1975. It is to be noted the appellant's office was in the parties' residence and considerable portions of the normal household expenses were deducted from the income tax return. Appellant also claimed as an expense the rental cost

of a Toronado automobile in excess of $200 per month. Prior to the dissolution, the parties had two income-producing properties, both of which were awarded to the appellee. The appellant has no income-producing property save and except the amount of $3,000, one-half of the certificate of deposit. Appellee is employed at the Westroads Bank at a gross salary of $490 per month and works part time at Hovland-Swanson's at approximately $130 to $140 per month. She has the income from $14,000 inherited from her mother, $3,000 savings certificate, and the income from the two houses awarded her.

Section 42-365, R. S. Supp., 1976, provides in part: "When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, * * * and the ability of the supported party to engage in gainful employment * * *."

In Brown v. Brown, 199 Neb. 394, 259 N. W. 2d 24, this court awarded, in a marriage of 12½ years and to which two children were born, both minors at the time of the dissolution, alimony of $200 per month for a period of 5 years and $100 per month for the 5-year period thereafter. The average income of the husband for the last 3 years prior to the dissolution was $24,000. Based on any standard inferable from that case, the award of the court in this case appears to be generous. Here, the appellant, with an income substantially less than the petitioner in Brown, was ordered to pay $150 per month until appellee dies or remarries. We agree that the division of property was not patently unfair and will not be disturbed in this court on appeal. However, considering the circumstances of the parties and their relative earning capacities as well as the fact that each appears to be in good health, we feel the amount of alimony awarded by the court was an abuse of discretion.

The appellant is hereby ordered to pay the appellee alimony in the amount of $1 annually until she dies or is remarried. The attorney's fee of $500 allowed appellee in the trial court was within the trial court's discretion and is approved. Counsel for appellee is allowed a fee of $250 in this court.

AFFIRMED AS MODIFIED.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNCIPAL EMPLOYEES, AFL-CIO, APPELLEE, v. COUNTY OF LANCASTER, NEBRASKA, APPELLANT.

263 N. W. 2d 471

Filed March 15, 1978. No. 41373.

1. **Statutes.** Repeals by implication are not favored.
2. _____. A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable.
3. _____. A legislative act which is complete in itself, and is repugnant to or in conflict with a prior law, repeals the prior law by implication but only to the extent of the repugnancy or conflict.
4. **Statutes: Counties: Administrative Law: Court of Industrial Relations.** Sections 23-2517 to 23-2533, R. R. S. 1943, relating to personnel administration in counties having a population of 150,000 to 300,000 inhabitants, did not repeal the Court of Industrial Relations Act except to the extent the acts are in conflict.
5. **Statutes: Counties: Administrative Law: Collective Bargaining.** The board of county commissioners in such counties is required to bargain with its employees on all matters relating to employment except those which are covered by specific provisions of sections 23-2517 to 23-2533, R. R. S. 1943.

Appeal from the Nebraska Court of Industrial Relations. Affirmed.

Michael G. Heavican, and William A. Harding of Nelson, Harding & Yeutter, for appellant.

John B. Ashford of Bradford & Coenen, for appellee.

Steven D. Burns, for amicus curiae.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

BOSLAUGH, J.

The American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) is the bargaining agent for the employees of Lancaster County, Nebraska. It commenced this proceeding in the Court of Industrial Relations to obtain an order compelling the defendant County of Lancaster, Nebraska, to bargain with the plaintiff concerning wages, hours, terms, and conditions of employment for employees of the county. The amended petition alleged that 11 negotiating sessions had been held between February 11, 1975, and June 25, 1975, but that the county had refused to bargain on the ground that the civil service statute applicable to Lancaster County, sections 23-2517 to 23-2533, R. R. S. 1943, prevented it from bargaining on matters referred to in the statute.

The case was submitted upon a stipulation of facts in which the parties agreed the basic dispute was over what was negotiable.

The Court of Industrial Relations found that an industrial dispute existed between the parties. The court held, one judge dissenting, that the Court of Industrial Relations Act and the civil service statute applicable to the county should be construed together, and that the parties should be required to bargain on all matters except selection of employees on merit and promotion of employees on merit. The court ordered the parties to complete bargaining within 30 days or bring the dispute to the court for resolution. The county has appealed.

The civil service act was passed in 1974, approximately 5 years after the 1969 amendments to the Court of Industrial Relations Act which authorized public employers to negotiate collectively with their

employees. The county's principal contention is that the civil service act substantially repealed the Court of Industrial Relations Act by implication so far as Lancaster County is concerned.

Repeals by implication are not favored. A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. A construction of a statute which, in effect, repeals another statute, will not be adopted unless such construction is made necessary by the evident intent of the Legislature. City of Grand Island v. County of Hall, 196 Neb. 282, 242 N. W. 2d 858.

A legislative act which is complete in itself, and is repugnant to or in conflict with a prior law, repeals the prior law by implication but only to the extent of the repugnancy or conflict. State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N. W. 2d 63.

The basic issue in this case is, to what extent, if any, the civil service act repealed the provisions of the Court of Industrial Relations Act. The resolution of this issue requires an analysis and interpretation of the civil service act.

The civil service act, which is applicable to Lancaster County, Nebraska, sections 23-2517 to 23-2533, R. R. S. 1943, establishes a system of personnel administration for the county government. All appointments and promotions made under the act are to be based on merit and fitness.

The act creates a personnel office in the office of the board of county commissioners, with a county personnel officer as its executive head. A personnel policy board of 5 members is established which reviews and makes recommendations to the board of county commissioners on personnel rules and regulations. The policy board also reviews any grievance or case of disciplinary action which is appealed to it by any employee in the classified service.

Two advisory groups, one of classified employees and one of department heads, are created to assist the county personnel officer in preparing proposed personnel rules and regulations for submission to the policy board. The personnel rules and regulations are to provide generally for all matters relating to county employees in the classified service, including a classification plan, a compensation plan, and competitive examinations for appointment and promotion of employees.

The effect of the civil service act is to transfer the control of county employees from the various independent county officers to the board of county commissioners. The county board exercises control through the personnel rules and regulations which it adopts. The policy board is an advisory body only, except in regard to grievance and disciplinary matters. On matters relating to compensation and working conditions, the county board generally may adopt whatever rules it chooses. On matters relating to the appointment and promotion of employees, it is bound by the provisions of the act.

Among the topics included in the package bargaining agreement which was presented by the plaintiff to the defendant were the following: Hours of work, work breaks, holidays, vacations, sick leave, leaves of absence, unpaid leaves of absence, insurance, wages, minimum time payments, overtime, transfers, lay-off and recall, uniforms and protective clothing, severance pay, work rules, and longevity pay. There is nothing in the civil service act which prohibited the county board from bargaining with its employees in regard to these topics. There were other topics included in the package bargaining agreement which were controlled by the civil service act to some extent, such as promotions, discipline, grievance procedure, nondiscrimination, and termination. To the extent that the civil service act contains specific and mandatory provisions relating

to such matters, the county board is not free to bargain. As an example, the act provides all appointments and promotions shall be based on merit and fitness. The county board has no power or authority to bargain or agree that any appointment or promotion shall be based upon anything other than merit and fitness except as provided in the act.

In a case involving somewhat similar issues the Supreme Court of Pennsylvania stated as follows: "The mere fact that a particular subject matter may be covered by legislation does not remove it from collective bargaining under section 701 if it bears on the question of wages, hours and conditions of employment. We believe that section 703 only prevents the agreement to and implementation of any term which would be in violation of or inconsistent with any statutory directive." Pennsylvania Lab. Rel. Bd. v. State Col. A. School Dist., 461 Pa. 494, 337 A. 2d 262. See, also, Sutherlin Ed. Assn. v. Sutherlin School Dist. No. 30, 25 Ore. App. 85, 548 P. 2d 204; Board of Education v. Associated Teachers, 30 N. Y. 2d 122, 331 N. Y. S. 2d 17.

The defendant had no right to refuse to bargain on all the topics contained in the package bargaining agreement which are referred to in sections 23-2517 to 23-2533, R. R. S. 1943, although it may not have been required or permitted to bargain upon some of the topics. Upon the present state of the record it is impossible to do more than generalize in regard to the particular matters that are subject to negotiation.

The order of the Court of Industrial Relations directing the parties to proceed with bargaining was correct and is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent because I believe the majority opinion incorrectly interprets the intent and purpose of the county civil service act. While repeals

by implication are not favored, a statute will be considered repealed by implication if the repugnancy between the new provisions and the former statute is plain and unavoidable. State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N. W. 2d 63 (1962). That is the situation which exists herein.

A brief review of some of the provisions of sections 23-2517 to 23-2533, R. R. S. 1943, should be sufficient to demonstrate this point.

Section 23-2517, R. R. S. 1943, describes the purpose of the act and says that it shall include policies and procedures for "salary administration, fringe benefits, discharge and other related activities."

Section 23-2525, R. R. S. 1943, describes the method of establishing rules and regulations and says such rules and regulations shall, *inter alia,* provide: "(2) For a compensation plan for all employees in the classified service, comprising salary schedules, hours of work, premium payments, special allowances, and fringe benefits, considering the amount of money available, the prevailing rates of pay in government and private employment, the cost of living, the level of each class of position in the classification plan, and other relevant factors. Initial, intervening, and maximum rates of pay for each class shall be established to provide for steps in salary advancement without change of duty in recognition of demonstrated quality and length of service. * * *

"(15) For establishment of a plan for resolving employee grievances and complaints;

"(16) For hours of work, holidays and attendance regulations in the various classes of positions in the classified service, and for annual, sick and special leaves of absence, with or without pay, or at reduced pay."

The majority opinion renders this language meaningless and effectively reads it out of the statute. I must assume the Legislature, in passing these provisions for counties in the classification of 150,000 to

300,000 population, knew what it was doing. I can only assume it specifically wished to give counties in that classification control over the matters specifically enumerated.

This is well stated by Judge Kratz who dissented from the opinion of the Court of Industrial Relations: "If the Nebraska legislature intended the Court of Industrial Relations Act and the Lancaster County civil service law to work together and in harmony, they should have given the administrators of the law a less (sic) limited function, related mostly to just recruitment, promotion, transfer, and discharge. *(This is what our opinion does.)* They didn't do this. Instead, they authorized rules and regulations for 'a compensation plan for all employees', 'salary schedules', 'rates of pay', 'hours of work,', 'grievances', and 'fringe benefits.' These items constitute wages and conditions, and they were authorized by statute subsequent to the enactment of the law which authorized public employees to bargain for wages and conditions.

"If we now say that application of the civil service law in Lancaster County doesn't include salaries, hours of work, grievances and fringe benefits, we have rendered those words meaningless in this newly enacted law. I am of the opinion that we cannot do this. If the Legislature had wanted to leave salaries, hours of work, and fringe benefits exclusively to collective bargaining, they should not have included them in LB 996.

"Apparently there has been a recent realization of the need for limitation in merit system statutes, but attempts to restrict the application of merit benefits, where benefits have been received through collective bargaining, have failed in both the 1974 (LB 907) and 1975 (LB 229) sessions of the Legislature."

In affirming the majority opinion by two members of the Court of Industrial Relations, this court has

permitted them to do what the Legislature itself on two occasions has refused to do.

I am in violent disagreement with reading these provisions out of the law. The parties should be bound in their negotiations by the statutory duties outlined in sections 23-2517 to 23-2533, R. R. S. 1943, and where the authority granted under those statutes conflicts with the authorization of the Court of Industrial Relations Act, the former should prevail.

ESTHER M. FARMER, APPELLEE, V. JOHN R. FARMER, APPELLANT.

263 N. W. 2d 664

Filed March 15, 1978. No. 41385.

1. **Divorce: Trial: Appeal and Error.** In a divorce action, the case is to be tried de novo upon the issues presented on appeal. The court in reaching its own finding, however, will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.
2. **Paternity: Evidence.** Only a preponderance of the evidence is necessary to sustain a finding of paternity in Nebraska.

Appeal from the District Court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Wilbur C. Smith and Eileen A. Hansen, for appellant.

Terry A. Davis, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

WHITE, C. J.

This is an action for modification of a divorce decree entered on January 29, 1976, which contained the following provisions relevant to this appeal:

"IT IS FURTHER ORDERED that there has been

born to Petitioner and Respondent, as a result of this marriage, one child, namely, Vicki Jonnette, born June 14, 1970; that the Petitioner is a fit and proper person to have the care, custody and control of the minor child of the parties; and that the Respondent should pay over and to the Petitioner, for the support and maintenance of said minor child, by and through the Clerk of the District Court of Douglas County, the sum of $30.00 per week, commencing and payable in the sum of $30.00 on the date of this Decree and like payments each and every week thereafter to continue until said child shall either reach the age of her majority, marry, or become emancipated, whichever shall come first. * * *

"IT IS FURTHER ORDERED that the Petitioner shall become solely responsible and assume payment of all indebtedness of the parties, including [specific debts listed]." (Emphasis supplied.)

The petitioner filed an application for modification of the decree alleging that petitioner's name was inadvertently typed in place of respondent's as the party responsible for the indebtedness of the parties and seeking a correction thereof. Respondent filed various applications and motions contesting the implied finding of paternity in the decree, and seeking to have those portions of the decree impliedly finding him to be the father of Vicki Jonnette and requiring him to pay child support stricken.

On March 29, 1977, the District Court denied respondent's application and motion and changed "petitioner" to "respondent" in the decree, as requested by petitioner, nunc pro tunc as of January 29, 1976, to correct an error of the court, through oversight. The respondent has appealed. We affirm the judgment of the District Court.

Vicki Jonnette was born on June 14, 1970. The parties were married on January 26, 1972. The respondent contends on appeal that the District Court was without jurisdiction to determine the paternity

of Vicki Jonnette in this divorce proceeding. He also argues that since the child was born in 1970, and no paternity action had been brought against him within the time provided under section 13-111, R. R. S. 1943, that section 13-111, R. R. S. 1943, bars any determination of paternity in this action.

Section 42-351, R. R. S. 1943, provides in part: "In proceedings under sections 42-347 to 42-379, the court shall have jurisdiction to inquire into such matters, make such investigations, and render such judgments and make such orders, both temporary and final, as are appropriate concerning the status of the marriage, the custody and support of minor children * * *."

Section 42-364, R. S. Supp., 1976, provides in part: "When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified * * *."

Section 42-377, R. R. S. 1943, states: "Children born to the parties, or to the wife, in a marriage relationship which may be dissolved or annulled pursuant to sections 42-347 to 42-379, shall be legitimate unless otherwise decreed by the court, and in every case the legitimacy of all children conceived before the commencement of the suit shall be presumed until the contrary is shown."

The above-quoted statutes give the District Court complete jurisdiction over the custody, support, and welfare of all minor children who are touched upon by the divorce proceedings and all related issues. Section 13-109, R. R. S. 1943, provides that a child born out of wedlock is legitimate if the parents of that child subsequently marry. Sections 28-446 to 28-446.03, R. R. S. 1943, provide that a stepparent, during the period he is ceremonially married to the natural or adoptive parent of a minor child, is both civilly and criminally liable for the support of stepchildren.

As can be seen from the above statutory scheme, if respondent is the father of Vicki then she was legitimatized by his marriage to the petitioner. If he is not her father, then as a stepparent, having not adopted Vicki, he can only be compelled to provide for her support while ceremonially married to the petitioner, and not thereafter. It is obvious that the issue of paternity will touch upon and affect Vicki's support and her future welfare. Accordingly, we hold that, under the circumstances of this case, the District Court had jurisdiction to determine whether or not respondent was the natural father of Vicki. See Timmerman v. Timmerman, 163 Neb. 704, 81 N. W. 2d 135 (1957).

The respondent's contention that a determination he is the father of Vicki is barred by the statute of limitations provided for in section 13-111, R. R. S. 1943, is without merit. Section 13-111, R. R. S. 1943, relates specifically to actions to establish paternity brought pursuant to sections 13-106 to 13-113, R. R. S. 1943. Such an action is not involved here, but rather a determination of paternity incidental to a divorce action.

Holding as we do, that the District Court had jurisdiction to determine whether or not respondent is the natural father of Vicki, we next review the record to see if the court's determination that the respondent is the natural father of Vicki is supported by the evidence.

In a divorce action, the case is to be tried de novo upon the issues presented on appeal. The court in reaching its own finding, however, will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Schuller v. Schuller, 191 Neb. 266, 214 N. W. 2d 617 (1974). Only a preponderance of the evidence is necessary to sustain a finding of paternity in Nebraska. Snay v. Snarr, 195 Neb. 375, 238 N. W. 2d 234 (1976).

In his pleadings, the respondent specifically denied that he was the father of any of petitioner's children. He testified that he had never lived with the petitioner prior to their marriage in 1972, nor had he had any sexual relations with the petitioner prior to the birth of Vicki in 1970. In his testimony he denied that he was Vicki's father and stated, that outside the time he was her stepfather, he had never accepted being the father of this child.

Introduced into evidence was an insurance policy from the National Life and Accident Insurance Company dated August 8, 1973. The respondent admitted that he had signed the application dated July 19, 1973, for this policy listing as beneficiaries Carla Brown, Lorrie Brown, and Vicki Farmer. The respondent testified that he had merely signed the application and that the agent filled it out. He testified that he did not know why Vicki was listed with his last name and the petitioner's other two children were not. The respondent admitted that he told Vicki he was her father but stated that he told all the petitioner's children the same, and only during the course of the marriage.

The consent decree was entered on January 29, 1976, and contained the provision regarding Vicki and her support quoted at the onset of this opinion. While the language of this provision may not be absolutely precise, it leaves a clear impression of an implicit finding that the respondent is Vicki's father. It is undisputed that Vicki was born June 14, 1970, and that the parties were ceremonially married about a year and a half later on January 26, 1972. The court categorically found that "there has been born to Petitioner and Respondent, * * * one child, namely, Vicki Jonnette, born June 14, 1970; * * *." It is apparent from the decree that the court intended the clause "as a result of this marriage" to mean "as a result of their union." The use of the term "marriage" instead of the word "union" which

was obviously intended, cannot form the basis of a substantive argument that Vicki is not the child of the respondent. To so hold would create a paradoxical absurdity out of the plain intent of the decree, its language, and the evidence in this case. Further, this decree was approved as to form and content by the respondent's attorney. The respondent admitted that he read the decree, received a signed copy of it, and knew it provided for the payment of child support. After the entry of the decree, the respondent made child support payments for Vicki.

Petitioner admitted that prior to going to the hospital for the birth of Vicki, she told her caseworker that a Nathaniel Williams was the father of the child. She testified that she did this because at the time the respondent was divorcing his then wife, adultery was being alleged, and she did not want to be dragged into this. On March 28, 1975, the petitioner went to the Douglas County welfare office to initiate an application for child support on behalf of Vicki. In connection therewith, she signed a document which names Nathaniel Williams as the father of the child.

The petitioner testified that she started dating the respondent in January 1968, and that she lived with him prior to their marriage. She identified the respondent as Vicki's father and stated that he was the only man she had sexual relations with between the time she met him and Vicki's birth. She testified that the respondent went to the hospital when Vicki was born. The petitioner stated that she had inquired about having Vicki's name changed to Farmer on her birth certificate but had not done it at the time of the trial.

Based upon our de novo review of the record, we conclude and find that, by a preponderance of the evidence, respondent is the natural father of the petitioner's child, Vicki Jonnette.

The respondent's final contention is that the Dis-

trict Court erred by changing the decree of January 29, 1976, as requested by the petitioner, by a nunc pro tunc order. The respondent does not dispute the substantive change but takes exception solely to the form by which it was accomplished, contending that a modification should have been made.

The purpose of a nunc pro tunc order is to correct the record which has been made so that it will truly record the action really had, but which through some inadvertence or mistake has not been truly recorded. O'Grady v. Volcheck, 148 Neb. 431, 27 N. W. 2d 689 (1947). The District Court corrected the decree in the proper manner. There is no merit to the respondent's objection.

The decree of the District Court is correct in all respects and is affirmed.

AFFIRMED.

RICHARD HALSTEAD, APPELLANT, V. FARMERS IRRIGATION DISTRICT, APPELLEE.

263 N. W. 2d 475

Filed March 15, 1978. No. 41389.

1. **Waters: Statutes: Constitutional Law: Negligence.** An irrigation district organized under Chapter 46, R. R. S. 1943, is liable for seepage damage under Article I, section 21, of the Constitution of Nebraska, without regard to negligence.
2. **Waters: Case Overruled.** Spurrier v. Mitchell Irr. Dist., 119 Neb. 401, 229 N. W. 273, overruled.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded.

Nichols, Meister & Winner, for appellant.

Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH,

McCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

BOSLAUGH, J.

The plaintiff is a lessee of farm land in Scotts Bluff County, Nebraska. He brought this action to recover damages for a portion of his crops which were destroyed in 1973 and 1974 by seepage from an irrigation canal owned and maintained by the defendant irrigation district.

A general demurrer filed by the defendant was sustained. The plaintiff elected to stand on his petition and the action was dismissed. The plaintiff has appealed.

The defendant district was organized under Chapter 46 of the Nebraska statutes. Although it is not shown by the pleadings, the plaintiff admits that the land which he leased was located within the boundaries of the defendant district. The question presented is whether the defendant is liable for seepage damage to land within its boundaries in the absence of negligence.

In Hooker v. Farmers Irr. Dist., 272 F. 600, decided in 1921, the United States Court of Appeals held that an irrigation district in Nebraska was liable for seepage damage under Article I, section 21, of the Constitution of Nebraska.

In Spurrier v. Mitchell Irr. Dist., 119 Neb. 401, 229 N. W. 273, decided in 1930, this court held that the owner of an irrigation ditch or canal was not liable to any one whose land was injured by seepage from the ditch or canal, not intentionally caused, unless the owner was negligent in the construction or operation of the works. The court specifically rejected a contention that the district was liable for seepage damage under Article I, section 21, of the Constitution of Nebraska. The constitutional provision prohibits the taking or damaging of private property for public use without just compensation.

The Spurrier case was followed in Livanis v. Northport Irr. Dist., 121 Neb. 777, 238 N. W. 757, and Omaha Life Ins. Co. v. Gering & Ft. Laramie Irr. Dist., 123 Neb. 761, 244 N. W. 296.

In the Omaha Life Ins. Co. case the court noted that the petition for the organization of the irrigation district had been signed by the person who had owned the land at the time the district was organized. The court stated that this gave rise to a contractual relationship with the district which resulted in the landowner being limited to the statutory remedy which was the right to have the land drained by the district on demand. See § 46-156 (2), R. R. S. 1943.

In Snyder v. Platte Valley P. P. & Irr. Dist., 144 Neb. 308, 13 N. W. 2d 160, the plaintiff sought to recover damages from the defendant district for negligence in the construction of a flume on its right-of-way. This court pointed out that without regard to whether the defendant was negligent, the plaintiff could recover under Article I, section 21, of the Constitution, citing Gledhill v. State, 123 Neb. 726, 243 N. W. 909. The court then noted that the Spurrier case was in conflict with the Gledhill case and stated: "An interesting statement with cited authorities in opposition to the holding in Spurrier v. Mitchell Irrigation District, supra, is found in the dissenting opinion in that case. In the view now taken we feel obliged, in the respect herein under consideration, to overrule the holding in that case."

In a later case, Halligan v. Elander, 147 Neb. 709, 25 N. W. 2d 13, the Snyder case was interpreted to mean that the Spurrier case had been overruled only insofar as it applied to public power and irrigation districts organized under Chapter 70, R. R. S. 1943.

It should be noted that public power and public power and irrigation districts organized under Chapter 70 had always been liable for seepage damage without regard to negligence and this liability had

been clearly established prior to the decision in the Snyder case. § 70-671, R. R. S. 1943; Applegate v. Platte Valley P. P. & Irr. Dist., 136 Neb. 280, 285 N. W. 585; Asche v. Loup River P. P. Dist., 138 Neb. 890, 296 N. W. 439; Heiden v. Loup River P. P. Dist., 139 Neb. 754, 298 N. W. 736; Luchsinger v. Loup River P. P. Dist., 140 Neb. 179, 299 N. W. 549.

In Baum v. County of Scotts Bluff, 169 Neb. 816, 101 N. W. 2d 455, a Chapter 46 irrigation district was held to be liable under Article I, section 21, of the Constitution, for damage caused by floodwaters resulting from a structure placed in a drainage ditch of the district. Among cases cited in support of this holding was the Snyder case.

Among the authorities cited in the Spurrier case was a California decision. It now appears that California follows the rule that an irrigation district which is maintained for distribution of water for public use is liable for seepage damage without regard to negligence. In Ketcham v. Modesto Irr. Dist., 135 Cal. App. 180, 26 P. 2d 876, the court said after discussing the rule of liability based on negligence: "The foregoing rule, however, is not applicable to the facts of the present case for the reason that the defendants are both irrigation districts which are maintained for the distribution of water for public use. The damaging of private land by the seeping of water from the reservoir or canals of an irrigation district which are constructed and maintained to supply water for public use, may not occur, under the inhibition of article 1, § 14, of the Constitution of California, without making just compensation therefor. It has been held this obligation is imposed upon one who takes or damages private property for public use, regardless of whether the acts complained of are the result of negligence. Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 568, 200 P. 814, 818. In the order of the Supreme Court denying a hearing in the case last cited, after

a decision had been rendered therein by the District Court of Appeal, the court said: 'In so far as the opinion of the District Court of Appeal appears to indicate that the plaintiffs cannot recover damages for the injury to their land unless it appears that the flooding thereof which caused the injury was the proximate result of the negligence of the defendant in the construction and maintenance of its canal, we disapprove the same. The canal is constructed for public purposes and to serve the purpose of distribution of water to public use. Apparently the damage to the plaintiffs is caused directly by seepage of water carried in said canal through the intervening soil onto the adjoining land of the plaintiffs. In such cases the plaintiff is secured a right to damages by the constitutional provision that private property shall not be damaged for public use. Article 1, § 14. In such cases the care that may be taken in the construction of the public improvement which causes the damage is wholly immaterial to the right of the plaintiff to recover damage, if the improvement causes it. This was expressly decided in Reardon v. San Francisco, 66 Cal. 505, 56 Am. Rep. 109, 6 P. 317, and Eachus v. Los Angeles, 103 Cal. 614, 42 Am. St. Rep. 149, 37 P. 750.' " See, also, Middelkamp v. Bessemer Irrigating Co., 46 Colo. 102, 103 P. 280; Maricopa County Municipal Water Cons. Dist. No. 1 v. Warford, 69 Ariz. 1, 206 P. 2d 1168.

After reviewing the previous decisions of this court, we are convinced that the decision in the Spurrier case was wrong and should be overruled.

The plaintiff's right to damages is grounded upon the provisions of Article I, section 21, of the Constitution of Nebraska, and it is a right which the Legislature could not destroy. A theory that every landowner within such an irrigation district has knowingly and intentionally waived his constitutional right to damages is unrealistic.

We hold that irrigation districts organized under

Chapter 46 of the Nebraska statutes are liable for seepage damages under Article I, section 21, of the Constituion of Nebraska, without regard to negligence.

The judgment of the District Court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

ARTHUR L. BOULTS, APPELLANT, V. KENNETH W. CHURCH ET AL, APPELLEES.

263 N. W. 2d 478

Filed March 15, 1978. No. 41453.

1. **Workmen's Compensation.** Generally, permanent total disability can only be held to exist where the workman is unable to get, hold, or do any substantial amount of remunerative work, either in his previous occupation or in any other established field of employment for which he is fitted.
2. _____. Whether or not the plaintiff is totally and permanently disabled, and is entitled to recieve the maximum allowable benefits, is a question of fact.
3. _____. The findings of fact made by the Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case.
4. **Workmen's Compensation: Appeal and Error.** The findings of fact made by the Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong.
5. _____. _____. In testing the sufficiency of evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Robert G. Decker and Mino St. Lucas, for appellant.

Joe P. Cashen and John K. Green of Kennedy, Holland, DeLacy & Svoboda, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. J.

This is a workmen's compensation case. The plaintiff sought a determination that he was entitled to continued disability benefits claimed due by reason of his alleged total disability as the result of an accident arising out of and in the scope of his employment. On December 8, 1976, the single judge Workmen's Compensation Court entered an order granting the plaintiff continued disability benefits. On April 14, 1977, the three-judge Workmen's Compensation Court on rehearing found that the plaintiff failed to prove he was totally and permanently disabled. The plaintiff has appealed. We affirm the judgment of the Workmen's Compensation Court.

That the plaintiff's injury arose out of and in the scope of his employment is undisputed; nor does the record disclose any unpaid medical or hospital expenses. The sole issue on appeal is the correctness of the Workmen's Compensation Court's finding that the plaintiff failed to prove he was totally and permanently disabled. The plaintiff has received a total of 300 weeks temporary total disability benefits. If the plaintiff is not totally and permanently disabled, then he has received the maximum compensation benefits allowable for less than permanent total disability. § 48-121, R. R. S. 1943.

Where an employee is totally unable to perform the duties of former employment or work of like nature, he is entitled to recover for permanent total disability. Tilghman v. Mills, 169 Neb. 665, 100 N. W. 2d 739 (1960). Permanent total disability can only be held to exist where the workman is unable to get, hold, or do any substantial amount of remunerative work, either in his previous occupation or in any other established field of employment for which he

is fitted. Elliott v. Gooch Feed Mill Co., 147 Neb. 612, 24 N. W. 2d 561 (1946).

Whether or not the plaintiff is totally and permanently disabled, and is entitled to receive the maximum allowable benefits, is a question of fact. Section 48-185, R. S. Supp., 1976, provides that, "The findings of fact made by the Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case."

At the time of the hearings, the plaintiff was 33 years old. The plaintiff started construction work when he was 18 years old. The plaintiff testified that in his occupation as a construction worker, he had mixed mortar, carried bricks and blocks, handled 16- to 20-foot planks to build scaffolds, and dug footings. He had climbed scaffolds and used a wheelbarrow. In brick laying he would handle concrete blocks weighing 40 to 60 pounds each and he stated it was not uncommon to lay 200 to 300 of these blocks per day. Occasionally larger blocks weighing 500 pounds had to be moved and placed by hand. The plaintiff further testified that his work involved reaching, climbing stairs, and working on uneven ground or surfaces.

The plaintiff testified he had worked off and on for the defendant for a period of 9 to 10 years before the accident. While employed by the defendant, he became interested in becoming a bricklayer and started in an apprenticeship program and went to school. On the date of the accident, September 19, 1970, he was employed by the defendant as an apprentice bricklayer earning $4.825 per hour.

Following the accident, the plaintiff felt pain in his lower back. He was hospitalized and underwent surgery. He did not improve. Another operation was recommended but the plaintiff chose not to have it. This decision was considered a reasonable one.

The plaintiff described himself as a rather strong individual before the accident. He stated that prior

to September 19, 1970, he had not been injured. The plaintiff testified that since his injury he lifted very little, sometimes had difficulty driving a car, and used to swim but had not been swimming since his accident. The plaintiff testified that on some days he has to soak in water and cannot get out of bed without help. He stated that his wife would sometimes have to help him get out of bed and dress. He testified he sometimes has leg cramps and trouble walking. The plaintiff testified that he attempted to return to do the same work but could not do the work. He testified he had attempted rehabilitation, but that nothing had happened. Ted Kisicki, business agent for the bricklayers' union, testified jobs are difficult to get for members with physical impairments.

Reports from two physicians were introduced into evidence. Dr. Louis F. Tribulato, in reports dated February 28, 1972, and January 22, 1975, concluded that the plaintiff is totally disabled. Dr. Bernard L. Kratochvil, in reports dated November 21, 1974, and February 12, 1976, gave the plaintiff a 15 percent permanent partial disability rating. In a report dated January 3, 1975, Dr. Kratochvil stated, in his opinion, the plaintiff "could do work that does not require excessive bending, weight bearing, or lifting."

