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REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 19, 1975 and APRIL 27, 1976

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM 1975 and JANUARY TERM 1976

VOLUME CXCV

H. EMERSON KOKJER

OFFICIAL REPORTER

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1976

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By H. Emerson Kokjer, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1975

BALI HAI', INCORPORATED, ALSO KNOWN AS BALI HAI', APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, AN ADMINISTRATIVE AGENCY OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

236 N. W. 2d 614

Filed December 18, 1975. No. 39862.

1. **Municipal Corporations: Licenses.** The mere fact that the state, in the exercise of the public power, has made certain regulations does not prohibit a municipality from exacting additional requirements so long as there is no conflict between the two, and if the requirements of the municipal bylaw are not in themselves pernicious, as being unreasonable or discriminatory, both will stand.
2. **Municipal Corporations: Licenses: Intoxicating Liquors.** Regulating the traffic in liquors involves not just prescribing who may sell liquor and under what conditions, but conversely, who may not, and under what circumstances the right to sell liquors may be forfeited.
3. ———: ———: ———. The power to regulate and control traffic in liquors necessarily confers the powers to refuse a license or limit the number of licenses to be granted.
4. **Constitutional Law: Standing.** This court will not declare a statute or ordinance unconstitutional at the suit of one who is not injuriously affected thereby.
5. **Constitutional Law: Intoxicating Liquors.** The right to engage in the sale of intoxicating liquors involves a mere privilege; and restrictive regulations or even a suppression of the traffic do not deprive persons of property without due process of law, violate the privileges or immunities clause, the due process clause, the uniformity provisions, nor, unless they contain ir-

rational classifications or invidious discriminations, the equal protection of the law as prohibited by the state and federal Constitutions.

Appeal from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Arthur R. Langvardt of Bauer, Galter & Geier, for appellant.

Charles D. Humble, for appellees.

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

WHITE, C. J.

The appellant appeals from a District Court judgment affirming an order of the Nebraska Liquor Control Commission, which in turn affirmed the order of the City of Lincoln revoking appellant's retail Class C liquor license because of the failure to operate as a retail liquor licensee. We affirm the judgment and the order of the District Court.

The assignments of error assert that section 6.08.280 of the Lincoln municipal code, authorizing such a revocation as herein ordered, is in conflict with the state statute and an invalid exercise of the police power by the City of Lincoln; and that the appellant was deprived of due process by the procedures used and the provisions followed in the revocation of its license.

The appellant was issued a Class C liquor license for premises in Lincoln, Nebraska, for the license year commencing May 1, 1971. The appellant remained voluntarily closed and never opened for business as a retail liquor licensee from May 1, 1971, through December 6, 1971. On June 1, 1971, the appellant, through its attorney, made a written request to remain voluntarily closed for an indefinite period of time. On June 28, 1971, the Lincoln city council adopted a resolution denying the request of the appellant and directed the police

chief to take up the appellant's license. The appellant's liquor license was not taken up by the police chief.

At the request of the appellant, through its attorney, a special meeting of the city council was held on July 26, 1971, to conduct a hearing on the appellant's request to remain closed for a definite period of time. During the course of the hearing, the appellant, speaking through its president, appeared and presented evidence. The appellant was also represented by its attorney who requested an extension of time, expressed in a specific number of days, for the appellant to remain closed. At this hearing the city council by unanimous vote rescinded its previous action and granted the request of the appellant's attorney, giving the appellant the right to be closed for 90 days from July 26, 1971.

The appellant failed to operate as a retail liquor licensee within the 90-day period, and on December 6, 1971, another hearing was granted by the city council at a special meeting convened for that purpose. At this hearing, the appellant appeared, presented evidence, and was granted the right to cross-examine witnesses. The appellant's president testified that the reason she remained closed was her failure to locate a suitable lessee to help her run the business. The city council found that the appellant had remained voluntarily closed as a liquor licensee from the date of the last hearing until December 6, 1971, and adopted a resolution revoking the appellant's liquor license under the authority of section 53-134(1), R. R. S. 1943, for failure to comply with section 6.08.280 of the Lincoln municipal code.

Section 6.08.280 of the Lincoln municipal code provides that: "Any liquor licensee whose licensed premises shall be and remain voluntarily closed for ten consecutive days shall be deemed to have elected to discontinue his business under such license and the chief of police shall obtain and take up such license and deliver it to the city clerk of the city of Lincoln for cancellation, or recommend its cancellation by the State

Liquor Control Commission; provided, however, this shall not apply if the licensee shall make application to the city council within such ten day period for permission, for good cause, to remain closed for a definite period, and provided the city council shall grant such permission; and provided further, that this section shall not apply in case the licensee's place of business remains closed as a result of the licensee's physical disability or as a result of closing for necessary alterations or repairs."

The contention of the appellant is that the City of Lincoln in enacting and enforcing in this case, section 6.08.280 of the Lincoln municipal code as set out above, went beyond its powers under the Liquor Control Act, therefore, the ordinance was invalid and the action thereunder is void.

The appellant argues the broad sweep of the language of section 53-116, R. R. S. 1943, which provides: "The power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors, except as specifically delegated in this act, is hereby vested exclusively in the commission." Section 53-118(4), R. R. S. 1943, grants to the Liquor Control Commission authority to make rules and regulations determining for what violations of the rules or regulations licenses shall be suspended or revoked. The appellant's argument, if carried to its logical conclusion, would clearly prohibit any and all regulatory ordinances of the liquor business by a municipality. This argument and this question have been before this court before, and an extensive review of the rationale of our previous holdings will not be indulged in. The question was laid to rest in Phelps, Inc. v. City of Hastings, 152 Neb. 651, 42 N. W. 2d 300. Our holding in that case affirmed the power of a municipal corporation to enact regulatory ordinances of the liquor traffic so long as they were not in direct conflict with a state statute, in which case, the statute is the superior law. In Phelps, Inc. v. City

of Hastings, *supra*, this court held: " 'The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal bylaw are not in themselves pernicious, as being unreasonable or discriminatory, both will stand.' "

It must be conceded that nowhere in the Liquor Control Act is there a provision that failure to actively use a liquor license for a prescribed period shall *not* be a cause for a license forfeiture. It is apparent, therefore, under the holding in the Phelps case, that the additional regulation as to nonuse and forfeiture were additional requirements, not in conflict with the state statute, and therefore the City of Lincoln was not precluded from enacting and enforcing section 6.08.280.

We agree with the appellant that exclusive power in this area is granted to the Liquor Control Commission under the sections of the state statute above referred to. But, not having exercised its power in the area covered by the city ordinance, the state has not preempted the field and it is left open to local regulatory legislation. The appellant argues that the Liquor Control Act is only concerned with regulating "traffic in alcoholic liquors" while the particular ordinance under attack deals with the "non-traffic" of alcoholic beverages. Such a simplistic and restrictive reading of the term "traffic in alcoholic liquors" will not stand against the obvious intent of these terms as they are used in the Liquor Control Act. Regulating the traffic in liquors involves not just prescribing who may sell liquor and under what conditions, but conversely, who may not, and under what circumstances the right to sell liquors may be forfeited. The action of the Lincoln city council in enacting section 6.08.280 was clearly within its local regulatory powers that have not been preempted by a state statute or a valid regulatory order of the Nebraska Liquor Control

Commission. The contention of the appellant is without merit.

The appellant contends that section 6.08.280 cannot be sustained as an exercise of the general police power because it serves no conceivable public policy. This court has held that the power to regulate and control traffic in liquor necessarily confers the powers to refuse a license or limit the number of licenses to be granted. Allen v. Nebraska Liquor Control Commission, 179 Neb. 767, 140 N. W. 2d 413.

The power to refuse a liquor license and to determine the number of licenses to be granted and to require their active operation represents a balance struck between two interests: The prevention of the many evils attached to the widespread and unlimited distribution of alcoholic beverages on the one hand, and the public demand for the sale of alcoholic liquors on the other. In other words, the public has a legitimate interest in maintaining the number of active licensees so that it does not drop below what the local governing body has determined to be the most beneficial for the welfare of the locality. Effective preservation of the necessary competition in the sale of the product and the proper serving of geographical areas within the municipal limits are only two of the public policy considerations that obviously support the enactment of the ordinance under question. There is no merit to the contention that the enactment of section 6.08.280 does not serve some public policy interest.

The appellant strenuously contends that the ordinance under question is unconstitutional because it contains no provisions for notice and hearing and that therefore the revocation of its license deprived it of due process of law. There are at least two answers to this contention. The record here reveals that the appellant requested and was granted a hearing with reference to the revocation of its license on July 26, 1971. As a result of this, the action of the city to revoke was continued for 90 days. At the December 6, 1971, hearing

the appellant was allowed to present evidence and to cross-examine witnesses. Having actually been afforded due process in all its traditional trappings, the appellant cannot now claim a denial of the same simply because the ordinance did not require it on its face. This court will not declare a statute or ordinance unconstitutional at the suit of one who is not injuriously affected thereby. State ex rel. Herbert v. Anderson, 122 Neb. 738, 241 N. W. 545; Hanson v. City of Omaha, 157 Neb. 403, 59 N. W. 2d 622.

The appellant seeks to apply, in its due process argument, the holding in Bell v. Burson, 402 U. S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90. In that case the Supreme Court of the United States held that the due process clause of the Fourteenth Amendment was applicable to state action suspending or revoking vehicle operators' licenses. Assuming that the caveat of Bell applies, Bell itself states that the due process required is sufficient if it affords " 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes *effective.*" In other words, the rationale of Bell is the requirement that a notice of a hearing be granted before the deprivation is made final. The authority of the city, under our statute, is "subject to the right of appeal to the Liquor Control Commission." Specific procedures are detailed for such appeal. See, §§ 53-134(1), and 53-1,115, R. R. S. 1943. It is clear, under our statutory scheme, that the action of a municipal body revoking the liquor license is not final or effective until that body's action is either affirmed by the Liquor Control Commission on appeal, or until the licensee has acquiesced by failing to take an appeal. Not only was the appellant present and fully represented at both the July 26, 1971, and the December 6, 1971, hearings before the city council, but the appellant appealed the action of the Lincoln city council to the Nebraska Liquor Control Commission, received a hearing before that body, and was represented by its attorney at that

hearing. There is no contention in this record that actual notice and all the requisites of due process were not in fact accorded to the appellant. We further point out that under our state statute, section 53-149, R. R. S. 1943, a liquor license is a purely personal privilege, does not constitute property, and vests no property rights in a licensee. In Safeway Stores, Inc. v. Nebraska Liquor Control Commission, 179 Neb. 817, 140 N. W. 2d 668, this court stated as follows: "The right to engage in the sale of intoxicating liquors involves a mere privilege; and restrictive regulations or even a suppression of the traffic do not deprive persons of property without due process of law, violate the privileges or immunities clause, the due process clause, the uniformity provisions, nor, unless they contain irrational classifications or invidious discriminations, the equal protection of the law as prohibited by the state and federal Constitutions."

The judgment of the District Court affirming the actions of the Nebraska Liquor Control Commission and the city council is affirmed.

AFFIRMED.

BERTHA OLSON, APPELLANT AND CROSS-APPELLEE, V. LE ROY OLSON, APPELLEE AND CROSS-APPELLANT.
236 N. W. 2d 618

Filed December 18, 1975. No. 39957.

1. **Divorce: Trial: Appeal and Error.** While an action for dissolution of marriage is heard de novo in this court, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite.
2. **Divorce: Alimony: Property.** Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion.

3. ———: ———: ———. The fixing of alimony or distribution of property rests in the sound discretion of the District Court, and, in the absence of an abuse of discretion, will not be disturbed on appeal.
4. ———: ———: ———. Where, in an action for dissolution of marriage, the wife is awarded a judgment for alimony the court should, if possible, divide the property in such a manner as to permit the husband the means of paying the judgment awarded the wife.

Appeal from the District Court for Custer County: EARL C. JOHNSON, Judge. Affirmed.

Padley & Dudden, for appellant.

Gary L. Scritsmier of Maupin, Dent, Kay, Satterfield, Girard & Scritsmier, for appellee.

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

BRODKEY, J.

This case involves an appeal by the wife, Bertha Olson, and a cross-appeal by the husband, Le Roy Olson, from a decree entered by the District Court for Custer County, Nebraska, in an action brought by the appellant, Bertha Olson, against her husband, Le Roy Olson, for the dissolution of the marriage and for an equitable division of the property.

Although counsel for appellant sets out numerous assignments of error in his brief, he has conceded in his argument to the court that the only two questions involved in this appeal are the questions of the division of the property between the parties and of the allowance of attorney's fees. Specifically, appellant alleges that the court's division of the property was unfair in denying her a fair share of the marriage property and in failing to reinvest her with an inheritance in the amount of $14,000. She also alleges that the trial court failed to consider her contributions to the marriage from salary earned outside the home, and erred in awarding her

only $38,254, payable by her husband in 12 equal annual installments of $3,187.83, without interest except on delinquent payments. The husband, Le Roy Olson, has cross-appealed claiming that the property and alimony award is excessive and that temporary allowances paid to appellant while this appeal is pending should be applied to the permanent alimony award. We affirm.

The parties were married on January 4, 1944, at Broken Bow, Nebraska. At the time of the trial, Bertha was 49 years of age and Le Roy was 51 years of age. They have lived in Custer County, Nebraska, since their marriage, but have moved on numerous occasions. During their marriage, Le Roy was engaged in farming, trucking, and in operating a gravel business. Bertha, in addition to raising their children, engaged in various types of work, including working on the farm, at various schools, and also in stores and other business enterprises. Since 1972, she has been working as a bookkeeper in the Broken Bow High School and has also sold a line of cosmetics on her own. The record also reveals that she kept the books in her husband's gravel business and did other work in that business for approximately 10 years. A considerable portion of her outside earnings was used for family purposes. During the marriage she obtained $6,000 from her father which was used as a downpayment on the parties' farm. This sum was later deducted as an advancement from an inheritance of $14,184.97 from her father's estate. The balance of the inheritance, except for certain personal expenditures, as found by the court, was also contributed for family purposes.

With the above as a background, we now turn to an examination of the property, real and personal, owned by the parties at the time of the commencement of the action, and also examine the court's decree with respect to the division of property. In that decree, entered on December 9, 1974, the court, on the basis of evidence presented during the trial, statements of counsel, and authorities submitted, found that the assets of the par-

ties had a total net value of $66,625.61. It is unnecessary to itemize the assets, and their valuations, but three items included therein must be specifically noted, since their values were disputed at the trial. They are as follows: (1) A certain farm owned jointly by the parties, which was subject to indebtedness of $21,600 and to which the court assigned a net value of $63,400; (2) the residence owned jointly by the parties, valued by the court at $16,000, after deducting a $5,500 mortgage; and (3) the assets of Middle Loup Sand and Gravel Co., a business owned and operated by Le Roy Olson, to which, after consideration of outstanding debts, the court ascribed a value of *minus* $23,859.39.

In its decree, the court awarded Bertha a 1969 Plymouth automobile, certain furniture in her possession, and other items of personal property, with a total value of $4,825. The court awarded Le Roy the farm real estate, the residential real estate, certain life insurance policies and other personal property, subject to all indebtedness existing on such items, with a total net value of $60,300.61. A sum of $1,500 representing money in the District Court escrow account was not awarded to either party.

As previously stated, there was a dispute as to the value of the farm and residential property. Appellant contends that the trial judge totally ignored her appraisals of the value of the property and accepted only those of the appellee. Appellant also contends that there has been a great increase in the value of the real estate in question since trial was had in this matter, and that this court should take cognizance of that fact. We point out, however, that at the pretrial hearing the parties stipulated that their real estate should be valued as of the date of the trial, but that the value of all other property should be valued as of the date of the filing of the petition. Under the terms of that stipulation, we may not consider any increase in the value of the real estate which has occurred since the trial in this matter.

The trial court heard all the evidence presented relative to the value of the property comprising the estate of the parties, and we accept its conclusions. This court has said that while a divorce action is heard de novo in this court, the court will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite. Seybold v. Seybold, 191 Neb. 480, 216 N. W. 2d 179 (1974); Tavlin v. Tavlin, 194 Neb. 98, 230 N. W. 2d 108 (1975).

We now consider the value of the property and other items awarded by the court to the appellant. We have already referred to the specific items of personal property set off to Mrs. Olson valued at $4,825. In 1963, Bertha received an inheritance of $14,184.97 from her father's estate, from which $6,000 previously used as a downpayment on the Olson's farm was deducted. Mrs. Olson claims that she is entitled to be reimbursed for the entire amount of $14,184.97, since it had been put into the family business. The court, however, awarded her only $10,684, excluding approximately $3,500, which it found from the record had been spent by Bertha on personal items. In addition, the court awarded her $27,570 as alimony. The decree ordered Le Roy to pay Bertha the total sum of $38,254, reflecting $27,570 as alimony and $10,684 as restoration of inheritance, in annual installments of $3,187.83. The court further provided that any delinquent payments should draw the legal rate of interest. When this award of $38,254 is added to the $4,825 in personal property, the total award to Bertha amounts to $43,079. This sum represents approximately 64.65 percent of the total assets of the marriage. Even excluding the $10,684 of inheritance returned to her, the percentage is still approximately 48.62 percent of the parties' assets. While it may be argued that the amount of $27,570, designated by the court as alimony in its decree, is a separate and distinct item from that of a division of property between the

parties, and should not be considered in determining the percentage of the total estate awarded to appellant, we recognize that adjustments in alimony are sometimes used to equalize awards to respective parties. In Corn v. Corn, 190 Neb. 383, 208 N. W. 2d 678 (1973), this court stated: "While a property division is technically distinct from alimony, the circumstances may well require that they be considered together." The same rule has been adopted in other states, including our neighboring state of Iowa. In the case of In re Marriage of Duane R. Novak and Betty A. Novak, 220 N. W. 2d 592 (Iowa, 1974), which involved an action brought by the husband for the dissolution of marriage under the Iowa dissolution of marriage law, the Supreme Court of Iowa stated: "Although alimony on one hand and allocation of property rights on the other are distinguishable and have different purposes in marriage dissolution proceedings, * * * they are still closely related in the matter of determining the amount to be allowed." Likewise, in Carlson v. Carlson, 178 Colo. 283, 497 P. 2d 1006 (1972), the court stated: "Alimony, support, and property settlement issues must be considered together to determine whether the court has abused its discretion."

The rule in this state is that the fixing of alimony or distribution of property rests in the sound discretion of the District Court, and, in the absence of an abuse of discretion, will not be disturbed on appeal. Wheeler v. Wheeler, 193 Neb. 615, 228 N. W. 2d 594 (1975). In appellant's brief, she contends that because of the duration of the marriage and her substantial contributions, financial and otherwise, to the marriage, she was entitled to a different property division. She urges that this court order a sale of the real estate, and, after the accounts and bills are paid from the proceeds, the balance be used, first, to reimburse her for her inheritance of $14,000, and the remainder be divided equally between the parties. Under the circumstances of this case, we cannot agree.

The record reveals that the gravel business has outstanding indebtedness of $99,728.76, which when added to the indebtedness on the other real estate results in a total indebtedness of approximately $127,263.74. While the amount which might be realized from a sale of the real estate and business is problematical, it is possible that it would be sufficient to pay off the indebtedness; but we conclude that the excess, if any, would be relatively small. A sale of the property does not seem to be the wisest choice of solutions. The 1973 income tax return filed by appellee reveals that the gravel business, for the first time, is showing a small amount of profit, although it is still heavily in debt. Rentals obtained from the farm property net about $2,500 annually. The 1973 income tax return, which is the latest return shown in the record of this case, shows that Le Roy Olson paid federal income tax in that year on an adjusted gross income of $15,808. To order the appellee, a 51-year-old man, to sell his business and real estate might deprive him of a means to earn a living and make it impossible for him to make the payments to his wife ordered by the court. This court has adopted the rule that where, in an action for dissolution of marriage, the wife is awarded a judgment for alimony the court should, if possible, divide the property in such a manner as to permit the husband the means of paying the judgment awarded the wife. Snow v. Snow, 190 Neb. 655, 211 N. W. 2d 719 (1973).

The record reveals that during her married life Bertha has earned substantial income while employed in various occupations. We assume that she has and will continue to be employed and supplement her income. It should also be remembered that should there be a substantial change in circumstances of the parties, either with respect to an increase in the income of the husband or a change in the condition of the wife, the provisions in this decree for alimony may possibly be subject to adjustment under the statutes of this state. We con-

clude therefore, that there was no abuse of discretion on the part of the trial court with respect to the property division and alimony provisions contained in its decree.

Appellant also challenges that portion of the decree which orders each party to pay his or her own attorney's fees. We point out, however, that Bertha had retained possession of $706.26 which she obtained by cashing a Travelers Insurance Company check made out to both parties. She had also withdrawn $400 from the joint bank account and had been granted $150 to pay a temporary attorney's fee. The trial court's power to award attorney's fees is discretionary and the court may well have believed that the property division would be unbalanced by requiring appellee to pay all attorney's fees. Tavlin v. Tavlin, *supra.*

One further matter requires consideration. Appellee, at the outset of the action, was ordered by the court to pay $150 per month as temporary support for his wife until the matter was heard and determined by the court. After the entry of the decree, and following a hearing, he was ordered to pay during the pendency of the appeal $375 per month as temporary support, commencing February 1, 1975. He urges that these latter sums be credited in partial payment of the alimony award. While we have on occasion permitted such procedure, we decline to do so in this case.

We conclude that the judgment of the District Court should be and hereby is affirmed.

AFFIRMED.

BETTY LOUISE HAMILTON TIEDEMAN, APPELLEE, v. LYLE HERMAN TIEDEMAN, APPELLANT.

236 N. W. 2d 807

Filed December 18, 1975. No. 39972.

1. **Judgments.** In an action to register the judgment of a foreign

court of general jurisdiction, there is generally a presumption that said foreign court had jurisdiction to enter said decree.

2. **Judgments: Divorce: Constitutional Law.** A decree of divorce rendered in another state may be collaterally attacked by showing that the court was without jurisdiction, either of the subject matter of the suit or of the person of the defendant, without violating the full faith and credit clause of the federal Constitution.
3. **Actions: Parties: Process: Constitutional Law.** A court of general jurisdiction may exercise in personam jurisdiction over a nonresident defendant when legislation has been enacted to specifically provide the court with jurisdiction, provided such exercise of jurisdiction does not violate the due process clause of the United States Constitution.
4. **Process.** Both Nebraska and Oklahoma have enacted legislation for obtaining personal jurisdiction over nonresidents, and each state has given broad interpretation of such legislation. Both states have expressed a desire to apply minimum contacts in order to protect the interests of the citizens of its states, when invoking personal jurisdiction over a nonresident, provided it does not offend notions of fair play and substantial justice.

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

Pierson, Pierson & Fitchett, for appellant.

Con M. Keating of Marti, Dalton, Bruckner, O'Gara & Keating and Schuman, Milsten & Jackson, for appellee.

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

TESAR, District Judge.

This is an action for registration of a foreign divorce decree, which contained certain money judgments. The District Court allowed said registration. We affirm.

The facts are that Betty Louise Hamilton Tiedeman and Lyle Herman Tiedeman were married in Laurel, Mississippi. Two children were born of that marriage. In December of 1968, the appellant moved from the State

of Mississippi to Oklahoma City, Oklahoma. He resided there until July of 1971. Appellant then moved to South West City, Missouri, which is approximately 1 mile from the Oklahoma border. The appellee and her children moved from Laurel, Mississippi, to Tulsa, Oklahoma, in December of 1971. The evidence showed that appellant registered and licensed his car in the State of Oklahoma in 1971 and 1972. Appellant and appellee filed joint federal and state tax returns, for the years 1971 and 1972, listing their residence as Tulsa, Oklahoma. The appellant was notified of the proceedings against him in the District Court for Tulsa County, Oklahoma, by certified mail. His signed return receipt was introduced into evidence without objection. The subject of this appeal is the registration of the judgments of the District Court for Tulsa County, Oklahoma, which required appellant to pay temporary and permanent child support and fees.

The validity of the divorce is not in question. Nebraska has long recognized the divisibility of foreign divorce proceedings. Mandelberg v. Mandelberg, 187 Neb. 844, 195 N. W. 2d 148. The "divisibility doctrine" holds that while a state court may have jurisdiction over the marriage to cause its termination, that same court may lack personal jurisdiction to adjudicate "personal matters" such as support or alimony. Estin v. Estin, 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561; Vanderbilt v. Vanderbilt, 354 U. S. 416, 77 S. Ct. 1360, 1 L. Ed. 2d 1456. Thus, the termination of the marital status may be entitled to full faith and credit, and yet, this recognition may be withheld from an accompanying money judgment.

As we said in Repp v. Repp, 156 Neb. 45, 54 N. W. 2d 238: "* * * when a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is open to inquiry. The party attacking the validity of the judgment has the burden of establishing its invalidity. * * * If such judg-

ment on its face appears to be one entered by a court of general jurisdiction, such jurisdiction over the subject matter and the parties will be presumed, unless disproved by extrinsic evidence or by the record itself." Appellant asserts that the presumption should not attach here. Appellant cites 50 C. J. S., Judgments, § 893, p. 500, for the proposition: "Where the duly authenticated record of the judgment of a court of general jurisdiction in another state is produced, it will be presumed that the court had jurisdiction, except where the defendant was not in the state when the judgment was rendered, or where jurisdiction wholly depended on statute. The burden of proof with respect to the jurisdiction of such court is generally on the party claiming a want of jurisdiction." The above exceptions to the presumption of validity normally accorded foreign judgments were carved out by a very restrictive theory of jurisdiction. This theory could be summed up in the following: "The tribunals of one State have no jurisdiction over the persons of other States unless found within their territorial limits; they cannot extend their process into other States, and any attempt of the kind would be treated in every other forum as an act of usurpation without any binding efficacy." Galpin v. Page, 85 U. S. 350, 367, 21 L. Ed. 959. See, also, Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. However, the concepts of jurisdiction and what things are permitted by the due process clause have changed significantly. A landmark case in the area, International Shoe Co. v. Washington, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A. L. R. 1057, asserted: "* * * due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " Appellant acknowledges in his brief: "* * * the theory of minimum contacts can be used to acquire in personam

jurisdiction over a non-resident defendant in a divorce action." Acceptance of the minimum contact theory to obtain personal jurisdiction over a nonresident would seem to preclude the territorial exception to the presumption of validity of a foreign judgment.

The trial court found that the presumption of validity was not rebutted. Even if the trial court had not found the presumption in effect, it cannot be said that there was a total lack of probative evidence to support that finding, nor that that finding was wrong as a matter of law.

Previously, it was mentioned that due process standards have changed considerably. Any determination here of what standards are necessary for personal jurisdiction must be seen as an attempt to delineate the parameters of Oklahoma law, in other words, whether the Oklahoma court had personal jurisdiction over the appellant. This question turns on the scope of Title 12 Oklahoma Statutes Annotated, section 1701.01 et seq. More specifically, it centers on the seventh base in section 1701.03(a): "(7) maintaining any other relation to this state or to persons or property including support for minor children who are residents of this state which affords a basis for the exercise of personal jurisdiction by this state consistently with the Constitution of the United States." In interpreting the above section, the Oklahoma Supreme Court asserted: "* * * it is clear from the concluding portion that it was the intention of our legislature to extend the jurisdiction of Oklahoma courts over nonresidents to the outer limits permitted by the due process requirements of the United States Constitution." Hines v. Clendenning (Okla., 1970), 465 P. 2d 460. Toward defining these outer limits, the Oklahoma court also cites with approval, Travelers Health Assn. v. Virginia ex rel. State Corporation Commission, 339 U. S. 643, 70 S. Ct. 927, 94 L. Ed. 1154, and McGee v. International Life Ins. Co., 355 U. S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223. Both cases concerned the sale of

insurance policies. In McGee, personal jurisdiction was found on the basis of the sale of one insurance policy in California. The United States Supreme Court emphasized the "estimate of the inconveniences" and found those to weigh heavily with the plaintiff, McGee. The court asserted that to hold otherwise would be to preclude persons with moderate claims from any convenient, affordable means of redress. California was said to have a "manifest interest" in providing an effective means of redress for the claims of its residents. In this vein, the Oklahoma court asserted: "The 'manifest interest' of the State of Oklahoma in the marital status, and financial relief incident thereto, of its residents, is surely as great as the interest of California in providing effective redress for insurance policy beneficiaries residing within its borders." Hines v. Clendenning, *supra*. The Oklahoma court found that sufficient minimum contacts existed for the exercise of personal jurisdiction.

Here, it cannot be said that there is a total lack of probative evidence to support a court's finding that either appellant was an Oklahoma resident or that sufficient minimum contacts were present to support personal jurisdiction over the appellant. Appellant admittedly resided in Oklahoma for approximately 3 years, and he planned from the outset to stay in Oklahoma if successful. It is reasonable to assume that appellant would not have come to Oklahoma if he had not intended to be successfully employed. Thus, appellant could be said to have intended to make Oklahoma his domicile. As intent is a mental process, relevant facts and circumstances must be scrutinized. Appellant registered his car in Oklahoma in 1971 and 1972. Appellant also filed joint state and federal income tax returns with appellee in 1971 and 1972. These returns listed Tulsa, Oklahoma, as his residence. The uncertain nature of appellant's activities in Missouri do not require a finding that he was a resident of that state. The above facts, plus visits of appellant to his family in

Tulsa provide ample probative evidence whereby a trial court could find the appellant a resident of Oklahoma.

In some ways, the present case may be seen as the opposite of Hines v. Clendenning, *supra*. In Hines, the wife was abandoned in Oklahoma. Here, the wife sought to join her husband in Oklahoma, the appellant husband did not want his family to join him. Appellee followed the trail her husband had laid to Oklahoma to seek employment for herself. As appellee still resides in Oklahoma, she cannot be said to be forum shopping. Thus, this is not a species of "migratory" divorce.

Appellee is a resident of Oklahoma and appellant had a sufficient quantum of contacts and personal jurisdiction may attach on that basis. There is no argument by appellant that the Oklahoma statutory procedures relative to service were not met. Appellant admits that he had notice of the proceedings in the District Court for Tulsa County, Oklahoma. Thus, an alternative basis for the trial court's finding of personal jurisdiction over the appellant could be based on sufficient minimum contacts by the appellant. In an extremely mobile age, this expansive authority to assume in personam jurisdiction clearly is appropriate.

It cannot be said that there was a total lack of probative evidence of appellant's actions linking him to Oklahoma, or to support a finding that he was an Oklahoma resident, nor can it be said that either of the above conclusions would be wrong as a matter of law. The holding of the District Court for Lancaster County is, therefore, affirmed.

AFFIRMED.

THOMAS SHOTKOSKI, APPELLANT, V. STANDARD CHEMICAL MANUFACTURING COMPANY, A NEBRASKA CORPORATION, APPELLEE.

237 N. W. 2d 92

Filed December 18, 1975. No. 39974.

1. **Trial: Verdicts: Evidence.** In reviewing the correctness of a trial court's action in directing a verdict, the party against whom the motion was directed is entitled to have the evidence, and every reasonable inference that can be drawn therefrom, construed in the light most favorable to him.
2. **Contracts: Warranty: Sales.** Under the Uniform Commercial Code, any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
3. ———: ———: ———. Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under section 2-316, U.C.C., an implied warranty that the goods shall be fit for such purpose.
4. ———: ———: ———. If instructions given in connection with the sale of the product were part of the basis of the bargain, and were inaccurate, and were relied on by the purchaser to his detriment, the breach of warranty may be based upon the inaccurate instructions.
5. **Damages: Warranty: Sales.** Where the seller of goods has breached a warranty with respect thereto the purchaser may recover consequential damages proximately resulting from the seller's breach.
6. **Damages: Warranty: Sales: Trial.** Where the seller of goods has breached a warranty with respect thereto the purchaser has the burden of proving both the cause of the loss and the extent thereof.
7. **Damages: Trial.** Damages need not be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact to estimate with a reasonable degree of certainty and exactness the actual damages.
8. ———: ———. It is the duty of the District Court to refrain from submitting to the jury the issue of damages where the

evidence is such that it cannot determine that issue without indulging in speculation and conjecture.

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

R. Steven Geshell of Robak & Geshell, for appellant.

Finlayson, McKie & Fisk, for appellee.

Heard before WHITE, C. J., MCCOWN, NEWTON, and CLINTON, JJ., and WINDRUM, District Judge.

CLINTON, J.

This is an action by the plaintiff, Thomas Shotkoski, a dairy farmer, to recover damages from the defendant, Standard Chemical Manufacturing Company, for loss of milk production and injury to dairy cows allegedly caused by feeding to the cattle a feed supplement manufactured by the defendant and sold by it to the plaintiff. The plaintiff proceeded upon theories of express warranty, implied warranty, negligence, and strict liability in tort. At the close of the plaintiff's case the defendant moved for a directed verdict on the ground that the evidence was insufficient to require submission of any of the issues, including damages, to the jury. The trial court granted the motion and dismissed the plaintiff's petition. The plaintiff appeals. We affirm.

"In reviewing the correctness of a trial court's action in directing a verdict, the party against whom the motion was directed is entitled to have the evidence, and every reasonable inference that can be drawn therefrom, construed in the light most favorable to him." Carley v. Meinke, 181 Neb. 648, 150 N. W. 2d 256. Accordingly we summarize the important parts of the plaintiff's evidence.

Plaintiff was approached by a salesman of the defendant, who suggested purchase of the supplement and stated, in the words of the plaintiff, that the "product . . . would increase our milk production." The plaintiff

purchased the supplement, which was in liquid form, along with a self-feeder. Plaintiff testified that in making the purchase he relied upon the salesman's statement that the supplement would increase milk production. The plaintiff was told by the salesman to "get the cattle started" by mixing ½ pound of the supplement with the 1½ gallons of rolled corn being given the cattle at the two daily feedings. Defendant also furnished to the plaintiff an analysis of the ration, that is, the silage and corn that was being fed to the dairy herd. The plaintiff commenced feeding the supplement mixed in the corn as instructed. The supplement was also made available to the cattle by the self-feeding device which consisted of a tank holding the liquid and four licking wheels from which the cattle could lick the supplement at a limited rate. The supplement was delivered about October 12, 1968, and was fed to the cattle by both methods for the first 2 or 3 weeks and thereafter for the balance of a 6 to 8-week period by the feeding device only. A feeding instruction label delivered with the product listed, among other things, an analysis of the ingredients and stated, "For Free-Choice Feeding." The evidence indicates that the latter term refers to feeding by the licking device. Feeding the supplement by mixture with grain is referred to as forced feeding.

After the supplement feeding had continued for about 2 weeks, milk production increased for a month and then fell off and some of the cows began drying up. Plaintiff notified defendant's salesman of the decrease in milk production at that time. The plaintiff consulted his veterinarian and the dairy herd was taken off the supplement. The supplement was analyzed and found to be as represented on the label. The veterinarian stated that in his opinion there was nothing wrong with the supplement, but that the feeding by the combination method was all wrong, and that as a consequence, some of the herd got too much urea which caused them to lose their appetites with a consequent

decrease in milk production, followed by some cows drying up. He stated that 15 to 20 percent of the herd was thus affected by the double feeding of the supplement. Once the drying up begins nothing can be done about it during that lactation cycle. Both the plaintiff and the veterinarian testified that milk production varies throughout the year, depending upon many varying factors, including the number of cows freshening, the number drying up naturally, the greening and drying of pastures, weather variations, water availability, and other factors. The plaintiff kept no production records on individual cattle, but his records do show the total number of pounds of milk sold every 2 weeks. At the time feeding of the supplement began in October of 1968, plaintiff had 64 milk-producing cows, but did not have that many in the spring of 1968. The average number of cows milked during the year 1968 is not shown by the evidence. In 1969 and 1967, the plaintiff milked an average of 40 cows.

To support his claim for damages the plaintiff introduced evidence to show that in 1968 he sold 576,149 pounds of milk and in 1969 he sold 393,537 pounds. He claims the difference between the sales price of the milk sold in the 2 years, that is, $3,903.96, as damages for loss of production.

Of the 64 cows which were producing milk on about October 12, 1968, when the feeding of the supplement began, he sold 29 at various times during 1969. He sold them because they were drying up. On February 24, 1969, he sold 11 cows for $3,245.57. On March 15, 1969, he sold 4 cows for $809.70. On April 28, 1969, he sold 3 first calf heifers for $987.98. On November 15, 1969, he sold 11 cows for $2,698.84. He testified that these 29 cows on October 12, 1968, were worth $400 each, or a total of $11,600. He claims the difference between the value on October 12, 1968, and the sales price on the various dates, or $3,857.91, as damages for injury to the cows, that is, decrease in their value because of the

loss of production on account of the feeding of the supplement. There is no expert testimony to establish that the drying of these 29 head was caused by consumption of too much urea. The veterinarian did not examine individual cattle. His testimony that 15 to 20 percent of the herd was affected was founded upon a look at the herd as a whole sometime in November of 1968.

Section 2-313(1)(a), of the Uniform Commercial Code, provides: "(1) Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." Subsection (2) of section 2-313 states: "(2) It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

Section 2-315, U.C.C., provides that: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."

In Larutan Corp. v. Magnolia Homes Manuf. Co., 190 Neb. 425, 209 N. W. 2d 177, we found the evidence sufficient to support a finding of both express and implied warranties where the seller and manufacturer were fully informed of the purpose for which the product (a soil stabilizer) was to be used and where they assured the purchaser that "it would do the job" and where they furnished expert assistance to assure the proper mixing of earth and stabilizer. In Larutan Corp.

v. Magnolia Homes Manuf. Co., *supra,* we said: "Under the Uniform Commercial Code, any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. . . . Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under section 2-316, U. C. C., an implied warranty that the goods shall be fit for such purpose. § 2-315, U. C. C."

In the case at hand the express representation was that the milk production would be increased. There was, however, no representation as to the specific amount of increase. The agent of the defendant also gave instructions as to how the feed was to be given. In this case the plaintiff seeks recovery because the product caused a decrease in production. He does not seek to recover profits lost because production did not increase. If he had, then a different question would be here presented. We need not now attempt to solve that problem. What is clear enough, however, is that an express warranty that milk production will increase is certainly inclusive of a representation that the product will not cause a decrease. One other aspect of the warranty in this case needs to be mentioned. The evidence does not support the conclusion that any breach of warranty or damage resulting therefrom was occasioned merely by the nature of the product itself. Plaintiff's evidence supports the conclusion that the decrease in production resulted from wrong instructions about the proper way to feed the supplement, i.e., he should not have been instructed to free feed and force feed the supplement simultaneously. Reliance upon the instruction of a seller can give rise to a warranty. Texsun Feed Yards, Inc. v. Ralston Purina Co., 447 F. 2d 660,

is on point. In that case the plaintiff purchased from the defendant a supplement to increase the rate of gain in cattle in the feed yard. The sale was accompanied by instructions to feed 1.5 pounds per head per day. The plaintiff followed the advice and the weight gain slowed down considerably from what it had been before the feed was administered. It was later established that the proper dosage should have been 2 pounds per day. The court there said: "It is commercially unrealistic to treat separately the sale of the ration supplement and the rendering of professional advice and assistance. If Texsun was given inaccurate instructions by Ralston's nutrition consultant and if Texsun relied on those instructions to its economic detriment, we can perceive no reason for preventing Texsun's recovery under a breach of warranty theory." If the instructions are part of the " 'basis of the bargain' " they are relevant in determining a breach of the express warranty. Elanco Products Co. v. Akin-Tunnel (Tex. Civ. App.), 474 S. W. 2d 789.

We conclude that the plaintiff's evidence was sufficient to make a jury question on the issue of breach of both express and implied warranty.

Where the seller of goods has breached a warranty with respect thereto the purchaser may recover consequential damages proximately resulting from the seller's breach. §§ 2-714(3), 2-715(2), U. C. C. The purchaser has the burden of proving both the cause of the loss and the extent thereof. § 2-715, U. C. C., comments 4 and 5. Damages need not be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact, in this case the jury, to estimate with a reasonable degree of certainty and exactness the actual damages. Midlands Transp. Co. v. Apple Lines, Inc., 188 Neb. 435, 197 N. W. 2d 646. It is the duty of the District Court to refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine that issue without indulging

in speculation and conjecture. Johnsen v. Taylor, 169 Neb. 280, 99 N. W. 2d 254; Midlands Transp. Co. v. Apple Lines, Inc., *supra.*

A part of the consequential damages which the plaintiff is entitled to claim is the loss in milk production which was the proximate result of the breach of warranty. Was the evidence such that the jury could determine this actual damage with a reasonable degree of certainty? The actual damage is necessarily determined by the decrease in the production of milk by the cows shown to have been affected from what it would probably have been had the injury not occurred. This damage, therefore, would clearly seem to depend upon the number of cows affected, whether all or just a part of the herd; the length of the period during which the cows would be affected, i.e., from the date of the injury to the end of the normal lactation period; and the amount by which the milk production of the cows affected would be decreased either individually or on the average. The evidence shows none of these things. Neither does it show that the herd was so managed that the average number of cows producing milk in the year 1968 was about the same as the average number producing milk in 1969, nor that the period during which production was affected corresponded to the calendar year 1969 so that it was reasonable, all other matters considered, to determine lost milk production by comparing the years 1968 and 1969.

The greatest deficiency, of course, is that the plaintiff's own evidence establishes that about 15 to 20 percent of the cattle fed the supplement suffered a substantial decrease in milk production because the supplement was fed in accordance with erroneous instructions, but does not show how long the normal lactation period of the 15 to 20 percent of cows affected would have continued. The evidence of both the plaintiff and his expert witness show many factors which may affect the production of milk and these we have already noted.

To permit the use of the differences in the total milk production figures for the whole of 1968 and the total production figures for the whole of 1969 as the measure of damages proximately caused would, under the state of the evidence, be the rankest form of speculation and conjecture.

A similar difficulty exists with reference to the claimed decrease in the market value of the cows affected by the feed. The general rule as to the measure of damages for injury to personal property which cannot be restored to its condition before the injury is the difference in the market value of the property immediately before and after the injury. Baum v. County of Scotts Bluff, 169 Neb. 816, 827, 101 N. W. 2d 455; Long & Smith v. Clapp, 15 Neb. 417, 420, 19 N. W. 467 (both cases involving damage to livestock).

The plaintiff's proof is deficient in at least two respects. First, the only competent evidence as to the number of cattle injured by the improper feeding is that of the veterinarian. His highest estimate was 20 percent, i.e., about 13 cattle were affected. There is no evidence at all to show which of the 29 cattle sold were the 20 percent affected. There is no evidence to show that the dryness in the other cattle sold was caused by the improper feeding. Secondly, the plaintiff sold the 29 cattle at various times in a period that extended from 2 to 3 months after the injury occurred, apparently sometime in November of 1968, to more than a year after the damage was noticeable. We may and do take judicial notice of the fact that the market price of cattle varies from time to time. The plaintiff testified as to the average value per head on October 12, 1968, before injury, as he was entitled to do, and such evidence was, of course, competent. Evidence of the amount for which the cattle sold is also, no doubt, some evidence of their market value on the dates sold. There is, however, no evidence whatever to establish the absence of change in market value between the date of

injury and the date the cattle were sold. Neither is there any evidence of how the injury to the cattle affected their market value either percentagewise or in any other way. As a consequence, under the evidence it cannot be reasonably determined how much of the decline in the valuation of the cattle between the date of injury and the date on which they were sold is attributable to the injury and how much to changes, if any, in market value between those dates.

The view we take on this issue makes it unnecessary for us to consider other issues raised and argued.

AFFIRMED.

KENNETH MOREHEAD, HOLDER OF INTEREST, ET AL., APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.

236 N. W. 2d 623

Filed December 18, 1975. No. 39995.

1. **Highways: Constitutional Law: Access: Property.** The right of direct access to an existing street or highway is a property right of which an abutting owner cannot be deprived without due process of law and compensation for his loss.
2. **Highways: Access: Property.** There is no right of direct access to a highway constructed upon a new right-of-way where no highway previously existed if the new highway is designated as a controlled access facility from the beginning.
3. **Eminent Domain: Words and Phrases.** General benefits are those which arise from the fulfillment of the public object which justified the taking. Special benefits are those which arise from the particular relation of the land in question to the public improvement.
4. **Eminent Domain: Trial: Evidence.** If the effect of the taking is to increase the value of the remainder, or some of it, or not diminish the value at all, the condemner is entitled to introduce valuation testimony from which these inferences may be drawn.
5. ———: ———: ———. The trial court has a wide discretion

in determining whether evidence of a particular sale may be admitted.

Appeal from the District Court for Richardson County: WILLIAM F. COLWELL, Judge. Reversed and remanded for a new trial.

Paul L. Douglas, Attorney General, Warren D. Lichty, Jr., and Royce N. Harper, for appellant.

Christensen & Glynn and Thomas J. Gist, for appellees.

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

BOSLAUGH, J.

This is an appeal in a proceeding in eminent domain. On January 26, 1973, the State of Nebraska condemned 7.5 acres of land in Richardson County, Nebraska, for highway purposes which was part of a 52.35-acre tract owned by the plaintiffs.

The appraisers appointed by the county judge fixed the damages at $31,450. Both parties appealed to the District Court where the jury returned a verdict in the amount of $49,750. The State has appealed to this court.

The plaintiffs' land which is situated just north of Falls City, Nebraska, was adjacent to U.S. Highway No. 73 on the west. A county road known as the airport road runs along the north line of the property. The 7.5 acres condemned is a strip approximately 150 feet in width running northwest to southeast through the property and is the right-of-way for relocated Highway No. 73. The remainder consists of two irregular tracts, each of which is a little over 22 acres. Old Highway No. 73, along the west edge of the plaintiffs' land, remains open as a road or street but is not a state highway.

The new highway is a controlled access facility with no access from the plaintiffs' land except a 40-foot

driveway at the south property line. The principal controversy is whether the plaintiffs were entitled to recover damages because they have no right of access to the new highway other than the driveway located at the south edge of the property. The issue is raised in several ways but primarily through the State's objection to instruction No. 8.

Instruction No. 8 advised the jury that in determining the reduction in value of the remainder the jury could consider whether the plaintiffs had been denied "their right of reasonable access to and from the remainders and the abutting 7.50 acre tract." The State contends the instruction was erroneous because the plaintiffs had no right of access to the 7.5-acre tract which is the new highway.

Section 39-1329, R. R. S. 1943, provides: "The right of reasonable convenient egress and ingress from lands or lots, abutting on an existing highway, street, or road, may not be denied except with the consent of the owners of such lands or lots, or with the condemnation of such right of access to and from such abutting lands or lots. If the construction or reconstruction of any highway, to be paid for in whole or in part with federal or state highway funds, results in the abutment of property on such highway that did not theretofore have direct egress and ingress to it, no rights of direct access shall accrue because of such abutment, but the department may prescribe and define the location of the privilege of access if any, of properties that then, but not theretofore, abut on such highway."

The State contends that the new highway constructed upon the right-of-way through the center of the plaintiff's property was not "an existing highway" and is a highway to which the plaintiffs "did not theretofore have direct egress and ingress." The plaintiffs contend that since their property abutted upon old Highway No. 73 and also abuts upon new Highway No. 73, the construction or reconstruction of the highway did not re-

sult "in the abutment of property on such highway that did not theretofore have direct egress and ingress to it."

The statute distinguishes between access to existing highways and access to constructed or reconstructed highways. The right of access to existing highways may not be taken without compensation. This is because the right of direct access to an existing street or highway is a property right of which an abutting owner cannot be deprived without due process of law and compensation for his loss. Balog v. State, 177 Neb. 826, 131 N. W. 2d 402.

There is no right of direct access, however, to a highway constructed upon a new right-of-way where no highway previously existed if the new highway is designated as a controlled access facility from the beginning. No right of direct access ever accrues to such a highway. An abutting landowner has no right to compensation for denial of access to the new highway because the right never existed. The question has not been squarely decided by this court before, but in Frank v. State, 176 Neb. 759, 127 N. W. 2d 300, we noted the landowner acquired no new access rights with the construction of a new highway.

The question has been decided in a number of other states. In D'Arago v. State Roads Commission, 228 Md. 490, 180 A. 2d 488, the rule was stated as follows: "It has, however, frequently been held that there is no right to consequential damages to the land not taken for lack of access to a new limited-access highway built where no road existed before. The reasoning is simple. At the time of the taking, there is no easement of access to the new road inuring to the benefit of the abutting land not taken. No existing right has been taken. And, of course, none will accrue in the future because, when the new road is declared to be one of limited-access, no easement of access by implication can arise in the face of that contrary declaration." See, also, Lehman v. Iowa State Highway Commission, 251 Iowa 77, 99 N. W.

2d 404; Carazalla v. State, on rehearing, 269 Wis. 608a, 71 N. W. 2d 276; Riddle v. State Highway Commission, 184 Kan. 603, 339 P. 2d 301; State v. Burk, 200 Ore. 211, 265 P. 2d 783; Schnider v. State, 38 Cal. 2d 439, 241 P. 2d 1; Winn v. United States, 272 F. 2d 282; Department of Transportation v. Hardin, 231 Ga. 359, 201 S. E. 2d 441; State v. Calkins, 50 Wash. 2d 716, 314 P. 2d 449; State ex rel. Morrison v. Thelberg, 87 Ariz. 318, 350 P. 2d 988; State ex rel. State Highway Commission v. Clevenger, 365 Mo. 970, 291 S. W. 2d 57; 3 Nichols on Eminent Domain (3d Ed. Rev.), § 10.2211(4), p. 393; 39 Am. Jur. 2d, Highways, Streets, and Bridges, § 180, p. 557; 26 Am. Jur. 2d, Eminent Domain, § 203, p. 886; 3 Stan. L. Rev. 298; Annotation, 43 A. L. R. 2d 1072.

Instruction No. 8 allowed the jury to consider whether the plaintiffs had been denied their right of access to the highway constructed upon the new right-of-way. The instruction was erroneous and prejudicial because the plaintiffs had no right of direct access to the new highway.

The plaintiffs' contention that a landowner has a right of access to a particular highway, designated by number or otherwise, even when relocated, is without merit. Renumbering or rerouting of highways has nothing to do with rights of access. A vested right of direct access has its origin in the fact of abutment upon an existing highway without regard to its designation or number. The fact that the highway constructed upon the new right-of-way is now U.S. Highway No. 73 creates no right of access that would not otherwise exist.

The plaintiffs are entitled to any damages that may result from the fact the remainder lying east of the new highway is now deprived of access to the old highway which is adjacent to the west line of the property. While this may be due, at least in part, to the fact that the new highway is a controlled access facility, it is a part of severance damage and not damage for denial of access to the new highway.

The State also complains of the trial court's refusal to instruct the jury concerning special benefits. The jury was instructed as a matter of law that no amount was to be deducted from the just compensation to which the plaintiffs were entitled because the only benefits which accrued to the remaining property were those shared by the public in general.

General benefits are those which arise from the fulfillment of the public object which justified the taking. Special benefits are those which arise from the particular relation of the land in question to the public improvement. Backer v. City of Sidney, on rehearing, 166 Neb. 492, 89 N. W. 2d 592.

The State's contention here was that the plaintiffs' property received a special benefit because the new highway intersects with the airport road which results in part of the remainder lying east of the new road being located upon an intersection. We think the trial court was correct in determining this was not a special benefit.

The State, however, was entitled to show any increase in value to the remainder that may have resulted from the project. If the effect of the taking is to increase the value of the remainder, or some of it, or not diminish the value at all, the condemner is entitled to introduce valuation testimony from which these inferences may be drawn. Frank v. State, *supra*.

The State further contends that an expert witness called by the State should have been permitted to use the sale of the subject property to the plaintiffs as a comparable sale. The sale took place on May 28, 1969, approximately 3½ years before the date of the taking, but the witness testified he had made adjustments for the changes that had taken place in the interval.

The trial court has a wide discretion in determining whether evidence of a particular sale may be admitted. Thacker v. State, 193 Neb. 817, 229 N. W. 2d 197. Here there was evidence of considerable development since

the time of the sale and some doubt as to whether the price paid had fairly represented the market value of the land at that time. The ruling made was not an abuse of discretion.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

VILLAGE OF SPRINGFIELD, APPELLEE, V. RAY HEVELONE ET AL., APPELLANTS, IMPLEADED WITH GALE HEVELONE, APPELLEE.

236 N. W. 2d 811

Filed December 18, 1975. No. 39998.

1. **Constitutional Law: Courts: Equity.** Article V, section 9, Constitution of Nebraska, grants chancery or equity jurisdiction to the District Court.
2. ———: ———: ———. The equity jurisdiction of the District Court conferred by the Constitution cannot be legislatively limited or controlled.
3. **Constitutional Law: Injunctions: Zoning.** Notwithstanding section 24-517 (5), R. S. Supp., 1974, the District Court retains jurisdiction in injunction actions brought to enforce zoning ordinances.
4. **Appeal and Error.** Questions not presented to or passed on by the trial court will not be considered on appeal.
5. **Contempt: Parties.** A civil contempt proceeding has for its purpose the preservation and enforcement of the rights of private parties.
6. **Contempt.** In a civil contempt proceeding willfulness is an essential element.
7. **Contempt: Jury.** A jury is not ordinarily required in a civil contempt proceeding.
8. **Continuances.** A motion for a continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Ledwith & Shokes and Michael G. Ryan, for appellants.

Monen, Seidler & Festersen, for appellee Village of Springfield.

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

NEWTON, J.

This is a contempt proceeding for violation of a temporary restraining order, a temporary injunction, and a permanent mandatory injunction. No appeal was taken from the decree in injunction. The District Court held the defendants to be in contempt for failure to obey the orders of the court. We affirm the judgment of the District Court.

Section 17-1001, R. R. S. 1943, gives villages and cities of the second class the authority to enforce zoning ordinances over an area within 1 mile of the corporate limits. The defendants, on land within 1 mile of the corporate limits of the Village of Springfield, sought to plat the land and to move several houses on it. Their plat was not accepted by the village and their request for a waiver of the village's zoning ordinance was refused. Defendants nevertheless proceeded to locate houses, which did not comply with zoning requirements, on the land. They improved at least two of the houses and occupied them.

An injunction action was brought by the village. A temporary restraining order was issued restraining defendants from moving any more structures to the premises or finishing any work on those already there. A temporary injunction of the same nature was subsequently issued followed by a permanent mandatory injunction. Defendants were directed to vacate the occupied houses and to move all structures from the land. No appeal was taken. Subsequently defendants were found to be in contempt for failure to vacate and remove

the houses. They were allowed 14 days to vacate the houses and submit plans for their removal. They did not do so and were forcibly evicted from the houses. They have appealed from the contempt judgment.

Defendants assert that: (1) The District Court did not have jurisdiction of the subject matter; (2) the proceeding is void as based on a void zoning ordinance; (3) the proceeding was for criminal, not civil contempt; (4) they were denied due process and the effective assistance of counsel; (5) insufficiency of the evidence; and (6) excessive punishment.

The argument regarding District Court jurisdiction of the subject matter is based on section 24-517 (5), R. S. Supp., 1974, which states that the county courts shall have: "Exclusive original jurisdiction in any action based on violation of a city or village ordinance, * * *." This portion of the statute is ambiguous when considered in the light of other statutory and constitutional provisions. Insofar as injunction actions are concerned, the statutes place jurisdiction in the District Court. See § 25-1064, et seq., R. R. S. 1943. The only jurisdiction conferred on a county judge is to issue a temporary restraining order when there is no District Judge in the county.

Article V, section 9, Constitution of Nebraska, grants chancery or equity jurisdiction to the District Court. It has long been recognized that the equity jurisdiction of the District Court conferred by the Constitution cannot be legislatively limited or controlled. See, State ex rel. Sorensen v. Nebraska State Bank, 124 Neb. 449, 247 N. W. 31; State ex rel. Wright v. Barney, 133 Neb. 676, 276 N. W. 676. An action for an injunction is an action in equity. See, 42 Am. Jur. 2d, Injunctions, § 2, p. 727; City of Syracuse v. Farmers Elevator, Inc., 182 Neb. 783, 157 N. W. 2d 394. It is apparent that section 24-517 (5), R. S. Supp., 1974, is, if construed to deprive the District Court of jurisdiction in injunctions for zoning violations, a restriction on the constitutionally con-

ferred powers of the District Court. To argue that the power remains because the case may be appealed to the District Court is a non sequitur. We conclude that the District Court had jurisdiction.

Defendants assert the contempt proceedings are void because based upon an invalid zoning ordinance. This proposition was not pleaded nor raised in any manner at the trial of the contempt matter. "Questions not presented to or passed on by the trial court will not be considered on appeal." Ford v. County of Perkins, 190 Neb. 304, 207 N. W. 2d 694. Furthermore, this issue had been raised in the original hearing on the application for injunction and had been determined adversely to defendants. That judgment was not appealed from and is res judicata. See Home Savings & Loan Assn. v. Mount Zion Baptist Church, 139 Neb. 867, 299 N. W. 287.

Defendants argue that procedurewise there is no distinction between civil and criminal contempts and that they were entitled to a jury trial. We have often recognized the distinction between civil and criminal contempts. In Megel v. City of Papillion, 190 Neb. 238, 207 N. W. 2d 377, we held that: "A civil contempt proceeding has for its purpose the preservation and enforcement of the rights of private parties." Such is the case here.

Although the federal courts have held that absence of willfulness does not relieve an individual from civil contempt (see National Labor Relations Board v. Ralph Printing & Lithographing Co., 433 F. 2d 1058 (8th Cir., 1970)), Nebraska requires that the violation be willful. See Kasparek v. May, 174 Neb. 732, 119 N. W. 2d 512. Here the defendants were found to be in contempt for ignoring a mandatory injunction to vacate the houses on their premises and remove them. In its decree of December 20, 1974, the court found the defendants to be in contempt but withheld sanctions until January 3, 1975, to permit defendants to submit a plan for removing the houses and to vacate the premises. Defendants

failed to comply with this order and on January 3, 1975, the court ordered the defendants forcibly evicted. No other penalties have been assessed. Willfulness is apparent. Under the circumstances defendants were not entitled to a jury trial. In Bloom v. Illinois, 391 U. S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522, the court stated that the power to commit for civil contempt and to punish petty criminal attempts summarily is unaffected and a jury is not required. The court further held that: "When the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty, the best evidence as to the seriousness of the offense is the penalty actually imposed." The punishment, if it may be so referred to, was obviously not excessive.

In regard to the degree of proof required being proof beyond a reasonable doubt and the sufficiency of the evidence to establish a willful violation of the decree of injunction, suffice it to say that examination of the record establishes that this contention is without merit. The defendants themselves testified to due knowledge and understanding of the terms of the injunction and conceded their failure to comply with it.

On November 20, 1974, defendants' counsel asked permission to withdraw. Notice of the application and of a hearing thereon on December 6, 1974, was immediately mailed to defendants. The application was granted but defendants failed to obtain other counsel until shortly before the contempt hearing held on December 20, 1974. A motion for a continuance was rejected with the result that defendants assert they were denied due process and the effective assistance of counsel. It is apparent that defendants had a month in which to obtain counsel but failed to do so. They cannot complain of a situation arising out of their own neglect. Furthermore, the issues at the hearing were uncomplicated and readily understood and prepared for. No prejudice resulted. "A motion for a continuance is addressed to the sound dis-

cretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal." Korte v. Betzer, 193 Neb. 15, 225 N. W. 2d 30.

The judgment of the District Court is affirmed.

AFFIRMED.

THOMAS EDWARD LOWRY, APPELLANT, V. JOHN MURREN ET AL., APPELLEES.

236 N. W. 2d 627

Filed December 18, 1975. No. 40004.

1. **Wills.** Where the language of a will is clear and unambiguous there is no room for construction.
2. **Wills: Property.** Where it is clear that the testator has not disposed of all his property, the courts cannot add provisions to his will which will prevent a partial intestacy, but the property which is thus omitted must pass as intestate property.
3. ———: ———. The rule in Shelley's case is not applicable where the "remainder" interest is only a life estate.
4. ———: ———. Vested interests are not subject to the rule against perpetuities nor does the rule apply to reversions.

Appeal from the District Court for Saunders County: HOWARD V. KANOUFF, Judge. Affirmed.

William J. Lindsay and Ralph R. Bremers, for appellant.

Haessler, Sullivan & Inbody and Edstrom, Bromm & Lindahl, for appellees.

Heard before WHITE, C. J., MCCOWN, NEWTON, and CLINTON, JJ., and WINDRUM, District Judge.

MCCOWN, J.

Thomas Edward Lowry brought this action to quiet the title in fee simple to him on 80 acres of land in Saunders County, Nebraska, devised under the will of Thomas Murren, Sr., deceased. Upon Thomas Lowry's

death, the action was revived in the name of Ralph R. Bremers, the executor of his estate and his sole devisee. The District Court found that the will of Thomas Murren, Sr., provided only for life estates in the land and did not devise the fee; and that Murren died intestate as to the fee title. The court quieted title to the land in the heirs-at-law of Thomas Murren, Sr., and directed partition accordingly. The plaintiff has appealed.

Thomas Murren, Sr., died testate January 12, 1925. His will provided that his widow, Hannah Murren, take a life estate in all his real estate, including the land involved here. The 80 acres here were also the subject of paragraph Eighth of his will. That paragraph provided: "EIGHTH; After the death of my wife, Hannah Murren, I give, devise and bequeath to my grandson, Thomas Edward Lowry, son of my deceased Daughter, Margaret Lowry, a Life Estate in and to the West ½, of SE-¼, of Sec. 35, Twp. 16, Rg. 7, in Saunders County, Nebraska. containing 80-Acres, in the event my grandson above mentioned marries and has children, at his death, his children, if any, shall take a Life Estate in and to the above described real estate, equally, share and share alike,. In case the above mentioned grandchild should die before my decease, then and in that event, the 80-Acres above described, is to go to MY Direct Heirs, (Sons & Daughter) living at that time of my decease, absolutely and forever equally, share and share alike." There is no general residual clause in the will.

Hannah Murren died intestate October 2, 1932. The heirs-at-law of Hannah Murren and Thomas Murren, Sr., are the same persons. Thomas Edward Lowry survived Thomas and Hannah Murren, and although he married, he had no children. He commenced this action to quiet title November 9, 1972, and died May 23, 1973. This action was revived in the name of Ralph R. Bremers, the executor of his estate and his sole devisee.

Thomas Edward Lowry having survived the testator,

the District Court found that the will of Thomas Murren, Sr., devised only life estates and did not devise the fee at the termination of the life estates. The District Court also found that Thomas Murren, Sr., died intestate as to the fee; that the fee was not a contingent remainder affected by the rule against perpetuities but passed immediately upon the death of the testator to his heirs, subject to the life estates. The District Court quieted the title in the heirs-at-law of Thomas Murren, Sr., and directed partition accordingly.

The plaintiff contends there is a presumption that a testator intended to dispose of his entire estate and not to die intestate as to any part thereof, and that a construction which results in intestacy should not be adopted if, by reasonable construction, it can be avoided. The plaintiff concludes that the language of paragraph Eighth, under the rule in Shelley's case and the rule against perpetuities, should be construed to constitute the devise of a life estate in the land to Thomas Edward Lowry and a devise of the remainder to his heirs, thus resulting in a devise of the land to Thomas Edward Lowry in fee simple. We cannot agree.

A will is not open to construction unless it is ambiguous. Where the language of a will is clear and unambiguous there is no room for construction. Wall v. Wall, 157 Neb. 360, 59 N. W. 2d 398.

While there is a presumption that a testator intended to dispose of his entire estate, there is also a rule of law that in order to effectively disinherit the heirs-at-law a testator must dispose of his property by will. It is elementary that real estate not disposed of by will becomes intestate property and descends to the heirs-at-law of the testator. The presumption that a testator intended to fully dispose of his estate by will does not overcome the rule requiring an express provision or necessary implication to disinherit heirs. Jacobsen v. Farnham, 155 Neb. 776, 53 N. W. 2d 917, 33 A. L. R. 2d 543.

As this court said in Hunter v. Miller, 109 Neb. 219, 190 N. W. 583: " 'It is not sufficient that the court may entertain a private belief that the testator intended a fee; it must see that he has expressed that intention with reasonable certainty on the face of his will. For the law will not suffer the heir to be disinherited upon conjecture. He is favored by its policy; and though the testator may disinherit him, yet the law will execute that intention only when it is put in a clear and unambiguous shape. * * *.' " Where it is clear that the testator has not disposed of all his property, the courts cannot add provisions to his will which will prevent a partial intestacy, but the property which is thus omitted must pass as intestate property. 4 Page, The Law of Wills, § 30.15, p. 105; Wehrer v. Baker, 161 Neb. 241, 72 N. W. 2d 844.

Plaintiff's contention that the rule in Shelley's case is applicable here is unsupportable. The rule is still applicable in Nebraska where the testator died before 1941, the effective date of the Uniform Property Act. Nevertheless, the rule cannot and does not apply here. Here only life estates are involved, and the final life estate is limited to the children of Thomas Edward Lowry rather than to his heirs. The rule in Shelley's case is inapplicable where the remainder is to the heir for life. Simes and Smith (2d Ed.), The Law of Future Interests, § 1547, p. 440. If the remainder interest is to children, rather than to the full line of heirs capable of inheriting at the time of the testator's death, the rule in Shelley's case is not applicable. See, Simes and Smith (2d Ed.), The Law of Future Interests, § 1549, p. 443; Salmons v. Salmons, 142 Neb. 66, 5 N. W. 2d 123. The rule in Shelley's case is not favored. It is only when the facts bring a case under the strict letter of the rule that courts will apply and enforce it.

Plaintiff's contention that the provisions of paragraph Eighth violate the rule against perpetuities is also untenable. Vested interests are not subject to the rule,

nor does the rule apply to reversions. All reversions are vested interests. See, 5 Page, The Law of Wills, § 42.10, p. 293; Simes and Smith (2d Ed.), The Law of Future Interests, § 1240, p. 148, and § 82, p. 65. It is clear that the remainder interest here vested in the heirs-at-law of Thomas Murren, Sr., immediately upon the death of the testator, although possession was postponed until the termination of the life estates. See, 5 Page, The Law of Wills, § 42.9, p. 282; Drury v. Hickinbotham, 129 Neb. 499, 262 N. W. 37. That reversionary interest vested at the time of the testator's death, even though possession was postponed until the termination of the life estates, and the rule against perpetuities was not violated.

The language of paragraph Eighth of the will is not ambiguous. It provided for life estates only and did not devise the fee. Thomas Murren, Sr., died intestate as to such fee and the fee passed immediately upon the death of the testator to his heirs-at-law, subject to the life estates provided for.

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

AFFIRMED.

PENDLETON WOOLEN MILLS, AN OREGON CORPORATION, APPELLEE, V. VENDING ASSOCIATES, INC., A NEBRASKA CORPORATION, APPELLANT.

237 N. W. 2d 99

Filed December 24, 1975. No. 40062.

1. **Negligence: Torts: Proximate Cause.** In an action based on negligence, the plaintiff, in order to recover, must establish not only the negligence of defendant but also that such negligence was the proximate cause of the occurrence and the resulting damages.
2. **Negligence: Torts: Proximate Cause: Words and Phrases.** Proximate cause is that cause which in a natural and continuous

sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred.

3. ———: ———: ———: ———. Negligence is not the cause in fact of an occurrence unless it is a "substantial factor" in causing the occurrence or "but for" the negligence, the occurrence would not have happened.
4. **Trial: Evidence.** Speculation and conjecture are not sufficient to establish causation. Plaintiff's evidence must be sufficient to make the theory of causation reasonable and not merely possible.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Reversed and dismissed.

Haney, Hansen & Katz, for appellant.

Richard L. Lydick and Zweiback & Laughlin, for appellee.

Heard before WHITE, C. J., BOSLAUGH, CLINTON, and BRODKEY, JJ., and MORAN, District Judge.

BRODKEY, J.

Appellant, Vending Associates, Inc., a Nebraska corporation, appeals to this court from a judgment entered against it by the municipal court of the City of Omaha, in favor of Pendleton Woolen Mills, an Oregon corporation, in the amount of $2,223, plus costs, representing water damage allegedly caused to the building of the appellee by the negligence of the appellant in failing to maintain and repair a certain soda pop vending machine owned by appellant corporation, and placed by it on the premises of appellee. The judgment was appealed to the District Court for Douglas County, which affirmed the judgment of the municipal court, based on the record of the trial made in the municipal court. Vending Associates, Inc., then perfected its appeal to this court. We reverse and dismiss.

It appears that the damage in question occurred sometime between July 3 and July 6, 1971. A large quantity of a mixture of water and syrup was found on the floor

in the vicinity of a soft drink vending machine on the third floor of the Pendleton Woolen Mills factory at 9th and Douglas Streets in Omaha. The water apparently had seeped into the second floor of the building and finally into the basement. Conveyor belts and a chute for moving crates of merchandise between the floors were also found to be waterlogged and covered with a sticky or gummy substance. Testimony was presented that water was seen coming from the bottom and rear of the soda pop vending machine which was of the type that mixes water and syrup in a cup. The machine obtained its water supply from a water pipe in the building to which it was connected by copper tubing.

The record is not clear as to the relationship between the parties with respect to this machine, i.e., whether a lease of the machine to appellee or another form of bailment was involved. No lease or written contract was introduced into evidence setting out the rights and duties of the respective parties. In its petition, plaintiff does not specifically allege the existence of a lease, but merely states: "That at all times material herein the plaintiff *provided space* in its place of business at 911 Douglas Street, Omaha, Douglas County, Nebraska, for the defendant to maintain vending machines thereon, which machines were under the sole care, control and maintenance of the defendant." (Emphasis supplied.) The only testimony with reference to the nature of the relationship between the parties was given by the witness William R. Parker, who was employed by Pendleton Woolen Mills as the administrative manager. He testified that there was no written agreement concerning the machine with Vending Associates, nor had he personally negotiated any oral agreement. He was asked the following question by counsel: "All right. Insofar as this particular machine is concerned, what was Pendleton's relationship with Vending Associates?" He replied: "They would supply the necessary ingredients for this machine so that our people could purchase

drinks at this machine." The evidence is undisputed that an employee of Vending Associates did check the vending machines on a daily basis, and replenished the necessary supplies, such as syrup, etc., and also performed minor repairs. Witness Parker also testified that if anything went wrong with one of the machines, and it failed to function properly, they would immediately call Vending Associates, who, in turn, would send out a qualified repairman to fix it. He also testified that it was necessary to have a key to open the machines to make repairs, etc., but that Pendleton was not given and did not have a key.

In its brief filed in this appeal, the appellant assigns as grounds for reversal that the District Court erred in finding that Vending Associates was negligent in its maintenance of the pop machine; and also that it erred in finding that the occurrence and alleged damages were proximately caused by any negligence of Vending Associates; and further that Pendleton did not sustain its burden of proving the foregoing matters by a preponderance of the evidence.

We first consider the issue of negligence. In its petition filed in the District Court in this matter, Pendleton alleges: "That on or about July 4, 1971, a water valve on one of said vending machines malfunctioned; that the malfunction was caused by defendant's negligence in failing to properly maintain and replace used and worn parts." This is the sole and only allegation of negligence contained in the petition, and in order to recover, Pendleton is obliged to establish those specific allegations of negligence, and no others.

It is clear from appellee's brief that it bases its right to recovery and justifies the judgment it obtained on the theory that Vending Associates had a duty to keep the machine in order, because it was a "dangerous instrumentality," particularly in view of the fact that it was connected to the water supply. It relies principally upon the case of Hickman v. Parks Construction Co., 162 Neb.

461, 76 N. W. 2d 403 (1956), and cites that case for the proposition that "* * * where a party is responsible for a dangerous place, agency, instrumentality, or operation likely to cause injury or damage to persons or property rightfully in its proximity, * * * he is charged with the duty of taking due and suitable precautions to avoid injury or damage to such person or property, and his failure to take such precautions constitutes negligence." That case, however, involved an unlighted and unguarded excavation and is clearly distinguishable on its facts from the situation in the instant case. We do not believe that the pop machine involved in this case could in any way be considered as a "dangerous instrumentality" in a class with firearms, explosives, propane gas systems, scaffolding, high tension electrical lines, and other items of a similar nature. The mere fact that property, if used negligently, could cause harm to persons or property, does not ipso facto make such property a "dangerous instrumentality," within the purview of the rules stated above. See 11 Words and Phrases, p. 112 et seq., for examples of various items which have been held to be, and also not to be, a "dangerous instrumentality."

However, we do not decide this case on the issue of whether Vending Associates was negligent under the facts of this case. We conclude that Pendleton was still not entitled to recover judgment against appellant because of a total lack of evidence establishing that any negligence attributable to Vending Associates was the "proximate cause" of either the leak or the damages; or to state it more accurately, that there was any "causation in fact" between the alleged negligence, and the occurrence and the water damage.

In an action based upon negligence, the plaintiff, in order to recover, must establish not only the negligence of the defendant, but also that such negligence was the "proximate cause" of the occurrence, accident, or harm; and also the proximate cause of the resulting damages. "Proximate cause," as used in the law of negligence, is

that cause which in a natural and continuous sequence unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. Weichel v. Lojka, 185 Neb. 819, 179 N. W. 2d 112 (1970). Also, this court in 1969 approved a standard instruction for trial judges to give to juries involving a definition and an explanation of "proximate cause." This instruction reads, in part, as follows: "By 'proximate cause' is meant a moving or effective cause or fault which, in a natural and continuous sequence (unbroken by an efficient intervening cause), produces the (harm, accident, injury, collision, occurrence), and without which the (harm, accident, injury, collision, occurrence) would not have occurred." NJI No. 3.41.

There is little doubt that the water came from the vending machine in question, but the only evidence in the record as to the cause of the leak was the testimony of William R. Parker, Pendleton's administrative manager, who testified, apparently without objection, that during a telephone conversation with Mr. Irving Gendler, president of Vending Associates, Gendler told him that the leak was caused by a malfunctioning shut-off valve on the machine. No other evidence was offered to show what part of the machine apparatus had malfunctioned. The flood is attributed to the shut-off valve only on the testimony of Parker who related the statement made by Gendler who may or may not have inspected the machine, or received his information from someone who did so. Even the statement of Gendler that the shut-off valve caused the leakage does not, however, prove that the negligence of Vending Associates caused the malfunction. No evidence was presented indicating the location of the shut-off valve in the machine, or how it operates, or, if in fact, it did cause the leak. The valve itself was not introduced in evidence, nor was there any testimony that a regular inspection would have detected a faulty or weakened shut-off valve or whatever part caused the leak. This court, in the past, has em-

ployed both the "substantial factor" test, and the "but for" test for determining causation in fact in negligence cases. See, for example, Landmesser v. Ahlberg, 184 Neb. 182, 166 N. W. 2d 124 (1969); Beranek v. Petracek, 184 Neb. 516, 169 N. W. 2d 275 (1969). Pendleton offered no proof that the absence of regular inspection was a "substantial factor" in causing the valve to malfunction, or that "but for" the absence of such inspection, the leak would not have occurred. Speculation and conjecture are not sufficient to establish causation. In Barkalow Bros. Co. v. Floor-Brite, Inc., 188 Neb. 568, 198 N. W. 2d 329 (1972), this court stated "* * * the evidence must be sufficient to make the theory of causation reasonable and not merely possible. Conjecture, speculation, or choice of possibilities is not proof. There must be something more which will lead a reasoning mind to one conclusion rather than another. Raff v. Farm Bureau Ins. Co., 181 Neb. 444, 149 N. W. 2d 52."

This court has also stated: "Misfortunes do occur which result from inevitable accident. A wire may have some defect which the most astute care will not discern. A wire originally good may come to be defective and break, when no human skill could reasonably be expected to detect it. Such accidents, unaccompanied by any negligence on the part of an electric company, can afford no basis for a recovery. Only insurers against injury are liable for injuries resulting from such accidents." Roos v. Consumers Public Power Dist., 171 Neb. 563, 106 N. W. 2d 871 (1961). The Roos case involved an explosion which resulted from the breaking of a primary conductor wire. The cause of the break was a "fatigue fracture" in the wire. Regarding the defendant's failure to discover the defect in the wire before the break, the court said: "We point out also that there is no evidence that the defendant had any reasonable or practical means of locating the defective place in the line prior to its break, or that it had any

knowledge of the defect. It is not shown that any special equipment existed that is of general use in the trade, which would have revealed the defect, the non-use of which would amount to a failure to properly maintain the line in the exercise of due care."

It is possible in the instant case that the water leakage was caused by a malfunction which the most astute care on the part of Vending Associates could not have discerned. Although there was no evidence of any "worn-out" parts in the machine, as alleged in the petition, it is possible that such a part, which could not be located by the repairmen or the routemen, in the course of any reasonable inspection, malfunctioned and caused the leakage. The burden was upon the appellee to establish by a preponderance of the evidence that inspection of the machine or of the shut-off valve would have revealed such a defect, and would have prevented the leakage which occurred. It failed to present such evidence. To find for Pendleton, it would be necessary to speculate as to the cause of the leakage, and then further assume that an ordinary reasonable program of maintenance would have prevented the malfunction of such faulty part or parts.

There being no evidence in the record to establish a connection in fact between the negligence of the appellant, if any, and the leakage which occurred, it is clear that the appellee failed to establish an essential element of its cause of action, and hence the municipal court and District Court erred in rendering judgment for the appellee. For this reason, the judgment of the District Court must be reversed, and the cause dismissed.

REVERSED AND DISMISSED.

GLENN E. BOTSCH ET AL., APPELLANTS, V. LEIGH LAND COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES.
236 N. W. 2d 815

Filed December 24, 1975. No. 40071.

1. **Nuisances.** Ordinarily a legitimate business enterprise is not a nuisance per se, but it may become a nuisance in fact. It may become such by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of its operation.
2. **Nuisances: Injunction.** The exercise of due care by the owner of a business in its operation is not a defense to an action to enjoin its operation as a nuisance.
3. **Nuisances.** Even in an industrial or rural area one cannot conduct a business enterprise in such manner as to materially prejudice a neighbor.
4. **Nuisances: Injunction.** A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance caused thereby. In the first instance, at least, it will require the cause of the grievance to be corrected and will enjoin the conduct of the enterprise perpetually after it has been proved that no application of endeavor, science, or skill can effect a remedy or that the owners cannot be induced to conduct it properly.

Appeal from the District Court for Colfax County: ORVILLE L. COADY, Judge. Reversed and remanded.

William A. Wieland of Healey, Healey, Brown, Wieland & Burchard and Fredrick L. Swartz, for appellants.

Joseph Ginsburg of Ginsburg, Rosenberg, Ginsburg & Krivosha and Steven J. Flodman of Barlow, Watson & Johnson, for appellees.

Heard before WHITE, C. J., MCCOWN, NEWTON, and CLINTON, JJ., and KUNS, Retired District Judge.

NEWTON, J.

Plaintiffs are the owners and occupants of a farm in Colfax County, Nebraska, upon which they conduct normal farming operations and a small livestock enterprise consisting of the raising of purebred cattle and the feed-

ing of a small number of hogs and cattle. To the south, directly across the road from plaintiffs' farm-building site, the defendants have built cattle yards or pens in which they have fed from 408 to 3,746 head of cattle simultaneously. Four lagoons are maintained to catch the runoff of water and manure from the feedlot. Plaintiffs seek an injunction due to offensive odors, dust, and insects originating on the defendants' premises. At the conclusion of plaintiffs' evidence, the trial court dismissed their petition. We reverse that judgment and remand the cause for further proceedings.

Plaintiffs' assignment of errors is directed primarily at the finding of the court that as a matter of law a nuisance did not exist and a failure to prove negligent operation. In its memorandum opinion the court stated that plaintiffs were subjected to intolerable odors in the use, comfort, and enjoyment of their dwelling and farmstead and suffered from a substantial increase in flies, all due to defendants' feeding operation and maintenance of the lagoons. These findings are amply sustained by the record.

Ordinarily a legitimate business enterprise is not a nuisance per se, but it may become a nuisance in fact. It may become such by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of its operation. See, City of Syracuse v. Farmers Elevator, Inc., 182 Neb. 783, 157 N. W. 2d 394; Sarraillon v. Stevenson, 153 Neb. 182, 43 N. W. 2d 509, 18 A. L. R. 2d 1025.

