REPORTS OF CASES

DECIDED BETWEEN

JULY 9, 1965 and MARCH 17, 1966

IN THE

Supreme Court of Nebraska

JANUARY TERM 1965, SEPTEMBER TERM 1965, and
JANUARY TERM 1966

VOLUME CLXXIX

WALTER D. JAMES
OFFICIAL REPORTER

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1966

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

PAUL W. WHITE, Chief Justice
EDWARD F. CARTER, Associate Justice
HARRY A. SPENCER, Associate Justice
LESLIE BOSLAUGH, Associate Justice
ROBERT C. BROWER, Associate Justice
ROBERT L. SMITH, Associate Justice
HALE MCCOWN, Associate Justice

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JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	Residence of Judge
First	Johnson, Pawnee, Nemaha, and Richardson.	William F. Colwell	Pawnee City
Second	Sarpy, Cass, and Otoe.	Victor H. Schmidt Walter H. Smith	Papillion Plattsmouth
Third	Lancaster.	Herbert A. Ronin Elmer M. Scheele Bartlett E. Boyles William C. Hastings	Lincoln Lincoln Lincoln Lincoln
Fourth	Douglas.	Patrick W. Lynch Lawrence C. Krell James P. O'Brien Donald Brodkey John C. Burke Paul J. Garotto John E. Murphy Rudolph Tesar Donald Hamilton	Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha
Fifth	Hamilton, Polk, York, Butler, Seward, and Saunders.	H. Emerson Kokjer John D. Zeilinger	Wahoo York
Sixth	Boone, Platte, Colfax, Dodge, Washington, Nance, and Merrick.	Robert L. Flory C. Thomas White	Fremont Columbus
Seventh	Fillmore, Saline, Thayer, and Nuckolls.	Joseph Ach	Friend
Eighth	Thurston, Dakota, Dixon, and Cedar.	John E. Newton	Ponca
Ninth	Knox, Antelope, Cuming, Pierce, Madison, Stanton, Wayne, and Burt.	Fay H. Pollock George W. Dittrick	Stanton Norfolk
Tenth	Adams, Clay, Phelps, Kearney, Harlan, Franklin, and Webster.	Edmund Nuss Norris Chadderdon	Hastings Holdrege
Eleventh	Hall.	Donald H. Weaver	Grand Island
Twelfth	Sherman and Buffalo.	S. S. Sidner	Kearney
Thirteenth	McPherson, Logan, Lincoln, and Dawson.	Hugh Stuart	North Platte
Fourteenth	Chase, Hayes, Frontier, Furnas, Red Willow, Hitchcock, Perkins, Gosper, and Dundy.	Victor Westermark	McCook
Fifteenth	Brown, Keya Paha, Boyd, Rock, Holt, and Wheeler.	William C. Smith, Jr.	Ainsworth
Sixteenth	Cherry, Sheridan, Dawes, Box Butte, and Sioux.	Albert W. Crites	Chadron
Seventeenth	Scotts Bluff.	Ted R. Feidler	Scottsbluff
Eighteenth	Jefferson and Gage.	Ernest A. Hubka	Beatrice
Nineteenth	Banner, Kimball, Morrill, Cheyenne, Garden, Deuel, Arthur, and Keith.	John H. Kuns	Kimball
Twentieth	Grant, Hooker, Thomas, Blaine, Loup, Garfield, Greeley, Howard, Valley, and Custer.	William F. Manasil	Burwell

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TABLES OF CASES REPORTED

IN MEMORIAM

PAUL E. BOSLAUGH

And now, at the hour of nine o'clock a.m., on this 3rd day of January, A.D. 1966, the same being the date fixed by the Court for hearing the report of the Committee appointed to draft resolutions in memory of Paul E. Boslaugh, the Court being in session and members of the bar in attendance, the Committee makes the following report:

HONORABLE LEON SAMUELSON.

MAY IT PLEASE THE COURT:

We have met this morning in memory of Paul E. Boslaugh who was a Judge of this Court from January, 1949, until January, 1961.

Paul E. Boslaugh was born near Mapleton, Iowa, June 13th, 1881, and died at Hastings, Nebraska, on June 29th, 1964, in the first month of his 84th year. He was graduated from the University of Nebraska Law School in 1903 and admitted to the Bar of Nebraska the same year. He began the practice of law immediately at Harvard, Nebraska, in association with Mr. L. G. Hurd who in 1904 was elected to the District Court bench. In 1913 he moved to Hastings, Nebraska, where he formed a law partnership with Mr. L. B. Stiner, a relation and association which continued together with Mr. L. R. Stiner, a son of Mr. L. B. Stiner until he was elected Judge of the Supreme Court of Nebraska in the fall of 1948. He was married in June, 1910, to Miss Ann Herzog who, together with a daughter and son of the marriage, survive him. Judge Boslaugh was privileged to see that son succeed him as a Judge of this Honorable Court.

After Judge Boslaugh retired from this Court he re-entered the practice of law at Hastings, Nebraska. He

often times remarked there was no other occupation to which a man could devote his life that afforded more satisfaction than to aid in the solution of the legal questions arising out of the business of men.

During the years of his active practice prior to his election as Judge of this Court he was a member of the committee which recommended the integration of the Nebraska State Bar Association, in 1937. He was President of the Nebraska State Bar Association in 1942, and a member of the Judicial Council from 1941 to 1950. He was also a consultant to the 1943 Statute Revision Commission. Judge Boslaugh was a member of the House of Delegates of the American Bar Association from 1942 to 1954.

Perhaps his outstanding endeavor as a lawyer was his representation of the State of Nebraska in the now famous John O'Connor Estate case from Adams County which was a matter of controversy in our courts for many years.

Judge Boslaugh loved the law and had a profound knowledge of its history and philosophy and traditions. His thinking was logical and sublime. He expected hard work from lawyers with whom he associated or appeared before him but never to the extent of his own toil. Climbing one intellectual hill only left a steeper one for him to climb. He sought in the wisdom of the ages the never changing fundamentals and preserved the integrity of his mind and conscience by advocating them vigorously with depth of thought and beautiful language. He believed a member of the Court should be human, considerate and understanding. He despised prejudice, hatred, intolerance and crooked thinking and opposed them at every turn. Few men have devoted as much of themselves to this Court as he did and it was with great regret and reluctance that it became necessary for him to relinquish his seat because of his age. He brought to the Court his boundless love of life and his work; and his understanding and respect for it could not have been more profound. Unquestionably his service here was

the triumphant culmination of the life of one of the best lawyers ever produced by the State of Nebraska.

His intense and instinctive patriotism made him keenly alive to the welfare of Nation, and of the State and the City of Hastings in which he lived. The strain of labor in his office and the courts never prevented him from doing his full share in the public movements and private enterprises through which a democratic community develops the best side of its nature. His interest was in the public effect of Party control, not in office or emoluments. His activity was in leadership of opinion not in Party management. He sought no office and he entered into no combinations. He held no Party office but when a serious decision was to be made he was wont to come as a champion from the ranks with all the weapons in the armory of debate, with clarity of statement and power of appeal and charm of persuasion against things sordid and corrupt, against indifference and decadence, and, for the cause he deemed just and best for all concerned.

The reputation of many good lawyers is confined to their own profession; but the wide range of his activities brought appreciation from the general body of good citizens. The basis of that appreciation was his achievement as a lawyer and his devotion to the duties of a private citizen in the service of the community in which he lived for so many years. His manner was dignified and courtly, but perfectly simple and unaffected, and it was the same everywhere and to everybody. His mind was strong, well balanced, and wonderfully alert and rapid in action. Its response to the emergencies which so continually arise in court was almost instantaneous. He worked hard and long with great intensity but was extremely contented and happy in so doing, and, his kindness and helpfulness to an associate or an adversary in trouble, will long be remembered by those of us who were fortunate enough to be associated with or against him in litigation.

He always aimed at nothing short of perfection in

everything that he undertook and this involved an amount of labor and self absorption seldom if ever exceeded. I know of no lawyer whose success was more fairly earned or more thoroughly deserved. His power of labor was inexhaustible and down to the last few days of his life he never relaxed the most acute and searching study of the case in hand. Think of a man, if you will, when the end of his professional labors was already in sight schooling himself to daily tasks in law, going to his office and briefing a case in order that he might make a better presentation and thus keep up with the procession of the law. Let no man seek to follow in his foot steps, unless he is ready to demonstrate, in his own person, that infinite work is the only touchstone of the highest standing in the law, and that the lazy and the indolent who enter here must leave all hope behind.

He was a loyal and devoted friend, as he was loyal to every cause he espoused, and every case he undertook; and he left no debt of friendship unpaid.

We need not remind those who are gathered here of the emptiness which his passing has left. In this room especially we recall his many activities as a practitioner and a jurist all of which are lost to us except in memory.

We, the Committee appointed by the Court respectfully submit this statement as a tribute to the memory of the late Judge Paul E. Boslaugh. Personal expressions of tribute will follow by individual members of the Committee.

January 3, 1966.

Respectfully submitted,
Robert H. Beatty
Walter D. James
L. R. Stiner
John W. Yeager
Leon Samuelson, Chairman

HONORABLE ROBERT H. BEATTY.

MAY IT PLEASE THE COURT, AND WITH THE PERMISSION OF THE COURT, MRS. BOSLAUGH, OTHER MEMBERS OF THE FAMILY, MEMBERS OF THE BENCH AND BAR, AND FRIENDS:

I consider it a great personal honor and privilege to appear before and briefly address this Court in paying tribute to the memory of a really great man, American citizen, patriot, lawyer and Judge.

I deeply regret that I am lacking in the capacity, through spoken word, to adequately express the real feeling of friendship and regard I have always had, and that now lies deep in my heart and mind for my cherished friend Paul E. Boslaugh.

I knew Judge Boslaugh very intimately for more than thirty years, and was very proud during all of that time to have had and considered him as one of my best and closest friends.

In the late 1930's I had the good fortune to be associated with him in the jury trial of nineteen consolidated condemnation cases in the United States District Court at North Platte, Nebraska. The trial of these cases to the jury consumed forty-one days. Several of the cases were taken to and later heard in the Circuit Court of Appeals.

Again in the early 1940's I was associated with Paul for twenty-one days in the jury trial of a will contest case, which was later heard by this Court and finally disposed of by settlement.

I was associated with Paul in many other cases, and during the time he was a distinguished Justice on this Court I had the privilege of appearing before the Court in the presentation of a number of appeals.

During my more than thirty years of acquaintance with Paul I had many social and business contacts with him, and am sure that through all of these contacts and associations I gained a pretty thorough knowledge of the many fine qualities possessed by him, that made him

the truly remarkable man that he was.

Paul was blessed with a brilliant and enlightened mind. He was, by nature, endowed with an intellectual honesty that I do not believe could be surpassed by any person. Paul possessed in full measure all the personal qualities that it takes to make the real lawyer. He was courageous, fearless and just in everything he undertook in life. He had a most personable charm. He was possessed of a kindly and unusual sense of humor and humaneness that endeared him to all who came in close contact or association with him. He never let up in his ceaseless quest for a greater knowledge of the law, its improvement, and more perfect application thereof in the attainment of justice between individuals.

Paul was a man of firm and steadfast convictions. He was completely fearless and unswerving in the exaction and execution of the obligations of our profession that he loved so much and which was indeed a real part of him. In his eagerness and determination to properly represent and procure for his clients their full and just legal rights he gave no thought or concern whatsoever to his own personal welfare.

Paul by nature reposed the utmost faith and confidence in his fellowmen, and in turn held and enjoyed their unyielding trust and reliance in him.

The record of Judge Boslaugh is one of a life time of hard work and public service. He lived solely for his family, his country and profession. It is indeed difficult to bring ourselves to a full realization that he is gone.

In the passing of Judge Boslaugh we have lost a cherished friend. Our country has lost one of its outstanding citizens. Our profession one of its great and uncompromising champions.

May he forever rest in Eternal Peace.

HONORABLE WALTER D. JAMES.

MAY IT PLEASE THE COURT:

There are two sides to the life of Paul E. Boslaugh to

which I desire to direct attention. One is that of the role of lawyer. The other is that of the position as a Judge of this court.

As a lawyer, it was my privilege to be associated with him in the trial of many cases. He was always willing to and did carry more than his share of the load. His preparation for trial was thorough. In every case, he came prepared with a comprehensive trial brief. In appellate court work, he was unexcelled. Here again, diligent and careful preparation were evident. In oral argument, he was logical and convincing.

As a Judge of this court, he served two terms with distinction and credit. He brought to the bench the viewpoint of a careful trial lawyer. He took office in 1949 as the oldest member of the court in point of years, but the youngest in point of service. It remained that way without change until he retired in 1961. His opinions as a member of this court are thorough and carefully written. The opinions show on their face the study and consideration he gave to their preparation. Only the members of the court with whom he served know the influence he had in consultation.

The crowning point in the career of Paul E. Boslaugh as a Judge occurred on his last day in office. On that day, he administered the oath of office to his son, Judge Leslie Boslaugh, as his successor on the bench. To very few has this privilege been accorded.

HONORABLE L. R. STINER.

MAY IT PLEASE THE COURT:

Paul Boslaugh was one of the first people I remember from childhood. My father was his partner. Later, he was my advisor, mentor, law partner, and friend. For fifty years my life was intimately involved with his.

He always commanded my respect, admiration, and affection—Respect and admiration for the innate gifts and acquired professional skills which brought to him the highest professional honors Nebraska could confer;

affection for his tolerance, his kindness and humanity.

Of his many qualities worthy of emulation, I think today particularly of his devotion and fidelity to his work as a lawyer and judge. He was patient and thorough, not alone because of duty to his client and his client's cause, but also because this was the work he loved. It was in the exercise of his unusual abilities as a lawyer that he derived great satisfaction. In his work he was motivated far more by the idea of a task well done than by any expectation of reward.

He will be missed, but the influence of his example will live on in the lives of those who knew him and loved him.

HONORABLE JOHN W. YEAGER.

MAY IT PLEASE THE COURT:

At this time I am reminded of words which in substance appear in an old poem. They are:

Heaven is not reached in a single bound
But by a ladder which we build
From the lowly earth to the vaulted skies
And we mount to its summit by a climb
Round by round.

I am reminded of words from another poem in the following substance:

Drive the nail aright, boys,
Hit it on the head
Strike with all your might, boys, while the iron's red.
When you've work to do, boys, do it with a will
They who reach the top, boys,
First must climb the hill.
Standing at the foot, boys, gazing at the sky
You can never get up, boys,
If you never try.
If you stumble off, boys,
Never be downcast
Try and try again, boys,
You'll succeed at last.

From what I knew from my observation of and association with my late and deeply admired and respected friend and associate, Paul E. Boslaugh, I am convinced that he built a strong ladder over all of his years which he climbed steadily and nobly to the end.

He not only built and climbed his ladder, but never along the way did he fail to drive with all his might, all his honor, and with all his devotion to his family and friends, and the state and nation of which he was proudly a part.

ASSOCIATE JUSTICE EDWARD F. CARTER.

It is with a deep sense of personal loss that I speak in memory of a former member of this court. Judge Paul E. Boslaugh was a competent and successful lawyer, a sound and distinguished judge, a man of honor and integrity, and a dedicated member of his chosen profession.

Whether he served in a public or private capacity as a legal advisor or as a Judge of the Supreme Court of this state, his traits of fine character and professional integrity manifested themselves. In his passing from this earthly scene the legal profession lost a fine member and the judiciary one who reflected great confidence in the integrity of the bench of this state.

My acquaintanceship with Judge Boslaugh had its beginning many years ago, flourished during the twelve years we were contemporaries on this court, and continued unabated until his passing. During all of those years he never sought advantage because of that friendship. As a lawyer I regarded him as one worthy of trust in matters of great or little importance. As a judge he was fair and impartial, completely independent, learned and practical in his application of the law, and worthy of the admiration that his contemporaries on the court had for him.

In reflecting on our long association I shall miss his friendship, his subtle humor, and his straightforward expression. His place in his profession will be assumed by others, as has his membership on this court, but his

counsel, courage, independence, and other attributes of his high character will linger on in our memories, never to be replaced. While the man is no longer with us, his life will continue to influence all who knew him. While we mourn his passing, we are truly grateful for his having lived his allotted time among us.

In his simple way he was a great man, a fine lawyer, and an excellent judge. We memoralize him publicly for what he was. He was austere in appearance but was in fact a friendly and engaging person. He was a man who gained and retained many friendships. The state has lost a fine citizen who devoted many years to the service of the public with the dignity and integrity that only a man of high character could possess.

The loss of a true friend cannot be replaced. His chair may be occupied, his portion of our time may be consumed by others, but his handclasp, his geniality, his counsel, his encouragement, and his loyalty to his friends, cannot be supplanted. Except as they linger in our memory they are gone forever. While it cannot be otherwise, a lasting affection and fondness remains in the memories of those who knew him best. No intrinsic monument can replace his loss to his family, his friends, and his profession. He left his mark in the hearts of men which will endure long after his passing beyond the veil which each of us must sooner or later penetrate and from which none of us shall return.

CHIEF JUSTICE PAUL W. WHITE.

The resolutions offered this morning are adopted by the Court. The resolutions, together with the statements of counsel, will be extended at length on the journal and printed in the official reports of this Court. Mrs. Boslaugh and the members of the family will be advised of the high regard of the Bench and the Bar for Justice Boslaugh, and of the expressions of sympathy made this day. Copies of the resolutions and statements of counsel will be sent to them.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1965

BENSON F. BACHUS ET AL., APPELLEES, V. CLARENCE L. E. SWANSON, STATE TREASURER OF THE STATE OF NEBRASKA, ET AL., APPELLANTS,
ROBERT O. REHKOPF ET AL., INTERVENERS-APPELLEES.
136 N. W. 2d 189

Filed July 9, 1965. No. 35993.

1. **Statutes.** A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
2. **Statutes: Penalties.** A penalty statute is to be strictly construed, and courts will not interpolate conditions omitted by the Legislature or extend the language used by implication. The courts must assume that the Legislature intended to do what it did.
3. **Counties: Penalties.** The county board of equalization has never been given authority by the Legislature to impose penalties, nor to hear any protests involving the penalties imposed or the waiver of them under L. B. 206, Laws 1961, c. 374, p. 1148, and does not have such authority.
4. **Constitutional Law.** The constitutional validity of an act of the Legislature is to be tested and determined not by what has been or possibly may be done under it, but by what the law authorized to be done under and by virtue of its provisions.
5. **Constitutional Law: Taxation.** L. B. 206, Laws 1961, c. 374,

p. 1148, is unconstitutional and void as discriminatory between members of a class, and nonuniform, arbitrary, and capricious in its operation, contrary to Article I, section 25, and Article III, section 18, Constitution of Nebraska; and it fails to conform with the constitutional requirements of due process.

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

Clarence A. H. Meyer, Attorney General, Homer G. Hamilton, William F. Ryan, Donald L. Knowles, Herbert M. Fitle, Edward M. Stein, Lane, Baird, Pedersen & Haggart, and Theodore M. Tedesco, for appellants.

Leary & Leary, for appellees.

Swarr, May, Royce, Smith, Anderson & Ross, for interveners-appellees.

Heard before WHITE, C. J., CARTER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and WESTERMARK, District Judge.

MCCOWN, J.

Plaintiffs brought this class action to test the constitutional validity of sections 77-318, 77-413, 77-716, and 77-1235, R. S. Supp., 1961, which were enacted as L.B. 206, Laws 1961, c. 374, p. 1148, and L.B. 697, Laws 1961, c. 375, p. 1152. L.B. 697 is amendatory of a part only of L.B. 206, and a determination of its validity is not essential to a determination of this action. The district court found L.B. 206 unconstitutional and void. The defendants have appealed.

Section 1 of L.B. 206 amends section 77-318, R. R. S. 1943, which applies only to returns of a decedent and provides that the tax be computed and to the tax shall be added "a penalty (1) on tangible property, of fifty per cent of the amount due and (2) on intangible property five times the amount due." This is the only section in which the amount of a civil penalty is spelled out.

Section 2 of L.B. 206 amends section 77-413, R. R. S.

1943, and has application to a situation where a taxpayer files a return but omits either tangible or intangible property. It provides that the tax shall be computed and: "To the tax shall be added * * * a penalty as provided in section 77-318; * * *."

Section 3 of L.B. 206 amends section 77-716, R. R. S. 1943, and applies to intangible property only. It applies where a taxpayer has failed to file a return as well as where he has omitted any intangible property from his return. It provides that the property not returned or omitted be taxed, "to which tax shall be added a penalty as provided in section 77-318."

Section 4 of L.B. 206 amends section 77-1235, R. R. S. 1943, and applies where a taxpayer files no return. It applies to tangible or intangible personal property and provides in part: "* * * the county assessor shall proceed to assess the number and description of the several enumerated articles of property and shall add to the value thereof the penalty provided by section 77-318; * * *."

The disparity in language between section 2 and section 4 of L.B. 206, with respect to where and how the penalty shall be applied, is immediately apparent. Section 2 provides that the assessor shall "compute the tax" and that "to the tax shall be added * * * a penalty as provided in section 77-318; * * *." Section 4 provides in part: "the county assessor shall proceed to assess the number and description of the several enumerated articles of property and shall add to the value thereof the penalty provided by section 77-318; * * *."

It appears obvious that the intent of the Legislature was that the precedure of section 2 be followed whether or not a return was filed. The defendants assert that the language of section 4 is ambiguous and susceptible of more than one meaning and that this court should rewrite the section by removing some words and substituting others. The position seems to be that any statute passed by the Legislature should be open to construction as a

matter of course, and that we should not only judicially construe it, but judicially rewrite it. A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. Franzen v. Blakley, 155 Neb. 621, 52 N. W. 2d 833; Todd v. County of Box Butte, 169 Neb. 311, 99 N. W. 2d 245. The language used does not appear to be ambiguous and, therefore, permits of no interpretation.

Even if it were deemed open to construction, this is a penalty statute which must be strictly construed, and its import may not be extended by construction. Misle v. Miller, 176 Neb. 113, 125 N. W. 2d 512.

Since a penalty statute is to be strictly construed, the courts will not interpolate conditions omitted by the Legislature or extend the language used by implication. The courts must assume that the Legislature intended to do what it did. Johnson Fruit Co. v. Story, 171 Neb. 310, 106 N. W. 2d 182.

The actual dollar penalty resulting from an application of the procedure quoted from section 4 of L.B. 206 (addition of the penalty to value prior to computation of the tax) would amount to 2 percent, whereas the penalty under section 2 (addition of the penalty to the computed tax) would be 500 percent.

The defendants contend that to permit section 4 of L.B. 206 to be read in accordance with its actual language would result in absurdity, apparently because the other three sections of L.B. 206 are worded differently. We suggest, however, that it might well be possible that a 2 percent penalty is no more absurd than a 500 percent penalty. This possibility is particularly emphasized

where, as here, there were two additional separate criminal penalties for falsely and willfully failing to return intangibles, which, incidentally, differed in both maximum and minimum amounts of fine. §§ 77-718, R. R. S. 1943, and 77-1232, R. S. Supp., 1961.

Other problems of uniformity and constitutional requirements are apparent in L.B. 206. A review of the Nebraska statutes since 1929 in connection with personal property taxes reveals a maze of changes and amendments, as well as overlapping and differing statutory penalties and varying methods of procedure.

It is apparent that there is a lack of uniformity not only as to penalties, but with regard to notice and opportunity for hearing and rights of appeal. Conflicting, overlapping, and ambiguous provisions are apparent in the statutes dealing with tangible and intangible personal property omitted or not returned. At least six different statutes deal with the adding of omitted or unreturned tangible or intangible personal property to tax returns. At least three different officers or bodies are given authority and responsibility with respect to adding omitted or unreturned personal property to the tax rolls. There are three separate sections dealing with notices, each one substantially different as to what is required and how it is given. There are two separate criminal penalties which apply to false and willful omissions as to intangibles. Provisions for hearing and appeals on the addition of intangible property for purposes of the tax and penalty vary, and three sections of L.B. 206 had no provision for appeal from a refusal to waive the penalty, while one section did.

Section 2 of L.B. 206 specifies an examination of the taxpayer under oath, and obviously before assessment, while sections 1 and 4 have no such requirement. Section 3 requires a notice by registered or certified mail and a hearing at a definite time and place. It should be noted that there is no evidence here that any taxpayers were ever examined, under oath or otherwise, prior to

the assessments of intangible taxes and penalties here involved. It is also clear that each taxpayer involved filed a return.

The provisions of sections 1, 2, and 4 of L.B. 206 provide for no appeal from a refusal to waive the penalty. However, they were amended in 1963 to provide for appeals. Even the appeals now provided for in those sections, as amended in Laws 1963, c. 443, p. 1463, differ from the appeal provisions provided for in section 3 of L.B. 206.

The defendants contend that all of the statutes pertaining to the returns of personal property are concerned with the matter of revenue and taxation and must be considered as a whole and "in pari materia." Any attempt to apply this rule to the veritable thicket of Nebraska statutes dealing with intangible property taxes demonstrates the lack of required constitutional uniformity, equality, and due process in L.B. 206.

The defendants contend that hearing could be held before the county board of equalization with respect to any section of L.B. 206. The county board of equalization, however, has never been given authority by the Legislature to impose penalties, nor to hear any protests involving the penalties imposed or the waiver of them, and still does not have such authority. §§ 77-1502 to 77-1507, R. R. S. 1943.

The Legislature, specifically in L.B. 206, endeavored to provide for a waiver of penalties where the omission or failure to return was the result of an innocent mistake and could not in any way be deemed to be the result of an intent to avoid the filing of a lawful return or the payment of a tax lawfully due. Yet, the Legislature provided a process so deficient that in operation, in many instances, a taxpayer might not even discover that he had a right to the benefits of the waiver, or the necessity to use the right.

The evidence shows that although it did not fit the requirements of any particular notice statute, the asses-

sor, nevertheless, in all but one instance, did notify the taxpayers that they had failed to list all their stocks or had undervalued some, and that their returns had been corrected as shown, with an itemization of the intangible property added. This notice also stated: "As required under the provisions of L.B. 697, 1961 Legislature, your assessment has been corrected as follows." At this point, we should note that the provisions of L.B. 697 referred to, in themselves, applied only to property of a decedent.

The assessor in Douglas County did not add the property or the penalty on the taxpayers' own returns, but prepared and filed a separate additional schedule for each of them which was filed and kept in a separate book. In all instances disclosed by the record, the taxpayers first received a statement for their regular personal property taxes computed from their returns as filed. This statement was sent after the assessor's notice by a few weeks, and, approximately one month later, they received a separate statement for the omitted property, which was shown as tax only. Even the notice of delinquency from the sheriff sent later referred to the entire amount as tax. Nowhere in any of the communications or tax statements did the word "penalty" appear at any time or at any place. At least one notice did advise the taxpayer that the board of equalization would convene on certain days at which time it could review the action of the county assessor, but some of the notices did not. The fact that approximately 300 penalties were removed by the assessor on his own volition and, apparently, without written protests, out of some 2,800 notices sent, graphically demonstrates the extent of the problem.

Perhaps the most important practical aspect is that the taxpayer who has made an innocent mistake, but has only a small amount of property added to his return, is the one least likely to realize that he has been sub-

jected to a penalty, and has already paid it, when he was entitled to have it waived.

As stated in Coe v. Armour Fertilizer Works, 237 U. S. 413, 35 S. Ct. 625, 59 L. Ed. 1027: "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. * * * 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing.' "

Here is involved the constitutional validity of an act of the Legislature imposing a penalty of 500 percent of the amount of the tax due and with a specific provision by the Legislature for the waiver of that penalty under specified circumstances. The constitutional validity of an act of the Legislature is to be tested and determined not by what has been or possibly may be done under it, but by what the law authorized to be done under and by virtue of its provisions. United Community Services v. The Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576.

For the reasons herein stated, we find L.B. 206 to be unconstitutional and void as discriminatory between members of a class, and nonuniform, arbitrary, and capricious in its operation, contrary to Article I, section 25, and Article III, section 18, Constitution of Nebraska; and that it fails to conform with the constitutional requirements of due process.

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

AFFIRMED.

ALVA KIMMEL ET AL., APPELLANTS, V. RICHARD ROBERTS ET AL., APPELLEES.
136 N. W. 2d 208

Filed July 9, 1965. No. 35905.

1. **Wills. The mere concurrent execution of reciprocal wills, with**

the full knowledge of their contents by both testators, is not enough to prove a legal obligation to forbear revocation in the absence of a valid and enforcible contract.

2. **Descent and Distribution: Frauds, Statute of.** When one claims the estate of a deceased person under an alleged oral contract, the evidence of such contract must be clear, satisfactory, and unequivocal.
3. ———: ———. Such oral agreements are unenforcible under the statute of frauds because not in writing, even if proved, unless there has been such part performance as the law requires.
4. ———: ———. In a suit to enforce an oral agreement embraced within the statute of frauds on the ground of part performance, the acts alleged to constitute part performance must refer to, result from, or be in pursuance of the oral contract sought to be enforced, and not from some other relation.
5. **Wills: Husband and Wife.** It is presumed that the passing of property from one spouse to the other by will results from and in pursuance of the marriage relation and it is not of itself referable to an oral agreement to make irrevocable and reciprocal wills as part performance.

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

Edward J. Robins, for appellants.

Richards, Yost & Schafersman, for appellees.

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

CARTER, J.

Plaintiffs brought this suit in the district court for Dodge County for the specific performance of an oral agreement by Frank Middaugh and Elizabeth Middaugh to execute reciprocal and irrevocable wills. The trial court found the evidence insufficient to sustain an enforcible contract. The plaintiffs have appealed.

Frank Middaugh and Elizabeth Middaugh were husband and wife. No children were born to them. They had acquired property, as stated in plaintiffs' brief, of the approximate value of $250,000, some of which was held individually and some in joint tenancy. In 1952 they concluded to make a testamentary disposition of their

property. On August 1, 1952, at the same time and place, they executed reciprocal wills, identical in content except for the change in names of the parties and the appropriate use of the words "husband" and "wife" therein. Each of the two wills was executed by the two parties for the benefit of the other and each provided that the estate of the survivor would go to the nieces and nephews of both, share and share alike.

Frank Middaugh died on February 13, 1953, and his reciprocal will dated August 1, 1952, was duly probated. Elizabeth Middaugh became the beneficiary of the estate under the terms of the reciprocal will of Frank Middaugh, which had never been changed. On November 17, 1960, Elizabeth Middaugh executed another will by which she materially changed the distribution of her estate to the benefit of her nieces and nephews and to the detriment of the nieces and nephews of Frank Middaugh. The petition also alleges that after the death of Frank Middaugh, she, by joint tenancy, survivorship, and the changing of the beneficiaries of insurance funds, effectually transferred a large portion of her property to her nephews and nieces to the exclusion of those of her deceased husband, Frank Middaugh. Elizabeth Middaugh died on February 9, 1964, her death giving rise to the present litigation.

The plaintiffs are the nieces and nephews of Frank Middaugh. The defendants are the three surviving nephews and the three children of a deceased niece of Elizabeth Middaugh. It is the contention of the plaintiffs that the reciprocal wills executed by Frank Middaugh and Elizabeth Middaugh, the oral evidence adduced, and the part performance of the oral contract constitute a binding and enforcible agreement which became irrevocable upon the death of Frank Middaugh. The defendants contend that a valid enforcible contract has not been established and that the will of Elizabeth Middaugh, executed on November 17, 1960, is a valid will which controls the disposition of her property.

There is evidence in the record supporting an oral agreement that the property of Frank and Elizabeth Middaugh upon the death of the survivor was to go to the nieces and nephews of both. The reciprocal wills contained no provision indicating an intent that such wills were to be irrevocable. Any relief to be granted the plaintiffs is therefore dependent upon the establishment of the oral agreement as binding and enforcible. It is a fundamental rule that in a suit to enforce an oral agreement embraced within the statute of frauds, acts of part performance must be shown sufficient to remove the bar of that statute. The making of reciprocal wills is not alone sufficient to establish the irrevocability of such wills. Eagan v. Hall, 159 Neb. 537, 68 N. W. 2d 147; Wyrick v. Wyrick, 162 Neb. 105, 75 N. W. 2d 376. In a suit to enforce an oral agreement within the statute of frauds on the ground of part performance, the part performance must refer to, result from, or be in pursuance of the oral contract sought to be enforced, and not from some other relation. To sustain such a contract the evidence must be clear, satisfactory, and unequivocal. Diez v. Rosicky, 145 Neb. 242, 16 N. W. 2d 155; Overlander v. Ware, 102 Neb. 216, 166 N. W. 611.

The evidence shows that upon the death of Frank Middaugh, his reciprocal will executed on August 1, 1952, was probated and Elizabeth Middaugh took all his property given her by the will pursuant to the terms of the will. It is contended that the acceptance of the property by Elizabeth Middaugh under the terms of the will was a part performance of the oral agreement and had the effect of barring the application of the statute of frauds. Such evidence will not sustain a finding of part performance of the oral contract. The giving of a husband's property to his wife by will is a matter of common occurrence in the relationship of husband and wife and it cannot be said that it refers to, results from, or is in pursuance of the oral contract here sought to be enforced. Eagan v. Hall, *supra*. It lacks the essential

element of being referable solely to the oral agreement sought to be established and does not therefore constitute such proof of part performance of the oral contract as to remove the bar of the statute of frauds. Taylor v. Clark, on rehearing, 143 Neb. 563, 13 N. W. 2d 621; Diez v. Rosicky, *supra;* Lunkwitz v. Guffey, 150 Neb. 247, 34 N. W. 2d 256; Eagan v. Hall, *supra;* Wyrick v. Wyrick, *supra.*

The rule applicable here is summarized in Overlander v. Ware, *supra;* as follows: "In considering cases of this character, where one is claiming the estate of a person deceased under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory and unequivocal. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear and satisfactory evidence, they are not enforceable unless there has been such performance as the law requires. The thing done, constituting performance, must be such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract—something that the claimant would not have done unless on account of the agreement and with the direct view to its performance—so that nonperformance by the other party would amount to fraud upon him."

Although there is evidence of an oral agreement, the effect of which is to make the reciprocal wills irrevocable, there is no proof of part performance sufficient to remove the bar of the statute of frauds.

The plaintiffs rely upon Brown v. Webster, 90 Neb. 591, 134 N. W. 185, 37 L. R. A. N. S. 1196, and Mack v. Swanson, 140 Neb. 295, 299 N. W. 543, in support of their position. These two cases have been cited to this court previously as holding for a different application of the controlling rule than as applied herein. Eagan v. Hall, *supra.*

In the case of Brown v. Webster, *supra,* the court held that the petition stated a cause of action and re-

versed the judgment of the district court in dismissing the action as not stating a cause of action. The court, as pointed out in the dissenting opinion, assumed that the evidence was before the court and that no defense is available thereto, even though one might have been pleaded and proved. We think the court purported to anticipate the evidence and make a determination thereof rather than to limit itself to the sufficiency of the petition to state a cause of action. Such a discussion of the evidentiary factors was outside the issue before the court and constitutes pure dicta. Nevertheless, the obiter dictum contained in the opinion lacks the force of an adjudication. Notwithstanding this fact, the opinion is relied upon from time to time to sustain oral contracts embraced within the statute of frauds which are not in compliance with the law of this state as declared by the cases cited in disposing of the present litigation. As a clarification of the applicable rules relating to the enforcibility of oral contracts embraced within the statute of frauds, we disavow and reject the statements in the opinion which are in conflict with the rules announced in the present opinion.

In Mack v. Swanson, *supra*, each of the reciprocal wills by the husband and wife gave a life estate by the maker of each will to the other and provided further "and should either of us pass away, whatever of the residue of all properties of every kind and nature shall revert to the heirs of both then living, share and share alike." The opinion holds: "The mutual promises of the parties amount to sufficient considerations. Performance of the oral contract by both parties during the remainder of the husband's life and the mutual writings pursuant to such oral contract clear the transactions from the statute of frauds." The acts of performance relied upon are not discussed in the opinion, nor are the mutual writings, referred to, set out. The only authority cited is Brown v. Webster, *supra*. This situation leaves the case in a questionable status as an authority in the case

before us. Giving it a most favorable construction, we must assume that the evidence supported the findings made and that they are not in conflict with the established rules set forth in this opinion dealing with part performance as validating oral contracts embraced within the statute of frauds.

We conclude that the oral agreement sought to be enforced is barred by the statute of frauds as the trial court found. The judgment of the district court is affirmed.

AFFIRMED.

McCOWN, J., concurring.

I concur generally in the result reached by the majority opinion, but I am convinced that the result is correct for another basic reason. The majority opinion proceeds on the assumption that there is evidence in the record supporting an oral agreement that the property of Frank and Elizabeth Middaugh, upon the death of the survivor, was to go to the nieces and nephews of both. An analysis of the record discloses that on the very first conference of the decedents with their attorney, they said: "* * * we have decided how we want to divide our property, but we think we should have a joint will. So that it will be the same for both of us no matter which one of us dies first." Their attorney then advised them: "I am opposed to joint wills for the reason that it ties you up and forfeits the wife getting the benefit of the marital deductions. * * * You can accomplish the same results by making two identical wills and put the property the way you want it that way." Separate wills were drawn for the decedents and there is not one word of testimony at any point that the decedents disregarded or intended to override the advice of their attorney, nor that they at any time intended to proceed with a so-called contractual arrangement, regardless of their attorney's advice. At the time of execution of the separate wills, each party stated that his or her will was just the way he or she wanted it.

In order to assume that the parties were going ahead with a contractual irrevocable testamentary plan, even if they had one originally, you have to assume that they intended to disregard their attorney's advice and that they planned to avoid the federal estate tax laws, neither of which, I think, are reasonable assumptions.

In a modern day in which husbands and wives are much more frequently making testamentary plans together, it is disregarding the plain facts of life to treat oral conversation between spouses that they have "agreed" on a testamentary plan or plans, as constituting the evidence of an oral, binding contractual obligation. A court should not introduce or imply the existence of a mercenary element in the execution of wills containing reciprocal provisions between husband and wife bound by close ties of affection, except upon clear affirmative proof that it was present within the understanding of all parties. Testimony which establishes only that wills containing reciprocal provisions were the result of the union of life and purpose of the testators, and not of a negotiation between them in which each testator represented his or her own interest, is not sufficient to establish a contract for the execution of the wills. The discussion by two persons bound to each other by the closest ties of affection concerning the disposition of their property, resulting in separate wills by which the property of each is disposed of in the same manner, affords no grounds for an inference that either undertook or exacted a legal obligation. This is glaringly apparent when they are dealing with federal estate taxes and joint testamentary planning.

The cases are absolutely clear in all states that I have been able to find that the degree of proof required to establish a contract for the execution of wills reciprocal in their bequests must be "clear, unambiguous, and convincing," "definite, certain, clear and convincing," "very convincing," "clear, definite, satisfactory and unequivocal," and in some instances, "most indisputable." Some

authorities go so far as to require proof beyond reasonable doubt or legitimate controversy to establish a contract for the execution of wills containing reciprocal bequests and bequests to third persons effective in enjoyment upon the death of the surviving testator, especially where the parties were husband and wife. 57 Am. Jur., Wills, § 728, p. 494.

The rule which I think applies here is set out in 57 Am. Jur., Wills, § 733, p. 499: "Parol proof offered to establish a contract for the execution of wills containing reciprocal bequests must be of the most satisfactory character, especially where the enforcement of the agreement will divert the title from the heirs at law of a decedent. Clearly the court cannot imply an agreement for the execution of separate wills containing reciprocal provisions and identical or similar provisions for the benefit of a third person where the circumstances are inconclusive and permit an inference either way. It has been held that in the absence of an express agreement for the execution of separate wills with reciprocal provisions and similar provisions for the benefit of a third person, the evidence of the surrounding circumstances must be such as imperatively to compel the conclusion that the testators intended and undertook to bind themselves and their estate irrevocably in the event of the prior death of one, in order to suffice as proof of a contract between them." See, also, Annotation, 169 A. L. R. 66, 67.

It is strange indeed that we place so many technical requirements and formalities about the execution of a will and its amendment or revocation and yet, in certain circumstances, permit mere oral statements to be somehow wrapped in a contractual package which will supplant and override the will itself. An attorney has a difficult enough time in preparing joint testamentary plans, drafting proper and effective wills, and complying with all the formalities of their execution. To make his memory of the oral conversations of the testators the

determining factor with respect to establishing some overriding contractual arrangement places an almost impossible burden upon him. If the facts of the so-called "contract" here were actually sufficient to constitute a binding oral contract to make irrevocable reciprocal wills, the careful draftsman would have to place in every reciprocal will a specific negation of any oral contractual agreement.

To demonstrate the reason for the concern with a reliance only upon the statute of frauds in this case, it can be pointed out that upon the recommendation of the attorney drawing the wills, certain property transfers were recommended. The record does not show when, whether, or to what extent, they were made. If a transfer had been made after the execution of the wills and in accordance with the so-called "agreement," such a transfer could be treated as part performance sufficient to take the "contract" out of the statute of frauds. Such transfers of property in pursuance of a testamentary plan are not only occasionally pursued in federal estate and gift tax planning, but are quite commonly pursued.

Insofar as the statute of frauds is concerned, it would seem preferable to adopt a rule that the execution of a will, and leaving it unrevoked until death, is not of itself sufficient to take an alleged irrevocable oral agreement for reciprocal wills between husband and wife out of the operation of the statute, unless the will on its face specifically refers to the oral contract.

The facts in this case are definitely insufficient to establish any oral contract to make irrevocable reciprocal wills.

I am authorized to state that Carter, J., is in agreement with this concurrence, but that the statute of frauds being a bar, a holding of the insufficiency of the oral agreement is not necessary to the disposition of the case.

BOSLAUGH, J., concurring.

I concur in the result reached in this case upon the ground that the evidence was not sufficient to establish

an oral contract to make the reciprocal wills irrevocable.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein for the reason that I think the opinion, in attempting to overrule long-settled authority, is bringing confusion to our law.

A reading of the wills herein convinces me that they were intended to serve but one purpose, the one contended for by the appellants. The wills were the same except for the change of names. The opinion could give an erroneous impression when it says that Elizabeth Middaugh took all of Frank's property given her by the will, pursuant to the terms of the will. Frank Middaugh's will, which was admitted to probate March 16, 1953, gave his motor vehicles, household goods, furniture, and personal belongings to his wife, Elizabeth Middaugh. The balance of his estate was given to two trustees, with directions to pay the income to Elizabeth during her lifetime. The will then, so far as here material, provided:

"E. If my said wife predeceases me or, having survived me, dies, my said trustee or their successors shall distribute said trust property and any other property which I might own at the time of my death to my nephews and nieces and to the nephews and nieces of my wife, Elizabeth Middaugh, share and share alike. It is my intention that the division of my property is to be made to the nephews and nieces of my said wife and myself who are living at the date of the death of my wife or to the issue of any deceased nephew or niece. The issue of any deceased nephew and niece of mine or my wife's shall take the share the parent would have taken if living. It is my intention that there shall be no vesting of this remainder in any nephew or niece of my wife or of myself until the date of the death of my wife and until said date the interest of said nephew or niece shall not be subject to alienation of any kind and no notices in connection with the administration of said trust shall be

required to be given to any nephew or *or* niece or to any survivor of any nephew or niece."

Elizabeth received the income so long as she lived. At her death, the trustees distributed Frank's estate to the nieces and nephews of Frank and Elizabeth, in accordance with the provisions of the will.

It is of interest to note that as a part of the transaction resulting in the wills, on the advice of counsel, the property of the parties, some of which was held jointly and some of which was held separately, was divided equally between the parties and the reciprocal wills were made.

The opinion holds: "Although there is evidence of an oral agreement, the effect of which is to make the reciprocal wills irrevocable, there is no proof of part performance sufficient to remove the bar of the statute of frauds."

I suggest Frank completely performed and that Elizabeth accepted the benefits of that performance until her death. That performance included the provision made for her nieces and nephews in consideration of a like promise she made for Frank's nieces and nephews. The division of the property between the parties as a part of the contract in the reciprocal wills providing for the conveyance of the remainder interest in Frank's property to Elizabeth's nieces and nephews certainly indicates to me a substantial part performance within the ambit of our cases.

This case is in no respect analogous to Eagan v. Hall, 159 Neb. 537, 68 N. W. 2d 147. In the Eagan case, the property was conveyed to the spouse with full power to sell and convey, with only the balance remaining undisposed of at the death of the survivor going to the heirs. Clearly that will did not necessarily purport an agreement. The instant case is entirely different. Here the wife receives only the income, with no right to encroach on principal, which is held by trustees, and one-

half of the corpus at her death vests in her own nieces and nephews.

Wyrick v. Wyrick, 162 Neb. 105, 75 N. W. 2d 376, involved a joint will which contained the provision: " 'In the event the one surviving should re-marry, the deceased (sic) interest is due and payable to his or her heirs.' " The survivor did remarry, and immediately closed up his wife's estate, under the provision of the will cited above, and paid the remaining portion of his wife's estate to her heirs as provided in the will. That case contemplated the situation which happened, and is not in any sense analogous to the instant one.

I am in full agreement with the statement that in a suit to enforce an oral agreement within the statute of frauds, on the ground of part performance, the part performance must refer to, result from, or be in pursuance of the oral contract sought to be enforced and not from some other limitation. In this case, however, I am unable to see any basis to account for the performance herein except on that of performance of the oral contract. It seems apparent to me that the only basis on which Frank Middaugh would have left one-half of his estate to his wife's nieces and nephews was pursuant to the contract.

I would say that the rule to be applied is that set forth in our opinion in Overlander v. Ware, 102 Neb. 216, 166 N. W. 611, as follows: "In considering cases of this character, where one is claiming the estate of a person deceased under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory and unequivocal. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear and satisfactory evidence, they are not enforceable unless there has been such performance as the law requires. The thing done, constituting performance, must be such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract—something that the claimant would not have

done unless on account of the agreement and with the direct view to its performance—so that nonperformance by the other party would amount to fraud upon him." The performance herein to me can only be referred to the contract sought to be enforced.

I am in full agreement with appellants that the cases of Brown v Webster, 90 Neb. 591, 134 N. W. 185, 37 L. R. A. N. S. 1196, and Mack v. Swanson, 140 Neb. 295, 299 N. W. 543, support their position. I certainly do not believe that we should overrule Brown v. Webster, *supra,* which has been the law in this jurisdiction for more than 50 years, which 53 years ago followed the majority rule in the country, and which still is the rule in a vast majority of the jurisdictions, without some compelling reasons.

Brown v. Webster, *supra,* came to this court on a demurrer to the petition. The court did not anticipate the evidence, and the opinion is not mere dicta. It followed the rule that a demurrer admits all facts well pleaded. Assuming the facts as established, for the purposes of the demurrer, it laid down the law applicable to those facts. The following discussion and authorities from that case may be of interest here: "It is not a question, therefore, of whether or not the execution of the wills aided an oral contract; the question is, were the wills an integral and important part of the contract? We held that they were, and that from the moment the wills were executed the contract no longer rested entirely in parol. We also think it would be doing violence to every rule of equity to hold that the contract of each, of which the will was a part, was not a good consideration for the contract of the other. We think the consideration of each was both a good and valuable consideration; but, even if it were to be held that it did not constitute a valuable consideration, in the sense that no money was paid or property delivered or personal services performed by the one to or for the other, the contract would still be enforceable for the reason that it was supported

by a good consideration. Conceding that a contract by A to make a will in favor of B, that upon A's death he would leave all of his property to B, could not be enforced by B, as against the creditors of A, or as against those having a superior equity to B, yet, if there are no creditors and no one possessing superior equities to B, then a good consideration would be sufficient to entitle B to enforce the contract after A's death. Parsell v. Stryker, 41 N. Y. 480, 485; Underhill, Law of Wills, sec. 285. That a contract to devise real estate, where there has been performance by the promisee, is good in this state is settled in this court by Kofka v. Rosicky, 41 Neb. 328; Teske v. Dittberner, 65 Neb. 167, 70 Neb. 544; Peterson v. Estate of Bauer, 76 Neb. 652; Peterson v. Bauer, 83 Neb. 405; Pemberton v. Heirs of Pemberton, 76 Neb. 669; Harrison v. Harrison, 80 Neb. 103; Cobb v. Macfarland, 87 Neb. 408; Johnson v. Riseberg, ante, p. 217. That the execution of the wills satisfied the statute of frauds, see Brinker v. Brinker, 7 Pa. St. 53; Shroyer v. Smith, 204 Pa. St. 310; Keith v. Miller, 174 Ill. 64; Bruce v. Moon, 57 S. Car. 60, 35 S. E. 415. That the will of deceased was not, in equity, ambulatory or revokable (sic), see Teske v. Dittberner, 70 Neb. 544, where, in the seventh paragraph of the syllabus, we held: 'A contract to leave property by will is not ambulatory or revocable, as being testamentary in character, after the promisee has performed his part of the contract.' See, also, Bolman v. Overall, 80 Ala. 451; Johnson v. Hubbell, 2 Stock. Ch. (N. J.) 332; and Rivers v. Executors of Rivers, 3 Desaus. Eq. (S. Car.) 190, where it is said: 'By this agreement (to make a will of a particular tenor) he has renounced that absolute power of disposing of his estate at his pleasure, or even at his caprice, with which the law had clothed him; and I cannot doubt that he could bind himself to do so. * * * A man may renounce every power, benefit, or right, which the laws give him, and he would be bound by his agreement to do so, provided the agreement be entered into fairly, without

surprise, imposition, or fraud, and that it be reasonable and moral. * * * It appears to me that to make a will in a particular way, on proper considerations, is as much a subject of contract as any other; and he who makes a contract on this subject is as much bound thereby as he would be by any agreement on any other subject.' See, also, Bruce v. Moon, 57 S. Car. 60, 71; Parsell v. Stryker, 41 N. Y. 480, 486, 487. The contention that plaintiff parted with nothing, that the manner in which she permitted her husband to manage and control her estate and take title to property in his own name and hold the same and the proceeds from sales thereof, after the execution of the contract, was not different from the manner in which she had permitted him to handle her property prior to its execution, does not impress us as being of any force. The fact is admitted that, at all times after the execution of the contract, she in good faith relied upon it by permitting her will to remain as originally executed, without any attempt at modification or revocation."

Supplementing the quotation from Mack v. Swanson, 140 Neb. 295, 299 N. W. 543, in the opinion, I quote the following: "The question to be determined on appeal is the sufficiency of the evidence to prove an oral agreement by husband and wife to make reciprocal wills. After those instruments were duly and legally executed by both husband and wife without fraud of any kind, a prior oral contract to do so was provable without direct evidence. Both husband and wife were competent to make testamentary disposition of their property. What they in fact did in that particular is evidence of their previous mutual voluntary purpose. Circumstances may evidence a prior, oral agreement for reciprocal wills as well as direct testimony. * * * These wills were drawn at the same time, the only difference between them being changes in names and in references of each to the other. They were signed and witnessed by the same persons at the same time and place a few days after they were

drawn. The witnesses to the wills certified that the husband declared in their presence and hearing that the instrument signed by him was his last will and testament and that his wife made a similar declaration. The executed wills were kept in a strong box accessible to both until after the death of her husband. The wills themselves, the definite purpose stated therein as to where the residue of the property of both should go upon the death of both and the surrounding circumstances, evidence a previous mutual agreement by husband and wife to make the irrevocable testamentary disposition of their property disclosed by the written instruments of identical import. Friends of William F. Mack testified he had at times expressed the purpose of himself and wife to make reciprocal wills, leaving the residue of their property upon the death of both to the heirs of both. The attorney who drew the reciprocal wills testified to the effect that William F. Mack and wife came to his office together; that the husband explained in the presence and hearing of the three of them the mutual plan to leave the residue of their property to the heirs of both, and that pursuant to directions he dictated the wills to a stenographer who read them to both husband and wife and that they both expressed satisfaction therewith. The evidence and circumstances summarized are uncontradicted. For the purposes of equity the oral agreement is fully established. For such purposes the oral agreement and the reciprocal wills should be treated as different parts of a single contract. The mutual promises of the parties amount to sufficient considerations. Performance of the oral contract by both parties during the remainder of the husband's life and the mutual writings pursuant to such oral contract clear the transactions from the statute of frauds. The rules of law and equity observed herein are well established in this state as well as in many other jurisdictions. Brown v. Webster, 90 Neb. 591, 134 N. W. 185, and the cases cited therein."

I cannot agree with the conclusion in the proposed

opinion that the oral agreement sought to be enforced is barred by the statute of frauds. In this finding the trial court erred.

BROWER, J., joins in this dissent.

IN RE ESTATE OF ELIZABETH MIDDAUGH, DECEASED. ALVA KIMMEL ET AL., APPELLANTS, V. RICHARD ROBERTS ET AL., APPELLEES.

136 N. W. 2d 217

Filed July 9, 1965. No. 35909.

1. **Wills.** A reciprocal will, like any other, is revoked by the execution of a later inconsistent will.
2. ———. Where a party to an agreement to make reciprocal wills makes a later will, before or after the other's death, his reciprocal will cannot be admitted to probate because it is not his last will.
3. ———. The last will of a party who has previously entered into an agreement with another for reciprocal wills and has executed such a will pursuant thereto, must be admitted to probate even though it is in violation of and does not comply with the agreement.
4. ———. The power of a probate court in the contest of a will is to determine only if the purported will is in fact the last will of the decedent.
5. ———. An agreement to execute reciprocal wills cannot be asserted as a ground for contesting the probate of a later revoking will.
6. **Wills: Equity.** A claim that a subsequent revoking will is a breach of an agreement for the making of irrevocable reciprocal wills may properly be asserted in a court of equity, but not in the probate court by contesting the later will or by objection to a decree of distribution.

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

Edward J. Robins, for appellants.

Richards, Yost & Schafersman, for appellees.

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

CARTER, J.

This is an appeal from the judgment of the district court for Dodge County admitting the last will of Elizabeth Middaugh to probate.

Elizabeth Middaugh died on February 9, 1964. She left a will which was duly executed on November 17, 1960. The executors named in the will, Richard H. Roberts and Dwight A. Nuessle, filed their petition for the probate of the will on February 14, 1964. The nieces and nephews of Frank Middaugh, the deceased husband of Elizabeth Middaugh, filed objections to the probate of the will.

The objections to the probate of the will recited that on August 1, 1952, Frank Middaugh and Elizabeth Middaugh executed reciprocal wills pursuant to an oral agreement that each would leave his entire estate to the other and that the survivor would leave his entire estate to the nieces and nephews of the two of them, living at the death of the survivor, share and share alike. Frank Middaugh died on February 13, 1953, and his reciprocal will, executed on August 1, 1952, was duly probated and all of his property passed to Elizabeth Middaugh by the terms of the will. It was asserted that because of the making of the reciprocal will by Frank Middaugh on August 1, 1952, and his death without changing the same, the reciprocal will of Elizabeth Middaugh, also executed on August 1, 1952, became irrevocable, and that her subsequent will executed on November 17, 1960, was a violation of the oral agreement and the reciprocal wills made pursuant thereto. The last will of Elizabeth Middaugh materially changed the distribution of her estate to the benefit of her nieces and nephews and to the detriment of the nieces and nephews of Frank Middaugh, contrary to and in violation of her oral agreement and the reciprocal wills exe-

cuted pursuant thereto. The objectors contend that upon the execution of the reciprocal wills, Elizabeth Middaugh contracted away her right to revoke her reciprocal will of August 1, 1952, that her subsequent will of November 17, 1960, was without authority for her to make, and that the reciprocal will of August 1, 1952, is the last will of Elizabeth Middaugh. Objectors allege the commencement of a suit in the district court for Dodge County to enforce the oral agreement and the reciprocal will of Elizabeth Middaugh made pursuant thereto. Objectors pray that the will of Elizabeth Middaugh executed November 17, 1960, offered for probate be denied and that the reciprocal will previously made be admitted to probate as the last will of Elizabeth Middaugh.

The proponents filed a motion to quash the objections on the ground that the county court is without jurisdiction to enforce an oral agreement embraced within the statute of frauds. The county court sustained the motion to quash the objections and admitted the will to probate. Objectors appealed to the district court. A petition praying for the admission of the will to probate, an answer incorporating the objections to probate filed in the county court, and a reply were filed in the district court. Proponents then filed a motion for a summary judgment which the trial court sustained, and admitted the will to probate. The objectors appealed to this court.

The issue involves the jurisdiction and powers of the county court. There is no issue of fact to be determined.

A reciprocal will, like any other, is revoked by the execution of a later will. Consequently, when a party, who has entered into an agreement to make reciprocal wills makes a later will, either before or after the death of the other party, his reciprocal will cannot be admitted to probate since it is not his last will. The last will may be admitted to probate, even though it does not comply with and is inconsistent with his agreement to make reciprocal wills. This is so even though it is subject to

the rights of affected persons to compel a distribution of the estate under the agreement to make reciprocal wills. The remedy of such affected persons is, however, in equity, and not in the probate court, the latter court having no choice but to distribute the estate under the last will in the absence of a decree of an equity court directing a different disposition under the agreement for reciprocal wills. 97 C. J. S., Wills, § 1366c, p. 298; 57 Am. Jur., Wills, § 716, p. 485; Annotation, 169 A.L.R., Joint, Mutual, and Reciprocal Wills, § 2, p. 53.

Whether or not reciprocal wills of husband and wife constitute a binding contract between them cannot be litigated in a contest of the probate of either will. Lansing v. Haynes, 95 Mich. 16, 54 N. W. 699, 35 Am. S. R. 545; Chitwood v. Collins, 122 W. Va. 267, 8 S. E. 2d 830. This is for the reason that the only issue on a contested probate is whether the purported will is in fact the last will of the decedent. A probate court whose jurisdiction is limited to the determination of such issue lacks power to enforce an agreement between two testators to make wills which are reciprocal in their provisions. Clements v. Jones, 166 Ga. 738, 144 S. E. 319. A probate court cannot refuse to probate a will on the ground that it was made in violation of an agreement to make reciprocal wills. Sumner v. Crane, 155 Mass. 483, 29 N. E. 1151, 15 L. R. A. 447. Nor may a contract to execute reciprocal wills be asserted as a ground for contesting the probate of a later revoking will. Fuller v. Nelle, 12 Cal. App. 2d 576, 55 P. 2d 1248. A claim that a subsequent revoking will is a breach of an agreement for the making of reciprocal wills can properly be asserted in a court of equity, but not in a court of probate either by contesting the later will or by objection to a decree of distribution. In re Estate of Rolls, 193 Cal. 594, 226 P. 608. See, also, Shawver v. Parks (Tex. Civ. App.), 239 S. W. 2d 188; Manrow v. Deveney, 109 Ind. App. 264, 33 N. E. 2d 371.

The action of the trial court in sustaining a motion for summary judgment and admitting the will of Eliza-

beth Middaugh, executed on November 17, 1960, to probate is in all respects correct and the judgment is affirmed.

AFFIRMED.

MAXYNE M. SOWDER, APPELLEE, V. MICHAEL R. SOWDER, APPELLANT.
136 N. W. 2d 231

Filed July 9, 1965. No. 35912.

Divorce. The earning capacity of the husband is an element to be considered in the allowance of alimony.

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

Max A. Powell and Rohn & Rohn, for appellant.

Wagner & Johnson, for appellee.

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

SMITH, J.

A divorce decree in favor of Maxyne M. Sowder is challenged with the propositions that her husband Michael is entitled to a divorce and that the alimony award is excessive.

This second marriage for both parties commenced December 28, 1958. At the time of trial Maxyne was 47 years of age, Michael, 40. They have no children by the second marriage, but three of Maxyne's daughters by a previous marriage were supported by Michael while they were living with the parties.

The finding of fault is correct. Michael angrily struck Maxyne on a number of occasions. Corroboration was supplied by one daughter and by a physician. Some violence was admitted.

Perhaps Maxyne's conduct was less than exemplary.

Certainly it was much less than cruel. We see no cause to lay blame on her for sexual incompatibility.

Quarrels over tidiness of the home and discipline of the daughters have been magnified beyond all proportion. We can hardly set a standard of perfection for the performance of marital duties.

In its decree the district court awarded Maxyne $7,500 alimony payable in monthly installments of $125, a 1962 Rambler automobile, and $400 for services of counsel. It divided miscellaneous personal property between the parties.

Michael is an accountant whose annual income exceeded $16,000 during the period 1961-1963. At the trial in July 1964, he predicted a substantial decrease for that year; but only a temporary reduction can be structured on his industry and prior earnings.

Balance sheets, which were prepared on cost basis with reserves for depreciation of some assets, show his net worth on December 31, 1958, to have been $8,639.65, and on April 21, 1964, $21,276.29. Adjustments for disparities between cost and value of real estate and for the cash value of insurance policies result in a 1964 valuation of approximately $21,000. Not included are his obligations for alimony and child support under a prior divorce decree. In 1964 alimony of $11,900 was payable in installments over the next 10 years, and child support of $7,425 was payable in installments over the next 5 years.

Maxyne brought to the marriage no property of consequence, and she has not contributed directly to the accumulation. A deficiency of technical skill no doubt will restrict her in the labor market.

The allowance by the district court is excessive if we disregard Michael's earning capacity. This we may not do. See Hefti v. Hefti, 166 Neb. 181, 88 N. W. 2d 231. The award is reasonable.

The judgment is affirmed and Maxyne is allowed $250 for services of her counsel in this court.

AFFIRMED.

MARTIN MILLING CO., A CORPORATION, APPELLANT, V. LARRY EVELYN, APPELLEE.
136 N. W. 2d 177

Filed July 9, 1965. No. 35913.

1. **Account Stated.** In creating an account stated, as in making any other agreement, the minds of the parties thereto must meet and understand that a final adjustment of the respective demands of each upon the other is being made.
2. **Sales.** In the absence of an agreement to the contrary the making of advancements to a salesman against future commissions creates no legal obligation on his part to repay them.

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

Wright, Simmons & Hancock, for appellant.

Marvin L. Holscher, for appellee.

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

SPENCER, J.

Involved herein is the question whether plaintiff can recover advances made to the defendant in excess of commissions earned in the absence of a specific agreement for such recovery.

Defendant, Larry Evelyn, entered the employ of plaintiff, Martin Milling Co., as a salesman on a commisison basis in September 1958. He was so employed until approximately April 1, 1962, when plaintiff, without notice to the defendant, went out of business, thus terminating his employment.

Previous to April 1, 1961, defendant had a drawing account of $162.50 per week. At that time, he had received advancements of $8,540.98 in excess of his commissions. About April 1, 1961, the parties entered into a new agreement, exhibit 2, whereby the advancements were to be reduced to $75 per week, and the plaintiff agreed, among other things, as follows: "At the end of this year, we will figure up your commission, and will

deduct from this what we have advanced during the year. If your commissions exceed the amount advanced, we will forward to you an amount equal to the amount of your second mortgage (if there is that much coming to you), and if there is anything over that amount we will send half of it to you, applying the other half to your account with this company."

Between April 1, 1961, and April 1, 1962, the defendant earned commissions of $6,986.04, and received advancements of $3,625, so that his commissions exceeded his advancements by $3,361.04. The parties stipulated that defendant's second mortgage, referred to in exhibit 2, was in the amount of $3,500.

On January 27, 1962, the defendant signed the following form, exhibit 3, which had been sent to him by the plaintiff's auditors:

"No. 10

"Dear Sirs:

"According to our records, the balance receivable from you as of 1/27/62 was $6,611.62. If this agrees with your records, please sign this confirmation form in the space provided below; if it does not agree with your records, do not sign below but explain and sign on the reverse side. In either case, please return this form directly to our auditors, Haskins & Sell, 912 First National Bank Building, Omaha 2, Nebraska, for their use in connection with an examination of our accounts. A stamped and addressed envelope is enclosed for your reply.

"Martin Milling Co.
"SIGN HERE if above is correct. (if incorrect, do not sign here but explain and sign on reverse side.)
"Larry Evelyn (Signed)
"By Larry Evelyn (Signed)

"(Larry Evelyn)
Box 313

(Gering, Nebraska) THIS IS NOT A REQUEST FOR PAYMENT"

Plaintiff in this action sued for the balance due, after applying the $3,361.04, on advancements of $5,643.14. The defendant cross-petitioned for the $3,361.04. The trial court entered judgment for defendant for $3,361.04 with interest. We affirm that judgment.

It is plaintiff's position that exhibit 3 is an account stated between the parties. We do not so construe it. It is merely a statement to plaintiff's auditors that defendant had received advancements of $6,611.62 in excess of commissions, and nothing more. To constitute an account stated, there must be a showing that the parties had reached an understanding as to the nature of the transaction between them, and that they understood that a final adjustment of the respective demands of each upon the other was being made.

As we said in Bingaman v. Huntley, 139 Neb. 819, 299 N. W. 180: "In creating an account stated, as in making any other agreement, the minds of the parties thereto must meet and understand that a final adjustment of the respective demands of each upon the other is being made."

The parties herein had a specific agreement as indicated by the quotation from exhibit 2 above. This agreement provided that the plaintiff was to forward to the defendant any earnings above the advancements at the end of the year up to the amount of defendant's second mortgage, which was $3,500. The excess earnings on April 1, 1962, were only $3,361.04, so they should have been paid to the defendant. If the earnings had exceeded $3,500, only one-half of the excess above $3,500 was to be applied on advancements.

Plaintiff puts considerable reliance on the fact that the agreement, which was made about April 1, 1961, but not confirmed by letter until June 5, 1961, contains the clause, "At the end of this year," and insists that in any event it would only be operative until January 1, 1962.

We do not so construe it. We construe the agreement to provide that periodically the parties would settle on the basis outlined until such time as a future agreement was made. It is no fault of the defendant that the plaintiff saw fit to discontinue its business and to terminate the defendant's employment.

While this is a case of first impression in Nebraska, the law is well settled that in the absence of an express or implied agreement or promise to repay advancements in excess of commissions earned, the employer has no remedy against the employee even though the contract may provide for periodic settlements. The sole source of reimbursement is the commissions earned and no personal liability rests on the employee to repay the advancements made. See, 56 C. J. S., Master and Servant, § 120, p. 562; Annotations, 57 A. L. R. 33, 165 A. L. R. 1367.

We hold that in the absence of an agreement to the contrary the making of advancements to a salesman against future commissions creates no legal obligation on his part to repay them.

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

AFFIRMED.

GEORGE H. STEVENS, APPELLANT, V. RICHARD D. SHAW ET AL., APPELLEES.
136 N. W. 2d 169

Filed July 9, 1965. No. 35915.

1. **Negligence: Trial.** Negligence must be proved by direct evidence, or by facts from which negligence can reasonably be inferred.
2. ———: ———. Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. However the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn there-

from, indicates with reasonable certainty the negligent act charged.

3. ———: ———. Contributory negligence is ordinarily an affirmative defense and the burden of proving it is on the party asserting it.

4. **Automobiles: Negligence.** The existence or presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances.

5. ———: ———. Stopping for different causes, and according to the exigencies of the occasion, is a natural part of the "travel." The right to stop when the occasion demands is incident to the right to travel.

6. ———: ———. Although a municipal ordinance prohibits parking or stopping in a careless, reckless, or negligent manner, a cabdriver who momentarily stops his vehicle in a blizzard on his extreme right-hand side of an icy street 30 feet wide to allow a lady passenger to alight in front of her home is not guilty of contributory negligence by reason of the stopping alone, as a sufficient necessity for his action is shown.

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

Chambers, Holland, Dudgeon & Hastings, for appellant.

Kier, Cobb & Luedtke and Janice L. Gradwohl, for appellee Shaw.

Stewart, Calkins & Duxbury, for appellee Capital Cab Co.

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

BROWER, J.

This is an action in tort for damages for personal injuries sustained by George H. Stevens, the plaintiff and appellant, in an automobile collision between a cab driven by him for the Capital Cab Company and an automobile driven by the defendant and appellee Richard

D. Shaw. The Capital Cab Company, a corporation, appellee and defendant, filed an answer alleging defendant Shaw's negligence and asking to recover that which it had paid the plaintiff as its employee under the workmen's compensation law.

A trial to a jury in the district court for Lancaster County resulted in a verdict and judgment in favor of the defendant Shaw. Plaintiff's motion for a new trial being overruled, he has brought the cause to this court by appeal.

The parties will be designated as they were in the trial court and the defendant when used will refer to Richard D. Shaw.

The plaintiff assigns only one error to the trial court which is that it submitted on its own motion the issue of the comparative negligence of the plaintiff to the jury by instruction No. 6. No objection is made to the form of the instruction but it is contended there was no evidence justifying the submission of the issue.

The accident resulting in the plaintiff's injuries occurred about 2 o'clock p.m., on January 11, 1963, in Lincoln, Nebraska. The plaintiff, a driver for Capital Cab Company, was delivering a passenger, Mrs. Mildred Bodkin, a regular customer, from her place of employment to her home. Her residence was at 2225 Holdrege Street, on the south side thereof in the middle of the block. Holdrege Street is a paved arterial street protected by stop signs. It runs east and west. It is only 30 feet wide and has two lanes. A dividing line is painted thereon by which 17 feet are allotted to westbound and 13 feet to eastbound traffic. The streets that day, however, were covered with snow and were icy and slippery. A blizzard was in progress and visibility was greatly restricted. The plaintiff testified at trial he could see one-half block ahead at the time, but in a previous deposition he had said his vision was curtailed to 50 feet only. The defendant was alone, driving from work to his home in a 1955 Mercury 2-door.

Both vehicles proceeded northward on Seventeenth Street until its intersection with Holdrege Street. The plaintiff's cab passed the Mercury car on Seventeenth Street. Both turned and proceeded east on Holdrege Street. The defendant had noticed the cab as it passed on Seventeenth Street but did not observe it again until within 40 feet of the accident. The plaintiff testified he had driven at the rate of from 20 to 25 miles per hour. He slowed the cab on approaching his passenger's residence and stopped 15 or 20 feet back of the walk leading out from her home because, as he said, traffic slowed in front of the cab. Starting up again he moved at 5 miles per hour to the entrance walk and stopped alongside the curb. He did not recall applying his brakes in this movement but said he might have flashed the lights. The right turn indicator was on. The cab was equipped with red stoplights at the rear which he said were operating. While in the process of opening the door for his passenger, the cab was struck from the rear by the defendant's automobile. His passenger was getting ready to pay her fare at that time. There is some conflict concerning the force of the impact. There is evidence that it was not great and did not move the cab forward. It did knock off the plaintiff's hat which was thrown into the back seat. According to both plaintiff and defendant there was traffic in the north lane coming from the east, going west.

The passenger, Mrs. Bodkin, testified there was no traffic in front of the cab coming or going when they stopped. She said she paid attention because she was a back seat driver. She testified the cab was right next to the curb and she was reaching for her fare when the collision occurred.

The defendant said he did not remember whether his lights were on. He testified he drove 20 miles per hour up Holdrege Street but had slowed to 10 miles per hour before the accident. He saw the cab 40 feet before the impact. On noticing the cab's brake lights go on he

pumped his brakes to avoid skidding but his automobile did skid. The cab had stopped half a second before. Both vehicles appear to have been in good mechanical condition.

The plaintiff stated that at the time of the accident the south side of Holdrege Street was posted, "no stopping, no parking at any time." There is no further evidence developing this statement or which related to any such signs. Exhibit 10 introduced in evidence is a picture of the home of Mrs. Bodkin. It was taken from directly across the street at another time when there was no snow. It shows a driveway between Mrs. Bodkin's home and that to the west of it. There is no testimony as to whose drive it was nor of its condition on the day of the accident. Plaintiff says he was not familiar with the drives into homes.

The defendant pleaded and made proof of section 10.32.220 of the Lincoln municipal code which reads as follows: "Operation of vehicle in careless, reckless or negligent manner. It shall be unlawful for any person to drive, use, operate, park, cause to be parked, or stop any vehicle (a) in a careless manner, or (b) in a reckless manner, or (c) in a negligent manner, or (d) in such a manner as to endanger life, limb, person or property, or (e) in such a manner as to endanger or interfere with the lawful traffic or use of the streets, or (f) in such a condition as to endanger or interfere with the lawful traffic or use of the streets."

The allegation of negligence claimed by the defendant against the plaintiff and submitted to the jury was in stopping his vehicle in such a manner and place as to endanger or interfere with the lawful traffic on the street. The question presented by the plaintiff's appeal, therefore, is whether or not the evidence is sufficient as a matter of law to submit the issue of comparative negligence to the jury. In Wolstenholm v. Kaliff, 176 Neb. 358, 126 N. W. 2d 178, this court in its syllabi stated: "Negligence must be proved by direct evidence, or by

facts from which negligence can reasonably be inferred. * * * Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. However the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicates with reasonable certainty the negligent act charged."

Contributory negligence is ordinarily an affirmative defense and the burden of proving it is on the party asserting it. Cawthra v. Shackelford, 176 Neb. 147, 125 N. W. 2d 186.

The theory of the defendant is that an issue of comparative negligence sufficient to make it a question of fact for the jury arises from the plaintiff's stopping even momentarily when a blizzard was in progress and visibility limited to 50 feet or less. He calls attention to the icy street, the approaching traffic coming from the east, and the street being posted no parking and no stopping. He urges that under the circumstances the momentary stopping was negligent.

Defendant relies also on the ordinance of the city herebefore set forth. Reading the ordinance carefully it appears it does not purport to prohibit either parking or stopping a vehicle under all circumstances. It is only when either is done in a careless, reckless, or negligent manner, or in such a manner or in such a condition as to endanger life, limb, person, or property, or endanger or interfere with the lawful use of the streets. Stopping but for a moment in a snowstorm on icy streets would not involve risk to the defendant had his car been under his control as contemplated by the law and set out by the rules of this court. "The existence or presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate

with such surrounding circumstances." Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250.

In Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N. W. 2d 669, this court considered and construed section 39-757, R. R. S. 1943, which was there applicable and provides in part as follows: "No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off the paved or improved or main traveled portion of such highway; Provided, in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of two hundred feet in each direction upon such highway." This court in the cited case reviewed the authorities there collected concerning temporary stopping or parking on the highway under various conditions. It said in its opinion: "We think this statute was not intended to prohibit a momentary stoppage on the paved portion of the highway under proper circumstances for a normal and reasonable purpose. A like statute was fully, and we think correctly, analyzed in Peoples v. Fulk, 220 N. C. 635, 18 S. E. 2d 147. Therein the court said: 'The temporary stop of the bus on the hard surface portion of the highway to take on a passenger did not constitute a violation of sec. 123(a), ch. 407, Public Laws 1937, which provides that "no person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or im-

proved or main traveled portion of such highway." * * * '"Park" or "leave standing" means something more than a mere temporary or momentary stop on the road for a necessary purpose. S. v. Carter, 205 N. C., 761, 172 S. E., 415; Stallings v. Transport Co., 210 N. C., 201, 185 S. E., 643, 42 C. J., 614, 2 Blashfield Cyc. Auto L. & P., 332, and cases cited; Billingsley v. McCormich Transfer Co., 228 N. W., 424 (N. D.); Axelson v. Jardine, 223 N. W., 32 (N. D.); Dare v. Bass, 224 Pac., 646; Kastler v. Tures, 210 N. W., 415 (Wis.); Henry v. S. Liebovitz & Sons, 167 Atl., 304 (Pa.); American Co. of Ark. v. Baker, 60 S. W. (2d), 572 (Ark.); Dolfosse v. Oil Co., 230 N. W., 31 (Wis.). Starting and stopping are as much an essential part of travel on a motor vehicle as is "motion." Stopping for different causes, and according to the exigencies of the occasion, is a natural part of the "travel." The right to stop when the occasion demands is incident to the right to travel. Fulton v. Chouteau County Farmers Co., 32 Pac. (2d), 1025; Morton v. Mooney, 33 Pac. (2d), 262.' See, also, Leary v. Norfolk Southern Bus Corp., 220 N. C. 745, 18 S. E. 2d 426; Fritz v. York Motor Express Co., 358 Pa. 398, 58 A. 2d 12; Naylor v. Dragoon, 116 Vt. 552, 80 A. 2d 600; American Co. of Arkansas v. Baker, 187 Ark. 492, 60 S. W. 2d 572."

In Peterson v. Skiles, 173 Neb. 470, 113 N. W. 2d 628, this court in construing section 39-757, R. R. S. 1943, stated: "In LaFleur v. Poesch, 126 Neb. 263, 252 N. W. 902, this court quoted the following with approval from Grubbs v. Grayson, 165 Wash. 548, 5 P. 2d 1033: 'The statutes are not violated if there is proper excuse or a necessity for stopping an automobile upon the highway, and a reasonable effort is made to get it entirely off the traveled portion of the road or as nearly so as circumstances will permit.' "

We think the question before us related to the excuse or necessity of the plaintiff stopping his cab to allow his passenger to alight. The evidence shows without refutation that the plaintiff did not stop suddenly or

fail to give a proper signal. His cab came to rest right against the curb. Except for the width of the cab the 30-foot width of the street remained unobstructed by the plaintiff's vehicle. The stop was momentary. It is apparent, moreover, that the ensuing blizzard and the icy street did not obviate or lessen but increased the responsibility of the plaintiff to deliver his lady passenger safely to her home. We do not consider the remark of the plaintiff, that he knew the street was posted no parking or stopping, standing alone, is significant. There was no evidence amplifying the statement. The burden of proof was on the defendant to show its pertinence here. It is to be implied that the ordinance pleaded and offered in proof was the only portion of the municipal code defendant found applicable. Although a municipal ordinance prohibits parking or stopping in a careless, reckless, or negligent manner, a cabdriver who momentarily stops his vehicle in a blizzard on his extreme right-hand side of an icy street 30 feet wide to allow a lady passenger to alight in front of her home is not guilty of contributory negligence by reason of the stopping alone, as a sufficient necessity for his action is shown. We have not found and the defendant does not point out other negligent acts attributable to the plaintiff. The trial court erred in submitting the issue of comparative negligence.

It follows that the judgment of the trial court should be reversed and the cause remanded for a new trial in accordance with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLANT, V. MARVIN EDWIN TAYLOR, APPELLEE.
136 N. W. 2d 179

Filed July 9, 1965. No. 35930.

1. **Criminal Law.** The State's right to appeal in a criminal case

is limited by the terms of sections 29-2315.01 to 29-2316, R. R. S. 1943.

2. ———. Under the terms of section 29-2315.01, R. R. S. 1943, the right of the county attorney to review questions of law in criminal cases is limited to those cases in which a final order or judgment in the criminal case has been entered.

3. ———. Under the terms of sections 29-2315.01 to 29-2316, R. R. S. 1943, the judgment or order of the district court may not be reversed nor in any manner affected where the defendant in the trial court has been legally placed in jeopardy.

4. ———. By the enactment of sections 29-2315.01 to 29-2316, R. R. S. 1943, the Legislature did not intend to provide a procedure by which appeals could be taken from the district court to the Supreme Court for the purpose of securing advisory opinions to govern the rulings of the trial court in a pending trial.

5. **Appeal and Error.** The test of finality of an order or judgment for the purpose of appeal is whether the particular proceeding or action was terminated by the order or judgment.

6. ———. An order sustaining a motion for a new trial is not an order by which the cause is terminated and finally disposed of.

7. **Criminal Law.** While a criminal case is still pending in the district court as a result of sustaining a motion for new trial, an appeal may not be had to this court for the purpose of securing rulings on questions of law that may arise on retrial of the case.

8. ———. The legitimate scope and purpose of sections 29-2315.01 to 29-2316, R. R. S. 1943, are to secure authoritative expositions of law to be used as precedent and govern in similar cases, or cases arising thereafter, but not to affect the right of the defendant in a particular case, except to the limited extent wherein a final order has been entered discharging the defendant before the defendant has been placed in jeopardy.

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

Paul L. Douglas, William D. Blue, and Ronald D. Lahners, for appellant.

John McArthur, for appellee.

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

WHITE, C. J.

On May 9, 1964, a jury returned a verdict of guilty against the defendant in a prosecution on information for assault with intent to rob in Lancaster County, Nebraska, on January 11, 1964. On August 19, 1964, the district court sustained a motion for a new trial, not stating any specific grounds upon which the motion was sustained. By permission of this court appeal by the county attorney was allowed under the provisions of sections 29-2315.01 to 29-2316, R. R. S. 1943.

A preliminary question presented by the record is whether or not a final order must be entered in the case below before the matter can be brought here on appeal. The State seeks to reverse the order granting a new trial and reinstate the verdict of guilty.

Section 29-2315.01, R. R. S. 1943, in pertinent part is as follows: "The county attorney may take exception to any ruling or decision of the court made during the prosecution of a cause by presenting to the trial court the application for leave to docket error proceedings which the county attorney intends to make to the Supreme Court with reference to the rulings or decisions of which complaint is made. * * * The county attorney shall then present such application to the Supreme Court within *one month from the date of the final order,* * * * and otherwise proceed to obtain a review of the case in the Supreme Court as provided in section 25-1912." (Emphasis supplied.)

Section 29-2316, R. R. S. 1943, provides as follows: "The judgment of the court in any action taken under the provisions of this act shall not be reversed nor in any manner affected where the defendant in the trial court has been placed legally in jeopardy, but in such cases the decision of the Supreme 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 state.* Where the decision of the Supreme Court *establishes that the final order of the*

trial court was erroneous, and the defendant had not been placed legally in jeopardy prior to the entry of such erroneous order, the trial court may upon application of the county attorney issue its warrant for the rearrest of the defendant and the cause against him shall thereupon proceed in accordance with the law as determined by the decision of the Supreme Court." (Emphasis supplied.)

These statutes are in harmony with section 25-1912, R. R. S. 1943 (expressly referred to in section 29-2315.01, R. R. S. 1943), which also provides that an appeal, to be taken, must be from a judgment entered or final order made.

By their terms, these statutes do not permit an appeal by the State from any interlocutory ruling of the trial court in a criminal proceeding. Such an interpretation would permit piecemeal review, create chaos in trial procedure, and destroy the orderly and expeditious trial of criminal cases. The statute provides for a determination of such questions on appeal to this court after a "final order" has been entered by the trial court. This is what the statute says and we see no need to resort to any of the rules of statutory construction applicable to conflicting or ambiguous statutes. To hold otherwise would be to hold that the Legislature intended that a succession of appeals could be granted in the same case to secure advisory opinions to govern the further action of the trial court. This flies in the face of reason, considerations of sound judicial procedure, and the plain words of the statute.

This court has held repeatedly that an order is final only when no further action is required to dispose of the cause pending and that when the cause is retained for a new trial or further action to dispose of it, the order is interlocutory and not final. Otteman v. Interstate Fire & Cas. Co., Inc., 171 Neb. 148, 105 N. W. 2d 583; Merle & Heaney Mfg. Co. v. Wallace, 48 Neb. 886, 67 N. W. 883; Continental Trust Co. v. Peterson, 76 Neb. 411, 107 N. W. 786, on rehearing, 76 Neb. 417, 110 N. W. 316;

Wunrath v. Peoples Furniture & Carpet Co., 98 Neb. 342, 152 N. W. 736; Barry v. Wolf, 148 Neb. 27, 26 N. W. 2d 303; Miller v. Schlereth, 151 Neb. 33, 36 N. W. 2d 497; Koehn v. Union Fire Ins. Co., 151 Neb. 859, 39 N. W. 2d 808; Harkness v. Central Nebraska Public Power & Irr. Dist., 154 Neb. 463, 48 N. W. 2d 385.

It is apparent that an order setting aside a verdict and requiring a retrial does not dispose of the cause. Specific holdings that an order sustaining a motion for a new trial is an interlocutory order and not final are Otteman v. Interstate Fire & Cas. Co., Inc., *supra;* Artman v. West Point Mfg. Co., 16 Neb. 572, 20 N. W. 873; Rose v. Dempster Mill Mfg. Co., 69 Neb. 27, 94 N. W. 964; and Wunrath v. Peoples Furniture & Carpet Co., *supra.*

Even though the Legislature made such an interlocutory order appealable in civil cases, our court recently held that this in nowise changed the interlocutory nature of the order. In Otteman v. Interstate Fire & Cas. Co., Inc., *supra,* we said: "This provision was in nowise declaratory of an intent to change the character of an order sustaining a motion for new trial as defined by this court from an interlocutory to a final order, although it did make such an order appealable. Such an order retained its character as an interlocutory order. *All that the statute did was to grant the right of appeal from such an interlocutory order.*" (Emphasis supplied.)

Our research has revealed no decisions under the present statute or its predecessors (section 29-2316, R. S. 1943; section 29-2316, Comp. St. 1929; section 10194, C. S. 1922; section 9187, R. S. 1913), in which an appeal was entertained from other than a final order in the nature of an acquittal, the sustaining of a motion to quash, or the like. In State v. Hutter, 145 Neb. 312, 16 N. W. 2d 176, the State attempted to appeal under the prior statute, section 29-2316, Comp. St. 1929. The statute at that time was silent as to any requirement of a final order prior to an appeal by the State in a criminal case. The district court, on motion, had dismissed in a homicide

case as to murder in the first and second degree and submitted the charge of manslaughter. The jury disagreed and the cause was continued for retrial. The court then sustained a plea in bar to the first and second degree murder charges, and the State was granted a continuance and appealed to the Supreme Court. This court said: "Whether or not the rendition of a final judgment was, in the contemplation of the legislature, to precede the filing of the bill of exceptions is not entirely clear from the act. No reason is suggested or presents itself why the bill of exceptions should be permitted to be filed before the prosecution is ended. Since the decision is not to reverse or in any manner affect the judgment in the case in which the exceptions are taken, the court may require a final order if it can in no other way make sure that its decision will in no manner violate the legislative mandate. That would appear to be the better practice. * * * To hear the matters herein presented would, in effect, determine the rights of the defendant in this action when he is neither a necessary nor proper party in the proceeding. That is not the purpose nor within the contemplation of the legislative act. Under the special proceedings provided by these statutes (sections 29-2314, 29-2315 and 29-2316, Comp. St. 1929) it would appear to be the better rule that generally this court require that a final order or judgment completely disposing of the case shall have been entered below before we will decide any questions therein presented, unless it is clearly shown by the record that the decision can in no manner reverse or affect the case in which the bill was taken."

The court, in the Hutter case, read into the statute the requirement of a final order as a condition of appeal. The successor and present statute expressly requires a final order as a condition precedent for an appeal without qualification. The change in the statute, after the opinion in the Hutter case, expressly requiring a final order is a further manifestation of legislative intent not

to permit the type of piecemeal review that is sought in this case.

The analogy of the Hutter case is compelling. As we view it, there is no significant difference between the two statutes that could change the reasoning in the Hutter case requiring a final order. We point out further that, within the meaning of section 29-2316, R. R. S. 1943, *the defendant had been placed in jeopardy.* The fact that the sustaining of the motion for new trial destroyed any claim of double jeopardy on retrial does not alter the fact that he had been "placed legally in jeopardy" in the trial of the case. It seems to us the meaning of the statute is clear. A purpose of the appeal by the State in this case is to secure a determination that would control the trial court's ruling as to admissibility of a confession and other evidence in the new trial. In the absence of a final order or judgment such a determination by this court could not only affect similar cases, or cases "which may thereafter arise," but might affect the rights of the defendant in this case in violation of the legislative mandate. This is so because if this court determined that the district court was in error in granting the motion for new trial, the case is still pending in district court and the district court would have no recourse but to overrule the motion for new trial. This, of course, would amount to a reinstatement of a guilty verdict after the court had set it aside. We know of no authority for such a procedure. It is plain by its order sustaining the motion for new trial that the district court has and is retaining full jurisdiction of the cause the same as if it had never been tried. The effect of the appeal, if honored in this case, would be to hold that both this court and the district court had concurrent jurisdiction of the case at the same time, which in some fashion would vest authority in this court to order specific rulings on the admissibility of evidence and other questions during the time the trial was pending in the district court. Following the theory of the

State, we know of no limit to the possible number of appeals that could be taken by the simple expedient of the trial court granting successive motions for new trial or for a continuance, as in the Hutter case. These statutes cannot be construed to set up a hide-and-seek game between the trial and the appellate courts. The delay in the final disposition of a criminal case alone resulting from such a construction would substantially and adversely affect the rights of the defendant.

The only area the statute permits the rights of an accused to be affected is where he has been, pursuant to a final order in the case, discharged *prior to having been put in jeopardy,* a situation not present here. See § 29-2316, R. R. S. 1943.

Sections 29-2315.01 to 29-2316, R. R. S. 1943, have for their purpose the securing of decisions from this court on questions of law for use in similar or subsequent cases. They do not have for their purpose the securing of advisory opinions or rulings that will control the rulings or disposition of the same case while pending in district court, except only to the limited extent therein provided and only after a final order has been entered discharging the defendant prior to the time he has been placed in legal jeopardy.

For the reasons given the appeal in this case is dismissed.

APPEAL DISMISSED.

CLARENCE L. SHIELDS ET AL., APPELLANTS, V. CITY OF KEARNEY, NEBRASKA, APPELLEE.

136 N. W. 2d 174

Filed July 9, 1965. No. 35932.

1. **Constitutional Law.** A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it and at the same time question its constitutionality.

2. ———. Constitutionality of Laws 1963, chapter 59, page 249, is not determined.
3. **Municipal Corporations.** A city of the first class may annex contiguous or adjacent lands which are urban or suburban in character but not agricultural lands which are rural in character. § 16-110, R. S. Supp., 1963.
4. ———. "Rural" means of or pertaining to the country as distinguished from a city or town, whereas "urban" means of or belonging to a city or town.

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

Mitchell, Taylor & Beatty, Nye & Wolf, and Tye, Worlock, Knapp & Tye, for appellants.

Ward W. Minor and Stewart, Calkins & Duxbury, for appellee.

Ralph D. Nelson, Henry L. Holst, Vincent D. Brown, Arlyss W. Spence, Everson, Wullschleger & Sutter, Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, Sebastian J. Todero, Walter J. Matejka, James E. Fellows, and P. D. Spenceri, for amici curiae.

Heard before WHITE, C. J., CARTER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and WESTERMARK, District Judge.

BOSLAUGH, J.

The plaintiffs, Clarence L. Shields, Elizabeth S. Shields, Raymond C. Pierson, Helen I. Pierson, Bede F. Williams, E. Marie Williams, and Alan Oldfather, are the several owners of a tract of land lying north of and adjacent to the city limits of Kearney, Nebraska, On May 14, 1963, the defendant, City of Kearney, Nebraska, by ordinance No. 1711, annexed this land to the city.

This action is an appeal under section 16-110, R. S. Supp., 1963, "from the enactment of the ordinance" by the plaintiff landowners, the township of Collins, and three taxpayers who own property within the township. The land in question was a part of Collins township be-

fore its annexation to the city of Kearney, Nebraska, and a township road is located across a part of the annexed property.

The trial court found generally for the defendant and against the plaintiffs and held that the property described in ordinance No. 1711 should be annexed to the city of Kearney, Nebraska. The plaintiffs' motion for new trial was overruled and they have appealed.

In 1963, the Legislature amended the statute relating to the annexation of property by cities of the first class. Laws 1963, c. 59, p. 249. Ordinance No. 1711 was adopted after the effective date of the 1963 act, L.B. 338. By their assignment of errors the plaintiffs challenge the validity of both L.B. 338 and ordinance No. 1711.

Section 16-106, R. S. Supp., 1963, provides that the city may annex any contiguous or adjacent lands, lots, tracts, streets, or highways that are urban or suburban in character but not agricultural lands which are rural in character. Section 16-110, R. S. Supp., 1963, provides that the owner of any territory annexed may appeal from the annexation ordinance to the district court by giving notice of appeal within 30 days from the effective date of the annexation ordinance. The plaintiffs in this action proceeded under the statute as amended by perfecting an appeal to the district court and asking that court to determine that the city was not entitled to annex the lands in question under the provisions of the statute as amended.

A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it and at the same time question its constitutionality. Peterson v. Vasak, 162 Neb. 498, 76 N. W. 2d 420.

The plaintiffs in this action have availed themselves of the remedy provided by the statute. They seek the benefit of the statute to obtain a determination that the action of the city was not authorized under the statute. They are, therefore, prevented in this action from questioning the constitutionality of the statute under which

they have proceeded. We make no determination of the question concerning the constitutionality of the statute as amended.

The plaintiffs contend that the lands annexed by the city of Kearney, Nebraska, under ordinance No. 1711 are agricultural lands which are rural in character and not subject to annexation by the city under section 16-106, R. S. Supp., 1963. "Rural" means of or pertaining to the country as distinguished from a city or town, whereas "urban" means of or belonging to a city or town. Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490.

The record shows that the lands annexed to the city of Kearney, Nebraska, by ordinance No. 1711 are contiguous or adjacent to the city and lie north of Thirty-ninth Street and either side of Second Avenue which is also State Highway No. 10 and the main north-south thoroughfare of the city.

The part of the tract lying west of Second Avenue and north of Thirty-ninth Street is owned by Alan Oldfather except for a small rectangular lot in the southwest corner that is owned by Bede F. Williams and E. Marie Williams. The Oldfather land has an area of approximately 12 acres and is leased to Williams Unimart, Inc., for a term of 20 years. The south one-third of this property is occupied by a retail market and parking lot. The balance of the property is rough farm ground and no use is being made of it at the present time.