Roger Helle, a Pinkerton detective hired by the defendant, testified he had observed the plaintiff swimming, racing short distances, diving or jumping from a diving board, engaging in water horseplay, and shopping for and climbing in and out of used cars. He testified he observed the plaintiff lifting, placing, and removing bicycles from the trunk of a car, removing a spare tire, placing it in the back seat of a car, and subsequently tossing the spare into the trunk of a vehicle he was operating. Mr. Helle stated that he observed nothing which appeared to cause the plaintiff's actions to be restrictive in any manner.

In Hyatt v. Kay Windsor, Inc., 198 Neb. 580, 254 N. W. 2d 92 (1977), we held that " * * * the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong."

In testing the sufficiency of evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom. Salinas v. Cyprus Industrial Minerals Co., 197 Neb. 198, 247 N. W. 2d 451 (1976).

We cannot say that the finding of the Workmen's Compensation Court is clearly wrong. There is sufficient evidence to support its conclusion.

The judgment of the Workmen's Compensation Court is correct and is affirmed.

AFFIRMED.

WHITE, C. THOMAS, J., dissenting.

Even under the more limited standard with which we now review the decisions of the Workmen's Compensation Court, I cannot agree with the majority that the finding of that court is not clearly wrong.

An analysis of the evidence when measured by the applicable standard of what constitutes permanent total disability reveals there is no material evidence to support the defendants' position that the plaintiff is not entitled to recovery. As the majority states, where an employee is totally unable to perform the duties of former employment or work of like nature, he is entitled to recover for permanent total disability. See Tilghman v. Mills, 169 Neb. 665, 100 N. W. 2d 739. Plaintiff was employed as an apprentice bricklayer at the time of injury. An official of the bricklayers' union, who had been a bricklayer almost 20 years prior to becoming a union official, testified that bricklaying is "heavy type work" and

a "job where you must be able to bend over constantly and lift constantly." The official also testified that the lifting involves concrete blocks and tile units of various weights, some over 40 pounds. The plaintiff testified that he lifted blocks of 60 pounds or more in the course of his employment and, on occasion, handled 200 to 300 blocks a day. Plaintiff was 27 years old at the time of the accident; he began working at 18 and the only work he has done is construction work and hooking logs in a paper mill.

The reports of two physicians were in evidence. Dr. Louis F. Tribulato determined the plaintiff is totally disabled. Dr. Bernard L. Kratochvil gave the plaintiff a 15 percent permanent partial disability rating and said plaintiff "could do work that does not require excessive bending, weight bearing, or lifting." Admittedly Dr. Kratochvil's testimony is not as conclusive in nature as is Dr. Tribulato's, in relation to plaintiff's claim. Dr. Kratochvil's report does not relate his opinion to plaintiff's former occupation. He did not testify that plaintiff could perform the usual and normal tasks required of a bricklayer.

Dr. Kratochvil's testimony does not refute Dr. Tribulato's opinion. It simply avoids the issue. The evidence does not damage plaintiff's claim or support defendants' contention.

In a letter to the plaintiff of June 11, 1976, Otto K. Link, a rehabilitation counselor, stated that: "In view of the nature and severity of your disability at this time, it does not appear that there is a likelihood or reasonable expectation that through vocational rehabilitation services you will be able to engage in a gainful occupation." Plaintiff had been unsuccessful in finding employment through vocational rehabilitation, but testified he was receptive to the idea that he try to utilize this program in the future.

Defendants called a Pinkerton detective who conducted a 1-day surveillance of the plaintiff on July

29, 1975. The detective made another surveillance, but no report of this was in evidence. The detective testified he observed plaintiff swimming and lifting a spare tire and bicycle from the trunk of a car. The bicycle was estimated to weigh between 15 and 20 pounds.

Even if we resolve the truth of this evidence in favor of the defendants, and afford them every reasonable inference, this evidence fails any test of sufficiency because it is immaterial to the issue to be resolved. The issue is whether the plaintiff has suffered a permanent total disability. We have stated such a condition exists when an employee can no longer perform the duties of former employment or work of like nature. The fact that an individual swims is not synonymous with the capability to perform sustained lifting, bending, and climbing. Plaintiff here had suffered a back injury. Swimming can be therapeutic to such ailments. The random incidents of lifting a bicycle weighing 15 to 20 pounds and a spare tire cannot be compared to continuous lifting of heavy objects such as concrete blocks. Plaintiff had testified the intensity of the pain varies and is more severe on some days than others. Correspondingly, his activity reflects his state of discomfort. On some days he is unable to get out of bed and cannot attend to even routine activities without assistance. On other days, it may be assumed he engages in moderate activity, including some lifting. It is interesting to note that the compensation court's order recited: " * * * the Court feels that defendants' evidence showing the plaintiff was able to swim, jump or dive from a diving board and remove a spare tire from the trunk of a Cadillac is sufficiently persuasive to show that the plaintiff's disability is not total and permanent." However, permanent total disability does not mean a state of absolute helplessness. See Elliott v. Gooch Feed Mill Co., 147 Neb. 612, 24 N. W. 2d 561. No evidence,

expert or otherwise, supports the compensation court's view that these activities indicate plaintiff can perform his duties as a bricklayer.

Here, the plaintiff has supported his claim of permanent total disability with an orthopedic specialist's conclusion that he is totally disabled. Defendants have failed to produce any material evidence to refute this. Therefore, I would reverse the judgment of the compensation court on rehearing and reinstate the judgment on hearing, allowing plaintiff to recover for permanent total disability.

CLINTON, J., joins in this dissent.

NORRIS FAUSS, DOING BUSINESS AS NATIONAL FOODS COMPANY, APPELLEE, V. DONNA F. MESSERLY, APPELLEE, IMPLEADED WITH GERALD E. CHIZEK, COMMISSIONER OF LABOR, APPELLANT.

263 N. W. 2d 668

Filed March 15, 1978. No. 41491.

Administrative Law: Due Process. Due process of law requires notice and an opportunity to be heard, as a matter of right and not by the let or leave of administrative officers or agencies, when the rights, duties, or privileges of interested parties are involved by an exercise of quasi-judicial power pursuant to the terms of a statute.

Appeal from the District Court for Madison County: EUGENE C. MCFADDEN, Judge. Affirmed.

James R. Jones and John W. Wynkoop, for appellant.

Mueting, DeLay & Spittler, for appellee Fauss.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

SPENCER, J.

The Commissioner of Labor in this appeal challenges the scope of review of the District Court for Madison County, sitting in its appellate capacity.

The Commissioner contends the District Court was without jurisdiction to enter the judgment rendered.

The present controversy concerns the charging of the experience account of Norris Fauss, doing business as National Foods Company, hereinafter referred to as National, for unemployment compensation benefits paid to Donna F. Messerly. Mrs. Messerly was employed full time by National at its plant in Norfolk, Nebraska. On October 24, 1976, the company temporarily reduced the working hours of its plant employees from 40 to 32 hours per week due to some reconstruction work in the plant. On October 26, 1976, Mrs. Messerly and two other employees applied for partial unemployment benefits at the Norfolk office of the Division of Employment.

Mrs. Messerly indicated in her application she was still employed by National but was working on a part-time basis. The Form DE 350 mailed to National informing it of her claim had typed on it the notation "Partial."

Upon receiving this notice the manager of National held a discussion with the three employees. He explained they probably would not be eligible for partial unemployment benefits because their wages were not sufficiently reduced. He also advised them that if the claims were processed, National would then have to inform the insurance company through whom it contracted its profit sharing and pension plans that claimants were part-time employees. Part-time employees are not eligible for benefits under those plans. The employees told the manager they would withdraw their claims for partial unemployment benefits. Believing they intended to do so, he gave them the DE Forms 350 to be returned to the Division of Employment for that purpose.

Two of the employees did withdraw their claims. Mrs. Messerly did not. Her testimony before the Nebraska Appeals Tribunal is as follows: "Q- (By Ref. Stanek) Did you take the employer information

report (DE Form 350) back in, Mrs. Messerly?

"A- I took it – the one lady especially, said if we take it down and drop it, well everything be forgotten. Because of the manner in the way he talked to us. And I says, I didn't dearly (sic) come out and says I was gonna take it back, but when I did bring it up here and going to drop the claim, but I really hadn't made my mind up, they (Employees, Division of Employment) told me I had three alternatives up here. So when we got all done talking I said well, I'll take this form back to Fred (Frederick Kirschner, manager of National Foods) then, let him fill it out, because he probably was under the impression that I was going to bring it back, and they said no, you won't, because he had no business letting you have it in the first place. That is what they told me; so I don't figure I lied to the company.

"Q- In other words, you hadn't fully made up your mind until you came back down to the office, the area claims office?

"A- No, because he told us, think it over a couple days.

"Q- You had that information sheet in your hand; when you got down here they told you what?

"A- They gave me three alternatives of what I could do after they found out what went on out there, and I felt bad about not taking it back out to him, but they told me that I –

"Q- What were the three alternatives?

"A- That I could drop the thing altogether; or that I could file; and I don't even remember what the third one was, but they did tell me that I had a right to file.

"Q- And that you should turn that in, not take it back out to Mr. Kirschner?

"A- No, I wanted to take it back out and give it to Fred, and they said no because he shouldn't have gave it to you."

Mrs. Messerly gave the DE Form 350 to an em-

ployee of the Division of Employment, who inscribed thereon: "Employer would not provide information. Form returned via clt. 10/29/76 J.M." This obviously did not reflect the facts, and the employee "J.M." could not help but know it did not. Mrs. Messerly then provided the necessary wage information and her claim for full unemployment was approved November 2, 1976, or 7 days after the filing of her claim for partial unemployment.

The first notice the employer received that a claim had been filed for total unemployment compensation benefits was November 26, 1976, when National was informed its experience account had been charged. A protest was immediately made to a claims deputy at the Norfolk division employment office.

The claims deputy took the position National could not contest the charge against its account except to demonstrate claimant was ineligible to receive benefits because she was not available for work. He made a determination favorable to claimant on the issue of availability December 7, 1976.

On December 10, 1976, National filed a request for hearing and an appeal from that determination on a form provided by the employment office. Several reasons were listed for the appeal, including the fact the only notice given was for a claim for partial unemployment. There is no dispute National did not receive any notice of the claim for total unemployment.

The notice of hearing mailed to the parties by the employment office indicated the only issue to be considered on appeal was claimant's availability for work. Both parties appeared at the hearing unrepresented by counsel. Over objection, the hearing examiner restricted inquiry to the availability issue and the deputy's determination was affirmed.

National filed a timely petition for review in the District Court January 25, 1977. The District Court,

after a hearing on April 15, 1977, entered judgment in favor of National. The court found the employer should have received notice of the second claim and the refusal of the claims deputy and the Appeal Tribunal to consider issues other than claimant's availability for work was arbitrary, unreasonable, and capricious. It held the refusal of the administrative agency to consider whether claimant left work voluntarily without good cause did not deprive the court of jurisdiction to decide that issue. The court ordered: "1. That the claimant left work voluntarily without good cause and her claim should be and should have been processed accordingly. 2. That the experience account of the employer-appellant is not to be charged on this claim. 3. That on the issue of 'availability for work' the Appeals Referee was correct, and in that context only the same is affirmed. 4. That costs should be taxed to the Commissioner-Appellee." The Commissioner appeals from this judgment.

Benefits are paid from the Unemployment Compensation Fund, which consists of money collected from employers and money credited to the State's account in the federal Unemployment Trust Fund. An employer's rate of contribution to the fund is dependent upon the amount of benefits paid to its former employees. § 48-649, R. S. Supp., 1976. For each employer a separate experience account is established for crediting contributions and charging benefits. Benefits are charged only against the accounts of base period employers, in inverse chronological order. An employer is not charged with benefits paid to its employees who have left work voluntarily without good cause or who have been discharged for misconduct. § 48-652, R. R. S. 1943.

An individual applying for benefits is required to appear in person at a state employment office and complete a claim form. Benefit Regulation No. 15 requires the Division of Employment to notify all

base period employers of the claim and to request wage and separation information on Form DE 350. The employers have 7 days in which to complete and return the form. A claims deputy then makes the initial determination upon the claim. Subsequent determinations are made for each week in which benefits are claimed. In this instance the employer did not receive the required notice.

Under the regulations promulgated by the Commissioner, the initial determination by the claims deputy controls whether an employer's experience account will be charged. Section 48-652 (3) (a), R. R. S. 1943, provides for noncharging of benefits because of a "voluntary quit" or discharge for misconduct only if "the employer has filed timely notice of the facts on which such exemption is claimed in accordance with regulations prescribed by the commissioner." Regulation 16 provides in part: "No charge shall be made to an employer's experience account for benefits paid to any individual who has left work voluntarily without good cause or has been discharged for misconduct connected with his work if so found by a deputy, and if the information as required by Benefit Regulation No. 15 as to wages and separation under such disqualifying conditions is received in writing at the office which mailed the Form DE-350 within seven days from the date it was mailed to the employer." Where, as here, no notice is given on the claim, the employer has no opportunity to bring the facts to the attention of the agency.

The determination of the deputy is the final decision on the claim unless an appeal is taken to the Appeal Tribunal within 10 days after the mailing of notice of the determination or, in the absence of such mailing, within 7 days after delivery of the notice. § 48-630, R. R. S. 1943. The right to appeal is conferred upon the "claimant or any other party entitled to notice of a determination." § 48-634, R. R. S. 1943.

The Commissioner points out that section 48-634, R. R. S. 1943, only confers the right of appeal upon the "claimant or any other party entitled to notice of a determination as herein provided." Section 48-632, R. R. S. 1943, only requires that notice be given to an employer "who has indicated prior to the determination, in such manner as required by regulation of the commissioner, that such individual may be ineligible or disqualified * * *." The Commissioner argues National did not provide disqualifying information in advance of the determination of November 2, 1976; therefore, it was not entitled to notice and it could not appeal that determination. The employer could appeal the determination of December 7, 1976, but that determination was limited to the issue of availability for work. Thus, the Commissioner argues, if the employer wishes to raise the issue of lack of notice it must do so by means of collateral attack and not by direct appeal.

The flaw in this argument is that the determination of December 7, 1976, also included a finding that the employer had received notice of the claim and had failed to provide disqualifying information. Upon receiving notification that its account had been charged, National was required to seek a redetermination or else be bound by the charge. § 48-651, R. R. S. 1943. National complied with the statute by promptly filing a protest with the claims deputy on November 26, 1976. The adverse decision of the claims deputy was properly appealed to the Appeal Tribunal, but that body refused to consider whether the deputy was correct in his assessment of the notice issue. Benefit Regulation No. 8 (3) (a) specifically provides: "All issues relevant to the appeal before an appeal tribunal shall be considered and passed upon." The refusal to consider the issue was a proper subject for appeal. The District Court was correct in finding the Appeal Tribunal erred by not addressing the issue.

We completely agree with the determination of the District Court that the employer was entitled to notice of the filing of the claim for total unemployment on October 29, 1976. The notice mailed to the employer on October 26, 1976, clearly indicated that only a claim for partial unemployment had been filed. Prior to October 29, 1976, National could not have supplied any separation information for noncharging of benefits because claimant was still in its employ. Further, the unemployment office prevented the employee from returning the claim form to the employer to be completed.

Benefit Regulation No. 15 provides: "(1) When an individual files a new claim for benefits, the Division of Employment *shall* notify all base period employers thereof; and request wage and separation information on Form DE 350, * * *." (Emphasis supplied.) Although claimant did not complete a new claim form on October 29, 1976, when she changed her claim from partial to total unemployment, this was the equivalent of filing a new claim and the agency was required to notify the employer. Any other interpretation of the regulation would be contrary to the intent of the statutory scheme. See California Dept. of Human Resources Development v. Java, 402 U. S. 121, 91 S. Ct. 1347, 28 L. Ed. 2d 666 (1971).

Moreover, the failure to provide the employer with the opportunity to present disqualifying information at any stage of the administrative proceedings constitutes an arbitrary, capricious, and unreasonable process. There is no possible justification or excuse for the procedure followed by the agency herein. We stated in First Fed. Sav. & Loan Assn. v. Department of Banking, 187 Neb. 562, 192 N. W. 2d 736 (1971): "Due process of law requires notice and an opportunity to be heard, as a matter of right and not by the let or leave of administrative officers or agencies, when the rights, duties, or privileges of inter-

ested parties are involved by an exercise of quasi-judicial power pursuant to the terms of a statute."

The Commissioner contends the only issue which could be considered in the District Court was claimant's availability for work. There was no question on claimant's availability for work. She was fully able to do so. The question was whether she quit available work without cause and whether notice was given to National of her claim for full unemployment benefits.

The Commissioner argues the failure of the agency to consider those issues deprives the District Court of jurisdiction to do so. We do not agree. The agency, by arbitrary, capricious, and unreasonable refusal to consider pertinent issues, cannot deprive the District Court of jurisdiction to do so.

Section 48-638, R. R. S. 1943, provides the method for an appeal to the District Court from a decision of an Appeal Tribunal. It requires the service of the petition on the Commissioner. The procedure on appeal is set out in section 48-639, R. R. S. 1943, and is as follows: "In any judicial proceeding under sections 48-638 to 48-640 the court shall consider the matter de novo upon the record. The court may on its own motion order additional evidence to be taken before it. In addition, any party to such review may offer additional evidence before the court, provided that such party shall have served written notice of such offer on the other parties at least ten days prior to the hearing thereof. Such notice shall set out the nature of the evidence which he so desires to offer and the names of the witnesses whom he intends to call. In such event the other parties may without advance notice offer evidence in rebuttal. Such proceedings shall be heard in a summary manner and shall be given precedence over all other civil cases except arising under the workmen's compensation law of this state."

Pursuant to the appeal procedure, a copy of the

petition for review in the District Court was personally served on the Commissioner. Additionally, National complied with the statute by serving notice of intention to offer additional evidence in support of the allegations made in its petition for review. It further specified the names of the witnesses to be called by it to sustain its allegations.

In its petition for review, National prayed for relief as follows: (1) Finding that claimant voluntarily quit employment with appellant without good cause to do so; (2) finding that no request for wage information regarding claimant's new claim for full benefits was ever made upon appellant by the Division of Employment; (3) finding that claimant grossly misrepresented to the Division of Employment the alleged fact that the DE Form 350 delivered by her to said division was the Commissioner's response to a request for wage information concerning a new claim, and per section 48-628 (b), R. R. S. 1943, finding that claimant should be disqualified from receipt of any benefits.

On the last point, the question to be determined, so far as National is concerned, is not whether the claimant should be disqualified from receipt of any benefits, but rather whether the experience account of the employer should be charged with benefits paid to her which is the relief granted by the District Court.

The District Court found: (1) Claimant left work voluntarily without good cause and her claim should be and should have been processed accordingly; (2) the experience account of the employer should not have been charged on the claim; (3) the employee was available for work and in that context only the order of the appeals referee was affirmed. All costs were taxed to the Commissioner.

This is a case where arbitrary and unreasonable action of employees of the Division of Employment prevented the employer from raising any defenses

to the action of that agency. To restrict the hearing to the sole question as to whether the claimant was available for work was to emphasize the obvious. No one ever disputed the fact that the claimant was able to work, and so was available to do so. By ignoring the clear language of the statute, the employees of the agency have put the employer to a considerable expense. To argue that the District Court has no jurisdiction to grant the remedy, because the agency refuses to recognize it, aborts the requirements of due process.

Section 48-639, R. R. S. 1943, in addition to providing for a de novo review, provides a procedure for adducing additional evidence in the District Court. National fully complied with the statute to adduce this evidence on the issues the hearing deputy and the Appeal Tribunal refused to consider. The evidence adduced is fairly conclusive on the issues decided by the District Court. To require the employer to incur the additional expense of again presenting those issues to the same individuals who arbitrarily refused to consider them in the first instance, although repeatedly importuned to do so, would make a mockery of justice. This is not a situation where the agency merely made a wrong decision. It is instead one where the agency refused to even consider the issues raised so it could make a decision.

On the facts adduced in this case, we determine the District Court properly exercised its jurisdiction and affirm the judgment entered by it.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD MCDERMOTT, APPELLANT.

263 N. W. 2d 482

Filed March 15, 1978. No. 41503.

1. **Criminal Law: Courts: Sentences.** In the absence of statute, when a valid sentence has been put into execution by commitment of a prisoner, the court has no authority to set aside, modify, amend, or revise the sentence, either during or after the term or session of court at which the sentence was imposed.
2. _____: _____: _____. Where a portion of a sentence is valid and a portion is invalid or erroneous, the court has authority to modify or revise the sentence by removing the invalid or erroneous portion of the sentence if the remaining portion of the sentence constitutes a complete valid sentence.

Appeal from the District Court for Hall County: DONALD H. WEAVER and LLOYD W. KELLY, JR., Judges. Affirmed.

Cunningham, Blackburn, Von Seggern & Livingston, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

MCCOWN, J.

This is an appeal to the District Court by a prosecuting attorney under the provisions of section 29-2317, R. R. S. 1943, from an order of the county court of Hall County, Nebraska, modifying a sentence previously pronounced against the defendant upon a conviction for operating a motor vehicle while his license was suspended, second offense. On that appeal the District Court affirmed the original sentence of the county court, and from that judgment the defendant has appealed to this court.

On January 5, 1977, in the county court of Hall County the defendant pleaded guilty to a charge of operating a motor vehicle while his operator's li-

cense was suspended, second offense. The mandatory penalty for that offense is 6 months imprisonment in the county jail. The alternative is probation. A mandatory suspension of motor vehicle operator's license for 2 years is also required. § 60-430.01, R. R. S. 1943.

The county court, on January 5, 1977, sentenced the defendant to "6 months in jail, subject to review in 30 days," recommended work release, and suspended his operator's license for 2 years. On January 5, 1977, the sentence was put into execution by commitment of the defendant to jail.

On January 10, 1977, defendant filed a motion for modification of sentence upon the ground that the sentence imposed was an unauthorized and erroneous sentence. On January 14, 1977, after hearing, the county court granted defendant's motion and sentenced defendant to probation for a period of 1 year with a condition that 89 days of that period be spent in jail; gave credit for the time served on the previous sentence; and recommended work release. Thereafter the prosecuting attorney gave notice of intent to appeal pursuant to section 29-2317, R. R. S. 1943, and the appeal was perfected.

On April 26, 1977, the District Court held that the original sentence in the county court was within statutory limits; that the county court had no authority to review or change the sentence; and reinstated the original sentence of the county court. On May 6, 1977, the District Court sustained defendant's motion for new trial. On May 25, 1977, on rehearing, the District Court found that the original sentence in the county court was within statutory limits and could not be reviewed or changed. The District Court then reinstated the original sentence of the county court, except that portion referring to a review of the sentence by the county court in 30 days.

This court has consistently held that in the absence of statute, when a valid sentence has been put

into execution by commitment of a prisoner, the court has no authority to set aside, modify, amend, or revise the sentence, either during or after the term or session of court at which the sentence was imposed. Any attempt to do so is of no effect and the original sentence remains in force. State v. Adamson, 194 Neb. 592, 233 N. W. 2d 925.

The original sentence here as pronounced was not a completely valid and authorized sentence. A sentence of 6 months in jail was a valid authorized sentence for the offense involved here. The addition of the words "subject to review in 30 days by the Court" was unauthorized and the sentence as pronounced was therefore partially valid and partially invalid or erroneous. The essential part of a sentence is the punishment, including the kind and the amount. Ulrich v. O'Grady, 136 Neb. 684, 287 N. W. 81. The addition of a provision for subsequent review is surplusage. Where a portion of a sentence is valid and a portion is invalid or erroneous, the court has authority to modify or revise the sentence by removing the invalid or erroneous portion of the sentence if the remaining portion of the sentence constitutes a complete valid sentence. The District Court was therefore correct in determining that the county court should have modified or revised its original sentence by removing the portion of it which provided for review in 30 days, and that the county court's action in setting aside the original sentence and entering a completely new one was erroneous.

The District Court, however, did not have the authority to set aside the sentence of the county court appealed from by the prosecution nor to change or reinstate the original sentence in this case.

The order and sentence here was appealed from by the prosecuting attorney under section 29-2317, R. R. S. 1943. Section 29-2319 (1), R. R. S. 1943, provides: "The judgment of the court in any action taken under the provisions of sections 29-2317 and 29-

2318 shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy, but in such cases the decision of the district court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered, or which may thereafter arise in the district."

The defendant had been placed legally in jeopardy in the county court and the decision of the District Court could determine only the law to govern similar pending or subsequent cases and not the judgment or the defendant in this case. The jail sentence required as a condition of the sentence of probation appealed from was completed prior to the judgment of the District Court, and the term of probation has now expired. The judgment of the county court has therefore presumptively been fully executed and defendant cannot be adversely affected by this appeal. The judgment of the District Court is affirmed as to similar or future cases only.

AFFIRMED.

BOSLAUGH, J., dissenting.

The sentence of the county court that the defendant be imprisoned in the county jail for 6 months was a valid sentence. The provision that the sentence was "subject to review in 30 days" was surplusage and of no legal effect. It did not render the otherwise valid sentence partially invalid or erroneous.

The determination by the District Court that the original sentence was valid should have ended the proceeding. There is no provision for an appeal by a defendant in a proceeding under section 29-2317, R. R. S. 1943, because the proceeding has no effect on the rights of a defendant who has been placed in jeopardy. The only provision for a direct review of a judgment in a proceeding under section 29-2317, R. R. S. 1943, is by the prosecuting attorney under sec-

tion 29-2315.01, R. R. S. 1943. § 29-2319 (3), R. R. S. 1943.

WHITE, C. J., and SPENCER, J., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. THEODORE V. OLSON, APPELLANT.

263 N. W. 2d 485

Filed March 15, 1978. No. 41614.

Criminal Law: Trial: Evidence: Verdicts. A court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed.

Veldon Magnuson of Magnuson, Magnuson & Peetz, for appellant.

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

WHITE, C. THOMAS, J.

The defendant was convicted in the county court of Holt County, Nebraska, of operating a motor vehicle at a rate of speed of 69.4 miles per hour in a 55 mile an hour zone. He was assessed a fine of $15 and costs. He perfected his appeal to the District Court; on appeal, the sentence and conviction were affirmed. He prosecutes his appeal to this court. We affirm.

The defendant was apprehended by a member of the Nebraska State Patrol and the speed was determined by means of a vascar unit. The vascar unit is essentially a device that measures time and dis-

tance. One switch measures the time that the suspect vehicle takes to cover a specified distance. The other switch measures the distance traversed by the patrol unit in covering the same distance. The two are computed and a reading is given to the officer which states the speed of the suspect car. The defendant does not assign as error any foundation with respect to the vascar testimony. The unit appeared to have been appropriately checked over a measured distance and compared with a stop watch operated by the officer and found to be registering accurately. On the morning of the arrest, the unit was routinely checked in accord with requirements of the Nebraska State Patrol.

The evidence indicates that on September 12, 1976, at 5:50 p.m., the arresting officer was patrolling State Highway No. 11 north of Atkinson and was proceeding in a westerly direction. The defendant, Theodore V. Olson, entered State Highway No. 11 in front of the arresting officer's car on that portion of State Highway No. 11 which runs north and south after the western leg has been completed. Officer Uehling, the arresting officer, dropped in behind the defendant and both proceeded in a southerly direction down State Highway No. 11. Officer Uehling was approximately ¼ to ½ mile behind the defendant. The arresting officer testified that he activated the timer sequence of the vascar unit at a point when the shadow of the defendant's automobile passed the driveway to the Shane farm. At the point when the patrol vehicle passed the Shane farm driveway, he activated the timer switch on the distance-measuring device.

Shortly after the defendant's car was past the Shane driveway, it passed over a short rise in the highway and the arresting officer lost sight of the vehicle for 10 to 15 seconds. The officer testified there were no vehicles between him and the Olson vehicle. The vehicle he was following, at the time it

passed the Shane driveway, was the same vehicle he saw when he again gained a view of the automobile as he topped the rise. The arresting officer followed the defendant's vehicle for approximately 2¼ miles and observed a tar strip on State Highway No. 11. At this point, the officer was approximately ¼ mile behind the defendant's automobile. He then turned the timing device off on his vascar unit. As his patrol vehicle passed the same tar strip, he turned off the distance measuring device. The unit then computed the speed of defendant's automobile at 69.4 miles per hour. The defendant's automobile was stopped and the defendant was issued a citation for speeding.

The defendant makes numerous assignments of error, but the issue is whether the evidence is sufficient to sustain the verdict. He essentially bases his argument on an apparent inconsistency in the officer's statement. The defendant recites the officer testified that the beginning point of his measurement was the passing of a shadow by defendant's automobile over the Shane driveway. The Shane driveway is shown to be on the west side of the north-south road. It is common knowledge that at 5:50 p.m. a shadow would be cast from west to east and not east to west, pointing to an apparent inconsistency in the arresting officer's statement. The county court concluded that the arresting officer's identification of the Shane driveway was positive as the beginning measuring point and simply concluded that the arresting officer misspoke when he apparently suggested that the shadow of the vehicle passed over the driveway. The District Court agreed.

We cannot say that the District Court was incorrect. A court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt. See, State v. Eynon, 197

Neb. 734, 250 N. W. 2d 658; State v. Digilio, 193 Neb. 348, 227 N. W. 2d 575. The judgment of a court on the facts will not be set aside on appeal if there is sufficient evidence taking the view most favorable to the state to support the judgment. The arresting officer, an experienced vascar officer, specifically identified the Shane driveway as a measuring point. Incidental reference or a misspeaking with reference to the direction of a shadow is not sufficient to overcome, as a matter of law, the sufficiency of the evidence to justify the conviction and sentence.

The judgment and sentence are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RUSSELL R. JUDD, APPELLANT.

263 N. W. 2d 487

Filed March 15, 1978. No. 41628.

1. **Criminal Law: Assault: Intent: Proof.** Specific intent is an essential element in the crime of assault with intent to inflict great bodily injury, and proof thereof is indispensable to sustain a conviction.
2. **Criminal Law: Intent: Proof.** Because the intent with which an act is done exists only in the mind of the actor, its proof must be inferred from the act itself and from the facts surrounding the act.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed.

Stanley C. Goodwin of Cunningham Law Offices, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

SPENCER, J.

Defendant appeals his conviction for assault with

intent to inflict great bodily injury. § 28-413, R. R. S. 1943. His sole assignment of error is the insufficiency of the evidence to sustain the verdict.

At the time of the offense defendant, Russell R. Judd, was 17 years of age. With three teen-aged companions, he went to the McCook Junior High School over the noon hour on December 17, 1976. Upon arrival at the school, defendant saw the complaining witness, Tim Redden, who was 15 years of age, standing along the north side of the school building with two friends, Galen Fisher and Glen Linder. Defendant approached Redden and asked him why he had called defendant a name the day before. Redden denied he had called him a name. At this time Redden was sitting on a wall which guarded the entrance to the cafeteria about 12 feet below. Defendant asked Redden if he wanted to get thrown over the wall he was sitting on, and Redden told him: "I wanted to live a few more years." Judd then got on the wall and told Redden: "If I wanted to do anything to you he (sic) would push me over the wall." Defendant grabbed Redden by his clothing and acted as if he was going to throw him over the wall, but he did not push him in any direction.

About 5 minutes later defendant pulled a knife from somewhere on his person and placed it to Redden's throat. Redden described the knife as having a blade about 5 or 6 inches long and a quarter of an inch wide. Judd held the knife at his throat but did not cut him with it. The following is Redden's testimony as to what transpired during the time the knife was held to his throat: "He said, 'Where is the kid with the gold coat', and I says 'I don't know'. And I said, 'He might be down on the island'. And he says, 'I want a better answer than that'. And so I told him — no, he said, 'Is he the one that called me a name?'. And I said, 'Yeah'. And he said, 'I want a better answer than that', and I said, 'Yeah, he

was'." After defendant held the knife at Redden's throat, he asked him, "How would you like your jaw broke?"

Galen Fisher, who was also 15 years old and who was a cousin of the defendant, testified he saw Judd grab Redden by the shirt and heard him tell Redden he was going to push him off the wall. He also testified defendant put a knife to Redden's throat. He described the knife as being from 4 to 6 inches in total length, with a blade about 1 inch wide. While Redden testified the knife was held to his throat for only a few seconds, Fisher testified it was there for more than 5 minutes. Fisher was asked if he thought Judd would use the knife, and he said he wasn't sure. He did not see where the defendant got the knife or where he put it away. Judd searched him and took a lighter out of his pocket. He gave it to one of his companions, who stomped on it.