The exercise of due care by the owner of a business in its operation is not a defense to an action to enjoin its operation as a nuisance. See, Sarraillon v. Stevenson, *supra;* 58 Am. Jur. 2d, Nuisances, § 34, p. 597.

The existence of the conditions revealed by the record in this case clearly establishes that defendants' feeding activities, as operated, constituted a nuisance. The odors generated by the lagoons and the manure dust, together with the insects resulting from failure to remove

manure, have rendered plaintiffs' premises well-nigh uninhabitable and the reduction in the number of cattle fed in recent months, due to unfavorable cattle prices or other conditions, cannot defeat this action when the potential for larger operations remains.

Defendants assert that since livestock feeding is essentially a rural activity and their project is located in a rural area, it cannot be denominated a nuisance and enjoined. It is true that rural residents must expect to bear with farm and livestock conditions normally found in the area where they reside. In the area under consideration almost every farm has a relatively small cattle-feeding operation but nothing approaching in size the defendants' large commercial operation or resulting in comparable objectionable features. Even in an industrial or rural area one cannot conduct a business enterprise in such manner as to materially prejudice a neighbor. In Horn v. Community Refuse Disposal, Inc., 186 Neb. 43, 180 N. W. 2d 691, this court indicated that a dump yard in a rural area could become a nuisance if not properly operated. In Karpisek v. Cather & Sons Constr., Inc., 174 Neb. 234, 117 N. W. 2d 322, this court approved the enjoining of the operation of an asphalt plant in an industrial area. In Chicago, R. I. & P. R. R. Co. v. Liddle, 253 Iowa 402, 112 N. W. 2d 852, it was held that stockyards in an industrial area were not a nuisance per se but could be conducted so as to become a nuisance. In Albaugh v. Abbott, 253 Mich. 588, 235 N. W. 263, the feeding of garbage to pigs in a rural area was enjoined. In Bedford v. City of Cleveland Heights, 18 Ohio Op. 319, 32 Ohio L. Abs. 233, a similar operation was enjoined. The case of Baldwin v. McClendon, 292 Ala. 43, 288 So. 2d 761, is almost identical to the one before us. A large hog-raising operation, with lagoons, located in a strictly farm area was held to be a nuisance. The waste material in the lagoons generated offensive odors. The court held: "Fact that hog-raising operation was carried on in a rural community given over

almost entirely to agricultural pursuits was a factor to be considered in determining whether odors emanating from the property constituted a nuisance, but there were other factors, including proximity of the operation to neighbors' home, intensity and volume of odors, their interference, if any, with neighbors' own well-being and enjoyment of their home, and any consequential depreciation in the value of the home." The court further stated: "Moreover, assuming that the appellants' operation met some set of sanitary standards for similar operations, this would not affect the appellees' right to equitable relief, because the issue is not whether the appellants were negligent, * * * or their business lawful, but whether or not from the inherent qualities of the business, or the manner in which it is conducted, it directly causes substantial injury to the properties of the appellees, or produces material annoyance and inconvenience to them in the comfortable enjoyment of their home." See, also, § 28-1016, R. S. Supp., 1974; Tinsley v. Monson & Sons Cattle Co., Inc., 2 Wash. App. 675, 472 P. 2d 546; Kuhn v. Wood, 34 Ohio L. Abs. 265, 36 N. E. 2d 1006; Yeager & Sullivan, Inc. v. O'Neill (Ind. App.), 324 N. E. 2d 846.

"A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance caused thereby. In the first instance, at least, it will require the cause of the grievance to be corrected and will enjoin the conduct of the enterprise perpetually after it has been proven that no application of endeavor, science, or skill can effect a remedy or that the owners cannot be induced to conduct it properly." Prauner v. Battle Creek Coop. Creamery, 173 Neb. 412, 113 N. W. 2d 518.

The lagoons maintained by defendants, as presently operated, clearly constitute a nuisance and must either be operated in a manner abating the odors complained of or destroyed. The feed yards must be kept reasonably clean with a view to reducing to a reasonable

minimum the propagation of flies or other insects and dust from manure. In the event it appears that plaintiffs can be adequately compensated in damages, the dispensing with an injunction should be conditioned on the actual payment of damages assessed.

The judgment of the District Court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

McCOWN, J., dissenting.

The majority opinion tacitly concedes that the evidence fails to establish negligence by the defendants in operating the feedlots. The majority opinion also concedes that in the rural agricultural area involved here "almost every farm has a relatively small cattle-feeding operation."

The record shows that the Department of Environmental Control of the State of Nebraska and its Agricultural Pollution Control Division made inspections of defendants' feedlots both in 1973 and 1974, and determined that the operation of the feedlots here was not in violation of any rules and regulations of the department pertaining to livestock waste control. The chief of the Agricultural Pollution Control Division also testified that controls on waste handling and removal systems were not required by the department unless the wastes polluted the waters of the state or created a nuisance. The inevitable conclusion is that under the departmental rules a nuisance did not exist at the times of the inspections.

The evidence also establishes that there are several feedlots in the immediate area with capacity of 300 to 500 head, and many of lesser capacity. At least one feedlot with a capacity of 10,000 head is located some 14 miles south of the location of these feedlots. Cattle had been kept on the area now used by defendants' feedlots for approximately 90 years. As early as 1946, there were some 1,100 head of cattle on feed there. Two of the dams involved here had been constructed more

than 20 years prior to trial. Two more were added in 1969. The defendants' operation at its peak averaged approximately 3,000 head in 1972. Since that time there was a gradual diminution of cattle until, in November and December of 1974, the total number kept in the defendants' feedlots was approximately 300.

The District Court specifically found that the feedlots operated by the defendants are not a nuisance per se and that there was insufficient evidence upon which to base a finding of negligence, and granted defendants' motion to dismiss. The majority opinion now holds that evidence of intolerable odors on many days and a substantial increase in the number of flies is sufficient to constitute a prima facie case for the granting of a mandatory injunction against a cattle feedlot operation conducted without negligence in the rural agricultural area of Nebraska. Apparently the court has somehow taken judicial notice that a large cattle feeding operation can be reasonably conducted without excessive odors or flies. The record will not support that conclusion, nor does it warrant the granting of injunctive relief here.

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

RAYMOND R. ZUKAITIS, APPELLANT, V. THE AETNA CASUALTY AND SURETY COMPANY, A CORPORATION, APPELLEE.

236 N. W. 2d 819

Filed December 24, 1975. No. 40077.

1. **Insurance: Notice: Words and Phrases.** The word "immediate" in referring to the notice required in an insurance policy means with reasonable celerity, with reasonable and proper diligence; and what is a reasonable time depends upon all the facts and circumstances of each particular case.
2. **Insurance: Agency: Notice.** Ordinarily, an agent having authority to solicit insurance, receive and forward applications,

deliver policies, and collect premiums is a general agent of the insurance company and notice to him will satisfy a requirement that notice must be sent to the company.

3. ———: ———: ———. The revocation of an agent's authority does not become effective as between the principal and third persons until they receive notice of the termination.

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Reversed and remanded with directions.

John A. Rickerson and Neal E. Stenberg, for appellant.

Harry L. Welch and Harold W. Kauffman of Gross, Welch, Vinardi, Kauffman & Day, for appellee.

Heard before SPENCER, MCCOWN, and NEWTON, JJ., and WEAVER and BLUE, District Judges.

BLUE, District Judge.

This is an action for a declaratory judgment brought to determine whether defendant-appellee, the Aetna Casualty and Surety Company, was obligated under its professional liability insurance policy to defend plaintiff-appellant, Raymond R. Zukaitis, in a medical malpractice suit.

The case was tried to the court under a stipulation of facts which can be summarized as follows: Raymond R. Zukaitis was a physician practicing medicine in Douglas County, Nebraska. Aetna issued Dr. Zukaitis a policy of professional liability insurance through its agent, the Ed Larsen Insurance Agency, Inc. This policy was for a period from August 31, 1969, to August 31, 1970.

On August 7, 1971, Dr. Zukaitis received a written notification of a claim for malpractice which allegedly occurred on September 27, 1969. On August 10, 1971, Dr. Zukaitis telephoned the Ed Larsen Insurance Agency. At the request of the agency the written claim was forwarded to it by Dr. Zukaitis. This was received on August 11, 1971, and was erroneously referred to the St.

Paul Fire and Marine Insurance Company on that date by the agency.

Dr. Zukaitis was insured with St. Paul Fire and Marine Insurance Company from August 31, 1970, to August 31, 1971. But on the date of the alleged malpractice, he was insured with Aetna. Apparently without notice to Dr. Zukaitis, the agency contract between Ed Larsen Insurance Agency and Aetna had been canceled effective August 1, 1970. At that time the agency placed Dr. Zukaitis' insurance with St. Paul.

On November 22, 1971, a malpractice action was brought against Dr. Zukaitis based on the alleged malpractice of September 27, 1969. Attorneys for St. Paul undertook the defense of the lawsuit. On January 25, 1974, St. Paul discovered that it was not the insurance carrier for Dr. Zukaitis on September 27, 1969, the date of the alleged malpractice, and advised Aetna of this at that time. Dr. Zukaitis was also advised of this, and the attorney retained for St. Paul to represent Dr. Zukaitis withdrew. Dr. Zukaitis made demand upon Aetna on May 28, 1974, for it to undertake the defense of Dr. Zukaitis, but this demand was refused.

Dr. Zukaitis retained his own attorney to represent him in the malpractice case. A motion for summary judgment was filed by Dr. Zukaitis in that case, which motion was sustained. This action for a declaratory judgment against Aetna therefore resolved itself into an effort to recover attorney's fees and costs. The District Court found for Aetna. Dr. Zukaitis' motion for new trial was overruled, and this appeal followed.

Aetna contends that it is relieved from its obligation to Dr. Zukaitis since notice was not given as required by paragraph 4(b) of the policy which provides: "If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative."

Dr. Zukaitis contends that under the circumstances,

notice to Aetna was given within a reasonable period in that the agent who wrote the policy was given notice, and further that a delay in giving notice does not defeat policy obligations unless the insurer is prejudiced by the delay.

This court has previously construed provisions of insurance policies similar to the one here. In Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co., 177 Neb. 287, 128 N. W. 2d 773, it is stated: "The word 'immediate' in referring to the notice required in an insurance policy means with reasonable celerity, with reasonable and proper diligence, and what is a reasonable time depends upon all the facts and circumstances of each particular case. George v. Aetna Casualty & Surety Co., 121 Neb. 647, 238 N. W. 36." See, also, Ach v. Farmers Mut. Ins. Co., 191 Neb. 407, 215 N. W. 2d 518.

Ordinarily notice to a soliciting agent who countersigns and issues policies of insurance is notice to the insurance company. Restatement, Agency 2d, § 127, p. 324; 13 Couch on Insurance 2d, § 49:27, p. 652 et seq; §§ 44-328 and 44-329, R. R. S. 1943. This is also true even if the agent forwards the notice to the wrong company. At 44 Am. Jur. 2d, Insurance, § 1468, p. 336, it is stated: "Also, an insured who has promptly given notice of an accident to the general agent that issued the policy, and has also promptly delivered process to him, has been held not required to do anything further, although in each instance the agent by mistake forwarded the papers to the wrong company."

The question then is whether this is true after the agency contract between the insurance company and the agent has been terminated as it was in this case. To answer this, it is necessary to refer to the general law of agency.

The rule is that a revocation of the agent's authority does not become effective as between the principal and third persons until they receive notice of the termina-

tion. 2A C. J. S., Agency, § 122b, p. 745; 3 Am. Jur. 2d, Agency, § 280, p. 642.

Here, Dr. Zukaitis did what most reasonable persons would do in this situation; he notified the agent who sold him the policy. There is no evidence that notice of the termination was sent to him or that he knew the agency contract had been canceled.

It is stated in 3 Couch on Insurance 2d, § 26.50, p. 513: "When the insurer terminates the agency contract, it is its duty to notify third persons, such as the insureds with whom the agent dealt, and inform them of such termination. If it does not so notify and such third persons or insureds deal with the agent without notice or knowledge of the termination, and in reliance on the apparently continuing authority of the agent, the insurer is bound by the acts of the former agent."

The following appears in 3 Couch on Insurance 2d, § 26.50, p. 515: "The principle of the carrying over of the authority of an agent after termination with respect to third persons having no notice or knowledge thereof has been applied so as to bind the insurer when the third person dealt with the apparent agent by contracting with him, or by forwarding or delivering to him suit papers and proofs of loss." See, also, Toub v. Home Ind. Co., 116 N. J. Law 287, 183 A. 827.

A case involving similar facts as the case presented here is Yannuzzi v. United States Cas. Co., 19 N. J. 201, 115 A. 2d 557. The insureds in that case were sued as the result of an accident which occurred on December 9, 1951. After insureds were served with the suit papers on October 16, 1952, they forwarded them to the agent who sold them an automobile accident insurance policy. The agency forwarded the suit papers to the wrong insurance company. The agency contract had been terminated effective January 1, 1952. The insurance company claimed the insureds did not comply with a condition of the policy requiring them to immediately forward to insurer every summons or other process. The

New Jersey Supreme Court, after citing abundant authorities, held that the insureds complied with this provision when they sent the suit papers to the agent from whom insureds had received the policy even though the agency relationship had been terminated. The New Jersey Court set out the following applicable statement from Southern Life Ins. Co. v. McCain, 96 U. S. 84, 24 L. Ed. 653: " ' No company can be allowed to hold out another as its agent, and then disavow responsibility for his acts. After it has appointed an agent in a particular business, parties dealing with him in that business have a right to rely upon the continuance of his authority, until in some way informed of its revocation. The authorities to this effect are numerous, and will be found cited in the treatises of Paley and Story on Agency. Story, secs. 470 and 471; Paley, § ——.' "

In the case of Western Millers Mut. Ins. Co. v. Williams, 231 F. 2d 425, it is stated: "The general rule, however, in Texas and elsewhere, is that an insured is entitled to assume that an insurance agent is continuing to act within the scope of his agency, unless and until he has either actual or constructive notice to the contrary; and 'a revocation by the principal, of the general authority of his agent, is ineffective as between the principal and such third persons as deal with the agent, as such, on the faith of the continued existence of his authority, without notice of the revocation.' "

We conclude that under the facts and circumstances of this case, the notice given by the plaintiff to the agent of the defendant constitutes notice to the defendant and would obligate defendant to carry out the terms of its insurance contract with plaintiff. The District Court was in error when it determined to the contrary.

The judgment of the District Court is reversed and the cause remanded with direction to enter judgment for plaintiff in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

JOSEPH E. HALLER, APPELLEE AND CROSS-APPELLANT, V. CHILES, HEIDER and CO., INC., A CORPORATION, APPELLANT and CROSS-APPELLEE.

236 N. W. 2d 822

Filed December 24, 1975. No. 40089.

Appeal and Error: Equity: Trial. In all appeals from the District Court to the Supreme Court in suits in equity, wherein review of some or all of the findings of fact of the District Court is asked by the appellant, it shall be the duty of the Supreme Court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and, upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the District Court or the fact that there may be some evidence in support thereof.

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Reversed and remanded with directions.

James M. Bausch and Cline, Williams, Wright, Johnson & Oldfather, for appellant.

D. C. Bradford, III, and Jeffrey A. Silver of Bradford, Bloch & Coenen, for appellee.

Heard before SPENCER, McCOWN, and NEWTON, JJ., and WEAVER and BLUE, District Judges.

SPENCER, J.

This is a declaratory judgment action brought by Joseph E. Haller, plaintiff, against Chiles, Heider and Co., Inc., to determine stock option purchase rights of the parties. The issue involved is when defendant exercised its right to purchase plaintiff's stock and the procedures involved in determining net book value. Plaintiff contends defendant did so in a letter dated January 28, 1974. Defendant contends it did not do so until its letter of February 27, 1974. The trial court

determined that the defendant had not validly exercised its option. Defendant appealed and plaintiff cross-appealed. We find for plaintiff and reverse.

Haller owned 40,000 shares of defendant's stock. He was also a vice president and director of defendant. In September of 1971, defendant, with Haller's approval as stockholder, adopted revised articles of incorporation. Under these revised articles defendant was granted an option to purchase Haller's stock if he decided to leave the company. Haller resigned on December 31, 1973. On January 2, 1974, at a special meeting, defendant's board of directors accepted Haller's resignation and decided to exercise the option to purchase his stock.

Article VI of the revised articles of incorporation provides that all shares of capital stock shall be held subject to the conditions and restrictions set forth in the revised articles of incorporation. These provide the corporation shall have a right for 60 days to purchase the shares of a stockholder whenever the stockholder ceases to actively engage in the business of the corporation. The purchase price is to be the net book value of the shares as determined as of the close of business on the date of commencement of the applicable option period.

Section 6 of Article VI of the revised articles defines the method of determining the net worth and net book value. It is as follows: "Method of Determination of Net Worth and Net Book Value. The net worth of the Corporation shall be determined by the Corporation in accordance with sound accounting principles but shall be adjusted up or down, as the case may be (i) to reflect the market value (the mean of the bid and ask price) of all memberships on securities exchanges owned by the Corporation or covered by so-called a-b-c agreements, (ii) to reflect the unrealized gain or loss on short sale commitments, (iii) to reflect securities owned at market value or, in the absence of market quotations, at fair value as determined by the Board of Directors of the Corporation, (iv) to provide appropriate accruals

for all taxes (including all taxes based on income), bonuses and all other employee compensation (including compensation determined and payable after the end of the then current fiscal year), reserves for contingent liabilities and any other reserves which the Board of Directors of the Corporation may deem proper, and all other items of income and expense attributable to the period prior to the date as of which the determination is made, and (v) to exclude any value whatsoever for customer's lists, records and files and good will appertaining to the name or business of the Corporation. The net book value of shares of Common Stock shall be computed by dividing the aggregate number of shares of Common Stock outstanding into the net worth of the Corporation."

On January 28, 1974, defendant sent the following letter to the plaintiff:

"Mr. Joseph E. Haller
5124 Izard
Omaha, Nebraska 68132
Dear Joe:

"You are the owner of 40,000 shares of Common Stock, par value $1 per share, of Chiles, Heider & Co., Inc. As of December 31, 1973, you ceased to be actively engaged in the business of Chiles, Heider & Co., Inc. Pursuant to the provisions of Article VI of the Revised Articles of Incorporation of Chiles, Heider & Co., Inc. it hereby exercises its right to purchase your 40,000 shares of Common Stock. Such purchase will be made by Chiles, Heider & Co., Inc. and the consideration to be paid for such shares shall be the net book value of the shares as of December 31, 1973. Payment therefor will be made in cash in accordance with the provisions of Section 8 of said Article VI.

"As you know, Arthur Andersen & Co. is making an audit of the financial records of the corporation as of that date and, as soon as that audit has been completed (which should be in the next several weeks), we will

then sit down and determine the net book value and be in contact with you.

"Very truly yours,
Charles Heider (sgd.)
Charles F. Heider
President"

On February 27, 1974, defendant sent the following letter to the plaintiff:

"Mr. Joseph E. Haller
5124 Izard
Omaha, Nebraska 68132
Dear Joe:

"We advised you on January 28, 1974 that Chiles, Heider & Co., Inc. would exercise its right to purchase your 40,000 shares of Common Stock pursuant to the provisions of Article VI of the Revised Articles of Incorporation of Chiles, Heider & Co., Inc. with Chiles, Heider & Co., Inc. being the purchaser.

"While we have now received our annual audit, we also have been named defendant in a lawsuit pending in the District Court of Douglas County, Nebraska Docket 671 - No. 317, William Mollie, Plaintiff, vs. Chiles, Heider & Co., Sanitary and Improvement District No. 195 of Douglas County, Nebraska, et al, Defendants, in which a judgment is sought against Chiles, Heider & Co., Inc. for $240,233.52, plus interest. You will recall that this was a matter which you handled for the corporation while you were employed by it.

"Subject to approval of the New York Stock Exchange, settlement will be made with you on or before August 25, 1974, which is 180 days after the date notice of transfer of your shares was requested of the Exchange. Our calculations of December 31, 1973 net book value amount to $4.403 per share, but without any reserve for contingent liability.

"As provided in the Articles, it is our present intention to establish a reserve for contingent liability in connection with the previously mentioned lawsuit equal to 58¢

per share. It is very possible that additional lawsuits of a similar nature might be filed against us in connection with this and other Sanitary and Improvement Districts, and, based upon our judgment of this possibility, we may increase the contingent liability reserve accordingly.

"Sincerely yours,
"Charles Heider (sgd.)
Charles F. Heider
President."

Section 25-1925, R. R. S. 1943, provides: "In all appeals from the district court to the Supreme Court in suits in equity, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the Supreme Court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof."

Defendant contends the notification of February 27, 1974, was the effective exercise of the option and that the net book value of the shares on December 31, 1973, of $4.403 per share should be reduced by a reserve for contingent liability. Passing for the moment the letter of January 28, 1974, it is apparent to us, as the trial judge found, the letter of February 27, 1974, was not a proper exercise of the option. It is true that the defendant specified amounts, but it also included this statement: "It is very possible that additional lawsuits of a similar nature might be filed against us in connection with this and other Sanitary and Improvement Districts, and, based upon our judgment of this possibil-

ity we may increase the contingent liability reserve accordingly."

This brings us to the question as to whether the notification of January 28, 1974, was an effective exercise of the company's option. The trial court held it was not because it did not set out the consideration and the date of payment. We do not agree. Plaintiff is told in that letter that the defendant *"hereby exercises its right to purchase your 40,000 shares of Common Stock."* (Italics added.) He was told that the purchase was to be made by the defendant. The consideration to be paid for the shares was to be the net book value of the shares as of December 31, 1973. Payment was to be made in cash in accordance with the provisions of section 8 of Article VI. That section provides that the date for payment shall not be less than 180 days after notice of the election to exercise the option has been given to the New York Stock Exchange and to the holder of the shares to be purchased.

The parties knew that an audit was being prepared as of December 31, 1973. The letter states the consideration shall be the net book value of the shares as of that date. The net value was not going to change. When it was determined, the parties would divide the number of shares into the total net value and determine the individual share value as of December 31, 1973. This when multiplied by the number of shares held by plaintiff would give the amount to be paid him. We believe the letter was definite enough to comply with the option provisions of the amended articles and the requirements of the New York Stock Exchange.

Exhibit 4, which is dated February 11, 1974, is the New York Stock Exchange financial questionnaire as of December 31, 1973, together with the auditor's report. It indicated plaintiff had withdrawn from the company as of December 31, 1973, and that the cash value of his shares as of that time was estimated at $176,120. This would be $4.403 per share. Haller had previously signed

an agreement that the approval of the New York Stock Exchange was required when stock was sold.

Exhibit 21 is a computation of aggregate indebtedness and net capital based upon the answer to a financial questionnaire being submitted to the New York Stock Exchange as of February 11, 1974, by defendant's independent public accountants. Included in exhibit 21 is a certification by the president and secretary of defendant. They certify as holders of voting stock of defendant that they had "caused an audit to be made" and that to the best of their "knowledge and belief, the answers to this questionaire prepared as of December 31, 1973, represent a true and correct financial statement of our firm and that the answers will promptly be made available to those holders of voting stock whose signatures do not appear below."

Included as a part of exhibit 21 is exhibit 20. It is as follows:

STOCKHOLDERS EQUITY 12-31-73				1,939,731.24
	COST	MARKET	GAIN(LOSS)	
NYSE	222,500.00	(1)107,500.00	(115,000.00)	
CBOE	12,150.00	(2) 26,500.00	14,350.00	
				(100,650.00)
				1,839,081.24

Adjusted Stockholder Equity	1,839,081.24	=	4.403
Outstanding Shares	417668		

Joseph E. Haller	40000	×	4.403	176,120.00
James E Michels	5618	×	4.403	24,736.05
				200,856.05

	NYSE	CBOE
BID	90000	26000
ASK	125000	27000
	215000	53000
MEAN	(1)107500	(2)26500

Exhibit 20 shows the adjusted stockholder equity for each share. It is $4.403. It also gives the names of the two stockholders withdrawing from the company and lists plaintiff as owning 40,000 shares at $4.403 a share, or $176,120. This exhibit shows the stockholder equity as of December 31, 1973, the date on which the net book value of the shares of defendant corporation were to be determined in accordance with defendant's letter of January 28, 1974. There can be no question that defendant is certifying to the New York Stock Exchange that the value of plaintiff's stock at the close of business December 31, 1973, was $176,120.

Defendant, in its brief, states that the audit of its financial records was completed February 11, 1974, the date of the report to the New York Stock Exchange. On February 13, 1974, a taxpayer filed a lawsuit in the District Court for Douglas County, Nebraska, against the defendant and other named defendants. The lawsuit prayed for money damages in the amount of $240,233.52 on behalf of the city of Omaha. The cause of action alleged in the lawsuit arose out of work done by the defendant and others on Sanitary and Improvement District No. 195. Subsequent to the filing of the lawsuit defendant wrote the letter of February 27, 1974. In this letter defendant stated it intended to establish a contingent liability reserve equal to 58 cents per share, and suggested the possibility that it might increase the contingent reserve if additional lawsuits were filed. It is obvious that the establishment of a reserve for contingent liability was an afterthought brought to defendant's attention by the filing of the action on February 13, 1974. Despite this fact, however, the defendant on February 20, 1974, wrote the following letter to the New York Stock Exchange:

"New York Stock Exchange, Inc.
Department of Member Firms
23rd Floor
55 Water Street

New York, N. Y. 10041
Gentlemen:

"In compliance with Rule 320 we request Exchange approval to redeem the shares of stock owned by the following individuals:

Name of Stockholder	Shares Owned	Redemption Value
Joseph E. Haller	40,000	$176,120
James E. Michels	5,618	24,736

The redemption price of $4.03 ($4.403) per share determined as of December 31, 1973 would amount to a total reduction in capital of $200,856.

"The net capital ratio on December 31, 1973 was 1.36 to 1. If the repurchase had been consummated prior to that date the ratio would have been 1.63 to 1. The net capital ratio on January 25, 1974 after giving effect to the redemption of the shares would be 0.71 to 1.

"Mr. Haller, a vice president, allied member and voting stockholder, resigned effective December 31, 1973.

"Mr. Michels, a registered representative and voting stockholder, because of personal reasons requested that the firm redeem his shares as of December 31, 1973. Mr. Michels will continue in his capacity of registered representative.

"We would appreciate your expeditious consideration of this matter. Please contact me if additional information is required.

"Yours truly,
Robert C. Rawley
Secretary-Treasurer"

From the letter of February 20, 1974, it is evident that the defendant was requesting approval to redeem the shares of stock held by the plaintiff without reference to any contingency reserve. Seven days later the defendant wrote the letter it now claims was the one in which it exercised its option. It is evident to us that as late as February 20, 1974, as plaintiff had previously been told orally, the net value of each share of his

stock was $4.403, and that the contingent liability reserve was an afterthought not included in the original transaction.

We reverse the judgment of the trial court and remand the cause with directions to enter judgment for the plaintiff in the amount of $176,120, and the costs of this action.

REVERSED AND REMANDED WITH DIRECTIONS.

McCOWN, J., dissenting.

The revised articles of incorporation contain the complete terms of the stock option agreement involved here. That agreement could not be and was not altered by the unilateral conduct or writings of either party acting alone. The letters of January 28 and February 27 had no contractual effect except as notice of exercise of the option in accordance with the articles of incorporation. The only real issue here is whether, under the terms of the option contained in the revised articles, the defendant had the right to set up a reserve for the contingent liabilities involved. Collateral issues are whether the reserve was reasonable and timely.

Under the specific terms of the option in the revised articles of incorporation, the net worth of the stock was to be determined by the defendant, and was to be adjusted to provide reserves for contingent liabilities, among other things. The contingent liabilities involved here were in existence on December 31, 1973, and there is not even a claim that the amount of the reserve was unreasonable. In fact, the remainder, if any, of plaintiff's share of the reserve for contingent liabilities will be paid to plaintiff when those liabilities have been finally determined and settled. The majority opinion writes into the option in the revised articles terms which are not included, and writes out other terms which are included. The express terms of a written, binding option cannot be disregarded or adjusted on the basis of the unilateral interpretation of one of the parties. Neither does the record support that action here.

MARY KAY MILLER, APPELLANT, V. LYLE D. HARRIS ET AL., APPELLEES.

236 N. W. 2d 828

Filed December 24, 1975. No. 40090.

1. **Dismissal and Nonsuit.** The right of a plaintiff to dismiss a cause of action before submission to the court is a statutory right and is not a matter of judicial grace or discretion.
2. **Dismissal and Nonsuit: Trial.** A final submission of an action, within the purview of section 25-601, R. R. S. 1943, contemplates its submission upon both law and fact.
3. ———: ———. A plaintiff cannot dismiss his action without prejudice after there has been a final submission of it either to the court or jury.
4. **Dismissal and Nonsuit: Trial: Motions, Rules, and Orders.** When a case has been submitted upon a motion for directed verdict, plaintiff's absolute right to dismiss without prejudice is lost.
5. ———: ———: ———. When a motion for directed verdict has been overruled, there is no longer a final submission to the court where issues remain to be determined by the jury and have not been submitted to it.
6. **Dismissal and Nonsuit: Trial: Records.** Where a dismissal by the plaintiff is intended as a retraxit or abandonment of his cause, the facts supporting that conclusion must be affirmatively and clearly shown by the record.
7. **Dismissal and Nonsuit.** Good practice would indicate that when a plaintiff dismisses his petition he specify whether the dismissal is "with" or "without" prejudice.

Appeal from the District Court for Howard County: LLOYD A. KELLY, JR., Judge. Reversed and remanded.

Philip T. Morgan, for appellant.

Marmion F. Yeagley of Knapp, State, Yeagley & Mues and John A. Wolf of Cronin, Shamberg & Wolf, for appellees.

Heard before WHITE, C. J., MCCOWN, NEWTON, and CLINTON, JJ., and KUNS, Retired District Judge.

CLINTON, J.

The single issue in this case is whether a voluntary

dismissal by the plaintiff of a previous action founded upon the same facts as in the present case, i.e., the identical cause of action, is res judicata of the present cause, or whether the dismissal of the previous action comes within the purview of section 25-601, R. R. S. 1943, which permits the plaintiff to dismiss his action without prejudice "before the final submission of the case to the jury, or to the court where trial is by the court."

The question arises under the following facts. Plaintiff, in the previous action, sued to recover for personal injuries incurred in an automobile accident when an automobile in which she was a passenger, operated by the defendant Lyle D. Harris and owned by the defendant Wilford Harris, collided with an automobile driven by LaMoine C. Arends. At the close of the plaintiff's evidence Lyle D. Harris moved for a directed verdict. The court overruled the motion. Immediately thereafter the plaintiff dismissed the action as to the Harrises. Defendant Arends then moved for a directed verdict. The court sustained that motion and its action was affirmed by this court on appeal. Miller v. Arends, 191 Neb. 494, 215 N. W. 2d 891. Thereafter the plaintiff filed the present action against the Harrises. The Harrises pled res judicata on the ground that the dismissal in the previous action was with prejudice. The trial judge found the defense of res judicata good and dismissed the plaintiff's petition. She appeals, relying upon section 25-601, R. R. S. 1943, and the principle that the right of the plaintiff to dismiss a cause of action without prejudice before submission to the court is a statutory right and not a matter of judicial grace or discretion. Giesler v. City of Omaha, 175 Neb. 706, 123 N. W. 2d 650; Gebhart v. Tri-State G. & T. Assn., 181 Neb. 457, 149 N. W. 2d 41. We reverse and remand.

The defendants Harrises argue (1) that a plaintiff may not dismiss without prejudice after a motion for a directed verdict has been made and submitted, or after

such a motion has been argued and the court expressed an opinion on it, and (2) the dismissal was with prejudice because the plaintiff did not expressly reserve her right to bring a future action, and the record discloses an intention on the part of the plaintiff to dismiss with prejudice. In support of the first grounds, the defendants cite Spies v. Union P. R.R. Co., 250 F. 434; Rhode v. Duff, 208 F. 115; Bee Building Co. v. Dalton, 68 Neb. 38, 93 N. W. 930; Fronk v. Evans City Steam Laundry Co., 70 Neb. 75, 96 N. W. 1053; Harbert v. Mueller, 156 Neb. 838, 58 N. W. 2d 221. Those cases support the general proposition first asserted. However, in each of those cases the motion by the plaintiff to dismiss was made either while the court was considering the motion of the defendant for a directed verdict, or after the court had indicated its intention to grant the directed verdict. In each of those cases the directed verdict was, in fact, granted.

In the case at hand the situation is different and distinguishable because here the motion for directed verdict was overruled and the plaintiff did not move to dismiss until after that ruling was announced. At that time the matter was then no longer under submission either to the court on the legal sufficiency of the evidence or to the jury for determination of issues of fact. The plaintiff had rested her case and the defendants' case was yet to be presented. The situation was not then any different for purposes of voluntary dismissal than if the defendants had never made the motion for a directed verdict.

We find no Nebraska cases precisely on point, but believe the decision here is controlled by the rather clear import of statements made in prior opinions. In Plattsmouth Loan & Bldg. Assn. v. Sedlak, 128 Neb. 509, 259 N. W. 367, this court set forth by quotation of authority from several other jurisdictions the common law genesis of and the reasons for the statutory rule governing the right of the plaintiff to dismiss without prejudice. At

common law the rule was broader and the plaintiff could dismiss at any time before the matter was decided, even after final submission. In Plattsmouth Loan & Bldg. Assn. v. Sedlak, *supra,* the first syllabus is: "A final submission of an action, within the purview of section 20-601, Comp. St. 1929, contemplates its submission upon both law and fact." The opinion in Bee Building Co. v. Dalton, *supra,* and other cases point out that the request for a directed verdict is a final submission to the court within the meaning of section 25-601(1), R. R. S. 1943, because the court is called upon to determine as a matter of law whether there are any issues arising from the facts submitted which present a jury question. The clear concomitant of that proposition is that where the motion is overruled there is no longer a final submission because fact issues remain to be determined by the jury, and those issues have not yet been submitted to the jury. That was the situation in the case before us. The plaintiff, under the provisions of section 25-601(1), R. R. S. 1943, was entitled to dismiss her action without prejudice.

This brings us to the question of whether the record establishes that the plaintiff did intend her dismissal to be with prejudice. The record shows that after the motion of the Harrises for a directed verdict was made the court said: "I don't want any argument. The motion is overruled." Plaintiff's attorney then gratuitously indicated "that the motion of the defendant Lyle Harris should be sustained." The court said: "I have overruled the motion, ... You may dismiss if you desire. The motion has been overruled." Plaintiff's counsel thereafter stated: "Your Honor, at this time plaintiff does hereby dismiss its suit against Lyle Harris ard Wilford Harris." The journalization of plaintiff's dismissal is as follows: "Plaintiff's Second Amended Petition and cause of action as against the Defendant Lyle D. Harris and the Defendant Wilford Harris is dismissed pursuant to Plaintiff's dismissal."

A voluntary dismissal by the plaintiff is not of itself an adjudication on the merits and therefore does not bar a future action under the principle of res judicata. 50 C. J. S., Judgments, § 633 b, p. 61, § 635, p. 70. It may come within the principle, however, if it is for a consideration pursuant to an agreement or clearly intended to be an abandonment (called retraxit at common law) of the action. 50 C. J. S., Judgments, § 634, p. 68, § 632, p. 59. Good practice would indicate that where abandonment is not intended the dismissal ought to indicate that it is without prejudice. Duffy v. Cody, 129 Neb. 737, 262 N. W. 828. We have found, however, no authority which makes this mandatory. It is generally stated that in order for a voluntary dismissal to constitute a retraxit the facts supporting that conclusion must be affirmatively shown by the record. Eulenberg v. Torley's, Inc., 56 Cal. App. 2d 653, 133 P. 2d 15; Hill v. Wilson, 119 Ore. 636, 250 P. 840; Boettcher Oil & Gas Co. v. Westmoland, 189 Okla. 110, 113 P. 2d 824. We would add that it ought to clearly so appear. Section 25-601, R. R. S. 1943, does not require that a voluntary dismissal expressly state that it is without prejudice in order that the plaintiff's rights under the statute be preserved. It merely describes the circumstances under which a voluntary dismissal is without prejudice and, as we have previously held, makes that a matter of right and not of judicial grace. It also describes the circumstances under which the court dismisses without prejudice and then goes on to provide: "In all other cases on the trial of the action the decision must be upon the merits."

The sole possible indication that the plaintiff's attorney may have considered his client's case nonmeritorious occurred after the court had already ruled against the defendants on their motion for a directed verdict. As is pointed out in the policy discussion in Plattsmouth Loan & Bldg. Assn. v. Sedlak, *supra,* there are many considerations which may lead a plaintiff to voluntarily dis-

miss his claim, for example, inadvertent failures of proof as by unexpected unavailability of a witness, which failure might be corrected by starting over. The record here does not affirmatively and clearly establish that the plaintiff intended her dismissal to constitute a retraxit.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE N. LEWIS, APPELLANT.

236 N. W. 2d 831

Filed December 24, 1975. Nos. 40105, 40106.

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

Frank B. Morrison and Stanley A. Krieger, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

BOSLAUGH, J.

In case No. 40106 the defendant was convicted of burglary and sentenced to imprisonment for 3 to 5 years. In case No. 40105 the defendant pleaded guilty to assault with intent to rob and was sentenced to imprisonment for 2 to 9 years, the sentence to be consecutive to the sentence in case No. 40106. Upon the motion of the public defender the cases were consolidated in this court for the purpose of briefing and argument. The sole issue presented here is whether the sentences imposed were excessive.

The burglary took place on September 25, 1974, and involved a residence property. The house was ransacked

and money, a pistol, a tape player, and a camera were stolen. The defendant was identified by his fingerprints which were found on a purse that had been emptied. In a statement to the police, the defendant admitted he was present during the burglary but claimed a companion broke into the property and took the articles which were stolen. The defendant was convicted of burglary after a trial to a jury.

The assault with intent to rob took place on November 20, 1974. The defendant and several companions entered a Kwik Shop. One of the group was armed with a pistol that was in fact a starter's pistol. The weapon was displayed and a demand for money was made. When the cash register was opened the group left without taking any money. They were apprehended almost immediately because the police had the store under surveillance.

The defendant is 17 years of age and single. He has a ninth grade education. He has a lengthy juvenile record dating from 1968. The trial court properly refused to remand the defendant to juvenile court. Past offenses include larceny, larceny from a person, and four other burglary charges. It is apparent from this record that the sentences imposed were not excessive and the trial court did not abuse its discretion in making the sentences run consecutively.

The judgments are affirmed.

AFFIRMED.

IN RE ELECTION CONTEST OF BILL DUGAN, SR.
BILL DUGAN, SR., APPELLANT, V. MILLARD D. VLACH ET AL., APPELLEES.

237 N. W. 2d 104

Filed December 24, 1975. No. 40114.

1. **Elections.** Failure of a disabled voter to sign the statement

required of such voter on the disabled voter's envelope, and absence of the signature of a person knowing of the voter's disability as also required thereon, is not substantial compliance with the disabled voters' statutes, and the ballot of such voter should not be counted.

2. ———. When a voter marks a ballot for a candidate in such manner that it cannot be determined whether the voter was voting for such candidate or had done so and then deleted or canceled such vote, the ballot should not be counted for such candidate.

3. ———. A ballot signed by a voter should be rejected and not counted.

4. **Elections: Trial.** In an election contest, the burden of proving facts which may make the vote illegal is upon the party so contending; and when such vote has been counted, such party also has the burden of proving how it was cast.

Appeal from the District Court for Greeley County: EARL C. JOHNSON, Judge. Affirmed in part, and in part reversed and remanded with directions.

Donald R. Treadway of Brower, Treadway & Bird, for appellant.

Robert D. Stowell of Stowell & Jensen, for appellee Vlach.

Heard before SPENCER, BOSLAUGH, and BRODKEY, JJ., and COLWELL and RIST, District Judges.

RIST, District Judge.

This is an election contest from Greeley County, Nebraska, involving the election of two county commissioners of said county in the general election held there on November 5, 1974. The petition alleges the official canvass showed a total vote for Harry G. Bannister of 819, for Millard D. Vlach, defendant-appellee, 806, and for Bill Dugan, Sr., plaintiff-appellant, 805. Dugan contested the election. The District Court for Greeley County determined the contest to be between Dugan and Vlach, Bannister having been elected, found and determined that Vlach received 806 votes and Dugan

805 votes, and declared Vlach the winner. Dugan has appealed to this court.

Appellant in his brief challenges the decision of the trial court with respect to ballots represented by exhibits 1, 2, 6, and 12, none of which were counted.

We note at the outset that this case is to be considered de novo by this court, and that the burden of proof is on the contestant Dugan. Dilsaver v. Pollard, 191 Neb. 241, 214 N. W. 2d 478.

Exhibit 1 is the disabled voter's envelope of Mrs. Mary E. Foster, which is unopened and apparently contains the ballot of Mrs. Foster. The envelope and ballot contained therein were rejected by the canvassing board and by the trial court. An examination of this exhibit reveals that the voter did not sign the envelope on the line provided for her signature following a statement printed thereon that she was unavoidably detained at home or elsewhere on account of physical disability and was voting in this election only on the ballot contained in the envelope, but instead appears to have signed her name on the other side of the envelope in the space provided for her return address when the envelope was mailed. The envelope contains no signature of any person knowing of the voter's disability as provided thereon. Section 32-807.01, R. R. S. 1943, provides in part that each disabled voter will receive an identification envelope and a set of instructions in such form as the Secretery of State shall prescribe. There is no claim that the identification envelope failed to comply with the form prescribed by the Secretary of State.

Appellant argues that Mrs. Foster's signature on the line provided for her return address is a sufficient compliance for her ballot to be valid, and that the envelope should be opened and her ballot counted. Substantial compliance may well be the guideline for considering the issues here involved. State ex rel. Brogan v. Boehner, 174 Neb. 689, 119 N. W. 2d 147. The voter's signature is not so located as to be reasonably proximate to

the statement requiring her signature, and the signature of the party knowing of her disability is totally lacking. This is not substantial compliance with the requirements for exercising the statutory privilege provided for disabled voters. The trial court correctly rejected the envelope and the ballot of Mrs. Foster.

Exhibit 2 is an official ballot cast at the election and which, with respect to the two positions for county commissioner, shows an X in the square to the left of the name of the candidate Bannister and an X in the square to the left of the name of the candidate Vlach (appellee herein) which latter square is also substantially filled in or blackened with pencil, with the X mark, however, still discernible. Former section 32-488, R. R. S. 1943, provided: "In the canvass of the votes * * * any ballot or parts of a ballot from which it is impossible to determine the elector's choice shall be void and shall not be counted; Provided, when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, it shall be the duty of the judges of election to count such part." The issue here is whether the voter's intention with respect to Vlach can be ascertained. Appellant argues that the intent of the voter with respect to Vlach cannot be reasonably ascertained and the vote for Vlach should have been rejected. Appellee argues that since the voter voted for only two candidates as he was entitled to do, and may mark his preference by filling in the square by the candidate's name or by other mark therein, then the vote for Vlach should be counted. The fact is that the square by Vlach's name contains two apparent marks: (1) An X, and (2) a filling in of the square with an X in it or made over it. We conclude that it is impossible to tell whether the voter voted for Vlach with an X and then tried to blot it out by filling in the square to indicate a cancellation of his vote or whether it was done in some attempt to emphasize or through inadvertence but intending a vote for Vlach. All the above possibilities

exist and we cannot appropriately determine from the record which it was. This being the case, this ballot should not have been counted for Vlach and the trial court erred in so doing.

Exhibit 6 is an official ballot cast in the election which has on the back thereof the signature "Ted Rother." An examination of the tally lists on recount (exhibits 14 and 15) show this to have been treated and considered as the signing of the ballot by the voter Rother. Exhibit 12 is an official ballot cast in the election which has on the bottom thereof the signature of "Kenneth M. Poss." This was likewise treated by the canvassing board on recount as the signing of the ballot by the voter Poss. The trial court appears to have so considered these signatures as did the parties in their briefs and oral argument. Neither of these ballots were counted by the canvassing board on recount or by the trial court.

The case of Swan v. Bowker, 135 Neb. 405, 281 N. W. 891, is controlling with respect to this issue. This court in that case held a ballot signed by a voter was invalid. Appellant suggests that Swan should be overruled and that a voter should not be disenfranchised by his signature if his ballot is otherwise proper. We conclude that there are valid policy reasons why the decision in Swan should stand. Secrecy as to how any elector votes is basic to our electoral process. Article VI, section 6, of the Nebraska Constitution, so provides. The reasons are basic: To identify the ballot of a voter and how he votes opens the door to fraud, undue influence, and a host of corrupt practices which could improperly influence an election. Secrecy of the ballot is so important a public consideration that if a clear showing of the voter's identity appears thereon the ballot should be disallowed regardless of what the voter's intent was in so identifying his ballot. Cases cited in 26 Am. Jur. 2d, Elections, § 264, p. 89, indicate this to be the position in other jurisdictions. We affirm these

policy considerations and adhere to the rule announced in Swan and accordingly determine the trial court correctly disallowed the ballots marked exhibits 6 and 12.

Appellant has noted in his brief two other irregularities listed on the official canvass which he does not challenge per se but alludes to as bases for his position in this case. One is exhibit 8, which is a regular ballot cast in the election, and bearing on the back two letter D's. This ballot was counted and appellant argues that if this ballot is valid then exhibits 6 and 12 should be valid also. We do not agree. These letters are written and located on the ballot and with respect to each other in random fashion. It is apparent that the trial court did not find them to be an identifying mark such as to identify the voter casting the ballot. After examining exhibit 8 we agree and conclude it was properly counted. This is not the case with exhibits 6 and 12.

The other irregularity so noted by appellant in his brief, concerns exhibits 9 and 9A. Exhibit 9 is an application for a disabled voter's ballot for Mary M. Ballweg, not actually signed by her but instead signed by Frank Ballweg on her behalf. Exhibit 9A is the disabled voter's identification envelope of Mary M. Ballweg, executed and signed in proper form. This envelope was opened and the ballot counted by the canvassing board. This was approved by the trial court. Appellant argues that if the Ballweg ballot is counted without her signature on the application therefore as required by statute, then the ballot of Mary Foster (exhibit 1) should be counted notwithstanding the lack of appropriate signatures on her envolope. While the two situations are not the same, nonetheless appellant might well challenge the counting of the Ballweg ballot. He has, however, failed in his burden of proof. It is incumbent on the contestant in challenging a vote that has been counted, to prove not only the casting of an illegal vote but also the candidate for whom it was cast. See, Dilsaver v.

Pollard, *supra*; Plouzek v. Saline County Reorganization Committee, 181 Neb. 440, 148 N. W. 2d 919; State ex rel. Brogan v. Boehner, *supra*. The record contains no evidence as to whom the vote of Mary Ballweg was for. Under the decisions above noted appellant has failed in his burden of proof and such defect as exists with respect to the Ballweg ballot is not considered. The ballot contained in exhibit 1 was not counted and the defect there can be considered without regard as to how the vote was cast.

Appellant in his oral argument, although not in his brief, referred to certain alleged irregularities in the notarial seals appearing on exhibits 11, 11A, 11B, and 11C, these being absent voters' envelopes which were opened and the ballots contained therein counted. Without discussing whether there is in fact any substantial irregularity, we note again as we did in the previous paragraph, that appellant has failed to prove for whom such ballots were cast and such irregularities will not be considered.

The decision of the trial court as to other irregularities appearing in the record is not challenged by appellant either directly or on a comparative basis and requires no further consideration by this court.

Accordingly we determine that inasmuch as the ballot identified as exhibit 2 was improperly counted as a vote for the appellee Vlach, and such vote is now rejected and disregarded, there exists a tie vote between appellant Dugan and appellee Vlach for the office of county commissioner of Greeley County, Nebraska, each receiving a total of 805 votes. We therefore reverse the judgment and remand this cause to the District Court for Greeley County, Nebraska, and direct that said court refer said tie vote to the county canvassing board of Greeley County, Nebraska, for resolution in accordance with the provisions of section 32-1001.42, R. S. Supp., 1975.

Costs of this action are taxed to Greeley County, Nebraska.

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

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

236 N. W. 2d 832

Filed December 24, 1975. No. 40126.

1. **Criminal Law: Indictments and Informations.** Separate offenses must be set out in separate counts in an information.
2. **Trial: Jury: Witnesses.** In jury cases, the jurors are the judges of the credibility of the witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment.
3. **Criminal Law: Indictments and Informations.** Where the several offenses charged in a multicount indictment or information involve factual variations, such as different times, dates, places, property, or victims, the finding on one count will not ordinarily be held inconsistent with that on any other.

Appeal from the District Court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Jeffrey H. Jacobsen, for appellant.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ.

NEWTON, J.

The defendant was convicted of the sale of heroin and hashish oil. He was tried for the sale of both substances at 12:20 a.m., on January 7, 1975, and for another sale of similar substances to the same party at 8:29 p.m., on the same day. The information contained

one count pertaining to the sale of heroin and another pertaining to the sale of hashish oil, both on the date mentioned. It fails to mention the time of these sales or that two separate sales incidents occurred. Instructions were given on four counts, two relating to the early morning sales and two relating to the evening sales. The information is not in keeping with sections 29-1603 and 29-2002, R. R. S. 1943, which require that separate offenses be set out in separate counts. The information was vulnerable to objection as was also the evidence and the instructions relating to the second sales. No objections were made and the jury acquitted the defendant of the second or evening sales. Neither has this situation been referred to in the motion for a new trial nor the defendant's assignments of error. Any objections have been waived, or cured by the verdict.

There was sufficient evidence to sustain the verdict finding defendant guilty of the early morning sales. Defendant asserts the verdict is "reversibly inconsistent" because the jury chose to believe the informant as to the morning sales but not as to the evening sales. As to the latter, there was substantial evidence submitted by defendant of an alibi. It is evident that this could well have raised a reasonable doubt in the minds of the jurors. We have often held that: "In jury cases, the jurors are the judges of the credibility of the witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment." State v. Godinez, 190 Neb. 1, 205 N. W. 2d 644. It was for the jury to determine how much or how little of the informant's testimony was acceptable. Furthermore, it is generally held that: "Where the several offenses charged in a multicount indictment or information involve factual variations, such as different times, dates, places, property, or victims, the finding on one count will not ordinarily be held inconsistent with that on any other."

Annotation, Criminal Verdict - Inconsistency, 18 A. L. R. 3d, § 9, p. 290. See, also, Weinecke v. State, 34 Neb. 14, 51 N. W. 307; Wentz v. State, 108 Neb. 597, 188 N. W. 467; Asbra v. State, 144 Neb. 146, 12 N. W. 2d 845.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRED EDWARD STEWART, APPELLANT.

236 N. W. 2d 834

Filed December 24, 1975. No. 40144.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed.

John J. Battershell of Cunningham Law Office, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

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

NEWTON, J.

The defendant was charged with breaking and entering with intent to steal. After a preliminary hearing he was held for trial. He then moved that the transcript of the preliminary hearing be suppressed, the information quashed, and the case remanded for a preliminary hearing. The information had been filed on July 25, 1974. The motions were filed on September 16, 1974, and on that date a copy of the information was served on the defendant. The defendant was out on bond and, it appears, absent until September 16, 1974. On that date defendant entered a waiver of his appearance at future proceedings until trial. On January 14, 1975, the pretrial motions were overruled. On February 13, 1975,

defendant was arraigned and waived any complaint based on the lack of a speedy trial due to delays thereafter occurring. Trial commenced on April 10, 1975.

The present action is one in habeas corpus. Defendant relies on the overruling of the motions dealing with the sufficiency of the evidence and the transcript of the preliminary hearing; also, he charges he has been denied a speedy trial. We affirm the judgment denying the requested writ of habeas corpus.

Habeas corpus will not lie to challenge the sufficiency of the evidence at a preliminary hearing. See, State v. Franklin, 194 Neb. 630, 234 N. W. 2d 610; Kruger v. Brainard, 183 Neb. 455, 161 N. W. 2d 520. Furthermore, examination of the record of the preliminary hearing reveals ample evidence justifying the binding over of the defendant. The defendant was seen entering the premises involved and was apprehended while hiding in the basement.

Under section 29-1207, R. S. Supp., 1974, trial is to be held within 6 months after the filing of the information. The statute specifically excludes from computation the time from filing to final disposition of pretrial motions, and any delay resulting from the absence of the defendant.

It is evident that this appeal is frivolous and the judgment of the District Court is affirmed. See Rule 20.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS LEE TEMPLE, APPELLANT.

236 N. W. 2d 835

Filed December 24, 1975. No. 40169.

1. **Criminal Law: Sentences: Work Release.** Work release is a privilege that may be granted by the sentencing court. It is not a right which must be granted to all prisoners.

2. ———: ———: ———. The sentencing court has a broad discretion in ruling on petitions for work release.
3. ———: ———: ———. A denial of the privilege of work release should not be subject to review except where there has been a clear abuse of discretion.

Appeal from the District Court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed.

Fisher & Fisher, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

BOSLAUGH, J.

The defendant was convicted of assault and battery and sentenced to 20 days imprisonment in the county jail. The judgment was affirmed by this court in State v. Temple, 193 Neb. 89, 225 N. W. 2d 422.

On March 26, 1975, after the mandate had been received and filed in the District Court, the defendant filed an application for work release. The application was denied but the sentence was suspended and the defendant's bond continued. The defendant has appealed and contends the trial court erred in refusing to grant his application for work release.

The work release law, which was enacted in 1969, provides that any person sentenced to a city or county jail may be granted the privilege of leaving the jail during necessary and reasonable hours for certain specified purposes. § 47-401, R. R. S. 1943. Working at his employment or conducting his own business or other self-employed occupation are among the authorized purposes set out in the statute. Petitions for work release should be filed in the sentencing court. § 47-402, R. R. S. 1943.

The defendant's application alleged the defendant had approximately 1,400 to 1,500 cows and calves in South Dakota, at a location approximately 80 miles from Rush-

ville, Nebraska, and that it was necessary for the defendant to be present during the day to look after the cattle and conduct his business. The defendant requested that he be allowed to serve his sentence in the Pennington County jail in Rapid City, South Dakota, and be allowed to leave the jail at 6 o'clock a.m. and return at 8 o'clock p.m. on each day of the sentence. The law provides the sentencing court may arrange for a sentence to be served in a different county. § 47-407, R. R. S. 1943.

Apparently, no showing was made in support of the application, other than the application itself. There is nothing in the record to show why the application was refused other than some indication that the trial court did not believe there would be any particular hardship on the defendant or his family if the application was denied.

Work release is a privilege that may be granted by the sentencing court. It is not a right which must be granted to all prisoners. We think the statute gives the sentencing court a broad discretion in ruling on petitions for work release, and a denial of the privilege should not be subject to review except where there has been a clear abuse of discretion. The record here fails to show a clear abuse of discretion.

The order of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LARRY L. KOLZOW, APPELLANT.

236 N. W. 2d 837

Filed December 24, 1975. No. 40266.

1. **Criminal Law: Probation and Parole.** The determination of whether to grant probation to one convicted of a crime is a matter within the sound discretion of the trial court; and the

denial of probation will not be disturbed on appeal in the absence of a showing of abuse of judicial discretion.

2. **Criminal Law: Sentences.** Where the punishment of an offense is left to the discretion of a court to be exercised within certain statutorily 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: SAMUEL P. CANIGLIA, Judge. Affirmed.

Ernest H. Addison and James M. Tyler, for appellant.

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

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

SPENCER, J.

Defendant, Larry L. Kolzow, entered a plea of nolo contendere to a charge of embezzlement. The court accepted his plea and after a presentence investigation sentenced him to confinement in the Nebraska Penal and Correctional Complex for a period of 3 years. The sole issue presented on this appeal is whether the trial judge abused his discretion in sentencing the defendant to prison rather than placing him on probation. We affirm.

Defendant embezzled approximately $25,000 while employed as a bookkeeper for the Record Printing Company, Inc. Defendant admitted embezzling funds from a previous employer, Vickers Oil Company of Des Moines, Iowa. He was not charged with this crime and agreed to repay the amount embezzled, about $16,000 or $17,000. A portion of the money embezzled herein was used to repay Vickers Oil Company.

No purpose will be served by a further discussion of the facts. The determination of whether to grant probation to one convicted of a crime is a matter within the sound discretion of the trial court; and the denial

of probation will not be disturbed on appeal in the absence of a showing of abuse of judicial discretion. State v. Ward (1974), 191 Neb. 421, 216 N. W. 2d 163. We find no abuse of discretion herein.

Defendant suggests that the sentence imposed is harsh and excessive. A flat 3 year sentence under the statute in question is the equivalent of a 1 to 3 year sentence. It is well within the limit of 1 to 7 years. Where the punishment of an offense is left to the discretion of a court to be exercised within certain statutorily prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Johnson (1974), 191 Neb. 54, 213 N. W. 2d 716. There was no abuse of discretion therein.

The judgment is affirmed.

AFFIRMED.

LEONARD L. DANIELS, BY AND THROUGH CHARLES JONES, HIS BROTHER AND NEXT FRIEND, APPELLEE, V. RICHARD R. ANDERSEN ET AL., APPELLEES, IMPLEADED WITH CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.

237 N. W. 2d 397

Filed December 31, 1975. No. 39945.

1. **Evidence: Trial.** In determining the sufficiency of evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
2. **Torts: Political Subdivisions.** Under the Political Subdivisions Tort Claims Act, section 23-2406, R. R. S. 1943, the findings of a District Court under the act will not be disturbed on appeal unless they are clearly wrong.
3. **Torts: Negligence.** An essential element in any negligence action is a duty recognized by law which the defendant owes to the plaintiff.

4. **Torts: Negligence: Jails and Jailers.** It is a basic principle of law that a jailer has a duty to exercise that degree of care necessary to provide reasonably adequate protection for his prisoners.
5. **Police Officers and Sheriffs: Negligence: Jails and Jailers: Intoxicated Persons.** In the case of an intoxicated prisoner the police officer is impelled to use a higher degree of care for his safety and protection than is necessary or expected in the case of one who has control of his physical and mental faculties and able to protect himself.
6. **Proximate Cause: Words and Phrases: Negligence.** Proximate cause, as used in the law of negligence is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred.
7. **Proximate Cause: Negligence.** If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence.
8. **Verdicts.** A verdict may be set aside as excessive on appeal when, and not unless, it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record.

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

Herbert M. Fitle, James E. Fellows, and Timothy M. Kenny, for appellant.

John T. Carpenter of Matthews, Kelley, Cannon & Carpenter, for appellee Daniels.

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

WHITE, C. J.

This is a negligence action brought against members of the Omaha police department and the City of Omaha, Nebraska. The District Court, sitting without a jury, found for the plaintiff and awarded him $200,000 in

damages. The defendant city appeals. We affirm the judgment of the District Court.

The plaintiff, Leonard L. Daniels, a 50-year-old male, was arrested by members of the Omaha police division on September 21, 1970, and booked on the charge of "drunk-no prosecution." It is the practice of the Omaha police division to arrest persons who are so intoxicated that they are in danger of injuring themselves. These persons are confined in what is referred to as the "drunk tank." When sober, they are released without formal charges. After the plaintiff was confined in the drunk tank, an intoxicated man by the name of Watson was placed in the drunk tank. Watson proceeded to go through the pockets of the other inmates, and then without any provocation, he punched the plaintiff in the head and also kicked him once. As Watson then moved around the cell, one of the other inmates, Kinstler began pounding on the window of the drunk tank, fearing that he was in danger. After some period of time, perhaps as much as 15 minutes, Watson, an ex-professional prize fighter and an escapee from a mental institution, returned to attack the plaintiff again. Watson picked plaintiff up and threw him on his head. Watson then kicked the plaintiff four or five times in the head. The plaintiff was finally discovered by one of the jailers when he opened the door to the drunk tank to place another drunk in the cell. Upon being taken to the hospital, it was discovered that the plaintiff had suffered a broken jaw and a severe brain injury. Since the injury, the plaintiff has not been able to talk or to remember anything. He cannot reason, and his physical abilities such as walking are severely limited. There was medical testimony to the effect that the plaintiff's condition will never improve, and that he will always require total custodial care.

Leonard L. Daniels, through his brother, Charles Jones, brought this negligence action against the City of Omaha, under the Political Subdivisions Tort Claims

Act, sections 23-2401 to 23-2420, R. R. S. 1943, alleging that the City of Omaha negligently caused him to be severely beaten while in the defendant's custody. The District Court found for the plaintiff and awarded him $200,000 in damages. The defendant appeals that decision, arguing first, that it was not liable for the plaintiff's injuries, and second, that the damage award was excessive.

"In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence." Lucht v. American Propane Gas Co., 183 Neb. 583, 162 N. W. 2d 891 (1968). See, also, Thompsen v. Miller, 177 Neb. 530, 129 N. W. 2d 498. Moreover, under the Political Subdivisions Tort Claims Act, section 23-2406, R. R. S. 1943, the "findings of a District Court under the act will not be disturbed on appeal unless they are clearly wrong." Craig v. Gage County, 190 Neb. 320, 208 N. W. 2d 82.

An essential element in any negligence action is a duty recognized by law which the defendant owes to the plaintiff. It is a basic principle of law that a jailer has a duty to exercise that degree of care necessary to provide reasonably adequate protection for his prisoners. See, 60 Am. Jur. 2d, Penal and Correctional Institutions, § 17, p. 821; Restatement, Torts 2d, § 320, p. 130. What is reasonable care of prisoners depends on the circumstances of each case. See O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123.

In the case at hand, the plaintiff was intoxicated. He was arrested for his own protection and placed in the "drunk tank." By being placed in the "drunk tank," Daniels was deprived of one basic method of self-protection - that of escape. Thus, being intoxicated and having no means of escape, Daniels possessed little ability to protect himself. The police are not insurers of

a prisoner's safety, but when a prisoner is intoxicated, a jailer has a duty to use a high degree of care to insure the prisoner's protection. The concept that a police officer owes a higher standard of care to an intoxicated prisoner has been recognized in other jurisdictions. In Barlow v. City of New Orleans, 228 So. 2d 47 (La. App., 1969), affirmed 257 La. 91, 241 So. 2d 501, the plaintiff, an intoxicated prisoner, was left unattended in the back seat of a police car which was locked in such a way that the prisoner could not escape. A fire broke out in the police car and the plaintiff was injured. The court said: "From our jurisprudence has evolved a principle of law that imposes upon a police officer the duty to exercise reasonable and ordinary care and diligence to prevent injury to a prisoner in his custody; * * *. The jurisprudence also supports the principle that in the case of an intoxicated prisoner the police officer is impelled to use a higher degree of care for his safety and protection than is necessary or expected in the case of one who has control of his physical and mental faculties and able to protect himself."

In this case not only was the plaintiff defenseless due to his condition, but as Lt. Hartquist, the detention commander, testified, fights between prisoners in the drunk tank were to be expected.

The crucial question to be decided is: Does the evidence support the finding that the defendant violated the high standard of care owed to the plaintiff? The District Court, on the facts, has already determined that the defendant breached its duty toward the plaintiff. That determination can be set aside only if the evidence shows it to be clearly wrong. We hold that there is sufficient evidence in the record upon which the trial court could have based its decision that the defendant was negligent.

First, the District Court might have based its decision upon the failure of the defendant to conduct a sufficient number of physical inspections of the drunk

tank. The drunk tank was constructed with the idea of having it monitored with two television cameras and one audio monitor. Thus, the jailers could see into and hear from the drunk tank without leaving the jailer's office. However, due to the accoustics of the drunk tank, the audio monitor was useless, and on the night of the plaintiff's injury, was not turned on. In addition, one of the television cameras was not functioning; although a repair order had been made. The sole remaining camera could not view that part of the cell where the plaintiff was attacked. The jail rules required a "constant" watch of the monitors. The jail rules also required an hourly inspection of the jail cells. If the rules demanded hourly inspections along with "constant" monitoring, it would be reasonable to assume that with the audio monitor and one of the two cameras not functioning, reasonable care would dictate that there would be more than one inspection every hour, particularly in the drunk tank where fights were predictable. In fact, Mr. Devere, who was the deputy chief of police in 1970 and in charge of the maintenance and control of the jail, testified that if the monitors were not functioning, good police practice would require more than one hourly inspection. Yet, even with the monitors out, the jailers did not make more than one hourly physical inspection, except for the limited check made incidental to the placing of additional prisoners in the drunk tank. The District Court could have reasonably concluded that due to the malfunctioning of the monitors, the jailers were negligent in not conducting more frequent inspections of the drunk tank.

Second, the District Court might have based its determination of negligence on the failure of the jailers to hear one of the prisoners, Kinstler, pounding on the window of the drunk tank. After Watson had attacked the plaintiff the first time, Kinstler began pounding on the window of the cell, fearing that the crazed Watson might attack him next. There is evidence that

Kinstler might also have yelled for help. Lt. Hartquist testified that jailers could easily hear a prisoner calling for help without the aid of an audio monitor. Thus, if Kinstler was pounding on the window and calling for help, and for purposes of review we must accept these assertions as facts, the jailers should have heard both the pounding and the yelling, and subsequently investigated. The fact that the monitors were not functioning properly is all the more reason for the jailers to have been alert for unusual noises. Certainly the District Court was not clearly erroneous in believing that the jailers should have been able to hear a frightened prisoner pounding and yelling in an attempt to get help.

Once the defendant's negligence has been established, it is necessary to find that the plaintiff's injuries were proximately caused by the defendant's negligence. In Weichel v. Lojka, 185 Neb. 819, 179 N. W. 2d 112, this court said: "Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred." See, also, Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758.

There are three basic requirements in establishing proximate cause. The first requirement is that the negligence be such that "without which the injury would not have occurred," commonly known as the "but for" rule. See Weichel v. Lojka, *supra*. This argument is referred to as the cause in fact. See 57 Am. Jur. 2d, Negligence, § 142, p. 497. It is clear in this case that the defendant's negligence was the cause in fact of the plaintiff's injury. The plaintiff was attacked twice by Watson. In the first attack, Watson punched the defendant once and then kicked him once. In the second attack, Watson picked up the plaintiff and threw him on his head. Watson then proceeded to kick the plaintiff four or five times in the head. It was certainly reasonable for the District Court to believe that

the second attack caused the plaintiff's injuries. If the defendant had not been negligent, Watson would not have had the opportunity to attack the plaintiff a second time. After being alerted to the plaintiff's condition after the first attack, either by Kinstler's pounding and yelling or by a physical check of the cell, the jailers would have surely removed both the plaintiff and Watson from the cell, thereby preventing the second and more severe attack. Therefore, but for the defendant's negligence, the plaintiff would not have suffered his injuries. Thus, the first requirement of proximate cause, the "but for" rule, was fulfilled.

The second requirement is that the injury be the natural and probable result of the negligence. See 57 Am. Jur. 2d, Negligence, § 164, p. 527.

In the instant case, it is clear that plaintiff's injuries were the natural and probable result of the defendant's negligence. The reason that the jailers were negligent in not checking the cells more often and in not hearing a prisoner pound on the cell window, was that the jailers should have anticipated fights in the drunk tank. Lt. Hartquist testified that there was a substantial danger of fighting between prisoners in the drunk tank. Thus, since the possibility of a fight was the danger which the defendant should have guarded against, the occurrence of a fight and its consequences are certainly the natural and probable result of the defendant's negligence.

The third requirement is that there be no efficient intervening cause. The defendant contends that the attack by Watson was an efficient intervening cause so as to relieve the defendant of liability. That contention has no merit. As this court stated in Johnson v. Metropolitan Utilities Dist., 176 Neb. 276, 125 N. W. 2d 708: "If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result

of the original negligence." The District Court could have found that the failure to properly monitor the drunk tank was evidence of the defendant's negligence in that it invited the first beating or intervention by Watson, and it could further have found that the second and more violent beating and intervention by Watson was foreseeable since such fights in the drunk tank were to be expected, as Lt. Hartquist had testified. We come to the conclusion that all three elements of proximate cause being present in the context of this case, there was sufficient evidence to support the finding that the defendant's negligence was the proximate cause of plaintiff's injuries.

The only remaining issue is that of damages. The District Court, sitting as the trier of fact, awarded the plaintiff $200,000. It appears that the District Court based its assessment of damages, in part, on the testimony of Dr. Turner, an economist. The defendant contends that Dr. Turner's analysis is erroneous in that first, in calculating the present value of lost future income and future expenses, Dr. Turner used a discount rate, 6 percent, which is too low, and second, Dr. Turner's calculation of future earning capacity is not truly representative of the plaintiff's lost future income.

As for the contention that the discount rate of 6 percent was too low, the plaintiff introduced evidence which indicated that 6 percent was a conservative yet reasonable rate to discount future income and expenses. This court cannot say that the District Court was clearly erroneous in using a 6 percent discount rate.

The contention that the lost future income was incorrectly calculated need not be decided. There was evidence at the trial that the future medical and nursing expenses alone, discounted to present value, amounted to more than $200,000. In addition, there was ample evidence to support an award of damages for pain and suffering. In Horky v. Schroll, 148 Neb. 96, 26 N. W. 2d 396, this court said: "A verdict may be set aside as

excessive * * * on appeal when, and not unless, it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record * * *." There was credible evidence at the trial to substantiate an award of $200,000, and therefore the award cannot be said to be clearly exorbitant.

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

AFFIRMED.

RICHARD E. TILLOTSON, APPELLANT, V. JOHN F. STEPHENS ET AL., APPELLEES, B C MFG., INC., INTERVENER-APPELLEE.

237 N. W. 2d 108

Filed December 31, 1975. No. 39960.

1. **Fixtures: Security Interest: Records and Recording Laws.** Section 9-401, U. C. C., requires that in regard to goods which are to become fixtures to perfect a security interest, it must be filed in the office where a real estate mortgage would be filed or recorded.
2. **Security Interest: Records and Recording Laws.** Section 9-401, U. C. C., renders an improper filing ineffective as against any party not having notice of the financing statement.
3. **Fixtures: Security Interest: Records and Recording Laws.** Section 9-313, U. C. C., provides that a security interest on goods which become fixtures does not take priority over a subsequent purchaser for value of an interest in the real estate if the subsequent purchase is made without knowledge of the security interest and before it is perfected.
4. **Foreclosure: Words and Phrases.** Section 9-313, U. C. C., provides that anyone, other than the mortgage holder, purchasing at a foreclosure sale is a subsequent purchaser.
5. **Foreclosure: Mortgages: Purchaser.** A bona fide mortgagee is entitled to the same protection as a bona fide purchaser or grantee.
6. **Mortgages: Purchaser.** It is ordinarily held that a subsequent purchaser or mortgagee of the land without notice is not bound

by an agreement between the annexer and the landowner that the property retain its status as personalty.

7. **Foreclosure: Mortgages: Fixtures: Notice: Purchaser: Security Interest.** Where property is subject to a mortgage and can be legally sold and conveyed, it is immaterial whether or not a purchaser had notice of plaintiff's interest in the property.

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

Kirby, Duggan & McConnell, for appellant.

Brogan & Stafford, for appellees.

Hutton & Garden, for intervener-appellee.

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

NEWTON, J.

This is an action to recover the value of a steel grain drying bin in which plaintiff had an interest as a conditional sale purchaser, but the bin was erected on the land of another which was subsequently mortgaged, foreclosed, and sold. Plaintiff appeals from a dismissal of his petition. We affirm the judgment of the District Court.

Plaintiff alleges error in two respects. First, that the case should not have been taken from the jury; and second, that the purchasers at the judicial sale did not acquire an interest in the bin superior to plaintiff's.

On December 27, 1967, plaintiff purchased a drying bin from B. C. Manufacturing, Inc. A security agreement in the nature of a conditional sales contract and a financing agreement were executed and subsequently filed in the office of the county clerk. The bin was erected on property owned by the Newman Grove Grain Company. A waiver of claims to the bin was signed by Willis C. Pelter individually as owner of the real estate. Pelter was a stockholder in and president of the Newman Grove Grain Company, but did not sign in that capacity. The bin was anchored to a concrete base and

became an integral part of the grain corporation's elevator to which it was connected with loading and unloading ducts, electrical wiring, etc. On February 2, 1971, the owner of the real estate mortgaged it to the Battle Creek State Bank. This mortgage was eventually foreclosed and defendants' title is based on a purchase at the foreclosure sale. Three different judicial sales were held. There is some evidence that at the first sale a reservation of the bin was announced and that one of the defendant purchasers knew plaintiff owned the bin. No reservation was made in the notice of sale or at the time the second and third sales were held.

Section 9-401, U. C. C., requires that in regard to goods which are to become fixtures to perfect a security interest, it must be filed in the office where a real estate mortgage would be filed or recorded. This means the B. C. Manufacturing, Inc., agreement had to be filed in the office of the register of deeds. It was not. This being true, section 9-401, U. C. C., renders the filing ineffective as against any party not having notice of the financing statement. There is no evidence of notice to the Battle Creek State Bank.

Section 1-201, U. C. C., states that "purchase" includes taking by mortgage and that "value" includes any consideration sufficient to support a simple contract.

Section 9-313, U. C. C., provides that a security interest on goods which become fixtures does not take priority over a subsequent purchaser for value of an interest in the real estate if the subsequent purchase is made without knowledge of the security interest and before it is perfected. The security interest of B. C. Manufacturing, Inc., not being properly filed, was not perfected and the Battle Creek State Bank's mortgage lien had priority. This section also provides that anyone, other than the mortgage holder, purchasing at a foreclosure sale is a subsequent purchaser.

There is no evidence that the Battle Creek State Bank, at the time it obtained the real estate mortgage,

had any notice of plaintiff's interest in the bin and there was nothing in the real estate records to reflect such an interest; neither was plaintiff in possession of the bin. Under such circumstances the bank acquired a lien on the bin which was a fixture on the mortgaged land. A bona fide mortgagee is entitled to the same protection as a bona fide purchaser or grantee. See, 55 Am. Jur. 2d, Mortgages, § 324, p. 393; Dorr v. Meyer, 51 Neb. 94, 70 N. W. 543; Clements v. Doak, 140 Neb. 265, 299 N. W. 505. "As a general proposition, special agreements fixing the status of property as realty or personalty are binding only on the contracting parties and their privies, and are not binding on third parties without notice thereof, * * *. Thus, it is ordinarily held that a subsequent purchaser or mortgagee of the land is not bound by an agreement between the annexer and the landowner that the property retain its status as personalty." 35 Am. Jur. 2d, Fixtures, § 18, p. 714. See, also, 36A C. J. S., Fixtures, § 18, p. 642.

The B. C. Manufacturing, Inc., had the legal title to the bin. Plaintiff had an equitable interest as the conditional purchaser. As we have seen, neither of these parties could prevail against the mortgagee of the real estate. The mortgagee was entitled to have the bin sold with the land and did so. "The buyer at a foreclosure sale acquires all the legal and equitable title of the parties to the suit." Clements v. Doak, *supra*. The purchasers at the foreclosure sale acquired all the property subject to the mortgage, including the bin. Since the bin was subject to the mortgage and could be legally sold and conveyed, it is immaterial whether or not a purchaser had notice of plaintiff's interest in the bin, just as it would be immaterial if the mortgagee acquired such notice *after* taking the mortgage.

The judgment of the District Court is affirmed.

AFFIRMED.

IN RE ESTATE OF HAROLD G. LINGLE, DECEASED. ERNEST R. FISCHER, APPELLEE, V. JO ANN LINGLE, APPELLANT.
237 N. W. 2d 110

Filed December 31, 1975. No. 39979.

1. **Probate and Administration: Pleadings.** Jurisdiction of res of an estate of a decedent is obtained by a county court upon the filing of a petition containing sufficient averments to confer such jurisdiction.
2. **Probate and Administration.** Upon obtaining jurisdiction of the res of an estate of a decedent, a county court shall thereafter cause, by appropriate orders, the service of notice on persons entitled thereto, and should the service of such notice be defective, the county court retains jurisdiction of the res until such service is perfected, or until such matter is abandoned.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed.

Alan L. Plessman of Nelson, Harding, Marchetti, Leonard & Tate, for appellant.

Keith Sinor, for appellee.

Heard before WHITE, C. J., MCCOWN, NEWTON, and CLINTON, JJ., and WINDRUM, District Judge.

WINDRUM, District Judge.

Ernest R. Fischer, as petitioner, filed a petition in the county court of Red Willow County, Nebraska, on October 1, 1971, alleging that one Harold G. Lingle, died intestate on October 5, 1969, a resident and inhabitant of the County of Red Willow, State of Nebraska, possessed of real estate and personal property in the State of Nebraska to be administered; he left surviving him Jo Ann Lingle, a wife, residing at McCook, Nebraska, and ——— Lingle, first name unknown, residence unknown, a daughter; and petitioner was a creditor of said deceased. The petition prayed for the appointment of an administrator of the estate of Harold G. Lingle, deceased.

Thereafter, on the same day, the petitioner and an-

other alleged creditor filed claims against said estate. On the same day the acting county judge of the county court of Red Willow County, Nebraska, entered an order for hearing and for publication. In compliance with said order, notice of administration in due form was duly published on October 4, 11, and 18, 1971, declaring that the petition for the appointment of administrator would be set for hearing in said court on October 20, 1971, at 10 o'clock a.m. The appropriate proof of publication was duly filed. On October 15, 1971, Jo Ann Lingle, appellant herein, filed in said cause objections to the appointment of an administrator. On the date set for hearing, the county court sustained the objections and dismissed the petition of Ernest R. Fischer. Appeal was duly taken to the District Court for Red Willow County resulting in an order of that court remanding the cause to the county court to hear the petition for the appointment of an administrator upon proper notice being given. Whereupon appellant filed a motion for a new trial or in the alternative to reverse and dismiss. Said motion was overruled and appellant appealed.

Appellant contends that the order of the District Court should be reversed because of two contentions. The first contention is that neither petitioner for the appointment of the administrator nor his attorney caused to be mailed to the heirs-at-law of said decedent a copy of the notice first published in the McCook Daily Gazette, within 5 days as provided by law, nor did either make an effort to determine who said heirs were and their post office addresses, nor did either file an affidavit indicating that he made diligent investigation to ascertain the names of the heirs-at-law and their post office addresses, all as provided by section 25-520.01, R. R. S. 1943. The second contention is that on the 4th day of May 1970, the county court of Red Willow County entered an order In the Matter of the Estate of Harold G. Lingle, deceased, on an application for an order determining inheritance tax. The order contained a find-

ing that the said decedent did not have any assets subject to administration; and appellant argues that the doctrine of res judicata therefore precludes the petitioner in the instant case from filing a petition for the appointment of administrator.

It is conceded that neither petitioner, nor his attorney, mailed notices to any heirs-at-law of said decedent and they did not file the affidavit as required by section 25-520.01, R. R. S. 1943. From the evidence adduced, it is readily apparent neither made any effort whatsoever to determine the names and relationship of the heirs-at-law of said decedent, and their then present post office addresses.

Appellant contends that where a notice of an action is given by publication as authorized by law, and the party instituting the action fails to comply with any of the requirements of section 25-520.01, R. R. S. 1943, the court in which the action is instituted has no jurisdiction over the matter upon objections by parties who appear to have a direct legal interest in it and whose names and post office addresses could have been ascertained through diligent investigation and inquiry. By filing objections, the appellant submitted herself to the jurisdiction of the court. Obviously the petitioner submitted himself to the jurisdiction of the court when he filed his petition. From the record, it appears that only one other party could be an heir-at-law of said decedent, and that was his daughter. She was not sent a notice. Her name and post office address were readily available by diligent investigation and inquiry.

Appellant cites two cases for her contention, Estate of Coleman v. Redford, 179 Neb. 270, 137 N. W. 2d 822, and Neumeyer v. Omaha Public Power Dist., 188 Neb. 516, 198 N. W. 2d 80. Estate of Coleman v. Redford, *supra,* stands for the proposition that first cousins of a testator are not prima facie heirs-at-law and without more appearing would have no standing to question probate proceedings. It was true in that case, notices

of hearing for the probate of the will were duly published and an affidavit was duly filed indicating that the petitioner had, within 5 days after the first publication thereof, made diligent inquiry as to the names and relationship of all the heirs-at-law of said decedent and their post office addresses. This court held that: "This was a sufficient compliance with the statute to give the court jurisdiction." This court did not differentiate as to whether the county court had jurisdiction over the estate or over the first cousin of the decedent who was alleging on appeal that she had not received copies of the first published notice of the hearing for the probate of the will.