The rectangular lot owned by Mr. and Mrs. Williams is occupied by their residence. Williams is the president of Williams Unimart, Inc.

The part of the tract lying east of Second Avenue and north of Thirty-ninth Street is divided into two parts. Raymond C. Pierson and Helen I. Pierson own the part lying immediately north of Thirty-ninth Street. A residence, garage and service station, and a motel are located on this property which has an area of approximately 2 acres.

The part lying north of the Pierson property is owned

by Clarence L. Shields and Elizabeth S. Shields. A discount store, drive-in cafe, and residence are located on the Shields property which has an area of approximately 6½ acres.

The Pierson property and the Shields property receive water service from the city of Kearney, Nebraska.

The land north of Thirty-ninth Street and east, north, and west of the annexed area is agricultural land that is rural in character except for a residential area known as Bethany Manor Subdivision. This subdivision, which was annexed to the city in 1959 and is now being developed, is approximately ½ mile east of the area involved in this action.

The area south of Thirty-ninth Street within the city limits is highly developed. Most of the residential construction in the last few years has been north of Thirty-first Street. Water service and street lighting extend north as far as Thirty-ninth Street on Second Avenue, and sewer service is available on Thirty-eighth Street. The new high school is located approximately 4 blocks west of the intersection of Thirty-ninth Street and Second Avenue.

The evidence sustains a finding that the area annexed by ordinance No. 1711 is contiguous or adjacent to the city and is urban or suburban in character and not agricultural lands which are rural in character. Bierschenk v. City of Omaha, 178 Neb. 715, 135 N. W. 2d 12. The annexation was proper under section 16-106, R. S. Supp., 1963.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT WILLIAM LOSIEAU, APPELLANT.
136 N. W. 2d 168

Filed July 9, 1965. No. 36028.

1. **Criminal Law: New Trial.** Under section 29-2103, R. R. S. 1943, a motion for a new trial in a criminal case upon grounds other than newly discovered evidence must be filed within 10 days after rendition of the verdict unless the movant is unavoidably prevented from doing so.
2. **New Trial.** The sufficiency of evidence in support of a motion for a new trial on the ground of newly discovered evidence cannot be reviewed without a bill of exceptions.

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

Robert William Losieau and Lyle B. Gill, for appellant.

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

Heard before WHITE, C. J., CARTER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and WESTERMARK, District Judge.

SMITH, J.

In this criminal case a motion by defendant pro se for a new trial was filed and overruled December 28, 1964. He has appealed.

In January 1962, defendant was sentenced following a jury verdict. The judgment was affirmed, State v. Losieau, 174 Neb. 320, 117 N. W. 2d 775, certiorari denied, 374 U. S. 814, 83 S. Ct. 1707, 10 L. Ed. 2d 1037.

Section 29-2103, R. R. S. 1943, requires that the motion, as to all grounds except newly discovered evidence, be filed within 10 days after rendition of the verdict unless the movant is unavoidably prevented from doing so. Since excuse for delay has not been suggested, the motion in this respect was filed out of time.

Because there is no bill of exceptions, we cannot pass upon the sufficiency of evidence in support of that part of

the motion relating to newly discovered evidence. See Wolff v. State, 172 Neb. 65, 108 N. W. 2d 410.

The judgment is affirmed.

AFFIRMED.

STATE EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. WALTER A. NIELSEN, RESPONDENT.
136 N. W. 2d 355

Filed July 16, 1965. No. 35578.

1. **Attorney and Client.** In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts.
2. ———. An attorney, as an officer of this court, must so conduct himself as to assist in maintaining confidence in the integrity and impartiality of the court.
3. ———. The ethical standards relating to the practice of the law in this state are the Canons of Professional Ethics of the American Bar Association which have been or may be, from time to time, approved by the Supreme Court.
4. ———. Violation of a code of ethics or any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession constitutes ground for suspension or disbarment.
5. ———. The findings to sustain disbarment must be sustained by a higher degree of proof than that required in civil actions, yet falling short of the proof required to sustain a conviction in a criminal action.
6. ———. An action to discipline an attorney at law is not a criminal proceeding and constitutional provisions guaranteeing the right to counsel do not apply.

Original action. Judgment of disbarment.

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

Walter A. Nielsen, pro se.

Heard before WHITE, C. J., CARTER, BOSLAUGH, BROWER, and MCCOWN, JJ., and WESTERMARK, District Judge.

BROWER, J.

This action was brought to discipline the respondent, Walter A. Nielsen, an attorney at law licensed and admitted to practice and a member of the Nebraska State Bar Association.

The complaint of the relator, Nebraska State Bar Association, was filed in this court by the committee on inquiry of the fourth judicial district of this state. It alleges the respondent was guilty of unprofessional conduct in two counts. The first sets out the complaint of one Betty Ivey who charged that the respondent as her attorney in a divorce proceeding received from the clerk of the district court certain checks payable to her for child support which he did not deliver to her, and that on inquiry respondent told her he had signed her name to them in order to get and apply the payments toward what she owed him. The second sets forth that the respondent, purporting to act as an attorney for his wife as the plaintiff, commenced an action for divorce against himself and acted as notary public in taking his wife's affidavit to the petition. It also alleged the respondent made certain objectionable statements set out therein to the World Herald for publication with respect to the divorce suit.

Respondent's answer in addition to a general denial alleged with respect to the first count that Betty Ivey, his client who had been denied a divorce, turned against him; that she had consented to his signing the checks in question; and that she had committed perjury in testifying otherwise before the committee on inquiry. It also asserted an attorney's lien on her funds in his possession. Concerning the second count, it alleged respondent could represent his wife in other matters and he thought he could do so in the divorce action also. The two had talked the matter over for years and there was no conflict of interest between them. It alleged the statement in the World Herald was made in a state of semiconsciousness on suddenly being awakened from

sleep induced by sleeping pills and he did not realize its import.

A referee being appointed by this court, a trial of the issues was had before him on July 24, 1964. The referee has filed herein a report of the proceeding, containing a review of the evidence, findings of fact, and conclusions of law. He found the respondent violated the Canons of Professional Ethics with respect to both counts. He found generally for the relator and submitted the matter to this court for disciplinary action.

Exceptions being filed by the respondent, the matter was argued herein and now comes on for determination. We will discuss such of these exceptions which we deem determinative of the problem before us. The respondent contends the referee erred in concluding there was sufficient evidence to warrant his findings. We will, therefore, first review the evidence with respect to the first count.

It contains many conflicting and contradictory statements made by Betty Ivey. At the trial before the referee, Betty Ivey, being called by the relator, testified she became acquainted with the respondent in October 1962 when she was desiring to discuss the possibility of a divorce. After several hearings the court ordered her husband to pay $15 a week for child support. The husband paid these amounts regularly to the clerk of the district court. The clerk made corresponding checks payable to Betty Ivey but they were sent to the respondent who forwarded them by mail or personally brought them to Betty. She had paid the respondent his full fee which she thought was $286. She first gave him $50 and afterwards $15 a week. Sometimes she gave this in cash. At other times when he brought the support check to her home she signed it and gave it to him. She said on one occasion respondent had called her by phone and she had told him to keep the checks as payment instead of coming to the house and right back again. She did not know why she made com-

plaint. At the time of filing the divorce she was too mixed up and upset by family trouble. She knew respondent would not have cashed the checks unless she had told him to. She admitted making the written complaint to the Douglas County Bar Association and appearing before the advisory committee in connection with it. She did recall the telephone conversation with respondent where she told him to endorse the checks. The gist of her testimony was that her written complaint was untrue as well as her previous testimony before the committee on inquiry. Her testimony before the referee agrees substantially with that elicited from her by the respondent as her attorney in the divorce action of Ivey v. Ivey in the district court for Douglas County on March 18, 1964.

The transcript of the previous hearing before the committee on inquiry, including certain exhibits, were admitted in evidence by stipulation of the parties made at pretrial. At that hearing, Betty, on direct examination, asserted she had never authorized the respondent to sign her name to checks nor to sign as her agent. Eight checks received in evidence were identified. She testified none of them bore her signature, she had never received their proceeds as far as she knew, and she had never authorized endorsement thereon.

Previous to the hearing at the board of inquiry, the respondent produced an affidavit dated May 14, 1963, of Betty Ivey which stated that the checks had been brought to her by the respondent, that she endorsed some of them, and later she had given respondent permission to endorse them and save him a trip to South Omaha. At the hearing before the board of inquiry she said she signed the affidavit in the presence of the respondent before a notary public at a bank in South Omaha. The respondent who had come to her house presented it to her and she had the paper to read on the way to the bank. She understood a part of it and did not understand the other parts. She stated she must

have skipped over it while talking with respondent on the way to the bank. She stated she would not have signed it if she had known it stated she had told him he could sign her name.

After Betty Ivey had testified before the referee, Margaret Wildrick, her mother, testified on behalf of the respondent. Pertinent to the issues in this court, she stated that Betty was unhappy at not receiving her support payment checks and she had thought the respondent was keeping them on fees. She had the impression her daughter had told her she had not given respondent permission to keep the checks. Betty had told her that she had gone to the bar association with a complaint so she could try and get her money back (referring to the child support).

There is evidence, moreover, that the respondent kept very incomplete records as to what and how much had been paid to him. He had never attempted to collect from the husband the $100 which had been allowed him by the court for temporary attorney's fees. No showing is made that he made demand for part or all of the fees but had merely retained the child support money. The respondent himself did not testify at the hearing before the referee. Before the board of inquiry he gave evidence stating that he had authority to sign Betty's checks and that he thought also he had an attorney's lien upon the funds belonging to his client that came into his hands.

It is evident that the testimony of Betty Ivey before the referee and in district court in her divorce trial is completely at variance with her complaint and her testimony before the board of inquiry with respect to her giving authority to endorse and cash her personal checks. The testimony shows that at the time referred to in the complaint she was without work and needed the funds to support her children. It tests credulity to suppose that, having authorized the signing and cashing of the checks, she made complaint and testified falsely. It is

significant that the respondent continued to represent her in the divorce case after the hearing before the board of inquiry. When the testimony of Betty's mother is considered, the evidence seems clear the respondent was withholding the checks rightfully belonging to and badly needed by his client.

The referee found that, giving him the benefit of the doubt, respondent had violated the following Canons of Professional Ethics, hereinafter set out. No. 11 provides: "The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client. * * * Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him." No. 29 provides in part: "* * * He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice." No. 32 provides in part: "* * * But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen." In this conclusion we concur.

There is little conflict with the evidence as to the second count. A copy of the divorce petition filed April 17, 1963, is in evidence. It is signed by the respondent as his wife's attorney and verified by his wife before the respondent as notary. It accuses the respondent of extreme cruelty, consisting of consorting with other women and excessive drinking. In the body of the petition it asked that the home be vested in the plaintiff and that the defendant be allowed to have his office therein for the period it may be necessary. The prayer was for plaintiff to be given possession and control of the property, the defendant to be allowed his office facility, each party to pay his own costs, and the title to the

property to remain as joint tenants. Respondent testified that there could be no conflict of interest under canon 6 of the Canons of Professional Ethics because his wife did in fact give her assent.

An affidavit of the wife states her consent was given. It avers the respondent stated he would prepare the petition, enter his voluntary appearance, make no defense, and pay the costs. Further, that title to the home should be placed in the wife and four children with a right of survival as joint tenants. The respondent was to have the right to maintain his office there as long as he was so inclined. The respondent and the affiant felt there would be no conflict of interest as a result of the arrangement. The publicity of the divorce action and the complaint against the respondent caused her to seek another attorney and file a subsequent divorce petition. A copy of the answer of the respondent in the second divorce action is in evidence. It denies the plaintiff's allegations of respondent's misconduct, asserts certain misconduct on her part, and prays the petition be dismissed.

The respondent himself did not testify at the hearing before the referee but his evidence appears in the transcript before the board of inquiry. He stated that although his wife and he were practically strangers there was no ill will between them. Although she was not familiar with the law as an attorney, nevertheless she had associated with him for years and had learned much about such matters, and fully understood the proposed representation in the divorce suit. They had talked it over for many years and there was no conflict of interest between them. In any event he felt the trial court would take care of the wife's interest and if the district court felt he should not represent her in the matter when the trial came, a "back-up" attorney would be provided to go to court with the parties and represent her in the hearing. He urged that an attorney always

took the oath of his client in the petitions and that he could do so in this instance.

The conduct of the respondent in light of both divorce actions indicates there was in truth a conflict of interest. He testified the principal reason for bringing the first action himself was that he might have firsthand and daily opportunity to dissuade her from consummating the action. It would seem the wife as plaintiff desired to be divorced and have appropriate alimony, and that the respondent preferred a reconciliation. This clearly shows their interests were directly opposite and that the respondent's true interest was not disclosed to his client.

Respondent made statements outside the record in regard to the divorce case. The evening edition of the World Herald for April 18, 1963, quotes the respondent as follows: "* * * Mr. Nielsen said he will not contest the divorce and will represent his wife 'just as though she were a complete stranger. We've been as far apart from each other as the astronauts are from the moon so I think I'll be able to try the case abstractedly.' * * * The attorney said that by representing his wife and himself he will be able to keep innocent parties from getting hurt. * * * Another lawyer 'might get careless,' he said. * * * Mr. Nielsen said his dual role should be acceptable to the court 'because I've tried over three hundred divorce cases in the last 30 years and I ought to know what I'm doing.' * * * For 'psychological' reasons he said he would ask the court to set the divorce hearing for May 24—only one day before he and his wife are to celebrate their twenty-third wedding anniversary."

The respondent testified that he was awakened in the middle of the night by a reporter calling him by phone who elicited answers to questions after awakening him from a sleep induced by sleeping tablets. The answers, he said, were given in a state of semiconsciousness without realizing their import. Respondent said he was unpleasantly surprised by the statements which appeared in the paper the next morning. He did not think the

reporter would publish them and therefore he had no intent of gaining publicity. He did not remember just what he had said and would not say he was misquoted.

The referee found that the respondent in count II violated canons Nos. 11, 29, and 32 of the Canons of Professional Ethics heretofore set out, and canons Nos. 6 and 20, hereinafter set out. No. 6 provides in part: "It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel." No. 20 provides in part: "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned." The respondent testified he was very familiar with the canons of ethics and that he understood them. We conclude that the referee's findings on this count are sustained by the evidence.

"In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts. * * * An attorney, as an officer of this Court, must so conduct himself as to assist in maintaining confidence in the integrity and impartiality of the Court. * * * The ethical standards relating to the practice of the law in this state are the Canons of Professional Ethics of the American Bar Association which have been or may be, from time to time, approved by the Supreme Court. * * * Violation of a code of ethics or any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession constitutes ground for suspension or disbarment." State ex rel. Nebraska State Bar Assn. v. Fisher, 170 Neb. 483, 103 N. W. 2d 325.

"The findings to sustain disbarment must be sustained by a higher degree of proof than that required in civil actions, yet falling short of the proof required to sustain a conviction in a criminal action." State ex rel. Nebraska State Bar Assn. v. Richards, 165 Neb. 80, 84 N. W. 2d 136.

The respondent filed an affidavit of poverty and a request for the appointment of counsel to represent him. It was denied and he contends there was error in failing to supply counsel. An action to discipline an attorney at law is not a criminal proceeding and constitutional provisions guaranteeing the right to counsel do not apply. State ex rel. Nebraska State Bar Assn. v. Richards, *supra*.

We find that the respondent has been guilty of unprofessional conduct by the violation of the particular Canons of Professional Ethics stated. Under all of the circumstances herein detailed we feel that the respondent in his conduct has utterly failed in his appreciation of the duties and responsibilities which an attorney should exercise to his client, to his profession, and to the courts.

The judgment is that the respondent be disbarred.

The costs of this proceeding, including the fees of the referee, are taxed to the respondent.

JUDGMENT OF DISBARMENT.

IN RE APPLICATION OF HEAVY HAULERS, INC.
WATSON BROS. VAN LINES & HEAVY HAULING CO. ET AL., APPELLEES, V. TED H. HART ET AL., APPELLANTS.
136 N. W. 2d 360

Filed July 16, 1965. No. 35810.

1. **Public Service Commissions. The grant of a request for a suspension of a certificate of public convenience and necessity by the Nebraska State Railway Commission is, in effect, a finding of nondormancy of the certificate, and, during the existence of the suspension order, the commission may not suspend, change, or revoke such certificate.**

2. ———. The Nebraska State Railway Commission may, however, after the termination of a suspension order granted by it on the request of the certificate holder, consider the question of willful dormancy and take into consideration the failure of the certificate holder to render service authorized by the certificate during the times a suspension order requested by the certificate holder was not in effect.
3. ———. The Nebraska State Railway Commission is authorized by statute to suspend, change, or revoke a certificate of public convenience and necessity, and where the action of the commission in so doing is sustained by evidence of a willful failure to comply with the statute or the lawful regulations of the commission, this court ordinarily will not interfere with the action of the commission thereon.
4. ———. An order of the Nebraska State Railway Commission revoking a certificate of public convenience and necessity without a finding of willful violation on the part of the certificate holder is not authorized by statute, is irregular, and will be set aside on appeal.

Appeal from the Nebraska State Railway Commission. Reversed.

Viren, Emmert & Epstein, for appellants.

James E. Ryan, for appellees.

Heard before WHITE, C. J., CARTER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and WESTERMARK, District Judge.

CARTER, J.

This is an appeal from an order of the Nebraska State Railway Commission sustaining complaint No. 954 and revoking the certificate of public convenience and necessity issued to Hart Construction Company, and in denying the application of Heavy Haulers, Inc., for the acquisition of the Hart Construction Company certificate of public convenience and necessity. The only assignment of error is that the commission erred in finding that the certificate was as a matter of fact and as a matter of law dormant.

The evidence shows that Ted H. Hart, doing business as the Hart Construction Company, acquired, on July

1, 1958, a certificate of public convenience and necessity for the transportation of (1) contractor's equipment over irregular routes between points in Nebraska and (2) sand and gravel and road and dam construction materials requiring the use of dump trucks between points and places in Nebraska, over irregular routes. The certificate holder, including the trustee in bankruptcy after Hart Construction Company filed a petition in bankruptcy, requested several suspensions of the certificate which the commission granted. On November 7, 1962, the last suspension was granted until a proposed transfer application to Jack L. Butler Construction Company was determined. This proposed transfer application was denied on January 28, 1963, and the motion for a rehearing overruled on March 13, 1963, and notice thereof given on April 25, 1963.

On April 10, 1963, the director of the motor transportation department of the commission filed a complaint alleging that Ted H. Hart had willfully discontinued the service authorized by his certificate contrary to statutes applicable thereto. In response thereto the trustee in bankruptcy alleged the existence of an order of suspension of the certificate, that the Jack L. Butler Construction Company is the holder of a contract to purchase the certificate which contract has been assigned to Heavy Haulers, Inc., which will forthwith file an application to transfer, and prayed for an order extending the suspension for 90 days in order that the transfer of the certificate to Heavy Haulers, Inc., could be acted upon.

On September 11, 1963, the commission dismissed the complaint for the reason that the certificate was suspended when the complaint was filed. No suspension of the certificate was granted. While the application to transfer the certificate was finally denied on March 13, 1963, the commission concluded that the right to appeal to the Supreme Court did not terminate until May 24, 1963, and the certificate was suspended until such

date by the terms of its order of suspension dated November 7, 1962.

Pending the decision on the complaint of the director of the motor transportation department, Watson Bros. Van Lines & Heavy Hauling Co., LeRoy L. Wade and Sons, Inc., and Sullivan Transfer and Storage Company, on June 13, 1963, filed their complaint, and on June 17, 1963, their amended complaint, alleging the dormancy of the Hart Construction Company certificate and the failure of the trustee in bankruptcy to comply with section 75-240.06, R. R. S. 1943, and praying for the revocation of the Hart Construction Company certificate. On August 5, 1963, the application of Heavy Haulers, Inc., to acquire the certificate of Hart Construction Company was filed. The same complainants in the pending complaint filed their formal protest to the application of Heavy Haulers, Inc., making the same allegations as in their formal complaint.

The complaint and the application of Heavy Haulers, Inc., were consolidated for hearing. The hearing was held and resulted in the order from which this appeal is taken.

The record discloses that the last suspension of the certificate of the Hart Construction Company was granted on November 7, 1962, and that such suspension order expired on May 24, 1963, as found by the commission. Whether or not the suspension order expired on May 24, 1963, or any date prior thereto, is not material to a decision in this case. The complaint of Watson Bros. Van Lines & Heavy Hauling Company et al., was filed on June 13, 1963, and the application to transfer the certificate to Heavy Haulers, Inc., was filed on August 5, 1963.

The evidence shows that the Hart Construction Company filed a petition in bankruptcy more than a year prior to January 31, 1962, the exact date not being reflected by the record. Under section 75-240.06, R. R. S. 1943, the trustee in bankruptcy could operate the busi-

ness and property of the bankrupt for a period of 90 days and, if necessary, is authorized to obtain additional time from the commission for the purpose of carrying on the business authorized by the bankrupt's certificate. The bankrupt failed to list its certificate as an asset with the result that the trustee in bankruptcy did not request additional time to carry on the business or, in this instance, to obtain a suspension of the certificate until January 31, 1962. There being no resistance to the application for suspension of the certificate, the suspension was granted by the commission on November 7, 1962. The order suspending the certificate expired on or before May 24, 1963. The complainants filed their complaint on June 13, 1963, alleging the dormancy of the certificate. There can be no question that the commission could properly consider the merits of the complaint at that time.

The evidence shows that there was a hiatus between the terminations of the various suspension orders and the grant of new ones during which periods no attempt was made to render the service authorized by the certificate. Nor was there any service rendered after the termination of the last suspension order. In fact, no service was ever rendered as authorized by the certificate subsequent to 1961, and apparently not before. There is no evidence in this record that the Hart Construction Company had any equipment to perform the service authorized by the certificate. When the Hart Construction Company listed its assets in the bankruptcy proceeding, it contained no equipment with which the certificated service could be performed. Under the provisions of section 75-238.01, R. S. Supp., 1961, service under a certificate of public convenience and necessity may not be suspended without commission approval. Under section 75-238, R. S. Supp., 1961, a certificate may be suspended, changed, or revoked, after hearing, for willful failure to comply with statutory provisions or the lawful orders, rules, or regulations, or with any

term, condition, or limitation in the certificate. The evidence sustains a finding made by the commission that no service was performed under the certificate for a long period of time and that the certificate had in fact become dormant. But under section 75-238, R. S. Supp., 1961, a finding of dormancy alone will not authorize the revocation of the certificate. The dormancy must be willful. There was no finding of willfulness in the instant case. The necessity for a finding of a willful failure to comply with the controlling statutes and rules of the commission has previously been determined by this court. See Hergott v. Nebraska State Railway Commission, 145 Neb. 100, 15 N. W. 2d 418, wherein it is said: "The order of the commission in the instant case failing to include such finding of willful violation is irregular and will be set aside on appeal."

For the reasons stated, the order of the commission sustaining the complaint of Watson Bros. Van Lines & Heavy Hauling Company et al., is irregular, and therefore unreasonable and arbitrary for failure to make a finding of willfulness. The order of the commission revoking the certificate of public convenience and necessity is therefore reversed.

REVERSED.

IN RE FREEHOLDERS PETITION OF HINZE.
NORA HINZE ET AL., APPELLEES, V. SCHOOL DISTRICT NO. 34 OF YORK COUNTY, NEBRASKA, APPELLANT.

136 N. W. 2d 434

Filed July 16, 1965. No. 35928.

1. **Schools and School Districts.** A school district may not maintain an action involving a change in boundaries of the school district, and has no legal interest in maintaining the boundaries of the district.
2. ———. A school district has no fixed territorial integrity and

a change or alteration in the boundaries must originate with the legal voters thereof.

3. **Pleading.** A want of legal capacity to sue is waived unless raised in the trial court by demurrer or answer.
4. **Appeal and Error.** A question not presented and ruled on by the district court will not be considered on appeal.
5. **Schools and School Districts.** Under subdivision (4) of section 79-403, R. S. Supp., 1961, where the petitioners' residence is closer to the schoolhouse in their own district than that of the adjoining district and both districts maintain bus routes, the distance to the schoolbus route of the district to which the transfer is sought must be one-half mile closer to the petitioners' residence than the route in the petitioners' district to entitle the petitioners' land to be transferred.

Appeal from the district court for York County: JOHN D. ZEILINGER, Judge. Reversed and remanded.

John E. Dougherty, for appellant.

Roderick R. Perry and Guy C. Chambers, for appellees.

Heard before WHITE, C. J., CARTER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and WESTERMARK, District Judge.

WHITE, C. J.

The district court detached petitioners' land from School District No. 34 of York County and attached it to School District of York. School District No. 34 has appealed to this court, and the question presented is whether petitioners have complied with the provisions of section 79-403, R. S. Supp., 1961, which was applicable at the time of the application for transfer on June 12, 1962 (Laws 1961, c. 397, § 1, p. 1207).

A preliminary question is presented by appellees as to the right of School District No. 34 to appeal. We have previously overruled a motion to dismiss this appeal, but the question is presented in the briefs and requires a disposition in this court. It is firmly established law of this state that a school district, although a body corporate under the statutes of the state, may not maintain an action involving a change in boundaries of the school

district, and has no legal interest in maintaining the boundaries of the district. The district has no territorial integrity and the change or alteration in the boundaries must originate with the legal voters thereof under the appropriate statutory procedure. Cowles v. School District, 23 Neb. 655, 37 N. W. 493; Halstead v. Rozmiarek, 167 Neb. 652, 94 N. W. 2d 37; Board of Education v. Winne, 177 Neb. 431, 129 N. W. 2d 255. But, the objection was not asserted in district court at any time and for the first time was raised here on appeal. The district court clearly had jurisdiction of the subject matter of the action under the statute and holdings of this court. See McDonald v. Rentfrow, 176 Neb. 796, 127 N. W. 2d 480. It is clear that what we have here is a want of legal capacity to sue or to appeal, and want of legal capacity to sue is waived unless raised by demurrer or answer. Kuncl v. Kuncl, 99 Neb. 390, 156 N. W. 772; Gentry v. Bearss, 82 Neb. 787, 118 N. W. 1077. See, also, 39 Am. Jur., Parties, § 106, p. 979. And, it is fundamental that the grounds for the assertion of error on appeal must be presented and ruled on by the trial court. It is our conclusion, notwithstanding the rule that a school district may not maintain an action or appeal involving the change of boundaries of a school district, that where objection is not made in the district court to its incapacity, its incapacity is waived and may not be raised for the first time on appeal to this court. Consequently, the case is before us here on the merits.

The pertinent provisions of section 79-403, R. S. Supp., 1961, provide as follows: "* * * file a petition with a board consisting of the county superintendent, county clerk, and county treasurer, asking to have any lands described therein set off from the district in which it is situated and attached to some other district. The petition shall state the reasons for the proposed change and show: (1) That the land therein described is either owned by the petitioner or petitioners or that he or they hold a school land lease under section 72-232, are in

possession or constructive possession as vendee under a contract of sale * * *; (2) that the land is located in a district that adjoins the district to which it is to be attached; (3) that the territory proposed to be attached has children of school age residing thereon with their parents or guardian; and (4) that they are each more than two miles from the schoolhouse in their own district, and at least one half mile nearer to the schoolhouse or a school bus route of the adjoining district, which distance shall be measured by the shortest route possible upon section lines * * *." The original petition was filed with the board on June 12, 1962.

It is necessary, of course, for petitioners to show compliance with the four jurisdictional requirements of the statute. The board and the district court found that they had complied and granted the transfer to the School District of York. On appeal, School District No. 34 asserts as error the finding of compliance with requirements (1) and (4) of the statute and concedes compliance with (2) and (3). A discussion of requirement (4) is all that is necessary to dispose of this appeal. Petitioners' land is about 6 miles from the nearest border of the School District of York. It consists of 240 acres of land, is farmed as a unit, and has two dwellings on one portion of it. Petitioners Gerald Hinze, his wife, and three children reside in one dwelling, and the other dwelling is occupied by Nora Hinze and her husband, parents of Gerald. The distance from appellees' farm to the schoolhouse in Waco School District No. 34 is 9.6 miles. The distance to the schoolhouse of the School District of York is approximately 13 miles. At the time the petition was filed the nearest point on the schoolbus route of the School District of York was 7 miles from appellees' land, and therefore appellees' land was 2.6 miles closer to the schoolbus route of the School District of York than to the schoolhouse in School District No. 34. But, the evidence is that the schoolbus route of School District No. 34 runs right by the appel-

lees' land. The Thayer District was merged with School District No. 34 in June 1962, and the bus routes both before and after ran right by the appellees' property.

The facts in this case are undisputed. What does the statute mean? Do we compare distances between schoolbus routes and schoolhouses or can we compare the distance to the Waco (No. 34) schoolhouse (9.6 miles) to the distance to the York schoolbus route (7 miles)? The School District of York schoolbus route is more than one-half mile nearer than the schoolhouse in School District No. 34 at Waco. Admittedly the language of the statute is open to that interpretation. Since the briefs were filed in this case, however, we have passed on this precise question. In Rebman v. School Dist. No. 1, 178 Neb. 313, 133 N. W. 2d 384, we said as follows: "It seems reasonable to assume the Legislature intended to allow a transfer only in case the adjoining district maintained facilities nearer and more convenient to the petitioners' residence. That was historically true in the previous statutes. We think in the present situation the Legislature by its amendment in 1961 intended to require the comparison of the distances from the petitioners' residence to the schoolbus routes of the two districts and made that comparison determinative of the issue. * * * We conclude that under subdivision (4) of section 79-403, R. S. Supp., 1961, where the petitioners' residence is closer to the schoolhouse in their own district than that of the adjoining district and both districts maintain bus routes, the distance to the schoolbus route of the district to which the transfer is sought must be one-half mile closer to the petitioners' residence than the route in the petitioners' district to entitle the petitioners' land to be transferred."

The above language needs no further elaboration. The adjoining School District of York did not and could not maintain bus facilities nearer and more convenient to appellees' farm and the children residing thereon. The bus route of School District No. 34 was the same as the

Thayer District, with which it merged about the same time the petition herein was filed. It ran right by the appellees' land. Consequently in light of our holding in the Rebman case, there was a failure of proof of compliance with subdivision (4) of the statute.

The judgment granting detachment is reversed and the cause remanded with directions to dismiss appellees' petition.

REVERSED AND REMANDED.

CORNELL S. SOBER, APPELLEE, V. JACQUES S. SMITH, APPELLANT.
136 N. W. 2d 372

Filed July 16, 1965. No. 35939.

1. **Negligence.** Where the thing which causes injury is shown to be under the control and management of the defendant and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of proper care.
2. **Trial: Appeal and Error.** It is the duty of the trial court to instruct the jury on the issues presented by the pleadings and evidence, whether requested to do so or not, and a failure to do so constitutes prejudicial error.
3. **Damages.** The measure of recovery in all civil actions in this state is compensation for the injury sustained.
4. **Automobiles: Damages.** Where a damaged automobile can be repaired at reasonable cost and restored to substantially its original condition, such cost is the proper measure of damages. Where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident.

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

John E. Dougherty, for appellant.

Wagoner & Grimminger, for appellee.

Heard before WHITE, C. J., CARTER, BOSLAUGH, BROWER,

SMITH, and MCCOWN, JJ., and WESTERMARK, District Judge.

BOSLAUGH, J.

This is an action for damages arising out of an automobile accident brought by Cornell S. Sober, as plaintiff, against Jacques S. Smith. The jury returned a verdict for the plaintiff in the amount of $1,303.50. The defendant's motion for new trial was overruled and he has appealed.

The accident happened at about 3:30 p.m., on January 5, 1963, on U. S. Highway No. 30 approximately 3½ miles west of Wood River, Nebraska. The highway at this point is straight and level. The weather was clear and the road was dry.

The defendant was driving a 1962 Pontiac station wagon in a westerly direction. He had been to Grand Island, Nebraska, and was taking five wooden storm sash to the lumberyard at Shelton, Nebraska. Three of the storm sash were being carried in the station wagon. The other two had been placed on a baggage carrier or baggage rack on the top of the station wagon. The storm sash projected about 10 inches over the back of the carrier. The sash were fastened to the rack with twine which was slightly smaller than a lead pencil.

The plaintiff was driving a 1962 Buick automobile in a westerly direction and was following the defendant's station wagon. The plaintiff first observed the defendant's station wagon between Alda and Wood River. The station wagon was then about one-quarter of a mile ahead of the plaintiff. When the plaintiff was approximately 3½ miles west of Wood River he noticed that there were storm sash on top of the station wagon and that they were moving around. The plaintiff then drove up to within 100 or 150 feet of the station wagon and blinked his headlights to attract the attention of the defendant. At about this time the fastenings became loose and the storm sash came off the station

wagon. The plaintiff turned to the left to avoid one of the windows, and the left front of his automobile collided with the left rear of another automobile operated by Carl Anderson which was proceeding in an easterly direction. This action was brought to recover the damages to the plaintiff's automobile which resulted from its collision with the Anderson automobile.

The plaintiff did not allege specific acts of negligence but relied upon the doctrine of res ipsa loquitur. Where the thing which causes injury is shown to be under the control and management of the defendant and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of proper care. Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N. W. 2d 224.

The things which caused the injury in this case were the storm sash. They were under the exclusive management and control of the defendant. If the defendant had exercised proper care, the storm sash would have been fastened to the baggage carrier in such a manner that they would not have come loose while the defendant was driving upon the highway. The facts in this case permit an inference of negligence on the part of the defendant. The trial court was correct in holding that the doctrine of res ipsa loquitur was applicable in this case.

The defendant's answer alleged that the plaintiff was negligent in failing to maintain a proper lookout; in failing to maintain proper control over his automobile; in failing to keep a reasonable distance behind the defendant's station wagon when the plaintiff knew the condition of the road and the cargo on the station wagon; and in failing to give the Anderson automobile the right-of-way.

The plaintiff testified that he was about a quarter of a mile behind the defendant when he first saw the

windows on top of the station wagon; that he could tell they were glass and were moving around on top of the car; that he drove up to within 100 or 150 feet of the defendant's car and blinked his lights; that the windows came loose from the station wagon and came "sailing" down the highway; that he swerved to the left to miss one window; that he then saw the Anderson car approaching from the west; and that he swerved back to the right but his automobile collided with the Anderson car.

Although the trial court instructed the jury concerning the doctrine of sudden emergency, no instruction was given concerning the comparative negligence statute. § 25-1151, R. R. S. 1943. It is the duty of the trial court to instruct the jury on the issues presented by the pleadings and evidence, whether requested to do so or not, and a failure to do so constitutes prejudicial error. Carlson v. Chambers, 173 Neb. 166, 112 N. W. 2d 729.

We think it was a question for the jury in this case whether the plaintiff was guilty of contributory negligence. The jury should have been instructed concerning the comparative negligence statute and its applicability in this case. The failure to instruct in this regard requires that the judgment be reversed and the cause remanded for a new trial.

The plaintiff alleged that the fair and reasonable value of necessary repairs to his automobile amounted to $400, and that in addition thereto the market value of his automobile was depreciated in the amount of $700 as a result of the accident. The prayer was for judgment in the amount of $1,100.

There was evidence, by way of stipulation, that the fair and reasonable value of repairs necessary to restore the plaintiff's automobile to "substantially its original condition" was $403.45.

The plaintiff, who is a used car dealer and has had experience as a mechanic, testified that the reasonable market value of his automobile before the accident was between $3,000 and $3,100. The plaintiff was not al-

lowed to testify as to the reasonable market value of the automobile after the accident and before it had been repaired. The plaintiff did testify, over objection, that the reasonable market value of his automobile, after it had been repaired and restored to "substantially the condition it was prior to the accident" was $2,250. There was other testimony that the value of the automobile before the accident was $3,050 to $3,250 and $3,295.

The trial court instructed the jury that the measure of damages for a vehicle which has been damaged and is repairable but cannot be restored to its original condition is such an amount as would reimburse the owner for the fair and reasonable cost of repairing the vehicle plus the difference between the fair and reasonable market value of the vehicle after the repair and its fair and reasonable market value before it was damaged. The defendant contends that this instruction was erroneous and that the plaintiff's recovery should have been limited to the reasonable value of necessary repairs.

The measure of recovery in all civil actions in this state is compensation for the injury sustained. Abel v. Conover, 170 Neb. 926, 104 N. W. 2d 684. The basic principle of the law of damages is that such compensation in money shall be allowed for the loss sustained as will restore the loser to the same value of property status as he occupied just preceding the loss. Davenport v. Intermountain Ry. L. & P. Co., 108 Neb. 387, 187 N. W. 905.

The general rule which has been established by the decisions of this court is that where a damaged automobile can be repaired at reasonable cost and restored to substantially its original condition, such cost is the proper measure of damages. Where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident. Wylie v. Czapla, 168 Neb. 646, 97 N. W. 2d 255.

Under the evidence in this case it was a question of fact as to whether the plaintiff's automobile could be restored to substantially its original condition by repair. Although there was evidence which tended to prove that the repairs which had been made had restored it to substantially its former condition, there was other evidence to the effect that it had not and could not be restored to its former condition. Under such circumstances it was a question for the jury as to which measure of damages was applicable and the jury should have been instructed accordingly.

The instruction which was given by the trial court was based upon a rule which has been followed in a number of other states. See, 6 Blashfield (Perm. Ed.), Cyclopedia of Automobile Law and Practice, § 3415, p. 52; 25 C. J. S., Damages, § 83b, p. 597; 8 Am. Jur. 2d, Automobiles and Highway Traffic, § 1044, p. 605. The rule recognizes that in many cases an award of damages based upon the cost of repairs alone is inadequate.

We think that the better rule is the one which has been stated in our previous decisions and which limits the plaintiff's recovery in a case such as this to the difference between the value of the automobile immediately before and immediately after the injury. Such a rule permits the plaintiff to be restored to the same value of property status as he occupied just preceding the loss.

It is unnecessary to consider the other assignments of error.

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

REVERSED AND REMANDED.

IN RE FORMATION OF DRAINAGE DISTRICT NO. 5 OF DAWSON COUNTY, NEBRASKA.
HIDDIE KUHLMAN ET AL., APPELLEES, V. FRED FOLKERS ET AL., APPELLANTS.
136 N. W. 2d 364

Filed July 16, 1965. No. 35941.

1. **Drains.** The proceeding for the establishment of a drainage district as a body corporate under Chapter 31, article 3, R. R. S. 1943, is purely statutory.
2. ———. In a proceeding for the establishment of a drainage district under Chapter 31, article 3, R. R. S. 1943, an objector may properly show that his land will not be benefited by drainage as a basis for the noninclusion of his lands within the proposed district.
3. ———. The feasibility and route of a drainage ditch is an engineering matter and is not an issue for consideration in the organization of a drainage district under Chapter 31, article 3, R. R. S. 1943.
4. ———. Where the owner of lands included in a proposed drainage district seeks to have such lands excluded on the ground that they will not be benefited, the burden of proof is on him to satisfy the court that they will not be benefited.
5. ———. The fact that it may be necessary for the owner of property in a drainage district to incur expense to avail himself of its benefits is not a valid objection to the inclusion of the land in a drainage district.
6. ———. In determining if lands will be benefited by drainage as provided by Chapter 31, article 3, R. R. S. 1943, it is proper to consider whatever will come to the land by drainage to make it more valuable for tillage and more valuable in the general market, the true and final test being what the influence of the proposed improvement will be on the market value of the property.
7. **Waters: Drains.** The diversion of seepage and floodwaters by an irrigation canal built across a natural drain carries with it no right on the part of lower landowners to insist on the continuance of such artificial condition in the absence of evidence affording a basis for an equitable estoppel.
8. ———: ———. An upper riparian owner constructing and maintaining an artificial structure diverting the flow of seepage and floodwaters for a purpose advantageous to it is not obligated by mere lapse of time to maintain the structure and the conditions produced thereby, although it incidentally benefits lower landowners.

9. ———: ———. An irrigation district under such circumstances may discontinue the diversion of seepage and floodwaters at any time by restoring them to their original course through which they were wont to run in a state of nature.
10. Waters: Estoppel. An estoppel, which would operate as a bar to the return of such waters to the original watercourse existing in a state of nature, requires a change of condition such as the construction of works or the expending of money in reliance on the permanence of the diversion.

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

William S. Padley, for appellants.

Smith Brothers, for appellees.

Heard before WHITE, C. J., CARTER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and WESTERMARK, District Judge.

CARTER, J.

This is a proceeding commenced under the provisions of Chapter 31, article 3, R. R. S. 1943, for the organization of Drainage District No. 5 of Dawson County, Nebraska. Objections were filed to the organization of the district by certain landowners. A trial was had on the application and the objections thereto. The trial court found against the objectors, the proposed drainage district was declared organized as a public corporation, and it was adjudicated that all the real estate described in the application, except one tract that was voluntarily removed, was properly in the district and would be benefited by the proposed improvement. The objectors have appealed.

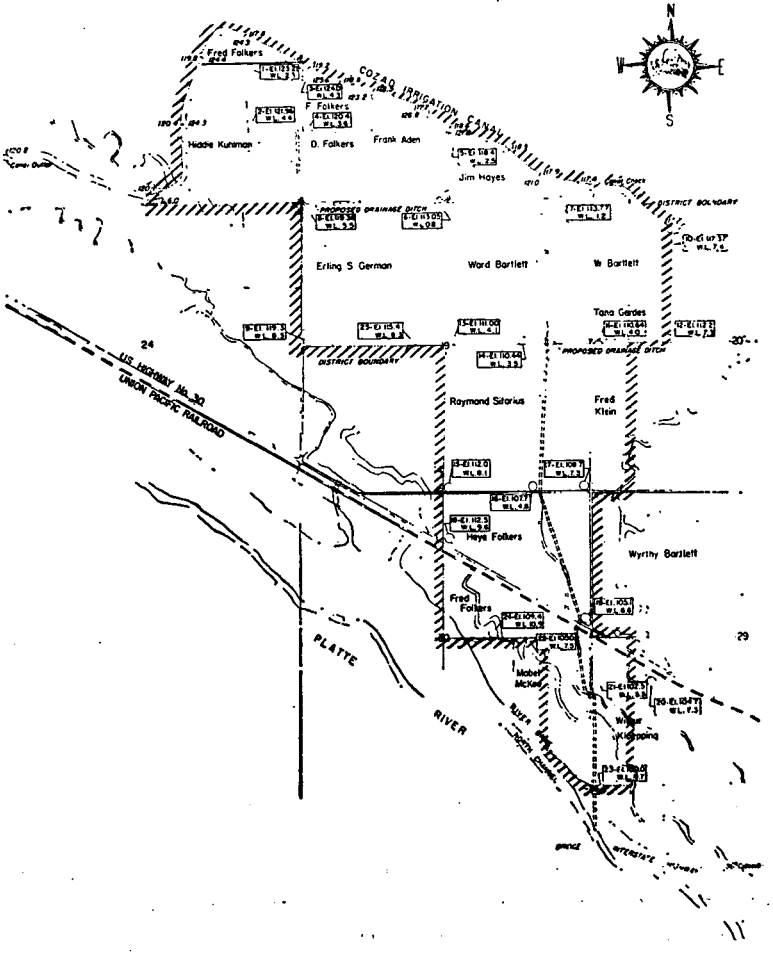
The drainage district as organized by the trial court contains 1,133.4 acres of land. The proponents are the owners of 631.8 acres. The objectors are the owners of 501.6 acres. The district contains more than 160 acres of wet or overflowed land, as the statute requires, and there is no issue as to that fact. It is the contention of the objectors that they will not be benefited by the

improvement and should not be included within the boundaries of the district, and that the purpose and intent of the statute is not met for the reason that the true purpose of the district's organization is to require objectors to receive and drain away waters which are the legal responsibility of others and for which they ought not to be required to pay.

The proceeding for establishment of a drainage district as a public corporation under Chapter 31, article 3, R. R. S. 1943, is purely statutory. Objectors to the organization must be excluded from the district if their lands will not be benefited by the improvement. The feasibility and route of the drainage ditch is an engineering problem and is not a matter to be determined in a proceeding for the establishment of the district. If lands within the district will be benefited by the improvement, they are proper to be included within the district. The amount or degree of the benefit is not material in a proceeding to establish the district since the amount and degree of benefit is an issue only in the assessment of benefits. Petersen v. Thurston, 157 Neb. 833, 62 N. W. 2d 68. Swamp or overflowed lands within the meaning of the statute apply to lands which from excessive rainfall or other causes retain at some seasons of the year excessive water which damages and renders them unfit for cultivation or profitable use. Petersen v. Thurston, 161 Neb. 758, 74 N. W. 2d 528.

The evidence in the case shows the land and water table elevations at 25 stations shown on the plat included in this opinion and appearing on the following page. It will be observed that the ground water table is high in the north part of the proposed district and along the course of the proposed drainage ditch. At the time of the trial a drainage ditch 6 feet in depth was contemplated, although it would be deeper where land elevations require it to maintain the flow line of the ditch. The fall of the ditch from the north end at station 2 to the south end at station 23 is approximately 10 feet.

The fall from station 23 to the river is 5 feet, which is deemed adequate. Some contention is advanced that the 6-foot ditch is not adequate and that a ditch of 8 or 9 feet in depth would be much more efficient. The expert testimony is that a ditch of the latter depth would not provide adequate fall to the river at the proposed outlet and would require the turning of the drainage ditch to the southeast, if it could be done at all, to secure ade-



quate fall if the ditch is built at a lower depth. These questions involve engineering problems with which this court cannot concern itself in this proceeding. The engineer for the objectors testified to the probable inefficiency of the 6-foot ditch but concedes that drainage in the area is needed.

The evidence sustains a finding that the high-water table in the area has brought harmful salts and alkali to the surface of the ground and caused an infestation of salt and sedge grasses of little value. This has resulted in the loss of the more valuable native grasses which would be brought back by the drainage of the area. There is evidence that the lands, if drained, would produce other crops in abundance and greatly increase their market value. Some contention is advanced that the drainage ditch would be of little benefit to areas where the water table is lower than the flow line of the drainage ditch such as is found at stations 9, 15, 18, and 25. The evidence is, however, that such areas would be benefited by the construction of the drainage ditch. The extent of the benefits is a matter to be considered in the assessment of the benefits and is not material in the present case.

The evidence shows that the lands of Hayes, Bartlett, Sitorius, H. Folkers, and Kloepping are subject to flooding and will be relieved by the drainage ditch. The other lands are boggy and at times have standing water on them, or in nearby road ditches.

It is argued by some of the objectors that the high water table subirrigates their lands and that they are content with them as they are. This is not, however, a controlling factor. The question is whether or not the land would be benefited by the drainage of their lands. One whose lands are benefited is not permitted to exclude himself from the district merely because he prefers to keep it in its present condition and thereby gain the benefit of the improvement without cost.

The evidence shows that the drainage of the water-

logged lands would not of itself increase the benefits to a maximum. To accomplish such a result it would be necessary for the landowner to level his land and apply irrigation water to it to remove the salts and alkali in a minimum period of time. Objectors argue that the burden of such costs, in addition to the assessments for the construction of the drainage ditch, should be considered in determining if their lands are benefited by the improvement. In 17A Am. Jur., Drains and Sewers, § 18, p. 453, it is said: "The mere fact, moreover, that it may be necessary for the owner of property to incur expense in order to avail himself of the benefits or services afforded by the improvement is not a valid objection to the inclusion of such property in an improvement district, upon the theory that he would thereby be deprived of his property without due process of law, or denied the equal protection of the laws, in violation of constitutional guaranties." See, also, Valley Farms Co. v. Westchester County, 261 U. S. 155, 43 S. Ct. 261, 67 L. Ed. 585.

The burden of proof is on an objector to show that his lands will not be benefited by the proposed improvement in order to have his land excluded from the drainage district. Petersen v. Thurston, 157 Neb. 833, 62 N. W. 2d 68. We think the evidence as to the lands benefited preponderates in favor of the proponents. The trial court after hearing the evidence and inspecting the lands in the proposed district concluded that the objectors had failed to prove that their lands would not be benefited by the improvement. We think the trial court correctly determined that the lands in the proposed district would be benefited by drainage.

It is contended by the objectors that an upper riparian landowner has no right to obstruct or change a watercourse and at a much later date be authorized to divert water back to the original watercourse upon the owners of the lower riparian lands. In determining this issue it is necessary to consider the general nature of the

area and the sources of the seepage and floodwaters which contribute to or cause the conditions existing in and on the lands contained in the proposed district. It is asserted by the objectors that their lands should not be burdened with these seepage and floodwaters and that the organization of the district and the construction of the drainage ditch is an attempt to impose the cost of drainage upon them when the legal liability therefor is upon others.

The evidence shows that the proposed drainage ditch lies in the lower end of a natural drain which extends from the Platte River in a northwesterly direction for a distance of 14 or 15 miles north of the city of Gothenburg. For convenience we shall refer to this natural drainway as Anderson Creek, as do some of the witnesses. There is no evidence that Anderson Creek is a live stream, although it picks up seepage and floodwaters in a rather extensive watershed. In 1895 the Cozad Irrigation Canal was constructed across Anderson Creek at what is now the north boundary of the proposed drainage district as shown on the plat. The land to the north of the Cozad Irrigation Canal is higher than the canal, with the result the seepage and floodwaters flow into the canal over or through its north bank.

The evidence is that when the Cozad Irrigation Canal was carrying irrigation waters, seepage and floodwaters from the north flowed into and overtaxed the capacity of the canal. To prevent these excess waters from going east in the canal to the damage of the irrigation canal company, a check was placed in the canal immediately north of the northeast corner of Section 19. This had the effect of turning the excess waters to the west where they were discharged to the south through a spillway about 2 miles distant in Section 13.

The water coming down Anderson Creek from the north has increased as drainage and road ditches have been straightened, farm lands leveled, and irrigation developed until the Cozad Irrigation Canal could no

longer handle these waters as before. From time to time the south bank of the canal was overflowed causing the flooding of lands in the proposed drainage district. Seepage from the lands to the north and the Cozad Irrigation Canal, together with natural rain and snowfall, found their way into the proposed drainage district and contributed to the raising of ground water levels and the wet swampy conditions there existing. It is proposed that with the construction of the drainage ditch the seepage and floodwaters from the watershed of Anderson Creek lying northwest of the Cozad Irrigation Canal shall be permitted to pass through the canal into the proposed drainage ditch. The Cozad Irrigation Company has agreed to provide the spillway for this purpose and to place the regulating controls in the hands of the board of directors of Drainage District No. 5 of Dawson County. In addition thereto the Cozad Irrigation Company agrees to pay its share of the benefits in the construction of the drainage ditch. The objectors contend, however, that the seepage and floodwaters coming from the north of the Cozad Irrigation Canal are the sole responsibility of the Cozad Irrigation Company and that it is without legal authority to discharge such waters into the proposed drainage ditch.

There is no evidence in this record that the Cozad Irrigation Company has made any use of the seepage and floodwaters from the north. The evidence is that such waters create a drainage problem which has been a constant concern for the last 60 or 70 years. The Cozad Irrigation Company has refrained from discharging these waters into the part of the natural drain south of its canal because of the damage it would do to lands in that area. It is not here claimed that irrigation waters flowing in the canal are or will be discharged into the proposed drainage ditch since the flow of water in the irrigation canal is controlled at a point four miles west of the proposed drainage district. The problem is, therefore, solely a matter of providing an outlet to the

river for seepage and floodwaters coming down the Anderson Creek watershed area.

We think the seepage and floodwaters from the north are not waters belonging to, or to be controlled by, the Cozad Irrigation Company as the objectors contend. This is so even if the Cozad Irrigation Company has diverted these waters for a long period of time for the purpose of providing an expedient method of getting these waters to the Platte River with minimum damage to lower lands in the course of natural drainage.

An upper riparian owner, constructing and maintaining an artificial structure in a natural drain affecting the flow of seepage and floodwaters for temporary purposes advantageous to it, is not ordinarily obligated by mere lapse of time to maintain the structure or the conditions produced by it, even though it incidentally benefits lower landowners.

In the instant case, if the Cozad Irrigation Canal had not been built, or if a siphon had been built under it in the course of natural drainage, the lower landowners could have no possible cause for complaint. The argument of objectors is that the construction of the irrigation canal permanently changed the watercourse and that they had a right to rely upon the change. This argument has no merit in the absence of facts supporting an equitable estoppel.

In the case of Mitchell Drainage Dist. v. Farmers Irr. Dist., 127 Neb. 484, 256 N. W. 15, the factual situation was very similar to the facts in this case. There the Farmers Irrigation District built its irrigation canal across Wet Spottedtail Draw. For many years the Farmers Irrigation District received the waters from Wet Spottedtail Draw and used them as irrigation water. When the waters of Wet Spottedtail Draw increased because of increased seepage and floodwaters, the Farmers Irrigation District discharged such waters into the drainage ditch of the Mitchell Drainage District in the natural watercourse lying below the Farmers Irrigation

District Canal. The Mitchell Drainage District sought to enjoin the discharge of the waters of Wet Spottedtail Draw into the natural watercourse on the theory that the Farmers Irrigation District had appropriated the new waters and changed their natural course over a long period of time and that it could not subsequently return them to the natural drain. In denying the injunction, this court said: "While there are many cases where rights accrue to the servient estate on account of acquiescence or estoppel, the mere intercepting of the waters by defendant irrigation district would not and could not give the plaintiff drainage district any rights. The use of it was for the benefit of defendant irrigation company. Through use of such waters for ten years or more the irrigation company might obtain the right to continue to use them. This would give no corresponding or reciprocal rights to the drainage district to require the irrigation district to continue to use or care for the waters unless the defendant became estopped, and the only estoppel suggested in this case is the alleged fact that the drainage district was established and its money expended to defendant's knowledge under the belief induced by defendant that the drainage district would never be asked or required to take care of these waters. Plaintiff to acquire any rights would have to show that it improved its property with reference to the diversion and in reliance on a continuance thereof, which it had no right to do in view of the needle-gate and spillway. The water in Wet Spottedtail Draw progressively increased; plaintiff made no showing that defendant constructed its drainage ditches different or expended more money relying on the diversion, and in view of the spillway and needle-gate it had no right to so rely. Furthermore, plaintiff never had the right to use these seepage or waste waters and therefore the use of them by defendant was not adverse. See Lambeye v. Garcia, 18 Ariz. 178, wherein it is held: 'The authorities hold that, while the water

so denominated as waste water may be used after it escapes, no permanent right can be acquired to have the discharge kept up, either by appropriation, or a right by prescription, estoppel or acquiescence in its use while it is escaping, and that, too, even though expensive ditches or works were constructed for the purpose of utilizing such waste water, unless some other element enters into the condition of affairs, other than the mere use of the water.' " See, also, 56 Am. Jur., Waters, § 244, p. 701; Drainage Dist. No. 2 v. City of Everett, 171 Wash. 471, 18 P. 2d 53, 88 A. L. R. 123.

There is no evidence in this case that the waters from north of the irrigation canal, and which flowed into it, were appropriated for the use of the irrigation canal company. It shows that the diversion was for the sole purpose of facilitating their drainage to the Platte River without damage to lower landowners. The lower landowners, including these objectors, did nothing in reliance on the diversion of these seepage and floodwaters. They neither constructed any structures nor expended any money in reliance on the continued diversion of these waters. There is no evidence in the record to support any theory of an equitable estoppel that would deprive the irrigation canal company of its right to permit the flow of these waters through or under its canal into the natural watercourse. We think that the seepage and floodwaters arising in the Anderson Creek watershed which flow into the Cozad Irrigation Canal may be properly discharged into the natural drain where they were wont to flow in a state of nature, there being no basis for an equitable estoppel to prevent the canal company from so doing.

We find that each assignment of error asserted by the objectors is without merit for the reasons herein stated. The judgment of the district court is correct and it is affirmed.

AFFIRMED.

THE WHITE MOTOR COMPANY, A CORPORATION, APPELLEE, v. ROLAND REYNOLDS, APPELLANT.
136 N. W. 2d 437

Filed July 16, 1965. No. 35945.

1. **Appeal and Error.** In the absence of a bill of exceptions it is presumed that the issues of fact presented by the pleadings are established by the evidence and the only issue that is considered on appeal is the sufficiency of the pleadings to sustain the judgment.
2. **Usury: Statutes.** There is no vested right in a usury law and it may be repealed or changed so as to affect causes of action and defenses in pending suits.
3. **Continuances.** A motion for continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, the ruling on the motion will not be disturbed.

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

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

Fraser, Stryker, Marshall & Veach and John E. Wendstrand, for appellee.

Heard before WHITE, C. J., CARTER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and WESTERMARK, District Judge.

BOSLAUGH, J.

This is an action in replevin to recover the possession of two motortrucks mortgaged by Roland Reynolds, the defendant, to The White Motor Company, the plaintiff. The trial court found that the plaintiff was entitled to the possession of the trucks. The defendant's motion for new trial was overruled and he has appealed. There is no cross-appeal.

There is no bill of exceptions in this case. In the absence of a bill of exceptions it is presumed that the issues of fact presented by the pleadings are established by the evidence and the only issue that is considered on

appeal is the sufficiency of the pleadings to sustain the judgment. Hague v. Sterns, 175 Neb. 1, 120 N. W. 2d 287.

The petition in this action was filed on May 9, 1963. It alleged the execution and delivery of the promissory notes and chattel mortgages to the plaintiff; the default of defendant; and the balance due the plaintiff of $16,430 plus interest. Copies of the chattel mortgages were attached to and made a part of the petition.

The defendant's answer and cross-petition was filed on July 24, 1963. It admitted the execution and delivery of the promissory notes and chattel mortgages, but alleged that the indebtedness was void and uncollectible because it was in violation of the Installment Loan Act. The prayer was for a return of the property, cancellation of the indebtedness, recovery of all payments that had been made, and damages for the loss of use of the trucks during the time that the action was pending.

On August 7, 1963, the plaintiff moved for additional time to plead. The trial court sustained this motion and extended the plaintiff's time to plead until September 9, 1963. On September 17, 1963, the court allowed the plaintiff until November 1, 1963, to plead. On October 28, 1963, the plaintiff moved for a further extension of time to plead until December 1, 1963. The transcript does not show any ruling on this motion.

On November 20, 1963, the plaintiff filed a reply and answer to the cross-petition. It alleged that the transactions in question were valid time sales; that they did not violate the Installment Loan Act; that the Installment Loan Act was unconstitutional; and that L. B. 17 enacted by the Seventy-fourth (Extraordinary) Session of the Nebraska Legislature was applicable to the transactions in question.

The defendant then filed a reply to the answer to

the cross-petition alleging that L.B. 17 was unconstitutional.

A pretrial conference was held on February 11, 1964. The parties stipulated that the simple interest rate on the contracts in question was not less than 10.7 percent.

Trial commenced on March 30, 1964. The trial court found that the transactions in question were in violation of the Installment Sales Act but that L.B. 17 was applicable; that the plaintiff was entitled to recover the unpaid principal balance of each loan but no interest or other charges; that the defendant was in default at the time of the commencement of the action; that the plaintiff was entitled to the possession of the trucks; and that the defendant was not entitled to damages.

This case is complicated by the fact that a change in the law occurred after the action had been commenced but before the rights of the parties had been determined. The defendant's real complaint in this case is that the trial court applied the law as it existed at the time the case was decided rather than as it existed at the time the action was filed.

The mortgages involved in this case were given pursuant to the sale of trucks by the plaintiff to the defendant on July 7, 1960, and July 14, 1961. It is apparent that these transactions were made in conformity with the 1959 Installment Sales Act. In an opinion filed June 28, 1963, this court declared the 1959 Installment Sales Act unconstitutional and held that contracts made in conformity with it were in violation of the Installment Loan Act and subject to the penalties of that act. Elder v. Doerr, 175 Neb. 483, 122 N. W. 2d 528.

L.B. 17, which became effective on November 15, 1963, changed the penalties provided in the Installment Loan Act and was made retroactive as to all transactions made prior to November 15, 1963, except those on which an action at law or in equity had been reduced to final judgment as of November 15, 1963. § 45-155.01, R. S. Supp., 1963 (April 1965 Pocket Part).

The defendant argues that the right to possession in a replevin suit must be determined upon the facts which existed at the time the action was commenced, and that the parties' rights become vested when the action is commenced. The problem here arises out of a change in the law which occurred subsequent to the commencement of the action rather than a change in the facts.

The defendant is attempting to claim a vested right to the forfeiture of all principal, interest, and charges which was the penalty provided in the Installment Loan Act before L.B. 17 was enacted. There is no vested right in a usury law and it may be repealed or changed so as to affect causes of action or defenses in pending suits. Davis v. General Motors Acceptance Corp., 176 Neb. 865, 127 N. W. 2d 907.

L.B. 17 has been held to be constitutional and applicable to prior transactions which had not been reduced to final judgment as of November 15, 1963. The transactions involved in this action were made prior to November 15, 1963, and had not been reduced to final judgment as of that date. L.B. 17 is applicable to the transactions involved in this case and the indebtedness of the defendant is collectible to the extent of any unpaid principal baalnce. See Dailey v. A. C. Nelsen Co., 178 Neb. 881, 136 N. W. 2d 186.

The defendant further contends that the judgment should be reversed because the court erred in granting continuances to the plaintiff. The defendant argues that as a result of the continuances which were granted to the plaintiff, the Legislature was permitted to manufacture a defense to his answer and cross-petition which requested forfeiture of both principal and interest.

The defendant assumes that if the continuances had not been granted, the issues would have been made up, the case tried, a judgment rendered in his favor, and the judgment would have become final, all before November 15, 1963. The record does not establish that this

would have occurred. To that extent, it fails to show that the continuances resulted in any prejudice to the defendant.

A motion for continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, the ruling on the motion will not be disturbed. Bailey v. Karnopp, 170 Neb. 836, 104 N. W. 2d 417.

There is nothing in the record which establishes that the trial court abused its discretion in extending the plaintiff's time to plead in this case. The transcript does not show that any resistance was made to the plaintiff's request for additional time to plead, and any showing that may have been made was not preserved in a bill of exceptions. The trial court may have concluded that the continuances which were granted in this case would permit a more orderly and expeditious disposition of the litigation than if the plaintiff were forced to plead within the statutory time and then seek relief at a later time by revision and amendment.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DALE LEROY KONVALIN, APPELLANT.
136 N. W. 2d 227

Filed July 16, 1965. No. 35978.

1. **Criminal Law: Witnesses.** The testimony of a witness in a criminal action which identifies a defendant as a participant in the commission of a crime is sufficient to sustain a finding of guilt if the witness had a reasonable opportunity to observe and recognize the defendant.
2. **Criminal Law.** In a criminal action, an appellate court will not interfere with a verdict of guilty based upon conflicting evidence, unless it is so lacking in probative force that it can be said as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt.

3. **Criminal Law: Evidence.** A gun found under circumstances tending to show that it was used in the commission of a crime and tending further to show ownership or possession by the accused is admissible as evidence.
4. **Criminal Law: Witnesses.** The credibility of witnesses and the weight of the evidence in a criminal action are for the jury to determine.
5. **Criminal Law.** The verdict of a jury based upon conflicting evidence in a criminal action will not be disturbed by this court unless it is clearly wrong.
6. ———. When the punishment of an offense created by statute is left to the discretion of the trial court within 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 Douglas County: PAUL J. GARROTTO, Judge. Affirmed.

Adolph Q. Wolf, Fred J. Montag, and Michael McCormack, for appellant.

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

Heard before WHITE, C. J., CARTER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and WESTERMARK, District Judge.

CARTER, J.

The defendant was convicted in the district court for Douglas County for robbery with a gun of the persons of Kenneth Malskeit and Lorraine Orr, and of the further offense of assaulting Lorraine Orr with intent to rape. The defendant was sentenced to imprisonment for 20 years on each of the two counts for robbery with a gun, such sentences to run concurrently, and to an additional sentence of 7 years imprisonment for an assault on the person of Lorraine Orr with intent to commit rape. The defendant appeals.

The contentions of the defendant are: (1) The evidence was insufficient to sustain the convictions, (2) the trial court erred in admitting exhibits 4, 5, and 6, and (3) the sentence was excessive. No contention is made

that the jury was not properly instructed.

The evidence in this case shows that at about 12:30 a.m., on February 14, 1964, the complaining witnesses, Kenneth Malskeit and Lorraine Orr, were sitting in Malskeit's parked automobile in the 600 block on South Thirty-eighth Street in Omaha, Nebraska. A man with a gun suddenly approached the car, opened the door, pointed the gun at the complaining witnesses, and announced that "this is a stick-up." The gunman entered the car and ordered Malskeit to drive the car as directed. Twice during the ensuing trip, Malskeit was struck with the gunman's pistol for alleged failure to follow driving instructions. The car was stopped on a dirt road southwest of South Thirty-ninth Street and Pacific Street. The place was a lonely, uninhabited area, grown up to weeds near a railroad and what is described as a rock quarry. The gunman took money from each of the complaining witnesses. He then locked Malskeit in the trunk of the car and proceeded south with Lorraine Orr. Some distance south of the car he announced his intention to Lorraine that he was going to rape her. She resisted and was struck down by the gunman. When she regained consciousness, the gunman had removed her pettipants and was opening or removing his own clothing for the evident purpose of carrying out the act of sexual intercourse. Lorraine grabbed his gun hand and broke away in the darkness. In the meantime, Malskeit had broken the lock mechanism in the car trunk with a tire iron and was running in the direction from which the screams of Lorraine came when she met him. The gunman fired one shot from a pistol, but the two were able to escape in the darkness. They found their way to a residence in the general neighborhood, and the police were notified. The police made a cursory examination of the site of the crimes, but, due to darkness, the investigation was continued until the next morning. The next morning, a thorough investigation was made by the police. A nine millimeter shell casing

was found on the dirt road which is identified in the record as exhibit 6. The gunman was not apprehended at or about this time. The evidence of the robberies with a gun and the assault with intent to rape are not disputed by this record. The issue is primarily one of the identification of the gunman as being the defendant.

The evidence shows that the Malskeit automobile was equipped with an interior light which came on automatically when a door was opened. Each time the car door was opened, the complaining witnesses could plainly see the gunman. He was described as wearing a black leather jacket, and a hat which was pulled down on his head. They heard him talk and had a recollection of his exposed facial features. Subsequent to the commission of the crimes, they looked at police pictures in the police mug file, but were unable to identify any as the defendant. They attended three or four police lineups or showups until the last one held on April 24, 1964. At that time, they positively identified the defendant as the gunman who had robbed both of them and assaulted Lorraine. State v. Wilson, 174 Neb. 86, 115 N. W. 2d 794; Small v. State, 165 Neb. 381, 85 N. W. 2d 712, 70 A. L. R. 2d 984.

The nine millimeter shell casing found at the scene of the crimes was found to have been fired from a Luger pistol alleged to belong to the defendant. An expert from the ballistics laboratory of the Federal Bureau of Investigation testified that the "fingerprints" made by the firing pin of the Luger pistol on the shell casing found at the scene of the crimes established that the shell was fired from this particular Luger pistol and no other. The defendant contends that the Luger pistol was not his and that the court erred in admitting exhibits 4, 5, and 6 into evidence, the same being the Luger pistol, the cartridge clip taken from the Luger pistol, and the shell casing found at the site of the crimes, respectively.

The evidence shows that defendant and one Swoboda were arrested by the police while sitting in a stolen

car on the streets of Omaha. The two policemen searched them for guns and found an Italian Burretta on the defendant. The police took defendant and Swoboda to the police station in a police cruiser car. While he was being checked into the police station, police officer Carl Longstreth, one of the arresting officers, remembered that defendant was squirming and twisting in the back seat of the cruiser while being transported to the police station, and that he had heard metal striking metal during the drive to the station which, up until then, he assumed to be the handcuffs striking each other. He went down to the police garage and examined the rear seat of the cruiser car and found the Luger pistol forced between the upholstery with the butt only showing. The gun was found on the side of the car where the defendant had been sitting only a matter of minutes before. The testimony of the police officers is that this gun was not in the cruiser car prior to the arrest of the defendant and Swoboda. The evidence was a strong circumstance that was proper for the jury to consider. Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868.

The jury is the judge of the credibility of the witnesses and the weight to be given their testimony. Salerno v. State, 162 Neb. 99, 75 N. W. 2d 362. The evidence adduced was sufficient to sustain the verdict of the jury. We find no error in the record that requires this court to interfere with the verdict.

Defendant contends that the sentence imposed by the court was excessive. The trial court imposed two concurrent sentences of 20 years imprisonment for robbery with a gun, or, in the language of the statute, did forcibly and by violence, or by putting in fear, take from a person personal property with intent to rob and steal. An additional sentence of 7 years imprisonment was imposed for assaulting a female person with the intention to rape. This record shows that defendant has been sentenced to imprisonment for four different felonies in the past. The record indicates that at the time of his

arrest, he was engaged in the theft of an automobile. He is a man 41 years of age who appears to be a confirmed criminal. He states that he cannot get employment because of his previous record as a convict. In other words, he asserts his previous crimes as a justification or mitigation of the ones for which he now stands convicted. But the crime of assault to commit rape can hardly be asserted as the product of his inability to obtain employment because of his previous criminal record. The trial court evidently did not, and this court will not, accept such contentions as having any value in the consideration of a sentence for the heinous crimes here committed. The sentences are within the scope of the penalties provided by statute and the record does not show that the trial court acted in any manner other than on a fair and impartial consideration of the facts it had before it. There was no abuse of discretion by the trial court. Salerno v. State, *supra;* Thompson v. State, 159 Neb. 685, 68 N. W. 2d 267; Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380.

For the reasons stated, we find that the assignment of errors cannot be sustained and that the judgment of the district court should be and is affirmed.

AFFIRMED.

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

136 N. W. 2d 428

Filed July 23, 1965. No. 35683.

1. **Trial: Evidence.** **Whenever the point is reached at which a trier of fact is being told that which it is itself entirely equipped to determine without a witness' aid, the testimony is superfluous.**
2. **Trial: Appeal and Error.** **The overruling of a general objec-**

tion to a question will not be disturbed on appeal unless the error was obvious.

3. **Judgments: Master and Servant.** A judgment exonerating a servant and holding his master liable in a negligence action against them jointly is self-consistent if it is logically justifiable by a difference in evidence, although liability of the master is only vicarious.

4. **Master and Servant.** Where the existence of a master-servant relationship is in issue, the right of control is ordinarily a question of fact.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. On motion for rehearing. See 178 Neb. 175, 132 N. W. 2d 361, for original opinion. Original opinion withdrawn. Affirmed.

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

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

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

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

SMITH, J.

Fire damage to a building is the subject of this negligence action. Plaintiff-owners recovered a judgment on a verdict against Mid-City Motors, Inc., their lessee, on the theory of a principal's vicarious liability; however, their claim against Service Junk Company, the alleged agent, was dismissed. Mid-City appealed and plaintiffs cross-appealed from the order of dismissal.

The dismissal was affirmed and Mid-City's motion for judgment notwithstanding the verdict was sustained in an opinion at 178 Neb. 175, 132 N. W. 2d 361. After reargument we now withdraw that opinion.

Plaintiffs complain that their case against the agent should have been sent to the jury and that the district

court erred in sustaining objections to a hypothetical question. Mid-City contends: (1) A quasi-admission was erroneously received in evidence; (2) the judgments for the agent and against the principal are inconsistent; and (3) the existence of a principal-agent relationship is speculative.

Causation is the pivotal issue relating to the dismissal. The sufficiency of evidence depends upon the reasonableness of inferences from a substantial lag between negligence and detection of the fire.

Mid-City rented, stored, serviced, and repaired motor vehicles on the top floor, which was near street level. At points north of center a vertical 6-inch steel pipe passed through the concrete floor and a Celotex ceiling 14 feet high. The conduit and a horizontal connecting 4-inch pipe were anchored by metal brackets attached to wood. They formed part of a sprinkler system which was no longer in use. The Celotex ceiling was nailed to "rafters."

In performance of a contract between the defendants but without notice to plaintiffs, two employees of the salvage company were engaged in removing the pipes on January 9, 1959, the day before discovery of the fire. Work began in the morning but as late as 3 p.m. pipe was being cut with an acetylene torch at a place 4 inches below the ceiling. Since the men used no shields, fragments of molten metal, seen as flying sparks, passed close enough to ignite the Celotex. Upon completion of the day's work some minutes later, they inspected the area except the attic. They found no fire.

Mid-City was conducting its business until 12:30 a.m. the following morning. There was no indication that the Celotex was smoldering. An inspection of vehicles shortly prior to closing was also negative.

The first alarm was given at 1:41 a.m., the second at 1:47 a.m. While approaching the building, firemen noticed smoke and flame aloft and near a 16- by 40-foot skylight in the center of the roof. One of them esti-

mated that the building had been burning at least one-half hour and at most one hour. From a place several feet inside an entrance they saw a red glow in the direction of the ceiling center.

Celotex will not normally flame, but it may smolder indefinitely. In experiments the ceiling material was reduced to ashes by slow combustion at the rate of 1 inch per minute. Odorous gas and smoke were emitted. The process was similar to the action of punk used to light fuses of fireworks.

The ignition temperatures of Celotex and wood are 1,500 and 700 degrees respectively. Steel melts at 2,700 degrees, but an acetylene torch can create heat up to 5,000 degrees.

Since causation is not reasonably inferable, the order of dismissal is right. Difficulty in determining the moment which separates sufficient evidence from insufficient evidence is readily conceded. Yet we are unwilling to say that time counts not at all, that judicial restraint on jury power is mercurial. It is enough that in law the time between pipe cutting and fire detection was too long under the circumstances.

Plaintiffs' other contention is groundless. The hypothetical question ranged far and wide. Counsel for plaintiffs asked their expert witness whether Celotex "could smoulder undetected for a period of ten to twelve hours, and then ignite other material or burst into flame, causing an extensive fire?" General objections were sustained. Later the witness testified that the material may smolder indefinitely.

The excluded evidence was worthless. See, McNaught v. New York Life Ins. Co., judgment reversed on rehearing, 143 Neb. 220, 12 N. W. 2d 108; Neal v. Missouri P. Ry. Co., 98 Neb. 460, 153 N. W. 492; Missouri P. Ry. Co. v. Fox, 56 Neb. 746, 77 N. W. 130. "* * * whenever the point is reached at which the tribunal is being told that which it is itself entirely equipped to determine without the witness' aid * * *, his testimony is super-

fluous * * *." 7 Wigmore on Evidence (3d Ed.), § 1918, p. 11.

In returning a verdict against Mid-City, the jury presumably acted upon some quasi-admissions in a petition which Meeks Rent-A-Car Company had filed on July 19, 1960, in another action against the salvage company. The exhibit was received in evidence against Mid-City alone.

The exhibit alleges that in removal of the pipes the defendant by use of an acetylene torch caused sparks to pierce the Celotex ceiling, that the fire eventually spread to other parts of the building, and that the damage was the proximate result of defendant's negligence in specified particulars.

It was received over objections that it was incompetent, irrelevant, and immaterial; that no foundation had been laid; and that it had been based on information obtained after the fire. Mid-City now contends that it was not identified with Meeks and that the exhibit was signed and verified by an attorney without proof that the client knew the contents.

The first contention has no merit. The corporate name was changed May 14, 1959. A certificate states that the resolution amending the articles of incorporation was adopted at a special meeting attended by all stockholders and directors. It bears the signature of John R. McCormack as secretary of the meeting. Neither certificate nor resolution was impeached. Indeed both were substantially corroborated. The faint suggestion of separate corporations is hardly credible.

The second is rejected on a procedural ground. The pleading was verified by John R. McCormack, attorney for the corporation at the time of the fire. The secretary-treasurer was unaware of the petition, but no further showing appears.

We look at the ruling in its setting. "Review is limited where a general objection has been overruled. It reaches only an obvious flaw; otherwise, specification

is required. * * * A trial court possesses a discretion." Campbell v. City of North Platte, 178 Neb. 244, 132 N. W. 2d 876. See, also, Kennedy v. Woods, 131 Neb. 217, 267 N. W. 390.

Reception was discretionary in spite of no direct evidence that any agent other than McCormack approved the allegations, particularly where the propriety of an exclusionary ruling on specific objection would be debatable. See, Paxton v. State, 59 Neb. 460, 81 N. W. 383, 80 Am. S. R. 689, judgment sustained on rehearing, 60 Neb. 763, 84 N. W. 254; Frank R. Jelleff, Inc. v. Braden, 233 F. 2d 671, 63 A. L. R. 2d 400; McCormick on Evidence, § 242, p. 513; 4 Wigmore on Evidence (3d Ed.), § 1066, p. 53. The contention comes too late.

Overthrowal of the verdict is unwarrantable. The difference in evidence against the two defendants accounts for the dismissal of the one and the vicarious liability of the other. However, Mid-City insists that the judgments are inconsistent.

If a master is to respond in damages solely on account of his servant's negligence, a judgment dismissing the servant but holding the master is with some exceptions not self-consistent. See, Bohmont v. Moore, 138 Neb. 784, 295 N. W. 419, 133 A. L. R. 270; Forsha v. Nebraska Moline Plow Co., 94 Neb. 512, 143 N. W. 453; Zitnik v. Union P. R.R. Co., 91 Neb. 679, 136 N. W. 995; Gerner v. Yates, 61 Neb. 100, 84 N. W. 596. The rule applies where the material evidence against both defendants is the same. See, Lewis v. Union P. R.R. Co., 118 Neb. 705, 226 N. W. 318; Mansfield v. Farmers State Bank, 112 Neb. 583, 200 N. W. 53; Young v. Rohrbough, judgment reversed on rehearing, 86 Neb. 279, 125 N. W. 513; Chicago, St. P., M. & O. Ry. Co. v. McManigal, 73 Neb. 580, 103 N. W. 305, judgment modified on rehearing, 73 Neb. 585, 107 N. W. 243.

The judgments here conform with traditional concepts of regularity. The tautology for producing inconsistency seems to include a law that events acquire

a standing independent of evidence, i.e., that rules permitting admission of evidence for limited purposes are meaningless. Such a system will not do.

The finding of agency implied by the general verdict is said to be speculative. The salvage company agreed to perform the work at its expense and to pay Mid-City any difference between the value of the pipe and the labor cost of removal. Mid-City agreed to furnish help or direction upon request of the workmen.

The testimony is open to a reasonable inference that Mid-City had the right to exercise substantial control over the details of the work. The right of control is ordinarily a question of fact. See, Mansfield v. Andrew Murphy & Son, 139 Neb. 793, 298 N. W. 749; Curry v. Bruns, 136 Neb. 74, 285 N. W. 88.

The judgments are affirmed.

AFFIRMED.

CARTER, J., dissenting.

In my judgment, the opinion adopted by the court is manifestly wrong in at least two respects.

This is an action for negligence. The negligence is claimed to have arisen because of the failure of two employees of Service Junk Company to properly handle a cutting torch while removing an old, unused sprinkler system from the premises leased from the plaintiffs by Mid-City Motors. The action was brought by the owners of the building against Mid-City Motors and the Service Junk Company. The trial court found that negligence was not proved against the Service Junk Company, and dismissed the action as to it. This court affirms this action of the trial court. The trial court submitted the issue of negligence by Mid-City Motors to the jury, which returned a verdict in the amount of $37,400 against it. This leaves the situation in the anomalous position of holding that the employees performing the work were not negligent as to their employer, Service Junk Company, but negligent as to Mid-City Motors, unless there

was a separate and different cause of action against Mid-City Motors.

Mid-City Motors was formerly known as Meeks Rent-A-Car Company. I do not question that they were one and the same corporation at all times pertinent to this litigation.

Meeks Rent-A-Car Company entered into an agreement with Service Junk Company whereby the latter agreed to remove the sprinkler system and to pay back to Meeks Rent-A-Car Company the difference between the value of the material removed and the cost of removal. Pursuant to this agreement, one of the partners of Service Junk Company took two of its employees to the Mid-City Motors building and instructed them on the work to be performed. One of the employees was an expert in the use of a cutting torch and its dangers. It is stated in the majority opinion that: "The testimony is open to a reasonable inference that Mid-City had the right to exercise substantial control over the details of the work." The majority opinion carries implications in its various parts that a principal and agent, master and servant, and employer and employee relationship existed. I submit that the record will not sustain a finding that any one of such relationships existed.

The only evidence bearing directly on the existing relationship is the evidence of a partner of Service Junk Company. His evidence is: "Q. Did you send or bring anyone else up there to supervise their work? A. No; Mr. Meeks told me that this foreman in there would help them on any situation that they needed; if anything they wanted, to sure go to him, and any kind of help they needed, why, he would give them any kind of help. Q. In other words, Mr. Meeks told you that if the men had any questions, they were to ask his foreman? * * * A. Yes; sir, if they wanted to know any certain thing, they could ask him." The Mr. Meeks referred to was the president of Meeks Rent-A-Car Company. The business of renting, storing, servicing, and

repairing motor vehicles was to continue while the sprinkler system was being removed. Mr. Meeks merely assured cooperation by his employees while the employees of Service Junk Company removed the sprinkler system. There is not a scintilla of evidence in this record that Mid-City Motors or its employees had the right to or did direct the manner of using the cutting torch or the details of its use. The reasonable inference referred to in the opinion is an assertion unsupported by the record. Certainly the right of Service Junk Company to control the details of the work was superior to any such right by Meeks Rent-A-Car Company, and Service Junk Company was determined not to be liable.

I submit that Service Junk Company was an independent contractor. The two employees who performed the work were hired, paid, and controlled by the Service Junk Company. There is no evidence of a principal and agent, master and servant, or employer and employee relationship between Mid-City Motors and Service Junk Company or its employees, as the majority opinion infers.

I submit that even if one of these relationships did exist, the evidence of negligence by the two employees of Service Junk Company could be no different against Mid-City Motors than against Service Junk Company. The majority opinion holds that there was other evidence to sustain a judgment against Mid-City Motors which gives rise to the second point to which I dissent.

The evidence shows that Meeks Rent-A-Car Company brought an action against Service Junk Company alleging that the fire was caused by the negligence of the employees of Service Junk Company. On the trial of the instant case the court found in favor of Service Junk Company. It is the contention of plaintiffs that the petition filed in that case was an admission against interest of Meeks Rent-A-Car Company and admissible against Mid-City Motors. I submit that the petition

so filed was not an admission against interest for the reasons following.

In the petition filed by Meeks Rent-A-Car Company, eight specifications of negligence were alleged against Service Junk Company which it was unable to establish. The petition alleged that the two workmen were at all times acting individually and not as agents, servants, and employees of Meeks Rent-A-Car Company. It is plain, therefore, that Meeks Rent-A-Car Company never admitted any relationship out of which a vicarious liability arose. Nor did it in any way admit fault on its part, or any fact from which liability could arise. The pertinent part of the pleading is: "That at all times material herein the plaintiff Meeks Rent-A-Car Company, a corporation, was in no way in charge of or exercising control or supervision over the actions of the defendant Samuel I. Rothenberg and Jack Levy, copartnership d/b/a Service Junk Company; that the said defendants were at all times hereinafter mentioned acting individually and not as agents, servants and employees of the plaintiff Meeks Rent-A-Car Company, a corporation." The petition is not an admission against the interest of Meeks Rent-A-Car Company and is in fact a denial of liability on its part of negligence or any vicarious liability because of the relationship of the parties. The offer of the pleading was objected to as not containing any admission of any knowledge prior to the fire, and raised the issue of competency, the holding of the majority opinion notwithstanding. The contention of the majority that the objection made was insufficient to raise the question of the admissibility of the petition as an admission against interest is indeed a feeble one. The petition was not admissible as an admission against interest and objection thereto was sufficiently made. The petition was nothing more than an opinion as to liability for negligence on the facts alleged which the court held was not sustained by the evidence.

"To be competent as an admission a statement must

be one of fact, and a statement which is a mere opinion or conclusion or a conclusion of law is as a rule inadmissible. An admission by a party of his fault or of his adversary's freedom from fault is generally held admissible." 31A C. J. S., Evidence, § 272b, p. 700.

"Generally, a statement of a party must concern a material fact in order to be receivable as an admission against interest, and an extrajudicial statement as to declarant's opinion or conclusion is ordinarily inadmissible, as discussed supra § 272." 31A C. J. S., Evidence, § 317, p. 806.

"As a general rule, statements or admissions relating to a question of law or constituting conclusions of law or opinions as to what the law is, are not admissbile in evidence, for the reason that a party should not be affected by statements which may be attributed to a misapprehension of his legal right." 31A C. J. S., Evidence, § 272b, p. 701.

I question the adequacy of the court's opinion. A judicial opinion should cover four pertinent points: (1) The decision of the trial court, (2) the complaints of the party appealing, (3) a concise but adequate statement of the facts, and (4) the law applicable to the facts. The court's opinion in the instant case draws inferences and conclusions from facts not stated in the opinion and which I insist are not supported by the record. A litigant who has a judgment against him affirmed for $37,400, or any other amount, is certainly entitled to know the facts upon which it is based. Without an adequate statement of the facts to which announced rules of law are being applied, the opinion is of little use to the legal profession as a precedent. While I do not in any sense of the word impugn the sincerity and integrity of the majority, it is my view that an adequate statement of the facts shown by the record is essential to the maintenance of a court's integrity. The drawing of inferences and conclusions from unstated facts leaves the litigants and the bar in complete darkness as to

the meaning of the opinion. This is particularly true when a minority of the court asserts that the record does not support the inferences and conclusions drawn.

For the reasons herein stated, I cannot agree to the affirmance of the case on the law and facts, nor to the manner of its disposition by the majority opinion.

BROWER, J., concurs in this dissent.

DETLEF J. KELLER ET AL., APPELLEES, V. KEITH COUNTY, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.
136 N. W. 2d 441

Filed July 23, 1965. No. 35931.

1. **Taxation. Under section 77-1315, R. S. Supp., 1963, notice by an assessor of an increase in the assessment for taxation of previously assessed lands or improvements is mandatory in that collection of the tax on an increase made without notice or waiver of notice may be enjoined.**
2. **———. If a notice is defective in omitting the date when the county board of equalization will convene but the board seasonably acquires jurisdiction over the assessee at his request, the defect is waived.**

Appeal from the district court for Keith County: JOHN H. KUNS, Judge. Affirmed as modified.

Frank B. Svoboda, for appellant.

Firmin Q. Feltz, for appellees.

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

SMITH, J.

The district court enjoined defendant from collecting 1963 and 1964 taxes upon an assessment of real estate in excess of $4,665. It found that the county assessor had raised the valuation to $8,805 without notice to plaintiffs, who hold record title in joint tenancy as husband and wife, and therefore that taxes upon the addition were uncollectible.

The principal issues are necessity of notice and waiver. Important to the first one is the nature of the contested assessments, to the second one, the conduct of the husband.

The evidence establishes the fact that the assessor increased the value of a previously assessed improvement and that he did not fix the value of an improvement previously unassessed. Plaintiffs testified that construction of a residence commenced in 1959 and that the house was completed and occupied by them in April 1960. According to the husband no improvements were made during the years 1961-1964.

The assessment book manifests this schedule:

Year	Value of Impvts.	Value of Land	Total Actual Value	Total Assessed Value
1960	12,585	1,505	1,505	525
	11,830	1,500	13,330	4,665
1961	11,830	1,500	13,330	4,665
1962	11,830	1,500	13,330	4,665
1963	11,830	1,500	13,330	4,665
	23,660		25,160	8,805
1964	21,170	1,500	22,670	7,935

Columns for addition or deduction of improvements in 1961 and subsequent years are blank, and no such information appears for 1960.

A deputy assessor testified that his entry of the 1960 correction resulted from a notation on an appraisal card that the building was half finished on January 1, 1960. In July 1963, without action by the county board of equalization and after its adjournment the assessor increased the 1963 sums.

On May 1, 1964, the assessor informed the husband by mail that the figure had been raised from $4,665 for 1960 to $8,805 for 1961. The notice states that one-half of the improvement was made in 1960 and one-half in 1961, but the county board of equalization is unmentioned.

Notice is required by section 77-1315, R. S. Supp.,

1963, as follows: "The county assessor shall before * * * filing (the assessment rolls with the county clerk), notify the record owner of every piece of real estate which has been assessed * * * higher * * * than * * * the last previous assessment. * * * (The notice) shall * * * state the old and new assessed valuation * * * and the date of the convening of the board of equalization."

Section 77-1317, R. R. S. 1943, which provides for the addition by an assessor of omitted lands and improvements, is silent on the subject of notice. We lay aside the question whether it is drawn within the ambit of section 77-1315, R. S. Supp., 1963. See Watson Bros. Realty Co. v. County of Douglas, 149 Neb. 799, 32 N. W. 2d 763. The assessment book discloses an increase in value of a previously assessed improvement. If parol evidence can contradict or explain it, the record before us is insufficient.

Notification pursuant to section 77-1315, R. S. Supp., 1963, is mandatory and collection of the tax on that part of an assessment raised without notice may be enjoined unless the taxpayer has waived the defect. Babin v. County of Madison, 161 Neb. 536, 73 N. W. 2d 807; Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489. This principle shapes our course.

On April 1, 1964, the husband protested to the county board of equalization that the 1963 assessment had been increased without notice, and he requested a reduction to $6,000. On May 21, 1964, the board declined to modify the 1963 valuation, but it reduced the 1964 figure to $7,935. No appeal was taken.

At the trial of the injunction suit the wife testified that she had received no notice prior to delivery of a 1963 tax statement in January 1964, but notification of the 1964 assessment is not negated. True, she personally made no protest to the board, and agency of the husband is not proved. However, these facts cannot be

inflated to proof that she was not notified of the later assessment.

Although the judgment as to the year 1963 is correct because the wife was not notified, dissimilar facts compel the opposite conclusion as to the year 1964. We have already seen that a finding in favor of the wife cannot be sustained. The husband fares no better. The notice, deficient in regard to the date when the board would convene, was adequate in view of his action at the 1964 session. See Gamboni v. County of Otoe, *supra*.

It matters not whether the board had jurisdiction over the subject matter, the 1963 assessment. It does matter that the board seasonably acquired personal jurisdiction. A stronger case for waiver can hardly be imagined.

In summary, noncompliance with the notice requirements renders the 1963 assessment ineffective to the extent that the tax on the increase is uncollectible. The tax on the 1964 assessment is collectible because failure of notice to the wife is not proved and the defect in the notice to the husband was waived.

The judgment is modified by vacating that part concerning 1964 taxes, and it is affirmed as modified. Costs are apportioned one-half to plaintiffs and one-half to defendant.

AFFIRMED AS MODIFIED.

DONNA JANE MOHR DELONG, APPELLANT, V. DON O. MOHR, JR., ET AL., APPELLEES.
136 N. W. 2d 443

Filed July 23, 1965. No. 35942.

1. **Deeds. Whether a deed is delivered or not ordinarily depends on the intention of the grantor, determinable from the circumstances of the case.**
2. **———. No particular acts or words are necessary to constitute delivery, but anything done by the grantor, by words or acts from which it is apparent that delivery was intended and**

that the instrument passed beyond his dominion, control, or authority is sufficient.

3. **———. It is not necessary that the grantor deliver the deed to the grantee personally, it is sufficient if it is delivered to a third person unconditionally for the use of the grantee.**

4. **———. A grantor's wife or other cograntor may be the third person to whom lawful delivery of a deed may be made by a grantor for the use and benefit of the grantee.**

5. **———. The exercise of control over property after the date of a deed and the failure to record it are not controlling as to delivery and are consistent with the valid unconditional delivery of a title for the use and benefit of a grantee.**

Appeal from the district court for Dixon County: JOHN E. NEWTON, Judge. Affirmed.

Verzani, Beck & Scoville and Mark J. Ryan, for appellant.

Frederick M. Deutsch, William I. Hagen, James P. Monen, James F. Peterson, E. J. McCarthy, and Harry N. Larson, for appellees.

Heard before WHITE, C. J., CARTER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and WESTERMARK, District Judge.

WHITE, C. J.

Two actions in equity between the parties were consolidated for trial. The sole question involved concerns the validity of the delivery of a warranty deed and a bill of sale executed by Don O. Mohr, Sr., the father, to Don O. Mohr, Jr., his son. The district court held that there was a valid delivery of both instruments, quieted title in Don O. Mohr, Jr., and dismissed plaintiff's petition in the original case and her cross-petition in the second case brought by Don O. Mohr, Jr. Plaintiff appeals. We affirm the judgment of the district court.

Deceased Don O. Mohr, Sr., had been engaged in the mortuary business in Ponca, Nebraska, for 49 years, was 70 years of age, and was killed instantly in an auto-

mobile accident on August 18, 1962. He left surviving him as his heirs, Lura B. Mohr, his widow, and his children by a previous marriage, Donna Jane Mohr DeLong, daughter and plaintiff in this action, and Don O. Mohr, Jr., son and defendant in this action. Don O. Mohr, Sr., died intestate and hence the widow would inherit one-fourth interest and the son and daughter each a three-eighths interest in his estate.