Glen Linder, who was 16 years old, testified he was present when defendant asked Redden if he had called him a name. He also heard defendant state he could break three people's jaws and leave one out. He assumed defendant was referring to Redden and the two boys who were with him the previous day. He left because he was scared. As he walked away, he saw Judd and one of his companions have Fisher against the wall. He saw Judd reach into Fisher's pocket, take out a lighter, and give it to his companion. He then saw the companion try to light it and throw it against the wall and smash it. He did not observe the other incidents testified to by the other boys. He thought there was going to be trouble and didn't want to get involved.

Judd took the stand. He testified he asked Redden who had called him names the day before. He admitted telling Redden, "He would like to break his jaw." He also told Redden he "would like to throw him over the wall." He denied touching Redden and also denied having a knife with him on the day in

question. Defendant's three companions were called to testify, and they also stated they had been present during the entire time and had not observed defendant with a knife.

The issue involved herein is whether there was sufficient proof of the required intent. The matter was tried to a jury which returned a verdict of guilty. The court sentenced defendant to the Youth Development Center at Kearney, Nebraska, for an indefinite period.

Specific intent is an essential element in the crime of assault with intent to inflict great bodily injury, and proof thereof is indispensable to sustain a conviction. Because the intent with which an act is done exists only in the mind of the actor, its proof must be inferred from the act itself and from the facts surrounding the act.

Defendant admits he told Redden he would like to break his jaw and that he should throw him over the wall. While the defendant denies he had a knife in his hand at any time during these events, there is sufficient evidence from which the jury could find he did.

It is a frightening experience for a 15-year-old to have a knife held to his throat. There can be little doubt that an assault did occur. The question is whether or not there was an intention to cause great bodily harm. This was a question for the jury on the evidence produced. We have no doubt the jury could readily find an intent to inflict great bodily injury from the threat to break Redden's jaw, from the threat to throw him over a 12-foot wall onto a concrete driveway, and holding a knife to his throat.

Even though defendant's counsel argues the mere displaying of a knife with no further act than to stick it under one's chin in the vicinity of the neck is no more than a childish prank, the jury could readily find otherwise. Holding a knife to one's throat is not a childish prank. It is a serious matter. A knife is

a dangerous weapon capable of inflicting a serious, if not a fatal, injury. A false movement on the part of either party could result in a very serious injury.

The trial court gave the following instruction on intent: "The intent required by Instruction No. 4 is a material element of the crime charged against the defendant. Intent is a mental process and it therefore generally remains hidden within the mind where it is conceived. It is rarely if ever susceptible of proof by direct evidence. It may, however, be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct. But before that intent can be inferred from such circumstantial evidence alone, it must be of such character as to exclude every reasonable conclusion except that defendant had the required intent. It is for you to determine from all the facts and circumstances in evidence whether or not the defendant committed the acts complained of and whether at such time he had the criminal intent required by Instruction No. 4. If you have any reasonable doubt with respect to either, you must find the defendant not guilty."

The evidence was sufficient to submit the issue to the jury. The instructions of the court adequately presented defendant's defense and fully protected his rights. The jury decided adversely to the defendant. The judgment must be affirmed.

Judgment affirmed.

AFFIRMED.

JAMES W. FISHER, DOING BUSINESS AS GENERAL MANUFACTURING, APPELLANT, V. BEEBE & RUNYAN FURNITURE COMPANY ET AL., APPELLEES, SHAFAR INDUSTRIES, INCORPORATED, INTERVENER-APPELLEE.

263 N. W. 2d 826

Filed March 22, 1978. No. 41191.

1. **Trial: Judgments: Appeal and Error.** A finding of fact by a court of law where the jury has been waived has the effect of a verdict by a jury and will not be set aside on appeal unless clearly wrong.
2. **Judgments: Evidence: Appeal and Error.** It is an elementary proposition of law that when a judgment is clearly against the weight of the evidence it should be set aside.
3. **Contracts: Principal and Agent.** If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone and the agent cannot be held liable thereon.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Reversed and remanded with directions.

Tony L. Fugit and Carol F. Rossiter of Fugit Law Offices, for appellant.

D. C. Bradford of Bradford & Coenen, for appellee Beebe & Runyan Furniture Co.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ.

WHITE, C. J.

This is an action for breach of contract. In its petition the plaintiff alleged that it had agreed to manufacture, and that defendant Beebe & Runyan Furniture Company had agreed to pay for, restaurant booths for ultimate use by Johnny's American Inn, Inc. The plaintiff sought recovery of the unpaid balance on the contract and on various other charges and expenditures alleged due him by the defendant. Defendant, Beebe & Runyan Furniture Company, filed a cross-petition alleging that the restaurant booths provided by the plaintiff were defective and

unfit for the purpose for which they were intended. The defendant Johnny's American Inn, Inc. (hereinafter referred to J.A.I.), was allowed to join the action as an additional defendant and cross-petitioner. In its answer and cross-petition, it alleged that at all times material to the action, the defendant Beebe & Runyan Furniture Company acted as its agent and that this agency was known and disclosed to the plaintiff. Shafar Industries, Incorporated, filed a petition in intervention alleging that it had an interest in the litigation.

The case was tried to the court without a jury. On June 10, 1976, the District Court entered its judgment, on the issues raised in the action, as follows: That Beebe & Runyan Furniture Company should be dismissed as a party defendant; that plaintiff should recover from the defendant J.A.I. the sum of $2,981; that the intervener should recover from the defendant J.A.I. the sum of $6,318; that the cross-petition of defendant J.A.I., concerning alleged breaches of implied warranties of merchantability and fitness, should be dismissed; and that the booths being held by the intervener were the property of the defendant J.A.I. Plaintiff filed a motion for a new trial, which was overruled, and now appeals. We reverse the judgment of the District Court.

On appeal the plaintiff contends that the District Court erred in dismissing the defendant Beebe & Runyan Furniture Company from the action and in its assessment of damages. While the District Court did not specify in its decision its grounds for dismissing the defendant, Beebe & Runyan Furniture Company, from the action, it is obviously based upon the pleadings and the theory on which the case was tried, and it must have concluded that at all times relevant in this action Beebe & Runyan Furniture Company acted as the agent for the defendant J.A.I. and that this agency was known and disclosed to the plaintiff.

A finding of fact by a court of law where the jury has been waived has the effect of a verdict by a jury and will not be set aside on appeal unless clearly wrong. Crane Co. v. Roberts Supply Co., 196 Neb. 67, 241 N. W. 2d 516 (1976).

"It is an elementary proposition of law that when a judgment is clearly against the weight of the evidence it should be set aside." Nebraska Mutual Ins. Co. v. Borden, 132 Neb. 656, 272 N. W. 767 (1937).

"If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone and the agent cannot be held liable thereon." Bury v. Action Enterprises, Inc., 197 Neb. 38, 246 N. W. 2d 724 (1976). The question on appeal is whether the defendant Beebe & Runyan Furniture Company acted as a known agent for a disclosed principal, the defendant J.A.I., and is thus not liable on the contract. The trial court determined that it had. We can only unseat this determination by the trial court if it is clearly wrong. We believe that it is.

James Fisher, the plaintiff, stated that he had done business with Beebe & Runyan Furniture Company (hereinafter referred to as Beebe), on several occasions prior to the transaction in question. He would deal with Jim or John Sandstedt. In the summer of 1969, Jim Sandstedt approached him concerning booths which Beebe was going to provide for J.A.I. for their "Here's Johnny" restaurants. Sandstedt asked him if he was interested in providing these and Fisher indicated that he was. Sandstedt subsequently introduced him to Henry Davis, director of equipment for J.A.I. A number of meetings followed between Fisher, Davis, Sandstedt, Roger Owens, a fiberglass manufacturer, and others. The concept desired for the restaurants was discussed and eventually a design formulated and approved.

Exhibit 2 is a purchase order for these booths dated November 8, 1969. The letterhead on the pur-

chase order is that of Beebe and it is designated "Purchase Order No. 196." It is signed by Henry Davis who is designated as "Buyer Agent."

Fisher testified that he considered the contract to be with Beebe; that no one from J.A.I. offered to contract with him; and that he would not have contracted with J.A.I. He stated that he contracted with Beebe because from past business dealings he knew it to be a sound and reliable firm. He testified that he knew Davis was an employee of J.A.I. but was told by Sandstedt and Davis that Davis was authorized to enter into a contract for Beebe.

Fisher testified that he sent all his bills to Beebe. Exhibits 20, 21, 90, and 92 were checks written to the plaintiff from Beebe, signed by John Sandstedt. Fisher stated that if there was a problem with payment, he would talk to people at J.A.I. or Swanson Enterprises, and that he would take money from anyone who wanted to pay his bill. He did not recall ever receiving a check from J.A.I. other than perhaps one to cover some transportation expenses. Exhibit 96 was a check dated March 20, 1970, from J.A.I. to the plaintiff. Exhibits 91, 93, and 95 were checks from J.A.I. to Beebe.

The plaintiff commenced manufacture of the booths after the contract was entered into. Various problems developed regarding the booths and a letter, dated July 17, 1970, was sent by J.A.I. to the plaintiff advising him to stop production on purchase order 196 until the problems could be resolved. Fisher testified that pursuant to this letter he stopped production.

John Sandstedt testified that in the summer of 1969 he was assistant vice president for Beebe. He stated that exhibit 2 was not a purchase order from Beebe but from J.A.I. who had it specially prepared. He testified that Beebe had an agreement with J.A.I. whereby Beebe would warehouse the merchandise which J.A.I. purchased through its suppliers. This

was done, he stated, because J.A.I. had no separate warehouse facilities of its own. In the case of the plaintiff, however, Sandstedt admitted that the merchandise was shipped directly to the site and would not be processed through Beebe's warehouse. He stated that the purpose of having Beebe's name on exhibit 2 was to implement correct shipments to its warehouse. He stated that there was no written agreement evidencing this warehousing arrangement.

Sandstedt acknowledged writing a number of checks to plaintiff, but stated that in all cases he looked to J.A.I. for payment before he paid the plaintiff. He further testified that Henry Davis was never employed by Beebe or had an office at Beebe.

Darrell Eckardt, assistant treasurer for Beebe, testified that payment from Beebe to Fisher depended upon Beebe's payment from J.A.I. He stated that J.A.I. would forward money to Beebe and authorize Beebe to make payment on merchandise J.A.I. had purchased. He did not know why J.A.I. did not pay directly for the purchases.

Kenneth Shafar, who is engaged in the manufacture of fiberglass products, testified that Fischer contracted with him to produce the fiberglass portions of the booths. He stated that Fisher showed him a copy of exhibit 2 during their negotiations. Shafar testified that he entered into a contract with the plaintiff on the belief that Beebe would be responsible for payment. He stated that he obtained a Dun & Bradstreet report on Beebe before signing the contract. Shafar testified: "I was led to believe, all along, that they [Beebe] would be the ones that would be responsible for the payment." Exhibits 119 and 120 represent the agreement between Shafar and the plaintiff. Exhibit 120, a document from the plaintiff to Shafar states: "It must be clearly understood that any payment from me to you is contin-

gent upon payment from Beebe and Runyan Furniture Company to me."

Shafar testified that he and Fisher went to Beebe's office on one occasion and talked to John Sandstedt about obtaining payment. Sandstedt was surprised that they should be coming to him for payment and told them that they would have to go to J.A.I. for payment.

Exhibits 6, 10, 12, 89, and 92A are invoices from the plaintiff dating from March to July 1970. These invoices show the merchandise listed thereon as "sold to Beebe & Runyan Furniture Co." Exhibit 13 is a letter dated July 16, 1970, from J.A.I. to the plaintiff which states:

"Enclosed is a check drawn by Beebe & Runyan Furniture Company * * * payable to General Manufacturing Company. This amount shall be applied towards *amounts due by Beebe & Runyan Furniture Company to General Manufacturing Company* * * *." (Emphasis supplied.) Exhibit 22 is a letter dated May 13, 1970, from the plaintiff addressed to a Mr. Jack Walker at the office of Beebe. The letter which rejects revised purchase order No. 196 refers to "our contract with you" and states "our contract is with Beebe & Runyan Furniture Company."

Henry Davis testified by deposition. He acknowledged that exhibit 2 was prepared by J.A.I. He stated that he was authorized to sign exhibit 2 and to purchase for Beebe. He testified that he told Fisher that he was to bill Beebe for the restaurant booths. He stated that when buying equipment for J.A.I., "I was representing myself as Beebe and Runyan and also as Johnny's American Inn." He further stated that Beebe was to pay for the booths and that he had no idea how Beebe and J.A.I. were to settle things between themselves.

The record indicates that some relation or interconnection exists between Swanson Enterprises, J.A.I., and Beebe.

We believe the record clearly shows, by an overwhelming preponderance of the evidence, that plaintiff intended to and believed that he was contracting with the defendant Beebe as principal. We find no evidence which would indicate that the plaintiff believed or knew that the defendant Beebe was, during the course of this transaction, acting only as an agent for the defendant J.A.I.

The record shows that the plaintiff looked primarily to Beebe for payment and not to J.A.I. The plaintiff understood that Beebe could not pay him until Beebe was paid by J.A.I. Payment was sought by the plaintiff from J.A.I., and elsewhere, after first contacting Beebe.

It is clear that Beebe's reputation for soundness and reliability was a primary inducement for both the plaintiff's contract and the intervener's contract with the plaintiff. Exhibit 2 bears the letterhead of Beebe and gives no indication of the purported agency. Fisher testified that he was told both by Davis himself and Jim Sandstedt that Davis was authorized to sign the purchase order for Beebe. Davis admitted that he represented himself to Fisher as authorized to sign for Beebe, was in fact so authorized, and instructed Fisher to bill Beebe.

The plaintiff knew that J.A.I. was the ultimate purchaser of the booths. The record indicates that the parties worked closely together on this project, the plaintiff, Beebe, and J.A.I. Under these circumstances the fact that the plaintiff worked with personnel of J.A.I. in formulating the design for the booths; the fact that J.A.I. had to approve the final design and that J.A.I. was to own the design; and the fact that J.A.I. advised the plaintiff to stop production when problems arose and the plaintiff did so are not inconsistent with the plaintiff's position.

The judgment of the District Court dismissing the defendant Beebe from the action was error and is reversed.

Plaintiff's next contention on appeal questions the District Court's award of damages. Plaintiff was awarded damages in the amount of $2,981. Plaintiff questions this figure and also argues that it was entitled to $19,400 amortization costs under the express terms of the contract. We have examined the record and are not clear on the basis for the District Court's determination on damages. We therefore reverse the judgment and remand the cause to the District Court with directions to reexamine the amount of damages due plaintiff, including plaintiff's amortization claim under the contract.

The judgment of the District Court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

HAROLD W. HERMAN, APPELLEE, V. MIDLAND AG SERVICE, INC., A NEBRASKA CORPORATION, APPELLANT.

264 N. W. 2d 161

Filed March 22, 1978. No. 41275.

1. **Trial: Instructions: Appeal and Error.** It is the duty of the trial court, without request, to submit to and properly instruct the jury on all material issues presented by the pleadings and supported by the evidence. This principle applies to theories of defense as well as those upon which the plaintiff's cause of action is founded. The failure to so instruct is prejudicial error.
2. **Trial: Evidence: Proof.** Where proof is by circumstantial evidence, the circumstances adduced by proof must render the existence of the inferred facts reasonably probable and proof of mere possibility is insufficient.
3. **Trial: Evidence.** In a proper case where sufficient foundation is laid, the results of scientific experiments may be admissible as substantive evidence to prove the existence of a condition as well as for the purpose of proving that the condition was the proximate cause of a result.
4. **Negligence.** A supplier of a dangerous substance owes the highest degree of care to prevent injury from the use of that product. He is not, however, an insurer of one who is aware of the dangerous character of the substance.

5. **Warranty: Damages.** If a breach of an implied warranty of fitness is not the proximate cause of an injury and consequential damages, there can be no recovery for the breach.
6. **Warranty: Bailment.** A contract of bailment of a chattel for consideration may give rise to an implied warranty of fitness of the chattel for the purpose for which it was bailed.
7. **Trial: Evidence: Statutes.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. § 27-401, R. R. S. 1943.
8. _____: _____: _____. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. § 27-403, R. R. S. 1943.

Appeal from the District Court for Merrick County: C. THOMAS WHITE, Judge. Reversed and remanded for a new trial.

Maupin, Dent, Kay, Satterfield, Girard & Scritsmier, Dale A. Romatzke, and Gary D. Byrne, for appellant.

Richard H. Williams of Barney & Carter, and Nelson, Harding, Yeutter, Leonard & Tate, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ.

CLINTON, J.

This is an action by the plaintiff, Herman, a farmer, against the defendant, Midland Ag Service, Inc., a fertilizer supplier, for personal injuries sustained by Herman on his farm while in the process of transferring anhydrous ammonia from a nurse tank furnished by the defendants to an applicator tank. Plaintiff sought recovery upon three theories: (1) Breach of implied warranty by defendant in furnishing a valve on the transfer hose on the nurse tank which was not reasonably fit for its purpose; (2) negligence; and (3) strict liability in tort. The

trial court submitted the cause to the jury on the theories of negligence and a breach of implied warranty of fitness, and as to the negligence theory, submitted the defendant's claim of contributory negligence and assumption of risk on the part of the plaintiff. The jury returned a verdict for the plaintiff. Because of the form of the verdict, it is not possible to determine whether the verdict was founded upon the defendant's alleged negligence, or upon breach of warranty, or both.

On appeal to this court the defendant makes numerous assignments of error and those which have been both assigned and argued in the brief are consolidated by us to the following: (1) The trial court erred in failing to instruct the jury as to the specific acts of contributory negligence pled by the defendant and which were supported by the evidence. (2) The evidence of the plaintiff to prove circumstantially and by alleged scientific experiments that the plaintiff's injuries were proximately caused either by the negligence of the defendant, or by a breach of warranty by the defendant, was insufficient to support the verdict. (3) The court erred in permitting the plaintiff to introduce the results of experiments as to how the accident and injuries might have occurred, when the experiments were based upon assumptions of which there was no proof. (4) The court erred in giving instruction No. 17, dealing with the standard of care exercisable by one who furnishes a dangerous substance because the instructions set forth, not just a standard of care of the highest degree, but also one of "strict accountability." (5) The court erred in submitting to the jury the proposition that plaintiff could recover upon the theory of an implied warranty of fitness for a particular purpose. (6) The court erred in refusing to give the defendant's requested instructions Nos. 2, 9, and 11 pertaining to the duty of the bailor of a product not manufactured by him to inspect before entrust-

ing to the bailee. (7) The evidence was insufficient to sustain the verdict because the plaintiff failed to prove that an inspection by the bailor would have revealed any defect. (8) The evidence was insufficient to sustain the verdict because the evidence failed to prove that the bailee relied upon the bailor's judgment in the selection of the product, to wit, the alleged defective valve. (9) The court erred in failing to instruct that an assumption of risk is a defense in an action for breach of warranty. (10) The court erred in giving instructions Nos. 2 and 18 and in refusing defendant's requested instruction No. 11, which instructions relate to the principle that there is no duty to warn of a known danger. (11) The court erred in refusing to direct a verdict for the defendant on the ground the evidence showed that the defendant was guilty of contributory negligence as a matter of law. (12) The court erred in refusing to permit evidence that the same equipment, to wit, the valve which allegedly caused the accident and injuries in this case, was used by others both shortly before and shortly after the accident without incident or modification in the equipment. For reasons hereinafter explained, we reverse and remand for a new trial.

It is admitted that on June 8, 1974, the defendant, pursuant to a purchase order for fertilizer, delivered to the plaintiff's farm a nurse tank filled with approximately 1,000 gallons of anhydrous ammonia. The nurse tank is equipped with a hose and nozzle by means of which the transfer of the fertilizer in the nurse tank to the applicator tank is made. On the day above mentioned, while the plaintiff was in the initial steps of the process of making the transfer, the valve on the nurse tank hose, in some manner not exlained by direct evidence, opened before the plaintiff had made the necessary attachment to the receiving valve on the applicator tank and, as a consequence, he suffered burns to the face and eyes which resulted in serious permanent injury.

As to the theory of warranty, the trial court, by its instructions, submitted to the jury the issue of whether the defendant furnished to the plaintiff "a transfer hose and valve, which valve was not reasonably fit for the use intended, that is, the transfer of anhydrous ammonia from the nurse tank to an applicator tank in a reasonable manner." As to the theory founded on negligence, the court submitted the following allegations of negligence: (1) Failure to warn the plaintiff by a plain and visible warning on the nurse tank, as required by certain regulations, of the dangerous propensities of anhydrous ammonia. (2) The failure to furnish to the plaintiff, for use in making the transfer, a full face mask or goggles as called for by certain regulations. (3) The failure to provide an adequately tightened valve. (4) The failure to instruct the plaintiff in safety procedures.

As to the negligence theory, the court submitted to the jury the defendant's pleaded defenses only in the following form: "a. Plaintiff was himself negligent in failing to exercise due care and proper caution in attempting to transfer anhydrous ammonia from a nurse tank to an applicator tank. . . . b. Plaintiff assumed the risk of his own injury." The trial court did not instruct the jury as to any specific claimed acts of contributory negligence, although the defendant had pleaded, among others, that the plaintiff was negligent in the following particulars: "4. In holding onto the wheel on the valve on the end of the nurse tank hose . . . when in the process of attempting to attach the nurse tank hose to the applicator tank. . . . 5. In opening the valve on the end of the nurse tank hose . . . when in the process of attempting to attach the nurse tank hose to the applicator tank."

Before determining the merit of the assignments of error it will be helpful to summarize certain portions of the evidence. This summarization will,

where necessary, later be supplemented as we discuss the particular assignments.

The evidence shows that shortly before noon on the day of the accident, one of the employees of the defendant had, at the plaintiff's request, delivered to the plaintiff's farm the nurse tank in question. The employee parked the nurse tank in the farmyard and left it. Whether he left it beside the applicator tank or whether plaintiff later moved the applicator tank into position by the nurse tank is disputed in the evidence. In any event, it is admitted that no special instructions were given by the employee to plaintiff at that time.

When a nurse tank is delivered, a valve at the tank end of the hose is closed as is the valve [the one here claimed to be inadequately tightened] at the end of the hose which is to be attached to the reciprocal valve on the applicator tank. Two employees of the defendant, one of whom filled the nurse tank on the day in question, testified that the valve on the hose was closed tight after the tank was filled and that it was not leaking. When the process of filling the nurse tank from the storage tank at the supplier's place of business is completed, the hose, although closed off from the nurse tank by a valve on the nurse tank itself, contains anhydrous ammonia under pressure and it is in this condition when delivered to the user.

The apparent procedure for making the transfer of the fertilizer from the nurse tank to the applicator tank is as follows: The hose is removed from its place on the nurse tank, a dust cap on the applicator tank valve is removed and the valve at the end of the hose is attached to the valve on the applicator tank by means of a threaded collar. Then the various valves are opened in the proper order and the pressure of the anhydrous ammonia in the nurse tank then forces the anhydrous ammonia into the empty, or partially empty, applicator tank.

When the accident occurred, Herman had removed the hose from the nurse tank. He testified that when he removed the hose, the valve thereon was not leaking. He did not, however, check it for tightness and never had checked on any previous occasion. He then pulled the hose to the applicator tank, held the hose in his left hand, and with his right hand removed the dust cap on the applicator valve. He had proceeded to the point where he was about to attach the collar on the hose valve to the valve on the applicator tank when there was a strong burst of ammonia covering his face and clothes. In response to this question on cross-examination: "Q. Would it be a fair statement to say that you honestly don't know and can't say for sure how the accident happened on June 8th, 1974?" he responded, "I'd have to say yes, that I don't know exactly what happened. No."

As admissions against interest, two prior statements of plaintiff were introduced. The first was from a deposition. The substance of that statement was that the accident occurred just as plaintiff was about to screw the collar of the hose valve to the receiving threads on the valve of the applicator tank and at a time when the collar was about a "quarter" [inch from?] or when it was about to touch the other valve. The evidence shows that the part of the valve on the applicator tank, which receives the hose valve, is a few inches above the top of the tank and projects upward at an angle of 45 degrees from the plane formed by the center top of the applicator tank. When the valve collar is in the position described in the above admission, the nozzle of the hose valve would be directed toward the tank and not toward plaintiff's face. It can also be inferred that when the collar is in the position described by plaintiff, the valve wheel would not be in contact with the surface of the applicator tank.

The second admission against interest came from

testimony in the cross-examination of an expert witness, Schnieder, who conducted the experiments which will later be described. About a year prior to the time Schnieder was retained by plaintiff as an expert witness, Schnieder, in his capacity as an instructor and gatherer of statistics on farm safety, having heard of plaintiff's accident, came to the farm to interview the plaintiff. The witness was, on that occasion, told by plaintiff that when the accident happened, plaintiff had his hand on the valve and the valve opened, that at that moment the open end of the valve was facing up, and the ammonia came out and struck him in the face.

Immediately following the accident plaintiff washed his face and eyes with water from a hose and tank which were on the nurse tank as first aid equipment. He also summoned help and a rescue squad arrived within minutes. One of the members of this squad, a propane dealer, somewhat familiar with valves and ammonia, checked and found that all valves were then closed. The day of the accident, plaintiff's son-in-law transferred some anhydrous ammonia from the nurse tank to the applicator tank without incident. The valve was closed when he picked it up and he found nothing wrong with it. Plaintiff testified that for a short time while he was administering first aid to himself he heard hissing as though ammonia were leaking from the nozzle. The first person present after the accident testified he touched nothing. The evidence, except for the possible inference that plaintiff, himself, closed it, does not explain how the valve became closed after the ammonia burst occurred.

Plaintiff had been buying anhydrous ammonia from the defendant for a period of several years and had used the same product regularly since about 1957, in quantities varying from 5 to 20 tanks annually. During this period of time he always made the transfers between the tanks himself. At no time had

he used goggles while doing so. In 1967, he had worked parttime for an anhydrous ammonia dealer for a period of several weeks and among his duties was the filling of nurse tanks from the storage tanks. Before the accident he knew that when the ammonia was delivered the hose contained ammonia under pressure. He knew that it was a dangerous substance and that it would burn the flesh.

It is undisputed that, although required by state regulations enacted pursuant to statute, neither goggles nor a full face mask were furnished with the nurse tank by the supplier. It is undisputed that the only warning printed upon the nurse tank were the words, "Caution Ammonia." The tank bore no printed instructions or cautions as to methods to be used in handling ammonia, although such were required by regulation. There was admitted into evidence the Operational Safety Manual for Anhydrous Ammonia, issued by the Agricultural Ammonia Institute, which contained private safety regulations. This manual recommended, among other things, that since safety in the field is primarily in the hands of the applicator: "Every effort should therefore be exerted by the Anhydrous Ammonia distributor to see that he is thoroughly trained in safe handling practices and has safe equipment. When a man has not been handling ammonia for a time, re-instructing in safe techniques is in order. Applicator men should particularly be instructed in the items under Section III-A." Among the admonitions in section III-A are the following: "6. Pick up a hose by the valve body or coupling, never by the valve handwheel. . . . 12. Stand on the upwind side of ammonia transfer operation. . . . 13. Always wear tight fitting safety goggles or a full-face shield and protective gloves made of rubber or other material impervious to anhydrous ammonia when transferring ammonia."

As a part of his case the plaintiff, over objection of

the defendant, was permitted to introduce the results of certain experiments. After the accident the plaintiff "reenacted" a number of times, and caused to be recorded on motion picture film, a portion of the process by which the transfer is made. The reenactments consisted of climbing to the frame of the applicator vehicle with the hose, including the valve, in hand and moving it toward the valve on the applicator to which it was to be attached. These motion pictures indicate that plaintiff, during some of the reenactments, dragged the valve across the surface of the tank in such a manner that the handwheel came in contact with the tank's surface. It cannot be observed in these films that the handwheel and stem did in fact rotate on these occasions. Plaintiff did not testify that he had, at the time the accident occurred, permitted the valve wheel to come into contact with the surface of the tank. Plaintiff did not testify that the valve had at any time struck anything, nor that he had dropped it. At trial plaintiff testified that he had not at any time taken hold of the valve by its handwheel.

The second set of experiments was performed by the witness Schnieder and some of these experiments were also recorded on film and shown to the jury. The apparent purpose of these experiments was to show how the valve might have opened without Herman having his hand upon the handwheel. Schnieder, previous to the experiments, dismantled the valve and examined it. It was found not to be defective in any respect. He discovered, however, that by loosening the packing nut and by closing the valve only to what he described as "finger tight" (a degree of tightness requiring, as measured with a torque gauge, only 5 inch pounds of torque to open the valve), the valve would sometimes open if dropped a few inches to the pavement, or if the valve handle were dragged along a surface such as that of the applicator tank. For purposes of demon-

strating these results on film, talc was placed in the valve and the hose was pressurized with air to approximately the same pressure as when filled with anhydrous ammonia and then the experiments were repeated and filmed. On some occasions the talc could be observed to discharge through the nozzle. If the packing nut was tightened and the valve stem closed to a degree described by the witness as "snug," it would take about 30 inch pounds of torque to open the valve, and if it were "jammed tight," it would require about 55 inch pounds of torque to open. These various degrees of tightness of the valve stem were all achieved by tightening by hand. Schnieder testified that the effect of loosening the packing nut was to lessen the pressure of the packing on the valve stem and make it easier to open. There was no evidence to indicate by measurement the degree of tightness of the valve stem at the time of the accident, except the direct testimony of the defendant's employees that they closed the valves as tight as could be done by hand pressure. Inferentially, this would mean that about 55 inch pounds of torque would be required to open the valve. There was no direct evidence of any kind as to the tightness of the packing nut when the accident occurred.

It is evident that at the time of the accident the valve opened, either because plaintiff took hold of the valve wheel when moving the hose toward the valve on the applicator tank, or it was in fact somewhat loose and the valve opened by coming in contact with some surface in the manner shown by the experiment. The foundation for the experiments then clearly depended upon the truth of plaintiff's testimony at trial that he did not at any time handle the hose by taking hold of the valve stem wheel. No instruction was given or requested which would focus the jury's attention upon that issue in determining the weight and credibility to be given the results of the "reenactment" and Schnieder's experiments.

We now consider the errors assigned in the order in which we numbered them.

The trial court, in its instruction relating to the plaintiff's possible contributory negligence, referred only to the alleged failure to exercise due care and did not submit to the jury any specific allegations of contributory negligence as pled by the defendant and as to which there was supporting evidence. We have many times said that it is the duty of the trial court, without request, to submit to and properly instruct the jury on all material issues presented by the pleadings and supported by the evidence. Ripp v. Riesland, 176 Neb. 233, 125 N. W. 2d 699; Pool v. Romatzke, 177 Neb. 870, 131 N. W. 2d 593. This principle, of course, applies to claims of contributory negligence. In the last-cited case we said: "Nowhere in the instructions was the jury told which acts of the plaintiff the defendant considered to be negligent. Nor was the jury in any way apprised of defendant's theory of defense as detailed in his answer. . . . 'It is the uniform and proper practice in this state that where specific acts of negligence are charged and supported by the evidence, the trial court instructs as to the specific acts so alleged and supported. The failure to do so, whether or not requested to do so, is error.' "

We have already pointed out in our summary of the pleadings and evidence the two items of claimed contributory negligence which found support in the proof, i.e., that the plaintiff held onto the handwheel of the valve when he attempted to attach the hose to the applicator tank, and in opening the valve when in the process of attempting to make the attachment. That one or the other of these alleged acts of plaintiff caused the discharge of ammonia may be inferred from: (1) Testimony of defendant's witnesses that the valve was closed as tight as it could be by hand. (2) Plaintiff's evidence that even if tight, the valve could open if the valve wheel was

used to move the pressurized hose. (3) Plaintiff's admission that he did not know how the accident happened. (4) The evidence supported the conclusion that the release of the blast of anhydrous ammonia could be accounted for only by the occurrence of one or the other of the alternatives earlier mentioned. (5) Defendant's evidence that the length of the hose and distance between the two tanks would require some bending and pulling on the hose. (6) Plaintiff's admission to Schnieder that "he had it [the valve] in his hand and that it had opened." (7) Evidence that the valve was closed when the member of the rescue squad checked it immediately after the accident and the inference that plaintiff must have been the one who closed it. (8) Plaintiff's own evidence on standard of care admonished against handling the hose by the valve wheel. The trial court having erred in failing to instruct on pleaded issues supported by proof, such failure was prejudicial error and retrial is required.