Neumeyer v. Omaha Public Power Dist., *supra*, involved an appeal from the report of appraisers in an eminent domain action. The question therein resolved was whether or not the District Court obtained jurisdiction on the appeal because the execution and approval of the undertaking required by section 76-716, R. R. S. 1943, was not filed within the time therein provided. That case dealt with the construction of statutes applicable to appeals from appraisers' reports in eminent domain proceedings and is not applicable to the issue here to be resolved.

The question then to be determined is whether or not the county court obtains jurisdiction of an estate of a deceased person upon the filing of a petition containing the necessary averments, or whether it acquires jurisdiction on completion of service by notice of publication, or whether it acquires jurisdiction upon compliance with the provisions of section 25-520.01, R. R. S. 1943.

In speaking on this subject, 31 Am. Jur. 2d, Executors and Administrators, § 84, p. 63, states as follows: "It had been held that the estate of a decedent is a res, that administration proceedings are at least quasi in rem, that the court acquires jurisdiction on the filing of a petition for letters for administration, and that notice of the application for letters is not necessary in order to

confer jurisdiction over the estate. Even though a statute requires that notice be given, notice has been deemed to be not essential to the jurisdiction and power of the court to grant letters of administration. In some jurisdictions, however, notice of an application for letters is a jurisdictional requirement." It must therefore be determined whether or not the provisions of section 25-520.01, R. R. S. 1943, are jurisdictional insofar as the res is concerned.

Petitioner maintains an estate proceeding is an action in rem wherein the court acquires jurisdiction upon filing of the petition and cites therefor section 30-317, R. R. S. 1943, and State ex rel. Coulter v. McFarland, 166 Neb. 242, 88 N. W. 2d 892. The section of the statute above referred to provides that when there shall be delay in granting letters testamentary, or of administration, the judge of probate may appoint a special administrator to act in collecting and taking charge of the estate of the deceased until the question of the allowance of the will, or such other question as shall occasion the delay, shall be determined and no appeal shall be allowed from the appointment of such special administrator. State ex rel. Coulter v. McFarland, *supra,* involved a situation in which a petition had been filed for the probate of a will. The necessary order was made directing service by publication. Thereafter a second petition was filed for the probate of the same will. The county judge refused to sign an order for a notice of hearing by publication on the second petition. This court stated as follows: "An estate proceeding is in the nature of a proceeding in rem. See, In re Estate of Sieker, 89 Neb. 216, 131 N. W. 204, 35 L.R.A.N.S. 1058; In re Estate of Sweeney, 94 Neb. 834, 144 N. W. 902; In re Estate of Marsh, 145 Neb. 559, 17 N. W. 2d 471; Rohn v. Kelley, 156 Neb. 463, 56 N. W. 2d 711. When a petition is filed in the county court for the purpose of administering or probating an estate therein the proceedings become one in rem to which everyone interested therein is a party,

whether he is named or not. In re Estate of Sweeney, supra; In re Estate of Marsh, supra; Rohn v. Kelley, supra. The filing of such a petition in the county court is in no sense an action within the ordinary meaning of that word. The petition filed is for the benefit of all persons interested therein. It is, in effect, a petition or application directed to the court to put in operation the functions of that office if the petition states the necessary jurisdictional requirements. It is the duty of the court to protect the interests of all parties thereto whether actually before the court or not. See, In re Estate of Marsh, supra; In re Estate of Glover, 104 Neb. 151, 175 N. W. 1017. As stated in In re Estate of Glover, supra: 'The instant the petition is filed the further operation or control of the matter passes out of the hands of the petitioner and into the hands of the court.' "

In re Estate of Glover, 104 Neb. 151, 175 N. W. 1017, involved the estate of a decedent who died intestate on May 23, 1913. On May 21, 1915, a creditor filed a petition asking for the appointment of an administrator of the estate. On June 8, 1915, the creditor filed a request to dismiss its petition for the reason that the claim had been settled, paid, and discharged. On June 9, 1915, another creditor filed an affidavit stating that he had a claim, and upon the appointment of an administrator, he would file the claim. Affiant further requested permission to name an administrator in the event the person previously so named did not qualify or refused to serve in such capacity. It was held that upon the filing of the first petition by the creditor the court acquired jurisdiction and the instant the petition was filed, further operation or control of the matter passed out of the hands of the petitioner and into the hands of the court. As a part of the rationale for such holding, this court pointed out to hold otherwise would provide a fruitful field for fraud. An interested party could make application for letters, delay it as long as possible, and thereafter dismiss the same when it would be too late

for a creditor to file a petition for such an appointment.

The same reasoning is applicable in this case. If appellant's contention were to prevail, other creditors who have filed claims would be deprived of the right to be heard upon the same, even though section 25-520.01, R. R. S. 1943, devolves upon them no duty whatsoever.

Petitioner argues that by virtue of granting power to the county court to appoint a special administrator as provided by section 30-317, R. R. S. 1943, the Legislature intended that the county court have jurisdiction of the res of an estate upon the filing of a petition containing the necessary averments. Such an argument was successfully advanced in In re Hanson, 105 Minn. 30, 117 N. W. 235, which has never been overruled and has been cited numerous times.

Appellant's contention that determination by the county court that the decedent owned neither real or personal property subject to administration in Nebraska is binding upon all persons and is not subject to collateral attack, when such finding or determination was made by said court in proceedings to determine inheritance tax, is without merit insofar as petitioner is concerned as he was neither a party to the former proceedings, nor in privity with a party therein, and needs no further comment.

AFFIRMED.

FLOYD A. TREFFER, APPELLANT, V. ELWOOD YALE SEEVERS ET AL., APPELLEES.

237 N. W. 2d 114

Filed December 31, 1975. No. 40104.

1. **Trial: Evidence: Verdicts.** In determining whether a party is entitled to a directed verdict the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom.

2. **Negligence: Motor Vehicles.** Generally, the failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is undisputably located in a favored position.
3. **Negligence: Trial.** Where reasonable minds may draw different conclusions and inferences from the evidence as to the negligence of the defendant and the contributory negligence of the plaintiff and the degree thereof when one is compared with the other, the issues must be submitted to the jury.

Appeal from the District Court for Custer County: EARL C. JOHNSON, Judge. Affirmed.

Boland, Mullin & Walsh, for appellant.

Maupin, Dent, Kay, Satterfield, Girard & Scritsmeier and Dale A. Romatzke, for appellees.

Heard before SPENCER, BOSLAUGH, and BRODKEY, JJ., and COLWELL and RIST, District Judges.

BOSLAUGH, J.

This is an action for damages arising out of a collision between a motorcycle which was being operated by the plaintiff and a 1953 Allis Chalmers farm tractor being operated by the defendant Susan K. Seevers, now Susan K. Seevers Riecks. The defendant Elwood Yale Seevers is the father of Susan and was riding on the tow bar of the tractor at the time of the accident. The plaintiff was severely injured in the accident.

The accident happened at about 6:40 p.m. on June 17, 1973, at the intersection of State Highway No. 21 and a county road, known as the Sumner Road, approximately 1.7 miles south of Broken Bow in Custer County, Nebraska. Highway No. 21 is surfaced with blacktop and is approximately 24 feet wide. The Sumner Road is surfaced with gravel and is approximately 27 feet wide. The Sumner Road forms a T-intersection and runs east from Highway No. 21. About 500 feet south of the intersection Highway No. 21 curves to the west. Traffic 496 feet south of the intersection has a clear view of traffic approaching from the north.

The weather was cloudy but the road was dry and visibility was good. Shortly after the accident it began to rain.

At the time the accident happened the Seevers tractor was towing a rake. The tractor was about 9½ feet long and the rake was 6 or 7 feet long. Elwood had been working in a field about 1 mile north of the intersection and was going to his home which is south and east of the intersection. The tractor had made a left turn and was proceeding east on Sumner Road when the front of the motorcycle struck the right side of the tractor just behind the front wheels.

The tractor stopped instantly because the distributor cap on the motor was knocked off by the impact. After the collision the tractor was facing mostly south but a little bit to the east with the right rear wheel about 3 feet east of the east edge of the blacktop of Highway No. 21. The front of the tractor was about 12 feet north of the south edge of Sumner Road. The rake was still coupled to the tractor and headed in an easterly direction. Photographs made at the scene of the accident show the right rear wheel of the rake near the east edge of the blacktop.

The evidence as to how the accident happened is in conflict. Susan, who was 16 years of age at the time of the accident, was operating the tractor which had been proceeding in a southerly direction on Highway No. 21. She testified that when she reached the intersection she stopped the tractor and looked to the south. She saw no traffic approaching from the south, so she commenced the left turn on to the Sumner Road. The impact occurred after the tractor had left the paved surface of Highway No. 21 and was on the Sumner Road. Susan did not see the plaintiff before the impact.

Elwood, Susan's father, testified that Susan stopped the tractor near the west edge of Highway No. 21 across from the center of Sumner Road. Elwood looked to the south and then to the north. There was no traffic in

sight to the south but there was a car approaching from the north at a distance of 1/2 to 3/4 of a mile away. Elwood did not look to the south again and did not see the plaintiff until just before the impact when the motorcycle was just a few feet away.

The plaintiff testified that as he came around the curve on Highway No. 21 south of the intersection, he was traveling north at between 35 to 40 miles per hour. He first saw the Seevers tractor when he was about 400 feet south of the Sumner Road. The tractor was then 40 to 45 feet north of the intersection. When he was about 45 or 50 feet south of the Sumner Road he saw the tractor turn across his lane of travel to go east on Sumner Road. His speed was then about 35 miles per hour. He turned to the right and applied the rear brake by pushing on the pedal "pretty hard." He did not apply the front brake which was separately controlled. The motorcycle left a skid mark 39 feet long leading up to the point of impact. The plaintiff estimated his speed at the time of the impact as 10 to 15 miles per hour. He estimated the tractor traveled 15 to 16 feet after he applied his brake until the impact.

The plaintiff's wife was following the motorcycle in the family automobile at a distance of about 400 feet and saw the accident. Her testimony corroborated that of the plaintiff generally.

An ambulance attendant testified that on the way to the hospital the plaintiff asked his wife what had happened and where did the tractor come from. The plaintiff was semiconscious at that time and appeared to be confused and disoriented.

The jury returned a verdict for the defendants on the plaintiff's petition and for the plaintiff on the defendants' counterclaim. The plaintiff has appealed and contends the trial court should have directed a verdict for the plaintiff on liability, should not have submitted the issue of contributory negligence to the jury, and that certain requested instructions should have been given.

In determining whether the plaintiff was entitled to a directed verdict on all or some of the issues the evidence must be considered in the light most favorable to the defendants. In determining whether a party is entitled to a directed verdict the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom. Hacker v. Perez, 187 Neb. 485, 192 N. W. 2d 166.

In order for the plaintiff in this case to have been entitled to a directed verdict on liability it would have been necessary for the evidence to show the defendants were guilty of negligence as a matter of law, that their negligence was the proximate cause of the accident and the plaintiff's injuries, and that the plaintiff was not guilty of contributory negligence that was more than slight.

The specifications of negligence alleged in the petition related to lookout, control, warning signals, right-of-way, and failure to stop or turn aside. There was evidence of negligence on the part of the defendants, but under the circumstances of this case there was no evidence of negligence as a matter of law.

Generally, the failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is undisputably located in a favored position. See Jones v. Consumers Coop. Propane Co., 186 Neb. 629, 185 N. W. 2d 458. Under section 39-636, R. R. S. 1943, a driver intending to make a left turn is not required to yield the right-of-way to a vehicle approaching from the opposite direction unless it is within the intersection or approaching so close as to constitute an immediate hazard. In this case the evidence is in sharp conflict as to where the plaintiff was at the time the Seevers tractor commenced to turn left.

Although the plaintiff testified he was only 45 or 50 feet south of the intersection when the Seevers tractor

began to turn into the Sumner Road, the defendants testified the plaintiff was not in sight when they looked to the south before commencing the turn. This evidence presented a question of fact to be resolved by the jury.

The evidence was similarly in conflict in regard to contributory negligence. The specifications of contributory negligence alleged in the answer related to lookout, control, right-of-way, and excessive speed. The evidence when considered most favorably to the defendants tended to support these allegations and presented questions for the jury.

While there was no direct evidence of speed in excess of the posted speed limit, there was circumstantial evidence from which the jury might have concluded that the plaintiff was traveling at an excessive rate of speed under the circumstances. The defendants' testimony that the plaintiff was not in sight when the tractor commenced the left turn and the evidence concerning damage to the tractor was relevant to this issue. There was also some evidence to the effect that the motorcycle veered to the right or "fishtailed" when the brakes were applied. The photographs indicate the skid mark left by the motorcycle may have started near the centerline of Highway No. 21.

Where reasonable minds may draw different conclusions and inferences from the evidence as to the negligence of the defendant and the contributory negligence of the plaintiff and the degree thereof when one is compared with the other, the issues must be submitted to the jury. Schmidt v. Orton, 190 Neb. 257, 207 N. W. 2d 390.

Since the jury accepted the defendants' evidence as to how the accident happened, much of the plaintiff's evidence must be disregarded. We think the evidence presented questions of negligence and contributory negligence which were properly submitted to the jury. The

record sustains the finding that the accident was the result of the combined negligence of the parties.

The plaintiff also complains of the trial court's refusal to give his requested instructions Nos. 4 and 7 in their entirety. The only portion of requested instruction No. 4 not given was not applicable to the evidence in this case. Requested instruction No. 7 related to lookout and stated that a motorist has a duty to look at a time and place where observation would be effective and should be made before a turning movement. The trial court gave the pattern instruction on lookout, NJI No. 7.03, and an additional instruction on the effect of the failure to see an approaching vehicle which is in a favored position. The instructions given were adequate and there was no prejudice to the plaintiff in refusing to give the requested instructions.

The judgment of the District Court is affirmed.

AFFIRMED.

LONNIE A. BREINER, APPELLEE AND CROSS-APPELLANT, V. TED OLSON, APPELLANT AND CROSS-APPELLEE.
237 N. W. 2d 118

Filed December 31, 1975. No. 40111.

1. **Criminal Conversation: Damages.** In an action for criminal conversation the plaintiff is entitled to recover only for such damages as are the natural, probable consequence of the act or acts complained of, or such as are the direct probable consequence of the particular tort.
2. **Trial: Appeal and Error.** A party on appeal may not properly assign the admission of evidence as error where no objection was made thereto in the trial.
3. **Trial: Evidence.** Error cannot be predicated on the admission of testimony when testimony of the same nature was previously admitted without objection.
4. **Trial: Evidence: Motions, Rules, and Orders: Time.** A motion for a mistrial because of the erroneous admission of evidence must be timely made.

5. **Trial: Instructions: Motions, Rules, and Orders.** The correctness of a ruling of the District Court in giving or refusing instructions cannot be considered by the Supreme Court unless such ruling is first challenged in the District Court by a motion for new trial.
6. **Instructions: Motions, Rules, and Orders: New Trial.** An assignment in a motion for a new trial that errors of law occurred at the trial does not present the correctness of giving or refusing instructions.
7. **Trial: Instructions: Jury.** In a case where it becomes necessary to give further instructions to a jury while it is deliberating, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel.
8. ———: ———: ———. It is error to give an instruction to a jury after it has retired to deliberate out of the presence of the parties and their counsel, but if it clearly appears that prejudice did not and could not flow therefrom, this is error without prejudice and not ground for reversal.
9. **Criminal Conversation: Damages.** In the absence of evidence of some special element of damage for which the law provides a specific means of measurement, it is the general rule that in an action for criminal conversation damages are incapable of precise measurement and there is no fixed rule for determining the amount thereof.
10. **Criminal Conversation: Verdicts: Damages.** Verdicts of juries in actions for interference with the marriage relationship should be set aside as excessive only where it clearly appears that the award was the result of passion and prejudice.

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

Nelson, Harding, Marchetti, Leonard & Tate and Alan L. Plessman, for appellant.

Patrick J. Heaton, Jr., for appellee.

Heard before WHITE, C. J., BOSLAUGH, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

CLINTON, J.

This is an action in two causes, the first for alienation of affections and the second for criminal conversation,

brought by the plaintiff, Lonnie A. Breiner, against the defendant, Ted Olson, to recover damages for interference by Olson with the marriage relationship of the plaintiff and his wife, Sharon Breiner. The trial court directed a verdict of liability against the defendant on the second cause of action submitting only the issue of damages. On the first cause the court submitted the issues of both liability and damages to the jury which found for the defendant. It awarded damages in the amount of $25,000 to the plaintiff on the second cause of action. The defendant filed a motion for new trial on the second cause. The plaintiff filed a motion for a new trial on the first cause. Both motions were overruled. The defendant appealed and the plaintiff cross-appealed.

The defendant makes numerous assignments of error which we consolidate by eliminating redundancies and restate as follows: (1) The court erred in admitting evidence concerning other litigation between the plaintiff and the defendant and in denying the plaintiff's motion for a mistrial because of the admission of such evidence. (2) The court erred in excluding the defendant's offer of the testimony of the Reverend Clarence Stenbeck. (3) Instructions Nos. 6 and 7 given by the trial court were erroneous. (4) The court erred in giving an additional instruction in response to a question by the jury during the course of its deliberations. (5) The jury's award of damages on the second cause is excessive and the result of passion, prejudice, mistake, or disregard of applicable rules of law. (6) The court erred in denying the defendant's motion to reduce the jury verdict to $15,000.

A detailed recital of the evidence would serve no useful purpose and we summarize it as follows, taking note of specific matters in more detail as is necessary in the discussion of each assignment. Breiner and his wife, Sharon, were married in 1962 and became the parents of four children. Breiner engaged in the raising of hogs and chickens on small acreages and did custom haying

as well. Sharon worked with him in these enterprises which, for a variety of reasons, including loss of hogs by disease, did not succeed. Breiner also did farm labor. In 1969 Breiner was hired by the defendant Ted Olson as a farm manager. Breiner performed to Olson's satisfaction as manager of up to 12 quarter sections of land irrigated by center-pivot sprinklers. Breiner's compensation was increased from year to year. Breiner's evidence, if believed, would enable the jury to find that in 1970 Breiner noticed that his wife was becoming distant; that their sexual relations diminished in 1971 and in 1972 ceased, and the marriage otherwise deteriorated; and that Sharon and Olson had entered into a clandestine affair and were meeting in two different trailer houses (in one of which the Breiners resided) on the Olson farm where the Breiners lived. These rendezvous occurred when Breiner was absent from the farmstead doing farmwork elsewhere. The evidence would permit the jury to find that Breiner did not become aware of the meetings or realize the significance of some of the earlier occurrences until he discovered, in the summer of 1972, a key to the second trailer house (which was unoccupied and had been moved onto the place by Olson in 1971) hidden among his wife's possessions. After the discovery he entered and inspected the trailer house and found a bed neatly made. Because of his suspicions he disturbed the covers to some extent and upon inspecting the bed the following day he discovered the bed had again been neatly made. Breiner repeated the process and inspection several times with like results.

On August 4, 1972, Sharon left the farm, taking the children with her. She went to her mother's home where Breiner found her and attempted to persuade her to return home. She refused. On August 8, 1972, Breiner was served with a summons in a divorce action. On August 9, 1972, he discovered that Sharon had left the children with a Mrs. Hammond, a friend and former neighbor of the Breiners. He was told that Sharon had

gone to Norfolk to look for work. Breiner, accompanied by Mr. Hammond to whom he had made known his suspicions, investigated and discovered the family car, which was in Sharon's possession, at the Norfolk airport. Olson is a licensed pilot and operates an irrigation sprinkler manufacturing company, of which he is a major stockholder and officer. This corporation owns an airplane which Olson uses. As a result of further investigation, Breiner discovered that on August 9, 1972, Olson had rented a plane at another airport. Breiner suspected that Olson had met Sharon at the Norfolk airport and that they had gone to Omaha. Accompanied by Hammond, Breiner drove to Omaha and found the rented plane at Epply Air Field. He then, by means of a multitude of telephone calls, located the motel at which Olson was registered. Breiner and Hammond then went to the motel and obtained the room number. Hammond (whose voice was unknown to Olson), by means of pretense, induced Olson to open the door. When it opened Breiner burst into the room, followed by Hammond. Olson was clad in his shorts. Sharon was in the bed and, if the testimony of Breiner and Hammond is believed, she was apparently unclothed.

Olson and Sharon admitted on the witness stand that on the occasion of their discovery in the motel in Omaha they had committed adultery. They both denied having done so on any other occasion. Breiner and Hammond testified that at the motel both Olson and Sharon admitted previous acts of sexual intercourse between them. They also stated they loved one another. All this Olson and Sharon denied.

Olson and Sharon in their testimony admitted some of the suspicious circumstances to which Breiner testified, but gave explanations which were of an innocent nature. Sharon testified that she left her husband because he had physically and sexually abused her and had beaten the children. She further testified that Ol-

son had not influenced her decision to leave her husband. Both she and Olson testified that the trip to Omaha was a spontaneous, unplanned event. Mrs. Hammond testified that Sharon had made arrangements on July 24, 1972, to leave the children with her on August 9, 1972. Sharon denied this. On rebuttal Mrs. Hammond testified that in 1971 Sharon had told her that Breiner was working so hard that he was unable to satisfy her sexual needs.

It is apparent that, except for the admitted act of criminal conversation in the Omaha motel, a jury question was presented on all issues.

On August 10, 1972, Breiner was fired by Olson and told to vacate the trailer house. Thereafter litigation related to compensation allegedly owed by Olson to Breiner resulted.

We will treat the assignments in the order in which we have previously stated them. The first assignment of error deals with Breiner's testimony concerning other litigation between him and Olson. The gist of this testimony was that when Olson told Breiner to vacate the trailer house forthwith following the Omaha incident, Breiner demanded that Olson first pay him the money which he had coming and Olson responded that he would "be foolish to pay you so you would have some money to sue me." Breiner then went on to testify, without any objection on the part of the defendant, that he had not yet been paid; that he had salary coming for part of the month of August 1972; that he was owed pickup rental, two-thirds of a promised bonus of $3,000 for the year 1972, and a few hundred dollars on commission from crop production; and that lawsuits were pending on these matters. Defendant's counsel made no objection to this evidence concerning litigation except to challenge an alleged inaccurate statement of plaintiff's counsel as to its current status. Later in Breiner's testimony the subject was again brought up and at that time the testimony was as follows: "Q. Now, Mr. Breiner, as a re-

sult of these actions that you have testified about, yesterday and today, have you incurred a considerable amount of financial expenses? A. Yes, I have. Q. As a result of these actions, have you been involved in many different items of litigation in Holt County? A. Yes, I have. Q. Would you tell the jury how many different types of cases you have been involved in, and what they are about? A. Well, there are four different cases." After the answer to the last question, objection was made that the evidence was irrelevant. The court then excused the jury and the plaintiff's counsel made an offer of proof in which he described the various litigation and the expenses incurred by plaintiff in connection therewith. The court sustained the objections to the offer of proof and informed plaintiff's counsel that he would not be permitted to introduce evidence as to amounts of expenses incurred, but that his client could testify to the fact that expenses were incurred. Breiner then testified to that fact without any objection being made.

All this occurred on the first day of the trial during the testimony of the first witness, the plaintiff himself. After the plaintiff rested on the third day of trial, the defendant moved for a mistrial because of the admission of the testimony on other litigation.

The defendant's first assignment of error requires some discussion of the nature of the injuries for which recovery may be had in actions of this type. Elements of damage caused by alienation of affection and by an act or acts of criminal conversation are to some extent, at least, overlapping. 42 C. J. S., Husband and Wife, § 692, p. 347, § 706, p. 361. In either case, however, it is our view that the damages to which the plaintiff is entitled are only such as are the natural, probable consequence of the act complained of, or the direct probable consequence of the particular tort. See 42 C. J. S., Husband and Wife, § 692, p. 347. In this case apparently it is the plaintiff's theory that except for the

defendant having committed the adultery with the plaintiff's wife and the discovery of that fact by the plaintiff, the other litigation would never have ensued and therefore the plaintiff is entitled to recover his litigation expense as an element of damage in this case. The other litigation, although in a certain sense caused by the defendant's tortious conduct, really related to collateral matters and is not such damage as is the natural, probable consequence of the acts of the criminal conversation nor the direct result of the particular tort. Rather it resulted from the collateral fact that the plaintiff was an employee of the defendant who discovered the wrongful conduct to which defendant retaliated by firing the plaintiff.

Evidence of the other litigation was not relevant and material to the plaintiff's damages and should not have been admitted had proper, timely objection been made. Defendant, however, waived his objection. The following principles govern. A party on appeal may not properly assign the admission of evidence as error where no objection was made thereto in the trial. Kehr v. Kehr, 173 Neb. 532, 114 N. W. 2d 26. Error cannot be predicated on the admission of testimony when testimony of the same nature was previously admitted without objection. In re Estate of Kaiser, 150 Neb. 295, 34 N. W. 2d 366; Anson v. Fletcher, 192 Neb. 317, 220 N. W. 2d 371. If we assume that admission of the evidence relative to other litigation was so prejudicial as to entitle the plaintiff to a mistrial if a proper objection had been made, it is still nonetheless necessary that the motion for mistrial be timely made. See Pope v. Tapelt, 155 Neb. 10, 50 N. W. 2d 352. The motion was not timely in this case.

The defendant called Reverend Clarence Stenbeck, a Lutheran pastor, to testify. The offer of his testimony was, upon objection, excluded. The defendant assigns that ruling as error. The objection of the plaintiff to the testimony was on various grounds, including that

of privilege under section 25-1201(4), R. R. S. 1943, as well as hearsay, irrelevance, and immateriality. The various objections were sustained. We have carefully examined the offer of the testimony made by the defendant. The objection of privilege appears not to have been good. The objection of hearsay as it applies to a conversation between the witness and Sharon was good. Objection to the testimony of a conversation between Reverand Stenbeck and Breiner, which occurred sometime after the motel incident, contained nothing which was relevant or material to the issues to be decided in this case and the objection was properly sustained. There is therefore no merit in the defendant's second assignment of error.

The defendant's next assignment asserts that instructions Nos. 6 and 7, given by the trial court, were erroneous. We will not consider the assignment because the defendant did not, in his motion for a new trial, challenge these instructions. In State v. Knowles, 192 Neb. 281, 220 N. W. 2d 30, we said: "The correctness of a ruling of the District Court in giving or refusing instructions cannot be considered by the Supreme Court unless such ruling is first challenged in the District Court by a motion for new trial." In Drucker v. Goscar, Inc., 184 Neb. 475, 168 N. W. 2d 534, we said: "An assignment in a motion for a new trial that errors of law occurred at the trial does not present the correctness of giving or refusing instructions."

This brings us to the fourth assignment. Sometime during the course of the deliberations of the jury, the foreman sent to the trial judge the following inquiry: "Does the jury enter an amount of damages in either cause of action." The trial court, without advising counsel for either party of the inquiry and without them being present, responded to the jury's inquiry in the following manner: "In response to your question, the third paragraph of Instruction Number 9 states: 'Alienation of affections and criminal conversation are

separate and distinct wrongs', and recovery may be allowed for one or the other or both." This court has said: "In a case where it becomes necessary to give further instructions to a jury while it is deliberating, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel. . . . It is error to give an instruction to a jury after it has retired to deliberate out of the presence of the parties and their counsel, but if it clearly appears that prejudice did not and could not flow therefrom, this is error without prejudice and not ground for reversal." Barry v. Moore, 172 Neb. 57, 108 N. W. 2d 401. The defendant's entire argument on this point is stated in his brief in the following language: "That error was reversible also because the instruction misled the jury. The initial instructions given by the court to the jury directed the jury to find in favor of the plaintiff and against the defendant on the second cause of action. The additional instruction, quoted above, contradicts the former one. As a result, the jury verdict and judgment must be set aside and a new trial granted."

It is to be noted that this instruction added nothing to the instructions which had already been given and as to which no objection is made. The defendant's argument that the added instruction contradicted the previous instruction directing a verdict for the plaintiff on the second cause of action demonstrates no prejudice to the defendant for the jury followed the court's instruction as to the second cause. The defendant surely cannot be heard to complain because the jury rendered no verdict against him on the first cause. If anything, the added instruction appears to have operated to the defendant's benefit and not his detriment. Under the principle enunciated in Barry v. Moore, *supra,* we cannot reverse for the party complaining clearly was not prejudiced by the error in giving the instruction in the absence of the attorneys.

Assignments Nos. 5 and 6 may be discussed together because both are assertions that the verdict was excessive. At 42 C. J. S., Husband and Wife, § 706, p. 361, there is an extensive discussion on the matter of damages in an action for criminal conversation. It is in part as follows: "While the damages in actions of this character are incapable of precise measurement, and there is no fixed rule for determining the amount thereof, in awarding damages the jury may consider, . . . the actual misconduct of defendant, the social relations of the parties, the existence of or lack of affection between the spouses, the destruction of plaintiff's home and happiness, and the pecuniary situation of the parties; and it has been held that the damages recoverable are fair compensation to plaintiff for the wrong so done him or her, including such elements as pain, suffering, injury to health, degradation, and humiliation, to which, in a proper case, may be added damages as compensation for the loss or impairment of the right of consortium resulting from the adultery." In White v. Longo, 190 Neb. 703, 212 N. W. 2d 84, we said: "In the absence of evidence of some special element of damage for which the law provides a specific means of measurement, it is the general rule that in an action for criminal conversation damages are incapable of precise measurement and there is no fixed rule for determining the amount thereof." Defendant seems to argue that the evidence discloses only a single act of adultery and therefore the verdict is necessarily excessive. This argument disregards the evidence and misapprehends the rule on damages. It is true that the direction of the verdict on the second cause was based upon a single admitted act of adultery. But this did not limit the jury to that one act when it came to determining damages. As we have already pointed out, the evidence supports the conclusion that other acts of adultery occurred and the jury was properly allowed to consider that in determining damages. Likewise, the jury

could, on the basis of the evidence, have found that even though Sharon did not have great affection for Breiner, or none at all, nonetheless these various acts of adultery were the cause of the breakup between the Breiners and that except for the acts the marriage may well have continued.

Jury verdicts in actions for interference with the marriage relationship should be set aside by appellate courts as excessive only where it clearly appears that the award was the result of passion and prejudice on the part of the jury. Hansen v. Strohschein, 178 Neb. 367, 133 N. W. 2d 598; Speck v. Gray, 14 Wash. 589, 45 P. 143.

The plaintiff in his cross-appeal argues that the verdict of the jury on cause of action No. 1 is contrary to the evidence. The evidence as to the affection existing between Sharon and Breiner is conflicting. The cross-appeal is without merit.

AFFIRMED.

IN RE ESTATE OF WESLEY JOHNSON, DECEASED.
ELM CREEK STATE BANK, ELM CREEK, NEBRASKA, A CORPORATION, BY AND THROUGH THE FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER, APPELLEE, V. ANNA L. JOHNSON, ADMINISTRATRIX OF THE ESTATE OF WESLEY JOHNSON, DECEASED, APPELLANT.
ELM CREEK STATE BANK, ELM CREEK, NEBRASKA, A CORPORATION, BY AND THROUGH THE FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER, APPELLEE, V. ANNA L. JOHNSON, APPELLANT.

236 N. W. 2d 838

Filed December 31, 1975. Nos. 40115, 40116.

1. **Appeal and Error: Records.** The inclusion of evidence in a bill of exceptions is the only vehicle for bringing evidence before this court on appeal. Evidence not included in the bill of exceptions may not be considered.

2. **Trial: Judgments.** In a jury-waived action, the judgment of the District Court on the facts has the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support it.

Appeals from the District Court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

David Jorgensen of Nye, Wolf & Hervert, for appellant.

Thomas Tye of Tye, Worlock, Tye, Jacobsen & Orr, for appellee.

Heard before SPENCER, MCCOWN, and NEWTON, JJ., and WEAVER and BLUE, District Judges.

BLUE, District Judge.

Wesley Johnson and Anna L. Johnson on April 2, 1973, executed a promissory note to the Elm Creek State Bank, Elm Creek, Nebraska, in the sum of $27,000. On May 30, 1973, Wesley Johnson died. A claim was filed in his estate for the amount of the above note by the Elm Creek State Bank through the Federal Deposit Insurance Corporation, receiver. The claim was allowed in the county court and an appeal was taken to the District Court for Buffalo County, Nebraska.

Elm Creek State Bank by and through the Federal Deposit Insurance Corporation, receiver, also filed an action in the District Court for Buffalo County, Nebraska, against Anna L. Johnson. The basis of this action was the promissory note of $27,000 that she executed with her husband, and which also was the basis of the claim in the county court.

A jury was waived and trial was held by the court on the appeal from the order allowing the claim in the estate. At the close of the evidence it was stipulated that the evidence presented in connection with the claim (with the exception of exhibit 6, an authorization for insurance) should be received in the case involving Elm Creek State Bank v. Anna L. Johnson. The trial court entered judgment for the bank in the sum of

$31,433.92 in both cases, collectible only once. Appellant's motions for new trials were overruled, and these appeals followed. We affirm the judgment of the trial court.

The evidence presented during the trial is that on the same day that Wesley Johnson and Anna L. Johnson executed the note for $27,000, they also executed a note for $10,500; one for $5,000; and Wesley Johnson executed a note for $6,400; all to the Elm Creek State Bank. The note for $27,000 upon which these actions were brought shows on its face that Wesley Johnson indicated he desired credit life insurance at a premium charge of 75 cents per $1,000 per month. Apparently the same indication was made on the other notes. On May 30, 1973, Wesley Johnson died and credit life insurance in the total amount of $15,000 was applied to the outstanding notes that were owing by the Johnsons to the bank. There is testimony that the method of pro rating the proceeds among the various notes was approved by Anna L. Johnson. Mrs. Johnson also contributed to the payment of the notes. The promissory note for $27,000 was not paid from the insurance proceeds or by Anna L. Johnson.

The evidence shows that the only credit insurance available to Wesley Johnson was a group life insurance plan with Lincoln Benefit Life Company. Under the terms of this group policy, the maximum amount of protection that any one insured could obtain was $15,000.

Appellant contends that since Wesley Johnson signed a statement on the note form that he desired life insurance coverage, the bank was obligated to procure this insurance and since it had not, it could not recover. The appellant in support of this contention cites several cases which we believe not applicable to the facts here. For instance, in Mid-America Corp. v. Roach (Okla.), 412 P. 2d 188, cited by appellant, the lending agency actually agreed to procure insurance and did in fact for a time. Midwest Lumber Co. v. Dwight E. Nelson

Constr. Co., 188 Neb. 308, 196 N. W. 2d 377, mentioned in appellant's brief, is not on point since in that case there was an agreement to procure insurance. In the promissory note form, Wesley Johnson simply indicated that he desired credit insurance on the $27,000 note. The evidence does not show that the bank agreed to procure the insurance, nor is there evidence that the borrowers were under the assumption that they were insured for the full amount of this note.

There is evidence indicating the Johnsons were aware that there was only one $15,000 policy. Welsey Johnson was in the construction business and had dealings with and borrowed money from the bank over a period of several years. Anna L. Johnson was the bookkeeper for the business. She testified that debit slips from the bank appeared in each monthly statement indicating a charge of $11.25 for credit insurance. Since the notes show that the premium was 75 cents per month for $1,000 coverage, certainly this constituted notice that the total coverage was only $15,000. Also, on July 27, 1971, Wesley Johnson signed an authorization for the bank to withhold this premium. This authorization clearly stated that the maximum insurance coverage was $15,000. No other authorization was ever signed. At one point in the testimony, Mrs. Johnson stated that she was aware that the total coverage was $15,000.

Appellant claims the bank should be precluded from recovering on this note in that it failed to comply with section 44-1707, R. R. S. 1943. This section requires among other things that the policy of credit insurance or certificate be delivered to the debtor. Apparently this was not done. The statute is silent as to the liability of a bank to a borrower if it fails to comply with the statutory requirements. Presumably these requirements were enacted to give the borrower notice. In this case there is evidence that the borrowers were quite aware that total insurance coverage was $15,000. The trial court so held.

Appellant asserts that the $27,000 note involved in this action was a partial renewal of a $15,000 note given to the bank on March 1, 1971, by Wesley Johnson. Appellant claims that at that time the chairman of the board of the bank fraudulently induced Welsey Johnson to invest the $15,000 in worthless debentures. It is argued, therefore, that the bank should not be permitted to recover this amount. There is no evidence in the record that supports this contention. In the transcript from the county court there are copies of proceedings in the District Court for Buffalo County, Nebraska, in the case of Anna L. Johnson, Administratrix of the Estate of Wesley Johnson, deceased v. Ronald Bycroft. That action involved the sale of certain debentures to Wesley Johnson by Bycroft, however, those proceedings were not offered into evidence or included in the bill of exceptions. We have stated many times that evidence cannot be considered by this court unless it is included in the bill of exceptions. Dilsaver v. Pollard, 191 Neb. 241, 214 N. W. 2d 478.

In this case, the parties waived a jury trial and the matter was tried to the court. It was for the court to determine not only the law applicable to the case, but it was also the trier of the facts. In a jury-waived action, the judgment of the District Court on the facts has the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support it. Burhoop v. Pegram, 194 Neb. 606, 234 N. W. 2d 828; Winchell v. National Bank of Commerce Trust & Savings Assn., 181 Neb. 870, 152 N. W. 2d 2.

In this case there is sufficient competent evidence to support the judgment of the trial court.

AFFIRMED.

HAGGARD DRILLING, INC., A CORPORATION, APPELLANT, V. RALPH W. GREENE ET AL., APPELLEES.

236 N. W. 2d 841

Filed December 31, 1975. No. 40117.

1. **Contracts.** A quasi-contract is a contract implied in law and usually has its origin in the principle that a person shall not be allowed to enrich himself unjustly at the expense of another.
2. **Contracts: Equity.** The law will not imply a promise against the express declaration of the party to be charged, made at the time of the supposed undertaking, unless such party is under legal obligation paramount to his will to perform some duty, and he is not under such legal obligation unless there is a demand in equity and good conscience that he should perform the duty.
3. ———: ———. The mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi-contract or unjust enrichment.
4. ———: ———. Where a third person benefits from a contract entered into between two other persons, in the absence of some misleading act by the third person, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third party.

Appeal from the District Court for Chase County: JACK H. HENDRIX, Judge. Affirmed.

McGinley, Lane, Mueller, Shanahan, McQuillan & Gale, for appellant.

Curtis & Curtis and Owens & Owens, for appellees Maddux.

Heard before SPENCER, MCCOWN, and NEWTON, JJ., and COLWELL and IRONS, District Judges.

COLWELL, District Judge.

This is a suit to recover $13,219.60 as the unpaid balance due for drilling five irrigation wells. Plaintiff claims three theories of recovery, express contract, implied contract, and quasi-contract based upon unjust enrichment. Defendant Ralph W. Greene was not served with process; he did not appear. The default of defend-

ant Edward L. Lewis was entered. Issues were joined as to defendants Maddux, and trial thereon was had to the court. Judgment was entered for defendants Maddux. We affirm.

On April 17, 1970, defendants Thomas A. Maddux and Helen Maddux, husband and wife, as sellers, by written option and agreement, granted to Ralph W. Greene and Edward L. Lewis an option to purchase a 3,800-acre ranch in Hayes County, Nebraska, hereafter called the Palisades Place. At the time the sellers lived on another nearby ranch property called the Enders Place. Both ranch properties were titled in the name of Thomas A. Maddux. Buyers were residents of Colorado. The material parts of the option are: "It is mutually agreed that the consideration for this option shall be that the Buyers shall, at their own expense, procure to be drilled, gravel packed and capped in a good and workmanlike manner in keeping with the standards of the area a total of twelve irrigation wells: seven of these wells shall be located upon the Sellers home place and five of these wells shall be located upon the real estate hereinabove described. It is further agreed that the Buyers shall make arrangements on the day of execution of this agreement with Haggard Drilling Company of Imperial, Nebraska, to do this work and the Buyers shall make all arrangements for the payment to the driller and shall hold harmless the Sellers from any cost or loss caused thereby. * * * In the event that the Buyers shall elect to exercise their option to purchase the hereinabove described real estate under the terms hereinafter set forth, then they shall have credit for the cost of the seven wells drilled on the Sellers home place, but they shall have no credit for the five wells drilled on the hereinabove described real estate, on the total purchase price. * * * In the event the Buyers elect to exercise their option to purchase the real estate, then the Sellers agree to sell to the Buyers and the Buyers agree to buy from the Sellers

the hereinabove described real estate for the good and valuable consideration of money to be paid, acts to be performed and promises to be kept, the value and sufficiency whereof as consideration being mutually herewith acknowledged by the execution of this instrument, under the following terms and conditions: * * * A. 1. The Buyers shall have the right to purchase said real estate for the cash purchase price of $380,000.00, * * * 2. Alternatively, the Buyers shall have the right to purchase said real estate for the installment sale price of $400,000.00, which shall be payable as follows: * * * a. The Buyers agree to purchase real estate of a cost of $50,000 or less as designated by the Sellers and to exchange the same as a part of this transaction in such manner as shall be most advantageous to the Sellers for tax purposes and which shall not increase the total cost of the Buyers. * * * b. On November 1st, 1970, to pay to the Sellers a sum of money equal to 29% of the installment sale price after the purchase hereinabove described at A. 1. a. * * * This sum of money shall be diminished by the cost of the seven irrigation wells on the Sellers home place as described in the option consideration. * * * H. In the event the Buyers fail to accept the option hereinabove granted, then the improvements accomplished by the twelve irrigation wells hereinabove described shall be the sole property of the Sellers, and the Buyers shall have no further liability to the Sellers arising from the option portion of this agreement."

The deadline for exercising the option by the buyers or other persons they might direct was May 18, 1970. After executing the option defendant Helen Maddux did nothing more concerning that instrument, its terms, or its performance.

On April 17, 1970, Greene, Lewis, and Thomas A. Maddux talked to Jon Elson, manager of the Haggard & Sargent Drilling Company at its office in Imperial, Nebraska, concerning the drilling of 12 irrigation wells

as provided in the option. Shortly thereafter there were more than two other conversations on the same subject matter between Lewis, Greene, and Elson. A copy of the option was exhibited to Elson; he read parts of it; and he understood the ownership of the lands involved and the relationship of the parties to the option, particularly, that the buyers had the sole obligation to secure the drilling of 12 wells and pay for the same. Elson submitted the drilling proposition to the board of directors of the Haggard & Sargent Drilling Company, which generally approved its acceptance and understood the buyers were to pay for the wells. Thereafter it was orally agreed between Elson, acting for the Haggard & Sargent Drilling Company, and Lewis and Greene for the Spring Creek Land and Cattle Company to drill the 12 wells as provided in the option. It was understood and agreed that Lewis and Greene were obligated to pay for the well drilling on the basis of reasonable charges, less 5 per cent discount for volume and the making of payments every 30 days. There was no understanding between any of the parties that the sellers were to pay or underwrite or guarantee the payment for any of the wells drilled; and there is no evidence in the record that sellers at any time represented to the driller or its agent that they would pay for any such service or material.

On September 22, 1971, the interests of the Haggard & Sargent Drilling Company were merged into Haggard Drilling, Inc., plaintiff. Both companies will hereafter be called plaintiff. Plaintiff had enjoyed many years of active drilling work in the Hayes County area.

Beginning on May 1, 1970, and continuing through June 5, 1970, test wells were drilled, logs prepared for 12 wells, and 5 wells were drilled with casing. Three of the drilled wells were on the Enders Place and two on the Palisades Place. During this time Thomas A. Maddux was occasionally present observing the drilling work and, at times, he did make suggestions as to the

location of some of the wells and the drilling work. He did not assume the role of directing the drilling work and he made no representation contrary to any term of the option.

On May 18, 1970, Lewis alone exercised the option by giving notice in writing to Thomas A. Maddux that he elected option A (2), to purchase the land. Greene did not thereafter participate in any of the matters relating either to the well drilling, or the option, and at the time of trial his whereabouts was unknown. No notice was given to the plaintiff or its agent that Lewis, individually, exercised the option; however, thereafter all contact by plaintiff concerning the drilling transaction was had with Lewis, personally, or the Spring Creek Land and Cattle Company, Lakewood, Colorado, which was a corporation established by Lewis for the purpose of managing the Palisades Place. At the time the option was exercised Lewis assumed possession of the land described in the option, which included the assignment to Lewis by the sellers of an existing agister's contract covering 1,000 head of cattle, the proceeds of which were to be divided 10 per cent to the sellers for managing, and 90 per cent to Lewis.

Plaintiff stopped drilling work on June 5, 1970, because Lewis failed to pay for the work as agreed. Statements for unpaid drilling work were sent to the Spring Creek Land and Cattle Company, at Lakewood, Colorado, which is the same address as that of defendant Lewis. The statements were sent on May 20, June 4, and June 16, 1970. In response to the last statement Lewis returned it to plaintiff along with a $2,500 payment, leaving a balance due of $12,433.62, and his notation "Balance to follow in 10 or 15 days * * * Thanks. Ed Lewis." Another statement was sent to Lewis on September 30, 1970; however, the balance due was then shown as $13,219.60 since plaintiff then added to the account the 5 per cent discount previously granted. No other payment was ever made by Lewis

for drilling charges. No statement of account was ever sent to either of the defendants Maddux and no formal demand of them was made prior to the filing of this suit on September 27, 1972.

The well registration forms for filing with the Nebraska Department of Water Resources were prepared by the plaintiff and sent (1) for the Enders wells to Thomas A. Maddux, and (2) for the two Palisades wells to Lewis who, in turn, forwarded them to Maddux.

Lewis made attempts to secure financing to complete the option and as late as November 1970, stated that he intended to complete the contract terms. However, he defaulted, and the record indicates that he is judgment proof. There has been no accounting between Lewis and Thomas A. Maddux on the agister's contract.

Plaintiff never filed or attempted to file a mechanic's lien. The petition in this action was filed September 27, 1972.

On March 31, 1972, Thomas A. Maddux and Helen Maddux were divorced. As a part of the decree 320 acres of the Palisades Place was awarded to her. One of the wells in question here was located on this 320 acres.

Both express and implied contracts have their foundation in the consent of the parties. At oral argument plaintiff did not urge its right of recovery on either the theory of express contract or implied contract. "The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside unless clearly wrong." Wonderling v. Conley, 182 Neb. 446, 155 N. W. 2d 349. The trial court properly held that there was no evidence of a contract either express or implied in law between plaintiff and defendants Maddux.

We next consider plaintiff's theory to recover on quasi-contract based upon unjust enrichment flowing to defendant Maddux. There is little controversy in the evidence. We consider this issue de novo.

"A quasi contract is a contract implied in law and usually has its origin in the principle that a person shall not be allowed to enrich himself unjustly at the expense of another. 17 C. J. S., Contracts, § 6, p. 566. Where benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving the benefits to avoid payment therefor, the law required the party receiving and retaining the benefits to pay the reasonable value of them." Bush v. Kramer, 185 Neb. 1, 173 N. W. 2d 367.

"The law will not imply a promise against the express declaration of the party to be charged, made at the time of the supposed undertaking, unless such party is under legal obligation paramount to his will to perform some duty, and he is not under such legal obligation unless there is a demand in equity and good conscience that he should perform the duty." 66 Am. Jur. 2d, Restitution and Implied Contracts, § 2, p. 944.

"The mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi contract, unjust enrichment, or restitution. Moreover, where a third person benefits from a contract entered into between two other persons, in the absence of some misleading act by the third person, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third person." 66 Am. Jur. 2d, Restitution and Implied Contracts, § 16, p. 960.

The acts and services of plaintiff did confer upon defendants Maddux a benefit which improved their land and its use; that benefit was contemplated by the terms of the option, and all parties understood those terms. This is expressed by Elson: "Q. Is it correct that you said there was never any time when Tom Maddux ever said that he would underwrite or pay for these five wells, is that correct? A. He wasn't going to pay for them. Q. And he never said that at any time

did he? A. Nope. Q. And did you say that you had read the basic part of this option and agreement, and did you understand from reading that that this was to be in the terms of the agreement at the expense of Lewis and Green for the drilling of the wells? A. That's right." Elson also testified: "Q. Then you did send statements only to Spring Creek Land and Cattle Company in care of Ed Lewis in Denver? A. That's right. Q. No demand was made upon Mr. Maddux until the month of October (1970) or thereafter, is that right, of that year? A. After we couldn't get any money out of them, we started on Tom."

Although defendants Maddux did recieve a benefit, by the terms of the option, they did have a change of position in that they gave up possession of the Palisades and were prevented from exercising all incidents of ownership until after default was made on November 1, 1970. There is also the further consideration of laches as relates to the divorce decree affecting defendants Maddux.

The failure of Greene and Lewis to be responsible credit risks cannot be a basis to provide equitable relief absent either fraud, misrepresentation, or wrongful conduct on the part of defendants Maddux; we find none of these present here. Defendants Maddux was not unjustly enriched. Judgment affirmed.

AFFIRMED.

SHARON BREINER, APPELLEE, V. LONNIE A. BREINER, APPELLANT.

236 N. W. 2d 846

Filed December 31, 1975. No. 40127.

1. **Divorce: Parent and Child: Alimony.** In this jurisdiction, provisions for support money should be certain and definite, based upon present conditions, and not made to depend upon uncer-

tain and speculative contingencies of hypothetical earnings or income.

2. ———: ———: ———. A formula providing for calculation of additional support money at the end of every year based on a variable amount of bonus is disapproved by this court.

3. ———: ———: ———. In determining the amount of child support the status, situation, and character of the parties, and all attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be noted.

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

Patrick J. Heaton, Jr., for appellant.

R. David Garber of Marks, Clare, Hopkins, Rauth, Garber & Batt, for appellee.

Heard before WHITE, C. J., BOSLAUGH, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

BRODKEY, J.

This is an appeal from a District Court order modifying the child support provisions of a divorce decree. The original decree entered July 18, 1973, directed the appellant, Lonnie A. Breiner, to pay $300 monthly for the support of his four children who were in the custody of appellee, Sharon Breiner. Since it appeared that appellant's monthly salary as a professional farm manager had been supplemented by an annual bonus, approximately equal to his total yearly salary in 1973, the decree also provided that appellant disclose to the court the amount of his bonus as well as any increases in wages and other benefits when he receives them. The decree also provided that the court would then give further consideration to the amount of child support and the question of alimony for appellee.

After a bifurcated hearing on the issues of alimony and additional child support, the court, on October 29, 1974, issued an order modifying the decree, from which this appeal was taken. Appellee was denied the alimony

she requested. Appellant was assessed an additional $1,050 in child support on the basis of his bonus for the period June 1 to December 31, 1973, and the court also established a formula for calculating child support amounts for subsequent years based on the amount of the bonus. The court's formula provided that appellant should round off the gross amount of his bonus to the nearest $1,000 figure and pay an additional $18.75 monthly per $1,000 of gross bonus. An illustration given by the court is that with a $10,000 bonus the calculation would be $18.75 x 10 = $187.50 x 12, or a total of $2,250 in additional child support payable at the end of the year.

Appellant argues (1) that the bonus provision is based on pure speculation and should be modified; and (2) that any award based on the bonus is excessive in light of the regular monthly child support and the circumstances of the parties. We agree that the form of the award is improper and modify it accordingly.

A motion to dismiss and a motion to affirm under Rule 20-A (2) were filed in this court by appellee. Ruling was reserved on these motions. They are now denied. Appellant, it appears, purged himself of contempt prior to the perfection of this appeal and the questions raised on appeal are not "unsubstantial," so as to require application of Rule 20-A (2).

This court has stated that "[s]upport money * * * should be certain and definite, based upon present conditions, and not made to depend upon uncertain and speculative contingencies of hypothetical earnings or income." Christoffersen v. Christoffersen, 151 Neb. 763, 39 N. W. 2d 535 (1949). In Christoffersen, child support was fixed at $70 monthly when the father earned $175 a month, and $50 monthly when he earned less than $175. The "sliding scale" form of award was specifically disapproved. Although appellant is required to pay $300 monthly as a fixed base for child support, the

amount of his year-end bonus is no more certain than was Mr. Christoffersen's monthly salary.

It is true that some jurisdictions have permitted decrees in this form, or similar forms, based on future earnings. See, Vollenhover v. Vollenhover, 4 Ill. App. 2d 44, 123 N. E. 2d 114 (1954); Condy v. Condy, 328 Ill. App. 8, 65 N. E. 2d 219 (1946); Scheldrup v. Gaffney, 243 Iowa 1297, 55 N. W. 2d 272 (1952). We feel, however, that since one purpose of the proceedings in the District Court was to determine rights of the parties and the children in appellant's earnings, the decree should be definite and certain in order to facilitate proper enforcement of the award. The need for computation itself is not objectionable, but an extraneous fact unknown until the end of the year, that is, the amount of the bonus, is necessary to compute the amount of child support. Executions could not be issued by the clerk of the District Court without a hearing to obtain information from an employer about the amount of appellant's bonus, so as to ascertain the exact amount due and the amount for which execution should be levied. Unnecessary administrative difficulties would be created.

Although the District Court decree itself does not require a new hearing on the issue every year, it seems possible that the parties would end up in court litigating differences as to the amount of the bonus. The proceedings involving these parties over the past 2 years have been acrimonious, to say the least. It can only be hoped, but not necessarily expected, that the tenor of their dealings with one another will change abruptly.

The child support provisions of a decree are always subject to modification if circumstances change sufficiently to merit a change in amount. Because of this, setting an amount certain for child support will not be harmful to the interests of either of the parties, or, more importantly, the interests of the children. The order, while stating a definite sum payable monthly, should take into account the fact of appellant's bonus

although that amount may vary. We disapprove the use of this or a similar formula based on future income to establish the amount of child support.

In determining the amount of child support the status, situation, and character of the parties, and all attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be noted. Connolly v. Connolly, 194 Neb. 241, 231 N. W. 2d 337 (1975).

Appellant's current payment of $300 monthly for child support should be increased. His gross monthly salary in 1973 was $650. Not included in this amount are the rent and utilities received as part of his compensation. His gross bonus was $8,091, bringing his gross total yearly income to about $15,891 or $1,324.25 per month. Sharon nets about $240 monthly as a medical records clerk. Although appellant was directed by the decree to pay the debts of the parties, it appears that many of these debts have been adjusted or settled by appellant for less than the amount owed. The decree does not require appellant to provide medical insurance for the children. This is currently being paid for by the mother.

Mrs. Breiner's earnings do not begin to cover the costs of housing, clothing, feeding, and caring for four children. We do not believe $300 monthly set as child support is adequate, especially when the appellant's salary will, in all likelihood, exceed $15,000 yearly, barring a crop disaster.

We conclude, therefore, that the court's order of October 29, 1974, modifying the decree in this case dated July 18, 1973, must itself be modified. Appellant is hereby directed to pay an additional $150 per month, or a total of $450 per month, as child support for the four children, commencing June 1, 1973, and monthly thereafter until each of said minor children becomes of age, self-supporting, or married. Appellant, is, of course, to be given credit for all child support payments made under the terms of the decree and order of modification.

All other references in the order of October 29, 1974, relating to the payment of child support, or to the computation of the amount of child support by considering future bonuses or other future income are deleted. Likewise, the award of the court in the foregoing order of $1,050 additional child support for the period June 1 to December 31, 1973, is also deleted. This modification shall not, however, be construed to preclude future applications for modification of child support because of a change in the circumstances of the parties, as provided by law.

In all other respects, the order of October 29, 1974, is affirmed.

AFFIRMED AS MODIFIED.

DORIS M. GRUMMERT, APPELLEE, V. ORLAND W. GRUMMERT, APPELLANT.

237 N. W. 2d 126

Filed December 31, 1975. No. 40162.

1. **Divorce: Trial: Appeal and Error.** While in a divorce action the case is to be tried de novo, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.
2. **Divorce: Alimony: Property.** The question of alimony and division of property may be considered together; in determining the same, the court shall have regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the abilities of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.
3. ———: ———: ———. Upon dissolving a marriage, the trial court has legal right to assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, title to which is held jointly by them, as the equities require.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Affirmed as modified.

Robert F. Lammers and James P. McKernan, for appellant.

Baldwin & Koenig, for appellee.

Heard before SPENCER, BOSLAUGH, and BRODKEY, JJ., and WARREN and VAN PELT, District Judges.

VAN PELT, District Judge.

This is an action for dissolution of marriage, brought by Doris M. Grummert, wife and appellee, against Orland W. Grummert, husband and appellant. The District Court dissolved the marriage, awarded custody of two daughters to the wife and custody of one son to the husband, provided for the payment of child support for the two daughters, divided the household furnishings and personal effects, awarded the real estate, crops, farm equipment, and livestock to the husband, and ordered a $52,000 lump sum payment from the husband to the wife.

The husband appeals, challenging the valuation and division of property, and in particular the $52,000 payment to the wife. The items of property, the valuations of which are disputed, consist of 120 acres of improved and irrigated farm land in Jefferson County, Nebraska, livestock, crops, farm machinery, and motor vehicles.

In 1948 the parties married, and in 1950 they moved onto the real estate in question, then owned by the husband's father. They both lived on and farmed this property until their separation in March of 1974. The husband has continued to reside thereon since. In February of 1970 the husband's father executed a deed to the premises conveying title to the parties as joint tenants, subject to a mortgage of $9,500. There is evidence of a parol agreement under which the parties agreed to pay to the husband's father one-fifth of all crops and ASC payments during his lifetime. This agree-

ment was never reduced to writing, was therefore not recorded, and there were no reservations or restrictions referring to the same appearing on the recorded deed.

The District Court valued the real estate, less the mortgage, together with the growing crops, farm machinery, farm cooperative investment, and cash on hand, at $150,000. The court further found the liabilities of the parties, other than the real estate mortgage, to be $20,000, arriving at a total net worth of the parties, less the household goods and personal effects previously mentioned, of $130,000. The court awarded the real estate and other property included in the total valuation of $150,000 to the husband, ordered that he pay the $20,000 of miscellaneous debt, and further ordered a lump sum payment of $52,000, payable to the wife from the husband, the same to be a lien against the real estate and drawing 8% interest from and after August 1, 1975.

The husband challenges the $52,000 payment on the grounds that: (1) The real estate was a gift from his father and not a part of the marital estate; and (2) the valuation of the real estate by the trial court was excessive, and, therefore, the $52,000 lump sum payment to the wife is an excessive proportion of the marital estate.

The husband contends that since the conveyance of the real estate was from his father, the same constituted a gift to him alone. This contention is in direct conflict with the recorded legal title which was conveyed to both parties jointly. The only evidence of any intent to convey the property to the husband alone was objected to as being nonresponsive and the objection was properly sustained by the trial court. If it had been the father's intent to give the property to his son alone, the deed could easily have been so drawn.

This court has held in some instances that it will look behind the legal title, and decree according to the equities of the situation. Fotinos v. Fotinos, 184 Neb. 486, 168 N. W. 2d 698; Tavlin v. Tavlin, 194 Neb. 98,

230 N. W. 2d 108. However, the above-cited cases involved marriages in which one spouse made a substantially greater contribution to the property in question than the other.

The evidence in the instant case is to the contrary. Although the parties did not take joint title until 1970, they worked on and improved the premises for 20 years prior to that date, as well as during the 4 years subsequent thereto. The wife helped with the chores, baling hay, planting, irrigating, and harvesting the crops, helped raise hogs, assisted in the milking, painted buildings, and helped shingle the house, in addition to the customary domestic and household duties and the raising of the children.

The contribution of both parties to the real estate from 1950 to 1970 was substantially the same as if they had been purchasing the same on contract. The father undoubtedly realized this in conveying the property jointly. Thus, in looking both at the legal title, as well as behind the same to the equities of the situation, the District Court properly included this real estate in the marital estate.

The husband next contends that the real estate was excessively valued. He did not testify directly as to the value, other than to state that a Production Credit Association worksheet completed in February of 1975 was correct. This worksheet valued the real estate at $60,000, and the cash, livestock, crops, cooperative stock, and equipment at approximately $54,000. The husband also offered the deed, which contained a Nebraska documentary stamp tax indicating a value of $16,000. The husband offered no expert testimony as to value. Both the wife and her expert witness testified that the value of the real estate was $120,000. Thus, there is ample evidence in the record, including the only evidence from a licensed real estate broker and appraiser, to sustain the total value of $150,000 placed upon the property by the District Court.

The husband finally asserts that the trial court's division is so unfair and inequitable that he will be unable to pay the $52,000 lump sum payment, without selling the farm, which is contrary to his father's intention. This contention is based upon fear, rather than fact. The record reveals an existing encumbrance of only $8,900, and the trial court provided for the subrogation of the liens created by the decree in order to facilitate long-term financing by the husband. Once this financing is accomplished, the income from the 120-acre farm, plus leased land, 260 acres of which is irrigated, and considering the availability of some $25,000 worth of farm machinery, trucks, and equipment, should generate sufficient income to support the husband, meet his support obligation, and service all indebtedness.

While in a divorce action the case is to be tried de novo, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Tavlin v. Tavlin, *supra.*

The rule for determination of alimony or division of property in a dissolution action provides no mathematical formula by which such award can be determined and, generally speaking, awards vary from one-third to one-half of the property involved, depending on facts and circumstances in each particular case. The trial court shall act within its sound discretion to divide the marital property and to allow alimony according to the facts of the case, and not according to any fixed rule or mathematical formula. Kula v. Kula, 181 Neb. 531, 149 N. W. 2d 430.

The question of alimony and division of property may be considered together. Sullivan v. Sullivan, 192 Neb. 841, 224 N. W. 2d 542. Section 42-365, R. S. Supp., 1974, which was amended in 1974, now provides that in determining both the payment of alimony and the division of property, the court shall have regard for the circumstances of the parties, duration of the mar-

riage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the abilities of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

A judgment of the trial court fixing the amount of alimony or making distribution of property will not be disturbed on appeal unless it is patently unfair on the record. Tavlin v. Tavlin, *supra*. Upon dissolving a marriage, a trial court has the legal right to assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, title to which is held jointly by them, as the equities require. Hoffmeyer v. Hoffmeyer, 157 Neb. 842, 62 N. W. 2d 138; Jablonski v. Jablonski, 173 Neb. 544, 114 N. W. 2d 1. In viewing the division of property made by the trial court in the light of the above-stated criteria, the division ordered is well within said guidelines, and, therefore, should be affirmed.

The decree provided that the $52,000 lump sum payment be made on or before August 1, 1975, draw 8% interest, and be subject to foreclosure from and after said date. Due to the passage of time involved in this appeal, the decree should be modified to provide that said sum of $52,000 shall draw interest at 8% from and after August 1, 1975, but need not be paid until May 1, 1976, and the wife shall not have the right to foreclose said lien for the same until on or after May 1, 1976.

Appellee's attorney should be allowed a fee in the sum of $500 for services in this court, the same to be taxed as costs to the appellant herein.

AFFIRMED AS MODIFIED.

ADAM CHARLEY ELIKER, APPELLEE, v. D. H. MERRITT & SONS, A CORPORATION, ET AL., APPELLANTS.
237 N. W. 2d 130

Filed December 31, 1975. No. 40191.

1. **Workmen's Compensation: Trial.** The burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that his disability was caused by an accident arising out of and in the course of his employment.
2. **Workmen's Compensation: Words and Phrases: Trial.** The word accident as used in the Workmen's Compensation Act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. The claimant shall have a burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment. There shall be no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment.
3. **Workmen's Compensation.** The "by accident" requirement of the Workmen's Compensation Act is now satisfied, either if the cause was of an accidental character, or if the effect was unexpected or unforeseen, and happened suddenly and violently. The problem in cases such as this is now causation, and whether an accidental injury arose out of and in the course of the employment.
4. **Workmen's Compensation: Words and Phrases.** The words "arising out of" and "in the course of" the employment are used conjunctively in the statute and both conditions must be established to satisfy the requirement of the Workmen's Compensation Act. The accident must occur not only in the course of the employment, but the causative danger must also arise out of it.
5. ———: ———. The words "arising out of" refer to the origin or cause of the accident and are descriptive of its character, while the words "in the course of" refer to the time, place, and circumstances of the accident.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Reversed and dismissed.

Richard D. Sievers of Marti, Dalton, Bruckner, O'Gara and Keating, for appellants.

Healey, Healey, Brown, Wieland & Burchard, for appellee.

Heard before SPENCER, McCOWN, and NEWTON, JJ., and COLWELL and IRONS, District Judges.

SPENCER, J.

Plaintiff, Adam Charley Eliker, filed this action in the Workmen's Compensation Court to recover benefits for an alleged injury arising out of and in the course of his employment. An order of dismissal was entered by a single judge of that court. On rehearing, the court en banc entered an award for the plaintiff, including a finding of a 12.5 percent permanent partial disability of the body as a whole. On appeal to the District Court for Lancaster County, the award was affirmed. We reverse and dismiss.

The issue involved is whether there was an injury in the course of and arising out of the employment. The issue herein is controlled by our decision in Reis v. Douglas County Hospital (1975), 193 Neb. 542, 227 N. W. 2d 879.

Plaintiff had been employed by the defendant corporation for over 29 years. He entered its employ at the age of 16. For the last 5 or 6 years he had performed the duties of a yard foreman or superintendent. His duties as a yard foreman required him to work long hours, starting daily at 7 a.m., during which time he was physically involved with loading and unloading 100-pound sacks of sand, plaster, and cement from trucks and railroad cars. This work involved bending, stooping, and twisting the body as a matter of course, in picking up and moving the heavy sacks. Mr. Eliker testified that his physical activities away from his job were not nearly so strenuous or demanding as those at work.

On the day in question plaintiff reported to work at

7 a.m., and was feeling fine. As plaintiff describes it, he went to work without any pain or disability and about 9 a.m., he started getting a terrible neckache. It kept getting worse during the day. Plaintiff, in answer to a question as to whether it was confined to his neck, stated: "Gradually just seem like it started in my higher neck and just felt like it just tightened the muscles until it was just sore kind of like all the way down your back. Like my entire back was sore, you see." The testimony continued: "Q- It didn't — it didn't come upon you suddently, did it? I mean it was — A- No, sir. Q- It was very gradual? A- It seemed like a gradual thing, yes, sir. Q- Okay. It didn't come upon you when you did a certain thing; is that also correct? A- I don't recall any certain thing, a definite — as I stated to the man in the hospital, I just couldn't — Q- And then it gradually worsened throughout the day, your neck, until you finally left at 3 in the afternoon, about? A- This is correct."

Plaintiff further testified: "Q- What was it you were doing at the time you noticed the difficulty come on? A- All of the normal work that I usually always do. Q- All right, and just describe specifically at this point what that would be? A- Well, lifting the bags, and all the other — all the other work that there is there to do. Q- All right. A- It's just a situation where you might just go from one thing to another, you see, and lifting bags here, and you might go over and back a truck over to the dock and, you see, this sort of thing. It's — it's a small operation that does a lot of business."

At another point in the record, plaintiff testified on direct examination as to the injury as follows: "A- Well, I came to work and of course I felt fine, and gradually during the morning I started getting a terrible neckache and I — it just kept getting worse and stressing to where it just pulled at the muscles in your back so terrible bad that — you know — you just couldn't hardly bear it. You'd grit your teeth and go on to do-

ing a little more work and each time you'd do a little more, it would just be a little more painful."

The above quotations sum up the testimony of the plaintiff as to the onset of his difficulty. At no place in the record does he pinpoint what he was doing when he first felt a pain in his neck, or what might have brought on the pain. Plaintiff went home about the middle of the afternoon. The next morning he went to the emergency room at St. Elizabeth Community Health Center, and after some tests was admitted to the hospital under the care of Doctor Getscher. He remained in the hospital until January 2, 1974, during which time he received hot pack treatments and was placed in heavy traction.

About 2 weeks after plaintiff's dismissal from the hospital, he went back to work. He worked one complete day and on the second day he passed out on the job and was taken home. On January 16, 1974, he was admitted to the hospital under the care of Doctor Goetowski. There he underwent tests for several days. Finally a myelogram was performed and a disc problem discovered. On January 24, Doctor Goetowski performed a laminectomy and found that Mr. Eliker had a large extruding, herniated disc, with resultant swelling of the nerve root. In response to a hypothetical question, the doctor testified that the herniated disc was related to plaintiff's work activity. On this record, the compensation court en banc found that the plaintiff had sustained an accident arising out of and in the course of his employment with the defendant; ordered the defendant to pay plaintiff's medical bills, together with 8 and 6/7ths weeks of temporary total disability and 291 and 1/7th weeks, at $16.35 per week, for a 12.5 percent permanent partial disability to the body as a whole.

Our law is well settled. The burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that his disability was caused by an accident arising out of and

in the course of his employment. Satterfield v. Nagel, 186 Neb. 332, 183 N. W. 2d 237 (1971).

The statute clearly requires an accident arising out of and in the course of the employment which causes personal injury. The testimony of the plaintiff does not meet this criteria. "Accident" is defined in section 48-151(2), R. R. S. 1943, as follows: "The word accident as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. *The claimant shall have a burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment. There shall be no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment.*" (Italics supplied.)

In Brokaw v. Robinson (1969), 183 Neb. 760, 164 N. W. 2d 461, in construing the "by accident" requirement, we said: "The 'by accident' requirement of the Workmen's Compensation Act is now satisfied, either if the cause was of an accidental character, or if the effect was unexpected or unforeseen, and happened suddenly and violently. The problem in cases such as this is now causation, and whether an accidental injury arose out of and in the course of the employment."

In answer to a hypothetical question, Doctor Goetowski said: "A Granting the circumstances you have related, and my personal knowledge of the patient and his general activity, I feel very definitely that the symptoms and the disc that I discovered was of traumatic nature, and could have very well been subjected to long-standing heavy physical trauma, which eventually caused this complete rupture. Q All right. Well, when you say, it could have been, do you feel with reasonable probability that it was? A Indeed. I feel, with

reasonable medical certainty, that it was definitely related to his work activity. Q All right. Do you have an opinion, taking into account the same things, as to whether — as to Mr. Eliker, that injury was of a nature which was of a nature which was unforeseen, unexpected, and accidental? A In my opinion, yes, sir. The incident of a disc extrusion can occur after degeneration has started. It may occur through some trivial response — a sneeze, a cough, a twist, a turn. But the degeneration and the further deterioration of the disc mass has started after some trauma, and persists with long, heavy-duty labor."

On cross-examination, Doctor Goetowski testified as follows: "Q Correct me if I'm wrong. Did you testify that herniated discs, as a rule, are caused by trauma? A Yes, sir. I would say they are of traumatic origin, almost universally. I realize that there are occasional peculiar things that cause a disc to rupture, but trauma is, by far, the most common cause. Q And didn't you testify that a person could sneeze, cough, something of this nature, and cause the start of the herniated disc, and not feel symptoms at that time? A Yes. That is correct. They can certainly do that. Q And isn't it possible, in Mr. Eliker's case, that this could have happened? That he could have sneezed, coughed? A I suppose he could have, although he did not relate any of that to me."

Assuming for the moment that the plaintiff sustained an accident which arose out of his employment, it is necessary under the terms of our statute that the plaintiff also establish by a preponderance of the evidence that the accident arose in the course of his employment. As we said in Reis v. Douglas County Hospital (1975), 193 Neb. 542, 227 N. W. 2d 879: "In Appleby v. Great Western Sugar Co., Inc., 176 Neb. 102, 125 N. W. 2d 103 (1963), we stated that the words 'arising out of' and 'in the course of' the employment are used conjunctively in the statute and both conditions must be established

to satisfy the requirement of the Workmen's Compensation Act. The accident must occur not only in the course of the employment, but the causative danger must also arise out of it. In that case this court also stated that the words 'arising out of' referred to the origin or cause of the accident and are descriptive of its character, while the words 'in the course of' refer to the time, place, and circumstances of the accident. As stated in 32 Journal of the American Trial Lawyers Assn., 440: 'The heart attack may be attributable to work-connected exertion, stress-and-strain and hence be deemed to have arisen out of the employment. * * * Under the "in course of" requirement, we are not concerned with whether the risk that ensued was work-connected; rather it must be demonstrated that there was a temporal and space nexus to the employment.' "

In Reis, we were concerned with conditions which might bring about a heart attack. Here, plaintiff is stressing the physical activities inherent in his employment.

We are of the opinion that the plaintiff has failed to sustain his burden of proving that his accident arose out of his employment or occurred in the course of his employment. It is true that the plaintiff said that his neck pains came on suddenly while at work. It is also true that he has been working in employment involving a lot of lifting, twisting, and stooping. There is no evidence, however, as to exactly what he might have been doing at the time of the onset of the pain. Plaintiff said he was pursuing his regular duties. Doctor Goetowski's notes contained the following statement: " 'Consider it an accident or not, I don't know.' " Further, Doctor Goetowski noted: " 'Don't have any definite notation of an accident, but he could have had several'?"

To hold for the plaintiff herein would require us by judicial fiat to legislate out the requirement that the claimant prove the accident occurred in the course of

his or her employment. While that result may appear herein to be unjust, we do not believe that this court is the proper forum in which to correct the situation.

In view of what we have stated above, we reach the conclusion that there was no reasonably competent evidence before the District Court to support a very material element of plaintiff's claim. The judgment of the District Court is therefore reversed and the cause is dismissed.

REVERSED AND DISMISSED.

McCOWN, J., dissenting.

Only factual issues are involved here. Both the Workmen's Compensation Court en banc and the District Court, on appeal, determined those factual issues in favor of the claimant, and there is reasonable competent evidence in the record to support those findings of fact. The majority opinion disregards the only medical testimony as to causation which was that the injury was, in fact, caused by the employment, and also fails to give the claimant the benefit of all reasonable inferences and conclusions which may be drawn from the evidence as to the time and place of occurrence of the "injury." The opinion ignores the rule set out by this court in Gifford v. Ag Lime, Sand & Gravel Co., 187 Neb. 57, 187 N. W. 2d 285. "On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence. * * * Upon appellate review of a workmen's compensation case in the Supreme Court, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record."

In a workmen's compensation case, as well as in many other situations to which the rule applies, a successful claimant is entitled to have the evidence considered in the light most favorable to him and to have the benefit of all reasonable inferences that can be rea-

sonably deduced from the evidence. The claimant here was denied the benefit of that rule, and this court has now reviewed the fact de novo without reference to the factual findings of the Workmen's Compensation Court and the District Court. This case should be affirmed.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1976

SALLY J. YOUNG, APPELLANT, V. DAYMON L. YOUNG, APPELLEE.

237 N. W. 2d 135

Filed January 8, 1976. No. 39977.

1. **Divorce: Parent and Child: Infants.** The judgment of the trial judge is entitled to great weight in determining the best interests of children in custody proceedings.
2. **Divorce: Parent and Child: Infants: Adopted Children.** Under all ordinary circumstances the father and mother of minor children born in lawful wedlock have an equal and joint right to their custody and control, and neither has a superior right over the other. This applies equally to lawfully adopted children.

Appeal from the District Court for Cedar County: JOSEPH E. MARSH, Judge. Affirmed.

Leo M. Williams, for appellant.

Brogan & Stafford, for appellee.

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

SPENCER, J.

In this dissolution of marriage action the trial court dissolved the marriage and awarded custody of two adoptive children of the parties to the husband, Daymon L. Young. The wife, Sally J. Young, prosecutes this appeal. The only issue contested is the custody of the children. We affirm.

The parties met while students at the University of

South Dakota in the late 1950's. Sally was graduated as a nurse in 1960. Daymon received a degree of Bachelor of Science in Education in 1961. They were married in June of 1962. They decided to become missionaries and, after a year's study at the Moody Bible Institute in Chicago, were assigned to a mission in Nigeria where Daymon taught and Sally worked as a nurse.

Tests taken in Nigeria indicated that the parties would not be able to have children. Personal problems arose and the parties drifted apart. Sally became involved with a doctor and as a result the parties returned to the States. After their return, the parties, still desiring children, turned to adoption proceedings. In January of 1969, Monte Ryan was placed in their home at approximately 6 weeks of age. In March 1971, Amber Leah came to their home at about 3 weeks of age. In 1971, Daymon completed his work for a Masters Degree in Social Work. At the time of the filing of this action Daymon was a social worker for the South Dakota Welfare Department in Yankton, South Dakota. However, the parties lived on the Nebraska side of the Missouri River near Yankton.

Both parties were in agreement that the marriage was irretrievably broken. Much testimony was adduced to suggest the unfitness of one or the other to have the custody of the two adopted children. It was stipulated and agreed that a child born on February 17, 1974, during the marriage, was not born of the marriage; Daymon was not the father of the child and his custody was not involved in the action. The testimony of Sally is that the child was the result of artificial insemination prompted by her desire to bear a child. No purpose will be served by detailing the respective claims of the parties. The evidence is conflicting and our law in such situations is well settled.

Section 42-364, R. S. Supp., 1974, provides, so far as material herein, as follows: "Custody and visitation of minor children shall be determined on the basis of their

best interests. Subsequent changes may be made by the court when required after notice and hearing.

"(1) In determining with which of the parents the children, or any of them, shall remain, the court shall consider the best interests of the children which shall include but not be limited to:

"(a) The relationship of the children to each parent prior to the commencement of the action or any subsequent hearing; * * *

"(2) In determining with which of the parents the children, or any of them, shall remain, the court shall not give preference to either parent based on the sex of the parent and no presumption shall exist that either parent is more fit to have custody of the children than the other."

We stated in Christensen v. Christensen (1974), 191 Neb. 355, 215 N. W. 2d 111: "The judgment concerning the custody of children is necessarily quite subjective in nature. Many factors may be considered in light of the particular circumstances of each individual case. The general considerations of the moral fitness of the parents, of respective environments offered by each parent, the emotional relationship between the children and their parents, their age, sex, and health, the effect on the children of continuing or disrupting an existing relationship, the attitude and the stability of character of each parent, and the capacity to furnish the physical care and education and needs of the children are some of many factors for the court to consider. In evaluating the general concept of the best interests and welfare of the children it is settled and fundamental law that this court will give weight to the fact that the trial judge saw and observed the witnesses and the attitude of the parents at the trial."

When viewing these cases from a cold record, the decision of the trial judge is peculiarly entitled to respect. He saw all the parties and witnesses. He was in closer touch with the situation than this court can be from a

review of a written record. While this case is triable de novo in this court, we cannot overlook the fact that the judgment of the trial judge is entitled to great weight in determining the best interests of children in custody proceedings. While the trial court did not find that either party was unfit to have the custody of the children, he did place them in the custody of Daymon. From a review of the record, we cannot say that he abused his discretion in this respect.

Sally, taking comfort from our earlier cases, argues that absent an affirmative demonstration that she is unfit, unsuitable, or unable to provide a good home, she should have the custody of the children because of their tender years. This was the law previous to July 12, 1974, the effective date of the last amendment to section 42-364, R. S. Supp., 1974. As we said in Kockrow v. Kockrow (1974), 191 Neb. 657, 217 N. W. 2d 89: "As we interpret our no-fault divorce statute, under all ordinary circumstances the father and mother of minor children born in lawful wedlock have an equal and joint right to their custody and control, and neither has a superior right over the other." This applies equally to lawfully adopted children.

For the reasons given, the judgment of the trial court is affirmed. Costs, including an allowance of $300 for services in this court for petitioner's attorney, are taxed to the respondent.

AFFIRMED.

KEVIN B. SWEENEY, APPELLANT AND CROSS-APPELLEE, V. BRIDAL FAIR, INC., A CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS, IMPLEADED WITH DONALD E. TAWZER, APPELLEE AND CROSS-APPELLEE.

237 N. W. 2d 138

Filed January 8, 1976. No. 40075.

Corporations: Forfeitures: Contracts. Section 21-2016, R. R. S.

1943, restricting forfeitures of subscription agreements, is applicable to a subscription agreement for additional authorized capital stock made after the organization of the corporation.

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

Joel Davis of White, Lipp, Simon & Powers and Ronald J. Meltzer, for appellant.

Frederick B. Allen, Jr., of Schmid, Ford, Mooney, Frederick & Caporale, for appellees Bridal Fair, Inc., et al.