The evidence shows that the deceased Don O. Mohr, Sr., was 70 years of age and in failing health. On July 13, 1962, he went to F. B. Hurley's office in Ponca and caused him to draft the deed and bill of sale in question to the mortuary, the real estate, and the personal property used in connection therewith. The father, Don O. Mohr, Sr., executed and acknowledged both instruments, went back to the mortuary, and sent his wife to Hurley's office where she also acknowledged and signed the deed. Hurley completed the instruments, placed them in an envelope, and handed them to Mrs. Mohr. Mrs. Mohr, who stands to lose one-fourth interest in the property involved here, was the chief witness for the defendant. She testified that she handed the envelope and the instruments to her husband, Don O. Mohr, Sr.; that he looked the instruments over and handed them back to her; that he told her to keep them until Don, Jr., comes back; and that he said, "give it to Don, Jr., when he comes." This took place on the same day the deed and bill of sale were executed. She took the deed and kept possession of it in her personal dresser drawer of the bedroom of their home. She testified that Don O. Mohr, Sr., told her that under no conditions was the envelope to be returned to him. She testified that she felt she was under an obligation with instructions to deliver the instruments to Don O. Mohr, Jr. On the envelope containing the instruments were the words "For Don O. Mohr Jr" which the undisputed evidence shows was in the handwriting of Don O. Mohr, Sr. She had continual possession of these instruments and

there was no evidence that her husband ever knew where she put them or knew that they were in her personal dresser drawer. She delivered the deed and bill of sale to Don O. Mohr, Jr., the defendant, shortly after he returned from California for the funeral.

Before reviewing the circumstances further we point out that whether a deed is delivered or not ordinarily depends on the intention of the grantor, determinable from the circumstances of the case. Short v. Kleppinger, 163 Neb. 729, 81 N. W. 2d 182; Smith v. Black, 143 Neb. 244, 9 N. W. 2d 193; Dowding v. Dowding, 152 Neb. 61, 40 N. W. 2d 245. And, no particular acts or words are necessary to constitute delivery, but anything done by the grantor, by words or acts from which it is apparent that delivery was intended and that the instrument passed beyond his dominion, control, or authority is sufficient. Dowding v. Dowding, *supra;* Black v. Romig, 151 Neb. 61, 36 N. W. 2d 772; Colbert v. Miller, 149 Neb. 749, 32 N. W. 2d 500; Phillips v. Vandemoer, 152 Neb. 145, 40 N. W. 2d 645.

Besides the testimony of the widow, which was directly against her own interest, there are ample supporting testimony and circumstances that point unequivocally to the deceased's intention to accomplish an irrevocable delivery of the deed and bill of sale. The fact that he gave them to his wife, one of the cograntors of the deed for delivery, is no impediment. Blochowitz v. Blochowitz, 122 Neb. 385, 240 N. W. 586, 82 A. L. R. 949; Haas v. Wellner, 90 Neb. 160, 133 N. W. 185; Milligan v. Milligan, 161 Neb. 499, 74 N. W. 2d 74. The same authorities demonstrate the proposition that it is not necessary that the grantor deliver the deed to the grantee personally, it is sufficient if it is delivered to a third person unconditionally for the use of the grantee.

The son, Don O. Mohr, Jr., was living in California and was employed as an officer in a bank. He was a licensed mortician and prior to 1953 had been engaged

in the mortuary business with his father. Although the dead man's statute, section 25-1202, R. R. S. 1943, barred direct testimony as to conversations or communications with the father, the evidence is ample to show that in 1962, especially in June when the son returned for his biennial visit, arrangements were made between them for the son to return to Ponca and take over the business. The son advertised his house in California for sale in July 1962, and he was in the process of closing out his affairs in California at the time of his father's death in the automobile accident. In evidence is an advertisement in the Los Angeles Times of July 28, 1962, advertising the home of Don O. Mohr, Jr., for sale. His home was actually sold in September and the deal closed in October. Again the widow, testifying against her own interests, stated that Don O. Mohr, Sr., told her of the arrangement and Don, Jr., was to return to Ponca, run the business, furnish them an apartment in the mortuary, and employ the father in the business. She testified that they talked many times of the arrangements for Don to leave California and return to Ponca; that they were looking for him home at any time; that when the son left to go back home after the visit Don O. Mohr, Sr., told her that he was going to return; that he was going back (to California) to make arrangements and would come back and be given the property; and that the arrangements were not to sell the property to Don O. Mohr, Jr., but to give it to him. On July 21, 1962, almost a month before his death, and a week after the execution of the deed and the bill of sale, the father changed the business bank account to put it in his son's and his name. Two days before he died, on August 16, 1962, his new stationery was printed with his son's name on it and he told the printer that his son was coming back.

Very significant we think is the testimony of an independent witness, a South Sioux City mortician, who

was a longtime friend of the deceased. He testified as follows: "A Well, I had a church truck of Mr. Mohr's and he stopped to get it, and he came in and sat down and started talking and I asked how the family was, mentioned the names of Don, Jr., and Lura and so on, and he said Don, Jr., had just been there and went back to California and he was coming back to take over the business because his health was getting bad. Q Don O. Mohr, Sr.'s health was getting bad? A Yes, and he made the statement that he had the papers fixed up and left with her and he was just going to kind of retire. * * * Q During this conversation Mr. Mohr made no statement to you as to what arrangement he had made with his son other than he was coming back to take over the business? A He gave it to him. He said 'if somebody gave me that opportunity when I was a boy.' "

E. J. McCarthy, an attorney, also testified that the deceased told him he expected Don, Jr., to come back from California and he was going to turn the mortuary over to him. The deceased also told attorney Hurley, who prepared the instruments, that Don, Jr., was coming back and take over the business.

It is true that the deceased kept operating the property and business after execution and delivery of the deeds to his wife. Plaintiff stresses this fact in argument. But, these facts are not controlling and not inconsistent with an intent to make an unconditional delivery of the deeds. Many of our cases have held valid a deed to be delivered and recorded on the death of the grantor and the retention of control of the premises, collecting rents, and paying taxes, insurance, and repairs has been held not inconsistent with delivery. Cerveny v. Cerveny, 154 Neb. 1, 46 N. W. 2d 632; Dowding v. Dowding, *supra;* Kellner v. Whaley, 148 Neb. 259, 27 N. W. 2d 183. In this case such a holding would require that the deceased close down the business until his son same back from clearing up his affairs in Cal-

ifornia. Besides, the agreement was that Don, Sr., and his wife were to live in an apartment over the mortuary and he was to remain as an employee in the business. We fail to see where these acts negatived an intention to deliver the deeds or render them invalid. There is no merit to this contention.

It is argued by the plaintiff that the widow's testimony was impeached by certain contradictory statements made by her in letters to the plaintiff. It is true that there are ambiguous and uncertain statements in these letters that relate to the whole situation existing in the family. A construction could be put on them impeaching Lura B. Mohr's testimony. But, her direct testimony is clear, positive, unequivocal, made against her own financial interest, and is amply corroborated by other independent witnesses' testimony and by undisputed circumstances in the case. We feel, as the trial court did, that her testimony as to the unconditional delivery of these deeds was not impeached and spoke the truth under the circumstances. The trial court did not consider the statements made in these letters as impeaching her clear, direct, and definite testimony as to delivery. This will be given great weight by this court where it is required to review and pass on the weight of the evidence.

The evidence also shows that the deceased had made ample provisions for the daughter in the form of life insurance, a $10,000 joint savings account, and he had contributed to the purchase of the daughter's California home. We point out that the widow's testimony as to the intention of the deceased to accomplish an unconditional delivery of these deeds is strongly supported by all the circumstances and the testimony of the independent witnesses. To overturn the strong persuasiveness of all these circumstances and the positive, direct testimony as to unconditional delivery, we would have to rely on a strained analysis of the uncertain meaning of letters written by Lura B. Mohr, when we feel that an

examination of the whole context of the letters support her other testimony and is consistent with testimony as to an intention that the deeds were delivered unconditionally.

There are other circumstances supporting the conclusion herein reached. The deceased, an experienced businessman, died intestate. He had made no will. The turning over of the business to his son, the execution of the deed and bill of sale, his acts in providing for his daughter and widow otherwise, are consistent with his intestacy. Although the dead man's statute bars the conversations between the son and father, the record shows that they did have many conversations in the months of June and July about the subject of the son returning to take over the business. After returning to California from the June and July visit, Don O. Mohr, Jr., told the plaintiff that he was selling out in California and going back to Ponca to run the business. There is evidence that the plaintiff, Donna DeLong, knew about the deed and bill of sale on the day after the father's death and witnessed the delivery by Lura B. Mohr, the widow, of the envelope containing the deed and bill of sale. The evidence is that the plaintiff and her husband stayed in Ponca for some time, helped in running the business, billed Don O. Mohr, Jr., for their services, which he paid in the sums of $148.42 and $500.

A further analysis of the testimony is unnecessary. We come to the same conclusion as the trial court that Don O. Mohr, Sr., intended to convey this property absolutely to the defendant; and that he executed and delivered the deed and bill of sale unconditionally with an intention that they be irrevocable. The judgment of the trial court is correct and is affirmed.

AFFIRMED.

FRANK MCARDLE ET AL., APPELLANTS, V. SCHOOL DISTRICT OF OMAHA, APPELLEE.

136 N. W. 2d 422

Filed July 23, 1965. No. 35948.

1. **Estates.** Estates upon condition subsequent, which, after having become fully vested may be defeated by a breach of condition, are not favored in law.
2. **Deeds: Estates.** Conditions subsequent contained in a deed of real estate will be construed most strongly against contingent devisees and a forfeiture will not be enforced unless clearly established.
3. ———: ———. To constitute a breach of condition subsequent in a deed relating to maintenance or use of the land conveyed, there must be such neglect to comply as to indicate an intention to disregard the condition.
4. ———: ———. In such a case it is not enough to show that the letter of the condition is violated; it must appear that its true spirit and purpose have been intentionally disregarded by the grantee.
5. ———: ———. To neglect and to omit are not synonymous terms. There may be an omission to perform an act or condition which is altogether involuntary and inevitable; but neglect to perform must be either voluntary or inadvertent. To neglect is to omit by carelessness or design, not from necessity.
6. ———: ———. Where property is conveyed upon condition that it is to be used for a certain purpose and in the event it is not so used title is to revert to the grantor or his heirs, there is not a breach of condition if the property is used for the purpose designated for a long-continued period and thereafter is not so used because changed conditions over which the grantee had no control render the prescribed use impractical and ineffectual to accomplish the original purpose contemplated.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. Affirmed.

George B. Boland and A. J. Whalen, for appellants.

W. Ross King, for appellee.

Heard before WHITE, C. J., CARTER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and WESTERMARK, District Judge.

BROWER, J.

The appellants, Frank McArdle, Clarence McArdle, Lawrence McArdle, Henry McArdle, Donald McArdle, Marie Paasch, Alice Whiteaker, Henrietta McArdle, and Beverly McArdle, as plaintiffs, brought this action to quiet title in them to a tract of land approximately 12 rods square against the School District of Omaha, the defendant and appellee herein. The parties will be referred to herein as designated in the trial court. From a judgment dismissing their petition the plaintiffs have appealed.

There is little dispute concerning the pertinent facts herein. They are generally admitted by the pleadings or set out in a stipulation of the parties. Other testimony was not refuted.

The stipulation of facts set forth that in the year 1862, John McArdle, then being owner of the land involved, executed a deed to the Board of Education of School District No. 19 in Douglas County, Nebraska. Said school district was on September 8, 1958, annexed by the School District of Omaha which is now the owner of the real estate subject only to the rights, if any, of the plaintiffs. The deed of John McArdle in 1862 contained the following provision:

> "* * * and it is hereby agreed between the parties hereto that said land shall be used only and solely for the erection of a schoolhouse thereupon, to be used as such for said Township, or any Sub-division thereof which may hereafter be made of said Township, including said described land within its limits and jurisdiction, and if said Board of Education shall not, within one year from date hereof, build a schoolhouse as aforesaid, on said land, or if said Board of (or) their successors in office, shall at any time hereafter, refuse or neglect to use said premises for a schoolhouse, as aforesaid, then in either case said land shall revert to the said John McArdle,

his heirs or assigns, and this conveyance shall be null and void."

Within 1 year from the giving of said deed, a schoolhouse was built on said tract and was continuously used for a schoolhouse from that date until the month of August 1959. John McArdle, the grantor, died in Douglas County, Nebraska, July 8, 1918. The will of John McArdle was duly admitted to probate in the county court thereof. It devised the residue of his estate to Joseph McArdle, his son.

The plaintiffs are all the beneficiaries and devisees under the will of Joseph McArdle who died April 15, 1954, in Douglas County, Nebraska, and whose will was admitted to probate.

Aside from the quoted provisions in the deed of John McArdle to the Board of Education in 1862, the contents of the deed are not before us. There had been no entry upon the premises although the photographs show the schoolhouse boarded up and the premises vacant. The plaintiffs' claim rests therefore as residuary beneficiaries and devisees of Joseph McArdle who was a devisee of the grantor John McArdle.

Construction of Interstate Highway No. 280 on the east of said premises resulted in the closing of county road No. 88B, known as the Old Dodge Road, which extended in a general east and west direction immediately south of the schoolhouse. This together with the elimination of an overpass across U. S. Highway No. 30 north of the school cut off access from the north and east. It necessitated the crossing of U. S. Highway No. 30 by pupils living north thereof. It was stipulated the assistant superintendent, if called, would testify that in the 1958 and 1959 school census it showed there were 184 children in the district. Using One Hundred Fourth and Dodge Streets a short distance north of the district as the center of the district, 101 children lived in the northwest quadrant, 53 in the northeast quadrant, 26 in the southwest quadrant, and 4 in the southeast quad-

rant. Because of the analysis indicating a loss of access from the east and hazards for pupils living north of U. S. Highway No. 30 in crossing that highway to reach the school, the use of the property for school purposes was discontinued.

The trial court held in favor of the defendant, dismissed the plaintiffs' petition, and quieted title in the defendant. It gave several reasons for its ruling, some of which are unnecessary for us to discuss. It held that the school district did not "refuse" or "neglect" to use the property involved for a schoolhouse, but was compelled to discontinue the use of the property by the construction of the interstate highway which cut off access to the property. Other reasons were given which are not necessary to be discussed. It further held that the provisions of the act regarding alienation of future interest, Laws 1959, chapter 350, page 1237, now sections 76-299 to 76-2,105, R. S. Supp., 1963, were constitutional and prevented reverter or a judgment for the plaintiffs.

The plaintiffs have appealed to this court. They assign error to the trial court in holding that the school district did not refuse or neglect to use the property involved for a schoolhouse as provided for in the deed, that the discontinuance of such use resulted in a reverter, and that the act concerning alienation of future interest was constitutional.

"An estate in fee simple subject to a condition subsequent is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that upon the occurrence of a stated event the conveyor or his successor in interest shall have the power to terminate the estate so created." Ohm v. Clear Creek Drainage Dist., 153 Neb. 428, 45 N. W. 2d 117. The plaintiffs' petition alleged and both parties here assert that the provision of the deed with respect to the refusal or neglect to use the premises for a schoolhouse is a condition subsequent.

Erskine v. Board of Regents, 170 Neb. 660, 104 N. W.

2d 285, was a case construing a will which had devised land upon certain conditions with respect to the building of a fence about it with a provision for a gate, and providing that scholarships were to be provided for by the Board of Regents of the University to whom the devise had been made. Certain of these conditions had not been fully performed. This court there held: "Estates upon condition subsequent, which, after having become fully vested may be defeated by a breach of condition, are not favored in law. * * * Conditions subsequent contained in a devise of real estate will be construed most strongly against contingent devisees and a forfeiture will not be enforced unless clearly established. * * * To constitute a breach of condition subsequent in a devise relating to maintenance or use of the land conveyed, there must be such neglect to comply as to indicate an intention to disregard the condition. * * * In such a case it is not enough to show that the letter of the condition is violated; it must appear that its true spirit and purpose have been intentionally disregarded by the devisee." We think the same applies to a deed with a condition subsequent.

It is to be noted in the case before us that the clause affecting the future maintenance of the premises for a schoolhouse stated that it should revert to John McArdle or his heirs or assigns if the board or its successors should at anytime hereafter "refuse" or "neglect" to use said premises for a schoolhouse.

In Sullivan v. Omaha & C. B. St. Ry. Co., 160 Neb. 342, 70 N. W. 2d 98, this court held: "To neglect and to omit are not synonymous terms. There may be an omission to perform an act or condition which is altogether involuntary and inevitable; but neglect to perform must be either voluntary or inadvertent. To neglect is to omit by carelessness or design, not from necessity."

It is apparent from the cases we are about to review that where property is conveyed upon condition that it is to be used for a certain purpose and in the event it is

not so used title is to revert to the grantor or his heirs, there is not a breach of condition if the property is used for the purpose designated for a long-continued period and thereafter is not so used because changed conditions over which the grantee had no control render such use impractical and ineffectual to accomplish the original purpose contemplated. The case of Carey & Bro. v. City of Casper, 66 Wyo. 437, 213 P. 2d 263, was a case that was decided on the demurrer to the petition which alleged a warranty deed had been given conveying land in fee to the city on condition that the land be maintained for a city hall and public park, or the land would revert to the grantors. Modifications followed which allowed construction of a city-county building. Thereafter the city allegedly used the city hall building thereon for 20 years. It then built another elsewhere and for most of the next 7 years the city rented portions of the old building to private persons and federal agencies without disposing of the premises. The court held that the change of the use alleged did not result in the forfeiture of the title and revert to the grantor's corporate successors. It held also that the grantor should have exercised his right of reverter by reentry on the conditions quoted which was not shown. This case cites many cases in which after long use the grantors of a conditional estate had attempted to recover the premises. Among them is Cunningham v. New York Central R. Co., 114 Ind. App. 90, 48 N. E. 2d 176, where the court in its discussion stated: "Conditions subsequent, having the effect in case of a breach to defeat estates already vested, are not favored in law, and hence always receive a strict construction. Hunt v. Beeson, 1862, 18 Ind. 380; Jeffersonville, Madison & Indianapolis Railroad Company et al. v. Barbour et al., 1883, 89 Ind. 375; Sheets et al. v. Vandalia Railway Company, 1921, 74 Ind. App. 597, 127 N. E. 609, and it has been held in this state that the erection and maintenance of a depot upon the land conveyed, for a long period of years, is a

substantial compliance with such a condition. Jeffersonville, Madison & Indianapolis Railroad Company et al. v. Barbour et al. supra; Sheets et al v. Vandalia Railway Company, supra; Cleveland Cincinnati, Chicago & St. Louis Railway Company v. Cross et al., 1928, 87 Ind. App. 574, 162 N. E. 253."

O. T. Johnson Corp. v. Pacific E. Ry. Co., 19 Cal. App. 2d 306, 65 P. 2d 368, was an action for damages against the defendant railroad company for its refusal to reconvey a right-of-way of the plaintiffs' land where the agreement for the right-of-way provided that the defendant was to use the same for railroad purposes and was to commence the operation of passenger trains under an agreed schedule without the time for continuance of such passenger service stated. The defendant built the railroad and maintained passenger service as agreed for a period of 18 years. It was held the defendant was not bound to maintain passenger service perpetually, and upon the discontinuance of such service, no breach of condition arose which resulted in reversion of title to the plaintiffs.

Trego County v. Hays, 93 Kan. 829, 145 P. 847, was a case where the grantor deeded certain land and in the deed it was provided: " 'that the said county erect a building and maintain a county high school therein or revert to the original owner.' " The building was erected at a cost of $28,000 in which a high school was maintained for several years. An action was brought to compel grantors to give an unqualified deed by executing a new conveyance to the county for the high school or that the grantors and the trustees be barred from all interest in the land. The court in the cited case stated: "Hays and his wife contend that they should not have been decreed to have no interest in the property, because, if a high school should cease to be maintained upon it, it would revert to them, or their successors, by virtue of the provisions of the deed. The soundness of their contention turns upon whether the phrase

'erect and maintain a county high school therein' should be interpreted as though it read 'erect and forever maintain', giving the clause in which it occurs the effect of a provision that the title should revert to the grantor if the maintenance of a high school upon the property should cease. * * * But in the present case the language chosen, in view of the entire situation, seems rather to impose the condition that a school shall be established upon the tract, and to vest a complete title in the public upon the fulfillment of that condition. The building has been erected and the school is established and maintained, not colorably merely, but in obvious good faith as a permanent institution. A note on the general subject includes cases holding that a condition for the 'permanent' location of a school is complied with by its maintenance for a reasonable period. (Note, 44 L. R. A., n. s., 1220, 1225.) As suggested in the note referred to (p. 1221) language providing for a forfeiture of title is construed strictly against the grantor." The court held that the grantors no longer had any interest in the property conveyed.

In Brooks v. Kimball County, 127 Neb. 645, 256 N. W. 501, a warranty deed executed in 1892 provided that Kimball County should erect and maintain a courthouse on the land. In 1928 the county built a courthouse on a different site. There was no reverter clause in the deed in this case. The courthouse had been maintained from 1893 to December 1928. The action was in equity to determine the title to the real estate and although the holding turned to a great extent on the fact that there was no reverter clause in the deed, the court cited and discussed therein many cases where such clauses were contained in the conveyance and where the use of the premises had changed. Among them was Mead v. Ballard, 74 U. S. 290, 19 L. Ed. 190, where the Supreme Court of the United States held that where a grant of land provided that a certain institution of learning then incorporated should be permanently located upon the land and the

deed contained the right of reverter if it was not so used, and such permanent location was made and the building was located on the land with the intent that it should be the permanent place of conducting the business of the corporation, and where thereafter the building was destroyed by fire and the institution subsequently erected another building on another piece of land, a substantial compliance with a condition subsequent had been made.

In United States v. 1119.15 Acres of Land, Williamson County, 44 F. Supp. 449, the government condemned certain school property which had been conveyed upon a condition that it be devoted to school purposes. The court observed that there was no evidence of any imminence or likelihood of abandonment of the school until the property was condemned. It held that the use had been for school purposes without interruption for many years and the entire award on condemnation should be paid to the school trustees.

In Board of Commissioners v. Young, 59 F. 96, the court said the plaintiff ought not to recover because the forfeiture is excused when the act of the law has prevented the further use of the estate for the public purposes intended by the grantor. These lots were used for burial purposes so long as such use was permitted by law. The cessation was the direct result of the law which prohibited a longer use.

The trial court also quieted title in the defendant. The evidence shows quite clearly that the nonuse of the premises for school purposes was not due to "refusal" or to "neglect." It was due to the construction of the interstate highway and the removal of the overpass over Dodge Street, concerning which the defendant had no control. Thereafter when these changes occurred it is shown that six-sevenths of the pupils of school age in the locality could not safely cross Dodge Street and could not cross the interstate highway at all. It was with this in view that the school was closed. The school was

maintained for 97 years. The photographs of the schoolhouse indicate it is a substantial building, obviously containing room for two or three grades. It appears that only 26 students of school age which includes children who would naturally attend high school were all that were left in the area accessible to the school without risk. Considering the circumstances that affected the substantial use of the premises for a schoolhouse and schoolgrounds have been destroyed by the action of the state, we are constrained to find as the trial court found that the defendant school district did not "refuse" or "neglect" to use the property involved for a schoolhouse but was compelled to discontinue the use by the construction of the highways cutting off the access. We further find that due to the length of time since the execution of the deed and the changed condition, the reversionary clause in this deed has served its purpose and has become obsolete, and it would be inequitable to enforce it; and that the judgment of the trial court in quieting the title in the defendant was entirely justified.

We do not reach and cannot properly consider the constitutionality of the statute abolishing reverters in certain instances because it is not necessary to do so.

The judgment of the trial court is right and should be and is affirmed.

AFFIRMED.

OSGOOD-LEWIS-PERKINS, INC., A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. ALMA M. GREEN ET AL., APPELLANTS AND CROSS-APPELLEES.

137 N. W. 2d 241

Filed October 1, 1965. No. 35857.

SUPPLEMENTAL OPINION

Appeal from the district court for Richardson County: WILLIAM F. COLWELL, Judge. On motion for rehearing. See 178 Neb. 807, 135 N. W. 2d 718, for original opinion. Original opinion modified. Motion for rehearing overruled.

Otto Kotouc, Jr., William L. Walker, and Earl Ludlam, for appellants.

Wiltse, Wiltse & Lantzy and Paul P. Chaney, for appellee.

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

SMITH, J.

Upon reconsideration of that part of the judgment in which the district court quieted title in plaintiff to tracts ABCDA and EFGHE, we now conclude that title should be quieted in plaintiff subject to the interest of the United States or its privies and that the part of the district court judgment quieting title should be affirmed

as so modified. Since no one else is affected and the United States is not a party to this suit, an inquiry on remand into the boundaries of the Indian land, including accretions, for this single purpose would not be worth while. We accordingly modify our opinion filed in this case June 11, 1965 (178 Neb. 807, 135 N. W. 2d 718), but we adhere to it in all other respects.

Defendants have submitted a motion for rehearing which is directed to other issues. It is overruled.

ORIGINAL OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

LARSON CEMENT STONE CO., A CORPORATION, APPELLANT, V. REDLIM REALTY CO. ET AL., APPELLEES, IMPLEADED WITH BUSS & WELCH EXCAVATING CO., A PARTNERSHIP, ET AL., APPELLANTS.

137 N. W. 2d 241

Filed October 8, 1965. No. 35918.

1. Mortgages. It is a general rule that the cancellation of a mortgage on the record is not conclusive as to its discharge, or as to the payment of the indebtedness secured thereby. And where the holder of a senior mortgage discharges it of record, and contemporaneously therewith takes a new mortgage, he will not, in the absence of paramount equities, be held to have subordinated his security to an intervening lien.
2. ———. A mortgage is a mere security. It has no efficacy if unaccompanied by a debt or obligation.
3. ———. An instrument can only take effect as a mortgage from the time some debt or liability shall be created, or some binding contract is made, which is to be secured thereby.
4. ———. A mortgage need not be founded on a present debt. The mortgage may be given to secure future advances.
5. ———. If an owner of real estate contracts to borrow money to erect buildings thereon, and gives a mortgage upon the real estate to secure the loan, which, by agreement, is to be advanced as the buildings progress, the lien of the mortgage begins upon the recording thereof nor is the lien subrogated upon renewal to intervening lienholders.
6. ———. Under such agreement, the advancement of money is

not optional with the mortgagee, but must be advanced as the building has progressed.

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

Crawford, Garvey, Comstock & Nye, McGrath, North & Macnamara, Boyle & Hetzner, Marks, Clare, Hopkins & Rauth, Collins & Collins, and Louis T. Carnazzo, for appellants.

John W. Delehant and John E. Dean, for appellee First Federal Savings & Loan Assn.

Heard before WHITE, C. J., CARTER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and WESTERMARK, District Judge.

WESTERMARK, District Judge.

This is a foreclosure action in which the principal question is whether or not material and labor liens are entitled to priority over a renewal mortgage. The original or senior mortgage as well as the subsequent mortgage were given to secure advances to be made by the mortgagee during the progress of the construction of four apartment buildings in Omaha, Nebraska.

The district court held that the subsequent mortgage related back to the senior mortgage, and the subsequent mortgage lien was prior and superior to the material and labor liens. The plaintiff, Larson Cement Stone Company, a holder of a material lien, and certain defendant holders of material and labor liens are the appellants herein. The defendant, First Federal Savings and Loan Association of Lincoln, the holder of the mortgage, is the principal appellee.

There is no conflict as to the essential facts. One Meyer H. Feldman and Redlim Realty Company, a corporation, whose stockholders were Howard Milder and Freda B. Milder, were the owners of an unimproved tract of land in Omaha, Nebraska. On June 28, 1962, these parties executed and delivered to appellee their

note in the sum of $300,000 which was secured by a real estate mortgage on the real estate. The mortgage was recorded July 3, 1962. The note was to be paid in monthly installments of $2,210 each. The first installment was due April 1, 1963. Meyer H. Feldman conveyed his interest in the real estate to Redlim Realty Company on January 15, 1963. This deed was recorded January 21, 1963. Up to this time the construction of the buildings had progressed slowly. For the purpose of releasing Meyer H. Feldman on the original or senior note and to extend the date of the first installment from April 1, 1963, to September 1, 1963, a new note and mortgage for the same amount was executed and delivered to appellee. This note and mortgage, which will be referred to as "subsequent note and mortgage," was executed January 15, 1963, by Redlim Realty Company and by Howard Milder and Freda B. Milder as individuals. A release of the senior mortgage dated January 14, 1963, was placed of record January 18, 1963. The parties agree that the appellants supplied the first items of their respective liens before January 15, 1963, and that the liens were properly filed as provided by law. The amounts due each lienholder are not questioned. For that reason, it is unnecessary to set out in this opinion the names of the lienholders and the amounts due each. It is conceded and agreed that the appellee did not advance any money to Redlim Realty Company or pay any suppliers of material or labor before January 14, 1963, the date of the release of the senior mortgage. The first payment or advance was made by appellee on January 15, 1963.

The evidence shows that construction of the apartment buildings continued until May or June 1963, when completion was stopped because of some alleged violation of zoning and building code regulations of Omaha, Nebraska; and that the appellee advanced to Redlim Realty Company and paid to suppliers upon the written authorization of Redlim Realty Company the sum of

$187,539.65 of which $5,800 was repaid leaving a net disbursement of $181,739.65. The district court found and held that this amount plus interest was due appellee on its note and mortgage; and that the subsequent mortgage constituted a lien upon the premises with priority as of July 3, 1962, which lien is prior to the liens of the other parties.

The appellants do not question the general rule relating to the discharge of a senior mortgage which was released of record upon the acceptance of a subsequent mortgage which is set out in Hadley v. Schow, 146 Neb. 163, 18 N. W. 2d 923. It is as follows: " 'It is a general rule that the cancellation of a mortgage on the record is not conclusive as to its discharge, or as to the payment of the indebtedness secured thereby. And where the holder of a senior mortgage discharges it of record, and contemporaneously therewith takes a new mortgage, he will not, in the absence of paramount equities, be held to have subordinated his security to an intervening lien unless the circumstances of the transaction indicate this to have been his intention, or such intention upon his part is shown by extrinsic evidence.' "

The main contentions of appellants are that the senior mortgage was invalid; that the appellee having made no distribution or advance of the proceeds of the note before the release of record there was no debt to support the senior mortgage, that is, no debtor or creditor relationship was established; and that the appellee was not unconditionally required to make any advances but was given an option to make advances in the future. Because of these contentions the appellants argue that appellee had no lien under its senior mortgage and that advances made after the acceptance of the subsequent mortgage did not validate the senior mortgage nor was any lien established.

In support of the contention that there must be a valid debt to support a mortgage, appellants cite Columbus Land, Loan & Building Assn. v. Wolken, 146 Neb. 684,

21 N. W. 2d 418, 165 A. L. R. 1285, which holds: "'A mortgage is a mere security. It has no efficacy if unaccompanied by a debt or obligation. The debt is the principal thing; the land is incident. Davidson v. Cox, 11 Neb. 250.'" The case of Ginsberg v. Capitol City Wrecking Co., 300 Mich. 712, 2 N. W. 2d 892, involved the lien of a mortgage given to a loan company for the purpose of financing the building. No advance had been made. The court found that no valid lien had been created. The court held in substance that an instrument can only take effect as a mortgage or encumbrance from the time some debt or liability shall be created, or some binding contract is made, which is to be secured thereby. The facts in that case show that on the date of the mortgage the makers of the mortgage authorized the loan company to make disbursements for payment of prepaid items due the builder for the construction of a residence and the money advanced was to be charged against the loan. The court found "no money was advanced by the Lanphar company, (loan company) nor is there any evidence that the Lanphar company promised or agreed to pay the materialmen and secure by the mortgage instrument any money so disbursed."

In this case the appellee loan company agreed to make disbursements or advancements as the construction progressed. Although no advances had been made prior to the execution of the subsequent mortgage, the evidence shows that the construction on January 15, 1963, was limited to some excavating, cement block work, and furnishing of lumber and footings. There is no evidence indicating that any advances should have been made by that time.

The testimony of E. Dewey Straka, Jr., vice president and branch manager of appellee is evidence of what the agreement was relative to advances. His testimony was as follows: "Q. About how far along was the construction on January 16, 1963? A. There were portions of the excavating, block work, and some lumber on

the site. Q. Was the agreement of First Federal to disburse funds to Redlim Realty Co. as the construction progressed? A. That is correct. Q. Approximately what was your agreed draw schedule or pay out schedule with Redlim Realty Co. and Mr. Feldman? A. It would be based upon our physical inspection of the improvements to be erected. We would estimate the percentage of completion and make our disbursements accordingly. Q. Mechanically, tell the Judge how you would make payments to Mr. Milder? What was your agreement? You would pay him when a certain percentage was done, would you? A. When a certain percentage of the work was completed on the job site and inspection so indicated; then we would make our percentage loan disbursement directly to Redlim Realty Co."

It is obvious that appellee undertook and became obligated to make advances "as the construction progressed." The evidence does not support the inference that it had an option to make any or no advance. The fact that there was no present debt at the time of the execution of the senior mortgage did not invalidate that mortgage. It secured future advances. "A mortgage need not be founded on a present debt, * * *. The mortgage may be made to secure future advances * * *." 36 Am. Jur., Mortgages, § 63, p. 720. See, also, 36 Am. Jur., Mortgages, §§ 64 and 65, pp. 720 and 721.

In our opinion, the holding in Creigh Sons & Co. v. Jones, 103 Neb. 706, 173 N. W. 687, is not only applicable but controlling. The Creigh case was identical to the instant case in that mechanic lienholders were attempting to get priority against a mortgage on the theory that the lienholders had done work before any advances were made upon the mortgage. The syllabi in the case reflects the holding of this court. They are as follows: "If the owner of real estate contracts to borrow money to erect buildings thereon, and gives a mortgage upon the real estate to secure the loan, which, by agreement, is to be advanced as the buildings progress, the lien of the

mortgage begins upon the recording thereof. * * * Under such agreement, the advancement of the money is not optional with the mortgagee, but must be advanced as the building has progressed."

Although we conclude that the future advances in the present case were promised and not optional, we point out that the Legislature has fixed the priority of some optional advances at the time the mortgage is recorded. See § 76-238.01, R. S. Supp., 1963.

The district court correctly held that the subsequent mortgage was a paramount and superior lien as of July 3, 1962; and it was prior to the liens of appellants.

Two other issues were presented by the appeal. These related to certain advances made by appellee on the authorization of Redlim Realty Company for which appellee required subordination of lien agreements. However, inasmuch as this court has determined that the mortgage lien of appellee is prior and superior to the material and labor liens, it becomes and is unnecessary to discuss those issues in this opinion.

For the reasons given above the judgment of the district court was correct and hereby is affirmed.

AFFIRMED.

MARGIE BUNSELMEYER, APPELLANT, V. IVAN L. HILL, APPELLEE.

137 N. W. 2d 354

Filed October 8, 1965. No. 35944.

1. **Negligence: Pleading.** A general allegation of negligence is good against a demurrer, and under such an allegation evidence of any fact which contributed to the injury sued for is competent.
2. **Negligence: Evidence.** Where no motion for a more specific statement is filed, it is competent under the general allegation of negligence to offer evidence of any fact which contributed to the injury.
3. **Trial.** Instructions given to a jury must be construed together and if, when considered as a whole, they properly state the law that is sufficient.

4. **Trial: Witnesses.** Where the evidence is contradictory, it is for the jury to decide and its verdict will not be interfered with unless clearly wrong. The credibility of witnesses and the weight to be given their testimony are for the jury's determination, and not for the court.
5. **Trial: Evidence.** A party should not be permitted to cross-examine a witness as to a matter foreign to the scope of his direct examination. The rule of strict cross-examination has been adopted and is in force in this state.
6. ———: ———. The ruling of the trial court in regard to the scope of cross-examination will be sustained unless it is an abuse of discretion.
7. **Trial: Appeal and Error.** Violation of the strict rule of cross-examination will not be considered ground for reversal unless it clearly results in prejudice to the substantial rights of the party complaining.

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

Schrempp, Lathrop, Rosenthal, Albracht & Bruckner, for appellant.

Kennedy, Holland, DeLacy & Svoboda and David A. Svoboda, for appellee.

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

BROWER, J.

Plaintiff and appellant Margie Bunselmeyer brought this action to recover damages for personal injuries sustained in a collision between a passenger car driven by her and a pickup truck owned and operated by the defendant and appellee Ivan L. Hill.

A trial to a jury in the district court for Douglas County resulted in a verdict and judgment for the defendant. From an order overruling a motion for a new trial the plaintiff appeals.

The accident involved herein occurred on Lake Street between Thirty-seventh and Thirty-eighth Streets in Omaha, Nebraska, about 10 o'clock on the morning of January 18, 1963. Both vehicles had entered Lake Street

at its intersection with Fortieth Street and proceeded eastward thereon toward its intersection with Thirty-eighth Street, and Thirty-seventh Street still further east. Defendant's pickup was ahead of the plaintiff's automobile. In this vicinity Lake Street is 30 feet in width, paved with brick, and approximately level although west of Thirty-eighth Street it slopes down to the east. There is testimony that, on the day of the collision, the surface of the street was icy and slippery. Defendant by profession was a mason, residing at Plattsmouth, Nebraska, and was en route to the place of business of the Natural Stone Center, at 3730 Lake Street, to procure stone to finish certain work in which he was engaged. The Stone Center is located on the north side of Lake Street between Thirty-seventh and Thirty-eighth Streets about the middle of a block which is longer than the usual one. On the corner east of Thirty-eighth Street there is an open area used for parking trailers on the north side of Lake Street. This extends 64 feet east from the corner. Immediately east of the parking lot is a wall containing several types of stone, extending eastward parallel with Lake Street and 12 feet from its curb. It is 118 feet long and at its east end there is a driveway into the premises of the Stone Center with a small office building immediately to its east. The office is 274 feet west of Thirty-seventh Street.

The collision occurred when the defendant was attempting to execute a left-hand turn into the driveway west of the office building of the Stone Center. The testimony with respect to the actions of the defendant driver in preparing to turn and turning the pickup, and its course and position prior to and after the collision, is not in harmony. Likewise, the evidence in respect to the plaintiff's driving and the course of her car is in conflict.

There is testimony favorable to the plaintiff which, if given credence, tends to show the defendant failed to properly observe the car behind him and failed to give a

turn signal or cause it to be given on the pickup. Also, it may be inferred that defendant's attention was diverted by his seeking the place of entrance to the Stone Center where he had been but once. There is evidence that the defendant turned his pickup from its right-hand lane instead of directing it toward the center lane before turning. Further, there is evidence that he drove his vehicle suddenly into the path of the plaintiff's automobile while plaintiff's vehicle was engaged in passing on its left. Plaintiff, because of this sudden action, was unable to get her car back on her right-hand side of the road, or to pass on the left, or put on her brakes. She testified she tried to stop her car but it was too late.

On the other hand, there is testimony now related which, if believed, favors defendant. The pickup was proceeding at 10 or 15 miles an hour. Parked trailers obstructed defendant's view until the truck got near the west end of the wall. There he signaled for a left-hand turn with the electric signal and put his truck in second gear. Plaintiff stated she had followed behind for quite a ways. She said she noticed he was from out of town and thought "he didn't know where he was going, or something or other," nor "why he was traveling that slow," and decided to pass. There is evidence that when her car was two car-lengths behind the truck after so observing its movements, she pulled her vehicle to the north and left to see around the truck until the front of her car was about "equal" to the rear of the truck, and attempted to pass at a speed of 20 or 30 miles an hour on an icy road. The impact was near the center of the front of the car and on the left rear end and corner of the truck. After the collision plaintiff's car straddled the center of Lake Street and the defendant's truck had swung around in a semicircle and had come to rest on the north side of Lake Street parallel with and close to its curb, facing west. This might indicate the truck was struck with considerable force.

The trial court submitted to the jury the question of the negligence of the defendant and the contributory negligence of the plaintiff under the usual comparative negligence rule.

Plaintiff contends the trial court erred in submitting the issue of plaintiff's contributory negligence for the jury's consideration. Her contentions in this respect are three-pronged. She first urges that it should not have been submitted at all because no specification of any particular acts of plaintiff's negligence was pleaded in defendant's answer. The pertinent allegations in the answer were: "Further answering, defendant alleges that the said vehicular collision resulted from the negligence and contributory negligence of the plaintiff, the latter being more than slight as compared with any negligence on the part of the defendant, if any there was, but, in this connnection defendant alleges that he was free from negligence in the premises." It is to be noted that no motion was made by plaintiff to require the defendant's answer to be made more specific, definite, or certain as to the allegations of negligence. Plaintiff did not attack this pleading in any manner with respect thereto. This court has held: "A general allegation of negligence is good against a demurrer, and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant." Chicago, R. I. & P. Ry. Co. v. O'Donnell, 72 Neb. 900, 101 N. W. 1009. See, also, Omaha & R. V. Ry. Co. v. Wright, 49 Neb. 456, 68 N. W. 618; Omaha & R. V. Ry. Co. v. Crow, 54 Neb. 747, 74 N. W. 1066, 69 Am. S. R. 741. In Behrens v. Gottula, 160 Neb. 103, 69 N. W. 2d 384, it was held: "* * * where no motion for a more specific statement is filed, it is competent under the general allegation of negligence to offer evidence of any fact which contributed to the injury." This portion of the assigned error has no merit.

The second objection with respect to the trial court's instruction concerning contributory negligence relates to

the manner of its submission. Plaintiff claims the court erred in submitting the issue of contributory negligence in a general manner without limiting same to specific specifications of plaintiff's negligence and contributory negligence, thus leaving the case open to a jury finding of any act of negligence that the jury might conjecture as being negligence of plaintiff. In this respect the plaintiff objects to instructions No. 3 and No. 6. After setting out the substance of the plaintiff's petition in instruction No. 2, the court in instruction No. 3 stated the general contents of the defendant's answer by setting forth the matter in plaintiff's petition admitted by the defendant, the denials contained therein, and reciting the general language with respect to the plea of contributory negligence in substantially the same manner as heretofore related.

Instructions No. 2 and No. 3 were not to be considered by the jury as evidence but only set forth each party's contentions. This is made plain by instruction No. 4 immediately following which stated: "No. 4. The contents of the pleadings of the parties are merely their statements and contentions made in this lawsuit and are not to be considered by the jury as evidence in this case."

Instruction No. 6 explained the rules with respect to the defense of contributory negligence and that the burden to prove the same by a preponderance of evidence was on the defendant. It gave instruction with respect to the jury's duty to find for defendant if it should find by such preponderance of evidence that contributory negligence existed and was the sole proximate cause of the injury. If it found such negligence existed and was a contributing cause only, it was to compare the negligence of the parties in accordance with a subsequent instruction No. 18. No error as to the contents of this instruction is pointed out. It appears to be a standard instruction and does not purport to state the grounds of negligence of the plaintiff as shown by the evidence.

Plaintiff overlooks instructions Nos. 11, 12, and 13, in which the court set forth the rules of the road deemed by it applicable to the circumstances disclosed by the evidence. These explain the duties of the drivers of motor vehicles with respect to keeping a lookout, reasonable control of the respective vehicles, the following of one car by another, stopping, decreasing speed, appropriate signaling on turning, and many other rules, all of which are unnecessary to be discussed here because plaintiff neither contends the rules were not correctly stated therein, nor that some are included that should not have been, nor that others were improperly omitted. Obviously all of these instructions are to be construed together. Nowhere is it claimed the law contained in any of them was improperly stated. The plaintiff has picked out instructions Nos. 3 and 6 as though they were the only ones touching upon the issue of contributory negligence. "Instructions given to a jury must be construed together and if, when considered as a whole, they properly state the law that is sufficient." Carter v. Chicago, B. & Q. R. R. Co., 175 Neb. 188, 121 N. W. 2d 44. When the instructions are considered together the plaintiff's contention cannot be sustained.

The plaintiff's third claim of error in respect to the submission of contributory negligence appears to be that there was no evidence sufficient to sustain the issue. The testimony disclosed in the record has been previously outlined. We have pointed out that which seems to sustain the defendant's contention. We think it is sufficient if given credence by the jury to show negligence on the part of the plaintiff. It might conclude therefrom that in driving her car back of the truck, plaintiff should have seen the signal given; that she did not maintain a proper lookout; or when following too closely she attempted to pass at an unreasonable rate of speed considering the icy street; and that she did not have proper control of her automobile at the time she attempted to pass the truck. Inferences might also arise

from the damage to the front of the plaintiff's automobile and its location, as well as that of the truck, after the accident. The fact that the investigating officer who testified reported it was a rear-end collision has some significance. "Where the evidence is contradictory, it is for the jury to decide and its verdict will not be interfered with unless clearly wrong. The credibility of witnesses and the weight to be given their testimony are for the jury's determination and not for the court." Sall v. Schnackenberg, 178 Neb. 699, 134 N. W. 2d 808. See, also, Klein v. Wilson, 167 Neb. 779, 94 N. W. 2d 672. Can it be said there was no evidence of contributory negligence to submit that issue? We think not.

Plaintiff's last assignment of error relates to the trial court's sustaining objections to certain questions asked on cross-examination of the defendant with respect to matters the plaintiff contends were testified to by the defendant on direct examination. The questions propounded, the objections thereto, and the ruling of the trial court will now be quoted:

"Q. (By Mr. Schrempp) Had you stopped anywhere at all before the accident happened to inquire as to where the location was of the place that you were looking for?

"MR. SVOBODA: Objected to as outside the scope of the direct examination; immaterial, irrelevant, incompetent.

"THE COURT: Sustained.

"MR. SCHREMPP: Well, Your Honor, Mr. Svoboda covered the witness's activities in searching for this place. I would ask leave to ask if he made some inquiry some place, and if so, where it was. I think it is within the scope of the direct.

"THE COURT: Objection sustained.

"Q. (By Mr. Schrempp) Had you stopped in any place to inquire—had you stopped in any place before the accident that served any intoxicating beverage?

"MR. SVOBODA: Objection, outside the scope of

direct; immaterial, irrelevant, incompetent.

"THE COURT: Sustained."

The defendant had testified he had come to Omaha to get a stonecutter. He went to the Sunderland Stone Company for that purpose and did not get one. He testified the next place he was going was to the Stone Center for the same purpose.

No issue had been raised nor testimony given concerning the defendant's intoxication or his drinking. The cross-examination would seem an attempt to raise this question by indirect insinuation. Defendant was not asked if he had been drinking but whether or not he had stopped at a place that served liquors. The matters of substance material and relevant to the issues of the case concern the conduct of the drivers of the automobile and truck between Fortieth Street and the business place of the Stone Center. What happened before could not be very material to the issues. Plaintiff claims she should have been permitted to ask these questions to test defendant's memory and credibility. His actions before reaching the Stone Center, it is true, had been testified to briefly. Plaintiff insists therefore she should be permitted to cross-examine with respect to them. Plaintiff relies on a quotation from Zimmerman v. Lindblad, 154 Neb. 453, 48 N. W. 2d 415. This case, while it states the general rule that a party has no right to cross-examine a witness except as to facts and circumstances testified about on direct examination, contains language that there might be certain exceptions to the rule permitting a witness to be cross-examined to test his accuracy, veracity, or credibility. An examination of that case clearly shows that the cross-examination sought to be elicited covered subjects at issue and sought to refute inferences which arose from examination-in-chief. The cross-examination had been permitted and the case was affirmed by this court.

In Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701, this court held: "The trial court in this instance strictly ob-

served and properly applied the rule of practice that a party should not be permitted to cross-examine a witness as to a matter foreign to the scope of his direct examination. If he desires to inquire of him as to other matters he must make the witness his own, calling him in the subsequent progress of the case. The rule of strict cross-examination has been adopted and is in force in this state. The ruling of the trial court in regard to the scope of cross-examination will be sustained unless it is an abuse of discretion."

In Goemann v. State, 100 Neb. 772, 161 N. W. 421, this court stated: "The scope of the cross-examination of a witness rests largely in the trial court, and its ruling will be upheld, unless an abuse of discretion is shown."

In the case of Manley State Bank v. Spangler, 130 Neb. 196, 264 N. W. 459, this court in its syllabus stated: " 'Under section 20-853, Comp. St. 1929 (now § 25-853, R. R. S. 1943), violation of the strict rule of cross-examination will not be considered ground for reversal unless it clearly results in prejudice to the substantial rights of the party complaining.' Brooks v. Thayer County, 126 Neb. 610, 254 N. W. 413."

Regardless of testimony-in-chief concerning defendant's movements previous to his entering Lake Street, can it be said that the exclusion on cross-examination of the questions elicited from the defendant as to where he had stopped, or whether he had made inquiry as to how to go to the Stone Center, clearly resulted in prejudice to the plaintiff? We think not.

None of the alleged errors complained of can be sustained, and the judgment of the trial court and its order overruling the motion for new trial should be and are affirmed.

AFFIRMED.

CHRYSTEL A. FISHER, APPELLANT, V. JOHN J. PEDEN ET AL., APPELLEES.
137 N. W. 2d 349

Filed October 8, 1965. No. 35955.

1. **Partition: Estates.** Where there is an outstanding life estate, a remainderman cannot maintain an action for partition of real estate over the objection of the holder of the life estate.
2. **Homesteads: Estates.** A homestead life estate may be conveyed and the grantee of such life estate has a life estate in the property during the life of the original grantor.
3. ———: ———. Ordinarily the homestead rights incidental to a homestead life estate are waived and terminated by the transfer of the homestead property, and the grantee takes an ordinary life estate divested of the homestead rights of the original grantor.
4. **Estates.** To constitute a merger of title it is necessary that the two estates be in one and the same person, at one and the same time, and in one and the same right.
5. **Homesteads: Estates.** An election of the owner of a homestead life estate to partition the premises subject to the life estate constitutes a forfeiture of the life estate, as provided by section 40-117, R. R. S. 1943, but such statute does not by analogy provide that the conveyance of such life estate constitutes an election to partition the life estate.

Appeal from the district court for Dawson County: WILLIAM F. COLWELL, Judge. Affirmed.

Murphy, Pederson & Piccolo, for appellant.

Smith Brothers, for appellees.

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

CARTER, J.

This is a suit for the partition of a quarter section of land in Dawson County, more specifically described in the judgment of the trial court. The trial court found that there was a life estate in existence in the land and that the owner thereof objected to its partition. The petition was thereupon dismissed. Plaintiff has appealed.

The evidence shows that William S. Peden died in-

testate on December 22, 1959, seized of the quarter section of land here involved. He was survived by his wife, Emily L. Peden, and two adult children, John J. Peden and Chrystel A. Fisher. The land descended in accordance with the intestacy laws of this state, an undivided one-third interest in Emily L. Peden, John J. Peden, and Chrystel A. Fisher, subject to the life estate of Emily L. Peden. Emily L. Peden and William S. Peden had lived on the land for many years prior to the latter's death. Emily L. Peden continued thereafter to live on the land and was residing on it at the time this suit was brought. The land was farmed by John J. Peden, who paid the landlord's share of the crop each year to Emily L. Peden.

On April 14, 1961, Emily L. Peden executed a warranty deed to the land to John J. Peden, Lucille M. Peden, and Emily L. Peden as joint tenants and not as tenants in common with rights of survivorship. After describing the land the deed provided: "* * * together with all the tenements, hereditaments and appurtenances to the same belonging, and all the estate, title, dower, right of homestead, claim or demand whatsoever of the said grantor, of, in or to the same, or any part thereof, subject to taxes of record. It being the intention of all parties hereto, that in the event of the death of either of said grantees, the entire fee simple title to the real estate described herein shall vest in the surviving grantee."

It is the contention of the plaintiff that the aforesaid deed has the effect of terminating the life estate of Emily L. Peden. In a discussion of this question we point out at the outset that there has been no forfeiture of the homestead life estate of Emily L. Peden, as provided by section 40-117, R. R. S. 1943. The primary question is whether or not such life estate was terminated by the deed.

It is a fundamental rule of law in this state that when there is an outstanding life estate, a remainderman can-

not maintain an action for partition of real estate over the objection of the holder of the life estate. Weddingfeld v. Weddingfeld, 109 Neb. 729, 192 N. W. 227; Bartels v. Seefus, 132 Neb. 841, 273 N. W. 485; Bodeman v. Cary, 152 Neb. 506, 41 N. W. 2d 797.

In this state, a homestead life estate may be conveyed to another person, and such conveyance neither destroys nor terminates such life estate and the grantee of said homestead life estate has a life estate in the property during the life of the original grantor. Naiman v. Bohlmeyer, 97 Neb. 551, 150 N. W. 829; Moffitt v. Reed, 124 Neb. 410, 246 N. W. 853; McManus v. Farrell, 130 Neb. 69, 264 N. W. 144. In the last-cited case the plaintiff relies heavily on the following from that opinion: "It is also true that the homestead rights may be waived, and are extinguished by transfer of the homestead property." We point out that a homestead life estate may be conveyed by the life tenant. While the grantee thereafter has a life estate in the property during the life of the original life tenant, its incidents are those of the ordinary life estate. The conveyance of the homestead life estate divests it of those qualities that grow out of the homestead rights of the homestead life tenant. The quoted language from the McManus case sustains this point and does not hold that the life estate itself is terminated or destroyed by the conveyance. This is made abundantly clear in the Naiman case as follows: "The land having been the homestead of Mr. Naiman was not subject to his debts. The deed from Mrs. Koch (nee Mrs. Naiman) and her husband to Mr. Bohlmeyer would be effectual to transfer the life estate of Mrs. Koch to Mr. Bohlmeyer, and ineffectual for any other purpose."

The contention of the plaintiff is that the deed by Emily L. Peden conveying her life estate to herself, her son John, and her son's wife in joint tenancy, extinguished the life tenancy. This could occur in case of a merger of the life estate and the remainder interest.

But in the instant case there can be no merger of title because the plaintiff has acquired no interest in the life estate and Lucille M. Peden had no remainder interest prior to the giving of the deed. Under such a situation there can be no merger of the life estate and remainder interest. The general rule is: "To constitute a merger, it is necessary that the two estates be in one and the same person, at one and the same time, and in one and the same right." 19 Am. Jur., Estates, § 135, p. 588. See, also, Moffitt v. Reed, *supra*.

Since there was no merger of title there is an existing life estate. It makes no difference whether the life estate is in Emily L. Peden or John J. Peden, Lucille M. Peden, and Emily L. Peden as joint tenants, a partition cannot be had over the objection of the owners of the life estate.

It is the contention of the plaintiff that even though the life estate of a surviving spouse may be freely conveyed or encumbered, the adoption of section 40-117, R. R. S. 1943, creates a limited or conditional life estate dependent upon the acts of the surviving spouse, and an election of such spouse to transfer or partition the land results in the termination of the life estate at the instant the spouse filed his petition for partition or transfers the title to it. It is true, of course, that the filing of a petition for partition by the holder of a life estate terminates the life estate and the homestead premises descend as other real estate of the deceased, all in accordance with section 40-117, R. R. S. 1943. In Metzger v. Metzger, 108 Neb. 613, 188 N. W. 229, this court said: "The right of homestead rests purely upon statutory provisions, and is held subject to such conditions and limitations as the legislature may impose. By the act in question it is clear that the legislature intended that, when the surviving spouse elects to partition the homestead premises, the homestead right becomes thereby forfeited, and the premises descend as other real property of which the deceased died seized."

It is by statute that the life estate is lost when the life tenant elects to partition the homestead premises.

But the statute, section 40-117, R. R. S. 1943, does not provide that a life estate is forfeited or terminated by a conveyance of the property. Plaintiff's counsel argues rather ingeniously that the rule is the same when the life tenant elects to convey as when he elects to partition the land. The result of an election by the life tenant to partition the real estate is specifically fixed by section 40-117, R. R. S. 1943, but his right to convey or mortgage his life estate to another without terminating the life estate remains unfettered. The Legislature specifically provided in section 40-117, R. R. S. 1943, when a life estate is or may be terminated. The conveyance of the real property covered by the life estate is not one of them. The conveyance of a life estate is not an election to partition as plaintiff contends.

If the Legislature had intended that a homestead life estate would terminate upon its conveyance by the original life tenant, it would have been a simple matter to have so provided. It must be presumed that the exclusion of the conveyance of the homestead life estate as a ground of forfeiture intended that such a conveyance does not amount to a forfeiture. The plaintiff's counsel does not cite any cases, domestic or foreign, that support the contention that is here advanced. We conclude that a conveyance of a homestead life estate does not terminate or destroy the life estate. We think Naiman v. Bohlmeyer, *supra*, supports this view.

We conclude as did the trial court that there was an outstanding life estate in the land sought to be partitioned. Since the holder or holders of the life estate have objected to the action for partition, the judgment of the trial court dismissing the petition is correct. The judgment of the district court is affirmed.

AFFIRMED.

ORIN SHULTZ, APPELLANT, V. MAURICE SIGLER, APPELLEE.
137 N. W. 2d 352

Filed October 8, 1965. No. 36082.

1. **Criminal Law.** In the sentencing of a defendant after conviction of a criminal offense, the words "consecutive into the sentences defendant is now serving" mean consecutive to the sentences defendant is now serving.
2. ———. The use of the word "into" in such a criminal sentence does not create an ambiguity from which the term of the sentence cannot be determined.
3. **Habeas Corpus.** Where a petition for habeas corpus shows on its face as a matter of law that petitioner is not entitled to the issuance of a writ, it is proper for the trial court to so find and dismiss the petition.

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

Orin Shultz pro se.

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

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

CARTER, J.

This proceeding was commenced on March 29, 1965, by Orin Shultz for the purpose of obtaining a writ of habeas corpus. The trial court held that the petition does not state facts sufficient to require the issuance of the writ of habeas corpus and does not state a cause of action. The petition was thereupon dismissed and plaintiff has appealed.

The petition alleges that plaintiff is confined in the State Penitentiary, that the sentence or sentences by which he was confined have terminated, and that plaintiff is illegally detained. In this connection the petition shows that plaintiff was convicted of robbery on November 6, 1953, and sentenced to serve 8 years imprisonment; that on March 11, 1955, plaintiff was convicted of attempted escape and sentenced to serve 5 years imprison-

ment to be served consecutive to his previous sentence; that on August 1, 1955, plaintiff was convicted of attempted escape and sentenced to serve 1 year imprisonment to be served consecutive to his previous sentences; and on March 8, 1956, plaintiff was convicted of second degree arson and sentenced to 7 years imprisonment to be served "consecutive into the sentences defendant is now serving."

It is the contention of the plaintiff that his sentence imposed on March 8, 1956, under the foregoing language, was to be served concurrently with the previous sentences, in which event his imprisonment under any or all sentences terminated in February 1965.

For the purpose of this appeal we accept the facts alleged in the petition as true in determining if the petition stated a cause of action. The only issue is whether or not the sentence of March 8, 1956, imposing a sentence of 7 years imprisonment to be served "consecutive into the sentences defendant is now serving," is a concurrent or consecutive sentence.

We are of the opinion that the words "consecutive into the sentences defendant is now serving" mean that the imposed criminal sentence is to be consecutive to the sentences defendant is serving. In determining if the sentence is consecutive or concurrent, the controlling word in the sentence is "consecutive" and not "into." The intent of the sentence of the court is clearly manifested by the use of the word "consecutive." The alleged ambiguity in the sentence is more apparent than real and involves no problem in determining its true meaning. There are no modifying words to give it any other meaning. Even in criminal cases, this court will not depart from the true meaning of language in favor of a questionable one requiring a strained interpretation.

The only case which has come to our attention which tends to support the position of the petitioner is Bledsoe v. Johnston, 154 F. 2d 458. In that case the court held the words "consecutive with" to be too ambiguous to

constitute a valid judgment. While we think the logic of that case lacks something to be desired, it is not authority for plaintiff's contention in the instant case. The Bledsoe case does not appear to have been followed in subsequent federal cases; in fact, it appears to have been rejected in Henry v. Madigan, 241 F. 2d 659, and Butterfield v. Wilkinson, 215 F. 2d 320. Under these circumstances we find nothing in the Bledsoe case that is contrary to our holding in the case before us.

For the foregoing reasons we hold that plaintiff's petition shows on its face that the sentence of March 8, 1956, was consecutive to the sentences then being served and that the trial court did not err in finding as a matter of law that plaintiff's petition did not state a cause of action.

AFFIRMED.

WILLIAM NOWNES, APPELLEE, V. HILLSIDE LOUNGE, INC., A CORPORATION, APPELLANT.
137 N. W. 2d 361

Filed October 15, 1965. No. 35952.

1. **Negligence. Where the thing which causes injury is shown to be under the control and management of the defendant and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of proper care.**
2. **———. It is the duty of the operator of a bar to use due care to keep the premises and facilities of the bar reasonably safe for the purpose for which they are to be used by its customers.**

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

Gaines, Spittler, Neely, Otis & Moore and Daniel G. Dolan, for appellant.

Schrempp, Lathrop, Rosenthal, Albracht & Bruckner, for appellee.

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

BOSLAUGH, J.

This is an action for damages brought by William Nownes as plaintiff against Hillside Lounge, Inc., the defendant. The jury returned a verdict for the plaintiff in the amount of $6,000. The defendant's motion for new trial was overruled and it has appealed.

The defendant operates a bar known as the Hillside Lounge at Eightieth and Blondo Streets in Omaha, Nebraska. The plaintiff is a carpenter, 36 years of age. On October 25, 1961, the plaintiff entered the Hillside Lounge, sat down on a stool at the bar, and ordered a bottle of beer. When the plaintiff first sat on the stool he noticed that it had a "slight wiggle" and that the entire stool seemed to move. At first he leaned forward and rested his elbows on the cushion railing of the bar. After he had been served and had taken two swallows of beer, he shifted his weight to the back, the stool tipped over, and he was thrown to the floor and injured.

The bar stool consisted of a seat supported by a cylindrical column that was bolted to a metal plate. The metal plate was 5 inches square and was fastened to the floor of the building by concrete nails or fasteners which were approximately ¼ inch in diameter and 1½ inches long. The floor was constructed of concrete covered with asphalt tile.

The stool tipped over because the plate came loose from the floor. After the accident, two of the fasteners were protruding from the plate. The concrete floor had flaked away where the stool had been installed and there were holes in the concrete where the fasteners had been inserted.

The plaintiff did not allege or prove specific acts of negligence but relied upon the doctrine of res ipsa

loquitur. Where the thing which causes injury is shown to be under the control and management of the defendant and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of proper care. Sober v. Smith, *ante* p. 74, 136 N. W. 2d 372.

The defendant contends that the doctrine of res ipsa loquitur is not applicable in this case and that the trial court should not have submitted the case to the jury upon that basis. The defendant argues that the doctrine is not applicable where the evidence establishes why, as well as how, the accident occurred; that the defendant is not liable for latent or concealed defects which are the result of ordinary wear and tear; and that the defendant is not liable for the negligence of an independent contractor who installed the stools for the defendant.

The evidence in this case shows that the accident occurred because the plate which was fastened to the floor became loose. There are many reasons why the plate may have become loose. The defendant had an opportunity to explain why the accident happened if he was able to do so.

The bar stool which caused the injury in this case was under the exclusive control and management of the defendant. If the defendant had exercised proper care, the stool would not have come loose from the floor while a customer was using it. Rose v. Melody Lane, 39 Cal. 2d 481, 247 P. 2d 335. We believe that the doctrine of res ipsa loquitur is applicable and in the absence of an explanation from the defendant, the facts permit an inference of negligence on the part of the defendant.

The evidence does not support the defendant's theory that the defect was latent or concealed and the result of ordinary wear and tear. The stools had been installed 3 or 4 days before the bar opened on September 18, 1961.

When the plaintiff sat down he noticed that the stool seemed to be loose. The defendant's manager testified that he had inspected the premises at the time the installation of the fixtures was completed, but that there was no reason for him to inspect the stools after that because he had not had any trouble with them.

The bar stools were installed by the Griswold Fixture Company. The evidence does not establish, as a matter of law, whether the fixture company was an independent contractor. The defendant could not escape liability by employing an independent contractor to make a defective installation of the bar stool. It was the duty of the defendant to keep the premises and facilities of the bar reasonably safe for the purposes for which they were to be used by its customers. Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N. W. 2d 224. Liability arises from the failure to exercise reasonable care and prudence in that regard. See Doyle v. Franek, 82 Neb. 606, 118 N. W. 468.

By instruction No. 17 the jury was advised that if a prior injury or infirm condition of the plaintiff had become dormant or static and was aggravated or activated by the negligence of the defendant, the defendant would be liable for the whole of such result. The defendant contends that this instruction was erroneous because the evidence failed to establish with reasonable certainty that the plaintiff had sustained a permanent injury, and the jury was not required to reduce damages for loss of future earnings to their present value.

The plaintiff did not allege or prove a loss of future earnings and the trial court did not instruct the jury in reference to a loss of future earnings. It was unnecessary for the trial court to advise the jury that damages for loss of future earnings should be reduced to their present value.

The plaintiff has a history of back injuries. In 1953, the plaintiff fell from a truck while unloading lime. He again injured his back in 1954 and 1957. In 1957, a

laminectomy was performed and the fourth lumbar disk was removed. The plaintiff testified that he made a satisfactory recovery from the 1957 surgery and did not have further trouble with his back until he fell at the defendant's bar in October 1961.

A second lumbar laminectomy was performed in January 1962. At that time dense scar tissue was found in the area of the fourth interspace. The scar tissue and some bone fragments were removed in the second operation. Dr. William Weingarten who performed both operations testified by deposition that the scar tissue was a result of the recent injury and the previous surgery. Dr. Weingarten further testified that he examined the plaintiff in April 1962; that the plaintiff was then having difficulty with his back but was attempting to return to work; that he thought that the plaintiff's eventual permanent disability would be approximately 20 percent; and that the accident at the defendant's bar in October 1961 caused further and more serious damage to the plaintiff's back.

Although the plaintiff had permanently injured his back previous to 1961, the evidence shows that the plaintiff was not disabled at the time of the accident at the defendant's bar in October 1961. The evidence further shows with reasonable certainty that the plaintiff sustained a permanent injury as a result of the accident in October 1961. We conclude that instruction No. 17 was not erroneous. See 15 Am. Jur., Damages, § 81, p. 490.

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

AFFIRMED.

LAVERN BENDER ET AL., APPELLANTS, V. MARY S. FUCHS, APPELLEE.
137 N. W. 2d 364

Filed October 15, 1965. No. 35964.

1. **Partition: Judgments.** A judgment in partition determines the title of the joint tenants or tenants in common and fixes their respective shares and, when reduced to a judgment that is not appealed from, is a final judgment as in any other civil action.
2. ———: ———. The title determined by a partition judgment which has become final is presumptive evidence of title in all cases, and as between the parties it is conclusive evidence of title.
3. **Partition: Estoppel.** A party to a partition action who has been properly served with process and raises no issue of title is estopped by judgment from subsequently asserting ownership of the partitioned premises by adverse possession.
4. **Partition: Estates.** The words "subject, however, to be defeated by proof of a title paramount to, or independent of, that under which the parties held as joint tenants or tenants in common," contained in section 25-21,107, R. R. S. 1943, mean that a judgment in partition may be defeated by a title paramount to the rights of the joint tenants or tenants in common in the hands of a third person or by such a paramount title acquired by a party to the partition proceeding after the judgment became final.
5. **Partition: Estoppel.** A party to a partition judgment who has acquiesced therein and accepted his share of the partitioned estate is estopped from questioning the title of the purchaser of the partitioned property as described and determined by the court.

Appeal from the district court for Platte County: ROBERT D. FLORY, Judge. Reversed and remanded with directions.

Byron Reed, for appellants.

Walter, Albert, Leininger & Grant, for appellee.

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

CARTER, J.

This is a suit to quiet title to an irregular tract of land along the east side of the east half of the north-

west quarter of Section 27, Township 20 North, Range 1 West of the 6th P.M., Platte County, Nebraska, containing 4.756 acres. The tract is described in the petition by metes and bounds, and for the purposes of this opinion will be referred to as the tract of land. The defendant asserted in her answer that she had obtained title to the tract by adverse possession. The trial court found for the defendant and quieted title in her to the disputed tract. The plaintiffs have appealed.

The plaintiffs are the owners of the east half of the northwest quarter of Section 27 and the defendant is the owner of the northeast quarter of Section 27, the respective lands having a common boundary between them. On or about March 13, 1959, a petition to partition the east half of the northwest quarter of Section 27 was filed, resulting in a partition sale. Plaintiffs were the successful bidders at the sale and a referee's deed was duly issued to plaintiffs on June 20, 1959. Mary Fuchs, the defendant herein, had a 1/30 interest in the land, was made a party defendant in the partition suit, was served with summons, made a general appearance but filed no answer, was present at the partition sale and made no objection thereto, and received her share of the sale price. The land was described in the referee's deed as "the East Half of the Northwest Quarter (E½ NW¼) of Section Twenty-seven (27), Township Twenty (20) North, Range One (1) West of the 6th P.M., Platte County, Nebraska." It is the contention of the plaintiffs that they purchased 80 acres of land according to government survey, which would include the tract giving rise to this litigation.

The defendant asserts that she is the owner of the disputed tract by adverse possession; that she has had open, notorious, and exclusive possession for more than 10 years prior to the commencement of the partition action. Plaintiffs contend that defendant is estopped to assert adverse possession by having failed to raise the issue in the partition suit to which she was a party.

Failing this, the defendant then contends there can be no estoppel where the parties have equal knowledge of the facts, which the defendant contends is the situation here.

The effect of the partition judgment is of primary concern in this case. Section 25-21,106, R. R. S. 1943, provides: "The defendants may be served in the same manner as in ordinary civil action by summons, or by publication as provided in this code, and when all the parties in interest have been duly served, any of the proceedings herein prescribed shall be binding and conclusive upon them all. If only a portion of such parties be served, they only shall be bound by such proceedings." The defendant in the instant case was served with summons, made a general appearance, and filed no pleading claiming any interest in the land other than that alleged in the petition for partition. It would appear that under the foregoing section of the statute defendant is bound by the judgment in the partition action and that she could not now raise an issue of title which existed at that time.

It is the contention of defendant that she was not obliged to assert title to the tract of land here involved in the partition action by virtue of section 25-21,107, R. R. S. 1943, which provides: "The judgment of partition shall be presumptive evidence of title in all cases, and as between the parties themselves it is conclusive evidence thereof, subject, however, to be defeated by proof of a title paramount to, or independent of, that under which the parties held as joint tenants or tenants in common." The question immediately arises as to the meaning of the words "subject, however, to be defeated by proof of a title paramount to, or independent of, that under which the parties held as joint tenants or tenants in common."

Section 25-21,106, R. R. S. 1943, provides that when all the parties in interest have been served by summons or by publication as in ordinary civil actions, the pro-

ceedings prescribed shall be binding and conclusive upon them all. Section 25-21,107, R. R. S. 1943, provides that a judgment of partition shall be presumptive evidence of title in all cases, and as between the parties themselves it is conclusive evidence thereof.

A text writer states the rule as follows: "The rule that a judgment is conclusive upon all the issues determined by it, is not less applicable to judgments in partition than to judgments in any other form or kind of action. One of the issues which such a judgment ordinarily determines is, that the parties were in possession of the property, holding it as cotenants. Hence, a party to a partition suit is estopped from showing that at the time of the partition he was holding any part of the premises in severalty adversely to his cotenants, or that the petitioner had no interest in the property." Freeman on Cotenancy & Partition, § 530, p. 642.

In Staats v. Wilson, 76 Neb. 204, 107 N. W. 230, 124 Am. S. R. 806, the court in dealing with a contention that a judgment in partition proceedings is not final, quoted Laws 1866, Title 26, section 839 (now § 25-21,106, R. R. S. 1943), and stated: "This language is so plain that no judicial interpretation is required." In holding that plaintiffs were estopped by the judgment in partition, the court in the syllabus said: "The judgment of the court, unappealed from, in a suit for partition of real estate, fixing the shares of the interested parties and making partition of the land, is final, and the parties thereto are estopped from claiming a greater interest, even though the proceedings of the court were irregular and the shares of the parties determined according to the provisions of an unconstitutional act of the legislature."

The foregoing rule appears to have been followed in Baskins v. Krepcik, 153 Neb. 36, 43 N. W. 2d 624, wherein it is said: "The partition statute requires that the petition allege the several interests and estates of the several owners of the property and if it is supposed there are any interests unknown, contingent, or doubt-

ful, the facts in reference thereto shall be set out. All persons having any interest contingent or otherwise must be parties and the proceeds of the property so situated are subject to the order of the court until the right becomes vested. When the shares and interests are settled, judgment shall be rendered confirming them and making partition accordingly either in kind or by sale to prevent prejudice to the owners, and when jurisdiction of the parties in interest exists, the proceedings are conclusive upon all of them."

We are of the opinion that the judgment of the court, unappealed from, in a suit for the partition of real estate, determining the title and fixing the shares of interested parties and making partition of the land, is final, and the parties thereto are estopped from asserting a greater interest than that found to exist at the time of the partition proceedings. In other words, a party to a suit for partition, holding an interest as a joint tenant or a tenant in common, is estopped to claim a right by adverse possession in a subsequent action against his cotenants or a purchaser at the partition sale.

Defendant contends, however, that estoppel does not apply unless adverse possession was an issue actually determined in the partition suit. The rule contended for is too narrow. The rule is that an estoppel applies to any claim of interest or title which was or could have been raised in the partition action. Atchison & N. R.R. Co. v. Boerner, 34 Neb. 240, 51 N. W. 842, 33 Am. S. R. 637; Burnett v. Central Nebraska Public Power & Irr. Dist., 147 Neb. 458, 23 N. W. 2d 661. While no issue of adverse possession was litigated in the partition case, the title and interest of the cotenants, including that of the defendant in the real estate sought to be partitioned, was litigated. Her failure to assert any right of adverse possession against the cotenants estops her from asserting it in a subsequent action.

Defendant contends that section 25-21,107, R. R. S. 1943, permits her to assert her claim of adverse posses-

sion. The language of the statute relied upon is: "* * * subject, however, to be defeated by proof of a title paramount to, or independent of, that under which the parties held as joint tenants or tenants in common." The interpretation of this language appears to be one of first impression in this state, even though we held in Staats v. Wilson, *supra,* that a homestead right not asserted in the partition action by the homestead owner, who was a party thereto, was barred by estoppel from asserting it.

We think the quoted language in the preceding paragraph means that a judgment in partition may be defeated by a title paramount to that of the joint tenants or tenants in common in the hands of a third person or a paramount title afterwards acquired by a party to the partition suit. The language of the complete section does not relieve a party to a partition suit from asserting any title he may have in the land being partitioned; nor does it relieve him from an estoppel by judgment from asserting any title or interest in the lands in the partition suit to which he is a party.

The defendant asserts that plaintiffs purchased the land after an inspection of the property and that they had no right to rely on the government survey of the premises because they could see that the line fence was not on the government survey line. It is true that the plaintiff LaVern Bender walked over the land and observed that the fence boundary was not straight and therefore not on the true line. He also testified that he assumed the tract he was buying contained 80 acres in accordance with the government survey as decribed in the petition and judgment in the partition action. We think he had a right to assume this as against any party to the action. Since we have found that defendant is estopped to assert adverse possession, she as a party to the partition suit will not be permitted to question the description of the land as contained in the petition for partition.

Although the doctrine of implied warranties between cotenants in a partition action existing at common law has been abandoned generally in this country and replaced with the principles of equity, they would seem to have application here as a matter of equity. Under the common-law rule in partition there was an implied warranty between cotenants and a consequent estoppel to assert claims of title by one cotenant against the others after a judgment in partition. It would seem to us that this principle of the common law applied in the law action for partition ought to be applied as a guideline to equity in arriving at a just result in the instant case. If this be sound reasoning, and we think it is, we can see no reason why the purchaser at a partition sale is not entitled to the benefit of the warranties of title that each cotenant has with the others. Under such reasoning the cotenants, and each of them, have warranted the title to the lands sought to be partitioned after judgment is entered and has become final. And inasmuch as a warrantor cannot claim against his own warranty, no tenant after partition can set up an adverse title to that of another which has been apportioned to him.

We fail to see how defendant is entitled to any relief in equity under these circumstances. The petition alleged that the land to be partitioned was the east half of the northwest quarter of Section 27 and that she had a 1/30 interest therein. The question of title was involved and she failed to assert adverse possession against her cotenants. She stood by in silence when the land was sold pursuant to the government survey. She stood silently by when plaintiffs took possession under their referee's deed. She accepted her share of the proceeds to which she was entitled under the judgment of partition. She knew the terms of the purchase and the share of the purchase money to which she was entitled, which she accepted. As we said in the early case of Wamsley v. Crook, 3 Neb. 344: "And the receipt and

acceptance of the purchase money, was an affirmation that the title had passed to Hall, the purchaser, by virtue of the deed from Crook to him. It is a well settled rule of law that one cannot be permitted to receive both the purchase money and the land. And the application of this principle of estoppel 'does not depend upon any supposed distinction between a void and voidable sale. The receipt of the money, with the knowledge that the purchaser is paying it upon an understanding that he is purchasing a good title, touches the conscience and therefore binds the rights of the party in one case as well as in the other;' * * *."

For the reasons stated, the judgment of the district court is reversed and the cause remanded with directions to enter judgment for the plaintiffs in accordance with their petition.

REVERSED AND REMANDED WITH DIRECTIONS.

FRANK H. GIBSON, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. OMAHA COFFEE COMPANY, A CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS.

137 N. W. 2d 701

Filed October 29, 1965. No. 35793.

1. **Trial.** In determining the sufficiency of the evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it.
2. **Trial: Evidence.** The jury is the sole judge on all fact questions. To justify this court in interfering with the findings of a jury on a fact question, the preponderance of the evidence must be so clearly and obviously contrary to the findings that it is the duty of the reviewing court to correct the mistake.
3. **Conspiracy.** An action of conspiracy sounds essentially in tort. The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental

action coupled with an intent to commit the act which results in injury. Without the scienter persons cannot conspire.

4. **Contracts.** Any person may do business with whomsoever he desires. Also, he may refuse business relations with any person whomsoever.
5. **Torts.** One who causes intended or unintended harm to another by refusing to continue a business relation with him, terminable at his will, is not liable for that harm.
6. **Good Will.** The good will connected with the establishment of any particular trade or occupation may be the subject of barter and sale. It is a valuable right, and if it be unlawfully destroyed or taken away, the law will award compensation to the injured party.
7. **Torts.** For harm resulting to a third person from the tortious conduct of another, a person is liable if he (a) orders or induces such conduct, knowing of the conditions under which the act is done or intending the consequences which ensue, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.
8. **Conspiracy.** The conspiracy was one to take plaintiff's business. Therefore the means adopted were unlawful. The actionable character of the means may be and often is determined by the use to which they are put. If, therefore, individuals conspire to commit the wrongful act of ruining one's business, the means, even though of themselves innocent, may be actionable.
9. **New Trial: Appeal and Error.** If the trial court gave no reasons for its decision, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions.
10. **Good Will: Damages.** In an action at law for the loss of good will, the evidence must contain sufficient data to enable a jury, with a reasonable degree of certainty and exactness, to estimate the actual damages.
11. **Damages: Appeal and Error.** The question of the amount of damages is one solely for the jury and its action in this respect

will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved.

12. **Corporations.** An officer or director of a corporation has a fiduciary relationship to the corporation and its stockholders. He must refrain from all acts inconsistent with his corporate duties. He is not necessarily precluded from entering into a separate business because it is in competition with the corporation; but if he does he must prove by a preponderance of the evidence that he did so in good faith and did not act in such a manner as to injure or damage or contribute to the injury or damage of the corporation, or deprive it of business, and if he fails in this burden of proof there is a breach of that fiduciary trust or relationship.

13. **Trial.** The instructions of the court must be considered in toto, and if when so considered they cover the issues raised by the pleadings and supported by the evidence, they are adequate.

14. ———. A party desiring a more explicit instruction than that given should offer such an instruction.

15. **Trial: Appeal and Error.** Instructions must be considered and construed together. If they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. And, unless this is done, the judgment will not ordinarily be reversed for such defects.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. On rehearing. See 178 Neb. 329, 133 N. W. 2d 462, for original opinion. Former opinion vacated. Judgment reversed and cause remanded with directions to reinstate the verdict and enter judgment thereon.

Pilcher, Howard & Hickman, for appellant.

Fraser, Stryker, Marshall & Veach, for appellees.

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

SPENCER, J.

This case was previously heard herein. Our former opinion, reported at 178 Neb. 329, 133 N. W. 2d 462, reversed the judgment of the trial court and remanded the cause with directions to enter dismissal of the action on

the defendants' cross-appeal. We now determine that our former opinion should be vacated.

This is an action brought by plaintiff, Frank H. Gibson, Inc., hereinafter referred to as Gibson, against Omaha Coffee Company, E. C. Conroy Coffee Company, Inc., hereinafter referred to as Conroy, and Kenneth Loseke, for damages alleged to have resulted from a conspiracy to purchase plaintiff's business on their own terms, and if unable to do so, to take over plaintiff's sales force, coffee routes, and customers.

In the trial of the action to a jury, Gibson recovered a judgment of $20,000. The trial court sustained a motion for a new trial. Gibson perfected an appeal, and the defendants perfected a cross-appeal.

Gibson was incorporated in 1931. At all times involved in this litigation, Edgar J. Bellows was its president, treasurer, and manager, and the owner of 625 shares of its stock. His wife was the owner of 10 shares. Kenneth Loseke was vice president and secretary, and the owner of 100 shares of stock for which he paid $2,500 in 1952. Bellows, his wife, and Loseke were the directors of the corporation, and the owners of all of its stock. George Christian, Mel Oliver, and Bill Dickens, along with Loseke, were the coffee salesmen employed by Gibson. Loseke was the customer's serviceman and supervised Gibson operations. For 2 months each summer he was in sole charge of the business. The business of Gibson was the selling of coffee, teas, and sundry items, primarily to restaurants, cafes, hospitals, factories, and other commercial enterprises, within a radius of 150 miles of Omaha. As a part of its business, Gibson provided certain equipment to regular customers using its products. The customers were served by established truck routes, over which the salesmen heretofore mentioned regularly delivered the products of the company. These salesmen were long-time, experienced employees, and operated without formal contracts of employment. For 2 years prior to October 1, 1962, Gibson had pur-

chased all of its coffee from Conroy, whose place of business was in Kansas City, Missouri. These purchases amounted to approximately $150,000 per year. Conroy was not in the retail business but was strictly a wholesaler, and had no retail sales force available.

Edgar J. Bellows, who will hereafter be referred to as Bellows, was referred to in our previous opinion as being 74 years old. His age is not a matter of record, but from statements made on rehearing, his age was overstated in our former opinion by at least 13 years. Bellows testified that before leaving on a vacation August 19, 1962, he visited with his auditor and with Loseke about the possibility of selling Gibson because of his health, age, and business competition, and authorized the auditor to explore the possibility. The auditor made contact with the Continental Coffee Company and Conroy. Bellows did not return from his vacation until September. He had his first conference with Continental Coffee Company on September 11, 1962. At that time Continental made an offer for Gibson good will of $5 per pound on the average weekly coffee sales for the preceding 1-year period. It is undisputed that this average was 6,000 pounds per week, so the offer was for $30,000, exclusive of physical assets. According to plaintiff's evidence, employment was also offered certain Gibson employees, with or without contract, at a higher rate of pay.

The jury returned a verdict for the plaintiff, so this record must be reviewed in the light of the following rule: "In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it." Graves v. Bednar, 171 Neb. 499, 107 N. W. 2d 12.

On September 12, 1962, Bellows had a conference at a motel in Omaha with Ralph Clark, who will hereinafter be referred to as Clark, president and sole stock-

holder of Conroy. The conference adjourned until the next morning. When Bellows and his wife returned the next morning, they observed papers scattered about the room on which appeared the names of Gibson customers. Clark then stated that Loseke had furnished him the names of the customers. It was Bellows' testimony that he had not authorized Loseke to negotiate any sale with Conroy, and particularly did not authorize the furnishing of the names of Gibson customers.

Clark and Bellows met the next day when the officers and stockholders of Gibson were discussed. Bellows quotes Clark as saying, with reference to Loseke's stock: " 'Well, you won't need to worry about that too much.' * * * 'We'll take care of Mr. Loseke on his stock.' " They then went to the auditor's office to examine the tax and operating statements of the company. At the next meeting, on September 17, 1962, the sale of the equipment was discussed. Bellows' testimony is that Clark on that occasion said: " 'Well, if we can't work something out,' * * * 'we are prepared to go into business ourselves, set up our own company. Your boys, men, have agreed to go with us, and we will start this company and start delivery of coffee to your customers next Monday morning." Bellows testified that he was flabbergasted by this and left almost immediately.

A further meeting was held the next day, at which time Clark stated he would have a contract drawn by his attorney in Kansas City. The following day, Clark met Bellows in an automobile in front of Bellows' office. On this occasion, the testimony is that Clark said maybe they could figure out a deal for around $40,000 for the business. Dave Clark, son of Clark, then said: " 'Well, you know that we can go into business next Monday morning.' * * * 'We have room rented and trucks are available and merchandise can be brought in here overnight, and we'll start in next Monday morning.' " Clark again stated that the Gibson employees would go along with them.

Bellows first called his attorney the night of September 19, 1962. On September 21, 1962, a meeting was held in the office of Bellows' attorney. Present were Clark, Dave Clark, Clark's attorney, Bellows, Mrs. Bellows, Bellows' auditor, and Bellows' attorney. Mrs. Bellows, addressing Clark, said: " 'Ralph, I understand that you are going into business here in Omaha with our men and deliver our customers.' " Clark answered, " 'That's right, we are prepared to do that.' " The meeting broke up. Loseke then put in an appearance. Loseke, under questioning by Bellows' attorney, admitted that he and the Gibson salesmen would start with Conroy the next Monday. The attorney asked him and his men to stay with Gibson for another week, to permit an agreement to be worked out, to which he agreed. Bellows also testified that he had previously talked with Loseke about Clark's statement that he and the salesmen were going with Conroy, and asked: " 'Is that right?' " Loseke answered: " 'Yes, we have decided to do that.' " Bellows had also visited with two of the salesmen, who confirmed Loseke's statement, and Oliver told him, " 'Yes, that's right.' * * * 'We have decided to all stick together.' "

After the meeting in the attorney's office, Bellows instructed his attorney to see if Conroy would raise its offer $5,000 for an agreement by Bellows not to compete. It refused to do so. The attorney was then instructed to accept the Conroy offer. When he communicated this acceptance to Conroy, Clark said: " 'No, I have changed my mind, I am not going to offer that much.' " This ended the negotiations with Conroy.

The jury could reasonably have concluded that at this time, because he had the Gibson employees committed to Conroy, Clark decided he could get everything he needed and wanted on his own terms. It is not unreasonable to conclude that Clark took advantage of the situation and pirated the good will of the Gibson company. Drawing this inference, it is possible to conclude that the Gibson employees assumed they had a perfect right to

deal with Conroy. Whether or not they were acting in good faith, their commitment to Conroy afforded Conroy the opportunity to take over Gibson customers and routes without paying anything since Gibson would no longer have the means to continue operation. There is, in addition, the fact that when they did start out on October 1, 1962, the customers had to continue to use Gibson equipment until such time as it could be replaced by defendants.

Bellows testified that before the threats by Clark, he had not formed a definite intention to sell but was exploring the possibilities to see what type of a deal might be worked out. After he learned that Clark and Loseke had agreed to form another company and to take over the business with the Gibson sales force, he determined he had to sell to the highest bidder. There was no way to replace his salesmen on quick notice. The last coffee order to Conroy company had not been delivered and he would be out of business without a sales force, so he was forced to sell as best he could. He secured the authorization of the stockholders to sell and sold the physical assets of Gibson to Continental Coffee Company on September 28, 1962, at their book value. No good will was sold, although this fact is disputed by defendants.

Loseke testified that he was an officer and director of Gibson and was informed by Bellows that a sale was being negotiated. He testified that Bellows said the business was worth about $100,000, and that Bellows offered it to him but it was far beyond his range. He discussed the matter with the auditor. It was his testimony that he was not invited to annual meetings of the stockholders, and that he signed the minutes as prepared by the auditor. He was informed by the auditor of the contacts the auditor made pertaining to a possible sale, and was fully informed on the situation. He got permission from Bellows to call Clark about the sale, which he did. He had dealt with Clark on many occasions on

Gibson business. Clark came to Omaha pursuant to his call and met Loseke the same evening. Clark told him it was essential to the purchase by Conroy that the sales force go with it; and that Clark contacted the salesmen and ascertained that they would stay with Conroy if it bought the Gibson company. At Bellows' request he listed the physical assets, including loaned coffee makers, and gave it to Clark.

Loseke further testified that he and the other salesmen agreed to stay with Gibson as long as Bellows was operating the business and able to keep going. On Saturday, September 29, 1962, Bellows informed him that he had sold the business to Continental, and Loseke walked out. He saw Clark that afternoon and agreed to work for him. He went to work 2 days later, Monday, October 1, 1962. The other salesmen also showed up to work for Conroy. They met at the Watson terminal. There was coffee on the dock. They had four rented trucks. They loaded the trucks, and Dave Clark, who was present, told them to sell the coffee. Loseke knew that the Omaha Coffee Company had been formed and that the other employees had been contacted for employment. He had worked for the Omaha Coffee Company since October 1, 1962, as manager. He became a director of Omaha Coffee Company on November 8, 1962. He and the former employees of the Gibson company were still working for the Omaha Coffee Company at the time of trial.

Sometime previous to September 25, 1962, Clark had had articles of incorporation prepared for the Omaha Coffee Company, listing his Kansas City lawyers as the incorporators. These were filed with the Secretary of State on September 25, 1962. On Monday morning, October 1, 1962, Loseke and the sales employees of plaintiff met at the Watson Brothers dock in Omaha and loaded four leased trucks with 5,000 pounds of coffee which had been prepared in Kansas City by Conroy and shipped to Omaha. The amount to be shipped had pre-

viously been determined by Loseke. Conroy, which was solely owned by Clark, was the sole stockholder of the Omaha Coffee Company. It paid all the expenses incident to the organization and starting the business and guaranteed all of the expenses to be incurred by Omaha Coffee Company. Loseke and the route salesmen, on October 1, 1962, left the dock with the leased trucks and immediately started to cover the routes they had previously covered for Gibson, servicing its customers as though no change had occurred. Their testimony is that they told the customers Gibson had sold out and that they were working for a new company.

More than 3 months after October 1, 1962, with the exception of a beauty school and one cafe, all of the customers of the Omaha Coffee Company were customers of the plaintiff previous to the formation of the Omaha Coffee Company. On October 1, 1962, these customers were using stoves, coffee urns, and Cory coffee makers owned by the plaintiff and loaned to them as customers. These customers continued to use this equipment until it could be replaced by the Omaha Coffee Company.

Does the plaintiff have a cause of action for damages? Our former opinion held there was insufficient evidence to raise a jury question, and directed a dismissal. We now determine this to be erroneous.

This record presented a fact question. The jury is the sole judge on all fact questions. To justify this court in interfering with the findings of a jury on a fact question, the preponderance of the evidence must be so clearly and obviously contrary to the findings that it is the duty of the reviewing court to correct the mistake. See Beavers v. Christensen, 176 Neb. 162, 125 N. W. 2d 551.

While the employees did not actually leave Gibson until the sale of the physical assets, they were committed to do so. Their commitment enabled Conroy to rescind its previous offer and to obtain the good will of Gibson at no cost. Clark knew the importance of Loseke,

a director and an officer, to the Gibson operation. The new company was formed after Clark's conference with Loseke and several days before he withdrew the Conroy offer. Without Loseke's cooperation, the new company would be a mere paper organization. Conroy could not get the Gibson business without its employees.

Defendants direct our attention to Reid v. Brechet, 117 Neb. 411, 220 N. W. 590, in which we said: "An action of conspiracy sounds essentially in tort. * * * The principle element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury. Without the scienter persons cannot conspire." They argue plaintiff must show some point in time where defendants reached the intent to commit the act resulting in the injury.

In this case, there is sufficient evidence from which the jury could determine that Conroy induced Loseke to commit an actionable wrong in violation of his fiduciary duty. It knew his fiduciary relationship with Gibson and understood the effect of its action. To say that Loseke could be liable, and the instigator who was the beneficiary not liable, is to ignore the obvious. It is also possible for the jury to infer that Conroy, on the pretense of purchasing, examined the plaintiff's books, contacted its employees, and according to the testimony of Bellows, surreptitiously secured a list of its customers, and then withdrew its offer of purchase. The important asset of Gibson was not its equipment but its customer routes. This is evidenced by the fact that several months after their appropriation, the defendants had been able to add only two new accounts.

As defendants pointed out, we said in Barish v. Chrysler Corp., 141 Neb. 157, 3 N. W. 2d 91: "Any person may do business with whomsover he desires. Also, he may refuse business relations with any person whomsoever, * * *. One who causes intended or unintended harm to

another by refusing to continue a business relation with him, terminable at his will, is not liable for that harm."

However, in the instant case we have a different situation. We do not have a refusal to do business, but rather an attempt to steal a business by taking unfair advantage of a business relationship. Here we have Clark working with Loseke, a fiduciary, to force a sale to Conroy on its own terms or to destroy the good will of Gibson. Proof of the intent, understanding, or agreement in such instances must usually rest largely on inferences. Here, however, we have direct testimony on the intent of Conroy, corroborated essentially by legitimate inferences from Loseke's actions. Also, the preliminary preparation and the promptness with which the defendants took over the Gibson routes can substantiate the inference of a preconceived plan.