Assignments (2) and (3) are related and we discuss them together. The defendant relies upon the proposition that to prove proximate cause, i.e., in this case that the packing nut was loose, that the valve was closed only finger tight, and that the valve opened when its handle came into contact with the tank's surface, the circumstances adduced must render the existence of the inferred facts reasonably probable, proof of mere possibility is insufficient, and that the evidence proves only a mere possibility. Defendant cites: Pendleton Woolen Mills v. Vending Associates, Inc., 195 Neb. 46, 237 N. W. 2d 99; the dissent of Judge Boslaugh in Kohler v. Ford Motor Co., 187 Neb. 428, 191 N. W. 2d 601; and Parham v. Dell Rapids Township in Minnehaha County, 80 S. D. 281, 122 N. W. 2d 548.

In the Pendleton case damage resulted when an automatic valve on a soft drink dispensing machine failed to close. In that case there was a complete

absence of evidence to show what caused the valve to remain open and of evidence which could lead to an inference that prior inspections would have prevented failure. In the South Dakota case the plaintiff was injured when his motor vehicle left the highway and crashed into a pole. This was an action against the defendant for improperly maintained highways. The plaintiff was unable to relate what had happened except that the highway contained chuckholes. The plaintiff's theory was that he hit a chuckhole and this caused him to strike his head on the ceiling of the vehicle which rendered him unconscious and caused loss of control. The Supreme Court of South Dakota held the evidence was insufficient as other possibilities as to cause were equally probable. In Kohler the plaintiff relied upon experimental evidence, as in this case. In Kohler there was extraneous expert opinion evidence to establish that a gear in the steering mechanism in an automobile was defective or broken when it left the factory, and that the gear could not have been broken as a result of the accident itself, because other parts would have given way first and they did not. The results of an experiment were then introduced to show that the broken gear could have caused both the steering jam and the accident. Kohler presented a much stronger case than the one before us. There the condition (broken gear) was established by extraneous evidence. The purpose of the following experiment was to show only that the broken gear could have caused the accident. In the case now before us the situation is different and unusual in that the purpose of the experiments was not only to establish possible causation, but also as substantive evidence of the conditions, to wit, looseness of the valve.

This court has said that when a party desires to introduce evidence of an experiment made outside of court, he should first show the similarity of the con-

ditions to those which were present when the occurrence in controversy occurred, and that where conditions are so dissimilar that the results of the experiment are likely to mislead or confuse the jury, they should not be admitted. Franks v. Jirdon, 146 Neb. 585, 20 N. W. 2d 597. The Nebraska Evidence Rules, recently enacted, do not contain any provision directly governing the use of the results of experiments as applied to the situation before us. However, it seems to us that sections 27-703 and 27-705, R. R. S. 1943, pertaining to expert opinion and disclosure of the bases therefore, as limited by section 27-403, R. R. S. 1943, pertaining to the exclusion of evidence if its probative value might mislead the jury, etc., are applicable by analogy. The discussion and analyses appearing in "The Nebraska Rules of Evidence, 1975," N. C. L. Ed., Inc., § 7, p. 11, seem pertinent and are as follows: "The one open question in this analysis is that while Rule 705 provides that the underlying basis need not be brought out before the expert gives his opinion, it is silent as to whether the direct examiner can bring it out when all or part of that basis is otherwise inadmissible. If allowed to do so, the opinion, of course, would be substantive evidence while the basis could be admitted not as substantive evidence but only on the issue of the credibility of the expert's opinion. As such, it would be *excludable only when the probative value to the issue of credibility was outweighed by the dangers enumerated in Rule 403.* While the piece of inadmissible evidence would not get in as substantive evidence under this analysis, the expert's opinion might serve the same purpose in terms of burden of proof requirements. Additionally, the attorney may be able to get it before the jury, though for a limited purpose." (Emphasis supplied.) A "piece of evidence offered may be relevant [and probative] only if some other fact is true." The Nebraska Rules of Evidence, *supra*, § 4, p. 4.

As earlier pointed out, plaintiff testified at trial that he did not maneuver the hose by using the valve wheel. If that testimony be true, then the valve opened in some other fashion and the Schnieder experiments were competent for the purpose of establishing other conditions under which it might open. The foundation for the experiment depended upon the credibility of Herman's denial that he held or moved the hose by having his hand upon the valve wheel. Despite the denial, the evidence was such as to permit the jury to find that he had in fact moved the hose by the valve wheel, and that this was the proximate cause of the accident and his injuries. Absent the denial, we believe the circumstantial evidence rule and section 27-403, R. R. S. 1943, support the defendant's contention that evidence of the experiment would be inadmissible. We think, therefore, that since, for reasons previously stated, the case must in any event be retried, that upon retrial the jury should be instructed that if it disbelieves plaintiff's denial, then it should not give any weight to the results of the Schnieder experiments or plaintiff's reenactment.

The trial court gave the jury the following instruction: "You are instructed that a supplier of a product who deals with a dangerous substance is held to strict accountability and owes the highest degree of care to prevent injury from the use of that product." The defendant complains that the use of the words "held to strict accountability" imposes a higher degree of care than the legal standard and was therefore erroneous in that it, in effect, imposed strict liability upon the defendant. We believe the words objected to overstate the standard of care applicable in this case, and could mislead the jury into believing that the defendant was in fact an insurer of the plaintiff's safety. The words "held to strict accountability" have not been used in any instruction which has received approval by this court in any case com-

parable to the one before us, nor in any other type of case so far as we can tell.

We discuss the cases cited and relied upon by the plaintiff in support of the instruction. In Rasmussen v. Benson, 133 Neb. 449, 275 N. W. 674, the plaintiff sold as cattle feed bran which had been prepared for use as grasshopper poison. In that case the trial court gave the following instruction which we apparently approved: "The court, after defining negligence in instruction No. 3, imposed a duty on the defendant in this language: 'And if the defendant at the time of the sale knew, or in the exercise of proper care should have known, that he had poisonous bran and that it was, or was likely to be, in the articles offered at his sale and to be so assembled or put out by himself or by others assisting him in preparing for the sale, then it was his duty to exercise a high degree of care to see that prospective purchasers were properly notified or warned of the dangerous character of the bran.' " This court then went into a long dissertation on liability and quoted numerous authorities, including the following from 49 C. J. 1045: " 'All persons who deal with deadly poisons or noxious and dangerous substances are held to strict accountability, and the highest degree of care must be used to prevent injury. . . .' " We then significantly pointed out that the plaintiff was totally ignorant of and had no reason at all to know of the poisonous nature of the substance delivered to him. He had purchased cattle feed. This court thereupon affirmed the verdict for the plaintiff.

In Colvin v. Powell & Co., Inc., 163 Neb. 112, 77 N. W. 2d 900, the defendant sold barrels containing a residue of a deadly poison, parathion, for use in storing backstrap molasses which was to be used as cattle feed, and this court, in discussing liability, again used the above quotation from Corpus Juris. Again, in that case, the defendant did not know or have any reason to suspect that there was a poisonous residue

in the barrels which had been sold to him as unused barrels. The defendant was held liable. In both of the above cases we would now hold the defendant liable under the standards applicable to strict liability in tort. Kohler v. Ford Motor Co., *supra*. The same would seem to be true in Rose v. Buffalo Air Service, 170 Neb. 806, 104 N. W. 2d 431, where an aerial sprayer used a spray containing 2,4-D and damaged a crop of sugar beets.

None of the three above cases is like the one at hand. Here the plaintiff knew the dangerous nature of the substance he was dealing with. The defendant owed him the "highest" degree of care, but was not "strictly accountable." See, also, Darnell v. Panhandle Coop. Assn., 175 Neb. 40, 120 N. W. 2d 278. The instruction given was proper, except for the words complained of, and they should be omitted if such an instruction is again given.

Assignments of error which we have numbered (5) through (9) are logically interrelated and will be discussed together.

The plaintiff's first theory of recovery was that the defendant breached the implied warranty of fitness imposed upon a seller by the provisions of section 2-315 of the Uniform Commercial Code. This aspect of the case has not been adequately briefed by either of the parties although it is quite clear from the defendant's tendered instructions, and its argument with reference thereto, that it considered its duties, insofar as the nurse tank, hose, and valve are concerned, solely those of a bailor or supplier to the plaintiff of a product for use in the defendant's business and not those imposed upon a seller by virtue of the provisions of section 2-315, U. C. C.

The plaintiff, on the other hand, assumes without citation of authority other than section 2-315, U. C. C., that that section applies to a supplier of a product under bailment as well as to a seller.

It is undisputed that the defendant sold only the

anhydrous ammonia. It furnished to the plaintiff the nurse tank and its appurtenances, including the allegedly untightened valve, for the purpose of dispensing the fertilizer. Section 2-315, U. C. C., by its literal terms, applies to sales. Here the alleged defect is not in the goods sold, but in the chattel supplied to hold and dispense the goods.

The question therefore is, should the warranty of section 2-315, U. C. C., be extended by interpretation to include cases where there is both a sale of goods and the concomitant and necessary supplying of a chattel container, or should there rise such a warranty independently of section 2-315, U. C. C.

As noted, the literal language of section 2-315, U. C. C., includes only goods which are the subject of a sale. The commentary to section 2-313, U. C. C., however, is significant and we quote: "2. Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents."

We seem long ago to have adopted the principle that implied warranties of fitness may arise out of a contract of bailment. In McWilliams v. Griffin, 132 Neb. 753, 273 N. W. 209, an action for personal injuries allegedly arising from the existence of defective brakes on a hired motor vehicle, we said: "It is also to be conceded that this contract of bailment, impliedly at least, warranted that the thing bailed 'is of a character and in a condition to be used as contemplated by the contract.' 7 Am. & Eng. Ency.

of Law (2d ed.) p. 306. See, also, Williamson v. Phillipoff, 66 Fla. 549, 64 So. 269; Collette v. Page, 44 R. I. 26, 114 Atl. 136."

We can discern no substantive difference, so far as implied warranties of fitness of a chattel are concerned, between the sale of goods and a container holding them, and the sale of goods accompanied by a bailment of the container. The practical consequences of any defect in the container are identical. The general rule seems to be that a bailor impliedly warrants the reasonable suitability of the bailed chattel for the bailee's known and intended use of it. 63 Am. Jur. 2d, Products Liability, § 6, p. 14; 8 Am. Jur. 2d, Bailments, § 144, p. 1039. Some courts have found it necessary to ground such warranties by interpretation of statutory provisions similar to section 2-315, U. C. C. See Pettella v. Corp Brothers, Inc., 107 R. I. 599, 268 A. 2d 699. That case involved the sale of propane and the accompanying bailment of a container which was defective as a result of which a fire ensued. In view of our prior precedent, we do not base our holding upon an extension of the terms of section 2-315, U. C. C. We hold that a contract of bailment of a chattel may give rise to an implied warranty of fitness for the purpose for which the chattel is bailed.

The defendant's complaint with reference to refusal of its requested instructions Nos. 2, 9, and 11 is without merit. The trial court did give NJI No. 11.01 which properly describes the duty *of care* which a bailor for compensation owes to the bailee.

Assignment (7) is likewise unmeritorious. The hose and valve were received into evidence, together with testimony as to how the valve functioned. If the valve was not sufficiently tightened, as claimed by the plaintiff, it is clear that the evidence would support the conclusion that the defect could have been discovered by inspection.

Assignment (8) is without merit. It is undisputed

that the purpose for which the hose and valve were furnished was that of transferring the anhydrous ammonia from one tank to the other. It is self-evident that both parties knew this. Our holding with reference to assignment (5) sufficiently answers the defendant's complaint.

Should the trial court have instructed that assumption of risk was a defense to the action insofar as it was founded upon the claimed breach of an implied warranty of fitness? The defendant points out that in Hawkins Constr. Co. v. Matthews Co., Inc., 190 Neb. 546, 209 N. W. 2d 643, we said: "Considerable discussion and argument is made by the defendants as to the submission of the issue of contributory negligence. It is clear that traditional 'contributory negligence' in the sense of a failure to discover a defect or to guard against it, is not a defense to a suit in strict tort, or for a breach of warranty. Assumption of risk and misuse of the product are. Restatement, Torts 2d, § 402A, Comment n, p. 356." An examination of that case indicates that the holding of the court was grounded upon the principle that one cannot complain of an error which is harmful only to the other party. That statement was therefore dictum. It cannot be considered as necessarily controlling here.

The cases considering the question of whether the defenses of contributory negligence or assumption of risk are available in actions founded upon the theory of breach of warranty are collated in the annotation and supplement thereto at 4 A. L. R. 3d, pp. 505 to 511. The authorities are divided and if we accept at face value the analyses of the writer of the annotation, those authorities are not readily reconcilable. See, also, White & Summers, Uniform Commercial Code, p. 335. Some of the cases analyze the question as one of proximate cause rather than of categorizing and determining the availability of defenses.

This court and others have pointed out that the de-

fenses of assumption of risk and contributory negligence meld where the facts are that the plaintiff is fully aware of the danger and nonetheless proceeds. As applied to the facts of this case, we think the issue may be resolved on the basis of proximate cause. If the accident happened in the manner contended by the plaintiff, i.e., as a consequence of an insufficiently tightened valve and the inadvertent striking of the valve wheel on the applicator tank, then the breach of warranty could be found to be the cause of the accident. If, on the other hand, it occurred as a consequence of the plaintiff's maneuvering the hose by holding the valve wheel, or by his prematurely opening the valve before the connection was made to the applicator tank, then the plaintiff's conduct, and not the breach of warranty, was the proximate cause. We hold that on retrial the jury should be specifically instructed on this point. It is evident, of course, that the resolution of the proximate cause issue depends upon the same credibility determination referred to earlier in our discussion of the weight to be given the experiments and reenactment. At this point it is appropriate to observe that while Schnieder rendered an opinion that the valve was not fit for the purpose for which furnished, i.e., for the transfer of anhydrous ammonia, the only basis for that opinion is the tests and the conditions assumed therein, to wit, that the packing nut was loose and the valve stem only finger tight, so that in this case the facts relied upon to prove one of the acts of alleged negligence, to wit, an insufficiently tightened valve, are the same as those relied upon to prove the breach of warranty and are therefore in this respect "married."

We now consider assignment (10). In its instruction No. 2, the court submitted to the jury, in items 1 and 4 of the instruction, relating to plaintiff's second cause of action, the plaintiff's specifications of negligence pertaining to defendant's alleged failure to

give "adequate" warning of the dangerous propensities of anhydrous ammonia and failure to instruct on safe operating practices in making the transfer from the nurse tank to the applicator tank. The defendant requested an instruction (No. 11) which would have advised the jury that the defendant had no duty to warn "against injury from a danger which is obvious or which is discoverable by reasonable inspection." This instruction the court did not give. The court did not err in refusing the requested instruction. While it is true that the plaintiff knew of the dangerous nature of anhydrous ammonia, the principal danger in this case, under the plaintiff's theory, arose from a valve claimed not to be sufficiently tight. Under the evidence, this danger would not be obvious. If there was anything wrong with the valve it could not be discovered by a mere visual inspection and the valve obviously could not be dismantled while there was anhydrous ammonia under pressure in the hose.

With reference to the submission of items 1 and 4, the court did not err. It cannot be said, even though a plaintiff knew the dangers of anhydrous ammonia, that a warning of the type required by the safety standards would not have been heeded, just as it cannot be assumed that if goggles or a face mask had been furnished that plaintiff would not have worn them. Neither can it be assumed that an instruction by defendant to the plaintiff on safe operating practices, such as not handling the hose by the valve wheel, would not have had effect. Admittedly, detailed warnings of any type were not given. These were matters for the jury's determination.

The defendant claims that the court erred in refusing to instruct that the plaintiff was guilty of contributory negligence sufficient as a matter of law to bar recovery. This position has no merit. The facts are in dispute as to how the accident occurred. Defendant's contention might possibly have merit if the

plaintiff had admitted that he had handled the hose by the valve wheel, or had admitted opening the valve before securely attaching it to the applicator tank. The failure of the plaintiff to use goggles is argued as contributory negligence as a matter of law, but this was not one of the items of contributory negligence pleaded by the defendant.

The defendant introduced evidence to show that on June 11, 1974, three days after the accident the same nurse tank, hose, and valve, without the condition of any part thereof being altered or changed in any way from what it was when the tank was removed from the plaintiff's farm after being emptied a few days following the accident, were, after the nurse tank had been refilled, used by another farmer to fill his own applicator tank. Later, the testimony of this farmer was offered to show that he used the valve on June 11, 1974, without incident or problem and that the valve was then tight. This offer was refused by the court. We hold that the evidence was relevant and admissible for the purpose of tending to show the absence of the defect in the valve claimed by the plaintiff. Section 27-401, R. R. S. 1943, of our Nebraska Evidence Rules says: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Section 27-403, R. R. S. 1943, says: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The proffered evidence, even though of an event subsequent to the accident, would seem to be at least as relevant, reliable, and probative as the "reenactment" and the Schnieder experiments. See, also, Rickertsen v. Carskadon, 169 Neb.

744, 100 N. W. 2d 852; McCormick, Evidence 2d, § 200, p. 477; 1 Hursh, American Law Prod. Liab. 2d, § 1:34, p. 110; 42 A. L. R. 2d 1057. Under the facts of this case, we believe the trial court abused its discretion in not receiving the evidence.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., concurs in result only.

ROGER BEDKE, APPELLANT, V. FRANK KUCERA, APPELLEE.

263 N. W. 2d 830

Filed March 22, 1978. No. 41316.

Trial: Evidence: Instructions. Where evidence is presented which could, if accepted by the jury, give rise to application of the sudden emergency rule, an instruction on that rule is proper.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Mingus & Mingus, for appellant.

Tye, Worlock, Tye, Jacobsen & Orr and Patrick J. Nelson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

MCCOWN, J.

This is an action for damages resulting from an intersection accident between a motorcycle and an automobile. The jury returned a verdict for the defendant and the plaintiff has appealed.

The accident occurred at an unprotected intersection in Pleasanton, Nebraska, at about 5 p.m., on the afternoon of July 9, 1972. The weather was clear and the streets were dry. The surface of the intersection itself, and of the streets running north and west of the intersection, was oil blacktop. The street to the east was oiled blacktop with loose gravel, and the vacated street, referred to as an

alley, which ran south from the intersection, was gravel. The portion of the east-west street lying west of the intersection was 62 feet in width, while the portion east of the intersection was 24 feet in width. The north boundary line of the east-west street was the same both east and west of the intersection.

The defendant, Frank Kucera, the driver of the automobile, approached the intersection from the east proceeding west. The plaintiff, Roger Bedke, on his motorcycle, and two of his friends, each on his own motorcycle, approached the intersection from the south proceeding north. There was a semi-trailer truck parked on the southeast corner of the intersection which partially obstructed the view. The three motorcyclists were proceeding single file, with the plaintiff last in line. The first motorcyclist, who was a considerable distance ahead of the other two, crossed the intersection first but did not look to the east nor see the defendant's car. The defendant saw the first rider go through the intersection in front of him, and then saw the second motorcycle suddenly appear from the south. The defendant, in an effort to avoid the second motorcycle, braked and swerved to the south. The defendant avoided the second rider but struck the plaintiff, who was the third rider.

The plaintiff's motorcycle came to rest near the northwest corner of the intersection approximately 56 feet from the point of impact, and the plaintiff was thrown approximately 18 feet further. There was no evidence that the motorcyclists applied brakes. The point of impact was in the southeast portion of the intersection. The defendant's automobile left skidmarks of 44 feet before impact and 91 feet after impact, and came to rest on the south portion of the street west of the intersection. The testimony of defendant's witnesses was that the speed of the defendant as he approached the intersection was

25 miles per hour, and the speed of the three motorcycles was 40 miles per hour. The motorcyclists placed their speed at 10 to 15 miles per hour.

The jury verdict was for the defendant. Plaintiff has appealed from the order of the District Court overruling a motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial.

The principal assignment of error on appeal is that the trial court erred in giving an instruction on sudden emergency. Plaintiff contends that the sudden emergency rule cannot be successfully invoked by the defendant here because the defendant brought the emergency upon himself by his own acts, and did not use due care to avoid creating the emergency.

The court instructed the jury that: "When a person by a sudden emergency which is not due to his own negligence is placed in a position of immediate danger and has insufficient time to determine with certainty the best course to pursue, he is not held to the same accuracy of judgment as is required under ordinary circumstances, and if he pursues a course of action to avoid an accident, such as an ordinary, prudent person placed in a similar position might choose, he is not guilty of negligence, even though he did not adopt the wisest choice." The instruction is NJI No. 3.09, and the plaintiff makes no objection to the form of the instruction.

This court has consistently held that where evidence is presented which could, if accepted by the jury, give rise to application of the sudden emergency rule, an instruction on that rule is proper. See, Jones v. Peterson, 184 Neb. 141, 165 N. W. 2d 713. The evidence of the defendant here, if believed by the jury, was sufficient to give rise to the application of the sudden emergency rule. The evidence as to whether or not there was a sudden emergency, and as to whose negligence was the cause of it, was in conflict. Where reasonable minds might differ as to conclusions to be drawn from the evidence, and

where there is conflict in the evidence, such issues are for the jury. Hansen v. Hasenkamp, 192 Neb. 530, 223 N. W. 2d 44. The instruction on sudden emergency was properly submitted to the jury.

Plaintiff also assigns as error the denial of plaintiff's motion for directed verdict and the overruling of plaintiff's motion for judgment notwithstanding the verdict. On such issues the evidence must be considered in the light most favorable to the party who obtained the verdict. Every controverted fact must be resolved in his favor and he is entitled to every reasonable inference that may be drawn therefrom. Hansen v. Hasenkamp, *supra.*

The issues of negligence and sudden emergency were properly submitted to the jury. The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., concurs in the result.

KARL F. RAPP, APPELLANT, V. WILSON & COMPANY, INC., APPELLEE.

263 N. W. 2d 832

Filed March 22, 1978. No. 41349.

1. **Contracts: Proof.** In an action for breach of contract, it is incumbent upon the plaintiff to establish both that he is one of the persons entitled to enforce such contract and that defendant failed to perform one or more provisions thereof to his damage.
2. **Contracts: Courts: Verdicts.** When the evidence is insufficient to establish plaintiff's right to sue, or the breach of any contractual provisions, the trial court has a duty to direct a verdict in favor of the defendant.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

J. Joseph McQuillan of McQuillan & Swartz, for appellant.

Louis M. Leahy of Leahy, Washburn & Render, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

KUNS, Retired District Judge.

This is an appeal from the District Court for Douglas County, Nebraska. Karl F. Rapp, the appellant, sued Wilson & Company, Inc., the appellee, for wages alleged to have been lost because he was not called for work in accordance with the terms of a union contract between the appellee and the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. The trial court directed a verdict in favor of appellee and dismissed appellant's action. We affirm the judgment of the trial court.

The appellant, a member of said union, was, at all times material to this case, a full-time employee of the Union Pacific Railroad Company. Both parties refer us to the following provisions of the union contract:

Article XXI--Seniority

21.11, page 25. "An Extra Board, consisting of employees present and registered in the employment office as hereinafter specified, will be utilized to meet employment needs. Available jobs will be offered to Extra Board employees, provided such jobs do not require a special skill, and further provided the employee can perform the job or learn it in a reasonable length of time, in the following sequence:

"(i) Open jobs in departments where no employees with seniority are laid off.

"(ii) Regular replacement jobs.

"(iii) Temporary openings.

"(iv) Part time and casual work.

"Open jobs in departments where no employees with seniority are laid off, regular replacement jobs and part time and casual work will be offered to Ex-

tra Board employees in accordance with their continuous service.

"Temporary openings and/or temporary replacement work will be offered in the following manner: * * *

"(3) The Company will recognize continuous service for those employees who desire to be called in for employment later in the day by calling the telephone number which that employee has registered that day at the Employment Office."

21.13 (A) page 26. "All employees in the Extra Board who have not been assigned work, except those who are working on the second shift or the night shift, who desire to work must report to the Employment Office each morning and be registered for work by 7 a.m., or in accordance with local practice."

21.15 (A) page 27. "New employees being hired for the first time in the Extra Board, after having worked thirty (30) days in a period of seventy-five (75) consecutive calendar days, will establish a service date in the Extra Board group dating back to the original date of hire for that period. * * *"

21.15 (E) page 27. "Employees who work as either regular replacements or temporary replacements in their own department shall have their seniority protected for a two (2) year period from the last day worked in their own department."

Appellant registered for work at the employment office of appellee previous to October 9, 1970. He stated that he was hired as a "spot worker," to perform casual labor, and described his work in this way: "Well, we unloaded trucks, unloaded the sawdust, worked in the hide cellar, killing floor, fill in on cleaning jobs when the regular boys didn't show up on cleanup, worked sweet pickle and bacon, pressing bacon and cleaning bacon. I would say a general laborer." He further stated that he worked in many departments and did anything that came up. Appel-

lant and three others doing the same work testified that when there was work for them, they were called in rotation according to their dates of first employment by Ed Skorka, a night superintendent; and not all such workers belonged to the union. They were only called for night work, the calls being placed between 5:30 and 6 p.m., on the days when they were needed.

The evidence does not show that appellant was ever specifically designated as an extra board employee or that he was ever called for anything except part-time and casual work. There is no showing that a date of seniority was ever established by working 30 days in a period of 75 consecutive calendar days, according to Art. XXI (A), quoted above; neither did appellant work in one department so that he might have seniority protected under Art. XXI (E), quoted above. The basis for the order of calling the members of the crew of which appellant was a part was not the union contract; both members of the union and nonmembers were treated alike and they were called in the order of the date of the commencement of their most recent employment. Appellant was not given priority according to his previous term of employment.

The terms of the union contract are not ambiguous. The conduct of the parties was consistent with a construction of the contract that appellant was not an extra board employee. The burden rested upon the appellant (1) to bring himself within the definition of such employment, and (2) to show that appellee breached one or more provisions of the contract. The evidence is entirely insufficient to require submission of either of these issues. The orders of the trial court were correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DARRELL L. PENAS, Appellant.

263 N. W. 2d 835

Filed March 22, 1978. No. 41396.

1. **Searches and Seizures: Police Officers and Sheriffs.** A warrantless entry is valid if police officers enter under exigent circumstances of hot pursuit.
2. **Criminal Law: Police Officers and Sheriffs.** When a citizen has knowingly placed himself in a public place, and valid police action is commenced in that public place, the citizen cannot thwart police action by fleeing into a private place.
3. **Trial: Appeal and Error.** In order for an error of law occurring at trial to be considered by the Supreme Court on appeal, the alleged error must be properly presented to the trial court and properly preserved.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Thomas A. Wagoner, for appellant.

Paul L. Douglas, Attorney General, and Gary B. Schneider, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

SPENCER, J.

Defendant was charged with driving while under the influence of alcoholic liquor, third offense, and with resisting arrest. The jury acquitted him of resisting arrest, but found him guilty of driving while under the influence of alcoholic liquor. The District Court placed defendant on probation for a period of 3 years. Defendant appeals, alleging two assignments of error: (1) The failure to suppress the chemical analysis obtained in alleged violation of defendant's constitutional rights; and (2) finding the records of prior convictions were sufficient to substantiate a conviction for a third offense. We affirm.

At approximately 1:30 a.m., on the morning of September 23, 1976, Officer Ferry of the Grand Island police department was operating his police

cruiser in a westerly direction on Fourth Street in the City of Grand Island. He observed a van turn onto Fourth Street from the south, heading west, approximately 1 block ahead of him. The van made an exceedingly wide left turn, narrowly missing parked vehicles. The officer started in pursuit. He observed the driver overcorrect after missing the parked vehicles, and veer into the eastbound oncoming lane of traffic. This forced the eastbound traffic to stop or pull out of the way to avoid being hit by the van. Officer Ferry accelerated to catch up to the van as it turned onto Cleburn Street. He rounded the corner of that street and saw the van make a "U" turn and park on the west side of the street. He pulled up directly in front of the van on the same side of the street.

Officer Ferry testified he came to a stop approximately 6 feet away from the van. He testified the police cruiser he was in bore abundant indicia of police identity, including visobar lights, a red bubble light, and two police insignias. Ferry then observed defendant rapidly alight from the van and start toward a house which he later learned was defendant's residence.

Ferry got out of the cruiser and called to the defendant to come over to him. He was then 6 or 7 feet away. Defendant then started running toward a house on the northwest corner of Cleburn and Fourth Streets. Ferry yelled, "I'm a police officer, stop." Defendant did not stop, so Ferry again asked him to stop and started running after him. Defendant ran to a side door of the residence, with the officer approximately 5 yards behind. When the officer reached the door of the residence the inside door was standing open but an aluminum glass and screen exterior door was closed. Officer Ferry opened the screen door but could not see anyone or determine whether defendant had gone upstairs or downstairs.

Being concerned for his own safety, Officer Ferry returned to his cruiser and radioed for assistance. Officer Kruse responded to the call almost immediately and both officers returned to the same door. There were lights inside and they could see a landing inside the door and steps going up and down. From the outside they could see the defendant with his shirt off, standing five or six steps down the stairs. Ferry opened the door "and called to the individual to come here." Defendant responded with profanity and asked why they were in his house. Ferry again asked him to come so they could talk to him. Defendant came upstairs and demanded their reason for being there. Ferry observed his eyes were bloodshot, red in color. He could also detect alcohol on his breath. When defendant refused to go outside, the officers took hold of his belt and shoulder and directed him outside the house where they asked him to perform some sobriety tests. Defendant refused. The officers then arrested him and took him to the police station. A breathalyzer test showed defendant's blood alcohol content was .19 percent.

Defendant filed a motion to suppress the results of the breathalyzer test on the ground that it was obtained as a consequence of an illegal arrest and unconstitutional search and seizure. The motion was overruled. After trial and conviction, this appeal followed.

Defendant contends his warrantless arrest was illegal and the result of a violation of his constitutional right to be secure in his home against unreasonable searches and seizures. The State contends the officers were authorized to enter defendant's home and make an arrest without a warrant and they substantially complied with statutory requirements for a warrantless arrest.

Defendant contends the violation of section 29-411, R. R. S. 1943, requires the exclusion of the results of the breath analysis. Section 29-411, R. R. S. 1943,

provides for executing a warrant for the arrest of a person charged with an offense, or a search warrant, or when authorized to make an arrest for a felony without a warrant, the officer may break open any outer or upper door or window of a dwelling house or other building, if after notice of his office and purpose he is refused admittance. Even if section 29-411, R. R. S. 1943, were involved, the State contends its terms were substantially complied with. The State argues the officers gave the statutory notice if section 29-411, R. R. S. 1943, is applicable. The State further contends the facts of the arrest fall within the exigent circumstances exception to the necessity of complying with that statute.

At the time defendant rapidy left his vehicle, Officer Ferry started out of his car, calling to the defendant. At this point, the officer and the defendant were only 6 or 7 feet apart. The defendant started running toward his house, at which time Officer Ferry yelled he was a police officer, but defendant did not stop. Defendant could not help but be aware he was fleeing from a police officer. The evidence is conclusive defendant was seeking the sanctuary of his residence to avoid contact with the officer.

Section 29-404.02, R. R. S. 1943, is the statute applicable herein. It provides as follows: "A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed:

"(1) A felony; or

"(2) A misdemeanor, and the officer has reasonable cause to believe that such person either (a) will not be apprehended unless immediately arrested; (b) may cause injury to himself or others or damage to property unless immediately arrested; (c) may destroy or conceal evidence of the commission of such misdemeanor; or (d) has committed a misdemeanor in the presence of the officer."