Heard before WHITE, C. J., BOSLAUGH, CLINTON, and BRODKEY, JJ., and MORAN, District Judge.

BOSLAUGH, J.

This was an action for a declaratory judgment to determine the rights of the parties in regard to an issue of additional stock in Bridal Fair, Inc., a corporation, which sells promotion plans to radio stations and other markets. The plaintiff and the defendants, other than the corporation, are stockholders in the corporation.

In 1971 the corporation was in financial difficulty because it was under-capitalized. At a special stockholders meeting on May 11, 1971, a resolution was adopted to increase the authorized capital stock of the corporation from $50,000 to $300,000; and further authorized 3,850 shares of additional capital stock to be issued and offered to the stockholders of the corporation at $13 per share in the same proportions as their existing stock ownership. The resolution was later amended to provide for the issuance of 1,000 shares at $50 per share. The original resolution also provided that a stockholder exercising his right to purchase additional stock was required to pledge his stock as security for a loan to be made to the corporation and to guarantee a proportionate share of the loan. The resolution further provided that the stockholders should tender payment in cash for the additional stock within 30 days from the date of the

resolution or forfeit all rights thereto in which event such shares of stock were to be issued to the majority stockholder.

All the stockholders were present at the May 11, 1971, meeting in person or by proxy. The plaintiff then owned 20 shares of stock and Don W. Burden owned 55 shares of stock. The other stockholders owned 10 or less shares each.

The 30-day period specified in the resolution ended on June 10, 1971. On that date the plaintiff and Donald E. Tawzer had submitted written acceptances of the offer together with payment for the shares to which they were entitled. The secretary-treasurer of the corporation received a written acceptance of the offer from Burden on June 5, 1971, but did not receive a check from Burden until June 11, 1971.

The controversy here is between Burden and the plaintiff and involves the right to purchase the shares of stock which were offered to stockholders who failed to comply with the terms of the resolution of May 11, 1971. The trial court found that Burden was the "majority stockholder" referred to in the resolution; that Sweeney, John Davis, and Tawzer had exercised their rights on June 10, 1971; and that Burden was entitled to purchase the shares of stock which had been offered to the other stockholders who had failed to comply with the terms of the resolution.

The plaintiff has appealed and contends that the trial court erred in finding that Burden was entitled to purchase the shares of stock which had been offered to stockholders who failed to comply with the resolution. The defendants, except Tawzer, have cross-appealed and contend that the trial court erred in finding that all defendants except Tawzer and Davis had forfeited their rights to purchase the additional stock. No issue is raised by any party concerning the validity of the provision in the resolution that the "majority stockholder"

was to be entitled to purchase the additional stock allotted to stockholders who forfeited their rights.

The plaintiff contends the majority stockholder should be determined as of the time the 30-day period specified in the resolution expired, and that since Burden failed to tender payment in cash within the 30-day period he forfeited his right to purchase the additional shares and the plaintiff then became the majority stockholder. The cross-appellees contend the forfeiture provision in the resolution conflicted with section 21-2016, R. R. S. 1943, and was invalid.

Section 21-2016, R. R. S. 1943, provides that no penalty working a forfeiture of a subscription to shares of capital stock of a corporation may be declared unless a written demand has been made for the amount due, and the amount due remains unpaid for a period of 20 days after the demand.

A subscription contract is an agreement to purchase original, previously unissued, shares of stock in a corporation. 4 Fletcher, Cyclopedia of the Law of Private Corporations (Perm. Ed.), § 1363.1, p. 19. Subscription agreements may be made before or after organization of a corporation. §§ 21-2002(6), 21-2016, R. R. S. 1943. See, also, 4 Fletcher, Cyclopedia of the Law of Private Corporations (Perm. Ed.), § 1372, p. 31; 18 Am. Jur. 2d, Corporations, § 288, p. 811; Reagan v. Midland Packing Co., 298 F. 500; Smith v. General Motors Corp., 289 F. 205. The acceptance of the offer to purchase additional stock to be issued as provided in the resolution constituted a subscription agreement.

The provision in the resolution relating to a forfeiture of the stockholder's rights for failure to pay the amount due within 30 days of May 11, 1971, was contrary to section 21-2016, R. R. S. 1943, and was unenforceable. Since Burden had accepted the offer before June 10, 1971, and paid the amount due on June 11, 1971, he remained the majority stockholder in the corporation.

The offer by its terms expired on June 10, 1971. The

stockholders who failed to comply with the resolution by accepting the offer on or before June 10, 1971, lost their rights to purchase additional stock in accordance with the resolution.

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

AFFIRMED.

ROBERT BLANKENSHIP, APPELLANT, V. OMAHA PUBLIC POWER DISTRICT, APPELLEE.

237 N. W. 2d 86

Filed January 8, 1976. No. 40107.

1. **Actions: Standing: Summary Judgments: Parties.** The right of a party to sue as representative of a class may be determined on motion for summary judgment.
2. **Actions: Trial: Summary Judgments.** The statutes of this state authorize a partial summary judgment. Whether a partial summary judgment is a final and appealable order depends upon its effect.
3. **Actions: Standing: Parties.** A party having an interest adverse to the interests of the parties sought to be represented may not sue as representative of a class under the provisions of section 25-319, R. R. S. 1943.
4. ———: ———: ———. Potentially conflicting interests within the class are incompatible with the maintenance of a true class action.
5. **Actions: Standing: Parties: Records: Summary Judgments.** Where, on motion for summary judgment, the record demonstrates the potentiality of conflict, either within the class or between the person who seeks to represent the class and the class, it is appropriate to dispose of the class aspect of the case upon motion for summary judgment.

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Affirmed in part, and in part reversed and remanded.

Charles I. Scudder and Howard Kaiman, for appellant.

Hird Stryker of Fraser, Stryker, Veach, Vaughn & Muesey, for appellee.

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

CLINTON, J.

The question for determination in this case is whether the plaintiff was entitled to maintain this action as representative of a class under the provisions of section 25-319, R. R. S. 1943. The defendant is a public power district and political subdivision of the State of Nebraska organized under the provisions of Chapter 70, R. R. S. 1943, and is engaged in the distribution and sale of electrical energy. The plaintiff is a resident of the city of Omaha and a customer of the defendant. He seeks in this action to have certain "late payment charges" or "forfeited discounts," which are imposed by the defendant as a part of its rate structure, declared usurious. He further requests an accounting and refund of all such allegedly unlawful charges to those entitled thereto after deduction of court costs and attorneys' fees. He asks the court to enjoin future imposition of such late charges and seeks other relief.

The plaintiff's right to bring the action as representative of a class was challenged on a motion of the defendant for summary judgment. Supporting and contending affidavits were received. The court granted the motion for summary judgment and dismissed the action without prejudice to the right of the plaintiff to sue on his own behalf.

The plaintiff alleged two causes of action. In the first cause the claimed class which the plaintiff asks to represent are all those customers or rate payers of the defendant who have, in the 5 years preceding the filing of the petition, paid late charges or forfeited discounts because of failure to pay by the due date. In the second cause of action the claimed class is all those

customers who will be "forced" in the future to pay the alleged illegal late charges.

The record establishes that the rate schedules of the defendant contain the following provisions:

"Schedule No. 10
Residential Service

" 'The net monthly bill, computed in accordance with the net monthly rate; plus an amount of ten percent, but not to exceed $5.00, which amount will be deducted if the bill is paid on or before the gross date thereon.'

"Schedule No. 30
General Service

" 'The net monthly bill, computed in accordance with the net monthly rate, plus an amount of ten percent, but not to exceed $25.00, which amount will be deducted if the bill is paid on or before the gross date thereon.' "

The plaintiff adduced, by way of affidavit, expert opinion evidence which characterized the late charges as "interest" and calculated the amount of such "interest" so as to show it usurious under the laws of this state.

Uncontroverted affidavits produced by the defendant established the following: For the years 1969 through 1973 (the approximate 5 years to which the plaintiff's petition applies), 98-plus percent of the defendant's customers came under schedules 10 and 30 and were subject to the late charges or forfeited discounts when the accounts were not paid "on or before the gross date"; that the total of the "forfeited discounts" for the 5 years in question was $2,409,397.31, or approximately $500,000 annually; that the defendant has the capability of determining from its records, with minor exceptions, "the identity and amounts of forfeited discounts"; and that if the defendant is required to "make refunds of forfeited discounts and/or to discontinue the gross-net billing procedure it will be necessary to replace the sums represented thereby by the adoption of new rate schedules the burden of which will be borne by all rate payers of the District including the plaintiff,

Robert Blankenship in order for the District to cover its operating expenses, debt service requirements and capital improvements." The affidavits further state: ". . . that approximately 85% of the rate payers pay the District for electrical energy before the due date shown on the rate-payer's billing, thus automatically being entitled to the net charge without regard to the gross. As to the remaining approximately 15% the discount is forfeited, subject however, to the dollar ceiling set forth in the District's rate schedules"; and that 1973 is a typical year and in that year billings for electrical energy by the defendant were $70,715,403.26 and forfeited discounts for that year were $570,257.25.

We observe that the defendant is not a utility whose charges for sale of energy are regulated by a public body empowered to regulate rates generally, but that its rates are fixed by its own board of directors in accordance with statutory standards. § 70-655, R. R. S. 1943. The law further authorizes the public power districts to operate in a successful and profitable manner. City of O'Neill v. Consumers Public Power Dist., 179 Neb. 773, 140 N. W. 2d 644; York County Rural Public Power Dist. v. O'Connor, 172 Neb. 602, 111 N. W. 2d 376. See, also, § 70-636, R. R. S. 1943. The statutes, however, do provide for intervention by the Power Review Board where an applicant for service and the supplier cannot agree upon the terms of service or where an applicant claims discrimination in the service. § 70-1017, R. S. Supp., 1974.

We must first dispose of a procedural point. Plaintiff urges that a motion for summary judgment is not an appropriate method for disposing of the issue of the plaintiff's right to sue as representative of a class and that the trial court erred in so doing. His position is that the remedy of summary judgment is available only to determine whether or not there is a factual issue upon which legal liability rests and that the right to represent a class is not such an issue. Section 25-1332, R. R. S.

1943, provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Our summary judgment act authorized partial summary judgments. § § 25-1330, 25-1332, 25-1333, R. R. S. 1943. See, Burroughs Corp. v. James E. Simon Constr. Co., 192 Neb. 272, 220 N. W. 2d 225; Hart v. Ronspies, 181 Neb. 38, 146 N. W. 2d 795. While a partial summary judgment will not usually be a final order, it may be when the effect is to wholly determine the case. It was a final order in this case because the summary judgment determined the merits of the plaintiff's claim to represent the class and hence directly affected much of the relief for which he prayed.

If under the undisputed facts the right of a plaintiff to sue as representative of a class is one of law, then there appears to be no reason why that portion of the plaintiff's "claim" should not be determined under the provision of the statute authorizing such judgment upon "all or any part thereof." § 25-1330, R. R. S. 1943. No party cites any case directly on point and we have found none. Defendant called to our attention Coffelt v. Arkansas Power & Light Co., 248 Ark. 313, 451 S. W. 2d 881, which involved a claim such as the one at issue here and was decided upon summary judgment. However, there was in that case no challenge on the class action aspect of the suit. We hold that the right of a party to sue as representative of a class may be raised by a motion for summary judgment.

The defendant's position on the main issue before us is that persons having an interest adverse to the parties purported to be represented cannot maintain a class suit on behalf of the latter. It relies upon our opinion in Evans v. Metropolitan Utilities Dist., 185 Neb. 464, 176 N. W. 2d 679. The plaintiff, on the other hand, argues that Evans is distinguishable from the present

situation and urges that our opinion in Gant v. City of Lincoln, 193 Neb. 108, 225 N. W. 2d 549, is determinative. In Gant we did not determine whether or not the suit was properly brought as a class action. The question there was the power of the trial court to vacate the judgment after term under the provisions of section 25-2001, R. R. S. 1943. We there said: "In determining whether a class action is properly brought, considerable discretion is vested in the trial court. In the absence of appeal, that decision is final and even though it may have been erroneous, it is not void. In the present instance the case did not come within the purview of section 25-2001, R. R. S. 1943 (power of the District Court to vacate judgment after term in which it was entered) and unless the judgment was void, the District Court was without authority to set it aside." Whatever else was said in that case about the characteristics of a class suit was dicta. We made no determination that Gant was a proper class action, we simply said that having so proceeded did not make the judgment void.

Section 25-319, R. R. S. 1943, provides: "When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." This statute represents an application of the equitable doctrine of virtual representation and makes the doctrine applicable in appropriate circumstances to law actions. 59 Am. Jur. 2d, Parties, §§ 58, 59, p. 427 et seq. It is implicit in the doctrine of virtual representation that there must be no conflict of interest between the representative and those represented. That is one of the principles that underlies our holding in Evans v. Metropolitan Utilities Dist., *supra*. As we read that case, its rule is that if any party included in the class stands to suffer an economic loss as the result of his inclusion, the party initiating the class action will "have an interest adverse to those" of the party he purports to represent

with the result that the action is not being brought "for the benefit of all members of the class," and the claim as a class suit must therefore fail.

Other courts have said that it is essential that the person or persons who thus appear as representatives have interests which are, in fact, similar to and consistent with those of the other members of the purported class. 132 A. L. R. 749, 750. They have also said potentially conflicting interests within the class are incompatible with the maintenance of a true class action. Wolf v. Bennett, 118 Ind. App. 567, 82 N. E. 2d 262; State v. Laramie Rivers Co., 59 Wyo. 9, 136 P. 2d 487.

The trial judge in the case at hand found: "If plaintiff were to succeed upon the first cause of action, it would be required that defendant accumulate a fund in excess of $2,000,000.00. Its only source would be its rate payers. The result would be that, in some instances, members of the successful class would be subjected to a rate increase (or denied a rate decrease, as the case may be) which would, in dollars or cents, exceed the amount of their recovery, even ignoring the fact that the fund would itself be diminished on account of attorney fees prior to its distribution.

"The same result is reached in the second cause of action, though with less clarity. Were plaintiff to succeed, defendant would necessarily be required to modify its rates so as to maintain the $500,000.00 plus annual income which would otherwise be lost to it. Of the class, in this instance, including all the rate payers, no doubt some would be financially advantaged while some would be financially disadvantaged over any period of time."

The determination on motion for summary judgment of the plaintiff's right to represent the class gives rise to a problem which is not present in the usual determination on summary judgment. On such motion the question for determination is whether there exists a genuine issue of fact that must be decided. If there is, then the

matter cannot be determined on motion for summary judgment. If there is no genuine issue of fact, and if as a consequence one party is entitled to judgment as a matter of law, the entry of summary judgment is appropriate. In summary judgment procedure the court is not concerned with questions of burden of proof.

When we attempt to apply these fundamental principles to the questions the trial court had to determine here, we are at once inclined to ask ourselves, what must the plaintiff demonstrate in order to be granted the right to commence a class action? Yet, when we do so, we seem to be talking about a burden of proof, which, under the conventional rules applicable to summary judgments, ought not to be a consideration.

Reflection and examination of pertinent authority, however, supply the answer to this apparent puzzle. All the court need determine in granting a motion for summary judgment denying the plaintiff the right to proceed in a class action is that the undisputed facts demonstrate the potentiality of conflict of interests between the represented, or some of them, and the interests which the plaintiff asserts.

The policy underlying our holding in Evans v. Metropolitan Utilities Dist., *supra*, appears to be the same as that underlying Rule 23(a)(3) and (4) of the Federal Rules of Civil Procedure. In Gerlach v. Allstate Ins. Co., 338 F. Supp. 642 (S. D. Fla.), that court on motion for summary judgment denied the right of the plaintiff to represent the class. In that case the underlying issue was collection on behalf of a class of a penalty under the Truth in Lending Act. The court, among other things, said: ". . . a potential result, if plaintiff's position were sustained, of rendering Allstate unable to meet its commitments to provide insurance coverage to its policyholders, since the imposition of the $100 penalty with respect to each policyholder would run into approximately a billion dollars and as a consequence plaintiff's position is adverse to those policyholders who would prefer insur-

ance coverage to the $100 penalty and risk of loss of coverage." The Eighth Circuit, in Ihrke v. Northern States Power Co., 459 F. 2d 566,[1] in a somewhat similar situation (acting, however, on the pleadings rather than on motion for summary judgment), reached a like result. In that case the plaintiff sought a declaration of the invalidity of the rules and regulations relating to the termination of utility service. The complaint in that case said: " '6. The plaintiffs are members of a class composed of all persons who reside in the City of Saint Paul and who have made application to the defendant, Northern States Power, for utility service. . . . 7. The plaintiffs are members of a subclass of the above defined class composed of those persons in that class who because of their poverty are unable to pay for utility services.' " The court of appeals said: "But it is highly unlikely that the claim of the Ihrkes that a hearing should be required after notice and prior to termination, is typical of the claims of the class. It is likely that some customers of Northern would feel that the additional expense of such a procedure, if it is indeed required, could conceivably result in a rate increase to all customers, and this certainly would not be considered desirable by all of the subscribers of Northern.

"The same analysis is applicable to the subclass, although it is conceded there would be a larger percentage of the subclass which would share the view that a pretermination hearing should be held. It should also be noted that the membership of the subclass (persons who because of their poverty are unable to pay for utility services), would be impossible to determine because of the vagueness of its description." The gist of these cases is summarized in a note in 53 Boston Univ. L. Rev. 418, as follows: "It is simply not sufficient for the plain-

[1]409 U.S. 815—Certiorari granted, judgment vacated, and case remanded with instructions to dismiss case as moot.

tiff to show the existence of a common potential injury as subsection (a)(3) requires; plaintiff must additionally demonstrate that the principal relief sought is not repugnant to class members. Two potential conflicts inhere in the granting of relief for a large class of persons: the long run economic consequence of granting the relief will be harmful to the class member; or the relief or new status accruing to the class members as a consequence of success on the merits will not be in their own interest. The potential conflict alluded to here is not simply over the manner and method of division of damages. Rather it refers to a real and substantial conflict over the desirability of the remedy sought, such that absent class members would prefer to see no action brought at all if the relief envisioned by the representative were ultimately granted."

The record before the trial court on the motion for summary judgment demonstrated conflict and the potentiality of conflict of interest in several respects. It is undisputed that if the plaintiff were to prevail on the merits as the representative of a class, the defendant would have to increase its rates sufficiently to raise approximately $2,400,000 to make the refunds. This increase would be shared by the class as well as by all other rate payers. Within the class are rate payers who paid the penalty charge only once or rarely. These would likely be damaged economically in the long run by the increased rates. The ones most likely to benefit would be those in the class who frequently or always paid the late charge. It must also be borne in mind that the refunds would in all likelihood be diminished by deductions for attorneys' fees and court costs. The affidavits further show that the utilities annual cost allocated to servicing accounts not paid on time and other expenses in connection therewith is approximately equal to the annual income from late charges. If the plaintiff prevails on behalf of the class, this annual cost would also be borne in part by the class. Again those of the

class who are included only because they once or infrequently paid a late charge would bear part of the cost and would likely in the long run suffer economically. The class also includes corporations which, under the provisions of sections 45-101 and 45-102, R. R. S. 1943, may not assert the defense of usury. This interest also conflicts with those of others within the class.

Another potentiality for conflict arises from the provisions of section 70-408, R. R. S. 1943, which authorizes the utility to impose on those rate payers within "cities of the first class having a population of more than five thousand and less than twenty-five thousand inhabitants, cities of the second class, villages, and unincorporated areas . . . either a penalty on or a discount from the amount of any bill to promote prompt payment thereof under uniform rules and regulations governing such penalty or discount." The existence of this provision in the statute raises potential conflict between those in the class who reside in the areas where the late charge is statutorily authorized and those within the class who reside where it seemingly does not apply.

The ruling of the trial court on the motion for summary judgment was correct insofar as it pertains to the class action aspect of the case and should be affirmed.

The plaintiff also asserts that the trial court erred in dismissing the petition in toto in that even if plaintiff was not entitled to represent the class, he was nonetheless entitled to have his own individual cause determined on the merits. We perceive no reason why plaintiff should not be entitled to proceed on any cause of action he may have individually. The action of the trial court in dismissing plaintiff's petition insofar as it affects any cause of action which plaintiff may have individually is reversed and the cause remanded for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. DENNIS CRAWFORD, APPELLANT.

237 N. W. 2d 140

Filed January 8, 1976. No. 40118.

1. **Criminal Law: New Trial: Evidence.** In a criminal case, a new trial may be granted for newly discovered evidence which is competent, material, and credible, and which the exercise of due diligence could not have discovered and produced at trial.
2. ———: ———: ———. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown that court's determination will not be disturbed on appeal.

Appeal from the District Court for Dawson County: KEITH WINDRUM, Judge. Affirmed.

John P. Icenogle of Tye, Worlock, Tye, Jacobsen & Orr, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

CLINTON, J.

The issue on this appeal is whether the trial court erred in denying the defendant a new trial on the ground of newly discovered evidence. We affirm.

Defendant was found guilty by a jury of the burglary of the residence of one Suchanek. The defendant and a female companion were apprehended while in the Suchanek residence.

A neighbor of Suchanek had observed the defendant make entrance through a broken window. This witness had also observed the defendant while he was inside the house and testified that the defendant had on his hands a pair of white stockings. It was apparently the theory of the prosecution that the stockings were a substitute for gloves and were being used to avoid leav-

ing fingerprints on the premises, and that this evidenced an intent to burglarize. The defendant, who was an acquaintance of Suchanek, testified that he had Suchanek's permission to enter the house. This was denied by Suchanek. The defendant denied having had on his hands or on his person the white stockings. Defendant's explanation for his presence and that of his companion in the Suchanek residence is somewhat unclear. However, the explanation he gave negatives an intent to burglarize. At the trial a city law enforcement officer testified that on the morning following the breaking and entering and shortly before the defendant was to be transferred from the city to the county jail, the defendant had in his pockets a pair of white stockings. The defendant at trial denied this.

The newly discovered evidence on which the defendant rests his claim to a new trial is the testimony of a county law enforcement officer that when the defendant reached the county jail after his transfer from the city jail the defendant did not have on his person a pair of white stockings.

The applicable rules are: In a criminal case, a new trial may be granted for newly discovered evidence which is competent, material, and credible, and which the exercise of due diligence could not have discovered and produced at trial. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown that court's determination will not be disturbed on appeal. State v. Whipple, 189 Neb. 723, 204 N. W. 2d 572. Each case must be judged on its own facts and circumstances. State v. Haynes, 186 Neb. 238, 182 N. W. 2d 199.

There are at least two reasons why there was no abuse of discretion by the trial court in this case. The evidence itself is only slightly corrobative of the defendant's story. It in no way contradicts the testimony of the eyewitness that the defendant had the stockings

on his hands while in the residence. Further, there appears to be no reason why the defendant could not have by due diligence produced the new evidence at trial. The affidavit in support of the motion recites that he did not know of the evidence and by way of legal conclusions states that he could not have discovered it with due diligence. The affidavit, however, does not describe any effort to discover such corroborative evidence, and there appears to be no reason why he could not have made such an effort even if he had to ask for a short continuance to interrogate the persons in the sheriff's office during the course of the trial. The defendant himself would know the identity of these persons and would also know whether or not he had white stockings in his possession when he reached the county jail.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEROY PAINTER, APPELLANT.

237 N. W. 2d 142

Filed January 8, 1976. Nos. 40119, 40120.

1. **Criminal Law: Guilty Plea: Trial.** While it is advisable to do so, the trial court is not required to specifically inquire of the defendant as to the factual basis for a plea of guilty. Inquiry of the county attorney or examination of the presentence report, if before the court, are alternative methods.
2. **Criminal Law: Sentences.** Unless an abuse of discretion appears, a sentence within the statutory limits will not be disturbed on appeal.

Appeals from the District Court for Cherry County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Duane L. Nelson, for appellant.

Paul L. Douglas, Attorney General, and Gary B. Schneider, for appellee.

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

SPENCER, J.

These appeals are from guilty pleas in two cases, each involving three counts of debauching a minor, in violation of section 28-929, R. S. Supp., 1974. Defendant, LeRoy Painter, was sentenced to 5 years in the Nebraska Penal and Correctional Complex on each count in both cases, with the sentences to run concurrently on the three counts in each case, but the sentences in each case to run consecutively. Defendant sets out four assignments of error: (1) The court erred in accepting pleas of guilty because there was no sufficient factual basis established for accepting such pleas; (2) the pleas were the product of an unfair and improper plea bargain; (3) the court erred in accepting the pleas without specifically having advised the defendant of the potential penalties; and (4) the court erred in imposing an excessive sentence. We affirm.

Painter lived with the complaining witness, Louise Howard, from October of 1972 until August 13, 1973. Also living in the home at that time were Louise Howard's three children, Francis Howard, Glen Donahoo, and Garrett Donahoo, whose ages were 8, 5, and 4. On August 11, 1973, after visiting several bars in Ainsworth, the complaining witness and Painter returned to their home in Wood Lake. It was there, sometime around midnight, that the specific instances of debauchery set out in the informations occurred. No useful purpose will be served by setting out in lurid detail the repulsive details of those incidents. We are here concerned only with the procedural matters of due process.

Defendant does not argue his second assignment of error, consequently, we will not discuss it. Suffice it to say, however, that as a result of the plea bargain two cases, one for assault with intent to do great bodily

harm and another for debauching a minor, were dismissed.

Defendant's first assignment is that there was no sufficient factual basis established as a matter of record for accepting his guilty pleas. While the trial court did not specifically ask the defendant about the specific facts of the offenses, he did ask him if he had given his attorney all the facts as he knew them, and the defendant replied that he had. There is no question the trial judge was familiar with the facts sustaining the charges. This case is within the ambit of State v. Leger (1973), 190 Neb. 352, 208 N. W. 2d 276. There we held that verification of the fact the court was aware of the factual basis for the plea from the presentence reports was sufficient. While it is advisable to do so, the trial court is not required to specifically inquire of the defendant as to the factual basis for a plea of guilty. Inquiry of the county attorney or examination of the presentence report, if before the court, are alternative methods.

Defendant's third assignment is that the court erred in accepting and entering judgment on the pleas without specifically having advised the defendant on the record of the potential penalties. There is no question in this case but that the defendant was well aware of the range of penalties. The trial court did ask him if he understood what possible penalties there might be and whether or not he had also discussed them with his attorney. He answered both questions in the affirmative. The offenses were described in detail in the information. The preliminary hearing, which is in the record, contains the statement of defendant's attorney as follows: "I have in my hands copies of all four complaints which Mr. LeRoy Painter, the defendant, furnished me about six days ago having had them in his pocket and he having read them. Uh it being my opinion that he does understand the charges and he has inquired of me and I have informed him of the statute and the penalty."

Defendant's last assignment alleges that the court erred in imposing a sentence of 10 years imprisonment, which he claims is an excessive sentence. We could not disagree more. In effect, under section 83-1,105, R. S. Supp., 1974, the defendant has received a 2 to 10 year sentence. Unless an abuse of discretion appears, a sentence within the statutory limits will not be disturbed on appeal. State v. Glouser (1975), 193 Neb. 186, 226 N. W. 2d 134. The debauchery involved is particularly heinous and repulsive. On the record, there was no abuse of discretion.

The judgment is affirmed.

AFFIRMED.

BRODKEY, J., dissenting.

I respectfully dissent. In State v. Turner, 186 Neb. 424, 183 N. W. 2d 763 (1971), this court specifically stated that the Standards Relating to Pleas of Guilty promulgated by the American Bar Association outline what should be the *minimum* procedure in the taking of pleas of guilty. Section 1.4 of those Standards provides as follows:

"1.4 Defendant to be advised *by court.*

The court should *not* accept a plea of guilty or nolo contendere from a defendant *without first addressing the defendant personally and*

(a) determining that he understands the nature of the charge;

(b) informing him that by his plea of guilty or nolo contendere he waives his right to trial by jury; and

(c) *informing him:*

(i) *of the maximum possible sentence on the charge, including that possible from consecutive sentences;*

(ii) *of the mandatory minimum sentence, if any, on the charge; and*

(iii) when the offense charged is one for which a different or additional punishment is authorized

by reason of the fact that the defendant has previously been convicted of an offense, that this fact may be established after his plea in the present action if he has been previously convicted, thereby subjecting him to such different or additional punishment." (Emphasis supplied.)

The record before this court does not affirmatively show compliance with the requirements of the foregoing standard that the court personally inform the defendant of the possible penalties. The only references in the record as to defendant's knowledge of the possible penalties are contained in the following colloquies. Defendant's attorney stated in the preliminary hearing in the county court, as follows: "I have in my hands copies of all four complaints which Mr. LeRoy Painter, the defendant, furnished me about six days ago having had them in his pocket and he having read them. Uh it being my opinion that he does understand the charges and he has inquired of me and I have informed him of the statute and the penalty." At defendant's subsequent arraignment in District Court, the judge asked him the following questions and received the following answers: "Q. You understand what posible penalties there might be? A. Yes. Q. Which you have also discussed with your attorney? A. Yes sir."

The Commentary to section 1.4 of the Standards makes it clear that the purpose of the requirement that the judge warn the defendant of the consequences of his plea is that "the judicial warning effectively serves to overcome subsequent objections by the defendant that his counsel gave him erroneous information." A.B.A. Standards Relating to Pleas of Guilty, Commentary to section 1.4 (c), p. 27.

In this case, Painter pleaded guilty to six counts of debauching minors. Three counts were included in each of the two informations. We cannot ascertain from the record before us if his attorney informed Painter that the maximum penalty for the offense was 5 years; and

whether he told him only that, and did not also tell him that the possible penalty he could receive on the 6 counts was 30 years. As a matter of fact, the prosecutor did request a sentence of 30 years. North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), is authority for the proposition that an accused may plead guilty, even though protesting his innocence, if he intelligently concludes his interests so require. Under this rule, Painter may well have been willing to enter his plea of guilty if he were under the impression that the maximum sentence which could be imposed upon him was 5 years, but not if he knew he could receive a sentence of imprisonment for 30 years. He had a right to make his decision with full knowledge of the pertinent facts, and in the absence of such information, I do not believe that it can be said he entered his plea voluntarily. It is possible that Painter was aware of the specific penalties, and the available alternatives, but the record before us does not so indicate. We have no way of knowing what his attorney or others may have told him, or whether the information imparted to him was correct. However, it does not appear from the record before us that the trial judge informed him of those matters at the time of his arraignment. The error, if any, should be corrected now, with the thought of possibly avoiding further legal proceedings of constitutional dimensions.

In State v. Lewis, 192 Neb. 518, 222 N. W. 2d 815 (1974), involving a similar situation and the question of whether or not the defendant was aware of the possible penalties at the time of the entry of the plea, this court, without vacating the judgment of conviction or the sentence, remanded the cause to the District Court for a hearing to determine that issue.

I would remand the cause to the District Court with leave to the defendant to apply to the District Court to withdraw his plea within 10 days from the receipt of the mandate. If he does so apply, the court should hold an evidentiary hearing to determine the extent of Paint-

er's knowledge of the penal consequences of his plea. If the court finds that he was not aware of the penal consequences, the judgment of conviction should be deemed vacated, and he should be permitted to plead again. If it determines he did know, then the judgment and sentence should stand.

McCOWN, J., joins in this dissent.

NORMAN C. BROWN, APPELLEE AND CROSS-APPELLANT, V. INTER-OCEAN INSURANCE COMPANY, AN INDIANA STOCK INSURANCE COMPANY, APPELLANT AND CROSS-APPELLEE.
237 N. W. 2d 146

Filed January 8, 1976. No. 40153.

1. **Insurance: Contracts: Proximate Cause.** An accident insurance policy, providing for the payment of stipulated sums for accidental injury or death of the insured, where such injury or death is from violent and accidental means alone, resulting directly, independently, and exclusively of all other causes and also providing that there shall be no liability whatever unless death or disability results wholly from the injury, nor when any disease, defect, or bodily infirmity is a contributing cause of death or injury, means that recovery may be had when the accident is the active, efficient, and precipitating cause which sets in motion the agencies which resulted in the injury or death without the intervention of any other independent force, even though existing infirmities of the insured may be necessary conditions to the result.
2. **Insurance: Contracts: Forfeiture.** Where a total disability clause, purporting to make physical and mental helplessness essential to liability of insurer, if enforced literally, would result in an unreasonable and unjust forfeiture of accident insurance, it should be liberally construed to mean such a disability as renders insured unable to perform the substantial and material acts of his business or occupation in the usual way.

Appeal from the District Court for Banner County: JOHN D. KNAPP, Judge. Affirmed.

Robert W. Mullin of Van Steenberg, Brower, Chaloupka & Mullin, for appellant.

Robert M. Brenner of Holtorf, Hansen, Kovarik & Nuttleman, for appellee.

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

NEWTON, J.

This is an action to recover for disability and medical expense under two accident insurance policies. The only witnesses called were plaintiff's. The fundamental question presented is in regard to the cause of plaintiff's disability. Verdict and judgment were for plaintiff for $2,971. We affirm the judgment of the District Court.

Plaintiff suffered from a degenerative disk disease of the spine resulting in protrusion of the disks between lumbar vertebrae 2 and 3 and 4 and 5. The protrusions were removed by surgery on December 14, 1971. In March 1972 plaintiff was sitting on a fender well in a pickup truck and on rising, slipped, and fell back a distance of about 16 inches, ending up again in a sitting position on the fender well. He suffered immediate pain. He was again operated on for a disk protrusion in the same area of the spine. This protrusion had not appeared at the time of the December 1971 surgery. The medical evidence indicated that the second, or March, condition was attributable to the injury sustained in the pickup truck, and that without such injury, he may well have escaped having a ruptured disk for the rest of his life. The medical evidence also indicated that half of his problem resulted from the preexisting disease and first surgery, and half from his injury and second surgery. Without the degenerative disk disease he would not have needed either operation. The insurance policies provided: "This policy shall not cover * * * (f) any loss caused directly or indirectly by any sickness, disease or mental infirmity * * *."

The undisputed medical evidence makes it clear that both the accident and the preexisting disease contributed to plaintiff's injury and that in the absence of either

factor, the injury would not have been sustained. Under such circumstances is liability barred by the exclusionary provision in the policy? The decisions are not unanimous on this question. See Annotation, 84 A. L. R. 2d, § 8, p. 199. A review of Nebraska law indicates liability. In Ward v. Aetna Life Ins. Co., 82 Neb. 499, 118 N. W. 70, it was held: "Where a person accidentally injured is insured against accident under a policy which provides for the payment of a sum named in case death results solely from such injury within 90 days, all morbid changes in the exercise of vital functions or the texture of bodily organs which result from or are induced by such injury should be regarded as the effect thereof, and not as independent causes; and, when death results from such morbid changes, it is caused by such accident within the meaning of such policy."

In Moon v. Order of United Commercial Travelers, 96 Neb. 65, 146 N. W. 1037, the insured suffered from Bright's disease, arteriosclerosis, and a chronic heart disease. He fell, sustained a severe bump and bruise in the area of his heart, and died shortly thereafter. The insurance policy contained an exclusionary clause as to death or disability resulting from or in consequence of bodily infirmity or caused wholly or in part by bodily infirmity or disease. The medical evidence indicated that the injury caused a rupture of the heart which would not have occurred to a normal heart. The court stated: "It is also contended by the defendant that the death was in consequence of disease, and that it was caused wholly or in part by bodily infirmity, and that the injury received was not the proximate, sole and only cause of the death. This would seem to bring us to the question whether the beneficiary of an elderly person who dies because of the injury received through an accident can recover anything if the organs of the body are affected by the age of the assured. When the membership is created it must be known that the member will grow old if he lives, and that the organs of his body,

including the heart, lungs and kidneys, are likely to be affected in time, and that the assured will be unable to resist in his old age the force of an accident which he might have successfully resisted at an earlier period." The court held: "The fact that the condition of the heart and other organs of the body of the assured may have the more readily permitted the rupture, it not having been shown that death would have ensued at the time it did but for the accident, the jury were warranted in finding that the accident was the proximate cause of the death."

The case of Russell v. Glens Falls Indemnity Co., 134 Neb. 631, 279 N. W. 287, is in conflict with these decisions, but has been disapproved in Long v. Railway Mail Assn., 145 Neb. 623, 17 N. W. 2d 675. The policy in the Long case provided: " 'There shall be no liability whatever unless death or disability results wholly from the injury, nor when any disease, defect or bodily infirmity is a contributing cause of death or injury, * * *.' " The insured sustained cuts from barbed wire and developed infection. Twenty-five days later he died of coronary and cerebral thrombosis. He suffered from an advanced stage of arteriosclerosis and was diabetic. The medical testimony was conflicting but in part indicated that the infection was the precipitating cause of death without which it might not have occurred. The court held that a jury issue was presented and laid down the following rule: "An accident insurance policy, providing for the payment of stipulated sums for accidental injury or death of the assured, where such injury or death is 'from violent and accidental means alone, resulting directly, independently and exclusively of all other causes' and also providing that 'There shall be no liability whatever unless death or disability results wholly from the injury, nor when any disease, defect or bodily infirmity is a contributing cause of death or injury,' means that recovery may be had when the accident is the active, efficient and precipitating cause which set in motion the agencies

which resulted in the injury or death without the intervention of any other independent force, even though existing infirmities of the insured may be necessary conditions to the result. When the cause of death involves the determination upon conflicting evidence of the relations between alleged causes and effects, it becomes a question of fact for a jury."

The cases above-cited remain the law of Nebraska and we are constrained to hold that recovery may be had. The foregoing also disposes of defendant's objections regarding instructions.

Defendant also urges that the evidence is insufficient to sustain a finding of total disability for a 6-month period. Examination of the record discloses that during this period plaintiff was able to perform very little of his usual work and was confined to acting in a supervisory capacity only. We held in McCleneghan v. London Guarantee & Accident Co., 132 Neb. 131, 271 N. W. 276, that: "Where a total disability clause, purporting to make physical and mental helplessness essential to liability of insurer, if enforced literally, would result in an unreasonable and unjust forfeiture of accident insurance, it should be liberally construed to mean such a disability as renders insured unable to perform the substantial and material acts of his business or occupation in the usual way." See, also, Schultz v. John Hancock Mutual Life Ins. Co., 134 Neb. 885, 280 N. W. 165. The Schultz case also holds that where reasonable minds may draw different conclusions as to whether total disability has been proved, a jury question is presented.

Finally, defendant contends that plaintiff testified to facts materially different from his deposition. A thorough check of the record fails to sustain the claim of material variance.

The judgment of the District Court is affirmed and plaintiff's attorney is allowed a fee of $300 for his services in this court.

AFFIRMED.

MAUDEL S. LEE, APPELLEE, V. GWEN S. WEAVER, APPELLANT.
237 N. W. 2d 149

Filed January 8, 1976. No. 40164.

1. **Animals: Negligence.** Ordinarily the existence of vicious or dangerous propensities in a domestic animal and knowledge of such propensities are indispensable to liability on the part of the owner.
2. **Animals: Negligence: Trial: Evidence.** Evidence that at some previous time a house cat bit its owner, without any evidence as to the circumstances present when the biting occurred, is not sufficient to sustain a finding that the cat was a vicious or dangerous animal or that the owner had notice of its vicious or dangerous nature.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Reversed and remanded with directions.

Stephen A. Davis of Cassem, Tierney, Adams & Gotsch, for appellant.

David Herzog, for appellee.

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

BOSLAUGH, J.

This is an action for damages for personal injuries resulting from a cat bite. The plaintiff was employed to do domestic work in the defendant's home. On November 8, 1972, a house cat owned and kept by the defendant bit the plaintiff's right leg. Complications developed from the bite and the plaintiff became disabled. As a result of the injury the plaintiff required extensive medical treatment and hospitalization.

The defendant has appealed from a verdict and judgment in favor of the plaintiff in the amount of $14,000. The question presented is whether the evidence is sufficient to sustain the verdict on the issue of liability.

The cat which bit the plaintiff was a large 4-year-old male Abyssinian house cat that had been neutered. At

the time the injury occurred the plaintiff was alone in the kitchen washing dishes. The cat was near a broom closet playing with straw "or something." The door to the broom closet came open and the cat started growling and ran into the dining room. The cat then returned to the kitchen and attacked the plaintiff. The cat held on to the plaintiff's leg and she had some difficulty in dislodging it.

Ordinarily the existence of vicious or dangerous propensities in a domestic animal, such as the defendant's cat, and knowledge of such propensities are indispensible to liability on the part of the owner. Fritz v. Marten, 193 Neb. 83, 225 N. W. 2d 418. The petition alleged the cat was known by the defendant to be vicious and in the habit of attacking and biting people; and the defendant, being aware of the viciousness of the cat, negligently failed to warn the plaintiff.

The only evidence which tended to show the cat was vicious, and that the defendant knew the cat was vicious, was the plaintiff's testimony that the defendant had said the cat had bitten her on some prior occasion. There was no further evidence as to the circumstances on that occasion other than the fact of the bite. There was no other evidence the cat had bitten anyone at any time but there was evidence it had scratched the defendant when it was a kitten and was playing. The defendant denied that she had told the plaintiff she had been bitten by the cat.

There was evidence the cat would growl and run away when the plaintiff operated the vacuum cleaner and when the plaintiff used a broom the cat would growl and strike at the broom with its paw. This evidence, however, did not tend to show the cat was vicious or in the habit of attacking and biting people.

The plaintiff was required to prove that a person of ordinary prudence would have known of the animal's inclination to commit an injury of the type which occurred. While there are decisions that indicate evi-

dence of a previous bite is sufficient to raise a jury question and the circumstances of the previous injury are not essential, we believe the better rule is that evidence of a bite by a house cat on some prior occasion is not sufficient by itself to sustain a finding that the cat was vicious or dangerous and put the owner on notice that the cat was a vicious or dangerous animal. Evidence of provocation or that the cat was engaged in play when the bite occurred are important circumstances that must be considered in determining whether the animal should have been considered to be vicious or dangerous. See, Maxwell v. Fraze (Mo. App.), 344 S. W. 2d 262; Judd v. Zupon, 297 Minn. 38, 209 N. W. 2d 423. As stated in the Maxwell case, the bare fact of a prior bite does not of itself establish the vicious propensity of the dog. The circumstances surrounding the occasion of the biting and its extent demonstrate whether the incident of the prior bite is sufficient evidence or some evidence of a vicious propensity to inflict injury.

In Clark v. Brings, 284 Minn. 73, 169 N. W. 2d 407, a babysitter was attacked and bitten by a Siamese cat. In that case the Minnesota court held that evidence the cat had bitten a babysitter on a previous occasion, had scratched several members of the household, and was usually confined to the basement was not sufficient to raise a jury question. The previous bite had occurred when the babysitter and the children were playing with the cat by pulling a spool across the floor and the bite inflicted was "superficial." The court said that since the first injury had occurred when the cat was excited and provoked by play it was not evidence that the animal was vicious.

We conclude that the evidence is not sufficient to sustain the verdict on the issue of liability. The judgment is reversed and the cause remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

CREDIT BUREAU SERVICES, INC., APPELLANT, V. PATRICK F. MOYLAN, APPELLEE.

237 N. W. 2d 151

Filed January 8, 1976. No. 40173.

Appeal and Error: Evidence. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it.

Appeal from the District Court for Saunders County: HOWARD V. KANOUFF, Judge. Affirmed.

John L. Cutright, for appellant.

David J. Cullan of Cullan & Cullan, for appellee.

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

NEWTON, J.

This is an action to recover on a construction contract for the erection of a duplex. Defendant failed and refused to make the final payment due on the contract. The claim was assigned to plaintiff. Defendant claimed a setoff for defective construction. On trial to the court, judgment was entered for defendant. We affirm the judgment of the District Court.

The contract provided for the furnishing of all labor and materials by the contractor, plaintiff's assignor; construction to be done in a good and workmanlike manner; and materials to be obtained from a local Bassett, Nebraska, lumberyard subject to owner's inspection. The contractor agreed to reexecute any work not conforming to requirements and remedy defects due to faulty material and workmanship. The plans and specifications were made a part of the contract. The specifications required 2-inch x 4-inch truss rafters set on 24-inch centers with 6-inch thick, 25-inch wide, Johns-

Manville insulation or its equivalent. Tub areas in bathrooms were to have 1/8-inch Marlite, and Marlite around balance of bathrooms to extend to height of 4 feet, with rest of walls above Marlite in prefinished paneling. Ceilings were to have 1/2-inch sheetrock with taped joints and joint compound. Six roof ventilators and three gable-end ventilators were to be installed. There was no provision for interior painting.

The fundamental question presented is whether or not the evidence supports the judgment. The court found that there were sagging ceilings resulting from the collection of moisture due to improper insulation and insufficient ventilators, gaps between the siding and the roof, unfinished walls over the bathtubs, a discolored ceiling in one kitchen, and carpet laid crooked in one bathroom, which defects offset plaintiff's claim. Most of the defects were admitted by the contractor who sought to excuse them on the basis of the necessity of using materials supplied by the Bassett lumberyard. There is nothing in the contract restricting the contractor's proper choice of materials. If the Bassett lumberyard did not have them, it could have insisted that they be obtained. It appears clear that the work was not done in a good and workmanlike manner and that the evidence sustains the finding and judgment of the trial court. "In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it." H. D. Fager Oil Co., Inc. v Vanice, 192 Neb. 789, 224 N. W. 2d 372.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JESSE LEE ABRAM, APPELLANT.

237 N. W. 2d 153

Filed January 8, 1976. No. 40196.

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

Frank B. Morrison and Stanley A. Krieger, for appellant.

Paul L. Douglas, Attorney General, and Melvin K. Kammerlohr, for appellee.

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

CLINTON, J.

Defendant pled guilty to a charge of robbery and was sentenced to the Nebraska Penal and Correctional complex for a term of 3 years, the minimum statutory sentence for the crime of robbery. § 28-414, R. R. S. 1943. On this appeal he argues he should have been sentenced to a term of probation instead of imprisonment. His position is founded upon his age, his employment history, and the claimed absence of a significant prior criminal record.

At the time of sentencing the defendant was almost 18 years of age. He was employed at that time and apparently had been a considerable part of the time since dropping out of high school in the 10th grade. His prior criminal record was a conviction as a juvenile for carrying a concealed weapon in 1971. For that offense he received a 6-month sentence of probation. We note that the carrying of a concealed weapon is a felony. § 28-1001, R. R. S. 1943. Whether the instant robbery was accomplished by the means of a weapon is uncertain. Defendant at least led the person he robbed to believe that he had a weapon.

We cannot say that the trial court abused its discretion in imposing the minimum sentence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. NORMAN L. HOFFMAN, APPELLANT.

237 N. W. 2d 403

Filed January 15, 1976. No. 40060.

1. **Jury: Trial.** In the absence of a showing of prejudice, a method of drawing and empaneling a jury substantially complying with the statute will be upheld.
2. **Criminal Law: Trial: Evidence.** Evidence showing a course of conduct, scheme, design, or intent relevant to an element of the offense charged is admissible, even though it also tends to show the commission of other criminal offenses.
3. **Criminal Law: Trial: Evidence: Time.** Evidence is admissible to show conduct by the defendant both before and after the date charged in the complaint in support of an allegation that defendant engaged in gambling for a livelihood.
4. **Criminal Law: Trial: Evidence: Searches and Seizures.** The foundation for the admission of a tape recording taken from the possession of defendant is sufficient if the evidence shows the circumstances of the seizure and that the exhibit is in the same condition as at the time of seizure.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Leonard Dunker, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and KUNS, Retired District Judge.

KUNS, Retired District Judge.

This is an appeal by Norman L. Hoffman, appellant, from a judgment by the District Court for Lancaster

County, Nebraska, affirming a conviction in the county court of said county, upon charges of keeping a room for gambling and of being a common gambler. We affirm the judgment.

Of numerous assignments of error, appellant argues the following: (1) Irregularity in empaneling the jury; (2) failure of the county court to instruct the jury in writing; (3) error in receiving evidence of the commission of other criminal offenses by appellant before and after the dates alleged in the complaint; (4) error in receiving in evidence a tape recording taken from appellant's possession; and (5) that the evidence was insufficient to support a finding of guilty upon either one of the two counts.

Appellant seems to argue that he was entitled to have 24 veniremen available in court from which the panel should be drawn and selected to try the case. The record does not show what, if any, objections were made by appellant before or during the empaneling of the jury. Neither does it appear whether appellant exercised all his preemptory challenges nor is there any showing of prejudice to the rights of the appellant. He cites many statutes in his brief, including some sections which were repealed before the time of the alleged offenses. We have, nonetheless, carefully examined the entire procedure as shown by the record. We find no irregularity or disregard of statutory requirements in the course of drawing, summoning, selecting, and empaneling the jury in this case. No statute requires that any particular number of jurors be present in the court; the procedure in the present case of drawing nine names from the panel on one day and five more on the next day provided a sufficient number of jurors even after the exercise of challenges. The applicable rule is stated in 47 Am. Jur., Jury, § 192, p. 783: ". . . a party or an accused has no vested right to any particular juror or jurors; all that he can insist on is an impartial jury of the requisite number in his own case and, at the most,

a substantial compliance with the statutes governing the selecting and summoning of jurors." No error has been shown in this respect.

Next, the appellant argues that the jury was not instructed in writing. The appellant himself offered exhibit 4, the court file and the transcript of the county court at the appeal hearing in the District Court, which included the written instructions. This assignment of error is without merit.

Appellant's next objection is directed toward the ruling of the court admitting evidence of the appellant's participation in poker games at places other than his residence and at times both before and after the date of the offense charged in count II. Objection was made that evidence of other offenses is not material. The general rule is that evidence of one offense is not, in and of itself, admissible to show the commission of another. State v. Knecht, 181 Neb. 149, 147 N. W. 2d 167 (1966); State v. Sharp, 184 Neb. 411, 168 N. W. 2d 267 (1969); State v. Brown, 190 Neb. 96, 206 N. W. 2d 331 (1973).

In State v. Knecht, *supra,* this court said: "It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes."

In a case involving a situation similar to the one charged here, the Tenth Circuit Court of Appeals said in United States v. Pauldino, 443 F. 2d 1108: ". . . appellants raise a question whether it was proper to admit the testimony concerning their gambling activities prior to and after their Nebraska trip. While, as we have indicated above, evidence of illegal activities other than the ones charged is not ordinarily admissible, there is an exception if the evidence establishes a *course of conduct, scheme, design or intent.* In this regard, we think there is no question but that the evidence had probative value

as proof that appellants were engaged in gambling as a *continuous enterprise.*" (Emphasis added.)

When the State alleged here that the appellant "did engage in gambling for a livelihood," such an allegation could not be established by evidence relating only to the one date mentioned in the charge. The jury needed to consider appellant's whole course of conduct and the relative importance of gambling along with other matters such as rental income and insurance commissions in the production of his income and livelihood. The charge must state a specific date of the offense within the period of limitations, but the evidence may properly cover an extended period of time. The evidence was properly received.

When the police executed a search warrant upon the appellant's residence, they seized various documents and one tape recording, all of which related to various business and gambling transactions by the appellant. When the tape recording was offered in evidence with a foundation identifying the place from which it was secured and that it was in the same condition as it was at the time of seizure, the appellant objected that such foundation was insufficient. The objection was overruled and he assigns error against such ruling. He contends that the foundation required to make a tape recording admissible in McKeeman v. Commercial Credit Equipment Corp., 320 F. Supp. 938, should also be required here. In that case, as well as in the precedents cited by the appellant where the tape recordings were made clandestinely or without the knowledge of any of the parties, the court was properly concerned that the foundation should be sufficient to show that the recording was made under circumstances showing its accuracy. On the other hand, when the tape recording is retained by one of the persons participating in the recorded conversation and kept by him with other documents reflecting business transactions in which he was engaged, it is no longer necessary to show the foundation stated

in McKeeman v. Commercial Credit Equipment Corp., *supra*. It is unlikely that such a recording would be retained if it were inaccurate or not authentic. When appellant testified, he did not deny that he was in possession of the tape or raise any question about its genuineness, but freely conceded that he had held the conversations recorded upon the tape. The foundation for the admission of the tape recording was sufficient and the objection was properly overruled.

Finally, the appellant argues that the evidence was insufficient to support the finding of guilty upon either one of the two counts of the charge. Much evidence was given concerning the description of appellant's home, the gambling materials found therein, and his participation in gambling activities in various places and over a long period of time. In addition, the appellant himself testified that he liked to gamble and that he took bets upon various sports events; he also stated that he had secured a federal gambling stamp and that for the year 1972, he paid a tax in the amount of $5,000, being 10 percent of a total of $50,000 in bets made by him. The verdict of the jury finding the appellant guilty upon each count is amply supported by the evidence.

The judgment of the District Court affirming the conviction in the county court is correct.

AFFIRMED.

LA DONNA L. HANISCH, APPELLEE AND CROSS-APPELLANT, v. WALTER R. HANISCH, APPELLANT AND CROSS-APPELLEE.
237 N. W. 2d 407

Filed January 15, 1976. No. 40065.

1. **Divorce: Appeal and Error.** In an appeal from a decree of dissolution of a marriage, this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.

2. **Divorce: Alimony: Property.** In an action for dissolution of marriage, the property should be divided, if possible, in such manner as to permit the husband to retain the means for payment of any judgment awarded to the wife.
3. ———: ———: ———. The rules for determining alimony or division of property in an action for dissolution of a marriage provide no mathematical formula by which such awards can be precisely determined.

Appeal from the District Court for Hall County: LLOYD W. KELLY, JR., Judge. Affirmed as modified.

Lyle E. Strom of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler and C. Patrick Shaughnessy, Jr., for Shaughnessy, Shaughnessy & Shaughnessy, for appellant.

John A. Wagoner, for appellee.

Heard before WHITE, C. J., MCCOWN, NEWTON, and CLINTON, JJ., and KUNS, Retired District Judge.

MCCOWN, J.

This is an action for dissolution of a marriage. The District Court found the marriage to be irretrievably broken, provided for custody of the minor children, made a division of the real and personal property, including alimony in gross, and assessed costs and attorneys' fees. The husband has appealed. The issues are limited to the property division, including alimony in gross, and the allocation of fees and costs.

Walter and La Donna Hanisch were married in 1954. After a brief residence in California, the parties returned to Nebraska in 1955. Walter engaged in farming with his father and the parties lived on a rented farm. Four children were born to the marriage. The District Court found that both parents were fit and proper persons to have the care and custody of the minor children, and no issues of custody or child support are involved here.

In 1959, the family moved to a farm owned by Walt-

er's parents and referred to in the record as the "home place." The home place consisted of 364 acres, a part of which was irrigated. Thereafter the family lived there and conducted a substantial dairy operation. La-Donna, in addition to her duties as housewife and mother, helped Walter with the dairy operation, with some help from the children. She also did all the bookkeeping. During several years prior to 1971, they were milking an average of 85 to 90 cows. In 1966, Walter's father died. In 1967, his mother conveyed an undivided one-fourth interest in the home place to Walter and La Donna, and conveyed an additional one-fourth interest to the two of them in 1968, 1969, and 1970. At approximately the same time she gave another farm to Walter's brother and his wife in a similar series of gifts. The gifts were made over a period of 4 years to avoid gift taxes.

A farm of approximately 280 acres was purchased by the Hanisches in July of 1971. This land is owned by Hanisch Farms, Inc., and Walter is the sole shareholder. This farm is referred to as the "corporate farm." The farm is partially irrigated and has some pasture land. The land is leased to a tenant for a cash rental of $5,500 per year. There is also a grade A dairy operation on the farm. Hanisch owns and furnishes the cattle and the tenant runs the operation. Hanisch receives one-third of the milk proceeds and one-third of the calves produced.

In 1967, Walter and La Donna purchased a quarter section of land which is referred to in the record as the "lone quarter." It is part dry land and part irrigated. The land is farmed by the same tenant who farmed the corporate farm and the rental is on a share basis.

In addition to the real estate, the parties had personal property valued at approximately $130,000. Cattle and farm machinery constituted more than half of that value, and the personal property also included an equity of approximately $10,000 in a tavern purchased by Walt-

er in 1973. Various debts, including encumbrances on the land, were approximately $120,000.

The District Court found the value of the home place to be $140,000 and the value of the lone quarter to be $60,000, and awarded both of these properties to Walter. The corporate farm was found to have a value of $80,000 and it was awarded to La Donna. La Donna was also awarded personal property in excess of $13,000 consisting of half of the checking account, investment funds, an automobile, and various items of household goods and furniture. The remaining personal property valued at approximately $116,000 was awarded to Walter, and it included the equity in the tavern as well as cattle and farm machinery. In addition, Walter was ordered to pay debts and encumbrances on all the properties in the total amount of approximately $120,000. He was also ordered to pay La Donna the total sum of $45,000 as alimony in gross, payable $5,000 on January 1, 1975, and a like amount on January 1 of each following year until the full sum was paid. The costs of the action, together with $2,500 in attorney's fees for La Donna were taxed to Walter. This appeal followed.

The appellant first contends that the District Court erred in making its determination of the value of the real estate involved and in including the home place in the property subject to division. In connection with the valuation of the real estate, there were four expert witnesses who testified, three on behalf of the wife, and one on behalf of the husband. The valuations of the wife's expert witnesses were essentially accepted by the trial court. We find no basis for disturbing the trial court's findings on the valuation issues. In an appeal from a decree of dissolution of a marriage this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Seybold v. Seybold, 191 Neb. 480, 216 N. W. 2d 179.

The contention that the home place should be treated as though the husband had inherited it from his parents, and therefore excluded from consideration as a part of the property to be divided, is unsupported by the record. The evidence is that the gift of the home place to Walter and La Donna was spread over a period of 4 years to avoid gift taxes, and the deeds and gift tax returns establish that fact. On this record there is no issue as to inherited property and the court properly included the home place in making an equitable adjustment of the property rights of the parties.

The husband also contends that the action of the trial court in assigning the corporate farm to the wife interfered with the operation of an economic unit, and endangered the ability of the husband to fulfill the obligations for payments imposed upon him by the decree. The record shows that operation of a grade A dairy unit on the home place had been terminated before trial and that the dairy barn on that land would need extensive modifications before it could again be used for a grade A dairy operation. The only grade A dairy operation being carried on at the time of trial was by Walter and the tenant on the corporate farm. All the cattle, valued at approximately $38,000, were assigned to Walter by the decree but the corporate farm upon which the only dairy operation was being conducted was assigned to La Donna. Income tax returns of Walter and La Donna for the 6 years ending with 1972, showed an average adjusted gross income of approximately $9,900 per year. For the calendar year 1972, the net income from the corporate farm operation was $4,178, while the total adjusted gross income of Walter and La Donna for that year was only $6,509.30.

The decree of the District Court requires Walter to pay total debts and encumbrances of approximately $120,000, and those debts include encumbrances on both the corporate farm and the lone quarter. In addition, the decree requires the payment by Walter to La Donna

of alimony in gross of $45,000, payable $5,000 on January 1, 1975, and a like amount on the 1st day of January of each year thereafter until fully paid. This court has frequently held that in an action for dissolution of marriage, the property should be divided, if possible, in such manner as to permit the husband to retain the means for payment of any judgment awarded to the wife. See Snow v. Snow, 190 Neb. 655, 211 N. W. 2d 719.

The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. They are to be determined by the facts in each case and the courts will consider all pertinent facts in reaching an award that is just and equitable. Cumming v. Cumming, 193 Neb. 601, 228 N. W. 2d 296.

Under the facts in this case we believe it necessary to assign the corporate farm to Walter to provide a more efficient economic unit for payment of the awards required by the decree; and that the lone quarter then be assigned to La Donna. Except for that modification, the decree of the District Court is affirmed. The appellee is allowed the sum of $1,000 for services of her attorney in this court.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. TED A. KELLER, APPELLANT.

237 N. W. 2d 410

Filed January 15, 1976. No. 40067.

1. **Criminal Law: Sentences.** A sentence imposed within the statutory limits will not be disturbed by this court on appeal, in the absence of an abuse of discretion.
2. **Criminal Law: Sentences: Presentence Reports.** Section 29-2261, R. S. Supp., 1974, makes the inspection of a presentence report by the defendant's attorney discretionary with the trial

court. However, this is a discretion which may be reviewed in this court.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Thomas A. Wagoner, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

SPENCER, J.

This is a criminal action for burglary. Defendant pled guilty and was sentenced to the Nebraska Penal and Correctional Complex for a period of 2 to 6 years. He assigns as error the excessiveness of the sentence and that the court erred in considering a presentence investigation report without giving defense counsel an opportunity to review it. We affirm.

Defendant, a 25-year-old male with no prior felony record, argues that a sentence of 2 to 6 years for burglary is excessive. The penalty for burglary is set out in section 28-532, R. R. S. 1943. It is imprisonment in the Nebraska Penal and Correctional Complex not more than 10 years nor less than 1 year, or by a fine not exceeding $500, or imprisonment in the jail of the county not exceeding 6 months. Our rule is well established, a sentence imposed within the statutory limits will not be disturbed by this court on appeal in the absence of an abuse of discretion. State v. Wade (1975), 193 Neb. 365, 227 N. W. 2d 400.

Defendant's own statement is that 2 or 3 weeks before the burglary two men took marijuana from his home at gunpoint. Keller, who had some previous law enforcement training, conducted his own investigation of the robbery and determined who he felt was responsible. He went to the home of one of the two he felt were responsible, to attempt to regain possession of his mari-

juana. When he found no one at home, he broke in and removed a stereo and other items, as purported compensation for his loss. On the record, we cannot say the trial court abused his discretion in the sentence rendered.

Defendant's second assignment is a contention that the trial court should have furnished him or his counsel with a copy of the presentence report. Defendant does not claim that he or his attorney were denied an opportunity to examine the presentence report. He concedes that no request to do so was made. Rather, he claims the trial judge erred by not furnishing his attorney with a copy of the report when he used it in passing sentence. The obvious answer is that no request was made for an inspection of the report. Section 29-2261, R. S. Supp., 1974, provides in part: "(5) Any presentence report or psychiatric examination shall be privileged and shall not be disclosed directly or indirectly to anyone other than a judge, probation officers to whom an offender's file is duly transferred, or others entitled by law to receive such information. The court may permit inspection of the report or examination of parts thereof by the offender or his attorney, or other person having a proper interest therein, whenever the court finds it is in the best interest of a particular offender. The court may allow fair opportunity for an offender to provide additional information for the court's consideration." The statute makes the inspection of a presentence report by the defendant's attorney discretionary with the trial court. However, this is a discretion which may be reviewed in this court.

The judgment is affirmed.

AFFIRMED.

BOSLAUGH and MCCOWN, JJ., concur in the result.

MORRIS RAYMOND, APPELLEE, V. BUCKRIDGE, INC., APPELLANT, IMPLEADED WITH STATE OF NEBRASKA, SECOND INJURY FUND, APPELLANT.
237 N. W. 2d 412

Filed January 15, 1976. No. 40084.

1. **Workmen's Compensation: Time: Pleadings.** A claim for compensation made within 6 months after the occurrence of disability is a condition prerequisite to the bringing of an action for compensation benefits, and is necessary even though notice of the occurrence of the injury is dispensed with by the knowledge of the employer of the fact of injury.
2. ———: ———: ———. When an employee knows that an injury has occurred and that disability therefrom was due to his employment, the period for making claim and filing action is not extended even though he was ignorant of the application of the Workmen's Compensation Act to his situation.

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

Joseph H. McGroarty of McGroarty, Welch, Langdon & McGill, for appellant Buckridge, Inc.

Paul L. Douglas, Attorney General, and Harold S. Salter, for appellant State of Nebraska, Second Injury Fund.

Matthews, Kelley, Cannon & Carpenter, for appellee.

Heard before WHITE, C. J., MCCOWN, NEWTON, and CLINTON, JJ., and KUNS, Retired District Judge.

KUNS, Retired District Judge.

This is an appeal from the District Court for Dodge County, Nebraska, affirming an award made by the Nebraska Workmen's Compensation Court in favor of Morris Raymond, appellee, against Buckridge, Inc., and State of Nebraska, Second Injury Fund, appellants.

The appellee scraped an ankle against a brake pedal when leaving his automobile in the employer's parking lot on May 3, 1972, the injury, complicated by his di-

abetic condition, worsened to the extent that he was hospitalized on June 28, 1972, and it became necessary to amputate his right foot on July 3, 1972; and he did not make any claim against his employer for workmen's compensation benefits until he filed this action on May 31, 1973. Both appellants defended upon the ground that no claim was filed within 6 months as required by section 48-133, R. R. S. 1943.

The compensation court made the following finding: "That the plaintiff suffered an injury which appeared to be slight but which was progressive in its course and the plaintiff was not aware of the real nature and extent of his injury until he was hospitalized on June 28, 1972; that the injury culminated in total loss of his right foot by amputation on July 3, 1972; that the plaintiff's petition was filed on May 31, 1973, within one year from the time the plaintiff had knowledge of the extent of his injury; that although there is no evidence of plaintiff ever making a written or oral claim specifically for workmen's compensation benefits until the petition was filed, defendant employer was aware on and after July 3, 1972, that plaintiff was making claim for benefits against the group health and accident insurance coverage furnished by Buckridge, Inc. to Buckridge, Inc. employees and Buckridge, Inc. knew or reasonably should have known that in the process of making such claim plaintiff was asserting that the accidental injury occurred on Buckridge, Inc. premises; that the plaintiff reasonably was not aware that accidents on parking lots of employers may be compensable under workmen's compensation laws until May, 1973, and then immediately filed his petition; that the failure of an injured employee to make a claim pursuant to Section 48-133, of the Nebraska Workmen's Compensation Act, where it is shown that he reasonably did not know or suspect that his injury was or might be compensable, ought not, in the absence of a clear showing of prejudice to the employer, bar the employee's subsequent action for compensation

if the claim therefor was made within six months after such knowledge was acquired; that there is no evidence indicating any prejudice to the defendants arising from the plaintiff's failure to make a claim specifically for workmen's compensation within six months after the occurrence of the injury." The facts referred to in the finding are supported by the record. The only question presented by the appeal is whether the law is correctly applied to these facts.

The appellants rely upon Good v. City of Omaha, 102 Neb. 654, 168 N. W. 639 (1908), as a controlling precedent. In that case, as here, the employer had knowledge of the injury, and the plaintiff did not give notice of the injury or make claim for compensation. This court stated: "It is argued by plaintiff that this provision makes no distinction between giving 'notice of injury' and making 'claim for compensation,' and that, inasmuch as the notice is unnecessary where the employer has knowledge of the injury, then in such case no claim for compensation need be made. We are of opinion that the provision will not bear such construction and is unambiguous. In Simon v. Cathroe Co., 101 Neb. 211, we recognize the giving of notice and the making of the claim as distinct and separate prerequisites to the bringing of an action." The statute in this regard has not been amended since this statement was made. If, during the past 50 years, the Legislature had determined that the requirement of making a claim was unduly burdensome or that it brought about unfair and unjust results, appropriate amendments could have been made.

Appellee argues that the period for making a claim should be extended during the time when he did not know that he might be entitled to compensation for disability due to an injury sustained in the employer's parking lot. He attempts to draw an analogy to the cases in which this period is extended when a latent injury does not culminate in disability until a later time. Such a situation existed in Williams v. Dobberstein, 182

Neb. 862, 157 N. W. 2d 776 (1968), when this court said: "Pain alone is not compensable under our statute and disability is the basic factor which gives rise to a claim for compensation. . . . We hold that under the Nebraska Workmen's Compensation Act, the period of limitation provided in section 48-137, R. S. Supp., 1965, runs from the time it is reasonably apparent that a compensable injury has been sustained, if the employee is aware that the disability is due to his employment."

In this case, the appellee was aware of the time and place of his injury and the onset of his disability on July 3, 1972. Although he did not make a claim for compensation, he did pursue his remedies upon other policies of insurance provided by the employer for the protection of himself and his family, collecting sums which would not have been due for a disability covered by the Workmen's Compensation Act. This dispels any idea that he was mentally incapacitated and thus unable to make his claim. For failure to make such claim within 6 months from July 3, 1972, this action cannot be maintained.

The judgment of the District Court is reversed and the cause is remanded with directions to dismiss the same as to each of the defendants.

REVERSED AND REMANDED.

RONALD KASPAR, SPECIAL ADMINISTRATOR OF THE ESTATE OF MARY A. KASPAR, DECEASED, APPELLANT, V. COLIN B. SCHACK, M.D., APPELLEE.

237 N. W. 2d 414

Filed January 15, 1976. No. 40136.

1. **Negligence: Trial: Pleadings.** Contributory negligence is an affirmative defense and the burden is upon the defendant to establish such defense.
2. ———: ———: ———. Where the defendant pleads that the plaintiff is guilty of contributory negligence, the defendant has

the burden to prove that defense, and this burden does not shift during the trial.

3. **Trial: Instructions.** Generally, it is error to give the jury instructions which contain inconsistent and conflicting paragraphs relating to the burden of proof.
4. ———: ———. The giving of an instruction which places the burden of proof to establish some of the facts put in issue by the pleadings on the wrong party is reversible error.
5. ———: ———. Where, in order to fairly and intelligibly present all the issues in a case to the jury by the instructions, it becomes necessary to repeat a proposition, its repetition, in proper connection with other facts or principles involved, is not erroneous.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded for a new trial.

Daniel G. Dolan and David S. Lathrop of Lathrop, Albracht & Dolan, for appellant.

Joseph P. Cashen of Kennedy, Holland, DeLacy & Svoboda, for appellee.

Heard before WHITE, C. J., BOSLAUGH, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

WHITE, C. J.

In this medical malpractice case, the plaintiff appeals from a jury verdict and judgment for the defendant, primarily asserting error in the instructions given by the trial court on the burden of proof. We reverse the judgment of the District Court and remand the cause for a new trial.

The plaintiff's decedent, Mary Ann Kaspar, was a young married woman. In April of 1972, Mary Ann visited Dr. Schack who diagnosed her pregnant. Mary Ann continued to visit Dr. Schack periodically. Everything appeared normal during these visits. However, Dr. Schack expressed concern over Mary Ann's weight gain. On April 18, she had weighed 152 pounds, and on August 19 she was up to 171 pounds. Dr. Schack warned

her about the possibility of developing toxemia, also known as eclampsia. Dr. Schack scolded her about her weight gain and warned of its potential consequences.

Mary Ann had an appointment scheduled for September 16, 1972, with Dr. Schack, but did not come in. She called Dr. Schack's office and told his nurse that she had overslept. She also reported some swelling of her ankles. That evening Ron Kaspar returned home from work. Mary Ann's condition had drastically changed from the time he had left in the morning. She appeared swollen all over, was unable to speak clearly, and stumbled and nearly fell at one point. Ron called Dr. Schack at his home between 7 and 7:30 that evening. The content of this phone conversation was in dispute at the trial. It was agreed, however, that Dr. Schack told Ron to have Mary Ann in his office Monday morning.

Mary Ann's condition did not appear to worsen Saturday night or Sunday. On Monday, Mrs. Echtenkamp, Mary Ann's mother, came to the Kaspar home to take Mary Ann to the doctor's office. About 10 to 15 minutes after Mrs. Echtenkamp's arrival Mary Ann went into continuous convulsions. Mrs. Echtenkamp called the rescue squad and Dr. Schack's office.

Dr. Schack was waiting for Mary Ann when she arrived at the hospital and there diagnosed her case as acute eclampsia. Dr. Schack testified that Mary Ann had gained 15 to 20 pounds between the last time he saw her in August and that Monday morning at the hospital. The baby was delivered the next morning and was dead. Mary Ann died on Friday.

The issues of damages arising from the three causes of action are loss of society and companionship, pain and suffering, and for burial expenses. The main factual issue presented to the jury was the plaintiff's allegation that the defendant was negligent in failing to recognize and treat the symptoms reported to him on September 16, 1972, at approximately 7 p.m., because

they indicated the development of eclampsia and that he failed to make a personal examination and diagnosis of Mary Ann.

Boiled down, the defendant's allegations of contributory negligence were the failure of the decedent to follow instructions, failure of Mary Ann to advise of the changes in her condition, her failure to return to the defendant for an examination as directed within 3 weeks of her August 19 appointment, and the failure to keep her appointment with the defendant on September 16.

Plaintiff contends that the trial court erred in giving instruction No. 17 which reads: "You are instructed that when a patient consults a doctor and accepts the professional skill of a doctor, it is the duty of the patient to follow the advice of the doctor, and if he fails to follow his advice and something untoward happens to the patient which would not have happened, or which was not the result of the doctor's negligence, in such a case the doctor would not be liable. It is the duty of the plaintiff to prove by a greater weight of the evidence that the injury, if any, *was not caused by fault on his part,* but that the injury, if any, was proximately caused by negligence on the part of the defendant as negligence is defined in these instructions." (Emphasis supplied.)

This instruction placed upon the plaintiff, as administrator of the decedent's estate, the burden of proof to show that the decedent was not contributorily negligent in failing to follow the physician's advice. It is settled law in Nebraska that contributory negligence is an affirmative defense and that the burden is upon the defendant to establish such defense. Nisi v. Checker Cab Co., 171 Neb. 49, 105 N. W. 2d 523; Sherman v. Lawless, 298 F. 2d 899 (8th Cir., Neb., 1962). It is also settled law that where the defendant pleads that the plaintiff is guilty of contributory negligence, as here, the defendant has the burden to prove that defense, and that this burden does not shift during the trial. Colton v. Benes,

176 Neb. 483, 126 N. W. 2d 652; Mills v. Bauer, 180 Neb. 411, 143 N. W. 2d 270.

The defendant argues that instruction No. 6 correctly placed the burden of proof on the defendant to show that the decedent was contributorily negligent in failing to follow the physician's instructions and on the other issues presented as to contributory negligence. It is argued that this undenied conflict between instructions Nos. 6 and 17 did not constitute prejudicial error, when examined in the light of the familiar rule that all instructions should be examined together to determine whether they misled the jury and resulted in prejudice to a party.

Analyzing all the instructions together, the defendant persuasively and forcefully argues that, although instruction No. 17 was in error, the jury could not have been misled and that, therefore, there was no prejudicial error. We point out, however, that the instructions under attack here, concerning the burden of proof, are at the core of and central to the proper disposition and consideration by the jury. It is an issue upon which there should be no doubt in the instructions to the jury. With relation to the instructions on burden of proof this court has held categorically that it is error to give the jury instructions which contain inconsistent and conflicting paragraphs *relating to the burden of proof*. Umberger v. Sankey, 151 Neb. 488, 38 N. W. 2d 21. In the Umberger case, directly applicable to the present situation, this court stated as follows: "The rules applicable to such a situation will be found in Omaha Street Ry. Co. v. Boesen, 68 Neb. 437, 94 N. W. 619, wherein it was held: 'The giving of an instruction which places the burden of proof to establish some of the facts put in issue by the pleadings on the wrong party, is reversible error.

" 'It is error to give the jury instructions which contain inconsistent and conflicting paragraphs relating to the burden of proof. Farmers' Bank v. Harshman, 33

Neb. 445, approved and followed.' See, also, Mercer v. Omaha & C. B. St. Ry. Co., 108 Neb. 532, 188 N. W. 296, and Myers v. Willmeroth, 150 Neb. 416, 34 N. W. 2d 756."

This holding by our court has been consistently followed and is supported by the following authorities: Robison v. Union Transfer Co., 141 Neb. 574, 4 N. W. 2d 558; Bramhall v. Adcock, 162 Neb. 198, 75 N. W. 2d 696; Darnell v. Panhandle Coop Assn., 175 Neb. 40, 120 N. W. 2d 278; Bartels v. Retail Credit Co., 185 Neb. 304, 175 N. W. 2d 292. It is therefore clear that not only were the conflicting instructions on the burden of proof erroneous, but that they come clearly within the general rule that an instruction which misstates the law upon a vital issue is not cured by another which states the law correctly. Robison v. Union Transfer Co., *supra*. The conflict between instructions Nos. 6 and 17 as to the burden of proof was prejudicial error which requires a reversal and a remand for a new trial.

Plaintiff next alleges that instructions Nos. 7, 12, 14, and 16 are repetitious and taken together give undue emphasis to the defendant's side of the case. In Gran v. Houston, 45 Neb. 813, 64 N. W. 245, the court wrote: "Where, in order to fairly and intelligibly present all the issues in a case to the jury by the instructions, it becomes necessary to repeat a proposition, its repetition, in proper connection with other facts or principles involved, is not erroneous." In Denise v. City of Omaha, 49 Neb. 750, 69 N. W. 119, the court stated: "It is not ground for reversal of a case that the trial court *repeated* a proposition of law in the instructions each time *in proper connection with facts or other principles* involved, or where it does not appear that the effect was to perplex or mislead the jury." (Emphasis supplied.) See, also, City National Bank v. Thomas, 46 Neb. 861, 65 N. W. 895; Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N. W. 2d 451. While instructions Nos. 7, 12, 14, and 16 were somewhat repetitious, we do not believe they were so unduly repetitious

as to confuse or mislead the jury, or that this was prejudicial to the plaintiff. Each instruction correctly stated the law.

Plaintiff's final alleged error is the failure of the trial court to give his requested instructions Nos. 1 and 2. These instructions deal with the duty of the physician to adequately inform himself as to the condition of his patient. The refusal to give proper instructions requested by the plaintiff which are not covered by the instructions given is error. Hansen v. Lawrence, 149 Neb. 26, 30 N. W. 2d 63. The instructions previously given relative to the duty of a physician and the application of his skill and learning adequately covered what the plaintiff sought to cover by his requested instructions, and thus there was no error in refusing them.

The judgment of the District Court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

GEORGE P. ROSE SODDING & GRADING COMPANY, A CORPORATION, APPELLANT, V. R. JOSEPH DENNIS, ALSO KNOWN AS JOE DENIS, ET AL., APPELLEES.

237 N. W. 2d 418

Filed January 15, 1976. No. 40140.

1. **Limitations of Actions: Pleadings: Demurrer.** Where a record discloses that an action was not commenced within the time allowed by statute, the petition is subject to demurrer. Although a specific statement in the demurrer that the petition is barred by the statute of limitations would be more appropriate, a general allegation that the petition does not state facts sufficient to constitute a cause of action is adequate to raise the defense of the statute of limitations.
2. **Limitations of Actions: Time.** An action is deemed commenced within the meaning of Chapter 25, R. R. S. 1943, on the date of the summons which is properly served on the defendant.
3. **Limitations of Actions: Time: Municipal Corporations.** The

fact that funds are not available to pay a claim does not toll the statute of limitations. The statute commences to run upon a contract with a governmental subdivision, which raises its money by tax levy and assessment, at the same time as upon other contracts when the right to payment accrues and not when funds become available to pay the debt.

Appeal from the District Court for Sarpy County: RAYMOND J. CASE, Judge. Affirmed.

Charles Ledwith, for appellant.

Waldine H. Olson, Schmid, Ford, Mooney, Frederick & Caporale, Malcolm D. Young, Thomas J. Monaghan, and Jo Ann York, for appellees.

Heard before SPENCER, BOSLAUGH, and BRODKEY, JJ., and WARREN and VAN PELT, District Judges.

VAN PELT, District Judge.

This is an action brought by plaintiff-appellant, George P. Rose Sodding & Grading Company, against the defendants-appellees, based on an alleged oral contract for the grading and sodding of five lots located in Sarpy County, Nebraska. The District Court sustained the defendants' demurrers and the plaintiff appeals. There having been no evidentiary trial, the case is before this court on the file and the pleadings.

The last item of labor or material was performed and furnished by the plaintiff pursuant to the oral contract on September 5, 1969. Plaintiff's original petition and praecipe was filed September 5, 1973. On September 6, 1973, the clerk of the District Court issued summonses for all defendants. Summonses issued for defendants Floyd E. Peterson, Vincent E. Peterson, Robert Kouba, and Sanitary Improvement District No. 43 of Sarpy County, Nebraska, were served on September 7, 1973. Summons issued for the defendant Land Paving Company was served on September 10, 1973. Summonses issued for defendants Dennis and Fontenelle Hills Co., Inc., were not properly served, and their special appearances

were subsequently sustained. Alias summonses for those two defendants were issued November 9, 1973.