The jury could reasonably find, as it must have done, that Bellows was forced to sell the company because of the conspiracy between Loseke and Conroy, and that this conspiracy entirely destroyed the good will of the plaintiff. In Nelson v. Hiatt, 38 Neb. 478, 56 N. W. 1029, we said: "In Sheppard v. Boggs, 9 Neb., 257, and Wallingford v. Burr, 17 Neb., 137, this court held that the good-will of a business was an element of value which was the subject of sale in connection with the sale of the business." In that same case, we quoted the following from an Iowa case, Carey v. Gunnison, 17 N. W. 885: " 'The good-will connected with the establishment of any particular trade or occupation may be the subject of barter and sale. It is a valuable right, and if it be unlawfully destroyed or taken away, the law will award compensation to the injured party.' "

There can be little doubt that it was possible for the jury to find that a conspiracy existed to take over the plaintiff's business. Such conspiracy may be established by circumstantial evidence or by deduction from facts. See Marsh-Burke Co. v. Yost, 98 Neb. 523, 153 N. W. 573.

In our former opinion we stated: "Defendant Conroy

Coffee Company had ample reason, and in the interest of good business, to take the action that it took in order to protect its business which would be lost to a competitor." This statement was erroneous. It had a right to protect its business, but not in the way it endeavored to do so. A legitimate purpose does not justify an unlawful act. It is undisputed in the record that Conroy was not in the retail business; that it had no retail business in the area; that it had no retail sales force available; and that the only way it could accomplish its purpose was by inducing a fiduciary to help it to take over plaintiff's sales force and by appropriating the use of plaintiff's equipment to its own purpose until it could replace it with its own. This is not a matter of competition except as it may be described as an unfair competitive practice. It is not a matter of simply hiring plaintiff's employees after a sale has been made to a competitor to call on plaintiff's former customers. Rather, a proper inference is that it was an agreement made previous to any offer of sale to take over the Gibson business if Conroy could not force a sale on its own terms (and the evidence is that when those terms were met, it changed its terms). It is the preconceived plan to accomplish this purpose which is illegal and which under plaintiff's theory forced the sale of the business and destroyed the good will of the plaintiff's business. "For harm resulting to a third person from the tortious conduct of another, a person is liable if he (a) orders or induces such conduct, knowing of the conditions under which the act is done or intending the consequences which ensue, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." Restatement, Torts, § 876, p. 435.

Our former opinion stated as follows: "The defend-

ant Loseke and other employees, having no contract of employment, could individually, without question, bargain for a contract of employment with whom they chose. This they could also do in concert with each other without it being illegal or for a wrongful purpose." There is no question that any of the plaintiff's employees, including Loseke, could leave plaintiff's employ at any time and take employment with anyone else, and it is not their leaving the employ that is actionable. It is the agreement before any sale that unless a sale was made to Conroy they would take over the Gibson business. This was not an agreement to solicit former customers for a new employer but an agreement to actually transfer the accounts without solicitation.

An officer or director of a corporation occupies a fiduciary relation towards the corporation and its stockholders. Fisher v. National Mtg. Loan Co., 132 Neb. 185, 271 N. W. 433. The jury could have found it was Loseke, who had a fiduciary duty regardless of the fact that we characterized it as nominal in our former opinion, who acted for Conroy to induce the other employees to leave in a body and to carry through for Conroy. This would make it impossible for the plaintiff to service its customers and would immediately enable the new employer to service those customers. Without Loseke and the other salesmen, Conroy could not have accomplished its scheme. Without the Conroy company, Loseke could not have accomplished this scheme. By acting in concert they could do so, and it was their joining together to do what they did that was wrongful and is actionable. The test for determining the lawfulness of the combination is the motive for it, or the nature of the result to be obtained as a consequence.

The rule enunciated in Scavenger Service Corp. v. Courtney, 85 F. 2d 825, is applicable herein. It is there said: "The consipiracy was one to ruin appellant's business. Therefore the means adopted were unlawful. The actionable character of the means may be and often

is determined by the use to which they are put. If, therefore, individuals conspired to commit the wrongful act of ruining appellant's business, the means, even though of themselves innocent, were actionable."

The case of Duane Jones Co., Inc. v. Burke, 306 N. Y. 172, 117 N. E. 2d 237, is analogous to the instant case. There the defendants, who except for one were former officers or employees of the plaintiff, agreed amongst themselves that they would take over the business of the plaintiff agency either by purchase of a controlling interest in the corporation or by resignation en masse and the formation of a new agency. When they were unsuccessful in purchasing, they resigned en masse, formed a new corporation, and attempted to service plaintiff's former accounts. The New York court upheld a jury verdict for plaintiff for $300,000. The answer to one of the defenses urged in that case is particularly pertinent herein. It was that the defendants did not avail themselves of the benefit of the customers and personnel diverted until after the defendants had received notice of discharge or had informed the plaintiff of their intention to leave. The court there held this was immaterial as the jury could have found the conspiracy originated while a fiduciary duty existed and the subsequent developments were merely the results of a predetermined course of action.

In the case of Hall v. Decker, 45 Cal. App. 2d 783, 115 P. 2d 15, Dekker, an officer and director of a corporation who had entered into a contract to sell his interest to the other stockholders, while still an officer and director, joined three other employees in organizing a competing company and, having obtained a list of the plaintiff's customers, solicited them and obtained orders. The California court, in affirming a judgment against all of the defendants, said: "It is the established law that a director or officer of a corporation may not enter into a competing enterprise which cripples or injures the business of the corporation of which he is an officer or di-

rector (Red Top Cab Co. v. Hanchett, 48 Fed. (2d) 236, 238; Hussong Dyeing Mach. Co. v. Morris, (N. J.), 89 Atl. 249, 250)."

Defendants' motion for judgment notwithstanding the verdict or for a new trial listed 31 alleged errors. The trial court overruled the motion for judgment notwithstanding the verdict but did sustain the motion to set aside and vacate the verdict and judgment, and granted a new trial. No reason was assigned by the court for its action.

The procedure in such situation is outlined in Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772. We there provided: "If the trial court gave no reasons for its decision, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions." To meet this burden, defendants urged 10 assignments of error. Having disposed of the motion for judgment notwithstanding the verdict, we consider herein the other assignments discussed in the defendants' brief.

Defendants urge that the trial court erred in permitting the plaintiff to prove the value of its alleged loss of good will by an offer of purchase made by the Continental Coffee Company. There is no merit to this contention.

With reference to the testimony as it appeared in the evidence of Bellows, the jury was properly admonished that the testimony as to the offer was not to be considered as an element of damages, and no further comment is necessary. Considering the evidence as it appeared in the testimony of Stanley Owens, financial

vice president of the Continental Coffee Company, a qualified expert, we do not interpret the testimony in the same light as the defendants. After qualifying the witness as an expert, he was asked: " 'Q. Now, Mr. Owens, based upon your experience over the years in the coffee business, and in the acquiring of other coffee companies such as Gibson Coffee Company, and your familiarity with the Gibson organization and operations as a result of the investigation that you testified that was made by your company of the Gibson operations, do you have an opinion as to the value of the good will of the Gibson Coffee Company, assuming the continuance of the then status quo of the Gibson operations and sales force as it then existed? I am referring to the early stages of your negotiations.' * * * 'Q. Just yes or no, if you have an opinion. A. Yes, I think I could. Q. Would you state that opinion?' * * * 'A. I would like the record to show, first of all, that no two negotiations are exactly alike and that the valuation placed on the Gibson Coffee Company by myself and my associates would have no relevancy to other acquisitions. It was our opinion that if we were able to acquire the Gibson Coffee Company and their organization as it was during the negotiations, we would have been willing to pay a total of $30,000, which is five dollars a pound for the 6,000 pounds of weekly business as a good will figure.' " Read in context, we construe this testimony to be the opinion of the expert as to the value of the good will at the time in question.

The instructions of the court restricted plaintiff's damage to the dollar reduction in value, if any, proximately caused as set out in instruction No. 5, to its good will. Defendants urge that the jury verdict of $20,000 cannot be sustained because it is based entirely upon conjecture by the jury. Bellows valued the good will at $35,000. Plaintiff's expert fixed its value at $30,000. The tax records of the company carried a good will figure of $444.71. Defendants contend that any good will there

may have been was sold, or at most it could not exceed the $5,000 which Bellows wanted for an agreement not to compete. Defendants insist that the jury is limited solely to one of these four figures. We do not accept this premise. In any event, there were other indications of value in the evidence. Dave Clark testified Bellows had told them the book value of the equipment was $18,000. There was also testimony that the formula worked out by the Conroy company for the accounts receivable and the equipment came to $25,000. The total sales price, which included these items and the good will, was to be between 40 and 50 thousand dollars.

If we were to follow defendants' argument to its ultimate conclusion, we would require a much higher degree of certainty for damages than for other elements in the action. Juries are allowed to act upon inferential and probable as well as direct and positive proof. In Tarry v. Johnston, 114 Neb. 496, 208 N. W. 615, we said: "In an action at law for the loss of good will, the evidence must contain sufficient data to enable a jury, with a reasonable degree of certainty and exactness, to *estimate* the actual damages." (Emphasis supplied.)

In many types of tort actions it may be said to be impossible to determine damages with exactitude and precision. Here, good will was not susceptible of exact pecuniary measurement. All that was required was that it be proved that damage resulted, and that sufficient evidence be adduced to enable the jury to make the most intelligible and accurate estimate which the nature of the case will permit.

In Colvin v. Powell & Co., Inc., 163 Neb. 112, 77 N. W. 2d 900, we held: "Where it has been proved that damage has resulted and the only uncertainty is the exact amount, it is sufficient if the record shows data from which the extent of the injury can be ascertained with reasonable certainty."

As we interpret this record, the verdict is within the range of the evidence. The jury is not duty bound to

accept the testimony of any one witness in every particular. It is permitted to make its estimate of the damage sustained, based upon its conclusion from the testimony of all of the witnesses. As we view this record, we cannot say that it does not contain sufficient data to enable the jury to reach the verdict it did.

In Van Wye v. Wagner, 163 Neb. 205, 79 N. W. 2d 281, we said: "The question of the amount of damage is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved."

Defendants attack the instructions of the court as misleading and confusing, and contend they are not sufficiently explicit to cover their theory of the case. The answers of the defendants were limited to general denials, and they did not tender any proposed instructions. Defendants specifically complain that the court did not give a specific instruction on malice or legal justification, and that for this reason the third paragraph of instruction No. 10 could only result in confusion. That paragraph is as follows: "What one employee may lawfully do may be done lawfully by several employees at the same time, so long, at least, as they act independently. But if their acts are done in concert, or all at the instance of a third party or parties, without just cause or for an unlawful or wrongful purpose, their acts become unlawful and constitute an actionable wrong." Defendants argue competition was a just cause and they were entitled to a specific instruction on that point. In this respect, conspiring with a fiduciary to violate his trust is not competition but an unfair competitive practice.

Defendants also complain of instruction No. 9 which defined coercion, fraud, misrepresentation, and unfair competitive practices. We find no error in the instruction, and the defendants have pointed out none except as they contend it to be inapplicable under their theory of the case. These terms are used in instruction No. 5

which covered the pleadings herein. There is evidence in the record from which the jury could find all of the elements present, as should be evident from what we have said heretofore.

Defendants insist that instruction No. 12 on fiduciary relationship is misleading. The instruction is as follows: "An officer or director of a corporation has a fiduciary relationship to the corporation and its stockholders. He must refrain from all acts inconsistent with his corporate duties. He is not necessarily precluded from entering into a separate business because it is in competition with the corporation; but if he does he must prove by a preponderance of the evidence that he did so in good faith and did not act in such a manner as to injury (sic) or damage or contribute to the injury or damage of the corporation, or deprive it of business, and if he fails in this burden of proof there is a breach of that fiduciary trust or relationship." The instruction is a correct statement of the law, and is not misleading under the issues herein. See Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393.

The instructions of the court must be considered in toto, and when so considered herein they cover the issues raised by the pleadings and supported by the evidence. If defendants wished more explicit instructions, it was their duty to tender proposed instructions. This they did not do. The applicable law in this connection is that set forth in Stahlhut v. County of Saline, 176 Neb. 189, 125 N. W. 2d 520. In that case, we said: "In Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612, this court said: 'It may be conceded that the instruction of itself was not sufficiently explicit, but defendants made no request for any instruction upon the issue. In that connection, the rule is that: " 'A party desiring a more explicit instruction than that given should offer such an instruction.' " * * * As held in Christensen v. Tate, 87 Neb. 848, 128 N. W. 622: "Instructions must be considered and construed together. If they are not

sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. And, unless this is done, the judgment will not ordinarily be reversed for such defects." ' "

From what has been said, it follows that our previous opinion should be vacated; that there is no prejudicial error in the record; that the verdict is supported by the evidence; and, therefore, the order of the trial court sustaining the motion for a new trial was erroneous. The verdict against the defendants should be reinstated and judgment entered thereon.

FORMER OPINION VACATED. JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS TO REINSTATE THE VERDICT AND ENTER JUDGMENT THEREON.

WHITE, C. J., and BOSLAUGH, J., dissenting.

We respectfully dissent from that part of the majority opinion which holds that the evidence was sufficient to sustain a finding that previous to any offer of sale, Loseke and Conroy conspired and agreed to take over the Gibson business if Conroy could not force a sale on its own terms.

RAY WOLFE, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

137 N. W. 2d 721

Filed October 29, 1965. No. 35870.

1. **Eminent Domain: Damages.** The measure of damages for the taking of an easement is the difference in the reasonable market value of the property before and after the taking of the easement.
2. ———: ———. The compensation due the landowner is to be determined by the difference in the value of the property before and after the taking and not by a method which separately values the easement or right that is taken.
3. ———: ———. In condemnation proceedings the burden of

proof is upon the landowner to prove the nature and amount of his pecuniary damages.

4. **Eminent Domain.** The statutory requirement that there be an attempt to agree with the owner prior to the institution of condemnation proceedings is satisfied by an offer made in good faith with a reasonable effort made to induce the owner to accept it.

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

Merrill R. Reller, Clarence A. Davis, and John McArthur, for appellant.

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

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ.

BOSLAUGH, J.

This is a proceeding by the State of Nebraska to secure control of outside advertising on land owned by Ray Wolfe which is adjacent to the Interstate Highway in Lancaster County, Nebraska. The action was instituted as a proceeding in eminent domain under section 39-1320, R. S. Supp., 1963, to secure a permanent easement for the control of advertising. In the district court the jury returned a verdict for the defendant, State of Nebraska. The plaintiff landowner's motion for new trial was overruled and he has appealed to this court.

In the district court the action was tried upon the theory that it was a proceeding by the State to condemn a permanent easement upon the land of the plaintiff. Neither party has raised any issue in this court concerning the form of the proceeding or the nature of the right acquired by the State in the proceeding. We dispose of the case on the mutual theory upon which it was tried in the district court.

The plaintiff's principal assignments of error relate

to the finding and judgment that the plaintiff is not entitled to damages for the taking of a permanent easement to control advertising adjacent to the highway. The plaintiff argues that the right to lease his land for advertising purposes is a valuable right and that a finding and judgment that he is not entitled to any damages for the destruction of this right cannot be sustained.

The plaintiff's theory in substance is that advertising rights, or an easement to control advertising adjacent to the highway, should be valued separately. The plaintiff produced evidence of value which was obtained by capitalizing an assumed income from an advertising lease. This is not the proper measure of damages for the taking of an easement.

The measure of damages for the taking of an easement is the difference in the reasonable market value of the property before and after the taking of the easement. Fulmer v. State, 178 Neb. 664, 134 N. W. 2d 798. The compensation due the landowner is to be determined by the difference in the value of the property before and after the taking and not by a method which separately values the easement or right that is taken.

In a particular case, the rule may result in a determination that the landowner is entitled to no compensation for the taking of an easement. Fulmer v. State, *supra*. There was evidence in this case that the value of the plaintiff's property was the same after the taking as it was before the taking. This evidence supports the verdict and judgment in this case. This court cannot determine, as a matter of law, that the taking of the easement depreciated the value of the plaintiff's property.

There was evidence to the effect that the plaintiff will incur abstracting expense as the result of the taking of the easement, but there was no evidence as to what that expense might amount to. In condemnation proceedings the burden of proof is upon the landowner to prove the nature and amount of his pecuniary damages. Mathis v. State, 178 Neb. 701, 135 N. W. 2d 17. Since

there was no evidence as to the amount of the pecuniary damage sustained by the plaintiff because of additional abstracting expense, there was no basis upon which the plaintiff could recover damages for the abstracting expense.

The plaintiff complains that in several of the instructions to the jury, the trial court stated that the jury should determine what damages "if any" the plaintiff had sustained. Similar instructions have been approved in other cases. See Frank v. State, 176 Neb. 759, 127 N. W. 2d 300. The instructions given in this case were proper because the evidence supports the finding that the plaintiff had not been damaged by the taking of the easement.

The plaintiff contends that the proceeding should have been dismissed because the defendant's offer to purchase made prior to instituting condemnation proceedings was not made in good faith. The statutory requirement that there be an attempt to agree with the owner prior to the institution of condemnation proceedings is satisfied by an offer made in good faith with a reasonable effort made to induce the owner to accept it. State v. Mahloch, 174 Neb. 190, 116 N. W. 2d 305. It is not necessary that extended negotiations transpire.

The evidence shows that Elsmer F. Villiers, a right-of-way agent of the defendant, contacted the plaintiff and explained to him that the State wanted to acquire an easement to control advertising adjacent to the highway. Villiers testified that he explained the easement and the rules and regulations of the Department of Roads to the plaintiff and offered the plaintiff $25 for the easement. The plaintiff replied that he would not sign a contract granting the easement for less than seven or eight thousand dollars. Villiers then told the plaintiff that if he did not accept the $25 offered, proceedings in condemnation would be instituted. A letter was then sent to the plaintiff confirming the offer of $25 for the easement and advising the plaintiff that the offer could

be accepted at any time prior to a hearing in the condemnation proceeding.

The evidence in this case shows a good-faith offer with a reasonable effort to induce the landowner to accept the offer. Although the amount offered was nominal, the amount was reasonable in view of the evidence concerning the damages sustained by the plaintiff. The evidence sustains the finding of the trial court that the defendant's offer was made in good faith.

Robert Walters, an expert witness for the defendant, was permitted to testify concerning comparable sales of other land which he used as the basis for his opinion as to the value of the plaintiff's land. This evidence was properly received. See State v. Mahloch, *supra*. The plaintiff's real complaint is directed at the testimony by this witness that the value of the land was the same after the taking of the easement as before. However, John W. Stahn, an expert witness for the plaintiff, admitted on cross-examination that the land had the same agricultural value after the taking as it did before, and would sell for the same price for farming purposes after the taking as it would have before the taking. There is no basis upon which the testimony of the witness Walters can be discredited as a matter of law.

There being no error, the judgment of the district court is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I dissent from the majority opinion for the reasons enumerated in the dissenting opinion filed in Fulmer v. State, 178 Neb. 664, 134 N. W. 2d 798, and for the further reason that I do not believe the State adequately met the statutory requirement that it make a good faith attempt to agree with the owner before starting the condemnation proceeding.

ALUMNI CONTROL BOARD, ALPHA PSI CHAPTER, DELTA SIGMA PHI FRATERNITY, INC., APPELLANT, V. CITY OF LINCOLN, A MUNICIPAL CORPORATION, APPELLEE.
137 N. W. 2d 800

Filed October 29, 1965. No. 35949.

1. **Zoning.** The disposition of a case involving an area variance and "practical difficulty" under a zoning ordinance depends on the facts and circumstances of each particular case.
2. **Zoning: Appeal and Error.** The acts of a board of zoning appeals are subject to review and reversal only if they constitute an abuse of discretion and are unreasonable, arbitrary, or illegal.
3. **Constitutional Law: Statutes.** A litigant who invokes the provisions of a statute may not challenge its validity; nor seek the benefit and in the same action and at the same time question its constitutionality.

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

O'Neal & Krause, for appellant.

Ralph D. Nelson and Henry L. Holst, for appellee.

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

MCCOWN, J.

This case involves an application for a building permit requiring a variance in front, rear, and side yard requirements and in offstreet parking requirements of the zoning provisions of the Lincoln municipal code. The application was denied by the building inspector, by the board of zoning appeals, and by the city council, and the denial was affirmed by the district court. The plaintiff has appealed.

The property involved is a corner lot having a 50-foot frontage on one street and a 92-foot frontage on the other. The property was in single separate ownership at the time of the adoption of the Lincoln zoning code in 1953. The plaintiff purchased the property in 1955 and apparently has occupied and used the property since then as a

fraternity house which, at the time of this application, housed 21 young men. The property is located in an F-restricted commercial district. Permitted uses are for single or two-family residences, multiple dwelling, fraternities, sororities, boarding and lodging houses, nonprofit hospital, religious, educational, and philanthropic institutions, private clubs and lodges (where the chief activity is not a service carried on as a business), apartment hotels, and office buildings. The building proposed is a four-story building 30 by 60 feet. Under the provisions of the code, a building 28 by 48.6 feet was the maximum size permitted. The variances requested involved front, rear, and side yard reductions varying from 5 feet to 6.4 feet. The offstreet parking under the zoning code was required to be on the premises or within 1,200 feet, while the offstreet parking proposed was 1,280 feet from the premises.

The evidence is that a fraternity house could be built within the requirements of the city zoning code to house 48 men, but that it would not comply with the University of Nebraska housing code which became mandatory September 1, 1965. The evidence also is that a fraternity house could be built within the requirements of the city zoning code and also in compliance with the University of Nebraska housing code, but that such a fraternity house could accommodate only 36 men.

The plaintiff's position is that it is not economically desirable to construct a fraternity house for less than 48 men, and that this fact, together with the requirements of the University of Nebraska housing code, constitute "practical difficulties" sufficient to require the granting of the variances.

Use variances are customarily concerned with "hardship" while area variances are customarily concerned with "practical difficulty." A use variance is one which permits a use other than that prescribed by the zoning ordinance in a particular district. An area variance has no relationship to a change of use. It is primarily a

grant to erect, alter, or use a structure for a permitted use in a manner other than that prescribed by the restrictions of the zoning ordinance. Area variances are principally involved in this case.

The disposition of a case involving an area variance and "practical difficulty" under a zoning ordinance depends on the facts and circumstances of each particular case. In most instances in which courts have found that a "practical difficulty" was present in an area variance case, they have apparently relied on the fact that the case involved substandard lots as to which the practical difficulty was obvious. This case does not involve a "substandard" lot, i.e., having a smaller size or having a lesser frontage than the required minimum. 1 Rathkopf, The Law of Zoning and Planning (3d ed.), 32-1. The minimum area requirements in this zoning district are: Single family or two-family residences, 4,000 square feet; multiple family residences, 500 square feet per family; and there is no minimum area restriction for fraternities. The plaintiff's lot is 4,600 square feet and it has a 50-foot frontage which is also not substandard.

The criteria generally and properly before a board of appeals on an application for a variance from area restrictions of a zoning code are: (1) Whether compliance with the strict letter of the restrictions governing areas, set backs, frontage, height, bulk, or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome; (2) whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners; and (3) whether relief can be granted in such a fashion that the spirit of the ordinance will be observed and public

safety and welfare secured. 2 Rathkopf, The Law of Zoning and Planning (3d ed.), 45-28.

"The purpose of variances in the broadest sense is the rendering of justice in unique and individual cases of practical difficulties or unnecessary hardships arising from literal application of zoning ordinances; zoning statutes and ordinances commonly provide in effect that the grant of variances should be to the end of doing substantial justice." 8 McQuillin, Municipal Corporations (3d ed. Rev.), § 25.172, p. 409.

The specific provisions of the Lincoln zoning code gave the board of zoning appeals the power: "* * * to vary the strict application of the height, area, parking or density requirements to the extent necessary to permit the owner a reasonable use of his land in those specified instances where there are peculiar, exceptional and unusual circumstances in connection with a specific parcel of land, which circumstances are not generally found within the locality or neighborhood concerned." Lincoln Municipal Code, § 27.44.040.

There is no evidence that the reasons constituting the plaintiff's claim of practical difficulty are peculiar to the property involved. So far as the evidence goes, both the University of Nebraska housing code and the economic factors applying to fraternity house operations apply equally to all other fraternities in the zoning district.

Insofar as the plaintiff's basic contention that a minimum of 48 men must be accommodated to make a fraternity house operation economically feasible, the evidence is contradictory. The plaintiff's own evidence showed that for the year 1962-1963, there were 5 fraternities with less than 48 sustaining members. Four of those five, including the plaintiff, showed an income greater than expenses. Of the fraternities having 48 sustaining members or more, 6 out of 13 had expenses exceeding income. Here the evidence is clear that even within the requirements of the University of Nebraska

housing code, the property could continue to be used for a fraternity house and even accommodate 60 percent more men than the plaintiff has accommodated on it for the last 10 years. The restrictions of the ordinance do not prevent the property from being used for any of the other authorized uses permitted in the district. There is essentially no difference here from any case in which an owner desires to expand, but finds himself with not enough property to do so and also meet the conditions of the ordinance. The mere fact that the plaintiff would like to have a fraternity house of larger dimensions does not establish practical difficulty in complying with the ordinance. The plaintiff's basic position is apparently that where the desire to expand a permitted use of the premises beyond the area restrictions of the zoning code is motivated by practical or economic reasons, this constitutes a "practical difficulty" and requires the granting of an area variance. We cannot agree.

Even if it be conceded that a "practical difficulty" was established, there is specific testimony that the yard requirements here are reasonable requirements, and that the granting of the variances requested would be in derogation of the spirit and intent and general plan of the zoning ordinance. The application was also opposed at the hearing by the owners of adjoining property. The fact that the plaintiff's fraternity house has now become inadequate for the plaintiff's plans for growth does not tend to show the provisions of the ordinance to be arbitrary or unreasonable. Neither does it establish that the owner is unreasonably prevented from using the property, nor that substantial justice will be done to other property owners, nor that the spirit of the ordinance will be observed and the public safety and welfare secured. The acts of the board of zoning appeals are subject to review and reversal only if they constitute an abuse of discretion and are unreasonable, arbitrary, or illegal. Peterson v. Vasak, 162 Neb. 498, 76 N. W. 2d 420.

We have discussed above strictly area variances on the property itself. A variance of a different nature, technically involving both use and area, is involved in the offstreet parking requirements.

The zoning code requires the plaintiff to provide offstreet parking on the property or within 1,200 feet from the property. This is a greater distance than is permitted by any other section or provision of the zoning code. The requested variance involves offstreet parking facilities 1,280 feet away from the property and in excess of the maximum distance specified. Congestion in the public streets (the basic problem giving rise to offstreet parking requirements) might not be reasonably nor adequately alleviated if the required offstreet private parking is so far away from the traffic generating property that it would not be reasonably or effectively used. We certainly cannot say that it is unreasonable nor arbitrary to refuse to grant a variance of an additional 80 feet where the maximum distance prescribed by the ordinance is already virtually a quarter of a mile from the location of the property. This is particularly true where there is no evidence of practical difficulty, nor unnecessary hardship, nor, in fact, of any other reason why the ordinance cannot be specifically complied with.

Under the facts in this case, we cannot say that the action of the board of zoning appeals and the city council did not permit the owner a reasonable use of the land, nor that it did not do substantial justice.

The plaintiff has directed several assignments of error to the constitutionality of the Lincoln zoning code. This court has held many times that a litigant who invokes the provisions of a statute may not challenge its validity; nor seek the benefit and in the same action and at the same time question its constitutionality. Peterson v. Vasak, *supra;* Shields v. City of Kearney, *ante* p. 49, 136 N. W. 2d 174.

For the reasons set forth, the action of the board of

zoning appeals and the city council in denying the requested variance was not unreasonable, arbitrary, or illegal; nor did its action violate the plaintiff's constitutional rights. The judgment of the district court was correct and is affirmed.

AFFIRMED.

CHARLES C. DENNIS, APPELLANT, V. MARIAN DENNIS, APPELLEE.
137 N. W. 2d 694

Filed October 29, 1965. No. 35954.

1. **Divorce.** The district court may at any time within 6 months of the trial and decision of a divorce case, if no appeal is taken therefrom, vacate or modify the decree therein.
2. ———. The right to vacate or modify a decree of divorce within 6 months of the trial and decision of the cause is not absolute but must be exercised within a sound discretion.
3. ———. In order that it may be said that the court exercised a sound judicial discretion in vacating or modifying a decree of divorce, good reason therefor must be shown and it must also appear that such action did not produce an unconscionable result.
4. **Divorce: Appeal and Error.** It is the duty of this court, on appeal of proceedings to modify a decree of divorce, to try it de novo on the record and to reach a conclusion uninfluenced by what was done by the trial court, except if there is irreconcilable conflict in the evidence the court may consider that the trial court saw the witnesses and accepted one version of the facts.
5. **Divorce.** The petitioner or moving party who seeks to vacate a divorce decree has the burden of proving the grounds charged by a preponderance of evidence, and where this burden is not sustained, a refusal to vacate the decree is proper.
6. **Trial.** It is the spirit and policy of the law to give every party an opportunity to prosecute or defend his case in court, and courts will not ordinarily deny such right except for the fault or gross laches of such party or his authorized attorney.
7. **Divorce.** What constitutes good reason for setting aside such a decree or what constitutes an unconscionable result prohibiting it depends upon the facts and circumstances of each particular case.
8. **Judgments: Appeal and Error.** Where a default has been reg-

ularly entered, it is largely within the discretion of the trial court to say whether the defendant shall be permitted to come in afterwards and make his defense and, unless an abuse of discretion is made to appear, this court will not interfere.

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

Ellick, Spire & Ryan, for appellant.

Burbridge & Burbridge, for appellee.

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

BROWER, J.

The plaintiff and appellant Charles C. Dennis was granted by default a decree of divorce from the defendant and appellee Marian Dennis on January 17, 1964, by the district court for Sarpy County, Nebraska.

Thereafter on April 20, 1964, within 6 months from the entry of the decree, the defendant Marian Dennis filed a petition to vacate and set aside the decree, alleging the child custody and property settlement agreement incorporated therein was entered into through fraud, intimidation, ignorance, and passion, because of which she was coerced into entering said settlement and did not appear to contest the action. It further alleged plaintiff represented to her that if she did not sign the stipulation, or appeared to contest the divorce, she would never see her children again. It stated she was without funds to defend herself and advice of counsel when she signed the stipulation. Plaintiff Charles C. Dennis filed an answer to the petition which was in substance a general denial. At times hereafter the parties will be referred to by their first names.

On August 7, 1964, the trial court found generally in favor of the defendant Marian Dennis. It set aside and vacated the decree of divorce, the child custody, and property settlement. Custody of the minor children

was continued in the plaintiff Charles C. Dennis until the final determination of the cause, with right of reasonable visitation continued in defendant Marian Dennis. Plaintiff's motions for new trial being overruled, he has appealed to this court.

Plaintiff contends the trial court erred in vacating the decree, and its order so doing is not sustained by the evidence and is contrary to law.

Certain facts as to which there is little or no dispute will first be related. Charles and Marian Dennis were married in Council Bluffs, Iowa, August 17, 1957. Two children were born to the union, Robert Crawford Dennis and Billy Joe Dennis, aged 7 and 4, respectively, at the time of the hearing on the motion to vacate the decree of divorce. Prior to the marriage, the parties had met in the course of their employment with Ice Capades, Marian as a professional skater and Charles as a drummer. At first they toured the country, but later settled down and resided in Phoenix, Arizona, for 2 years and then moved to Bellevue, Nebraska. Marian was born in Toronto, Canada, and came to the United States when she was 18 or 19 years old. She received a high school education in Canada.

In October 1963, the parties first discussed a divorce. Afterward Charles and his brother, Joe Dennis, whom he had consulted regarding a lawyer, went together to the office of Gordon Ryan, an attorney at law, in Omaha, Nebraska, on November 1, 1963. There the questions of divorce, child custody, and a property settlement were discussed. The following day both Charles and Marian went to the same lawyer's office where the terms subsequently embodied in the written agreement were related by Charles in the presence of both. A petition for divorce for Charles to sign and a voluntary appearance for Marian were prepared. The petition was filed November 8, 1963. The voluntary appearance was mailed to the home where the parties were then living. Marian signed it November 8, 1963, before William H. Fitz-

patrick, a notary public, who was a neighbor living nearby. This was filed in court November 13, 1963. Attorney Ryan also prepared the child custody and property settlement in accordance with the terms recited by Charles in Marian's presence while they were both in his office. It was mailed to Marian who signed it before Fitzpatrick as a witness December 7, 1963, and mailed it back. The decree of divorce was entered by default. It approved the child custody and property agreement which was filed with it January 22, 1964. This provided that Charles was to have permanent custody of the children and Marian was to receive $1,000 in cash and a 1958 Chevrolet in full settlement of her property rights. The $1,000 and the car had been received by the defendant but their return was tendered at the hearing to set aside the decree.

The parties' property consisted of a home subject to a mortgage of $19,000 in which there was an equity of $3,500 to $5,000, household furniture which Marian itemized and valued generally at cost at about $5,000, and the Chevrolet automobile worth $300. Charles testified the personalty was of less value and that he owed his brother a note for money advanced for $3,000. Marian knew the extent of the property at the time of the divorce but there is a conflict in the testimony as to her knowledge concerning the note.

We will now turn to the consideration of the pertinent evidence with respect to setting aside the decree of divorce as to which there is great conflict.

Marian Dennis testified on her own behalf. She stated that in October 1963 she first suggested to Charles procuring a divorce. Charles at that time threatened her. He stated that he would get the divorce himself and he would take the children, or he would kill himself or kill her so that nobody could have them. When she was in Ryan's office, he talked with Charles and not with her. She did not understand her legal rights and feels that the attorney and Charles misled her because

she should have gotten a lawyer. After going to Ryan's office, Charles, after this meeting, again threatened her life and his own in the event she contested the divorce. He told her if she did procure custody of the children he would not help her with their support. The several threats were always made to her alone. She stated that she failed to consult a lawyer only because of her fear of Charles. She believed her husband would carry out these threats and was ignorant of her rights as a mother. He had cuffed and struck her on several occasions and once threw her down a flight of stairs, stating he would kill her. She had told her friends, Ardis Peterson and Anne Dennis of this physical abuse before the divorce and Ardis of the threats. She testified Charles became intoxicated frequently and in that condition slept in their car all night. Following the entry of the decree of divorce she became so upset it became necessary to consult Dr. J. Whitney Kelley, a neurologist.

This Dr. Kelley testified on behalf of the defendant Marian Dennis. He was consulted by her March 24, 1964. He gave her a psychiatric and a psychological examination at that time. Psychological tests that were given showed she was telling the truth. A history was related by the patient to the doctor. He spent an hour and a half trying to elicit the facts in her past which would relate to her mental state. He stated her condition presented no psychiatric problem, but one of anxiety, that she simply wanted to be reconciled with her husband so that they could bring the children up together. She had originally suggested making request for divorce herself but had been persuaded to do otherwise by the family and to have Charles file a petition because the family would be financially more able to care for the children. She was anxious but capable of making up her own mind. She did not relate any threats that had been made against her. She claimed that any financial responsibility for the children had been disclaimed by Charles if she got their custody.

There was no further testimony on behalf of the defendant and we will now review the evidence offered on behalf of the plaintiff. Marian was recalled as a witness for the plaintiff. She testified that she had known John Haizlip who was a friend of both parties. He had come to the house two or three times to assist her by giving information to be used in a speech for the Toastmistresses Club. She had coffee with him at Council Bluffs before a convention of those clubs at Shenandoah, Iowa. She had met him at a zoo and was in a car with him two or three times during the 2-months' period while the divorce was pending. She accompanied him to Pal Joey's in Ralston and at another time had bowled with him.

The plaintiff Charles Dennis testified on his own behalf. He stated that the divorce was first discussed with Marian early in the evening of October 31, 1963. He wanted to go to a minister or marriage counselor and offered to take her but she refused. She said she wanted a divorce. Charles asked, " 'What about the children?' " Marian's first response was they should go with the mother. Charles said the children were close to him, that he lived in Bellevue and his family was there, the children were in school, and he thought it best not to take them away. The talk began early in the evening but was interrupted by Charles going out with the children for their tricks and treats. In the interval Marian drove the car down town. The talk was resumed after both returned. They talked of getting a lawyer and Charles asked her if she wanted to get one. She said, " 'Well, you handle it.' " She did not want a Bellevue lawyer and suggested asking his brother, Joe, if he knew someone. She stated she would like one in Omaha so it would be as quiet as possible because she did not want any gossip. The conversation ran to 3 o'clock in the morning.

The next day Charles and Joe Dennis went to the attorney's office and told him Marian desired the divorce

and Charles was to have the children. After this meeting custody of the children was again discussed. Marian said she did not know if she could give them up and suggested splitting the custody between them. Charles objected to this and she finally agreed that they could not be separated. The next day upon both going to the attorney's office, Charles told the lawyer in Marian's presence that it was agreed that he should have the children, and that they felt if Marian received $1,000 and the car that was a fair settlement. He testified he originally did not want a divorce but had made an adjustment and no longer desired a reconciliation.

Charles denied having struck, pushed, or hit Marian and further denied that he had threatened her with physical violence, or telling her she would never see the children again if she opposed the divorce. On occasion he had been intoxicated, but only infrequently, and denied it ever resulted in sleeping in the car as claimed. He stated Marian had told him early in January 1964 that she was going to get a lawyer and take the children. He then told her he was going ahead with what he was doing and she could do as she wished.

Phyllis James, the wife of the high school football coach at Bellevue, appeared as a witness for Charles. She had been acquainted with both parties 2 or 2½ years prior to November 1963. On November 2, 1963, she received a phone call from Marian. Marian asked her if she had heard a rumor around high school that she was "having an affair, or going out, or something," with Mr. Haizlip. Phyllis replied she had heard no such rumor and asked what the trouble was. Marian stated over the phone they were going to get a divorce. Phyllis asked if it would help if she came over and talked with her, and Marian said, " 'If it's all right with Charles.' " Phyllis thereupon went to their home and the matter was discussed in the presence of both parties and Phyllis from 8 o'clock p.m., until 12:30 the next morning. Marian stated she wanted a divorce and gave

as her reason that she did not love Charles and doubted if she ever had. During the conversation Marian appeared composed but Charles was upset and, in fact, cried. Marian said she was giving up the children and Phyllis advised against it. Marian said that was their home, the oldest boy was in school, they would be better off financially, and she thought it best for their sake. Marian stated she knew that she could get them if she wanted to. Phyllis suggested a trial separation.

Norma Cleary, called on behalf of Charles, testified she was a roommate of Marian from November 15, 1963, to January 17, 1964. Marian had called her by phone and asked to live with her, and Norma had assented to the arrangement. Marian was then working, selling trip insurance at the airport. Before coming to live with her, Marian came to look at the apartment. Marian then said that they both felt it would be best for the children to be with Charles. He would be more able financially to take care of them and one child was in school. She never related any threats or intimidation to Norma. While living with her, Marian gave no indication of insomnia or sleeplessness. She did not cry but appeared relaxed and happy.

Anne Dennis, who testified for Charles, was the wife of his brother. She told of being acquainted with both parties since 1956 and of seeing Marian since July 1963 socially approximately once a week. These visits continued up to the time of the divorce and afterward. She related conversations between herself and Marian relative to the custody of the children of the parties. She said she advised Marian against giving up her children. Marian's response was to the effect that she and Charles had decided it was best for the children to stay with Charles. In one conversation, however, Marian had expressed an inclination to get a lawyer and take the children if Charles did not stop bucking her. She said Marian had never told her of any physical violence, or threats of violence. On cross-examination she was asked

if she remembered telling Marian that Charles would kill her if he did not get the children. She testified she had not said that, but had said, "* * * that wives have been killed for less, and that she should be careful, because you never knew what a husband would do."

Gordon Ryan was called as a witness for Charles and it was stipulated by Marian's counsel that he might testify although he was also acting as opposing attorney. He related that the details of the child custody and property settlement were outlined by Charles in Marian's presence. Ryan then asked Marian if this was so and she answered that it was. He told her that he did not represent her in any way and she had a right to have counsel. He later drafted the written agreement and forwarded it by mail. It was subsequently signed and returned by mail. The voluntary appearance was handled in the same manner.

John Haizlip was called as a witness for Charles. The court permitted his examination as a hostile witness. He had previously given testimony by deposition. The witness had known both of the parties prior to the divorce. He had called at the home on certain occasions while assisting Marian in preparing a talk to be given at the Toastmistresses meeting to be held at Shenandoah, Iowa. He had been with her for coffee on occasion. They had gone to the zoo together with the children, to the Leisure Lanes to bowl, and to Pal Joey's, a night club at Ralston. They had met on the occasion of her going to Shenandoah to the Toastmistresses meeting and had gone to Council Bluffs for coffee. He thought they had met seven or eight times while the divorce was pending, generally at Howard Johnson's in Council Bluffs or the Union Station. Some of the meetings were arranged by phone. To prevent gossip he never picked her up at her home. He was only Marian's friend and there was no love interest between them. He had taught school 3 years in Bellevue and then had a promise of a contract in California.

This court has considered several cases involving the vacating and setting aside of a decree of divorce on application of a party within the period of 6 months from decree. In Firebaugh v. Firebaugh, 163 Neb. 79, 77 N. W. 2d 891, this court in its syllabi held: "The district court may at any time within 6 months of the trial and decision of a divorce case, if no appeal is taken therefrom, vacate or modify the decree therein.

"The right to vacate or modify a decree of divorce within 6 months of the trial and decision of the cause is not absolute but must be exercised within a sound discretion.

"In order that it may be said that the court exercised a sound judicial discretion in vacating or modifying a decree of divorce good reason therefor must be shown and it must also appear that such action did not produce an unconscionable result."

It was also held: "It is the duty of this court, on appeal of proceedings to modify a decree of divorce, to try it de novo on the record and to reach a conclusion uninfluenced by what was done by the trial court, except if there is irreconcilable conflict in the evidence the court may consider that the trial court saw the witnesses and accepted one version of the facts."

In Willie v. Willie, 167 Neb. 449, 93 N. W. 2d 501, the following rules were stated: "The petitioner or moving party who seeks to vacate a divorce decree has the burden of proving the grounds charged, including the falsity of allegations of residence within the jurisdiction of the court by a preponderance of evidence, and where this burden is not sustained, a refusal to vacate the decree is proper. * * *

"It is the spirit and policy of the law to give every party an opportunity to prosecute or defend his case in court, and courts will not ordinarily deny such right except for the fault or gross laches of such party or his authorized attorney.

"What constitutes good reason for setting aside such a

decree or what constitutes an unconscionable result prohibiting it depends upon the facts and circumstances of each particular case.

"Where a default has been regularly entered, it is largely within the discretion of the trial court to say whether the defendant shall be permitted to come in afterwards and make his defense and, unless an abuse of discretion is made to appear, this court will not interfere."

In the case before us the defendant's counsel calls attention to the decision of the trial court in setting aside the decree and contends that this court has always given great weight to the trial court's action. It is quite clear, however, from the rules cited that the matter comes to this court for trial de novo.

The petition to vacate alleged fraud, threats, and intimidation, together with deprivation or lack of counsel. The burden was upon defendant to prove the grounds relied upon. Her testimony with respect to abuse, threats, and intimidation rests entirely on her unsupported evidence. It is directly contradicted by that of Charles. Her visit to Dr. Kelley, she claims, occurred when she was in a state of doubt, confusion, and frustration, arising from fear of Charles. It is of great significance that Dr. Kelley was unable to relate anything in her history indicating abuse, threats, or fear although he spent an hour and a half endeavoring to elicit the cause of her anxiety. Marian had many personal contacts without the home and if she had been abused, threatened, and intimidated it would appear remarkable indeed if she had not related the situation to her roommate, Norma Cleary, and her friends, Phyllis James or Anne Dennis. If she dwelled in constant fear it would have been foremost in her mind. Marian also said she confided greatly in her friend, Ardis Peterson, who did not testify.

The alleged threat of Charles to leave Marian without support or provision to care for the children could

have only influenced her if she was entirely without understanding of her legal rights. Both Phyllis James and Anne Dennis related conversations with Marian which indicated she understood her rights. Marian was 29 years old and had been married 7 years. She had traveled through the United States with the Ice Capades and earned her own way. She had friends with whom she was in constant contact. It appears incredible that during repeated meetings with Norma Cleary, Phyllis James, and Anne Dennis, as well as Ardis Peterson, John Haizlip, and other persons with whom she was on a footing of friendship, her legal rights were not suggested to her and that she was so unsophisticated as not to understand them.

Charles testified he had asked Marian if she desired to procure an attorney. Attroney Ryan said she was informed he did not represent her and she had the right to procure counsel. The voluntary appearance and the custody and property agreement were not signed in his presence, but mailed from and returned to his office after being signed before others. The testimony of Phyllis James and Anne Dennis tends to show she knew her legal rights, and their statements and that of Norma Cleary clearly indicate her conduct gave no indication of fear or restraint.

Considering the evidence de novo as we are required to do, we conclude that Marian Dennis failed to prove by a preponderance of the evidence that she was coerced by fear, threats, or intimidation in entering into the child custody and property agreement. Neither was it shown she was ignorant of her right to counsel had she desired such. Indeed it appears that Marian desired the divorce and freely consented to the agreement regarding the custody of the children and property settlement in order that it be procured at that time. After the decree approving the settlement, she changed her mind and desired that matter be tried anew. Such conduct is an imposition on the time of the trial court and

should not be permitted unless the evidence shows some injustice has occurred.

It follows that the trial court was in error in setting aside the decree of divorce and the child custody and property settlement, and its judgment must be and is reversed and the cause remanded with direction to dismiss the defendant's petition to vacate the decree of divorce.

REVERSED AND REMANDED WITH DIRECTIONS.

HENRY B. MCPHERSON ET AL., APPELLANTS, V. FLORENCE F. MINIER ET AL., APPELLEES.

137 N. W. 2d 719

Filed October 29, 1965. No. 35965.

Gifts. It is essential to the validity of a gift that the donor shall have sufficient mental capacity to make the gift.

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

Lyle B. Gill, for appellants.

Richards, Yost & Schafersman, for appellees.

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

BOSLAUGH, J.

This is an action to recover $25,000 which represents the proceeds from United States government bonds which were jointly owned by the plaintiffs and Ralph V. McPherson in his lifetime. The plaintiffs allege that the defendants, by fraud and undue influence, caused Ralph V. McPherson, who was then incompetent, to redeem the bonds and deliver the proceeds to the defendants who converted the proceeds to their own use. The defendants' general demurrer to the second amended petition was sustained and the action dismissed. The

plaintiffs appeal from the order dismissing the action.

The second amended petition alleged that the plaintiffs, with one exception, were relatives of Ralph V. McPherson, now deceased, by blood or marriage; that the defendant Florence F. Minier was the housekeeper for the deceased; that the defendant Clara Marie Minier is the daughter of Florence F. Minier and lived with her at the home of the deceased; that the bonds were redeemed on January 23, 1963, and the proceeds deposited in a bank account of the deceased on March 2, 1963; that on March 3, 1963, the deceased executed a check in the amount of $25,000 to Clara Marie Minier; that on March 7, 1963, Florence F. Minier signed a signature card at the bank giving her "rights of survivorship" to the account of the deceased; that the account was closed on July 30, 1963; that the deceased died on October 29, 1963, at the age of 90 years; that a petition for the administration of his estate was dismissed on July 2, 1964, on the ground that he did not own sufficient property at the time of his death to require that his estate be administered; that the deceased was incompetent on January 23, 1963, when he redeemed the bonds and on March 3, 1963, when he executed the check for $25,000 to Clara Marie Minier; and that the signing of the bonds on January 23, 1963, and the drawing of the check on March 3, 1963, were the result of undue influence exerted by the defendants who conspired to strip an old man of his property. There are other allegations in the petition but the foregoing summary is sufficient for the purpose of this appeal.

The trial court found that the demurrer should be sustained and the action dismissed because the action was, in effect, a collateral attack upon the order of the county court dismissing the administration proceedings; that the plaintiffs had no legal interest in the proceeds of the bonds on or after March 3, 1963, which was the time when the alleged wrong was completed; and that any interests of the plaintiffs are several and not joint.

The defendants contend that the trial court was correct in sustaining the demurrer because the bonds were cashed by Ralph V. McPherson during his lifetime, the proceeds received by him, and then received by the defendants from him; that the joint ownership of the bonds was destroyed during the lifetime of Ralph V. McPherson; that the proceeds from the bonds, if not disposed of during his life, became a part of his estate upon his death; and that any action should be brought by the personal representative of the deceased.

The defendants' theory of the case assumes that Ralph V. McPherson was able to destroy the joint ownership of the bonds even though it is alleged that he was incompetent at the time and that his act was the result of fraud and undue influence exerted upon him by the defendants. This theory of the case ignores the effect of his alleged incompetency and the alleged conspiracy of the defendants to strip an old man of his property by fraud and undue influence.

The plaintiffs' theory of the case is that Ralph V. McPherson at a time when he was incompetent and under the control of the defendants made a gift to the defendants of property that was jointly owned by Ralph V. McPherson and the plaintiffs. It is essential to the validity of a gift that the donor shall have sufficient mental capacity to make the gift. Parkening v. Haffke, 153 Neb. 678, 46 N. W. 2d 117. If Ralph V. McPherson was incompetent on the dates alleged and the transaction in question was the result of the alleged fraud and undue influence exerted by the defendants, the transaction in question was invalid as between the parties to this action. See, Wager v. Wagoner, 53 Neb. 511, 73 N. W. 937; Rose v. Kahler, 151 Neb. 532, 38 N. W. 2d 391.

The plaintiffs are the real parties in interest because they would have succeeded to the ownership of the bonds upon the death of Ralph V. McPherson. The bonds were jointly owned and would not have become a part of the assets of the estate of Ralph V. McPherson, deceased.

His personal representative would have no interest in their proceeds.

It is unnecessary to consider any question of joinder because it has not been raised by the parties. See, § 25-806, R. R. S. 1943; Reynolds v. Warner, 128 Neb. 304, 258 N. W. 462, 97 A. L. R. 1128.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

RHONDA ANN LORINGER, APPELLANT, V. JOSEPH R. KAPLAN, APPELLEE.

137 N. W. 2d 716

Filed October 29, 1965. No. 35971.

1. **Marriage.** Public policy will not permit a married person to contract for or enter into a marriage with another when his or her spouse is alive and not divorced.
2. ———. A person contracting marriage has a primary duty to know his or her marriage status and to know that he or she is eligible to marry.
3. **Fraud.** It is a general rule that fraud and deceit cannot be predicated upon misrepresentation of law for the reason that everyone is presumed to know the law.
4. ———. An exception to the foregoing rule may exist under some circumstances where there is a relation of trust and confidence between the parties or where the speaker has, or professes to have, superior knowledge of the law.
5. **Divorce.** Where a married person commences an action for a divorce, such party is conclusively bound to know the contents and legal effect of the decree which she herself sought, and where the decree did not purport to grant an absolute divorce such person is estopped from asserting fraud and deceit in contracting a void marriage.

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

Schrempp, Lathrop & Rosenthal, for appellant.

White, Lipp, Simon & Powers and Albert L. Feldman, for appellee.

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

CARTER, J.

The plaintiff, Rhonda Ann Loringer, filed her petition in the district court for Sarpy County against the defendant, Joseph R. Kaplan, for damages for a breach of contract to marry, and for fraud and deceit in inducing her to become a party to a void marriage. A general demurrer was filed to plaintiff's petition which the trial court sustained. Plaintiff elected to stand on her petition and the action was dismissed. The plaintiff has appealed.

The petition alleges the following facts: During the times herein mentioned plaintiff was the wife of John Loringer, although separated from him. Defendant met the plaintiff about December 1961 and commenced courting her at that time. He importuned her to obtain a divorce from Loringer in order that she could marry him. She refused. She then moved to California to where the defendant followed her, continuing his avowals of affection. Eventually defendant employed attorneys in California, who proceeded to obtain a divorce for the plaintiff. An interlocutory decree was obtained on December 12, 1962. Defendant gave plaintiff engagement and wedding rings and purchased expensive gifts for her. He promised to buy a nice home in Omaha and to maintain plaintiff and her children in accordance with his means, which he assured her were considerable. Defendant caused plaintiff to select a home on South One Hundred Seventh Avenue of the value of between $40,000 and $50,000, which he was to purchase.

Under the law of California the decree of December 12, 1962, in the divorce action was interlocutory only and the purported divorce became effective after 1 year from the date of the interlocutory decree and the subsequent entry of a final decree of divorce. No contention is here made that the divorce decree ever be-

came effective, in fact the parties now agree that it did not.

Plaintiff alleges that defendant, claiming to have obtained legal advice in the matter, persuaded her that although she could not remarry in California for 1 year from the date of the decree, she could remarry in Nebraska 6 months after the date of the interlocutory decree. By this means defendant induced plaintiff to return to Nebraska to engage in a marriage ceremony, which she did at Papillion, Nebraska, on August 7, 1963, such date being more than 6 months and less than 1 year from the date of the California decree. They proceeded to live together as husband and wife.

Shortly thereafter marital difficulties developed and the defendant filed an action to annul the purported marriage on the ground that plaintiff was legally married at the time of their purported marriage and that their purported marriage was void.

Plaintiff then commenced this action, alleging that defendant had induced her to return to Nebraska and enter into a marriage contract by fraud and deceit. She alleges that his representations as to the validity of the marriage were false and known to him to be such. She alleges that she and defendant were in a confidential relationship and that she relied upon defendant and the means he had of finding the legal effect of the California decree. She alleges that, by the fraud and deceit of defendant, she has been unlawfully seduced by him, causing her great humiliation, distress of mind, and mental pain and anguish. She alleges further that because of his fraud and deceit she has been deprived of the benefits of the home and wealth of the defendant. The prayer of her petition is for damages in a substantial amount. We accept the allegations of the petition as true in considering whether or not a cause of action is stated.

Public policy will not permit a married person to enter into a marriage contract with another when his or

her spouse is alive and not divorced. If such married person is prevented by law from entering into a marriage contract, he or she can have no cause of action for a breach of promise to marry. It seems axiomatic that one cannot have a cause of action for damages on a contract he is barred by public policy from making. The plaintiff here can have no cause of action for a breach of promise to marry because she, having a husband living, was prohibited by law from entering into a contract of marriage.

The plaintiff asserts that she can maintain an action for damages for fraud and deceit under the facts alleged. It is a general rule that misrepresentations as to law will not give rise to an action for fraud and deceit. That this is the general rule is not here questioned. See 23 Am. Jur., Fraud and Deceit, §§ 45, 46, pp. 809, 810. Plaintiff relies upon an exception to the general rule. The exception is: An exception exists under some circumstances where there is a relation of trust and confidence between the parties or where the speaker has, or professes to have, superior knowledge of the law. 23 Am. Jur., Fraud and Deceit, § 48, p. 812. While we concede that such an exception to the general rule exists, it can have no application here.

The plaintiff sought and obtained the interlocutory divorce decree in the courts of California. She is bound to know the contents of the decree which she obtained. It would be against public policy to hold that she could claim lack of knowledge of the contents and legal effect of a decree which she herself sought. She is clearly estopped to assert those things which she is bound to know as a matter of law. The case of Rich v. Fulton, 104 Neb. 262, 177 N. W. 175, touches upon certain phases of the present case, although it does not appear to be conclusive of the facts alleged in this case.

It is clear by the law of California that plaintiff had only an interlocutory decree of divorce. She had no divorce at all until a final decree would be entered more

than 1 year after the date of the interlocutory decree. To permit a party seeking a divorce to allege and prove that she believed it meant something else or that she was persuaded that it meant something different, would involve many serious problems of public policy. A party who petitions for a divorce is estopped to deny the legal effect of the decree he obtains. See Lefferts v. Lefferts, 243 App. Div. 278, 276 N. Y. S. 809.

The plaintiff relies mainly upon three cases: Jekshewitz v. Groswald, 265 Mass. 413, 164 N. E. 609, 62 A. L. R. 525; Amsterdam v. Amsterdam, 56 N. Y. S. 2d 19; and Larson v. McMillan, 99 Wash. 626, 170 P. 324. In the Groswald case liability was found to exist because the defendant arranged a mock wedding and asserted it to be a valid marriage, knowing full well it was not. In the Amsterdam case the defendant was held liable for concealing a previous divorce by which he was prohibited from remarrying during the lifetime of the former wife. In the McMillan case defendant was held liable for concealing the existence of a wife and family and deceiving the plaintiff into a void marriage. These cases and others referred to in plaintiff's brief are not similar to the case at bar and do not support the principle applicable to this case.

The petition in the instant case is subject to demurrer, and when plaintiff stood on her petition the trial court properly dismissed the action.

AFFIRMED.

IDELLA M. MORRISSEY, APPELLANT, V. ARVILLA M. JOHNSON ET AL., APPELLEES.
137 N. W. 2d 713

Filed October 29, 1965. No. 35981.

1. **Automobiles: Highways. A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be**

considered with all the other facts and circumstances in determining whether or not a party was negligent.

2. ———: ———. The giving of the statutory signal for a turn at a highway intersection will not alone absolve the driver from a charge of negligence when he fails to exercise ordinary care for his own safety and that of others by looking to the front and rear for the approach of other vehicles.

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

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

Kelly & Kelly, for appellant.

Kenneth H. Elson, for appellee.

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

CARTER, J.

This is an action to recover for personal injuries and property damage resulting from a collision of two automobiles at the intersection of Stolley Park Road and Fred Street south of Grand Island, Nebraska. Plaintiff pleaded acts of negligence on the part of the defendant driver and the defendant driver asserted contributory negligence on the part of the plaintiff. The case was submitted to a jury on these issues. The jury found that there was no cause of action by either driver against the other. A motion for a new trial was filed by plaintiff and overruled by the trial court. The plaintiff has appealed.

The only question raised by the appeal is whether or not the trial court was in error in submitting the issue of contributory negligence to the jury. The finding of negligence on the part of the defendant by the jury is not questioned on the appeal.

The collision occurred on May 13, 1960, at about 7:10

p.m. It was during daylight hours and visibility was good. The streets and intersection involved were paved and dry. The plaintiff was returning from Hastings accompanied by Mrs. Arlene Hansen and Mrs. Darlene Jackson. Plaintiff was driving her automobile, with Mrs. Jackson riding in the right front seat and Mrs. Hansen riding in the rear seat. They drove north on Locust Street and turned west on Stolley Park Road for the purpose of taking Mrs. Jackson to her home. They approached Riverside Road at about 15 miles per hour. Mrs. Jackson informed plaintiff that this was not the turn and they proceeded west to Fred Street, which they approached at 15 miles per hour. Plaintiff testified she turned on her left-turn signal two houses back from the intersection. She looked in her rear-view mirror and saw no vehicles following as she entered the intersection. She testified that as she turned left onto Fred Street she was struck by defendant's car at about the center of the intersection, but that there was no line to go by. She said she made practically a square turn to the left. After the collision plaintiff's car was off the pavement, headed south, a few feet south of Stolley Park Road on the west side of Fred Street. It had been struck at the rear of the door on the left side. Plaintiff's evidence was largely corroborated by Mrs. Hansen and Mrs. Jackson.

The defendant testified that she was travelling alone from Lincoln to her home in Lexington, Nebraska. She also drove north on Locust Street toward Grand Island and turned west on Stolley Park Road. After turning west she saw plaintiff's car about a block ahead of her. She was then driving about 25 miles per hour. She saw plaintiff's car slow down at Riverside Road and then drive on west. When she was some distance to the rear of plaintiff's car and as plaintiff approached Fred Street, the defendant turned into the left lane and speeded up to 35 miles an hour for the purpose of passing. She stated that she sounded her horn as she started around and as she neared the intersection plain-

tiff's car cut the corner to the left in front of her, resulting in the collision. Defendant testified that she saw no turn signal of any kind, although she admitted plaintiff's mechanical turn signal was on immediately after the collision. She stated that the turn signal was dim and dusty and difficult to see, even after it was pointed out to her. She applied her brakes some 57 feet back, as shown by tire marks on the pavement for that distance. After the collision her car was in the south part of the intersection, headed northwest.

A state patrolman who appeared at the scene of the accident testified to the skid marks made by defendant's car as being 57 feet in length to the east of the point of impact. He determined the point of impact to have been 6 feet west of the east edge of the pavement on Fred Street and 3½ feet south of the centerline of Stolley Park Road.

We do not think the trial court erred in submitting the question of plaintiff's contributory negligence to the jury. Plaintiff testified that she looked in her rear-view mirror as she commenced her turn at the intersection. She testified that she had previously looked in her rear-view mirror some distance back and had seen no vehicles behind her. Defendant testified that she sounded her horn as she started to pass the plaintiff's car. Plaintiff testified that she heard no audible warning. The evidence shows that plaintiff was looking for Fred Street and was being informed by Mrs. Jackson as to where it was. The evidence shows that plaintiff did cut the corner in turning left onto Fred Street, contrary to the provisions of section 39-750, R. R. S. 1943. This is evidence of negligence. Warren v. Bostock, 170 Neb. 203, 102 N. W. 2d 55.

The collision occurred on a protected highway outside of the city limits of Grand Island. There is no evidence of excessive speed on the part of either driver. The giving of a statutory signal for a turn from a highway will not alone absolve the driver from negligence

where he fails to exercise care for his own safety, and that of others, by looking to the front and rear for approaching cars. Lockmon v. Reed, 170 Neb. 772, 104 N. W. 2d 269. A motorist is required to use reasonable care for his own safety while operating an automobile on the public highways. Where the evidence shows a violation of the statutory rules of the road, or the evidence is in conflict thereon, the issue is one of fact for the jury.

The evidence is in dispute as to whether or not the plaintiff looked to the rear at a time when looking would have been effective. Plaintiff was cross-examined as to contradictory statements pertaining to the accident. We think the conflicts in her evidence were for the jury's determination.

In Gross v. Johnson, 174 Neb. 273, 117 N. W. 2d 534, this court said: "Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict therein, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to the jury."

In Cawthra v. Shackelford, 176 Neb. 147, 125 N. W. 2d 186, we said: "In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and prudence required of him under the circumstances of the particular situation the issue of negligence on the part of the operator is one of fact to be determined by a jury."

The evidence of defendant's negligence and plaintiff's contributory negligence was for the jury. No contention is made that the issues were not properly submitted other than that there was no evidence of contributory negligence. There was therefore no error assigned that requires a reversal of the judgment by this court, and the judgment is affirmed.

AFFIRMED.

MICHAEL W. BROWN, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.
137 N. W. 2d 814

Filed November 5, 1965. No. 35889.

1. **Appeal and Error.** In an error proceeding from an inferior tribunal to the district court, the petition in error and the transcript of the proceedings must be filed in the district court within 1 calendar month after the rendition of the judgment or the making of the final order complained of.
2. ———. The right to appeal or to perfect error proceedings is statutory and the requirements of the statute are mandatory and must be met before the district court acquires jurisdiction of the subject matter of the action.
3. ———. This court has no power to extend the period of time of appeal.
4. **Statutes.** The term "calendar month" is a period terminating with the day of the succeeding month, numerically corresponding to the day of its beginning, less one.
5. **Appeal and Error.** An order is final and appealable when the substantial rights of the parties are determined even though the cause is retained for determination of matters incidental thereto.
6. **Judgments.** A judgment is "rendered" when the decision is announced upon the law and the facts, and the transmittal of the judgment or order to the parties concerned is not an integral part of the judicial act of rendering judgment.
7. **Appeal and Error.** An appellate court may not consider or decide a case within its appellate jurisdiction unless its authority to act is invoked in the manner prescribed by law.
8. ———. If a district court was without jurisdiction of the subject matter of the litigation, this court does not acquire jurisdiction thereof by an appeal to it from a final order of the district court.

Appeal from the district court for Douglas County: JAMES P. O'BRIEN, Judge. Reversed and remanded with directions.

Herbert M. Fitle and Marchetti & Samson, for appellants.

Simon J. Albracht and Schrempp, Lathrop & Rosenthal, for appellee.

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

WHITE, C. J.

Appellee, Michael W. Brown, was suspended and discharged from the Omaha police department on December 12, 1963. A letter from police chief Ostler to Brown on that date reveals that the stated reason for his discharge was conduct unbecoming an officer in that he gave false testimony under oath in a liquor license hearing before the city council.

Appellee appealed from this order of suspension and discharge to the personnel board of the City of Omaha. The personnel board took extensive evidence in hearings commencing on January 20, 1964, and concluding *on February 3, 1964,* at which time the board took the following action: "THE CHAIRMAN: The members of the Board all being present, and the *parties being present,* the special session of the Omaha Personnel Board in the matter of the hearing on the appeal of Michael Brown is again officially in session, *after executive session to consider the matter.* The board will entertain any comments or motions that any member of the board may have in this matter at this time. MR. NOVAK: I move that Mike Brown's appeal be denied. MR. GALAS: I will second it. THE CHAIRMAN: Motion made and seconded that the appeal in the case of Michael Brown be denied. Will the secretary please call the roll? SECRETARY: Mr. Cascio? MR. CASCIO: Yes. SECRETARY: Mr. Galas? MR. GALAS: Yes. SECRETARY: Mr. Novak? MR. NOVAK: Yes. SECRETARY: Mr. Syas? MR. SYAS: No, for the following reasons: * * *." (Emphasis supplied.)

The chairman of the board, Dr. Frank Barta, made the following statement at the end of the hearing: "* * * I firmly vote with the members of the board who deny his appeal and also deny it, and this makes it four to one, and it is so ordered. * * * (Whereupon, at 10:35 p.m.,

on February 3, 1964, the hearing was concluded.)" The record discloses that appellee and counsel for both parties were present when the above proceedings took place.

The petition in error herein was filed in the district court for Douglas County on *March 5, 1964.* The first assignment of error raises the question of the jurisdiction of the district court. The district court overruled the objections of the appellants as to its jurisdiction. These objections were made under section 25-1931, R. R. S. 1943, applicable here. This section provides that no proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced unless *within 1 calendar month* after the rendition of the judgment or the making of the final order complained of. And, we have construed the term "calendar month" as being a period terminating with the day of the succeeding month, numerically corresponding to the day of its beginning, less one. Ruan Transport Corp. v. Peake, Inc., 163 Neb. 319, 79 N. W. 2d 575.

We have no power to extend the period of review for 1 or 2 days any more than we could extend it 6 months, and it is fundamental that the right to review by error proceedings or to appeal is statutory and the requirements of the statute must be met before the district court or this court acquires jurisdiction of the subject matter of the action.

In the Ruan case, *supra,* the court said: "If the appeal is not timely perfected within 1 month from the date of the entry of the order to which complaint is made, then this court has no jurisdiction."

We have held that a judgment is the final determination of the rights of the parties; that a judgment is "rendered" when the *decision is announced* upon the law and the facts; and further that the entry of a judgment upon the record is not an integral part of the judicial act of rendering judgment. Ricketts v. Continental Nat. Bank, 169 Neb. 809, 101 N. W. 2d 153.

In Dorshorst v. Dorshorst, 174 Neb. 886, 120 N. W. 2d

32, we held that an order is final and appealable when substantial rights of the parties are determined even though the cause is retained for determination of matters incidental thereto. It is apparent that the action of the personnel board in passing the motion denying the appeal constituted a final determination of the rights of the parties and was a rendition of a judgment upon the law and the facts.

In a similar situation, this court said in Harms v. County Board of Supervisors, 173 Neb. 687, 114 N. W. 2d 713, as follows: "However, in the case of Anania v. City of Omaha, 170 Neb. 160, 102 N. W. 2d 49, where this court considered an appeal from the judgment of the district court brought to the trial court by error proceedings it was made clear that the provisions of the statutes granting the right of review in such cases must be followed. In that case the court laid down the following rules: 'A petition in error in a district court to test the validity of a final order of an inferior tribunal is an independent proceeding the object of which is to obtain a reversal of the order presented for review. * * * Appellate jurisdiction of a case cannot be conferred upon a court by action of the parties thereto and the absence of such jurisdiction may be asserted at any time during the pendency of the litigation. * * * An appellate court may not consider or decide a case within its appellate jurisdiction unless its authority to act is invoked in the manner prescribed by law. * * * If a district court was without jurisdiction of the subject matter of litigation, this court does not acquire jurisdiction thereof by an appeal to it from a final order of the district court therein.' * * * In proceedings under section 25-1901, R. R. S. 1943, it is mandatory that a petition in error and the transcript be properly authenticated and timely filed to vest the appellate court with jurisdiction of the subject matter. Anania v. City of Omaha, *supra*. * * * *it is apparent that the district court acquired no jurisdiction of the subject matter, and that this court*

under the circumstances acquired none either. It follows that the action of the district court dismissing the petitions on appeal must be affirmed." (Emphasis supplied.)

Appellee argues that the Omaha municipal code (chapter 7.04.100 (c)), requires that the board "report in writing" its findings and decisions to the parties; that this document, the report in writing, bears the date of February 7, 1964; and that the time for appeal should be computed from this date. We do not agree. The personnel board was sitting in a quasi-judicial capacity; in other words, it was exercising a judicial function in determining the rights of appellee. After the personnel board announced its decision on February 3, 1964, nothing remained to be done except the administrative act of reducing the order to writing and transmitting it to the appellee.

The chairman announced in open hearing on February 3, 1964, "it is so ordered." The municipal code requirement provided for the reduction of the order to writing and its transmittal to the parties. But, this in no way destroys the indisputable fact in the record that the board announced and rendered its decision at the termination of the hearing on February 3, 1964. It is true that the action of the board had to be transmitted to the parties. But, we feel that this requirement of transmittal is no more significant as far as the finality of the order is concerned than was the necessity, as in the Ricketts case, that a formal decree be spread on the records of the court. It is clear from the holding in the Ricketts case that the rendition of the judgment or final order takes place when the announcement of the decision is made. The appellee was present with counsel and was fully aware of the board's final and announced decision. The chairman of the board announced, "it is so ordered."

Consequently, we hold in this case that the district court acquired no jurisdiction of the subject matter, the

petition in error having not been timely filed, and that therefore this court under these circumstances acquired no jurisdiction either. The order of the personnel board remains final and binding on all parties concerned. The judgment of the district court is reversed and the cause remanded with directions to dismiss the error proceedings on the ground of lack of jurisdiction.

REVERSED AND REMANDED WITH DIRECTIONS.

SMITH, J., dissenting.

The majority opinion holds that the oral vote constituted the rendition of the judgment regardless of the date when the action was spread upon the records of the board. For support it looks to rules governing appeals to this court from the district court. The analogy bares the sensitivity of the court to the need for a record entry in a case where the transcript is jurisdictional—the case of Michael W. Brown.

Prior to 1941 the transcript was jurisdictional. Although the statute measured the time from rendition of the judgment, this court repeatedly held that time commenced to run when the judgment was entered of record, "'* * * so that it * * * (was) within the power of the appellant to comply with the statute regulating appeals, by filing in this court a certified transcript of the proceedings in the district court.'" Sloan v. Gibson, 156 Neb. 625, 57 N. W. 2d 167, quoting Bickel v. Dutcher, 35 Neb. 761, 53 N. W. 663.

In 1941 the transcript lost its jurisdictional feature, but the phrase "rendition of such judgment" was retained. Subsequently the court said that an announcement without a record entry could be a rendition. See Ricketts v. Continental Nat. Bank, 169 Neb. 809, 101 N. W. 2d 153. The new interpretation responded to the repeal of the jurisdictional requirement that a transcript be filed. See Sloan v. Gibson, *supra*. If we stretch the analogy a little further, we run into the present statutory provision that a notation on the trial

docket is an integral part of the rendition. See § 25-1301, R. S. Supp., 1963.

Time did not commence to run against Brown before entry of the decision on the records of the board so that it was within his power to comply with the statute by filing the transcript in the district court. I respectfully dissent.

SPENCER, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. GEORGE D. SWINEY ET AL., APPELLANTS.

137 N. W. 2d 808

Filed November 5, 1965. No. 35937.

1. **Criminal Law.** In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.
2. ———. This court will not interfere with a verdict of guilty which is based on conflicting evidence unless the evidence is so lacking in probative force that it is insufficient as a matter of law to support a finding of guilt beyond a reasonable doubt.
3. ———. Any person who is present at the place of the crime, aiding and assisting in the commission of the crime, is a principal.
4. Criminal Law: Evidence. Evidence of other similar acts and offenses is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge.
5. **Husband and Wife: Witnesses.** The right of a husband to prevent his wife from testifying against him is personal to him and may be waived by him. §§ 25-1203 and 25-1207, R. R. S. 1943.
6. **Trial: Appeal and Error.** An instruction will not be held erroneous because of a mere typographical error which cannot reasonably be said to have confused or misled the jury to the prejudice of the party complaining.
7. **Criminal Law.** In the absence of the showing of an abuse of discretion, this court will not disturb a sentence imposed within the limits prescribed by the statute.

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

Leonard Dunker, William L. Walker, and Earl Ludlam, for appellants.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

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

BOSLAUGH, J.

The defendants, George D. Swiney and Loren Swiney, were convicted of child stealing in violation of section 28-418, R. R. S. 1943, and sentenced to imprisonment in the Nebraska Penal and Correctional Complex. Their motions for new trial were overruled and they have appealed to this court.

The information alleged that the defendants, on or about August 31, 1963, in Platte County, Nebraska, forcibly took and carried away Kathlene Teske, Stanley Teske, Dennis Teske, and Denise Teske, all minors under the age of 18 years, with the intent unlawfully to detain or conceal said children from Carol Brinkman, the mother and person having legal custody of them.

George D. Swiney is the pastor of the Bible Baptist Church in Columbus, Nebraska. Loren Swiney is a son of George D. Swiney. For convenience in this opinion, George D. Swiney will be referred to as Reverend Swiney and Loren Swiney as Loren.

The Teske children referred to in the information are children of Carol Brinkman by a former marriage. The care, custody, and control of these children were awarded to her by a judgment in a divorce action in the circuit court for Clackamas County, Oregon. Subsequent to the divorce, Carol married Harold Brinkman who is her present husband. Harold Brinkman did not adopt the Teske children and has no legal right to their care, custody, or control except through Carol Brinkman.

The defendants' principal assignment of error relates to the alleged insufficiency of the evidence to sustain

the verdict and judgment. In determining the sufficiency of the evidence to sustain the conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Snell, 177 Neb. 396, 128 N. W. 2d 823. This court will not interfere with a verdict of guilty which is based on conflicting evidence unless the evidence is so lacking in probative force that it is insufficient as a matter of law to support a finding of guilt beyond a reasonable doubt. State v. Brown, 174 Neb. 387, 118 N. W. 2d 328.

There is evidence in this case from which the jury could find that on August 31, 1963, Carol Brinkman and Harold Brinkman and their family returned to Columbus, Nebraska, from a trip to Oregon. Later that day some difficulty developed between Carol and Harold concerning his refusal to go to a grocery store with her. Carol related this difficulty to Twila Teske, a friend of hers, and Twila notified Loren that the Brinkmans were having difficulty and should be helped.

Twila Teske was Harold Brinkman's first wife, and is now married to Melvin Teske, Carol Brinkman's first husband. The record indicates that Melvin Teske, Twila's present husband, is now living in Oregon.

Between 8:30 and 9 p. m., Loren called Harold Brinkman and asked if he could come to the Brinkman home and talk with him. Shortly thereafter, Reverend Swiney and Loren came to the Brinkman home and talked with Carol and Harold. The conversation included a discussion of the Brinkman's financial problems, their purchase of an automobile, Carol's attitude toward the church while on the Oregon trip, whether it was proper for Carol's daughters to wear slacks or tights, and the reading of some scriptures from the Bible by Reverend Swiney. Twila Teske came to the Brinkman home and was present during the conversation. Several members of the Bible Baptist Church including two of Reverend

Swiney's children came to the Brinkman home while the conversation was taking place.

When Carol did not agree with Reverend Swiney, he raised his voice, stated that "Somebody here isn't saved," or words to that effect, and pounded the coffee table with his fist. Carol said that she didn't have to listen to this, left the room, and walked outdoors. While outside the house she heard Reverend Swiney tell Harold to get the children. Loren then went to the basement to awaken the children who slept there, and Harold went upstairs where the other children slept. Carol re-entered the house by the back door just as Harold was coming down the stairs with Jeff Brinkman, their youngest child. She tried to get Jeff away from Harold but he turned his back, handed Jeff to Reverend Swiney who in turn handed Jeff to Mrs. Peterson. Mrs. Peterson is Harold Brinkman's mother and lived in the Brinkman home.

When all of the children were present, the defendants and Harold asked the Teske children whether they wanted to go with their "daddy" or their mother. Carol attempted to get to the telephone to call the police. Loren pushed her away from the phone several times and Reverend Swiney told him to yank the phone off the wall if Carol tried to get to the phone.

During this time all of the children except Melvin Teske left the house. Carol went outside and found that they were in Twila Teske's automobile with Mrs. Peterson. Carol attempted to open the car door but was pushed away by Loren. Loren admits that he pushed the door shut and pushed her hand off the door handle, but testified that he did this because he was afraid Carol would harm Mrs. Peterson.

Twila Teske came out of the house, got in her car, and drove away with the children. Reverend Swiney and Loren went back into the Brinkman house. One of the persons present said that it would not be necessary to stay and guard Carol any longer because the children were gone.

When everyone except Carol and Melvin Teske had left the Brinkman home, Carol called the police and reported what had happened. Later that evening she went to the police station, signed a complaint against the defendants and Harold, and a warrant was issued.

When Twila Teske left the Brinkman home she took the children to her home. Reverend Swiney and Loren came to the Teske home where Reverend Swiney said to hurry and take the children to "Danny's" before the police knew where they were. Twila then took the children to the Daniel Armstrong home near Columbus where they remained until September 2, 1963.

On September 1, 1963, Reverend Swiney and Loren were arrested, taken before the county judge, and released on bond. On the same day Harold Brinkman and Reverend Swiney had a conversation at the Armstrong home concerning what should be done with the children. They decided that the four Teske children should be returned but that Harold would keep the two Brinkman children with him. At about 7 p. m. that day, Reverend Swiney talked to the sheriff of Platte County, Nebraska, at the sheriff's home. Reverend Swiney wanted to know if he would be charged with kidnapping if the Teske children were returned. The sheriff replied that it was a legal question which he could not answer. Reverend Swiney did not say that he knew where the Teske children were.

On the afternoon of September 2, 1963, Harold Brinkman left the Armstrong home and took the Brinkman children to the Doyle Tucker farm near Lindsay, Nebraska. He had no funds at that time except $15 which Reverend Swiney had given him.

On the same day, Reverend Swiney told his son, George W. Swiney, to take the Teske children from the Armstrong home to Columbus, Nebraska, and release them close to town. At about 8 p. m., the Teske children were returned to Columbus, Nebraska, and released at a point about 5 blocks from their home.

From the Tucker farm, Harold Brinkman went to the Wilgocki farm near Elgin, Nebraska, and then to a motel at Sioux Falls, South Dakota. On the following day, Reverend Swiney came to the motel and talked with Harold. They decided that Harold should go to Atlantic, Iowa, where another member of the church, Lawrence Hassebrook, was living under an assumed name. Reverend Swiney then took Harold Brinkman and the two Brinkman children to the Lawrence Hassebrook home in Atlantic, Iowa, where Hassebrook was living with his daughter, Janet, under the name of Hansen.

Katherine Hassebrook testified that she was married to Lawrence Hassebrook in 1945; that Lawrence was a member of the Bible Baptist Church but that she was not; that in 1958 she commenced having discussions with Reverend Swiney concerning religious matters; that they had differences of opinion concerning religious matters; that Reverend Swiney told Lawrence that Mrs. Hassebrook was a devil and not a fit mother for her children; that in 1959, Mrs. Hassebrook filed a suit for divorce; that on Mother's Day in 1959, while the divorce action was pending, the family was planning to attend church together; that Lawrence took Janet to the church first and Mrs. Hassebrook understood that they would be right back; that they did not return and she did not see Janet again or know where Janet or Lawrence Hassebrook were until November 1963.

The record does not show how long Harold Brinkman stayed in Atlantic, Iowa, or where he went when he left there except that he went to California. In October 1963, Harold Brinkman called Carol several times in an effort to effect a reconciliation. They agreed to meet near Grand Island, Nebraska. Carol then notified the authorities and on November 2, 1963, Harold was arrested on the complaint that had been filed on August 31, 1963.

Carol Brinkman and Harold Brinkman have since

become reconciled and are now living in Oregon with their children.

The record in this case shows by both direct and circumstantial evidence that the defendants forcibly took and carried away the four Teske children with the intent unlawfully to detain or conceal them from their mother who had their legal custody. Although much of the testimony offered by the State was denied by the defendants or contradicted by other witnesses produced by them, there is sufficient evidence to sustain the findings of guilt. It was the province of the jury to resolve the conflicts in the testimony, determine the credibility of the witnesses, and weigh the evidence. The assignments of error relating to the alleged insufficiency of the evidence are without merit.

The defendants contend that the trial court should have instructed the jury in reference to section 28-201, R. R. S. 1943, which provides that whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender. Any person who is present at the place of the crime, aiding and assisting in the commission of the crime, is a principal. Puckett v. State, 144 Neb. 876, 15 N. W. 2d 63; Hill v. State, 42 Neb. 503, 60 N. W. 916. The evidence in this case shows that the defendants were present at the place of the crime and participated in it as principals. Consequently, the trial court was not required to instruct the jury in reference to accessories before the fact.

The defendants further contend that the trial court erred in permitting the State to introduce evidence of other similar crimes. Specifically, the defendants complain as to the testimony of Harold Brinkman and Kathcrine Hassebrook concerning Reverend Swiney's knowledge and participation in the concealment of Janet Hassebrook who was living with her father under an assumed name in Atlantic, Iowa.

In this case the State was required to prove that the

children were forcibly taken or carried away by the defendants with intent unlawfully to detain or conceal the children from their parent. A specific intent was an essential element of the offense. Evidence of other similar acts and offenses is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge. Sall v. State, 157 Neb. 688, 61 N. W. 2d 256; Turpit v. State, 154 Neb. 385, 48 N. W. 2d 83. In the Turpit case this court quoted with approval the following statement from I 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 evidence concerning the Hassebrook child was admissible in this case as tending to prove the criminal intent of the defendant Reverend Swiney when he participated in the forcible taking and carrying away of the Teske children. By instruction No. 15 the trial court advised the jury that the evidence could be considered for that purpose only and adequately protected the rights of the defendants in that regard.

Both Harold Brinkman and Carol Brinkman testified as witnesses for the State. Harold Brinkman was named as a defendant in the complaint filed in the county court on August 31, 1963, but was not included as a defendant in the information filed in the district court. In the district court, Harold Brinkman specifically waived any privilege that he may have had to prevent his wife from testifying against the defendants. The defendants contend that this was error and that Carol Brinkman should not have been allowed to testify against them.

The prohibition against a wife testifying against a husband is contained in section 25-1203, R. R. S. 1943. Section 25-1207, R. R. S. 1943, provides in part: "The prohibitions of the preceding sections do not apply to cases where the party in whose favor the respective provisions are enacted, waives the rights thereby conferred." If any privilege existed in this case, it is clear that it was waived by Harold Brinkman. The privilege was personal to Harold and did not exist for the benefit of the defendants. See VIII Wigmore on Evidence (McNaughton Rev.), § 2242, p. 256.

The defendants contend that instructions Nos. 8, 9, and 17 given to the jury were erroneous. Although there was only one exhibit admitted in evidence, in instruction No. 8 the trial court referred to the "exhibits." In instruction No. 9 the trial court referred to both defendants by name and later used the pronoun "he" instead of "they." There was no prejudicial error in these instructions. An instruction will not be held erroneous because of a mere typographical error which cannot reasonably be said to have confused or misled the jury to the prejudice of the party complaining. Kaufman v. State, 112 Neb. 718, 200 N. W. 998.

Instruction No. 17 advised the jury that the testimony of a defendant is to be considered as that of any other witness, taking into consideration his interest in the result of the trial, his manner, the probability of the testimony, and giving it such weight as it is entitled to receive under the circumstances. Similar instructions were approved in Darwin v. State, 107 Neb. 177, 185 N. W. 312, and Davis v. State, 171 Neb. 333, 106 N. W. 2d 490.

The penalty for violation of section 28-418, R. R. S. 1943, is imprisonment for not more than 20 years nor less than 1 year. Reverend Swiney was sentenced to imprisonment for a term of 18 months to 3 years. Loren Swiney was sentenced to imprisonment for 1 year. The defendants contend that the sentences are excessive and

that the defendants should have been placed upon probation.

It is a matter within the discretion of the trial court whether the defendant in a particular case should be sentenced or placed upon probation. The sentences imposed are within the maximum and minimum limits prescribed by the Legislature. In the absence of the showing of an abuse of discretion, this court will not disturb a sentence imposed within the limits prescribed by the statute. State v. Ohler, 177 Neb. 418, 129 N. W. 2d 116. There is nothing in this record to show an abuse of discretion by the trial court.

The right of parents to the care, custody, service, and companionship of their minor children is well recognized. One purpose of the statute is to prevent third persons from interfering with this relationship. Those who choose to disregard the law must bear the responsibility for their conduct. The record in this case amply sustains the action of the trial court.

The judgment of the district court is affirmed.

AFFIRMED.

KENTON B. BOWERS, APPELLANT, V. GRACE B. MAIRE, ADMINISTRATRIX OF THE ESTATE OF HERMAN C. MAIRE, DECEASED, APPELLEE.

137 N. W. 2d 796

Filed November 5, 1965. No. 35951.

1. **Negligence.** Negligence is never presumed and cannot be inferred from the fact that an accident occurred.
2. **Negligence: Evidence.** Where evidence is wholly circumstantial it is insufficient unless the circumstances proved are of such a nature and so related to each other that the conclusion reached is the only one that can be fairly and reasonably drawn therefrom.
3. **Automobiles: Witnesses.** An automobile accident is a "transaction" within the meaning of the dead man's statute, section 25-1202, R. R. S. 1943.

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

Stubbs & Metz, for appellant.

McGinley, Lane, Mueller & Shanahan, for appellee.

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

WHITE, C. J.

This is a suit for personal injuries and property damage arising as a result of an automobile accident. The district court directed a verdict in favor of the defendant, administratrix of the estate of Herman C. Maire, decedent. The questions involved concern the sufficiency of the evidence to establish negligence of defendant's decedent Maire and, second, the trial court's holding that the plaintiff was barred from testifying as to how the accident occurred under the provisions of section 25-1202, R. R. S. 1943, the dead man's statute.

The accident occurred at about 6:30 p.m., on July 24, 1963, on State Highway No. 2, approximately 11 miles west of Mullen, Nebraska. The highway was oiled, ran in an east-west direction, had a painted centerline, and was approximately 19 feet, 6 inches wide. The road was dry and visibility was good. Plaintiff Bowers was driving west and defendant's decedent Maire was driving east. Maire was killed in the accident. Since plaintiff was barred from testifying as to how the accident happened, the evidence before the court was the location of the vehicles after the accident, and evidence of certain physical facts as developed by the testimony of the highway patrolman, Eldred Folkers, and the deputy sheriff, Francis E. Brown. The evidence shows that there was severe damage to the right front portion of both vehicles, the Maire station wagon and the plaintiff's pick-up truck. The plaintiff's vehicle was off the highway to the south, was next to the fence, and was pointing in a northwesterly direction. The Maire vehicle was partly on the

highway, was north of the centerline, and was headed in a southwesterly direction. It appears that the distance between the vehicles was approximately eighteen feet. There were no skid marks leading up to either vehicle at the scene of the accident. There was debris, including oil and dirt, strewn over the highway, mainly on the north side. The evidence is that there were several gouge marks in the highway close to and on both sides of the centerline. There was a scuff mark on the highway leading from the vicinity of the gouge marks diagonally across the highway to the south in the direction of the plaintiff Bowers' vehicle.

Negligence is never presumed and cannot be inferred from the fact that an accident occurred. Bowers v. Kugler, 140 Neb. 684, 1 N. W. 2d 299; Anderson v. Interstate Transit Lines, 129 Neb. 612, 262 N. W. 445. And, where the evidence is wholly circumstantial, as here, it is insufficient unless the circumstances proved are of such a nature and so related to each other that the conclusion reached is the only one that can be fairly and reasonably drawn therefrom. Flory v. Holtz, 176 Neb. 531, 126 N. W. 2d 686; Wolstenholm v. Kaliff, 176 Neb. 358, 126 N. W. 2d 178; Anderson v. Interstate Transit Lines, *supra*.

Plaintiff is entitled to have all conflicts in the evidence resolved in his favor and is entitled to the benefit of all reasonable inferences to be drawn therefrom. Does the evidence, construed most favorably to the plaintiff, establish that the proximate cause of the accident was the negligence of Maire in driving on the north or wrong side of the road? We think not. The gouge marks were on both sides of and close to the centerline of the highway. Debris was generally over the roadway leading to both cars. No evidence appears from which a reasonable inference can be drawn as to where the point of impact was. The gouge marks cannot be identified as coming from or caused by a particular vehicle. The ones on the north or south could have been caused by either vehicle. Both vehicles were damaged on the

right front but this does not show where the impact occurred, much less indicating that the proximate cause of the accident was the Maire vehicle being driven on the north or wrong side of the road. The inference can be drawn that both drivers turned to the left immediately prior to the accident but this in no way demonstrates that at that time the Maire vehicle was in the north or wrong lane. The position of the vehicles, with the Bowers' vehicle coming to rest considerably south of the road, leads us to no inference of what position it was traveling on the road prior to the accident. As we noted in Anderson v. Interstate Transit Lines, *supra,* the complexity of forces operating on two rapidly moving vehicles in collision with one another makes it extremely difficult to reconstruct how the accident happened from the marks found on the highway and the positions and conditions of the vehicles after the accident. The plaintiff's position is further weakened by the testimony of the patrolman that he could not connect the markings on the highway to the accident itself, although there was testimony that the markings were of recent origin. There is no evidence in the record as to speed of the automobiles or as to lookout since, under the dead man's statute, section 25-1202, R. R. S. 1943, plaintiff was not permitted to testify. In Anderson v. Interstate Transit Lines, *supra,* this court held that the evidence as to negligence of the defendant who collided with an oncoming truck was not sufficient to allow the case to go to the jury. The court said: "Nothing in the evidence tends to reasonably identify the point of collision, with reference to the center boundary of the highway. The actual problem presented by the record in its present form is one of the resolution of forces, and we would be required to determine from the position of the two motor vehicles at the conclusion of the incident, just where they actually collided. With no evidence before us as to the weight, speed, location on the highway, or direction of movement thereon, of either

truck or bus at the moment of impact, obviously this can not be done." In the case before us, there is likewise no evidence to identify the point of collision with reference to the center boundary of the highway. Debris was scattered over the highway generally and the point of collision could not be identified. We cannot determine from the position of the two vehicles at the conclusion of the accident just where they actually collided. There is no testimony in the record as to the speed, lookout, or location on the highway of either vehicle at the moment of the impact. From the evidence presented, we cannot reconstruct how the accident happened.

The burden rested on the plaintiff to establish Maire's negligence. The circumstances lead to no conclusive inference that the accident was caused by Maire's driving on the wrong or north side of the road. A verdict of a jury on the evidence presented in this case would be based on conjecture, surmise, and speculation and could not be permitted to stand. The district court was correct in directing a verdict for the defendant.

Plaintiff, as to his second assignment of error, asks us to reconsider our holding that an automobile accident is a "transaction" within the language of section 25-1202, R. R. S. 1943, the dead man's statute. This question was resolved adversely to plaintiff's contention in Fincham v. Mueller, 166 Neb. 376, 89 N. W. 2d 137, and in the recent case of Bruno v. Kramer, 176 Neb. 597, 126 N. W. 2d 885. These cases hold that an automobile accident is a transaction and that a claimant's testimony is barred insofar as it relates to his own and the decedent's actions immediately before or at the time of the accident. This question has been decided and has become the law of this state. We adhere to this holding. We point out that in Fincham v. Mueller, *supra,* we held that any change in the rule was a legislative matter and that if the rule was too severe, that it was not a matter of judicial opinion, but one for legislative correction. We also point out that the Legislature has not seen fit

to change the rule or carve out an exception with reference to automobile accidents. This court will not indulge in judicial legislation which, by our indictment, we would be engaging in if we changed the rule.

There is no merit in the plaintiff's assignments of error. The judgment of the district court in directing a verdict for the defendant is correct and is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

I respectfully dissent from that portion of the majority opinion which affirms the prior holdings of this court that an automobile accident is a "transaction" within the meaning of section 25-1202, R. R. S. 1943. This question was originally decided by this court in Fincham v. Mueller, 166 Neb. 376, 89 N. W. 2d 137.