This section permits an officer to arrest a person

without a warrant if he has reasonable cause to believe the person has committed a misdemeanor in the presence of the officer. Defendant's erratic driving and subsequent conduct was sufficient to give Officer Ferry reasonable cause to believe defendant was under the influence of either drugs or liquor. Further, defendant obviously was attempting to evade contact with the officer.

In this case the circumstance known as "hot pursuit," which is recognized as an exigent circumstance, renders the acts of Officer Ferry valid. A warrantless entry is valid if police officers enter under exigent circumstances of hot pursuit. United States v. Santana, 427 U. S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976). Even if it could be said probable cause for an arrest was lacking, the officer was entitled to make an investigatory stop. We are of the opinion United States v. Santana, *supra*, supports the decision of the trial court herein. The holding in that case is: "A suspect may not defeat a warrantless arrest set in motion in a public place upon probable cause by the expedient of escaping to a private place." In Santana the defendant was standing in the doorway of her home when the police drove up. The police pulled within 15 feet of her and got out of their van, shouting "police," and displaying their identification. As they approached, Santana retreated into the vestibule of her home. The officers followed and seized her holding some drugs and marked money.

The instant case is not too different from Edwards v. United States (D. C. Court of Appeals, 1976), 364 A. 2d 1209, which followed Santana. There, police officers dressed in plain clothes and driving an unmarked car observed the defendant and a companion late at night walking up the street at a moderate pace, carrying a pillowcase. They had not seen defendant or his companion commit any crime, and had no knowledge of any crime having been com-

mitted. When they sought to make an investigatory stop, the defendant fled to his apartment in a nearby building. The District of Columbia Court of Appeals held when a citizen has knowingly placed himself in a public place, and valid police action is commenced in that public place, the citizen cannot thwart police action by fleeing into a private place.

As a collateral point, there could be a question as to whether Officer Ferry ever entered the home of defendant Penas. Ferry stepped inside the screen door onto a landing or entryway similar to a vestibule or chamber between the outer door and the actual living area. From this landing, steps led up to a door to the upper part of the house and down to the basement apartment where the defendant lived. The record does not indicate whether there was a door or some partition between the staircase area and the actual living areas. There is authority to the effect that a vestibule is considered a public area for the purpose of applying Fourth Amendment rules. United States v. Calhoun, 542 F. 2d 1094 (9th Cir., 1976); United States v. Santana, 427 U. S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976).

Defendant Penas' second assignment of error is the alleged insufficiency of the record of the two prior convictions for operating a motor vehicle while under the influence of alcoholic liquor, to substantiate a conviction for a third offense. There is no merit to this assignment. The record of the two prior convictions are contained in exhibits 2 and 3. When exhibit 2, covering the conviction of January 24, 1975, was offered, defense counsel said: "Your Honor, we have no objection to Exhibit No. 2." Defendant's present counsel represented the defendant when he pled guilty to that offense.

As to exhibit 3, covering the conviction of October 22, 1972, the record is as follows: "MR. POTTER: At this time the State would offer proposed Exhibit 3, Your Honor.

"THE COURT: All right, Mr. Wagoner?

"MR. WAGONER: We have no objection, Your Honor."

Defendant not only did not object to the admission of these two previous convictions, but specifically stated that he had no objection to their admission.

In order for an error of law occurring at trial to be considered by the Supreme Court, the alleged error must be properly presented to the trial court and properly preserved. Lucht v. American Propane Gas Co., 183 Neb. 583, 162 N. W. 2d 891 (1968).

Not only was there no objection made to the exhibits sustaining the previous convictions, but their alleged insufficiency was not assigned as error in defendant's motion for a new trial. The assignment not only is without merit, but on the record is frivolous.

The judgment is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

Some additional facts are material. At no time during any of the occurrences here did the police officer ever turn on his red lights or his siren. During the entire time Officer Ferry observed defendant's van, the only erratic driving he observed or testified about was the wide turn and overcorrection into the wrong lane of traffic which first attracted the officer's attention.

When the officer stopped his cruiser in front of the defendant's car, the defendant had already turned off his ignition and lights and gotten out of the van. It was 1:30 a.m. There is no evidence that there was any light in the area except for the headlights of the police cruiser, and the defendant was looking into those lights. There is no evidence that the defendant could see any indicia of police identity on the car, nor that the man driving the car was a police officer. Officer Ferry, when he opened his car door, called to the defendant to come over to him,

and that command started defendant's flight. Thereafter Officer Ferry identified himself as a police officer, ordered the defendant to stop, and ran after him.

When Officer Ferry opened the outer door of the house, he could not see anyone, nor determine whether the defendant had gone up the stairs from the landing or down the stairs. Officer Ferry then returned to his cruiser and radioed for assistance. There is no evidence as to the exact amount of time it took for Officer Kruse to respond, although there is evidence that it was prompt. Both officers then returned to the side door of the residence.

There were then lights on inside and they could see the defendant, with his shirt off, standing five or six steps down the stairs. They opened the door and went in onto the stair landing. They did not knock or ring the doorbell, announce their official purpose, nor request permission to enter. The side door through which the officers entered defendant's residence opened onto a landing on an inside stairway. Steps led up from the landing to the first floor of the residence, and steps led down from the landing to the basement. The stairway was a commonplace residential stairway, and the evidence will not support the conclusion that it was a vestibule or public area.

At no time while they were in the house did the officers tell the defendant he was under arrest, nor tell him what their purpose was, even after they saw his eyes and smelled his breath. It was only after the defendant was forcibly removed from the house, and after he refused to perform the sobriety tests ordered by the officers, that the defendant was formally arrested and taken to the police station.

Distinctions between a misdemeanor and a felony are critical in this case. Although the majority opinion tacitly concedes that the offense of operating a motor vehicle while under the influence of alco-

holic liquor is a misdemeanor, the distinctions between a misdemeanor and a felony in the context of this case are ignored.

The offense of driving while under the influence of alcoholic liquor, section 39-669.07, R. R. S. 1943, although it is a crime, is not designated as either a misdemeanor or a felony. It appears in the statutes under the category of "Serious Traffic Offenses." It is, nevertheless, clear that a violation of that section is a misdemeanor rather than a felony. Repetition of the offense enhances the penalty, but does not change the nature of the offense. It is also clear from the record here that neither of the arresting officers had any cause to believe that the defendant might be guilty of a felony of any kind.

The common law did not authorize the arrest of persons guilty or suspected of misdemeanors except in cases of a breach of the peace. Prior to 1967 in Nebraska a peace officer was authorized to arrest a person for a misdemeanor without a warrant only if the misdemeanor was committed in the presence of the officer. In 1967 the Legislature, for the first time, broadened that authority. Section 29-404.02, R. R. S. 1943, now provides: "A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed:

"(1) A felony; or

"(2) A misdemeanor, and the officer has reasonable cause to believe that such person either (a) will not be apprehended unless immediately arrested; (b) may cause injury to himself or others or damage to property unless immediately arrested; (c) may destroy or conceal evidence of the commission of such misdemeanor; or (d) has committed a misdemeanor in the presence of the officer."

The statute retained the traditional authority for a warrantless arrest for a misdemeanor committed in the presence of the officer, and added authorization

to arrest without a warrant for misdemeanors committed outside his presence only if there was reasonable cause to believe a misdemeanor had been committed *and* reasonable cause to believe that one of the three specific circumstances set out in subsection (2) (a), (b), or (c) might occur.

It will be noted that whether the misdemeanor was committed in the presence of the officer or outside his presence, reasonable cause to believe that the person has committed a misdemeanor is still a necessity. The facts in this case clearly gave Officer Ferry the authority to make an investigatory stop of the defendant's vehicle in order to determine whether there was probable cause for an arrest. The fact that the defendant momentarily drove his vehicle on the wrong side of the road, however, did not constitute probable cause to make an arrest for driving while under the influence of alcoholic liquor. A founded suspicion which will support a momentary investigatory or detention stop cannot be equated with probable cause, nor will such founded suspicion, without more, justify an arrest. Much less does it justify a warrantless entry into a house to make an arrest.

If there was "hot pursuit" to begin with by Officer Ferry, it certainly ended when he returned to his patrol car and called for assistance. The officers' conduct after they entered the defendant's residence demonstrates that they entered the residence to seek evidence that would furnish probable cause for an arrest and not to arrest the defendant on probable cause already established. Even if it were conceded for purposes of argument that the officers had probable cause to arrest the defendant for driving while intoxicated, there was still no authority to enter the defendant's residence as they did here.

Section 29-411, R. R. S. 1943, provides in relevant part: " * * * when authorized to make an arrest for a felony without a warrant, the officer may break

open any outer or inner door or window of a dwelling house or other building, if, after notice of his office and purpose, he is refused admittance; * * *." It is obvious that this section applies only to felonies and not to misdemeanors. It is also obvious here that even if the statute applied to a misdemeanor arrest, the specific terms of the statute were not complied with. The officers here did not request admission, nor were they refused. They simply opened the door and entered the residence. Even after their entry the officers did not tell the defendant he was under arrest, nor tell him what the purpose for entering was.

The majority opinion ignores the requirements of section 29-411, R. R. S. 1943, and indirectly holds that its procedural requirements may be ignored, even for a misdemeanor. Freedom from intrusion into the privacy of one's home is the cornerstone of the protection afforded by the Fourth Amendment. Even where the crime is a felony and there is probable cause for arrest, a warrant is ordinarily required in order to justify a forcible entry into a person's residence. This court has consistently held that a search or seizure in a place of residence without a warrant is not justified under the Fourth Amendment to the Constitution of the United States except for probable cause *and* the existence of exigent circumstances or other recognized exception. State v. Patterson, 192 Neb. 308, 220 N. W. 2d 235. None of the statutory circumstances spelled out in section 29-404.02, R. R. S. 1943, were present here.

Every case cited in the majority opinion involves a felony. The case of United States v. Santana, 427 U. S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300, did not hold that hot pursuit constituted exigent circumstances. The defendant Santana was standing on the threshold of her house holding a sack that the officers reasonably believed contained drugs and bait money. There was probable cause to make the

arrest and "the need to act quickly." When the officers sought to arrest her, she escaped into the vestibule of the house, where they arrested her. The Supreme Court held that the defendant, standing in an open doorway, was in a public place when the police, acting on probable cause, first sought to arrest her. The court determined that the defendant could not thwart the otherwise proper arrest in a public place by retreating into a private place, and that the arrest and seizure of her person under those circumstances did not violate the Fourth Amendment. There is little resemblance between that case and this one. "Hot pursuit" does not establish probable cause, nor transform a misdemeanor into a felony. In this misdemeanor case it means only that the police were following the defendant. Even that "hot pursuit" ended several minutes before the officers entered the defendant's house.

The majority opinion here holds that without knocking, requesting permission, or announcing their identity and purpose, police officers may enter a suspect's house without a warrant, in the middle of the night, to investigate, or to seize and arrest a person for a misdemeanor which the officers reasonably suspect may have been committed; provided the officers had followed the suspect to the house, saw him enter, and entered themselves a few minutes thereafter. No case in the United States that we have been able to find has ever gone so far. If the majority opinion is correct, the Fourth Amendment guaranty: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *" becomes meaningless.

CLINTON and WHITE, C. THOMAS, JJ., join in this dissent.

JOHN H. KERIAKEDES, APPELLANT, V. J. C. PENNEY CO., INC., A CORPORATION, ET AL., APPELLEES.

263 N. W. 2d 841

Filed March 22, 1978. No. 41397.

Corporations: Summons: Statutes: Words and Phrases. A managing agent of a foreign corporation upon whom service of summons may be made under section 25-511, R. R. S. 1943, is an agent who has charge of the business activities of the corporation, or some branch, department, or division thereof; and in respect to matters entrusted to him, he exercises judgment and discretion in the conduct of the corporation affairs within this state; and who, under the circumstances here, is of sufficient position and rank to make it reasonably certain the defendant will be apprised of the service of summons.

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

Nelson, Harding, Marchetti, Leonard & Tate, for appellant.

John A. Rickerson of Rickerson & Welch, for appellees.

Heard before WHITE, C. J., BOSLAUGH and WHITE, JJ., and WARREN and KORTUM, District Judges.

WARREN, District Judge.

This is an appeal from the dismissal of the action after the overruling of a motion to reconsider an order sustaining the special appearance of the defendant J. C. Penney Co., Inc.

Plaintiff, John H. Keriakedes, filed this action on January 30, 1976, against J. C. Penney Co., Inc., a Delaware corporation, for damages for unlawful arrest and defamation as a result of an incident at one of the defendant's Omaha stores on February 3, 1975.

Summons was forthwith issued and delivered to the sheriff of Douglas County for service. Service was made by Deputy Sheriff Ernest L. Mackey, whose return certified in part as follows: "Received this writ on January 30, 1976 and served the

same on January 30, 1976 on the within named, J. C. PENNEY CO., INC., a corporation, by delivering to TOM KRUEGER, General Manager and Managing Agent, personally in Douglas County, a true and duly certified copy of this writ with all the endorsements thereon. He being in charge at the usual place of doing business of such named corporation in said county, and no higher officer of said corporation being found in said county."

Defendant appeared specially for the sole purpose of objecting to the jurisdiction of the court for the reason that service of process upon it was not properly made. This special appearance was supported by the affidavits of Tom Krueger, upon whom the purported service was made; and Vern Lindstrom, defendant's Westroads store manager. Tom Krueger stated in his affidavit that he was, on January 30, 1976, the personnel manager for the defendant's J. C. Penney store at Westroads in Omaha; that Deputy Sheriff Mackey "simply inquired as to my name and handed the summons to me"; that he was neither general manager nor managing agent for J. C. Penney Co., Inc., on that date and had not been designated in any way to receive service of summons or other process; that Vern Lindstrom was the store manager of defendant's store at Westroads on the date in question; and that David Anderson, with offices at 10050 Regency Circle, Omaha, Nebraska, was defendant's district manager on January 30, 1976. Vern Lindstrom by his affidavit stated his status as defendant's store manager at the Westroads store and said that on "the 30th day of January, 1976, he was on duty and was generally at the Westroads store during various portions of that day"; that Tom Krueger was personnel manager for the Westroads store; and that David Anderson, as defendant's district manager for the area was "the highest official of J. C. Penney Co., Inc. in this area."

At the hearing on the special appearance, plaintiff called Deputy Sheriff Mackey to testify regarding service. He stated that he went to the executive offices on the second floor of defendant's Westroads store and asked the receptionist for the president, vice president, secretary, or treasurer. When informed that none of these officers were present, Mackey asked for the next "highest officer who was available" in the building at the time, and was directed to Tom Krueger. The deputy sheriff further testified that Krueger told him, upon inquiry as to what was his office, that he was general manager, and consequently Mackey completed service upon Krueger and certified in his return that service was made upon Tom Krueger as general manager and managing agent. Mackey admitted that he did not ask who was the store manager.

Plaintiff assigns as error the finding of the trial court that Tom Krueger was neither an officer of J. C. Penney Co., Inc., nor its managing agent within the purview of section 25-511, R. R. S. 1943, and the subsequent sustaining of the special appearance and dismissal of the action.

Section 25-511, R. R. S. 1943, provides as follows: "A summons against a corporation may be served upon any officer thereof or its managing agent; or, if none of the aforesaid can be found in the county, by a copy personally served upon the registered agent of the corporation or left at the registered office of the corporation within the state. When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent."

The issue here is a narrow one. It may be simply stated: Was Tom Krueger, personnel manager of the defendant's Westroads store in Omaha, a managing agent of the defendant on the date of the purported service?

This court, in Wilken v. Moorman Manuf. Co., 121

Neb. 1, 235 N. W. 671 (1931), with respect to service on foreign corporations, said: "A sales manager of a foreign corporation who exercises judgment and discretion in the conduct of the corporation's affairs within this state is, within the meaning of the statute relating to service of process on such corporations, a managing agent, notwithstanding his acts and doings as such agent may refer only to a part of the business transacted by the corporation." The rule was reiterated with respect to a sales manager of a foreign corporation in Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N. W. 2d 151 (1957).

We may reasonably infer that a person having the title of "personnel manager" in a large shopping center store exercises considerable judgment and discretion with respect to the hiring and management of the employees of that business. The previous holdings of this court make it plain that the managerial duties of such an employee need not be all-encompassing, but may be restricted to one department, one store, or one area. "It has been generally recognized that in order to be a 'managing agent' of a foreign corporation for the purpose of service of process, the person served need not have control over all or every department of the corporation's business." Annotation, 17 A. L. R. 3d 625, at p. 635.

In order to sustain the trial court's finding, we would be required to hold that even though a manager who has charge of the sales of a foreign corporation is "a managing agent" of such corporation, a manager who has charge of the personnel of a foreign corporation is not "a managing agent." The distinction escapes us. Foreign corporations understandably do not clothe an officer or employee with the title "managing agent" just to enable persons suing it to obtain proper service. The statutory provision for service upon "a managing agent" is not intended to restrict service of process to one person

with one title, but rather to service upon a person with sufficient position, rank, and duties to make it reasonably certain that the corporation will be apprised of service. Annotation, 17 A. L. R. 3d 625, at p. 633. A foreign corporation may, depending upon the particular facts and circumstances, have a number of such managing agents employed within the state. There is presently no requirement under section 25-511, R. R. S. 1943, that the chief officer or the highest officer be served.

While the evidence is sketchy as to the powers and duties of the defendant's personnel manager who was served in this instance, it is evident from his title and the fact that he was identified by the receptionist as the highest officer present in the defendant's store building at the time, and that he was of sufficient position, rank, and duties to make it reasonably certain that the defendant would be apprised of service.

A managing agent of a foreign corporation upon whom service of summons may be made under section 25-511, R. R. S. 1943, is an agent who has charge of the business activities of the corporation, or some branch, department, or division thereof; and in respect to matters entrusted to him exercises judgment and discretion in the conduct of the corporation affairs within this state; and who, under the circumstances here, is of sufficient position and rank to make it reasonably certain the defendant will be apprised of the service of summons.

We are not unmindful of the admonition in Erdman v. National Indemnity Co., 180 Neb. 133, 141 N. W. 2d 753 (1966), that: "Statutes prescribing the manner of service of summons are mandatory and must be strictly pursued." We do not intend to relax that rule by this holding.

Defendant contends that the ruling in Erdman v. National Indemnity Co., *supra*, controls. The distinction is obvious. The Erdman case concerned

service upon a domestic corporation and turned upon the former requirement of section 25-511, R. R. S. 1943, that in the first instance service had to be made upon the chief officer of the corporation before service could be made upon its cashier, treasurer, secretary, clerk, or managing agent. The service in Erdman was made upon the director of personnel without first ascertaining that the chief officer of the corporation was not available, and this court held that a failure to follow the mandatory priority of the statute was fatal to proper service. However, the Legislature amended section 25-511, R. R. S. 1943, in 1973 by entirely deleting the priority requirements upon which the Erdman holding was based and substituting the provision that a summons against a domestic corporation could be served upon "any officer thereof or its managing agent." We note that although the provision for service upon domestic corporations now refers to service upon "its managing agent," the provision for service upon a foreign corporation refers to service upon "a managing agent."

For the reasons above stated, we hold that the defendant's "personnel manager" was a "managing agent" within the provision of section 25-511, R. R. S. 1943, relating to foreign corporations, and consequently the trial court erred in sustaining the special appearance of the defendant J. C. Penney Co., Inc.

The judgment of the District Court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

RICHARD ELMER LONG, APPELLEE, V. SARA CHRISTINE LONG, APPELLANT.

263 N. W. 2d 825

Filed March 22, 1978. No. 41484.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

Joseph A. Shaughnessy, for appellant.

John A. Gale for McGinley, Lane, Mueller, Shanahan, McQuillan & Gale, for appellee.

Heard before SPENCER, MCCOWN, and BRODKEY, JJ., and REAGAN, District Judge, and KUNS, Retired District Judge.

REAGAN, District Judge.

Sara Christine Long appeals from an order of the District Court granting custody of a minor child of the parties to the father, Richard Elmer Long. The parties were married on October 17, 1970, and the only issue of the marriage is a son, Michael, born November 22, 1972. The parties separated in the early part of 1975. The action was tried in April of 1977 and during the period of separation, Michael remained with Mrs. Long. At the close of the trial, the District Court dissolved the marriage, divided the property, and awarded custody of Michael to Mr. Long.

Appellant assigns as error: (1) Utilization by the trial court of a comparative standard of fitness in determining custody of the minor child; (2) consideration of evidence of conduct of appellant which had no adverse effect on the health, morals, or well-being of the minor child; and (3) abuse of discretion in the custody award.

The first assignment of error is totally without merit. A comparative standard of fitness is exactly the test each trial court must employ in determining which parent should have custody. § 42-364, R. S.

Supp., 1976. It is usually stated that a mother and father have an equal and joint right to custody, and that custody is to be determined by the best interests of the child or children. Theye v. Theye. *ante* p. 206, 263 N. W. 2d 92 (1978). The cases cited by appellant in support of this assignment of error deal generally with custody awards to third parties.

The second and third assignments are properly considered conjunctively. The evidence shows that Mrs. Long lived in at least 6 different places during the 2-year separation prior to trial, and at one time lived with another man. She worked at several jobs during the period, drew welfare money, and a portion of the time relied on a paramour for support. In contrast, the evidence shows Mr. Long maintains a stable environment, both at home and work. He has a good job with prospects of advancement. He provided financial support for Michael during the separation period.

The applicable rule of law has been so oft-stated that one more repetition may have little, if any, precedential value. However, a trial court's determination of custody will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion, or it is clearly against the weight of the evidence. Theye v. Theye, *supra*. No such showing has been made in this case, and the judgment of the District Court should be affirmed.

AFFIRMED.

BARNEY L. MCGAHAN, APPELLANT, V. ST. FRANCIS HOSPITAL, A NONPROFIT CORPORATION, ET AL., APPELLEES.

263 N. W. 2d 845

Filed March 22, 1978. No. 41490.

1. **Workmen's Compensation: Time.** A claim in Workmen's Compensation Court must be filed within 1 year of the date in which the the last statement for services or compensation was paid.

2. _____: _____. The time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness, and probable compensable character of his injury or disease.
3. **Workmen's Compensation.** A decision of the Workmen's Compensation Court is entitled to the same force and effect as a verdict of a jury in a civil case and will not be upset where there is evidence in the record to sustain its findings.
4. _____. Where a claim for workmen's compensation is involved, the mere fact that the plaintiff did not know the full extent of his injury from a medical standpoint does not make it latent, particularly when the medical facts were reasonably discoverable. The plaintiff's knowledge that there is a compensable disability and not the full extent thereof is the thing that controls.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

John A. Wagoner, for appellant.

Cunningham, Blackburn, Von Seggern, Livingston & Francis, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. THOMAS, J.

The plaintiff, a licensed physical therapist, was injured on the 28th day of May 1975, while in the employ of the defendant St. Francis Hospital. The plaintiff was lifting a patient to place him on a table and suffered an acute sprain to his dorsal spine. The plaintiff was hospitalized from May 30, 1975, to June 3, 1975. The hospital's compensation carrier paid the hospital, the treating physician, and the claimant for the period of temporary total disability. The plaintiff was hospitalized for a period of almost a week and released for work on June 24, 1975. The plaintiff returned to work and was discharged by the hospital on September 22, 1975, for inability to adequately perform his work. The last statement for medical services was submitted to the carrier and paid on July 18, 1975. After his release from the hospital and before and after his discharge from em-

ployment, the plaintiff continued to consult with his physician, Dr. Robert House, up to and including November 30, 1976, at which time Dr. House first determined there was a permanent disability partial in character to the plaintiff by reason of the injury of May 28, 1975. Plaintiff filed his action in the compensation court in December 1976. The one-judge compensation court found that the plaintiff's claim was barred by section 48-137, R. R. S. 1943, for the reason that the action was not filed within 1 year of the date in which the last statement for services or compensation was paid. Plaintiff appealed to the Workmen's Compensation Court en banc. The three-judge court affirmed the decision of the one-judge court. The plaintiff appeals. We affirm.

The plaintiff's evidence discloses that after release from hospital care, plaintiff suffered continuing episodes of pain and muscle spasms and, throughout the course of time from the release from the hospital, consulted Dr. House on a more or less regular basis. The statements for services by Dr. House were paid by the plaintiff and were not submitted to his former employer or the insurance carrier. Prescriptions for medication in excess of $700, prescribed by Dr. House and taken by the plaintiff, were paid for by the plaintiff. Again, the statement for such medication was not submitted either to the former employer or to its insurance carrier. The plaintiff seeks to excuse his failure to file an action within 1 year of the "expiration" from the time of the making of the last payment by suggesting that no determination had been made of the degree of disability if any; and that the time ought to have begun to run from November 30, 1976, the date on which the plaintiff's physician was first able to determine that a degree of permanent disability resulted from the injury of May 28, 1975.

"The time period for notice or claim does not begin to run until the claimant, as a reasonable man,

should recognize the nature, seriousness and probable compensable character of his injury or disease." 3 Larson, Workmen's Compensation Law, § 78.41, p. 15-65. We are conscious that in reviewing a decision of the Workmen's Compensation Court, its determination is entitled to the same force and effect as a verdict of a jury in a civil case and will not be upset where there is evidence in the record to sustain its findings. See Fite v. Ammco Tools, Inc., 199 Neb. 353, 258 N. W. 2d 922. With that in mind, we will consider the evidence offered by the plaintiff.

The plaintiff was a licensed physical therapist with college and hospital training. He was an employee of a hospital. The diagnosis was known to him. The compensable nature of the claim was known to the plaintiff because his hospital bills and medical bill were paid by the insurance carrier. A check for temporary total disability identified as such was presented to and accepted by the plaintiff.

The plaintiff's principal assertion as the reason why the statute of limitations should not be deemed to have commenced to run on the date of the last payment was the suggestion that the injury was latent. The condition as diagnosed during the hospitalization of plaintiff after the injury on May 28, 1975, is the same condition that was diagnosed by Dr. House on November 30, 1976, the difference being that after November 30, 1976, the physician attached a degree of permanent disability to the condition. The episode that forced the plaintiff to refrain from work at St. Francis Hospital recurred at periodic intervals throughout the period of time until the filing of the petition, differing apparently neither in degree nor in intensity from that originally suffered after the injury. In Ohnmacht v. Peter Kiewit Sons Co., 178 Neb. 741, 135 N. W. 2d 237, the plaintiff tripped and sprained an ankle on July 15, 1960. He received medical treatment until August 6, 1960, and was told there was no permanent injury. The medi-

cal expenses were paid by the compensation carrier. On one or two occasions in 1961, plaintiff was forced to leave work early because of pain in his ankle. Although the symptoms of disability were evident to plaintiff from the inception of the accident, plaintiff did not actually ascertain the extent of his permanent disability until May 1963 when an orthopedic surgeon estimated a 30 percent permanent partial disability to his left foot. Plaintiff filed suit in July 1963. This court said: "There can be no question that the plaintiff knew that he had a physical disability, and that it was due to his employment. It might be said that the mere fact that the plaintiff did not know the full extent of his injury from a medical standpoint does not make it latent, particularly where the medical facts were reasonably discoverable." The plaintiff's: "Knowledge that there is a compensable disability, and not the full extent thereof, is the thing which controls." Seymour v. Journal-Star Printing Co., 174 Neb. 150, 116 N. W. 2d 297. The evidence supports the holding of the three-judge compensation court that the plaintiff, as a reasonable man, recognized the nature, seriousness, and compensable character of his claim; and the fact that he did not know the full extent thereof is not a defense to a tolling of the statute of limitations where the action is not filed within 1 year of the last payment of compensation.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. THOMAS R. HUBBARD, APPELLANT.

263 N. W. 2d 847

Filed March 22, 1978. No. 41510.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed as modified.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein, for appellant.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BOSLAUGH, J.

The defendant was charged with two counts of robbery. After a trial to a jury, he was found guilty on the first count and guilty of larceny from the person on the second count. He was sentenced to imprisonment for 3 to 5 years on the first count and 2 to 5 years on the second count, the sentences to run concurrently. He has appealed and contends the sentences imposed were excessive.

The record shows that on March 19, 1977, at just before 8 p.m., three boys were walking east on California Street in the vicinity of 38th Street in Omaha, Nebraka. Two of the boys were brothers, being 14 and 12 years old, and the third boy was 13. The defendant and a companion stopped the boys and the defendant asked if he could borrow a quarter. When the oldest boy said no, the defendant said "Let me check," and removed $3 from the oldest boy's pocket. The 13-year-old gave the defendant a nickel, which was all the money he had. The defendant went through the pockets of the other two boys and then made the boys remove their coats and went through the pockets of the coats. While this was going on the defendant's companion was holding a wire coat hanger, which had been straightened, and he was slapping it against his hand. Immediately after the incident the boys who had been robbed called the police and the defendant and his companion were apprehended. Between the time the robberies occurred and the defendant and his companion were apprehended, the defendant broke

into a truck and removed a tape player from the truck.

The defendant testified, claiming that his companion had searched the boys and obtained the money. Although there is no evidence that the defendant made any verbal threats, the evidence is clear that the boys were afraid of the defendant, largely because of the fact that he was older and bigger than they were.

The defendant was 18 years of age, 5 feet, 8 inches tall, and weighed 160 pounds. He was attending Omaha Technical High School, was in the 12th grade, had been active in sports, and had played on the varsity football team. The defendant has no prior juvenile record and his only prior offense was a charge of assault and battery which occurred 6 days before the robberies when the defendant and two companions followed three girls into a restroom at Westroads Shopping Center and molested them. The defendant was sentenced to 30 days in jail for that offense.

The trial court was of the opinion that the defendant was a poor risk for probation and that any sentence other than imprisonment would depreciate the seriousness of the crime and promote disrespect for the law. The nature of the crime was such that we cannot say a minimum sentence should not have been imposed.

There are mitigating circumstances in this case. In view of the defendant's age and the fact he had no substantial prior criminal record, we believe the sentences should be reduced to the statutory minimum. The judgment of the District Court is modified to provide for a sentence of 3 years on count I and 2 years on count II, the sentences to run concurrently, and the judgment as modified is affirmed.

AFFIRMED AS MODIFIED.

VIRGINIA S. HURLBUT, APPELLEE, V. KENT B. LANDGREN, APPELLANT.

264 N. W. 2d 174

Filed March 29, 1978. No. 41277.

1. **Trial: Verdicts: Motions, Rules, and Orders.** It is elementary that in considering a motion for a directed verdict, the truth of all competent evidence submitted on behalf of the party against whom the motion is directed shall be considered as true. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can be reasonably deduced from the evidence.
2. **Motor Vehicles: Pedestrians: Highways.** Where a sidewalk is not available, any pedestrian walking along and upon a highway shall walk only on a shoulder, as far as practicable from the edge of the roadway. Where neither a sidewalk nor a shoulder is available, any pedestrian who walks along and upon a highway shall walk as near as practicable to the edge of the roadway and, if on a two-way roadway, shall walk only on the left side of such roadway.
3. **Negligence.** A violation of a statute is not negligence per se but is merely evidence of negligence.
4. **Assumption of Risk.** Defense of assumption of risk presupposes that the plaintiff had some actual knowledge of the danger, that he understood and appreciated the risk therefrom, and that he voluntarily exposed himself to such risk.
5. **Damages: Proof.** The burden is on the defendant to prove that plaintiff should have taken some action to lessen her damages.
6. **Trial: Damages: Proof: Instructions.** Where the defendant totally fails to sustain the burden with respect to mitigation of damages the trial court is correct in refusing to submit a tendered instruction.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Schmid, Ford, Mooney, Frederick & Caporale and Waldine H. Olson, for appellant.

Richard J. Dinsmore of Dolan & Dinsmore, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. THOMAS, J.

The appellee, plaintiff below, brought an action in

the District Court for damages for personal injuries resulting from an automobile-pedestrian accident near Waterloo, in rural Douglas County, Nebraska. The jury returned a verdict for plaintiff of $180,001. The appellant, defendant below, filed a motion for new trial which the trial court overruled, and defendant appeals. We affirm.