On September 14, 1973, Land Paving Company demurred. On October 30, 1973, the defendants Floyd E. Peterson, Vincent E. Peterson, and Robert Kouba demurred. On December 7, 1973, the demurrers of Petersons, Kouba, and Land Paving Company were sustained, and the plaintiff was given 3 weeks additional time in which to plead. On December 11, 1973, the defendant Dennis filed a demurrer, which was sustained on December 28, 1973, with the plaintiff being given 3 weeks in which to further plead.

On January 16, 1974, the plaintiff filed an amended petition against all defendants. After the overruling of defendants' motions to strike on December 30, 1974, all defendants, except Land Paving Company, filed a demurrer on January 29, 1975. On February 3, 1975, Land Paving Company filed its demurrer. On February 28, 1975, the District Court sustained all demurrers and dismissed plaintiff's amended petition. On March 10, 1975, the plaintiff filed a motion for new trial, which was overruled on April 3, 1975.

The plaintiff's assignment that the District Court erred in sustaining each demurrer and dismissing plaintiff's amended petition, is based upon the following contentions: (1) The demurrers did not specifically state that the petition shows on its face that the action is barred by the statute of limitations, and a general allegation that the petition does not state facts sufficient to constitute a cause of action does not raise the defense of the statute of limitations; (2) the statute of limitations had been tolled by virtue of the fact that defendants, through fraud and deceit, had induced the plaintiff to refrain from commencing the suit and had lulled him into a false sense of security within the period of the statute of limitations; and (3) because of the fraud previously mentioned, the statute of limitations does not begin to run until the fraud or deceit either was or

reasonably should have been discovered.

Respecting defendants Floyd E. Peterson, Vincent E. Peterson, and Robert Kouba, there is no allegation in the amended petition that they entered into any contract with the plaintiff, orally or in writing. Such an allegation would have been essential, and their demurrer would be good for that reason, even if the demurrers of the other defendants were improper vehicles for raising the defense of the statute of limitations.

Plaintiff's contention regarding the use of a demurrer to raise the statute of limitations was answered in Schmer v. Gilleland, 185 Neb. 54, 173 N. W. 2d 391, wherein it was held that where a record discloses that an action was not commenced within the time allowed by statute, the petition is subject to demurrer. See, also, Reliance Trust Co. v. Atherton, 67 Neb. 305, 93 N. W. 150; Gorgen v. County of Nemaha, 174 Neb. 588, 118 N. W. 2d 758. Although a specific statement in the demurrer that the petition is barred by the statute of limitations would have been more appropriate, the customary and general allegation that the petition does not state facts sufficient to constitute a cause of action is adequate to raise the defense of the statute of limitations by demurrer. This is true since once the petition alleges facts showing a bar by the statute of limitations, additional facts must be alleged by the plaintiff to show the tolling of the statute, or some other basis for avoiding its effect. If plaintiff fails to allege such facts, as it failed to do in its amended petition, it has, in effect, failed to allege facts sufficient to constitute a cause of action, and the petition is therefore subject to demurrer.

Section 25-206, R. R. S. 1943, provides that an action on a contract, not in writing, expressed or implied, can only be brought within 4 years. Section 25-217, R. R. S. 1943, provides that an action shall be deemed commenced within the meaning of Chapter 25, as to the defendant, at the date of the summons which is served upon him. This has been construed in Schmer v. Gille-

land, *supra*, to mean that the action is commenced on the date of the summons, which is properly served upon the defendant. Thus, in the present case, the action was commenced against Sanitary Improvement District No. 43, Floyd E. Peterson, Vincent E. Peterson, Robert Kouba, and Land Paving Company on September 6, 1973, and against Joseph Dennis and Fontenelle Hills Co., Inc., on November 9, 1973.

A cause of action upon an oral contract for work performed accrues, and the statute of limitations begins to run, when the aggrieved party has the right to institute and maintain a lawsuit. Whenever one person may sue another, the cause of action has accrued and the statute begins to run. Bend v. Marsh, 145 Neb. 780, 18 N. W. 2d 106; Weiss v. Weiss, 179 Neb. 714, 140 N. W. 2d 15.

In the instant case the oral contract was for sodding and grading work to be performed. According to the amended petition, the contract was silent as to the time of performance or the time of payment. In such a case the statute would run when the work was performed, which was September 5, 1969. See 17 Am. Jur. 2d, Contracts, § 338, p. 776. Thus, the statute commenced running on said date. In computing the 4-year term pursuant to section 25-2221, R. S. Supp., 1974, by excluding the date of the act after which the period begins to run, and including the last day of the period, the last day of the 4-year period of limitations would be September 5, 1973. Since summonses against all defendants were not properly served until after that date, the causes of action are barred, unless the plaintiff has shown the tolling of the statute.

The plaintiff does not claim that the statute was tolled by any of the statutory grounds set forth in section 25-216, R. R. S. 1943, but relies instead on certain common law equitable doctrines. In paragraphs five, six, and seven of the amended petition, the plaintiff alleges that it submitted bills for partial payment to

the defendant who possessed knowledge of the procedure and approval for the payment of the same; that the plaintiff in late September of 1969 was advised by one of the defendants that there were no funds in the Sanitary Improvement District No. 43 treasury for payment to the plaintiff; that, therefore, there would be a tax levy and assessment to raise such funds; that the earliest time the plaintiff could have been paid was after April of 1971; and that in reliance upon the statement by defendant Dennis that a sufficient mill levy would be forthcoming to provide funds for payment to the plaintiff, the plaintiff took no further action, other than to file a mechanic's lien and wait.

Based upon these allegations, plaintiff contends that one cannot lull his adversary into a false sense of security and then be permitted to claim the defense of the statute of limitations, when he has induced the delay through misrepresentation, conduct, and promises, citing Degmetich v. Beranek, 188 Neb. 659, 199 N. W. 2d 8; State Farm Mut. Auto. Ins. Co. v. Budd, 185 Neb. 343, 175 N. W. 2d 621; In re Estate of Wise, 144 Neb. 273, 13 N. W. 2d 146; Speas v. Boone County, 119 Neb. 58, 227 N. W. 87.

Although this is a correct statement of the law when applied to certain factual situations, an examination of the cases cited by the plaintiff reveals that the doctrine is not applicable to the present case. Speas v. Boone County, *supra,* was a workmen's compensation case, in which the statute of limitations provided that the claim would be barred unless, within 1 year after the accident, the parties agreed upon the compensation payable. Both the trial court and the Supreme Court found that the parties had entered into such an agreement pursuant to the statutory provision, and the case is, therefore, not applicable both as to its facts and the applicable statutory provision.

In re Estate of Wise, *supra,* does not support the proposition for which it was cited by the plaintiff. There

was a limited discussion of the doctrine of novation but that doctrine is not applicable to this case.

State Farm Mut. Auto. Ins. Co. v. Budd, *supra,* is one of the leading cases in this jurisdiction setting forth the equitable doctrine of estoppel in pais. That case involved an insurer who on several occasions told the plaintiff to diary its file to a date in the future until personal injury claims had been settled, so that it might consider a property damage subrogation claim. Since the insurer on those several occasions assured the plaintiff that it would honor its claim and conceded liability for the full amount of the same, and thereby secured multiple extensions of time to discuss the same until the statute of limitations had run, the court properly applied the estoppel in pais doctrine. In so doing, the court recognized that equitable estoppel rests on the facts and circumstances of each particular case. That case must be limited to its facts, which are much more extreme than those alleged in plaintiff's amended petition.

In Degmetich v. Beranek, *supra,* this court refused to apply the doctrine set forth in the State Farm case, which was therein described as "unusual," to the ordinary creditor-debtor relationship, and accordingly upheld the sustaining of a demurrer on the ground that the statute of limitations had run.

The fact that funds are not available to pay a claim does not toll the statute of limitations. The statute of limitations commences to run upon a contract with a governmental subdivision which raises its money by a tax levy and assessment at the same time as upon any other contract, that is, when the right to payment accrues and not when funds become available to pay the debt. City of New York v. New York City Transit Authority, 53 Misc. 2d 627, 279 N. Y. S. 2d 278; George C. Diehl, C. E., Inc. v. City of Lacawanna, 233 App. Div. 348, 252 N. Y. S. 838, affirmed 258 N. Y. 579, 180 N. E. 340.

Thus, the District Court was correct in sustaining all the demurrers to plaintiff's amended petition, and the judgment in that respect is, therefore, affirmed

AFFIRMED.

LAWRENCE MICHAEL DEARNALY WILSON ET AL., APPELLEES, v. STATE OF NEBRASKA, APPELLANT.
IN RE ESTATE OF SIDNEY F. WILSON.
LAWRENCE MICHAEL DEARNALY WILSON ET AL., APPELLEES, v. STATE OF NEBRASKA, APPELLANT.
237 N. W. 2d 835

Filed January 15, 1976. Nos. 40147, 40148.

1. **Statutes: Aliens: Descent and Distribution: Escheat.** Section 76-408, R. R. S. 1943, applies to sections 76-401 and 76-402, R. R. S. 1943.
2. **Aliens: Property: Deeds.** An alien may hold and convey the title to land acquired by purchase if no proceedings have been brought by the State to declare an escheat.
3. **Aliens: Descent and Distribution: Escheat.** Where no proceedings to declare an escheat are commenced during the life of an alien, upon his death his interest passes to his heirs or devisees subject to the restrictions imposed by statute.
4. **Statutes: Treaties.** A treaty is the supreme law of the land and is controlling over statutory provisions which conflict with it.

Appeals from the District Court for Box Butte County: ALFRED J. KORTUM, Judge. Affirmed as modified.

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

Jeffrey D. Toberer of Kennedy, Holland, DeLacy & Svoboda, for appellees.

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

BOSLAUGH, J.

These cases involve the right of nonresident aliens to

acquire real estate in Nebraska by purchase and devise. Case No. 40147 is an action to quiet title. Case No. 40148 is an appeal from a decree in a proceeding in the county court of Box Butte County, Nebraska, to probate the will of Sidney Fielden Wilson, deceased. The cases were consolidated for trial in the District Court. Since each case involves the same question they have been considered together in this court.

Sidney Fielden Wilson was a citizen and resident of England. In 1914 he purchased a quarter section of land in Box Butte County, Nebraska. He died on March 29, 1961, testate. His will, which was admitted to probate in England on July 10, 1961, devised the property in trust with the income to be paid to his widow, Rosalind Wilson, during her lifetime. The widow died on December 2, 1969. Upon her death the property was to be divided among the testator's three children, Lawrence Michael Dearnaly Wilson, Mary Rosamond Wilson, now Mary Rosamond Griffin, and Nancy Wilson, now Nancy Page Thomas.

The will was admitted to probate in the county court of Box Butte County, Nebraska, on December 31, 1973. The county court found, however, there was no property to be assigned to the devisees named in the will because the interest of the deceased had vested in the State of Nebraska.

The District Court found the title to the property should be quieted in the three surviving children of the deceased who were to have 1 year from the date of the judgment in which to sell the property. In the event the property was not sold within the time provided, the property would then escheat to the State of Nebraska. The State has appealed.

Since at least 1889 the laws of this state have provided that nonresident aliens are prohibited from acquiring title to real estate by descent, devise, or purchase except as provided by statute. See § 76-402, R. R. S. 1943. The State contends that Sidney Fielden Wilson

did not acquire an interest in the land because of the statute, and as a result the land escheated to the State.

The statute further provides it shall be the duty of the county attorney to commence legal actions to enforce and declare escheats and forfeitures when they occur. See § 76-408, R. R. S. 1943. At any time before proceedings for forfieture have been instituted or before final decree, the widow, heirs, or devisees of a deceased nonresident alien may have the land sold as in partition and the proceeds divided according to the interests of the parties as if there had been no escheat. See § 76-409, R. R. S. 1943. Despite the internal reference which now appears in section 76-408, R. R. S. 1943, the section applies to sections 76-401 and 76-402, R. R. S. 1943. See Shames v. State, 192 Neb. 614, 223 N. W. 2d 481. To the extent Semrad v. Semrad, 170 Neb. 911, 104 N. W. 2d 338, may be in conflict it has been overruled.

The rule is well established in many states that an alien may hold and convey the title to land if no proceedings have been brought by the state to declare an escheat. The rule is stated in 27 Am. Jur. 2d, Escheat, § 22, p. 889, as follows: "If an alien acquires land by purchase, it is a positive rule of law that an inquest of office must be found, or other judicial proceedings brought, before an escheat is established or title vests in the state. * * * An alien's equitable estate in land, created by deed or will, does not escheat to the state until there has been an adjudication of escheat. Even a statute forbidding aliens to hold real estate has been held not to affect the title of an alien grantee before an adjudication of escheat. Before an inquest, the alien may defend his possession and may even maintain an action for the recovery of the possession. He may also make a valid conveyance of the land and may thereby defeat the right of the state to an escheat." See, also, 3 C. J. S., Aliens, § 23, p. 808; 30A C. J. S., Escheat, § 7, p. 936; Annotation, 23 A. L. R., § IV, p. 1244; 5

Thompson on Real Property, § 2513, p. 396; 5 Tiffany, Law of Real Property (3d Ed.), § 1377, p. 216; III American Law of Property, § 12.69, p. 328; Lord v. Shultz, 115 Neb. 33, 211 N. W. 210.

The provisions in the Nebraska law requiring the county attorney to bring an action to have an escheat declared, and the provision authorizing a sale by the widow, heirs, or devisees at any time before a final decree, support the conclusion that the interest of Sidney Fielden Wilson did not escheat automatically. The failure of the State to declare an escheat by proper proceedings during the life of an alien operates as a loss of the right upon his death, and his interest passes to his heirs or devisees. See Abrams v. State, 45 Wash. 327, 88 P. 327. Since no proceedings were commenced by the State during the life of Sidney Fielden Wilson, upon his death his interest passed to his devisees subject to the restrictions imposed by statute. The question remaining is whether they may now dispose of the property.

The three surviving children of the deceased are all citizens and residents of England. A treaty between the United States and the United Kingdom, dated March 2, 1899, provides as follows:

"Article I.

"Where, on the death of any person holding real property (or property not personal), within the territories of one of the Contracting Parties, such real property would, by the laws of the land, pass to a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and to withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the citi-

zens or subjects of the country from which such proceeds may be drawn." 31 U. S. Stat. L., Art. I, p. 1939.

Under the treaty of 1899, which is the supreme law of the land and binding upon the State and all courts, the surviving children of the deceased were entitled to sell the property any time within 3 years after the death of the testator and during such additional time as the circumstances rendered it necessary. The trial court found they should have 1 year from the date of the judgment in which to sell the property.

The record shows the children of the deceased have been diligently attempting to perfect their title in order to dispose of the property since the death of the testator in 1961. During this time they consulted and employed a series of lawyers in both England and this country with but little success. The record fully supports the conclusion of the trial court that the devisees should have additional time in which to sell the property.

The judgments of the District Court are modified to provide that the property may be sold at any time within 1 year from the date on which the mandate of this court is filed in the District Court. As modified the judgments are affirmed.

AFFIRMED AS MODIFIED.

MARY LOU SAUNDERS, APPELLEE, V. CINDY L. MITTLIEDER ET AL., APPELLEES, MUTUAL SERVICE CASUALTY INSURANCE COMPANY, GARNISHEE-APPELLANT.

237 N. W. 2d 838

Filed January 15, 1976. No. 40159.

Insurance: Notice: Cancellation of Instruments. Section 44-516, R. R. S. 1943, requires registered or certified mail for every cancellation notice regardless of the period the policy has been in force.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Emil F. Sodoro and Michael P. Cavel, for garnishee-appellant.

John J. Brownrigg and Eisenstatt, Higgins, Kinnamon, Okun & Stern, for appellee Saunders.

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

SPENCER, J.

In this garnishment action the District Court held Mutual Service Casualty Insurance Company, garnishee-insurer, liable to the plaintiff for $10,000, the liability limit of the defendants Mittlieders' policy. Garnishee appeals. The question presented is whether garnishee had canceled defendants' insurance policy prior to the accident involving the plaintiff and the defendant Cindy Mittlieder. We hold the purported cancellation ineffective and affirm the judgment.

In July of 1973, Marvin Mittlieder owned two motor vehicles which were insured under separate policies written by garnishee. The policy involved herein covered a 1964 Chevrolet automobile. On July 31, 1973, notices of cancellation of the two insurance policies were sent by the garnishee to Mittlieder. The reason given for cancellation was nonpayment of premiums. The effective date of the cancellation was August 12, 1973. The policies were canceled on that date.

On August 12, 1973, Mittlieder sent garnishee a check in the amount of $64.70. The two policies were reinstated as of August 24, 1973, for a 6-month period to February 24, 1974. Invoices for additional premiums then due were sent with both policies. The invoice for the premium due on the Chevrolet was for $44.10. When this amount was not paid, a cancellation notice was sent to Mr. Mittlieder by regular mail on October 16, 1973. The effective date of the cancellation was to be October 28, 1973. The unearned premium on the policy was computed and a draft for that sum was sent to Mittlied-

er. Mittlieder denies receiving the notice of cancellation. The draft for the unearned premium was never cashed.

On January 20, 1974, Mittlieder's daughter, defendant Cindy Mittlieder, while driving the Chevrolet, was involved in an automobile accident with the plaintiff's vehicle. Notice was immediately given to garnishee's agent. Approximately 1 week later the agent was informed by garnishee that the policy had been canceled. He advised defendants that the company disclaimed coverage. On October 4, 1974, a judgment was rendered against the Mittlieders in the sum of $10,946. This garnishment is in aid of execution on that judgment.

Appellee argues that this case is controlled by section 44-516, R. R. S. 1943, which provides, so far as material herein, as follows: "(1) No notice of cancellation of a policy to which section 44-515 applies shall be effective *unless mailed by registered or certified mail to the named insured* at least thirty days prior to the effective date of cancellation; Provided, that where cancellation is for nonpayment of premium at least ten days' notice of cancellation accompanied by the reason therefore shall be given. Unless the reason accompanies or is included in the notice of cancellation, the notice of cancellation shall state or be accompanied by a statement that upon written request of the named insured, mailed or delivered to the insurer not less than twenty-five days prior to the effective date of cancellation, the insurer will specify the reason for such cancellation." (Italics supplied.) It is conceded that garnishee did not send notice of cancellation by registered or certified mail as required by this statute.

Garnishee argues that a notice of cancellation of an automobile liability insurance policy need not be mailed by registered or certified mail if the policy has been in effect less than 60 days at the time notice of cancellation is mailed by the insurer unless the policy itself so requires. We do not accept garnishee's premise that a

reinstated policy is in effect a new or original policy or that the policy herein was in effect for less than 60 days. Assuming garnishee's premise, however, it would make no difference in the result.

Garnishee relies on subsection (2) of section 44-515, R. R. S. 1943. That section is as follows: "(1) A notice of cancellation of a policy shall be effective only if it is based on one or more of the following reasons: (a) Nonpayment of premium; (b) fraud or material misrepresentation affecting the policy or in the presentation of a claim thereunder, or violation of any of the terms or conditions of the policy; or (c) the named insured or any operator, either resident in the same household or who customarily operates an automobile insured under the policy, (i) has had his driver's license suspended or revoked pursuant to law; (ii) has been convicted of larceny of an automobile or theft of an automobile in violation of section 28-521; (iii) has been convicted of an offense for which such suspension or revocation is mandatory; or(iv) whose driver's license is subject to revocation or suspension pursuant to the provisions of sections 39-669.26 to 39-669.30, by reason of his driving record as disclosed by the files of the Director of Motor Vehicles during the policy period or, if the policy is a renewal, during its policy period or the one hundred eighty days immediately preceding its effective date.

"(2) This section shall not apply to any policy or coverage which has been in effect less than sixty days at the time notice of cancellation is mailed or delivered by the insurer unless it is a renewal policy.

"(3) This section shall not apply to nonrenewal."

It is garnishee's position that subsection (2) of section 44-515, R. R. S. 1943, is controlling and that section 44-516, R. R. S. 1943, does not apply herein. Garnishee argues that at the time of cancellation Mittlieder's reinstatement policy had been in effect less than 60 days, consequently notice of cancellation under section 44-516, R. R. S. 1943, need not be sent by registered or

certified mail, and the regular mail notice was sufficient. We disagree.

In 1972, in response to a growing national concern over arbitrary policy cancellations and nonrenewals, the Nebraska Legislature adopted a statutory scheme dealing with automobile insurance policy cancellations patterned after some model legislation proposed by certain insurance trade organizations. In 1973, it added the requirement that the cancellation notice must be mailed by registered or certified mail. This amendment to the bill became effective after the policy in question was written but before its purported cancellation.

It is clear to us that the intent of the Legislature in the passage of these sections was to clear up confusion in the area of automobile insurance policy cancellation, not to further it. We are satisfied the construction contended for by the garnishee would abort the intent of the Legislature in this particular. We conclude the intent of subsection (2) to exclude the effect of section 44-515, R. R. S. 1943, for the first 60 days, was intended solely to give the insurance company a short period for investigation to determine whether or not other reasons might make the risk unacceptable. Subsection (2) relates to the time period provided for cancellation, not to the type of notice required. We are satisfied it is the intent of section 44-516, R. R. S. 1943, to require registered or certified mail for every cancellation notice regardless of the period the policy has been in force, and so construe it.

There is no good reason to require a different type of notice of cancellation of policies in existence less than 60 days than is required for policies older than 60 days. The primary consideration of notice and proof of cancellation is the same in both instances. The requirement of registered or certified mail facilitates proof of receipt of notice. Whatever length of time a policy has been in effect, a policyholder is not ordinarily expecting to have his coverage canceled. The clear intent

of the legislation is that if one's coverage is to be so canceled, that fact should be made clear to him. The registered or certified mail requirement does exactly that.

The judgment is affirmed.

AFFIRMED.

GERALD TIMMERMAN ET AL., APPELLEES, V. MORRIS HERTZ, APPELLANT.

238 N. W. 2d 220

Filed January 15, 1976. No. 40167.

1. **Pleadings: Contracts: Trial: Evidence: Statutes.** In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance. § 25-836, R. R. S. 1943.
2. **Pleadings: Contracts.** Where by statute plaintiff is authorized to plead a general performance of all conditions precedent, defendant must, if he relies on the fact that any of the conditions precedent have not been performed, set out specially the condition and the breach, thus confining the issue to be tried to such particular condition or conditions precedent as he may indicate as unperformed. A mere general denial, therefore is insufficient to raise the issue.
3. **Pleadings: Contracts: Statutes.** The purpose of section 25-836, R. R. S. 1943, is to simplify pleading, and only by requiring the defendant to set forth the particular condition which is relied on as a defense may the plaintiff be advised of the exact defense he will be required to meet, and the trial court informed as to the exact issue to be determined.
4. **Pleadings: Trial: Evidence.** The right to introduce evidence depends upon there being an issue of fact as to which it is relevant. The issues are made by the pleadings; and unless there is an issue of fact before the court, there is no right to introduce evidence to prove or disprove the fact. Where the answer does not state a defense, the trial court should direct a verdict for the plaintiff.
5. **Rules of Court: Records: Pretrial.** The rules of this court re-

quire that the trial judge must make a record of pretrial procedures formulating issues.

6. **Trial: Evidence: Records.** Before this court can consider evidence bearing upon an issue of fact, the evidence must have been offered in the trial court and embodied in a bill of exceptions.
7. **Pleadings.** The pleading of legal conclusions is insufficient to raise an issue of fact. A proposed amendment to pleadings offered during trial should plead ultimate facts and not legal conclusions.
8. **Pleadings: Customs and Usages: Contracts.** It is ordinarily incumbent upon one who relies upon a special custom as a basis of recovery or defense to allege the custom and to plead and prove the other party had knowledge of the custom and contracted with reference thereto.
9. **Pleadings: Trial: Appeal and Error.** The principle that on appeal the case will be considered upon the theory upon which the case was tried below, even though not pleaded, has application only where both parties acquiesce in the theory and the case was submitted to the trial court on that basis.

Appeal from the District Court for Sarpy County: RAYMOND J. CASE, Judge. Affirmed.

Robert F. Craig of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Rae Schupack and John Herdzina of Abrahams, Kaslow & Cassman, for appellees.

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

CLINTON, J.

The principal underlying question on this appeal is whether the trial court abused its discretion in refusing to permit the defendant to amend his answer to state an affirmative defense at a point in the trial when the plaintiffs had presented their evidence and rested, had moved for a directed verdict, and had presented arguments in support of their motion. The trial court denied the request to amend, granted the motion of the plaintiffs for a directed verdict, and rendered judgment

against the defendant for the sum of $8,956.87. We affirm.

The plaintiffs in their petition alleged, among other things, that they, on August 3, 1973, entered into a contract in writing to sell cattle to the defendant. The petition incorporated the contract. They further alleged: "That the plaintiffs have duly, timely and fully performed all of their obligations set forth in said Livestock Contract," and that the defendant had failed to pay the balance owing of $8,956.87. The written contract, insofar as it is necessary in this opinion to note its specific terms, provided for the sale by the plaintiffs to the defendant of: ". . . about 550 or 5 Loads Black Hfr. Calves, . . . and now located in Davis Ranch Pasture in Bryan County, Okla. near Durant, Okla. Said cattle to be good, well-bred Angus cattle with a no per cent cut back, after all unmerchantable cattle and apparent pregnant heifers have been thrown out; this cut to be made by the Buyer at Davis Ranch. The delivery is to be made free of encumbrances f.o.b. cars or trucks at Davis Ranch. Said cattle to be weighed at Davis Ranch, with 3% of Equivalent shrink, . . . 3 Loads-Oct 1, 73, 2 Lds-Jan 1, 74. . . . The price agreed upon is $69.25 per cwt., per head. $5500.00 paid as part payment, receipt of which is hereby acknowledged, balance to be paid upon delivery of said cattle."

The defendant's answer admitted the identity of the parties and then stated: "This defendant admits that the plaintiffs and defendant entered into a livestock contract. . . . Further answering, defendant denies each and every other allegation of plaintiff's Amended Petition except for those allegations specifically admitted above."

The plaintiffs' evidence established prima facie the contract and delivery of the cattle in accordance with the contract terms. It was then stipulated by the parties: (1) That the contract attached to the plaintiffs' petition, exhibit A, which had been received in evidence, had

been entered into by the parties, (2) that five loads of cattle were delivered to the defendant by the plaintiffs; and (3) that of the total contract price, $8,956.87 had not been paid.

At that point the defendant moved for a directed verdict. The court denied this motion. The plaintiffs then moved for a directed verdict and also moved the court to deny the admission of any evidence by the defendant. The basis of these motions was that the answer of the defendant tendered no issue for the jury to decide. Oral arguments were heard and a brief was submitted by the plaintiffs. At the completion of the plaintiffs' argument in support of their motion, the defendant made his motion to amend. It was as follows: ". . . for order amending the answer to allege that the terms of the contract or implied terms of the contract required that all five loads be even as to the cattle and that the defendant—and that the plaintiffs failed to comply with that implied term of the contract, assuming that that is necessary, but assuming that it is necessary this was—whole case was tried all throughout plaintiffs' evidence on that theory. Certainly, if we were going to take plaintiff by surprise then perhaps it would be an abuse of discretion to allow us to amend the answer."

In sustaining the plaintiffs' motion for a directed verdict the trial court apparently relied upon decisions of this court cited by the plaintiffs which apply section 25-836, R. R. S. 1943. That section provides: "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance."

In Morearty v. City of McCook, 119 Neb. 202, 228 N. W. 367, we said: " 'Where by statute plaintiff is authorized to plead a general performance of all con-

ditions precedent, defendant must, if he relies on the fact that any of the conditions precedent have not been performed, set out specially the condition and the breach, thus confining the issue to be tried to such particular condition or conditions precedent as he may indicate as unperformed.' . . . A mere general denial, therefore, is insufficient to raise the issue." The above principle has been reaffirmed many times by this court. Lehnherr v. National Accident Ins. Co., 126 Neb. 199, 252 N. W. 823; Davidson v. First American Ins. Co., 129 Neb. 184, 261 N. W. 144; Peters v. Wilks, 151 Neb. 861, 39 N. W. 2d 793; Cartwright & Wilson Constr. Co. v. Smith, 155 Neb. 431, 52 N. W. 2d 274; Rickertsen v. Carskadon, 172 Neb. 46, 108 N. W. 2d 392. The rationale for requiring the defendant to plead a specific defense was set out by this court in Lehnherr v. National Accident Ins. Co., *supra,* as follows: "It will be remembered that the purpose of the statute is to simplify pleading, and only by requiring the defendant to set forth the particular condition which is relied on as a defense may the plaintiff be advised of the exact defense he will be required to meet, and the trial court informed as to the exact issue to be determined."

In Midland-Ross Corp. v. Swartz, 185 Neb. 484, 176 N. W. 2d 735, we said: "The right to introduce evidence depends upon there being an issue of fact as to which it is relevant. The issues are made by the pleadings; and unless there is an issue of fact before the court, there is no right to introduce evidence to prove or disprove the fact. . . . Where the answer does not state a defense, the trial court should direct a verdict for the plaintiff. Sloan Commission Co. v. Fry & Co., 4 Neb. (Unoff.) 647, 95 N. W. 862; Winterringer v. Warder, Bushnell & Glessner Co., 1 Neb. (Unoff.) 413, 95 N. W. 619; Osborne & Co. v. Kline, 18 Neb. 344, 25 N. W. 360; Western Mfg. Co. v. Rogers, 54 Neb. 456, 74 N. W. 849; Hrabak v. Village of Dodge, 62 Neb. 591, 87 N. W. 358. Here the plaintiff proved a prima facie case by the ad-

missions of the defendant. Since the answer failed to state a defense, it was proper for the trial court to enter judgment for the plaintiff. Osborne & Co. v. Kline, supra; Hrabak v. Village of Dodge, supra; Western Mfg. Co. v. Rogers, supra."

In support of his position that the request to amend should have been permitted, the defendant claims the plaintiffs knew what the specific defense would be and that they were, in fact, not taken by surprise; and that therefore the amendment was required in the furtherance of justice and consequently an abuse of discretion by the trial court is shown. Defendant cites sections 25-852 and 25-853, R. R. S. 1943, and numerous opinions of this court decided under the authority of those statutes. He relies especially upon Louis Hoffman Co. v. Western Smelting & Refining Co., 150 Neb. 524, 34 N. W. 2d 889. In that case the motion to amend was made just prior to trial and it was proved that the attorney for the other party had received a copy of the amended pleading 4 days prior to trial. The other party made no move for a continuance. Upon appeal we held the trial court had abused its discretion in denying the requested amendment.

The defendant asserts the plaintiffs would in no way have been prejudiced by the amendment in this case because the plaintiffs knew for a long time that the defense would be lack of "evenness" in the cattle. To support that contention the defendant made a showing before the trial court. His first claim is that there was a pretrial conference held immediately before trial at which that issue was defined. One of the defendant's attorneys testified that the plaintiffs' counsel had stated in substance at that time: ". . . you are not really disputing that the contract was entered into, you are not disputing that the five loads of cattle were delivered, you are disputing that the fifth load did not measure up to the terms of the contract." He further testified: ". . . it was clear at the time that the defendant's only

defense to the contract was that the fifth load of cattle were not even. It was certainly clear at the time through the discussion between counsel and the Court that that would be the defense." It is claimed that this conversation occurred in chambers in the presence of the trial judge just before the jury was to be empaneled. Defendant relies upon the proposition that issues joined in a pretrial conference supersede those joined by the pleadings and constitute the issues upon which the case is to be tried. Kresha Constr. Co., Inc. v. Kresha, 184 Neb. 188, 166 N. W. 2d 589. Defendant's claim on this point must fail. The rules of this court require that the trial judge must make a record of pretrial procedures formulating issues. See Pre-Trial Procedure: Formulating Issues, Revised Rules of the Supreme Court, 1974, p. 52. There is in the record no pretrial order defining issues and the trial court in its ruling makes no reference thereto. We must therefore presume there was no pretrial conference defining issues. It is true that in Kresha Constr. Co., Inc. v. Kresha, *supra,* the trial court in effect added to its pretrial order by a finding during the course of trial that matters had inadvertently been omitted from the pretrial order. Nothing like that appears in the record in this case.

As a further showing of knowledge on the part of counsel for the plaintiffs, defendant also points to answers given by defendant to interrogatories put to him by the plaintiffs and filed in the transcript about 10 months before trial which disclose what the defense would be. The transcript discloses an answer which states: "A portion of the cattle . . . were not even." There are, however, in these answers to interrogatories other answers which make defensive claims of various other kinds, viz, some of the cattle were yearlings and not calves; the cattle were never accepted; failure to deliver cattle as specified in the contract; the cattle were not as represented in the contract; the cattle did not meet contract specifications; inadequacy of con-

sideration; the contract was changed or unfulfilled in unspecified ways without the defendant's prior consent and ratification; and there were defects and discrepancies in the cattle not discovered until after delivery. If the answer stating "the cattle . . . were not even," is to be given significance in defining the issues, then it would seem that all the other answers referring to a variety of possible affirmative defenses should be granted significance as well and defendant ought to be free to make other amendments. But to allow this in the middle of trial would effectively do away with the principle embodied in section 25-836, R. R. S. 1943, and the cases decided thereunder.

The defendant also claims that various discovery depositions taken by the parties disclose that the defense would be "evenness." These depositions were not offered in support of the showing made in the trial court and are not included in the bill of exceptions before us, although they apparently were transmitted by someone for filing and are on file herein. Before this court can consider evidence bearing upon an issue of fact, the evidence must have been offered in the trial court and embodied in a bill of exceptions. Arla Cattle Co. v. Knight, 174 Neb. 360, 118 N. W. 2d 1.

Two other considerations support the conclusion that the trial court did not abuse its discretion when it denied the defendant's motion to amend. The first is that any tendered amendment ought to be well pleaded. The second is that the introduction of additional issues by amendment would entitle the plaintiffs to make responsive replies which could well have raised yet additional issues, all of which might well have required a delay of the trial. We will discuss each consideration in order.

The offered amendment to defendant's answer was simply a legal conclusion that there was an implied term of the contract that each load be "even as to cattle" and that plaintiffs breached that term. The plead-

ing of legal conclusions is insufficient to raise an issue of fact. 77 C. J. S., Sales, § 362d, pp. 1275, 1276; Koch v. Grimminger, 192 Neb. 706, 223 N. W. 2d 833.

The defendant's theory is that there was a custom and usage among cattle dealers that each load be "even." It is ordinarily incumbent upon one who relies upon a special custom as a basis of recovery or defense to allege the custom and to plead and prove the other party had knowledge of the custom and contracted with reference thereto. Shambaugh v. City Bank of Elm Creek, 118 Neb. 817, 226 N. W. 460; Runner v. Pierson, 144 Neb. 847, 14 N. W. 2d 847; Langdon v. Kennedy, Holland, DeLacy & McLaughlin, 118 Neb. 290, 224 N. W. 292; 25 C. J. S., Customs & Usages, § 32a, p. 167. The proffered amendment to the answer was, in the face of objection, not sufficient to properly raise a factual issue of the existence of a particular custom and usage among cattle dealers. If it is being claimed that there existed implied warranties of fitness for a particular purpose under the provisions of section 2-315, U. C. C., the plaintiff would still be required to plead the ultimate facts which would bring the sale within the provisions of that statute, viz, that the seller knew or had reason to know that the cattle were being purchased for a particular purpose, and the buyer was relying on the seller's skill and judgment to select suitable cattle.

The proffered pleading is also deficient for another reason. The purchaser must plead that he gave timely notice of the breach. § 2-607(3)(a), U. C. C. See Hrdlicka v. Allen, 179 Neb. 250, 137 N. W. 2d 775, decided under similar provisions of the former Uniform Sales Act. The offered amendment contained no allegation of such notice.

If an amendment had been permitted the plaintiff would be entitled to meet the new pleading by appropriate responsive pleadings. If appropriate facts existed possible defenses are suggested by the following provisions of the Uniform Commercial Code: Section

2-316(3)(c), exclusion of implied warranties by usage of trade; and section 2-607(2), acceptance of the goods by the buyer.

The foregoing discussion of matters of pleading is not intended as any expression of opinion as to whether additional terms could, in fact, be added by custom and usage to the apparently complete contract here involved. See, § § 2-202 (a) (b), 2-208, 2-317 (c), U. C. C. See, also, Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co., 177 Neb. 287, 128 N. W. 2d 773; James Poultry Co. v. City of Nebraska City, 135 Neb. 787, 284 N. W. 273; Peterson v. State Automobile Ins. Assn., 160 Neb. 420, 70 N. W. 2d 489.

One other contention of the defendant should be noted. He claims that the case was tried below upon the theory that the defense was "evenness" and that on appeal the matter will be considered upon the theory on which the case was tried in the trial court. That principle applies only where both parties have acquiesced in the theory and the case was submitted to the trial court on that basis. That principle has no application where, as here, the record shows the plaintiffs did not acquiesce and the trial court did not decide the case on the theory that a defense had been properly pled. See, Ford v. County of Perkins, 190 Neb. 304, 207 N. W. 2d 694; Saum v. L. R. Foy Constr. Co., Inc., 190 Neb. 783, 212 N. W. 2d 648.

As we have noted earlier, the purpose of section 25-836, R. R. S. 1943, is to sharply define and limit the issues. The issues must be defined before trial starts if the purpose of the statute is to be served. Issues are made by the pleadings and not by inquiries made in discovery depositions taken or interrogatories put long before trial nor by informal conversation between counsel. For all the reasons given it appears clear that the trial court did not abuse its discretion in denying the defendant's motion to amend.

AFFIRMED.

DONALD K. DUNMIRE, APPELLANT, V. EUGENE COOL ET AL., APPELLEES.

237 N. W. 2d 636

Filed January 22, 1976. No. 39965.

1. **Contracts: Wills: Equity: Standing.** One who claims under an oral contract a portion of decedent's estate for services rendered has no standing to contest decedent's will in county court, and his remedy is restricted to the District Court for equitable relief.
2. **Contracts: Trial: Equity: Specific Performance.** Equity will grant specific performance of a parol agreement to leave property to another under an oral contract, if it is proved by evidence convincing and satisfactory, and if it has been wholly performed by one party and its nonperformance would be a fraud on him.
3. **Contracts: Trial: Specific Performance.** Each action for specific performance or suit to impress a trust on certain property is to be determined from the facts, circumstances, and conditions presented by the evidence.
4. **Attorney and Client: Privileged Communications.** Communications between attorney and client made in the presence of others do not constitute privileged communications within the meaning of former sections 25-1201 and 25-1206, R. R. S. 1943.

Appeal from the District Court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded.

Andrew J. McMullen and Luebs, Tracy, Dowding, Beltzer & Leininger, for appellant.

Robert G. Duncan of Duncan & Russell and Gary B. Schneider, for appellees.

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

TESAR, District Judge.

This is an original action brought by plaintiff in the District Court alleging that the decedent, Lynn B. Buchanan, promised plaintiff that he would leave him one-half of his estate for services to be performed by the plaintiff for the decedent during his lifetime. Plaintiff

alleges that these services were performed by the plaintiff, and that the decedent breached his agreement by changing his will prior to his death. In the alternative, the plaintiff alleges that the defendants through fraud and undue influence encouraged the decedent to change his will to make them beneficiaries and that, thus through their acts, they were unjustly enriched.

The defendants generally denied the plaintiff's claims of the existence of an oral contract between plaintiff and decedent as to the division of decedent's property in the event of his death. The issues were tried to the court.

The District Court, at the close of plaintiff's evidence, found there was insufficient evidence to find that a contract existed between the decedent and the plaintiff and dismissed plaintiff's action. We reverse and remand for further proceedings the decision of the District Court.

All parties by their briefs filed in this court, admit that the sole issues tried in the District Court were whether there was a contract and, if there was a contract, whether plaintiff performed his duties thereunder. Initially, the plaintiff alleged undue influence and fraud to encourage the decedent to change his will as an alternative cause of action. The District Court properly found that it had no jurisdiction in an original action to determine that issue, for the original jurisdiction of that issue is in the county court. However, since plaintiff in his assignments of error asserts that the court erred in failing to find for plaintiff on those issues, which ultimately eliminated the plaintiff as a beneficiary in decedent's estate, we state, on remand of this cause, that undue influence and fraud to encourage one to change his will is not a proper issue, since the District Court's jurisdiction of these issues arises solely by appeal from the county court, which has original jurisdiction.

It is important to place the respective litigants in

their proper perspective. The plaintiff, Dunmire, started renting from the Buchanans, among whom there were three bachelor brothers, in 1937 and eventually, after the death of the Buchanan parents and of two Buchanan brothers, the renting of nearly all the farmland was from Lynn B. Buchanan, whom we will now refer to as the decedent. The decedent died June 3, 1973, at the age of 79 years. Starting in 1959, after decedent's last brother died, the plaintiff started doing various and numerous services for him and it was then that the decedent executed his first will leaving the plaintiff one-half of his estate plus 80 acres. Witnesses testified to conversations, from this time forward, with the decedent in which he told them of the agreement worked out with plaintiff, all of which amply sustained plaintiff's burden of proof of the existence of an oral contract to devise property to plaintiff. These included conversations with Claire Sumstine, James Prichard, and attorneys Jess Adkins and Richard Hove. The defendant, Eugene Cool, is the decedent's second cousin, twice removed, and it was in 1960 that he began to visit the decedent's place annually. On December 1, 1970, attorney Jess Adkins destroyed the old will of decedent, and he was directed to draft a new will renaming the plaintiff to receive one-half of the estate plus 80 acres and which was identical to the original will except for change of executor. At that time Eugene Cool was to get the balance of the estate after plaintiff received his one-half plus 80 acres. In November 1971, decedent was admitted to the hospital in Kearney and later transferred to a nursing home where he remained until he passed away. In March of 1972, the decedent was brought to attorney Hove's office by defendant, Eugene Cool, and decedent's will was changed to divide the estate in thirds with plaintiff, defendant Eugene Cool, and Eugene Cool's son, Harold, as beneficiaries. On March 8, 1973, a new will was executed, again, at Eugene Cool's apparent behest, wherein Eugene Cool's grandson, Michael Cool, was sub-

stituted for the plaintiff in the new will. This is the will which was admitted to probate, and which excluded the plaintiff of any share of decedent's estate.

One must realize that plaintiff has no standing in county court to contest the will of the decedent on the grounds that it violates their agreement that decedent was to make provision in his will for plaintiff's behalf pursuant to their oral contract. Anderson v. Benson, 117 F. Supp. 765; Kimmel v. Roberts, 179 Neb. 25, 136 N. W. 2d 217. While it may be true that plaintiff, although not an heir-at-law, did have standing to contest decedent's last will by virtue of being a party "concerned" under our statutes, section 30-217, R. R. S. 1943, he ultimately chose not to do so. He relied on his contract, which he had a right to do, rather than to assert his claim of undue influence and fraud in the county court. His right to contest the will in county court as a party "concerned," of course, stems from the fact that he was a devisee under all prior wills of decedent (although not always to the extent that plaintiff contends was the contractual agreement) and the will being admitted to probate would destroy his share in the estate. See, 80 Am. Jur. 2d, Wills, § 892, p. 78, § 909, p. 90; Annotation 39 A. L. R. 3d, p. 328.

Although not germane to the issue before us, it is interesting to note the court's findings made at the close of plaintiff's evidence, where he said we have here: "the most beautiful classical case of undue influence at this stage of the proceeding, unless it can be rebutted, that the Court has ever seen, during his term on the Bench."

After the court very properly enunciated the law referable to cases of this nature, he made the following comment which is germane to the issue: "Now what was the evidence? The evidence was that the Plaintiff took him to the grocery stores; whenever he wanted to go to town; when he had some immediate problem over on the farm that he couldn't quite handle, he would go

over there and do it. Now, as we look back on these things, remember that the Plaintiff's own evidence is that the deceased had told him he was going to leave him half his property *and I think that is well substantiated in the evidence.*" (Emphasis supplied.)

This record is replete with testimony by credible witnesses, friends, and business associates of the decedent of the carrying out by plaintiff of his contractual bargain with decedent. Our court has held numerous times that oral contracts to transfer realty by deed or will for personal services, may be shown by parol proofs and of execution of will, which was subsequently destroyed or changed, where the personal services were freely performed and accepted. Robinette v. Olsen, 114 Neb. 728, 209 N. W. 614. As was stated in that opinion: "Performance of personal services * * * in consideration of an oral contract for the conveyance of realty, by deed or will may be shown by evidence that the attendant was frequently observed at his duties, and that they were performed and that they were acknowledged and accepted by the other party."

Equity will grant specific performance of a parol agreement to leave property to another if it is proved by evidence convincing and satisfactory, and if it has been wholly performed by one party and its nonperformance would be a fraud on him. Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478. The evidence in this record thus far presented is clear, satisfactory, certain, and unequivocal that the plaintiff and the decedent entered into this personal contract. Its performance was referable solely to their existing understanding and the carrying out of its provisions was solely referable to their contract and not such as might reasonably be referable to some other or different contract or relationship.

We think the language of Sopcich v. Tangeman, *supra,* should sufficiently answer defendants' claim that this type of action cannot be brought in equity court.

There the court said: "And when such contract and relation are established under a single and indivisible contract, and the promisor dies without having complied with the terms of his promise, the county court is without, and the district court has jurisdiction of an action for the specific performance of such contract."

This court fully appreciates that each action for specific performance is to be determined from the facts, circumstances, and conditions presented in the evidence. We are also aware that this type of contract is on its 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. We find that there has been such performance as shown by the record to this point. Plaintiff has maintained his burden of showing that he performed the burdens imposed upon him by the contract and that he is now entitled to the fruits or benefits, unless, of course, on re-trial upon production of defendants' evidence, the contrary can be shown.

Sufficient to say, it is the law of this state that in determining whether a contract to leave property to someone or to make a will leaving property to a beneficiary was entered into by the parties, it is proper to consider the relations existing between the parties. Rine v. Rine, 100 Neb. 225, 158 N. W. 941. The record, without exception, shows the close relationship of plaintiff and decedent through neighbors, businessmen and friends, and one has but to call attention to the offer of proof which was entered in this record as it pertains to attorney Adkins talking to decedent in the presence of Eugene Cool as it relates to the plaintiff when the offer, which should have been admitted, states, "He (Buchanan, decedent) wanted Dunmire (plaintiff) to receive what the will provided because he *owed it to him and he felt he was entitled to it.*" (Emphasis supplied.) One

doesn't usually *owe* another something of this nature, unless he had promised or contracted for it.

The trial court refused to allow two of decedent's former attorneys to testify as to matters which were vital to plaintiff's cause, upon the theory of client-attorney privilege. While these matters were discussed, other persons were present, and the privilege did not attach. Communications made in the presence of others do not constitute a privileged communication. See, Anderson v. Benson, *supra*; Jenkins v. Jenkins, 151 Neb. 113, 36 N. W. 2d 637; Beacom v. Daley, 164 Neb. 120, 81 N. W. 2d 907; Short v. Kleppinger, 163 Neb. 729, 81 N. W. 2d 182. This testimony was properly admissible.

In this court's recent decision in Clark & Enerson, Hamersky, S., B. & T., Inc. v. Schimmel Hotels Corp., 194 Neb. 810, 235 N. W. 2d 870, the court said: "A promise may be stated in words, either oral or written, or may be inferred wholly or partly from conduct." The conduct of decedent and plaintiff tends most strongly toward that inference.

We reverse the judgment and remand the cause to the District Court for further proceedings.

REVERSED AND REMANDED.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, APPELLEE, V. DEPARTMENT OF PUBLIC INSTITUTIONS STATE HOSPITALS OF THE STATE OF NEBRASKA, APPELLANT.

237 N. W. 2d 841

Filed January 22, 1976. No. 40031.

1. **Statutes: Constitutional Law.** All acts of the Legislature are presumed to be constitutional.
2. ———: ———. In construing an act of the Legislature, all reasonable doubts must be resolved in favor of its constitutionality.
3. **Legislature: Constitutional Law.** The Legislature has plenary

legislative authority except as limited by the state and federal Constitutions.

4. **Constitutional Law: Governmental Powers.** The powers of the government of this state are divided into three distinct departments, the Legislative, Executive, and Judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.
5. **Constitutional Law: Administrative Law.** Article IV, section 1, of the Constitution of the State of Nebraska, provides in part: "Subject to the provisions of this Constitution, the heads of the various executive or civil departments shall have power to appoint and remove all subordinate employees in their respective departments."
6. **Constitutional Law: Administrative Law: Legislature.** Article IV, section 19, of the Constitution of the State of Nebraska, provides: "The general management, control and government of all state charitable, mental, reformatory, and penal institutions shall be vested as determined by the Legislature."
7. **Constitutional Law.** The provisions of the Constitution of the State of Nebraska must be taken in their ordinary and common acceptation in such manner as to express the intent of its framers.

Appeal from the Court of Industrial Relations. Affirmed.

Paul L. Douglas, Attorney General, and Melvin K. Kammerlohr, for appellant.

Robert E. O'Connor, Robert E. O'Conner, Jr., and Zwerdling, Maurer, Diggs & Papp, for appellee.

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

PER CURIAM.

This is an appeal by the defendant from an order of certification issued by the Court of Industrial Relations to the plaintiff, the American Federation of State, County, and Municipal Employees, AFL-CIO. We affirm the order of the Court of Industrial Relations.

The plaintiff brought this action in the Court of In-

dustrial Relations, asking that court to invoke its jurisdiction over a dispute between the plaintiff and the defendant, the Department of Public Institutions State Hospitals of the State of Nebraska. The defendant, under authority granted in section 83-108, R. S. Supp., 1974, controls most of the state charitable and penal institutions, including the mental health and retardation facilities at Lincoln, Hastings, Norfolk, and Beatrice, Nebraska, and the Nebraska Psychiatric Institute at Omaha, Nebraska. The plaintiff asked the Court of Industrial Relations to order a secret ballot election among employees of the defendant. This election was to determine if the employees wanted the plaintiff to represent them in collective bargaining, and if so, whether the employees wanted the plaintiff to be the exclusive representative. The Court of Industrial Relations ordered the election. The election was held and a majority of those voting chose the plaintiff as their representative. The Court of Industrial Relations then entered an order of certification which certified the plaintiff as the exclusive bargaining agent. The defendant, the Department of Public Institutions State Hospitals of the State of Nebraska, appeals that order.

There is only one issue raised on this appeal. The defendant contends that the Court of Industrial Relations had no jurisdiction over the defendant because sections 48-801 et seq., R. R. S. 1943, the statutes which give the Court of Industrial Relations jurisdiction over public employees, are unconstitutional. We disagree.

In deciding the question of the constitutionality of a statute, it must be remembered that "all acts of the Legislature are presumed to be constitutional." Stanton v. Mattson, 175 Neb. 767, 123 N. W. 2d 844 (1963). In State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N. W. 2d 63 (1962), this court said: "The judiciary may not declare an act of the Legislature unconstitutional unless it clearly contravenes some provision of the fundamental law * * *. In construing an act of the

Legislature, all reasonable doubts must be resolved in favor of its constitutionality."

The defendant contends that sections 48-801 et seq., R. R. S. 1943, are unconstitutional because they violate Article II, section 1, and Article IV, section 1, of the Constitution of the State of Nebraska. When viewing these two constitutional provisions together, this contention appears correct at first glance. Article II, section 1, provides: "The powers of the government of this state are divided into three distinct departments, the Legislative, Executive and Judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

Article IV, section 1, provides in part: "*Subject to the provisions of this Constitution,* the heads of the various executive or civil departments shall have power to appoint and remove all subordinate employees in their respective departments." (Emphasis supplied.) Thus, Article IV, section 1, gives the executive branch the power to dismiss its employees, and Article II, section 1, then says that no other branch can exercise "any power properly belonging to either of the others [departments]." The stumbling block in the defendant's reasoning is the language in Article IV, section 1, which states: "Subject to the provisions of this Constitution." The real question is whether there is a different provision of the Constitution which gives the Legislature the authority to give the Court of Industrial Relations jurisdiction over the defendant in this case.

The plaintiff argues that Article XV, section 9, gives the Legislature the authority to create a Court of Industrial Relations which has jurisdiction over public employees. The defendant, on the other hand, cites the proceeding of the Constitutional Convention of 1919-1920, to show that Article XV, section 9, was not intended to cover all public employees. Although correct

in its interpretation of Article XV, section 9, the defendant fails to consider Article IV, section 19, of the Constitution of the State of Nebraska.

Article IV, section 19, provides: "The general management, control and government of all state charitable, mental, reformatory, and penal institutions shall be vested as determined by the Legislature." This court has held that the provisions of the state Constitution "must be taken in their ordinary and common acceptation in such manner as to express the intent of its framers * * *." State ex rel. Johnson v. Marsh, 149 Neb. 1, 29 N. W. 2d 799. The "ordinary and common" meaning of the words in Article IV, section 19, are clear. The Legislature has complete authority over the entities named in Article IV, section 19. Pursuant to this authority, the Legislature created the Department of Public Institutions to manage the entities referred to in Article IV, section 19. § 81-101, R. S. Supp., 1974.

By delegating the actual day-by-day administration to the Department of Public Institutions, the Legislature did not lose its constitutionally mandated *power* to control all state charitable, mental, reformatory, and penal institutions. It is not contended, nor could it be, that the statutes creating and delegating administrative authority to the Department of Public Institutions, are in any way constitutionally infirm because of the failure to enact proper standards under the familiar constitutional principle. Nor can it be contended that the Legislature attempted to divorce itself from or delegate its power to control to any other branch of the government. See Orleans Education Assn. v. School Dist. of Orleans, 193 Neb. 675, 229 N. W. 2d 172. A reading of the constitutional provisions and the legislative acts involved demonstrates, without doubt, that the Legislature retained complete and plenary authority to control, regulate, and administer the Department of Public Institutions. It follows that if the Legislature in the exercise of its continuing control of the department wants

to subject the Department of Public Institutions to the jurisdiction of the Court of Industrial Relations, it has the power under Article IV, section 19, of the Constitution of the State of Nebraska.

Looking at the intent of the drafters of Article IV, section 19, in its present form, it is clear that the drafters intended that the Legislature should have exclusive control over the Department of Public Institutions. Prior to the most recent amendment to Article IV, section 19, in 1958, section 19 provided for a Board of Control, which was appointed by the governor, to govern all state charitable, reformatory, and penal institutions. The 1958 amendment took control away from the Board of Control and the governor, and placed it in the Legislature. Legislative hearings on the 1958 amendment clearly indicate that the drafters of the amendment believed that the Legislature would be better able to supervise the Department of Public Institutions than would the Governor. Thus, the history of Article IV, section 19, reinforces the clear meaning of the words in Article IV, section 19.

Since it cannot be doubted that Article IV, section 19, gives the Legislature the continuing power to control the Department of Public Institutions, sections 48-801 et seq., R. R. S. 1943, clearly do not violate Article II, section 1, dealing with the separation of powers. By giving the Court of Industrial Relations jurisdiction over the Department of Public Institutions, the Legislature is merely exercising the authority granted to it in Article IV, section 19.

The defendant's argument in this case is similar to the argument recently raised in Orleans Education Assn. v. School Dist. of Orleans, *supra*. In Orleans, the Court of Industrial Relations ruled on a dispute between school teachers and the defendant school district concerning the rate of pay and other benefits. The defendant appealed. One basis for the appeal was that the Court of Industrial Relations did not have juris-

diction over the dispute because the statute giving the court jurisdiction, the Nebraska Teachers' Professional Negotiation Act, sections 79-1287 et seq., R. R. S. 1943, was unconstitutional. The defendant school district argued, as does the defendant in this case, that Article II, section 1, prohibited the Legislature from giving jurisdiction over public employees to the Court of Industrial Relations. This court in Orleans upheld the jurisdiction of the Court of Industrial Relations, not by utilizing Article XV, section 9, but rather by using Article III, section 1. The court held that under Article III, section 1, the Legislature has plenary authority over school districts. In the exercise of that authority, the Legislature could constitutionally give the Court of Industrial Relations jurisdiction over disputes between teachers and school districts.

The Orleans rationale is consistent with the holding in this case. In each case, a specific provision of the Constitution of the State of Nebraska gave the Legislature complete authority over certain public employers and employees. In Orleans, Article III, section 1, gave the Legislature that authority over school districts and its employees. In the case at hand, Article IV, section 19, gives the Legislature that authority over the Department of Public Institutions and its employees.

The order of the Court of Industrial Relations is correct and is affirmed.

AFFIRMED.

BOSLAUGH and CLINTON, JJ., concur in the result.

NEWTON, J., dissenting.

I respectfully dissent from the majority opinion. A major error appears based on Article IV, section 19, of the Constitution of Nebraska, which states that the management, control, and government of our public institutions "shall be vested as determined by the Legislature." Based on this provision it is asserted that the Legislature has simply delegated administrative authority while retaining complete control. The constitutional

provision mentioned *does not* give the Legislature complete control over state institutions. It simply gives the Legislature the right to designate what body shall exercise this authority.

Prior to the 1958 amendment to Article IV, section 19, the Board of Control was a constitutionally created body with full power and authority over state institutions. Under the power conferred by the amended section the Legislature has vested these powers in the Department of Public Institutions. A change of name has occurred but the powers and duties of the department are synonymous with those formerly executed by the Board of Control. See Ch. 83, art. 1, § 83-101.01, R. R. S. 1943. It appears that both bodies were, or are, executive departments.

Article IV, section 1, of the Constitution, designates certain executive officers and also provides that it shall include "the heads of such other executive departments as set forth herein or as may be established by law." It further provides that heads of departments established by law shall be appointed by the Governor and may be removed by him, and the department heads shall have authority to remove and appoint all subordinate employees. Article IV, section 27, of the Constitution of Nebraska, contemplates the creation of the new executive state offices by the Legislature. It is clear that not all state administrative bodies are to be deemed simply legislative adjuncts.

The Nebraska statutes make it clear that the Department of Public Institutions is an executive body. Section 81-101, R. S. Supp. 1974, specifically designates it as such. It has charge of the state hospitals and the Nebraska Veteran's Home. True, it operates under laws promulgated by the Legislature, but so does the Governor, Secretary of State, etc. The fact remains that the Department is specifically charged with the operation of these institutions and operates them through subordi-

nate supervisors, administrators, or directors. It has direct and sole responsibility for operating these institutions just as does the board of directors of a corporation.

The terms administrative and executive are usually deemed to be interchangeable. Regardless of which term is resorted to it is evident that here we are dealing with a body comprising a part of the executive department of the state. Article IV, section 19, of the Constitution of Nebraska, grants the management, control, and government of public institutions to the body named by the Legislature, namely, the Department of Public Institutions. The constitutional language divests the Legislature of "management, control, and government" of the institutions and necessarily vests such powers as to employees exclusively in the department.

SPENCER, J., joins in this dissent.

JESSIE M. KORTUS, APPELLANT, V. WERNER P. JENSEN, APPELLEE.

FRED KORTUS, APPELLANT, V. WERNER P. JENSEN, APPELLEE.

237 N. W. 2d 845

Filed January 22, 1976. Nos. 40057, 40076.

1. **Verdicts: Trial.** A motion for a directed verdict or its equivalent must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Physicians and Surgeons: Torts: Negligence.** In performing professional services a doctor who is a specialist must use the skill and knowledge ordinarily possessed and used under like circumstances by members of his specialty in good standing in his or similar localities. In the application of this knowledge and skill the doctor must also use reasonable care.
3. ———: ———: ———. In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of

a doctor in a particular community, the test is that which physicians or surgeons in the same neighborhood and in similar communities engaged in the same or similar lines of work would ordinarily exercise for the benefit of their patients.

4. **Physicians and Surgeons: Torts: Negligence: Trial: Evidence.** Proof of medical negligence (malpractice) requires two basic evidentiary steps, followed by proof relating to proximate cause and damages: (1) Evidence of the generally accepted and recognized standard of care or skill of the medical community in the particular kind of care; and (2) a showing that the physician or surgeon in question negligently departed from that standard in his treatment of the plaintiff. The burden of establishing *both* these essential elements rests upon the plaintiff's introduction of expert medical testimony.
5. **Physicians and Surgeons: Torts: Negligence: Trial: Expert Witnesses.** A specialist from one medical community is competent to testify as an expert witness in a medical malpractice case as to the standard of care or skill required in another community, if the witness has knowledge of and familiarity with the practice and standard of the locality in question or in similar or like communities.
6. **Physicians and Surgeons: Torts: Negligence: Trial: Witnesses.** The testimony of other physicians that they would have followed a different course of treatment than that followed by the defendant, or a disagreement of doctors of equal skill and learning as to what the treatment should have been, does not establish negligence. It is not enough merely to present the testimony of a doctor who would have acted differently, or who is willing to express the opinion that an operation should have been performed differently.

Appeals from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

William J. Riedmann and E. Terry Sibbernsen of Riedmann & Welsh, for appellants.

Lyle E. Strom and C. L. Robinson of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee.

Heard before SPENCER and BOSLAUGH, JJ., and WARREN, VAN PELT, and FAHRNBRUCH, District Judges.

WARREN, District Judge.

Plaintiff Jessie M. Kortus brought this medical negli-

gence action against the defendant Werner P. Jensen, M.D., for a sciatic nerve injury she sustained while undergoing hip surgery by the defendant. The plaintiff Fred Kortus filed a separate action for the husband's loss of consortium. The two actions were consolidated for trial. At the conclusion of the plaintiffs' case-in-chief, the trial court sustained the defendant's motion for dismissal of the respective actions. Plaintiffs appeal. We affirm.

Plaintiff Jessie M. Kortus, to whom we hereafter refer as the plaintiff, age 39, suffered from degenerative arthritis of the left hip. After consultation and examination, the defendant recommended a total hip arthroplasty, surgical reconstruction of the hip joint. A thorough discussion of possible problems was had, her husband was consulted, and plaintiff consented. Plaintiff underwent surgery on November 3, 1972, at Archbishop Bergan Mercy Hospital, where she had been employed as a medical secretary up to that time. Plaintiff first noticed a numbness and pain in her left leg on the afternoon of the day of surgery, which continued until her discharge from the hospital on November 22, 1972. She left the hospital wearing a brace on her left foot and leg which she wore daily for almost a year in an attempt to alleviate the causalgic pain. A neurosurgeon, Dr. Daniel McKinney, twice hospitalized the plaintiff, for 29 days in December 1972, and for 27 days in January 1973, and performed lumbar sympathetic blocks by injection of a local anasthetic in the nerve area. Outpatient physical therapy followed. Pain medications were prescribed. On October 24, 1973, plaintiff was again hospitalized and Dr. McKinney performed a surgical sympathectomy to relieve the pain. Plaintiff continued to suffer a burning pain in her left foot, and was unable to do outside work or engage in her normal activities. The new hip joint itself functioned satisfactorily. She entered the hospital once more on July 22, 1974, for treatment of a stomach disorder and was discharged

July 31, 1974. Her condition improved and she returned to work as a medical secretary at St. Joseph's Hospital on August 5, 1974. Dr. McKinney testified that in his opinion the damage to plaintiff's sciatic nerve was occasioned by a stretching of the nerve at the time of the formation of the new hip joint. He further stated that plaintiff will continue to have some discomfort in her left foot for an indeterminate length of time, and that at time of trial she still experienced some sensory loss and numbness over the sole of her left foot, but showed good strength in her left leg and foot, except for some weakness in toe movement.

Plaintiff's petition alleges that during the course of the total hip procedure performed by defendant, "plaintiff suffered a traction type injury to the sciatic nerve which was incurred during the formation and insertion of the new hip joint by defendant" and that "the injury * * * was the direct and proximate result of the negligence of the defendant, Werner P. Jensen, in the formation and insertion of the Charnley-Mueller acetabular and femoral components."

We first note that there was no allegation in the pleadings regarding lack of an informed consent, and therefore such issue is not before the court.

Plaintiffs' sole assignment of error is that the trial court erred in directing a verdict for defendant at the conclusion of plaintiffs' case. We therefore review the record in accordance with the rule cited in Wees v. Creighton Memorial St. Joseph's Hospital, 194 Neb. 295, 231 N. W. 2d 570 (1975): "A motion for a directed verdict or its equivalent must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence."

Plaintiffs relied upon a portion of the deposition of

the defendant, and the expert testimony by deposition of Donald S. Harder, M. D., of Denver, Colorado, to establish a prima facie case. Their testimony must be examined in some detail.

Dr. Jensen, the defendant, testified that he had practiced his specialty of orthopedic surgery in Omaha, as a board certified surgeon, since 1950. His testimony included an extensive history of experience and continuing education, including having performed 103 total hip procedures. He stated that the practice of orthopedic surgery in Omaha is comparable to, or the same as, the practice of orthopedic surgery throughout the country; that neither the American Board of Orthopedic Surgery nor the American Academy of Orthopedic Surgeons sets standards of procedure other than orthopedists discussing them at meetings. Defendant described the technique he used in the subject surgery, beginning with the Austin-Moore approach, and including the technical surgical procedure which he followed to prevent injury to the sciatic nerve, which involves leaving the sciatic nerve encased in its surrounding muscles, pulling the muscles out of the way and keeping the retractors right on the hip joint so as to not endanger the sciatic nerve; that the sciatic nerve at that point is the size of one's ring finger, that he did not observe the sciatic nerve in the instant operation, and did not make any effort to view the nerve. Defendant testified that the post-operative numbness in plaintiff's left leg was probably caused by a stretching of the sciatic nerve during the surgery; and that this was his first case of a post-operative complaint regarding injury to the sciatic nerve.

Dr. Donald S. Harder testified that he practices in Denver, Colorado, specializing in orthopedic and rehabilitative medicine. He is certified by the American Board of Orthopedic Surgery. He practiced medicine privately from 1964 until 1971 when he sustained a shoulder injury which prevented him from performing surgery. He presently teaches part-time at the University of Colo-

rado Medical Center where he operates a pain rehabilitation center. He had watched hip arthroplasty and total arthroplasty when they first came out. He had performed many arthroplasties of the hip of various types, but never a total hip arthroplasty.

Dr. Harder stated that he was familiar with the practice of orthopedic surgery in communities other than Denver, Colorado, and that he was not aware of any differences between the practice of orthopedic surgery in November of 1972 as between Omaha and Denver. He defined orthopedic surgery to include a total hip procedure. His testimony at this point is quoted because it is vital to this decision:

"Q. With reference to a total hip procedure Dr. Harder, are you familiar with the standards of care, if you will, the quality of performance imposed upon orthopedic surgeons during this procedure in Colorado?

A. Yes sir.

Q. With reference to the total hip procedure, are you familiar with the standard of care, that is, the quality of performance that is required of orthopedic surgeons doing this procedure nationally?

A. Yes. * * * Essentially the approach to the hip is a very standard approach which is used internationally. It is the Austin-Moore approach from the posterior, and it is this approach that is very standard. Now some of the techniques beyond that, there may be some differences from one locale to the next. * * *

Q. Dr. Harder, in your opinion as an expert in the field of orthopedic surgery, and your opinion based on reasonable medical certainty, were acceptable standards for the quality of care adhered to in the surgical technique utilized by Dr. Jensen, specifically, as he indicates in the operative report? * * *

A. Yes, I have an opinion, and my opinion is that it is not standard. * * *

Q. Dr. Harder, with reference to the performance of a total hip arthroplasty, by means of the Austin-Moore

incision, what in your opinion in November of 1972 in Omaha, Nebraska, would have been the acceptable standard with reference to care of the sciatic nerve? * * *

A. Well, in the few hundred exposures I have made with the Austin-Moore approach, I have always dissected out the sciatic nerve completely and placed around it a soft Penrose type of rubber tubing and gently retracted it and had it visualized in the operative field at all times; and at no time did I ever expose the hip or dislocate the hip joint without first identifying the sciatic nerve. * * *

Q. In your opinion, would the failure to do so constitute an unacceptable practice of orthopedic surgery? * * *

A. I have an opinion.

Q. What is your opinion?

A. Yes. The answer is yes.

Q. Now, Dr. Harder, had the standard been followed which you have testified to here today, that is, in your opinion the acceptable standard, that is, isolating and dissecting out the nerve — assume for a moment that standard had been followed in November of '72 in Mrs. Kortus' case, are you able to form an opinion as an expert in orthopedic surgery and your opinion based on a reasonable medical certainty as to whether or not Mrs. Kortus, had your standard been followed, whether or not she would have sustained a traction-type nerve injury to her sciatic nerve?

A. Yes.

Q. What is your opinion? * * *

A. In my opinion, the complication of partial interruption of the sciatic nerve would not have happened."

Dr. Harder concluded with the opinion that based upon his study of X-rays and medical and hospital reports, the plaintiff's sciatic nerve was damaged by being placed under undue pressure or stretch during the total hip procedure, and that there was some resulting permanent damage in the leg.

In performing professional services a doctor who is a specialist must use the skill and knowledge ordinarily possessed and used under like circumstances by members of his specialty in good standing in his or similar localities. In the application of this knowledge and skill the doctor must also use reasonable care. Halligan v. Cotton, 193 Neb. 331, 227 N. W. 2d 10 (1975); NJI No. 12.01.

In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a doctor in a particular community, the test is that which physicians or surgeons in the same neighborhood and in similar communities engaged in the same or similar lines of work would ordinarily exercise for the benefit of their patients. Mecham v. McLeay, 193 Neb. 457, 227 N. W. 2d 829 (1975); Meyer v. Moell, 186 Neb. 397, 183 N. W. 2d 480 (1971).

Under the foregoing rules, proof of medical negligence (malpractice) requires two basic evidentiary steps, followed by proof relating to proximate cause and damages: (1) Evidence of the generally accepted and recognized standard of care or skill of the medical community in the particular kind of care; and (2) a showing that the physician or surgeon in question negligently departed from that standard in his treatment of the plaintiff. The burden of establishing *both* these essential elements rests upon the plaintiff's introduction of expert medical testimony. The doctrine of res ipsa loquitur is inapplicable here.

In Robbins v. Nathan, 189 App. Div. 827, 179 N.Y.S. 281 (1919), the court said: "The court correctly charged the jury: ' "The defendant was not a guarantor of his work, or the result that would follow; he is not an insurer as to the result. In other words, in this case, he was required to use the ordinary care of such a man having the ordinary skill in this locality; and, if he does not, the mere fact that there is a bad result is not enough, but you have got to trace it to his lack of skill, or his negligence." ' Despite the relative inex-

perience of plaintiff's expert, Dr. Harder, in this particular procedure, when compared to that of the defendant, we think Dr. Harder was sufficiently qualified as to knowledge of general standards of care in orthopedic surgery to make him competent to testify as to such standard of care or skill in Omaha, Nebraska, at the time in question. We recognize that medical standards of care and skill are becoming national, rather than local or regional. There are no state lines recognized in the Nebraska rules which speak in terms of "similar localities" and "similar communities." The evidence that Dr. Harder had never performed a total hip procedure, had not practiced surgery since 1971, had never performed surgery in Omaha, Nebraska, and had never examined the plaintiff are all matters that go to the weight of the evidence to be accorded by the trier of fact, and do not prevent the plaintiff's expert from testifying to a general standard of care and skill in Omaha, Nebraska, if he testifies that he is familiar with that standard. A specialist from one medical community is competent to testify as an expert witness in a medical malpractice case as to the standard of care or skill required in another community, if the witness has knowledge of and familiarity with the practice and standard of the locality in question or similar or like communities. Annotation, 8 A. L. R. 2d 772.

The problem here is, did Dr. Harder testify to a general standard of care or skill, or did he testify to his own practice or technique in a more limited type of operation? We conclude that Dr. Harder specifically testified to his own personal technique in identifying, dissecting out, and sheathing the sciatic nerve with rubber tubing, and then limited that personal technique to a more limited type of surgery, namely, hip arthroplasty, as contrasted with *total* hip arthroplasty where the entire hip joint is surgically reconstructed. Dr. Harder at no time testified that there was a generally accepted medical standard of care or skill which re-

quired identification, dissecting out, and sheathing of the sciatic nerve in performing a total hip procedure. We are left to speculate as to whether his personal procedure may have been superior or inferior to the technique used by defendant in more than 100 total hip procedures. Dr. Harder's personal technique is irrelevant. Defendant was not required to adhere to Dr. Harder's standard, but rather to the medically accepted standard in general use in Omaha and similar communities.

It is not enough merely to present the testimony of a doctor who would have acted differently, or who is willing to express the opinion that the operation should have been performed differently. The Supreme Court of Washington was presented with similar evidence in Hayes v. Hulswit, 73 Wash. 2d 796, 440 P. 2d 849 (1968). The court there concluded: "In the last analysis, all that plaintiff's evidence establishes is a difference of professional opinion as to diagnosis and treatment. This alone is not evidence of malpractice. * * * Our disposition of this case is governed by the rule announced in Richison v. Nunn, 57 Wn. 2d 1, 16, 340 P. 2d 793 (1959), and recently reaffirmed in Versteeg v. Mowery, 72 Wn. 2d 754, 435 P. 2d 540 (1967): * * * The testimony of other physicians that they would have followed a different course of treatment than that followed by the defendant, or a disagreement of doctors of equal skill and learning as to what the treatment should have been, does not establish negligence. In such cases, the court must hold that there is nothing upon which the jury may pass, the reason being that the jury may not be allowed to accept one theory to the exclusion of the other."

The reasons for this rule were stated in the early case of Gramaldi v. Zeglio, 3 N. J. Misc. 669, 129 A. 475 (1925), wherein the court said: "The fact that the plaintiff introduced evidence of physicians and surgeons that they would have made incisions in the arm which would

have laid it open from the wrist to elbow is not evidence of malpractice. Surgeons of eminence frequently differ in their opinions as to the treatment to be used in a given case. To permit a jury to pass upon the question of malpractice because testimony is given by physicians that they would have used a different treatment from the one prescribed or followed would be to make a physician or surgeon a guarantor of the success of his treatment in every case. If he fails to restore his patient, he must face a lawsuit with its accompanying annoyances and expenses. If the plaintiff's position be sound, a jury must pass upon the question whether the treatment given was correct or not. As the plaintiff did not respond to the treatment given and his arm became restored to its condition prior to the fracture, it could be expected that a jury would reach the conclusion that some other treatment of the condition which arose should have been applied. The result would be to return a verdict for the plaintiff, notwithstanding the same infection might have followed the other kind of treatment. If such were the law, there would be few physicians and surgeons who would undertake to treat a case. For every failure to effect a cure would lay the basis for a lawsuit. * * * It takes more than the opinion of one or more physicians or surgeons that the treatment followed in a given case should have been different to lay a foundation for malpractice." See, also, Boyce v. Brown, 51 Ariz. 416, 77 P. 2d 455 (1938); Willis v. Western Hospital Assn., 67 Idaho 435, 182 P. 2d 950 (1947); Fritz v. Horsfall, 24 Wash. 2d 14, 163 P. 2d 148 (1945); Hazen v. Mullen, 32 F. 2d 394 (Ct. App., D.C., 1929).

It should be obvious that the practice of medicine is not an exact science which can be accomplished merely by the routine following of prescribed procedures. On the contrary it, perhaps more than any other profession, involves the exercise of individual judgment within the framework of established procedures within the profession. Proof of a difference in judgment within that

framework cannot amount to a proof of malpractice since such differences of opinion are consistent with the exercise of due care, or even the highest degree of care.

If a standard of care or skill existed in Omaha, Nebraska, and similar communities in November 1972, requiring that the sciatic nerve be identified, dissected out, and cushioned in a total hip procedure, it would have been a simple matter for Dr. Harder to have said exactly that. Having failed to do so, the plaintiffs' evidence would not have supported a finding that defendant did not exercise that degree of care and skill which the law requires, and the trial court was correct in dismissing the actions.

AFFIRMED.

FAHRNBRUCH, District Judge, concurs in the result.

MICHAEL L. CAIN, APPELLEE, V. LA GRANGE STEEL ERECTORS, INC., ET AL., APPELLANTS.
237 N. W. 2d 640

Filed January 22, 1976. No. 40058.

1. **Workmen's Compensation: Appeal and Error: Evidence.** The Supreme Court, on an appeal from the District Court in a workmen's compensation case, may set aside the judgment of the District Court only upon the grounds provided by statute which include "(3) the findings of fact are not supported by the evidence as disclosed by the record."
2. ———: ———: ———. When the record in a workmen's compensation case reflects nothing more than a resolution of conflicting medical testimony, this court will not substitute its judgment of facts for the judgment of the Workmen's Compensation Court.
3. **Workmen's Compensation: Evidence.** Where pain is sufficiently severe to prevent a normal function of a body member, a partial loss of use of that member results within the purview of section 48-121(3), R. R. S. 1943.

Appeal from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

M. J. Bruckner and Richard D. Sievers of Marti, Dalton, Bruckner, O'Gara & Keating, for appellants.

Robert T. Grimit of Baylor, Evnen, Baylor, Curtiss & Grimit, for appellee.

Heard before SPENCER, BOSLAUGH, and BRODKEY, JJ., and COLWELL and RIST, District Judges.

RIST, District Judge.

This is a workmen's compensation case. Plaintiff sustained injuries to both feet as a result of an accident on December 27, 1972, arising out of and in the course of his employment by the defendant, La Grange Steel Erectors, Inc. The one judge Workmen's Compensation Court found and determined that plaintiff sustained a 20 percent permanent partial disability to his right foot and made an award accordingly. On rehearing before the Workmen's Compensation Court en banc, that court found that plaintiff had sustained permanent partial disabilities to both his right and left feet and being a two-member permanent partial disability under section 48-121(3), R. R. S. 1943, resulted in a 13 percent permanent partial disability of plaintiff's body as a whole. Defendants appealed to the District Court which affirmed the en banc judgment of the Workmen's Compensation Court and defendants have now appealed to this court.

The appropriate rule on review of a case such as this is: "The District Court shall set aside a judgment of the Workmen's Compensation Court on rehearing only upon the grounds provided by statute, which include '(3) the findings of fact by the court are not supported by the record.' § 48-184, R. R. S. 1943; * * *. The Supreme Court on an appeal from the District Court in a workmen's compensation case may set aside the judgment of the District Court only upon the grounds provided by statute, which include '(3) the findings of fact are not supported by the evidence as disclosed by the record.' § 48-185, R. R. S. 1943. If this court so finds,

it then considers the matter de novo." McPhillips v. Knox Constr. Co., Inc., 190 Neb. 306, 208 N. W. 2d 261.

Defendants' principal contention is that there is no evidence to support a finding of any permanent disability to plaintiff's left foot, it being conceded there is evidence to support a finding of permanent partial disability to plaintiff's right foot.

The record reflects that plaintiff, while working as an ironworker on December 27, 1972, fell approximately 25 feet, landed on his heels, and sustained fractures of the calcaneus of both feet, with joint involvement in the right foot. Dr. James K. Styner, who was the attending physician, commenced treatment on the date of the accident, inserting a pin in the right foot and putting both feet in casts. Subsequently the pin and casts were removed. Plaintiff continued under Dr. Styner's care and treatment and remained off work until March 18, 1974, when he returned to limited construction work. Up to this time plaintiff's complaints to Dr. Styner dealt with his right foot.

On April 25, 1974, plaintiff complained to Dr. Styner of pain in both feet. On this date Dr. Styner found that the left foot demonstrated normal anatomy and testified he felt the pain was due to the recent physical activity of plaintiff after having been off work for an extended period, but that if the pain continued he would have to assume it was based on either an anatomical or psychological reason and that he did not believe plaintiff was a malingerer. He concluded that while X-rays did not reveal any basis for pain in the left foot, it did not mean a problem did not exist, but that he would not give an opinion of disability at that time, believing that further observation of the left foot was necessary.

Dr. Andris Matisons first saw and examined plaintiff on January 11, 1974, and for the second and last time on May 24, 1974. The plaintiff gave Dr. Matisons essentially the same history respecting the accident as was given Dr. Styner as well as a history of Dr. Styner's

treatment. At the examination on January 11th, plaintiff complained primarily of pain in his right foot and Dr. Matisons on that date found that plaintiff had a permanent partial disability in the right foot.

When Dr. Matisons examined plaintiff on May 24, 1974, plaintiff stated that he had returned to work but could not perform his work as an ironworker except on flat surfaces; that he could work only for several days a week; and that he suffered pain in both feet which increased the more he was on his feet. Examination of the left foot on that date revealed no limitations of motion or deformity.