That opinion extensively considered the varying judicial interpretations and viewpoints. The court relied heavily upon the fact that many cases holding that an automobile accident is not a "transaction," involved statutes in which the word "personal" qualified the word "transaction." The opinion then distinguished previous statements by this court that the testimony referred to by the statute related to something of a "personal" nature by classifying them as dicta. It seems to us that the meaning of the word "transaction," under any realistic definition, carries the connotation of something not involuntary, or at least not fortuitous nor accidental. The specific language of the statute "* * * *transaction* or conversation had *between* * * *" ought not to be interpreted as applying to a situation in which the parties were acting independently of each other; nor should the fact that there was an accidental collision *between* their automobiles transform their independent actions into a "transaction" *between* them. (Emphasis ours.) We simply cannot accept the conclusion that the Legislature in using the word "transaction" intended to include a fortuitous, involuntary automobile accident in which the parties were operating independently of each

other. The dissenting opinion in the Fincham v. Mueller case points out the fact that the disqualification of witnesses is not favored, and that the "dead man's" statute should not be extended or expanded by interpretation.

The majority opinion implies that to change the rule of the Fincham case would be judicial legislation. If judicial legislation is to be defined as "any interpretation of a statute," then, of course, the Fincham case itself was judicial legislation. It is quite clear, however, that the rule adopted in the Fincham case was a judicial interpretation adopted by this court, and clearly subject to change by this court if and when convinced that it was erroneous. The majority opinion points out that the Legislature has not seen fit to change the statute since our original interpretation, and implies that because of that fact, what was originally judicial interpretation has now become legislation. While we recognize that affirmative action by the Legislature following a judicial interpretaton constitutes legislation, inaction by the Legislature does not amount to the same thing. There may, of course, be facts and circumstances which may be strongly persuasive as to whether the Legislature approved or disapproved a judicial interpretation by not acting on it. This does not convert judicial interpretation into legislation, nor should it make an erroneous interpretation inviolable.

For the reasons stated, we respectfully dissent.

CARTER and SMITH, JJ., join in this dissent.

CECIL D. HAWTHORNE ET AL., APPELLANTS, V. CHARLES CASSIDY, DOING BUSINESS AS CASSIDY LAND AND CATTLE COMPANY, APPELLEE.

137 N. W. 2d 818

Filed November 5, 1965. No. 35966.

1. **Contracts. The law presumes that the parties understood the**

import of their contract and that they had the intention which its terms manifest.

2. ———. A written contract expressed by clear and unambiguous language is not subject to interpretation or construction.

3. ———. In construing a writing it is the duty of the court to give the words used their ordinary and popularly accepted meaning in the absence of explanation or qualification.

4. **Estates: Landlord and Tenant.** Forfeitures of estates under leases are not favored in law and covenants will not be extended by implication to sustain a claim of forfeiture.

5. **Appeal and Error.** Where the evidence is in irreconcilable conflict, this court will consider that the trial court saw and heard the witnesses and that it accepted the version of one party on controverted issues of fact.

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

Joseph J. Divis and Edward C. Hastings, for appellants.

Leo F. Clinch, for appellee.

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

MCCOWN, J.

This is an action by the lessors for forfeiture of a lease, and for damages to the property. The district court dismissed the action and the plaintiffs have appealed.

In February 1962, plaintiffs and defendant executed a written lease covering a 9,500-acre ranch, including the buildings and improvements except the main residence. The term was for 5 years commencing May 1, 1962, for a cash rental of $20,000 per year. The lease contained the following specific provision: "It is further expressly agreed between the parties hereto that the Lessee shall not graze livestock on the premises to exceed 800,000 pounds weight during a five month period in any one year term, said weight limitation being the weight of the livestock as of the date they are placed on the premises. The aforesaid weight and time period limitations may be used in its entirety or spread out over

a years term of the lease at the option of the Lessee, provided said limitations are not exceeded."

The total number of livestock and agreed weights, in most instances, and the length of time they were on the ranch during the lease year 1962-1963 was stipulated by the parties. Most of the animals were placed on the ranch between May 1 and May 5, 1962, and were taken off the ranch between September 28 and October 6, 1962, except one large group of yearling heifers. During the first 5 months of the lease year, May to October, approximately 525,000 pounds of livestock were grazed on the ranch. In November 1962, 61 cows and 12 bulls were placed on the ranch with the large group of yearling heifers which had been retained on the ranch. The weight of the animals on the ranch after November 12 was approximately 278,000 pounds. These were retained on the ranch for the remainder of the lease year.

The defendant made timely payments of the rental in accordance with the lease, but the plaintiffs allege that the provision of the lease quoted above was violated and that plaintiffs are entitled to a forfeiture of the lease and also allege that the violation of the provision damaged the land and pray for a recovery of the damages sustained.

Both parties agree to the proposition that the law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest. They both cite Shepard v. Shepard, 145 Neb. 12, 15 N. W. 2d 195. It is also undisputed and agreed that a written contract expressed by clear and unambiguous language is not subject to interpretation or construction and both parties cite Frentzel v. Siebrandt, 161 Neb. 505, 73 N. W. 2d 652, in support of this proposition.

The plaintiffs' position basically is that the language referred to requires that the livestock placed on the range take on new weights at the end of each 5-month period in a lease year. This interpretation is in direct

opposition to the specific language of the lease which states: "* * * said weight limitation being the weight of the livestock *as of the date they are placed on the premises.*" (Emphasis ours.)

The defendant's position is that the specific option given to the lessee to spread out the weight and time period limitations over a year's term of the lease refers to 800,000 pounds of weight and a 5-month period of grazing, and these must be combined to determine the annual limitation, which can be spread. Both parties agree that if 800,000 pounds of livestock have been grazed on the premises for 5 months, the lease year limitations have been reached. Obviously, with cattle being placed on the premises and removed from the premises at varying dates and times, and with the time limitation used relating to months and the weight limitations referring to pounds, the total annual weight time period limitation must be converted to month pounds. By computation, 800,000 pounds for a 5-month period is 4,000,000 month pounds. The defendant could, therefore, graze 800,000 pounds for 5 months; 400,000 pounds for 10 months; or 333,000 pounds for 12 months; or other combinations of the month pounds that did not exceed the weight time period limitations. We believe this is correct. Applying that construction and meaning would show more than 4,000,000 month pounds, if applied to all cattle placed or kept on the ranch for the entire time they remained there. The lease, however, states that the lessee shall not "graze" livestock to exceed the weight and time limitation. Only the weight is determined as of the date they are "placed on the premises." It must be remembered that this was not merely a pasture lease, but a lease of an entire ranch including all of the buildings, barns, corrals, etc., except the main residence. It is quite obvious from all the evidence that limitation of grazing was the object of the entire provision.

The evidence shows that 12 bulls placed on the prem-

ises in November 1962, were kept in the bull pen and fed grain and hay during the balance of the lease year. It also shows that 13 bulls were pastured for a portion of the time, but were also kept in the bull pen and fed grain and hay during 4½ months of the lease year.

Certain horses were used, kept in the barn and fed grain, and a team of mules was likewise used and kept in the same fashion. There is also evidence that for a 5-month period, an average of 50 animals were kept in barns and hospital corrals because they were weak or sickly. It seems obvious that such animals should not be treated as having been "grazed" during such periods. For a 60-day period in the winter of 1962-1963, snow covered the ranch, and the animals then on the premises could not graze and the defendant fed them during that period. If these animals are not treated as having been "grazed" during this period, then less than 95 per cent of the annual weight time limitation was used in the 1962-1963 lease year. We believe this to be a reasonable interpretation, and consequently the terms of the lease were not violated. There are also additional claims as to other circumstances in which animals were claimed to be not grazing which we do not deem it necessary to discuss.

If the parties had intended to use the words "place," or "keep," rather than the word "graze" they could have done so. In construing a writing it is the duty of the court to give the words used their ordinary and popularly accepted meaning in the absence of explanation or qualification. Francis R. Orshek Co. v. State, 174 Neb. 668, 119 N. W. 2d 48.

Forfeitures of estates under leases are not favored in law and covenants will not be extended by implication to sustain a claim of forfeiture. Chesnut v. Master Laboratories, 148 Neb. 378, 27 N. W. 2d 541. The issue of waiver has also been presented by the defendant, but in view of the foregoing, we shall not discuss it.

The plaintiffs also assert a claim for damages to the

ranch. Essentially, the plaintiffs' expert witness testified that some of the pastures were over-utilized and some of the pastures were under-utilized; and that there was poor range management, and if not corrected by less use of the over-utilized pastures, it would in time result in damage to the range. He specifically testified that there was then no damage to the range condition. An expert witness for the defendant denied that there was even poor range management. The real estate appraiser called by the plaintiffs refused to testify that there had been any damage to the land value. Other testimony as to damage was likewise conflicting. Where the evidence is in irreconcilable conflict, this court will consider that the trial court saw and heard the witnesses and that it accepted the version of one party on controverted issues of fact. Muller Enterprises, Inc. v. Gerber, 178 Neb. 463, 133 N. W. 2d 913.

For the reasons stated, the judgment of the district court dismissing the plaintiffs' petition was correct and is affirmed.

AFFIRMED.

ALBERT F. HRDLICKA ET AL., DOING BUSINESS AS HRDLICKA BROTHERS, APPELLEES, V. J. P. ALLEN, APPELLANT.

137 N. W. 2d 725

Filed November 5, 1965. No. 35982.

1. **Sales: Pleading.** The consideration for the contract of a vendee to pay for goods sold and delivered is the goods themselves. If failure of warranty of the goods is not sufficiently pleaded and proved, it cannot be relied upon as a defense of failure of consideration.
2. ———: ———. A breach of warranty is not available to the buyer as a defense in an action by the seller unless both the warranty and the breach are pleaded.
3. **Sales.** Unless the purchaser gives notice of a breach of warranty within a reasonable time, it is not a defense in an action by the seller. § 69-449, R. R. S. 1943.

Appeal from the district court for Furnas County: VICTOR WESTERMARK, Judge. Affirmed.

Hugh W. Eisenhart and Perry & Perry, for appellant.

Ward Urbom, Baylor, Evnen, Baylor & Urbom, and Melvin K. Kammerlohr, for appellees.

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

BOSLAUGH, J.

This is an action to recover $1,230 alleged to be due the plaintiffs for calves sold and delivered to the defendant. After the jury had been sworn and opening statements made, the plaintiffs objected to the introduction of any evidence on the ground that the answer failed to state a defense. The trial court sustained the objection and entered judgment for the plaintiffs upon the pleadings. The defendant's motion for new trial was overruled and he has appealed.

The appeal presents a very narrow issue. The question to be determined is whether the answer alleges any defense.

The petition alleged that the plaintiffs were dealers in dairy cattle; that at the special instance and request of the defendant the plaintiffs sold and delivered calves to the defendant; that the defendant gave and delivered his check in the amount of $1,230 to the plaintiffs in payment for the calves; that the defendant stopped payment on the check; that upon presentation of the check the bank refused payment; that the defendant has refused to pay the sum of $1,230 or any part thereof; and that "said account" is still due and owing.

The answer admitted the sale and delivery of calves to the defendant by the plaintiffs; the execution and delivery of the check; that payment was stopped; and that upon presentation of the check to the bank, payment was refused. The answer denied the allegations that the plaintiffs were dealers in dairy cattle and that the de-

fendant was indebted to the plaintiffs. The answer alleged that the plaintiffs had not complied with the Packers and Stockyards Act or the requirements of the bureau of animal husbandry of the State of Nebraska; that some of the animals which the defendant had purchased from the plaintiff were diseased; that they had died through no negligence of the defendant and had thus caused failure of consideration for the alleged sale by the plaintiffs to the defendant; that the defendant had purchased the calves relying upon the belief that the plaintiffs had complied with the federal and state requirements; that because of the plaintiffs' failure to comply with federal and state requirements and their having sold diseased animals to the defendant, he was justified in stopping payment of the check for failure of consideration for the alleged sale; and that the defendant is entitled to a credit against the sale price for the loss of the animals and for expenses incurred in trying to save them when it was found that they were diseased.

The reply was a general denial of all allegations in the answer except those which admitted allegations of the petition.

The defendant contends that the action is a suit upon a negotiable instrument; that the defendant is entitled to plead a failure of consideration because the action is brought by the payee and not a holder in due course; and that the allegations in the answer were a sufficient pleading of the failure of consideration.

The plaintiffs contend that defendant is attempting to assert a breach of warranty as a defense; that to be available as a defense a breach of warranty must be pleaded; that after acceptance of the goods a buyer must give notice to the seller of a breach of warranty within a reasonable time; and that the defendant is required to allege that the required notice has been given.

As we view the record in this case, it is not important whether the action be considered to be a suit upon an account or a suit upon a negotiable instrument. Since

the action is between the original parties, the defendant could plead a failure of consideration as a defense in either event.

The petition in this case alleges the sale and delivery of calves by the plaintiffs to the defendant. The answer admits that the calves were sold and delivered but alleges that they were diseased and that some of them died. The defendant had no complaint concerning the calves sold and delivered except their alleged diseased condition. This amounts to a claim that the calves were warranted to be not diseased and that the warranty was breached. In Fetzer & Co. v. Johnson & Nelson, 93 Neb. 763, 141 N. W. 823, this court said: "The defense of want of consideration is based upon the claim 'that the drills would not do work, were utterly worthless, of no value.' This, of course, is virtually a defense of breach of warranty. The goods were the consideration for the contract made by the defendants; and, if failure of warranty of the goods is not sufficiently pleaded and proved, it cannot be relied upon as a defense of failure of consideration. The defendants cited numerous authorities holding that, as between the original parties to an agreement, oral evidence is admissible to show want or failure of consideration. There is no doubt of this proposition, but these authorities are not applicable to this case. This contract was not nudum pactum."

After acceptance of the goods, a buyer is required to notify the seller within a reasonable time of the breach of any promise or warranty or the seller is not liable. § 69-449, R. R. S. 1943. In Nekuda v. Allis-Chalmers Manuf. Co., 175 Neb. 396, 121 N. W. 2d 819, we said: "Section 69-449, R. R. S. 1943, requires that notice of a breach of warranty must be given within a reasonable time. Under this section the purchaser has neither a right of action for the breach of a promise or warranty in the contract, nor a defense to an action for the purchase price, unless the required notice has been given. Marsh Wood Products Co. v. Babcock & Wilcox Co., 207

Wis. 209, 240 N. W. 392; Jan Ree Frocks, Inc. v. Pred, 68 S. D. 356, 2 N. W. 2d 696. This section requires notice of a claim for damages as a condition precedent to a right of recovery. Lumbermens Mut. Cas. Co. v. S. Morgan Smith Co., 251 Wis. 218, 28 N. W. 2d 343; Simonz v. Brockman, 249 Wis. 50, 23 N. W. 2d 464."

The answer in this case did not allege that the plaintiffs had warranted the calves to be not diseased or that the defendant had notified the plaintiffs within a reasonable time that the calves were diseased and that he claimed a breach of the contract for that reason. The answer failed to state a defense and the plaintiffs were entitled to judgment on the pleadings.

The judgment of the district court is affirmed.

AFFIRMED.

ELMER F. BUSBOOM ET AL., APPELLANTS, V. OTIS G. GREGORY ET AL., APPELLEES.
137 N. W. 2d 825

Filed November 5, 1965. No. 35987.

1. **Appeal and Error.** An order sustaining an objection to personal jurisdiction is not final within the meaning of section 25-1902, R. R. S. 1943.
2. ———. In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority nor jurisdiction to act, and in the absence of such judgment or order the appeal will be dismissed.
3. **Appearances.** An appearance is special when its sole purpose is to question the jurisdiction of the court over the person or subject matter of the action.
4. **Appearances: Appeal and Error.** The request of an unsuccessful litigant for the court to enter a judgment or final order is not a general appearance or a consent judgment barring an appeal where the entry of a final order or judgment is necessary only to the obtaining of the right of review to which he is entitled as a matter of law.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Appeal dismissed.

Viren, Emmert & Epstein, for appellants.

Fraser, Stryker, Marshall & Veach, for appellees.

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

CARTER, J.

The plaintiffs commenced this action to recover the sum of $14,862.66, the amount claimed to be due and owing by the defendants on a contract of sale of 2,250 shares of common stock in Busboom Bros., Inc. The purchase of the stock was by written contract in which the defendants Otis G. Gregory and Lois M. Gregory are shown as the purchasers. It is alleged that the defendants Gregory entered into a contract of sale of such stock with Busboom Bros., Inc., and Robbins Floor Products, Inc., by which Busboom Bros., Inc., and Robbins Floor Products, Inc., became liable to plaintiffs for any unpaid amount due on the stock.

Summons was served on Robbins Floor Products, Inc., by delivering a certified copy thereof to Tom Dougherty, vice president and managing agent, in Douglas County, Nebraska. Summons was served on Busboom Bros., Inc., by delivering to Frank Frost personally a certified copy of the summons. Special appearances were filed by Busboom Bros., Inc., and Robbins Floor Products, Inc., severally objecting to the jurisdiction of the court over the persons of each of the defendants, which were sustained by the trial court. Motion for a new trial was filed and overruled. Plaintiffs appealed.

The first question is whether or not there is an appealable order. Counsel concede that there is no appealable order under our holding in Erdman v. National Indemnity Co., 178 Neb. 312, 133 N. W. 2d 472. In that case we held that an order sustaining an objection to personal jurisdiction is not final within the meaning of section 25-1902, R. R. S. 1943. Plaintiffs contend that this decision is in error and that its correctness should be reexamined.

We point out that the sustaining of a special appearance for want of jurisdiction over the person is not final. Where the summons is defective, improperly served, or served on the wrong person, a new or alias summons may issue. When a special appearance is sustained, it becomes a final order when the plaintiff elects to stand on it and brings about a dismissal.

In Persinger v. Tinkle, 34 Neb. 5, 51 N. W. 299, we said: "The order quashing the service was the last order made in the case by the district court, so far as the record before us discloses. There has been no final disposition of the case, but the action is still pending in the lower court. There is nothing to prevent the plaintiff from having an alias summons issued and served upon the defendant and a final judgment rendered against him on the merits. In the absence of a judgment finally disposing of the case, this court has no authority or jurisdiction to act." We held to the same effect in Standard Distilling Co. v. Freyhan, 34 Neb. 434, 51 N. W. 976, and Lewis v. Barker, 46 Neb. 662, 65 N. W. 778. These cases are followed in Erdman v. National Indemnity Co., *supra*, and Ruse v. Navajo Freight Lines, Inc., 178 Neb. 670, 134 N. W. 2d 807. We can find no valid reason for departing from this long-established rule.

The plaintiffs state that they should not be required to proceed at their peril, and request that the court point out the proper procedure in such cases. The procedure to be followed must be determined by the plaintiffs. It is for them to determine whether or not a new or amended service of summons can be had. If plaintiffs elect to stand on the service obtained they should so indicate and thereby bring about the dismissal of the action against the persons as to whom the special appearances were sustained.

We do not think that a plaintiff, after the sustaining of a special appearance by one made a party to the action, who moves for a final order to permit an appeal thereby makes a general appearance or consents to the

judgment in the sense that he forecloses his right to appeal. An appearance is special when its sole purpose is to question the jurisdiction of the court. Behr v. Duling, 128 Neb. 860, 260 N. W. 281; South Omaha Nat. Bank v. Farmers & Merchants Nat. Bank, 45 Neb. 29, 63 N. W. 128. The obtaining of a final order under such circumstances, for the purpose of testing the correctness of the ruling on the special appearance, is special in that it is the obtaining of that without which he could not obtain a review of the ruling on the special appearance. In Carlson v. Benton, 66 Neb. 486, 92 N. W. 600, a somewhat similar case, this court said: "The judgment is the logical product of the prior proceedings in the case. With the record of such proceedings before it, the court not only had authority, but it was its duty, to render the judgment. It is also true the record shows that the judgment was rendered on the plaintiff's motion. The motion was made at a term subsequent to the term at which his motion for a new trial had been denied. He had a right to a hearing in the court of last resort. A final judgment was necessary to that end. It would be a mockery of justice to deny him a hearing in this court because he asked the trial court to do that without which he could not obtain such hearing."

There being no final and appealable order, the appeal is dismissed at plaintiffs' cost.

APPEAL DISMISSED.

MINNIE GILES, APPELLEE, V. JOHN V. SHERIDAN, APPELLANT, IMPLEADED WITH HARLEY GILES ET AL., APPELLEES.
137 N. W. 2d 828

Filed November 5, 1965. No. 36095.

1. **Estates. Where a conveyance of property is made to two or more persons and the instrument is silent as to the interest which each is to take, the rebuttable presumption is that their interests are equal.**

2. **Joint Tenancy.** An estate in joint tenancy can be destroyed by any act of one joint tenant which is inconsistent with joint tenancy, and such act has the effect of destroying the right of survivorship incidental to it.
3. ———. Where one of two joint tenants severs a joint tenancy, it extinguishes the right of survivorship. Where, however, one of three or more joint tenants destroys one or more of the necessary coexistent unities, this operates as a severance of the joint tenancy as to the share held by him, but the other joint tenants continue to hold their interests in joint tenancy.
4. **Joint Tenancy: Tenancy in Common.** The purchase by a tenant in common or a joint tenant of an outstanding title to or the payment of an encumbrance on the joint estate which inures to the common benefit entitles the purchaser or payer to contribution.

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

Barney, Carter & Buchholz and Herbert M. Brugh, for appellant.

Merlin L. Springer, G. Porter Putnam, and Lewis R. Ricketts, for appellee Minnie Giles.

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

SPENCER, J.

This is an equitable action to determine and establish the interests of the parties in Lot 3, Randolph Terrace Third Addition to Lincoln, Lancaster County, Nebraska, on which a duplex is located, and for partition.

The plaintiff is Minnie Giles, who at the time of the acquisition of said property was 83 years of age. The initial defendants were John V. Sheridan and Helen M. Sheridan, husband and wife, who will hereafter be referred to as defendant and Helen. Helen was a niece of plaintiff. The petition was filed May 27, 1963. Helen died February 23, 1964, and was survived by defendant and their three children, Barbara Littlejohn, Sally Sheridan, and James Sheridan, the last two being minors. The deed to the property in question is dated October 31, 1962, and describes as grantees Minnie Giles, a single

person, and John V. Sheridan and Helen M. Sheridan, husband and wife, as joint tenants and not as tenants in common. Subsequent to the filing of the action, by a warranty deed dated November 9, 1963, plaintiff conveyed an undivided 1/20 of her interest in said property, subject to a life estate, to a nephew, Harley Giles.

The case went to trial on the third amended petition, which was filed April 28, 1964, and the cross-petition of the defendant, filed June 4, 1964. Service had been perfected on the minor children of Sheridan, Barbara's spouse, and Harley Giles and his spouse, and a guardian ad litem was appointed for the minor defendants. Trial was held July 21, 1964, and a decree was entered March 5, 1965, confirming the shares of the parties and appointing a referee. Defendant has perfected an appeal to this court.

The petition of the plaintiff seeks to establish the interests of the parties on the basis of the contribution made to the purchase price of the property. Plaintiff attempted to prove that Helen came to her home in Hastings in 1961 to induce plaintiff to buy an apartment in Lincoln for joint occupancy and agreed to pay one-half of the costs thereof, and that pursuant to that agreement Helen found the duplex and the plaintiff signed an offer to purchase after looking it over with the Sheridans. This testimony was excluded as a transaction with a deceased, within the provisions of section 25-1202, R. R. S. 1943, the dead man's statute.

It is undisputed that the offer to purchase, dated August 25, 1962, which was signed only by the plaintiff, was prepared by the defendant. The purchase price was $33,325. Plaintiff deposited $1,000 with the offer, which was accepted, and agreed to assume a mortgage to the First Federal Savings and Loan Association of Lincoln in the approximate sum of $20,500, and to pay the ballance on or before November 1, 1962. The sale was consummated October 31, 1962. Plaintiff paid $12,121.04 at that time to the grantors, and the deed described

above was delivered. Plaintiff offered to prove the deed was executed in this manner because Helen demanded that she and her husband be included in the title, but the testimony was excluded. In this connection, it is of interest that on examination by his own attorney, defendant testified as follows: "Q Mr. Sheridan, did you ever ask that your name be placed on this deed? A My wife did. Q Did you? A I doubt if I did; I think it was my wife that did." The deed was drawn by a representative of the First Federal Savings and Loan Association of Lincoln, and the evidence is that the defendant told him how it was to be drawn.

The mortgage was paid December 28, 1962. On that date plaintiff gave a check to the First Federal Savings and Loan Association in the amount of $19,003.96, and Helen gave a check in the amount of $686.49. Plaintiff had previously paid $205.50 on the mortgage. On the same day, Helen issued a check to the county treasurer for taxes in the amount of $257.95.

It is defendant's contention that the Sheridans were to pay only $1,000 on the purchase price, and that the plaintiff was to pay the balance. It is his contention that the two items enumerated above constitute a part of the $1,000 they were to pay. There is no other testimony in this record to prove that the Sheridans actually paid $1,000 on the purchase price. Defendant's testimony is contradicted by plaintiff, who insists she always demanded one-half of the purchase price.

The trial court found as follows: "IT IS, THEREFORE ORDERED, CONSIDERED AND ADJUDGED, BY THE COURT, that said shares of each of the parties and their respective interests in said real estate are: 1. Minnie Giles, Plaintiff, Nineteen-twentieths (19/20) of a One-third (⅓) interest in said property, plus and in addition thereto the sum of $13,135.50 from her co-tenants and the survivor to reimburse said Minnie Giles for her payment of the mortgage on said premises, and said sum shall be and constitute a lien on said co-tenents

(sic) share; and a life tenancy in the undivided one-sixtieth (1/60) interest of Harley Giles therein. 2. Harley Giles, an undivided one-sixtieth (1/60) interest therein, subject to the life estate of the plaintiff, Minnie Giles, who on November 9, 1963, was 85 years of age. 3. John V. Sheridan (his own interest and as surviving joint tenant of Helen M. Sheridan) two-thirds (⅔) interest in said property, subject to and charged with the payment and reimbursement of the said sum of $13,135.50 to Minnie Giles, advanced and contributed in payment and release of the mortgage lien thereon."

The plaintiff did not file a motion for a new trial or a cross-appeal on the finding of the interests of the parties in said property, so we limit our discussion of that phase except as it is necessary to an understanding of the other questions involved.

Defendant urges that plaintiff's petition is defective because plaintiff did not allege that she was a joint tenant or a tenant in common, or specify the nature of the interests and estates of the defendant. Section 25-2170, R. R. S. 1943, provides in part: "The petition must describe the property, and the several interests and estates of the several joint owners, or lessees thereof, if known." There is no merit to the defendant's contention.

The plaintiff pleaded the facts in detail, described the monetary interests of the parties therein, alleged in effect a co-tenancy by virtue of said facts, set out the fractional interests by a monetary proportion, prayed for a determination that the parties were owners as tenants in common, for a determination of their exact interest, and for a partition.

The nature of the interest and the estate is what the plaintiff sought to have determined in the action as well as for a partition after the determination was made. Where plaintiff pleads the facts which show the interest, she is not required to define the nature of the interest

where there may be a question because of contribution, mistake, or otherwise.

Plaintiff had the burden of the proof to establish that the estate described in the deed was other than it purported to be. If the plaintiff had not been prevented by the dead man's statute, the indication is that she would have attempted to prove a joint tenancy between the plaintiff and Helen, with each being required to make an equal contribution. This she could not do because of the statute. Reading the deed in the light of its expressed intent and in the absence of proof to indicate otherwise, we must conclude that the deed created a joint tenancy with the three grantees as joint tenants. As such they were seized of the entire estate for the purpose of tenure and survivorship, but only of an undivided interest for the purpose of conveyance.

In Hoover v. Haller, 146 Neb. 697, 21 N. W. 2d 450, we held: "Where a conveyance of property is made to two or more persons, and the instrument is silent as to the interest which each is to take, the rebuttable presumption is that their interests are equal."

When plaintiff on November 9, 1963, conveyed a portion of her interest to Harley Giles, she terminated the joint tenancy as to her, and converted her interest and that of her grantee to a tenancy in common.

In DeForge v. Patrick, 162 Neb. 568, 76 N. W. 2d 733, we said: "An estate in joint tenancy can be destroyed by an act of one joint tenant which is inconsistent with joint tenancy and such act has the effect of destroying the right of survivorship incidental to it.

"Any act of a joint tenant which destroys one or more of its necessarily coexistent unities operates as a severance of the joint tenancy and extinguishes the right of survivorship."

This, however, raises a question as to the nature of the interest of the other two joint tenants, Helen and defendant. If one of two joint tenants disposes of his interest by conveyance inter vivos, the other joint tenant

and the grantee become tenants in common, while, if one of three or more joint tenants conveys his interest to a third person, the latter then becomes a tenant in common, instead of a joint tenant, with the others, though such others remain joint tenants as between themselves. 2 Tiffany, Real Property (3d ed.), § 425, p. 209, note 67 and cases cited therein. See, also, 4 Thompson on Real Property (Perm. Ed.), Joint Tenancy, § 1780, p. 317; 20 Am. Jur. 2d, Cotenancy and Joint Ownership, § 16, p. 109.

With relation to the payment of the encumbrance on the property, a different question arises. The evidence is undisputed that plaintiff paid off the mortgage with a slight assist from Helen which defendant contends was to be applied on the $1,000 they were to pay on the purchase price. We note that the deed under which the defendant is claiming has the following provision: "* * * subject to the unpaid balance of an existing mortgage to FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LINCOLN, which the grantees assume and agree to pay." The deed would indicate, therefore, that the mortgage is a joint obligation of all of the grantees and if defendant seeks to avoid the effect of this language he of course would have the burden to prove an agreement otherwise.

In Carson v. Broady, 56 Neb. 648, 77 N. W. 80, 71 Am. S. R. 691, we said: "In the case of Brown v. Homan, 1 Neb. 448, it was held that the purchase by a tenant in common of an outstanding title to, or incumbrance on, the joint estate, would inure to the common benefit and entitle the purchaser to contribution. And this is believed to be the universal rule."

In Oliver v. Lansing, 57 Neb. 352, 77 N. W. 802, we held: "As between themselves, co-tenants are liable for the payment of liens and incumbrances existing against the common estate, in proportion to their respective interest therein, each being surety for the others."

In Exchange Elevator Co. v. Marshall, 147 Neb. 48, 22 N. W. 2d 403, we held: "A joint or joint and several

debtor who has been compelled to pay more than his share of the common debt has the right of contribution from each of his codebtors."

The deed which created the joint tenancy specifically provided that the grantees assumed and agreed to pay the mortgage. By its terms, therefore, the parties were equally liable for the discharge of the obligation. Defendant has not met his burden to prove that the mortgage was otherwise than the joint obligation of the parties. We hold that a joint tenant who pays off an encumbrance on the property, under such circumstances, does so for the common benefit of the joint tenants and is entitled to contribution.

For the reasons given, we hold that the judgment of the trial court was correct and should be and is affirmed.

AFFIRMED.

ELEANOR NAFFZIGER ET AL., APPELLANTS, V. MARGARET COOK ET AL., APPELLEES.
137 N. W. 2d 804

Filed November 5, 1965. No. 36099.

1. **Wills: Taxation.** A testator may direct in his will the ultimate liability for estate taxes, but an effective direction must be at least clearly inferable.
2. ———: ———. A testamentary provision for payment of debts and administration expenses out of the residue does not clearly imply ultimate liability of the residue for estate taxes.
3. **Wills.** A testator may designate in his will the source for payment of debts, and in interpretation of it the court will give full effect to his true intention so far as it can be collected from the whole instrument if the interpretation is consistent with a permissible appropriation of assets for that purpose.

Appeal from the district court for Sioux County: ALBERT W. CRITES, Judge. Affirmed as modified.

Wright, Simmons & Hancock, for appellants.

Lester A. Danielson, for appellee Margaret Cook.

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

SMITH, J.

In this action between a widow and her stepdaughters we review a declaratory judgment construing the will of Harold J. Cook, deceased, and specifying estate assets ultimately liable for death taxes and a mortgage debt.

Cook willed to his wife a life estate in the Agate Springs Ranch, to his four daughters by a previous marriage all real property "subject * * * to the life estate," and to his wife all other property. He emphasized the life estate of the wife and attached certain conditions in this language:

"I * * * devise * * * to my beloved wife, Margaret, * * * (the Agate Springs Ranch) to have and to hold the same, during the term of her natural life: Provided, however, she shall keep the buildings insured to the full insurable value thereof, and the improvements and irrigation system in good repair and from the operation thereof and revenues therefrom keep up and pay all encumbrances thereon as they mature, and all taxes and insurance premiums and other expenses of operation: Provided further that the encumbrances shall continue under the amortization plan as provided in the case of Federal Land Bank loans." (Underscoring by Cook.)

In the residuary paragraph, under which the widow receives the personal property, Cook also provided: "I * * * direct that all my just debts * * * and expenses of administration shall first be paid from such residue." His widow is executrix without power of sale.

The district court decided that the federal estate tax was payable out of the corpus of the ranch and that those installments of the mortgage debt which mature in the lifetime of the widow were payable by her out of income from operation of the ranch. The judgment fixed no liability for subsequent installments. Three daughters, who were plaintiffs in the district court, argue

that property given to the widow must be used to pay the tax and any debt installments unmatured at the termination of the life estate.

The facts are stipulated. The following assets and deductions are described in an unaudited federal estate tax return:

Estate Assets		
Ranch	$187,000.50	
Other Real Estate	310.00	
Livestock	69,730.00	
Other Personal Property	17,704.75	
Property in joint tenancy with wife	8,162.86	
Total gross estate		$282,908.11
Deductions		
Mortgage on Ranch	20,986.72	
Other debts and funeral and administration expenses	28,274.35	
Marital deduction	66,808.72	
Total deductions		$116,069.79
Exemption		$ 60,000.00
Taxable Estate		$106,838.32
Net estate tax payable		$ 22,454.99

No federal estate tax is due on account of any estate assets except the ranch. If the obligations in question are payable out of the residue, the corresponding decrease in the marital deduction will increase the tax.

At any given time between October 24, 1949, the date of the will, and Cook's death the ranch was encumbered with one, but only one, mortgage which ran to the Federal Land Bank. The present mortgage note for $23,800, which was given by Cook and his wife on February 27, 1953, was payable in 35 annual equal installments. Under the amortization plan referred to in the will, each installment included both principal and interest so that performance in accordance with the loan agreement would discharge the debt on January 1, 1988.

The Agate Springs Ranch was settled by Cook's ma-

ternal grandfather. Since its acquisition in 1887 by the testator's father, Captain James H. Cook, it has been the family home. The ranch is known nationally as a site of Indian conferences and Indian lore, but it is best known for its unique fossil quarries and geological formations. Exhibits from the quarries may be seen in major museums throughout the world. The ranch stimulated Harold Cook to earn a doctorate in paleontology and geology. In these pursuits, which kept him on the ranch much of the time, he wrote a number of scholarly papers and won international distinction.

Estate taxes are apportioned equitably in accordance with statutory rules unless a testator has directed otherwise in his will. See § 77-2108, R. R. S. 1943. An effective direction must be at least clearly inferable. See, In re Estate of Armstrong, 56 Cal. 2d 796, 366 P. 2d 490; Morgan Guaranty Trust Co. v. Huntington, 149 Conn. 331, 179 A. 2d 604; In re Estate of Pepper, 307 N. Y. 242, 120 N. E. 2d 807; In re Estate of Hoffman, 399 Pa. 96, 160 A. 2d 237.

The main theme of the protest against proration of the tax is Cook's desire to perpetuate the entire ranch in the family. The daughters have assembled a variety of arguments in support. The widow is not the primary object of bounty. In requiring her to pay matured installments of principal out of ranch income, Cook imposed a burden which the ordinary life tenant is free of. He conferred no power of sale upon the executrix. He required debts and expenses to be paid out of the residue, and the tax must be at least one of the two. It also falls within the words "all encumbrances" and "all taxes," which condition the life tenancy. The historical and scientific importance of the ranch to Cook colors the will in favor of the daughters. So the arguments run.

We conclude that Cook failed to direct effectively the ultimate impact of the tax, but we do so with some difficulty in the face of these arguments the other way. On

the whole the meaning of the will, even with the coloring from extrinsic evidence, is too doubtful. We see no preference for beneficiaries like those in Stuckey v. Rosenberg, 169 Neb. 557, 100 N. W. 2d 526, where paragraph after paragraph of will and codicil together revealed anxiety over welfare of the favorites and the court thought it self-evident that the testatrix had intended no diminution of their gifts. If Cook favored his daughters, it is clear that he set the limit in language inexpressive of a purpose to protect them from the tax. Likewise, if he intended to preserve the ranch in the family, he stated his desire ambiguously; for he stopped far from the boundary of permissible restraints on alienation.

Other arguments are less troublesome. The testamentary provision for payment of debts and administration expenses out of the residue describes expenditures ordinarily made in administration of an estate. The usage is common, and it excludes this tax. See Jerome v. Jerome, 139 Conn. 285, 93 A. 2d 139. The location of the words "all taxes" and "all encumbrances" in the devise of the life estate creates a substantial uncertainty that Cook had death taxes in mind. Amplification would add little.

The silence of the judgment with respect to liability of the ranch or the residue for debt installments maturing after termination of the life estate is unexplained, and a further declaration should be made. A testator may designate in his will the source for payment of debts, and in interpretation of it the court will give full effect to his true intention so far as it can be collected from the whole instrument if the interpretation is consistent with a permissible appropriation of assets for that purpose. See, § 30-230, R. R. S. 1943; Bray v. Sedlak, 168 Neb. 633, 97 N. W. 2d 225.

The will contains two signs that Cook intended to charge the residue and to exonerate the ranch. First, of course, the obligation is a "debt," as that word is used

in the residuary paragraph, unless Cook elsewhere restricted its meaning. The sense is unaffected by failure of the creditor to file a claim in the estate proceeding. See Lienhart v. Conway, 146 Neb. 821, 21 N. W. 2d 749. Second, the devise to the daughters was specific. See, § 30-232, R. R. S. 1943; Bray v. Sedlak, *supra*.

On the other hand there is one sign of a charge on the ranch. Cook stated that "the encumbrances shall continue under the amortization plan as provided in the case of Federal Land Bank loans." Consistent with an intention to exonerate the remainder interest in the ranch, Cook could have been concerned with the tax impact or with insufficiency of the residue to discharge the entire debt — about $22,000 in 1949 — along with other estate obligations. The possibilities are remote. If we should restrict the meaning to a prohibition against prepayment of installments, the detailed requirement for use of income during the life tenancy would lose significance. With the restriction a distinction between ranch income and residuary property would lack practical difference. We think that the quotation refers to payers as well as to time. This sign overrides the others, and the daughters' interest in the land should be charged.

The judgment should be modified by addition of a declaration that as between widow and daughters, the remainder interest in the ranch devised to the daughters, and not the residuary property, is liable for installments of the mortgage debt maturing after termination of the life estate, and the judgment is affirmed as so modified with costs on appeal taxed against plaintiffs.

AFFIRMED AS MODIFIED.

IN RE ESTATE OF MEZZIE T. COLMAN, DECEASED.
ESTATE OF MEZZIE T. COLMAN, DECEASED, APPELLEE, V. HELENA ISABELLE REDFORD, APPELLANT.

137 N. W. 2d 822

Filed November 5, 1965. No. 36125.

1. **Wills.** First cousins of a testator are not prima facie heirs-at-law, and without more appearing would have no standing to question probate proceedings.
2. **Wills: Judgments.** The county court is vested by the Constitution and statutes of the state with exclusive original jurisdiction in all matters concerning the probate of wills and the settlement of estates of deceased persons. The adjudication by the court of a matter within its authority is, unless appealed from, final and not subject to collateral attack.

Appeal from the district court for Seward County: H. EMERSON KOKJER, Judge. On motion to dismiss appeal. Motion to dismiss appeal sustained.

Russell A. Souchek, for appellant.

Robert T. Cattle, Jr., for appellee.

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

SPENCER, J.

This case comes before us on a motion of John W. Cattle, administrator c.t.a., of the estate of Mezzie T. Colman, deceased, to dismiss the appeal of Helena Isabelle Redford, for the reason that appellant has no standing in this court and that the appeal is frivolous, vexatious, and fictitious.

Mezzie T. Colman departed this life a resident of Seward County, Nebraska, on May 3, 1964. A petition was filed for the probate of a purported last will and testament. Notice was given by publication, and an affidavit of the mailing of notices on the probate was executed and filed by the attorney for the petitioner. This affidavit specifies that a copy of the notice required in this proceeding was sent to the following

named persons: Milton E. Zillig, R. R. No. 2, Seward, Nebraska; Alta Zillig, R. R. No. 2, Seward, Nebraska; St. Andrew's Church, in care of Reverend L. J. Adams, Seward, Nebraska; and Wood Bros., Seward, Nebraska. The affidavit further states that after diligent investigation and inquiry, the affiant and the petitioner are unable to ascertain and do not know the post-office address of any other person appearing to have a direct legal interest in the action or proceeding other than those to whom notice has been mailed. Proper proof was filed on the publication, and hearing was had at the time assigned and set for hearing on the petition for probate. The will was admitted to probate on May 29, 1964, and no appeal was taken therefrom.

The executor named in the will declined to serve, and John W. Cattle was appointed as administrator c.t.a. The administration proceeded in regular form, and a decree on the final account of the administrator c.t.a. was entered March 19, 1965, ordering the distribution of the estate in accordance with the provisions of the will.

On the 12th day of April 1965, Helena Isabelle Redford, alleging herself to be an heir-at-law and a first cousin of the deceased by blood relationship, for the first time appeared in the proceedings by filing a notice in the county court of her intention to appeal the judgment, decision, and decree on final account. No other pleadings were filed. This appeal was filed in the district court on the 16th day of April 1965, which was within 1 month of the entry of the decree of distribution. On motion of the administrator c.t.a., the appeal was dismissed at appellant's cost. Appellant filed a motion to vacate and set aside the order of dismissal or in the alternative to grant a new trial. This motion was overruled, and appellant has perfected an appeal to this court to which the present motion is addressed.

It seems to be appellant's contention that she is a first cousin by blood relationship to the deceased and an

heir-at-law, and that she was not given notice of these proceedings as provided by section 25-520.01, R. R. S. 1943, which section requires that all persons having a direct legal interest in the proceedings be mailed a copy of the first publication of the published notice in a decedent's estate.

The only information disclosed by the filing herein on behalf of appellant is the statement that appellant is an heir-at-law of deceased and her first cousin by blood relationship. Nowhere in the filing has she alleged the absence of any members of the several classes enumerated in section 30-102, R. R. S. 1943, who would take before first cousins. First cousins are not prima facie heirs, and appellant, without more appearing, even in a proper action, would have no standing. See Sorensen v. Sorensen, 68 Neb. 483, 94 N. W. 540.

Further, appellant's notice of appeal is from the decree on final accounting. The will had been admitted to probate several months previously. Appellant was not a legatee or devisee in said will, and obviously would have no standing at law to question the final accounting.

The sole question before this court is the propriety of the order dismissing the appeal. That question is in this court on the pleadings and judgment alone. There is no bill of exceptions or evidence to supplement the pleadings. We are concerned, therefore, solely with the sufficiency of the pleadings to support the judgment. See Pauley v. Scheer, 168 Neb. 343, 95 N. W. 2d 672. John W. Cattle's motion to dismiss should be sustained.

Ignoring the question of proper pleading, and assuming, for the sake of discussion, that the appellant in the absence of a will would be an heir-at-law, we interpret appellant's brief to suggest that her whereabouts could have been discovered by diligent investigation and inquiry, and that she had no notice of the proceedings herein until after the hearing on the final account of the administrator c.t.a. This is a case of first impression in this jurisdiction, and involves the question as

to whether or not a collateral attack may be made on an order admitting a will to probate, because until the order admitting the will to probate has been vacated, the appellant can have no standing to question the proceeding.

There is also inherent in appellant's pleading the contention that in every probate case personal notice must be given to everyone who conceivably could be found to be an heir-at-law even though their existence is unknown and cannot be ascertained by diligent inquiry. There is no merit to this latter inference. It should be readily apparent that people who have lost contact with relatives do not usually inform their friends and associates of their existence or whereabouts, and in many cases the testators themselves are unaware of their existence or whereabouts. To adopt such a construction would cast a cloud of uncertainty over the admission of every will to probate.

The ordinary objects of a deceased's bounty, who are those who would take in the absence of a will, are entitled to notice to permit them to satisfy themselves that the proposed will has been properly executed. This is required for due process. All due process can require, however, is that personal notice be given to all those whom diligent investigation and inquiry may indicate could have a direct legal interest in the proceedings whose address can be ascertained. All others must be constructively noticed. This our statute requires.

In the instant case the proceedings appear to be regular in every particular. The affidavit on file would indicate that there has been full compliance with section 25-520.01, R. R. S. 1943. The affidavit itself is in the words of the statute, and after listing the parties to whom notice was mailed, reads: "* * * your affiant further states that such party and his * * * attorney, after diligent investigation and inquiry, were unable to ascertain and do not know the postoffice address of any other party appearing to have a direct legal interest

in the above entitled action or proceeding other than those to whom notice has been mailed in writing * * *." This was a sufficient compliance with the statute to give the court jurisdiction.

The order of the court admitting the will to probate is conclusive against collateral attack. In Clutter v. Merrick, 162 Neb. 825, 77 N. W. 2d 572, we said: "The county court is vested by the Constitution and statutes of the state with exclusive, original jurisdiction in all matters concerning the probate of wills and the settlement of estates of deceased persons. The adjudication by the court of a matter within its authority is, unless appealed from, final and not subject to collateral attack." See, also, Byron Reed Co. v. Klabunde, 76 Neb. 801, 108 N. W. 133, and the early case of Loosemore v. Smith, 12 Neb. 343, 11 N. W. 493. To permit a collateral attack would create so much uncertainty and confusion as to the validity of administration proceedings that no one could safely rely thereon.

With reference to appellant's inference questioning the accuracy of the affidavit when it alleges the diligence of the parties in ascertaining possible heirs-at-law, we suggest that if fraud is involved, there is an adequate remedy in the county court. The county court is vested by the Constitution and statutes with exclusive original jurisdiction in the admission of wills to probate. Any remedy the appellant may have is in the sole and original jurisdiction of that court.

For the reasons outlined above, appellant has no standing to prosecute the appeal herein to this court, and the motion to dismiss should be and hereby is sustained.

MOTION TO DISMISS APPEAL SUSTAINED.

MARY JEAN HOUGHTON, APPELLEE, V. JAMES RICHARD HOUGHTON, APPELLANT.

137 N. W. 2d 861

Filed November 12, 1965. No. 35943.

1. **Parent and Child: Evidence.** Where it is shown that a qualified pathologist made blood grouping tests with the assistance of experienced technicians, and that the technicians recorded the results of their work which were given to the pathologist for interpretation who thereupon in reliance of such records makes a written report, the report and testimony of the pathologist concerning the tests are admissible in evidence without calling the technicians to give foundation testimony under the provision of section 25-12,115, R. R. S. 1943.
2. ———: ———. Judicial recognition should be accorded the accuracy and reliability of blood grouping tests to disprove paternity.
3. ———: ———. In the absence of evidence of a defect in the testing methods, blood grouping tests are conclusive on the issue of nonpaternity.
4. **Divorce.** Where the evidence in a divorce action establishes adultery on the part of one of the parties thereto, the court is required to grant the prayer of the other party seeking a divorce on that ground unless prevented from doing so by applicable statutory provisions.
5. ———. Where a wife is found to be guilty of adultery she is ordinarily an unfit person to have the care and custody of her minor children as against the husband she has wronged.
6. **Divorce: Attorney and Client.** Where adultery by a wife is established, she is not entitled to an award of alimony and ordinarily will not be allowed an attorney's fee or an award of costs.
7. **Divorce.** Where in an action for divorce both parents are found to be unfit or unsuitable to have the care and legal custody of the minor children of the parties, the welfare and best interest of the children will constitute the sole consideration in determining the right of custody.
8. **Divorce: Parent and Child.** Under the provisions of section 43-236, R. R. S. 1943, where the parents of minor children are unfit or unsuitable to have their custody, the separate juvenile court may properly place their legal custody in the chief juvenile probation officer on such terms and conditions as the court may prescribe.

Appeal from the district court for Douglas County:

LAWRENCE C. KRELL, Judge. Reversed and remanded with directions.

Schmid, Ford, Snow, Green & Mooney and Robert V. Dwyer, Jr., for appellant.

Schrempp, Lathrop, Rosenthal, Albracht & Bruckner, for appellee.

Heard before WHITE, C. J., CARTER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and WESTERMARK, District Judge.

BROWER, J.

Plaintiff and appellee Mary Jean Houghton brought this action on October 10, 1962, for a divorce on the ground of extreme cruelty from the defendant and appellant James Richard Houghton in the district court for Douglas County, Nebraska. The original petition alleged one child, Alice Marie Houghton, was born to this union on May 4, 1961.

After filing the original petition the plaintiff became pregnant and on July 16, 1963, she filed a supplemental petition, alleging that because of defendant's promises the parties had resumed marital relations after the action was begun and were expecting the birth of a second child in the month of October 1963. She again alleged acts of cruelty and sought a divorce, custody of Alice Marie, child support, and alimony.

The defendant thereafter filed an amended answer and cross-petition. It admitted defendant was the father of the first-born child. It alleged that plaintiff enticed the defendant into having sexual relations on February 17, 1963, and on several occasions thereafter but denied having such relations between October 10, 1962, and February 17, 1963. It denied the child the plaintiff alleged to be expecting was the defendant's child. It alleged plaintiff had condoned any alleged acts of cruelty committed against her as a result of enticing him into sexual relations with her. It further alleged the plain-

tiff had committed adultery and was guilty of extreme cruelty. It prayed for a divorce and the custody of the child which was admitted to be his.

The child referred to in the supplemental petition was born October 1, 1963. She was named Sandra Kay and the testimony shows she was fully developed at birth.

After a trial the court found the defendant to be the father of the infant and awarded a decree of absolute divorce to the plaintiff with custody of both minor children in her, subject to visitation rights in the defendant who was ordered to pay $12.50 per week for the support of each child. It gave the plaintiff the household furniture and fixtures and the equity in the real estate of the parties. It further ordered the defendant to pay the professional services of the doctor with the prenatal care and birth of Sandra Kay Houghton, together with attorney's fees of the plaintiff. Defendant's motion for new trial being overruled, defendant has appealed.

The assignments of error, so far as are necessary for our decision, are: The court erred in its finding that the defendant was the father of the infant, Sandra Kay; in ordering the defendant to pay the plaintiff support for her maintenance and to pay the doctor bills in connection with the prenatal care and birth of said infant; in granting custody of the minor child, Alice Marie, to the plaintiff; and in granting the plaintiff an absolute divorce from the defendant, and in not granting the defendant an absolute divorce from the plaintiff on the grounds of adultery and extreme cruelty. The court further erred in not finding that the results of blood tests of the plaintiff, defendant, and the infant, Sandra Kay, were conclusive, and that as a result of the tests the defendant overcame any presumption of legitimacy of said child.

A motion was made previous to the trial by the defendant to require blood tests to be taken of the parties and Sandra Kay for the purpose of determining the parentage of that infant. The motion was never heard

but the parties agreed that the tests would be made and agreed that Dr. Earl Greene would make them.

Medical science has established that such tests may determine in some instances that a certain person cannot be a parent of a certain child although they may not affirmatively prove that one is in fact one of the parents.

The doctor was notified of their agreement by the plaintiff's attorney and the parties appeared pursuant to arrangements on December 17, 1963, at the Bishop Clarkson Memorial Hospital, the plaintiff bringing the infant with her. Blood was drawn from each of the three in the presence of the doctor and the samples labeled in his presence. The blood specimens so labeled were taken to the blood bank where blood typing is normally done. The tests on the three specimens were made by qualified medical technologists in the laboratory at Bishop Clarkson Memorial Hospital under the supervision and direction of Dr. Greene. A separate technologist typed each specimen. On the following day the tests were repeated, each by a technologist other than the one who analyzed the particular specimen the day before. The results were identical and thereafter they were recorded and submitted to Dr. Greene for analysis.

Dr. Greene explained the general procedure for blood typing as follows: "* * * blood is typed by what is called an antigen-antibody reaction. The antigen is the red blood cell and the antibodies are derived from the serum or from the portion of the blood that does not have the red cell. These antibodies and cells are incubated together * * * for a period of time and if the antigen that you are seeking with this particular antibody is present you get a clumping of the cell. This is called the positive reaction and this particular type is present and this particular antigen is present. Q. In other words if the antigen is present then you will get the clumping. If it is not present you will not get any clumping, is that right? A. Yes. Q. If there is a clumping you call it positive and

if there isn't clumping you call it negative? A. Yes, sir."

Tests were made under two systems of each person's blood, one called the Rh system and one the MN system. In this case Dr. Greene made out a report and copies were sent to counsel for each party, one of which was admitted in evidence, showing the results of the tests as reported to him and his interpretation of them which is therein set out. Although he testified at length in regard to these tests and their significance, his conclusion from that report may be understood better than an attempt to here summarize his evidence. They are as follows:

> "(1) Rh system. There are 6 antigens in the Rh system. These are usually written, C, D, and E and c, d, and e. All persons have 6 Rh antigens and these occur in three pairs. There is a pair of "C's", a pair of "D's", and a pair of "E's". Each pair may be any combination, i.e., CC, cc, Cc. One of the antigens in each of the pairs comes from the father and one from the mother. In the above case, Mary Jane Houghton has e antigen and no E antigen, and her formula for this particular antigen pair must be ee. James Richard Houghton has e antigen and no E antigen, and his formula for this antigen pair must also be ee. Sandra Kay Houghton has e antigen and E antigen. Her formula for this pair, therefore, would have to be eE. Since neither Mary or James have the E antigen, it must have come from another source.
>
> "(2) In the MN system: The MN system is composed of a pair of anigens which occur in the following combinations: MM, NN, or MN. In the above typing, Mary Jane Houghton is positive for M and positive for N. Her formula is MN. James Richard Houghton is negative for M and positive for N. His formula is NN. Sandra Kay Houghton is positive for M and negative for N. Her formula is, therefore, MM. One of the M's in Sandra Kay's

formula could have been inherited from the mother, Mary Jane Houghton. However, the other M could not have been inherited from James Richard Houghton, since he does not possess this factor. It would, therefore, have to come from another source.

"The above findings would exclude James Richard Houghton as father of the infant, Sandra Kay Houghton."

Irrespective of the weight to be given evidence derived from such blood tests generally, plaintiff contends that the result of the tests and the doctor's conclusions and report therefrom cannot be accepted in the present case. Plaintiff urges she objected to the admission of the doctor's testimony and his conclusions formed therefrom as well as his report because it was without foundation and immaterial because the doctor did not personally perform the tests. The doctor had testified at length as to the procedure regularly followed in making blood tests which he said was followed here. The technologists, he said, were working under his direction. In part he stated: "I might add that as far as supervision or not supervision, this is the blood bank. This is the normal practice for transfusions where the blood is to be given to a patient where incompatible blood if given will cause a reaction, a severe illness, morbidity, even death. These girls do this routinely. The girl in charge of blood banking has been in this blood bank for about five years. This is after her initial training which consists of three years of college, one year of medical technology, four years experience in another hospital, back in our hospital where she has been in the blood bank for five years. * * * The other girls have worked in the blood bank for a period. They are all registered medical technologists except for one but they have been in for periods—I don't believe there is any under one year. This is what they do all year."

Where it is shown that a qualified pathologist made blood grouping tests with the assistance of experienced

technicians, and that the technicians recorded the results of their work which were given to the pathologist for interpretation who thereupon in reliance of such records makes a written report, the report and testimony of the pathologist concerning the tests are admissible in evidence without calling the technicians to give foundation testimony under the provision of section 25-12,115, R. R. S. 1943.

Plaintiff maintains that even if the evidence were admissible, its force in the case before us was destroyed by reason of admissions of the doctor on cross-examination.

The doctor was cross-examined in part by plaintiff's counsel asking questions concerning his procedure in making this paternity test as compared to the methods and precautions suggested by certain eminent authorities in an article appearing in the Journal of the American Medical Association for the year 1952, Vol. 149, page 699. The article was written before and its publication in turn had been previously approved by the Committee on Medicolegal Problems of the association. At its beginning it is stated that great progress had been made in the 15 years since the committee had made a previous report. The following appears near the close: "This committee recommends that this report be distributed to proper medical and legal authorities in order to familiarize them with the facts available concerning the medicolegal application of blood grouping tests. In this way it is hoped that this knowledge will become more generally available and the maximum use be made of the tests in courts of law, in order to substitute scientific facts for opinion." More than 12 years have passed between its publication and the trial of this matter in district court.

Objections based on the contents of this article were made by plaintiff because commercial serums were used. At one point the published article stated: "It is reprehensible to accept a case of disputed paternity and then

purchase the necessary testing serums in order to obtain one's first experience with the delicate M-N and Rh-Hr tests with a problem of this nature." The doctor, on being interrogated on this statement, said that it might be improper in such a case to go right out and buy the serum and use it, but in this instance the antigens used were those available in their laboratory which are kept for blood banking generally although not for paternity testing. He admitted when he cross-matched and typed blood for purposes of transfusion, many times they did not go into the typings employed in making this test. What blood group he types depends on whether it is blood you are going to give, or for a patient with a disease in the Rh or MN groups. The Kell and Duffy groups are ordinarily further investigated only in the presence of atypical antibodies which are not usual, and they are moderately frequent in their blood bank. Many of these patients are referred in because they cannot be cross-matched in a smaller hospital. At the hospital they had previously gone into the MN groups infrequently and he could only think of one instance. The doctor explained that it was not necessary to rely on the label of commercial serums as to potency because its potency is determined by using known antigens and doing a reaction with known antigens to see whether the reaction occurred. He stated that much of that which the authorities in the article were writing about related to previous times when antiserum was actually made in the laboratory and was not commercially available. In 1953 and 1954 much of the commercial antiserum was of variable strength and these were difficulties that had been guarded against since 1958. In the last 2 or 3 years the problems of storage and transportation of serums had been overcome. The doctor, when asked if he had tested the serums, answered: "No. This was handled as the specimens are routinely handled in our laboratory. I made no attempt purposely to mark this out or say this is it. The checks and controls that

are normally done when these people are my agents were normally done." We think from the doctor's testimony the fact that the serums were originally obtained commercially does not detract from the efficiency of the tests where subjected to the safeguards mentioned. Nothing is shown which indicates the serums used were not proper.

The doctor stated that this was the first test made by him for the purpose of determining nonparentage. The plaintiff's attorney cross-examined the doctor relative to a passage from the quoted article which stated: "These tests have numerous pitfalls, and accurate results can be obtained only by specialists with regular and continuous experience with these tests. Moreover, the qualified expert must not only be a capable immunologist but also be well versed in genetics." The doctor stated he agreed generally with this statement but his testimony makes clear that in his opinion the statement in regard to "specialists with regular and continuous experience with these tests," relates to the technicians who perform the tests and not to the pathologist who interprets them. He testified concerning the technologists, saying they were qualified to make the tests and were qualified as immunologists. That is what they are doing. Genetics would refer to the interpretation of the tests and to interpret them day after day is not necessary. However, he stated the girls in the blood bank were well aware of the inheritance of these groups and in general how the blocks are inherited. "Q. And that would be genetics? A. That would be genetics. Q. And they are well-schooled and qualified in genetics? A. Not in the same sense as a geneticist or a physician but I would say that the tests which are done are the listing of the postiive-negatives (sic). The genetics is the last two paragraphs of interpretation."

The doctor himself is licensed to practice medicine in the State of Nebraska and has offices at Bishop Clarkson Memorial Hospital and in the Doctors Building in

Omaha, Nebraska. He holds a Bachelor of Science degree and a Doctor of Medicine degree from the University of Nebraska. He interned at the Charles T. Miller Hospital in St. Paul, Minnesota, and spent his first 2 years of residency in the study of pathologic anatomy and clinical pathology at Bishop Clarkson Memorial Hospital. His third year in clinical pathology was taken at the Indianapolis General Hospital, Indianapolis, Indiana, and his last year of pathologic anatomy was taken in the Armed Forces Institute of Pathology, Washington, D. C. Dr. Greene was certified by the American Board of Pathology in 1958. He has been in the practice of pathology at Bishop Clarkson Memorial Hospital since 1957.

We have reviewed the evidence of the doctor carefully and we think the qualifications of his technicians to make the tests have been adequately shown as have his qualifications to interpret them. Although this is the doctor's first test for nonparentage, other tests of that nature have been made by his partner using the same facilities. The plaintiff introduced no medical testimony to refute them. The doctor who performed the tests was agreed upon by both parties and was not working for either one of them. We conclude there is nothing in the record which would indicate any defect in the testing methods, and his testimony and conclusions remain unshaken.

Having determined that no defect in the testing methods appears from the evidence concerning the blood tests in the case before us, the next question presented is what consideration and weight should be given to the results disclosed by them. Various statutes have been passed providing for blood tests in cases where paternity is an issue. Plaintiff contends that in the absence of a statute specifically authorizing such blood tests this court should not consider them in the present case at all. The Supreme Court of New Hampshire, in Groulx v. Groulx, 98 N. H. 481, 103 A. 2d 188, 46 A. L. R. 2d 994, a case

which had been decided in the trial court before the passage in that state of such a statute, held that judicial recognition should be accorded the accuracy and reliability of blood grouping tests to disprove paternity. See, also, State v. Damm, 62 S. D. 123, 252 N. W. 7, 104 A. L. R. 430, and particularly the same on rehearing, 64 S. D. 309, 266 N. W. 667, 104 A. L. R. 441, where the court corrected and clarified its original holding of 3 years before, stating: "We therefore say, without further elaboration or discussion, that it is our considered opinion that the reliability of the blood test is definitely, and indeed unanimously, established as a matter of expert scientific opinion entertained by authorities in the field, and we think the time has undoubtedly arrived when the results of such tests, made by competent persons and properly offered in evidence, should be deemed admissible in a court of justice whenever paternity is in issue." Many authorities are thereafter cited. We hold this court should likewise take judicial notice of the scientific accuracy and reliability of such tests.

In cases arising either under such statutes or by courts which have taken judicial notice of the reliability of such tests, the courts are not in harmony as to the weight to be given to such evidence. A review of the cases upon this question is contained in an Annotation in 46 A. L. R. 2d, at page 1000. Some cases have held that blood tests indicating nonpaternity are only entitled to the same weight as other evidence. Among them are Arais v. Kalensnikoff, 10 Cal. 2d 428, 74 P. 2d 1043, 115 A. L. R. 163; Berry v. Chaplin, 74 Cal. App. 2d 652, 169 P. 2d 442; and Ross v. Marx, 24 N. J. Super. 25, 93 A. 2d 597. The reasoning of the courts holding this view is stated in Arais v. Kalensnikoff, *supra,* as follows: "Expert testimony 'is to be given the weight to which it appears in each case to be justly entitled.' * * * 'when there is a conflict between scientific testimony and testimony as to facts, the jury or trial court must determine the relative weight of the evidence.' " This is the view

taken by the trial court in the case before us. It admitted into evidence the results of the test but apparently concluded thereafter that the time-honored presumption of legitimacy of a child born in wedlock overweighed the evidence of nonpaternity disclosed by the tests.

The courts of other jurisdictions, while holding the results obtained from tests are not conclusive on the issue of nonpaternity, do hold that such tests should be given great weight. See, Commonwealth v. Gromo, 190 Pa. Super. 519, 154 A. 2d 417; State ex rel. Steiger v. Gray, 3 Ohio Op. 2d 394, 145 N. E. 2d 162; Beck v. Beck, 153 Colo. 90, 384 P. 2d 731. The last-mentioned case relates to the legitimacy of a child, the court holding the results of the blood test were sufficient to overcome the presumption of legitimacy. The other cases dealt with the paternity of children born out of wedlock.

The defendant contends a third rule followed by some courts is the correct one and should be adopted by this court. It is that, in the absence of evidence of a defect in the testing methods, blood grouping tests are conclusive on the issue of nonpaternity. See, Anonymous v. Anonymous, 1 App. Div. 2d 312, 150 N. Y. S. 2d 344; Saks v. Saks, 189 Misc. 667, 71 N. Y. S. 2d 797; Jordan v. Davis, 143 Me. 185, 57 A. 2d 209; Commonwealth v. D'Avella, 339 Mass. 642, 162 N. E. 2d 19; Commonwealth v. Coyle, 190 Pa. Super. 509, 154 A. 2d 412; Retzer v. Retzer (App. D. C.), 161 A. 2d 469.

The case of Anonymous v. Anonymous, *supra*, was an action for separation brought by the wife as plaintiff based on abandonment, nonsupport, and cruelty. Defendant husband filed a counterclaim for divorce alleging the plaintiff had been living in an adulterous relation with another. He admitted the paternity of the oldest child and denied he was the father of the younger twins. He applied for a blood grouping test of himself, the plaintiff, and the twins. The application was denied. The appellate court modified the judgment of the trial court and ordered the tests to be made. In its opinion

the court discussed the question of the weight to be given to such evidence on the new trial, saying: "It is urged that the presumption of legitimacy resulting from the fact that plaintiff and defendant lived together during the period of gestation requires a denial of the motion.

"Reason and logic, as well as a recognition of the modern advances in science, compel a determination that the presumption of legitimacy is not conclusive but rebuttable. The probative value of the results of skillfully conducted blood grouping tests has been widely accepted. The tests of course will be relevant only if they show noncompatibility as between the blood of defendant, the plaintiff, and the twins. If so, such evidence should be deemed conclusive as to nonpaternity." It further stated: "There is no doubt that with the passing of years and the advance of science the age-old concept has gradually given way to the sway of reason, and that the presumption of legitimacy has been withering and shrinking in the face of scientific advances. (Hynes v. McDermott, 91 N. Y. 451, 459; Matter of Matthews, 153 N. Y. 443; Matter of Findlay, *supra.)* Presumptions are looked upon ' "* * * as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts." ' (Mockowik v. Kansas City, St. Joseph & Council Bluffs R. R. Co., 196 Mo. 550, 571.) It cannot be gainsaid that we have now reached the point where presumptions must yield to modern scientific facts." We agree with the reasoning in the cited case and hold that in the case before us the results of the tests conclusively determine that the defendant is not the father of Sandra Kay.

Our conclusion with respect to the tests renders it unnecessary to consider on the issue of paternity the evidence offered by the plaintiff tending to show marital relations existed between the parties during the period in which this apparently fully developed child would have been naturally conceived, nor the testimony on behalf of

defendant tending to refute it. Neither is it necessary on the paternity issue to consider the testimony on behalf of the defendant tending to show the presence of another man during late hours in that period at the home of the plaintiff while the parties were living separately. It is, however, of some significance on the issue of the custody of the older child, hereafter to be considered. The results of the tests lend great weight to the latter testimony. In any event, it follows that the results of the tests and our determination concerning them establish that the plaintiff has committed adultery.

In Baker v. Baker, 166 Neb. 306, 89 N. W. 2d 35, this court laid down the following rules in a case where adultery of the wife has been established: "Where the evidence in a divorce action establishes adultery on the part of one of the parties thereto, the court is required to grant the prayer of the other party seeking a divorce on that ground unless prevented from doing so by applicable statutory provisions.

"Where a wife is found to be guilty of adultery she is ordinarily an unfit person to have the care and custody of her minor children as against the husband she has wronged.

"Where adultery by a wife is established, she is not entitled to an award of alimony and ordinarily will not be allowed an attorney's fee or an award of costs."

In the present case it is unnecessary to review the decisions of this court to determine whether or not cruelty committed by the husband is sufficient to permit us to refuse him a divorce under section 42-304, R. R. S. 1943, where the wife has committed adultery. The testimony is compelling that the defendant at various times committed acts of violence amounting to extreme cruelty on the plaintiff both prior to, at, and shortly after the time of the separation. This evidence is adequately corroborated. The defendant in fact admits such actions in certain instances although he attempts to justify his conduct because of the aggravating conduct

of the plaintiff which included acts of violence on her part in some instances also corroborated. We think such cruelty in the past was condoned by the plaintiff who resumed marital relations thereafter. In Wright v. Wright, 153 Neb. 18, 43 N. W. 2d 424, this court stated: "Condonation is forgiveness, express or implied, for a breach of marital duty, with the implied condition that the offense shall not be repeated. Forgiveness sufficient for condonation is complete if there is a voluntary resumption of the marital relations." On the other hand, "Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and a repetition of the offense revives the wrong condoned." Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368. The record indicates no acts of violence by the defendant after the resumption of marital relations. Defendant discontinued such relations on discovering the plaintiff to be pregnant. The plaintiff's amended petition itself alleges: "That the plaintiff believing the promises of the defendant that he would refrain from repetition of the acts of cruelty complained of in her earlier Petition and that he would treat the plaintiff as a true wife, did resume the marital relationship shortly thereafter." The plaintiff doubtless claims the defendant's subsequent assertion of plaintiff's infidelity to be a renewal of his cruelty, permitting her to reassert his previous actions. The results of the blood tests establish the defendant's assertions to have been justified.

With respect to the issue of child custody, however, it is to be noted that the defendant's acts of violence were at times committed in the presence of his child, Alice Marie. There is evidence, to some extent corroborated, that he struck the child of plaintiff by a former marriage although defendant explained she was hurt on striking the doorjamb while flinching. The testimony indicates he became intoxicated at which times he was quarrelsome. Defendant manifested little concern for the every-

day needs of his child. Immediately after the separation he had rented an apartment for $100 per month, purchased a new car, and committed himself for furniture for $750 which he later returned to the seller. While living with his parents in 1963 he earned over $3,000 as an insurance salesman. He bought a new car at that time but contributed little to his daughter's support. We find the defendant unsuitable to have the custody of his daughter, Alice Marie.

In Beck v. Beck, 175 Neb. 108, 120 N. W. 2d 585, a case involving the wife's adultery, it is stated: "Where in an action for divorce both parents are found to be unfit or unsuitable to have the care and legal custody of the minor children of the parties, the welfare and best interest of the children will constitute the sole consideration in determining the right of custody.

"Under the provisions of section 43-236, R. R. S. 1943, where the parents of minor children are unfit or unsuitable to have their custody, the separate juvenile court may properly place their legal custody in the chief juvenile probation officer on such terms and conditions as the court may prescribe.

"Where adultery by a wife is established in an action for divorce, she is not entitled to an award of alimony and ordinarily will not be allowed an attorney's fee to be paid by the husband." In the Beck case the legal custody of the minor chillren was placed in the chief juvenile probation officer of Lancaster County, Nebraska. In the present case a like officer exists in Douglas County. It is uncontroverted that the plaintiff is an immaculate housekeeper. The children were neat and clean. The child of both parties is of the tender age of 5 years. Babysitters have been provided for while the mother was at work. Neither child has been neglected. Moreover, it is quite desirable that the half-sisters should not be separated. We conclude that the custody should be resolved as it was in the Beck case.

The trial court ordered the defendant to pay $12.50

a week for each of the two children determined by it to be the defendant's children. The defendant is a salesman of insurance. He has been occupied in that capacity since March 1, 1962. His company permits him during the first years of his employment to draw more than he earns, the excess to be deducted from future earnings when he becomes a more proficient salesman. In 1963 he drew from his company $5,100, but appears to have earned $3,900, subject to deduction not only of withholding and social security but for certain advertising expenses chargeable to him. It is admitted his employment is expected to be more profitable although he presently owes his employer more than $4,000 for advanced withdrawals. We think he should pay $25 a week for the support of Alice Marie.

The judgment of the trial court should be reversed. It is directed to enter a decree of divorce in favor of the defendant on his cross-petition for the adultery committed by the plaintiff and to find the defendant is not the father of the child, Sandra Kay. It should provide that the defendant pay the costs of the blood tests, the other costs to be taxed to the plaintiff. The expenses occurring on the birth of the minor, Sandra Kay, and attorney's fees to plaintiff are to be disallowed.

The legal custody of the minor child, Alice Marie Houghton, is placed in the chief juvenile probation officer of Douglas County with instructions to leave the physical custody with her mother, Mary Jean Houghton, under the supervision of such probation officer, during the time she shall properly care for her, and under an environment not inimical to the child's best interests. If the mother fails in her obligation to act in accordance with the child's best interests and welfare, such failure is to be called to the attention of the court for further disposition as it shall deem necessary. The defendant is to pay $25 a week for the support of Alice Marie with the right of visitation at reasonable times on Sundays.

No contention is made with respect to the division

of the property made by the trial court and no change need be made. The temporary orders for support made by the trial court should be paid by the defendant but no further support should be awarded the plaintiff.

The judgment of the trial court is reversed and the cause remanded with directions to enter a decree of divorce in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, C. J., and BOSLAUGH, J., dissenting.

We respectfully dissent from that part of the majority opinion which holds that the results of blood tests in cases such as this conclusively determine the issue of paternity.

WESTERMARK, District Judge, dissenting.

The child, Sandra Kay Houghton, involved in this action was born during wedlock. She is presumed to be the child of the defendant in this case unless the presumption is overcome by clear and convincing evidence. Nebraska recognizes this presumption of parentage. Zutavern v. Zutavern, 155 Neb. 395, 52 N. W. 2d 254. As recently as in 1963, Volume 10 Am. Jur. 2d was published. Under the title of "Bastards" section 11, page 852, we find the following rule: "While the former arbitrary rule has been relaxed so that the presumption of legitimacy of a child begotten or born in wedlock is now rebuttable by practical methods and substantial evidence, it remains one of the strongest rebuttable presumptions known to the law, and the interests of society require that it be given effect unless overcome by the strongest sort of evidence, in the absence of which the presumption remains conclusive."

The opinion adopted by the court holds that the findings of the pathologist, who conducted the blood tests that were made as shown by the opinion, were conclusive and by reason thereof were sufficient to overcome the presumption of legitimacy. In my opinion the evidence relating to the blood tests does not support such a conclusion nor does it support the conclusion that the

presumption of legitimacy has been overcome by the strongest sort of evidence.

The courts seem to agree that before blood tests may be considered in determining nonpaternity the accuracy of the testing methods must be established. See 46 A. L. R. 2d 1005. In Beach v. Beach, 72 App. D. C. 318, 114 F. 2d 479, 131 A. L. R. 804, which was decided in construing a statute, the appellant alleged pregnancy caused by the defendant, which he denied. A child was born pending suit and the district judge, on motion of the defendant, ordered that the mother and child submit to blood grouping tests to compare with the blood of the defendant. The court said: "The value of blood grouping tests as proof of non-paternity is well known. On this point it is enough to cite the report of the American Medical Association's Committee on Medicolegal Blood Grouping Tests, which shows that although such tests cannot prove paternity, and cannot always disprove it, they can disprove it conclusively in a great many cases provided they are administered by *specially qualified experts.*" (Emphasis supplied.) In 46 A. L. R. 2d 1005, we find the following statement: "As to the weight to which evidence consisting of blood grouping test results is entitled, the courts are divided. Some, but not all, have ruled that such results are conclusive on the question of paternity where they show nonpaternity and *where the accuracy of the testing methods is established.*" (Emphasis supplied.)

In this case, the pathologist who supervised the tests admitted on cross-examination that one Doctor Philip Levine, who first discovered Rh antigen, in 1946 had written an article in the Journal of American Medicine headed, "Medico-Legal Application of Blood Grouping Tests"; and agreed with his statement in the article, "These tests have numerous pitfalls and accurate results can be obtained only by specialists with regular and continuous experience with these tests." He further admitted that these tests were the first blood grouping

tests to determine nonpaternity that he had supervised. By these admissions we have no assurance that the tests conducted under his supervision carry the weight which are conclusive and which are sufficient to overcome the presumption of legitimacy.

The importance of blood grouping tests and the necessity of obtaining accurate reports by competent experts has been a matter of consideration by the National Conference of Commissioners on Uniform State Laws. It may be noted that in 1952 the National Conference of Commissioners on Uniform State Laws approved the Uniform Act on Blood Tests to Determine Paternity. The uniform act has been adopted in California, Michigan, New Hampshire, and in Oregon, and possibly some other states. The purpose of the act is to provide certain procedures relative to blood tests before the findings of the experts may be considered conclusive.

In my opinion the matter of determining paternity or nonpaternity of children born in wedlock is of such importance that the tests should not be considered conclusive unless it is so provided by legislative enactment.

We all recognize the advances made in medical science. The procedures and tests performed as a result of the advances in the medical field are entitled to every consideration. The courts recognize and accept the new procedures. Yet the duty of preserving the home and protecting children born during the marriage relationship from the stigma of illegitimacy is one of the most important responsibilities of society and the courts. To meet this responsibility the courts have adopted the rules relating to the presumption of legitimacy. These rules must not be changed or modified by new medical procedures and tests unless such tests are shown to have been accurately made; or unless the Legislature has enacted appropriate statutes relative to such tests.

From a strict legal standpoint, it may be said that there was condonation on the part of the plaintiff which would deny her the right of divorce. Technically, she should

have dismissed her action for divorce after the alleged condonation and filed a new action alleging nonsupport to conform to the facts in this case. However, the facts in this case certainly indicated that the only solution to the problems is a decree of divorce. The husband by his acts of cruelty commenced the series of incidents which led to the problems of these parties. The trial court no doubt considered all of the circumstances in this light in granting the divorce to the plaintiff.

Further, I do not agree with the provision in the judgment of the court which provides that legal custody of the minor child, Alice Marie Houghton, be placed in the chief juvenile probation officer of Douglas County with instructions to leave the physical custody with her mother. No doubt this requirement was to provide a proper moral atmosphere for the child. This of course is important. But it should not be the sole consideration. In too many cases the courts overlook the fact that minor children are not chattels. They are personalities with definite and various needs and should be treated as such. One of the common legal expressions in divorce actions is that one or the other parent is "entitled to custody" overlooking the most important matter which is, what are the minor children entitled to.

The record in this case shows that the mother did not neglect the child, Alice Marie Houghton. Because the husband failed to provide support, the mother was employed steadily, except for a short time before Sandra Kay was born; but she provided for the material and physical needs of the children, kept a neat home, and kept the children clean. The child, Alice Marie, depended upon the mother for all her physical needs. From the record we can infer that the only feeling of security and love and affection she got was given by the mother. There is no showing that she will not continue to provide these vital needs of the child. The record shows that no other person was prepared to or would provide the child with the material necessities of life, and also

what is so important to a child, a feeling of security, love, and affection. Certainly a probation officer cannot provide these important requirements.

This court has said in several cases that the custody and care of minor children is to be determined by what will be for the welfare and best interests of the child. This of course should include future welfare as near as it can be reasonably foreseen.

To me it is rather difficult to distinguish between legal custody and physical custody as applied to this case. In a sense it is a split custody. Applying it to all the problems of caring for children, including discipline, it suggests many situations wherein a reasonable and honest misunderstanding may arise. These situations will have the tendency of creating in the child a feeling of uncertainty and insecurity. It may haunt her until she reaches the age of maturity. For instance, if she should desire to get married upon reaching marriageable age, before attaining the age of 21 years, she must obtain the consent for marriage under the provisions of section 42-105, R. R. S. 1943. Under the provisions of the decree, the mother cannot sign the consent because she does not have legal custody and the probation officer cannot sign the consent because he does not have the actual custody. For these reasons I conclude that the provisions as to custody of Alice Marie Houghton are not for the welfare and best interests of the child.

Certainly, we are interested in the moral atmosphere for the child. This need could be assured by providing that the home be visited by the probation officer, who may be directed to report to the district court having jurisdiction of this case and the minor child any failure of the plaintiff in meeting the responsibilities of caring for the child or failing to rear the child in a proper moral atmosphere.

In my opinion the trial court was correct in determining that the plaintiff was entitled to a divorce and in

awarding custody of the minor children to the plaintiff, and I would affirm the lower court's findings and decree.

LOUIS WEINER ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

137 N. W. 2d 852

Filed November 12, 1965. No. 35957.

1. **Eminent Domain: Appeal and Error.** Either condemner or condemnee may appeal from the assessment of damages by the appraisers to the district court of the county where the petition to initiate proceedings was filed. Such appeal shall be taken by filing a notice of appeal with the county judge within 30 days from the date of filing of the report of appraisers.
2. **Constitutional Law.** Due process is the right to a fair hearing before some tribunal having jurisdiction to determine the controversy in question.
3. ———. Article I, section 24, Constitution of Nebraska, guarantees the right to be heard in all civil cases in the court of last resort, but that guarantee is dependent upon its exercise in strict conformity to law.
4. **Eminent Domain.** Condemnation proceedings become judicial proceedings only when appealed to the district court.
5. ———. The power conferred upon a county judge by the eminent domain act and the duties required of him by that act are not judicial powers and duties but are purely ministerial in character.
6. **Eminent Domain: Judgments.** Section 25-1301.01, R. R. S. 1943, has no applicability to the filing of the report of the appraisers with the county judge.

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

Alfred A. Fiedler, for appellants.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., and George W. Venteicher, for appellee.

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

SPENCER, J.

The sole question involved herein is the propriety of the dismissal of appellants' appeal from a condemnation award. The district court dismissed the appeal for lack of jurisdiction for the reason that notice of appeal was not filed within the statutory time.

The board of appraisers filed its return April 18, 1963. It is undisputed no written notice was given to appellants of its filing. Appellant Louis Weiner and appellants' attorney had appeared at the hearing before the board of appraisers. Appellants filed their notice of appeal June 14, 1963, and filed their transcript of appeal in the district court June 26, 1963. Their petition was filed July 31, 1963.

Section 76-715, R. R. S. 1943, provides as follows: "Either condemner or condemnee may appeal from the assessment of damages by the appraisers to the district court of the county where the petition to initiate proceedings was filed. Such appeal shall be taken by filing a notice of appeal with the county judge within thirty days from the date of filing of the report of appraisers as provided in section 76-710." The notice of appeal herein was filed almost 1 month after the statutory time had expired.

It is appellants' contention that written notice to appellants of the filing of the award is an essential element in the proceeding and that time for appeal does not commence to run until they have received such notice. Appellants also contend that to hold otherwise is a violation of the due process clause of the United States Constitution, Amendment XIV, section 1, as well as of the Constitution of Nebraska, Article I, section 3. We answer this last contention by saying that due process is satisfied by the original notice, that of the hearing before the board of appraisers.

Due process is generally understood to mean the right to a fair hearing before some tribunal having jurisdiction to determine the controversy in question. Albin

v. Consolidated School Dist., 106 Neb. 719, 184 N. W. 141. See, also, Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865. This means in a condemnation case that the owner is entitled to such notice of the proceedings as will give him an opportunity to be heard upon the questions involved. It does not require notice of the rendition of the award. In passing, we might observe that an appeal is not necessary to due process. Chicago, B. & Q. R. R. Co. v. Headrick, 49 Neb. 286, 68 N. W. 489. See, also, Dohany v. Rogers, 281 U. S. 362, 50 S. Ct. 299, 74 L. Ed. 904, 68 A. L. R. 434, which held: "The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it."

While Article I, section 24, Constitution of Nebraska, guarantees the right to be heard in all civil cases in the court of last resort, that guarantee is dependent upon its exercise in strict conformity to law. In this case that would mean the filing of the notice of appeal within 30 days from the date of the filing of the report of appraisers.

Appellants rely on section 25-1301, R. R. S. 1943, covering civil practice in district court defining a judgment, its rendition, and its entry, and on section 25-1301.01, R. R. S. 1943, requiring the clerk of the court to mail certain notices within 3 days after the rendition of the judgment, to sustain their position.

Without considering the applicability of these statutes to county courts, it is clear they have no applicability to proceedings in eminent domain until they reach the district court. In Lane v. Burt County Rural Public Power Dist., 163 Neb. 1, 77 N. W. 2d 773, we held

that condemnation proceedings become a judicial proceeding only when appealed to the district court, and the appointment of freeholders to assess damages does not constitute the proceeding a matter instituted and pending in the county court. The power conferred upon a county judge by the eminent domain act and the duties required of him by that act are not judicial powers and duties but are purely ministerial in character.

Appellants argue that an award is void unless a proper method of notification is employed, and urge three Nebraska cases for our consideration. These cases state the law of this jurisdiction but none of them have any applicability herein because they all involve the question of whether or not the parties were given notice of hearing and had an opportunity to be heard. Our law is clear that a judgment is void unless a reasonable method of notification is employed and a reasonable opportunity to be heard is afforded to the persons affected. That, however, is not the situation before us. In the instant case, appellants were given notice of the hearing and appeared before the board of appraisers with able counsel. This satisfied the requirement of due process. Section 25-1301.01, R. R. S., 1943, has no applicability to the filing of the report of the appraisers with the county judge.

Appellants failed to file their notice of appeal within the time limited. The district court did not acquire jurisdiction to consider the appeal, the motion to dismiss was properly sustained, and the judgment is affirmed.

AFFIRMED.

HARTMANN VACKINER, APPELLANT, V. MUTUAL OF OMAHA, INSURANCE COMPANY, APPELLEE.

137 N. W. 2d 859

Filed November 12, 1965. No. 35960.

1. **Trial: Judgments.** Summary judgment procedure is useful only

to pierce pleadings and show that the controlling facts are otherwise.

2. ———: ———. Nonexistence of a genuine issue of material fact is not established merely by evidence which would be insufficient to carry the issue to a jury, because the record may constitute only a part of the evidence available at a trial on the merits.
3. **Insurance.** An untrue representation made by an insured in response to a question in an application calling for an opinion, judgment, or belief will not avoid a policy issued on the application, unless the misrepresentation was knowingly made with intent to deceive.
4. ———. In an action on a policy, an insurance company cannot prevail on a defense of fraudulent representations by the insured in his application, unless the representations were material to the risk.

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

Homer E. Hurt, Jr., for appellant.

Sidner, Gunderson, Svoboda & Schilke, for appellee.

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

SMITH, J.

Defendant obtained a summary judgment on a claim by plaintiff for hospital and surgical benefits under an insurance contract between the parties. On appeal we review the bill of exceptions with particular reference to contentions that plaintiff fraudulently represented his good health in the written application for the insurance and that the representations were material to the risk.

The application exhibits negative answers to these questions:

"Have you * * * ever had, or been told you had, or received advice or treatment for: * * * (a) * * * heart, vein or artery trouble * * *? * * * (c) * * * kidney or bladder trouble, prostate trouble * * *? (d) Mental or nervous trouble * * *? * * *

"Have you * * * ever had, or been told you had, or

received advice or treatment for: (a) any physical conditions or injuries not mentioned above, or (b) any symptoms of ill health? * * *"

Plaintiff, 71 years of age, signed the application on March 18, 1963, below this printed statement:

"I represent that my above answers and statements are true and complete to the best of my knowledge and belief * * *."

When the policy with the attached application was delivered, plaintiff noticed his negative answers. He made this claim on July 30, 1963, as a result of a prostate operation the same month. There too he answered negatively a question concerning medical or surgical advice for any other condition during the preceding 5 years. The English language was an obstacle, for he read with some difficulty and wrote with more.

From investigation of the claim defendant discovered an adverse medical history. In January 1958, plaintiff was hospitalized 8 days for angina pectoris secondary to myocardial ischemia. An electrocardiogram showed a right bundle branch block, which was noted again in 1963. Occasional treatment was being administered as late as September 1958.

Early in 1958 plaintiff received electric shock treatments for a disorder defined as "involitional psychiatric recation," and from June to September he was using medications prescribed for it. The insurance policy excludes benefits for losses from mental disorders.

Histories elicited from plaintiff in June 1963, disclosed a slowness of his urinary stream. Although some diminution had been occurring for 2 years, it progressed only during the preceding 3 or 4 months. A urologist reported that the exact cause had not been knowledgeable by the patient, and plaintiff's testimony is not conclusive for present purposes.

In his reply to defendant's answer plaintiff pleaded his health as follows:

"Plaintiff * * * admits that he underwent certain tests

and examinations relative to his general health; denies knowledge of any heart condition; admits some intermittent urinary difficulties in the form of slowing or diminution of the stream; admits treatment * * * for a transitory nervous condition; admits that he has consulted doctors on occasion during the years for minor conditions and for periodic health examinations but alleges that this has been less than average for persons of comparable age."

On August 29, 1963, defendant notified plaintiff of cancellation and tendered the amount of the premium. In subsequent affidavits the writing agent and his supervisor stated that if the true history, or a part of it, had been known, the application would not have been accepted because the underwriting program prohibited issuance of the policy when the health history was adverse.

An untrue representation made by an insured in response to a question in an application calling for opinion, judgment, or belief will not avoid a policy issued on the application, unless the misrepresentation was knowingly made with intent to deceive. Muhlbach v. Illinois Bankers Life Assn., 108 Neb. 146, 187 N. W. 787. This rule is controlling here. See Dezsi v. Mutual Benefit Health & Accident Assn., 255 Iowa 1027, 125 N. W. 2d 219.

Summary judgment procedure is effective only to pierce pleadings and show conclusively that the controlling facts are otherwise. Nonexistence of a genuine issue of material fact is not established merely by evidence which would be insufficient to carry the issue to a jury, because the record may constitute only part of the evidence available at a trial on the merits. Berg v. Rasmuss, 176 Neb. 340, 125 N. W. 2d 905.

Defendant failed to prove that in a jury trial plaintiff would be unable to avoid a determination, as a matter of law, that nondisclosure of his prostate condition had been fraudulent. Materiality of the other representations to the risk remains for consideration.

In an action on a policy, an insurance company cannot prevail on a defense of fraudulent representations in the application by the insured, unless the representations were material to the risk. Muhlbach v. Illinois Bankers Life Assn., *supra*. Assuming without deciding that nondisclosure of conditions other than the urinary one was fraudulent, we think that their materiality to the risk as a matter of law in a trial on the merits is unproved. The medical diagnoses are not instructive enough to supply deficiencies in the affidavits of the two agents. The men should stand cross-examination in view of their general opinions and their nonparticipation in the formulation of the underwriting program.

The motion for summary judgment should not have been sustained. We reverse the judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CLARENCE BLOBAUM ET AL., APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.
137 N. W. 2d 855

Filed November 12, 1965. No. 35969.

1. **Witnesses.** An opinion of an expert witness has no probative force unless the assumptions for it are shown to be true.
2. **Eminent Domain.** In an eminent domain proceeding an unaccepted promise to do something in the future cannot affect the character or the extent of the rights acquired or the amount of damages to be recovered as just compensation.
3. **New Trial: Appeal and Error.** An order granting a new trial will not be reversed by this court unless it clearly appears that there was no tenable ground.

Appeal from the district court for Chase County: VICTOR WESTERMARK, Judge. Affirmed.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., W. L. Strong, and James J. Duggan, for appellant.

Bosley & Bosley and W. C. Conover, for appellees.

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

SMITH, J.

The State took by eminent domain for highway purposes a small part of plaintiffs' ranch. The district court granted a new trial on the ground that the jury assessment of the amount recoverable was too small, and from this order the State has appealed.

The State acquired a fee simple title, excepting mineral rights, to 54.36 acres in the form of an irregular strip longer than a mile east-west; a permanent easement in 1.06 acres; and a temporary easement in 0.28 acre. The parties stipulated that for the purposes of trial the easements were to be considered a part of the taking instead of consequential damage. The jury, which had viewed the premises, returned a general verdict of $11,612 with special findings of $4,938 for the part taken and $6,674 for consequential damage.

The highway runs roughly through the middle of approximately 2,240 acres owned by plaintiffs before the condemnation. Cropland lies on both sides but most of the ranch is pasture. The expropriation in fee comprised 21 acres of farmland and 33.36 acres of pasture.

Some valuations, especially of the remainder before and after the taking, are far apart. In the testimony of one plaintiff, a neighboring rancher, and a real estate appraiser for plaintiffs the estimates range from $6,633.50 to $6,093, for the part taken, and from $36,775 to $32,587.25 for consequential damage, and from $43,053.40 to $38,680.25 for the total. From the testimony of two real estate appraisers for the State the amounts are $4,885 and $4,785 for the part taken and $4,615 and $5,410 for consequential damage, with totals of $9,500 and $10,195. Although the State finds weaknesses in plaintiffs' evidence, it does not pretend to shore up the

verdict with anything other than the testimony of its two experts.

The opinion of Russell Harrach, the first expert for the State, rested upon an extraneous consideration. During plaintiffs' case-in-chief witnesses pictured prominently the damage from highway interference with irrigation of cropland to the south. Although they referred vaguely a number of times to the possibility of laying pipes through tubes or concrete boxes built by the State underneath and across the highway, a license or easement was unmentioned.

Harrach testified on direct examination that 50 acres of cropland to the south had been reduced in value per acre from $150 to $100. Anticipating some inconvenience in irrigating, he expressed the possibility of running pipes underneath the highway. On cross-examination he was asked whether he had inquired concerning permission from the highway department and whether information from the department influenced his opinion. He answered: "I was told that it was permissible." Counsel for the State then volunteered: "* * * I will stipulate it is permissible." Opposing counsel objected but obtained no ruling. Discussion at the bench followed, but no further record of it was made.

The State attempts to justify Harrach's opinion on two grounds. First, it reminds us that plaintiffs cannot now complain because they proceeded without protecting their record. The reminder overlooks the distinction betwen errors at a trial and an inadequate verdict. An opinion of an expert witness has no probative force unless the assumptions for it are shown to be true. Cover v. Platte Valley Public Power & Irr. Dist., 167 Neb. 788, 95 N. W. 2d 117.