Defendant assigns as error: (1) The overruling of the defendant's motions for a directed verdict at the close of plaintiff's case and at the close of all the evidence; (2) the refusal to give defendant's tendered instruction No. 5 informing the jury that the court found that plaintiff was contributorily negligent as a matter of law; (3) the refusal to give defendant's tendered instruction No. 14 that the jury should reduce the amount of any recovery in the event it found for the plaintiff, if it found that by reason of the plaintiff's own conduct she enhanced her own injuries by refusal to cooperate in treatment; (4) the court's refusal to give defendant's tendered instruction No. 12 on assumption of risk; and (5) that the evidence did not support the verdict.

Sometime between midnight and 1:30 a.m., on May 12, 1974, the plaintiff was walking along county road No. 96 in Douglas County near Waterloo, Nebraska, when she was struck by a vehicle operated by the defendant. The plaintiff suffered severe injuries. Prior to the incident, the plaintiff had been in a bar in Waterloo. Her husband had been with her, but the plaintiff, desiring to stay a longer time, remained at the bar when her husband left for home. The plaintiff left the bar and inquired of the village marshal whether she could secure a ride to her home in the Timber Lodge area west of Waterloo, Nebraska. The marshal replied that he could not leave his post, but stopped an automobile operated by two boys to secure a ride for the plaintiff to her home. It was the opinion of the marshal that the plaintiff was intoxicated at the time he had this con-

versation with her. This evidence was disputed by the plaintiff and by the bartender at the Townhouse bar in Waterloo, both of whom testified to the contrary.

The route to the plaintiff's home was along county road No. 29, a road which runs from the west to the east out of the village of Waterloo. County road No. 29 is a 24-foot asphalt surfaced county road. The county road intersects county road No. 96, east of Waterloo. Prior to the intersection proper, there is a curve, or diagonal, going generally from the northwest to the southeast to enable traffic that is proceeding west on county road No. 29 to turn into county road No. 96 and bypass the intersection of county road No. 96 completely. At the approximate point where the diagonal joins county road No. 96, there is a gravel driveway, and approximately 628 feet to the south of this driveway on county road No. 96 is the entrance to the plaintiff's home.

The driver of the car in which the plaintiff was a passenger let the plaintiff out of the vehicle at the northernmost gravel drive near the intersection of the diagonal and county road No. 96. The plaintiff's reason for desiring to get out of the vehicle at this point, rather than being driven directly to her driveway, was that she had been experiencing some marital difficulty with her husband and did not wish to arouse his anger by being seen in the company of other persons. The plaintiff then began walking south on the shoulder of county road No. 96 toward her driveway and, according to her testimony, had progressed approximately one-half the distance between the driveways when she was struck by the defendant's automobile. The plaintiff testified on both direct and cross-examination that at all times she was walking on the shoulder of county road No. 96. The driver of the vehicle, from which the plaintiff had just alighted, continued south, dropped another passenger off, and then turned around and pro-

ceeded north on county road No. 96 where he observed the plaintiff lying on the shoulder west of county road No. 96. The witness testified that he saw the plaintiff 100 to 150 feet south of an identified telephone pole which is approximately half way distant between the two driveways.

Defendant, a 19-year-old young man, had spent the afternoon with companions; and, by his own admission, he had consumed a quantity of beer. The defendant, who immediately before the accident was operating his vehicle on county road No. 29, used the same diagonal as had the automobile in which plaintiff had been a passenger. The testimony indicates the defendant was going between 35 and 40 miles per hour. He saw the plaintiff only a split second before the impact and the plaintiff was then on the traveled portion of the highway.

As a result of the accident, plaintiff's left leg was broken in two places, one above the knee and one below the hip, as well as sustaining fractures of the bones of the left ankle joint, toes, fingers, right hip socket, and the tail bone.

We now consider the defendant's assignments of error. The defendant's first assignment of error is to the effect that the court erred in failing to direct a verdict for the defendant. It is elementary that in considering a motion for a directed verdict, the truth of all competent evidence submitted on behalf of the party against whom the motion is directed shall be considered as true. Further, that such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. Laux v. Robinson, 195 Neb. 601, 239 N. W. 2d 786.

Section 39-646, R. R. S. 1943, provides in part: "(2) Where a sidewalk is not available, any pedestrian walking along and upon a highway shall walk only on a shoulder, as far as practicable from the edge of the roadway.

"(3) Where neither a sidewalk nor a shoulder is available, any pedestrian who walks along and upon a highway shall walk as near as practicable to the edge of the roadway and, if on a two-way roadway, shall walk only on the left side of such roadway."

It was the plaintiff's testimony that she at all times was walking on the shoulder. It was the defendant's testimony, and that of other witnesses, that the plaintiff was walking on the roadway proper. It is obvious that there was a disputed issue of fact in this matter. For the purpose of the decision on the motion for directed verdict, both the trial court and this court must assume that the testimony of the plaintiff with respect to where she was walking immediately prior to the accident was true. She was, therefore, for the purpose of this discussion, totally within the permitted limits of the statute. It was obvious that the trial court was correct in not directing a verdict either at the close of the plaintiff's evidence or at the close of all the evidence.

Defendant's second assignment of error concerns the trial court's refusal to give the defense' tendered instruction No. 5. This instruction recited: "The court has determined as a matter of law under the evidence that the plaintiff was negligent with regard to her position upon a portion of the roadway open to vehicular traffic at the time of the accident." The court's refusal to give this instruction was amply justified. Again, it will be pointed out that the plaintiff's position on the highway, whether on the traveled portion of the roadway or on the shoulder, was a matter of dispute in the evidence. Furthermore, even if the plaintiff had been found by the jury to be walking on the traveled portion of the highway at the time of the accident, a violation of a statute is not negligence per se but is merely evidence of negligence. See, Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612; Egenberger v. National Alfalfa Dehydrating & Milling Co., 164 Neb. 704, 83 N. W. 2d 523.

Defendant's next assignment of error is the failure of the trial court to submit defendant's tendered instruction No. 12 concerning the plaintiff's assumption of risk. Defense of assumption of risk presupposes that the plaintiff had some actual knowledge of the danger, that he understood and appreciated the risk therefrom, and that he voluntarily exposed himself to such risk. See Jensen v. Hawkins Constr. Co., 193 Neb. 220, 226 N. W. 2d 346. We are asked to conclude, as was the trial court, that by reason of the fact that the plaintiff asked to be let out some 600 feet from her driveway, and undertook at night to walk along or even upon the traveled portion of a two-way roadway, that the plaintiff voluntarily and knowingly assumed the risk of being struck by an automobile traveling along said roadway. This we are unwilling to do. We do not conclude that the mere act of walking along a roadway or on a roadway is of itself an assumption of risk of an accident involving severe personal injuries.

The final assignment of error relates to the plaintiff's own conduct with respect to her injuries and during the course of treatment of those injuries. After the extensive injuries suffered by the plaintiff, she was hospitalized at Nebraska Methodist Hospital from May 12, 1974, to July 5, 1974. She was operated upon and was discharged to her home with a total body cast which rendered her absolutely incapable of getting around the house. She was again hospitalized on October 20, 1974, and dismissed on December 22, 1974. Again she had a total body cast, was unable to care for herself, and was totally reliant upon other people. There was further hospitalization from January 29, 1975, to June 21, 1975. She was dismissed without the total body cast and was placed on crutches; this was the first time that the plaintiff was not totally bedfast. The plaintiff was again hospitalized from February 9, 1976, to May 10, 1976.

The plaintiff, according to the defendant, did not

cooperate in her own treatment. The evidence reveals that the patient developed complications which hindered the healing process. At trial, there was testimony from a treating physician that at the time of the injury plaintiff was taking cortisone, a steroid drug. Since steroid drugs cannot be abruptly discontinued, but must be gradually decreased over a period of time, the plaintiff had to continue on the cortisone. This medication interferes with the normal healing process. Corrective surgery, which would restore some of the movement to her fractured leg, was not capable of being performed due to extensive tissue necrosis. Necrosis is a condition characterized by deposits of dead tissue in the area of the fractured bones which can develop because of inactivity while a person is bedfast.

The defendant alleges that it was difficult to persuade the plaintiff to eat properly and that, while in the body cast, she resisted movement in the bed. Such movement would have assisted and possibly forestalled the tissue necrosis. The defendant's allegation was supported by deposition testimony of a nurse who attended the plaintiff for a period of time. Extensive psychiatric testimony was introduced by the plaintiff that the plaintiff's lack of interest in an appropriate diet and in moving and cooperating with the nurse about the movement into different positions while bedfast was due to a depressive neurosis. This type of neurosis is a predictable part of the whole injury-recovery syndrome. In addition to being a very active person who was suddenly bedfast and totally helpless, the plaintiff's marriage was in the process of breaking up during the time of her recovery. It was the opinion of the psychiatrist that the plaintiff at all times was being honest, candid, and straightforward. The psychiatrist testified the plaintiff wanted to get better and that the plaintiff had no motivation either consciously or unconsciously not to get better. Her lack of interest and

depression were not willful or intentional, but a simple medical condition within the whole concept of the entire injury. Even the defendant's witness testified that it is not unusual for a person who has sustained multiple fractures to get depressed and thus to be listless and careless about his condition and cooperation in the treatment. The trial court refused to submit to the jury the requested instruction that the jury should reduce the amount of any recovery to the extent it found the plaintiff had enhanced her own injuries. The trial court found that the burden was on the defendant to prove that plaintiff should have taken some action to lessen her damages. Colton v. Benes, 176 Neb. 483, 126 N. W. 2d 652. The defendant's evidence, when properly considered, only suggested the effects of a psychiatric and mental state that was totally explanatory of the plaintiff's listlessness. The defendant introduced no evidence whatever that the plaintiff willfully failed to act to improve her own condition and offered no expert testimony to contradict that of the plaintiff's psychiatrist. The defendant totally failed to sustain the burden with respect to mitigation of damages and the trial court was correct in refusing to submit the tendered instruction.

Finding no error, we affirm the decision of the trial court.

AFFIRMED.

WOLFSON CAR LEASING COMPANY, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS WOLFSON USED CARS, APPELLEE, V. PAM WEBERG ET AL., APPELLANTS.

264 N. W. 2d 178

Filed March 29, 1978. No. 41324.

1. **Motor Vehicles: Certificate of Title Act.** No person shall acquire any right, claim, or interest in or to a motor vehicle until he shall have had delivered to him physical possession of such motor vehicle and a certificate of title.

2. _____: _____. The purpose of the Nebraska Certificate of Title Act is to provide a means of identifying motor vehicles, ascertaining motor vehicle owners, and preventing theft of motor vehicles and fraud in the transfer of motor vehicles.
3. _____: _____. The Nebraska Certificate of Title Act is the exclusive means of transferring title.
4. **Principal and Agent: Proof.** A party alleging the existence of the agency relationship has the burden of proving the agent's authority and the agent's acts, for which liability against the principal is sought, are within the scope of the agent's authority.
5. **Principal and Agent: Torts.** A principal is liable to third persons for the torts of his agent when committed in the course of and within the scope of the agency, although the principal never authorized, participated in, or ratified the tort; but he is not liable where the tortious act was committed, not in furtherance of the principal's business, but for a purpose personal to the agent himself.
6. **Principal and Agent.** Apparent or ostensible authority to act as an agent may be conferred if the alleged principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon the apparent agency.
7. _____. Apparent or ostensible authority or agency for which a principal may be liable must be traceable to him and cannot be established by the acts, declaration, or conduct of an agent.
8. **Restitution: Damages.** The law of restitution and unjust enrichment deals with situations in which one person is accountable to another on the ground that otherwise he would unjustly suffer loss.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

James E. McCarthy and Marks, Clare, Hopkins & Rauth, for appellants.

Thomas F. Dowd, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. THOMAS, J.

This is an appeal from the denial of the defendants-appellants' counterclaims in replevin actions. In finding for the plaintiff in these actions, the municipal court held that the certificates of title to each of the used cars in issue always remained in the name of the plaintiff with the exception that, in one instance, title was transferred on the certificate, but

the certificate remained in plaintiff's possession. The court also held that the defendants were not innocent purchasers and that plaintiff's agent was not a "merchant" within the scope of section 2-104, U. C. C. In their counterclaims, defendants raised agency and negligence issues. The court denied the counterclaims without specific findings. On appeal, the District Court affirmed the judgment of the municipal court both as to the granting of replevin and denial of the counterclaims. On this appeal, defendants do not challenge the lower court findings in respect to the certificates of title and the granting of replevin. The defendants' appeal is limited to the denial of its counterclaims.

The plaintiff is a Nebraska corporation dealing in used cars. Plaintiff's sole place of business is a lot which at times has over 200 cars on it. In August of 1974, Harry Wolfson, president of plaintiff corporation, hired Robert Silliman as salesman. Silliman was employed until August 1975. Wolfson made no inquiries into Silliman's background and did not ask for references.

The duties and authority of Silliman consisted of the negotiation of the sale of used cars on behalf of Wolfson in price ranges from $200 to $300 above wholesale, the movement of used cars to various reconditioning facilities, and the physical delivery of certificates of title to the purchasers upon approval of the sales by Harry Wolfson. Silliman did not have access to the certificates of title; Wolfson himself notarized the titles upon receiving the purchase price of a car. The titles were either in the physical possession and control of Wolfson's bookkeeper or the bank which financed the inventory. Silliman did have authority to take cars off the lot and let the prospective purchasers use the cars for a period of time. Along with such authority, he had access to and authority to use intransit stickers and dealer plates.

In late 1974, Silliman became acquainted with a Montgomery Ward store employee. He approached this employee at the store and indicated he had cars to sell, representing himself to be a broker for the United States Steel Corporation. Silliman alleged the cars had been leased by the Hertz Rent-A-Car Corporation to United States Steel Corporation and he was now authorized to sell the cars. Since the vehicles were high-mileage and not reconditioned, Silliman offered to sell them at wholesale or below. The Montgomery Ward employee believed Silliman and purchased a car.

A number of other Montgomery Ward employees heard about the transaction. Subsequently, Silliman sold cars to interested employees until August of 1975. The defendants herein include a number of these employees. Other defendants include a policeman, postal inspector, real estate salesman, and mechanic. The price paid for the cars was below wholesale. The average difference between the actual price paid and the wholesale price was $700. The buyers either paid Silliman cash or issued checks payable to him. The buyers were given a receipt written on notepaper and signed by Silliman. Silliman transferred possession of the cars and furnished keys, intransit stickers, and, in some instances, dealer plates. While title passed to some of the purchasers, none of the defendants herein received title. When the defendants asked about title, Silliman informed them they had to be processed by Hertz Rent-A-Car in New York City causing a 5 to 6 week delay.

All parties agree that Harry Wolfson had no actual knowledge that Silliman was selling Wolfson cars by misrepresentation. Silliman's scheme became known to both Wolfson and the defendants when Silliman absconded with some purchase money in late August 1975. Wolfson never received any proceeds from the sales to defendants. In his dealings with

the defendants, Silliman never represented himself as an agent for Wolfson. The only reference to Wolfson made by Silliman to the defendants was that the cars had to be sold through a licensed dealer such as Wolfson.

Defendants did make an effort to inquire about Silliman's authority. Silliman was listed in the Omaha city directory as a broker for United States Steel Corporation. The defendants checked Silliman's credit rating with the Montgomery Ward credit department. Inquiry was made with the Douglas County sheriff's department to see if the vehicles Silliman offered for sale were on the stolen vehicles list. Defendants did not ask Silliman to verify that he was an agent of United States Steel Corporation, nor did they contact that corporation. Some of the defendants had been informed that Silliman was observed on the Wolfson car lot; no effort was made to contact Wolfson.

The defendants claim that the plaintiff is responsible for their monetary losses resulting from this scheme because the plaintiff's negligent control of his agent's activities contributed directly to the agent's ability to perpetrate the fraud. It is alleged Wolfson breached his duty to the public to use due care in the selection and supervision of his agent, Silliman. According to defendants' theory, this breach of duty was the proximate cause of their loss.

Although defendants allege that Wolfson's practices of allowing his agent to remove cars from the lot for periods of time and accounting for inventory contributed directly to defendants' losses, no evidence was offered as to the standard of due care ordinarily utilized in the used car business. Defendants urge such evidence is unnecessary and rely on the allegation that Wolfson violated section 60-1417, R. S. Supp., 1976. Such statute provides: "Every motor vehicle, * * * sale * * * shall be evidenced by an instrument in writing upon a form * * * approved

by the Attorney General which shall contain all the agreements of the parties and shall be signed by the buyer and seller or a duly acknowledged agent of the seller." There is no evidence in the record to support such an allegation. Even if it were true that Wolfson's practices conflicted with this statutory requirement, the filling out of buyer-seller forms is unrelated to the transactions of the defendants. Since Silliman was avoiding disclosure of his true agency, he did not use standard forms, particularly ones which might bear a reference to Wolfson.

The defendants also ask us to hold that section 60-105, R. R. S. 1943, of the Certificate of Title Act, has no application in determining the defendants' claim. We cannot so hold. Section 60-105, R. R. S. 1943, states: "No person, * * * shall acquire any right, title, claim, or interest in or to such motor vehicle, * * * until he shall have had delivered to him physical possession of such motor vehicle, * * * and a certificate of title * * *." We have stated that the purpose of this act is to provide a means of identifying motor vehicles, ascertaining motor vehicle owners, and preventing theft of motor vehicles and fraud in the transfer of motor vehicles. See, First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co., 196 Neb. 595, 244 N. W. 2d 209; State Farm Mut. Auto Ins. Co. v. Drawbaugh, 159 Neb. 149, 65 N. W. 2d 542; Snyder v. Lincoln, 150 Neb. 580, 35 N. W. 2d 483. This statutory scheme is the exclusive means of transferring title.

The passage of title of the automobile is so inherent in the transfer of the vehicle we cannot divorce the question of plaintiff's negligence from the Certificate of Title Act. The evidence is clear that Harry Wolfson, and not Silliman, had control of the certificates of title. Since no legal ownership is acquired without a duly notarized certificate and Wolfson retained such control, we cannot say from the record that Wolfson was negligent and therefore responsible for defendants' losses.

Even if we found Wolfson to be negligent, we would have to resolve the issue of defendants' contributory negligence. The issue becomes whether the defendants exercised reasonable care in their dealings with Silliman. The defendants did attempt to check Silliman's authority. However, no attempts were made to contact United States Steel Corporation. The defendants did not contact Wolfson when put on notice that he was somehow involved. The Certificate of Title Act again comes into play. Defendants accepted the cars without titles. Admittedly, they were misled into believing that title would arrive eventually because others who had bought cars from Silliman had received titles. However, some of these titles had an obvious superimposed tape with "Hertz Rent-A-Car" typed on the tape. Underneath was the name of Wolfson. Possession of a certificate of title is as significant as possession of the car. The defendants were negligent in accepting and paying for cars without receiving title.

The defendants also urge us to find that they are entitled to recovery under the doctrines of actual and apparent authority. The party alleging the existence of the agency relationship has the burden of proving the agent's authority and the agent's acts, for which liability against the principal is sought, are within the scope of the agent's authority. See, J. R. Watkins Co. v. Wiley, 184 Neb. 144, 165 N. W. 2d 585; Nebraska Tractor & Equipment Co. v. Great Lakes Pipe Line Co., 156 Neb. 366, 56 N. W. 2d 288. The defendants did not sustain this burden of proof. The evidence reveals that Silliman, as an agent of Wolfson, had authority to negotiate sales of cars for a price of $200 to $300 above wholesale. He sold the cars to the defendants for an average of $700 below wholesale. Silliman always represented himself as an agent for United States Steel Corporation, not as an agent of the plaintiff. When Silliman negotiated

with defendants, it is clear he was not acting pursuant to the actual authority given to him by Wolfson. Silliman was acting only for his own interests. A principal is liable to third persons for the torts of his agent when committed in the course and within the scope of the agency, although the principal never authorized, participated in, or ratified the tort; but he is not liable where the tortious act was committed, not in furtherance of the principal's business, but for a purpose personal to the agent himself. See Division No. 1, Railway Employees' Department, A. F. L. v. American State Bank, 113 Neb. 196, 202 N. W. 632.

Apparent or ostensible authority to act as an agent may be conferred if the alleged principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon the apparent agency. See Bliss v. Falke, 125 Neb. 400, 250 N. W. 250. We have already held that the principal, Wolfson, was not negligent. Wolfson could not have affirmatively or intentionally clothed Silliman with the authority he represented to defendants because he lacked knowledge of Silliman's dealings. Apparent or ostensible authority or agency for which a principal may be liable must be traceable to him and cannot be established by the acts, declarations, or conduct of an agent. See, Rodine v. Iowa Home Mut. Cas. Co., 171 Neb. 263, 106 N. W. 2d 391; Plummer v. National Leasing Corp., 173 Neb. 557, 114 N. W. 2d 21. The defendants testified that they at all times believed Silliman to be the agent of United States Steel Corporation and not the agent of Wolfson. Wolfson had no knowledge of Silliman's scheme. The ostensible authority is not traceable to him.

Defendants rely on the case of Oleson v. Albers, 130 Neb. 823, 266 N. W. 632. In Oleson, a seller sought to recover from the buyer the purchase price of corn. The corn had been delivered to the buyer by seller's agent. The buyer had paid the agent,

who absconded with the money. This court did say that an agent of the owner of goods, entrusted with the possession thereof for the purpose of selling and delivering the same, has authority, upon the sale of the goods, to collect and receive the purchase price, and payment to such agent discharges the liability of the buyer; and this is so whether or not the agency be known or disclosed to the buyer. We also held that an agent having possession of commodities which he is authorized to sell has implied authority to receive or collect payment therefor. Oleson is distinguishable from the case at bar. In Oleson, there is some evidence that the buyer knew the identity of the owner-principal. The main distinguishing element of the present case is again the fact that automobile ownership is evidenced by a certificate of title. In Oleson, the possession of the corn, coupled with payment to the seller's agent, was sufficient to complete the transaction for the buyer. The defendants here had mere possession of the vehicles. If the defendants had received titles as well as possession they would be in a position similar to the buyer in Oleson.

The defendants contend they are entitled to recover the money they spent on repairs for the cars under a theory of unjust enrichment. The law of restitution and unjust enrichment deals with situations in which one person is accountable to another on the ground that otherwise he would unjustly suffer loss. Ladenburger v. Platte Valley Bank of North Bend, 180 Neb. 167, 141 N. W. 2d 766. There is evidence that the defendants made repairs on the cars they purchased from Silliman. Wolfson has benefited at the expense of the defendants since the repaired cars are now in his possession. However, only one of the defendants on this appeal has counterclaimed for damages above the purchase price of the car. Thus, we can only consider the claim of this defendant, Jerry Menousek.

The evidence shows that the defendant Menousek paid Silliman $1,700 for a car. His counterclaim asked for damages of $2,240. Menousek testified he made about $500 worth of repairs on the car. There is no other evidence of itemization and actual cost of the repairs. Absent any specific evidence of the amount Menousek spent and the nature of the repairs, we cannot grant the desired relief.

The judgment of the District Court is affirmed.

AFFIRMED.

WILMA LAURA MURDOCH, APPELLANT, V. JOHN WILLIAM MURDOCH, APPELLEE.

264 N. W. 2d 183

Filed March 29, 1978. No. 41344.

1. **Divorce: Witnesses: Infants.** Children of the parties to a marriage dissolution proceeding are not by that fact alone rendered incompetent as witnesses, but whether it is reversible error to refuse to hear their testimony depends upon the circumstances of the case.
2. **Statutes: Evidence: Words and Phrases.** Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. § 27-801 (3), R. R. S. 1943.
3. **Trial: Evidence: Appeal and Error.** A presumption arises that the trial court, trying a case without a jury, in arriving at a decision, will consider such evidence only as it is competent and relevant and the Supreme Court will not reverse a case so tried because evidence was erroneously admitted where there is other material, competent, and relevant evidence admitted sufficient to sustain the trial court's judgment.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed.

Vince Kirby, for appellant.

William W. Griffin, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

CLINTON, J.

This appeal arises from the dissolution of the marriage of the parties, the award of custody of four of the five children of the parties to the respondent husband, and the award of alimony to the petitioner wife. The wife appeals and makes the following assignments of error: (1) The court erred in awarding custody of the four children to the husband. (2) The award of alimony to the wife is insufficient. (3) The court erred in refusing to hear the testimony of two of the children whom the wife desired to call as witnesses. (4) The court erred in permitting the husband to testify as to conversations with third persons.

While this appeal was pending the husband filed motions in this court as follows: (1) To vacate the decree insofar as it required payment of alimony to the wife after October 10, 1977, on which date the wife had remarried; and (2) to limit the appeal to the issue of child custody and support because the wife had accepted the benefits of alimony payments and property given her under the decree.

The motions were heard and on December 15, 1977, we sustained motion No. (1). We now sustain motion No. (2) and we consider in this opinion only assignments of errors (1), (3), and (4).

Some background information is necessary. The parties were married on September 22, 1971, after a rather short acquaintance. The husband's first wife died in June of 1971. Three daughters were born to the earlier marriage and, at the time of trial, were 13, 11, and 9 years of age. The wife had previously been married four times. She is the mother of a daughter who, at the time of trial, was 17 years of age. About 6 months after the marriage each party adopted the children of the earlier marriages. One child, a daughter, was born to the marriage here dissolved.

Difficulties developed between the parties and in February of 1976 the husband moved from the family

residence to an apartment. All the children remained with the wife. The husband continued the support of the wife and the children just as he had previously done. The wife filed her petition for dissolution and trial commenced on October 29, 1976. After the wife had testified, the trial judge, in chambers in the presence of counsel for both parties, questioned the two oldest of the husband's natural daughters. They expressed a preference for living with their adoptive mother. The court then continued the trial to December 20, 1976, and entered an order giving temporary custody of the children, except the daughter of the wife's earlier marriage, to the husband. At that time the husband was given possession of the home until December 20th. Provision in that order was also made for the support of the wife and a guardian ad litem was appointed for the children.

Thereafter the trial continued on several different dates. As her final witnesses the wife called the two oldest natural daughters of the husband. The court declined to hear their testimony. The court entered a decree which awarded custody of the wife's daughter of an earlier marriage to her and made a provision for child support. The husband was given custody of the other children and the wife was given certain visitation rights. Both custody orders were made "subject to the continuing jurisdiction of the court."

We will not here recite the testimony of the parties and their witnesses as it relates to the issue of their respective fitness and the best interests of the children as we do not believe it would serve a useful purpose. Suffice it to say that the evidence was sharply conflicting in many respects and presented for the trial court the matter of determining credibility and of exercising its judgment as to what custody would suit the best interests of the children. Even without having observed the witnesses, we, on

the written record, arrive at the same conclusion as did the trial court.

The principal issue before us is whether the court erred in refusing to hear the testimony of the two daughters. Children of the parties to a marriage dissolution proceeding are not by that fact alone rendered incompetent as witnesses. Annotation, 2 A. L. R. 2d 1329. However, in some jurisdictions it is largely within the sound discretion of the trial court as to whether it will hear the testimony of the children. May v. May, 275 Cal. App. 2d 264, 79 Cal. Rptr. 622; Dings v. Dings (Fla. App.), 161 S. 2d 227; York v. York (Ky. App.), 280 S. W. 2d 553. A number of courts have held to the contrary, stating that it is reversible error not to receive such testimony if the child has reached the age of competence.

In the present posture of this case, the sole issue is what will serve the best interests of the children. As already noted, the trial court had questioned the two children in the presence of counsel for both parties and that unsworn testimony is in the record before us. Considering all the testimony in the record, we do not believe that additional testimony of the children would have in any way affected the trial court's determination of the credibility of the witnesses. On the other hand, requiring these young children to testify, in the presence of their parents, could not but have a traumatic and disrupting emotional effect upon these children and would have tended to harm, rather than help, the ultimate custodial arrangement and therefore the interests of the children. We find that the refusal to again hear the children was not reversible error.

The court, over objection of the attorney for the wife, permitted the husband to testify to two conversations with neighbors as to the fact of and the reason for the neighbors not permitting their children to come to the house of the parties "any more"; to statements made in his presence by a psychiatrist

to whom one of the daughters had been taken for treatment of an emotional problem; and to a conversation with this same daughter. Also, over objection, a witness was permitted to testify to a telephone conversation with this daughter during which the mother was "coaching" the daughter. In each instance the objection was that the conversations were hearsay.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 27-801 (3), R. R. S. 1943.

In the instance of the conversation with the neighbors, the statements of the neighbors, if offered to prove the truth of their stated reasons for not letting the children enter the home of the parties, were clearly hearsay. The ultimate fact that other children discontinued coming to the home was, of course, material if the necessary connecting foundation were laid. In this instance that depended upon the truth of the stated reasons. The objection should have been sustained. This is also true of the statement of the psychiatrist. We note, however, that in the case of the psychiatrist the declarant was later called as a witness.

The conversation between the daughter and her father, however, was not hearsay because the daughter's statements, expressions of affection, were relevant and material because of the fact that they were made irrespective of the truth of the content. The telephone conversation was also competent and not hearsay because not offered to prove that the content of the things said were true, but because of the fact that the conversation took place and that the mother was heard "coaching" the daughter. This was relevant and material as showing the ability of the mother to influence what the daughter said.

As to the hearsay conversations which were ad-

mitted, we must keep in mind that this was a trial to the court. We have frequently said that a presumption arises that the trial court, trying a case without a jury, in arriving at a decision, will consider such evidence only as it is competent and relevant and the Supreme Court will not reverse a case so tried because evidence was erroneously admitted where there is other material, competent, and relevant evidence admitted sufficient to sustain the trial court's judgment. Stecker v. Stecker, 197 Neb. 164, 247 N. W. 2d 622.

AFFIRMED.

MAXINE M. MANNSCHRECK, APPELLANT, V. CONNECTICUT GENERAL LIFE INSURANCE COMPANY, APPELLEE.

263 N. W. 2d 849

Filed March 29, 1978. No. 41345.

1. **Summary Judgments.** In reviewing the correctness of the granting of a motion for summary judgment, the evidence will be viewed in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom.
2. _____. A moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where under the facts he is entitled to judgment as a matter of law.
3. **Insurance: Principal and Agent.** The knowledge of an insurance agent, to be considered that of the insurer, must be acquired by the agent in the course of his transaction of its business and the insurer is not chargeable with information acquired by an agent in transactions outside the scope of his agency.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Affirmed.

Joseph F. Chilen, for appellant.

David R. Buntain and Cline, Williams, Wright, Johnson & Oldfather, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. J.

This is an action by the beneficiary of a group life insurance policy to recover $40,000 in increased benefits. Plaintiff's decedent was denied increased benefits by the defendant on the ground that the decedent failed to satisfy the policy's "active service" clause. Both parties filed motions for summary judgment. The District Court held that the policy was governed by Illinois law and found on the undisputed facts that the plaintiff's decedent did not satisfy the "active service" clause of the policy. The District Court further found that under Illinois law, the doctrine of estoppel and waiver could not be invoked to broaden the policy coverage and that there was no evidence before the court which would give rise to an estoppel or waiver of the "active service" clause. Defendant's motion was granted and plaintiff's second amended petition dismissed. The plaintiff appeals. We affirm the judgment of the District Court.

Plaintiff's decedent, Robert C. Mannschreck, was a farm implement dealer who sold and serviced John Deere products. His business was incorporated in 1973 as the Mannschreck Implement Company, Inc. (the dealership). In 1968 the John Deere Dealer Group Insurance Trust (dealer trust) was established by John Deere dealers to provide insurance programs for their employees on a group basis. The dealer trust at first offered only group life insurance but in 1972 began providing health and accident insurance. Since March 1972, health and accident insurance and weekly indemnity benefits have been underwritten by the John Deere Insurance Company.

On June 2, 1972, the dealer trust obtained group life insurance policy number 35001-01 from the defendant with an effective date of March 1, 1972. On

April 27, 1972, the dealer trust received an application for the dealership and an enrollment card for the decedent. The dealership's application was accepted and the decedent was issued a certificate of insurance showing coverage in the amount of $10,000 for life insurance effective May 1, 1972.