When Dr. Matisons was asked if plaintiff had any permanent disability of the left foot the following testimony resulted: "A Based on the history of his injury, the X-rays of the fracture and above all his complaints of pain in the left foot, I would have to say that he does have a disability. * * * Q Based upon reasonable medical certainty, Doctor, do you think his disability is permanent? Do you have an opinion as to whether it is permanent? A I really don't. I would really have to be guessing one way or the other. * * * Q Do you have an opinion as to whether or not this is permanent? A Yes, I would. Q And is it permanent? A I would like to say it is a very thin line but I would have an opinion on it. He has developed this pain since returning to work and as far as I can tell if he continues the same type of activity and work he will continue to have the same type of thing. Q So you would conclude that this is permanent? A If he continues the same type of work that he is doing in this field it will be permanent."

On cross-examination Dr. Matisons was asked if there was any objective evidence to support an opinion of permanent disability of the left foot. Dr. Matisons' response was: "The one of a previous fracture of the os calcis on that side and I believe it had been testified to before that we can see the bone damage, if the bone is damaged. We do not see what happens to the cartilage

and soft tissues that are actually involved directly around the joint. In this case most likely the cartilage. If the blow was hard enough to break the bone then there is very likely damage to the cartilage. * * * Q So * * * you acknowledge that any opinion of permanent disability of the left ankle is premised solely on his testimony of pain that he has now, is that correct? * * * (Answer) I base my judgment on the complaint of pain by the individual and also knowing that a previous fracture of the left os calcis was present which could produce this type of pain."

Defendants argue that the only medical evidence supporting a finding of permanent partial disability to the left foot is the opinion of Dr. Matisons; that this is a guess; and that it rests on what plaintiff told him respecting pain and on no objective medical evidence and, therefore, the opinion is of no probative value. This is not an accurate reflection of the record. Whatever may be said concerning the relative strength or weakness of Dr. Matisons' opinion, it is clear that it rests on his knowledge of the nature of the accident, the fracture of the os calcis of the left foot, plaintiff's complaints of pain, and the doctor's knowledge of soft tissue damage occurring in this type of accident and injury.

It is worth noting that while Dr. Styner was unwilling to give an opinion at the time of his testimony concerning the left foot, he did testify as follows: "You cannot break a bone and take that kind of compression onto a joint. I don't care if you break it or not, you can do some damage to it and a cartilage you can't see radiographically and it is on that basis that I cannot say, yes, there is nothing there because there can be and you have got to stand the test of time to determine whether there is or not." In some measure therefore the disagreement of the doctors is not that permanent injury to the left foot cannot be determined on the basis of the evidence in the record but rather

when in point of time such a conclusion may properly be reached.

We cannot say that the decision of the Workmen's Compensation Court en banc was without any basis in the evidence. The following rule in Marion v. American Smelting & Refining Co., 192 Neb. 457, 222 N. W. 2d 366, is applicable: "Where the record in a case reflects nothing more than a resolution of conflicting medical testimony, there appears no purpose in this court substituting its judgment of facts for the judgment of the compensation court."

Defendants also contend that since there is no physical limitation to plaintiff's left foot as a result of the fracture but only a claim of pain, plaintiff is not entitled to compensation as pain alone is not compensable. While this court in some contexts has held that pain alone is not compensable it has never held that where the use or function of a specified body member cannot be had without substantial pain such as to interfere with the use of such member it would not be treated as a compensable loss. This court has held that pain can be a basis for compensable loss in an industrial disability situation under section 48-121(1), R. R. S. 1943. City of Lincoln v. Jordan, 131 Neb. 879, 270 N. W. 508. There is no reason why it may not form the basis for compensable loss where the loss of use or function of a specific body member is considered under section 48-121(3), R. R. S. 1943.

Pain in relation to loss of a specific member was considered in detail by the Georgia Court of Appeals in Williamson v. Aetna Casualty & Surety Co., 101 Ga. App. 220, 113 S. E. 2d 208, which held in part: "In injuries to specific members, loss of use, or disability, must necessarily be rated on the basis of pain among other factors, for where pain is sufficiently severe to prevent a normal function of the member a partial loss of use of that member results." Such reasoning is appropriate in this case.

There is evidence in this record that plaintiff's pain in both feet is the proximate result of the accident previously described and sufficiently severe to limit the use and function on a permanent basis. This evidence was obviously accepted by both the Workmen's Compensation Court and the District Court and we cannot say it was error to do so.

We affirm the judgment. Plaintiff is allowed an attorney's fee of $750 for services in this court.

AFFIRMED.

TRI-CITY BEER COMPANY, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

237 N. W. 2d 852

Filed January 22, 1976. No. 40064.

1. **Intoxicating Liquors: Administrative Law: Licenses and Permits.** Equipment furnished by a wholesale distributor of beer licensee to a retail package liquor licensee, and used only for display purposes, does not thereby become an advertising sign under the provisions of section 53-169, R. R. S. 1943.
2. **Trial: Witnesses: Administrative Law: Evidence.** A prior written statement of a witness, not a party, contrary to a statement made before an administrative tribunal, may be admitted by the tribunal for impeachment purposes, although not substantive evidence of the fact declared in the written statement.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Luebs, Tracy, Dowding, Beltzer & Leininger, for appellant.

Paul L. Douglas, Attorney General, and Robert R. Camp, for appellee.

Heard before SPENCER, NEWTON, and CLINTON, JJ., and HENDRIX and BUCKLEY, District Judges.

HENDRIX, District Judge.

The Tri-City Beer Company, plaintiff, appeals from

the judgment of the District Court for Lancaster County, Nebraska, affirming the action of the Nebraska Liquor Control Commission in suspending the license of the plaintiff for 7 days for an alleged violation of section 53-169, R. R. S. 1943. We affirm.

The Tri-City Beer Company is the holder of a wholesale distributor of beer license. Charles Lee Parks is the holder of a retail package liquor license. In about November 1972, the owner of the Tri-City Beer Company, John Folsum, brought a portion of a beer tapper to the business premises of Charles Lee Parks in Grand Island, Nebraska. The tapper was called a "jockey box." There was furnished a 5-gallon bucket with a Miller High Life decal displayed on the bucket. There was an opening in the front of the bucket and a Falstaff spigot was attached thereto by means of a coupling. There were coils of plastic tubing inside the bucket through which beer could flow to the spigot. At the other end of the coils there was a coupling at the top and back side of the bucket. There was also supplied a black rubber or plastic tubing with a special fitting which could be attached to the back side coupling and into a keg of beer with a special fitting on the tubing for that purpose. The lid for the bucket was supplied, but the tapping equipment and CO2 regulator were not. The jockey box had an intrinsic value for tapping a keg of beer and could be used at such functions as picnics, parties, weddings, and similar functions. The jockey box had previously been used for that purpose in Kearney, Nebraska. In this case, however, it was not used for the purpose of drawing beer, but was placed on display on top of a stack of Miller High Life beer in Mr. Parks' place of business. It was used only for display purposes, and the licensees testified that such was their intention.

At the hearing before the Nebraska Liquor Control Commission, a written statement of Charles Lee Parks was admitted into evidence, over objection, upon his di-

rect examination by the commission. It was offered to the commission after Mr. Parks denied that Mr. Folsum had offered to sell him the jockey box for $75. The statement contained the words, "Folsum advised that when he Folsum had it complete I would have to pay him about $75, for the whole unit, if I Parks wanted this unit."

The substantive question presented to this court is whether the jockey box constituted an "advertising sign" under the statutes of the State of Nebraska. The furnishing of equipment is prohibited in section 53-169(1), R. R. S. 1943, which states in part: "No * * * distributor, or wholesaler shall * * * (a) * * * supply, furnish, * * * loan * * * any * * * equipment on the premises of a place of business of another licensee authorized under this act to sell alcoholic liquor at retail * * *." The furnishing of interior decorations are likewise prohibited in section 53-169(2), R. R. S. 1943, but an exception is made for advertising signs for inside use costing less than $100. This statute states in part: "(2) No * * * distributor, or wholesaler shall * * * furnish, * * * lend, * * * any interior decorations other than advertising signs * * *."

It is concluded that the jockey box is not an advertising sign. It was constructed for tapping beer, it had been used for tapping beer, and with the CO2 gas, regulator, and tapping equipment, it was capable of being used again for tapping beer. The Miller High Life decal and the Falstaff spigot added some measure of advertising, of course, but did not change the essential character of the jockey box. It is still an apparatus to remove and cool beer from kegs. Its display does not change the inherent nature of the item. Many products and pieces of equipment bear signs and seals and are placed on display by a retailer. This does not make them advertising signs. Finally, the stated intent of the licensees that the jockey box was to be used for display purposes, together with its use for such purposes, do not make it

an advertising sign. Both licensees were aware of the purpose for which it had and could be used, and they knew that it was not a sign, but a piece of equipment. For a violation, the law only requires that the item be "equipment" and "furnished." Both were shown by competent evidence.

The procedural question presented to this court pertains to the receipt in evidence of the statement of Mr. Parks. Mr. Parks was not a party to the action, but may be impeached as a witness by the introduction of statements contrary to those made in court. Schluter v. State, 153 Neb. 317, 44 N. W. 2d 588. At least the same latitude would be granted at an administrative tribunal. While Mr. Parks was a witness for the commission, under these and other proper circumstances impeachment will lie. Mantell v. State, 141 Neb. 15, 2 N. W. 2d 586. The statement was therefore admissible for the purpose of impeachment at least, and particularly in a hearing before an administrative tribunal. The statement was not required as substantive evidence of the fact declared by the commission. No error can be predicated upon the receipt of the document.

We find that the commission's findings were supported by substantial evidence and that the District Court has applied proper statutory criteria in its review of the commission's decision. The 20's, Inc. v. Nebraska Liquor Control Commission, 190 Neb. 761, 212 N. W. 2d 344.

The penalty prescribed by the commission, a suspension of 7 days, is a reasonable penalty.

AFFIRMED.

JOSEPH H. MCGINTY, APPELLANT, V. GERALD V. MCGINTY ET AL., APPELLEES.

237 N. W. 2d 855

Filed January 22, 1976. No. 40097.

1. **Fraud: Rescission: Pleadings: Trial.** To maintain an action

for rescission because of false representations the party seeking such relief must allege and prove what representations were made; that they were false and so known to be by the party charged with making them, or else were made without knowledge as a positive statement of known fact; that the party seeking relief believed the representations to be true; and that he relied and acted upon them and was injured thereby.

2. **Fraud: Trial: Evidence.** Fraud is never presumed, but must be established by the party alleging it by clear and satisfactory evidence.
3. **Fraud: Time.** Fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on representations or statements which involve mere matters of futurity or things to be done or performed in the future.

Appeal from the District Court for Dakota County: JOSEPH E. MARSH, Judge. Affirmed.

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

Sandra K. Olejniczak, for appellees.

Heard before SPENCER, BOSLAUGH, and BRODKEY, JJ., and COLWELL and RIST, District Judges.

COLWELL, District Judge.

This is an action in equity for an accounting and to set aside a quit claim deed executed September 20, 1968, by plaintiff Joseph H. McGinty, a single man, then aged 64 years, conveying 95.58 acres of land in Dakota County, Nebraska, to his son, Gerald V. McGinty, and Josephine McGinty, husband and wife. The action was commenced May 8, 1969. Trial to the court was had beginning February 20, 1975, after several delays occasioned by plaintiff. The petition alleges failure of consideration, fraud, false representation, and error in description. Plaintiff contends he intended to convey only 1 acre as a gift. Defendants claim the agreed consideration was $30 per acre, of which $2,000 had been paid. The trial court found for defendants and ordered them to pay plaintiff $867.40, the balance of the consideration, plus interest. We affirm.

We hear the matter de novo subject to the condition that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying. Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131.

Beginning in 1966 dialogue began between the parties relating to defendants moving from California to South Sioux City, Nebraska, and plaintiff conveying a part of his farm to them. In August 1967, defendants visited plaintiff in Nebraska, and they then had further similar conversations that plaintiff would convey to the defendants that part of his farm lying north of the power line. These conversations generally included references to defendants using the land for a farm, building a home on the land, and building a boat dock or marina. Gerald did represent in general terms that he would assist plaintiff in his farm work, all without reference to either time or particulars. Defendants' evidence is that plaintiff offered to give them the land north of the power line, and, later, plaintiff agreed to accept $30 per acre for that land. The exact acreage was unknown at the time since the survey was not made until the next year. No written agreement or memorandum of agreement was made by the parties. Defendants returned to California and sold their home in December 1967.

In the fall of 1967 Josephine McGinty wrote two letters to plaintiff which are in part: "Norwalk, Calif. * * * Dear Dad: We made it back to Los Angeles just fine. * * * Sure wish you could have come back with us. * * * We have $10,000.00 cash so far and we can get more if we need it. We're ready to start building around the first of June, 1968. So get your paper and pencil out. Where are we going to start first? The Motel? The snack bar and Tavern? The Landing? * * * You know what you want and the best place for

it. I can be your secretary and get the bids, do the running around and make the different contacts that would be necessary. * * * What do you think? How much cash do you think it will take? We'll bring our two boats back this next trip. We can rent them out for so much an hr. Well Dad, write us what you think we need. If we work it right, we ought to make a living, right? We're trying to think of a good name to call it. How's this for a starter: * * * Lets make 1968 our big year?! Love Jerry, JoAnn. P. S. Are you with us? On this? We are serious?! Are you?

"Oct. 16, 1967. Dear Dad, We were real glad to hear from you. * * * In the mean time could you check to see or you know what has to be done as far as clearing and grading so that we can put in a boat landing or dock and Bar with Courts for trailers and etc. or Motel (you know). * * * Jerry wants to know what you think about getting that farm really going. Do you think we can make a living off it? * * * Jerry doesn't really want to have a job in the city part-time or otherwise. I think he just wants to put everything he's got in to the farm—and with a little effort and time you'll have quite a ranch and farm and Boat Palace Let's say by 1970. * * * Jerry doesn't know how Mike, Paul, & Jane will feel about us coming back there with you. He doesn't want them having hard feelings about this. Do you think they will? All we want to do is make a living. * * * How about you calling us on the telephone, * * * we can square away things you want to know about and us too. Things that can be done back there now and while we are still here and will send you the money that you need for these things as you have them done. Do you follow me?! Like the work you suggested in your letter — road — river — both ends of the farm. We'll pay for it. * * * Love, Jerry, JoAnn and Children."

Josephine McGinty explained these letters and the proposals contained therein as a "pipe dream" on her

part. The evidence was that the area was not suitable for the construction of a boat marina except at great expense.

During the winter of 1967-68 defendants hired bulldozing work done on the 95.58 acres, all with the plaintiff's knowledge and without objection. In March 1968, Josephine returned to South Sioux City to arrange for her children to attend school there the next fall. While there, she again talked to plaintiff about the transaction between the parties and it was agreed that a survey would be made. After she returned to California, defendants talked to plaintiff by telephone and it was agreed that defendants would send $2,000 to plaintiff as part payment for the farm, which was done and plaintiff accepted that sum in April 1968. Plaintiff first contended that the $2,000 was a gift and, later, claimed that it was a loan.

In August 1968, defendants moved from California to South Sioux City and lived for a time in a trailer near plaintiff's house. With plaintiff's knowledge, an official survey was made of that part of the farm north of the power line. Plaintiff assisted the surveyor in placing stakes and poles. A copy of the official survey was furnished to plaintiff showing that the tract contained 95.58 acres. Defendants paid for the expense of the survey.

A few days prior to September 20, 1968, plaintiff and defendants went to the office of Francis J. Kneifl, an attorney of South Sioux City, Nebraska, who was a brother of Josephine McGinty. The purpose was to prepare a deed. Plaintiff requested that his own attorney, Mark J. Ryan, South Sioux City, Nebraska, be employed for this purpose. The parties then went to the office of Mark J. Ryan where plaintiff requested that a quit claim deed be prepared conveying the property described in the copy of survey which was furnished to Ryan conveying that property to defendants. The deed was not prepared that day. Two or three days later

plaintiff was informed that the deed was ready for execution. On September 20, 1968, plaintiff and Josephine went to Ryan's office where the deed was exhibited to both of them, and Ryan read the instrument to plaintiff. Plaintiff signed and acknowledged the quit claim deed in the presence of Josephine and attorney Ryan. The deed was recorded on October 10, 1968. The description in the deed is by metes and bounds the same as set out in the official survey. The deed recites that the consideration was "One dollar and other valuable consideration," and particularly recites "said land containing 95.58 acres more or less." Defendants paid for Ryan's services. At the time the deed was delivered, Josephine offered to pay plaintiff the balance of the purchase price. Plaintiff declined, saying that the defendants would need that money in building their house. Shortly after the deed was delivered, the defendants began constructing a five bedroom house on the land. In the years 1967, 1968, and 1969 defendants paid more than $7,000 for land leveling and dirt moving. The house was located in the southeast part of the tract conveyed at a point more than 1,400 feet from the Missouri River near the high water bank line. Attorney Mark J. Ryan was deceased at the time of trial.

Plaintiff denies any agreement or intentions on his part to convey the 95.58-acre tract to the defendants and, on the contrary, states that he agreed and intended to convey to them as a gift a 1-acre tract of land on which to build a house. There is nothing in the record showing any source or suggestion of a legal description of that 1-acre tract. Plaintiff claims that he first learned of the description contained in the deed in February 1969.

"To maintain an action for rescission because of false representations the party seeking such relief must allege and prove what representations were made; that they were false and so known to be by the party charged with making them or else were made without knowledge

as a positive statement of known fact; that the party seeking relief believed the representations to be true; and that he relied and acted upon them and was injured thereby. * * * Fraud is never presumed, but must be established by the party alleging it by clear and satisfactory evidence." Russo v. Williams, *supra.*

In 37 Am. Jur. 2d, Fraud and Deceit, § 57, p. 86, it is stated: "The general rule * * * is that fraud must relate to a present or pre-existing fact, and cannot ordinarily be predicated on representations or statements which involve mere matters of futurity or things to be done or performed in the future." It is further stated therein at § 62, p. 96: "Thus, as between parties at arm's length, a representation of intention as to future events, which was not falsely made with intent to deceive, does not afford a basis for rescission of the contract induced by the representation."

The transaction here had a history of more than 2 years; most of that time defendants were in California. Up to February 1969, plaintiff and defendants enjoyed a normal, friendly family association with no showing in the evidence that the defendants either used or attempted to use their family relationship to influence plaintiff in the transaction. The description of the 95.58 acres was openly determined by the official survey and a copy of the survey was furnished to plaintiff. Plaintiff had his own attorney prepare the conveyance from the description contained in the survey furnished by him.

As to the claimed misrepresentations made by defendants concerning the use of the land for farming and building a boat dock or marina, particularly as contained in Josephine's letters, these representations were material; however, they related to future acts, plans, and conduct of defendants, and there is no evidence that they were intended by defendants, or either of them, to defraud plaintiff; they were not statements of present or preexisting facts; and the evidence is that plaintiff did not rely thereon as shown by his own testi-

mony on direct examination: "Q Do you recall anything about what was said in the course of the conversation? A No. Q Do you have any recollection of any conversations with your son and daughter-in-law about their returning here to Nebraska to live in 1967? * * * A Yes. Q Do you remember where that conversation took place, Mr. McGinty? A I believe that's out on the farm. * * * Q Would you relate to the best of your present recollection what you said and what your son and daughter-in-law said in the course of this conversation? A I agreed with them about coming back to make a home in Nebraska. * * * Q Joe, you have to say what they said and what you said, do you understand? Tell us their words they used, not exactly but in substance. A Well, in substance they was coming back here to make a living, they was going to build a home out on the farm or near the farm and they had a boat and they was going to put a boat in the river and a little boat dock there and all live and enjoy life I figured."

Plaintiff's claim that the $2,000 paid to him by defendants was not payment of a part of the purchase price and his claim that he intended to convey only 1 acre of land both lack credibility, and the evidence in support thereof does not meet plaintiff's burden of proof.

There is no fraud here.

Plaintiff claims the consideration of $30 per acre was inadequate and he offered expert evidence that the land had a value of $350 per acre as commercial land abutting on the river and near to a city.

"* * * mere inadequacy of consideration is not sufficient, even in equity, to warrant the setting aside of a contract." Sic v. Loup River Public Power Dist., 136 Neb. 506, 286 N. W. 700.

The evidence was that the 95.58 acres were subject to overflow and in 1969 the river had backup water to within a few feet of defendants' house. About 15 acres of the tract was tillable and there was some limited

pasture. Most of the land was grown up in brush, trees, and willows. We conclude that, as between these parties and considering the attending circumstances, $30 per acre was the consideration agreed upon by the parties and was neither inadequate nor inequitable.

Plaintiff claimed as a part of the consideration that Gerald agreed to assist plaintiff in his farm work and that Gerald failed to do so. At most the evidence was that Gerald made some general representations that he would help his father, which Gerald did do up to a time in 1969, when plaintiff acquired a housekeeper which caused a strained relationship between them. Plaintiff failed to prove that this claimed error was a part of the consideration for the conveyance.

Error is claimed that a copy of an appraisal made by the Home Federal Savings & Loan Association, Sioux City, Iowa, was admitted into evidence without foundation showing that the land had a value of $100 per acre. This was error without prejudice to the plaintiff and is further disposed of by Miller v. Banner County, 127 Neb. 690, 256 N. W. 639: " 'In a case tried to the court, the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was admitted.' "

Plaintiff claims error in that the court limited his cross-examination of Josephine McGinty concerning the issue of building a marina. The record shows the following: "Court: Well, I think we have gone into it far enough anyway. You have established your record." The limiting of cross-examination is within the discretion of the trial court. See Chicago Lumber Co. v. Gibson, 179 Neb. 461, 138 N. W. 2d 832.

"Where a court of equity has obtained jurisdiction of a case for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation." Zwink v. Ahlman, 177 Neb. 15, 128 N. W. 2d 121.

The plaintiff has failed to sustain his burden of proof. The court properly denied plaintiff's prayer for rescission and accounting and ordered defendants to pay plaintiff $867.40 and interest.

AFFIRMED.

LONNIE A. BREINER, APPELLEE, V. TED OLSON, APPELLANT.
237 N. W. 2d 644

Filed January 22, 1976. No. 40112.

Contracts: Trial: Judgments. In an action for the recovery of amounts due upon a severable contract, judgment may be rendered for the items established by the evidence, but not for any claim not proved as alleged.

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

Nelson, Harding, Marchetti, Leonard & Tate and Alan L. Plessman, for appellant.

Patrick J. Heaton, Jr., for appellee.

Heard before WHITE, C. J., BOSLAUGH, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

KUNS, Retired District Judge.

This is an appeal from a judgment of the District Court for Holt County, Nebraska, affirming a judgment of the county court of that county.

The action arose from a contract of employment by which the appellee had performed services for the appellant for the years 1969 through August 14, 1972. The record shows that the parties made an initial oral agreement for the employment of appellee as a farm manager upon the appellant's farms with compensation to appellee of a salary, pick-up rental, and a place to live. In subsequent years, new agreements were made and when operations began to include custom farming, the

appellee was also granted a commission on the amounts thus earned. No specific agreements were ever made for the payment of annual bonuses to appellee although the appellant did pay annual bonuses in the amounts of $1,200, $1,523, and $1,800 during the years 1969, 1970, and 1971. Appellant discharged the appellee on August 14, 1972, and, shortly thereafter, appellee brought action for the amounts claimed by him to be due for his services. In his petition, he alleged an oral contract of employment under which he was to be paid a salary of $525 per month, pick-up rental of $130 per month, commission on custom-farming of 10 percent of the amounts charged, and a bonus for the year 1972 of $3,000. The amounts due for salary, pick-up rental, and commission were stipulated between the parties and judgment entered for such amounts. Although appellee pleaded that he was discharged without cause, he did not allege or prove any damage arising from wrongful discharge. The allegation and prayer concerning the bonus was subsequently amended by appellee to claim the sum of $2,000, as being the amount earned during two-thirds of the year. The appellant denied that he had ever made any promise to pay appellee a bonus.

Appellee testified that for the year 1972, his salary remained at $525 per month and his pick-up rental was increased by $25 to $130 per month, and that at a later time, when discussing additional operations, he asked for more money, "something like $3,000" and an additional tractor, to which appellant replied "you do the work and we will get along—no problem." Appellant testified that he had never discussed or promised to pay a bonus of $3,000 and that during the previous 3 years, he had made a determination of an appropriate bonus for appellant in view of general operations and yields for the year under consideration. For reasons which are not clear from the record, the trial court found that the amount of $1,320 was due appellee for "earned bonus."

There was no allegation or proof to support any right of recovery upon a theory of quantum meruit. The evidence was insufficient to establish any promise to or acceptance by the appellee; the contract between the parties did not extend to an obligation to pay a bonus and appellee may not recover this item. Ely Constr. Co. v. S & S Corp., 184 Neb. 59, 165 N. W. 2d 562 (1969). See, also, Annotation, 43 A. L. R. 3d 503, at 507.

The contract is severable, both by its terms and the theory of the parties. Judgment was properly entered for the items and amounts stipulated between the parties. Such judgment is modified to show a finding and judgment in favor of appellant as to any bonus and will be affirmed as to the remainder thereof.

AFFIRMED AS MODIFIED.

BOSLAUGH, J., dissents.

CUSTOM LEASING, INC., A CORPORATION, APPELLANT, V. CARLSON STAPLER & SHIPPERS SUPPLY, INC., A CORPORATION, APPELLEE.

237 N. W. 2d 645

Filed January 22, 1976. No. 40146.

1. **Contracts.** In a contract upon a form prepared and regularly used by one of the parties, disputed provisions of doubtful or ambiguous meaning should be construed against the party preparing such document.
2. **Contracts: Guaranty: Subrogation.** A guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control, and, in the absence of assent, waiver, or estoppel, he is generally released by an act of the creditor which deprives him of such right.
3. **Contracts: Guaranty: Subrogation: Waiver: Principal and Surety.** Where the creditor has security from the principal and knows of the surety's obligation, the surety's obligation is reduced pro tanto if the creditor (a) surrenders or releases the security, or (b) willfully or negligently harms it, or (c) fails to take reasonable action to preserve its value at a time

when the surety does not have an opportunity to take such action.

4. **Trial: Judgments.** The judgment of the trial court in an action at law in which a jury has been waived has the effect of the verdict of a jury and will not be set aside unless clearly wrong.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

Monen, Seidler & Festerson, for appellant.

Larry R. Forman of Schmid, Ford, Mooney, Frederick & Caporale, for appellee.

Heard before SPENCER, MCCOWN, and NEWTON, JJ., and COLWELL and IRONS, District Judges.

MCCOWN, J.

This is an action on a guaranty agreement. Jury trial was waived and the case was tried to the court. After trial, upon consideration of the evidence the District Court entered judgment against the plaintiff and in favor of the defendant, and plaintiff has appealed.

The plaintiff, Custom Leasing, Inc., is a Nebraska corporation engaged in the business of purchasing various kinds of equipment and leasing it to users. It is a wholly owned subsidiary of the Otoe County National Bank of Nebraska City, Nebraska. The defendant, Carlson Stapler and Shippers Supply, Inc., is a Nebraska corporation engaged in the business of selling and distributing industrial machinery, among other things.

In 1970, the defendant contacted Creative Buildings, Inc., of Urbana, Illinois, which was in the business of constructing prefabricated modular homes. Creative Buildings was interested in securing specialized equipment for use in the manufacture and assembly of modular homes but was unable to finance the purchase of the equipment. Plaintiff and defendant together with Creative determined that plaintiff would buy the equipment from the defendant and lease it to Creative, subject to defendant's guaranty.

The plaintiff purchased seven pieces of equipment built to Creative's specifications from the defendant for the sum of $55,116.32, and the equipment was shipped to Creative. On October 16, 1970, plaintiff entered into a lease of the equipment with Creative for a term of 3 years for a total rental of $68,256, payable $1,896 per month. The lessee, Creative, also had the option to continue the lease from year to year thereafter.

On November 2, 1970, the defendant executed the guaranty agreement involved here. It was on a dealer guaranty form prepared by plaintiff. After preliminary recitals, the agreement provides: "NOW THEREFORE, for and in consideration of mutual convenants and agreements, and for the further consideration of inducing the LESSOR to lease the aforesaid equipment to the said LESSEE, the undersigned DEALER does hereby promise that in the event the LESSEE fails to perform any of the terms of the aforesaid Lease Agreement, the DEALER agrees to Repossess the said equipment at his own expense and therwith (sic) simultaneously pay the LESSOR forthwith an amount equal to the number of remaining months and/or fraction of a month thereof under Lease Agreement #E-1801 multiplied by a factor of 2.777% computed against the original invoice cost of said equipment.

"IT IS FURTHER UNDERSTOOD AND AGREED that any and all costs and damages, incurred or sustained by LESSOR by reason of taking possession of said equipment will be borne and paid for by the undersigned DEALER."

On November 1, 1970, plaintiff, by letter, gave Creative an option to purchase the equipment at the termination of the lease for a purchase price of $2,624.59. Defendant did not know of the option to purchase until more than a year later.

On October 30, 1970, the plaintiff assigned the lease to Otoe County National Bank of Nebraska City, Nebraska. On November 12, 1970, the Otoe County Na-

tional Bank filed a financing statement in the recorder's office of Champaign County, Illinois, covering the equipment lease. It was improperly filed with the wrong authority.

Payments from Creative to plaintiff under the lease were reasonably current for the first 7 or 8 months of the lease, but were late during the summer of 1971, and payments for September and October 1971, were made on November 1, 1971. Thereafter Creative made no further payments. On February 8, 1972, defendant sent a check to the plaintiff for $1,460.12, the amount of plaintiff's service charges on the lease for the months of November and December 1971, and January and February 1972. On January 28, 1972, Creative Buildings, Inc., filed bankruptcy proceedings in Illinois, and notice to creditors was given on February 18, 1972. On February 22, 1972, plaintiff wrote to defendant advising it of the bankruptcy and made demand upon the defendant for $32,222.62, the amount then due and owing on the guaranty. The defendant responded on February 25, 1972, stating that it stood ready to make good its guaranty but before doing so asked for assurance that good and sufficient title to and right of possession of the equipment involved would be reconveyed and granted to the guarantor. The equipment was in the hands of the trustee in the bankruptcy proceedings, who laid claim to the equipment on the basis that the improper filing of the financing statement and the minimal option price for purchase at the termination were indicative of the fact that it was not a true lease but a secured transaction. The plaintiff then directed its attorneys to take steps to secure a release of the equipment and in June 1972, the Otoe County National Bank through its Illinois attorneys filed a reclamation petition in the bankruptcy proceedings. On March 19, 1973, after several continuances requested by plaintiff's counsel, the bankruptcy court determined that the lease to Creative was an effective lease and not a secured transaction

and granted possession of the equipment to Otoe County National Bank, the assignee of the plaintiff.

In the 13 months between February 1972, and March of 1973, there was a sharp decrease in the value of the equipment involved because of several factors, including a change in laws and building codes regarding modular homes. The evidence was that the equipment was worth more than $32,000 in February 1972, but when it was sold after March 19, 1973, it produced only $24,762.12. Because of the loss of value, the defendant was no longer willing to make payment on its guaranty.

On May 9, 1973, Otoe County National Bank reassigned the lease to the plaintiff and this proceeding was filed in the District Court on May 11, 1973. The amended petition sought the recovery of $8,522.82 due on the guaranty after application of all sums received in disposing of the equipment, and the sum of $6,789.39 for attorney's fees and costs in obtaining possession of the equipment from the trustee in bankruptcy, a total of $15,312.21.

The plaintiff asserts that the guaranty was absolute and not conditional and that a creditor's failure to protect collateral, even if negligent, is not a defense to a claim against an absolute guaranty. The defendant contends that the guaranty agreement as drawn is ambiguous, must be interpreted against the plaintiff, and that under the circumstances here, the guaranty was conditional rather than absolute. The defendant also contends that active negligence which results in detriment to a guarantor will exonerate the guarantor, even under an absolute guaranty. Defendant also asserts that affirmative acts or negligent omissions of the creditor which diminish the security of the guarantor discharge the guarantor pro tanto, if not completely.

In a contract upon a form prepared and regularly used by one of the parties, disputed provisions of doubtful or ambiguous meaning should be construed against the party preparing such document. The guaranty here

was on a form prepared for and used by the plaintiff. Any ambiguity or doubt as to its meaning must be resolved against the plaintiff. See Lyman-Richey Sand & Gravel Co. v. State, 123 Neb. 674, 243 N. W. 891. That principle is peculiarly applicable to guaranties. See City National Bank of Lincoln v. Denslow, 114 Neb. 600, 209 N. W. 254.

The language of the guaranty here must be interpreted with reference to the document as a whole and, if possible, effect must be given to every part. The provision for costs incurred by the lessor by reason of taking possession of the equipment, when read in conjunction with the language that the dealer agrees to repossess the equipment, may be interpreted as placing the burden of initial taking of possession from the lessee upon the lessor, with the obligation of the dealer then being to repossess from the lessor. The guaranty requires the dealer to repossess the equipment at its own expense and "therewith simultaneously pay" the lessor. The right to repossession can be said to be a condition precedent to the obligation to pay.

Under the circumstances here, the defendant could not repossess the equipment from the trustee in bankruptcy without proper evidence of title and right of possession of the equipment. Upon the filing of the petition for reclamation in the bankruptcy court by the plaintiff or its assignee, there was thereafter no room for any claim by the defendant guarantor. See, 3 Collier on Bankruptcy (14th Ed.), § 57.05[5], p. 153, § 57.21, p. 365; Bankruptcy Rule 304. The conduct of the parties themselves justifies the inference that the plaintiff assumed the right and burden of taking possession from the trustee in bankruptcy, and that payment by the defendant, under the terms of the guaranty, was to be made simultaneously with repossession. All these factors point to a conditional guaranty.

In any event, the critical issue in this case is not whether the guaranty is absolute or conditional but

whether or not the plaintiff's actions harmed or diminished the value of the equipment security, injured the defendant, or deprived it of subrogation rights. The general rule is that a surety or guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control and, therefore, in the absence of assent, waiver, or estoppel, he is generally released by an act of the creditor which deprives him of such right. See, 74 Am. Jur. 2d, Suretyship, § 86, p. 63, § 92, p. 67; 38 Am. Jur. 2d, Guaranty, § 126, p. 1135.

Restatement, Security, § 132, p. 358, provides: "Where the creditor has security from the principal and knows of the surety's obligation, the surety's obligation is reduced pro tanto if the creditor (a) surrenders or releases the security, or (b) wilfully or negligently harms it, or (c) fails to take reasonable action to preserve its value at a time when the surety does not have an opportunity to take such action."

The cases in many instances distinguish between affirmative action and passive nonaction, and impose liability for the affirmative action in either an absolute or conditional guaranty, but impose liability for passive negligence only under a conditional guaranty. Here the actions of the plaintiff and its assignee were affirmative and intentional as well as negligent. There is ample evidence upon which the District Court could have found that the actions of the plaintiff and its assignee bank in improperly filing the financing statement in Illinois, and in granting to Creative an option to purchase the equipment at the termination of the lease for $2,624.59, were taken without the knowledge or assent of the defendant guarantor; were willful or negligent; and that such actions were the direct and proximate cause of the refusal of the trustee in bankruptcy to deliver possession of the equipment and of the litigation, delay, and loss of value of the equipment. There are reasonable inferences to be drawn from the

evidence that except for these actions of plaintiff and its assignee, the trustee in bankruptcy would have promptly released the equipment without litigation and neither plaintiff nor defendant would have suffered a loss. Whether the guarantor is entitled to a full discharge or only pro tanto, it is released from its liability to the extent of the injury caused by the willful or negligent acts of the plaintiff and its assignee bank.

Some courts, on similar related issues, have extended the rule as to negligent affirmative acts to include a negligent failure to act. See, D. W. Jaquays & Co. v. First Security Bank, 101 Ariz. 301, 419 P. 2d 85; First Nat. Bank in Grand Forks v. Haugen Ford, Inc., 219 N. W. 2d 847 (N. D.); Behlen Mfg. Co. v. First Nat. Bank of Englewood, 28 Colo. App. 300, 472 P. 2d 703. Such cases are fully supportive of the determination here.

The issues of whether the actions of the plaintiff and its assignee bank were willful or negligent, and whether such actions deprived the defendant of rights to the equipment security, the amount of the loss, and the extent of defendant's injuries were all factual determinations. The case was tried to the court without a jury. Under such circumstances, the judgment has the effect of the verdict of a jury and will not be set aside unless clearly wrong. American Standard Ins. Co. v. Tournor, 186 Neb. 585, 185 N. W. 2d 267.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EARL WALDO LACY, APPELLANT.

237 N. W. 2d 650

Filed January 22, 1976. No. 40174.

1. **Criminal Law: Evidence: Witnesses.** In determining the suf-

ficiency of evidence to sustain a 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, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury.

2. **Criminal Law: Evidence: Verdicts.** The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it.
3. **Criminal Law.** Common purpose to commit a crime may be inferred from the circumstances surrounding the act and from the defendant's subsequent conduct.
4. **Criminal Law: Sentences: Guilty Plea.** A more severe punishment cannot be exacted in order to punish a convicted person for exercising his right to trial. However, sentence concessions are proper when a defendant pleads guilty to an offense.
5. **Criminal Law: New Trial: Time.** The time requirements of section 29-2103, R. R. S. 1943, are mandatory. A motion for a new trial under that section must be filed within 10 days after the verdict is rendered, not within 10 days from the date of sentencing, unless the verdict and sentencing occur on the same day.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

Keith N. Bystrom and Leonard P. Vyhnalek, for appellant.

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellee.

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

BRODKEY, J.

Earl Waldo Lacy appeals from a jury verdict finding him guilty of robbery as defined in section 28-414, R. R. S. 1943, and from the court's sentence of not less than 5 nor more than 8 years in the Nebraska Penal and Correctional Complex. The appellant contends that the evidence does not support the verdict and that the court abused its discretion in sentencing in view of the fact that Lacy's alleged accomplice, Wordie Wright,

Jr., received a 3-year term after pleading guilty. We affirm.

On November 1, 1974, an over-the-road truck driver, Earl J. Bartron, stopped at the I-80 reststop east of Sutherland. On his way into the restrooms, he observed a Thunderbird automobile parked with a person whom he identified as Lacy sitting in the front passenger seat. According to the victim, he met Wordie Wright, Jr., as he, Bartron, was entering the building. While he was in the restroom, he heard the door open again. Lacy and Wright were waiting when Bartron emerged from the stall. Bartron further testified that Wright had a gun, which he identified at trial, prevented Bartron from leaving, and asked Lacy if they should "kill him." Wright asked Bartron for money and he turned the cash in his wallet over to Wright. He did not know how much money was in the wallet. Wright allegedly told Bartron to get in a stall and stay there. Bartron did so and thought that he heard one person leave the building; and after another warning from Wright and a time elapse of perhaps 3 to 4 minutes, he heard a second person leave. Perhaps 15 minutes later, he left and told his partner, who was sleeping in the truck, about the robbery which they reported on a citizen's band radio.

Wright and Lacy were apprehended by a Nebraska State Patrol officer while traveling west on the Interstate Highway. The Thunderbird fit the officer's radio report description of the suspects. He clocked the car driven by Lacy at speeds exceeding 100 m.p.h. During his pursuit he noticed the passenger, Wright, take a black bag from the front seat and put it into the back of the car. After the car was stopped and the two arrested, the gun which Bartron identified as the robbery weapon was found in the bag. This gun had some distinctive characteristics - the bluing was off and it was slightly rusted.

Lacy testified in his own defense, and also called

Wright, who had pleaded guilty to robbery, as a witness. Both testified that they had stopped on their journey to California to rest the car and themselves. Wright said that he took Lacy's gun to the restroom and robbed Bartron. He testified that he kept the $15 Bartron gave him and that Lacy came to the restroom door after Wright robbed Bartron. According to Wright, an exchange occurred in which Lacy asked what was taking so long. Wright replied "nothing," and Lacy left, saying he would be in the car.

Lacy testified that he woke up in the car, went into the restroom, and saw Wright with the gun held to Bartron's head. Wright then allegedly told Lacy to get out. Lacy stated he then left and tried to start the car in order to leave Wright behind. The car stalled and Wright returned to the car, which Lacy then drove onto the highway.

The evidence against Lacy was mainly direct testimony by Bartron about Lacy's involvement in the crime. Lacy and Wright contradicted this testimony. The rule is that: "In determining the sufficiency of evidence to sustain a 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, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury." State v. Spidell, 194 Neb. 494, 233 N. W. 2d 900 (1975). After hearing all the evidence, including testimony by Lacy and Wright that they had less than $10 between them when they reached the reststop, and that Wright had produced $15 from his trouser waistband after he was arrested, the jury chose to believe Bartron. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Fowler, 193 Neb. 420, 227 N. W. 2d 589 (1975).

The testimony indicated that Lacy did not use the gun to threaten Bartron, nor did he have possession of the money taken from Bartron. The court gave the

jury the Nebraska Jury Instruction on aiding and abetting. Under this instruction if found guilty of aiding and abetting, Lacy could be punished as if he were the principal offender. There is ample evidence to show that the actual robbery was committed by Wright who was engaged with the defendant in a common, concerted unlawful act. NJI No. 14.12. Common purpose to commit a crime may be inferred from the circumstances surrounding the act and from the defendant's subsequent conduct. Miller v. State, 173 Neb. 268, 113 N. W. 2d 118 (1962).

Of course, silence or acquiescence is not enough to make one an accomplice, but the evidence here presented was sufficient to permit the jury to find conscious participation or sharing in the criminal act involved. State v. Alvarez, 189 Neb. 276, 202 N. W. 2d 600 (1972).

Lacy next claims that the disparity between Wright's 3-year sentence and his 5-year sentence, in addition to comments by the trial judge, indicate that the court penalized Lacy for not pleading guilty, which constituted an abuse of discretion on its part. At sentencing, the judge made the following remarks: "* * * the sentence that was passed against your co-defendant, Wordie Wright, was entered as a result of a plea bargain and he was given special consideration in that he entered a plea of guilty. Now, I'll give you a fair consideration, but you don't get any special consideration because you are not entitled to that. This was as a result of a plea bargain."

In State v. Shonkwiler, 187 Neb. 747, 194 N. W. 2d 172 (1972), this court noted that: "* * * where two or more defendants are convicted for the same offense and different penalties are inflicted, and it appears from the evidence that the defendant receiving the least punishment is at least equally guilty, it may be necessary for this court to examine the evidence to determine whether there were justifiable reasons for the distinctions." In Shonkwiler, both defendants pleaded guilty and the one

with a more lengthy criminal record received probation, while Shonkwiler was sentenced to imprisonment evidently due to his remarks about the Vietnam War and his claim of conscientious objection.

Here Wright pleaded guilty and Lacy chose to go to trial on the charge. It is true that a more severe punishment cannot be exacted in order to punish a convicted person for exercising his right to trial. Hess v. United States, 496 F. 2d 936 (8th Cir., 1974); Scott v. United States, 419 F. 2d 264 (D.C. Cir., 1969).

However, sentence concessions are proper when a defendant pleads guilty to an offense. A.B.A. Standards Relating to Pleas of Guilty, § 1.8. The fact that Wright apparently received consideration as to his sentence as a result of his plea of guilty in no way requires a conclusion that Lacy was penalized for exercising his constitutional rights.

The bill of exceptions contains no information relative to Wright's previous criminal record. It may be that his record was less serious than that of Lacy, who had previously been charged in Michigan with felonious assault with a gun and had a history of emotional nervous instability. The sentence of 5 to 8 years is close to the statutory minimum, and no abuse of discretion appears.

Although what we have stated above is more than sufficient to dispose of this case on the merits, there appears to be an additional cogent reason for affirming the judgment and sentence of the District Court. We refer to the contention raised by the State in its brief and on oral argument on appeal that Lacy failed to file his motion for a new trial within the time provided by statute. The applicable statute is section 29-2103, R. R. S. 1943, which provides, so far as material herein, as follows: "The application for a new trial shall be by motion upon grounds, and may be filed either within or without the term at which the verdict is rendered. It shall, except for the cause of newly discovered evi-

dence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, be filed *within ten days after the verdict was rendered* unless unavoidably prevented." (Emphasis supplied.)

The record in this case reveals that Lacy did not file his motion for a new trial within 10 days from the date of the verdict, but did file it within 10 days from the date of his sentencing. The statute appears to be clear and unambiguous with regard to the time requirements for filing a motion for a new trial, and has been adhered to, almost without exception, to the present date. See State v. Seger, 191 Neb. 760, 217 N. W. 2d 828 (1974). However, an element of ambiguity was introduced into the rule in the case of Stanosheck v. State, 168 Neb. 43, 95 N. W. 2d 197 (1959). In syllabus 1 of that case, the statement is made that a motion for a new trial in a criminal action must be filed "within 10 days after the verdict *or judgment* is rendered in order to be considered on appeal, * * *." (Emphasis supplied.) The additional words "or judgment" are, however, not contained in the opinion itself, which merely quotes the exact language of section 29-2103, R. R. S. 1943. The error was repeated in Vacek v. Marburger, 188 Neb. 180, 183, 195 N. W. 2d 515, 517 (1972), where this court obviously copied verbatim syllabus 1 of Stanosheck v. State, *supra,* to the effect that "a motion for a new trial in a criminal action must be filed within 10 days after the verdict or *judgment* is rendered * * *." In order to clarify the matter and to alleviate any possible future confusion upon the question, we now specifically state that the time requirements of section 29-2103, R. R. S. 1943, are mandatory and that a motion for a new trial under that section must be filed within 10 days after the *verdict* is rendered. It may not be filed within 10 days after the date of sentencing, unless, of course, the verdict and sentencing occur on the same day.

Our conclusion on the merits is that there is ample evidence in the record to sustain the conviction on the charge of robbery in the lower court, and that the sentence imposed upon the defendant was in all respects in conformity with law, and not excessive.

AFFIRMED.

ALLEN L. MARECHALE ET AL., APPELLEES, V. GEORGE T. BURR,, APPELLANT, IMPLEADED WITH BETTY CROWSON JONES HASBROUCK ET AL., APPELLEES.
237 N. W. 2d 860

Filed January 29, 1976. No. 40066.

Liens: Quieting Title. An agreement creating a lien upon real estate must meet the requirements of section 76-211, R. R. S. 1943, to be valid against subsequent purchasers.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

George T. Burr, pro se.

E. Dean Hascall, for appellees Marechale et al.

Heard before WHITE, C. J., BOSLAUGH, CLINTON, and BRODKEY, JJ., and MORAN, District Judge.

MORAN, District Judge.

This is a suit to quiet title. What was purportedly plaintiffs' motion for judgment on the pleadings was treated as a motion for summary judgment. The trial court sustained the motion and quieted title to the real estate against the claims of the defendant, George T. Burr. Burr appealed. We affirm the judgment of the District Court.

Burr, an attorney, had performed legal services for Joseph M. Jones and had not been paid. While Jones owned the real estate in question, Burr filed two instruments in the office of the register of deeds against

the real estate. One was a notice of lis pendens which recited the filing of his attorney's lien in another action then pending in the District Court for Sarpy County. The other instrument was entitled "Notice of an Attorney's Lien," and in it Burr claimed, among other things, a lien on the real estate and the proceeds of any gain from its conveyance. Jones thereafter conveyed the real estate to the plaintiffs who then brought this action.

Burr makes four claims on appeal. First, he has an attorney's lien on the real estate by agreement; second, plaintiffs do not come into court with clean hands; third, that there was a material issue of fact on his claim that the conveyance to the plaintiffs was made to defraud him of his attorney's fees; and fourth, that the trial court erred in not sustaining his motion to bring in Jones as an additional party.

Apart from section 7-108, R. R. S. 1943, an attorney's lien, like any other, can be created by agreement. If, however, it is to be upon real estate and effective against subsequent purchasers, it must meet the requirements of section 76-211, R. R. S. 1943. Burr's claim is on oral agreement, and it is not good.

Burr informed the parties of the instruments filed before the conveyance. He perceives a lack of clean hands in the conveyance of the real estate despite his claimed lien. The answer is that those concerned were not required to recognize his so-called lien as valid and were entitled to ignore him when the real estate was conveyed.

There is no evidence to support the claim that the conveyance was fraudulent, and Jones had conveyed his entire interest in the real estate. He was not a proper party to the action.

The judgment of the District Court is affirmed.

AFFIRMED.

GERALD D. BRIDGEFORD, APPELLANT, V. U-HAUL COMPANY, A CORPORATION, ET AL., APPELLEES.
238 N. W. 2d 443

Filed January 29, 1976. No. 40096.

1. **Statutes: Constitutional Law: Legislature.** The extent to which the Legislature may exercise the police power, an attribute of state sovereignty, is primarily a matter of legislative judgment, but the purpose of the regulatory matter must be legitimate and the means employed to effect it must be reasonable.
2. ———: ———: ———. If, in this court's opinion, a reasonable basis exists for legislative enactments, this court will not ordinarily substitute its judgment for that of the Legislature.
3. ———: ———: ———. A classification created by legislation need not be all-inclusive so long as the class subject to the law is differentiated from other classes upon some rational basis.
4. **Statutes: Constitutional Law.** A statute is not vague unless men of normal intelligence would necessarily have to guess at its meaning or would usually differ as to its application.
5. **Strict Liability: Words and Phrases.** Vicarious liability is generally recognized as a form of strict liability.
6. **Strict Liability: Constitutional Law.** The legislative imposition of strict liability does not per se constitute a deprivation of due process under the federal and state Constitutions.
7. **Strict Liability: Constitutional Law: Motor Vehicles: Lessors and Lessees.** Section 39-6,193, R. R. S. 1943, imposing vicarious liability on owners-lessors of trucks for the damages caused by lessees and operators of the leased trucks is not a violation of either state or federal due process or equal protection of the law.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Reversed and remanded.

Paul D. Budd and Kutak, Rock, Cohen, Campbell, Garfinkle & Woodward, for appellant.

Michael F. Kinney and Terry J. Grennan of Cassem, Tierney, Adams & Gotsch, for appellee U-Haul Co.

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

BRODKEY, J.

This appeal involves a constitutional challenge to section 39-6,193, R. R. S. 1943, formerly designated as section 39-7,135, R. R. S. 1943, which reads as follows: "The owner of any leased truck, truck-tractor, whether with or without trailer, or trailer shall be jointly and severally liable with the lessee and the operator thereof for any injury to or the death of any person or persons, or damage to or the destruction of any property resulting from the operation thereof in this state."

In his amended petition, plaintiff, Gerald D. Bridgeford, alleged that on or about January 2, 1973, he was a passenger in a 1962 Buick automobile that was stopped at a stop sign at an intersection, when a 1966 Ford pickup truck, owned and leased by defendant U-Haul Company, struck the rear of the automobile in which plaintiff was a passenger, causing severe injuries to Bridgeford. Plaintiff further alleged that the collision was caused by the specifically enumerated negligent acts of the operator of the Ford pickup truck, defendant, John Doe, true and real name unknown, whose negligence was imputed to defendant U-Haul Company and its lessee by virtue of the provisions of the above-cited statute, and prayed for a joint and several judgment against the defendants. According to statements in U-Haul's brief and oral argument, defendant John Doe, the operator of the leased truck, fled the scene of the collision on foot, and plaintiff has been unable to learn his true identity. In his argument, Bridgeford's counsel also stated the investigation revealed that U-Haul had leased the truck to a person misrepresenting his identity by using the lost or stolen identification papers of another.

In its demurrer to plaintiff's petition, defendant U-Haul alleged that the statute in question was unconstitutional because it deprived the defendant of its property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United

States and Article I, section 3, of the Constitution of the State of Nebraska; and also because it denied the defendant equal protection of the law under the Fourteenth Amendment to the Constitution of the United States, and Article I, section 1, of the Constitution of the State of Nebraska. Defendant U-Haul also alleged in its demurrer that the statute was never intended to and did not apply to vehicles such as the 1966 Ford pickup truck allegedly involved in the accident. Further, although not set out in the demurrer itself, U-Haul claims in its brief on appeal that the statute is vague, and hence invalid, because the word "truck" is not defined. The District Court sustained the demurrer, and dismissed plaintiff's petition, following his failure to amend his petition within the time allowed. Plaintiff then perfected his appeal to this court. We find that the statute in question is constitutional, reverse the ruling of the trial court, and remand the cause.

It is clear from a reading of U-Haul's brief and from its oral argument before this court that the principal basis for its claim that section 39-6,193 is unconstitutional is that the statute deprives it of its property without due process of law because it fails to limit the imposition of owner-lessor liability to situations where the vehicle is operated with the owner-lessor's knowledge or consent, express or implied. U-Haul claims there is no rational connection between the mere ownership of a leased pickup truck and the imposition of liability on the owner for the acts of someone who is not under the direct control of the owner. It cites as authority for that proposition Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615 (1913); Frankel v. Cone, 214 Ga. 733, 107 S. E. 2d 819 (1959); and Camp v. Rogers, 44 Conn. 291 (1877). These cases do sustain the general proposition for which they are cited, but we point out that none of the three involved a leased truck. Daugherty and Frankel involve the use of, but not lease of, an automobile, although Camp, decided in 1877, did involve

the letting of a horse and carriage. As hereinafter demonstrated, this factual distinction is important in the determination of the propriety of the Legislature's classification, challenged by U-Haul's equal protection attack.

Section 39-6,193, by its terms, applies only to *leased* trucks. It does not apply to any other type of motor vehicle, leased or otherwise. Although not specifically so restricted by its terms, it is apparent that it was principally intended to apply to commercial enterprises, such as truck-renting businesses. The owner-lessor of the truck is made "jointly and severally liable with the lessee *and* the operator thereof" for injuries, death, or damage resulting from the operation of the truck. (Emphasis supplied.) It does not, however, as pointed out by U-Haul, specifically require that the leased truck be operated at the time of the accident with the consent of the owner, express or implied. There can be no question that by leasing the truck to a lessee, the owner consents to the lessee driving the truck. Royal Indemnity Co. v. Olmstead, 193 F. 2d 451 (Ct. App., 9th Cir., 1951).

Consent is not vitiated by the fact that someone misrepresented his identity when he rented the truck. U-Haul permitted the lessee to take the truck and had the opportunity to satisfy any doubts as to the identity of the lessee. As a California court has said, the name of the car driver is immaterial as the "statute was designed for the protection of the public and places upon the owner of a motor vehicle the responsibility of ascertaining the character, ability and responsibility of the person to whom he intrusts his automobile." Tuderios v. Hertz Drivurself Stations, Inc., 70 Cal. App. 2d 192, 160 P. 2d 554 (1945).

In its brief and argument, U-Haul contends that the statute is overbroad, arguing that under its terms, the owner-lessor would be liable for the negligent acts of a thief who stole the leased truck from the lessee and

was thereafter involved in an accident while driving the truck. As another example, U-Haul claims that the statute would impose liability upon an owner-lessor of the truck whose lessee, either without the knowledge or consent of the owner, or even in direct contravention of the lease agreement or instructions, permits its use by another who negligently causes an accident. In the example of the thief stealing the truck from the lessee, the lessor would not ordinarily be liable under the statute which provides that the owner shall be jointly and severally liable with "the lessee *and* the operator." (Emphasis supplied.) We interpret this language to mean that before liability may be imposed upon the owner under the statute, the lessee must also be legally liable for the negligent operation of the truck, either because of his own driving or by virtue of facts sufficient in law to impose liability upon him because of its negligent operation by another. This leaves, then, the situation suggested by U-Haul that the statute would impose liability upon the owner-lessor of a truck where the lessee permits another to drive the truck, perhaps even in violation of the lease or the lessor's instructions, but under such conditions that in law the negligence of the driver is imputed to the lessee. This situation would seem to be an extension of the rule of the common law, under the principle of respondeat superior. Whether the imposition of such additional liability by action of the Legislature is constitutional is the issue in this case. The answer depends on whether the statute represents a proper exercise of the police power of the state. Statutes which are reasonably designed to protect the public safety, health, morals, and general welfare do not violate the Constitution where the statute operates uniformly on all within a class which is reasonable. Central Markets West, Inc. v. State, 186 Neb. 79, 180 N. W. 2d 880 (1970). In the foregoing case, this court, quoting from Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388 (1939), stated that: " 'The balance between due

process and the police power is * * * more or less unstable, as it must necessarily keep pace with economic and social orders. As the exercise of the police power increases to meet new conditions, the protection of the due process clauses must necessarily recede to a corresponding degree.' "

Constitutional attacks on similar statutes have, in the past, been phrased and answered both in terms of imputation of negligence and imposition of strict liability. See, Frankel v. Cone, *supra*; Daugherty v. Thomas, *supra*. Since the owner-lessor may be held liable, given the requisite circumstances, even if he has exercised the utmost care, the statute does create, in one sense, a form of strict liability. Prosser, Law of Torts (4th Ed., 1971), § 69, p. 458. In fact vicarious liability is now quite generally recognized as a form of strict liability. Prosser, Law of Torts (4th Ed., 1971), § 81, p. 539. An analysis of the statute, its purposes and constitutionality may be made using both the standards for applying vicarious liability and those for applying strict liability.

The imposition of strict liability, in the exercise of the police power of a state, does not of itself contravene the due process clauses of the federal or state Constitutions. Jones v. Brim, 165 U. S. 180, 17 S. Ct. 282, 41 L. Ed. 677 (1897); St. Louis & S. F. Ry. Co. v. Mathews, 165 U. S. 1, 17 S. Ct. 243, 41 L. Ed. 611 (1897); Sandstrom v. California Horse Racing Board, 31 Cal. 2d 401, 189 P. 2d 17 (1948); 16 Am. Jur. 2d, Constitutional Law, § 296, p. 580. Legislation imposing liability without fault is frequently sustained as a proper exercise of the police power. Jones v. Brim, *supra;* St. Louis & S. F. Ry. Co. v. Mathews, *supra;* 16 Am. Jur. 2d, Constitutional Law, § 327, p. 633. The extent to which the Legislature may exercise the police power, an attribute of state sovereignty, is primarily a matter of legislative judgment, but the purpose of the regulatory matter must be ligitimate and the means employed to effect it must be reasonable. Central Markets West, Inc. v. State,

supra. Nebraska has, both by legislation and court decision, approved the principles of strict liability and vicarious liability in its workmen's compensation statutes, judicial application of the family purpose doctrine, and defective products cases. Stevens v. Luther, 105 Neb. 184, 180 N. W. 87 (1920); Kohler v. Ford Motor Co., 187 Neb. 428, 191 N. W. 2d 601 (1971); Butera v. J. C. Mardis Co., 99 Neb. 815, 157 N. W. 1024 (1916).

Strict liability like vicarious liability is not a recent or radical development. Before the 19th century, absolute liability was the rule, with a concept of negligence and standard of reasonableness developing in response to an increasingly complex, industrial development. Students of the doctrine of strict liability have pointed out that several features are common to enterprises on which strict liability is imposed. They are: (1) A nonreciprocity of risk, i.e., the party pursuing the regulated activity creates a greater risk to the community than vice versa; (2) the subject activity may be more dangerous or hazardous than usual but has sufficient social utility to be immune to injunction; (3) there may be some difficulties of proof due to the nature of unusual mishaps; and (4) the more financially secure individual is reached, that party being the most able to distribute the costs of the loss involved. This final function, risk spreading, is viewed by some as the main justification for vicarious liability. See, for example Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972); Peck, Negligence and Liability Without Fault in Tort Law, 46 Wash. L. Rev. 225 (1971); Vold, Strict Liability for Aircraft Crashes and Forced Landings on Ground Victims Outside of Established Landing Areas, 5 Hast. L. Rev. 1 (1953).

Under the above criteria, the business of leasing trucks may properly be the subject of strict liability legislation. Trucks are generally heavier than automobiles and more difficult for inexperienced drivers to handle, thus creating a greater risk to public safety than other

vehicles. Neither the public at large nor the driver of the vehicle involved in a collision with a leased truck get any substantial benefit from the availability of truck rentals. Proof of what actually happened in a traffic accident may be difficult particularly in view of the fact that long periods of time frequently elapse between the accident and the trial. The rental enterprises involved are usually more able to pay a judgment than the lessee-operator and more able to bear the loss than the victim. The costs of insuring against mishaps becomes a cost of doing business and is passed on to consumers in higher rental fees. In view of the catastrophic nature of car accidents, their frequency, and cost to individuals and society, the financial and physical protection of an innocent party would certainly seem to be within the realm of legislative action in imposing strict liability or in imputing liabilty to the owner-lessor.

Other states have recognized the applicability of the doctrine of strict liability to the rental of vehicles, even without a statute. In Cintrone v. Hertz Truck Leasing & Rental Service, 45 N. J. 434, 212 A. 2d 769 (1965), a case involving the lease of a defective vehicle, the court stated: "We may take judicial notice of the growth of the business of renting of motor vehicles, truck and pleasure cars. * * * The nature of the U-drive-it enterprise is such that a heavy burden of responsibility for the safety of lessees and for members of the public must be imposed upon it. * * * Accordingly, we are of the opinion * * * (2) that the nature of the U-drive-it business is such that the responsibility of Hertz may properly be stated in terms of strict liability in tort." See, also, Martinez v. Nichols Conveyor & Engineering Co., Inc., 243 Cal. App. 2d 795, 52 Cal. Rptr. 842 (1966).

Another theory upon which the application of the doctrine of strict liability is frequently sustained is that of the entrustment of a dangerous instrumentality. Susco Car Rental System of Florida v. Leonard, 112 S. 2d 832 (Fla., 1959).

Authorities are not agreed as to whether or not an automobile or truck is, per se, a dangerous instrumentality. The rule in Nebraska, as set out in Deck v. Sherlock, 162 Neb. 86, 75 N. W. 2d 99 (1956), is that while a motor vehicle is not an inherently dangerous instrumentality, nevertheless, where the owner entrusts the control and operation of it to a person lacking in competency and skill, the vehicle may be considered a dangerous instrumentality. In enacting our statute, the Legislature may well have considered the possibility that by entrusting the truck to a lessee, the owner-lessor should be held strictly liable for the negligence of the driver about whose driving ability he may have no knowledge.

Whether there was a reasonable basis for the enactment of the statute in question is primarily a matter of legislative determination, subject to limited judicial scrutiny. In Nelson v. Tilley, *supra,* this court stated: "Whatever the personal views of this court may be as to the necessity of such legislation, the fact remains that the legislature of the state concluded that a reasonable basis existed for its enactment and, there being some foundation in fact to justify legislative action, this court is powerless to substitute its judgment for that of the legislature even if it cared to do so." Questions of public policy are for the Legislature and not for the courts. Butera v. J. C. Mardis Co., *supra.*

There is no doubt that the state may protect the health, safety, and general welfare of the public by measures directed to increasing highway safety. The Legislature's Banking, Commerce and Insurance Committee in its statement on L.B. 126 in 1957, now section 39-6,193, indicated that the legislation was in part designed to remedy situations where "the results were disasterous to the injured" because no insurance was in force. Besides encouraging adequate insurance coverage, it appears that the bill would also have the effect of making lessors more diligent in checking the abilities and credentials of prospective lessees. L.B. 126 was

clearly within the scope of the state's police power which may subject the right of an owner to unrestricted use of his property to reasonable regulations. Kuester v. State, 191 Neb. 680, 217 N. W. 2d 180 (1974).

We now consider the claim of U-Haul that section 39-6,193 denies it equal protection of the law under both the United States Constitution and the Constitution of the State of Nebraska. It acknowledges that it is proper for the Legislature to classify but argues that section 39-6,193 fails to meet the requirement that the classification rest on some reasonable public policy, some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to that which is classified. U-Haul argues that section 39-6,193 is too narrow and discriminatory in its coverage because it does not also impose liability on the owners of unleased trucks, and leased and unleased automobiles. An excellent discussion with reference to the problem of classification under the equal protection clause not involving suspect classifications or fundamental rights, is found in Schwartz, Constitutional Law (1972), § 153, p. 289, where that authority states: "Judicial review determines only whether there was a reasonable basis for the particular classification, from the point of view of the legislators who adopted it. The test is whether legislators could in reason have acted upon the classification. A classification having some reasonable basis does not offend merely because it is not made with mathematical nicety. We have to consider not whether the legislator acted with the exactness of a geometric equation, but only whether, though the law bear hard upon some particular class, the class itself is differentiated upon some rational basis. Judicial review of classifications is not exercise in logical abstractions. Legislatures are presumed to have acted within their constitutional power despite the fact that their laws result in some inequal-

ity." See, also, Botsch v. Reisdorff, 193 Neb. 165, 226 N. W. 2d 121 (1975).

A class need not be all-inclusive. As this court has said: "Legislation is to a large extent an evolutionary process, and legislatures often work by piecemeal. Not infrequently they approach a new subject of legislation in a timid and halting spirit, and it often takes years and many sessions to frame legislation covering a whole subject." Freadrich v. State, 89 Neb. 343, 131 N. W. 618 (1911). See, also, Williamson v. Lee Optical of Oklahoma, Inc., 348 U. S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955). Courts should be "very cautious in condemning what legislatures have approved" when those enactments are based on legislative judgment resting on practical knowledge of the business concerned. Carroll v. Greenwich Ins. Co., 199 U. S. 401, 26 S. Ct. 66, 50 L. Ed. 246 (1905). "The legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.'" West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937). See, also, Freadrich v. State, *supra*.

As stated in Freadrich: "The classification may be, to some extent, arbitrary in its nature, but it is difficult to draw the line, and there may have been, and no doubt were, reasons appealing to the legislative mind which are not presented here and are not apparent to us, but which may, nevertheless, exist. The court does not sit to review the wisdom of legislative acts. Its only function in this respect is to determine whether it has acted in such a manner as to violate the constitutional provisions."

We think it is clear that the purpose of the Legislature in enacting section 39-6,193 was for the promotion of highway safety and the financial protection of innocent traffic victims. The Legislature may well have felt that the ordinary owner of a nonleased vehicle would be more likely to personally know the person whom he per-

mits to drive the vehicle and be familiar with his or her driving abilities. On the other hand, possession of a leased truck ordinarily passes from the lessor to strangers, who may or may not be who they profess to be and who may allow the truck to be used by family, friends, acquaintances, or strangers. It is common knowledge that the U-Haul operation, and those similar to it, involves the rental of trucks, trailers, etc., to individuals, frequently for use in nonbusiness activities, such as moving household goods to a new home. The lessees may often be persons who have not had previous experience in driving trucks or vehicles heavier than cars, which, because of their weight and bulk, pose a greater danger to those involved in accidents with them. We conclude that there is a reasonable basis to distinguish between a rented truck, and rented and nonrented automobiles, and the distinction is sufficient to support this legislation. There was a "reasonable basis for the particular classification from the point of view of the legislators who had adopted it." See Schwartz, Constitutional Law, § 153, p. 289. It may be that in time the Legislature will see fit to add other classes of rented vehicles to the statute, but the fact that it has taken a "step-by-step" approach in this situation does not make the statute unconstitutional as a denial of equal protection of the laws.

U-Haul's claim that section 39-6,193 was unconstitutionally vague because at the date of the accident it lacked a statutory definition of "truck" is without merit. There has been a statutory definition of "trucks" since 1919. Laws 1919, c. 190, Art. IV, § 1, p. 818; § 60-301, Comp. St. 1929. That section defined "trucks" as including "motor vehicles equipped or used to carry anything other than passengers." An additional definition has since been added, and reads as follows: "Truck shall mean any motor vehicle designed, used, or maintained primarily for the transportation of property." Laws 1973, L.B. 45, § 2; § 39-602 (109), R. R. S.

1943. The word "truck" is a term of common understanding, and men of normal intelligence would not necessarily have to guess at its meaning nor would they usually differ as to its application. Cramp v. Board of Public Instruction, 368 U. S. 278, 82 S. Ct. 275, 7 L. Ed. 2d 285 (1961); State v. Sullivan, 189 Neb. 465, 203 N. W. 2d 169 (1973), citing Cameron v. Johnson, 390 U. S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182 (1968).

A common pickup truck would normally be viewed as falling within the scope of the statute under the definition of "truck." There is also no indication that the Legislature intended to exclude this kind of truck from statutory coverage. Its use is subject to the same dangers as that of larger trucks. It is more than likely to be a manual transmission model and will often be loaded with cargo, perhaps inadequately secured, and may be more difficult to handle than a regular automobile.

We hold, therefore, that section 39-6,193 is in all respects constitutional and is a valid exercise of the police power of the state by the Legislature. The trial court erred in sustaining defendant U-Haul's demurrer to plaintiff's petition on the ground that the statute was unconstitutional, and the cause is hereby remanded.

While the trial court's sustaining of U-Haul's demurrer to the applicability and constitutionality of section 39-6,193 is reversed, Bridgeford may have to amend his petition in conformity with the prerequisites to liability enunciated in this opinion. The identity of and facts showing the liability of both the lessee and operator, if they are separate individuals, must be alleged in the petition to state a cause of action under section 39-6,193.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. JESSIE BROWN, APPELLANT.

237 N. W. 2d 861

Filed January 29, 1976. No. 40110.

1. **Criminal Law: Evidence: Witnesses.** 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, determine the plausability of explanations, or weigh the evidence.
2. **Criminal Law: Controlled Substances.** In the absence of a legislative declaration to the contrary, a quantity with a potential for abuse is not an essential element of the offense of unlawful possession of a controlled substance.
3. **Criminal Law: Constitutional Law: Probable Cause: Stop and Check.** The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. A brief stop of an individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

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

Paul E. Watts, J. Joseph McQuillan, Gerald E. Moran, and Robert C. Sigler, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

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

NEWTON, J.

Defendant was convicted by a jury of possession of a controlled substance with intent to distribute or deliver. There are three assignments of error: First, that the court failed to suppress evidence obtained as the result of a wrongful stop, detention, and search; second, insufficiency of the evidence; and third, the court erroneously resubmitted the case to the jury to correct a

verdict. We affirm the judgment of the District Court.

At about 10 a.m. on October 10, 1974, a police officer received information from an informant known to him, and who had previously supplied him with reliable information, to the effect that at about noon that day the defendant would deliver a controlled substance in the vicinity of 24th and Franklin Streets in Omaha, Nebraska. The officer maintained a watch in the area and at 11:30 a.m. the defendant appeared driving a pickup truck. Defendant was stopped by the officer who then observed marijuana on the seat. On further search, marijuana was found under the seat and a package containing a mixture including heroin was found in the bed of the pickup, together with a syringe and cap. Defendant was arrested when the first marijuana was found.

The jury returned two verdicts, one guilty of possession of a controlled substance with intent to distribute, and the other, guilty of the included offense of possession. The court resubmitted the case to the jury with a supplemental instruction to the effect that if it found the defendant guilty of possession with an intent to distribute, it was not necessary to find him guilty of simple possession. The jury then returned only the verdict of guilty of possession with intent to distribute.

The evidence indicates that defendant had a 12½-ounce bag of a mixture containing about 60 percent Epsom salts, 12 percent Dorman, 26 percent Hide, and .02 percent heroin. Of the 356 grams of material, about 6 grams were heroin. Street-grade heroin usually contains 2 to 3 percent heroin. The Hide is a mice and rat killer. Defendant testified that he made the mixture himself the morning he was apprehended but denied putting heroin in it. He claimed he had a job cleaning up some apartments that day and two others were going to help him to clean and get rid of mice and insects. A vacuum cleaner was in the pickup. Neither the defendant's alleged helpers nor employer testified.

Defendant's evidence disclosed that he was not a

heroin user; that at one time he had been in the drug-distributing business for 3 or 4 months; and that he had a prior conviction of possession of a controlled substance with intent to distribute it.

The circumstantial evidence regarding intent to distribute the substance is not overwhelming; yet the factors affecting the jury verdict appear clear. The defendant's story regarding the intended use of the mixture was entirely uncorroborated notwithstanding his reference to an employer and to two helpers. According to his own story, no one could have added the heroin to the mixture except himself unless it was done by the arresting officer and there appears to have been little opportunity for that. The defendant was not a heroin user and would not have possessed it for that purpose. He had a previous conviction bearing on the question of intent. No logical reason appears for adding heroin to an insecticide or rodent killer. On the contrary, the mixture only succeeded in diluting the heroin very materially. Also, he admitted he had distributed controlled substances in the past. "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, determine the plausability of explanations, or weigh the evidence. Such matters are for the jury." State v. Cano, 191 Neb. 709, 217 N. W. 2d 480.

"In the absence of a legislative declaration to the contrary, a quantity with a potential for abuse is not an essential element of the offense of unlawful possession of a controlled substance." State v. McElroy, 189 Neb. 376, 202 N. W. 2d 752.

We believe the evidence is sufficient to sustain the verdict.

Should the evidence of the seizure of the controlled substance have been suppressed. In Aguilar v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723, it was held that information received by a law officer was insuf-

ficient to justify issuance of a search warrant in the absence of disclosure of the informant's source of information. In the present case verification of the information received was sought by the officer and he observed the defendant driving by at the time and place specified by the informant.

In Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889, an officer stopped and searched three men who appeared to be "casing a job, a stick-up." Defendant was prosecuted for carrying a concealed weapon. The court held the weapon was admissible in evidence and the search justified. The court stated that there is "no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails," and held that there must be present specific facts which taken together with rational inferences reasonably warrant the intrusion. Such facts were present in the case under consideration.

The case of Adams v. Williams, 407 U. S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612, presents facts pertaining to a stop practically identical to those in the case before us. The court stated: "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. * * * A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. * * *

"This is a stronger case than obtains in the case of an anonymous telephone tip. The informant here came forward personally to give information that was immediately verifiable at the scene. * * * Thus, while the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, * * * the information carried

enough indicia of reliability to justify the officer's forcible stop of Williams." See, also, United States v. Legato, 480 F. 2d 408 (5th Cir., 1973); United States v. Hernandez, 486 F. 2d 614 (7th Cir., 1973); State v. Micek, 193 Neb. 379, 227 N. W. 2d 409; State v. Brewer, 190 Neb. 667, 212 N. W. 2d 90.

It is evident that under the circumstances the officer was fully justified in stopping defendant and defendant does not contend that once the stop had been made and the officer had discovered a controlled substance lying in plain sight the arrest and seizure were improper.

The correction of the verdicts which the District Court required was not prejudicial to defendant. The jury had simply found him guilty of both the principal charge and a minor included charge. The court might well have simply ignored the verdict of guilty on the minor included charge but instead gave the defendant the opportunity to have both charges resubmitted with a view to having the jury choose between them.

The judgment of the District Court is affirmed.

AFFIRMED.

ELMO R. MCKAMY ET AL., APPELLANTS, V. BONANZA SIRLOIN PIT, INC., ET AL., APPELLEES.
237 N. W. 2d 865

Filed January 29, 1976. No. 40138.

1. **Property: Adjoining Landowners.** The owner of property in its natural state has a right of lateral support from adjoining owners, irrespective of any questions of care or negligence.
2. ———: ———. The right of lateral support is mutual and reciprocal between adjoining property owners, nondelegable and constituting a servitude as to each.
3. **Property: Adjoining Landowners: Time.** An owner of property, entitled to lateral support, has a right of action against the servient owner at the time of the removal of such lateral sup-

port; he does not have a cause of action against subsequent owners or tenants, except for negligence.

4. **Trial: Verdicts.** A motion for a directed verdict admits, for the purpose of the ruling thereon, the truth of all relevant evidence together with all inferences which might reasonably be drawn from it in favor of the adverse party.
5. ———: ———. When reasonable minds might draw different conclusions either as to the weight of evidence or the credibility of witnesses, a motion for a directed verdict should be overruled.

Appeal from the District Court for Sarpy County: RAYMOND J. CASE, Judge. Affirmed in part, and in part reversed and remanded.

L. W. "Jim" Weber of Weber & Fugit, for appellants.

Emil F. Sodoro and William E. Gast, for appellees.

Heard before WHITE, C. J., BOSLAUGH, CLINTON, and BRODKEY, JJ., and KUNS, Retired District Judge.

KUNS, Retired District Judge.

The appellant brought this action in the District Court for Sarpy County, Nebraska, to recover damages from the appellees for depriving their property of lateral support. At the conclusion of all the evidence, the trial court directed a verdict in favor of all the appellees. This appeal followed. We reverse as to the appellee, Midwest Franchise Corporation, and affirm as to the remaining appellees.

Before 1970, Nob Hill Addition to the City of Bellevue, Sarpy County, Nebraska, had been developed and parts of it had been improved. In 1970, the appellants purchased Lot 142 in said addition, which then had a house upon it. Lot 201A lying immediately to the west of it and unimproved was purchased later by the Midwest Franchise Corporation. In 1972, Midwest Franchise Corporation, in the course of constructing a Bonanza Sirloin Pit restaurant facility, caused the lot to be leveled to provide a site for the restaurant, parking, and delivery space. This required a cut approximately 20 feet

deep across the entire west boundary of Lot 142, within about 5 feet from the lot line. In November 1972, about 2 months after the cut was made, a wooden retaining wall about 20 feet high was built along the edge of the excavation. A month later, the earth from the appellants' property slid against the retaining wall and a portion of the wall collapsed. Subsequently a new and stronger retaining wall was built by the appellees which still remains in place. There is no evidence of later earth slides, although the appellants complain of a subsidence along their entire west boundary. In their petition, the appellants allege removal of lateral support causing damage to them; there are no allegations of negligence against any of the appellees. The appellees filed a joint general denial.

Both sides recognize the applicability of the common law rules concerning the right to lateral support between adjoining landowners. This rule is stated in 2 C. J. S., Adjoining Landowners, as follows: "Under the common law, as a natural right of property incident and attached to the ownership of the soil, an owner of land has, against coterminous owners, the absolute right to the lateral support of his soil in its natural state, * * *. This rule is based on the proposition that in a state of nature all land is held together and supported by adjacent lands through operation of forces of nature, and ownership of land is acquired and held subject to the rights and burdens arising from such situation.

"The right of lateral support for land in its natural condition is a mutual and reciprocal right between the adjoining owners, which is not dependant on any question of care or negligence. In its nature, the right is a 'servitude' rather than a common law 'easement,' although it is analogous to an easement in many respects." § 9, p. 13.

"A landowner who excavates close to the boundary line owes a nondelegable duty to prevent injury to adjacent lands from the removal of lateral support."

§ 15, p. 18. This obligation, however, rests only upon the owner who caused the making of the excavation, not on a subsequent owner, Paul v. Bailey, 109 Ga. App. 712, 137 S. E. 2d 337 (1964); nor upon a tenant, Knapp v. Cirillo, 133 N. Y. Supp. 2d 356 (1954).

The record here shows that the appellee, Midwest Investment Company, acquired title to Lot 201A in March 1973, and that the leasehold interests to Abdouch, Inc., and Bonanza Sirloin Pit, Inc., arose as of January 1, 1973. The alleged damage from loss of lateral support had already occurred. No allegations of negligence have been made against any of them nor does any theory of negligence appear from the evidence. The trial court was correct in directing a verdict for these appellees, even though a different reason for the ruling was stated by the court.

The dispute between the parties related primarily to the presence or absence of fill upon the appellants' property. The appellants and their witnesses testified generally that the property was in its natural condition and that any debris found in the displaced earth was placed there by outside sources, such as children of the neighborhood, following the slide. The contractor for appellee, Midwest Franchise Corporation, described the debris found in the earth as looking like "a typical contractor's dump" and said that the earth did not break away clean, as it would in a natural condition. A testing engineer drilled three holes on the appellants' property between their house and the west boundary of the lot finding indications of filling to depths of 5 or 6 feet, according to his opinion. Neither side appeared to be able to secure direct evidence about the previous history of the two properties or changes of grade which might have been made during the course of the development. The appellants had the burden of establishing that their land was in its natural state and that a removal of lateral support had caused damage to it. The motion by the appellees for a directed verdict has the effect of

admitting the truth of all relevant evidence, with the benefit of reasonable inferences which might be drawn from it. Wrasse v. Gustavson, 193 Neb. 41, 225 N. W. 2d 274; Pick v. Pick, 184 Neb. 716, 171 N. W. 2d 766. It is possible that reasonable minds might draw different conclusions from the testimony summarized and give different weight to various portions thereof according to the credibility of witnesses. The issues should have been submitted to the jury for its determination. Flanagin v. DePriest, 182 Neb. 776, 157 N. W. 2d 389. The judgment is reversed and the cause remanded for retrial as to the appellee, Midwest Franchise Corporation.