Second, the State tells us that plaintiffs should be held to the theory upon which they tried the case in the district court. Plaintiffs' evidence excluded a pipeline across the highway. The objection to the offer of counsel for the State was inconsistent with acceptance,

and the absence of a ruling cannot be expanded to acceptance by silence. Fairly interpreted, the offer amounted to a promissory stipulation. "An unaccepted promise to do something in the future cannot affect the character or the extent of the rights acquired or the amount of damages to be recovered as just compensation." Little v. Loup River Public Power Dist., 150 Neb. 864, 36 N. W. 2d 261, 7 A. L. R. 2d 355.

The second appraiser for the State also valued the farmland south of the highway at $150 per acre before, and $100 after, the taking. However, unlike the first one, he was unconcerned with irrigation after the taking because he considered it dry land. His unit estimate of $150 was not firm. He admitted not only ignorance of the availability of water for irrigation before the condemnation but also failure to inquire. He assumed that the supply would be adequate at times. He based value on assumptions with doubtful verification. We think that his testimony presented a borderline situation within the discretion of the district court, although the jury had viewed the premises. See Wagner v. State, 176 Neb. 589, 126 N. W. 2d 853.

An order granting a new trial will not be reversed by this court unless it clearly appears that there was no tenable ground. Wagner v. State, *supra;* De Matteo v. Lapidus, 116 Neb. 549, 218 N. W. 379. There is no reversible error.

The judgment is affirmed.

AFFIRMED.

IN RE ESTATE OF MARIE L. HAUSCHILD, DECEASED. ALBERT O. SKOCHDOPOLE, EXECUTOR OF THE ESTATE OF MARIE L. HAUSCHILD, DECEASED, APPELLEE, V. DAISY BAYS, APPELLANT.

137 N. W. 2d 875

Filed November 12, 1965. No. 35972.

1. **Wills. Anyone, who at the time of the execution of his will**

understands the nature of the act, the extent of his property, the proposed disposition of it, and the natural objects of his bounty, is competent to make a will.

2. ———. In a will contest where the proponent has made a prima facie case that the testator was mentally competent to make a will, the contestant must produce sufficient evidence to support a contrary finding by a jury, otherwise there is no disputed question of fact to submit to a jury.

3. ———. It is essential to the validity of a will that the testator know and understand the contents thereof at the time of its execution.

4. ———. It is not essential that the testator understand the meaning of all the technical terms and legal phraseology employed in the will or be able to correctly interpret the will in a legal sense. It is sufficient that he understand the meaning and effect of the instrument as a whole if it truly expresses his testamentary intention as to the disposition of his estate.

5. ———. There is no requirement that a will be read to the testator or the witnesses thereto prior to its execution. It is sufficient if the court is satisfied by competent evidence that the contents of the will were known to and approved by him.

6. ———. If a testator, of sound mind and under no restraint, executes a will, it will be presumed, in the absence of evidence of mistake, fraud, and the like that he executed it with knowledge of its contents, although it is not read at execution.

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

Dier & Ross and Mingus & Mingus, for appellant.

Moller R. Johnson and Nye & Wolf, for appellee.

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

BOSLAUGH, J.

Marie L. Hauschild died on February 2, 1964. Her last will and testament, dated October 16, 1960, was admitted to probate over objections in proceedings commenced for that purpose in the county court of Buffalo County, Nebraska. From that judgment, Daisy Bays, a daughter of the deceased and the contestant, appealed to the district court.

In the district court the parties stipulated that the

will had been duly executed. At the close of the contestant's evidence, the proponent moved to withdraw the issues of testamentary capacity and undue influence from the jury. The district court sustained the motion and entered judgment admitting the will to probate. The contestant's motion for new trial was overruled and she has appealed.

In this court the contestant has waived all issues except testamentary capacity. The only question presented by the appeal is whether the evidence was sufficient to raise a jury question concerning the testamentary capacity of the deceased at the time the will was executed.

The proponent produced the testimony of Lester V. Kozel and Robert R. Svanda who witnessed the execution of the will by the deceased. Kozel testified that he had been the postmaster at Ravenna, Nebraska, for 27 years; that he had been acquainted with the deceased since "the late 20's"; that on October 16, 1960, she asked him to witness her will; that she appeared to be normal at that time; that in his opinion the deceased had the mental ability to understand the nature of her act in making the will; that she knew the extent of her property; that she had the mental ability to understand the proposed disposition of her property; and that she knew who were the natural objects of her bounty.

Svanda testified that he has been a pharmacist in Ravenna, Nebraska, since 1924 and had known the deceased since that time; that on October 16, 1960, she asked him to witness her will; that she appeared to be healthy and he noticed nothing unusual about her; that she had the mental ability to understand the nature of her act in making the will; that she had the mental ability to know the extent of her property; that she had the mental ability to understand the proposed disposition of her property by the will; and that she knew who were the natural objects of her bounty.

Anyone, who at the time of the execution of his will

understands the nature of the act, the extent of his property, the proposed disposition of it, and the natural objects of his bounty, is competent to make a will. In re Estate of Bose, 136 Neb. 156, 285 N. W. 319. The evidence of the proponent in this case was sufficient to make a prima facie case that the deceased had testamentary capacity at the time she executed her will. It then became the burden of the contestant to produce sufficient evidence to support a contrary finding by the jury. In re Estate of Bucy, 150 Neb. 263, 34 N. W. 2d 265.

The evidence produced by the contestant shows that the deceased was born in Saxony, Germany, and came to this country when she was 14 years old; that she attended a German school near Ravenna, Nebraska, through the fourth or fifth grade; that she could not read or write English very well and had other persons read newspapers and mail to her; and that the deceased and one of her daughters corresponded by means of tape recordings. There is no evidence that the deceased had difficulty in understanding the English language, although she could not read or write it very well.

Mabel Von Krosigh, a daughter of the deceased, testified that her mother called her in 1960 and asked her to come home; that the witness arrived at her mother's home near Ravenna, Nebraska, on Thursday, October 13, 1960, and stayed with her mother; that her mother was planning to have surgery at Grand Island, Nebraska, on Monday, October 17, 1960, and appeared to be very nervous and was quite concerned about making a will; that the deceased did not go to her lawyer's office in Ravenna, Nebraska, while the witness was with her but did go to Mr. Skochdopole's office on Saturday, October 15, 1960. Albert O. Skochdopole is the executor named in the will and the proponent in this proceeding.

On the morning of October 16, 1960, Mrs. Von Krosigh took her mother to Ravenna, Nebraska. On the trip into town the deceased said she would like to fix the

property so the land would be in the boys' names but they could never sell it, let the girls have the money, give "Uncle Louie" some money and a house, and give something to the church. They stopped at Mr. Skochdopole's office first and then went to Mr. Johnson's office where the will was executed. After the deceased went into Mr. Johnson's office, Mr. Skochdopole arrived, then Mr. Kozel, and last Mr. Svanda. About 5 or 6 minutes after Mr. Svanda entered Mr. Johnson's office, the deceased came out of the office. The deceased was nervous and shaking so much that she could not open the car door. The deceased began to cry and said: " 'Mabel, I didn't get to make it like I wanted to. They didn't let me make it the way I wanted to.' " Mrs. Von Krosigh then said: " 'Mother, why did you sign it, then?' " The deceased did not reply but continued to cry. Mrs. Von Krosigh then said: " 'Oh, mom, it can't be that bad, * * * Albert Skochdopole has done such a beautiful job. You're probably mistaken.' " They then returned to the home of the deceased.

Gertrude Chaney, a daughter of the deceased, testified that she came to her mother's home at about 1:30 p. m., on October 16, 1960; that her mother was sitting in the kitchen when she arrived; that she appeared to be pale, worried, and frightened about going to the hospital; that when asked how she felt, the deceased said she didn't feel very well; that the deceased started to cry and then said, " 'Gertie, they wouldn't let me make my will like I wanted it' "; and that when Mrs. Chaney asked who "they" were, the deceased said, " 'At the attorney's office.' " Later in the afternoon, Mrs. Von Krosigh took the deceased to the hospital in Grand Island where the deceased had surgery the following day.

The deceased remained in the hospital at Grand Island for 10 days and then returned to her home. She had further surgery in April 1961, and was hospitalized in September 1963.

Mrs. Chaney further testified that in December 1963,

she took the deceased to Grand Island to visit her son Otto, a brother of Mrs. Chaney; that as they passed the Fred Hankins land south of the land owned by the deceased, she pointed to the Hankins farm and said: " 'I could buy this, but in my will the children that don't get land will get equal amounts of money, to the land.' "

The deceased was again hospitalized in January 1964, and died February 2, 1964.

The contestant does not urge that the deceased lacked the necessary mental ability to make a will on October 16, 1960. The contestant contends that the record fails to show that the contents of the will were known and approved by the testatrix.

It is essential to the validity of a will that the testator know and understand the contents thereof at the time of its execution. In re Estate of Bose, *supra*. It is not essential that the testator understand the meaning of all the technical terms and legal phraseology employed in the will or be able to correctly interpret the will in a legal sense. It is sufficient that he understand the meaning and effect of the instrument as a whole if it truly expresses his testamentary intention as to the disposition of his estate.

The evidence in this case does not show that the will was not read or explained to the deceased at some time prior to its execution, although the record does show that the will was not read to the deceased at the time of its execution. However, there is no requirement that a will be read to the testator or the witnesses thereto prior to its execution. It is sufficient if the court is satisfied by competent evidence that the contents of the will were known to and approved by him. In re Estate of Goist, 146 Neb. 1, 18 N. W. 2d 513; In re Estate of Bose, *supra*.

It was stipulated in this case that the will was duly executed. The act of execution raises a presumption that the deceased knew and approved the contents of the

will. If a testator, of sound mind and under no restraint, executes a will, it will be presumed, in the absence of evidence of mistake, fraud, and the like, that he executed it with knowledge of its contents, although it is not read at execution. 1 Page on Wills (Rev. Ed.), § 5.9, p. 179. See, also, In re Estate of Dobals, 176 Iowa 479, 157 N. W. 169; In re Rowland's Estate, 70 S. D. 419, 18 N. W. 2d 290; In re Will of Bakke, 160 Minn. 56, 199 N. W. 438, 37 A. L. R. 597; 57 Am. Jur., Wills, § 861, p. 572; 94 C. J. S., Wills, § 130, p. 906; 95 C. J. S., Wills, § 384a (3), p. 273.

The contestant argues that when evidence was introduced which showed that the deceased could not read English and that the will was not read to her at the time of its execution, the proponent should have been required to prove affirmatively that the deceased knew the contents of the will. The contestant relies upon In re Gluckman's Will, 87 N. J. Eq. 638, 101 A. 295, L. R. A. 1918D 742, and Blume v. Hartman, 115 Pa. 32, 8 A. 219, 2 Am. S. R. 525. In the Blume case the will was prepared by a beneficiary and the evidence showed that the testatrix did not know the contents of the will at the time it was executed. In the Gluckman case the court said that where a testator by reason of physical or educational disability is unable to read the will, an additional burden is imposed upon the proponents where there are circumstances which lead the court to suspect that the testator may have been imposed upon. These authorities are not applicable to the facts in this case.

The evidence in this case indicates that the testatrix understood the provisions of her will. Her statements to Mrs. Von Krosigh in Ravenna, immediately after the execution of the will, and to Mrs. Chaney at her home in the afternoon of the same day, that she had not made the will the way she had wanted to make it, indicate that she knew what was in the will.

The deceased was survived by six children, three girls and three boys. Her land was devised to two of her

sons and charged with the payment of specific amounts to the other four children and a brother of the deceased, referred to in the record as "Uncle Louie."

The deceased lived more than 3 years after the making of the will. There is no evidence that she made any effort to change her will during this time or that she made any further expression of dissatisfaction with it. Her statement to Mrs. Chaney in December 1963, made more than 3 years after the execution of the will, indicates that she understood and remembered the testamentary plan expressed in the will although her opinion as to values may have been not realistic.

The evidence in this case was sufficient to admit the will to probate as a matter of law, and did not present a jury question as to the testamentary capacity of the deceased.

The judgment of the district court admitting the will to probate is affirmed.

AFFIRMED.

ANZALONE INVESTMENT COMPANY, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.
137 N. W. 2d 857

Filed November 19, 1965. No. 35893.

1. **Appeal and Error.** In reviewing cases in this court the transcript here filed, when properly verified, is the sole, conclusive, and unimpeachable evidence of the proceedings in the district court.
2. ———. A party cannot appeal from an order or judgment which was made with his consent or upon his application.
3. ———. Where a party to an action in the district court files a motion for a new trial and thereafter consents to its being overruled, no order remains from which an appeal may be taken.

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

Shrout, Hanley, Nestle & Corrigan, for appellant.

Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, Sebastian J. Todero, Walter J. Matejka, James E. Fellows, Allen L. Morrow, and P. D. Spenceri, for appellee.

Gross, Welch, Vinardi, Kauffman & Schatz, amici curiae.

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

CARTER, J.

This is an appeal from a judgment of the district court for Douglas County finding that ordinance No. 22908 of the city of Omaha, zoning Lot 11, Block 14, West End Addition to the City of Omaha from C-1 to R-9, to be valid and enforcible against the owner, Anzalone Investment Company. The Anzalone Investment Company filed a motion for a new trial which was overruled.

In overruling the motion for a new trial the court entered the following order: "This cause now comes on for hearing upon the motion of Plaintiff for a New Trial. Whereupon by agreement of the parties, it is by the Court ordered that said motion be, and hereby is overruled." As this court has many times held, the record of the trial court for the purpose of all appellate proceedings, when certified as required by law, imports absolute verity. A transcript of the orders or judgment entered is the sole, conclusive, and unimpeachable evidence of the proceedings in the district court. Worley v. Shong, 35 Neb. 311, 53 N. W. 72; Chadron Banking Co. v. Mahoney, 43 Neb. 214, 61 N. W. 594. The correctness of the record may not be assailed collaterally in this court. First Trust Co. v. Glendale Realty Co., 125 Neb. 283, 250 N. W. 68.

The record before this court conclusively shows that plaintiff's motion for a new trial was overruled by agreement of the parties. It is the long-established rule in this court that a party will not be heard to complain of

errors which he himself invited. Tucker v. Paxton & Gallagher Co., 152 Neb. 622, 41 N. W. 2d 911; Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367; Ripp v. Riesland, 170 Neb. 631, 104 N. W. 2d 246; Robins v. Sandoz, 175 Neb. 5, 120 N. W. 2d 360.

In Pahl v. Sprague, *supra*, the following is quoted with approval: "The ruling or decision complained of was made at the request of the plaintiff in error, and to now permit it to assign the same for error would be a violation of the plainest principles of law. A party is not entitled to prosecute error upon the granting of an order or the rendition of a judgment when the same was made with his consent, or upon his own application."

The plaintiff, having joined with the defendant in consenting to the overruling of the motion for a new trial, has barred itself from a review here of the assignments of error set out therein.

For the reasons stated, plaintiff's appeal is dismissed.

APPEAL DISMISSED.

ROBERT J. BULGER, GUARDIAN OF GEORGE PETRI, INCOMPETENT, ET AL., APPELLANTS, V. ALICE E. MCCOURT ET AL., APPELLEES.

138 N. W. 2d 18

Filed November 19, 1965. No. 35970.

1. **Appeal and Error.** The fact that an affidavit used as evidence in the district court was filed in the office of the clerk of the district court and made a part of the transcript is not important to a consideration and decision of an appeal of the cause to this court. If such affidavit is not preserved in the bill of exceptions, its existence or contents cannot be considered by this court.
2. ———. A judgment of the district court brought to this court for review is supported by a presumption of correctness, and the burden is upon the party complaining of the action of the district court to show by the record that it is erroneous.
3. ———. In the absence of a bill of exceptions no question will be considered which requires the examination of evidence produced in the trial court.

4. **Pleading: Evidence.** The admissions of fact contained in the pleadings are treated as established and do not require support in the evidence.
5. **Deeds.** A reservation need not be expressed in the granting clause of the deed but may be contained in the warranty clause, habendum or reddendum clause, or within the four corners of the deed.
6. **Statutes: Deeds.** Section 76-205, R. R. S. 1943, requires this court to carry into effect the true intent of the parties so far as it can be ascertained from the whole instrument, if not inconsistent with law.
7. **Deeds.** Each word and provision in a conveyance must be given such significance as will make effective the intention of the parties.
8. ———. Language used in a conveyance prepared by one of the parties thereto which is susceptible to more than one construction should receive such construction as the party preparing the same at the time supposed the other party would give to it, or such construction as the other party would be fairly justified in giving to it.
9. **Words and Phrases.** The expression "subject to" is a term of qualification which acquires its meaning from the context in which it appears, although ordinarily it will mean subordinate to, subservient to, governed or affected by, dependent upon, or limited by.
10. **Deeds: Mines and Minerals.** In the conveyance herein, the words "subject to" excepted one-half of all oil, gas, and mineral rights from the operation of the questioned conveyance.
11. **Mines and Minerals.** The term "minerals" ordinarily embraces oil, petroleum, and natural gas.
12. **Trial: Judgments.** Where the order sustaining a motion for summary judgment necessarily determined that appellants had no rights in the portion of the oil, gas, and mineral rights excepted from the deed, the trial court properly dismissed appellees' petition for a declaration of rights.

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

Robert J. Bulger, for appellants.

Martin, Davis, Mattoon & Matzke, for appellees.

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

SPENCER, J.

This is an action to construe a warranty deed and to declare the rights of the parties to certain oil, gas, and minerals in the property described in the deed.

On August 19, 1946, Albert T. Seybolt and Bessie L. Seybolt, husband and wife, executed the deed in question. Its granting clause is in part as follows: "* * * do hereby grant, bargain, sell, convey and confirm unto George Petri and Selma L. Petri husband and wife as JOINT TENANTS, and not as tenants in common, the following described real estate, situated in the County of Morrill and State of Nebraska, to-wit: North-West Quarter of Section Eighteen (18) Township Twenty-Three (23), North of Range Fifty-One (51) West of the 6th P.M. together with all the tenements, hereditaments and appurtenances to the same belonging, and all the estate, title, dower, right of homestead, claim or demand whatsoever of the said grantors, of, in or to the same, or any part thereof; subject to ONE-HALF OF ALL OIL AND MINERAL RIGHTS."

On August 29, 1949, the Seybolts executed a quit-claim deed to Willard L. Miller, conveying the "right, title and interest in and to all of the oil, gas or mineral rights owned by the grantors in the above described premises," the above-described premises being the same property described in the warranty deed hereinafter referred to as the Seybolt-Petri deed. By conveyance and other transfers the defendants and appellees, Alice E. McCourt and W. D. Landon, have succeeded to whatever interest Willard L. Miller acquired under said quit-claim deed.

One of the grantees, George Petri, is incompetent and Robert J. Bulger is his duly appointed, qualified, and acting guardian. The guardian in such capacity appears with the other joint tenant as plaintiffs and appellants herein.

It is the appellants' contention that the Seybolt-Petri deed conveyed the full interest owned by the Seybolts

without exception or reservation, and that appellants acquired all of the oil and mineral rights in said land. It is their contention that the "subject to" provision in the granting clause of the Seybolt-Petri deed did not constitute an exception or reservation of one-half of the oil and mineral rights but was merely a limitation on the liability of the grantors under the warranties in the deed. The appellees, on the other hand, contend that the "subject to" clause was intended to and did effectively except and reserve to the Seybolts, appellees' predecessors in title, an undivided one-half interest in the oil, gas, and minerals in and under and that may be produced from said land.

The case was tried to the court on appellants' amended petition, appellees' answer, appellants' reply, and on a motion by the appellees for summary judgment. The court sustained appellees' motion for summary judgment and dismissed the appellants' amended petition. It specifically determined that there was no genuine issue as to any material fact; that a construction of the Seybolt-Petri deed shows that an undivided one-half of the oil, gas, and other minerals in and under and that may be produced from the lands described in said deed was not conveyed to the Petris; and found that the appellees were entitled to judgment as a matter of law. Appellants have perfected an appeal to this court.

The order for summary judgment recites: "* * * the Court, having considered the record, stipulation and affidavits * * *." However, there is no bill of exceptions before this court, so the stipulations and affidavits, if they were actually offered in evidence, are not before us, even though the record indicates that the affidavits were filed in the office of the clerk of the district court.

In Peterson v. George, 168 Neb. 571, 96 N. W. 2d 627, we said: "Here there is no bill of exceptions. In view of that fact the following from Spidel Farm Supply, Inc. v. Line, supra, has application: 'At the hearing of the motion for summary judgment affidavits were presented

by the parties and considered by the court. * * * There is no affidavit preserved or contained in the bill of exceptions in this case. The effect of this omission is that any affidavit considered by the district court is not before and may not be considered by this court. An affidavit used as evidence in the district court cannot be considered on an appeal of a cause to this court unless it is offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. * * * The fact that an affidavit used as evidence in the district court was filed in the office of the clerk of the district court and made a part of the transcript is not important to a consideration and decision of an appeal in the cause to this court. If such an affidavit is not preserved in a bill of exceptions, its existence or contents cannot be known by this court."

The following, also from Peterson v. George, *supra,* is pertinent herein: "A judgment of the district court brought to this court for review is supported by a presumption of correctness and the burden is upon the party complaining of the action of the former to show by the record that it is erroneous. It is presumed that an issue decided by the district court was correctly decided. The appellant, to prevail in such a situation, must present a record of the cause which establishes the contrary. * * * The condition of the record prevents this court from knowing the evidence presented to the trial court or which part of the evidence before it was accepted and acted upon."

In the absence of a bill of exceptions, no question will be considered which requires the examination of evidence produced in the trial court. See Wabel v. Ross, 153 Neb. 236, 44 N. W. 2d 312. We therefore confine ourselves to the question as to whether or not the pleadings sustain the judgment of the district court. In this respect, however, admissions of fact contained in the pleadings are treated as established and do not require support in the evidence. See Johnson v. School Dist. No.

3, 168 Neb. 547, 96 N. W. 2d 623. The facts detailed herein are embraced within that category.

The construction of the Seybolt-Petri deed involves actually the position of the words, "subject to one-half of all oil and mineral rights." They are in the granting clause, but appellants urge that because they do not follow the description of the land itself but are placed where encumbrances are usually described, they constitute no more than a limitation of liability under the warranty. With this we do not agree. Appellants cite an Oklahoma case, Rose v. Cook, 207 Okl. 582, 250 P. 2d 848, to sustain their position. In that case, however, the clause in question was not a part of the granting clause but was the concluding sentence in the habendum of the deed, the habendum clause being that portion of the deed beginning, "to have and to hold," and which in the Seybolt-Petri deed contains the warranty provisions. We do not consider this material, however, as a reservation need not be expressed in the granting clause of the deed but may be contained in the warranty clause, habendum or reddendum clause, or within the four corners of the deed. Section 76-205, R. R. S. 1943, requires this court to carry into effect the true intent of the parties so far as it can be ascertained from the whole instrument, if not inconsistent with law. Each word and provision of a conveyance must be given such significance as will make effective the intention of the parties. See Elrod v. Heirs, Devisees, etc., 156 Neb. 269, 55 N. W. 2d 673.

Contrary to appellants' position, we do not believe the language of the deed is so ambiguous or obscure as to make interpretation difficult. It seems apparent to us that the ordinary person would readily interpret the conveyance as a retention by the grantor of one-half of all oil and mineral rights. To hold that the questioned language in the granting clause, without more appearing, was solely a limitation on the liability of

the grantors under the warranties in the deed, would actually be a strained and unnatural construction.

Despite appellants' ingenious arguments, the words "subject to" are often used by nonlawyers to cover exceptions, reservations, and exclusions. We agree with appellants that the expression has no well-defined meaning, although ordinarily it will mean subordinate to, subservient to, or governed or affected by. See Black's Law Dictionary (4th Ed.), p. 1594.

In State ex rel. Johnson v. Tilley, 137 Neb. 173, 288 N. W. 521, which did not involve a conveyance, we said: "The words 'subject to' are defined as 'dependent upon; * * * limited by; * * *.'" We now hold that the expression "subject to" is a term of qualification which acquires its meaning from the context in which it appears. Here it is evident to us that in the Seybolt-Petri deed there was a reservation of one-half of all oil and mineral rights.

Appellants urge that the provisions of a deed are to be construed against the grantor and in favor of the grantee in the event of any ambiguity or uncertainty, and cite Gettel v. Hester, 165 Neb. 573, 86 N. W. 2d 613, to support that position. The case is no authority for appellants' position unless an ambiguity exists and there is evidence that the grantors prepared the instrument. In that case, the evidence was undisputed that the grantee was the one who had the instrument prepared and the grantor had no choice in the selection of the words used. In Gettel v. Hester, *supra*, we said: "'Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it.'" The trouble with appellants' argument is that the pleadings do not disclose who prepared the deed, and we cannot consider that question in the absence of a bill of exceptions.

The trial court's order for summary judgment determined that the Seybolt-Petri deed did not convey "an undivided one-half of the oil, gas and other minerals * * *." Appellants urge that the use of the words "oil and mineral rights" excludes from their operation "gas" or "natural gas." In 1A Summers, Oil and Gas (Perm. Ed.), § 135, p. 268, the statement appears: "The courts are practically unanimous in holding that oil and gas are minerals in the broad and general sense in which that term is used."

In Belgum v. City of Kimball, 163 Neb. 774, 81 N. W. 2d 205, 62 A. L. R. 2d 1295, we said: "While there is apparently no issue raised in the instant case as to whether or not oil, petroleum, and natural gas are minerals, we believe that it would be proper to state that the term 'mineral' ordinarily embraces oil or petroleum and natural gas." (Citation of authorities omitted.) We reaffirm that statement, and hold that the term "minerals" ordinarily embraces oil, petroleum, and natural gas. This definition, of course, must give way to the rule that intention controls, and if from the context it is apparent that the parties did not so intend the term, it would be otherwise. Appellants insist that is the situation here and urge the application of the legal maxim "expressio unius est exclusio alterius" (the expression of one thing is the exclusion of another) to support their position. While there could be some merit in the appellants' argument if several items constituting minerals had been enumerated, we do not agree with its application herein. While gas is more closely associated with oil than with other minerals, we do not feel the use of the term "oil" excludes gas from the term "minerals." We find it more reasonable to believe that the parties intended to include oil and everything else which would be embraced within the term "minerals." The trial court so interpreted it.

Lastly, appellants complain that it was error for the trial court to dismiss their petition without declaring

the rights of the parties. There is no merit to appellants' assignment. The summary judgment proceedings required the court to construe the meaning of the questioned clause "subject to one-half of all oil and mineral rights." This was the sole question involved in appellants' action. The court by its order determined that the Seybolt-Petri deed affirmatively showed that an undivided one-half of all oil, gas, and other mineral rights in and under and that may be produced from the lands described in said deed were not conveyed to appellants, and found that the appellees were entitled to judgment as a matter of law. This accomplished everything that could have been accomplished if appellees had not filed a motion for summary judgment. We find that the order sustaining the motion for summary judgment and dismissing appellants' petition necessarily determined that appellants had no rights in the portion of the oil, gas, and mineral rights excepted from the deed.

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

AFFIRMED.

AVIS ANN FRENCHY, APPELLANT, V. CITY OF SCOTTSBLUFF, APPELLEE.

138 N. W. 2d 30

Filed November 19, 1965. No. 35976.

1. **Trial: Judgments.** A party who moves for summary judgment shows the nonexistence of a genuine issue of material fact by proof beyond a reasonable doubt that his opponent in a trial on the merits would be unable to raise an issue for the fact finder.
2. **Municipal Corporations.** A city is required to exercise ordinary care to keep its crosswalks in a reasonably safe condition for pedestrians.

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

Wright, Simmons & Hancock, for appellant.

Holtorf, Hansen, Fitzke & Kortum and Loren G. Olsson, for appellee.

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

SMITH, J.

Plaintiff stumbled over loose gravel on a paved crosswalk of defendant city. In falling she suffered personal injuries, which are the basis of this negligence action. On defendant's motion for summary judgment her petition was dismissed. We affirm the judgment because in a trial on the merits she would be unable to raise a factual issue of negligence.

The accident occurred at about 1:45 p.m. on November 27, 1959, in the east crosswalk of the intersection of Fourteenth Street and First Avenue. The pavement was dry, the weather a noncontributing factor. In the south and east crosswalks there was a scatter of gravel, which looked as if it had fallen from a truck. The rocks were approximately 2 inches in one or more dimensions. While walking north from the curb at the southeast corner of the intersection, plaintiff slid because of rocks turning underfoot, and she fell.

Plaintiff has not suggested that in a jury trial she would be able to offer anything better than the undisputed evidence which we have summarized, and defendant has proved her prospective inability beyond a reasonable doubt. A party who moves for summary judgment shows the nonexistence of a genuine issue of material fact by proof beyond a reasonable doubt that his opponent in a trial on the merits would be unable to raise an issue for the fact finder. See, Storz Brewing Co. v. Kuester, 178 Neb. 135, 132 N. W. 2d 341; Miller v. Aitken, 160 Neb. 97, 69 N. W. 2d 290.

There is nothing here for a jury. The alleged negligence is the failure of the city to remove the gravel. A

city is required to exercise ordinary care to keep its crosswalks in a reasonably safe condition for pedestrians. See, Anthony v. City of Lincoln, 152 Neb. 320, 41 N. W. 2d 147; Hupfer v. City of North Platte, 134 Neb. 585, 279 N. W. 168. The gravel was an obstruction too trivial to have constituted an unreasonable risk of harm to plaintiff when the utility of defendant's inaction is considered.

The judgment is correct and it is affirmed.

AFFIRMED.

NEBRASKA CONFERENCE ASSOCIATION OF SEVENTH DAY ADVENTISTS, APPELLEE, V. BOARD OF EQUALIZATION OF HALL COUNTY, NEBRASKA, ET AL., APPELLANTS.
138 N. W. 2d 455

Filed November 19, 1965. No. 35996.

1. **Taxation. The ownership and exclusive use of property determines whether or not it is entitled to exemption from taxation.**
2. **———. The primary or dominant use, and not an incidental use, is controlling in determining whether or not property is exempt from taxation.**
3. **———. It is the use of the property as distinguished from the use of the income from the property that determines whether or not it is exempt.**
4. **———. The burden of proof is upon one claiming property to be exempt from taxation to establish that its predominate use is for one of the purposes set out in section 77-202, R. R. S. 1943.**
5. **———. In proving a claim that property is exempt from taxation, the evidence must show that such property is reasonably needed and predominately used for one of the purposes specified in the exemption statute.**
6. **———. Residence buildings located on real estate which is exempt from taxation because of its predominate use for educational purposes, and which are occupied by teaching personnel and other employees of the school located thereon, are exempt from taxation when used for the primary purpose of carrying out the educational program of such school.**

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed in part, and in part reversed and remanded with directions.

Clarence A. H. Meyer, Attorney General, William E. Peters, and Richard L. DeBacker, for appellants.

Luebs, Tracy & Huebner and Asa A. Christensen, for appellee.

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

CARTER, J.

This is an appeal by the board of equalization and county assessor of Hall County from a judgment of the district court for Hall County exempting from taxation certain property owned by the Nebraska Conference Association of Seventh Day Adventists.

The Conference Association maintains a denominational grade and high school 1 mile east of Shelton, Nebraska, in Hall County. The facility is known as the Platte Valley Academy. It is principally a boarding coeducational parochial high school, although it operates a grammar school primarily for the benefit of the children of the teachers and employees connected with the operation of the school. The high school is accredited by the state and its teachers are certificated as required by the laws of Nebraska. At the time of trial there were 110 students in the high school and 13 in the grammar school. All students are lodged and boarded at the school and require constant supervision throughout the school year. For the school year of 1964-1965, the costs charged for each student were: Tuition, $415; room and laundry, $250; board, $340; a total of $1,005.

The Conference Association is incorporated and holds title to the real and personal property operated as a school. At the time of trial the property used by the Platte Valley Academy consisted of approximately 463 acres of land on which are located school buildings, dormitories, farm buildings, residences occupied by the faculty and maintenance service personnel, a dairy herd of 100 milch cows, and machinery for farming the land.

For convenience, the land was described on exhibit 2 as six tracts numbered I to VI. The residences were numbered 1 to 11. The question of exemption from taxation involves the 93-acre tract of land in Tract VI, and the 11 residences.

The 93 acres of land designated as Tract VI were purchased in 1963, after the decision of this court in Nebraska Conf. Assn. Seventh Day Adventists v. County of Hall, 166 Neb. 588, 90 N. W. 2d 50, in which we held that Tracts I to V, inclusive, were exempt from taxation as being used for educational purposes. The evidence shows that, at the time of the former case, the Conference Association was renting 60 acres of land which were being used in connection with the farming operations of the Platte Valley Academy. Subsequently the lease was lost and the Conference Association purchased the 93-acre Tract VI to replace the leased 60 acres. It is the contention of the Conference Association that Tract VI was needed to carry on its agricultural program in the Platte Valley Academy. The board of equalization contends that this tract is not needed to carry on the agricultural program of the school, and is used only to afford additional income and work opportunity for students, and that it is therefore taxable. This constitutes the issue before the court.

The evidence shows that most of the students attending the school are not financially able to pay the required tuition and expenses in cash. It is the policy of the school to afford farm work to the male students attending the school and to credit such work at an hourly rate on their tuition and expenses. The principal of the school testified that if all tuition and expenses were paid in cash, the school would be self-sustaining, but that this is impossible. The evidence shows that work is afforded male students on the farm lands and dairy and for female students in the food service department and in certain room and custodial service. No academic credit is given for this work. During the current year there

were some 14 boys taking the agriculture course. Farm mechanics is not taught and industrial arts is alternated with the course in agriculture. While the record shows that some of the boys perform some labor on the 93 acres for which they are given credit on their tuition and expenses, there is no evidence that the land was needed to carry out the school's educational program. In fact, the evidence is to the contrary. The school principal testified that as far as academic use is concerned, the acquisition of the 93 acres was not essential to the operation of the academy. The evidence clearly indicates that the purchase of Tract VI was for the purpose of increasing the income for the Platte Valley Academy and was not for the primary purpose of providing educational facilities for the school.

This court has held that it is the exclusive use of property which determines its exempt character. It is the use of property as distinguished from the use of the income from the property that determines whether or not it is exempt from taxation. Doane College v. County of Saline, 173 Neb. 8, 112 N. W. 2d 248; Lincoln Woman's Club v. City of Lincoln, 178 Neb. 357, 133 N. W. 2d 455; Nebraska Conf. Assn. Seventh Day Adventists v. County of Hall, *supra*.

The use of land to increase the income to a school, or for the sole purpose of providing compensable work for students, is an incidental use of property that does not bring it within the terms of the Constitution and statutes providing for exemption from taxation as property owned and used exclusively for educational, religious, charitable, or cemetery purposes, even though such property is not used for private financial gain or profit.

As early as Academy of the Sacred Heart v. Irey, 51 Neb. 755, 71 N. W. 752, this court said: "The test applied by this court in First Christian Church of Beatrice v. City of Beatrice, 39 Neb., 432, was whether the property is used directly, immediately, and exclu-

sively for one of the purposes enumerated in the statute creating the exemptions, in which case it was ruled that lots owned by a religious society, but not used for religious purposes, and entirely separate and distinct from that on which its church edifice is situated, are not exempt from taxation, notwithstanding it was the intention of the society in the future to build a church edifice on said property not so occupied. The doctrine of that case is not only sound, but it is supported by the decisions of the courts of last resort of many of the sister states. It is the exclusive use of the property which determines its exempt character. If it is devoted exclusively to educational purposes, it is not liable to taxation, unless such use is not direct, but remote. If property is used only partially for the purposes of education, exemption from the burdens of taxation cannot be claimed."

This court has also held that if property is partly exempt and partly nonexempt, the value of the nonexempt portion is subject to taxation. Masonic Temple Craft v. Board of Equalization, 129 Neb. 293, 261 N. W. 569, on rehearing, 129 Neb. 827, 263 N. W. 150. The mere fact, therefore, that the 93 acres in Tract VI are being used as a part of the farm operations of the school in which a part of said lands are exempt, does not prevent the taxation of the lands found not to be used for an exempt purpose.

We conclude that Tract VI is not used exclusively for educational purposes, and that its use to round out the farming operations and to provide work for students is too remote to bring it within the purview of the constitutional provision and statute authorizing tax exemption when used exclusively for educational purposes.

The issue resolves itself into a question of fact. The burden of proof is on the party claiming the exemption to show that Tract VI was predominantly used for educational purposes. There is undisputed evidence in the record that it was not needed for academic purposes.

Watson v. Cowles, 61 Neb. 216, 85 N. W. 35. There is evidence that the instructor in agriculture has one class which meets for approximately one hour a day, Monday through Friday. He states that the laboratory work is usually done on Sunday during a two-hour period. He takes his class to any part of the farm that fits in appropriately when the weather is good. There is no evidence other than this general statement as to the academic use made of Tract VI. We do not think the foregoing is sufficient to sustain a finding that the predominate use of Tract VI is for an educational purpose. It could be argued that, although Tract VI was not needed for educational purposes, its use was the same as the other farm lands that were found to be exempt in the previous case. There is no issue here as to Tracts I to V which were held to be exempt in Nebraska Conference Assn. Seventh Day Adventists v. County of Hall, *supra*. We think that use for educational purposes implies that a reasonable need exists for such use. If this is not so, there would be no limit on the amount of land that might be acquired and claimed as exempt for educational purposes when it is actually put to little or no educational use. We think the exemption implies that to be exempt it must be shown that the lands were reasonably needed and predominately used for educational purposes. The evidence in this case will not sustain a finding that Tract VI was predominantly used for educational purposes. The claim of exemption therefore fails for want of sufficient proof. Under such circumstances the tract is not exempt from taxation.

There are 11 residences located on the real estate used in connection with the Platte Valley Academy. Tax exemption was allowed by the district court on all of these residences. The board of equalization and the county assessor assign this as error.

The Platte Valley Academy is operated outside of the corporate limits of any city or town. The students are required to live in the dormitories provided. The school

is coeducational and constant supervision is required. Members of the faculty and other permanent employees are required to live on campus and to assist in maintaining the constant supervision required. The principal designates the residences in which the personnel are to reside. Residing off campus is not permitted except in case of a housing shortage. The academy charges 10 percent of the salary of each occupant as rent, which is credited to the operational fund for maintenance of the homes.

Faculty members and other permanent employees are required to entertain students in their homes, usually on Saturday nights. The cost of such entertainment is jointly shared with the academy. This service is not ordinarily required of each more than four times in a year. Faculty members are required to supervise the cafeteria and play periods on a rotation basis.

There are three residences adjacent to the academy grounds on Tract IV designated as residences Nos. 6, 8, and 10 on Exhibit 2, that are occupied by the principal of the academy, the English instructor, and the minister attached to the school, respectively. No issue is raised as to residence No. 10, the residence of the minister. Residence No. 6 is occupied by the principal and, while he does no teaching, he is responsible for the overall operation of the facility. The evidence shows that he uses the residence in carrying on his administrative work for a period of 7 or 8 hours a week. The residence is used for counseling with students, and he is on call at all times in connection with the affairs of the school. Residence No. 8 is occupied by the English instructor. She uses this residence as her office and spends 10 to 12 hours a week in the home in classroom preparation. She counsels and entertains students in her home as needed or required. We are of the opinion that the requirement that these faculty members live in assigned residences, and the use to which the residences are put in the furtherance of the educational program,

makes their dominant use educational and their occupancy as a dwelling incidental. Nebraska Conf. Assn. Seventh Day Adventists v. County of Hall, *supra;* Doane College v. County of Saline, *supra.* The trial court correctly held residences Nos. 6, 8, and 10 exempt from taxation.

There are three residences separated from the immediate academy grounds designated as residences Nos. 2, 3, and 11. They are occupied by the science and mathematics instructor, the vocal teacher and choir director, and the history and Spanish instructor, respectively.

Residence No. 2 on Tract III is occupied by the science and mathematics instructor and is one of a group of three houses about 6/10 of a mile from the academy. He entertains and counsels periodically as do other faculty members. He has his desk in the dining room of his home but does his class preparation in the classroom. Academic activity in this home is not great due to the distance from the academy building. It is located on Tract III which has been determined to be exempt from taxation. Like the other faculty members, he is required to live in this home and to share in the supervision of the students.

The vocal instructor and choir director occupies residence No. 3 on Tract III. It is located close to residence No. 2. He does no classroom preparation in the home because of the distance from the academy building. He supervises and entertains as do the other resident faculty members.

We are of the opinion that the foregoing two residences are likewise exempt in that their occupants are engaged in an integral part of the educational program of the school. They are required to live in the residences assigned and share in the supervision and entertainment of the students. The land occupied by them is exempt from taxation for educational purposes and we think the

houses are exempt for the same purposes, as is the land on which they are located.

Residence No. 11 is located on Tract VI and became the property of the academy at the same time as the 93 acres in that tract. This residence is a mile from the main academy building. It is occupied by the Spanish and history instructor. It is described by the principal as not functional because of its distance from the school facility. All of the classroom preparation that is done by this instructor is done in the classroom. Counseling is not done in this residence, although some required entertaining is done. It is located on Tract VI, which we have determined to be nonexempt for taxation purposes. It is not an integral part of the academic program. It seems to us that this residence is no more exempt from taxation than a home provided off campus in a town or city. It is located on non-tax-exempt real estate and its predominate use is that of a dwelling and not for educational purposes. We necessarily conclude that it is taxable the same as the 93 acres on which it is located.

Residences Nos. 1, 4, and 5 are located on Tract III, a tract that is tax exempt. They are occupied by the supervisor of the dairy, the assistant farm manager, and the supervisor of farm operations, respectively.

The supervisor of the dairy operations teaches no classes but does infrequent counseling and supervising. He resides in residence No. 1, which is located close to residences Nos. 2 and 3. He keeps the records of the dairy in the dairy office and supervises the care of the livestock and the milking of the 100 dairy cows. Residence No. 4 is occupied by the assistant farm manager who is the instructor in the course in agriculture. He is primarily responsible for upkeep of machinery and supervision of the students operating farm machinery. He is responsible for farm maintenance and water supply. He entertains students periodically as other employees do and takes his turn supervising play periods;

but does not supervise in the cafeteria. He has an office in his home where he keeps his records. Residence No. 5 is also on Tract III near residence No. 4. It is occupied by the supervisor of farming operations. He maintains the farm records in his home. He entertains students as do other employees. He does some counseling with students, although he is not a member of the faculty.

We shall consider the claimed exemption of the foregoing 3 residences in connection with residences Nos. 7 and 9, which are located on Tract IV near the main school building and are occupied by the food supervisor and the head of the maintenance department, respectively. Residence No. 7 is located across the road from the academy cafeteria. The food supervisor operates the cafeteria which serves 3 meals a day, 7 days a week. The residence is used for irregular staff meetings and for entertainment of students once or twice a semester when required. She is required to live in this residence in order that she will be constantly available in her work. She teaches no classes.

Residence No. 9 is occupied by the head of the maintenance department, who is required to reside in this residence. He has charge of the maintenance, repair, and remodeling of all buildings, including the heating system. He is subject to call 24 hours a day in the performance of these duties.

It is the contention of the board of equalization and the county assessor that residences Nos. 1, 4, 5, 7, and 9 do not have a predominate use for educational or religious purposes. It is asserted that these residences are only remotely connected with the educational or religious use of the facility. Residences Nos. 1 to 10 are all located on land that is exempted for educational purposes. They were held to be exempt in Nebraska Conf. Assn. Seventh Day Adventists v. County of Hall, *supra*, and there is no evidence that their use is any different now than it was then. It is an important consideration that the academy is located in a rural area, a mile or

so from the village of Shelton. The fact that the occupants of these residences are not members of the faculty is not a controlling distinction. It seems reasonably necessary to have these employees, who perform the duties recited herein, to be housed in proximity to the school buildings and the places where their duties are performed. The responsibility for farm operations, the care of the livestock, the operation of the dairy, the maintenance and safety of buildings and their occupants, and the operation of the cafeteria and dormitories is of primary importance in carrying out the academic program for the students of this school. The requirement that they reside on the premises appears to be reasonable in view of the location of the school and the constant need for continuing operations, care, and upkeep. We think the use of these residences is predominantly for educational purposes and their use as dwellings is only incidental to the purposes for which they are used. We conclude that the use of these residences is reasonably necessary to the maintenance of the academic program and an integral part of the overall purpose of the facility. They are therefore exempt from taxation.

For the reasons stated, the 93 acres of land in Tract VI and residence No. 11 located thereon are subject to taxation. Residences Nos. 1 to 10, inclusive, are exempt from taxation for the reasons stated. The judgment of the district court is affirmed in part, and in part reversed and the cause remanded with directions to enter a judgment in accordance with this opinion.

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

GERTRUDE V. BOHY, APPELLANT, V. PFISTER HYBRID COMPANY, APPELLEE.

138 N. W. 2d 23

Filed November 19, 1965. No. 36007.

1. **Workmen's Compensation.** In order to recover under the Workmen's Compensation Act, the plaintiff must prove that the death or disability of the workman was the result of an accident arising out of and in the course of the employment.
2. ———. The contract under which service is performed and the performance thereunder determine the relationship between the contracting parties.
3. ———. The issue as to whether or not a workman is an employee, as distinguished from an independent contractor, is to be determined from all the facts in the case. There is no single test by which that determination can be made.
4. ———. An independent contractor is one who renders the service in the course of an independent occupation representing the will of his employer only as to the result of the work and not as to the means by which it is accomplished.

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

Wright, Simmons & Hancock, for appellant.

Holtorf, Hansen, Fitzke & Kortum and Sidner, Gunderson, Svoboda & Schilke, for appellee.

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

BOSLAUGH, J.

This is a proceeding under the Workmen's Compensation Act. Gertrude V. Bohy, the plaintiff, is the widow of Henry C. Bohy. The petition alleged that Bohy had been employed by Pfister Hybrid Company, the defendant, and while in the course of his employment was killed in a grade crossing accident on February 14, 1963.

The answer denied the allegations of the petition generally; and alleged that Henry C. Bohy was an independent contractor and that no accident occurred which made the Workmen's Compensation Law applicable.

The compensation court, after the hearing before a single judge of that court, found that Bohy was an independent contractor and dismissed the action. Both parties filed applications for rehearing before the full compensation court. The compensation court sitting en banc, with one judge dissenting, found that Bohy was an independent contractor and dismissed the action.

The plaintiff appealed to the district court which found generally for the defendant, that the judgment of the compensation court should be affirmed, and dismissed the action. The plaintiff's motion for new trial was overruled and she has appealed to this court.

The record shows that the defendant is engaged in the business of producing and marketing hybrid seed corn. In 1955, Bohy submitted an application to the defendant to obtain a contract authorizing him to sell the defendant's product in the Scottsbluff, Nebraska, area. On March 10, 1955, Bohy and the defendant executed a written contract entitled "Dealer's Agreement." On August 1, 1961, a new agreement, substantially the same as the March 10, 1955, agreement, was executed. The August 1, 1961, agreement was in force at the time of Bohy's death on February 14, 1963.

The contract between Bohy and the defendant provided that Bohy, as a dealer, agreed to undertake the sale of Pfister Hybrid Seed Corn in the Scotts Bluff County area and that Bohy would not handle any other hybrid seed corn while the contract was in force. The defendant agreed to deliver seed corn to Bohy on consignment to fill the orders taken by him, and allow him a discount from the established retail price at a special rate which varied according to the quantity sold. The contract further provided that prices and terms of sale would be prescribed by the defendant; that Bohy was responsible for delivery of seed corn to purchasers and collection of the purchase price; that the title to seed corn delivered to Bohy remained in the defendant; that claims for shortages or damage must be made immedi-

ately; that seed corn remaining unsold could be returned to the defendant; that proceeds from the sale of seed corn were the property of the defendant and were to be transmitted to the defendant in the same form as received; that orders and downpayments were to be sent to the defendant weekly; that a report of completed deliveries and the net amount due would be sent to the defendant weekly; that details of work, hours of work, and personnel of dealer's assistants were entirely within the discretion of Bohy but that Bohy agreed to consult with representatives of the defendant and bring matters affecting the business to the attention of the defendant; that crop failure and other conditions beyond the control of the defendant relieved it from its obligations under the contract; and that the agreement could be terminated by either party at any time by written notice. The agreement further provided: "NEITHER said dealer nor any of his agents or employees shall in any manner be deemed or held to be employees of the Pfister Hybrid Company, nor shall said dealer or any agent or employee of his be entitled to any benefits payable to employees of the Pfister Hybrid Company, such as, but not limited to, workmen's compensation, pension, unemployment insurance and social security laws of the United States or the several States thereof."

The record further shows that Bohy sold seed corn other than that supplied by the defendant and did not transmit proceeds from the sale of seed corn to the defendant weekly or in the same form as received. To that extent, the performance by the parties deviated from the strict terms of the written contract.

The record indicates that Bohy supplied his own transportation and advertising materials. Joe Foster, a fieldman for the defendant, would sometimes ride with Bohy to call on customers. Funds remitted to Bohy by the defendant were designated on the defendant's record as discount, discount earned, or commission.

The contract under which service is performed and

the performance thereunder determine the relationship between the contracting parties. In re Estate of Bingaman, 155 Neb. 24, 50 N. W. 2d 523.

The issue as to whether or not a workman is an employee, as distinguished from an independent contractor, is to be determined from all the facts in the case. There is no single test by which that determination can be made. An independent contractor is generally distinguished as being a workman who is independent in his employment; one who contracts to do a particular piece of work according to his own method, and is not subject to the control of his employer, except as to the results of his work. He is not in such a case a servant of his employer; nor can he be controlled by the employer in the manner of doing the work, except to the extent that the employer has the right to give such directions as may be found necessary to insure compliance with the contract. Petrow & Giannou v. Shewan, 108 Neb. 466, 187 N. W. 940.

An independent contractor is one who renders the service in the course of an independent occupation representing the will of his employer only as to the result of the work and not as to the means by which it is accomplished. Wilds v. Morehouse, 152 Neb. 749, 42 N. W. 2d 649.

In Johnston v. Smith, 123 Neb. 716, 243 N. W. 894, the plaintiff who sold newspaper advertising for the defendant upon a commission basis was held to be an independent contractor. This court said: "The plaintiff having undertaken to obtain contracts for advertising for no other remuneration than a percentage of the gross amount of the contracts, to pay all of his own traveling expenses, to choose his hours of labor, and to select the prospective customers upon whom he should call in his territory, without apparent right of the defendant to control his work, was not an employee within the meaning of the workmen's compensation act at the time of his injury, even though he was assigned a territory in

which to work and given a list of prospective customers and supplies with which to write the contracts. Christensen v. Protector Sales Co., 105 Neb. 389; Petrow & Giannou v. Shewan, 108 Neb. 466; Priest v. Business Men's Protective Ass'n, 117 Neb. 198."

We think that the facts and circumstances in this case show that Bohy was an independent contractor and not an employee of the defendant.

The plaintiff argues that the written contract between the parties, the "Dealer's Agreement," was a scheme, artifice, or device used by the defendant to avoid liability under the Workmen's Compensation Act and that the defendant should be held liable under section 48-116, R. R. S. 1943. Except as provided in section 48-112, R. R. S. 1943, an employer cannot escape liability under the Workmen's Compensation Act by the use of a written contract of employment in which an employee, who would otherwise be covered by the act, is recited to be something other than an employee. In this case all of the facts and circumstances, including the contract under which the service was performed and the performance thereunder, establish that the relationship between Bohy and the defendant was that of independent contractor.

The plaintiff further argues that the "Dealer's Agreement" between Bohy and the defendant was an illegal contract unless it was a contract of employment. The plaintiff asserts that a contract by which the defendant controls the price for resale of its product violates the provisions of Chapter 59, R. R. S. 1943, and the federal laws which pertain to such agreements. One difficulty with this argument is that it assumes that the defendant's products were sold to Bohy so that they became his property and were then resold by Bohy to his customers. The "Dealer's Agreement" clearly provided that title to the defendant's products delivered to Bohy remained vested in the defendant and provided for the return to the defendant of products remaining unsold.

There is another phase of the case that should be

mentioned. Before the plaintiff could recover compensation in this case, she was required to prove that Bohy was killed as a result of an accident arising out of and in the course of his employment by the defendant. The only evidence concerning what Bohy may have been doing at the time of the accident is the plaintiff's testimony that the last time she saw her husband before his death was "That morning when he left to go to work." The accident occurred at about 11:30 a. m., south of Morrill, Nebraska. The evidence in this case was not sufficient to show affirmatively that Bohy, if an employee, was on his employer's business at the time of the accident. See Oline v. Nebraska Nat. Gas Co., 177 Neb. 851, 131 N. W. 2d 410.

The conclusion which we have reached is the same as that reached by the compensation court and the district court. The judgment of the district court is, therefore, affirmed.

AFFIRMED.

ROBERT JOHNSON, DOING BUSINESS AS NANCE COUNTY IMPLEMENT CO., APPELLANT, V. DOYLE FRANCIS, APPELLEE.
138 N. W. 2d 27

Filed November 19, 1965. No. 36026.

1. **Trial.** On a motion to dismiss, made at the close of plaintiff's case, every fact which is alleged and which the evidence tends to support will be considered as proved.
2. **Landlord and Tenant: Sales.** A tenant on a farm who purchases fertilizer for use on his leased farmland is the original promisor or debtor, and is primarily liable to the seller as such.
3. ———: ———. An agreement between a landlord and tenant contained in a written lease by which each is to pay for one-half the cost of applying fertilizer to the leased cropland gives a third party no cause of action against the landlord for one-half the value of applying fertilizer sold to the tenant.
4. **Sales: Estoppel.** A single previous transaction, standing alone, is ordinarily insufficient to establish a course of conduct that will sustain liability by estoppel or agency by apparent authority.

Appeal from the district court for Howard County: WILLIAM F. MANASIL, Judge. Reversed and remanded.

Philip T. Morgan, for appellant.

Cyril P. Shaughnessy, for appellee.

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

CARTER, J.

This is an action to recover $346.52, the amount remaining due for material and labor furnished the defendant. At the close of plaintiff's evidence the trial court dismissed the action and plaintiff has appealed.

The evidence shows that plaintiff was engaged in the business of selling and applying fertilizer in Fullerton, Nebraska. The defendant was a tenant on a farm owned by one Ralph Peters. In the spring or summer of 1962 the defendant called on plaintiff and ordered fertilizer applied to a certain number of acres of land he was farming. It is not disputed that fertilizer was furnished and applied, and that the reasonable cost thereof was $693.14, of which the defendant paid $346.57. The prayer of the petition was for $346.52, together with interest, attorney's fees, and costs.

The evidence shows that the materials and labor were purchased by defendant. Plaintiff testified that he assumed defendant would pay as any one else would, but that defendant assured him it would be paid. Plaintiff stated that defendant said Peters would pay half, whether to him or to defendant he did not know. Plaintiff sold and applied the fertilizer on the basis of defendant's statement that it would be paid for.

The evidence further shows that defendant requested plaintiff to bring action against Peters for one-half of the cost on the assurance that defendant would pay the balance of the bill if he would be unsuccessful in the action. It appears that plaintiff brought an unsuccessful action against Peters.

The evidence shows that defendant ordered the application of the fertilizer on defendant's leased cropland. The evidence also shows that defendant agreed to pay for it, an agreement that would be implied in the absence of a specific contract. The plaintiff made a prima facie case. The agreement between Peters and defendant is not material under the facts shown by the record.

On a motion to dismiss at the close of plaintiff's evidence, every fact which the evidence tends to support will be considered as proved. Canaday v. Krueger, 156 Neb. 287, 56 N. W. 2d 123; Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496.

The agreement of a landlord contained in a written lease to pay one-half of the purchase price of the fertilizer gives a third party no cause of action against the landlord for half of the fertilizer sold to a tenant. This subject was dealt with in Schultz v. Williams, 207 Wis. 122, 240 N. W. 844, as follows: "The liability of the defendant created by his agreement to furnish one-half of the feed and seed was one personal to the parties thereto. While the agreement would permit Fred Schultz to recover from the defendant any balance due him resulting from his purchase of feed or seed under the agreement, it cannot, by virtue of its terms alone, be held to give to the plaintiff a cause of action against the defendant. * * * In order to establish liability of an owner for goods purchased by a cropper, authority to purchase goods on the credit or account of the owner would have to be shown at least by circumstances which would give rise to an original promise by the owner to pay."

The evidence makes a prima facie case that defendant purchased and agreed to pay for the fertilizer and its application to defendant's leased lands. The defendant as the purchaser is the original promisor or debtor, and he may not avoid liability by asserting some agreement with another, of which the seller had no knowledge and

which would have been of no benefit to him even if he had known about it.

There is evidence in the record that Peters and defendant each paid plaintiff one-half of the cost of the fertilizer for the previous year. It is asserted that this is a course of conduct that would impose liability on the landlord to the plaintiff by agency or estoppel. We do not think that a single previous transaction of this nature, standing alone, is sufficient to establish a course of conduct that would sustain liability either by estoppel or agency by apparent authority.

The trial court erred in sustaining defendant's motion to dismiss at the close of plaintiff's evidence. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

HARLEY B. GRAFF, ADMINISTRATOR OF THE ESTATE OF MARGARET E. GRAFF, DECEASED, ET AL., APPELLANTS, V. MARGARET E. GRAFF, SPECIAL ADMINISTRATRIX OF THE ESTATE OF ROBERT V. GRAFF, DECEASED, ET AL., APPELLEES.

138 N. W. 2d 644

Filed November 26, 1965. No. 35968.

1. **Equity: Trial.** If a defendant in an action in equity moves at the close of the evidence of the plaintiff for a dismissal of the action for want of proof to support a judgment, he admits the truth of the evidence and any reasonable conclusions deducible from it.
2. **Acknowledgments.** A person, by appearing before an officer and making a formal acknowledgment of an instrument, thereby adopts as his signature his name written to the instrument by someone else.
3. **Courts: Executors and Administrators.** The district court has exclusive jurisdiction to adjudicate controversies between the executor and persons claiming adversely to the estate.
4. **Estates: Limitations of Actions.** The statute of limitations does not begin to run against a remainderman until knowledge is

clearly brought home to him that another is claiming title adversely.

5. **Executors and Administrators: Estates.** Where one nominated as executor in a will under which he receives a life estate in property with the remainder over to others, reports to the county court that there is no property on which the will can operate whereupon further probate is dispensed with, the statute of limitations does not commence to run against an action brought by a remainderman to recover such property from the life tenant who has placed it in his own name until knowledge is clearly brought home to the remainderman that there is such property.
6. **Appearances.** Where a defendant files a cross-petition asking for affirmative relief, it constitutes a general appearance and gives the court jurisdiction of the cross-petitioner.

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

Lyle B. Gill, for appellants.

Richards, Yost & Schafersman, Sidner, Lee, Gunderson & Svoboda, and T. L. Grady, for appellees.

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

BROWER, J.

Robert V. Graff, mentioned herein, was married twice. His first wife's name was Margaret E. Graff. After her death in 1958 he married Margaret E. Coffee who became Margaret E. Graff also. As Margaret E. Graff she appeared and answered as special administratrix and thereafter executrix of the estate of Robert V. Graff. We will refer to her herein, however, as Margaret Coffee Graff to distinguish her from the first Margaret E. Graff.

The plaintiffs and appellants, Harley B. Graff, Administrator of the Estate of Margaret E. Graff, deceased, Harley B. Graff, and Vida Marie James, brought this action in the district court for Stanton County against Margaret Coffee Graff, Special Administratrix of the Estate of Robert V. Graff, deceased, Margaret Coffee

Graff, John C. Thor, and Joan Thor, defendants. Plaintiffs' petition sought to establish and enforce a trust on a certain note and mortgage given by the defendants John C. Thor and Joan Thor, husband and wife, on certain lands in Stanton County, Nebraska, as well as on certain payments thereon alleged to have been fraudulently converted by Robert V. Graff from the estate of his first wife, Margaret E. Graff, and for an accounting of such property. The petition alleged that Margaret E. Graff had been the owner of the mortgaged premises, that she and Robert V. Graff, her husband, had conveyed the premises to the Thors, and that certain payments set out and the mortgage mentioned represented the purchase price therefor. The petition was subsequently amended to state that the signatures of Margaret E. Graff on the deeds to the Thors were a forgery.

Margaret Coffee Graff as special administratrix filed a special appearance objecting to the jurisdiction of the court over her person for the stated reason that she was a resident of another county than that in which the action was brought and that the joinder of her as administratrix with the resident defendants was colorable only. The special appearance was overruled but the special administratrix and Margaret Coffee Graff as executrix thereafter attempted to preserve it in subsequent pleadings by so stating therein.

Answers were filed by the special administratrix and the executrix with quite similar allegations. The answer of the executrix alleged the plaintiffs had failed to file any claim in the estate of Robert V. Graff, that notice to creditors had been given, and the time to file claims had expired. It alleged the claims of the plaintiffs were barred by the statute of non claims and of limitations, and by the laches of the plaintiffs. It alleged the real estate mortgage mentioned and the payments set out were given in settlement of the purchase price of a farm sold to the defendants Thor; that the farm was owned by Robert V. Graff and title thereto was

temporarily placed in the name of Margaret E. Graff as part of a proposed estate planning arrangement which was never carried out, and title was kept in her name as a matter of convenience; and that she assented to its sale, joined in the deed, released her interest in the premises to the Thors, and transferred any deferred payments owed by them to Robert V. Graff. It stated the proceeds of the sale were placed in a joint bank account of the spouses and used in payment of the expenses of the family, including medical care of Margaret E. Graff, except certain portions loaned to the plaintiff Harley B. Graff. The cross-petition of the executrix alleged Robert V. Graff had loaned $15,000 to the plaintiff Harley B. Graff who had promised to repay the same and that $7,250 was owing thereon. The prayer of the answer was that the petition be dismissed. The cross-petition sought to recover judgment against the plaintiff Harley B. Graff for the balance of his loan.

Margaret Coffee Graff separately filed in turn a special appearance, demurrer, and answer similar to those made by her as personal representative of the Robert V. Graff estate. Plaintiffs filed a reply to the answers denying all new allegations of fact.

A trial was had in district court. Evidence was submitted by the plaintiffs who rested. No evidence was offered by the defendants. Thereupon separate motions were made by Margaret Coffee Graff, individually and as executrix, to dismiss the plaintiffs' petition which were sustained by the court. The trial court found the signatures of Margaret E. Graff on the deeds were not forgeries. With consent of the plaintiffs, title to the real estate involved was quieted in the defendants Thor subject to the balance due on the Robert V. Graff mortgage, and thereafter the court dismissed the Thors from the proceedings also. It continued the action on the cross-petition of the executrix against Harley B. Graff.

The evidence shows Robert V. Graff and Margaret E. Graff, his first wife, were married for 51 years prior

to the wife's death in 1958. On November 21, 1952, Robert V. Graff deeded to Margaret E. Graff the 400 acres of land involved in the sale hereafter mentioned. The deed recited it was given for $1 and other good and valuable consideration. Margaret E. Graff suffered a heart attack on December 5, 1957, and a stroke sometime after the middle of that month. On February 19, 1958, Margaret E. Graff and Robert V. Graff purportedly signed an acceptance of a written offer contained in a uniform purchase agreement executed by John C. Thor to purchase 400 acres of land in Stanton County. The recited consideration was $60,000. It is alleged in the plaintiffs' petition that the premises were then subject to a mortgage of $12,600 which was admitted in the answer of the defendants Thor. The Graffs agreed to carry back $22,000 on the southwest quarter of Section 9, Township 23, Range 2 East, a part of the 400 acres. On March 31, 1958, Robert V. Graff entered into a second uniform purchase agreement with respect to the premises last described with John C. Thor and his wife, Joan Thor. The second agreement was entered into because the tenant of the particular land described thereon had refused to vacate. It was not executed by Margaret E. Graff. Floyd James, the husband of the plaintiff Vida Marie James, was present when the second contract was executed. He took no part in the negotiation but knew what was going on. It provided for the payment of $27,000, with $1 down and the balance at the option of the buyers before February 28, 1960, Robert V. Graff agreeing therein to carry back $22,000 at 5 percent interest, $2,000 payable 2 years and $20,000 payable 5 years after closing.

On February 21, 1958, two deeds were executed purportedly by Margaret E. Graff and Robert V. Graff, husband and wife, covering in the aggregate the 400 acres described in the first uniform purchase contract. John C. Thor was the grantee in one and Joan Thor in the other. These deeds were regularly acknowledged

by the grantors as husband and wife. Both deeds were recorded February 26, 1958.

Margaret E. Graff died November 14, 1958. She left a will. As far as it is of significance here, it devised and bequeathed a life use of all her property, real or personal, to Robert V. Graff and provided that upon his death the remainder should be divided equally between her children, Harley B. Graff and Vida Marie James. It nominated Robert V. Graff as executor. Robert V. Graff made a report to the county court of Dodge County, Nebraska, of jointly owned property of Margaret E. Graff which was sworn to December 13, 1958. It listed a residence in Fremont, Nebraska, and certain oil and mining stock. It alleged that the decedent had no property in her own name. On January 15, 1959, the county court entered an order finding that lawful notice had been given and the will was admitted to probate. It further found there was no known property belonging to the deceased upon which the will could operate. It adjudged that further administration be dispensed with and no executor be appointed.

On March 3, 1959, after the death of Margaret E. Graff, the Thors executed a promissory note and mortgage on the land described in the second purchase agreement for $20,000 to Robert V. Graff. After entering into the first purchase agreement John C. Thor testified he paid Robert V. Graff by check $10,000, being the downpayment therein mentioned. Thereafter he paid Robert V. Graff on said contracts or the mortgage given thereon by checks payable to R. V. Graff. They were later endorsed by Graff or his attorneys for deposit. The dates and amounts of the respective checks were as follows: $10,400 on March 26, 1958; $5,000 on March 3, 1959; $2,000 on March 25, 1960; $1,100 on March 25, 1960; $2,000 on March 1, 1961; $1,950 on March 2, 1962; and thereafter he paid $1,900 by check to the R. V. Graff estate which was endorsed by Margaret Coffee Graff, administratrix. Some of the checks were partially or

wholly interest on the deferred amount owing at the time. Thor testified there was $16,000 plus interest still owing on the mortgage.

On January 1, 1960, Robert V. Graff married Margaret Coffee Graff. He died on February 18, 1963. Letters as administrator de bonis non with the will annexed on the estate of Margaret E. Graff, deceased, were issued to Harley B. Graff from the county court of Dodge County on December 26, 1963.

John C. Thor testified that he was engaged in the real estate, insurance, and farming business. When Robert V. Graff first conferred with him, he came with the purpose of either listing or selling the farm and at that time Mr. Graff told him, "* * * his wife had had a heart attack, and he was afraid she wouldn't live very long, and he wanted to sell the farm and get the money into a joint account, so he wouldn't have to go through an estate with it." He testified he saw Robert V. Graff sign the first purchase agreement but Margaret E. Graff did not sign it in his presence. In regard to the delivery of the deeds, he testified: "Q (By Mr. Gill) When were these deeds delivered to you, Exhibits 8 and 9? A Shortly after we made the purchase agreement. I was surprised Mr. Graff mailed me the deeds. Q The purchase agreement was made February 19. How soon thereafter, how many days or weeks? A Couple of days, I think. Q At that time had you paid the purchase price for this farm? A No. We had only paid $10,000.00."

Plaintiff Vida Marie James testified she was the daughter of Robert V. Graff and Margaret E. Graff. She had learned her mother had a will the night after she died but never saw it, never received a copy of it, and was not informed of its contents until shortly before bringing the action. The plaintiff Harley B. Graff testified he knew his mother left a will but did not see it until it was shown to him by his lawyer on December 13, 1963. He had received a copy of the notice to probate the will by mail.

Winsor C. Moore, an examiner of questioned documents, testified concerning the results of a study made by him in which he compared the signature of Margaret E. Graff on the first uniform purchase contract and the two deeds to the Thors with her signature on other documents identified in evidence as genuine and with her name on an income tax return signed by Robert V. Graff as her attorney-in-fact. He gave it as his opinion that the signatures on all three documents studied were not those of Margaret E. Graff, and further that it was his opinion that her name appearing on each was in fact written by her husband, Robert V. Graff.

The plaintiffs' assignments of error are quite general. They contend that the trial court erred in sustaining the motions to dismiss the action as to the several defendants and that its judgment was contrary to the law and the evidence. They argue that the plaintiffs' evidence made a prima facie case. Several matters will be discussed which are raised by the briefs and appear to relate to these contentions. Unless otherwise specified, our discussion will be limited to the errors assigned as they affect the executrix of the estate of Robert V. Graff.

In Armbruster v. Stanton-Pilger Drainage Dist., 165 Neb. 459, 86 N. W. 2d 56, this court held: "If a defendant in an action in equity moves at the close of the evidence of the plaintiff for a dismissal of the action for want of proof to support a judgment, he admits the truth of the evidence and any reasonable conclusion deducible from it."

The trial court found that the deeds from Margaret E. and Robert V. Graff to the Thors were not forgeries. Plaintiffs maintain the unrefuted testimony of the expert witness on questionable documents, that in his opinion the signatures of Margaret E. Graff on the deeds were not her signature and in fact were written by her husband, was sufficient to raise an inference that her signatures thereon were forged. The deeds appear to be regularly acknowledged. No attempt was made to

impeach the certificate of the notary. In an Annotation in 57 A. L. R. 525, the general rule is stated: "* * * that a person, by appearing before an officer and making a formal acknowledgment of an instrument, thereby adopts as his signature his name written to the instrument by someone else, * * *." Many cases are there cited as authority for the statement. We are not referred to a decision of this court on precisely this question, but this court has held: "Where a person's name is signed to an instrument for him, at his direction and in his presence, by another, the signature becomes his own." In re Estate of Winslow, 115 Neb. 553, 213 N. W. 819. In Fisher v. Standard Investment Co., 145 Neb. 80, 15 N. W. 2d 355, this court said: "When the party executing a deed or mortgage knows that he is before an officer having authority to take acknowledgments, and intends to do whatever is necessary to make the instrument effective, the acknowledging officer's official certificate will be, in the absence of fraud, conclusive in favor of those who in good faith rely on it." The rules set out in the cases cited from this court underlie that stated in the annotation which is adopted and applied by us now. The evidence offered is not sufficient to raise an inference that Margaret E. Graff did not properly execute the deeds.

The plaintiffs contend the trial court erred in sustaining the motion to dismiss the action as to the defendant Margaret Coffee Graff as executrix. The motion of defendants was based on several grounds. Defendants first asserted that any claim of the plaintiffs was one against the estate of Robert V. Graff and had to be filed against his estate. In the case before us the plaintiffs made claim to the property as beneficiaries of the estate of Margaret E. Graff. They sought to impress a trust on property in the hands of the personal representative of the Robert V. Graff estate belonging to the estate of Margaret E. Graff. Their claim was adverse and hostile to the estate of Robert V. Graff. The dis-

trict court has exclusive jurisdiction to adjudicate controversies between the executor and persons claiming adversely to the estate. See, Lutcavish v. Eaton, 166 Neb. 268, 89 N. W. 2d 44; Brown v. Applegate, 166 Neb. 432, 89 N. W. 2d 233; Father Flanagan's Boys' Home v. Graybill, 178 Neb. 79, 132 N. W. 2d 304.

Another ground of the defendants' motion to dismiss was that plaintiffs' cause of action was barred by the 4-year statute of limitations set forth in section 25-207, R. R. S. 1943. Plaintiffs contend the trial court was in error if this was its reason for sustaining the motion. The defendants maintain the plaintiffs who were beneficiaries under the will of Margaret E. Graff could have maintained an action against Robert V. Graff for the property in his lifetime and his death would not toll the running of the statute, citing Carden v. McGuirk, 111 Neb. 350, 196 N. W. 698, and McNeill v. Schumaker, 94 Neb. 544, 143 N. W. 805. In the case before us, however, the property in question was given by the will to Robert V. Graff for life. In Criswell v. Criswell, 101 Neb. 349, 163 N. W. 302, L. R. A. 1917E 1103, this court reviewed its early cases with respect to the statute of limitations as it applied to the rights of remaindermen in actions against a life tenant with respect to real estate. It held that the statute of limitations commenced running against a remainderman from the time he knew or might have known that the possessor claimed the entire estate in his own right, or from the time when in the exercise of reasonable care for his own rights, he should have known that the land was so held by the one in possession. In Mohr v. Harder, 103 Neb. 545, 172 N. W. 753, this court in its syllabus stated: "The statute of limitations does not begin to run against a remainderman until knowledge is clearly brought home to him that another is claiming title adversely."

In the case before us the defendants claim that the plaintiffs' receipt of a copy of the notice to probate the will or knowledge that there was a will was sufficient

to charge them with knowledge of their rights in their mother's estate. If they had inquired and procured a copy of the will it would only have shown that their father had a life estate in all of their mother's property. If they had examined the proceedings in county court in her estate further they would have been confronted with an apparent showing that their mother left no property upon which the will operated. Even had the real estate records at the courthouse been examined it would have disclosed no property standing in their mother's name at her death. This would be true both as to the real estate or the mortgage thereon. The relation of a life tenant to his remaindermen is that of a quasi-trustee. See, Attebery v. Prentice, 158 Neb. 795, 65 N. W. 2d 138; Trute v. Skeede, 162 Neb. 266, 75 N. W. 2d 672. In the present case we hold that where one nominated as executor in a will under which he receives a life estate in property with the remainder over to others, reports to the county court that there is no property on which the will can operate whereupon further probate is dispensed with, the statute of limitations does not commence to run against an action brought by the remaindermen to recover such property from the life tenant who has placed it in his own name until knowledge is clearly brought home to the remaindermen that there is such property. Under the evidence adduced the action was not barred by failure to proceed against Robert V. Graff in his lifetime. Neither from the record is laches indicated.

Inasmuch as our decision determines that a new trial is necessary, it should be said that as to the payments received in the lifetime of Margaret E. Graff, she would have had an action against Robert V. Graff to recover them if she did not give them to him. See Trayer v. Setzer, 72 Neb. 845, 101 N. W. 989. Her death would not toll the running of the statute of limitations. See, Carden v. McQuirk, *supra;* McNeill v. Schumaker, *supra.* This applies to the $10,000 downpayment made February

19, 1958, and the $10,400 payment made March 26, 1958.

The defendant Margaret Coffee Graff, executrix, contends that in any event the errors urged by the plaintiffs should not be considered because her special appearance, objecting to the trial court's jurisdiction over her person which she attempted to preserve in her pleading, should have been sustained. It is not necessary to discuss the grounds urged by the executrix as a basis for her claim. It is only necessary to state that the answer and cross-petition filed by her prayed for affirmative relief. Where a defendant files a cross-petition asking for affirmative relief, it constitutes a general appearance and gives the court jurisdiction of the cross-petitioner. See O'Hara v. Frederickson Building Corp., 166 Neb. 206, 88 N. W. 2d 643.

The defendants urge that Robert V. Graff made a gift of the land by his deed and in such a case it did not become the property of his wife, Margaret E. Graff. They cite section 42-201, R. R. S. 1943, which in part reads as follows: "The property, real and personal, which any woman in the state may own at the time of her marriage, rents, issues, profits or proceeds thereof and real, personal or mixed property which shall come to her by descent, devise *or the gift of any person except her husband* or which she shall acquire by purchase or otherwise shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to disposal by her husband or liable for his debts; * * *." (Italics supplied.) Although this section has been amended the portion quoted reads the same as it did when it was construed by this court long ago with respect to a similar contention. In Dayton Spice-Mills Co. v. Sloan, 49 Neb. 622, 68 N. W. 1040, this court, in a decision interpreting it, said: "The married woman's act being for the purpose of extending, and not contracting or limiting, the rights of married women in this state, will not be held to have abrogated the equitable rule which upheld gifts from husbands to wives made

when the husband was solvent, and which did not impair the existing rights of creditors." See, also, First Nat. Bank of Wahoo v. Havlik, 51 Neb. 668, 71 N. W. 291. In 41 C. J. S., Husband and Wife, § 148(e), p. 620, the text, in considering gifts from a husband to the wife, states that a gift sustainable in equity or valid under statutory provisions is good between the parties, their heirs, representatives, or next of kin. The deed from Robert V. Graff to Margaret E. Graff conveyed title and she became the owner of the land if it was a gift. Neither it is necessary here to discuss its provisions which recite it was given for $1 and other good and valuable consideration.

A careful review of the evidence discloses that the title to the land conveyed to the Thors was in Margaret E. Graff. Payments on the purchase price were received by Robert V. Graff after the death of the owner. The mortgage given for the balance carried back was taken in the name of Robert V. Graff after the owner's death also. There is evidence from which a reasonable inference arises that Robert desired to have the land sold and the proceeds placed in a joint account in the name of him and his wife before her death, and that he hurried the delivery of the deeds for that purpose. This plainly indicates he considered it his wife's property. It is inferable that he attempted to procure the avails from the land by such means to avoid probating of his wife's estate and the application of her will with respect to the proceeds. This inference is strengthened from his report to the county court that there was no property belonging to the estate upon which the will operated. We think there was evidence that presents a prima facie cause of action against the executrix of his estate. The trial court erred in dismissing the plaintiffs' petition as to the executrix on her motion at the close of the plaintiffs' case.

The plaintiffs contend the court erred in dismissing the petition as to the defendant Margaret Coffee Graff,

individually. We have reviewed the evidence and find no instance where this defendant individually received any of the proceeds either from the sale or belonging to the estate of Margaret E. Graff. Plaintiffs' counsel stated they would not resist the motion in this respect in the trial court. We do not think they should be permitted to assert such resistance on appeal after declining to do so at the trial. There was no error in the dismissing of the case as to this defendant.

The plaintiffs claim the trial court erred in dismissing the defendants Thor from the action. The court quieted title to the premises in them subject to the mortgage and plaintiffs' counsel stated in open court they had no objection thereto. A temporary restraining order, which plaintiffs had obtained to prevent the Thors from making payments upon the mortgage to the executrix, had been dissolved by an agreement which provided the executrix receive, receipt for, and place the proceeds in a separate account pending the litigation. Under the circumstances the Thors no longer appear to be necessary parties to the litigation. There was no error in the court's ruling.

The judgment of the trial court is reversed insofar as it dismissed the plaintiffs' petition as against Margaret Coffee Graff as executrix of the Estate of Robert V. Graff and the cause remanded with direction to grant a new trial on the issues between the plaintiffs and such executrix. It is affirmed with respect to the dismissal of the action as to the defendants Thor and Margaret Coffee Graff, individually.

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

ALBERT J. ROGERS, APPELLEE, V. WESTERN ELECTRIC COMPANY, INC., APPELLANT, IMPLEADED WITH COMMERCIAL CONTRACTING CORP., APPELLEE.
138 N. W. 2d 423

Filed November 26, 1965. No. 35990.

1. **Pleading: Set-Off and Counterclaim.** A defendant in an action is not restricted to the counterclaim provided for in sections 25-812 and 25-813, R. R. S. 1943, but, in a proper case, may seek affirmative relief either against the plaintiff or against co-defendants by cross-petition.
2. ———: ———. The basis of the right to bring a cross-suit is to be found in sections 25-2218 and 25-1302, R. R. S. 1943, and in the consideration that in cases where the code is silent, remedies furnished by the old common law or equity practice, not inconsistent with its provisions, may be resorted to in order to prevent failure of justice.
3. **Pleading: Equity.** A cross-petition is maintainable either to aid in the defense of the original suit, where affirmative equitable relief is required to make such defense effective, or to obtain a complete adjudication of the controversies between the original complainant and the cross-complainant over the subject matter of the original suit.
4. ———: ———. The rules of chancery practice are so far enlarged under the code that although a cross-petition is more than merely defensive and seeks affirmative relief beyond the purposes of defense, such relief need not be equitable nor need the cross-petition be based on equitable grounds.
5. **Pleading: Actions.** A cross-petition or cross-claim is not limited to an equitable action under our procedure. It is the substance of the action rather than the form of it which will determine the availability of the relief. The criterion to be applied is that the issues raised by the cross-bill must be so closely connected with the cause of the action in the original suit that a cross-claim is a mere auxiliary or dependency upon the original action.
6. **Actions: Set-Off and Counterclaim.** New and distinct matter not maintainable under the provisions of the code as a counterclaim and not involved in a proper determination of the subject matter of the original suit must be litigated in a separate action.
7. **Pleading: Actions.** The matters set up in the cross-petition must be germane to the original suit under the code quite as much as under the chancery practice.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Pilcher, Howard & Hickman, for appellant.

Cassem, Tierney, Adams & Henatsch and Stoehr, Rickerson & Caporale, for appellee Commercial Contracting Corp.

Eugene D. O'Sullivan, Jr., for appellee Rogers.

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

SPENCER, J.

This is an action for damages for alleged personal injuries sustained by Albert J. Rogers, hereinafter referred to as plaintiff, when he fell from a scaffold device furnished by his employer, the defendant Commercial Contracting Corporation, hereinafter called Commercial, while painting at the defendant Western Electric Company's Millard plant. Defendant Western Electric Company, Inc., will be hereinafter designated as Western.

The negligence alleged against Western is that one of its employees drove a scooter truck against the scaffold, throwing the plaintiff against a guardrail which broke, causing him to fall approximately 25 feet. Commercial is made a party defendant by virtue of section 48-118, R. R. S. 1943, which requires the joinder of an employer for purposes of subrogation and reimbursement of compensation paid. Commercial filed an answer admitting the payment of compensation under the provisions of the Nebraska Workmen's Compensation Act, and alleging that it is entitled to be subrogated to plaintiff's right of recovery to the extent of payments made or to be made. Commercial prayed for judgment against Western to the extent that it be fully protected in its subrogation rights under the Nebraska Workmen's Compensation Act.

Western filed a pleading, denominated: "Answer, Counterclaim and Cross-Petition of Defendant, Western Electric Company, Inc." The answer admitted that

plaintiff was injured when he fell from the scaffold; denied each and every other allegation of the petition; and alleged that the injuries sustained by the plaintiff proximately resulted from his own negligence and the negligence of others, including defendant Commercial. The counterclaim and cross-petition is directed against Commercial, alleging that the sole and proximate cause of the injury was a defective scaffold furnished by Commercial to plaintiff and that by doing so it violated section 48-425, R. R. S. 1943. The counterclaim and cross-petition further alleged that Commercial specifically contracted to indemnify Western for all damages, costs, and expenses incurred by Commercial's failure to comply with all laws, ordinances, and regulations. The answer and counterclaim prayed that if Western was adjudged liable to the plaintiff, it recover judgment against Commercial in an amount sufficient to discharge said liability, plus court costs, attorneys' fees, and other expenses incurred in the defense of plaintiff's action, or, alternatively, that it recover judgment against Commercial in an amount sufficient to contribute in a fair proportion to the discharge of said liability.

The motion of Commercial to strike the counterclaim and cross-petition was sustained, and said counterclaim and cross-petition was dismissed without prejudice. Western has perfected an appeal to this court.

In its brief on appeal, Western has defined and limited the issues herein. It specifically states: "To the extent that the name of the pleading is deemed to be of importance, we rely on our claim as a cross-petition rather than as a counterclaim.

"The substantive law of indemnity and contribution, as unaffected by special contract, is not directly involved or presented here. Western is making a claim on an express contract of indemnity against loss by reason of being compelled to respond to the plaintiff.

"* * * it is unnecessary here to decide matters of 'passive' and 'active' negligence, and 'primary' or second-

ary' liability in connection with non-contractual claims of indemnity.

"It is further unnecessary to decide questions involving the substantive law of contribution, * * *."

To this we add that it is obvious that the allegations of the cross-petition are limited solely to Commercial and in no way involve the plaintiff's claim against Western.

The reasons urged by Commercial in its motion to strike may be summarized as follows: (1) The cross-petition is improper, premature, and redundent to the issues involved in plaintiff's petition; (2) the law of Nebraska does not authorize or permit cross-claims against defendants; (3) Commercial is made a defendant by virtue of the law compelling plaintiff to join his employer, and is not such a party to the litigation as would permit the filing of a cross-claim; and (4) the petition of the plaintiff is in tort, and the cross-petition of Western is contractual and is therefore improper and is premature.

Section 25-1302, R. R. S. 1943, provides as follows: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; it may determine the ultimate rights of the parties on either side, as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper. The court may also dismiss the petition with costs, in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve summons on other defendants, or to proceed in the cause against the defendant or defendants served."

The question inherent in Western's position is whether the above provision of our Code of Civil Procedure

requires the allowance of its cross-petition against its codefendant to secure its ultimate rights, which it contends includes its right of indemnity. The question as to the applicability and use of a cross-petition in Nebraska is not a new one, but was discussed at length in Armstrong v. Mayer, 69 Neb. 187, 95 N. W. 51. We there held: "A defendant in an action is not restricted to the counter-claim provided for in sections 100 and 101 of the code (now sections 25-812 and 25-813, R. R. S. 1943), but, in a proper case, may seek affirmative relief, either against the plaintiff or against codefendants, by cross-petition.

"The basis of the right to bring such a cross-suit is to be found in sections 1 and 429 of the code (now sections 25-2218 and 25-1302, R. R. S. 1943), and in the consideration that in cases where the code is silent, remedies furnished by the old common law or equity practice, not inconsistent with its provisions, may be resorted to in order to prevent failure of justice.

"A cross-petition is maintainable either to aid in the defense of the original suit, where affirmative equitable relief is required to make such defense effective, or to obtain a complete adjudication of the controversies between the original complainant and the cross-complainant over the subject matter of the original suit."

Commercial argues that although a cross-petition against a codefendant has been allowed in equitable proceedings, it is not available in a law action. To meet this argument, Western relies on the implications inherent in section 25-1302, R. R. S. 1943, as well as on section 2 of our Code of Civil Procedure, section 25-101, R. R. S. 1943, which provides: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and in their place there shall be hereafter but one form of action, which shall be called a civil action."

It is true that the mode of procedure to afford the relief set out by section 25-1302, R. R. S. 1943, is not

pointed out by our statutes, and the authority given is one previously possessed only by courts of chancery. There is no question that procedures exercised by courts of chancery, although not mentioned in the statute, have for years been permitted in Nebraska in equitable proceedings. To come this far, this court resorted to the rules of pleading and practice of those courts as modified by the spirit of the code to achieve this result. In the same vein, we do not agree that cross-petitions are limited to strictly equitable actions.

In Armstrong v. Mayer, 69 Neb. 187, 95 N. W. 51, we said: "We are inclined to the opinion * * * that the rules of the chancery practice * * * are so far enlarged, under the code, that, although a cross-petition is more than merely defensive, and seeks affirmative relief beyond the purposes of defense, such relief need not be equitable nor need the cross-petition be based on equitable grounds."

We also call attention to Burks v. Packer, 143 Neb. 373, 9 N. W. 2d 471, which was a malpractice action against a physician in which the defendant had made the compensation carrier a party for the purpose of subrogation, as provided by the Nebraska Workmen's Compensation Act. The compensation carrier filed a cross-petition setting out the payment of a lump sum settlement and claiming subrogation to the extent of the payment. The plaintiff subsequently settled with the doctor and dismissed her action, and the case went to trial on the cross-petition against the doctor. The trial court, at the conclusion of the compensation carrier's evidence, sustained a motion to dismiss. We reversed the judgment of the trial court, and directed the entry of a judgment on the cross-petition, on the principle of equitable subrogation.

If we are to accept the true spirit of the reformed procedure intended by the code, then it is the substance of the action rather than the form of it which will determine the availability of the relief. The criterion

to be applied is that the issues raised by the cross-bill must be so closely connected with the cause of action in the original suit that a cross-claim is a mere auxiliary or dependency upon the original action. The new issues which a defendant may introduce by cross-claim are to be limited to such as it is necessary for the court to have before it in deciding the questions raised in the original suit in order to do complete justice to all parties with respect to the cause of action on which the plaintiff bases his claim for relief. If a defendant in filing a cross-bill attempts to go beyond this and to introduce new and distinct matter not essential to the proper determination of the issue put in litigation by the original bill, although he may show a perfect case against either the plaintiff or one or more of his co-defendants, his pleading will not be permitted as a cross-bill. New and distinct matter not maintainable under the provisions of the code as a counterclaim and not involved in a proper determination of the subject matter of the original suit must be litigated in a separate action.

It is important to note that the cross-petition of Western is one for indemnity against the plaintiff's employer, its codefendant. The claim for indemnity implies a primary or basic liability in the employer as between the defendants. The Nebraska Workmen's Compensation Act prevents any consideration by the plaintiff of actionable negligence, if any, of the employer Commercial. Even if there is actionable negligence on the part of Commercial, plaintiff does not have a tort action against it, but is relegated to the contractual rights provided by statute.

The present action is a common law action in tort against Western, with Commercial joined solely to comply with the statute to protect any rights of subrogation. If the plaintiff was not bound by the provisions of the compensation act and the negligence of both defendants concurred to cause his injury, he could elect

to sue one or both and there is no method by which he could be deprived of this right. To permit the filing of the cross-petition not only complicates the plaintiff's action and tends to obscure its merits in a quarrel between the codefendants in which he can have no part, but involves him in a cross-action to which he cannot be a party.

Even under the chancery practice, it was held that the cross-suit must be germane to the original suit and the new issues which a defendant could introduce by a cross-bill were limited to such as it was necessary for the court to have before it in deciding the question raised in the original suit.

As we said in Armstrong v. Mayer, 69 Neb. 187, 95 N. W. 51: "We see no reason to doubt that the matters set up in the cross-petition must be germane to the original suit under the code, quite as much as under the chancery practice." We see no reason to deviate from this rule.

It cannot be said that the matters set up in the cross-petition, which in no way involve the plaintiff but are limited to the question of indemnity in the event of a recovery, can be germane to the original suit. Actually, before there can be indemnity there must be the establishment of liability, a recovery, and payment. This would mean that the plaintiff must recover a judgment against Western herein which Western must pay before it is entitled to indemnity from Commercial, if it can prove such right to indemnity.

For the reasons given, the dismissal of Western's cross-petition without prejudice was proper and the judgment is affirmed.

AFFIRMED.

LINCOLN BONDING & INSURANCE COMPANY, A CORPORATION, APPELLEE, V. FRANK J. BARRETT, DIRECTOR OF INSURANCE OF THE STATE OF NEBRASKA, APPELLEE, LEON BINGHAM ET AL., INTERVENERS-APPELLANTS.

138 N. W. 2d 462

Filed November 26, 1965. No. 36016.

1. **Judgments.** Where a default judgment has been regularly entered it is largely within the discretion of the trial court as to whether or not the judgment shall be set aside to permit the defendant to make his defense, and, unless an abuse of discretion is shown, this court will not interfere with the trial court's ruling thereon.
2. ———. Where the record shows that the failure of a defendant to appear at a trial is due to his own negligence or indifference, it is not an abuse of discretion by the trial court to deny a motion to set aside the judgment to permit a defense to be made.
3. **Judgments: Intervention.** Leave to intervene in an action after the entry of final judgment is not allowable as a matter of right, and will be permitted only for cogent and compelling reasons.
4. ———: ———. A right to intervene must be asserted within a reasonable time, and where it appears it was not sought for more than 7 months after judgment, of which he had knowledge, intervener's application was properly denied on the ground of laches.

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

Edwin F. Dosek and Thomas J. Gorham, for interveners-appellants.

Chambers, Holland & Dudgeon, for appellee Lincoln Bonding & Ins. Co.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee Barrett.

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

CARTER, J.

This is an action in which the Lincoln Bonding & Insurance Company, a corporation, appears as the plain-

tiff and Frank J. Barrett, Director of Insurance of the State of Nebraska, appears as the defendant. The petition alleged that the capital account of the corporation had become so impaired that the purposes of the corporation could no longer be achieved, and prayed for the dissolution and liquidation of the corporation. Leon Bingham and Rose Bingham were granted leave to intervene. They filed a petition in intervention as holders of a surplus note, objecting to the dissolution and liquidation of the corporation. Thereafter and on February 11, 1964, the trial court entered a judgment, after trial, granting the prayer of plaintiff's petition. On September 24, 1964, Edward A. Dosek requested leave to intervene as a holder of surplus notes for the purpose of asserting a want of authority of the corporate officers and directors in bringing the action. Leave to intervene was denied. An appeal was taken by Leon Bingham and Rose Bingham. An appeal was also taken by Edward A. Dosek. The issues raised by the two appeals are different and require a separate consideration of each.

As to the appeal of interveners Bingham, the record shows that their petition in intervention was filed on November 15, 1963. Plaintiff filed its answer to the petition in intervention on December 9, 1963, and a copy thereof was mailed to Ralph R. Bremers, attorney for the Binghams, on the same day. On December 19, 1963, the attorney for the plaintiff wrote Binghams' attorney that the case was set for trial on February 6, 1964. On December 26, 1963, Bremers informed the Binghams of the trial date by letter. On January 7, 1964, Bremers again wrote the Binghams that since he had heard nothing from them about the trial date, he assumed they had lost interest in the case and stated: "As a result, it becomes necessary that I withdraw as your attorney of record in the subject case and I am herewith informing you and am advising the Court of that fact. No doubt you will be able to find other able counsel to represent you in this case." On January 7, 1964, Rose Bingham

wrote Bremers that February 6, 1964, was a trial date "impossible for either of us to keep." On January 23, 1964, Bremers wrote Rose Bingham again informing her of his withdrawal from the case and included the following: "Due to the fact that you folks will be unable to appear for trial on said date the Court will allow a continuance if the reason for your inability is good. However, I have withdrawn from the case and will not be in a position to urge the continuance." The Binghams did not appear at the trial on February 6, 1964, either in person or by counsel. The judgment entered on February 11, 1964, noted the nonappearance of the Binghams, and dismissed the petition in intervention filed by the Binghams.