On December 1, 1973, the dealer trust announced that a new schedule, schedule D, of increased life benefits was available under this policy to all dealer members. On March 1, 1974, the dealer trust received an enrollment card for schedule D coverage from the dealership. The application was accepted, to be effective on April 1, 1974, and a certificate of insurance was issued to the decedent.

On July 18, 1974, the dealer trust received a proof of death form and a certificate of death for the decedent. The trust administrator, upon review of the death certificate, noted that the decedent had metastasis for 19 months, yet increased his life insurance coverage on April 1, 1974. A check with the records of the John Deere Insurance Company disclosed that the decedent had received a total of $22,710.07 in health and accident benefits and $6,500 in weekly indemnity benefits from January 1973 until his death. The defendant was then informed that the decedent did not satisfy the active service requirement of the policy. The defendant has paid plaintiff the $10,000 due under the original policy but has denied coverage for the $40,000 increased benefits.

In reviewing the correctness of the granting of a motion for summary judgment, the evidence will be viewed in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom. Farmland Service Coop., Inc. v. Klein, 196 Neb. 538, 244 N. W. 2d 86 (1976). The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where un-

der the facts he is entitled to judgment as a matter of law. Barnes v. Milligan, 196 Neb. 50, 241 N. W. 2d 508 (1976).

Negotiations for the purchase of the group policy were carried on and the policy delivered to the dealer trust's offices in Illinois. The dealer trust collects the individual premiums from each dealership or employee and makes a monthly lump sum payment from its Illinois office. We must thus look to the law of Illinois in deciding questions raised by this appeal. See Simmons v. Continental Cas. Co., 285 F. Supp. 997 (D. Neb. 1968), affirmed 410 F. 2d 881 (1969); Exstrum v. Union Cas. & Life Ins. Co., 165 Neb. 554, 86 N. W. 2d 568, withdrawn on rehearing, 167 Neb. 150, 91 N. W. 2d 632 (1958).

The first issue to decide is the correctness of the District Court's determination that plaintiff's decedent did not meet the active service requirement of the policy. When schedule D coverage was added, the following provisions were stated in connection therewith:

"SPECIAL PROVISION APPLICABLE TO INCREASES IN AMOUNT OF INSURANCE. If an Employee is not in Active Service on the day his amount of insurance would otherwise be increased, his amount of insurance will not be increased until he returns to Active Service." And, "No increase in the amount of life insurance on an Employee not in Active Service on the day a change in his Dealer's Plan becomes effective will be effective until the day the Employee returns to Active Service."

From its initial effective date, "active service" was defined in this manner thusly in the group policy:

"ACTIVE SERVICE. An Employee will be considered in Active Service with an Employer on a day which is one of the Employer's scheduled work days if he is performing in the customary manner all of the regular duties of his employment with the Em-

ployer on a full-time basis on that day either at one of the Employer's business establishments or at some location to which the Employer's business requires him to travel. An Employee will be considered in Active Service on a day which is not one of the Employer's scheduled work days only if he was performing in the customary manner all of the regular duties of his employment on the next preceding scheduled work day."

From its initial effective date, "employee" was defined thusly in the group policy:

"1) an individual proprietor or partner who is actively engaged in and devotes a substantial part of his time to conducting the business of his dealership; and

"2) each other full time employee of any Employer, excluding, in any case, part-time employees, temporary employees and employees who work less than 30 hours a week for the Employer."

These definitions were repeated verbatim in the certificates of insurance issued to the decedent.

Prior to the discovery in January 1973 that he had cancer, Robert Mannschreck was responsible for the overall operation of the dealership, including sales, and spent about 80 percent of his time at the show room. The amount of time which he spent at the show room changed drastically after discovering the cancer. Prior to Mannschreck's illness, his wife kept the dealership's books, setting aside a room in their home to keep her typewriter, calculators, and adding machines. The family would also meet occasionally at the home to discuss operation of the business. As Mannschreck's condition worsened, he spent less and less time at the show room and by the end of 1973 was there less than 10 percent of the time. A hospital bed was set up at the Mannschreck home in February 1974 and thereafter Mannschreck was either confined there or at a hospital.

The sole property at the Mannschreck home treated

as dealership assets was the business equipment used by the plaintiff to keep the books. The Mannschrecks never claimed a business deduction on their personal income tax returns for the office in their home. After the death of her husband, plaintiff became president of the dealership. She now spends about 80 percent of her time at the show room. Mannschreck's son stated that the reason his father conducted business from his home was because of his health.

Subsequent to February 27, 1974, and up until a few weeks prior to his death, Mannschreck devoted more than 50 percent of his time to the operation of the dealership. Plaintiff stated that her husband spent at least 6 hours per day on dealership activities. He kept in contact with the dealership by phone, met with various sales and John Deere representatives, planned the erection of a warehouse, and had daily conferences with his sons.

Our research discloses no Illinois cases construing an "active service" or "active employment" clause identical to or similar to the one before us. Other courts, however, have been called upon to do so. See collected cases at Annotation, 58 A. L. R. 3d 993 (1974). Group insurance policies seldom require a medical examination. Therefore, many such policies will contain an active service or employment clause whose purpose is to provide a test to determine the reasonably good health of an employee and to exclude an employee who is in such a poor state of health that he cannot fully perform all his duties at his customary place of employment on the date the policy is to become effective as to him. See 1 Appleman, Insurance Law and Practice, § 44, at p. 60 (1965).

In Kolligian v. Prudential Ins. Co. of America, 353 Mass. 322, 231 N. E. 2d 381 (1967), the deceased, treasurer and director of a car dealership, was held to be "absent from work" on the date that his in-

creased coverage was to become effective, even though he continued to conduct business while away from the dealership premises. In Smith v. Connecticut General Life Ins. Co., 25 App. Div. 2d 555, 267 N. Y. S. 2d 579 (1966), the court sustained a summary judgment for the defendant insurer, where the policy required the employee to be in "active service with the Employer on (the effective date of the policy)." An employee was defined in the policy to be in active service "on any day on which he performs on a full-time basis at his Employer's regular place of employment the regular duties of his occupation or employment." The court concluded:

"* * * the undisputed hospital confinement of plaintiff's decedent * * * throughout the relevant period when the policy was in force requires a determination that the insurance never became effective as to the decedent."

In Prudential Ins. Co. of America v. Morrow, 368 F. 2d 813 (5th Cir., 1966), the policy required that the insured employee be "actively engaged in the operation of" his automobile dealership; that he not be "absent from work due to illness" on the effective date of the policy; or that he make a "return to work" for coverage to be effective. The decedent, a 50-percent owner of the dealership, was held to be "at work" since he continued to carry on dealership activities at his home and by telephone after the onset of terminal cancer. The court noted, however, that: "If, as argued by the Insurer in its requested charges, ['work'] means the doing of the usual and customary tasks performed at the usual and customary place just prior to the onset of the terminal cancer, the Assured would fail."

In Roby v. Connecticut Gen. Life Ins. Co., 166 Conn. 395, 349 A. 2d 838 (1974), the policy contained an "active service" clause identical to the one before us. Plaintiff's decedent was a tenured university professor who, on the date coverage was to be-

come effective, was engaged in self-directed activities in his home. The court held that the decedent satisfied the active service requirement of the policy, stressing the "particular nature of professorial employment." The court specifically found that among the duties contemplated of a tenured university professor were study, scholarship, and research activities which could be performed at home, at night, or on weekends.

The policy in Rabinovitz v. Travelers Ins. Co., 11 Wis. 2d 345, 105 N. W. 2d 807 (1960) provided: "* * * no employee who is not actively at work performing all of the duties of his employment with the Employer Member at his customary place of employment on the date his insurance is to become effective shall be insured until he returns to active work and the performance of all such duties."

Plaintiff in that case argued that although the decedent was confined to a hospital, he had continued to perform his duties as chief executive of the company until his death. The Wisconsin Supreme Court directed a summary judgment for the insurer, stating: "He happened to be [in the hospital], not because required by his employment or because it was advantageous to his employer, but because of his state of ill health. To construe the words of the contract to mean that the employee's customary place of employment was in the hospital, or wherever he happened to be at any given moment, would render the cause in the policy meaningless." Rabinovitz v. Travelers Ins. Co., *supra*.

The District Court, we conclude, correctly determined that plaintiff's decedent failed to satisfy the active service requirement. Despite his continued attention to and interest in dealership affairs following the onset of his illness, it cannot be said that the decedent, while confined to his home or in a hospital during the relevant period, was performing his duties at one of his employer's business establishments

or at some location which the employer's business required him to travel.

The next issue is whether the defendant waived or is estopped or otherwise precluded from asserting the decedent's failure to satisfy the active service requirement as a defense.

The cover letter which accompanied the promotional and explanatory literature for the increased benefits sent out by the dealer trust, stated in part:

"Enrollment is very easy. All you need to do is complete one of the enclosed DT-4B Application Cards and forward it to the Trust * * *.

"Complete information regarding the new Life Schedule 'D' is contained in this packet."

The DT-4B application card read: "We hereby apply for participation in the John Deere Dealer Group Insurance Trust. We represent that all our employees who enroll for coverage are bona fide full-time (30 hours per week or more) employees and that all proprietors, partners or officers who enroll are actively engaged in and devote a substantial part of their time (51%) to our employer dealership."

Both parties agree that the application of the employer and the employee, together with the master policy, constitute the entire contract between the parties under Illinois law. 73 Smith-Hurd Ill. Stat. Annotation § 843 (b), p. 447, (1965); Fuller v. Standard Oil Co., 1 Ill. App. 3d 799, 274 N. E. 2d 865 (1971); Laib v. Fraternal Reserve Life Assn., 177 Ill. App. 72 (1913). Plaintiff argues that there is a conflict between the application which is silent as to the active service requirement that the employee be performing his regular duties in a customary manner at one of his employer's business establishments or at some location to which the employer's business requires him to travel, and the master policy which contains the active service requirement; and that therefore the less stringent requirement of the appli-

cation card, that the employee work in excess of 30 hours per week or else devote a substantial (51 percent) part of his time to the dealership, should control.

We believe that this situation is governed by Kleinman v. Commercial Ins. Co. of Newark, 19 Ill. App. 3d 1004, 313 N. E. 2d 290 (1974). Defendant there had issued a group disability policy to the Chicago Bar Association. Plaintiff was issued a certificate of insurance which stated that the holder would not receive benefits beyond his 73rd birthday. In September 1961, defendant offered a modification of the disability insurance. Prior to this time plaintiff was covered under an insurance contract issued by the defendant and another one underwritten by Bankers' Security Life. Defendant offered a new contract of increased benefits as a substitute for the latter policy. Each policy holder could indicate his choice by a so-called enrollment application. Plaintiff completed this form, which was silent concerning the discontinuation of benefits past the policy holder's 73rd birthday. Plaintiff subsequently became disabled and the defendant refused to pay benefits beyond his 73rd birthday.

Plaintiff filed suit contending that the enrollment application was actually a rider and that the more favorable terms of the application should control the rights of the parties. The court rejected plaintiff's contention and affirmed a summary judgment for the insurer. The court concluded that the insurer's position that "the enrollment application was purely and simply an application, as distinguished from a rider or a new contract, there is no conflict between the policy and the application form but the contract of insurance merely provides a limitation upon which the application was silent * * *" was well taken and stated: "The certificate itself expressly provides that disability benefits will not be paid 'beyond the 73rd Anniversary of the Covered Member's

date of birth.' The enrollment application signed by plaintiff constitutes an offer to augment the insurance contract as regards the number of weeks of sickness indemnity and amount thereof, but it does not purport to affect or modify in any regard the underlying and preexisting condition that these payments are to terminate upon the 73rd anniversary of plaintiff's birth." Kleinman v. Commercial Ins. Co. of Newark, *supra.*

Plaintiff contends that the defendant is estopped from invoking the active service requirement because of promotional and explanatory literature prepared by the dealer trust which allegedly gives the impression that to obtain the increased benefits the employee need only be working at least 30 hours per week or be actively engaged in and devoting a substantial part (51 percent) of his time to conducting the business of the firm. Under the law of Illinois, as we find it, the doctrines of waiver and estoppel cannot be used to broaden the coverage of an insurance policy. Jennings v. Bituminous Cas. Corp., 47 Ill. App. 2d 243, 197 N. E. 2d 513 (1964); Spence v. Washington Nat. Ins. Co., 320 Ill. App. 149, 50 N. E. 2d 128 (1943); Simmons v. Continental Cas. Co., *supra;* Commonwealth Ins. Co. v. O. Henry Tent & Awning Co., 287 F. 2d 316 (7th Cir. 1961). See, also, 1 A. L. R. 3d 1139 (1965). The active service clause relates to eligibility for increased benefits and the question of eligibility is one which relates to the risk assumed or coverage. Crawford v. Equitable Life Assurance Soc. of U. S., 56 Ill. 2d 41, 305 N. E. 2d 144 (1973).

Finally, plaintiff contends that the defendant waived the active service requirement by accepting decedent's application and premiums and issuing him a certificate of insurance with knowledge of his health condition.

From January 1973 until his death, plaintiff's decedent received health and accident benefits and week-

ly indemnity payments from the John Deere Insurance Company. Plaintiff introduced evidence that the dealer trust maintains a common post office box to receive correspondence for both the John Deere Insurance Company policy and defendant's policy. A dealer trust employee examines all the incoming correspondence and directs it to the appropriate insurer or to the dealer trust. Plaintiff contends that the dealer trust is thus the agent for both the John Deere Insurance Company and the defendant and seeks to charge the defendant with the knowledge of this agent concerning the decedent's health condition and receipt of benefits from the John Deere Insurance Company.

The District Court correctly rejected this argument. The knowledge of an insurance agent, to be considered that of the insurer, must be acquired by the agent in the course of his transaction of its business and the insurer is not chargeable with information acquired by an agent in transactions outside the scope of his agency. 43 Am. Jur. 2d, Insurance, § 1063, p. 987. While the dealer trust may have served as an agent for both insurers, knowledge acquired by it concerning the payments of benefits to the decedent by the John Deere Insurance Company would have been outside the scope of its agency for the defendant and thus not chargeable to the defendant. The record is clear that no employee of the dealer trust who was involved in administering the defendant's policy knew of the decedent's disability payments, nor did the defendant know about the decedent's health condition and the fact that he received disability payments until more than 2 weeks after his death.

Other contentions and arguments raised by the plaintiff have been examined and are found to be without merit.

The judgment of the District Court is correct and is affirmed.

AFFIRMED.

BOSLAUGH, J., not participating.

HARRIET W. WENGER, APPELLANT, V. JAMES E. WENGER, APPELLEE.

263 N. W. 2d 855

Filed March 29, 1978. No. 41360.

1. **Divorce: Property: Alimony.** Alimony may be ordered in addition to a property settlement award. The relevant circumstances in determining whether alimony should be awarded and in what amount will vary from case to case.
2. **Divorce: Alimony.** When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Affirmed as modified.

John A. Wagoner of Wagoner & Wagoner and Cunningham, Blackburn, Von Seggern & Livingston, for appellant.

Luebs, Tracy, Dowding, Beltzer & Leininger, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

SPENCER, J.

This is an action for dissolution of marriage. Petitioner, Harriet W. Wenger, appeals, challenging the division of property and the failure to award alimony. We affirm as modified.

The parties were married in 1949. Harriet W. Wenger, at the time of the trial, was 52 years of age. Respondent, James E. Wenger, was 54. Both are in

good health. Three children were born of the marriage. All are of legal age.

During the marriage petitioner received as gifts and inheritance the sum of $69,121.97, which was contributed to the marriage. She contributed $40,000 toward the cost of the family residence in 1964, and $20,000 for the purchase of a cabin in Estes Park, Colorado, in 1975. This latter contribution is evidenced by a promissory note from respondent in the amount of $20,000. Petitioner testified that she advanced $4,000 in 1960, to pay bills of her husband's insurance agency which later merged with the present agency, Stephens-Ryder-Wenger Insurance Company. Respondent testified that part of the $4,000 was to pay personal bills and family obligations.

James E. Wenger is part owner of the insurance agency. His adjusted gross income since 1970, has been as follows:

1970	$38,216
1971	39,187
1972	44,487
1973	48,172
1974	56,800
1975	60,208
1976	87,790

The court determined the assets of the parties had a value of $126,990. The court found petitioner had contributed $69,121.97 to the marriage, from inheritance and gifts, and that she should be entitled to the return of that amount before any property division between the parties occurred. The court then found the remaining equity in the assets was $57,868.63, and that each party should receive an equal share of said amount.

The value of the property set off to the wife was $96,256.29. This included her inheritance of $69,121.97, plus $26,934.32 of the marital property. This was achieved by setting off to her the home of the parties at a value of $75,000. This is the home ac-

quired with $40,000 of the wife's inheritance, plus an equity in a prior home of $9,500. Additionally, the wife received household goods valued at $1,000; a bank account of $2,138; a Mercury automobile valued at $4,500; cash of $1,618.29; and $12,000 of mutual funds.

The property set off to the husband included the Estes Park property at $37,000, with an indebtedness of $11,000; 220 shares of stock in his insurance business, on which a value of $25,823.60 was placed; Bankshares of Nebraska stock at a value of $4,700; and Commercial National Bank stock of $2,633. This was a total of $59,156.60, from which he was to pay two bank loans and miscellaneous debts of $28,604. He was also to pay $1,618.29 cash to his wife, giving him a net of $28,934.31.

The 220 shares of stock in the insurance agency were included in the property division at $25,823.60. The dividends paid on the stock during the year preceding the divorce were $8,279, or a return of $37.63 per share. This would indicate that property may be undervalued.

The wife has challenged the property division and the failure to award alimony. We find no fault with the property division. We note, however, the court did not award the wife one-half of the marital property, as his order suggests. This comes about because property to the value of $1,800 listed in the inventory of the marital assets was not included in the final figures. The property division, however, would appear to be equitable, and we affirm it.

We find, however, that the wife should have been awarded alimony. This was a marriage of 28 years duration. The petitioner had a considerable inheritance which was used to advance the life style of the parties and their three children. Part of her inheritance was used to pay debts of the husband's business before it was merged into the present business. During the 7 years from 1970 to 1976, the husband's

annual income has increased from $38,000 to approximately $88,000. It is evident his business has now reached a very profitable plateau. On the other hand, the wife, whose employment opportunities are very limited at her present age, has acquired a real estate license. For the year before the trial herein she grossed $2,900 before the deduction of expenses, which would absorb a good part of that amount.

We said in Magruder v. Magruder, 190 Neb. 573, 209 N. W. 2d 585 (1973): "Alimony may be ordered in addition to a property settlement award. * * * The relevant circumstances in determining whether alimony should be awarded and in what amount will vary from case to case."

In that case we also said: "When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment * * *."

Considering the ages and respective incomes of the parties herein, Harriet W. Wenger is allowed monthly alimony of $300 per month for a period of 5 years, beginning with the filing of our mandate in the trial court, but such alimony shall terminate upon the death of either party, or the remarriage of the petitioner.

The petitioner is awarded an attorney's fee of $1,000 for the services of her attorney in this court.

The judgment of the District Court is affirmed as modified.

AFFIRMED AS MODIFIED.

FAY TINNIN BARNES, APPELLEE AND CROSS-APPELLANT, v. HARLAND S. MILLIGAN, APPELLANT AND CROSS-APPELLEE, IMPLEADED WITH GLAIDETH FRANK ET AL., APPELLEES AND CROSS-APPELLEES.

264 N. W. 2d 186

Filed March 29, 1978. No. 41361.

1. **Adverse Possession: Evidence.** One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years.
2. **Adverse Possession: Words and Phrases.** Claim of right or of ownership mean hostile and these terms describe the same element of adverse possession.
3. **Adverse Possession: Intent.** Ordinarily the intent with which the occupier possesses the land can best be determined by his acts and the nature of his possession.
4. **Adverse Possession: Intent: Limitations, Statute of.** The statute of limitations will not run in favor of an occupant of real estate, unless the occupancy and possession are adverse to the true owner and with the intent and purpose of the occupant to assert his ownership of the property.
5. **Statutes: Evidence: Hearsay.** Declarations of an existing state of mind, if material, are admissible as exceptions to the hearsay rule. § 27-803 (2), R. R. S. 1943.

Appeal from the District Court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed.

Michael V. Smith of Smith & King, for appellant.

Edmund Hollstein, for appellee Barnes.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

CLINTON, J.

This action involves title to approximately 1,000 acres of the Tinnin ranch in Sheridan County, Nebraska, of which Fay Tinnin Barnes, plaintiff, is owner of the record title. She brought this action of ejectment and damages for trespass against the defendant, Harland S. Milligan, record title owner of the adjoining Modisett ranch. Milligan, in his answer, claimed title to the disputed land (hereinafter

referred to as the Deer Creek land) by adverse possession as successor in title to Phyllis Edmiston and Glaideth Frank, a partnership, and their predecessors in title, the Abbott Company and Stansbie and Engel Company, both corporations. Milligan's cross-petition asks that title to the disputed land be quieted in him.

This case was before this court previously, Barnes v. Milligan, 196 Neb. 50, 241 N. W. 2d 508, upon the issue of whether the trial court had properly rendered summary judgment for the plaintiff. We there reversed and directed trial on the merits. After trial on the merits the District Court again rendered judgment for the plaintiff and the defendant Milligan has appealed. We affirm.

The defendant on this appeal makes and argues assignments of error which are founded upon the following propositions: (1) Where a claimant establishes the open, visible, continuous, and unmolested use of land for 10 years, the use will be presumed to be under a claim of right. The record owner has the burden of rebutting the presumption by proving that the use was permissive. (2) The existence of a fence separating two landowners for more than 10 continuous years, coupled with mutual recognition of and acquiescence in the use up to that fence line, has established the fence as the true boundary line between the two adjoining owners.

The record establishes the following facts. The two ranches, as presently constituted and shown by record title, adjoin. The Tinnin ranch lies to the west of the Modisett ranch. The Tinnin ranch contains approximately 6,500 acres and the Modisett ranch about 50,000 acres.

In 1951, the Tinnin ranch was owned by Fay Tinnin Barnes (hereinafter called Barnes) and the Stansbie and Engel Company, a corporation, owned by Chris Abbott and others. In that year, as a consequence of a partition action in the federal District

Court and a stipulated judgment and exchange of deeds between the parties, Barnes became the record title owner of the Tinnin ranch, as presently constituted, and a portion of the former Tinnin ranch became part of the Modisett ranch, as presently constituted, owned by the Stansbie and Engel Company. Although this division of property was, for the most part, along section lines, running straight north and south, there existed no boundary fence. Barnes, who lived in Texas, was hard to get along with and apparently did not want to participate in the cost of a boundary fence, so none was immediately erected. As a consequence, cattle wandered back and forth between the ranches. Sometime prior to his death in 1954, Chris Abbott constructed a fence on an irregular line consisting of seven different traverses running southwesterly beginning at an arbitrarily chosen point near the north line of the two ranches and ending at a point at least 1.5 miles westerly of the true boundary and at least a mile from the south boundary of the ranches. This fence did not connect with anything and did not provide a fence which would keep cattle from wandering back and forth. Sometime later in the same year, Barnes' foreman, beginning at a point near the south line of the ranches and close to the true boundary, constructed a fence running northwesterly to connect with the fence built by Abbott at its terminal point. These fences have remained in the same locations up until the present time. It is the land lying between the fence and the true boundary which is the disputed land.

In 1962, the Stansbie and Engel Company merged with the Abbott Company and conveyed to it the Modisett ranch. This deed described the Modisett ranch by legal description which did not convey the Deer Creek land. Edmiston and Frank were daughters of Chris Abbott and shareholders in the Abbott Company and officers, secretary and treas-

urer, respectively, of the Abbott Company from about 1960 until 1967. In the latter year the Modisett ranch was conveyed to them in exchange for surrender of their shares in the corporation. They formed a partnership and, using the same legal descriptions as the merger deed, conveyed the Modisett ranch to the partnership. In October 1970, the partnership contracted to sell the Modisett ranch to the defendant Milligan. The contract contained the same legal description used in the prior conveyances. It contained, however, the following provisions: "11. *Additional Assurances.* Certain real estate in Sections 15 and 22, Township 30 North, Range 43 West of the 6th P.M., has been fenced, occupied and used by Seller and its predecessors. Seller will assign and transfer to Purchaser at his request any rights with respect to such real estate that Seller has by reason of its fencing, occupation and use of such real estate." The Modisett ranch was conveyed to Milligan by deed dated April 1, 1971. In the latter part of 1972, Milligan requested a deed to the disputed land. On November 1, 1972, Edmiston and Frank, at the request of Milligan, executed and delivered to him a quitclaim deed to the Deer Creek land. Shortly after delivery of this deed, Barnes began the construction of a fence on the true line. The fence was removed by Milligan. She then began the construction of a second fence on the line. Again the fence was removed by Milligan. This litigation ensued.

It is evident that if title to the disputed land was lost by Barnes and ripened into title in the possessor by virtue of the limitations of section 25-202, R. R. S. 1943, barring the right of action for the recovery of real estate, the limitation occurred during the time possession was in the Abbott Company, which, assuming that the period of adverse possession began with the construction of the fences, would be sometime not later than 1965.

One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years. Campbell v. Buckler, 192 Neb. 336, 220 N. W. 2d 248; Shirk v. Schmunk, 192 Neb. 25, 218 N. W. 2d 433.

In Barnes v. Milligan, *supra,* we pointed out: "3 Am. Jur. 2d, Adverse Possession, § 96, p. 177, states: 'Terms such as "claim of right," "claim of title," and "claim of ownership," when used in this connection, mean nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual title or right. * * * Thus, "claim of right" means no more than "hostile" and if possession is hostile it is "under a claim of right." ' " It is apparent that the terms claim or ownership and hostility describe the same element of adverse possession. We then went on to quote from Purdum v. Sherman, 163 Neb. 889, 81 N. W. 2d 331, and pointed out that adverse possession is founded upon the intent with which the occupant held possession and can best be determined by his acts. We then quoted Purdum v. Sherman, *supra:* " 'It is the nature of the *hostile* possession that constitutes the warning.' " (Emphasis supplied.)

It is the position of Milligan that where, as here, it is clear that his predecessors in possession were in actual, continuous, exclusive, and notorious possession (sometimes we have described this as open possession), then a presumption of claim of ownership arises and the burden of proof shifts to the owner of record title to establish by a preponderance of the evidence that possession was not hostile or under claim of ownership. Milligan asserts that if this principle is properly applied in this case we must come to the conclusion that the possession was hostile or under a claim of ownership.

Milligan's position rests upon statements of this court in Fischer v. Grinsbergs, 198 Neb. 329, 252 N. W. 2d 619, and the discussion in III American Law of Property, § 15.2, pp. 759 to 761, in which the text writer points out that when statutes of limitation bar the claim the record title is extinguished. The writer then adds: "Difficulties have arisen from statements made in the cases that the adverse possessor must have occupied under claim of right; that his possession will not be adverse and will not ripen into ownership under the statute unless he asserts a title adverse to the title of the record owner; that he will acquire no title by adverse possession under the statute if he admits, no matter how casually to third parties, that he knows he has no title to the property, or admits that the real ownership is in the record owner." Concerning this last-quoted paragraph, Milligan says: "The last paragraph highlights the confusion of the trial court in this case. The court should have determined whether or not the possession claimed had been continuous, open, notorious and exclusive for a ten year period, and thereafter required the ousted party to explain the loss of possession." In Fischer v. Grinsbergs, *supra,* a case involving an acquisition of an easement by a prescription, we said: " 'The prevailing rule is that where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid the acquisition of the easement by prescription, has the burden of rebutting the prescription by showing the use to be permissive.' " Milligan also relies on Butts v. Hale, 157 Neb. 334, 59 N. W. 2d 583.

We do not believe that the principles set forth in the cases cited in the two preceding paragraphs, or in our opinion in Barnes v. Milligan, *supra,* are in conflict.

Notwithstanding the historical discussion in III American Law of Property, sections 15.2 and 15.4, tending to show that "claim of ownership" or "hostility" is not a necessary element of adverse possession, it is clear that this element has, in Nebraska law, always been required. This principle is not contradicted simply because we have frequently held that usually the "hostility" or "claim of ownership" is evidenced by the nature of the possession, Foos v. Reuter, 180 Neb. 301, 142 N. W. 2d 552, and, in the absence of contrary evidence, that is sufficient to sustain the burden of him to claim adverse title. In our discussion in Barnes v. Milligan, *supra,* where we quoted from Purdum v. Sherman, *supra,* and discussed the nature of the possession as giving "notice" of hostility, it was assumed that hostility existed. It is clear that we were not saying that nonhostility could not be shown even where the nature of the possession was sufficient to give notice of hostility. The warning loses its significance if the evidence shows that hostility is not present, because then one of the elements of adverse possession is missing.

A long line of cases make it evident that intent has always been an element in Nebraska. The intent may be either actual or presumed, or inferred from the circumstances. In most cases it is inferred from the circumstances. Colvin v. Republican Valley Land Assn., 23 Neb. 75, 36 N. W. 361 (1888); Smith v. Hitchcock, 38 Neb. 104, 56 N. W. 791; Ryan v. City of Lincoln, 85 Neb. 539, 123 N. W. 1021; Carnahan v. Cummings, 105 Neb. 337, 180 N. W. 558; Ohme v. Thomas, 134 Neb. 727, 279 N. W. 480; McDermott v. Boman, 165 Neb. 429, 86 N. W. 2d 62; Olson v. Fedde, 171 Neb. 704, 107 N. W. 2d 663; Thomas v. Flynn, 169 Neb. 458, 100 N. W. 2d 37; Fitch v. Slama, 177 Neb. 96, 128 N. W. 2d 377; Konop v. Knobel, 167 Neb. 318, 92 N. W. 2d 714; McCain v. Cook, 184 Neb. 147, 165 N. W. 2d 734; Mentzer v. Dolen, 178 Neb. 42, 131 N. W.

2d 671. The intent, even though mistaken, is sufficient as where the claimant occupies to the wrong line believing it to be the true line and even though he does not intend to claim more than that described in the deed. Hammerly v. County of Dodge, 186 Neb. 608, 185 N. W. 2d 452. In the case of prescriptive easements, some elements of possession may sometimes be different, e.g., exclusive use may not under some circumstance be required. Fischer v. Grinsbergs, *supra.* As the cases make clear, actual assertion of claim of ownership is not necessary. However, in the case before us the evidence was such as to permit the trial court to find that the occupiers to the time of the sale to Milligan did not intend to possess as owners.

The evidence in this case would permit the trial court to find that the possession of the Deer Creek land by the Stansbie and Engel Company, its successor, the Abbott Company, and its grantees until the time of the occupation by Milligan was not hostile. In Ryan v. City of Lincoln, *supra,* where the claimed adverse possessor acknowledged he did not intend to possess adversely, we said: " 'The statute of limitations will not run in favor of an occupant of real estate, unless the occupancy and possession are adverse to the true owner and with the intent and purpose of the occupant to assert his ownership of the property. * * *' "

The inference referred to in the preceding paragraph is supported by the following evidence or inferences which may be drawn from the evidence. When Chris Abbott, who controlled the Abbott Company, constructed the partial separation fence sometime between 1951 and his death in 1954, he was under no misapprehension as to where the true line was and he did not intend the fence as a boundary line fence. He knew that for a major portion of its distance, about 2½ miles, the true line followed section lines in a straight north-south line and then at

the north end followed smaller subdivision lines in a generally westerly direction to the Niobrara River. He was an apparently careful man. He was a licensed surveyor and had the necessary equipment to make an accurate survey. The fence was placed where it was merely as a matter of convenience. Any fence erected on the true line would have intersected Deer Creek and would have been constructed in part over very rough land. Abbott ended the fence without enclosing anything and must have expected, or had some agreement with Barnes' foreman, John Dykes, that the latter would erect a fence to meet it. Dykes was deceased at the time of trial. However, the fact that Dykes erected the connecting fence is not disputed.

At the time Abbott caused the corporation's portion of the fence to be built, he declared that he could pay "the old lady" (referring to Barnes) rent just like anybody else. This expressed intention to pay rent was never carried out and that fact may be explained by Abbott's death. There is evidence that, in at least one earlier instance, Abbott caused the corporation to pay unsolicited rent to an owner of a tract which was included within the Modisett fence.