Arguments were also offered concerning the nature of the right of lateral support and the extent of the servitude resting upon the owner of Lot 201A, depending upon such factors as partial filling, compacted filling, long-continued duration of a filled condition, or the presence of fill upon Lot 201A. In view of a lack of determined facts and of the necessity of speculating on possible findings by the jury, we feel that it would be inappropriate to state rules of law which might or might not be applicable to a later record.

The judgment is affirmed as to appellees, Midwest Investment Corporation, Abdouch, Inc., and Bonanza Sirloin Pit, Inc. As to the appellee, Midwest Franchise Corporation, it is reversed and the cause remanded for a new trial.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. GARY L. BLANKENSHIP, APPELLANT.

237 N. W. 2d 868

Filed January 29, 1976. No. 40157.

1. **Criminal Law: Sentences: Time.** If a sentence is invalid or erroneous and beyond the power of the trial court to pronounce,

it is of no effect and the court may then impose a lawful sentence.

2. ———: ———: ———. The rule that the penalty of a sentence cannot be increased after the sentence is being served is applicable only when the sentence is legal and valid and within the minimum and maximum statutory sanctions.
3. **Criminal Law: Sentences.** A sentence within statutory limits will not be disturbed on appeal unless there is an abuse of discretion.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Frank B. Morrison and Stanley A. Krieger, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

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

MCCOWN, J.

The defendant was found guilty by a jury on a charge of second degree murder and sentenced to life imprisonment. The issues involved are whether the sentence is excessive and whether, after the imposition of an invalid indeterminate sentence, a resentencing to life imprisonment was invalid and unconstitutional.

On April 11, 1975, a jury found the defendant guilty on a charge of second degree murder. On April 14, 1975, the defendant filed a motion for new trial. On Friday, May 2, 1975, the District Court overruled the motion for new trial and imposed a sentence for an indeterminate period of not less than 25 years nor more than 30 years. On Monday, May 5, 1975, the court, on its own motion, determined that the indeterminate sentence previously imposed was invalid; vacated that sentence; and sentenced the defendant to life imprisonment. On May 9, 1975, the defendant filed a notice of appeal.

The defendant's basic contention here is that the

District Court had no power to resentence the defendant to a harsher sentence than the one originally imposed. The defendant relies on North Carolina v. Pearce, 395 U. S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656, to support his position and inferentially contends that the maximum term of 30 years in the original indeterminate sentence constituted a valid sentence which could not be increased. We disagree.

There is a serious question as to whether the second sentence here was actually harsher than the original indeterminate sentence. Under the laws applicable then, a sentence to life imprisonment, so far as eligibility for parole is concerned, was the same as though 10 years had been expressed as the minimum of an indeterminate sentence. See State v. Thompson, 189 Neb. 115, 201 N. W. 2d 204. The original sentence pronounced here was 25 to 30 years. As a practical matter, there is considerable doubt as to which sentence was more harsh. Even if we assume that the life sentence was more harsh, the result in this case is unchanged.

The general rule is that if the original sentence is invalid, it is of no effect and the court may then impose any sentence which could have been validly imposed in the first place. As this court said in State v. Shelby, 194 Neb. 445, 232 N. W. 2d 23: "It is settled law that the District Court has the power to impose a lawful sentence where the one pronounced was erroneous or void as being beyond the power of the trial court to pronounce and where the accused himself has invoked appellate jurisdiction for the correction of error."

In State v. Laravie, 192 Neb. 625, 223 N. W. 2d 435, this court specifically held: "Under present statutes, upon conviction for second degree murder, the court is not authorized to pronounce an indeterminate sentence. The court may impose a sentence of a definite term of years, not less than the minimum authorized by law; or, in the alternative, may impose a sentence of life imprisonment." Under that holding the original sentence

here was clearly erroneous and invalid and the District Court had the authority to impose a valid sentence for the offense.

The remaining question is whether the corrected sentence could increase the maximum term of imprisonment. In Bozza v. United States, 330 U. S. 160, 67 S. Ct. 645, 91 L. Ed. 818, the United States Supreme Court upheld the addition of a statutorily required period of parole to a prison term previously imposed as against a charge of double jeopardy. In Thompson v. United States, 495 F. 2d 1304 (1st Cir., 1974), the court said: "The full import of Bozza is that a trial court not only *can* alter a statutorily-invalid sentence in a way which might increase its severity, but *must* do so when the statute so provides."

In Garcia v. United States, 492 F. 2d 395 (10th Cir., 1974), cert. den. 419 U. S. 897, 95 S. Ct. 178, 42 L. Ed. 2d 142, the court said: "The rule that the penalty of a sentence cannot be increased after the sentence is being served is applicable only when the sentence is legal and valid and within the minimum and maximum statutory sanctions."

The record in this case establishes that the District Court realized that the original sentence was invalid and erroneous, and on the next court day, on its own motion, vacated that sentence and entered a valid one. The record negatives any suggestion that the defendant was being penalized for exercising any of his constitutional rights, or that there was any intent to chill the exercise of his right to appeal. The defendant had not filed any notice of appeal at the time of resentencing, but did so 4 days later. Any errors at trial could have been argued in this appeal. Significantly, none were assigned or argued. North Carolina v. Pearce, 395 U. S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656, is not applicable here.

The remaining issue is the contention that the sentence of life imprisonment is excessive. The defendant here shot and killed his brother in a dispute over fi-

nancial differences in the presence of witnesses. He is 30 years of age with a criminal record extending over almost half his lifetime, including three prior felony convictions. A sentence within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Laravie, 194 Neb. 548, 233 N. W. 2d 789. There was no abuse of discretion here.

AFFIRMED.

IN RE ESTATE OF LUDVIK CAHA, DECEASED.
THEOPHIL CAHA, APPELLANT, V. DON J. NELSON, EXECUTOR OF THE ESTATE OF LUDVIK CAHA, APPELLEE.
237 N. W. 2d 870

Filed January 29, 1976. No. 40165.

1. **Appeal and Error: Records: Time: Decedents' Estates.** Sections 30-1601, 30-1602, 30-1604, 30-1605, and 30-1606, R. R. S. 1943, and 30-1603, R. S. Supp., 1974, concerning appeals in probate matters, require that a transcript of the probate proceedings be filed in the District Court within 40 days from the date of the order which appellant challenges.
2. **Appeal and Error: Records: Time.** Section 30-1605, R. R. S. 1943, requires the county judge to transmit a certified transcript to the District Court within 10 days of the perfection of appeal, if the transcript fees have been paid.
3. **Appeal and Error: Records: Decedents' Estates.** Prepayment of transcript fees may be waived by the county judge.
4. **Appeal and Error: Records: Time: Public Officers and Employees.** Late filing of the transcript in District Court may, under certain circumstances, be excused if caused by the fault or negligence of county court officials or employees.
5. **Affidavits: Tender.** Mere conclusionary allegations of "tender" stated in an affidavit do not suffice to establish the fact of "tender."
6. **Appeal and Error: Tender: Records: Time.** A proffer of payment to a county court employee at time of ordering a transcript for appeal does not constitute a legal tender, since no payment was then due nor would the cost of said transcript be then ascertainable.
7. **Bonds: Fees: Statutes: Decedents' Estates.** The cash bond

required by section 30-1603, R. S. Supp., 1974, is not available for payment of the county judge's transcript fees.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Hyman Polsky, for appellant.

John V. Hendry of Marti, Dalton, Bruckner, O'Gara & Keating and Wallace Rudolph, for appellee.

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

PER CURIAM.

Theophil Caha appeals to this court from an order entered by the District Court for Lancaster County dismissing his appeal from the county court of Lancaster County on the ground that the transcript for appeal was not timely filed as required by the statutes of this state governing appeals in probate matters. We affirm.

The applicable statutes are sections 30-1601, 30-1602, 30-1604, 30-1605, and 30-1606, R. R. S. 1943, and section 30-1603, R. S. Supp., 1974. Section 30-1601 provides that in all matters of probate jurisdiction, appeal shall be allowed from any final order, judgment, or decree of the county court to the District Court by any person against whom any order, judgment, or decree may be made or who may be affected thereby. Section 30-1602 provides that all appeals shall be taken within 30 days after the decision complained of is made. Section 30-1603, so far as material, provides that every party so appealing shall within 30 days of the rendition of the decision give bond in such sum as the court shall direct, conditioned that the appellant will prosecute such appeal to effect without unnecessary delay, and pay all debts, damages, and costs that may be adjudged against him. Section 30-1605 provides that when such appeal is taken "the county court shall, *on payment of his fees therefor,* transmit to the clerk of the district court,

within ten days after perfecting such appeal, a certified transcript of the record and proceedings relative to the matter appealed from." (Emphasis supplied.) Section 30-1606 provides, so far as material, that upon the filing of such transcript in the District Court, that court shall be possessed of the action, and shall proceed to hear, try, and determine it in the manner set out in the statute.

These statutes have been construed together to establish the rule that the District Court does not acquire jurisdiction of an appeal from an order in a probate proceeding unless within 40 days from the date of the order, a transcript thereof with the proceedings relative to it is filed with the clerk of District Court, nor unless within 30 days from the date of such order the bond upon appeal, required by the statute, has been executed and filed. In re Estate of Runyon, 111 Neb. 635, 197 N. W. 417 (1924); Jones v. Piggott, 68 Neb. 140, 93 N. W. 1000 (1903); In re Estate of Nelson, 108 Neb. 296, 187 N. W. 916 (1922). However, we have also held that under section 30-1605 the probate judge, by his conduct or customary course of procedure, may waive the right to demand in advance his fee for the making of such transcript. Harte v. Gallagher, 186 Neb. 141, 181 N. W. 2d 251 (1970); In re Estate of Tagart, 119 Neb. 647, 230 N. W. 492 (1930); Drexel v. Reed, 69 Neb. 468, 95 N. W. 873 (1903).

In this case the will and codicil of Ludvik Caha, deceased, were offered for probate in the county court, and a hearing held thereon, and also on the objections to probate filed by Theophil Caha. On January 8, 1975, the court entered its order admitting the will and codicil to probate. On January 14, 1975, Theophil Caha gave notice of his intention to appeal from that order and at the same time filed a $200 cash bond as set by the court. Counsel for appellant then filed a praecipe for a transcript on January 16, 1975, but the transcript itself was not filed in the office of the clerk of the

District Court until February 26, 1975, when the fee for it was paid. That date, according to the legal computation, was 49 days after the January 8th decree from which Theophil Caha appealed, or 9 days beyond the statutory maximum period allowed for perfecting the appeal. See § 25-2221, R. S. Supp., 1974. The issue becomes, therefore, whether appellant's delay was possibly excusable, because of waiver of prepayment of the transcript fee, or fault or negligence on the part of county officials or employees, or was caused by the fault of others. See, for example, Harte v. Gallagher, *supra*; In re Estate of Bednar, 151 Neb. 242, 37 N. W. 2d 195 (1949); In re Estate of Tagart, *supra;* In re Estate of Runyon, *supra;* Stewart v. Raper, 85 Neb. 816, 124 N. W. 472 (1910); Drexel v. Reed, *supra.*

No oral evidence was adduced at the hearing in District Court on the motion to dismiss, the entire matter being heard on affidavits submitted as exhibits by the parties. These affidavits described, sometimes in conclusory terms, the actions of the county judge, his staff, and of appellant's attorney at that time. A deputy clerk in the county court stated that the transcript was prepared by the court on January 22, 1975, and that on January 23, 1975, she telephoned the office of the attorney of record for Theophil Caha and informed his office that the transcript was ready to be transmitted upon the payment of the fee. In additional affidavits, the same deputy clerk, and also another clerk, deposed that they had personally informed certain individuals, known to them to be employees of the law firm of appellant's counsel, that the transcript was prepared and ready to be transmitted upon the payment of the fee. Both the county judge and the county clerk deposed in their separate affidavits that payment of the fees for the transcript was not waived in this case, and that it is not their practice or custom to waive the right to demand in advance fees for the preparation of transcripts in probate appeals not taken by the administra-

tors or executors; and that, in fact, transcripts are never allowed to be transmitted to the District Court for Lancaster County prior to the payment of fees. Theophil Caha, in resistance to appellee's motion to dismiss his appeal, submitted the affidavit of his attorney to the effect that he gave notice to the county court of his intention to appeal, together with a cash deposit in the amount of $200, filed a praecipe for the preparation of the transcript, "and tendered fees therefor," on or about January 14, 1975. He further stated that the transcript was never delivered to him nor transmitted to the clerk of the District Court; that he relied upon the clerk of the county court in this matter; did not receive a telephone call to the effect that the transcript had been prepared; nor did the county judge at any time contact affiant with respect to this matter; and that said transcript was not transmitted to him. We note in passing that the affidavit of one of the deputy clerks also states that on February 26, 1975, the fee for the transcript was paid to the county court of Lancaster County, Nebraska, "and a transcript was duly presented to a representative of Theophil Caha upon the payment of said fee." We are unable to ascertain from the record who paid the clerk for the transcript on the day in question, nor to whom it was delivered.

In this appeal, appellant makes two principal claims. First, that his alleged "tender" of the fee resulted in a waiver of the right to advance payment by the county court; and, second, that since he had posted a $200 cash appeal bond, it should have been used to pay for the transcript fees. In his affidavit counsel for appellant does allege that he tendered the fees for the transcript at or about the time he ordered it. The word "tender" is a word of art, and, standing alone, appears to be a mere legal conclusion. It would have been more helpful to the court had we been informed as to what actually transpired and what conversation ensued between the parties involved therein. It is the general rule that an

affidavit should be made by one having actual knowledge of the facts, and its allegations should be of the pertinent facts and circumstances, rather than conclusions, and should be full, certain, and exact. 3 Am. Jur. 2d, Affidavits, § 20, p. 396; 2A C. J. S., Affidavits, § 47, pp. 488, 489. Although appellant's counsel states in his affidavit that he "tendered fees," there is nothing in the record whatsoever that any proffered payment was refused; and what actually transpired, as previously stated, is a matter of conjecture.

The word "tender" has implicit in it a conclusion that all prerequisite elements are present to make the "offer" an actual "tender." Tender is an offer to perform a condition or obligation, coupled with the present ability of immediate performance, so that were it not for the refusal of cooperation by the party to whom tendered, the condition or obligation would be immediately satisfied. 15 Williston on Contracts (3d Ed.), § 1808, p. 418 (1972). According to Williston, "Tender of an unliquidated amount of money is also in the strict sense impossible." At the time that Caha's attorney allegedly offered to pay the transcript fees, the amount due was not known, nor was it immediately capable of certain calculation. At common law, tender could be pleaded in actions on a debt but not in an action on the case or in any action brought strictly for the recovery of unliquidated damages. In the absence of a statute to the contrary, tender is authorized "only in those cases where the demand is in the nature of a debt - where the sum due is either certain, or capable of being made certain by a mere arithmetical calculation." Johnson v. Williams, 222 Ala. 278, 132 S. 170 (1931), citing Green v. Shurtliff, 19 Vt. 592; Ganus & Co. v. Tew, 163 Ala. 358, 50 S. 1000 (1909). Under the circumstances of this case, a "tender" in contemplation of law was not possible before the cost of the transcript was determinable. Clearly, payment was not a condition to the preparation of the transcript; and an obligation to pay,

that is a debt, did not exist until the court had prepared the transcript. This court has stated that by pleading a tender one concedes "that the amount tendered was due at the time it was made." James v. Hogan, 154 Neb. 306, 47 N. W. 2d 847 (1951); Portsmouth Savings Bank v. Yeiser, 81 Neb. 343, 116 N. W. 38 (1908). The amount of the transcript fee was unknown; and that amount, whatever it might have been, was not due when appellant's attorney allegedly proffered payment. We conclude that under the facts of the instant case a legal tender was not made to the county court for the payment of the transcript fees. Such effort, so far as revealed by the available record, did not result in a waiver of the payment of such fees. All the evidence indicates that the filing of the transcript was delayed solely because of appellant's failure to pay the fees.

Appellant next contends that the appeal bond, in this case a cash bond of $200, should have been used to pay the fee. This argument is likewise without merit. Section 30-1603 provides that the bond shall be used to "pay all debts, damages and costs that may be adjudged" against the appellant. It is a cardinal principle that statutes pertaining to the same subject should be construed together as if they were one law, and effect given to every provision; and that absent evidence of clear legislative intent, the court should not give an interpretation to a statute which would have the effect of nullifying another statute. Livestock Carriers Div. of M. C. Assn. v. Midwest Packers Traf. Assn., 191 Neb. 1, 213 N. W. 2d 443 (1973). If the cash bond were intended to be available for the payment of the transcript fees, the provision of section 30-1605 requiring the county court to transmit the transcript to the clerk of the District Court "on payment of his fees therefor" would become a nullity and totally superfluous in the many cases where the county court's fee is less than the bond on deposit. We also point out that the "debts, damages and costs" covered by the bond under section

30-1603 are not those assessed by the county court. Those are settled before an appeal may be pursued. Section 30-1603 refers to the costs imposed by the District Court in disposing of the case.

In conclusion, we find the record in this case does not establish that a waiver of fees was customary in the county court of Lancaster County, nor was appellant's attorney informed that the transcript would be filed without advance payment. Nor does there appear to be any evidence of negligence on the part of the county judge or of the county court's employees that would mandate measures to mitigate the admittedly harsh results of a loss of an appellant's hearing. There is evidence in the record from which the District Court could properly conclude in this case that the employees and agents of appellant's attorney were notified of the necessity of paying the fee before the transcript would be transmitted. The attorney is chargeable with this notice under fundamental rules of agency. See Restatement, Agency 2d, § 9(3), (1958).

In this case the transcript was not filed in the District Court within 40 days from the decision of the county court, and no legal excuse appears. Therefore the District Court did not have jurisdiction of the appeal, and properly dismissed it upon motion. We affirm the order of the District Court dismissing appellant's appeal to that court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FREDERICK D. BANKS, III, APPELLANT.

237 N. W. 2d 875

Filed January 29, 1976. No. 40181.

1. **Criminal Law: Constitutional Law: Trial.** Whether an identification procedure is violative of due process will be determined

upon a consideration of the totality of the circumstances surrounding it.

2. **Criminal Law: Constitutional Law: Trial: Evidence.** Even though an identification procedure may have been suggestive, the in-court identification may be allowed to go to the jury if under the totality of the circumstances it is determined to be reliable because it has an origin independent of the taint.
3. ———: ———: ———: ———. If identification procedures are such as to violate due process, the denial of a proper and timely motion to suppress and the admission of the in-court identification constitutes reversible error unless this court can say beyond a reasonable doubt that the error was harmless.
4. ———: ———: ———: ———. Bolstering of an eyewitness identification of an accused by reference to a pretrial identification of the accused is prohibited only where the pretrial identification procedures violate due process standards.
5. **Criminal Law: Constitutional Law: Trial: Evidence: Time.** The general rule is that in a prosecution for a crime, where there is other evidence of the guilt of the accused and the crime is of such a nature that the acquisition of money may be regarded as a natural or ordinary result of its perpetration, evidence is admissible of the sudden acquisition of money by the defendant, or the marked improvement in his financial condition at or subsequent to the time the offense was committed, even though the source of the money is not definitely traced or identified by the prosecution. However, under some circumstances testimony as to possession of such money may be admissible without the foundation of showing the accused's previous financial condition.

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

Warren S. Zweiback of Zweiback & Laughlin, for appellant.

Paul L. Douglas, Attorney General, and Chauncey C. Sheldon, for appellee.

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

CLINTON, J.

The defendant, Frederick D. Banks, III, was found guilty by a jury on charges of robbery and the use of a

firearm in the commission of a felony. He was sentenced to confinement in the Nebraska Penal and Correctional Complex for a term of 5 to 10 years on the robbery charge and to a consecutive term of 3 years on the firearm charge. He appeals to this court and assigns as error the following: (1) The trial judge erred in not suppressing an in-court identification which he alleges was the product of an impermissibly suggestive lineup. (2) The trial judge erred in admitting testimony at trial of an identifying witness that she had previously identified the defendant in a lineup. (3) The trial judge erred in admitting testimony as to a quantity of currency found on the defendant's person at the time of his arrest 4 days after the robbery. (4) The sentences imposed are excessive because the defendant has no serious prior criminal record. We affirm.

The last comprehensive review by this court of the rules of law applicable to the first two assignments of error was in our opinion in State v. Sanchell, 191 Neb. 505, 216 N. W. 2d 504. Upon rehearing in that case a majority of this court reached different factual conclusions, but the legal principles applicable were not affected. In the opinion cited above we reviewed the various opinions of the Supreme Court of the United States relating to the issue and then stated the rules as follows: "The conduct by the police, at whatever time, of identification procedures must not be so unnecessarily suggestive and conducive to a substantial likelihood of irreparable mistaken identification as to be a denial of due process of law.

"Whether an idenfitication procedure is violative of due process will be determined upon a consideration of the totality of the circumstances surrounding it.

"Even though an identification procedure may have been suggestive, the in-court identification may be allowed to go to the jury if under the totality of the circumstances it is determined to be reliable because it has an origin independent of the taint.

"If identification procedures are such as to violate due process, the denial of a proper and timely motion to suppress and the admission of the in-court identification constitutes reversible error unless this court can say beyond a reasonable doubt that the error was harmless." In that opinion we also, with reference to the bolstering of the in-court identification by testimony of the previous identification by the witness at a lineup, pointed out that such bolstering is prohibited only where the lineup or other pretrial identification violates due process standards. We there also noted our view that the per se exclusionary rule of Gilbert v. California, 388 U. S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178, had implicitly been overruled by Neil v. Biggers, 409 U. S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401.

In the present case the first question we must decide is whether, under the totality of the circumstances shown by the record, the pretrial identification procedures were so unnecessarily suggestive as to be conducive to a substantial likelihood of irreparable misidentification. If that question is answered affirmatively, the in-court identification is nonetheless admissible if it is determined in the light of all the evidence that the identification was reliable because it has an origin independent of any taint from suggestive pretrial identification procedures.

As we read the brief of the defendant, his first two assignments are directed to the identification testimony of the witness Itaras Rose.

Two front desk employees at the Holiday Inn at 72nd and Grover Streets in Omaha were robbed at gunpoint by two black men at about 2:15 o'clock a.m. on November 16, 1974. Approximately $2,300 in currency, property of the Inn, was taken in the robbery. The only witnesses were Patricia Thomas, desk clerk, Itaras Rose, night auditor, and Gene Petro, a guest of the Inn. The conviction of the defendant rested upon his identification by the witnesses Rose and Petro. These wit-

nesses testified that the defendant was the shorter of the two robbers, was the one armed with a revolver, and was the one who gave directions during the robbery.

Details of the robbery are important to the issues here to be decided only insofar as they relate to the certainty of the identification by these witnesses and their opportunities for observation. We therefore make detailed reference to the evidence from the Wade hearing and the trial only as we discuss the testimony of these witnesses and the manner in which the pretrial identifications were made.

After the robbers left the Inn, the police were called. Petro and Rose gave descriptions to the police. Thomas could not. The substance of the latter's testimony at trial was that the robbers were two black males, one tall and one shorter. The shorter one held the gun and gave the directions. She could not otherwise describe the robbers other than: "I really don't remember. The only thing that I was interested in was the gun. All I know is the one was tall, and I thought sure that he had a black jacket on, leather one. And the short one, I don't remember anything, except the gun. That's all I could remember. Q. Just the gun? A. Yes, sir, and that he was short." This witness did not identify the defendant at trial nor in a lineup.

Shortly after the robbery one of the investigating officers took the three witnesses to the police station where the witnesses looked at photographs in mug books. At that time Rose picked out a photo of one Willie Haney as one bearing a resemblance to the shorter robber. Haney was apprehended later that day and the police conducted a showup with Haney alone at which Rose and Thomas were present. Rose then stated positively that Haney was not the robber. Thomas also did not believe he was the one.

On November 20, 1974, Petro was a guest at the Hilton Hotel in Omaha and at about 11:15 p.m. on that date

he entered the lobby from the elevator. As he did so a young black man moved toward the elevator to enter it. Petro immediately recognized the face as one he had seen before and as the two men passed Petro realized it was the man who held the gun during the robbery at the Holiday Inn on the 16th. Petro also at the time recognized a leather jacket worn by the man as one identical to one worn by the robber. Petro immediately notified the hotel security officer (an off-duty policeman) and the police were called. The defendant was apprehended about an hour and a half later after he was seen leaving the elevator and going to the parking garage adjacent to the Hilton Hotel.

Later, on the night of November 20, 1974, at the jail, a lineup was held. The lineup consisted of the defendant (minus jacket); two black city employees then working at the jail; and a black jail inmate, one Terry Kent. One of the employees in the lineup was about 6 feet 4 inches tall. The other three, including the defendant, were about the same height, but the second employee was considerably heavier and wore a full beard. Both the defendant and Kent then had thin mustaches and they would appear from lineup photographs to be of about the same age although Kent was stated to be 16 years of age and the defendant about 25. The defendant was attired in a brown turtleneck sweater and brown slacks. The two employees wore blue slacks and denim work jackets. Kent was attired in blue trousers, a loose blue undershirt, and a faded denim jacket. At this lineup Thomas stated that Kent looked most like the smaller of the two robbers. Rose was then called to view the lineup. She at once identified the defendant as the man who held the gun and gave directions during the robbery. Petro was then called and he identified the defendant.

At trial Rose identified defendant as the robber who held the gun and did the talking. She stated that his appearance was distinctive because of his thin nose and

face. She at trial further testified to her identification of the defendant at the lineup on November 20, 1974, and testified that she had at that time stated: " 'I'm positive that's him.' " At trial Petro positively identified the defendant. He was not a witness at the Wade hearing and was not asked at trial to buttress his identification by testimony of his previous lineup identification.

It is clear that Petro's identification of the defendant was not dependent upon his identification of him at the lineup. Prior to the lineup he had spontaneously identified the defendant as the latter was boarding the elevator at the Hilton Hotel. This spontaneous identification by Petro is very like the identification to which we attached considerable weight in State v. Moss, 187 Neb. 391, 191 N. W. 2d 543. The description Petro gave the police immediately after the robbery was in no way inconsistent with his later identification and testimony. At the trial Petro testified that he had good looks at the defendant's features on four occasions just before and during the robbery, viz., (1) when he and the robber looked directly at each other when the robber was at the telephone; (2) when the revolver was jabbed in his ribs or stomach; (3) when the robber opened the door and directed him to go into the room where Rose was working; and (4) again when Petro was moving to lie down on the floor at the robber's direction.

We find that the lineup was not unduly suggestive. The only black persons immediately available were the three who stood in the lineup with the defendant. At least one of these was sufficiently close in general appearance to the defendant so that the witness Thomas thought he resembled the robber. We further find that the identification by Rose and Petro rested upon an independent basis free of any possible taint by the lineup.

We now consider the third assignment. At the police station following his arrest defendant was found to have in his possession $753 in currency, including the

following: Four $100 bills, two of which were new and two of which were old, the new bills bearing consecutive serial numbers; and ten $5 bills, eight of which were new. The serial numbers of these new bills were every second number in consecutive order of two different series, tending to support the conclusion that the series could have been recently split between two or more persons. During the State's case-in-chief one of the police officers was, over the defendant's objection, permitted to testify to the possession of this money by the defendant at the time of his arrest. The record establishes that none of the $2,300 currency taken consisted of $100 bills. The defendant therefore argues that the money could not have come from the robbery and was therefore irrelevant. The State's theory is that, since there is other evidence to connect the defendant with the crime, the possession of this substantial sum of money shortly after the crime has some relevance, and that the newness of some of the bills and the unusual relation of serial numbers tend to support an inference that money taken in the robbery had been exchanged for the purpose of disguising it.

The general rule is that in a prosecution for a crime, where there is other evidence of the guilt of the accused and the crime is of such a nature that the acquisition of money may be regarded as a natural or ordinary result of its perpetration, evidence is admissible of the sudden acquisition of money by the defendant, or the marked improvement in his financial condition at or subsequent to the time the offense was committed, even though the source of the money is not definitely traced or identified by the prosecution. 91 A. L. R. 2d 1049. In this case the State's case-in-chief did not introduce any evidence to show the defendant's financial circumstances previous to the robbery. However, the defendant took the stand in his own behalf, denied his participation in the robbery, and testified to an alibi which was weakly corroborated. His testimony further

showed that he was by trade a drywall taper and earned about $8 per hour; and that in this trade one was not usually employed fulltime and that, in this particular case, he had not been regularly employed since August of 1974.

Some courts have admitted proof of possession of substantial sums of money in cases similar to this even where the financial condition of the defendant previous to the crime has not been shown and they have said that in all such cases the weight of such evidence is for the jury. See, Harrison v. State (Fla. App.), 104 S. 2d 391; People v. Siemsen, 153 Cal. 387, 95 P. 863; People v. Falls, 150 Cal. App. 2d 554, 310 P. 2d 484; People v. Gardner, 128 Cal. App. 2d 1, 274 P. 2d 908; State v. Cofer, 73 Idaho 181, 249 P. 2d 197. We hold that under the circumstances here shown, the testimony as to the possession of the currency by the accused was not erroneous.

The last assignment of error is the claim of excessive sentence. The defendant had no prior felony conviction. However, the evidence establishes a threat to the lives of the victims and a claim of professionalism by the robber. Petro testified that the defendant said to Rose: " 'Lady, you better get down on the floor or I'll blow your head off. I do this for a living. I'm not fooling around. I do this for a living.' " The other two witnesses testified similarly. We do not feel that the sentence imposed was, under the circumstances, excessive.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EDWIN A. LEE, APPELLANT.

237 N. W. 2d 880

Filed January 29, 1976. No. 40202.

1. **Weapons: Evidence: Trial: Criminal Law.** Evidence of pos-

session of a revolver or gun of prohibited description, which is in apparently good condition and has the characteristics and appearance commonly understood to be those of the firearm it purports to be, is prima facie evidence sufficient to go to the jury in a prosecution under section 28-1011.15, R. S. Supp., 1974.

2. **Continuances: Trial: Criminal Law.** A trial court may, in a proper case, order a continuance on its own motion.
3. ———: ———: ———. In the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal.
4. **Evidence: Trial: Records: Criminal Law.** Where conviction of a previous felony is an essential element of the crime charged, proof of such prior conviction is properly made by offering in evidence authenticated copies of the complaint or information, and the judgment rendered on the verdict or the plea of guilty, evidence that the judgment has become final, and that the defendant is the same person presently before the court.

Appeal from the District Court for Keith County: JOHN H. KUNS, Retired District Judge, and KEITH WINDRUM, Judge. Affirmed.

LeRoy Anderson of Murphy, Pederson & Piccolo, for appellant.

Paul L. Douglas, Attorney General, and Jerold V. Fennell, for appellee.

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

MCCOWN, J.

The defendant was found guilty by a jury of the crime of unlawful possession of a firearm by a felon and sentenced to imprisonment for 1 year.

The evidence established without serious dispute that the defendant did possess a 22-caliber revolver with a 4¾-inch barrel. The defendant's assignments of error rest on three principal contentions: (1) That the State failed to prove that the revolver was a "firearm" because it failed to prove that the revolver was operable; (2) that a continuance granted by the court was im-

proper; and (3) that the State failed to prove that the defendant, Edwin A. Lee, was the same person as the Edwin Lee convicted of a felony as shown by an authenticated transcript of conviction in evidence here.

Section 28-1011.15, R. S. Supp., 1974, makes it unlawful for any person who has been convicted of a felony to possess any firearm with a barrel less than 12 inches in length. The evidence established the defendant's possession of a 22-caliber revolver with a 4¾-inch barrel. The revolver was admitted into evidence. At various places in the testimony it was referred to as a "gun," a "weapon," a "revolver," as well as a "firearm." It was examined and the barrel measured by a witness who had extensive experience and training with firearms. No witness even intimated that the gun was not operable, although no one affirmatively testified that the gun was in operating condition.

The jury was instructed that a "firearm" is an instrument used to propel shot, shell, or bullets by the action of gunpowder exploded within it, and that the State must establish that the defendant did possess a firearm with a barrel less than 12 inches in length. No error is assigned as to instructions.

The defendant contends that the State must prove not only that the instrument is a gun or firearm but also that it is operable and capable of being fired, even though there is nothing in the record which even suggests that the "firearm" here was not, in fact, operable.

Some courts have held that evidence of a defective or inoperable condition of a firearm was an affirmative defense which the defendant should be required to establish. We think the better rule, however, to be that evidence of possession of a revolver or gun of prohibited description, which is in apparently good condition and has the characteristics and appearance commonly understood to be those of the firearm it purports to be, is prima facie evidence sufficient to go to the jury in a prosecution under section 28-1011.15, R. S. Supp., 1974.

See, Commonwealth v. Lee, 224 Pa. Super. 17, 302 A. 2d 474; State v. Thomas, 244 Ore. 377, 418 P. 2d 837; State v. Bolin, 200 Kan. 369, 436 P. 2d 978.

The defendant contends that it was error for the District Court to grant a continuance during the course of the trial. The continuance was from Tuesday afternoon to Friday morning to permit the State to present a final witness not available on Tuesday. The ground of defendant's objection is that the State made no written motion for continuance supported by affidavits in accordance with section 25-1148, R. R. S. 1943, and section 29-1206, R. S. Supp., 1974, and that the granting of the continuance was an abuse of discretion. The argument is that the claimed error is presumptively prejudicial, but there is no claim or showing of any actual prejudice.

In this case, as in Waite v. State, 169 Neb. 113, 98 N. W. 2d 688, the continuance was granted to enable the State to produce a witness to identify the defendant as the person previously convicted of another felony. In the Waite case this court held that a trial court may, in a proper case, order a continuance on its own motion. The District Court here, although acting at the request of the county attorney and over the objection of the defendant, specifically took notice of the fact that the county attorney had taken office as county attorney only a few days before, and granted leave to him to secure the additional evidence. As in Waite, the trial court here was acting for the obvious purpose of preventing a miscarriage of justice and in the exercise of a sound judicial discretion.

Under circumstances where the trial court, on its own motion, could properly grant a continuance, it would be strange indeed to hold that he could not grant the same continuance at the request of one of the parties. In the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal. Elm Creek State Bank v. Depart-

ment of Banking, 191 Neb. 584, 216 N. W. 2d 883. There was no abuse of discretion here.

The defendant's final contention is that the evidence was insufficient to establish that the defendant had previously been convicted of a felony. Where conviction of a previous felony is an essential element of the crime charged, we have consistently held that proof of such prior conviction is properly made by offering in evidence the complaint or information, the judgment rendered on the verdict or the plea of guilty, evidence that the judgment has become final, and that defendant is the same person presently before the court. State v. Ninneman, 179 Neb. 729, 140 N. W. 2d 5.

At the commencement of the trial here, the State identified exhibit 1 and offered it in evidence. The defendant objected to its introduction on the ground, among other things, that there was no showing that the defendant was the same defendant presently before the court. At that time ruling was reserved on exhibit 1. Exhibit 1 contained authenticated copies of an information, jury verdict, and judgment of conviction. They established the prosecution and subsequent conviction of Edwin Lee for the felony crime of forcible breaking and entering of a building in Thayer County, Nebraska, on July 7, 1968. As evidence of identity, the State called the sheriff of Thayer County, Nebraska. He testified that he had been in the sheriff's office for 12 years, and had been personally acquainted with the defendant for at least 15 or 20 years. The sheriff testified that the defendant was the person prosecuted in Thayer County in approximately 1968. The defendant did not cross-examine the sheriff, and exhibit 1 was then received in evidence over the objection of the defendant. While the examination of the sheriff by the county attorney left much to be desired, the evidence elicited was sufficient to support the jury finding.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. THOMAS L. WOOD, APPELLANT.

238 N. W. 2d 226

Filed January 29, 1976. No. 40203.

1. **Criminal Law: Searches and Seizures.** A consent to search may be valid even though the subject of the search is unaware that he has a right to refuse consent.
2. **Criminal Law: Searches and Seizures: Arrest.** Where probable cause exists for the arrest of an accused in his motor vehicle upon a public highway and at that time probable cause for the search of his vehicle exists as well, a search of the vehicle a short time later at a different location while the vehicle is still in police custody is not unreasonable even though made without a warrant.
3. **Criminal Law: Searches and Seizures: Probable Cause: Time.** When, subsequent to a stop of a camper, by the use of his senses, a trooper became aware of the presence of marijuana, at that time, under our law, he had probable cause to search the camper for marijuana without the necessity of relying on consent.
4. **Criminal Law: New Trial: Time.** The time requirements of section 29-2103, R. R. S. 1943, are mandatory. A motion for a new trial under that section must be filed within 10 days after the verdict is rendered, not within 10 days from the date of sentencing, unless the verdict and sentencing occur on the same day.

Appeal from the District Court for Keith County: HUGH STUART, Judge. Affirmed.

Leonard P. Vyhnalek of Beatty, Morgan & Vyhnalek, for appellant.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, BOSLAUGH, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ.

SPENCER, J.

Defendant, Thomas L. Wood, who waived a jury, was convicted of possession of marijuana with intent to distribute or deliver. He was sentenced to a term of not

less than 1 nor more than 2 years in the Nebraska Penal and Correctional Complex. We affirm.

When the defendant's motion at the close of the State's case was overruled, defendant rested. Defendant's only assignments of error herein are the overruling of his motion to suppress evidence and the failure to sustain his objections to that evidence when introduced at the time of the trial. There is no merit to these assignments. State v. Holmberg (1975), 194 Neb. 337, 231 N. W. 2d 672, is controlling herein.

On April 22, 1974, defendant was observed driving a pickup truck on Interstate 80 east of Ogallala. It had a camper mounted on it, and the trooper was unable to see a front license plate because of a spare tire attached to the front grill. It was a Michigan vehicle and he knew Michigan, like Nebraska, requires two plates. The trooper stopped the vehicle to check on whether the vehicle had a front license plate.

The trooper asked the defendant for his driver's license and the vehicle registration. Defendant produced his driver's license and two registrations, one for the pickup and one for the camper. Both the camper and the pickup had different registrations, neither of which was that of the defendant. Suspecting the vehicle may have been stolen, and that defendant might not have its keys, the patrolman asked him if he knew what was in the camper. Defendant said that it contained some beer and volunteered, "Here, I'll show you." Defendant went to the camper entrance at the rear of the truck and both he and the patrolman entered the camper.

The trooper, who had been trained in drug identification, noticed the distinctive odor of marijuana when he entered the camper. He also noted fresh carpenter markings and sawdust along cabinets on the inside of the camper. The built-up compartments normally are not found in a manufactured stock-type camper.

The trooper then asked defendant to accompany him

to the Ogallala police station so the registration of the vehicle could be checked. There defendant was asked to wait in the foyer of the police department. The trooper testified he asked defendant if he could search the vehicle and defendant replied, "Yes." Defendant testified the trooper asked him for the keys to the vehicle and that he complied. A search revealed over 500 pounds of marijuana hidden in specially constructed compartments in the camper.

Defendant does not argue that a search pursuant to consent is unlawful, but argues rather that his consent to search was coerced because he was unaware of his right to refuse consent. A consent to search may be valid even though the subject of the search is unaware that he has a right to refuse consent. The United States Supreme Court exhaustively discussed this issue in Schneckloth v. Bustamonte (1973), 412 U. S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854. There, the officer asked one of the occupants of the car, who said the car was his brother's, if he could search it, and was told, "Sure, go ahead." In the instant case, without a request the officer was invited to inspect the camper by the defendant. The Supreme Court held knowledge of the subject's understanding of his right to refuse was only one factor to be taken into account. The Supreme Court went on to say: "One alternative that would go far toward proving that the subject of a search did know he had a right to refuse consent would be to advise him of that right before eliciting his consent. That, however, is a suggestion that has been almost universally repudiated by both federal and state courts, and, we think, rightly so. For it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning. Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. The

circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning. The police may seek to investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a crime. These situations are a far cry from the structured atmosphere of a trial where, assisted by counsel if he chooses, a defendant is informed of his trial rights. Cf. Boykin v. Alabama, 395 U. S. 238, 243. And, while surely a closer question, these situations are still immeasurably far removed from 'custodial interrogation' where, in Miranda v. Arizona, supra, we found that the Constitution required certain now familiar warnings as a prerequisite to police interrogation."

In any event, after being invited to inspect the camper, the officer detected a strong odor of marijuana. He then had a right to make a full-scale search of the camper, either on the highway or at the police station. However, defendant was taken to the station and asked there if the officer could search his vehicle. The testimony on consent is in dispute. The officer testified that defendant replied, "Yes," and gave him the keys. While defendant does not directly deny this testimony, his version is that the officer told him to lock the vehicle and give him the keys. Subsequently, defendant did deny ever giving the officer consent to search. To the extent the testimony was controverted, the court, trying the case without a jury, resolved the conflict in favor of the State. It has the same force and effect as a jury finding. On the record we are bound by that finding.

State v. Franklin (1975), 194 Neb. 630, 234 N. W. 2d 610, dealt with the question of a subsequent search of a vehicle while in police custody, without a warrant. We there said: "Where probable cause exists for the arrest of an accused in his motor vehicle upon a public highway and at that time probable cause for the search of his vehicle exists as well, a search of the vehicle a

short time later at a different location while the vehicle is still in police custody is not unreasonable even though made without a warrant."

In Chambers v. Maroney (1970), 399 U. S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419, the Supreme Court held that where probable cause exists for the search of an automobile, that probable cause is not lost by the removal of the automobile to the police station, and a search warrant is not required even though the automobile is in the hands of the police and the danger of its removal or the destruction of the contraband has been eliminated.

The facts in State v. Holmberg (1975), 194 Neb. 337, 231 N. W. 2d 672, were almost identical to the instant case except there the officer did not have as good a reason to stop the defendant as the trooper did in the instant case. In Holmberg we said: "Subsequent to the stop, by the use of his senses, the trooper became aware of the presence of marijuana. At that time, under our law, he had probable cause to search the camper for marijuana without the necessity of relying on consent, although he had consent in this case. In the search he discovered the marijuana and placed the defendant under arrest."

What we have said disposes of this appeal. There is, however, another reason why the appeal must fail. Defendant was convicted on March 25, 1975. Possibly through a misunderstanding on the part of defendant's counsel, the motion for a new trial was not filed until May 16, 1975. Section 29-2103, R. R. S. 1943, provides that the application for a new trial shall: "* * * except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, be filed within ten days after the verdict was rendered unless unavoidably prevented." The motion was not filed within 10 days, and the defendant was not unavoidably prevented from filing one.

As we said in State v. Lacy, (1976), *ante* p. 299, 237

N. W. 2d 650: "The time requirements of section 29-2103, R. R. S. 1943, are mandatory. A motion for a new trial under that section must be filed within 10 days after the verdict is rendered, not within 10 days from the date of sentencing, unless the verdict and sentencing occur on the same day."

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HATTIE E. PADLEY, APPELLANT.

237 N. W. 2d 883

Filed January 29, 1976. No. 40228.

1. **Constitutional Law: Statutes.** Where it appears that unconstitutional portions of an act can be separated from the valid portions and the latter enforced independent of the former, and it further appears that the invalid portions did not constitute such an inducement to the passage of the valid parts that they would not have been passed without them, the former may be rejected and the latter upheld.
2. **Constitutional Law: Statutes: Legislature.** The Legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend.
3. **Constitutional Law: Statutes: Motor Vehicles.** Section 39-662, R. S. Supp., 1974, is not unconstitutional.

Appeal from the District Court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Padley & Dudden, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

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

The defendant was arrested on November 17, 1974,

NEWTON, J.

for driving in excess of 55 miles per hour on a freeway. At the time of her arrest sections 39-662 and 39-662.01, R. S. Supp., 1974, were in effect. She contends that these statutes are unconstitutional as an unauthorized delegation of power to the President of the United States, and as having been passed as the result of federal pressure. We affirm the judgment of the District Court.

Section 39-662 fixes highway speeds at a maximum of 55 miles per hour and then provides that when the President terminates the Emergency Highway Energy Conservation Act the permissible speed upon a freeway shall be 75 miles per hour.

Section 39-662.01 provides that if Congress should amend the conservation act, the maximum freeway-speed limit should be 75 miles per hour "or such speed as Congress requires for compliance with such act, whichever is the lesser."

There had not been any amendment of the act as contemplated in section 39-662.01 and it has no bearing on defendant's guilt or innocence. She was convicted under the speed limit set in section 39-662. We do not deem it necessary to pass on the constitutionality of section 39-662.01 as it is not in issue and constitutes a separate legislative act.

It will be noted that section 39-662 fixes a definite speed limit and the contingency that the fuel emergency would be terminated by a presidential proclamation never occurred. This provision in the act has no bearing on defendant's case unless it is deemed not to be severable. We hold that it is severable. "Where it appears that unconstitutional portions of an act can be separated from the valid portions and the latter enforced independent of the former, and it further appears that the invalid portions did not constitute such an inducement to the passage of the valid parts that they would not have been passed without them, the former may be rejected and the latter upheld." Safeway Stores, Inc. v.

Nebraska Liquor Control Commission, 179 Neb. 817, 140 N. W. 2d 668.

It may also be noted that after fixing a definite speed limit presently effective, the statute proceeds to fix an alternative speed limit to become effective when the federal conservation act is nullified. In so doing the Legislature has not delegated its power to make the law but has designed its alternative provision to become effective on the happening of a certain contingency. It is a well-recognized rule of law that: "The legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend." Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N. W. 451. See, also, 16 Am. Jur. 2d, Constitutional Law, § 253, p. 503, § 258, p. 507; City of Milwaukee v. Sewerage Commission, 268 Wis. 342, 67 N. W. 2d 624; Florka v. City of Detroit, 369 Mich. 568, 120 N. W. 2d 797.

It is the defendant's position that the statute would not have been adopted except that Congress made sharing in federal road funds contingent upon compliance with the 55 mile an hour speed limit and that such coercion renders the statute unconstitutional. We are at a loss to follow this reasoning. It is the privilege of Congress to fix the terms upon which federal money allotments to the states shall be made and it is entirely optional with the states to accept or reject such offers. There is no coercion and each state acts of its own volition. See Oklahoma v. United States Civil Service Commission, 330 U. S. 127, 67 S. Ct. 544, 91 L. Ed. 794.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY LEE DAVIS, APPELLANT.

237 N. W. 2d 885

Filed January 29, 1976. No. 40239.

Criminal Law: Indictments and Informations: Trial: Instructions: Police Officers and Sheriffs. A defendant charged with assaulting and resisting a law enforcement officer in the performance of his official duties may be found guilty upon proof of either an assault or a resisting where the statute is worded in the disjunctive and in such a case it is not error for the trial court to instruct the jury as to the elements of the offense in the language of the statute. § 28-729.01, R. S. Supp., 1974.

Appeal from the District Court for Butler County: HOWARD V. KANOUFF, Judge. Affirmed.

Walker, Luckey, Whitehead & Sipple and Mark M. Sipple, for appellant.

Paul L. Douglas, Attorney General, and Jerold V. Fennell, for appellee.

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

BOSLAUGH, J.

The defendant was charged with assaulting and resisting the sheriff of Butler County, Nebraska. The jury returned a verdict of guilty and the defendant was sentenced to imprisonment for 1 year. The defendant has appealed and contends the trial court erred in instructing the jury in the disjunctive, as the statute provides, instead of in the conjunctive as the information alleged.

The record shows that a deputy sheriff was called to Bellwood, Nebraska, on December 13, 1974, because of a tavern fight that had taken place. The deputy asked the defendant to leave the tavern and go home. The defendant left the tavern but drove around Bellwood instead of going directly to his home. The sheriff arrived and as the defendant's automobile passed near

the sheriff and the deputy some obscene language was shouted from the defendant's automobile. The sheriff then determined to arrest the defendant for disturbing the peace.

The sheriff stopped the defendant's automobile, opened the door on the driver's side, and told the defendant that he was under arrest for disturbing the peace. The sheriff asked the defendant for identification. The defendant did not comply with the request, but cursed the sheriff and drove off at a high rate of speed. The glove on the sheriff's left hand became entangled in the handle or door latch and the sheriff was dragged 75 or 100 feet before he could free his hand from the glove.

The defendant does not challenge the sufficiency of the evidence to sustain a finding that the defendant was guilty of resisting the sheriff. The defendant's theory of the case is that the State was required to prove both a resisting and an assault because the information was worded in the conjunctive, and the trial court was required to instruct in the conjunctive.

Section 28-729.01, R. S. Supp., 1974, provides that: "Whoever forcibly assaults or resists any law enforcement officer while engaged in or on account of the performance of his official duties, shall be guilty of a felony * * *." Under this statute the offense is complete if the evidence shows either an assault or a resisting of any law enforcement officer while engaged in the performance of his official duties.

In Nash v. State, 110 Neb. 712, 194 N. W. 869, this court approved the following statement from 1 Bishop, Criminal Procedure (3d Ed.), § 436: " 'It is common for a statute to declare that, if a person does this, or this, he shall be punished in a way pointed out. Now, if, in a single transaction, he does all the things, he violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore an indictment upon a statute of this kind may allege, in a single count, that the defendant did as many

of the forbidden things as the pleader chooses, employing the conjunction *and* where the statute has *or*, and it will not be double, and it will be established at the trial by proof of any one of them. * * *.' " See, also, Pines v. United States, 123 F. 2d 825, where the court held that, although a statute is disjunctive, the various acts made criminal may be charged conjunctively and the defendant be found guilty of some act prohibited by the statute.

The instructions given by the trial court correctly advised the jury as to the charge contained in the information, the language of the applicable statute, and the essential facts required to be found before a verdict of guilty could be returned. Although some authorities have held instructions confusing where the indictment or information charged the offense in the conjunctive and the instructions set out the elements of the crime in the disjunctive, we think the contention made in this case is without merit. We find no error in the instructions.

The judgment of the District Court is affirmed.

AFFIRMED.

JOHN HUPKE, APPELLEE, V. MARVA JOY HUPKE, APPELLANT.
238 N. W. 2d 229

Filed February 5, 1976. No. 39947.

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

George H. Moyer, Jr., of Moyer & Moyer, for appellant.

Jewell, Otte, Gatz, Collins & Domina, for appellee.

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

MCCOWN, J.

This is an action for dissolution of a marriage. The

District Court found the marriage to be irretrievably broken, made a property division, awarded custody of the two children to the wife, and set the child support to be paid by the husband at $125 per month per child. The wife has appealed.

The parties were married on November 13, 1972, and separated in January of 1974. The petition here was filed in the District Court on April 10, 1974, and decree was entered on November 8, 1974. Two children are involved. Chad Michael is a son of the wife by a previous marriage. He was born October 20, 1971, and was adopted by the husband in this action. Jill Kathryn was the daughter of the parties born May 18, 1974.

The principal issues here are financial, involving the property division and child support amounts. At the time of the hearing in November of 1974, the total gross value of the marital property was approximately $4,600, of which approximately $3,100 was the equity in a house they were purchasing on contract, against which foreclosure proceedings had been commenced. The remaining $1,500 was personal property consisting principally of the husband's car, valued at $1,200. Debts of the parties totaled $2,378.51, $1,456.51 of which was owed to a finance company.

The husband was employed by the Nebraska Harvestore Company. He worked an average of 55 hours per week with overtime after 40 hours, and after required deductions, his approximate net weekly take-home pay was $165, or a little more than $650 a month. The parties' income tax return for 1973 showed a total adjusted gross income of $7,530, all from wages or salaries. The wife, prior to marriage, had worked for the telephone company as an operator, but at the time of trial she was earning $35 to $40 per week babysitting.

The court attempted to divide the property equally between the parties, after allowance to the wife of $1,400 and $300 to the husband for property brought into the marriage by each. The court awarded to the hus-

band his personal property and the automobile, subject to the payment of half of the $1,456.51 due to the finance company. The wife was awarded all personal property in her possession, including all household goods; income tax refunds of approximately $125; and the equity in the house, subject to any encumbrances. The court directed her to pay the remaining indebtedness, except for the half of the finance company debt to be paid by the husband.

The husband was also directed to pay child support in the sum of $250 per month, $125 for each child. The court also directed the husband to pay costs and a partial attorney's fee of $150 for the wife, and, exclusive of that amount, the parties were directed to pay their own attorney's fees.

Affidavits of record establish that after the entry of the decree the parties executed a deed to the property to the wife's parents without consideration. The wife presently resides in the house and is paying monthly rental to her parents. We are uncertain as to the inferences or implications raised by these facts, but in any case, they occurred subsequent to the decree.

The District Court meticulously evaluated the property involved, as well as the respective circumstances of the parties. At the time of the decree the parties were 28 and 27 years of age respectively. The marriage had lasted less than 2 years and the debts incurred were almost equal to the total value of the property. The court attempted to allow to each of the parties their respective contributions at the inception of the marriage, and to divide the remaining property and debts equally. That task here was a difficult one.

The rules for making a division of property or in fixing the amount of child support provide no mathematical formula by which such matters can be precisely determined. The judgment of a trial court fixing the amount of child support or making a distribution of property will not be disturbed on appeal in the absence

of an abuse of discretion. Cumming v. Cumming, 193 Neb. 601, 228 N. W. 2d 296. There was no abuse of discretion here.

The judgment is affirmed, the parties to pay their own attorney's fees and costs in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID C. BLACK, APPELLANT.

238 N. W. 2d 231

Filed February 5, 1976. No. 40093.

1. **Statutes.** It is the duty of the court, so far as practicable, to give effect to the language of a statute and to reconcile the different provisions of it, so they are consistent, harmonious, and sensible.
2. **Statutes: Criminal Law: Intent.** When the literal enforcement of a statute would result in absurdity, the courts will assume that such consequences were not intended.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Frank B. Morrison and Bennett G. Hornstein, for appellant.

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellee.

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

WHITE, C. J.

Defendant was charged and found guilty under section 28-531.02, R. R. S. 1943, with breaking and entering a parked motor vehicle in Omaha, Nebraska. On March 14, 1975, the court sentenced the defendant to an indeterminate term of 1 to 2 years imprisonment in the Nebraska Penal and Correctional Complex. The sole assignment of error is that the District Court erro-

neously sentenced the defendant to an indeterminate term of imprisonment whose minimum term exceeded one-third of the statutory maximum term provided by law for the offense for which he was convicted. We affirm the judgment and sentence of the District Court.

Defendant rests his argument upon section 83-1,105(1), R. S. Supp., 1974, which provides: "Except where a term of life is required by law, in imposing an indeterminate sentence upon the offender, the court may: (1) Fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be less than the minimum provided by law *nor more than one-third of the maximum term,* and the maximum term shall not be greater than the maximum term provided by law." (Emphasis supplied.) It is settled that the phrase "nor more than one-third of the maximum term" refers to the maximum term provided by law for the offense, and not the maximum term set by the court. State v. Suggett, 189 Neb. 714, 204 N. W. 2d 793 (1973).

If the provision in section 83-1,105(1), R. S. Supp., 1974, that the minimum limit on an indeterminate sentence shall not exceed one-third of the statutory maximum term, is applied to this case, then the minimum limitation on the indeterminate sentence would be 8 months and thus less than the minimum term specifically provided by the Legislature for the offense which the defendant was convicted for. Section 28-531.02, R. R. S. 1943, provides for imprisonment of "*not less than one year* nor more than two years." (Emphasis supplied.)

Section 28-531.02, R. R. S. 1943, and section 83-1,105(1), R. S. Supp., 1974, are clearly in conflict. There is also a conflict within section 83-1,105(1), R. S. Supp., 1974, itself, for other language in that section provides that "the *minimum limit fixed by the court shall not be less than the minimum provided by law.*" (Emphasis supplied.) "It is the duty of the court, as far as prac-

ticable, to give effect to the language of a statute and to reconcile the different provisions of it so they are consistent, harmonious, and sensible." Van Patten v. City of Omaha, 167 Neb. 741, 94 N. W. 2d 664 (1959). "When the literal enforcement of a statute would result in absurdity, the courts will assume that such consequences were not intended." Kearney County v. Hapeman, 102 Neb. 550, 167 N. W. 792 (1918).

By its terms (section 83-1,105(1), R. S. Supp., 1974), the Legislature did not intend to affect or change the statutory minimum term of imprisonment for offenses, such as that prescribed by section 28-531.02, R. R. S. 1943, when it enacted section 83-1,105(1), R. S. Supp., 1974.

Applying the above rules, we necessarily conclude that the language in section 83-1,105(1), R. S. Supp., 1974, providing that the minimum limit of an indeterminate sentence shall not exceed one-third of the statutory maximum term, was not intended to be applicable to cases such as this, where one-third of the statutory maximum term is less than the statutory minimum term. In such a case, the language in section 83-1,105(1), R. S. Supp., 1974, that "the minimum limit fixed by the court shall not be less than the minimum provided by law" will be controlling and will fix the minimum limitation of the indeterminate sentence imposed.

Under our interpretation of section 83-1,105(1), R. S. Supp., 1974, the sentence imposed by the District Court was within statutory limits, and as such will not be disturbed on appeal absent a clear abuse of discretion. State v. Green, 194 Neb. 770, 235 N. W. 2d 663. There was no abuse of discretion in this case.

The judgment and sentence of the District Court are correct and are affirmed.

AFFIRMED.

GLEN L. PFEIFER, APPELLANT, V. SYLVESTER PFEIFER ET AL., APPELLEES.

238 N. W. 2d 451

Filed February 5, 1976. No. 40100.

1. **Summary Judgments.** The burden is upon the party moving for a summary judgment to show that no issue of fact exists, and unless he can conclusively do so, the motion must be overruled. Upon a motion for summary judgment, the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. In considering a motion for summary judgment, the court views the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom.
2. **Summary Judgments: Torts: Negligence.** The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense. Properly used it can accomplish that purpose. It can, however, have the opposite effect. In tort cases of the kind where reasonable minds may differ as to whether an inference of negligence is to be drawn from the given set of facts, it can have no application.

Appeal from the District Court for Platte County: C. THOMAS WHITE, Judge. Reversed and remanded.

Kirby, Duggan & McConnell, for appellant.

Jewell, Otte, Gatz, Collins & Domina, for appellees.

Heard before SPENCER, NEWTON, and CLINTON, JJ., and HENDRIX and BUCKLEY, District Judges.

BUCKLEY, District Judge.

Plaintiff, Glen L. Pfeifer, appeals from a summary judgment dismissing his tort action for damages.

The defendants Sylvester, Donald, and Pat Pfeifer, plaintiff's father and two brothers, respectively, are partners doing business as Sylvester Pfeifer & Sons. They commercially operated a picker-sheller combine. Pat brought the combine to Glen's farm to pick his corn. Shortly after the picking began, the combine broke down

and was taken into a quonset building for attempted repairs.

Glen and Pat went onto a platform on the top of the combine. While Pat was in the process of loosening or removing a safety shield in order to get at the source of the trouble, a large flat washer fell into the shelled corn in the bin. Concerned over the effect of the washer running through a machine or being swallowed by an animal, Glen eventually left the platform and went to the bottom of the bin to try and retrieve the washer. Pat, unaware of this, continued to search for the source of the trouble.

The unloading mechanism of the combine consisted of a horizontal auger at the bottom of the bin, which fed the corn into a second vertical auger inside the bin, which in turn delivered the corn to a third horizontal auger which delivered the corn to the truck. The auger at the bottom of the bin was exposed and in the area of the dropped washer.

While Pat continued working on the platform, Glen twice reached into the bin with his left arm but couldn't reach the washer. He then switched to his right arm for a third attempt. While he was doing this, Pat, suspecting that one of the augers was broken, went down the platform to the cab, reached in, and engaged the gear which activated the auger in the bottom of the bin, which in turn caught Glen's right arm, resulting in its ultimate amputation.

No reasons were given by the trial court in sustaining the motion for summary judgment. The evidence consists solely of the deposition testimony of Glen and Pat. Defendants contend that the undisputed facts show that plaintiff's contributory negligence was sufficient to bar recovery as a matter of law. Defendants also contend that plaintiff assumed the risk of his injury as a matter of law, but this affirmative defense was not pled, and will not be considered.

The principles of law involved are set out in Green v.

Village of Terrytown, 189 Neb. 615, 204 N. W. 2d 152: The burden is upon the party moving for a summary judgment to show that no issue of fact exists, and unless he can conclusively do so, the motion must be overruled. Upon a motion for summary judgment, the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. In considering a motion for summary judgment, the court views the evidence in the light most favorable to the party against whom it is directed giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom.

It is true that the testimony of Glen and Pat as to how the accident happened is essentially without dispute. Glen was generally familiar with the combine, but had never repaired it. When the washer fell into the bin, Glen immediately told Pat he would go down and get it but Pat said, "just let it go for now." It was less than 5 minutes later when Pat engaged the gear without ever realizing that Glen eventually had left the platform and was trying to retrieve the washer. As Pat said regarding his lack of effort to see where Glen was, "I just forgot." From under the bin, Glen could not see Pat up on the combine, but Pat, with little effort, could have looked down and seen the bottom of the bin, the auger, and Glen alongside. The motor of the combine was running throughout, but Pat gave no warning of his intention to engage the gear.

As is so often the case in tort actions, the inferences that may be drawn from established facts go to the heart of the resolution of the issues. Unless these inferences are conclusively established, a summary judgment cannot be granted. Are the inferences here conclusively established or could reasonable minds differ as to: (1) Whether Glen had a duty to tell Pat when he left the platform to retrieve the washer. (2) Whether Glen should have looked to see exactly where Pat was and what he was doing before reaching into the bin.

(3) Whether Pat should have looked for Glen and, noting his absence from the platform, realized he might be down at the bin retrieving the washer. (4) Whether Pat should have given a warning to Glen of his intention to engage the gear.

We find that reasonable minds could differ as to these inferences, and that the defendants accordingly are not entitled to summary judgment as a matter of law. As we said in Green v. Village of Terrytown, *supra*: "The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense. Clark on Code Pleading (2d. Ed.), § 88, p. 557. Properly used it can accomplish that purpose. It can, however, have the opposite effect. In tort cases of the kind where reasonable minds may differ as to whether an inference of negligence is to be drawn from the given set of facts, it can have no application. It is difficult to use in many tort cases."

The defendants rely on several farm-accident cases decided by this court, but in each one the trial court sustained defendant's motion for a directed verdict. This court said in Johnson v. Metropolitan Utilities Dist., 176 Neb. 276, 125 N. W. 2d 708: "A motion for a summary judgment is not a substitute for a demurrer or a motion for a directed verdict. We do not determine at this time that the plaintiff's evidence, whatever it will be, will present a jury question. We determine only that the record at this time does not show conclusively that there is no issue of fact in this case."

The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

CLINTON, J., dissenting.

I respectfully dissent. The majority opinion correctly points out that there is no essential dispute in the evidence. The opinion is, however, I believe, incorrect in suggesting that upon trial there could be additional evi-

dence which might affect the inferences which a reasonable mind might draw from the undisputed facts. Such an assumption is unrealistic. The plaintiff and the defendant Pat were the only witnesses with knowledge of the facts. This knowledge was thoroughly explored in the two depositions. If the plaintiff had further pertinent evidence he could have introduced it by affidavit or otherwise in opposition to the defendants' motion for summary judgment. A photograph or photographs might more clearly illustrate the oral evidence, but could not in any essential way change it.

The majority opinion lists four propositions, the inferences as to which it is stated reasonable minds might differ. However, in my judgment, the one proposition which is critical and as to which reasonable judicial minds ought not to differ, if the principle of stare decisis is to be given credence, is not dealt with.

That proposition is that the plaintiff was, as a matter of law, guilty of contributory negligence more than slight proximately contributing to his injury. That inference flows from the following: Plaintiff was 25 years of age. He was a farmer. He was familiar with the combine mechanism. He knew or ought to have known that the engine was running. He knew or ought to have known that if, while the engine was running, the clutch, by which the auger was controlled, was intentionally or accidentally moved to the operating position, the auger would rotate. He knew or ought to have known that if his arm or hand were in the auger channel when this should occur serious personal injury was inevitable. Nonetheless, immediately after he suggested to the defendant Pat that he (plaintiff) would attempt to retrieve the lost washer and Pat had said, "let it go for now," he went ahead, without informing Pat, in his efforts to find the washer and in so doing placed his arm and hand in the auger channel in the bottom of the bin. At that time he knew or ought to have known that the auger was operational. He did

this without informing Pat. He did this at a time when, under the evidence, he should have realized that Pat might, in order to test whether the repairs had been successful, shift the clutch which controlled the auger. It seems clear from the record the plaintiff was guilty of negligence contributing to his injury and that that negligence was of a kind and measure which was more than slight.

Accidents of this type causing personal injury are a frequent occurrence. So frequent, in fact, that manufacturers now customarily print upon machines of various types, for example, snowblowers, warnings which caution operators against working on or attempting to dislodge clogged material from working parts while the engine is running. These are cautions against relying merely upon disengagement of some type of clutch control. It is the very fact that such controls may inadvertently or intentionally be engaged that makes so extremely hazardous working upon such machines while the motor is running.

In principle this case is indistinguishable from Anstine v. Briggs, 191 Neb. 489, 215 N. W. 2d 878; and Fritchley v. Love-Courson Drilling Co., Inc., 177 Neb. 455, 129 N. W. 2d 515. In the first case we affirmed the verdict for the defendants. Plaintiff in that case was a 17-year-old youth employed at a feed yard and he had "placed himself between [a] tractor and [a] feed wagon in a position of extreme danger if the wagon should be moved." We held he was guilty of contributory negligence as a matter of law. In the second case, the plaintiff was, in the course of his employment, required to climb an iron bar ladder on the side of a water tank in an oil field. One of the rungs of the ladder was loose at one end. Plaintiff was aware of this. He climbed the ladder. The rung swung out slightly, causing him to fall. We there said that he was guilty of contributory negligence as a matter of law.

If the principle of stare decisis is to be given credence,

we ought to follow it in applicable cases. The two cases cited are in principle indistinguishable from the one at hand. If anything, the plaintiff's negligence in this case is greater than that of the plaintiffs in the cases cited.

I would affirm the judgment of the trial court.

NEWTON, J., joins in this dissent.

DOLLY VADA SNAY, A MINOR, BY AND THROUGH OTTO SNAY, HER FATHER AND NEXT FRIEND, APPELLEE, V. JOHN E. SNARR, APPELLANT.

238 N. W. 2d 234

Filed February 5, 1976. No. 40128.

1. **Trial: Appeal and Error.** In a law action tried to the court without a jury, it is not within the province of this court to weigh or resolve conflicts in the evidence. The credibility of the witnesses and the weight to be given to their testimony are for the trier of fact.
2. **Trial: Paternity.** In a paternity case where a jury is not requested by the alleged father, the findings of the court have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong.

Appeal from the District Court for Sarpy County: RAYMOND J. CASE, Judge. Affirmed.

Charles I. Scudder, for appellant.

Robert V. Broom and David A. Jacobson, for appellee.

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

MCCOWN, J.

This is a civil proceeding brought by the plaintiff, a 17-year-old minor, by and through her father, against the 19-year-old defendant, to establish the paternity of her child. The District Court entered its judgment determining the defendant to be the father of the minor child.

The plaintiff was born July 5, 1957. She was single and had never been married. The plaintiff testified, and the defendant admitted, that they had sexual intercourse on March 29, 1974, and on April 5, 1974. There was corroboration by two witnesses as to the first incident. Shortly thereafter plaintiff suspected she was pregnant and on May 3, 1974, a test at University Hospital confirmed the pregnancy. Plaintiff immediately notified the defendant. The child was born on December 27, 1974.

The plaintiff's obstetrician testified that the child, a 7 pound 2 ounce baby girl, was a full-term baby. The doctor testified that he did not know whether the baby was, in fact, overdue but that if it was, it was less than 3 weeks overdue because of the absence of clinical signs. He also testified that in his professional opinion, considering the date of delivery, the outer limits of the period of conception were from March 10 through April 10, 1974, and the most likely time for conception would have been from March 17 to March 19. He testified that conception on March 29, 1974, was possible but unlikely. If conception occurred on March 29, 1974, the period of gestation was 274 days. The plaintiff testified that during the critical period from March 10 until she missed her menstrual period in April 1974, she did not have sexual intercourse with any man except the defendant.

There was evidence the plaintiff was found to have gonorrhea on June 4, 1974. The defendant testified that in the early part of June 1974 he had undergone tests for venereal disease and that all were negative, and that he had never had venereal disease. The defendant also introduced evidence, largely circumstantial, to indicate that plaintiff might have had sexual intercourse with other individuals within the critical time frame. That evidence was directly contradicted by the evidence of plaintiff and her father.

After the birth of the baby, blood tests were taken

of the plaintiff, defendant, and the baby which did not exclude the defendant as the father of the child.

The case was tried to the court without a jury and upon consideration of the evidence, the court entered its determination that the defendant was the father of the child.

The defendant's assignments of error are all directed to the basic issue of whether the evidence is sufficient to support the judgment of the trial court.

A paternity proceeding in Nebraska is considered as a civil action and only a preponderance of evidence is necessary to sustain a verdict. See, §§ 13-111 and 13-112, R. R. S. 1943; Lockman v. Fulton, 162 Neb. 439, 76 N. W. 2d 452.

In a law action tried to the court without a jury, it is not within the province of this court to weigh or resolve conflicts in the evidence. The credibility of the witnesses and the weight to be given to their testimony are for the trier of fact. Brewer v. Case, 192 Neb. 538, 222 N. W. 2d 823.

In a paternity case, where a jury is not requested by the alleged father, the findings of the court have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong. Stauffer v. Wilson, 182 Neb. 129, 153 N. W. 2d 454; Brewer v. Case, *supra*; § 13-112, R. R. S. 1943.

The evidence is sufficient to support the finding and judgment of the trial court.

AFFIRMED.

LYDIA HAUG, APPELLANT, V. LLOYD F. HAUG, APPELLEE.
238 N. W. 2d 455

Filed February 5, 1976. No. 40137.

Divorce: Alimony: Res Judicata. Unless amounts have accrued prior to the date of service of process on a petition to modify,

orders for alimony may be modified or revoked for good cause shown, but when alimony is not allowed in the original decree dissolving a marriage, such decree may not be modified to award alimony. § 42-365, R. S. Supp., 1974.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Lydia Haug, pro se.

Erickson, Sederstrom, Johnson & Fortune, for appellee.

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

PER CURIAM.

This is an appeal from an order of the District Court for Douglas County entered on February 24, 1975, upon the petitioner's application for modification of the original decree as to alimony; respondent's answer to that application; respondent's petition for modification of child support; the petitioner's application for change of custody of Daniel Haug, child of the parties, and for attorney's fees and costs; and respondent's answer to the application. The order of February 24, 1975, denied the application for alimony; continued legal custody of Daniel Haug in the court with possession in the petitioner; and directed the payment of child support for maintenance of Daniel Haug in the amount of $600 per month commencing October 10, 1974, with credit being given for interim payments made. The order further directed that each party pay his own attorney's fees and costs but directed the respondent to pay the sum of $150 to the court-appointed guardian ad litem for Daniel Haug.

The petitioner, Lydia Haug, represents herself pro se in this court. The respondent, Lloyd F. Haug, appears by counsel.

We take note of and consider the errors claimed by the petitioner only insofar as our appellate jurisdiction permits us to do so. We cannot, therefore, take notice of other litigation not before us on this appeal; evi-

dentiary matters not included in the bill of exceptions; and previous orders which became final because not appealed from and which are, under the law, not subject to modification. Neither can we make procedural rules especially for this case, but we must adhere to those applicable and already established.

The basic issues here are: (1) Whether the trial court had power under the pertinent case authority and statutes to award alimony and, if it did, whether the evidence justified an award of alimony. (2) Whether the order re child custody and child support was proper. (3) Whether the petitioner should have been awarded a sum for the services of her attorney. We affirm the judgment of the District Court.

Some of the history of the litigation is necessary for a proper consideration of the first issue. Lydia Haug was granted a divorce from Lloyd F. Haug on September 1, 1970, and was awarded custody of the two sons of the parties, David and Daniel. The divorce decree incorporated an agreement which had been entered into by the parties and which was entitled: "AGREEMENT FOR SETTLEMENT OF PROPERTY, CHILD SUPPORT, CUSTODY AND VISITATION." That agreement, among other things, provided: "5. The Defendant shall pay the Plaintiff for the support and maintenance of the minor children of the parties hereto through the office of the Clerk of the District Court of Douglas County, Nebraska the sum of One Thousand and no/100 Dollars ($1,000.00) per month for one year commencing August 1, 1970, payable on the first day of each month through July, 1971, the sum being Five Hundred and no/100 Dollars ($500.00) per month per child. Thereafter he is to pay the sum of Seven Hundred Fifty and No/100 Dollars ($750.00) per month, said sum being Three Hundred Seventy-Five and No/100 Dollars ($375.00) per month per child payable on the first day of each month until said minors reach twenty years of age, become emancipated, die, or while each child is

regularly enrolled as a full-time student in an institution of higher learning and is regularly pursuing a course of study to attain a degree and is in good standing in said institution."

On June 15, 1973, pursuant to an application of Mr. Haug, filed on November 10, 1972, the court changed custody from the petitioner to the court and by its order incorporated a stipulation which had been entered into by the parties. This stipulation provided in part: "5. That if the boys shall choose to remain in the physical possession of the plaintiff then the defendant shall continue to pay maintenance that he has been paying in preceding months, namely, $1,000 per month; that in the event one of said children shall remain with the plaintiff the defendant shall pay maintenance of $750 per month and all of said maintenance payments shall continue for such period of time as originally designated in the decree heretofore entered in this matter or until further order of Court.

"6. That in the event that the boys remain in the possession of the defendant maintenance to the plaintiff shall be reduced to the sum of $500 per month for one year after the date of commencement of residence of the children with the defendant."

Petitioner argues that the original agreement for child support, incorporated in the September 1, 1970, order, was, in fact, intended to be in part an award for support for her and that it is therefore subject to future modification under the provisions of section 42-365, R. S. Supp., 1974, which contains provisions authorizing modification of awards of alimony. Petitioner's interpretation of the agreement is without legal basis. The monetary awards provided for in paragraph 5 are, by the unambiguous terms thereof, "for the support and maintenance of the minor children of the parties." There is no way the agreement or the September 1, 1970, order of the court incorporating it can be construed otherwise. Under that agreement Mrs. Haug

was awarded certain real estate, apparently the home of the parties, all the furniture and fixtures therein, and an automobile. The order incorporating the agreement recites as part of the court's findings that "the parties have entered into an agreement setting forth the property rights of the parties and have agreed upon alimony and child support payments." It then incorporates the "agreement." Petitioner argues that the inclusion by the court of the term "alimony" in the court's recital has the effect of making the payment alimony in part. The use of the word "alimony" may be a mere inadvertence, or it may be a loose reference to the division of property which is sometimes referred to somewhat improperly as alimony. The order itself, however, was very specific and contains no reference to alimony. It recited: "WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiff be and hereby is granted an absolute divorce from the Defendant, and the custody of the children of the parties subject to rights of visitation as set forth in Exhibit 'A'.

"IT IS ORDERED that the Defendant shall pay support for said minor children as set forth in Exhibit 'A'.

"IT IS ORDERED that the property settlement, child support and visitation rights agreement, marked Exhibit 'A' and attached hereto is hereby approved and adopted as part of this decree."

It is next pointed out that paragraph 6 of the stipulation approved by the court on June 15, 1973, does award alimony and it is argued that this award is subject to modification under the provisions of section 42-365, R. S. Supp., 1974, even though the original decree is not subject to modification. Respondent in effect concedes that paragraph 6 provides for alimony which he voluntarily agreed to pay, but argues that it is alimony in gross and not modifiable unless a change of circumstances is shown, and urges that the evidence shows no change of circumstance. This was the position taken by the District Court in its order of February

24, 1975, which is the order from which this appeal was taken.

Section 42-365, R. S. Supp., 1974, provides in part: "Unless amounts have accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown, but when alimony is not allowed in the original decree dissolving a marriage, such decree may not be modified to award alimony." It is clear that under this provision of the statute the decree of September 1, 1970, was not subject to modification to award alimony because that decree made no alimony award. Is the order of June 15, 1973, incorporating the voluntary agreement by Mr. Haug to pay alimony for a 12-month period, subject to modification under the terms of that statute, that is, may the order of June 15, 1973, incorporating the voluntary agreement of the respondent be interpreted as an "original decree dissolving a marriage" so as to bring it within the terms of section 42-365, R. S. Supp., 1974? The answer, we think, for reasons we will elaborate, is no.

First of all, the order and stipulation of June 15, 1973, is not within the literal language of section 42-365, R. S. Supp., 1974. Secondly, the pertinent provision of section 42-365, R. S. Supp., 1974, with which we are concerned, seems to incorporate the law relative to modification of alimony awards as the law existed previous to the marriage dissolution act of 1972. Before the act of 1972, section 42-324, R. R. S. 1943, provided in part as follows: "After a decree for alimony or other allowance for the wife and children, or either of them, . . . the court . . . may revise and alter such decree respecting the amount of such alimony . . . ." Previous to the marriage dissolution act, even under statutes such as section 42-324, R. R. S. 1943, it was generally held that if the decree awarded no alimony there was nothing to modify and the statutory provision was inapplicable. In the annotation at 83 A. L. R. 1248, it is stated: "It

seems to be well settled, apart from statutory considerations, that, when alimony is in issue and is omitted from the decree, it cannot thereafter be inserted, at least in the absence of fraud or mistake." Cases are cited from Arizona, California, Georgia, Iowa, Kansas, Maryland, Michigan, New York, South Dakota, and Wisconsin. At page 1250 of the same annotation, we find the following: "It has been generally, though not invariably, held that statutes permitting modifications or changes as to alimony do not apply where no alimony has been granted in the decree." Cases are cited from 14 different jurisdictions. In Kelkenney v. Getsey, 137 Neb. 416, 289 N. W. 795, an action for reformation of a divorce decree to provide for alimony, we denied relief. The original decree had made no alimony award and we at least implied that the rules just cited were the law in this jurisdiction. The theory was one of res judicata—whatever aspects of alimony were or could have been litigated in the divorce action cannot be attacked collaterally if the court does not award alimony in the original decree. See 24 Am. Jur. 2d, Divorce and Separation, § 651, p. 770. See, also, 43 A. L. R. 2d 1393.

Thus it appears that, except for the voluntary agreement of Mr. Haug to pay alimony in the stipulation incorporated in the order of June 15, 1973, the District Court would have had no power to make an award of alimony at that time. If we were to adopt petitioner's position, it would result in imputing to the Legislature the anomalous intention of permitting modification of an order affirming a voluntary agreement to pay alimony entered subsequent to the original decree where the court would have no authority otherwise to order modification. This would discourage court-ratified, voluntary, subsequent agreements to pay alimony because such voluntary action might become the basis for a continued obligation under section 42-365, R. S. Supp., 1974. We think such voluntary agreement ought not

to be discouraged. We note in passing that uncertainties need not exist in cases hereafter if pertinent provisions of the new statutes are carefully followed by the parties and the court. We point out specifically the following: "Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient." § 42-365, R. S. Supp., 1974. "Except for terms concerning the custody or support of minor children, the decree may expressly preclude or limit modification of terms set forth in the decree." § 42-366(7), R. R. S. 1943.

Because of our determination that section 42-365, R. S. Supp., 1974, has no applicability to the alimony award approved by the order of June 15, 1973, it is not necessary for us to review de novo the District Court's determination that there was no change of circumstance which would have justified a modification of the alimony award if section 42-365, R. S. Supp., 1974, were applicable. Nonetheless, we have carefully read the bill of exceptions and have come to the same conclusion as did the trial court.

For the reasons given, the District Court did not err in denying a modification of the alimony award.

We now turn to the child custody and child support issues. Pursuant to the previously mentioned agreement between the parties, both sons, David and Daniel, chose to go to Texas to live with their father. In August 1974 Daniel, the youngest, who was 16 years of age at the time of trial, returned to Omaha for a visit with his mother and decided to remain with her. Thereafter Mr. Haug filed the previously mentioned application for modification of child support payments. Mrs. Haug, among other things, filed the application for change of child custody. The court denied the request for change of child custody and awarded child support to Mrs. Haug in the amount of $600 per month. Mrs. Haug asserts the amount is insufficient. We have read

the record as it pertains to that issue. We find no abuse of discretion by the trial court in determining the amount of the award. Neither did the trial court abuse its discretion in denying an award of attorney's fees to Mrs. Haug. Tavlin v. Tavlin, 194 Neb. 98, 230 N. W. 2d 108. Each party will pay his own costs and attorney's fees in this court.