On September 18, 1964, the Binghams filed a motion to set aside the default judgment entered against them on February 11, 1964. The motion was supported by the affidavit of Leon F. Bingham which states that interveners had no notice of the hearing on February 6, 1964, or of the withdrawal of their attorney, Ralph R. Bremers, from the case. The affiant asserts that he had no notice of the entry of the judgment and moves for an order setting the judgment aside as to the Binghams. The trial court denied the motion to set aside the judgment as it relates to the petition in intervention, and this is asserted as error.

We point out that the Binghams had a month's notice that the trial was set for February 6, 1964. On January 7, 1964, they were informed by their attorney of his withdrawal from the case. They were informed by the attorney that they could obtain a continuance for good cause, but that he would not be present to urge a continuance. The Binghams did nothing, although they had a month before the trial to do so. They failed to appear at the trial, although they had ample notice of the date.

It is a general rule that where a default has been entered against a defendant it is largely in the discretion

of the court as to whether or not the default shall be set aside and a trial of the issues had, and unless there has been an abuse of discretion by the trial court this court will not interfere. Barney v. Platte Valley Public Power & Irr. Dist., 147 Neb. 375, 23 N. W. 2d 335; Benson v. General Implement Corp., 151 Neb. 234, 37 N. W. 2d 223; County of Scotts Bluff v. Bristol, 159 Neb. 634, 68 N. W. 2d 197.

In the case at bar the interveners had notice of the trial date and the withdrawal of their attorney from the case in ample time to engage another. Such negligence or indifference cannot be condoned. We cannot say, under such circumstances, that the trial court abused its discretion in refusing to set aside the judgment of February 11, 1964, as to these interveners.

As to the appeal of Edward A. Dosek, the record shows that he was present at the trial which commenced on February 6, 1964. He had known of the pending action since November 1963, but had done nothing toward intervening in the litigation until he appeared at the trial on February 6, 1964, and sought a continuance for the purpose of obtaining additional time to intervene. The continuance was denied. He then waited until September 24, 1964, when he filed his petition for leave to intervene. In the meantime a receiver was appointed, substantial expenses incurred, and the liquidation of the corporation has been in continuous progress.

A petition in intervention may be filed as a matter of right before the trial. § 25-328, R. R. S. 1943. See, also, Kirchner v. Gast, 169 Neb. 404, 100 N. W. 2d 65. In Kitchen Bros. Hotel Co. v. Omaha Safe Deposit Co., 126 Neb. 744, 254 N. W. 507, we said: "Leave to intervene after the entry of a final decree is not allowable as a matter of right and should seldom be granted, but equity sometimes requires a departure from the general rule. In the light of both reason and precedent it has been said: 'Applications for leave to intervene after

entry of a final decree are unusual, and generally have been denied.' "

A right to intervene should be asserted within a reasonable time. The applicant must be diligent and not guilty of unreasonable delay after knowledge of the suit. An intervener may not unreasonably delay the original parties, unduly retard the trial of the case, or render nugatory a judgment without a compelling cause, particularly when it has been partially performed. Consequently, persons who would otherwise be granted leave to intervene are denied consideration where they sit by and allow litigation to proceed without seasonably requesting leave to enter the case. 39 Am. Jur., Parties, § 72, p. 944.

The delay of Dosek in seeking to intervene, and the consequential setting aside of the receivership if granted, is reason enough for the trial court to deny the application.

We find no error in the action of the trial court in refusing to set aside the judgment as to the interveners Bingham. Nor do we find any error by the trial court in refusing leave to intervene to Edward A. Dosek for the reasons stated.

We find no prejudicial error in the record. The rulings of the trial court on the assignments of error in the appeals are correct and the judgments are affirmed.

AFFIRMED.

SPENCER, J., not participating.

NED A. RUNYAN, APPELLEE, V. STATE OF NEBRASKA, SECOND INJURY FUND, APPELLANT.

138 N. W. 2d 484

Filed November 26, 1965. No. 36050.

1. **Witnesses: Evidence.** Before a party is entitled to reproduce the testimony of a witness given on a former trial, he must

show that by exercising reasonable diligence he has been unable to secure the attendance of the witness at the trial.

2. **Workmen's Compensation.** In order to receive workmen's compensation from the Second Injury Fund, a claimant must in fact have a permanent total disability.
3. ———. A workman who is unable to perform or to obtain any substantial amount of labor, either in his particular line of work or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the Workmen's Compensation Act.
4. ———. The Workmen's Compensation Act should be liberally construed to the end that its beneficent purposes may not be thwarted by technical refinement of interpretation.
5. **Statutes.** The intention of the Legislature should be determined from the act as a whole rather than from the loose words or phrases of isolated paragraphs.

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

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

Holtorf, Hansen & Kortum, for appellee.

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

BOSLAUGH, J.

This is a proceeding under the Workmen's Compensation Act brought by Ned A. Runyan, the plaintiff, against the State of Nebraska to recover compensation from the Second Injury Fund.

The plaintiff was injured on May 14, 1962, as the result of an accident arising out of and in the course of his employment while employed by Lockwood Graders, Inc. The plaintiff was operating a hydraulic press used to form sheet metal, and was attempting to center the bottom die in the press when his right foot struck the treadle and caused the press to operate. The fingers on both hands of the plaintiff were caught in the press and crushed. In a previous action against the employer, the plaintiff recovered compensation at the maximum

rate for 219 weeks for temporary total disability and the loss of his fingers. See Runyan v. Lockwood Graders, Inc., 176 Neb. 676, 127 N. W. 2d 186.

In 1933, the plaintiff was injured in a motorcycle accident which resulted in the amputation of his right foot at the level of the proximal metatarsal bones. The plaintiff now claims that he suffered permanent total disability as a result of the combination of the injury to his foot and the injury to his fingers, and that he is entitled to compensation from the Second Injury Fund for the additional disability resulting from the combination of the injuries.

The compensation court found that the plaintiff's disability resulted from the loss of his fingers and not from a combination of the injuries, and dismissed the action. The plaintiff waived rehearing before the compensation court and appealed to the district court.

The district court found that the plaintiff suffered permanent total disability as a result of the injury to his foot and the injury to his fingers and that he was entitled to compensation for the additional disability from the Second Injury Fund. The defendant was ordered to pay compensation to the plaintiff in accordance with subdivision (1) of section 48-121, R. R. S. 1943, after the expiration of 219 weeks from May 14, 1962. The defendant's motion for new trial was overruled and it has appealed.

Over the plaintiff's objection, the trial court permitted the defendant to introduce in evidence a transcript of the pleadings and evidence in the previous action against the plaintiff's employer. At the time the exhibits were offered, counsel stated that the defendant wished to call particular attention to the medical testimony which had been admitted in the previous action.

Before a party is entitled to reproduce the testimony of a witness given on a former trial, he must show that by exercising reasonable diligence he has been unable to secure the attendance of the witness at the trial. Van-

dewege v. Peter, 83 Neb. 140, 119 N. W. 226. The defendant in this case made no attempt to satisfy this requirement. The medical testimony in the previous action was not admissible in the absence of a proper showing and must be disregarded in the disposition of this appeal.

The Workmen's Compensation Act provides that if an employee receives an injury which of itself would cause only partial disability, but which combined with a previous disability other than one caused by disease does in fact cause permanent total disability, the employer shall be liable only for the partial disability which would have resulted from the second injury in the absence of any preexisting disability, and the employee shall be compensated for the additional disability out of the Second Injury Fund. § 48-128, R. R. S. 1943.

In order to receive workmen's compensation from the Second Injury Fund, a claimant must in fact have a permanent total disability. Kelly v. Peter Kiewit Sons Co., 175 Neb. 621, 122 N. W. 2d 501. A workman who is unable to perform or to obtain any substantial amount of labor, either in his particular line of work or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the Workmen's Compensation Act.

The record in this case shows that the plaintiff is 55 years of age and has a high school education. He has worked as a cook; as a pinsetter and alleyman in bowling alleys; as an assembler assembling bus seats and similar products; and as a machine operator operating lathes, drill presses, spinning machines, and other machines.

The accident on May 14, 1962, resulted in the amputation of three fingers, two on the left hand and one on the right hand. The remaining fingers are stiff and have a very limited movement. The plaintiff's thumbs were not injured and they have a full range of motion.

The motorcycle accident in 1933 resulted in the amputation of approximately one-half of the plaintiff's right foot. The plaintiff wears a high-top shoe which is laced

above his ankle. The vacant space in the shoe is stuffed with cotton or other material. The plaintiff has lost the arch and ball of his right foot and cannot balance on that foot. His right foot tires easily, tends to drag, and is painful. It gets cold very easily and becomes sore from rubbing inside the shoe. As a result of the injury to his foot, the plaintiff is unable to use a shovel, climb ladders, or do any work that requires agility of the feet.

After the May 14, 1962, accident, the plaintiff returned to work at Lockwood Graders, Inc., on September 24, 1962. He worked 2 days in the tip shop helping to hold material while other employees welded it. He was then transferred to the parts department and worked there 5 days before he was laid off. He obtained employment at the sugar factory as a locker room attendant and worked until December 31, 1962. He had difficulty doing that work because of the disability to his fingers. He has not been able to obtain employment since that date.

The record in this case shows that the plaintiff in fact suffered permanent total disability. The controversy here is whether the disability is a result of the injury to the fingers only or is a result of the combination of the injury to the fingers and the injury to the foot. The defendant contends the sole cause of the disability is the injury to the fingers and that there is no connection between that injury and the injury to the foot.

Dr. William E. Holmes, a witness for the plaintiff, testified that the plaintiff was totally disabled as a result of the combination of the injury to the foot and the injury to the fingers; that the injury to the fingers alone would not be totally disabling; that the injury to the foot resulted in a loss of balance potential; that the disability to the plaintiff's fingers interfered with the use of his hands to compensate for the instability resulting from the foot injury; and that the plaintiff could do considerably more with his hands if his foot was all right.

Dr. Stuart P. Wiley, a witness for the plaintiff, testified

that in his opinon the plaintiff was totally disabled as a result of the combination of the injury to the fingers and the injury to the foot. Dr. Wiley admitted on cross-examination that in the previous action against the employer he had testified that the plaintiff was totally disabled as a result of the injury to his fingers. Dr. Wiley said that he had revised his opinion after considering the opinion of this court in the previous action.

The loss of all fingers of both hands alone does not entitle an employee to compensation for permanent total disability as defined in the Workmen's Compensation Act. § 48-121, subdivision (3), R. R. S. 1943; Runyan v. Lockwood Graders, Inc., *supra*. This is a matter which must be considered in determining the rights of the plaintiff under the act.

This court has said many times that the Workmen's Compensation Act should be liberally construed to the end that its beneficent purposes may not be thwarted by technical refinement of interpretation. Wheeler v. Northwestern Metal Co., 175 Neb. 841, 124 N. W. 2d 377. The intention of the Legislature should be determined from the act as a whole rather than from the loose words or phrases of isolated paragraphs. Hauff v. Kimball, 163 Neb. 55, 77 N. W. 2d 683.

Before May 14, 1962, the plaintiff was able to use his hands to compensate somewhat for the disability resulting from the injury to his foot. He was able to use his hands to steady himself and could perform useful tasks and obtain employment. He is now unable to use his hands for that purpose and is unable to perform useful tasks or obtain employment. We think that the evidence in this case establishes that the plaintiff is entitled to compensation for permanent total disability as a result of the combination of the injuries to his fingers and his foot.

The judgment of the district court awarding the plaintiff compensation from the Second Injury Fund for the

additional disability resulting from the combination of his injuries is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERRY SHELDON, APPELLANT.

138 N. W. 2d 428

Filed November 26, 1965. No. 36091.

1. **Criminal Law.** In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.
2. ———. This court will not interfere with a verdict of guilty which is based on conflicting evidence unless the evidence is so lacking in probative force that it is insufficient as a matter of law to support a finding of guilt beyond a reasonable doubt.
3. ———. The purpose of a preliminary hearing is to ascertain whether a crime has been committed and whether there is probable cause to believe that the accused committed it. It is not a trial of the person accused to determine his guilt or innocence, but is a procedural safeguard to prevent persons from being detained in custody without probable cause existing that the crime charged was committed by them.
4. **Constitutional Law: Criminal Law.** Under the facts and circumstances in this case, the failure to appoint counsel for the defendant at the time of the preliminary hearing was not a denial of procedural due process or a violation of the defendant's constitutional right to the assistance of counsel.
5. **Criminal Law.** The habitual criminal act does not create a new offense but provides a greater penalty for repetition of criminal conduct.
6. ———. In the absence of the showing of an abuse of discretion, this court will not disturb a sentence imposed within the limits prescribed by the statute.

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

Edgar V. Thomas, for appellant.

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

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

BOSLAUGH, J.

Jerry Sheldon, the defendant, was convicted of burglary and possession of burglar's tools. His motion for new trial was overruled and he has appealed.

The amended information charged the defendant with burglarizing the Wachs Implement Company on November 26, 1964, and with possession of burglar's tools. In this case the burglary consisted of the willful, malicious, and forcible breaking and entering of a shop or office by the defendant with intent to steal property of any value. § 28-532, R. R. S. 1943. The possession of burglar's tools consisted of the defendant having in his possession a hammer, screwdriver, and punch with intent feloniously to break and enter any shop or other building containing valuable property. § 28-534, R. R. S. 1943.

The principal assignment of error relates to the sufficiency of the evidence to sustain the conviction. The record shows that on November 26, 1964, it was discovered that the Wachs Implement Company had been burglarized. Entry to the building had been gained by prying open a window on the alley. The safe had been broken into and approximately $60 in cash removed from it. The safe was broken into by knocking off the dial and breaking the locking mechanism so that the locking bars could be broken loose. An unsuccessful attempt had been made to break the locking mechanism with a punch, but some other tool was been used to break the locking mechanism.

At about 3 a. m. on November 26, 1964, James E. Newcome, the chief of police of David City, was patrolling the city. Jerome L. Meister, the sheriff's brother, was riding in the patrol car with Newcome. As they crossed the railroad tracks on Fifth Street, Meister saw two men standing on the tracks east of the crossing. Newcome turned the patrol car around and stopped on

the east side of the street just north of the tracks. The defendant, who was standing on the tracks near an electric pole about 60 feet east of the crossing, bent over, dropped something, and threw his right arm to the right rear of his body. The other man, who was the defendant's brother Herbert, walked over to the patrol car. The defendant then walked up to the patrol car.

The defendant said that they had had car trouble and wanted help to get their car started. The defendant's car was located 1 block east and 6 or 8 blocks south of the crossing on Fifth Street. They had lost their ignition keys so the car was started by wiring past the ignition switch. Meister helped them start the car and followed them for several miles as they left David City.

Newcome radioed to Lincoln to check the identification on the defendant's car. Then Newcome and Meister returned to the area where they had first seen the defendant and his brother. A screwdriver and a punch were found where the defendant had been standing, and a large ball peen hammer was found approximately 43 feet northeast of where the defendant had been standing. There were places on the ground where the hammer had bounced as it was thrown.

The ball peen hammer, screwdriver, and punch, together with the dial and other parts of the safe from Wachs Implement Company, were examined at the Federal Bureau of Investigation Laboratory at Washington, D. C. There was expert testimony that upon the dial and other parts of the safe there were impressions similar to those produced by hammer blows, and punch marks similar in size and shape to those made by the punch that was found where the defendant had been standing. There were marks upon a lock and plate taken from the safe which, upon microscopic examination, were found to be identical with those made by the screwdriver that was found where the defendant had been standing. There was further expert testimony that

the safe at the Wachs Implement Company contained a form of gypsum as insulation. A small deposit of that type of gypsum was found on the punch. The entire blade of the screwdriver was covered with deposits of gypsum which microscopic examination showed was of the same color, texture, appearance, and composition as that used in the safe at the Wachs Implement Company.

The evidence which has been summarized was sufficient to permit the jury to find the defendant guilty of burglary and possession of burglary tools. Although there was some conflict in the evidence in this case, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Snell, 177 Neb. 396, 128 N. W. 2d 823. This court will not interfere with a verdict of guilty which is based on conflicting evidence unless the evidence is so lacking in probative force that it is insufficient as a matter of law to support a finding of guilt beyond a reasonable doubt. State v. Brown, 174 Neb. 387, 118 N. W. 2d 328.

The record shows that the defendant was not represented by counsel at the time of the preliminary hearing in the county court. The defendant filed an affidavit of poverty and a written motion requesting the appointment of counsel which was overruled by the county judge. The complaint was read to the defendant and he pleaded not guilty to all counts. Evidence was taken and the defendant bound over to the district court. The defendant argues that the failure to appoint counsel for him at the time of the preliminary hearing deprived him of his constitutional right to the assistance of counsel.

The purpose of a preliminary hearing is to ascertain whether a crime has been committed and whether there is probable cause to believe that the accused committed it. § 29-506, R. R. S. 1943; Fugate v. Ronin, 167 Neb. 70, 91 N. W. 2d 240. It is not a trial of the person accused to determine his guilt or innocence, but is a procedural safeguard to prevent persons from being de-

tained in custody without probable cause existing that the crime charged was committed by them.

In a recent decision, Burnside v. State of Nebraska, 346 F. 2d 88, the United States Court of Appeals, Eighth Circuit, said: "It is quite true that petitioner was not represented by counsel at his preliminary hearing. Petitioner entered a plea of not guilty at such hearing and did not testify or make any admission at the hearing. Ronzzo v. Sigler, D. C. Neb., 235 F. Supp. 839, establishes that under Nebraska law the preliminary hearing is not a critical stage of the criminal proceeding and that a defendant loses no constitutional rights and suffers no prejudice as a result of lack of representation at a preliminary hearing, particularly where, as here, he offers no testimony and makes no admissions. See Pointer v. State of Texas, 380 U. S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923; Nolan v. Nash, 8 Cir., 316 F 2d 776." See, also, Ronzzo v. Sigler, 235 F. Supp. 839; Ronzzo v. Sigler, 346 F. 2d 565; Bird v. Sigler, 241 F. Supp. 1007.

The record in this case does not show a denial of procedural due process or a violation of the defendant's constitutional rights.

The other assignments of error relate to an alleged variance in the information and the instruction on circumstantial evidence.

The complaint filed in the county court contained a count charging the defendant with burglary of the Wells Lumber Company. This count was omitted from the amended information upon which the defendant was tried. The amended information contained an additional count charging the defendant with being an habitual criminal. This count was dismissed by the trial court upon the defendant's motion after the hearing provided for in section 29-2221, R. R. S. 1943. There is no showing of any prejudice to the defendant, and his claim that the variance amounted to a denial of a preliminary hearing has no merit. The habitual criminal act does not create a new offense but provides a greater penalty for

repetition of criminal conduct. Rains v. State, 142 Neb. 284, 5 N. W. 2d 887.

The trial court gave an adequate and proper instruction to the jury upon the circumstantial evidence rule. The instruction given conformed to the rules stated in State v. Nichols, 175 Neb. 761, 123 N. W. 2d 860, and State v. Ohler, 178 Neb. 596, 134 N. W. 2d 265.

The defendant also complains that the sentences are excessive. The defendant was sentenced to 10 years imprisonment upon count I which charged burglary, and to 3 years imprisonment upon count II which charged possession of burglar's tools, the sentences to run consecutively. The sentences imposed are within the maximum and minimum limits prescribed by the Legislature. In the absence of the showing of an abuse of discretion, this court will not disturb a sentence imposed within the limits prescribed by the statute. State v. Swiney, *ante* p. 230, 137 N. W. 2d 808. The record in this case fully supports the judgment of the trial court.

The judgment of the district court is affirmed.

AFFIRMED.

PRAIRIE VIEW TELEPHONE COMPANY, A MUTUAL ASSOCIATION, ET AL., APPELLEES, V. COUNTY OF CHERRY, STATE OF NEBRASKA, APPELLANT.

138 N. W. 2d 468

Filed December 3, 1965. No. 35963.

1. **Eminent Domain.** Where a statute requires that an attempt to agree with the owner shall first be made before the institution of condemnation proceedings to take private lands for public use, such provision is mandatory, and condemnation proceedings instituted without first making a bona fide attempt to agree with the owner are subject to direct attack.
2. ———. The attempt and failure to agree must be alleged and proved, and this must appear on the face of the record.
3. ———. In order to satisfy the statutory requirement of attempting to agree with the owner prior to the institution of

condemnation proceedings, there must be a good faith attempt to agree, consisting of an offer made in good faith and a reasonable effort to induce the owner to accept it.

4. **Trial: Judgments.** The purpose of a summary judgment proceeding is to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than alleged.

5. ———: ———. When the allegations of the pleadings have been pierced and the resistance to the motion fails to show that a genuine issue of fact exists, a summary judgment will be granted.

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

Richard L. Spittler and Rush C. Clarke, for appellant.

Dean L. Donoho, for appellees.

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

WHITE, C. J.

This is an eminent domain proceeding brought by the County of Cherry to condemn real estate owned by the appellees Grooms for a county road. The action originated before appraisers appointed by the county judge, and the county, being dissatisfied with the allowance of the appraisers, appealed to the district court. The district court, on motion for summary judgment, dismissed the action on the grounds that the county did not attempt to agree with the appellees Grooms by making a good faith offer and a reasonable attempt to induce them to accept said offer for the right-of-way in controversy. The County of Cherry appeals. The requirement of a good faith offer and a reasonable attempt to induce a settlement is mandatory and jurisdictional. In Higgins v. Loup River Public Power Dist., 157 Neb. 652, 61 N. W. 2d 213, the court said: "The attempt and failure to agree must be alleged and proved, and this must appear on the face of the record. * * * *Statutory provisions of the type* here considered (section 76-704, R. R. S. 1943) are usually regarded as mandatory and jurisdictional, and

it has been stated broadly that objection based on the failure of the record to show that the parties cannot agree may be raised at any time by direct attack." (Emphasis supplied.)

The proceedings were instituted by the County of Cherry in September 1962. The record shows that on February 21, 1962, the county commissioners wrote the following letter to appellee Edgar J. Grooms:

"On February 15, 1962, the Cherry County Board of Commissioners requested your appearance before the Board to negotiate the opening of the section lines between sections 31, 32, 30 and 29, Township 35, Range 26, for the purpose of building a public road. * * * Since you failed to appear as requested, and the Board failed to find you home after making a trip to your residence, we submit the following offer as required by law: * * * To Edgar J. Grooms and Martin G. Grooms, $3,000.00 for all damages. * * * We request your appearance before the Board at their next regular meeting March 6, 1962, at 2:00 p.m. to discuss this offer. Failure to appear at this time or otherwise notify the Board will be considered as a refusal to accept said offer and refusal to further negotiate."

A copy of this letter was sent to appellee Martin G. Grooms. The affidavits of appellees Grooms show that this letter was the only communication or effort by the county to make an offer of settlement and to induce an agreement. There were no counter affidavits or showing in opposition by the county. There was nothing in this letter that would or did indicate the extent of the lands actually sought for the right-of-way. The evidence shows that the appellees were never offered a definite proposal as to the exact right-of-way to be acquired, and consequently were never in a position to make an absolute acceptance thereof. In order to satisfy the statutory requirement of attempting to agree with the owner prior to the institution of condemnation proceedings, there must be a good faith attempt to agree,

consisting of an offer made in good faith and a reasonable effort to induce the owner to accept it. State v. Mahloch, 174 Neb. 190, 116 N. W. 2d 305.

The record does not reveal just what lands the county was seeking at the time the letter was written. On March 16, 1962, some 3 weeks after the letter was written, the county board passed a resolution to acquire an 82½-foot right-of-way across the appellees Grooms' property. But, this action was never communicated to appellees. Nothing further was done in the matter until September 6, 1962, when the county filed the condemnation proceedings. We hold, as the district court did, that there was no offer made in good faith because the county never informed the appellees as to the amount of land it was taking.

The county complains that on motion for summary judgment it should not be required to try this issue and be forced to produce evidence in support of its pleadings. Otherwise stated, it takes the position that it may stand on its pleadings, and the pleadings will be sufficient to raise a genuine issue of fact which it is entitled to try on the merits. This argument ignores the very purpose of a summary judgment proceeding. Its purpose is to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than alleged. And, when the allegations of the pleadings *have been pierced by the movant,* and the resistance to the motion *fails to show* that a genuine issue of fact exists, a summary judgment will be granted. Knoll v. Knoll, 173 Neb. 602, 114 N. W. 2d 40; Miller v. Aitken, 160 Neb. 97, 69 N. W. 2d 290.

Here the allegations of the pleadings of the county were pierced by the affidavits of the appellees Grooms. These affidavits established the lack of a proper offer in good faith. The county filed no counter affidavits or no resistance to the motion. It simply stood on its pleadings. This it may not do. The appellees Grooms pierced the pleadings of the county by the affidavits

setting out the letter from the county commissioners. Under the above rule, it became the duty of the county to resist the motion by counter affidavits or other appropriate showing which it entirely failed to do. If the county had evidence in support of its pleadings, it became its duty to make a proper showing to this effect.

The county cites the case of Berg v. Rasmuss, 176 Neb. 340, 125 N. W. 2d 905. That was an automobile accident case and the plaintiff, in resistance to defendants' motion for summary judgment, filed an affidavit showing there was a genuine issue of fact as to gross negligence. This court held in that case that a motion for summary judgment could not be granted. In the present case the affidavits of the appellees Grooms stand uncontroverted. There was no resistance. The pleadings were pierced and the record shows there was no genuine issue of fact on whether or not the county did in fact make a good faith attempt to agree, consisting of an offer made in good faith, and a reasonable effort to induce the appellees Grooms to accept it.

The district court properly sustained the motion for summary judgment and dismissed the proceeding because of lack of jurisdiction. Its judgment is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAUL E. BROWN, APPELLANT.
138 N. W. 2d 465

Filed December 3, 1965. No. 35975.

1. **Appeal and Error.** It is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. Ordinarily these are matters for the determination of the jury.
2. **Criminal Law: Evidence.** In a criminal action this court will not interfere with a verdict of guilty based on conflicting evidence unless the evidence is so lacking in probative force that

as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt.

3. ———: ———. The testimony of an accomplice, if it satisfies the jury beyond a reasonable doubt of the guilt of the defendant, may be sufficient to warrant a conviction, although not corroborated.

4. ———: ———. To justify conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together or as a whole, must be of such a character as to be consistent with each other, and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence.

5. **Trial: Appeal and Error.** If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issue from consideration of the jury, error cannot be predicated on failure to charge on some particular phase of the case, unless proper instruction has been requested by the party complaining.

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

Francis M. Casey, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

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

WHITE, C. J.

This is a criminal prosecution for burglary. From a jury verdict of guilty and sentence thereon the defendant appeals. The principal assignments of error relate to error in connection with instructions and the sufficiency of the evidence to support the verdict.

There is evidence on behalf of the State that supports the following statement of facts. On or about January 13, 1964, between the hours of 2 p.m. and 3 p.m., the defendant Paul Brown visited the Plattsmouth Sports Hall, remaining there until 5:30 p.m. when he departed with one Robert Piper at the conclusion of the latter's

working hours in said establishment. The defendant and Piper spent the next several hours at local taverns. They were at Bob's Bar until midnight, the 40 & 8 Club until 1 a.m., and then the Welcome Inn. After leaving the Welcome Inn they went to Tim's Tavern. The testimony is that the defendant broke a window and assisted Piper in entering the building through the broken window. Piper testified that, having gained entrance, he went to the back door and let the defendant in. Piper knew that Timms kept their money in a cooler. He went to the cooler and found the money which he took. It amounted to around $60 and was in a sack. About this time Piper observed the red light of a police car outside. He went to the basement with the sack, hid behind some whiskey bottles, and "passed out."

The defendant, in an extensive review of the witnesses' testimony, contends that they were impeached and their testimony, as a matter of law, is not worthy of belief. We do not agree. After reviewing the record, we come to the conclusion that the following from State v. Nichols, 175 Neb. 761, 123 N. W. 2d 860, is applicable: " 'It is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. * * * In a criminal action this court will not interfere with a verdict of guilty based upon conflicting evidence unless the evidence is so lacking in probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt.' "

It is true that the State's case rests primarily on the testimony of an accomplice, Robert Piper. But, it is fundamental that the testimony of an accomplice, if it satisfies the jury beyond a reasonable doubt of the guilt of the defendant, may be sufficient to warrant a conviction, although not corroborated. Barnes v. State, 124 Neb. 826, 248 N. W. 381. The record shows that Piper's testimony was corroborated by the witness

Prokupek. She was working in a bakery on the other side of the street and was in a position to observe the front door of Tim's Tavern. She fixed the time of the breaking and entering. She testified that she saw two boys in the doorway of Tim's Tavern; that she could not see what they were doing; but that after a while one of the boys went around to the back of a building known as Nellie's Kitchen, which was located on the southeast corner of the intersection and next door to Tim's Tavern. This would be the route one would take to get to the rear door of Tim's Tavern. Piper testified that he was wearing a blue jacket at the time. The witness Prokupek testified that one of the boys she saw was wearing a blue jacket. While it was not necessary for Piper's testimony to be corroborated, we feel that the corroborating testimony, as recited, supports the conclusion of the sufficiency of the evidence to sustain the conviction. We note that the court, in instruction No. 14, fully instructed the jury as to the consideration of the testimony of an accomplice, and no complaint is made by the defendant in this respect.

The defendant attacks the credibility of several witnesses, claiming they were impeached. This was a matter for the jury to decide and this court will not interfere if there is competent evidence to support the verdict. There is no merit to the assignment of error as to the insufficiency of the evidence to support the verdict.

Defendant contends instruction No. 13 on circumstantial evidence was in error. The portion of the instruction attacked is as follows: "To justify a conviction on circumstantial evidence, it is necessary that the *facts and circumstances essential to the conclusions sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together* must be of such character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence." (Emphasis supplied.) It is argued that this

instruction fails to tell the jury that the facts and circumstances alone must be proved by competent evidence beyond a reasonable doubt. We do not agree. The portion of the instruction quoted requires, by reasonable construction, that the facts and circumstances standing alone must be proved by competent evidence beyond a reasonable doubt and then goes on to say that *when taken together* must be consistent with each other and the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence.

The court, in instruction No. 13, stated the law as we have long adhered to. Almost identical language was approved in Sedlacek v. State, 166 Neb. 736, 90 N. W. 2d 340, wherein we said: "As stated in Watson v. State, 141 Neb. 23, 2 N. W. 2d 589: 'They do not, however, change the rule, *long followed and stated by this court in Vinciquerra v. State,* 127 Neb. 541, 256 N. W. 78, as follows: "To justify conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together or as a whole, must be of such a character as to be consistent with each other, and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence." ' " (Emphasis supplied.)

The instruction given followed in almost identical language the established law of this state and was free from error.

It is claimed the court erred in not giving an instruction, on its own motion, on the maxim "falsus in uno, falsus in omnibus." The defendant did not request such an instruction. The proper rule is stated in State v. Archbold, 178 Neb. 433, 133 N. W. 2d 601: " 'If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issue from consideration of the jury, error cannot be predicated on failure to charge on some particular phase of the case,

unless proper instruction has been requested by the party complaining.' "

It is clear that the court instructed generally on the law of the case and withdrew no essential issue from the consideration of the jury. A request was necessary before the court could properly consider whether to instruct on this issue. There is no merit to this contention.

We find no prejudicial error in the record. The judgment of the district court should be and is affirmed.

AFFIRMED.

LETTY WEAVER DAVIS, APPELLANT, V. LANDIS OUTBOARD MOTOR COMPANY ET AL., APPELLEES.
138 N. W. 2d 474

Filed December 3, 1965. No. 35983.

1. **Automobiles. A guest by the terms of section 39-740, R. R. S. 1943, is a person who accepts a ride in a motor vehicle without giving compensation therefor.**
2. **———. The words of the statute "without giving compensation therefor" do not limit compensation to persons paying for transportation in cash or its equivalent and do not require that the compensation be exclusively from the passenger to the driver.**
3. **———. A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity. However, if his carriage contributes such tangible and substantial benefits as to promote the mutual benefits of both the passenger and owner or operator, or is primarily for the attainment of some tangible and substantial objective or business purpose of the owner or operator, he is not a guest.**
4. **———. A benefit to the owner or operator of a motor vehicle sufficient to remove an occupant riding in it from the provisions of the guest statute must be a tangible and substantial one and a motivating influence for his furnishing the transportation.**
5. **———. The question of whether a person riding in a motor vehicle is a guest, or engaged in a joint enterprise or other relationship, is generally one for determination in the individual case. It must be ascertained from facts establishing the identity of the persons advantaged by the carriage, the relationship**

between the parties, and the purposes to which the transportation is incident.

6. **Automobiles: Negligence.** An essential element necessary to be proved to entitle a passenger in an automobile to recover damages from the host on the ground of negligence less than gross is that he is a passenger for hire.
7. **Negligence.** Gross negligence means great and excessive negligence; that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.
8. **Trial.** The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery.
9. **Automobiles: Negligence.** The fact that the car got out of the driver's control does not establish negligence and much less gross negligence, nor does it prove the proximate cause of the accident. Negligence is not presumed and cannot be inferred from the fact that there was an accident.
10. **Negligence.** The line of demarcation between gross and ordinary negligence is not always clear. The cases however are clear in their declaration that negligence to be gross must be great or excessive; must be in a very high degree; not alone a momentary distraction of attention; and not alone the absence of slight care in the performance of a duty.

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

Spencer & Hoch and John S. Redd, for appellant.

Moran & James, Cline, Williams, Wright, Johnson, Oldfather & Thompson, and Richard M. Tempero, for appellees.

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

BROWER, J.

Plaintiff Letty Weaver Davis brought this action in the district court for Otoe County to recover damages for personal injuries suffered by her in an automobile accident. At the time she was riding in a jeep station wagon owned by defendant Landis Outboard Motor Company, under which name Clement M. Landis, Sr., and Clement M. Landis, Jr., operated their business at

Nebraska City. The defendant Lois M. Landis was the wife of Clement M. Landis, Jr., and was driving the vehicle at the time.

At the trial of the cause the defendants at the close of plaintiff's evidence made a motion for a directed verdict or in the alternative for a dismissal of the action. The trial court sustained the motion and dismissed the action. From an order overruling her motion for a new trial the plaintiff has appealed to this court.

The plaintiff maintains the trial court erred in finding as a matter of law in both instances, first, that plaintiff was a guest in the automobile in which she was riding, and second, the defendant driver was not guilty of gross negligence, because of which rulings the action was dismissed and a new trial denied.

The record in the case before us shows that on the day of the accident, July 29, 1962, the plaintiff, a resident of Imogene, Iowa, accompanied her friend, Glenn Fox, of Coin, Iowa, in his boat on the Missouri River. The boat was launched at Bartlett Landing on the Iowa side of the river about 15 miles north of Nebraska City. From there they proceeded up the river to Omaha, stopping at the River Club Marina at Fort Omaha where they had lunch. After spending "a couple of hours" there, they proceeded back down the river. At a point somewhere south of the South Omaha Bridge, the motor got "hot and stuck" and became inoperative. Fox paddled the boat downstream by hand for a ways, found a man near the river to whom he threw a rope, and docked the boat on the Iowa shore. Fox went with the man to a telephone. After first calling two marinas at Omaha, who he said were either busy or too expensive, he called Landis Outboard Motor Company and talked with defendant Clement M. Landis, Jr. Landis had worked on boats for Fox before and the latter had confidence in Landis' knowledge of the river and boat motors. Landis agreed to come up and assist. Landis arrived about 1½ hours later. Lois M. Landis, his wife, and two

daughters had accompanied him in the jeep station wagon to the place where the boat was laid up. The two men worked on the boat at least an hour before it was repaired. The river is perilous to navigate at night and requires an expert in navigation after dark. It was dusk when the work was finished and Fox was afraid to make the trip. He engaged Landis to bring the boat back to the landing.

While the men were working on the motor, the plaintiff and the defendant Lois M. Landis remained on the bank with the children. When it was getting late Mrs. Landis went part way down the bank and met her husband. He handed her the plaintiff's bag. Returning she told the plaintiff, "You will go with me." She drove the jeep and on the way told plaintiff she was not going to Bartlett but directly to Nebraska City. Mr. Fox did not remember how plaintiff's carriage was arranged. Mrs. Landis, in answering interrogatories served by the plaintiff and introduced in evidence by her counsel, testified that Mr. Fox had called her husband to fix the engine on the boat. This was the reason for the trip. It being Sunday she took the children along for the outing. Although she did not normally go with him on boat repair calls, she did in this instance in order to drive back if her husband needed to drive the boat in the dark which Mr. Fox had requested. Her husband told her Mr. Fox had asked if plaintiff could ride back with her and Landis had told Fox she could.

The men went down the river in the boat to Bartlett Landing where it was loaded and taken to the boat shop of defendants Landis at Nebraska City. After going to the home of defendants Landis, they were informed of the accident with the jeep. Fox intended to compensate Landis for his services, but on being asked about it, Landis said, "We have had enough trouble, just skip it."

Meanwhile, the defendant Lois M. Landis was driving the jeep with her children and the plaintiff therein

southward toward Nebraska City. About 3 miles north thereof they approached a left-hand curve, commonly called the "beehive curve." Plaintiff testified that part of the way around the curve the jeep "began to kind of zag, and she (Mrs. Landis) threw up her hands and said, 'I can't make it!' That's the last I can remember until it stopped." She also had said that immediately before the accident the vehicle made a sharp turn to the right. Mrs. Landis, in answer to interrogatories put in evidence by the plaintiff, stated that just before the accident her vehicle was in high gear, traveling about 50 miles per hour. She did not put on her brakes because the accident happened so fast she did not have time to consider doing so. There were no mechanical defects in the jeep. Photographs of the roadway were taken shortly after the accident and introduced in evidence. The newspaperman who took them testified that the road was paved at the curve, that the paving was normal and not wet, and that there was no fog or smoke.

We will first consider the question relating to the status of the plaintiff while riding in the defendants' car, to wit: Whether she was a guest or a passenger therein.

In Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593, this court in its syllabi stated: "A guest by the terms of section 39-740, R. R. S. 1943, is a person who accepts a ride in a motor vehicle without compensation therefor.

"The words of the statute 'without giving compensation therefor' do not limit compensation to persons paying for transportation in cash or its equivalent and do not require that the compensation be exclusively from the passenger to the driver.

"A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity. However, if his carriage

contributes such tangible and substantial benefits as to promote the mutual benefits of both the passenger and owner or operator, or is primarily for the attainment of some tangible and substantial objective or business purpose of the owner or operator, he is not a guest.

"A benefit to the owner or operator of a motor vehicle sufficient to remove an occupant riding in it from the provisions of the guest statute must be a tangible and substantial one and a motivating influence for his furnishing the transportation."

In Carter v. Chicago, B. & Q. R.R. Co., 170 Neb. 438, 103 N. W. 2d 152, many of the same rules are set forth. In that case it was further held: "The question of whether a person riding in a motor vehicle is a guest, or engaged in a joint enterprise, or other relationship, is generally one for determination in the individual case. It must be ascertained from facts establishing the identity of the persons advantaged by the carriage, the relationship between the parties, and the purposes to which the transportation is incident."

In Lincoln v. Knudsen, 163 Neb. 390, 79 N. W. 2d 716, the syllabi of this court sets out: "An essential element necessary to be proved to entitle a passenger in an automobile to recover damages from the host on the ground of negligence less than gross is that he is a passenger for hire.

"The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery."

Applying these rules to the evidence in the case before us, it appears the plaintiff has failed to meet the burden of establishing that she was a passenger for compensation. Plaintiff contends it was intended the defendant Landis was to be compensated for his services by Fox. It appears, however, Landis was called to fix the motor on the boat and was further requested to drive it down the river in the dark. When he was called by phone there is nothing to indicate the plaintiff was

mentioned. It plainly appears the reason for plaintiff's returning by the automobile was to protect her from the risks incident to navigating the river after dark. This was a benefit to her. Nothing appears to indicate a benefit would occur to the defendants to have the plaintiff return by car rather than by boat. Defendants appear to have received no benefit whatever and certainly none that was tangible or substantial or that could be said to be the motivating influence for furnishing the transportation. Indeed it appears that the transportation was furnished plaintiff through a desire to render assistance to a lady who would otherwise be forced to undertake the trip home under circumstances involving considerable danger. Such a motive is reasonably attributable to ordinary hospitality. We find the status of the plaintiff while riding in the jeep was that of a guest.

The next question concerns whether gross negligence attributable to the defendant driver has been shown. In Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593, it is stated in the syllabi: "A guest to recover damages from his host for injury received by the guest while riding in a motor vehicle operated by the host must prove by the greater weight of the evidence in the case the gross negligence of the host relied upon by the guest and that it was the proximate cause of the accident and injury.

"Gross negligence means great and excessive negligence; that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty." In that case, this court in its discussion stated: "The fact that the car of deceased got out of his control does not establish negligence and much less gross negligence nor does it prove the proximate cause of the accident. Negligence is not presumed and cannot be inferred from the fact that there was an accident. The burden was on appellant to prove gross negligence that was the proximate cause of the damage. This could not

be done by evidence from which negligence could only be surmised or conjectured. There was a serious deficiency in the proof. It does not show what caused the car to leave the highway."

In Boismier v. Maragues, 176 Neb. 547, 126 N. W. 2d 844, it was said: "As is made apparent by the cases on the subject, the line of demarcation between gross and ordinary negligence is not always clear. The cases however are clear in their declaration that negligence to be gross must be great or excessive; must be in a very high degree; not alone a momentary distraction of attention; and not alone the absence of slight care in the performance of a duty. See, Bishop v. Schofield, 156 Neb. 830, 58 N. W. 2d 207; Ottersberg v. Holz, 159 Neb. 239, 66 N. W. 2d 571; Holliday v. Patchen, *supra;* Pester v. Nelson, 168 Neb. 243, 95 N. W. 2d 491; Cole v. Wentworth, *supra.* * * * In the light of what has been said the burden is on the plaintiff in order to have sustained the judgment which she received in the district court to demonstrate by the record here that her evidence was sufficient to have submitted to a jury the question of gross negligence of the defendants in one or more of the five particulars charged in her pleaded causes of action."

In the present case the plaintiff in her petition alleges the defendant driver was negligent in four particulars.

She first states the defendant driver operated her automobile at a speed greater than was reasonable under the circumstances. The plaintiff testified she had no idea of the rate of speed. The only proof was the answer of the defendant driver to the interrogatories propounded to her and introduced by the plaintiff in which she stated the jeep was proceeding at 50 miles per hour. There is no evidence that such a rate of speed was not reasonable and prudent under the circumstances.

The second ground of negligence alleged is that she did not have the automobile under proper control on reaching the curve, and the third was that she failed

to observe, consider, and anticipate the curve in the highway. These will be considered by us together. Plaintiff testified that the accident occurred when they were through, or almost through, the curve. The jeep began to zag and immediately turned to the right. The defendant driver threw up her hands and said she could not make it. Why the jeep zagged is not shown. There is no evidence as to whether something suddenly happened to the vehicle since there is nothing to show it was examined subsequently. The evidence shows a crushed rock roadway led from the curved pavement. A photograph, exhibit 8, indicates some gravel or other substance was on the pavement at a point in the curve. Whether or not something on the highway caused the jeep to swerve is not shown. There is no evidence from which it can be told what caused the defendant driver to lose control of the jeep. Certainly she observed the curve and went through a portion of it. It is not shown whether she had traveled on and was familiar with this particular road, but whether or not she anticipated it, she realized she was in it when she got there and was attempting to negotiate it.

The last allegation is that the defendant driver did not keep a proper lookout ahead when, by exercise of ordinary care, she should have known she must turn at said point. There is no evidence that defendant driver did not maintain a proper lookout. Although the cause of the accident was not shown, the evidence indicates quite clearly that the failure, if any, on the part of the defendant driver was a momentary inadvertence which, under our decisions, does not constitute gross negligence. The record does not warrant the submission of the cause to the jury because of negligence which was great and excessive and of a high degree.

It follows that the trial court committed no error in holding the plaintiff's status was that of a guest in defendants' jeep. Neither did the court err in finding as a matter of law that gross negligence was not shown.

The judgment of the trial court was right and should be and is affirmed.

AFFIRMED.

IN RE APPLICATION OF SIDNEY J. SIMMERMAN.
SIDNEY J. SIMMERMAN, DOING BUSINESS AS SID'S SINCLAIR SERVICE, APPELLEE, V. NATIONAL TRAILER CONVOY, INC., ET AL., APPELLANTS.
138 N. W. 2d 481

Filed December 3, 1965. No. 35984.

1. **Public Service Commissions: Motor Carriers.** In a proceeding before the Nebraska State Railway Commission to obtain a certificate authorizing irregular route transportation of property, the burden of proof is on the applicant to show that the service is or will be required by the present or future public convenience and necessity. If there is any lack of such a showing, the application shall be denied.
2. ———: ———. In determining public convenience and necessity, the controlling questions are whether the operation will serve some useful purpose responsive to public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served as well by applicant without endangering or impairing the operations of existing carriers contrary to the public interest.
3. ———: ———. Where the fitness of the applicant is in issue and evidence both affirmative and negative in nature is presented, this court will not substitute its judgment for that of the Nebraska State Railway Commission if the order of the commission is supported by competent evidence.

Appeal from the Nebraska State Railway Commission. Reversed.

Pilcher, Howard & Hickman, Nelson, Harding & Acklie, and Richard A. Peterson, for appellants.

Clinton & McNish and Martin, Davis, Mattoon & Matzke, for appellee.

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

McCOWN, J.

This is an appeal from an order of the Nebraska State Railway Commission granting a certificate of public convenience and necessity to the applicant authorizing the transportation of house trailers in secondary movements between points and places within a 50-mile radius of Sidney, Nebraska, and between points and places within the said radial area on the one hand, and on the other hand, all points in the State of Nebraska over irregular routes.

The issues presented on the original application were: (1) Whether the proposed service is or will be required by the present or future public convenience and necessity, and (2) whether the applicant is fit, willing, and able to perform the service proposed.

Following the hearing, an examiner's report and recommendation was filed finding that the application should be denied; that the public convenience and necessity does not warrant the granting of the application; and that the evidence presented at the hearing was not a sufficient showing of need. Thereafter, the commission entered its order denying the application and confirming the findings of the examiner. Thereafter, the applicant filed a motion for rehearing and/or reconsideration alleging that on December 4, 1956, the commission entered its order granting to the applicant authority to conduct the following described operations:

"A. SERVICE AND ROUTE OR TERRITORY AUTHORIZED: Wrecked or disabled motor vehicles and house trailers being towed by such vehicles, by winch or tow truck between points and places within a 30-mile radius of Sidney, Nebraska and between points and placed within said radial area on the one hand, and, on the other hand, points and places within the State of Nebraska, over irregular routes.

"B. Used house Trailers in secondary movements between points and places within a 50-mile radius of Sidney, Nebraska, over irregular routes."

The motion further alleged that the applicant, at the time of the hearing on the order of December 4, 1956, understood that the authority to be issued, in fact, authorized the operations described in the present application; that a stipulation was entered at the initial hearing upon his authority prior to the order of December 4, 1956, with all interested parties, and approved by the commission, authorizing said operations; that applicant has conducted continuous operations since December 4, 1956, in accordance with his belief; that the evidence of such past operations under color of authority was excluded or omitted at the hearing held on the instant application, and would have conclusively shown a need for applicant's service; that through mistake or omission, the order entered by the commission on December 4, 1956, failed to authorize applicant to conduct the operations defined in the present application; and that the authority issued by the commission December 4, 1956, in fact, authorizes transportation of house trailers as requested in the instant application, within a 30-mile radius of Sidney, Nebraska.

The applicant in such motion prayed that the commission enter an order granting the authority requested in the present application or, in the alternative, that the matter be set for rehearing on the issues of public convenience and necessity and upon the issue of the correction of the authority granted on December 4, 1956, and for clarification of the existing authority under the order of December 4, 1956; and further prayed for the entry of an order granting him equitable relief in such other manner as the commission might deem necessary, including the right to amend his application in conformity with the allegations contained. Thereafter, a supplemental motion for rehearing or reconsideration was filed alleging that the action of the commission in its order denying the present application erroneously amended and revoked a portion of applicant's authority without notice or hearing.

Oral argument on the motion for rehearing and reconsideration was heard before the commission on April 14, 1964. The commission entered its order reciting that upon due consideration of the motion and supplemental motion for rehearing and/or reconsideration, and the oral argument thereon, and the files and records of the commission herein, it found: That the motion for rehearing and/or reconsideration and the supplemental motion should be sustained; that the order denying the application should be vacated; that the applicant was fit, willing, and able to perform the service; that the proposed service is or will be required by the present or future public convenience and necessity; that the application should be granted; that the certificate of public convenience and necessity under applicant's prior authority should be revoked and canceled and the authority therein consolidated with the authority granted in the instant application; and that a consolidated and clarified certificate of public convenience and necessity should be issued. It thereupon entered an order in accordance with those findings. This appeal followed.

Three witnesses, in addition to the applicant, appeared in support of the application. One witness testified as to one incident in which a driver for one of the protestants, in connection with an interstate movement, damaged a trailer and left it in a position to block the driveway to the trailer court. Another witness described a volume of traffic originating from a former employer; testified that time is an important element in trailer movement; and that he would not use a carrier other than the applicant for secondary moves, but would buy his own truck before using other service. He had never used the service of any of the protesting carriers himself, nor had he needed any trailers moved more than 50 miles from Sidney. The third witness was a trailer house dealer and operator of a trailer court in Kimball, Nebraska. He testified that on initial movements of trailers he does use and is given satisfactory service by

the existing carriers. On secondary movements, he has used only the service of applicant, and of one of the protestants because of his personal acquaintance with the drivers involved. He testified that on unspecified occasions he had called for service and none was available and he was forced to use his own truck. He also testified that because of a bad experience, he will not hire carriers whose drivers he does not know, and that he was getting service about 90 percent of the time.

The evidence of the protestants was that their equipment was idle a substantial part of the time; that they had reserve equipment and that they could and would put on additional equipment if needed; that they were active in soliciting business; that there was not enough business; that they were giving prompt service on all requests; and that an additional carrier in the field would work a financial hardship on existing carriers.

The burden of proof is on the applicant to show that the service is or will be required by the present or future public convenience and necessity. If there is any lack of such a showing, the application shall be denied. § 75-311, R. S. Supp., 1963. The Greyhound Corp. v. American Buslines, Inc., 178 Neb. 9, 131 N. W. 2d 664.

In determining public convenience and necessity, the controlling questions are whether the operation will serve some useful purpose responsive to public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served as well by applicant without endangering or impairing the operations of existing carriers contrary to the public interest. Black Hills Stage Lines, Inc. v. Greyhound Corp., 174 Neb. 425, 118 N. W. 2d 498.

The testimony of the applicant's witnesses here fails to establish a public demand or need as that term has previously been used by this court.

The protestants also assert that the evidence establishes that the applicant has not been shown fit to perform the proposed service. This claim is based upon the

testimony that the applicant on occasion was operating outside the scope of his authority, and in some instances of emergency had connected and disconnected utilities to a mobile home unit contrary to the official towing tariff. In any event, no complaints were filed, nor any investigation instituted by the commission. There was also ample evidence that applicant was fit to perform the service.

Where the fitness of the applicant is in issue and evidence both affirmative and negative in nature is presented, this court will not substitute its judgment for that of the commission if the order of the commission is supported by competent evidence. In re Application of Moritz, 153 Neb. 206, 43 N. W. 2d 603.

It is apparent in this case that the commission's order from which this appeal was taken was based upon some of the facts and allegations in the applicant's motion and supplemental motion for rehearing and/or reconsideration, and the order of the commission as entered has both findings and rulings which can refer only to matters raised in those motions. Yet, except for the motions themselves, there is no record of any kind before us other than the testimony at the initial hearing on the application prior to the entry of the order denying it. The commission had jurisdiction and authority to set aside its order of denial and grant a rehearing. It is also apparent that if some of the allegations made in the motions were established, the order finally entered by the commission would have been proper. Without a record, however, we cannot determine this, nor speculate as to what evidence was before the commission or considered by it.

For the reasons stated, the action of the commission must be and is reversed.

REVERSED.

REDMAN INDUSTRIES, INC., A CORPORATION, APPELLANT, V. MORGAN DRIVE AWAY, INC., APPELLEE.
138 N. W. 2d 708

Filed December 3, 1965. No. 35985.

1. **Motor Carriers.** A common carrier is not liable for loss of cargo during interstate transportation if an act of God is the sole proximate cause to the exclusion of concurrent negligence of the carrier.
2. **Evidence.** When the facts which form the basis of a conclusion cannot be exhibited adequately, an estimate made by a witness who observed them is competent evidence unless it is based on pure speculation.
3. **Appeal and Error.** The overruling of a general objection to a question will not be disturbed on appeal unless the error was obvious.
4. **Evidence.** Exclusion of cumulative evidence is ordinarily discretionary.
5. **Trial.** In argument to the jury the party required first to produce his evidence has the opening. § 25-1107 (6), R. R. S. 1943.

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

Luebs, Tracy & Huebner, for appellant.

Pilcher, Howard & Dustin, for appellee.

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

SMITH, J.

A windstorm destroyed plaintiff's mobile home and contents while defendant, a common carrier, was transporting it in interstate commerce. In this action for damages a jury returned a verdict for defendant. According to plaintiff, the verdict should be vacated because of insufficient evidence, erroneous rulings on admissibility of testimony, and denial of plaintiff's right to begin the argument to the jury.

Plaintiff framed its cause of action in the common law, which excepts an act of God from the causes of loss for which a common carrier is liable. The excep-

tion is qualified by the rule that concurrent negligence of the carrier must be excluded. See, 49 U. S. C. A., § 319; Missouri P. R. R. Co. v. Elmore & Stahl, 377 U. S. 134, 84 S. Ct. 1142, 12 L. Ed. 2d 194. Plaintiff focuses its contention of insufficient evidence on this exception.

The trip was to be made from Grand Island, Nebraska, to Butte, Montana, by truck with the mobile home in tow. The accident occurred near Buffalo, Wyoming, on November 20, 1962, at approximately 9:45 a.m.

The truck was under lease to defendant from Glen Gosnell, who was employed to operate it. This 1958 2-ton Chevrolet weighed 6,000 pounds and had a wheel base of 14 feet, 6 inches. The mobile home weighed 12,390 pounds and measured 50 to 55 feet by 10 feet.

The Chevrolet was modified to pull mobile homes in accordance with regulations of the Interstate Commerce Commission. The hitch included a ball, a coupler, and a welded locking mechanism. Had it broken while the truck was pulling the mobile home, two safety chains secured by a pin would have served to hold the alignment. The truck was fit for service.

Gosnell gave the only eyewitness account of the trip, which had been uneventful until his arrival at Casper, Wyoming, on November 19, 1962. During his overnight stay there he did not inquire what the weather was likely to be, although he had traveled this route many times. It is clear that a truck with a mobile home in tow should not be operated in a wind exceeding 25 miles per hour. Defendant had such a rule, and Gosnell knew it.

When Gosnell resumed the trip at sunrise in clear weather, the wind was under 25 miles per hour. As he drove along, it was not noticeable and the only forecast which he heard over the truck radio was one of snow in Montana. At Buffalo there was less wind, and it subsided as he continued north on U. S. Highway No. 87.

At the top of a hill about 12 miles from Buffalo, Gosnell hurriedly stopped and parked the equipment when he

sighted grass and dust in agitation. Fearing a blow which would take both truck and trailer, he alighted and unhooked the pin of the safety chains; but time was too short for him to disengage the hitch. He then crossed the road and crawled down in the ditch on the west side.

One gust lifted the equipment completely from the ground with a twist which broke the hitch. Another gust swept the trailer over an embankment and through a right-of-way fence. The chassis fell near the embankment, but pieces of the body flew a quarter of a mile. Estimating the velocity of the strongest gust at more than 100 miles per hour, Gosnell thought that releasing the safety chains had saved his truck from damage. After the accident the wind lessened, but it blew strong for an hour.

James C. Ward, a Wyoming Highway Patrol officer in the district since 1952, corroborated some of Gosnell's testimony. During this period the wind damaged only three trailers, and the threat caused him to close the highway to traffic less than twice a year.

Ward's first knowledge of unusual weather on November 20, 1962, was gained from the accident report to him at Buffalo. En route to the scene he first noticed windiness 3 miles from his destination; but farther on the condition was worse—so much so that danger to his automobile crossed his mind when he arrived 45 minutes after the accident. He described the aftermath, attributing the loss to the storm.

Data was obtained from two United States weather stations 158 miles apart, one at Casper and the other 2.5 miles south of the Sheridan post office. On November 20, 1962, at 5 a.m. strong winds generally were expected because of a high-low-pressure system. In its forecast at 6:15 a.m., Sheridan used the word "windy," but it omitted any warning of severe gales. Its hourly velocity readings in miles per hour between 5:57 and 9:56 a.m. indicated winds from 28 to 46 with gusts from 35 to 57.

The peak for 1963 was 66, and a record 84 was set in November 1949. Readings at Casper between 3:55 and 8:55 a.m. showed winds from 21 to 37 with gusts from 35 to 47.

The wind was probably a "shinook" blowing down the eastern slope of the Big Horn Mountains. Such winds, which are commonly known locally, vary from place to place on account of the exposures.

This record presents negligence as a question of fact. The testimony of Gosnell and Ward supports a finding that Gosnell was reasonably attentive to the state of the weather. Removal of the safety chains may not have been negligence. The break in the hitch, the breach in the fence, the rubble—all fortify the conclusion that Gosnell's decision in the emergency was not necessarily unreasonable.

Plaintiff attacks a ruling which permitted Gosnell to estimate the velocity of the strongest gust. To the question it interposed an objection that he had not been qualified as an expert and a general objection to foundation.

Overruling the objection was not error. Wind velocity is a subject upon which a nonexpert witness may testify. See, Kubicek v. Slezak, 119 Neb. 542, 230 N. W. 248, 69 A. L. R. 1166; 2 Jones, Evidence (5th Ed.), §§ 405, 411, pp. 754, 771. When the facts which form the basis of a conclusion cannot be exhibited adequately, an estimate made by a witness who observed them is competent evidence unless it is based on pure speculation. The sufficiency of observation is largely within the discretion of the trial court. Rickertsen v. Carskadon, 169 Neb. 744, 100 N. W. 2d 852.

The objection to foundation was insufficient. The overruling of a general objection to a question will not be disturbed on appeal unless the error was obvious. Sears v. Mid-City Motors, Inc., *ante* p. 100, 136 N. W. 2d 428. See, also, O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123.

The trial court rightly excluded testimony of plain-

tiff's expert that standards of care in the industry required Gosnell to check weather forecasts and not to tow a mobile home in a wind exceeding 25 miles per hour. Gosnell admitted the affirmative duty, but even his testimony was superfluous in view of the negative duty. He and his supervisor both testified to the company rule, and it stands uncontradicted. Exclusion of cumulative evidence is ordinarily discretionary. Klinginsmith v. Allen, 155 Neb. 674, 53 N. W. 2d 77.

Taking up the last contention, we think that the district court properly permitted defendant to open the argument. Section 25-1107 (6), R. R. S. 1943, provides in part: "In argument, the party required first to produce his evidence shall have the opening and conclusion." The pleadings were superseded by a written stipulation which substituted for a formal pretrial order, and causation alone remained in issue. Although at the commencement of the evidence plaintiff read part of the stipulation, which had eliminated all other issues, defendant retained the right to begin the argument. See J. I. Case Co. v. Hrubesky, 125 Neb. 588, 251 N. W. 169.

The record being free from prejudicial error, the judgment is affirmed.

AFFIRMED.

HERBERT W. READ ET AL., TRUSTEES OF THE ESTATE OF A. H. READ, DECEASED, APPELLANTS, V. CITY OF SCOTTSBLUFF, A MUNICIPAL CORPORATION, APPELLEE.

138 N. W. 2d 471

Filed December 3, 1965. No. 35989.

1. **Statutes. A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it and at the same time and in the same action question its constitutionality.**
2. **Constitutional Law: Statutes. An act of the Legislature stating**

the fact of emergency, without stating the nature of, or the grounds constituting the emergency, is sufficient under the provisions of Article III, section 27, of the Constitution of Nebraska.

3. **Statutes.** A determination that a statute should take effect immediately rather than 3 months after adjournment of the session is so obviously a matter of legislative policy, that no court should disregard or question the determination unless, in the manner of its adoption, or in substance, there has been plain violation of some constitutional mandate.

4. **Courts: Statutes.** A court is not at liberty to ignore an erroneous legislative declaration of emergency when the validity of the law depends upon the actual existence of an emergency of a kind which will justify the action taken.

5. **Statutes.** The determination of whether or not an emergency exists which makes it necessary that an act should go into effect immediately is a question for the Legislature, to be conclusively evidenced by a declaration of emergency.

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

Van Steenberg, Winner & Wood, for appellants.

Loren G. Olsson and Marvin L. Holscher, for appellee.

Ralph D. Nelson, Henry L. Holst, Vincent D. Brown, and Arlyss W. Spence, for amicus curiae.

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

MCCOWN, J.

On August 26, 1963, the City of Scottsbluff passed an ordinance annexing certain property, including that of the plaintiffs, to the City of Scottsbluff. The ordinance was enacted under the provisions of L.B. 338, 1963 Legislative Session, and the plaintiffs perfected their appeal to the district court pursuant to section 4 of that act (§ 16-110, R. S. Supp., 1963). The district court found generally for the city and dismissed the plaintiffs' appeal.

The first two assignments of error rest on the contention that L.B. 338 is unconstitutional because it violates due process of law with respect to notice and hearing, and the subject of the bill is not clearly expressed in

the title. The case of Shields v. City of Kearney, *ante* p. 49, 136 N. W. 2d 174, is determinative on these issues. As we stated in that case: "The plaintiffs in this action have availed themselves of the remedy provided by the statute. They seek the benefit of the statute to obtain a determination that the action of the city was not authorized under the statute. They are, therefore, prevented in this action from questioning the constitutionality of the statute under which they have proceeded." A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it and at the same time and in the same action question its constitutionality. Alumni Control Board v. City of Lincoln, *ante* p. 194, 137 N. W. 2d 800.

The only remaining issue is whether or not L.B. 338, 1963 Legislative Session, containing an emergency clause, became effective on the date of its passage and approval, rather than 3 calendar months after the adjournment of the legislative session.

Article III, section 27, Constitution of Nebraska, provides: "No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in case of emergency, to be expressed in the preamble or body of the act, the Legislature shall, by a vote of two thirds of all the members elected to each House otherwise direct." The plaintiffs contend that this language of the Constitution requires a statement in the act of the facts or grounds constituting the emergency, and the mere declaration that an emergency exists is not enough. They also contend that, in any event, the legislative declaration of emergency is not conclusive; that no emergency, in fact, existed; and that the legislative recital as to emergency is subject to judicial review. Both issues are of first impression in this court.

It is quite apparent from an examination of the decisions of other states, that the courts have followed divergent points of view, influenced by the varying language

of the particular constitutional provisions involved. Among states whose constitutional language is almost identical to ours, it has been held that the statement of the fact of emergency is sufficient, and that the ground of the emergency need not be stated. See, Breckenridge v. County School Board, 146 Va. 1, 135 S. E. 693; and the discussion in City of Roanoke v. Elliott, 123 Va. 393, 96 S. E. 819.

In some cases weight has been given to the long-continued use of certain forms of emergency clauses by the Legislature, but there is no evidence before us as to Nebraska legislative practice. Many states have constitutional provisions requiring "setting forth the facts constituting the emergency," or "reasons for the emergency," or similar words or terminology. The words used in our own Constitution read in their ordinary meaning indicate that only the fact of "emergency" need be expressed. The framers of the Constitution, had they intended that an act must express the grounds or nature of the emergency, could have said so.

We, therefore, hold that an act of the Legislature stating the fact of emergency, without stating the nature of, or the grounds constituting the emergency, is sufficient under the provisions of Article III, section 27, of the Constitution of Nebraska.

The second issue here involves the broad question as to whether a legislative determination of emergency is reviewable by the courts. This question has also had divergent judicial consideration. The usual reason advanced for justifying judicial review of emergency acts in the few states which have done so, is that under the constitutional provisions of those states, the Legislature, by merely declaring an act to be an emergency act, destroys the right of referendum. In this state, the right of referendum, under Article III, section 3, of the Constitution of Nebraska, is applicable to "* * * any act or part of an act of the Legislature, except those making appropriations for the expenses of state government or

a state institution existing at the time of the passage of such act." As to "* * * emergency acts or those for the immediate preservation of the public peace, health or safety * * *," the taking effect of the act may not be suspended until the act has been voted on by the electors. An interference with a constitutional delegation of power can hardly be justified on the ground that the right of referendum is materially impaired in Nebraska.

Here the only two plain consequences of enacting a so-called "emergency act" are to make the measure effective upon its passage rather than 3 calendar months after the adjournment of the legislative session at which it was passed, and to prevent the operation of the act from being suspended until after the next general election.

A determination that a statute should take effect immediately rather than 3 months after adjournment of the session is so obviously a matter of legislative policy, that no court should disregard or question the determination unless, in the manner of its adoption, or in substance, there has been plain violation of some constitutional mandate. A court is not at liberty to ignore an erroneous legislative declaration of emergency when the validity of the law depends upon the actual existence of an emergency of a kind which will justify the action taken; but whether an emergency exists which makes it necessary that an act go into immediate effect is a question for the Legislature.

We hold that the determination of whether or not an emergency exists which makes it necessary that an act should go into effect immediately is a question for the Legislature, to be conclusively evidenced by a declaration of emergency.

For the reasons stated, the judgment of the district court was correct and is affirmed.

AFFIRMED.

JOSTEN-WILBERT VAULT COMPANY, APPELLANT, V. BOARD OF EQUALIZATION, BUFFALO COUNTY, NEBRASKA, ET AL., APPELLEES.

138 N. W. 2d 641

Filed December 3, 1965. No. 36003.

1. **Taxation. Ordinarily the valuation by the assessor is presumed to be correct. There is also a presumption that a board of equalization has faithfully performed its official duties, and in making an assessment, acted upon sufficient competent evidence to justify its action.**
2. **———. Evidence that a sale was made at a price different than the value for tax purposes is not sufficient competent evidence to overcome the presumption without proof of the character and circumstances of sale.**
3. **———. The burden of proof is upon a taxpayer to establish his contention that the value of his property has been unlawfully fixed by the county board of equalization in an amount greater than its actual value.**
4. **———. Evidence that a sale of real estate was made at a price less than the value for tax purposes is not ordinarily sufficient to establish that the value of the property has been unlawfully fixed by the county board of equalization.**

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

Dier & Ross and Marti, O'Gara & Dalton, for appellant.

Andrew J. McMullen and Duane L. Hubbard, for appellees.

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

MCCOWN, J.

The plaintiff has appealed from a judgment of the district court refusing to change the 1964 tax valuation of plaintiff's real estate.

The real estate consists of aproximately 10 acres of ground with a tile building of 13,040 square feet, located on the westerly edge of Kearney, on a graveled road several blocks from U. S. Highway No. 30. The build-

ing was constructed in 1952 by the Greater Kearney Corporation, a local civic promotional body with the objective of attracting industry to Kearney. After it was built in 1952, it stood vacant for several years, and later was leased to the Rockwell Company for a term of 10 years. This lease had not expired at the time of the hearing. The Rockwell Company occupied the building and used it as a school for its employees and later for storage purposes. In 1962, after the Greater Kearney Corporation had disposed of all of the residences that it owned, the board voted to dispose of this property and liquidate the corporation. The property was listed for sale with several real estate men in Kearney, and various efforts were made to sell the property. It was sold to plaintiff in January 1964 for $27,000. The testimony of the secretary of the Greater Kearney Corporation was that when the offer of $27,000 was presented: "* * * I took it up with the board members of the Greater Kearney Corporation and I had to show them whether we could liquidate and pay off all the stockholders with that amount. After considerable figuring I came to the conclusion that we could liquidate, and they approved the offer." He also testified that, in his opinion, in January 1964, $27,000 was the best price they could get for this building and property. A real estate and insurance man testified: "Well, I concluded that we were not going to be able to sell it to the Josten-Wilbert Vault Company for what we wanted to get for it, so Mr. Wittera and I sat down and figured out how little we could take for the building and still liquidate the Greater Kearney Corporation. * * * We offered it to them for $27,000 and they bought it." The same witness also testified that he did not know of anybody else who would have paid in January 1964, more than $27,000, and in response to the question: "Do you have an opinion as to whether this price was the most you could get for it?" answered, "I am quite sure that it was the maximum dollars that could be obtained for the build-

ing at that time." No witness for the plaintiff was ever asked, nor did any testify, as to his opinion of the actual value or the fair market value of the property. The prior tax valuation was $59,360 and on protest, the board of equalization reduced the valuation to $45,825.

It is the plaintiff's basic contention that a sale price, under the facts here, establishes "actual value" for tax purposes. We cannot agree.

Ordinarily the valuation by the assessor is presumed to be correct. There is also a presumption that a board of equalization has faithfully performed its official duties, and in making an assessment, acted upon sufficient competent evidence to justify its action. Collier v. County of Logan, 169 Neb. 1, 97 N. W. 2d 879; Matzke v. Board of Equalization, 167 Neb. 875, 95 N. W. 2d 61.

We have held that the presumption of correctness disappears if there is competent evidence to the contrary, and thereafter the reasonableness of the valuation is one of fact to be determined by the evidence. Richards v. Board of Equalization, 178 Neb. 537, 134 N. W. 2d 56. Evidence that a sale was made at a price different than the value for tax purposes is not sufficient competent evidence to overcome the presumption without proof of the character and circumstances of sale. There is no magic formula or mathematical yardstick by which actual value can be precisely determined. No single factor or element of value standing alone is conclusive. While a sale price, in some circumstances, may be a very important factor in determining actual value or fair market value, it is only evidence to be considered along with other evidence. "Sale price" is not synonymous with actual value or fair market value.

The evidence is undisputed that the assessor considered all elements of value set out in section 77-112, R. R. S. 1943. A detailed and itemized appraisal is in evidence. The evidence was undisputed that both the assessor and the board of equalization knew that plaintiff's property had been sold for $27,000, and that they

did not think the sale price reflected actual value. The plaintiff, in cross-examination, brought out testimony with respect to other buildings for purposes of comparison. Their type and general construction were similar, although their location, equipment, and size were different. The valuation for tax purposes of one of these buildings was $4.28 per square foot, and of another $4.15; while the plaintiff's building was $3.12 per square foot. Evidence was brought out showing that the other properties had been sold for approximately their tax valuation, while plaintiff's property had been sold at a substantially lower figure than the tax valuation. It is contended that this evidence established that the tax valuation on plaintiff's property was too high. It might be just as logically argued, however, that it established that the sale price on plaintiff's property was too low. The evidence was uncontradicted that they were all valued for taxation on the same basis, but there was no evidence whatever that the circumstances of the sales were the same.

It has consistently been held that the burden of proof is upon a taxpayer to establish his contention that the value of his property has been unlawfully fixed by the county board of equalization in an amount greater than its actual value. Newman v. County of Dawson, 167 Neb. 666, 94 N. W. 2d 47. Evidence that a sale of real estate was made at a price less than the value for tax purposes is not ordinarily sufficient to establish that the value of the property has been unlawfully fixed by the county board of equalization. To the extent that a sale is motivated in part by considerations other than the value of the property sold, the sale price carries even less weight as evidence of actual value. Under the evidence in this case, the plaintiff has failed to sustain the burden of establishing that the actual value of its property was less than that fixed by the board of equalization.

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

AFFIRMED.

BOSLAUGH, J., dissenting.

I respectfully dissent from the opinion of the majority of the court in this case which holds that the evidence concerning the sale of the property was not sufficient to overcome the presumption that the valuation fixed by the board of equalization was correct.

The property involved in this case was originally offered for sale in 1962 at $32,000. It was offered through a multiple listing with all of the local real estate men. Prospects were contacted and the property was advertised in an Omaha, Nebraska, newspaper. Mr. A. C. Wittera, a real estate broker, testified that he tried to sell it for about 2 years but was unsuccessful. In 1963, the property was offered to the plaintiff at $32,500, later at $30,000, and eventually sold at $27,000.

Evidence of sale price alone may not be sufficient to overcome the presumption that the board of equalization has valued the property correctly. But where, as in this case, the evidence discloses the circumstances surrounding the sale and shows that it was an arm's length transaction between a seller who was not under compulsion to sell and a buyer who was not compelled to buy, it should receive strong consideration.

The property concerned here is located at the edge of town and off the highway. Its principal use seems to be for storage. The witnesses for the defendant attempted to compare it with a building constructed upon land which is located upon a highway and valued proportionately at more than 10 times that of land upon which the plaintiff's building is constructed. It would appear that too much emphasis has been placed upon reproduction cost and sufficient consideration not given to relative location and desirability.

I am authorized to state that Judge Brower and Judge Smith concur in this dissent.

ROBERT D. MORFORD, APPELLANT, V. LIPSEY MEAT COMPANY, INC., A CORPORATION, APPELLEE.
138 N. W. 2d 653

Filed December 10, 1965. No. 35997.

1. **New Trial: Appeal and Error.** An order granting a new trial in a civil action is appealable. § 25-1315.03, R. R. S. 1943.
2. **Appeal and Error.** A notice of appeal need not specifically describe the judgment appealed from in order to comply with section 25-1912, R. S. Supp., 1963.
3. **Negligence.** A negligent defendant may be liable for bodily harm to plaintiff, although the injury is greater than usual due to a physical condition which predisposed plaintiff to the injury.
4. **Negligence: Damages.** In a personal injury action future loss of earnings is not necessarily measured by plaintiff's calling or income at the time of injury.

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

Martin A. Cannon, for appellant.

Gaines, Spittler, Neely, Otis & Moore, for appellee.

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

SMITH, J.

This is a negligence action in which a jury awarded $20,000 for personal injuries to plaintiff. The district court sustained defendant's motion for a new trial. On appeal defendant argues that the interlocutory nature of the order for new trial and a defective notice necessitate dismissal of the appeal and that the jury awarded excessive damages appearing to have been given under the influence of passion and prejudice.

An order granting a new trial in a civil action is appealable. § 25-1315.03, R. R. S. 1943. Its interlocutory nature is immaterial if the new trial will involve reexamination of an issue of fact. See, § 25-1142, R. R. S. 1943; Otteman v. Interstate Fire & Cas. Co., Inc., 171 Neb. 148, 105 N. W. 2d 583.

Plaintiff filed notice of his intention to appeal the cause to this court, but he omitted specific description of the order appealed from. "The proceedings to obtain a reversal * * * of * * * orders (granting new trials) * * * shall be by filing * * * a notice of intention to prosecute such appeal * * *." § 25-1912, R. S. Supp., 1963. The statute was designed to simplify the steps which give this court jurisdiction of the cause and all parties in the district court. Madison County v. Crippen, 143 Neb. 474, 10 N. W. 2d 260. The text of the notice conveyed an intention too clear for misunderstanding. It complied with the statute.

In the general verdict the jury must have included a substantial amount for permanent injury to plaintiff's back and for loss of future earnings. The folly is said to have been the disregard of plaintiff's preexisting physical condition and of his meager preaccident income.

Plaintiff, who was approaching 43 years of age with a negative medical history at the time of the accident, was a self-employed concrete and block mason. He also constructed homes through subcontractors, except that he himself physically performed the masonry. He lifted concrete blocks which weighed 36 pounds apiece, and he moved wheelbarrows which contained concrete mixture. The labor was hard.

On October 10, 1962, defendant's backing truck struck plaintiff's left knee. The blow spun him around and his back contacted a post. Feeling leg pain, he promptly complained to his physician, a general practitioner.

Two days later plaintiff experienced pain in the lower right side of his back, which had not been under stress in the interim. He tried to work until November 12, 1962, when he revisited his doctor, who diagnosed lumbosacral strain. One of several surgeons who later examined plaintiff thought that there was no serious orthopedic involvement.

From an examination on March 26, 1964, Dr. W. R. Hamsa, an orthopedic surgeon, found that the lumbar

spine showed close to 75 percent of normal motion. Tests produced pain in the lumbosacral joint, in the midline one space above, and over the buttock-muscle attachment on the right side.

X-rays showed an incomplete fusion of the first sacral vertebra with the rest of the sacrum. Short muscles in front of the thigh caused an abnormal pelvic tilt. This congenital or developmental condition made the spine susceptible to injury.

Dr. Hamsa diagnosed chronic strain of the lumbosacral joint and the left sacral-spinalis muscle. Concluding that plaintiff had a decreased ability to bend, to lift weights, or to carry objects, he estimated a 10 to 15 percent permanent partial disability of the back as a whole.

Dr. Hamsa related the origin of the strain to the accident. As a rule, such a congenital condition will not cause disability in the absence of stress. If impairment had resulted from hard labor, he would have expected slightly different evidence with respect to areas of tenderness remaining at the late date of his examination.

The evidence sustains a finding that the accident caused plaintiff's disability. Prior to that time the congenital or developmental condition neither produced pain nor impaired function. A negligent defendant may be liable for bodily harm to plaintiff, although the injury is greater than usual due to a physical condition which predisposed plaintiff to the injury. See Nownes v. Hillside Lounge, Inc., *ante* p. 157, 137 N. W. 2d 361.

Past earnings, which were shown in the income tax returns of plaintiff, were small, varying from $1,038.40 to $4,238.56 annually between 1959 and 1963. The sums represented total income without allocation between subcontracting and physical labor, but plaintiff testified generally that the subcontracting business had not been successful, a conclusion fairly obvious. During seasonable weather he labored 8 hours or more daily as a mason, usually attending to the subcontracting business

in the evening. The prevailing hourly wage scale for a concrete and block mason rose from $3.50 or $3.80 in 1961, to $4.40 in 1964.

From January 1964 to the trial plaintiff netted $360 monthly for doing light maintenance work in rental units of a real estate company. His income was greater than it had been before the accident. He desisted from masonry because of physical injury, but he desisted from housebuilding because of financial injury.

Future loss of earnings is not necessarily measured by plaintiff's calling or income at the time of injury. See Jacobsen v. Poland, 163 Neb. 590, 80 N. W. 2d 891. The tax returns challenged indirectly plaintiff's skill and industry in masonry, but the jury may have seen consequences of business risk. Plaintiff answered incorrectly some material questions, but his credibility went merely to the weight to be given his testimony by the jury. The verdict bears a reasonable relationship to the damage, and it should be upheld on appeal. See Hert v. City Beverage Co., Inc., 167 Neb. 557, 94 N. W. 2d 27.

The order of the district court sustaining the motion for a new trial and setting aside the verdict of the jury is reversed and the cause is remanded with directions to reinstate the verdict and judgment thereon.

REVERSED AND REMANDED WITH DIRECTIONS.

WALTER A. KOEPPLIN, APPELLANT, V. PFISTER HYBRID COMPANY OF FREMONT, NEBRASKA, A CORPORATION, APPELLEE.

138 N. W. 2d 637

Filed December 10, 1965. No. 35998.

1. **Trial: Equity.** When a defendant in an action in equity moves for a dismissal at the close of plaintiff's evidence for want of proof to support a judgment, he admits the truth of the evidence and any reasonable inferences deducible therefrom.
2. **Corporations.** A corporation must act through its officers and

agents, and the presumption is that their acts are authorized by the corporation.

3. **Corporations: Evidence.** While the minutes of the meetings of the board of directors of a corporation are the best evidence of its affirmative actions, parol testimony by a person present at a directors' meeting is competent to prove action actually taken though not recorded in the minutes.
4. **Reformation of Instruments.** In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory; and, until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties.
5. **Reformation of Instruments: Equity.** Equity will decree the reformation of a contract only for fraud, mutual mistake, or inequitable conduct.

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

Richards, Yost & Schafersman, for appellant.

Sidner, Gunderson, Svoboda & Schilke, for appellee.

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

CARTER, J.

This is an action by Walter A. Koepplin on his written contract of employment with the Pfister Hybrid Company of Fremont, Nebraska, praying for the reformation of the contract and an accounting of the amounts due thereon. At the close of plaintiff's evidence, the trial court sustained a motion to dismiss for insufficiency of the evidence to establish a cause of action. The plaintiff has appealed.

The organization of the defendant company grew out of the following circumstances: In 1939, Pfister Associated Growers was organized in the State of Illinois. Each stockholder of the corporation had a business of his own for the purpose of producing, processing, and distributing hybrid seed corn and related products. Each stockholder had a contract with Pfister Associated Growers for the production of seed corn for sale to the

latter in accordance with estimates and allocations previously agreed upon. Each stockholder, who is in fact a grower, usually sells to Pfister Associated Growers all seed grown except that needed in the local territory. At the times here involved, Pfister Associated Growers had 24 stockholders or growers.

In 1944, 10 of these growers organized the defendant company with its principal place of business at Fremont, Nebraska. The company entered into a written contract of employment with the plaintiff to organize and manage the defendant company. Plaintiff served as manager from August 1, 1944, until October 29, 1962, under several successive written contracts of employment.

The last contract was entered into on August 1, 1958. Under this contract plaintiff was to organize and manage the sales, production, and distribution of Pfister hybrid seed corn and hybrid sorghum seed in accordance with the instructions and policies of the company formulated by its board of directors. As compensation plaintiff was to receive $800 per month and 25 percent of the company profits based on the following method of accounting: The wholesale cost of seed from stockholders was to be established by the board of directors, but not to exceed 52½ percent of the established retail price of regular hybrids including cost of bags and transportation. Unsold corn was to be figured on inventory at the regular market price. Net profit was to be determined after all encumbrances and expenses were deducted but not including capital stock taxes, excess profits tax, or income taxes. The contract was terminable by either party on giving notice by wire or in writing.

The defendant was a sales organization and was not itself a producer. It was the duty of the manager to estimate the needs for the following year and after approval by the board of directors to make allotments to and contracts with stockholder-growers for the amount

and types of hybrid corn and sorghum seed needed. The seed so produced was paid for by the defendant corporation and sold to local customers and the Pfister Associated Growers.

It appears to have been the policy of the company to have a carryover of about 21,000 bushels of seed corn each year. In 1960, 1961, and 1962, sales fell off, due largely to additional restrictions on corn ground allotments by the government. This resulted in a larger carryover of corn and a continuing increase in the amount of corn shown by the inventory. The fact that this carryover corn was paid for at the contract price of hybrid seed corn and inventoried at the market price of ordinary corn, indicated such a loss as to deprive plaintiff of a profit bonus that he would otherwise have. The contract of employment provides that in determining the profits of the corporation for the purpose of determining the amount of plaintiff's bonus, the carryover seed shown in the inventory was to be carried at the regular market price irrespective of its cost. It cannot be questioned that if the carryover seed corn was inventoried at its cost price rather than at the regular market price of corn, a substantial profit would be shown which would entitle plaintiff to 25 percent thereof as a bonus. The trial court applied the terms of the employment contract according to its terms after holding that no basis existed for reforming it.

The defendant is a corporation controlled by its board of directors. A corporation must act through its officers and agents, and the presumption is that their acts are authorized by the corporation. The acts of such board must ordinarily be established by the minutes of the board of directors authorizing the questioned actions. But authorized acts of a board of directors may not be disavowed merely because the authorization does not appear in its minutes. While the minutes of a corporation's board of directors are the best evidence of its affirmative actions, parol testimony by a person present

at the meeting to prove action actually taken but not recorded in the minutes is competent. Omaha Wool & Storage Co. v. Chicago G. W. R.R. Co., 97 Neb. 50, 149 N. W. 55, Ann. Cas. 1917A 358.

It is the contention of the plaintiff in this case that the question of the effect of carrying inventoried hybrid seed at the regular market price upon his bonus was discussed with officers and directors of the defendant company in and out of regular board meetings, and that it was agreed that plaintiff's bonus would be paid when the carryover seed appearing on the inventory was sold. There is evidence in the record that such conversations took place, but the controversy results from a difference in construction of the language used. Defendant contends that the evidence meant that although profits were reduced in years when the carryover seed was in greater quantity, the profit would accrue when it was subsequently sold as seed corn; in other words, that it merely delayed the profit accrual. This evidence assumed that plaintiff would continue in the employ of the company and would be in a position to get his bonus when the holdover seed would be sold as hybrid seed corn. But in the instant case the plaintiff was notified on July 31, 1962, that his employment contract would not be renewed. He did, however, continue as manager until October 29, 1962, a date prior to the sale of any holdover corn.

It is assigned as error that the trial court unduly restricted the evidence of conversations between the plaintiff and the board of directors which the plaintiff contends resulted in an agreement modifying his employment agreement of August 1, 1958. As we have heretofore stated there was some evidence of conversations between the plaintiff and the officers and directors of the corporation to the effect that plaintiff would get his bonus when inventoried seed was sold. Obviously this was true if it resulted in profit to the company. But when plaintiff's employment contract was not renewed

on August 1, 1962, at which time the inventoried corn had not been sold, the plaintiff seeks to have the original written contract "amended and completed and clarified as shown by the subsequent oral agreements to pay to the plaintiff 25% of the profits as a result of the reduction of the inventory."

The minutes of the board of directors do not show that a new contract was made or the old one modified. There is no evidence or offer of proof in this record that the board of directors entered into any new agreement or agreed to modify the written agreement of August 1, 1958, by action not shown by the minutes. There is no evidence of mistake, fraud, or inequitable conduct in the making of the contract. The most that can be said is the evidence shows that officers and directors of the corporation stated the profits and bonus would normally follow as the inventory was reduced. This was no misrepresentation of fact, even though it did not normally follow because of plaintiff's discharge as manager before the inventoried seed could be sold. The discharge of the plaintiff possibly created an unanticipated condition. The contract provided that either party could terminate the contract by notice at any time. The contingency was apparent in the contract when it was signed and, in the absence of an enforcible modification, it is enforcible according to its terms.

The contract of employment is not indefinite or ambiguous. There is no evidence of fraud, mistake, or inequitable conduct. The record does not disclose any evidence or offer of proof tending to support an agreement by the board to modify the contract of employment.

In order to warrant the reformation of a written contract, the burden of proof is on the party requesting such relief to show his right thereto by evidence that is clear, convincing, and satisfactory. Failing this, the written contract must stand as made. Lortscher v. Winchell, 178 Neb. 302, 133 N. W. 2d 448.

The controversy, reduced to a minimum, is one where

the plaintiff became the manager of the corporation under a written contract for a fixed salary and a percentage of the profits. It was the manager who estimated the amount of production to meet future needs, subject to the approval of the board of directors, which it always gave. The basis of determining the profit was by an accounting method fixed by the contract. The contract was terminable at the end of any fiscal year by written notice by either party. The fact that when the plaintiff's contract was not renewed and there was a large quantity of carryover seed shown by the inventory does not have the effect of changing his contract. It is true that if plaintiff had continued as manager and if he had sold the holdover seed, he would have received 25 percent of any profit resulting therefrom. Because his contract was terminated at a time when the inventory was high, he seeks a reformation of his contract to give him a bonus on unsold corn which is not due until sold at a price producing a profit. For ought the evidence shows the inventoried corn may never be sold at a profit. In the absence of a subsequent agreement, a high inventory, operating to his disadvantage, does not alone afford a basis for reformation of the contract.

We conclude, as did the trial court, that the evidence will not sustain an action for the reformation of the contract, and that it must be enforced as made.

AFFIRMED.

PAUL CHRISTENSEN, APPELLANT, V. EDWIN A. BOSS ET AL., APPELLEES.

138 N. W. 2d 716

Filed December 10, 1965. No. 36009.

1. **Corporations: Constitutional Law.** It is well settled that a corporation may be dissolved by a surrender of its charter with the consent of the sovereignty creating it, and such a dissolution is not invalid as impairing the obligation of the contracts of the corporation with third persons.

2. **Corporations.** The surrender of a charter can be made only by some formal, solemn act of the corporation, and will be of no avail until accepted by the government. There must be the same agreement of the parties to dissolve that there was to form the compact. It is the acceptance which gives efficacy to the surrender.
3. ———. Where a corporation has had its charter forfeited and its legal existence terminated by dissolution in law, it is no longer a corporation, either de jure or de facto, and such fact may be shown in any case in which the existence of the corporation is properly in issue, and by private individuals as well as by the state, and such dissolution may be shown in a collateral proceeding.
4. **Corporations: Actions.** Where a corporation has in fact been dissolved and no longer exists as a legal entity, the rule of its incapacity to sue or be sued applies regardless of the mode of dissolution whether by judicial decree or otherwise. In the absence of statutory provisions to the contrary no action at law can be maintained by or against it as a corporate body or in its corporate name.
5. **Corporations.** By statute in this state, section 21-186, R. R. S. 1943, a corporation's existence is prolonged for 5 years after dissolution for the purpose of prosecuting or defending suits by or against it and of enabling it to wind up its affairs as stated therein.
6. **Corporations: Actions.** Where a statute continues the existence of a corporation for a certain period after its dissolution for the purpose of prosecuting and defending suits, etc., the corporation becomes defunct upon the expiration of such period, at least in the absence of a provision to the contrary, so that no action can afterwards be brought by or against it, and must be dismissed.
7. **Administrative Law: Judgments.** The order or determination of an administrative body acting with jurisdiction and under authority of law is not subject to collateral attack in the absence of fraud or bad faith.
8. **Corporations.** Section 21-186, R. R. S. 1943, does not distinguish between matured and contingent claims. The section is a limitation on the existence of the corporation itself.

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

Sidner, Gunderson, Svoboda & Schilke, for appellant.

Spear, Lamme & Simmons, for appellees.

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

BROWER, J.

Paul Christensen, plaintiff and appellant, brought this action against Edwin A. Boss and Pathfinder Hotel Company, defendants and appellees, in the district court for Dodge County, Nebraska. The defendants each separately appeared specially and challenged the jurisdiction of the court over their respective persons. Each special appearance was sustained by the trial court and the action dismissed.

From an order overruling his motion for a new trial, the plaintiff appeals to this court. The plaintiff does not assign error to the trial court in sustaining the special appearance of Edwin A. Boss and the sole question before us concerns the propriety of the trial court's ruling on the special appearance of the Pathfinder Hotel Company.

Plaintiff's petition alleges he is the owner of the premises on which a hotel, known as the Pathfinder Hotel, is located in Fremont, Nebraska. The action is based on a lease under which the plaintiff through various assignments and extensions asserts the right of lessor and the duties of defendants Edwin A. Boss and Pathfinder Hotel Company are fixed as lessees. Plaintiff alleges the lease required defendants to maintain the leasehold property and the furniture and fixtures thereof in good repair, which provisions were breached by defendants. Plaintiff alleges that in 1958, through false representations of the defendants as to the condition of the premises and responsibility of the third parties named Calder, his consent was obtained to the assignment of the lease to the Calders although the defendants remained liable on the covenants thereof. Defendants had obtained a conditional sales contract on furniture in the hotel from the Calders and defendant Boss claimed some lien thereunder. Plaintiff alleges that 7 months' rent was

in default, and that it was necessary for the court to determine the amount due on the lease and decree it to be a lien on the personal property in the hotel as provided in the plaintiff's lease superior to any lien of the defendants. It alleges the defendant Boss has attempted a dissolution of defendant Pathfinder Hotel Company but the claimed dissolution is ineffective and incomplete. Plaintiff prays for specific performance of the lease contract, for a determination that the dissolution of the defendant company is ineffective to relieve it of its obligation, and of the rent due and the priority of liens, and for the appointment of a receiver.

Plaintiff contends that the court erred in sustaining the special appearance and dismissing the action and that its ruling is contrary to law.

The summons for the Pathfinder Hotel Company dated May 5, 1964, was directed to the sheriff of Dodge County and from the return thereto it purports to have been served by leaving a copy at the last usual place of business of the defendant, no other person designated in section 25-515, R. R. S. 1943, providing for service on dissolved corporations being found in that county.

The special appearance on behalf of the defendant was filed by Donald A. Boss who appeared on behalf of the defendant company and as amicus curiae. It states that the corporation had been dissolved by the Secretary of State on November 17, 1958, and had no legal existence.

The special appearance was supported by an affidavit of Donald A. Boss who was secretary of the defendant Pathfinder Hotel Company, a Nebraska corporation, prior to November 19, 1958, the contents of which are here summarized. It avers that pursuant to a previous contract of sale the personal property in the hotel building owned by the plaintiff and previously operated by the defendant company was turned over to the Calders and the lease on the hotel property assigned to them prior to March 1, 1958. The defendant discontinued doing business in Fremont, Dodge County, Nebraska, prior

to March 1, 1958, and has done no business therein since. The registered office and agent of the defendant was on February 7, 1957, changed from Fremont, Nebraska, to that of the agent of the defendant company John G. Papineau at Omaha, Nebraska, which change was registered in the Secretary of State's office. On November 17, 1958, a certificate of dissolution of the defendant company was filed and recorded in the office of the Secretary of State of Nebraska. A copy of the certificate of the Secretary of State, showing the filing and recording of the dissolution, was attached. The notice of dissolution was published in the Daily Record of Omaha, Nebraska, for 3 consecutive weeks ending December 10, 1958. A copy of the notice which included a statement of assets and liabilities and the names of the persons who would manage the corporation and distribute its assets, with the affidavit of publication by the manager of the paper, is attached. A copy of this notice and affidavit was filed in the office of the county clerk of Douglas County on December 17, 1958, and a like copy with the Secretary of State. On November 3 and 4, 1958, letters were sent to the plaintiff and another who then had an interest in the premises, notifying them of the intended dissolution. At or prior to its dissolution all of the assets of the defendant company were assigned to the Boss Hotel Company, the sole stockholder, a Delaware corporation, which holds any lien rights in the property mentioned by plaintiff. After November 17, 1958, the defendant company did no business in Nebraska.