The persons who managed the Modisett ranch after Abbott's death knew, apparently from Abbott, that the Abbott Company did not own or claim to own the Deer Creek land and that this position was understood not as a mere reference to record title, but in the sense that possession was not hostile.

Leases of the Modisett ranch, made after Abbott's death, did not in their legal descriptions include the Deer Creek land.

While the testimony of Edmiston and Frank relates to a period more than 10 years after the fences were constructed, it is corroborative of the evidence of the apparently previously existing intent of their predecessors in title as evidenced by the officers and

agents of the corporation. Edmiston and Frank were secretary and treasurer, respectively, of the Abbott Company from 1960 until 1967 when they personally acquired title. Although their actual knowledge of events before 1967 is not shown, their attitude and intention after they acquired title is clear and seems to be an adoption of the intent which existed earlier. They did not believe in 1967 that they had acquired title to the Deer Creek land. Before the contract with Milligan was signed, they expressly disclaimed ownership, including any claim of title by adverse possession. Milligan acknowledges that he was informed by Edmiston and Frank that they did not claim title by adverse possession; and that they could not sell the property to him because they did not own it. Edmiston and Frank testified that the agreement for the giving of the quitclaim deed was "strictly an accommodation" to Milligan. He apparently wished to lay a clear ground for a claim of adverse possession and establish a clear-cut case of privity.

Milligan contends that the declarations of Abbott cannot be considered, and at trial objected to the evidence of the declaration of Abbott about intention to pay rent on the ground that it constituted hearsay. Declarations of an existing state of mind, if material, are admissible as exceptions to the hearsay rule. § 27-803 (2), R. R. S. 1943. See, also, Lichty v. Clark, 10 Neb. 472, 6 N. W. 760; Sutter v. State, 102 Neb. 321, 167 N. W. 66. The evidence was admissible.

We find it unnecessary to consider Milligan's contention regarding the applicability of section 34-301, R. R. S. 1943, for the reason that it raises no issues which have not been disposed of in the foregoing discussion.

AFFIRMED.

DONALD S. CRINK, APPELLEE, V. NORTHERN NATURAL GAS COMPANY, A CORPORATION, ET AL., APPELLANTS.

263 N. W. 2d 857

Filed March 29, 1978. No. 41378.

Motor Vehicles: Highways: Negligence. A driver approaching an unprotected intersection, where he knows and can readily observe that his view is obstructed, must do so at such a speed as will afford him a reasonable opportunity to make effective observations for cars approaching on the intersecting road and give him a reasonable opportunity to properly react to the situation he then observes or could observe. Where his view is completely obstructed and his speed is such that he has given himself no opportunity at all to observe and react appropriately he may, where the facts are undisputed, be found negligent as a matter of law.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Reversed and remanded.

Michael F. Kinney of Cassem, Tierney, Adams & Gotch, for appellants.

Gross, Welch, Vinardi, Kauffman & Day, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

BRODKEY, J.

This action arose out of a motor vehicle collision which occurred at an intersection of two county roads. Donald S. Crink, plaintiff and appellee herein, alleged that the collision was caused by the negligence of defendant Cyril E. Krumwiede, who was an employee of defendant Northern Natural Gas Company, and who was acting within the scope of his employment at the time of the collision. The specific allegations of negligence were that Krumwiede failed to keep his vehicle under reasonable control, failed to keep a proper lookout, and failed to yield the right-of-way to the plaintiff. The defendants in a cross-petition, alleged that the plaintiff was negli-

gent for the same reasons and also alleged that the plaintiff was operating his automobile at an excessive rate of speed.

The case was tried before the municipal court of the City of Omaha, which found in favor of the defendants on plaintiff's petition, and in favor of the plaintiff on defendants' cross-petition. On appeal to the District Court, the court entered judgment in favor of the plaintiff on his petition in the amount of $1,195 and costs, although the prayer in his petition was for $1,515.76, and also dismissed defendants' cross-petition. Defendants have appealed to this court, contending that the District Court erred in failing to find as a matter of law that the plaintiff was guilty of contributory negligence in a degree more than slight and sufficient to bar recovery. We reverse the judgment of the District Court.

The significant facts are not disputed, the accident occurred at 9:30 a.m., on September 2, 1976, at an intersection of two gravel roads. There were no adverse weather conditions, and the road surfaces were dry. There were no traffic lights or signs governing traffic at the intersection. The plaintiff was driving south, the defendant Krumwiede was driving west; and as both drivers approached the intersection, the vision of each with respect to the other was obstructed by growing corn. All witnesses agreed that it was a "blind" intersection insofar as both drivers were concerned. Both drivers were traveling at a speed of approximately 25 miles per hour when they approached the intersection.

The plaintiff, who was familiar with the intersection, testified that he observed Krumwiede's car when he was approximately 30 or 40 feet from the intersection, at a time when Krumwiede was also 30 or 40 feet from the intersection. The plaintiff immediately applied his brakes. Krumwiede testified that he did not see the plaintiff's automobile until he had entered the intersection, and an instant before the

collision occurred. The left front of plaintiff's car struck the passenger door of Krumwiede's vehicle. A deputy sheriff testified that he found skidmarks of the length of approximately 50 feet behind the plaintiff's car, but was unable to find any evidence of skidmarks behind Krumwiede's vehicle.

Krumwiede, who was to the left of the plaintiff as the two vehicles approached the intersection, had the duty to yield the right-of-way to the plaintiff under section 39-635, R. R. S. 1943. That section provides that when "two vehicles approach or enter an intersection from different roadways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right." "Right-of-way" is defined in section 39-602 (80), R. R. S. 1943, as the "right of one vehicle or pedestrian to proceed in a lawful manner in preference to another vehicle or pedestrian approaching under such circumstances of direction, speed, and proximity as to give rise to danger of collision unless one grants precedence to the other." As stated in Reese v. Mayer, 198 Neb. 499, 253 N. W. 2d 317 (1977), under the two sections cited above, when two vehicles approach an intersection at approximately the same time, the vehicle on the right has the right to proceed in a lawful manner in preference to the vehicle on the left.

The driver on the right, however, does not have an absolute right to proceed regardless of the circumstances. See Hodgson v. Gladem, 187 Neb. 736, 193 N. W. 2d 779 (1972). In Hodgson the facts were similar to the facts of the present case. In that case the accident occurred at a blind intersection of two gravel roads, and the plaintiff was to the right of the defendant as he approached the intersection. Both drivers were traveling at a speed of approximately 40 to 45 miles per hour. The plaintiff saw the defendant's vehicle only an instant before the collision. The defendant saw the plaintiff's vehicle when the

defendant was approximately 30 feet from the intersection, and his vehicle left skidmarks of about 15 feet. The defendant filed a cross-petition against the plaintiff. The trial court found both parties guilty of negligence more than slight as a matter of law and dismissed both the petition and the cross-petition.

On appeal, this court affirmed the judgment of the District Court. We specifically held "that a driver approaching an unprotected intersection where he knows and can readily observe that his view is obstructed must do so at such a speed as will afford him a reasonable opportunity to make effective observations for cars approaching on the intersecting road and give him a reasonable opportunity to properly react to the situation he then observes or could observe, and where his view is completely obstructed and his speed is such that he has given himself no opportunity at all to observe and react appropriately he may, where the facts are undisputed, be found negligent as a matter of law."

In the present case, as in Hodgson, both drivers approached a blind intersection at about the same time and at such a rate of speed that neither could take any effective action to avoid the accident when he first saw or could have seen the other. Plaintiff attempts to distinguish Hodgson on the grounds that the plaintiff in that case was traveling at the speed of 40 to 45 miles per hour and did not apply his brakes prior to the collision, while the plaintiff in this case was traveling 25 miles per hour and did apply his brakes shortly before impact. The fact remains, however, that plaintiff's speed was such that he could not avoid the collision, even though he braked when he first observed Krumwiede's vehicle. Therefore, as stated in Hodgson, the plaintiff's speed "left him no alternative but to enter the intersection irrespective of whatever his observations might disclose when he reached a position where he could see to his left."

We find no basis to distinguish Hodgson under the undisputed facts of this case, and conclude that the plaintiff was guilty of contributory negligence more than slight as a matter of law.

Also we do not believe that under the facts of this case reasonable minds could differ as to the fact that the negligence of the plaintiff in this case was at least more than slight when compared to the negligence of the defendant.

Therefore, the judgment in favor of the plaintiff is reversed and the cause remanded to the District Court with directions to vacate the judgment in favor of plaintiff and dismiss plaintiff's petition.

REVERSED AND REMANDED.

McCOWN, J., dissenting.

This case was tried in the District Court on appeal from the municipal court de novo on the record. In such cases the judgment of the District Court on the facts will not be set aside if there is sufficient competent evidence to support it. Fauss Constr., Inc. v. City of Hooper, 197 Neb. 398, 249 N. W. 2d 478.

In the present case the damage to plaintiff's vehicle was stipulated to be $1,493.78. The District Court judgment for the plaintiff was for $1,195, a reduction of 20 percent almost to the penny, from the stipulated amount of damage. It is obvious that the District Court applied the comparative negligence rule and determined, as the fact finder, that the plaintiff's negligence, in comparison to the defendant driver's negligence, was slight and, therefore, properly reduced the award.

This court now finds that the determination by the fact finder on the facts in this case was clearly wrong; that there was no evidence to support it; and that, as a matter of law, the plaintiff was guilty of negligence more than slight in comparison to that of the defendant driver.

The majority opinion does so solely on the authority of Hodgson v. Gladem, 187 Neb. 736, 193 N. W. 2d

779. There are critical factual differences between the two cases. In Hodgson the plaintiff and the defendant were each traveling about 45 miles per hour. In the case now before the court the cars were traveling at 25 miles per hour. In Hodgson the plaintiff did not see the defendant's vehicle until an instant before the collision. In the present case the plaintiff saw the defendants' vehicle when it was still 30 or 40 feet away from the intersection. In Hodgson the plaintiff did not apply his brakes before the collision. In the case before us the plaintiff applied his brakes and left skidmarks of 50 feet 8 inches before the impact. In Hodgson the defendant saw the plaintiff's vehicle when he was 30 feet away and the defendant's vehicle left 15 feet of skidmarks. In the case before us the defendant driver did not see the plaintiff's automobile until an instant before the collision occurred, and there was no evidence of any skidmarks behind defendants' car. In Hodgson the defendant's vehicle struck the plaintiff's car on the left side. In the present case the plaintiff's car struck the right-hand door of the defendants' vehicle.

On the basis of such divergent facts the majority opinion here now holds that a plaintiff with the right-of-way at a blind county intersection, who is traveling at a speed of 25 miles per hour, and who applies his brakes and skids for over 50 feet, was traveling at such a speed that it gave him no opportunity at all to observe and act appropriately, and that he is guilty of negligence more than slight as a matter of law in comparison to the negligence of a defendant traveling at the same speed who failed to yield the right-of-way, and never even saw the plaintiff until the moment of impact. For all practical purposes the court now holds that at a "blind" intersection a plaintiff with the right-of-way who is unable to stop before a collision is guilty of negligence more than slight as a matter of law. Such a holding destroys the comparative negligence rule and makes direc-

tional right-of-way rules meaningless.

The District Court necessarily determined that both parties were negligent on the facts here, but it also obviously determined that plaintiff's negligence was slight in comparison to the defendant driver's negligence. Those factual determinations are supported on the record. Where reasonable minds might differ on issues of comparative negligence, just as on issues of negligence, the matter should be for the fact finder to determine. The judgment of the District Court here should be affirmed.

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

MASON STEINBERG, APPELLEE, V. JERRY STAHLNECKER, APPELLANT.

263 N. W. 2d 861

Filed March 29, 1978. No. 41379.

1. **Trial: Pleadings: Judgments.** Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits.
2. **Pleadings: Words and Phrases.** A meritorious or substantial defense or cause means one which is worthy of judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts.
3. **Courts: Judgments.** The matter of the vacation of a default judgment rests in the sound discretion of the trial court but this discretion is not an arbitrary one and it must be exercised reasonably.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

David L. Herzog and William T. Weisbecker, for appellant.

No appearance for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH,

McCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

SPENCER, J.

Judgment was entered against the defendant, Jerry Stahlnecker, by default in the Omaha municipal court. When his motion to set aside the default was denied, Stahlnecker appealed to the District Court, which found for the plaintiff, Mason Steinberg, and dismissed the appeal. Defendant appealed to this court. We affirm.

Plaintiff filed a claim in small claims court for $471.25, alleging that defendant on August 28, 1975, "Borrowed my 1973 T-Bird and destroyed the engine. He told me on Aug. 29, 1975 that he would take care of fixing the engine, and now Mr. Stahlnecker refuses to pay for the full repair and reinstallation of the engine, including the cost of towing." Thereafter the defendant filed a request for removal of the case from the small claims court to the regular docket of the municipal court. On January 2, 1976, defendant filed an answer denying generally and demanding strict proof.

Trial was set for April 9, 1976, but was continued to June 14, 1976. Stahlnecker did not appear on June 14, and a default judgment was entered against him. On June 15, 1976, he appeared with counsel and moved to set aside the judgment entered the previous day. The presiding judge refused to vacate the default judgment unless plaintiff would agree to its vacation. Plaintiff refused and defendant appealed to the District Court which dismissed the appeal.

Our law is well settled. Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits. Beren Corp. v. Spader, 198

Neb. 677, 255 N. W. 2d 247 (1977). The difficulty in the present case is that while the defendant moved promptly, he did not submit an answer or other proof disclosing a meritorious defense.

As suggested above, defendant had previously filed a general denial, requesting strict proof of plaintiff's claim. No answer was tendered with the motion to set aside the default. The affidavit of defendant's attorney, so far as material herein, states: "that the Defendant possesses a good and sufficient defense to the claim and suit of the Plaintiff; * * *." This is nothing more than a cursory statement on the part of the defendant's counsel.

In Beren Corp. v. Spader, *supra,* we said: "A meritorious or substantial defense or cause means one which is worthy of judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts."

The matter of the vacation of a default judgment rests in the sound discretion of the trial court but this discretion is not an arbitrary one and it must be exercised reasonably. A party seeking to vacate a default judgment must tender an answer or other proof disclosing a meritorious defense. Such party is not required to show that he will ultimately prevail in the action but only that he has a defense which is recognized by the law and is not frivolous.

On the record, our inquiry is limited to whether or not the trial judge abused his discretion in refusing to set aside the default judgment. In the absence of an answer disclosing a meritorious defense, we cannot say that he did. On the record, the judgment must be affirmed.

Judgment affirmed.

AFFIRMED.

MICHAEL DEAN CLEMON, APPELLANT, V. OCCIDENTAL FIRE & CASUALTY COMPANY OF NORTH CAROLINA, A FOREIGN CORPORATION, ET AL., APPELLEES.

264 N. W. 2d 192

Filed March 29, 1978. No. 41393.

1. **Words and Phrases.** The term "willful" means that the act so described was done knowingly and of stubborn purpose; the use of the term does not amount to an allegation of illegality, malice, or fraud.
2. **Words and Phrases: Damages: Insurance.** The measure of recovery by an insured for the partial damage of the insured property is the actual cash value of the part damaged, or the cost of repair or replacement thereof with like kind and quality with deduction for depreciation, not exceeding the limit of liability stated in the policy. Such a policy is "open" and not "valued."
3. **Damages: Insurance: Contracts.** Unless an insurer contracts for the making of repairs to damaged property or exercises possession or control over the insured property, said insurer is not liable for damages for negligence in the making or delaying of such repairs.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Warren C. Schrempp, Thomas G. McQuade, and Richard E. Shugrue of Schrempp & McQuade, for appellant.

Ronald H. Stave and Joseph S. Daly of Emil F. Sodoro Law Offices, for appellee Occidental Fire & Cas. Co.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

KUNS, Retired District Judge.

This is an action in which Michael Dean Clemon, the appellant, sued Occidental Fire & Casualty Company of North Carolina and others to recover upon a policy of fire insurance upon appellant's truck. His first cause of action seeks to recover amounts due under the provisions of his policy; no questions are

here raised as to the first cause of action. The trial court sustained a demurrer ore tenus to, and entered an order of dismissal of, the second cause of action, from which this appeal was taken. We affirm the order of the trial court.

Both causes of action are based upon a policy of fire insurance upon a 1971 White tractor, for the period of 12 months from September 16, 1974. Appellant alleged that on October 17, 1974, the truck was damaged by fire. In his second cause of action, appellant alleged that the truck was taken to Cramer Brothers & Sons Co. for repair, and that appellee had knowledge thereof; that the cost of repair was $12,581.39, and that appellant demanded such amount from appellee but that appellee willfully refused to pay such claim; that Cramer Brothers filed a lien, which included charges for interest and storage, amounting at the time of suit to approximately $7,000; and that appellant did not have funds to pay such charges and had been unable to secure possession of the truck or to use the same in his business, to his damage. He prayed for damages equal to the charges for storage and interest, for the amount of business lost, and for attorneys' fees and costs.

It appears from the briefs of the parties that the cab of the insured truck had been partially damaged by fire and that Cramer Brothers replaced it with a new cab. Appellant claims the full cost of the new cab while appellee contends it is not liable for more than the depreciated value of the original cab. This is in issue in the first cause of action. As noted, appellant alleged a "willful refusal" by appellee to pay the amount claimed due. There is neither an allegation that the refusal to pay is either malicious or in bad faith, nor of facts from which malice or bad faith should be inferred. The allegation that appellee's refusal to pay was "willful" is not an allegation of an illegal, malicious, or fraudulent act; it is simply a statement that the refusal was done knowingly

and of stubborn purpose. Bundy v. State, 114 Neb. 121, 206 N. W. 21. It might be applied appropriately in any situation where two parties, with different views as to the construction of a contractual provision, each act in accordance with their contention.

Appellant next argues that the policy in suit is a "valued" policy and that appellant therefore has a right to recover the total amount of his repair bill without deduction for depreciation. This contention completely overlooks the language of section 44-380, R. R. S. 1943, which applies only to total losses of real property. Furthermore, in Insurance Co. of North America v. County of Hall, 188 Neb. 609, 198 N. W. 2d 490, this statute was held to conflict with section 44-501, R. R. S. 1943, the court saying: "Section 44-501, R. R. S. 1943, on the other hand, incorporates the provisions of the 1943 Standard Fire Insurance Policy of the State of New York, the provision in the insurance contract here, and requires an 'open' policy providing recovery of the actual value of the loss, and the amount of the insurance designated in the policy being a limitation on recovery. Borden v. General Insurance Co., 157 Neb. 98, 59 N. W. 2d 141 (1953)." Appellant's claim that the policy is "valued" is completely without merit.

Appellant next urges the consideration of various decisions in cases where the insurer took a direct role in contracting for the making of necessary repairs or took possession of the insured property for some reason. In such cases, of course, an insurer may make itself liable for negligence in the making of repairs or delay in returning the property to the insured. Appellant, however, alleged only that appellee knew that the insured property had been taken to Cramer Brothers for repairs. This is not an allegation that appellee was a party to the contract for repairs or that it had undertaken to repair or to replace the vehicle. Appellant's cited cases do not apply to such a situation. If Cramer Brothers had a

valid lien for the cost of repairs, storage, and interest, the right to such lien arose from the contract for such repairs and not from any act of the appellee. Under the provisions of the policy, the appellee had an option to repair or replace the vehicle. There is no allegation that it exercised such option or that it undertook any new obligations or responsibilities to the insured after the occurrence of the damage to the insured property. In the absence of allegations showing the creation of new obligations or responsibilities on the part of the appellee subsequent to the execution of the insurance policy, the appellant is left only with his first cause of action. The trial court, therefore, was correct in sustaining the demurrer ore tenus and in dismissing the second cause of action. The judgment is affirmed.

AFFIRMED.

WILLIAM J. HUBBELL, APPELLANT, V. THE FARMERS INSURANCE GROUP, APPELLEE.

263 N. W. 2d 863

Filed March 29, 1978. No. 41401.

1. **Summary Judgments.** The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law. The trial court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists.
2. **Appeal and Error: Pleadings: Evidence.** In the absence of a proper bill of exceptions, any assignment of error that requires an examination of evidence cannot prevail on appeal. In such a case, the only question presented on appeal is the sufficiency of the pleadings to sustain the judgment of the trial court.
3. _____: _____: _____. Depositions, affidavits, answers to interrogatories, and requests for admissions offered in evidence on a motion for summary judgment must be included in a bill of exceptions to be reviewed in this court on appeal.
4. **Insurance: Proof: Intent.** Automobile theft insurance protects only against losses arising from criminal takings of the insured vehicle. There can be no recovery under such a policy for a loss asserted to amount to a theft in the absence of proof of the ex-

istence of a criminal intent on the part of the taker.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

James P. Miller, for appellant.

John K. Green of Kennedy, Holland, DeLacy & Svoboda, for appellee.

Heard before WHITE, C. J., MCCOWN, CLINTON, and BRODKEY, JJ., and HENDRIX, District Judge.

BRODKEY, J.

William J. Hubbell, plaintiff and appellant herein, brought this action against defendant, The Farmers Insurance Group, to recover $4,200 for the theft of his car, which he alleged was insured by the defendant under an insurance policy providing for theft coverage. Defendant denied liability under the policy, and moved for summary judgment. After a hearing, the trial court concluded that no genuine issue of fact existed, sustained defendant's motion, and dismissed the petition with prejudice. Plaintiff's motion for new trial was overruled, and plaintiff has appealed to this court, contending that the District Court erred in granting summary judgment in favor of the defendant. We affirm the judgment of the District Court.

The insurance policy in question covered loss of plaintiff's automobile caused by "theft," and had an effective date of May 7, 1975. In his petition plaintiff alleged that on or about May 7, 1975, he had suffered a theft loss of his automobile. He then alleged: "A subsequent investigation by Mr. William J. Hubbell revealed that said automobile had been repossessed by Gilbert Gibreal, an Omaha car dealer, and subsequent investigation revealed that Mr. Gilbert Gibreal had a superior title due to the fact that Mr. Hubbell had purchased the car from an individual who had been able to secure a valid Nebraska title based on foreign title i.e. from the District of Columbia."

At the hearing on the motion for summary judgment, the defendant offered in evidence several exhibits relevant to the issue of whether the automobile was taken by theft, or repossessed by a person with superior title to the plaintiff. Relying solely on statements in the briefs of the parties, it appears that Gilbert Gibreal had sold the car to one Donald Branch, retaining title to the vehicle. Branch then somehow obtained a District of Columbia title, and used it to secure a second, Nebraska, title which did not reflect Gibreal's interest in the vehicle. The plaintiff purchased the automobile from Branch, who gave plaintiff the second, Nebraska, title. Gibreal then repossessed the car, and plaintiff brought a replevin action against Gibreal to recover the car. As stated in plaintiff's brief, "the issue of possession was decided against Mr. Hubbell in a replevin action by the Omaha, Nebraska, Municipal Court." Plaintiff then filed this action against the defendant. The exhibits offered and received in evidence at the hearing on the motion for summary judgment, however, are not before this court because the plaintiff did not have a bill of exceptions prepared and filed in this court.

The law is that the moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law. The trial court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. See, Barnes v. Milligan, 196 Neb. 50, 241 N. W. 2d 508 (1976); Green v. Village of Terrytown, 189 Neb. 615, 204 N. W. 2d 152 (1973).

In the absence of a proper bill of exceptions, however, any assignment of error that requires an examination of evidence cannot prevail on appeal. In such a case, the only question presented on appeal is the sufficiency of the pleadings to sustain the judg-

ment of the trial court. Boosalis v. Horace Mann Ins. Co., 198 Neb. 148, 251 N. W. 2d 885 (1977); State v. Jacobsen, 194 Neb. 105, 230 N. W. 2d 219 (1975). Depositions, affidavits, answers to interrogatories, and requests for admissions offered in evidence on a motion for summary judgment must be included in a bill of exceptions to be reviewed in this court on appeal. See, Brown v. Shamberg, 190 Neb. 171, 206 N. W. 2d 846 (1973); Lange v. Kansas Hide & Wool Co., 168 Neb. 601, 97 N. W. 2d 246 (1959). In the present case the plaintiff has not filed a bill of exceptions in this court containing the exhibits received at the hearing on the motion for summary judgment; therefore, the only question presented on appeal is the sufficiency of the pleadings to sustain the judgment of the trial court. Boosalis v. Horace Mann Ins. Co., *supra*.

Plaintiff alleged in his petition that his automobile was repossessed by a person who had superior title to the vehicle. This repossession was the basis for plaintiff's claim that the loss of his automobile had been caused by "theft." In Raff v. Farm Bureau Ins. Co., 181 Neb. 444, 149 N. W. 2d 52 (1967), this court stated that the term "theft" as used in an insurance policy "is not necessarily synonymous with larceny, but may have a much broader and more inclusive meaning. It could cover pilferage, swindling, embezzlement, conversion, and other unlawful appropriations as well as larceny." See, also, Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co., *ante* p. 46, 262 N. W. 2d 183 (1978). In the latter case we stated: "Automobile theft insurance is uniformly viewed as furnishing protection only against losses arising from criminal takings of the insured vehicle and there is apparently no judicial dissent from that proposition. * * * There can be no recovery under such a policy for a loss asserted to amount to a theft in the absence of proof of the existence of a criminal intent on the part of the taker."

It is apparent that automobile theft insurance does not furnish protection against the lawful repossession of a vehicle by a person with superior title to the insured. Repossession by a person with superior title cannot be said to be a criminal taking. See Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co., *supra*. Since plaintiff's loss, as alleged in his pleadings, was the result of repossession of his automobile by a person with superior title, we conclude the District Court was undoubtedly correct in concluding that summary judgment should be granted to the defendant. The pleadings support the judgment of the trial court, and therefore the judgment is affirmed.

AFFIRMED.

KARLA JEAN MASON, APPELLEE, V. AUSTIN HENRY MASON, APPELLANT.

263 N. W. 2d 865

Filed March 29, 1978. No. 41421.

1. **Divorce: Custody: Infants.** In a determination of the custody of children of parties whose marriage has been dissolved, the paramount consideration is the best interests and welfare of such children.
2. **Divorce: Custody: Appeal and Error.** The discretion of the trial court in determining issues of custody is subject to review, but will not be disturbed on appeal unless it is shown to be a clear abuse of discretion or clearly against the weight of the evidence.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

John J. Reefe, Jr. for appellant.

William T. Oakes of Kennedy, Holland, DeLacy & Svoboda, for appellee.

Heard before SPENCER, MCCOWN, and BRODKEY, JJ.,

REAGAN, District Judge, and KUNS, Retired District Judge.

KUNS, Retired District Judge.

This is an appeal from an order modifying the custody provisions of a previous divorce decree.

A marriage between the parties was dissolved by decree on March 15, 1971; the custody of three daughters was granted to Karla Jean Mason, the appellee. Austin Henry Mason, the appellant, was granted the right of visitation and ordered to pay support. In June 1972, the daughters visited appellant at his home and remained with him until March 1976. There is a dispute whether appellee consented to the exercise of custodial rights by appellant but she did not take any steps to enforce the provisions of the decree either as to custody or as to the payment of support during that period. After she retook custody in March 1976, appellant made an unsuccessful physical effort to regain custody and, in April 1976, filed a motion for the modification of the original decree. In this motion, he alleged unfitness of appellee to have custody. The appellee, in her response, made a counterallegation of unfitness on the part of appellant. No purpose will be served by detailing the evidence presented at the hearing. Generally, the appellant produced evidence of his fitness for custody, that he could provide a good home for the daughters, and that the appellee had shown unfitness by residing with a man to whom she was not married. The appellee produced evidence that she was a good mother, that appellant had provided only a home which was rustic and with inadequate facilities, and that his conduct had been violent. Each of the daughters, in response to inquiry by the court, stated that she preferred to live with her mother.

After consideration of the factors enumerated in section 42-364, R. S. Supp., 1976, the court found that the best interests and welfare of the children re-

quired their custody should be placed in the District Court for Douglas County, Nebraska, that physical possession be placed in the appellee, and that appellant should support them. The trial court was able to see and hear the witnesses, and both parents and the minors whose custody was in issue. The discretion of the trial court is subject to review. Its determination, however, will not be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. The record in this case does not show either. Allen v. Allen, 198 Neb. 544, 253 N. W. 2d 853; Osterhaus v. Osterhaus, 198 Neb. 802, 255 N. W. 2d 432.

The reservation of general custody of the children in the District Court enables the court to provide for regular supervision over the care provided by the appellee and over the conditions under which the children are living. If it should appear at any time that the best interests and welfare of the children are adversely affected by any circumstance, the court will be able to take prompt action to correct the situation.

The order of the court is well within its discretion and is affirmed.

AFFIRMED.

JAMES T. LOVELL, APPELLEE, V. CITY OF KEARNEY, NEBRASKA, APPELLANT.

263 N. W. 2d 867

Filed March 29, 1978. No. 41423.

1. **Motor Vehicles: Negligence: Evidence: Trial.** Finding that appellee was not negligent in the operation of appellant's vehicle, held supported by competent evidence.
2. **Estoppel: Evidence.** In the absence of evidence of statements or conduct by one party upon which the opposite party might rely to its prejudice, no estoppel arises.
3. **Words and Phrases: Accord and Satisfaction.** Neither a compromise and settlement nor an accord and satisfaction may take place unless the parties have agreed that some payment or performance shall be paid and accepted in full satisfaction of a disputed claim.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Michael E. Kelley, for appellant.

Tye, Worlock, Tye, Jacobsen & Orr and Patrick J. Nelson, for appellee.

Heard before SPENCER, MCCOWN, and BRODKEY, JJ., REAGAN, District Judge, and KUNS, Retired District Judge.

KUNS, Retired District Judge.

This is an appeal from the District Court for Buffalo County, Nebraska. James T. Lovell, the appellee, brought suit to recover wages claimed due from the City of Kearney, Nebraska, the appellant. The appellant assigns error against an adverse judgment. We affirm the judgment of the trial court.

The evidence and the record show that the appellee was an employee in the street department of the appellant. On June 13, 1975, he was operating a pick-up truck and, in the course of backing it up, an air compressor was damaged to the extent of $110. The evidence as to whether he was acting in accordance with or contrary to instructions of the foreman, his superior, was in dispute. Both the county court and the District Court found that he was acting in accordance with instructions from his superior and that the appellee was not negligent. The findings are supported by competent evidence.

The question whether appellee was entitled to procedural due process, in being granted notice of and a hearing upon the establishment of liability against him for damages caused by his negligence, is argued at length by both sides. Further consideration of this question, however, becomes unnecessary in view of the findings of the court upon the issue of negligence.

Appellant refers to the facts that it (1) issued its check to appellee for the amount of wages admitted

due to him, minus a deduction of $110 and (2) the appellee accepted and cashed said check. It argues that the acceptance of the check now raises an estoppel against the appellee to question the right of appellant to make the deduction. The record shows various notices from the appellant to its employees, including appellee, that damages resulting from the negligent operation of appellant's vehicles will be deducted from wages. The record fails to show any agreement by appellee consenting to such deduction nor does it show any condition attached to the tender of the check that it must be accepted in full satisfaction of all amounts due appellee. No statement or conduct of appellee is shown from which appellant would be justified in claiming that appellee intended to accept the check in full satisfaction. Obviously, the appellant made no change in its position in reliance upon statements or conduct by appellee; therefore, no estoppel exists. Breslow v. City of Ralston, 197 Neb. 346, 249 N. W. 2d 205; Chappelear v. Grange & Farmers Ins. Co. of Blair, 190 Neb. 589, 210 N. W. 2d 921.

Neither is there any basis for either a compromise and settlement or for an accord and satisfaction. The appellant acted unilaterally in making the deduction for damages. It is only when the parties mutually agree that some amount shall be paid and accepted in full satisfaction of a disputed liability, that there is compromise and settlement or accord and satisfaction. Farmland Service Coop. Inc. v. Jack, 196 Neb. 263, 242 N. W. 2d 624.

The trial court did not err in its findings or judgment and the judgment is affirmed.

AFFIRMED.