The procedure to be followed to effect voluntary dissolution of a corporation as it existed at the time under consideration is set out in the original section 21-183, R. R. S. 1943. It sets forth the various steps to be taken and for notice to be given preliminary to holding a meeting of the stockholders of the corporation to vote on a resolution of dissolution submitted to them by the board of directors. It provides that if two-thirds of the stockholders assent in writing to the dissolution, such consent

with the names and residences of the directors and officers and a list of the stockholders shall be filed in the office of the Secretary of State. He, upon being satisfied by due proof that these requirements have been complied with, shall issue a certificate that such consent has been filed and on the issuance of this certificate and proof of publication of the notice required in section 21-1,147, R. R. S. 1943, has been filed, the corporation shall be dissolved.

Section 21-1,147, R. R. S. 1943, provides in part: "Whenever any corporation is dissolved, notice of the dissolution thereof and the terms and conditions of such dissolution and the names of the persons who are to manage the corporate affairs and distribute its assets and their official title, with a statement of the assets and liabilities of the company, shall be published three successive weeks in some legal newspaper of general circulation near the principal place of business of said corporation. Proof of publication of any of the foregoing required notices shall be filed in the office of the county clerk of the county in which the corporation is at that time maintaining its principal place of business in this state, and in the office of the Secretary of State."

In 19 Am. Jur. 2d, Corporations, § 1591, p. 956, that text states: "It is well settled that a corporation may be dissolved by a surrender of its charter with the consent of the sovereignty creating it, and such a dissolution is not invalid as impairing the obligation of the contracts of the corporation with third persons. * * * The surrender of a charter can be made only by some formal, solemn act of the corporation, and will be of no avail until accepted by the government. There must be the same agreement of the parties to dissolve that there was to form the compact. It is the acceptance which gives efficacy to the surrender. Consent of the state is sometimes given by general statute." Cited cases by the text include Shapard v. Lesser, 127 Ark. 590, 193 S. W. 262, 3 A. L. R. 247.

In 16A Fletcher, Cyclopedia Corporations (Perm. Ed.), § 8025, p. 125, it is stated: "Under the statutes in all the states dissolution may be effected by action of the stockholders and without resort to the courts. This is ordinarily done by vote of the required number of stockholders, at a meeting properly called, adopting a resolution favoring the dissolution and later filing the same, or written consent to dissolution, with the proper state officer, whereupon a certificate of dissolution or other required certificate is issued and published, where publication is made necessary by the statute."

Where a corporation has had its charter forfeited and its legal existence terminated by dissolution in law, it is no longer a corporation, either de jure or de facto, and such fact may be shown in any case in which the existence of the corporation is properly in issue, and by private individuals as well as by the state, and such dissolution may be shown in a collateral proceeding. See, 16A Fletcher, Cyclopedia Corporations (Perm. Ed.), § 7973, p. 18; Dobson v. Simonton, 86 N. C. 492; Bonfils v. Hayes, 70 Colo. 336, 201 P. 677; National Bank v. Colby, 88 U. S. 609, 22 L. Ed. 687; 48 Iowa L. Rev. 1006.

At common law a corporation's capacity to sue or be sued terminates when the corporation is legally dissolved. See, 16A Fletcher, Cyclopedia Corporations (Perm. Ed.), § 8142, p. 311; Beasley v. Fox, 173 F. 2d 920; Leiserson & Adler, Inc. v. Keam (Ky.), 266 S. W. 2d 352; In re National Surety Co., 286 N. Y. 216, 36 N. E. 2d 119.

Where a corporation has in fact been dissolved and no longer exists as a legal entity, the rule of its incapacity to sue or be sued applies regardless of the mode of dissolution whether by judicial decree or otherwise. See, 16A Fletcher, Cyclopedia Corporations (Perm. Ed.), § 8142, p. 315; MacAffer v. Boston & Maine R.R. Co., 268 N. Y. 400, 197 N. E. 328. In the absence of statutory provisions to the contrary no action at law can be maintained by or against it as a corporate body or in its corporate name. See, 16A Fletcher, Cyclopedia Corpora-

tions (Perm. Ed.), § 8142, p. 312; Peoria Engraving Co. v. Streator Cold Storage Door Co., 221 Iowa 690, 266 N. W. 548; Garrett v. Pilgrim Mines Co., 47 Idaho 595, 277 P. 567; Meramec Spring Park Co. v. Gibson, 268 Mo. 394, 188 S. W. 179; Pendleton v. Russell, 144 U. S. 640, 12 S. Ct. 743, 36 L. Ed. 574.

By statute in this state, section 21-186, R. R. S. 1943, a corporation's existence is prolonged for 5 years after dissolution for the purpose of prosecuting or defending suits by or against it and of enabling it to wind up its affairs as stated therein. It further provides that as to an action, suit, or proceeding brought before dissolution or within 5 years thereafter, the corporation shall *only* for the purposes of such action, suit, or proceeding be continued beyond the 5-year period. Section 8144, p. 325 of 16A Fletcher, Cyclopedia Corporations (Perm. Ed.), states: "It is generally held, that where a statute continues the existence of a corporation for a certain period after its dissolution for the purpose of prosecuting and defending suits, etc., the corporation becomes defunct upon the expiration of such period, at least in the absence of a provision to the contrary, so that no action can afterwards be brought by or against it, and must be dismissed." Many cases are cited, including Ruthfield v. Louisville Fuel Co., 312 Ill. App. 415, 38 N. E. 2d 832; Boston Tow Boat Co. v. Medford Nat. Bank, 228 Mass. 484, 117 N. E. 928; Maine Shore Line R.R. Co. v. Maine Central R.R. Co., 92 Me. 476, 43 A. 113; and O'Neill v. Continental Illinois Co., 341 Ill. App. 119, 93 N. E. 2d 160. Various decisions of courts exist as to who should raise the question of the nonexistence of a corporation. Some have permitted it to be raised by the corporation itself although this implies its existence for the very purpose of the pleading. Others have admitted such a plea by the persons served or by a corporate officer, a receiver, or by an attorney suggesting it, or by an amicus curiae. See, 9 Fletcher, Cyclopedia Corporations (Perm. Ed.), § 4531, p. 434; First National Bank

v. Colby, *supra;* Kelley v. Mississippi Cent. R. Co., 1 F. 564; Callender v. Painesville & Hudson R.R. Co., 11 Ohio St. 516; Morgan v. New York Nat. Bldg. & Loan Assn., 73 Conn. 151, 46 A. 877; Combes v. Keyes, 89 Wis. 297, 62 N. W. 89, 27 L. R. A. 369, 46 Am. S. R. 839; Thornton v. Marginal Freight Ry. Co., 123 Mass. 32. In the proceeding before us the special appearance was filed by an amicus curiae shown by the affidavit to be its secretary at the time of its dissolution. We think he was a proper person to make such an appearance.

Plaintiff here points out no insufficiency in the certificate of the Secretary of State showing the dissolution. Neither is any issue raised as to the contents of the notice published as to its dissolution. He does contend that the dissolution was not proper because it should have been effected in Dodge County, Nebraska. He contends that this was the last place the corporation had its place of business and that its articles of incorporation so stated and were never lawfully changed in that respect. Because of this he urges the notice of dissolution should have been published in the Fremont papers, under section 21-1,147, R. R. S. 1943, and that the Daily Record of Omaha, Nebraska, was not a newspaper of general circulation near the principal place of business of said corporation. He further maintains the certificate of dissolution and the affidavit of publication of the notice of dissolution should have been filed in the county clerk's office of Dodge County under the last-mentioned section. All of these matters urged by the plaintiff amount to a collateral attack on the dissolution of the corporation by the Secretary of State. In a judicial proceeding the order of dissolution cannot be attacked collaterally on grounds not affecting the jurisdiction of the court to make the decree. See, 19 C. J. S., Corporations, § 1693, p. 1460; 16A Fletcher, Cyclopedia Corporations (Perm. Ed.), § 8017, p. 108; Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P. 335. The force of these authorities may be somewhat blunted in the present case because of the

general rule that a judgment of a court having jurisdiction generally cannot be attacked collaterally, but we think the same rule applies to the dissolution by the Secretary of State. The order or determination of an administrative body acting with jurisdiction and under authority of law is not subject to collateral attack in the absence of fraud or bad faith. See, 73 C. J. S., Public Administrative Bodies and Procedure, § 146, p. 479; In re Application of Hvidsten (N. D.), 72 N. W. 2d 524; State ex rel. Board v. Cole, 215 Ind. 562, 20 N. E. 2d 972; Industrial Commission of Arizona v. J. & J. Const. Co., 72 Ariz. 139, 231 P. 2d 762. In the present case no counter showing was made to that filed in support of the special appearance. Neither does the plaintiff's petition allege fraud in the procurement of the certificate of dissolution but only asserts it was ineffective and incomplete. There appears a dispute as to the last place of business of the corporation. Although mailing notice of dissolution to the plaintiff was not required, the letter mailed of the intention to dissolve it tends to show good faith.

Plaintiff contends that under section 25-511, R. R. S. 1943, provision is made for service upon a corporation after its dissolution. This section only sets forth the method of making service. It in no way purports to extend the period of 5 years limiting the existence of the corporation and the time in which it may bring and defend actions. It is not applicable to the case before us where more than 5 years have elapsed since dissolution.

Plaintiff contends that he should have been mailed notice of the dissolution after it took place by virtue of section 25-520.01, R. R. S. 1943, but that section is limited to actions in any court and with respect to equalization of special assessments or assessing costs of improvements. It, too, has no application.

Plaintiff argues that his petition states a cause of action on a contingent claim arising after the dissolution

and which did not become vested and known until more than 5 years thereafter. Without discussing the nature of the cause of action pleaded in the petition, it is sufficient here to state that section 21-186, R. R. S. 1943, does not distinguish between matured and contingent claims. The section is a limitation on the existence of the corporation itself.

We conclude that the affidavit supporting the special appearance shows the corporate defendant had been legally dissolved more than 5 years previously to the bringing of action and was no longer in existence and could not be sued, and that its dissolution cannot be collaterally attacked in this action. It follows that the trial court properly sustained the special appearance and its judgment should be and is affirmed.

AFFIRMED.

IN RE APPLICATIONS OF EASTERN NEBRASKA PUBLIC POWER DISTRICT AND CITY OF AUBURN, NEBRASKA.
CITY OF AUBURN ET AL., APPELLANTS, V. EASTERN NEBRASKA PUBLIC POWER DISTRICT, APPELLEE.
138 N. W. 2d 629

Filed December 10, 1965. No. 36015.

1. **Public Service Commissions: Electricity.** The authority granted to the Nebraska Power Review Board by sections 70-1001 to 70-1020, R. S. Supp., 1963, extends to all electrical transmission lines carrying more than 700 volts, whether for retail or wholesale distribution, to be constructed by any public corporations specified in the act.
2. **Electricity: Statutes.** Sections 70-1001 to 70-1020, R. S. Supp., 1963, constitute a legislative entry into a field not theretofore occupied, cover the whole subject to which it relates, and is an independent act complete in itself.
3. **Statutes.** Where a legislative act is complete in itself but is repugnant to or in conflict with a prior statute which is not referred to nor repealed by the latter, the earlier statute is repealed or modified by implication by the later act, but only to the extent of the repugnancy or conflict.
4. **Electricity: Statutes.** Sections 19-2701 and 70-502, R. R. S.

1943, are modified by sections 70-1001 to 70-1020, R. S. Supp., 1963, to the extent that the powers granted in the latter modify those granted in the former.

5. **Administrative Law.** An administrative board has no power or authority other than that specifically conferred by statute or by a construction necessary to accomplish the plain purpose of the act.
6. **Constitutional Law.** Sections 70-1001 to 70-1020, R. S. Supp., 1963, are not violative of the impairment of contract clauses, the due process clauses, and the equal protection clauses of the state and federal Constitutions.
7. **Municipal Corporations: Electricity.** A contract made by one city with another for electric power, which requires the construction of an electric distribution line carrying more than 700 volts, is subject to the provisions of sections 70-1001 to 70-1020, R. S. Supp., 1963, unless excepted therefrom, and such line may not be constructed without the approval of the Nebraska Power Review Board.
8. **Public Service Commissions: Electricity.** Under section 70-1014, R. S. Supp., 1963, the Nebraska Power Review Board is authorized to grant an application, after hearing, when the evidence sustains findings that the granting of the application will serve the public convenience and necessity and that the applicant can most economically and feasibly supply the electric service resulting from the proposed construction without duplication of facilities or operations.
9. ———: ———. Where it appears that the Nebraska Power Review Board has complied with the requirements of the controlling statutes in exercising the powers granted to it by legislative authority, and the evidence is sufficient to support its findings of fact, this court may not substitute its judgment for that of the board, and the action of the board will be sustained.

Appeal from the Nebraska Power Review Board. Affirmed.

Yale C. Holland, John Ferneau, Clarence E. Heaney, Jr., Kennedy, Holland, DeLacy & Svoboda, Donald F. Stanley, Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellants.

Marti, O'Gara, Dalton & Bruckner, for appellee.

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

CARTER, J.

The City of Auburn filed its application with the Nebraska Power Review Board on September 11, 1964, for an order authorizing it to construct a transmission line for the purpose of serving the city of Peru with electrical energy. The Eastern Nebraska Public Power District filed a protest to the application. On September 14, 1964, the Eastern Nebraska Public Power District filed its application with the Nebraska Power Review Board for authority to construct a transmission line to serve the city of Peru with electrical energy. The city of Auburn protested the granting of this application. The two applications were consolidated for hearing before the Nebraska Power Review Board. After a hearing the Nebraska Power Review Board denied the application of the city of Auburn and sustained that of the Eastern Nebraska Public Power District. The city of Auburn has appealed.

For the purposes of this opinion we shall refer to the city of Auburn as Auburn, the Eastern Nebraska Public Power District as Eastern, the city of Peru as Peru, the Peru State College as the college, the Board of Education of State Normal Schools as the board of education, and the Nebraska Power Review Board as the board.

The evidence in this case shows that Peru has been providing electrical energy to the college for several years from its power generating plant. The college uses almost one-half of the electrical energy produced by the Peru municipal plant. The college is within the territorial limits of Peru. The board of education and the college became apprehensive of the ability of Peru to provide adequate electrical energy to the college and entered into a contract with Auburn whereby the latter was to construct a transmission line and furnish electrical energy to the college at a flat rate of 1.45 cents per KWH. Peru was intending at that time to enlarge its generating capacity because it was about to lose its largest user. Auburn instituted an action in the district

court for Lancaster County against Peru to test the validity of the Auburn-board of education contract. The court held the contract invalid and Auburn and the board of education appealed to the Supreme Court, where the case is pending a final decision.

On June 30, 1964, the electors of Peru voted to purchase electrical energy at wholesale rather than increase the generating capacity of their generating plant and authorized the city council to purchase additional power at wholesale.

In order to serve the immediate needs of Peru and the college and at the same time to settle the litigation pending in the Supreme Court, Auburn, Peru, the board of education, and the college entered into a contract referred to in the record as the tripartite agreement. By this agreement, dated August 13, 1964, Auburn was to construct a transmission line and serve Peru with electrical energy at a flat rate of 1.26 cents per KWH. Peru in turn contracted with the board of education and the college to provide electrical energy to the college at a flat rate of 1.90 cents per KWH. The tripartite agreement provided for the length of time, manner and method of service, and the financial considerations usually contained in contracts of this type. Pursuant to this tripartite agreement, Auburn filed its application with the board to construct the transmission line in order to serve Peru in accordance with the tripartite contract. As we have heretofore stated, Eastern filed objections and filed its own application to construct a transmission line for the purpose of serving Peru.

The issues raised by the appeal are as follows: (1) Whether or not the board has jurisdiction of the controversy; (2) which of the two applications would best serve the public convenience and necessity; (3) whether or not the board has the authority to disregard the tripartite agreement in reaching its decision; and (4) which of the two applicants can more feasibly and economi-

cally serve Peru without unnecessary duplication of facilities and operations.

The municipal plant at Auburn has 4 diesel-driven generators with a total capacity of 4,950 kilowatts and firm generating capacity of 2,840 kilowatts. Auburn serves the towns of Brownville, Nemaha, Howe, Johnson, and Graf, in addition to Auburn itself, and the rural needs in those respective areas. By serving Peru, the generating needs of Auburn would, or would in the near future, require an extension of its generating facilities or the purchase of outside power. Auburn has a 12,500-volt line running almost due east to Brownville. The tripartite agreement requires Auburn to construct a 12,500-volt line from its Auburn-Brownville line approximately 6 miles north to Peru. The estimated cost of this line is $42,000, which Auburn is able to provide. Auburn has no rural customers along this proposed line, rural customers in the area being served by Eastern. The proposed transmission line would cross 4 distribution lines of Eastern and would parallel distribution lines of Eastern for approximately 1¼ miles, none of which has the load capacity to serve Peru. Within 5 to 7 years Auburn would be faced with additional costs of replacing the lines from Auburn to Peru with higher voltage lines if the projected increase of consumer use materializes.

Eastern has a 69,000-volt line running north and south approximately 3 miles west of Auburn. Eastern's application provides for the construction of a 69,000-volt line due east from this line to Peru. The cost of the line is estimated at $98,000. Eastern serves the rural needs north, west, and south of Peru, all of which is in Eastern's service area. The 69,000-volt line into Peru would not only serve Peru with all its power needs for the present and future, but would firm up its rural power distribution needs in its rural service area. It is the contention of Eastern that the transmission line proposed by Auburn is an invasion of Eastern's service area and an unwar-

ranted duplication of service. Witnesses for Eastern testified that Eastern will furnish power to Peru at a flat rate of 1.23 cents per KWH. The evidence shows further that Eastern is interconnected with three other sources of wholesale power and that outage of its lines is consequently much less likely than on Auburn's proposed transmission line. The evidence conclusively indicates that both applicants are financially able to construct their respective proposed transmission lines.

It is upon the foregoing evidence that the board assumed jurisdiction of the subject matter, found that Eastern would best serve the public convenience and necessity, disregarded the tripartite agreement, and determined that Eastern could better supply the electric service to Peru under its proposed construction without the duplication of distribution lines or operations.

The first contention raised by Auburn is that the statute creating the board and defining its jurisdiction, sections 70-1001 to 70-1020, R. S. Supp., 1963, confers no powers in the board over the construction of transmission lines to be used for the transmission of electrical energy for wholesale use.

The parties to the present suit are all public corporations over which the Legislature has plenary control. The right to regulate and control such corporations rests with the Legislature, as we have many times held. The purpose of sections 70-1001 to 70-1020, R. S. Supp., 1963, as stated in the first section thereof, is to avoid and eliminate conflict and competition between public power districts, public power and irrigation districts, municipalities, electric membership associations, and cooperatives in furnishing electrical energy to retail customers, to avoid and eliminate the duplication of facilities and resources which result therefrom, and to facilitate the settlement of rate disputes between suppliers of electricity. It was clearly the intention of the Legislature that the public corporations of the state engaged in the generation, transmission, and distribution of elec-

trical energy should eliminate conflict and competition among themselves and to prevent duplications of facilities and resources which result in a higher cost of electrical energy to the ultimate user. Sections 70-1001 to 70-1020, R. S. Supp., 1963, were clearly enacted by the Legislature to accomplish this purpose.

It is true that the act deals at length with practices in the retail distribution and sale of electrical energy and the service areas in which suppliers of electrical service may operate. However, sections 70-1012 and 70-1013, R. S. Supp., 1963, purport to deal with matters not directly related to retail electrical service. Section 70-1012, R. S. Supp., 1963, states in part: "Before any electric generation facilities or any transmission lines or related facilities carrying more than seven hundred volts are constructed by any supplier other than a municipality within its corporate limits and its zoning area outside such corporate limits, an application, filed with the board and containing such information as the board shall prescribe, shall be approved by the board; * * *" followed by specific exceptions not material here. Section 70-1013, R. S. Supp., 1963, provides for the filing of an application, notice, and hearing of matters authorized and required by section 70-1012, R. S. Supp., 1963.

Section 70-1012, R. S. Supp., 1963, relates to "any" electric generation facility or "any" transmission lines or related facilities carrying more than 700 volts to be constructed by "any" supplier, and provides that the construction of such lines must be approved by the board. The section is not limited to retail suppliers by specific language or by implication. It cannot logically be contended that the limitation of the statute on the duplication of transmission lines carrying power for wholesale, or the restrictions on the construction of unneeded and uneconomic transmission lines, is not germane to the providing of electrical energy to the ultimate user as economically and feasibly as possible, consistent with sound business practices. The

plain language of the act confers power on the board to exercise its stated authority as to the construction of any transmission line carrying more than 700 volts of electrical energy, whether for wholesale or retail sale by any public corporation specified in the act.

An administrative board has no power or authority other than that specifically conferred upon it by statute or by a construction necessary to accomplish the purpose of the act. Scotts Bluff County v. State Board of Equalization & Assessment, 143 Neb. 837, 11 N. W. 2d 453; County of Antelope v. State Board of Equalization & Assessment, 146 Neb. 661, 21 N. W. 2d 416. The clear and unambiguous language of section 70-1012, R. S. Supp., 1963, sustains the jurisdiction of the board over the transmission lines involved in the present case.

It is the contention of Auburn that, even if the statute grants authority to the board over transmission lines carrying electrical energy for wholesale, it can have no application in the instant case for the reason that its enactment does not conform to constitutional requirements. It is the contention of Auburn, in part at least, that the statute is amendatory in character and that it failed to repeal certain statutes authorizing Auburn to enter into the tripartite agreement. By section 19-2701, R. R. S. 1943, a city of the first or second class is authorized to contract for the sale of electrical energy beyond the corporate limits of such city. By section 70-502, R. R. S. 1943, any city is authorized to enter into agreements to purchase or sell electrical energy and to connect or interconnect its electric light and power plants, distribution systems, and transmission lines with those of any one or more other cities upon such terms as may be agreed upon. Although other conflicting sections of the statutes were amended and repealed, the foregoing sections were not mentioned in the act. It is the contention of Eastern that such statutes were amended by implication by sections 70-1001 to 70-1020,

R. S. Supp., 1963, which it contends is an act independent and complete in itself.

The sections of the statute here under consideration constitute a legislative entry into a field of regulation not theretofore exercised. It was an act complete in itself. It repealed statutes in conflict therewith. It specifically amended others to conform to the purposes of the new legislation. It is true that sections 19-2701 and 70-502, R. R. S. 1943, were neither repealed nor specifically amended by the act. There is no indication that the Legislature intended to deprive cities from entering into contracts for the sale or purchase of electrical energy outside of their corporate limits, although the statute did have the effect of limiting the power to contract where the city failed to get the approval of the board for the construction of a transmission line carrying more than 700 volts, necessary to comply with its contract. The effect of the statute before us was to place a limitation upon the construction of duplicating plants and transmission lines among public corporations, including cities, all for the public interest. We necessarily conclude that the act, now sections 70-1001 to 70-1020, R. S. Supp., 1963, is an independent and complete act to regulate an area in which the Legislature had not previously entered.

"An act complete in itself which covers the whole subject to which it relates may properly modify, change or destroy the effect of other statutes without contravening the provisions of the Constitution." Beisner v. Cochran, 138 Neb. 445, 293 N. W. 289.

In State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N. W. 2d 63, we said: "Where a legislative act is complete in itself but is repugnant to or in conflict with a prior law which is not referred to nor in express terms repealed by the latter, the earlier statute is repealed by implication as to the latter act, but only to the extent of the repugnancy or conflict." See, also, State ex rel. Gage County v. Benton, 33 Neb. 834, 51 N. W.

144; Chicago & N. W. Ry. Co. v. County Board of Dodge County, 148 Neb. 648, 28 N. W. 2d 396; Jensen v. Omaha Public Power Dist., 159 Neb. 277, 66 N. W. 2d 591.

We necessarily conclude that sections 19-2701 and 70-502, R. R. S. 1943, are modified by sections 70-1001 to 70-1020, R. S. Supp., 1963, and that the former sections in no way limit the application of the latter. Auburn alleges that the grant of authority to the board over transmission lines which Auburn contracted to construct under the terms of the tripartite agreement is in violation of the impairment of contract clauses of the Constitution of the United States, Article I, section 10, and the Constitution of Nebraska, Article I, section 16. We can find no merit in these contentions. The provisions of the tripartite agreement are subject to sections 70-1001 to 70-1020, R. S. Supp., 1963, just as if they were included as a part of the tripartite agreement when it was made. These statutes were in effect on August 13, 1964, the date the tripartite agreement was entered into. The act was a proper regulatory provision with which Auburn must comply just as it assumed to do by the specific terms of the contract in making it subject to the favorable action of the board.

Auburn further contends that the grant of authority to the board, and its exercise by the board, are unconstitutional and void as violative of the due process clauses of the Constitution of the United States, the Fifth and Fourteenth Amendments thereto, and the Constitution of Nebraska, Article I, section 3, and, also, of the equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and Article I, section 1, of the Constitution of Nebraska. We find no basis for these contentions. The Legislature was acting within its province in enacting this legislation. It provided for notice and hearing, and a right of review, of the board's findings. The grant of quasi-judicial power to the board to determine controverted facts is the usual function of an administrative board. We fail

to see where there are any meritorious constitutional questions asserted under either the state or federal Constitutions.

It is argued that the tripartite agreement was entered into for the purpose of settling any contractual liability under the Auburn-board of education contract, the validity of which is being tested in the courts, as well as for the purchase of outside power at wholesale by Peru. Auburn contends that the board has no authority to disregard, and in effect invalidate, the tripartite agreement. It asserts that the board has no such authority, particularly when Eastern has no contract with Peru. Auburn contends that the board has no authority to substitute its judgment for that of the municipal authorities in the exercise of their right to contract for electrical energy.

We point out that sections 70-1001 to 70-1020, R. S. Supp., 1963, place the power to decide the factual issues as to the construction of more than 700-volt lines, not excepted from the act, in the board in accordance with the guidelines provided by the act. The right of the city to contract, when the construction of such lines is material to the agreement, is limited by the requirements of the statute under consideration. The statute is in effect a part of the contract and cannot be avoided for the reasons stated.

Auburn asserts that the evidence before the board was insufficient to sustain its conclusion. In this connection section 70-1014, R. S. Supp., 1963, provides: "After hearing, the board shall have authority to approve or deny the application. Before approval of an application, the board shall find that the application will serve the public convenience and necessity, and that the applicant can most economically and feasibly supply the electric service resulting from the proposed construction, without unnecessary duplication of facilities or operations." It is of course necessary that the findings of the board be sustained by evidence.

The evidence adduced by Eastern, which we have heretofore summarized, is sufficient to sustain the board's findings. The determination of the facts is peculiarly the province of the board and not this court. It is only where there is no evidence to sustain the action of the board or, for some other reason, the record shows the action of the board to be arbitrary and unreasonable that this court may void the action of the board. This has long been the rule on appeals to the courts from the decisions of administrative agencies.

"In determining this appeal, we may not substitute our judgment for that of the State Board. We review the record to determine if the State Board has complied with the requirements of the statutes in exercising the powers granted to it by legislative authority and, where the record is clear that it has, it is then our duty to hold its actions to be in accordance with the law." County of Howard v. State Board of Equalization & Assessment, 158 Neb. 339, 63 N. W. 2d 441.

"It cannot be seriously disputed that the legislature is clothed with power to delegate to administrative boards and agencies of the state the power of ascertaining the facts upon which the laws are to be applied and enforced. It may also authorize the doing of specific acts necessary to the furtherance of the purposes of the act. Such delegations of power and authorizations of acts do not transcend constitutional inhibitions so long as the law-making power is wholly reserved to the legislature and no part thereof has been delegated to any other governmental subdivision, board or agency." Board of Regents v. County of Lancaster, 154 Neb. 398, 48 N. W. 2d 221.

It appears that, during the course of the hearing before the board, a proposed merger of Eastern and Omaha Public Power District was entered into. Auburn moved to dismiss the application of Eastern on the theory that Eastern was no longer a legal entity or the real party in interest. The evidence shows that the

contract of merger was wholly executory, Eastern as an entity was still in existence, and the successor corporation, if the merger contract would be performed, would assume all the liabilities and commitments of Eastern. On the basis of this record, the board overruled the motions of Auburn to dismiss. We find no error in this ruling.

Auburn in its appeal set out 26 assignments of error. We have considered and disposed of those necessary to a decision in this case. We have examined the other errors assigned and conclude that they were without merit, unnecessary to a determination of the issues presented, or immaterial to the factual issues before the board.

We come to the ultimate conclusion that the board has jurisdiction of the subject matter and that the evidence before the board was sufficient to sustain its findings that the grant of Eastern's application will better serve the public convenience and necessity and most economically and feasibly supply electric service to Peru without duplication of facilities or operations. Under such circumstances this court is without authority to interfere with the result reached by the board.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. EVERETT SATTERFIELD, APPELLEE.

138 N. W. 2d 656

Filed December 10, 1965. No. 36052.

Criminal Law. An appeal by the State from a final order in a criminal case will be dismissed if no application for leave to docket error proceedings is presented to this court within 1 month from the date of the final order.

Appeal from the district court for Loup County: WILLIAM F. MANASIL, Judge. Appeal dismissed.

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

Vogeltanz & Kubitschek, for appellee.

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

SMITH, J.

The information in this case charges that defendant neglected and refused to testify and to permit examination of his records pertaining to his 1963 personal tax return for intangible property, in violation of section 77-718, R. R. S. 1943 (prior to the 1965 amendment). On demurrer the district court dismissed the information in February 1965, and the State filed notice of appeal.

We dismiss the appeal for the reason that no application for leave to docket error proceedings has been presented. "The county attorney shall * * * present such application to the Supreme Court within one month from the date of the final order, * * *." § 29-2315.01, R. R. S. 1943. See, also, State v. Halphrey, 14 Neb. 578, 16 N. W. 823.

APPEAL DISMISSED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. ROBERT H. BLANCHARD, RESPONDENT.

138 N. W. 2d 804

Filed December 17, 1965. No. 35577.

Attorney and Client. The disbarment of an attorney is required where he converted the proceeds of a judgment collected for a client and refused to return an unearned retainer after his withdrawal from a case, all in violation of Canons 11 and 44 of the Canons of Professional Ethics adopted by the Supreme Court of this state.

Original action. Order of disbarment.

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

No appearance for respondent.

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

CARTER, J.

The State on the relation of the Nebraska State Bar Association instituted disciplinary proceedings against respondent as an attorney. J. R. Swenson was appointed by the court as referee, and the record of the hearing had before him and his report were filed on September 20, 1965. Respondent has filed no exceptions to the referee's report in accordance with Rule III, section 8, Revised Rules of the Supreme Court, 1963, which provides: "Within 10 days after the filing of such report, either party may file written exceptions to such report. If no exceptions are filed, the court in its discretion may consider the findings final and conclusive, and on motion shall enter such order as the evidence and law require." The relator now moves that the report be approved and confirmed, and that an appropriate disciplinary order be entered.

The findings of the referee are as follows: "The respondent has violated Rule No. 11 of the Canons of Professional Ethics promulgated and adopted by the Nebraska State Bar Association in converting to his own use the sum of $260.47 received by him in his capacity as attorney for Ervin Underwood. The respondent has likewise violated the said Rule No. 11 in failing to refund to his client, Frances Sims, the sum of $51.00 received by him as a retainer in an action from which he subsequently desired to withdraw despite a promise by the respondent to make such refund. The respondent has likewise violated Rule No. 44 in circumstances surrounding his withdrawal from representation of the said Frances Sims. The referee, therefore, recommends that

the respondent be subjected to disciplinary action by the Supreme Court of the State of Nebraska."

Rule No. 11 of the Canons of Professional Ethics provides: "The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client. Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him."

Rule No. 44 of the Canons of Professional Ethics provides in part: "Upon withdrawing from a case after a retainer has been paid, the attorney should refund such part of the retainer as has not been clearly earned."

The referee having found a violation of the cited canons, and no exceptions having been filed thereto, the findings are final and conclusive. The correctness of the findings are sustained by the following cases: State ex rel. Nebraska State Bar Assn. v. Niklaus, 149 Neb. 859, 33 N. W. 2d 145; State ex rel. Sorensen v. Goldman, 127 Neb. 340, 255 N. W. 32; State ex rel. Spillman v. Priest, 123 Neb. 241, 242 N. W. 433.

An order of disbarment is required. State ex rel. Nebraska State Bar Assn. v. Hyde, 138 Neb. 541, 293 N. W. 408. Respondent will accordingly be disbarred from the practice of law in this state, his license is to be revoked and canceled, and his name will be stricken from the roll of attorneys of the state.

ORDER OF DISBARMENT.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 507, APPELLEE, V. CITY OF HASTINGS, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.

138 N. W. 2d 822

Filed December 17, 1965. No. 35973.

1. **Labor Relations.** Public employees are generally not entitled to collective bargaining in the sense that private industrial employees are.
2. ———. A public agency or governmental employer has no legal authority to bargain with a labor union in the absence of express statutory authority.
3. **Statutes.** The enumeration of certain powers in a statute implies the exclusion of all others not fairly incidental to those enumerated and an affirmative description of specific circumstances in which certain powers may be exercised implies a negative as to the exercise of such powers in circumstances not enumerated.
4. ———. The construction of a statute of doubtful meaning given it by those whose duty it is to enforce it, which construction the Legislature has, by its continued noninterference for a number of years, acquiesced in, will be approved unless, as thus construed, it contravenes some provision of the Constition or is clearly wrong.
5. **Labor Relations.** The Court of Industrial Relations has no power to compel a public utility operated by government in its proprietary capacity to bargain or negotiate with a labor union.

Appeal from the Court of Industrial Relations. Reversed.

Nelson, Harding & Acklie, for appellants.

David D. Weinberg, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BROWER, SMITH, and MCCOWN, JJ.

MCCOWN, J.

This case involves the validity of an order of the Court of Industrial Relations requiring the parties to "eliminate or define" their controversies by "communications in good faith."

The City of Hastings is a municipal corporation or-

ganized and existing under the laws of Nebraska and, in its proprietary capacity, owns and operates the electrical, gas, and water departments of the city. The defendant board of public works directs the operation of these utilities and it has operated under this structure for many years pursuant to statute.

The action was initiated by the union with the authorization of a number of utility employees to compel the City of Hastings and its board of public works to discuss or bargain with the union in a representative capacity concerning the employees' wages, hours, and conditions of employment. The petition alleged that the city and its board of public works failed to reply to the union's requests to discuss or bargain with it as the authorized representative of the employees, and alleged that an industrial dispute existed between the parties.

The Court of Industrial Relations, on its own motion, ordered stricken the language in the prayer of the second amended petition requesting that the court order the City of Hastings and its board of public works to negotiate or bargain with the union; and appointed an investigator to determine the nature and extent of the industrial dispute, if any, between the parties. After hearing upon the investigator's report and recommendations, the court entered its order requiring:

"1. That the plaintiff and the defendants by communications in good faith shall eliminate or define their controversies in so far as such controversies concern:

a. The appropriateness of the procedure for setting wages of utility employees in so far as such procedure relates wages of the plaintiff's members to wages of policemen and firemen,

b. Basic wage rates, classification of workers, and wage rates for night work,

c. The standard for determining wage increases, and,

d. Fringe benefits, including but not limited to sick leave, meal allowances, and call-back pay; * * *.

"2. That such communications shall include written

and oral communications in such form, at such times and places, and under such circumstances as the parties in good faith with reasonable promptness shall determine; and that each communication of a party shall be reasonably responsive to the prior communication of the other.

"3. That the defendants shall arrange for the plaintiff's holding and conducting meetings of employees of Hastings utilities on utility time under circumstances no less favorable and convenient to the employees than have been the circumstances for such meetings heretofore held by the committee composed of superintendents, supervisors, and foremen.

"4. That each party shall respect and deal with, as the representatives or spokesmen of the other, such persons as such other in good faith shall authorize; and that the defendants shall not deal with or recognize or declare as the representatives of employees named in paragraph numbered 4 said committee composed of superintendents, supervisors, and foremen.

"5. That the plaintiff by supplemental petition and the defendants by cross petition filed in this Court no later than January 5, 1965, shall report the respects in which said controversies have been eliminated or defined."

It is the contention of the defendants that the order of the Court of Industrial Relations is invalid because, in fact, it requires a governmental employer to engage in collective bargaining or negotiations with a labor union, and because no statutory authority exists for the Court of Industrial Relations to make such an order.

Up to the present time, public employees are generally not entitled to collective bargaining in the sense that private industrial employees are. See Annotation 31 A. L. R. 2d 1142. The generally accepted rule established in other jurisdictions on the issue, which we adopt, is that a public agency or governmental employer has no legal authority to bargain with a labor union in the ab-

sence of express statutory authority. See, International U. of Op. Eng., Loc. 321 v. Water Works Bd., 276 Ala. 462, 163 So. 2d 619; Dade County v. Amalgamated Assn. of S. E. Ry. & M. C. Emp. (Fla.), 157 So. 2d 176.

Section 48-818, R. R. S. 1943, provides in part, with respect to the Court of Industrial Relations that: "The findings and order or orders may establish or alter the scale of wages, hours of labor, or conditions of employment, or any one or more of the same." That section then proceeds to list factors which the Court of Industrial Relations shall consider in establishing wage scales, hours of labor, and conditions of employment.

Section 48-816, R. R. S. 1943, provides in part: "In the event of an industrial dispute between employer and employees of a public utility *not operated by government in its proprietary capacity,* where such employer and employees have failed or refused to bargain in good faith concerning the matters in dispute, the court may order such bargaining to be begun or resumed, as the case may be, and may make any such order or orders as may be appropriate to govern the situation pending such bargaining." (Emphasis ours.)

Nowhere in the statutes governing the Court of Industrial Relations is the court given any power to compel a public utility, operated by government in a proprietary capacity, to bargain, negotiate, or otherwise communicate with its employees or any representative of them. It has long been accepted in this state that the enumeration of certain powers in a statute implies the exclusion of all others not fairly incidental to those enumerated, and that an affirmative description of specific circumstances in which certain powers may be exercised implies a negative as to the exercise of such powers in circumstances not enumerated. Harrington v. Grieser, 154 Neb. 685, 48 N. W. 2d 753; Hueftle v. Eustis Cemetery Assn., 171 Neb. 293, 106 N. W. 2d 400.

Where the Legislature has specifically limited the exercise of the power to compel bargaining to cases in-

volving public utilities *not* operated by government in its proprietary capacity, it has clearly manifested its intention that this power was not to be exercised in cases involving utilities which *are* operated by government in its proprietary capacity.

The Court of Industrial Relations in its very first case in 1948 held that it was without jurisdiction to compel and order utilities operated by the government in its proprietary capacity to bargain with a labor union, and that sections 48-801 to 48-823, R. R. S. 1943, contained no provisions, express or implied, for compelling bargaining or negotiation between unions and public utilities operated by government in a proprietary capacity. Local Union 739, International Brotherhood of Electrical Workers v. Central Nebraska Public Power & Irr. Dist., case No. 1, May 1, 1948, Court of Industrial Relations.

Legislative acquiescence in that interpretation of the statute by the Court of Industrial Relations has been clear and convincing. Bills to change that 1948 interpretation of the statute were introduced in the 1953, 1955, 1959, 1961, and 1963 legislative sessions. None of these bills were reported out of committee. In 1959, L. B. 464, the sole amending provision of which was to delete the phrase "not operated by government in its proprietary capacity" from section 48-816, R. R. S. 1943, was introduced. A motion to place L. B. 464 on general file was defeated.

The construction of a statute of doubtful meaning given it by those whose duty it is to enforce it, and which construction the Legislature has, by its continued noninterference for a number of years, acquiesced in, will be approved unless, as thus construed, it contravenes some provision of the Constitution, or is clearly wrong. Ainsworth Irr. Dist. v. Bejot, 170 Neb. 257, 102 N. W. 2d 416; Chicago & N. W. Ry. Co. v. Bauman, 132 Neb. 67, 271 N. W. 256.

We can reach no other conclusion than that the Court of Industrial Relations has no power to compel a public

utility operated by government in its proprietary capacity to bargain or negotiate with a labor union.

The plaintiff's position, and apparently that of a majority of the members of the Court of Industrial Relations, is that the court has jurisdiction and power to eliminate, define, and simplify controversies and thereby implement settlement of an industrial dispute; and that its jurisdiction, power, and authority must be liberally construed to effectuate public policy. Apparently the position is that the order here is actually within the judicial framework of the court, and is to require the parties, by "communications" in good faith, to eliminate or define their controversies, but is not really an order requiring the defendants to bargain or negotiate with the plaintiff. This is an exercise in semantics. There can be no logical question but that the order requires the parties to bargain or negotiate with each other. The only thing which even connects it with a judicial framework is the order of the Court of Industrial Relations. It cannot realistically be treated as anything other than a compulsory extrajudicial discussion, negotiation, or bargaining. The use of the word "communications" for "bargaining" may change the semantic surface, but the context is fatally distinctive. A gilded lily is still a lily. No matter what disguise in language is employed, the actual result remains negotiation or bargaining between the parties and outside any court. However desirable extrajudicial discussion between the parties or a court encouraged voluntary settlement might seem in effectuating the policies of the statutes, the statutory grant of power does not extend to the order here.

For the reasons stated, the Court of Industrial Relations was without power and authority to take the action which it did, and its order is therefore reversed.

REVERSED.

CHICAGO LUMBER COMPANY OF KEARNEY, NEBRASKA, A CORPORATION, APPELLANT, V. RAY G. GIBSON, DOING BUSINESS AS KEARNEY SHEET METAL AND ROOFING COMPANY, APPELLEE.

138 N. W. 2d 832

Filed December 17, 1965. No. 35974.

1. **Municipal Corporations: Evidence.** Courts will not as a rule take notice of municipal ordinances unless required to do so by special charter or general law.
2. **Municipal Corporations: Pleading.** A party to have the benefit of a municipal ordinance must generally plead and prove the existence of the ordinance.
3. **Trial.** The trial court has a certain discretion in determining the limits of cross-examination and the extent to which repetition should be permitted must necessarily be within the discretion of the trial court.
4. **Trial: Appeal and Error.** A prerequisite to review on appeal of alleged improper conduct of and statements by a trial judge, on the trial in the presence of the jury, is an objection thereto.
5. ———: ———. A party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury's verdict, and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time.
6. ———: ———. An error to be sufficient to require the granting of a new trial must be an error prejudicial to the rights of the unsuccessful party.
7. **Judges: Pre-trial Procedure.** District judges have the power to promulgate reasonable rules for pre-trial procedure.

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

Haney, Walsh & Wall and Munro, Parker & Munro, for appellant.

Tye, Worlock, Knapp & Tye and Jeffrey H. Jacobsen, for appellee.

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

SPENCER, J.

This is an action for damages in consequence of a fire which occurred January 17, 1963, on certain prem-

ises owned by Chicago Lumber Company of Kearney, Nebraska, a corporation, hereinafter referred to as plaintiff. Plaintiff alleged the fire was proximately caused by the negligence of Ray G. Gibson, doing business as Kearney Sheet Metal and Roofing Company, hereinafter referred to as defendant, in the renovation of a flue on a heating stove located on the premises. The jury returned a verdict for the defendant, and the plaintiff has perfected an appeal to this court.

The fire occurred in an old uninsulated building used for storage and as a set-up shop to assemble and repair farm machinery. A wood and coal-burning heating stove was used to heat the set-up shop. The roof stack on the roof of the building broke off or was rusted through and the defendant was called to make repairs thereto. Plaintiff's general manager testified that he told defendant's employee: " 'Whatever it takes, go ahead and do it, as long as it's safe.' " One of defendant's employees who inspected the stove before the repair testified he recommended to plaintiff's general manager "that the stovepipe be removed, changed, and another system put up; that it wasn't good enough for the amount of fire that they had in there; * * *." The employee further testified plaintiff's general manager said: " 'That's the way it has been. Put it back like it was.' "

The testimony is extensive and it will serve no useful purpose to detail it herein further than necessary to understand the assignments of error alleged. Plaintiff's testimony in substance is to the effect that the fire was caused by the improper installation of the flue; that it was installed without proper insulation; and that it was installed in such a manner as not to allow sufficient spacing between it and the combustible material of which the roof of the building was constructed. Defendant's testimony is to the effect that a new stovepipe was put in exactly like the pipe it replaced. It was installed through a sleeve which was not removed or changed in any way. Defendant also adduced testimony that it was

not possible to determine the cause of the fire. The fire started soon after the heating stove was put to use after the repairman left. It is evident from its verdict that the jury accepted the defendant's theory of the case.

Plaintiff sets out 22 assignments of error which will be grouped for purposes of discussion herein. Plaintiff's principal assignment relates to the refusal of the trial court to take judicial notice of building code ordinance No. 1104 of the city of Kearney, and certain sections of the national building code. Plaintiff's assignments of error Nos. I, II, III, V, and VII relate directly to this assignment.

At the start of the trial and before the introduction of any evidence, the plaintiff asked the court to take judicial notice of building code ordinance No. 1104 of the city of Kearney, and of Article 5, section 546, of said ordinance, as well as of sections 1002.1 and 1008.4 of the national building code, 1955 edition, which is referred to in the building code of the city of Kearney. The defendant objected "for the reason that none of the same has any application to any of the issues in this matter," which motion the court said it was sustaining at that stage.

At the close of its case-in-chief, plaintiff again requested the court to take judicial notice of sections 1002.1 and 1008.4 of the national building code, and in support thereof had identified and offered in evidence photostatic copies of said sections. The objection previously made was renewed and a further objection was made as to foundation. No ruling appears in the record, but it is evident that the photostatic copies were not received in evidence.

Plaintiff then offered chapter 8 of the city code of Kearney for 1959, as revised through 1963. This is the building code of the city. Defendant objected for the reason that it was incompetent, irrelevant, immaterial,

and not within the issues of this lawsuit, which objection was sustained.

We do not understand the basis for plaintiff's insistence that the district court take judicial notice of the city ordinance involved or of the national building code. As we said in Dell v. City of Lincoln, 168 Neb. 174, 95 N. W. 2d 336: " 'The general rule is that ordinances * * * are not judicially known to courts having no special function to enforce them, although the power of municipalities to pass ordinances * * * is judicially noticed by the courts within the state.' " This has long been the rule in this jurisdiction. We said in 1894 in Foley v. State, 42 Neb. 233, 60 N. W. 574: "Courts will not, as a rule, take notice of municipal ordinances, unless required to do so by special charter or general law."

A party, to have the benefit of a municipal ordinance, must generally plead and prove the existence of the ordinance. See Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677.

Plaintiff in its petition pleaded provisions of ordinance No. 1104 of the city of Kearney, but did not offer said ordinance except as it may have been integrated into chapter 8 of the Kearney city code. From plaintiff's petition, we determine that the portions embraced in plaintiff's pleadings are found in sections 8.114, 8.115, and 8.80 of chapter 8. The first two are embraced in article VI of chapter 8, which applies to an R3 residence district. Section 8.80 is found in article IV, R1 residence district. Article IX covers the industrial district, and the sections pleaded by plaintiff have no application to it. The record does not disclose the location within the city of Kearney of plaintiff's premises, but from the evidence it would appear to be located in the industrial and not a residential district. It would appear that plaintiff has excerpted completely out of context portions of the Kearney building code pertaining to residential districts, which it sought to have applied to what appears to be an industrial or commercial

building in the industrial area. One of the plaintiff's witnesses located the building as directly behind plaintiff's main building, which is located on Central Street. This is as close as the record gets to locating it within the city of Kearney. The evidence is conclusive that the building was used exclusively for a set-up shop and for storage. The plaintiff has not called our attention to any provisions of the city code which might have application to industrial or commercial buildings. There is no merit to any of the above assignments of error on the record presented to this court.

Assignments of error Nos. IV and VI are directed to plaintiff's contention that it was unduly limited in its cross-examination of Carrol Sheldon, and to the court's comments thereon. There is no merit to plaintiff's assignments. Plaintiff's counsel was either confused or misunderstood the testimony of the witness. Plaintiff's counsel was unduly repetitious and the trial court was strictly within proper bounds in restricting further repetition. The trial court has a certain discretion in determining the limits of cross-examination, and the extent to which repetition should be permitted must necessarily be within the discretion of the trial court. See Longman v. Pope, 111 Neb. 838, 197 N. W. 955.

The comments of the court which are assigned as prejudicial error are as follows: "The Court: What is counsel trying to do, here. He is going over the same thing and he is trying to confuse the witness about things about which he has already testified. Are you trying to stall, counselor? Mr. Wall: No, I'm not. The Court: Well, then, lets move on. * * * Q No, Mr. Knapp and I were both talking about the top of the sleeve. Mr. Knapp: I object to that, Your Honor, as—The Court: Sustained. I think counsel is the only one that has been talking about the top of the sleeve. The witness hasn't been. That's where we have been having the difficulty. Mr. Wall: I would like to have the court instruct the jury to disregard the last remark of the

court. The Court: Yes, the jury will disregard the last remarks of the court."

From the record, it is understandable why the court made the observation it did in the first instance. It was necessary for the court to step in if it was to maintain control of the trial. The court, however, should have made the observation out of the hearing of the jury. In the second instance, the court on request directed the jury to disregard the remark. In neither instance does the record reflect that any objection was made to the remarks of the court. In Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913, we held: "A prerequisite to review on appeal of alleged improper conduct of and statements by a trial judge, on the trial in the presence of the jury, is an objection and exception thereto." See, also, Pittenger v. Salisbury & Almquist, 125 Neb. 672, 251 N. W. 287.

Plaintiff in its brief, possibly to explain its failure to object, states: "It is contended that even though the Court instructed the jury to disregard his commentary, the harm resulting therefrom had already taken place." The obvious answer is that plaintiff cannot wait until an unfavorable verdict to decide that it wants to object to the remarks. If it was plaintiff's reaction that the harm could not be cured, it should have moved for a mistrial. As we said in Law v. Gilmore, 171 Neb. 112, 105 N. W. 2d 595: "A party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury's verdict, and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time."

Plaintiff's assignments of error Nos. IX, X, XI, XII, XIII, XIV, XVI, XVII, and XVIII all relate to the question of plaintiff's damages. We see no necessity to discuss these assignments herein inasmuch as the jury found against the plaintiff on the cause of the fire.

Plaintiff's assignment of error No. VIII is directed to the trial court's instruction No. 8, which is as follows: "If you find that the defendant's employees notified

plaintiff or its employees of defective conditions existing in the chimney, and that the plaintiff directed defendant's employees to make only the repair actually made by defendant, and that the other defective conditions proximately caused the fire and resulting damages rather than the repairs made by defendant, then the plaintiff can not recover." It is plaintiff's contention that the defendant did not make the repairs indicated by the plaintiff. This was a question of fact to be determined by the jury. Instruction No. 8 set out the defendant's theory of the case. The jury obviously believed that the repairs were made as directed by plaintiff's general manager, and there is evidence to sustain that finding.

Plaintiff's assignment of error No. XIX complains of the admission into evidence of the negatives of the pictures constituting exhibits Nos. 1 through 14 which were offered by the plaintiff and received in evidence. Plaintiff's assignment of error No. XX is directed to the admission into evidence of the enlargements of some of the photographs received in evidence which were made from the negatives. The negatives were offered during the cross-examination of the photographer who testified he made enlargements from them. The enlargements were extensively used in cross-examination of the plaintiff's expert as well as in the examination of defendant's expert. Many details which were obvious in the enlargements could not be readily discerned in the small prints offered by the plaintiff. There is no merit to plaintiff's assignments of error Nos. XIX and XX.

Plaintiff's assignment of error No. XXI refers to the fact that exhibit No. 68 was identified but was not offered in evidence although defendant's witnesses testified concerning it. Exhibit No. 15-A is the boot or saddle which sat around the stovepipe on the top of the roof. Exhibit No. 68 was a new boot or saddle and had been obtained from a sheet metal shop for demonstration purposes. The record reflects that it was an exact replica of exhibit No. 15-A. We fail to see how the plaintiff

could possibly have been prejudiced by defendant's failure to offer exhibit No. 68 in evidence. We also observe that plaintiff availed itself of the opportunity to cross-examine defendant's witnesses with respect to exhibit No. 68.

Assignment of error No. XXII complains that plaintiff's counsel, during the closing argument, referred to two exhibits, Nos. 60 and 61, which were plaintiff's sales records covering a period subsequent to the fire. These exhibits had been identified but not offered in evidence. Defendant's counsel told the jurors before they could bring in damages against Ray Gibson for the items west of the company shop they should check exhibit No. 58-A and find the item on that exhibit, and they should then check the inventory, exhibit No. 59, and find the item there, and then, to be completely fair, they should check exhibits Nos. 60 and 61 to see if the item had been sold. Plaintiff's counsel then interrupted the argument and asked to make a record of the fact that exhibits Nos. 60 and 61 were neither offered nor received. Defendant's counsel then stated: "Mr. Knapp: May I state to the jury that at this time we don't know whether Exhibits 60 and 61 have been received in evidence or not, but if they haven't been received then my reference to your use of those exhibits should be ignored and the jury should refer to the testimony with reference to those exhibits." Exhibits Nos. 60 and 61, not having been offered or received, were not examined by or displayed to the jury. We are unable to see how plaintiff could have been prejudiced by the misstatement of defendant's counsel. An error to be sufficient to require the granting of a new trial must be an error prejudicial to the rights of the unsuccessful party. See Owen v. Moore, 166 Neb. 239, 88 N. W. 2d 768.

Assignment of error No. XV is directed to the refusal of the trial court to permit the plaintiff to amend its pre-trial list of witnesses. The pre-trial list of witnesses was furnished August 17, 1964, as directed by the court.

Trial commenced Monday morning, September 21, 1964. The request to amend was made Friday morning, September 25, 1964, the last day of the trial, just before defendant produced his last witness. The proceedings were as follows: "Mr. Wall: Comes now the plaintiff and moves the court for leave to amend the pre-trial list of witness (sic), to add the name of Ralph Grimes thereto, Mr. Grimes' testimony to be limited to his inspection of the electrical system of the building in question after the date of the fire, and his finding of no problems or no unusual circumstances in connection with said electrical system. Mr. Knapp: Show my objection to the motion for the reason that it is contrary to the rules of pre-trial of this court, and for the further reason that the plaintiff has had knowledge and notice of the defense of defective wiring to be introduced on the part of this defendant for many months, and that such evidence of Mr. Grimes would be incompetent, immaterial, and irrelevant, and that the plaintiff was not surprised by this defense. The Court: The objection is sustained and the motion is overruled. Call the jury."

Plaintiff had previously offered a photostatic copy of the pre-trial rules adopted by the district court for Buffalo County, which was admitted into evidence for the record. There is no question as to the power of district judges to promulgate reasonable rules for pre-trial procedure, but in any event this right is recognized by the rules promulgated by this court covering pre-trial procedure. Revised Rules of the Supreme Court of the State of Nebraska, 1963, p. 35. Rules Nos. 7 and 15 of the pre-trial rules for Buffalo County are as follows: "7. At the time of pre-trial there shall be presented to the court a list of names and addresses of all witnesses to be used by both parties, both in their case in chief and in rebuttal, and an outline of matters about which they will be expected to testify. (This does not, of course, include impeachment.) * * * 15. The Judge of the Court for good cause shown in order to prevent

undue hardship may waive any of the above requirements except as to notice." There is no question that for good cause shown to prevent a manifest injustice, amendments should be permitted in any pre-trial procedure. Rule No. 15 so provides. The showing made by plaintiff is clearly insufficient to require a determination that the trial court abused its discretion in refusing plaintiff permission to amend its list of witnesses at that late stage of the proceedings. In this respect we might observe that a fair conclusion to be drawn from this record is that plaintiff's counsel may have been attempting to circumvent the pre-trial rules of the court. To permit amendments when good cause is not shown is to destroy the efficacy of the pre-trial procedure.

We note that rule No. 7 above covers rebuttal witnesses, and observe that in many instances it is not possible to know at a pre-trial conference what witnesses may be needed for rebuttal purposes. We would question the exclusion of a rebuttal witness where the need for his testimony could not have been readily anticipated at the pre-trial conference. In the instant case, however, no proper and sufficient record was made.

For the reasons stated, none of the assignments of error set out by the plaintiff can be sustained. The judgment herein is affirmed.

AFFIRMED.

IN RE APPLICATION OF CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT, V. STAMFORD ELEVATOR COMPANY ET AL., APPELLEES.

138 N. W. 2d 816

Filed December 17, 1965. No. 36011.

1. **Public Service Commissions.** The prime object and real purpose of Nebraska State Railway Commission control is to secure

adequate, sustained service for the public at minimum cost, and to protect and conserve investments already made for this purpose. In doing this, primary consideration must be given to the public rather than to individuals.

2. **Public Service Commissions: Carriers.** It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent.

3. ———: ———. Although the Nebraska State Railway Commission has broad powers of regulation, it does not enjoy the freedom of an owner of the carrier. Unless public necessity requires it, the discretion of the carrier in establishing and maintaining its stations should not be interfered with by the commission.

4. **Railroads.** The facilities and services to be furnished by a railroad company at any station need only be just, reasonable, and adequate to the requirements of the station, and should in a measure be commensurate with the patronage and receipts from that portion of the public to whom such service is rendered. The need for agency service should not be measured by financial results alone, but should be measured also by the agent's usefulness to the company as well as to the public.

5. **Public Service Commissions: Railroads.** The matter of time necessary to be devoted to the performance of duties by an agent of a railroad is a matter of importance in determining whether an application to discontinue the agency may be denied.

6. ———: ———. When an application is made to discontinue an existing service or facility, the issue presented should be determined by the public need or lack of need therefor, as distinguished from local convenience. In the final analysis, the question to be determined is the public need or lack of need for the service.

7. ———: ———. Although the comparison between the cost of providing the service and the revenue derived therefrom is an element which should be considered, it is not necessarily controlling. There is no requirement that a railroad expend the earnings received from a particular community in that community contrary to the requirements of reasonable service.

8. ———: ———. The matter of allocation of revenue and the cost of station operation is important only insofar as the sums involved measure the public need for the service in question. A carrier is not required to maintain standby station agency service not comprehensibly used by the public, or to be used only when other established carriers fail to meet the need.

9. ———: ———. A ruling on an application for the discontinu-

ance of an agency relates only to the time and conditions presented in the record and is not an adjudication for the future.

Appeal from the Nebraska State Railway Commission. Reversed.

Mason, Knudsen, Berkheimer & Endacott, for appellant.

Nelson, Harding & Acklie and D. A. Russell, for appellees.

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

BOSLAUGH, J.

This is a proceeding before the Nebraska State Railway Commission upon an application by the Chicago, Burlington & Quincy Railroad Company for authority to dualize its agencies at Beaver City and Stamford, Nebraska, or, in the alternative, to discontinue the agency at Stamford, Nebraska. A formal protest to the granting of the application was filed by the Stamford Chamber of Commerce and Stamford Elevator Co. Letters of protest were filed by Naden's General Merchandise of Stamford, the Stamford Bank, the Stamford Watershed District, the Beaver City Chamber of Commerce, and the South Platte United Chambers of Commerce.

A hearing upon the application was held at Beaver City, Nebraska, before two members of the railway commission. The commission found that the efficient and economical management and operation of the railroad did not require that the application be granted, and denied the application. The applicant's motion for rehearing was overruled and it has appealed.

The applicant operates a branch line from Oxford, Nebraska, through Orleans, Stamford, and Beaver City, Nebraska, to St. Francis, Kansas. The train service on this line at this time consists of a mixed train running west to St. Francis, Kansas, on Monday, Wednesday, and

Friday, and east to Oxford, Nebraska, on Tuesday, Thursday, and Saturday.

Beaver City, Nebraska, has a population of approximately 820 people and is located in Furnas County. Stamford, Nebraska, has a population of approximately 220 persons and is located in Harlan County, approximately 13½ miles east of Beaver City. Both towns are located on State Highway No. 89, an all-weather, hard-surface road, and have common carrier truck service.

At the present time the applicant maintains regular full-time agents at Beaver City and at Stamford. The applicant proposes to eliminate the agent at Stamford and have the agent at Beaver City handle the business and duties of the agent at both stations. The schedule proposed by the applicant provides for the agent to be at Stamford for 2½ hours and at Beaver City for 5 hours of each workday. The applicant will provide telephone service between the stations at its expense for the convenience of persons who wish to contact the agent.

The evidence shows that most of the business handled through the Stamford agency is freight in carload shipments. During the 12 months ending in November 1963, 88 carloads were forwarded and 18 received. In the same period 4 less-than-carload shipments were forwarded and 74 were received; 10 passenger tickets were sold; and 45 express shipments handled.

Hollinger is a closed station located about halfway between Stamford and Beaver City. The accounting for Hollinger is handled through the Stamford agency. During the 12 months ending in November 1963, Hollinger forwarded 81 carloads and received 2.

The applicant produced evidence that the average time required to perform the duties of the agent at Stamford is 2 hours and 2 minutes per working day. This includes the work connected with business at Hollinger. The average time required to perform the duties of the agent at Beaver City is 2 hours and 21 minutes. This includes some work connected with business at Hendley which is

a closed station handled partly through Beaver City. The total combined time required to handle the work at both agencies, including 1 hour allowed for the trip from Beaver City to Stamford and return, would be 5 hours and 23 minutes per working day. If the agencies were dualized, Beaver City would be the reporting station and but one report would be made for both stations. This would result in some economy of time because the combined report would take less time to prepare than the two separate reports.

The applicant also produced evidence that dualization would result in an estimated annual saving of $5,331.79. This saving would result from the elimination of part of the direct expense attributable to the Stamford agency.

The applicant produced further evidence that the operation of the Stamford station in 1963 resulted in a loss of $2,672. This computation assumed that expenses other than direct station expenses amounted to 82 percent of creditable revenues, which is the system average, and did not include revenue received through the Hollinger station. The use of system average data in computing station operating costs was approved in Chicago, R. I. & P. R.R. Co. v. Hebron Chamber of Commerce, 169 Neb. 867, 101 N. W. 2d 448. See, also, Missouri P. R.R. Co. v. Zimmerman Feed Yards, 176 Neb. 501, 126 N. W. 2d 679.

The protestants produced evidence that if the revenue creditable to the Hollinger station were added to the revenue creditable to the Stamford station, the operation of the Stamford station for the year 1963 would show a small net profit. There was testimony that the annual report of the railroad submitted to the railway commission indicated that the ratio of operating expense to revenue received was less in Nebraska than on a system basis. If the ratio computed from the annual report were used instead of the system ratio, the operation of the Stamford station in 1963 would show a net profit of $2,748.91.

The protestants also produced evidence relating to trends in agricultural production in the area, grain in storage, and prospects for increased use of rail facilities in the area.

The prime object and real purpose of Nebraska State Railway Commission control is to secure adequate, sustained service for the public at minimum cost, and to protect and conserve investments already made for this purpose. In doing this, primary consideration must be given to the public rather than to individuals. Missouri P. R.R. Co. v. Zimmerman Feed Yards, *supra*.

It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent. In re Application of Chicago, B. & Q. R.R. Co., 152 Neb. 352, 41 N. W. 2d 157.

Although the Nebraska State Railway Commission has broad powers of regulation, it does not enjoy the freedom of an owner of the carrier. Unless public necessity requires it, the discretion of the carrier in establishing and maintaining its stations should not be interfered with by the commission. Chicago, B. & Q. R.R. Co. v. Order of Railroad Telegraphers, 155 Neb. 387, 52 N. W. 2d 238.

The facilities and services to be furnished by a railroad company at any station need only be just, reasonable, and adequate to the requirements of the station, and should in a measure be commensurate with the patronage and receipts from that portion of the public to whom such service is rendered. The need for agency service should not be measured by financial results alone, but should be measured also by the agent's usefulness to the company as well as to the public. Thomson v. Nebraska State Railway Commission, 143 Neb. 52, 8 N. W. 2d 552.

The matter of time necessary to be devoted to the performance of duties by an agent of a railroad is a matter of importance in determining whether an application to discontinue the agency may be denied. Thomson v.

Nebraska State Railway Commission, 142 Neb. 477, 6 N. W. 2d 607.

When an application is made to discontinue an existing service or facility, the issue presented should be determined by the public need or lack of need therefor, as distinguished from local convenience. Chicago, R. I. & P. R.R. Co. v. Hebron Chamber of Commerce, *supra*. In the final analysis, the question to be determined is the public need or lack of need for the service. Chicago, B. & Q. R.R. Co. v. Keifer, 160 Neb. 168, 69 N. W. 2d 541.

The question to be determined in this case is whether the evidence is sufficient to support a finding by the railway commission that a public need exists for full-time agency service at both Stamford and Beaver City.

The protestants contend that the Stamford station does not operate at a loss and, therefore, the agency should not be discontinued. The protestants argue that the revenue from the Hollinger station should be considered as a part of the operation of the Stamford station. Upon that basis, they assert that the Stamford station in 1963 operated at a profit, the amount depending upon how expenses other than direct station expenses are computed and allocated.

Although the comparison between the cost of providing the service and the revenue derived therefrom is an element which should be considered, it is not necessarily controlling. Chicago, R. I. & P. R.R. Co. v. Hebron Chamber of Commerce, *supra*. There is no requirement that a railroad expend the earnings received from a particular community in that community contrary to the requirements of reasonable service. Thomson v. Nebraska State Railway Commission, 142 Neb. 477, 6 N. W. 2d 607. The following statement from Chicago, B. & Q. R.R. Co. v. Order of Railroad Telegraphers, *supra*, is applicable in this case: "In the case at bar, a large part of the record, briefs of counsel, and arguments as well have been devoted to the question of whether or not the car-

rier's theory of allocation of revenue and cost of operation at the station involved was correct. We do not consider that question of prime importance except insofar as sums involved may measure the public need by indicating the extent of use or lack of use of the services there made available by the carrier. In other words, the carrier is not required to maintain standby station agency service not comprehensively used by the public, or to be used only when other established carriers fail to meet the need."

In reality, there is no relationship between Hollinger revenue and the need for a full-time agent at Stamford. The accounting for Hollinger, which is located about halfway between Stamford and Beaver City, can be done at either station. So far as the persons using the Stamford station are concerned, it is not important whether the accounting for Hollinger is handled at Beaver City or at Stamford. Consequently, Hollinger revenue is not a measure of the need for a full-time agency at Stamford.

If the agencies are dualized, there will be some inconvenience to patrons at each station. The inconvenience will result from the fact that an agent will be on duty only part time at each station instead of full time each working day. This inconvenience is not sufficient to require the maintenance of a full-time agency at both stations. Thomson v. Nebraska State Railway Commission, 141 Neb. 697, 4 N. W. 2d 756. The substitute service, although less convenient, will be adequate to serve the public need.

In a similar case this court said: "The evidence clearly shows that the combining of the agencies at Orchard and Brunswick will provide all essential services at these two points. The inconveniences testified to are not sufficient to justify an expenditure in excess of $5,000 to eliminate them. The evidence shows without substantial conflict that there is no actual public need for a full-time station agent at either point and that the

public need can be adequately served by one agent in the manner outlined by the carrier. Under such circumstances the denial of an application to dualize these two station agencies is not sustained by evidence and is unreasonable and arbitrary." Chicago, B. & Q. R.R. Co. v. Drayton, 172 Neb. 321, 109 N. W. 2d 369.

The record in this case shows that one agent can easily perform the duties at both stations within the time allotted. There is a lack of need for full-time agencies at both Stamford and Beaver City. The record does not support the action of the commission in denying the application to dualize the agencies.

In the event that conditions change and additional transportation requirements in the area create the need for a full-time agency at Stamford, the decision in this case will not be determinative of that situation. A ruling on an application for the discontinuance of an agency relates only to the time and conditions presented in the record and is not an adjudication for the future. Chicago, B. & Q. R.R. Co. v. Keifer, *supra*.

It is unnecessary to consider the applicant's other assignments of error.

The order of the Nebraska State Railway Commission is reversed.

REVERSED.

L. G. SCUDDER, APPELLEE, V. BOARD OF EQUALIZATION FOR COUNTY OF BUFFALO ET AL., APPELLANTS.
138 N. W. 2d 727

Filed December 17, 1965. No. 36018.

Taxation. The action of a county board of equalization with respect to actual value of property will be affirmed on appeal unless the contention of unreasonable valuation has been established.

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

Andrew J. McMullen and Duane L. Hubbard, for appellants.

Dier & Ross, for appellee.

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

SMITH, J.

This case involves the actual value of a commercial grain storage elevator for taxation in 1964. The county board of equalization approved a valuation of $360,155, but on appeal by plaintiff owner the district court ordered a reduction. The basic issue is economic obsolescence.

The building, consisting of cylindrical units of reinforced concrete and having a storage capacity of 1,240,000 bushels, was constructed in 1955 at a cost of $453,000. The structure was primarily a warehouse, not a standard working elevator in which grain is adapted for use.

Plaintiff rented the building in 1955 for a 10-year term at an annual rent of $61,000 the first 5 years with subsequent rent to be agreed upon. The lessee paid $61,000 annually until 1963, $30,500 in the first half of 1963, and $25,000 semiannually from July 1963 to July 1964.

The lease obligated plaintiff to pay real estate taxes and maintenance expenses. During the first 3 years taxes totaled $45,000. The elevator was valued for taxation in 1956 and 1957 at $630,000, but in 1958 the valuation was reduced to $421,180. In 1962 plaintiff coated the building with a water-repellent cement at a cost of $16,000. Other items have not been shown.

There is evidence of obsolescence. The first 5 years of the lease were lucrative because of a government guaranty, but conditions changed. Diminished rental mirrored diminished storage, the monthly average of grain being 541,344 bushels in 1963. Plaintiff testified that the quantity in Nebraska warehouses had decreased 50 percent between 1961 and 1964, and that his property was

worth only $200,000 as a result of economic obsolescence.

The county assessor considered his valuation of $360,155, which is less than $0.30 per bushel of capacity, to be fair and equitable. He referred to three standard working elevators in which the amounts ranged from $0.42 to $0.57, but we agree with plaintiff that these elevators are not comparable. However, similar testimony concerning other warehouses was not elicited, although the assessor had inspected all grain elevators in the county.

In the opinion of the assessor the effect of the recession upon individual elevators varied greatly. After a review of gross income and storage records over the years, he lowered valuations of some other elevators in 1964, one taxpayer receiving a 30 percent reduction. The 1964 board of equalization also reduced valuations of some facilities for flat storage; but the board denied a reduction to the Ravenna Grain Company, which owned a structure of concrete construction. These decreases represented the first favorable adjustment for any elevator except one. In 1962 the board had changed the actual value of plaintiff's elevator from $421,180 to $360,155.

The action of a county board of equalization with respect to actual value of property will be affirmed on appeal unless the contention of unreasonable valuation has been established. See, § 77-1511, R. S. Supp., 1963; LeDioyt v. County of Keith, 161 Neb. 615, 74 N. W. 2d 455.

The data before us is inadequate. The mere difference between plaintiff and the assessor does not prove unreasonableness. See LeDioyt v. County of Keith, *supra*.

Plaintiff seems to rely on actual value for taxation in 1963 and on decreased rental, perhaps assuming that 1963 value is controlling except for economic obsolescence. We reject the assumption. At best a prior determination is a fact without constant weight in all cases, and in the present case we attach little importance to that fact. Economic obsolescence may not have been

the only variable between 1963 and 1964, or there may have been error in 1963. The proportion of rental to valuation demanded explanation. There has been none. Plaintiff's opinion, the 1963 value, and the reduced rental have not established a worth under $360,155.

Actual value sometimes represents disproportionate value in need of equalization, but here the evidence concerning the treatment of other elevators is flimsy proof. Relief was based on economic obsolescence, yet neither assessor nor board disregarded all other influences upon actual value. No example of undervaluation appears, and economic obsolescence was not an arbitrary factor indicative of discrimination against plaintiff.

Since the action of the board should have been affirmed, the judgment of the district court is reversed and the petition of plaintiff is dismissed.

REVERSED AND DISMISSED.

ELMER CHARLES HAHN, APPELLANT, V. ELVIRA C. HAHN, APPELLEE.

138 N. W. 2d 722

Filed December 17, 1965. No. 36025.

1. **Divorce.** A decree of divorce from the bonds of matrimony should only be granted when the evidence brings the case within the definition of the statute providing for such relief.
2. ———. Section 42-335, R. R. S. 1943, means that corroborative evidence other than the declarations, confessions, or admissions of the parties is required of the acts or conduct asserted as grounds for a divorce.

Appeal from the district court for Lancaster County: NORRIS CHADDERDON, Judge. Affirmed in part, and in part reversed and remanded with directions.

Johnston & Grossman, for appellant.

Dwight Griffiths and Perry & Perry, for appellee.

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

BROWER, J.

Plaintiff and appellant Elmer Charles Hahn brought this action for divorce against the defendant and appellee Elvira C. Hahn in the district court for Lancaster County, Nebraska, on the ground of extreme cruelty. The defendant filed an answer and cross-petition. The answer, after admitting the marriage of the parties, their residence, and the children born of the union, contained a general denial. The cross-petition asked for a divorce on the grounds of cruelty therein alleged.

The case was tried on plaintiff's petition and the answer and cross-petition of the defendant. At the close of the plaintiff's case defendant's counsel made a motion to dismiss the plaintiff's petition because no grounds of extreme cruelty had been proved and there was no corroboration. The motion was sustained. The defendant then introduced evidence in support of her cross-petition and rested. The plaintiff moved to incorporate the plaintiff's testimony given in his case in reply to the defendant's testimony on her cross-petition in order to save time. The motion was never ruled on. This testimony is before us and will be considered by this court. The defendant having rested, plaintiff then moved to dismiss defendant's cross-petition for insufficiency of the evidence. The motion was overruled.

The court orally announced it would grant the defendant a divorce and gave the substance of its decision concerning the division of the property of the parties. A decree of divorce was thereafter entered accordingly. From an order overruling his motion for a new trial the plaintiff appeals to this court.

Plaintiff contends the trial court erred in dismissing plaintiff's petition and refusing to grant a divorce to plaintiff, and in refusing to sustain plaintiff's motion to

dismiss defendant's cross-petition. Other errors are assigned which are not necessary for us to discuss.

The parties intermarried at Johnson, Nebraska, December 8, 1932. They have two boys, one of whom was of age and married, and the other was 19 years old at the time of trial. When married they had no property. At first they operated a 240-acre farm in Johnson County which they rented. Sometime later plaintiff inherited 80 acres of land from his father's estate. They also bought 80 acres more from the other heirs, going in debt for its purchase. They both worked hard without modern facilities. Thereafter they farmed the 160 acres until 1955. At that time the defendant's health was bad. She attributed it to sinus trouble caused by the low place in which they lived and a general breakdown of her health. Plaintiff said she was allergic to something growing there. They had a measure of success in farming but because of defendant's poor health the farm was sold in 1955 apparently for either $17,000 or $19,000, and a sale of personal property brought in approximately $7,000 more. They then were indebted in an amount of approximately $13,000 which was paid out of the proceeds. After a trip to Arizona for the defendant's health, they returned to Johnson and in 1956 built a home near that of the defendant's parents on a 7½-acre tract owned by her father. The house cost $12,000 and is now clear and paid for.

In 1960 the plaintiff moved to Lincoln where he procured employment, the defendant staying in Johnson. Later in September the defendant came to Lincoln and brought the younger child with her. In Lincoln they first lived with Erma Anderson, the defendant's sister. Later they shared a home with Mr. Lathrop at Havelock. At the end of the school year in June 1961 the defendant took the younger child and moved back to their home built on her parent's property in Johnson. The parties have not lived in the same home since. While they were in Lincoln the defendant procured employment at the

Colonial Inn at $1 an hour. She later worked elsewhere at Auburn, Nebraska, and at Johnson.

Since selling the farm and equipment, the plaintiff has worked at a good many occupations at various places. He has changed his occupation quite frequently although it does not appear that he has been without work for any extended period. On several occasions he has been holding down two jobs at the same time. He at present is working as a guard in the state penitentiary and receives $300 a month, and $42 a week from an outside job when it is available. He, however, is apparently still in debt for a considerable amount.

The plaintiff testified that when the defendant left Lincoln and returned to Johnson, she refused to live with him and has refused to cohabit with him. Plaintiff did not refuse to live with the defendant. He asked her to live with him but being refused and after a period he gave up asking her. He supported the family. The parties have a joint bank account and plaintiff has been trying to pay off their debts. He has been unable to secure credit because the title to the land their house is on was held by her parents. Her father had promised him to convey the land on which it stands to them for $1 but now refuses. The defendant nags at him over financial matters which arose by building the house on her father's land and the inability to obtain a loan thereon. This makes him nervous and worries him. He thinks they cannot be reconciled.

On cross-examination he admitted writing a letter to defendant concerning a lady friend who had offered to help him financially. He claims she was a fellow employee. He had taken her in his car to and from work where they were employed, and had worked for her in painting and repairing her houses and at such times stayed in the home overnight in a separate room. He claims the relationship was proper. The letter itself was not offered in evidence.

Erma Anderson was called as a witness to corroborate

the evidence of plaintiff. She said the defendant was living in Johnson and the plaintiff in Lincoln. The parties have been separated ever since the defendant moved back to Johnson in June 1961. Many difficulties have arisen since. When the parties lived in her house at Lincoln they had no difficulties and no improper conduct was disclosed. She had talked with both parties in an attempt to effect a reconciliation. She knew nothing of the cause of the separation or their troubles except that related to her in the conversations with them. Apparently these conversations took place with each party separately. From these conversations the witness concluded the trouble arose because the plaintiff was trying to clear up their debts and the defendant wanted plaintiff home more. She thought they should be reconciled because they had both worked so hard together.

On cross-examination the witness stated she had talked with defendant about the letter written by plaintiff concerning the other woman. At defendant's request she had in turn spoken to the plaintiff about it. Plaintiff told her he and the other woman both worked at the same place. She had asked plaintiff to take her for a ride in his car and he had done so. When asked if he had told her he had been seeing the other woman, the witness answered: "I can't remember exactly, but I believe so." Plaintiff had purchased a new car while in Lincoln. While the couple were at her home the defendant paid the rent and bought the groceries. The witness said she had very little to do about their finances.

At this point the plaintiff rested and the defendant's motion to dismiss plaintiff's petition was sustained.

The same Mrs. Erma Anderson was then examined as a corroborating witness for defendant. Her testimony consisted of a description of the hard work of the defendant while on the farm at the home and in the field. She stated the defendant had been a good mother. Defendant paid her $10 a week while living with her.

She thought the defendant paid in cash but was not sure. The witness never saw the defendant cash her paycheck but assumed the rent came from her wages because it was paid in cash and she was working then. She said plaintiff changed jobs quite often. There was no cross-examination.

The defendant then testified. She told of her hard work on the farm under adverse circumstances without modern equipment. Plaintiff did not ask her to come to Lincoln at first. She and the boy followed. She paid the rent out of her funds earned. They had a joint checking account. She moved back to Johnson because plaintiff was put on a commission and earned little, and her health was giving out and she could not handle her job. He visited her there at irregular intervals. They had marital relations up to the early part of 1962. Plaintiff changed work frequently and she testified of his various positions and places of employment. He often started working on a salary which was changed to a commission after which he received very little compensation. At times the joint checking account was exhausted and she was forced to borrow money to replenish it. She received the plaintiff's letter telling of the other woman. Plaintiff had shown her pictures of this woman and said he had been with her.

On cross-examination she admitted the plaintiff at times held down two jobs at once. She said plaintiff spent all of his money on his car payments and such things and never brought any home. She admitted that they had a joint bank account all through their married life, that her earnings in some cases after buying certain articles and paying certain bills went into this joint account, and her husband's earnings were placed there too. After coming to Lincoln her savings went to pay the bills and there was little left to put in the bank. His earnings were still placed in the joint account. They could both write checks on it. On returning to Johnson she had procured employment there. They had gotten

into debt and apparently still owed $4,000 to members of the plaintiff's family, borrowed to buy the farm. She did not know about this until after they built the house. Building bills were left from the house for a time. Some bills were paid out of the joint account but she first put money in it. She said the main trouble was when she left Lincoln because she was paying the bills and he was running about hunting for work and the house at Johnson was vacant. As he was going with the other woman and living in her apartment she told him if he straightened out they might be reconciled but he insisted he wanted his freedom. She had nothing to do with the deed to their house but her parents had stated when they did not need it any more it would be hers and they would give it to her by will. She feels they cannot be reconciled now.

At the conclusion of this evidence the defendant rested and the plaintiff's counsel moved to dismiss the defendant's cross-petition for insufficiency of the evidence which the trial court overruled.

Section 42-335, R. R. S. 1943, reads as follows: "No decree of divorce and of the nullity of a marriage shall be made solely on the declaration, confessions or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose."

In Birth v. Birth, 165 Neb. 11, 84 N. W. 2d 204, this court in its syllabi held: "A decree of divorce from the bonds of matrimony should only be granted when the evidence brings the case within the definition of the statute providing for such relief.

"Section 42-335, R. R. S. 1943, means that corroborative evidence other than the declarations, confessions, or admissions of the parties is required of the acts or conduct asserted as grounds for a divorce." Many previous cases are there cited where this court has followed the same rules.

We have heretofore set forth in considerable detail the

evidence in the case before us. The only corroboration of the testimony of either party with respect to the acts and conduct of the other party which might offer any ground for a divorce is the testimony of Erma Anderson. She did not testify as to any marital misconduct which she herself observed nor to acts or conduct that came to her personal attention. She only testified as to declarations, confessions, or admissions made to her by the parties themselves.

The corroborating witness knew nothing of the circumstances or reasons for the wife leaving the husband and returning to Johnson, nor of the troubles with respect to building the home upon the land of the defendant's father save through the declarations and admissions of the parties. The plaintiff did not produce evidence showing extreme cruelty and entitling him to a divorce, and the court did not err in sustaining the motion to dismiss the plaintiff's petition.

Likewise this witness had no personal knowledge of the plaintiff's association with the woman concerning whom the plaintiff wrote to the defendant aside from the declarations, admissions, and confessions of the parties. We are therefore not required to consider this evidence nor the plaintiff's attempt to explain his conduct and to come to a conclusion concerning it. It was not corroborated as required by the statute. The witness had no personal knowledge of the parties' financial dealings except she assumed the defendant paid certain rents because they were paid by her in cash. Neither would this prove the plaintiff had cruelly neglected to provide for his wife if true. The allegations of defendant's cross-petition to entitle her to a divorce because of extreme cruelty were in no respects corroborated as required by the statute. The trial court erred in not sustaining the motion to dismiss the defendant's cross-petition and in granting a divorce to the defendant thereon.

The judgment of the trial court in dismissing the plaintiff's petition is affirmed, and its judgment in overruling

the plaintiff's motion to dismiss defendant's cross-petition and granting her a decree of divorce thereon is reversed and the cause remanded with directions to dismiss the cross-petition.

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

IN RE APPLICATION OF CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT, V. WILBER CHAMBER OF COMMERCE ET AL., APPELLEES.

138 N. W. 2d 711

Filed December 17, 1965. No. 36027.

1. **Public Service Commissions: Appeal and Error.** On appeal to the Supreme Court from an order of the Nebraska State Railway Commission while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order of the commission is not unreasonable or arbitrary.
2. **Public Service Commissions: Railroads.** The time necessary to devote to the performance of duties by station agents is a matter of importance in determining whether or not the Nebraska State Railway Commission acted arbitrarily and unreasonably in a dualization case.
3. **Railroads.** The facilities and services to be furnished by a railroad company at any station need only be just, reasonable, and adequate to the requirements of the station.
4. ———. There is no requirement that a railroad expend the earnings received from a particular community in that community contrary to the requirements of reasonable service.
5. ———. It is the function of management to operate economically and it is charged with the duty of reducing costs where it can do so and still continue to perform essential services to the public.
6. **Public Service Commissions: Railroads.** It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent. This duty is not limited to localities where the railroad is losing money.

7. ———: ———. When an application is made to discontinue an existing service or facility, the need for the service or facility and not mere local convenience provides the yardstick.
8. ———: ———. When the service sought to be discontinued or modified is one of convenience rather than necessity, the question of expense to the company, the volume of business done, the community need, the revenue return, and the relative benefit to the public are factors that cannot be disregarded.

Appeal from the Nebraska State Railway Commission. Reversed.

Mason, Knudsen, Berkheimer & Endacott, for appellant.

Clarence C. Kunc and William L. Monahan, for appellees.

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

MCCOWN, J.

This is an appeal from a decision of the Nebraska State Railway Commission denying an application to operate two railway agencies at Wilber and Swanton, Nebraska, with one agent working part-time at each station, commonly referred to as "dualization."

The applicant, hereafter referred to as "railroad," maintains two station agencies at Wilber and Swanton in Saline County, Nebraska. The population figures for Wilber are 1,360 and for Swanton, 190. The distance between these communities is 14.6 miles by highway and 15.24 miles by rail. The railroad maintains a full-time station agent at each community who is on duty for a full period of 8 hours a day, 5 days per week. The railroad applied for an order authorizing it to dualize the station agencies of Wilber and Swanton so that they can be handled by one agent serving part of the time at one station and part of the time at the other station, being available by telephone at either station for any business from the other station. The proposed schedule was: At Swanton 8:30 a.m. to 10:30 a.m., and at Wilber

from 11 a.m. to noon, and from 1 p.m. to 5 p.m. The 30 minutes between 8 a.m. and 8:30 a.m. and between 10:30 a.m. and 11 a.m. to be travel time between the communities.

During the 12 months ending March 31, 1964, 312 carload shipments were forwarded from Wilber, 124 carloads received, 14 less-than-carload shipments forwarded, and 81 less-than-carload shipments received. During the same period in Swanton, 279 carloads were forwarded, 38 carloads received, no less-than-carload shipments forwarded, and 15 less-than-carload shipments received. Total creditable revenue figures covering the years 1961, 1962, 1963, and the 12-month period ending March 1964 were:

	1961	1962	1963	12 months ending March 1964
Wilber	$50,483	$48,678	$49,424	$48,254
Swanton	33,240	47,144	42,809	43,933
Total	$83,723	$95,822	$92,233	$92,187

For the 12 months ending in March 1964, Wilber had a profit of approximately $2,400 and Swanton a profit of about $1,800. Had the stations been dualized during the 12 months ending March 1964, the savings to the railroad because of reduced expenses would have been $5,567.05.

A time study of the agent's work at Wilber for the 12 months ending March 31, 1964, showed that an average of 2 hours and 19 minutes per working day was required during that period for the agent to perform all of his duties at Wilber. The time study of the agent's work at Swanton for the same period showed an average of 2 hours and 2 minutes per working day was required.

Train service at Wilber consists of one southbound train about 4:50 a.m. and a northbound train about 5:50 p.m. Train service through Swanton is an extra train

which moves westward through Swanton on Monday, Wednesday, and Friday and eastward on alternate days, each passing through Swanton between 1 and 3 p.m. on the average. There is no necessity for train orders to be issued at either station, nor for an agent to be on duty when the train comes through, and spotting cars is the train crew's job.

Under the proposed dualization, the business at both stations would be handled in the same manner as it is now except that the agent would be at each station only a part of a day. Shippers' telephone toll charges between the two stations incurred as a result of dualization would be absorbed by the railroad.

There was testimony on behalf of the protestants that business activity in and about Wilber was on the increase, and that an increase in railroad business might be anticipated in Swanton from the elevator company. A gravel operation near Wilber had recently constructed a railroad siding, and the Farmers Cooperative Elevator in Wilber was installing new equipment which should increase their incoming shipments. The operator of the gravel company testified that they normally want to contact the agent about 2 or 3 o'clock in the afternoon, and that if the agent was to be at Wilber in the afternoon, it would not inconvenience them. The elevator manager at Wilber testified that as to incoming shipments, his only interest is in getting the cars spotted, which is the train crew's job; that the additional incoming shipments will be prepaid; that he orders cars for outgoing shipments one day to be brought in the following day or some day after that; that any contact with the agent in the mornings would be to order cars; and that at the present time he contacts the agent by telephone as well as personally.

The manager of the Swanton Cooperative Elevator, which is overwhelmingly the largest shipper in Swanton, testified that the board had approved a new blending plant for bulk fertilizer which should require incoming

shipments of over 250 tons a year. This might be 10 or 15 carloads. He testified that he felt he could not get along without a full-time agent, but an analysis of the testimony shows that it is largely an expression of concern or fears which are not evidentially supported.

Hearing upon the application was held and the railway commission found that the continuation of a full-time agent at both Wilber and Swanton does not place an unreasonable burden upon the railroad nor result in an unnecessary depletion of revenue, and that the honest, efficient, and economical management and operation of the railroad did not require that the application be granted; and denied the application. This appeal followed.

On appeal to the Supreme Court from an order of the Nebraska State Railway Commission while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary. Chicago, B. & Q. R.R. Co. v. Keifer, 160 Neb. 168, 69 N. W. 2d 541.

In a dualization case, no change in transportation is involved, nor in the nature of the agency services provided. The only change is in the hours it is provided at any one station. The basic issue involved in any such case is the use made of and the need for agency services at the points involved. The business of the carrier at both stations will be handled in the same manner as it is now except that the agent will be at each station only part of the day.

The time necessary to devote to the performance of duties by station agents is certainly a matter of importance in determining whether or not the Nebraska State Railway Commission acted arbitrarily and unreasonably. Thomson v. Nebraska State Railway Commission, 142 Neb. 477, 6 N. W. 2d 607. The record here shows that one agent could perform all the duties of both stations within the scheduled time, and even in peak periods. There is no evidence that one agent is not more than sufficient

to perform all the duties and provide adequate service to both communities.

The facilities and services to be furnished by a railroad company at any station need only be just, reasonable, and adequate to the requirements of the station, and should in a measure be commensurate with the patronage and receipts from that portion of the public to whom such service is rendered. Thomson v. Nebraska State Railway Commission, 143 Neb. 52, 8 N. W. 2d 552.

The appellees seem to take the position that so long as the agencies involved show a profit of any sort, a railroad cannot eliminate services or conveniences, nor even reduce the time they are offered each day, even though they are no longer needed or used by the public to any substantial extent nor required to provide adequate service. While costs and revenue and the resultant profit or loss must be considered, they are not necessarily controlling. There is no requirement that a railroad expend the earnings received from a particular community in that community contrary to the requirements of reasonable service. Thomson v. Nebraska State Railway Commission, 142 Neb. 477, 6 N. W. 2d 607. " 'The purpose of commission control of railroads is to secure adequate, sustained service for the public at a minimum cost. The commission is not in the position of an owner. It has a duty to the railroads as well as to the public. It must protect and conserve the investments in the railroads and insure a reasonable return to railroads that are efficiently maintained and operated.' " Chicago, B. & Q. R.R. Co. v. Drayton, 172 Neb. 321, 109 N. W. 2d 369.

"It is the function of management to operate economically and it is charged with the duty of reducing costs where it can do so and still continue to perform essential services to the public." Chicago, B. & Q. R.R. Co. v. Drayton, *supra*. "It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or

used by the public to any substantial extent." Chicago, B. & Q. R.R. Co. v. Keifer, *supra*. This duty is not limited to localities where the railroad is losing money. A railroad company has a right to cut costs, meet competition, and show a profit. Indeed, that is its duty. It should not be prevented from doing so unless it is clearly established that the public will suffer substantial loss or inconvenience. When an application is made to discontinue an existing service or facility, the need for the service or facility and not mere local convenience provides the yardstick. Chicago, R. I. & P. R.R. Co. v. Hebron Chamber of Commerce, 169 Neb. 867, 101 N. W. 2d 448.

"The relation of costs to revenue is also an important element to be considered. When the service sought to be discontinued or modified is one of convenience rather than necessity, the question of expense to the company, the volume of business done, the community need, the revenue return, and the relative benefit to the public are factors that cannot be disregarded." Chicago, B. & Q. R.R. Co. v. Drayton, *supra*.

The evidence here shows that the combining of the agencies at Wilber and Swanton will provide all essential services at these two points. There is no evidence that one agent cannot perform all the work of both stations and supply the needs of the two communities. The minor difference in convenience involved is not sufficient to require an expenditure of well over $5,000 per year by the railroad company. The evidence shows without any substantial conflict that there is no actual public need for a full-time station agent at either point, and that the public need can be adequately served by one agent in the manner outlined by the carrier. Under such circumstances, the denial of an application to dualize the two agencies is not sustained by the evidence and is unreasonable and arbitrary.

The order of the railway commission is reversed.

REVERSED.