AFFIRMED.

JIM L. ESSEX, APPELLANT, V. SYNTHA E. ESSEX, APPELLEE.
238 N. W. 2d 235

Filed February 5, 1976. No. 40163.

1. **Divorce: Alimony: Property.** The rule in this state is that the fixing of alimony or distribution of property rests in the sound discretion of the District Court, and, in the absence of an abuse of discretion, will not be disturbed on appeal.
2. **Divorce: Alimony.** Under section 42-365, R. S. Supp., 1974, a court may, upon dissolution of a marriage, order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment.
3. **Divorce: Alimony: Property.** Generally, assets held in trusts, established by third persons, for the benefit of one of the spouses or the children are not marital assets, even though under some circumstances an indigent spouse may reach them to satisfy a support obligation.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Guinan & Kolenda, for appellant.

Harry H. Foulks, for appellee.

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

WHITE, C. J.

This case is an appeal from a divorce decree. The

appellant originally brought the action, seeking a dissolution of his marriage to the appellee. In his pleadings, the appellant asked for a property division and for alimony. Both parties testified to the irretrievable breakdown of the marriage, and there was no dispute over custody of the minor children. The District Court found the marriage irretrievably broken and dissolved it. Custody of the minor children was given to the appellee, and the appellant was directed to pay child support and to maintain health insurance policies for the benefit of the minor children during their minority. The household goods and an automobile were awarded to the appellee. The parties were awarded their respective personal belongings and were directed to pay their own costs and fees. Neither party was awarded alimony. We affirm the decree of the District Court.

At trial, the appellant sought to show that the corpus of various trusts, established by the maternal grandparents of the children for the benefit of the appellee during her life and for the children, was greatly increased via his efforts in obtaining a premium sale price on stock held by the creators of the trusts. The appellant contends that this testimony should have been received because it had a direct bearing upon the final property division. The appellant apparently feels that since the trust benefits the appellee and the children, he should be compensated for his efforts in enhancing it by a greater award of property than he ultimately received or by alimony. The District Court divided the marital assets, assets which either party or both had title to, and did not regard the trusts as marital assets to be included when determining the division of property. The appellant's offer of proof was refused on grounds of irrelevancy.

In a dissolution of a marriage, a division of property is a division of property owned by the parties - marital assets. Bliven v. Bliven, 190 Neb. 492, 209 N. W. 2d 168 (1973). Assets held in trusts, established by third per-

sons, for the benefit of one of the spouses or the children are not marital assets, even though under some circumstances an indigent spouse may reach them to satisfy a support obligation. See, e.g., In re Will of Sullivan, 144 Neb. 36, 12 N. W. 2d 148 (1943). The District Court was correct in refusing to accept the testimony offered by the appellant.

The appellant also finds error in the District Court's failure to award him alimony. Under section 42-365, R. S. Supp., 1974, a court may, upon dissolution of a marriage, order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, the duration of marriage, and the ability of the supported party to engage in gainful employment. Walker v. Walker, 193 Neb. 540, 227 N. W. 2d 878 (1975). One of the primary reasons for an award of alimony is support. Corn v. Corn, 190 Neb. 383, 208 N. W. 2d 678 (1973). The record discloses that the appellant is 45 years old, in good health, holds degrees from the University of Omaha and Illinois Tech in Chicago, has been continuously employed since his graduation in 1954, and is currently employed in Ames, Iowa, by a large corporation as a senior project engineer earning $1,649 per month gross pay. The appellant shows no need for alimony and we cannot find error in the District Court's refusal to award the appellant alimony.

"The rule in this state is that the fixing of alimony or distribution of property rests in the sound discretion of the District Court, and, in the absence of an abuse of discretion will not be disturbed on appeal." Olson v. Olson, *ante* p. 8, 236 N. W. 2d 618 (1975). We find no abuse of discretion in this case.

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

AFFIRMED.

LESTER OLDS, APPELLEE, V. DEAN JAMISON, APPELLANT.
238 N. W. 2d 459

Filed February 5, 1976. No. 40170.

1. **Contracts: Evidence: Trial.** Parol evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties.
2. **Contracts: Evidence.** A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous.
3. **Contracts: Evidence: Trial.** Conflicting evidence relating to ambiguity and contradictory provisions in a written contract is for the finder of fact.
4. ———: ———: ———. The fact that one of the parties to a contract denies that a mistake was made does not prevent a finding of mutual mistake nor prevent reformation.
5. ———: ———: ———. Where a written contract is the basis of an action and neither party asks for a reformation thereof, it is the duty of the court to ascertain its meaning and enforce it accordingly.

Appeal from the District Court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed.

Richard A. Douglas of Herman & Herman, for appellant.

Michael V. Smith of Smith & King, for appellee.

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

MCCOWN, J.

This is an action for the replevin of wheat planted by the plaintiff and harvested by the defendant after the expiration of a lease. The court found generally in favor of the plaintiff and the defendant has appealed.

In January 1971, the plaintiff, Lester Olds, and Charles Matteson discussed and agreed on the general terms of a lease on a 480-acre farm owned by Matteson located

near Gordon, Nebraska. The plaintiff and Matteson went to the office of an attorney in Gordon, Nebraska, to have him prepare the lease for them. When the lease was ready some days later, it was mailed to Matteson at his residence in South Dakota, where he signed it. It was then returned to the attorney's office in Gordon where the plaintiff signed it. The lease was dated February 20, 1971. The lease was for 3 years from the 1st day of March 1971, until the 28th day of February 1974, for a total cash rental of $9,000, payable $1,500 on March 1, 1971, $1,500 on September 1, 1971, and like sums on the 1st day of March and September of each year thereafter during the term of the lease.

The lease provided that it was subject to the sale of the premises and that in the event the land was sold to someone other than the lessee "Lessee shall peaceably give up possession at the end of the lease year in which the premises are sold, provided Lessors give Lessees three (3) months notice of such sale and termination of lease."

The lease also gave the lessee a first option to purchase the premises for the same price as may have been negotiated and agreed with any other prospective purchaser.

The critical paragraph in the lease provides: "3. The Lessor shall have the privlege (sic) of harvesting any grain crop planted by him in the year subsequent to the expiration of this lease."

The plaintiff took possession of the farm on March 1, 1971. At that time there was a wheat crop growing on the land which had been planted by a previous tenant who returned in the summer and harvested the crop. On June 29, 1971, the lessor, Matteson, notified plaintiff that he had a person interested in purchasing the farm and that plaintiff had first option to purchase. The plaintiff was unable to finance a purchase. Matteson then sold the land to defendant, Dean Jamison, and his wife on an installment contract dated October 9,

1971. The plaintiff was never given any notice of sale by the lessor nor any notice that the lease would terminate at the end of lease year, but was told that he could continue on the farm. Plaintiff paid the rent to Matteson on March 1, 1971, and September 1, 1971, and paid the rent to Jamison on March 1, 1972, and September 1, 1972. In January 1973, the plaintiff and defendant agreed that plaintiff would feed, pasture, and look after approximately 40 head of defendant's cattle instead of paying cash rent that year. The arrangement did not work out and defendant removed his cattle from the farm sometime in September 1973, and demanded payment of cash rental for the balance of the year. Plaintiff tendered $1,000, but the defendant refused it as not enough.

Plaintiff summer fallowed the wheat land on the farm in the summer of 1973, and in the fall provided the seed and planted approximately 115 acres of winter wheat. In September the defendant notified the plaintiff that he would have to move at the termination of the lease. There is a direct conflict in the testimony with respect to negotiations or an agreement between the parties regarding the wheat. The defendant's evidence was that plaintiff was to be paid the costs of summer fallowing and planting the wheat computed at $20 an acre. Plaintiff's evidence was that defendant offered to buy the wheat for that price but was told that plaintiff did not want to sell his wheat, and that the amount offered was even less than the cost of planting. Defendant did not tender or pay the plaintiff any amount for the wheat, and plaintiff did not pay defendant any cash rent for the latter part of the 1973-74 lease year.

On February 24, 1974, the plaintiff was informed by defendant that the wheat belonged to the defendant and that defendant was going to harvest it. The plaintiff vacated the premises and by letter dated February 28, 1974, informed defendant that plaintiff claimed the

wheat and intended to harvest it. The defendant thereafter harvested the wheat planted by the plaintiff and stored the 3,586 bushels in grain elevators. This replevin action followed.

The District Court found that the lease should be reformed by changing the word "lessor" to "lessee" in paragraphs 3 and 5, and that plaintiff had the right to receive the wheat crop, and entered judgment against the defendant for $11,776.32, the value of the wheat crop, less the cost of harvesting. The court also allowed $1,710 in set-offs to defendant on his counterclaim, which included the sum of $1,250 as the balance due on the cash rental for the 1973-74 lease year.

Defendant's assignments of error all center around the trial court's finding that the lease should be reformed by changing the word "lessor" to "lessee" in paragraphs 3 and 5. The basic position of the defendant is that there was no mistake or ambiguity in the lease and that it was therefore error to admit oral testimony to alter or vary the terms of the lease. Defendant also contends that the issue was not within the pleadings and that the lease could not be reformed on the ground of mistake because the lessor testified that it was not a mistake.

The principal argument rests on defendant's contention that the lease was the complete written expression of the parties' agreement, and that no parol testimony should have been admitted to interpret or alter its provisions.

The term "parol evidence rule" is in itself inaccurate and its interpretation is often confusing and misleading. See 3 Corbin on Contracts, § 573, p. 358. For a full discussion of the parol evidence rule and its multiple exceptions, see 3 Corbin on Contracts, Chapter 26, The "Parol Evidence Rule," p. 356.

Parol evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties.

Central Constr. Co. v. Osbahr, 186 Neb. 1, 180 N. W. 2d 139. In any event, this court has ordinarily applied the parol evidence rule only in the absence of fraud, mistake, or ambiguity. Securities Acceptance Corp. v. Blake, 157 Neb. 848, 62 N. W. 2d 132.

A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous. Conflicting evidence relating to ambiguities and contradictory provisions in a written contract is for the finder of fact. Ely Constr. Co. v. S & S Corp., 184 Neb. 59, 165 N. W. 2d 562. Where the language and meaning of a written contract are not clear and unambiguous, the agreement must be interpreted or construed.

There is ample evidence of both mistake and of ambiguity in this record. The critical paragraph 3 reads: "The *Lessor* shall have the privlege (sic) of *harvesting* any grain crop *planted by him* in the year *subsequent* to the expiration of the lease." (Emphasis ours.) Taken literally, if the word "lessor" was correct, the entire paragraph is not only confusing but virtually meaningless. It is undisputed that the plaintiff was the only one who planted any wheat during the period of the lease. The lessor had no authority to plant wheat during the term of the lease, and the words "planted by him" could not reasonably refer to the lessor under any circumstances. If the paragraph was intended to refer to grain crops both planted and harvested subsequent to the expiration of the lease, there was no reason to require it for either the lessor or the lessee, and the paragraph is completely meaningless. To say the least, the paragraph is confusing, vague, and ambiguous as written.

In addition to the issue of ambiguity, the testimony is persuasive that the word "lessor" in paragraphs 3 and 5 was a mistake of the scrivener. Paragraph 5 of the lease reads: "*Lessor* agrees to graze the pastures in

a good and husband-like manner and carefully protect all buildings, fences, mills and improvements * * *." (Emphasis ours.) The lessee testified that under the actual agreement of the parties the word "lessor" in both paragraph 3 and in paragraph 5 was a mistake and should have been "Lessee." The lessor himself concedes that the word "lessor" should have been "lessee" in paragraph 5 but testified that it was not a mistake as to paragraph 3. At the same time he conceded that in the case of a lease for a cash rent, it was the common custom, where wheat was planted in the fall, for the tenant to harvest that wheat after his lease had expired. The defendant testified that when he received plaintiff's letter claiming ownership of the wheat, he took it to the attorney who had drawn the lease, and the attorney stated: "That's a mistake in the lease." The defendant also testified, however, that at other times the attorney had advised him that the wheat was his. The attorney died prior to trial and was unavailable to testify.

The defendant also contends that the lease could not be reformed upon the basis of a unilateral mistake, and that because the lessor testified that there was no mistake on his part as to paragraph 3, there is no basis for reformation. In Lippire v. Eckel, 178 Neb. 643, 134 N. W. 2d 802, we held that if a clause was inserted in a deed by mistake on the part of the scrivener who drew it, then the mistake was mutual, because it was contrary to the real intention and agreement of the parties. The fact that one of the parties to a contract denies that a mistake was made does not prevent a finding of mutual mistake nor prevent reformation. See McFadden v. American Oil Co., 215 Pa. Super. 44, 257 A. 2d 283; 76 C. J. S., Reformation of Instruments, § 28(a), p. 364. The evidence of mistake here was clear, convincing, and satisfactory.

Defendant also asserts that the issues of mistake and ambiguity were not within the pleadings and not prop-

erly before the court. At pretrial the principal issue set out for trial was: "Did plaintiff and Matteson (lessor) agree that plaintiff was to have the crop harvested after the expiration of the lease?" The facts were pleaded in detail although they did not specifically seek reformation of the lease. Where a written contract is the basis of an action and neither party asks for a reformation thereof, it is the duty of the court to ascertain its meaning and enforce it accordingly. Martin v. Reavis, 117 Neb. 219, 220 N. W. 238. Other assignments of error are without merit.

The trial court saw and heard the witnesses and the evidence fully supports its findings and decree. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN M. MCFARLAND, APPELLANT.

238 N. W. 2d 237

Filed February 5, 1976. No. 40177.

1. **Searches and Seizures: Motor Vehicles: Standing: Criminal Law.** A thief has no legitimate interest in a stolen car and does not have standing to challenge a search of the automobile.
2. **Probation and Parole: Records: Criminal Law.** Where a probation revocation hearing is a judicial proceeding, a written statement as to the evidence relied on and the reasons for revoking probation is not required.

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

Frank B. Morrison and Bennett G. Hornstein, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

BOSLAUGH, J.

This is an appeal from an order revoking the defendant's probation. After pleading nolo contendere to burglary, the defendant was placed on probation for 2 years on February 27, 1974.

On January 14, 1975, a notice of violation of probation was served on the defendant. The notice fixed January 16, 1975, as the date for a preliminary hearing in the county court. A preliminary hearing was held on that date and the defendant was bound over. An information was filed in the District Court on January 17, 1975.

After an evidentiary hearing in the District Court the defendant was found guilty of violation of probation and his probation was revoked. On April 29, 1975, the defendant was sentenced to imprisonment for 3 to 9 years. The defendant has appealed.

The violation of probation charge arose out of an incident at a Richman Gordman store in Omaha, Nebraska, on September 28, 1974. A security officer at the store arrested the defendant for shoplifting. The police were called and took the defendant into custody at about 12:45 p.m. The police noticed a strong odor of marijuana about the person of the defendant. The defendant stated that he had an automobile in the parking lot. On the way to the police cruiser, the defendant and the officer went to the defendant's automobile to see if it had anything of value in it. When they arrived at the automobile the officer looked through the window and saw a bottle of white pills in a plastic waste basket on the floor of the automobile.

The officer then unlocked the automobile with a key taken from the defendant and searched it. In addition to the 55 pills, which proved to be amphetamine tablets, 16 packets of marijuana, 10 capsules of valium, and 6 plastic syringes were found in the automobile. Sub-

sequent investigation disclosed that the automobile was a stolen automobile.

The State alleged that the defendant had violated his probation by having unlawful possession of marijuana with intent to deliver, unlawful possession of amphetamines, and by committing petit larceny. At the time of the hearing in the District Court the defendant had been convicted of petit larceny as a result of the incident on September 28, 1974. The case, however, was then pending in this court on appeal and that charge was not considered by the trial court. The judgment in the petit larceny case was later reversed in State v. McFarland, 194 Neb. 569, 234 N. W. 2d 204, and the prosecution dismissed.

The defendant's principal contention on this appeal involves the search of the defendant's automobile following his arrest and before he was taken to police headquarters. The defendant contends the search was illegal and the evidence discovered during the search should have been suppressed and not considered at the probation revocation hearing. There are several reasons why we believe there is no merit in this contention.

There was no motion to suppress filed in this case. In addition to being charged with violation of probation the defendant was separately charged with unlawful possession of marijuana and amphetamines. Motions to suppress were filed in the other cases and counsel agreed that the hearing in this case could be combined with the hearings on the motions to suppress filed in the other cases.

After the defendant had been taken into custody by the police, the officer had a duty to make sure that no property of value was left unprotected in the defendant's automobile. The defendant said that he had been living out of the car for a couple of weeks and there was clothing and some kittens in the car. The strong odor of marijuana about the defendant's person was an indication that it was probable there was marijuana in the

automobile. When the officer arrived at the automobile, the amphetamine tablets were in plain sight. When the officer opened the door to the car, there was a strong odor of marijuana in the automobile. The defendant did not want the car towed away but planned to have some friends pick it up.

At the hearing the defendant testified he had no knowledge of the drugs in the car; they were not his property; and he did not know who put them in the car.

Perhaps the most important circumstance is the fact that the automobile was a stolen car. The evidence established the automobile belonged to another person and the defendant had been using it without permission. We believe the correct rule to be that the thief has no "legitimate interest of any kind" in a stolen automobile and does not have standing to challenge a search of the automobile. See, Brown v. United States, 411 U. S. 223, 93 S. Ct. 1565, 36 L. Ed. 2d 208; Palmer v. State, 14 Md. App. 159, 286 A. 2d 572.

The defendant also complains that he was denied a speedy preliminary hearing and a speedy final probation revocation hearing before a neutral and detached hearing officer in violation of the rules set out in Morrissey v. Brewer, 408 U. S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484; and Gagnon v. Scarpelli, 411 U. S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656. These objections, which are raised for the first time in this court, have no merit.

The claim that the trial court was not a neutral and detached hearing officer is based on several statements made by the judge at a hearing on April 10, 1975, on a motion to release the defendant on his own recognizance. At that hearing the trial court observed that the defendant had been convicted of burglary; while on probation had "committed another two crimes"; and the defendant was "no sweet pea." The further discussion that ensued demonstrates that the trial court was merely stating that a convicted burglar who has been charged

with two additional crimes while on probation is not a good risk for release upon a personal recognizance.

With respect to the revocation hearing in District Court on April 11, 1975, it is clear that the hearing was held within the probation period. The defendant was given credit on his sentence for all jail time except the 30-day sentence for petit larceny. There is no evidence of any prejudice to the defendant because of the delay that intervened between the filing of the charge and the final hearing. Under the circumstances of this case we believe the contention is without merit.

Since the revocation hearings were judicial proceedings, a written statement as to the evidence relied on and the reasons for revoking probation was not required. State v. Jaworski, 194 Neb. 645, 234 N. W. 2d 221.

A further review of the evidence is unnecessary. It was sufficient for the trial court to conclude that the defendant's violation of his probation had been established by evidence that was clear and convincing.

The judgment of the District Court is affirmed.

AFFIRMED.

McCOWN, J., concurs in the result.

MICHAEL B. GROWNEY AND MICHAEL B. GROWNEY, ASSIGNEE, APPELLEES, V. C M H REAL ESTATE COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLANTS.
238 N. W. 2d 240

Filed February 5, 1976. No. 40182.

1. **Contracts: Fraud.** An essential element of actionable false representation is justifiable reliance on the representation.
2. **Fraud: Actions.** The general rule is that where ordinary prudence would have prevented the deception, an action for the fraud perpetrated by such deception will not lie.
3. **Contracts: Damages: Penalties.** The question of whether a stipulated sum is for a penalty or for liquidated damages is

answered by the application of one or more aspects of the following rule: A stipulated sum is for liquidated damages only (1) where the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty, and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach *or* is reasonably proportionate to the damages which have actually been caused by the breach.

4. ———: ———: ———. Ordinarily a sum paid in part performance of a contract, with a provision that it shall be forfeited in the event of a default, if not excessive, and if the actual damages are not calculable in advance, will be regarded as liquidated damages.

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

Stephen T. McGill of McGill, Koley & Parsonage, for appellants.

Michael F. Kinney of Cassem, Tierney, Adams & Gotsch, for appellees.

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

NEWTON, J.

This is an action to recover a downpayment on a contract to purchase real estate. Judgment was entered for the plaintiff-purchaser. We reverse the judgment of the District Court.

Plaintiff alleges a contemporaneous oral agreement to the effect that the contract was to be void if it were ascertained that the property purchased was not suitable for the construction of a swimming pool; also, that defendants misrepresented the property as being suitable for the construction of a swimming pool.

The record reflects that plaintiff and a Russell E. Clark, Jr., were interested in buying a home with a yard suitable for a swimming pool. Plaintiff was absent for quite some time during which time his mother and Clark looked for a house. They were shown the home of the defendants' Mayberry and were well satis-

fied with the house but were doubtful that the steeply terraced backyard was suitable for the construction of a swimming pool. They examined the property and Clark walked over the backyard. The real estate salesman was asked for his opinion and he stated that he was no authority on swimming pools but it looked to him like a good spot for a pool. Clark and Mrs. Growney signed a contract to purchase the property for $42,950 and paid down $1,000 to apply on the purchase price. The contract provided that on failure of the purchasers to consummate the contract the vendor could retain the money as liquidated damages. When the plaintiff returned home he inspected the premises and had them examined by a builder of swimming pools to determine their suitability for a swimming pool. They were not suitable and the purchasers notified the real estate salesman that they would not complete the transaction. Thereafter the property was sold to others for the same price, or $42,950, about 56 days after the date of the contract in which plaintiff is interested. The interests of Clark and Mrs. Growney have been assigned to the plaintiff.

Although defendants were aware that plaintiff wanted a property suitable for a swimming pool and that his representatives were doubtful that defendants' property qualified, plaintiff's representatives nevertheless entered into the written contract which stated that they had inspected the property and were not relying upon any warranties or guarantees of the agent as to its condition. There is nothing in the record to show that a contemporaneous oral agreement was either proposed or entered into.

Was there a fraud committed? "An essential element of actionable false representation is justifiable reliance on the representation." Camfield v. Olsen, 183 Neb. 739, 164 N. W. 2d 431.

"The general rule is that where ordinary prudence would have prevented the deception, an action for the

fraud perpetrated by such deception will not lie." Swanson Petroleum Corp. v. Cumberland, 184 Neb. 323, 167 N. W. 2d 391.

Both Clark and Mrs. Growney were aware that the real estate agent was not an expert on swimming pools and knew no more about them than they did. Although they could readily have obtained competent expert advice, as plaintiff later did, they chose to rely on their own judgment and entered into the contract forthwith. The facts will not sustain a charge of fraud. Furthermore, this is not an action to rescind. On breach of the contract the property was resold. The present action is only one to recover the downpayment and is dependent entirely on whether the payment constituted a penalty or liquidated damages. In this connection the only parties in interest among the defendants are the Mayberrys who sold the property.

As a general rule: "The question of whether a stipulated sum is for a penalty or for liquidated damages is answered by the application of one or more aspects of the following rule: a stipulated sum is for liquidated damages only (1) where the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach *or* is reasonably proportionate to the damages which have actually been caused by the breach." 22 Am. Jur. 2d, Damages, § 214, p. 299. See, also, Abel Constr. Co. v. School Dist. of Seward, 188 Neb. 166, 195 N. W. 2d 744. The question of whether or not the damages to be anticipated on breach could reasonably have been ascertained at the time the contract was entered into must be answered in the negative. While the accrual to defendants of additional expense for such items as insurance, taxes, interest, and housing were to be foreseen, the amount was dependent entirely on the time required for a resale of the property

and this was not readily determinable. Neither at that time could it be determined if the property could be resold for a like sum. The downpayment of $1,000 on a $42,950 purchase does not appear to be disproportionate or unreasonable in view of the uncertainty regarding the extent of the damages which could be encountered. Although the record does not disclose the actual sums lost by defendants during the time elapsing before a resale was effected, these items could not have been greatly disproportionate to the sum retained as liquidated damages. Ordinarily a sum paid in part performance of a contract, with a provision that it shall be forfeited in the event of a default, if not excessive, and if the actual damages are not calculable in advance, will be regarded as liquidated damages. See 22 Am. Jur. 2d, Damages, § 214, p. 299, § 229, p. 314.

We conclude that judgment was erroneously entered for plaintiff and that the judgment must be reversed.

REVERSED.

IN RE ESTATE OF SAMUEL ROHDE, DECEASED.
WARD W. MINOR, APPELLEE, V. IONE BICKFORD ET AL., APPELLANTS.

238 N. W. 2d 243

Filed February 5, 1976. No. 40190.

1. **Wills: Undue Influence.** Implicit in the concept of the term undue influence, as that term is used in the law, is the premise that the influence which overcomes the will of the testator must be undue influence exercised upon the testator by someone else so that the testamentary disposition is not really the testator's own.
2. **Wills: Trial: Appeal and Error: Evidence.** Issues of fact in will contest cases are determined in this court by the sufficiency of the evidence under the law to sustain the verdict of the jury or the findings of the District Court and, where the evidence in a case tried to the jury is conflicting, issues of fact are questions for its determination.

Appeal from the District Court for Custer County: EARL C. JOHNSON, Judge. Affirmed.

Padley & Dudden, for appellants.

Schaper & Schaper, for appellee.

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

CLINTON, J.

This is an appeal from a judgment of the District Court admitting to probate the last will and testament of Samuel Rohde after a jury verdict in favor of the proponent, Ward W. Minor, executor. The contestants are Ione Bickford and Maxine DeLisle, daughters and heirs-at-law of the testator. In the courts below the contestants pleaded that the will was not that of the testator because it was the product of undue influence and because Samuel Rohde lacked testamentary capacity. Both of these positions rest upon the factual claims that for a period of 20 years there existed an incestuous relationship between Rohde and the contestant Ione Bickford; that Ione terminated this relationship and left Rohde's home in 1961; and that mental aberrations of Rohde growing out of the relationship and its termination caused the testator to disinherit his daughters. The trial court submitted to the jury only the issue of testamentary capacity.

We, on this appeal, consider only those assignments of error which are both assigned and discussed. See Rule 8 a 2 (3), Revised Rules of the Supreme Court, 1974. Assignments meeting the above requirements are: (1) Refusal of the trial court to permit the jury to consider the issue of undue influence, and (2) refusal of the trial court to receive in evidence exhibit 11 which consisted of certain writings of the testator made in 1961. We affirm the judgment of the trial court.

With reference to the first assignment, we state the position of the contestants by quotation from their

brief: "We suggest in this case that the conduct of the Decedent himself brought about the undue influence that created the situation which caused him to make the Will he did." The elements of undue influence have been stated by this court many times and there is no need to restate them again. Implicit in the concept of undue influence, as that term is used in the law, is the premise that the influence which overcomes the will of the testator must be undue influence exercised upon the testator by someone else so that the testamentary disposition is not really the testator's own. See, Scholting v. Scholting, 183 Neb. 850, 164 N. W. 2d 918; Spinar v. Wall, 191 Neb. 395, 215 N. W. 2d 98. Neither this court nor any other that we know of has equated an uninfluenced motive of the testator with undue influence. The contestants cite no authority which supports their position.

We have carefully read the entire record. It contains not the slightest bit of evidence that anyone sought to influence the testator in the execution of or in his determination of the dispositions made in the will which was admitted to probate. The record shows that the beneficiary of the will, a neighbor and tenant of Rohde, who, together with his wife, were kind to Rohde during his latter years, neither knew of the existence of the will until after the death of Rohde, nor had any expectation of benefit from Rohde's estate. So far as the record before us shows, only Rohde, the lawyer who drew the will, and the latter's secretary knew of the will and its contents until the beneficiary was informed by the lawyer of the will after Rohde's death. The contestants' first assignment of error is without merit.

The contestants offered into evidence exhibit 11, foundation for the admission of which was laid by the contestant Ione Bickford. She testified that she found the writings which were exhibit 11, shortly before she left her father's home in 1961. She testified that these writings are entirely in her father's handwriting. These

writings (1) indicate that Rohde, at the time the writings were made, was contemplating suicide; (2) tend to corroborate Ione's testimony of the incestuous relationship; and (3) tend to show that Rohde was semiliterate so far as the written language is concerned. The reasons given by the trial court for excluding the exhibit were that the writings had (1) slight probative value in comparison with their tendency to inflame, and (2) the contestants had failed to deposit the exhibit with the court and make it available for inspection before trial. We do not believe the trial court's ruling was in error. The exhibit was written in 1961. The will in question was executed in 1971, 2 years prior to Rohde's death. There was no competent evidence of Rohde's lack of testamentary capacity as that term is understood in legal contemplation. Many witnesses, who were longtime friends and acquaintances and who knew Rohde well, testified to his mental competence and testamentary capacity. The record before us is extensive, but the contestants' position may be capsulized by quotation from the record. The contestant Ione Bickford testified that she had an opinion as to her father's competence. Then followed these questions and answers: "Q. What is that opinion? A. I would say he was incompetent. Q. On what do you base your statement in regard to his competency; in other words what do you believe as to that or your opinion as to why he was incompetent? A. I think he had a real guilty conscience the way he treated his family, the way he did them and he didn't want anything to do with any of them." Two other witnesses testified to Rohde's lack of competence. The foundation for this testimony may be described as extremely weak. Nonetheless, the trial court submitted to the jury the question of Rohde's testamentary capacity. If it may be said there is any dispute of fact, it was resolved by the jury's verdict. Issues of fact in will contest cases are determined in this court by the sufficiency of the evidence under the

law to sustain the verdict of the jury or the findings of the District Court and, where the evidence in a case tried to the jury is conflicting, issues of fact are questions for its determination. Jensen v. Priebe, 163 Neb. 481, 80 N. W. 2d 127.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAUL R. SWAILS, APPELLANT.

238 N. W. 2d 246

Filed February 5, 1976. No. 40204.

Criminal Law: Probation and Parole. This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Paul E. Watts, J. Joseph McQuillan, Gerald E. Moran, and Robert C. Sigler, for appellant.

Paul L. Douglas, Attorney General, and Melvin K. Kammerlohr, for appellee.

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

MCCOWN, J.

The defendant pleaded nolo contendere to a charge of assault with intent to inflict great bodily injury. He was found guilty by the District Court and sentenced to the Division of Corrections for an indeterminate period of not less than 1 nor more than 2 years. The statutory penalty is not less than 1 year nor more than 20 years. The sole issue is the excessiveness of the sentence.

The record shows that the defendant had been drinking for some hours before the offense occurred. Around 4 a.m., he met a girl in the coffee shop at the bus

station and requested her assistance in getting a suitcase out of his car. When they got outside, the defendant proceeded to beat the girl severely and violently for no apparent reason. The victim suffered facial lacerations, multiple bruises, and severe swelling around her lips and both eyes. She was hospitalized for several days for treatment of the injuries.

The defendant was 24 years old with a high school education and no previous criminal record except minor traffic offenses. He had served in the military service for 2 years and had received an honorable discharge. He was regularly employed with a good work record.

The defendant contends that it was an abuse of discretion for the District Court to deny him probation. If we were to accept defendant's arguments, first offenders with a good prior record would be entitled to probation as a matter of right, regardless of the seriousness of the crime or of the violence used in its commission. The premise is unacceptable.

Our statutes specifically authorize the imposition of imprisonment rather than probation where the granting of probation will depreciate the seriousness of the offense or promote disrespect for law. § 29-2260(2)(c), R. S. Supp., 1974.

Under factual circumstances somewhat similar to those here, this court said: "Probation might have been appropriate except for the seriousness of the offense and the violence with which it was committed." State v. Radtke, 193 Neb. 853, 229 N. W. 2d 209. Inevitably there are cases in which the decision to grant or not to grant probation is one of delicate balance and in those cases the judicial discretion of the trial court should be accorded great weight.

This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion. State v. Purviance, 194 Neb. 541, 233 N. W. 2d 788. We cannot say that the

trial court abused its discretion here. The judgment is affirmed.

AFFIRMED.

IN RE INTERESTS OF KATHLEEN ANN LEWIS ET AL., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. KATHLEEN ANN LEWIS, JACK MARTIN, III, AND ROBERT LEE MARTIN, BY IRENE MARTIN, APPELLANT.
238 N. W. 2d 247

Filed February 5, 1976. No. 40210.

1. **Constitutional Law: Statutes: Waiver.** The constitutionality of a legislative act must be raised at the trial or it will be considered to be waived.
2. **Parent and Child: Infants: Trial: Witnesses: Physicians and Surgeons.** In a proceeding to terminate parental rights a physician may be required to testify concerning his examination and treatment of the parent of a dependent and neglected child.

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

Frank B. Morrison and Bennett G. Hornstein, for appellant.

Donald L. Knowles and John S. Slowiaczek, for appellee.

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

BOSLAUGH, J.

This is an appeal from the separate juvenile court of Douglas County, Nebraska, in a proceeding involving the welfare and custody of three minor children, Kathleen Ann Lewis, Jack Martin, III, and Robert Lee Martin. The trial court found the children were dependent and neglected and terminated the parental rights of the

mother, Irene Martin. Jack Martin, Jr., the father of Jack Martin, III, was then an inmate of the penal complex and the proceedings were dismissed as to him. The father of the other two children was unknown. The appellant here is Irene Martin.

The record shows the appellant left the children by themselves with no supervision on many occasions. One of the children, who attended preschool at a day care center, appeared to be extremely hungry, pale, and glassy-eyed when he came to school on Monday mornings. On one occasion he came to school wearing only a diaper. The appellant was observed to be drinking on a number of occasions. She abused and threatened personnel at the elementary school attended by the oldest child on several occasions.

The trial court found the appellant was afflicted with alcoholism and a psychiatric disorder, described as sociopathic personality, and was unable to provide proper support and parental care for the children. These findings are fully supported by the record and are not challenged by the appellant in this appeal.

The appellant contends the sections of the statute under which the proceedings were brought, specifically section 43-201, R. R. S. 1943, defining dependency and neglect, and section 43-209, R. R. S. 1943, prescribing the grounds for terminating parental rights, are unconstitutionally vague. This issue is raised for the first time in this court. The appellant also contends the trial court erred in permitting a physician to testify over objection concerning his examination and treatment of the appellant.

Both contentions were considered by this court in a similar, recent case, State v. Norwood, 194 Neb. 595, 234 N. W. 2d 601. In that case we held the constitutional issue could not be raised for the first time in this court; and under section 25-1207, R. S. Supp., 1974, a physician could be required to testify concerning his examination and treatment of the parent of a dependent

and neglected child in a proceeding to terminate parental rights.

State v. Norwood, *supra,* is controlling here. The judgment of the separate juvenile court is affirmed.

AFFIRMED.

McCOWN, J., concurs in the result.

BURNELL O. SCHULZ, APPELLANT, V. GENERAL WHOLESALE COOPERATIVE COMPANY, INC., A NEBRASKA COOPERATIVE CORPORATION, ET AL., APPELLEES.

238 N. W. 2d 463

Filed February 11, 1976. No. 40052.

1. **Workmen's Compensation: Attorneys at Law: Fees: Jurisdiction.** Section 48-118, R. R. S. 1943, provides in part: "If the employee or his personal representative or the employer or his compensation insurer join in the prosecuting of such claim and are represented by counsel, the reasonable expenses and the attorney's fees shall be, unless otherwise agreed upon, divided between such attorneys as directed by the court before which the case is pending and if no action is pending then by the district court in which such action could be brought."
2. **Workmen's Compensation: Attorneys at Law: Fees.** That portion of section 48-118, R. R. S. 1943, involved here, ordinarily does not apply to require a division of attorneys' fees where the subrogation interest of the employer or its insurance carrier is fully and adequately represented by its own counsel and where the services of the employee's attorney were not relied upon to effect the subrogation recovery.

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

Nelson, Harding, Marchetti, Leonard & Tate, Kenneth Cobb, and Scott E. Daniel, for appellant.

Jewell, Otte, Gatz, Collins & Domina, for appellees.

Heard before SPENCER, NEWTON, and CLINTON, JJ., and HENDRIX and BUCKLEY, District Judges.

BUCKLEY, District Judge.

In this appeal, the issue is whether counsel for the injured employee in a tort claim should be allowed attorney's fees from that portion of the total settlement attributable to the workmen's compensation subrogation claim of his employer. The trial court denied such allowance and we affirm.

The plaintiff, Burnell O. Schulz, an employee of defendant General Wholesale Cooperative Company, Inc., was seriously injured on February 13, 1973, while unloading a railroad car in Norfolk, Nebraska. A door inside the car came off the track and fell on him, causing various injuries which ultimately resulted in a medical evaluation of 100 percent permanent disability.

Immediately following the accident, defendant St. Paul Fire and Marine Insurance Company, the workmen's compensation insurer for plaintiff's employer General Wholesale, retained the firm of Jewell, Otte, Gatz, Magnuson & Collins to represent its interest as to plaintiff's compensation claim and to investigate the accident with a view toward a subrogation claim against any third party responsible. The third party turned out to be Pacific Fruit Express Company, owner of the railroad car, and it was duly notified of St. Paul's subrogation claim.

From the date of the accident, February 13, 1973, until May 10, 1974, plaintiff was not represented by counsel. During this time, all investigation regarding the accident and plaintiff's medical condition, and all contact and negotiations with representatives of Pacific Fruit Express were accomplished by Arlen Magnuson from the Jewell, Otte law firm, which was done solely in connection with St. Paul's subrogation claim. On May 10, 1974, plaintiff retained counsel, including Kenneth Cobb, to represent him in his own claim against Pacific Fruit Express. On May 20, 1974, Magnuson and Cobb met to discuss and coordinate their respective interests. After that date, all further investigation and negotiations with Pacific Fruit

Express were done by Cobb, which resulted in a total settlement of $125,000 in October 1974. No lawsuit was ever filed. To complete the settlement, a petition for approval of a lump sum settlement was granted by the District Court for Madison County, Nebraska. The terms of the settlement provided that St. Paul would receive $12,409.99 in refund for the medical and hospital expenses and temporary total disability payments which it had previously paid to and for the plaintiff. St. Paul would also receive full credit for its future workmen's compensation liability in the amount of $34,936.75. Plaintiff received the balance of $112,590.01.

Cobb's basic contention is that at the time he was retained by plaintiff, Magnuson's investigation for St. Paul had not established to the satisfaction of Pacific Fruit Express either its liability for the accident or plaintiff's total disability as a result thereof; that Cobb's efforts did result in a settlement based upon agreed liability and total disability; that St. Paul benefited from those efforts in recovering in full its subrogation claim; and that, therefore, Cobb should be entitled to an attorney's fee from St. Paul for the benefit it received.

Plaintiff's claim is based upon that part of section 48-118, R. R. S. 1943, which provides in part that: "If the employee or his personal representative or the employer or his compensation insurer join in the prosecuting of such claim and are represented by counsel, the reasonable expenses and the attorney's fees shall be, unless otherwise agreed upon, divided between such attorneys as directed by the court before which the case is pending and if no action is pending then by the district court in which such action could be brought." The statute provides no specific guidance as to what the court should consider in determining a proper division of attorneys' fees and expenses between counsel.

We have considered this question twice previously. In Gillotte v. Omaha Public Power Dist., 189 Neb. 444, 203 N. W. 2d 163, the injured employee sued the third

party and obtained a verdict of $79,263. The employer's compensation carrier did not retain counsel to represent its subrogation interest until suit was filed. Thereafter, employer's counsel filed the appropriate pleadings claiming subrogation interest, did not participate in the trial (at the request of plaintiff's attorney), and furnished some minor research assistance. The judgment was successfully defended on appeal, in which the employer took no part. The total advantage to the employer was over $29,000 and the trial court allowed an attorney's fee to plaintiff of $10,000. In affirming this award, we said: "The workmen's compensation insurer contends that where the employer or his workmen's compensation insurer is represented by its own counsel and its attorney offers to assist in the preparation and trial, the district court may not deduct any attorney's fees from the insurer's share of the judgment.

"That contention is disposed of by the terms of section 48-118, R. R. S. 1943, itself. Even if the employee and employer or his insurer join in the prosecuting of a claim and are represented by counsel, the reasonable expenses and attorney's fees, in the absence of agreement, are to be divided between such attorneys as directed by the court. To permit an employer or his workmen's compensation insurer to refuse to reimburse an employee for reasonable expenses and fees incurred in the recovery of a judgment against a third party for the benefit of the employer or his insurer under their right of equitable subrogation simply because a pleading had been filed by employer's counsel asserting the admitted right of subrogation would twist the statute and destroy its purpose. It would constitute a return to the situation as it existed prior to the amendment of section 48-118, R. R. S. 1943, in 1963."

Thus, we made it clear that the mere fact that the employer or its compensation carrier retains counsel to represent its subrogation interest will not, in and of it-

self, prevent an allowance of attorney's fees to the employee's counsel from the subrogation recovery.

In Versch v. Tichota, 192 Neb. 251, 220 N. W. 2d 8, the employee filed suit but made a settlement, when the cause came to trial, for $15,000. The employer City of Omaha was joined in the suit to determine its subrogation rights. With the parties unable to agree on distribution of proceeds, the court ordered $8,250 to the plaintiff and $6,750 to the city. Plaintiff's counsel applied for allowance of one-third of the city's recovery as an attorney's fee but was allowed $1,350. We did not detail further the services rendered by both counsel but we did observe: "By cross-appeal the plaintiff contends that the award of attorney's fees in the sum of $1,350 was inadequate. The thrust of the plaintiff's contention is that the award of attorney's fees should have corresponded with the contingent fee contract with the plaintiff. While this may be a proper factor that rests in the court's consideration, there are many other factors involved. Furthermore, the proportionate value of the services of counsel is a special factor, under this particular statute, ..." In saying this, we do not interpret the statute to require some allowance of fees to the employee's attorney in every dual prosecution, the amount of such fee to depend upon the proportionate value of the services rendered. To do so would promote many evils. Instead of the needed cooperation between the attorneys for the employee and his employer, it would turn them into competitive adversaries. It would cause a "race to the courthouse" to file suit so as to give the winner the dominant role in the handling of the case. Confusion would reign as each attorney goes off on his own, as concerned about protecting or increasing his fee as in protecting and advancing the interests of his client. It would also place the employer or the insurance carrier in the position of having to pay two attorneys' fees, even if the attorneys it retained fully and adequately represented its interests.

We said in Gillotte v. Omaha Public Power Dist., *supra,* that the amendment herein involved to section 48-118, R. R. S. 1943, may well have been influenced by our decision in United Services Automobile Assn. v. Hills, 172 Neb. 128, 109 N. W. 2d 174. There we recognized the equitable principle that: ". . . where the holder of the subrogation right does not come into the action, whether he refuses to do so or acquiesces in the plaintiff's action, but accepts the avails of the litigation, he should be subjected to his proportionate share of the expenses thereof, including attorney's fees." We, therefore, hold that that portion of section 48-118, R. R. S. 1943, involved here, ordinarily does not apply to require a division of attorneys' fees where the subrogation interest of the employer or its insurance carrier is fully and adequately represented by its own counsel and where the services of the employee's attorney were not relied upon to effect the subrogation recovery.

The evidence in this case shows that Magnuson's investigation on behalf of St. Paul included an immediate inspection of the accident scene, having photographs taken of the railroad car and the faulty door, interviewing and obtaining statements from three witnesses, obtaining invoices to determine where the car was loaded, giving Pacific Fruit Express formal notice of St. Paul's subrogation claim, and obtaining medical reports and medical bills paid by St. Paul and furnishing them to St. Paul. By late March 1974, Magnuson had concluded that Pacific Fruit Express was legally liable for the accident and so informed its claim agent Caffrey. He later furnished Caffrey with computations on St. Paul's total claim, including the total future disability claim on a lump sum basis.

St. Paul contends that when Cobb was retained, Caffrey had already agreed to protect and pay its subrogation claim. Cobb denies this, contending that the questions of liability and extent of plaintiff's disability re-

sulting from the accident were not established at that time but only after and as a result of his own investigation. He testified that it was his further investigation which determined that Pacific Fruit Express employees had closed the door when it was loaded; that he cleared up discrepancies in medical reports as to diagnosis of plaintiff's injuries; and that he cleared up some questions regarding plaintiff's prior medical history.

We deem the dispute as to whether Pacific Fruit Express had already admitted liability when Cobb was retained to be irrelevant. At that point, some 15 months after the accident, St. Paul furnished Cobb with the results of Magnuson's investigation. St. Paul was ready to file suit but Cobb requested it hold off so he could investigate his client's interests. This included plaintiff's own economic loss, which was of no concern to St. Paul. Although counsel for St. Paul felt their client's subrogation claim was fully presented, they remained ready and willing to participate with Cobb in any further investigation or negotiation that Cobb felt was necessary. However, Cobb never contacted them further at any time until after he settled the claim. He did have telephone contacts with St. Paul, one to obtain a medical bill and another in an unsuccessful attempt to discount St. Paul's claim. Assuming Cobb's efforts did benefit St. Paul, it is evident that the plaintiff also benefited from Magnuson's investigation. When the required cooperation exists between counsel in this type of dual prosecution of claims, it is virtually inevitable that there will be mutual benefit to the parties, which, of itself, does not call for any division of attorneys' fees.

At no time did St. Paul's counsel terminate or abandon its representation or rely on or acquiesce in representation of their client by Cobb. Their representation of St. Paul remained active and viable throughout, culminating in their participation in the District Court hearing to approve the final lump sum settlement.

Under these circumstances, we conclude that St. Paul

had full and adequate representation from its own counsel and we affirm the District Court's denial of plaintiff's application for attorney's fees.

AFFIRMED.

RICHARD L. FRANCIS, APPELLEE, V. MARION ARLENE FRANCIS, APPELLANT.

238 N. W. 2d 468

Filed February 11, 1976. No. 40168.

Divorce: Judgments: Notice: Parent and Child. Under section 42-364, R. S. Supp., 1974, the trial court on its own motion may make subsequent changes or modifications in a decree of dissolution of a marriage in relation to any minor children and their maintenance when required, but only after notice to the parties and an opportunity to be heard.

Appeal from the District Court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed in part, and in part reversed.

Charles F. Fisher of Fisher & Fisher, for appellant.

Michael V. Smith of Smith & King, for appellee.

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

MCCOWN, J.

This is an application by a husband to modify a decree of dissolution of marriage by reducing or changing the payment terms of a property settlement award, and by expanding and spelling out the visitation rights of the husband. The District Court denied the application to reduce the property settlement amount and granted some of the visitation changes requested. In addition, the court reduced the amount of child support, removed the custody of the minor children from the parties and placed it in the court, but retained physical custody with the wife. The wife has appealed.

The original decree of dissolution of marriage was entered June 20, 1974. It was based upon the agreement of the parties approved by the court. It granted a dissolution of marriage; granted household goods, an automobile, clothes, and personal property to the wife; and directed the payment to her from the husband of $50,000, payable $5,000 per year for 10 years, as settlement of their joint property interests. It assigned the real estate, livestock, and all other property to the husband. The wife was granted custody of the three minor children of the parties and the husband was directed to pay $100 per child per month as child support. The husband was to have reasonable rights of visitation and specifically the right to have the children on the second and fourth weekends of each month, together with additional visitations to be agreed upon.

On February 6, 1975, the husband filed his application for modification of the decree of dissolution. The application prayed for reduction of the property settlement award of the wife and deferment and extension of time for payments. The application also prayed for orders to allow visits at specified times and days of each month, and dividing custody of the children between the parties on school vacation times in an equitable manner.

Hearing was held on March 13, 1975. The evidence for the husband established that there had been a drastic adverse change in the cattle business during the preceding year and that he was having financial problems in continuing operations. He also testified he was having difficulty in arranging for visitation periods and had been refused visitation rights on various occasions. The wife's evidence tended to justify the visitation difficulties or explain them on other grounds. There was no evidence of any deficiencies of any kind in the wife's physical care of the children, nor was there any evidence of misconduct nor of any changed circumstances in the care of the children. A counselor from the Pan-

handle Mental Health Center, Children's Program, whose qualifications were not disclosed, was called by the wife. The counselor testified that it was not good for the children to be exposed to the battle going on between the parents over visitations. She testified that the solution was to reduce the number of visitation periods. In response to a question by the court as to her attitude about depriving both parents of custody, she testified that it would be traumatic for all the children to be separated from their mother.

After hearing, the court denied the application to reduce or defer payments under the property settlement; ordered child support reduced from $100 per month to $75 per month per child; and ordered that custody of the minor children be taken from both parties and placed in the court, with physical custody to remain in the wife until further order. The order also gave the husband the right to visit the children on the fourth weekend of each month, and directed him to receive and return them at specified times, and gave him the right to have the children during the month of June of each year. The parties were to have the children alternately for Thanksgiving and Christmas periods in each year.

The basic issue here involves the jurisdiction and power of the court to modify a specific provision of a decree of dissolution when that modification is not requested by either party. The contention is that the wife had no notice or opportunity to be heard with respect to the issues of reducing child support payments or removing custody of the children from her and placing it with the court. Under such circumstances it is contended that the District Court had no jurisdiction or power to modify those portions of the decree.

There is no doubt that the petition for modification did not seek any modification of child support payments nor did it raise any issues of the fitness of either party to have custody of the children. The determination

here, therefore, rests upon the court's authority to make such modifications on its own motion without notice and opportunity for hearing.

Our statutes provide that a decree of dissolution of marriage may include such orders as shall be justified in relation to any minor children and their maintenance. Modifications or "(s)ubsequent changes may be made by the court when required, *after notice and hearing.*" (Emphasis ours.) § 42-364, R. S. Supp., 1974. Under the comparable statute dealing with the subject under our prior divorce law, such modifications or changes could be made on the court's own motion or on the petition of either parent, but there was no statutory requirement for notice and hearing. See § 42-312, R. R. S. 1943, repealed 1972. Even under that statute this court has consistently held that the court had no authority or jurisdiction to act on its own motion without notice to the parties and an opportunity to be heard. Morehouse v. Morehouse, 159 Neb. 255, 66 N. W. 2d 579.

In Vasa v. Vasa, 165 Neb. 69, 84 N. W. 2d 185, neither of the parties had filed a petition for revision of the decree as to custody of a minor child, but were before the court in connection with a motion for dismissal. This court said: "In this case it is true that the parties were before the court but no question of custody was involved. The action of the court in this respect was without notice, hence the court was without jurisdiction in this respect."

In Erpelding v. Erpelding, 176 Neb. 266, 125 N. W. 2d 688, neither party had applied for a modification of an existing child support judgment, nor was there a pleading before the court on which to base any such modification. The hearing before the court involved a partition action and the application of its proceeds to child support payments. This court held that a District Court had the power to modify a divorce decree on its own motion so far as care, custody, and maintenance of children are concerned, but nevertheless: "Proceedings to

modify a divorce decree with regard to the care, custody, and maintenance of minor children are special statutory proceedings and in such cases jurisdiction must be proved or affirmatively shown on the record. The court, however, has no authority or jurisdiction to modify such a decree without notice to the parties and an opportunity given them to be heard."

In the case before us the parties had no notice and no opportunity to be heard on the issue of whether or not the amount of child support should be changed, nor on the issue of whether or not the custody of the minor children should be taken from the wife or both parties and placed in the court. Under these circumstances the trial court had no authority to modify the decree by reducing the amounts of child support or taking custody of the minor children from the wife and placing it in the court, without notice to the parties and an opportunity to be heard. Under section 42-364, R. S. Supp., 1974, the trial court on its own motion may make subsequent changes or modifications in a decree of dissolution of a marriage in relation to any minor children and their maintenance when required, but only after notice to the parties and an opportunity to be heard.

As to all matters properly within the authority and jurisdiction of the court, the court's order of March 13, 1975, was correct and is affirmed.

The attorney for respondent is allowed a fee of $250 for services in this court.

AFFIRMED IN PART, AND IN PART REVERSED.

THE OMAHA HOME FOR BOYS, APPELLEE, V. STITT CONSTRUCTION COMPANY, INC., A CORPORATION, ET AL., APPELLANTS.

238 N. W. 2d 470

Filed February 11, 1976. No. 40188.

1. **Instructions: Trial.** Alleged errors in instructions given by the trial court will not be considered on appeal when they were not raised in the motion for new trial.
2. **Instructions: Trial: Waiver.** The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal.
3. **Contracts: Insurance: Bonds: Fees: Attorneys at Law.** In an action on a performance bond where the surety admits execution of the bond but does not admit defective performance by the contractor, the plaintiff is entitled to recover an attorney's fee under section 44-359, R. R. S. 1943.

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

John W. Delehant, for appellants.

John A. Rickerson, for appellee.

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

BOSLAUGH, J.

This is an action for damages arising out of a construction contract. In 1969 the defendant, Stitt Construction Company, Inc., entered into a written contract to construct a gymnasium building and other improvements for the plaintiff, The Omaha Home for Boys, upon its property in Omaha, Nebraska. The total contract price was in excess of $640,000. The contract contained detailed specifications as to how the project was to be built.

In addition to the gymnasium building, the contract provided for the construction of a concrete patio area on one side of the building and a large asphalt play area on the other side of the building. The contract also called for the construction of two large planters

adjacent to the building and patio area, a utilities tunnel, and various sidewalks and driveways. The principal controversy here involves the patio area and play area.

The contract provided that all subgrades for drives, floor slabs, parking areas, running track, sidewalks, and other structures should be "compacted to 90 per cent of maximum density at optimum moisture content." All other areas were to be compacted to at least "85 percent maximum density at optimum moisture content." Tests were to be determined by AASHO Standard Method T180D-57. The contract specifically provided: "The Contractor shall perform the necessary work to meet these compaction requirements."

On March 1, 1971, the job had been substantially completed. During that spring some settling occurred in the paved areas and the defendant made repairs. The plaintiff continued to have difficulty with the paved areas and structures outside the building and had soil compaction tests made. An engineering firm that made tests in and around the patio area recommended the existing backfill be removed to its full depth and replaced in a dense condition and the surface improvements be reconstructed. In October 1972, the plaintiff's architect requested the defendant to repair the backfill "around new foundation structures." The defendant replied that it would proceed with exploratory work upon receipt of $4,988.89, the balance due the defendant under the original contract. The plaintiff then employed another contractor to make the repairs.

This action was commenced in November 1973, to recover the damages the plaintiff alleged it sustained as a result of the failure of the defendant to compact the filled areas to the density required by the contract. The General Insurance Company of America, the surety on defendant's performance bond, was made an additional defendant after the action had been commenced. The insurance company admitted it had issued the bond but

did not admit that Stitt's performance under the contract was defective.

The jury returned a verdict for the plaintiff in the amount of $23,414.73 against both defendants. The defendants have appealed.

The record contains evidence which shows in great detail the settling that occurred under the surface of the play area and the patio area. The plaintiff produced an expert witness who testified that it was his opinion the settling was due to a combination of loose backfill and entry of water into the backfill. He further testified that water would not have entered the backfill to the same extent if the original compaction had complied with the requirements of the contract. He explained that when clay is compacted into a dense condition it is very impervious, does not have many voids, and there is very little room for water to travel through the clay. When clay is loose there is lots of room for the water to travel.

The defendant's evidence tended to show the contractor had followed the usual and customary procedure used by contractors in this area to compact backfill. No compaction tests were made until after the settling had occurred so there was no direct evidence that the contractor had failed to comply with the compaction requirements of the contract.

We believe the evidence presented a question for the jury as to whether the defendant had complied with the compaction requirements specified in the contract. The evidence as to the settling that occurred together with the expert testimony as to the cause was sufficient to permit the jury to find that the defendant had not complied with the requirements of the contract.

The contract specifications contained a provision that except as otherwise stated all work and materials were guaranteed for 1 year. The general conditions contained a further provision, under paragraph 13.2, Correction of Work, that: "If, within one year after the Date of Sub-

stantial Completion or within such longer period of time as may be prescribed by law or by the terms of any applicable special guarantee required by the Contract Documents, any of the Work is found to be defective or not in accordance with the Contract Documents, the Contractor shall correct it promptly after receipt of a written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition."

The defendants contend this provision was a limitation upon the plaintiff's right to recover for defective work and eliminated any right to recover for defective work except as therein provided.

Another paragraph in the same article provided: "The obligations of the Contractor under this Paragraph 13.2 shall be in addition to and not in limitation of any obligations imposed upon him by special guarantees required by the Contract Documents or otherwise prescribed by law."

The liability of the contractor for damages caused by its failure to comply with the requirements of the contract was an obligation imposed or otherwise prescribed by law. The provision requiring the contractor upon notice to remedy defective work discovered within 1 year of substantial completion was in the nature of a guarantee or warranty and was an additional protection for the owner. The provision was not exclusive and did not bar recovery for defective work discovered more than 1 year after the date of substantial completion.

The defendants also contend the trial court erred in failing to instruct the jury that the proper measure of damages in this case was the fair and reasonable costs of necessary repairs less the amount due the defendant under the original contract. It was undisputed there was a balance of $4,988.89 due the defendant on the original contract.

The record shows counsel for both parties assisted the

trial court in preparing the instructions to the jury. After the final draft of the instructions had been prepared, counsel for the defendants advised the trial court the proposed instructions were "accepted" and the defendants had no objections. The defendants' motion for new trial contained no assignment objecting to any of the instructions. Under these circumstances the defendants can not now complain to this court that the instructions were erroneous. See Moser v. Jeffrey, 194 Neb. 132, 231 N. W. 2d 106.

The trial court allowed the plaintiff an attorney's fee in the amount of $5,000 to be taxed as costs against the defendant surety, General Insurance Company of America. The insurance company contends the fee was excessive and no fee should have been allowed because there was no dispute concerning the performance bond itself.

Although the surety company admitted it had issued the bond it did not admit that Stitt's performance under the contract was defective. The allowance of an attorney's fee under section 44-359, R. R. S. 1943, was proper. Reorganized Church of Jesus Christ v. Universal Surety Co., 177 Neb. 60, 128 N. W. 2d 361. The amount allowed was within the discretion of the District Court.

The judgment of the District Court is affirmed. No additional fee is allowed for the services of the plaintiff's attorney in this court.

AFFIRMED.

PATRICIA ANN JOHNSON, A MINOR, BY AND THROUGH HER FATHER AND NEXT FRIEND, GERALD JOHNSON, APPELLANT, v. WILLIAM F. EVERS AND UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEES.

238 N. W. 2d 474

Filed February 11, 1976. No. 40193.

1. **Master and Servant: Negligence.** Conduct of a servant is

within the scope of employment if, but only if, it is of the kind he is employed to perform; it occurred substantially within the authorized time and space limits; and it is actuated, at least in part, by a purpose to serve the master.

2. **Master and Servant: Negligence: Motor Vehicles.** A corporation is liable for the negligent operation of an automobile by its agent or servant only when such agent or servant is engaged in the employer's or principal's business with its knowledge and direction.
3. **Master and Servant: Negligence: Motor Vehicles: Trial.** In an action against an employer for personal injuries inflicted by an employee upon a third person by the negligent use of an automobile owned and operated by the employee, the burden is on the plaintiff to prove that the employee was acting within the scope of his employment at the time of the injury.
4. **Master and Servant: Negligence: Motor Vehicles.** The doctrine of respondeat superior is applicable only when the employment relation can be found to exist at the time and with respect to the conduct giving rise to the injury.
5. **Summary Judgments.** Motion for summary judgment may be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Sarpy County: RAYMOND J. CASE, Judge. Affirmed.

James R. Welsh and G. Michael Kealhover of Riedmann & Welsh, for appellant.

Patrick W. Healey of Healey, Healey, Brown, Wieland & Burchard, for appellee Evers.

Daniel P. Morisseau, for appellee Union P. R.R. Co.

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

MCCOWN, J.

This is an action for personal injuries sustained by plaintiff in an automobile accident. The defendants were William F. Evers and Union Pacific Railroad Company. The District Court sustained a motion for summary judgment by the Union Pacific Railroad Company

and dismissed that defendant. The plaintiff has appealed.

On April 18, 1966, the plaintiff, Patricia Ann Johnson, then a 9-year-old girl, was a passenger in a car driven by her mother, Frieda Johnson. There was a head-on collision between the Johnson car and a car driven by William F. Evers. The accident occurred on a highway in Garden County, Nebraska. Plaintiff suffered severe injuries for which she seeks recovery in this action, brought on her behalf by her father. The critical issue here is whether the alleged negligence of William F. Evers can be imputed to the defendant, Union Pacific Railroad Company.

William F. Evers had been employed by the Union Pacific Railroad Company as a brakeman or conductor since 1943. For some years prior to 1966, he had worked for the Union Pacific in a western Nebraska district, which included Torrington, Wyoming. During those years he worked and lived in several different towns, including two times in both Torrington, Wyoming, and North Platte, Nebraska. For some 2 years prior to April 1, 1966, he had lived in and worked out of Torrington, Wyoming. About April 1, 1966, there was a reduction in assignments for trainmen at Torrington and Evers moved to North Platte, Nebraska, and went to work off the extra board at that location. He preferred to work in Torrington, Wyoming, and wished to return there whenever there were assignments available. When he moved to North Platte he did not take all his clothing and belongings and some were left in Torrington.

From April 1 until the date of the accident he lived in a hotel in North Platte and worked on assignment from the extra board. He worked on the night of April 17, 1966, and then returned to his hotel. On the morning of April 18, 1966, Evers called the crew dispatcher about any jobs which might be opening up in Torrington and was told that there were no openings and would be

none. Evers also inquired as to the probable length of time before his next job would come up on the extra board and was told that it would not be on that day or the next. In one deposition Evers stated that someone at the railroad told him that he was going to have to work in North Platte and that he was going to have to move all his belongings from Torrington to North Platte. Evers also said he was told to go ahead and get his clothes. The persons who made such statements were not specifically identified although the implication is clear that he was referring to the crew caller. On cross-examination Evers agreed that the crew caller did not order him to go to Torrington to pick up his belongings. Evers also knew that he would not receive any pay for the trip.

The affidavit of the trainmaster for the Union Pacific Railroad Company shows that he was at that time the operating officer having direct supervision and control over all brakemen and conductors, and crew callers and crew dispatchers, within his geographical jurisdiction, including specifically William F. Evers; and that all orders to any of them would be issued by him or through his office. The affidavit also shows that "Mr. William F. Evers was at no time instructed by me to travel to Torrington, Wyoming on April 18, 1966, or any other date to recover certain of his personal belongings left there when he had moved to North Platte, Nebraska earlier in that same month or for any other reason."

The affidavit also shows that crew callers or crew dispatchers keep a roster of train crew personnel in seniority order known as the "extra board" from which crews are called in rotation order. Such employees do not issue orders to trainmen. They supply information to trainmen making inquiries as to the type of jobs which are open for bidding on the basis of the trainmen's seniority and the number of turns which an individual trainman may be away from what is likely to be the next call for duty as a member of a train crew.

After Evers' telephone conversation on the morning of April 18, 1966, Evers started to drive to Torrington, Wyoming, in his car to get his clothes and belongings. On that trip the accident occurred and the plaintiff was injured. The District Court sustained the motion of the Union Pacific Railroad Company for summary judgment and this appeal followed.

The plaintiff contends that there is a factual dispute and that Evers was acting in furtherance of the business of the Union Pacific Railroad Company in that the trip would incidentally or indirectly contribute to the service and benefit of the employer.

Restatement, Agency 2d, § 228, p. 504, provides: "(1) Conduct of a servant is within the scope of employment if, but only if:

"(a) it is of the kind he is employed to perform;

"(b) it occurs substantially within the authorized time and space limits;

"(c) it is actuated, at least in part, by a purpose to serve the master, and * * *."

Comment c to that section makes it clear that there is no liability for the conduct of one who, although a servant in performing other services, is doing work as to which there is no control or right to control by the master.

A corporation is liable for the negligent operation of an automobile by its agent or servant only when such agent or servant is engaged in the employer's or principal's business with its knowledge and direction. Scott v. Service Pipe Line Co., 159 Neb. 36, 65 N. W. 2d 219.

In an action against an employer for personal injuries inflicted by an employee upon a third person by the negligent use of an automobile owned and operated by the employee, the burden is on the plaintiff to prove that the employee was acting within the scope of his employment at the time of the injury. Sutton v. Inland Constr. Co., 144 Neb. 721, 14 N. W. 2d 387. In Scott v. Service Pipe Line Co., *supra,* this court quoted the fol-

lowing with approval: " 'It is not enough, in order to establish liability, to show that the master has an interest in what is being done. It must also be made to appear that the servant whose act is in question has authority from the master to perform the class of service to which the act belongs. * * *.' "

The doctrine of respondeat superior is applicable only when the employment relation can be found to exist at the time and with respect to the conduct giving rise to the injury. Cobb v. United States, 247 F. Supp. 505, affirmed, 367 F. 2d 132.

In this case the purpose for Evers' trip was personal. The trip was entirely outside the space and time limits of his employment, and driving an automobile was not in any sense within the class of work for which he was hired. It was beyond the ability of the employer to assert any control, directly or indirectly, over Evers' conduct or performance. There are many off-duty activities of employees which might be said to benefit employers to some degree, but ordinarily they constitute no part of the work employees are hired to perform. If an employer were liable under the circumstances here simply because of some remote possibility of indirect benefit to him, there would be virtually no limit to the liability which could be imposed upon an employer for the off-duty torts of any employee on his payroll. There is no justifiable reason for such an extension of the doctrines of legal liability.

Section 25-1332, R. R. S. 1943, provides that summary judgment shall be rendered where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Randall v. Erdman, 194 Neb. 390, 231 N. W. 2d 689.

The plaintiff contends that there are factual issues in dispute as to whether or not Evers was ordered or directed to take the trip. Nevertheless, the purpose of a motion for summary judgment is to pierce the allegations of the pleadings and to show that the controlling

facts are clear and that no genuine issue of fact remains for trial. On the record presented here the defendant was entitled to judgment as a matter of law.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BEN MARSHALL HALSEY, APPELLANT.

238 N. W. 2d 249

Filed February 11, 1976. No. 40237.

Post Conviction: Criminal Law: Trial. In a post conviction proceeding, the defendant has the burden of establishing a basis for relief.

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

T. Clement Gaughan and Paul M. Conley, for appellant.

Paul L. Douglas, Attorney General, and Gary B. Schneider, for appellee.

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

WHITE, C. J.

The appellant was charged with assault with intent to do great bodily injury. He was tried to a jury and found guilty. On August 27, 1973, he was sentenced to a term of 2 to 3 years imprisonment in the Nebraska Penal and Correctional Complex. No appeal was taken from this proceeding.

Thereafter, the appellant brought a post conviction proceeding under section 29-3001, R. S. Supp., 1974. The District Court found that the sole issue raised by the appellant was whether he had been denied effective counsel, and that the appellant failed to sustain his

burden of proof on this issue. The appellant's motion to vacate and set aside the sentence was denied. The appellant has appealed, alleging that the District Court erred in its findings and in denying his motion. We affirm the judgment of the District Court.

If a defendant is denied his right to appeal because his notice of appeal is not filed within the statutory time limitation, the proper means to attack that denial, as being in violation of his constitutional rights, is by a post conviction action brought under section 29-3001, R. S. Supp., 1974. State v. Blunt, 182 Neb. 477, 155 N. W. 2d 443 (1968); State v. Wycoff, 183 Neb. 373, 160 N. W. 2d 221 (1968).

The appellant asserts the following proposition of law: "The failure to file a timely Notice of Appeal, due to counsel's negligence, establishes a prima facie case for relief under Neb. Rev. Stat. § 29-3001 (Cum. Supp. 1974)."

The appellant then devotes a substantial portion of his brief to the proper scope of relief by the District Court in a post conviction proceeding if it is found that the defendant lost his right of appeal due to the negligence of counsel.

It is not necessary to decide in this case what the proper scope of relief would be under such circumstances. The record reveals that the appellant failed to meet his burden of proof in attempting to show that his failure to take an appeal was due to the negligence of counsel.

In a post conviction proceeding, the defendant has the burden of establishing a basis for relief. State v. Myles, 187 Neb. 105, 187 N. W. 2d 584 (1971); State v. Reizenstein, 183 Neb. 376, 160 N. W. 2d 208 (1968); State v. Rapp, 186 Neb. 785, 186 N. W. 2d 482 (1971). The mere fact alone that no appeal has been taken from a criminal proceeding does not raise any presumptions that this was due to the negligence or incompetence of counsel. A defendant must show, by a preponderance of the evidence, that he was denied his right

to appeal due to the negligence or incompetence of counsel, and through no fault of his own.

A hearing was held by the District Court on appellant's motion, and it was found as a matter of fact that after the appellant had stated his desire to appeal to his private attorney, his attorney advised him and his wife of the expenses which would be incurred in an appeal and further advised him that he would qualify as an indigent so that the public defender could be appointed at no cost. The District Court found that the appellant stated at that time that he would employ the public defender, and that the private attorney at that time advised the appellant as to appeal procedures, including the necessity of filing a notice of appeal with the court within 30 days from the date of sentence. The District Court found that there was an issue of fact as to whether the appellant's attorney was to take any affirmative steps in the appeal of the appellant's case, and if so, what they were, and held that the appellant failed to meet the required burden of proof. The appellant does not challenge the sufficiency of the evidence supporting these facts.

The findings of the District Court will not be disturbed on appeal unless they are clearly erroneous. Having carefully reviewed the record in this case, we cannot say that the District Court was clearly erroneous in its findings.

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

AFFIRMED.

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

238 N. W. 2d 477

Filed February 11, 1976. No. 40272.

1. **Controlled Substances: Words and Phrases: Criminal Law.**

In section 28-4,117, R. S. Supp., 1974, Schedule II(c), listing as a controlled substance: "Any material, compound, mixture, or preparation which contains any quantity of the following substances *having a potential for abuse associated with a stimulant effect on the central nervous system*: (1) Amphetamine, its salts, optical isomers, and salts of its optical isomers" the italicized words modify the word "substances," not "quantity."

2. **Controlled Substances: Criminal Law: Trial.** In a prosecution brought under section 28-4,125(3), R. S. Supp., 1974, for possession of amphetamine, it is not necessary that the State prove that the defendant possessed a *quantity* of amphetamine having a potential for abuse associated with a stimulant effect on the central nervous system.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Reversed.

Paul D. Empson and Randall A. Rinquest, for appellant.

John K. Sorensen of Raymond & Olsen, for appellee.

Roger C. Lott, for amicus curiae.

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

BRODKEY, J.

The county attorney of Box Butte County brings error proceedings to this court pursuant to sections 29-2315.01 to 29-2316, R. R. S. 1943, from a decision and order of the District Court of that county sustaining defendant's motion made at the close of the State's evidence to dismiss the charges against the defendant that he "did knowingly or intentionally possess a controlled substance, to-wit: Amphetamine, its salts, optical isomers, or salts of its optical isomers." The court found that the defendant did knowingly or intentionally possess a quantity of amphetamine, but further found that the State failed to prove that the quantity of amphetamine possessed by defendant was such a quantity that it had a "potential for abuse associated with a stimulant effect on

the central nervous system." The court found the defendant not guilty, and discharged him. Since defendant Jennings has been placed in legal jeopardy by virtue of his trial, our decision today will not affect the judgment of the trial court. § 29-2316, R. R. S. 1943; State v. Faircloth, 181 Neb. 333, 148 N. W. 2d 187 (1967). Under the foregoing statutes, the scope and purpose of our review in these error proceedings is to provide an authoritative exposition of the law for use as a precedent in similar cases which may now be pending or which may subsequently arise. § 29-2316, R. R. S. 1943; State v. Taylor, 179 Neb. 42, 136 N. W. 2d 179 (1965).

Because of the importance of the issue involved, the Nebraska County Attorney's Association has filed a brief amicus curiae in this court in support of the State of Nebraska, the appellant. We have concluded that the District Court erred in its interpretation of the applicable law, and reverse its ruling in that regard.

The Uniform Controlled Substances Act was adopted in this state in 1971 as L.B. 326, following intensive study and analysis by the Nebraska Crime Commission and the Legislature. It was modeled after and closely followed the federal act adopted in 1970. Title 21 U. S. C., § 801, et seq. In State v. Neal, 187 Neb. 413, 191 N. W. 2d 458 (1971), we stated: "L.B. 326 is a comprehensive act designed to regulate the use, possession, manufacture, distribution, delivery, and production of drugs and controlled substances. The act generally is patterned after Public Law 91-513, 91st Congress, H.R. 18583, being the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970." The Nebraska act appears as sections 28-459 and 28-4,115 to 28-4,142, R. S. Supp., 1974. The "controlled substances" covered by the act are enumerated in Schedules I through V, of section 28-4,117.

As originally enacted in 1971, L.B. 326, listed amphetamines in Schedule III, as did also the federal act enacted in 1970. Under the federal act, however, the

United States Attorney General is given authority after investigation and findings by the Director of the Bureau of Narcotics and Dangerous Drugs, to administratively add to or delete drugs from the controlled substances schedules, or to change drugs from one schedule to another. This was not permitted under the Nebraska act because of possible constitutional questions arising by virtue of Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N. W. 2d 227 (1960). Under the Nebraska act it is necessary that such changes be made by the Legislature. In 1971, following an investigation by the Bureau of Narcotics and Dangerous Drugs, amphetamines were reclassified in the federal act and changed from Schedule III to Schedule II. The Director of the Bureau of Narcotics and Dangerous Drugs found "that amphetamines and methamphetamines and their salts, optical isomers, and salts of their optical isomers: (1) Have a high potential for abuse; (2) Have a currently accepted medical use in treatment in the United States with severe restrictions; (3) That abuse of these substances may lead to severe psychological dependence." See Vol. 36, No. 130, Federal Register, p. 12735 (July 7, 1971). Following the example of the federal government, the Nebraska Legislature in 1974 also amended section 28-4,117 of the Nebraska act, the avowed purpose of the amendment, according to the legislative history of the bill, was to make the schedules in the Nebraska act conform with those of the federal act. The amendment changed the listing of amphetamines from Schedule III to Schedule II. This clearly evidences an intention and desire on the part of the Nebraska Legislature to achieve uniformity between the two acts.

Schedule II (c) with which we are concerned in this case, as set out in section 28-4,117, lists as a controlled substance: "Any material, compound, mixture, or preparation which contains *any quantity* of the following *substances having a potential for abuse associated with a stimulant effect on the central nervous system*: (1)

Amphetamine, its salts, optical isomers, and salts of its optical isomers; * * *." (Emphasis supplied.) The precise question presented for determination is whether the phrase "having a potential for abuse associated with a stimulant effect" modified the word "substances" or the word "quantity." The trial court found that the phrase modified the word "quantity." The result of such interpretation would be that in a prosecution for possession of amphetamines the State would be required to prove, in addition to the other elements of the offense, that the defendant possessed a *quantity* of amphetamines that had a potential for abuse associated with a stimulant effect on the central nervous system. We disagree with the District Court's interpretation and rule that it is not necessary in a prosecution for possession of amphetamines for the State to prove that the defendant possessed an amount of the substances sufficient to create a potential for abuse associated with a stimulant effect on the central nervous system.

The cardinal rule for the interpretation of statutes is that the court determine the legislative intent in enacting the provision in question. Matzke v. City of Seward, 193 Neb. 211, 226 N. W. 2d 340 (1975); State v. Neal, *supra*. The legislative intent may be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the questioned language is classified. Matzke v. City of Seward, *supra*. The reasons for the enactment of the statute, and the purposes and objects of the act may also be guides in the attempt to give effect to the main intent of the lawmakers. Anstine v. State, 137 Neb. 148, 288 N. W. 2d 525 (1939). A review of the legislative history of the Uniform Controlled Substances Act makes it clear that one of the reasons for the passage of the act was the rapid and tremendous growth of drug use and the problems of law enforcement and control, both in the legal and illegal channels of distribution. It was the

thought of the Nebraska Legislature that the laws governing drugs and controlled substances be as uniform as possible throughout the states. Therefore, so far as possible, it wished to update the Nebraska laws to conform with the recent revisions of the federal act by creating a system of drug distribution and control permitting maximum state regulation and efficiency of enforcement.

In light of the foregoing factors, it would seem clear that the legislative intent was that amphetamines, as such, be considered as controlled substances. It is to be noted that Schedule II(c) is a part of section 28-4,117 entitled "Controlled substances; enumerated." If the Legislature had wanted to place a quantity restriction on possession of these drugs it could have set a volume or weight limit, as it did for certain codeine, morphine, and certain other opium derivative drugs as set out in Schedule III(c), and Schedule V. No other provision of the act indicates any intention of the Legislature to require a minimum amount before classifying a substance as controlled. It is an elementary rule of construction that all the parts of an act relating to the same subject shall be considered together, and not each by itself. Behrens v. State, 140 Neb. 671, 1 N. W. 2d 289 (1941).

Moreover, the rules of syntax and sentence construction clearly indicate that the interpretation by the trial court was erroneous. It is a rule of interpretation that relative and qualifying words and phrases are to be applied to the words or phrases immediately preceding and as not extending to or including other words, phrases, or clauses more remote, unless the extension or inclusion is clearly required by the intent and meaning of the context, or disclosed by an examination of the entire act. Nebraska State Railway Commission v. Alfalfa Butter Co., 104 Neb. 797, 178 N. W. 766 (1920). Under this rule, known as the rule of the last antecedent clause, a referential or qualifying phrase refers

solely to the last antecedent, absent a showing of contrary intent. It is clear in the case before us that the words "having a potential for abuse" immediately follow the word "substances" and modify that noun, and not the word "quantity" used earlier in the sentence.

Defendant argues, however, that unless the words "having a potential for abuse" modified "quantity," they are rendered mere surplusage. We do not agree. The phrase serves as an indication of what kind of substances the Legislature may add to Schedule II(c) in the future. See United States v. Nickles, 509 F. 2d 810 (5th Cir., 1975), interpreting analogous classifications of depressants under the federal act, Title 21 U.S.C. 801, et seq. We find support for this point of view in section 28-4,138, R. S. Supp., 1974, which provides that the Department of Health and the Division of Drug Control shall carry out educational and research programs with reference to controlled substances, and in connection with such research may: "(a) Establish methods to assess accurately the effects of controlled substances and to identify and characterize controlled substances *with potential for abuse*; * * *." (Emphasis supplied.) We have held that a word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears. Behrens v. State, *supra;* 2 Lewis' Sutherland, Statutory Construction (2d Ed., 1904), § 399, p. 758. See, also, Seward County Rural Fire Protection Dist. v. County of Seward, 156 Neb. 516, 56 N. W. 2d 700 (1953).

We have also examined the case law concerning the particular language in question, or analogous language contained in schedules of depressants, both federal and state, and find that the overwhelming weight of authority supports the interpretation urged by the county attorney. In Doyle v. State, 511 P. 2d 1133 (Okla. Cr. App., 1973), the same phrase before us today was ruled to be "descriptive of the essential nature of the prohibited derivatives," and not indicative of any "necessity

of proving a quantative analysis of the contraband." 511 P. 2d at 1136. Other courts have interpreted corresponding language contained in Schedule III(b) dealing with certain depressants. Each of these courts has ruled that the "abuse" and "effect" language modified "substance" and thus did not place upon the State any burden of proof with reference to potency or quantity. United States v. Nickles, 509 F. 2d 810 (5th Cir., 1975), interpreting Title 21 U. S. C. 841 (a)(1), the federal counterpart to section 28-4,117, Schedule III (b)(7), R. S. Supp., 1974; People v. Kincade, 61 Mich. App. 498, 233 N. W. 2d 54 (1975); People v. Busby, 56 Mich. App. 389, 224 N. W. 2d 322 (1974), c.f., State v. Jefferson, 391 S. W. 2d 885 (Mo., 1965), involving similar language but not the language of the uniform act; State v. Allesi, 216 N. W. 2d 805 (N. D., 1974); State v. King, 9 Wash. App. 389, 512 P. 2d 771 (1973). We also call attention to State v. McElroy, 189 Neb. 376, 202 N. W. 2d 752 (1972), a case decided under our Uniform Controlled Substances Act but involving possession of cocaine which is listed in a schedule not employing the words "quantity with a potential for abuse." Notwithstanding the factual difference, this court in that case specifically stated the rule in Nebraska to be that: "In the absence of a legislative declaration to the contrary, a quantity for a potential for abuse is not an essential element of the offense of unlawful possession of a controlled substance."

Finally, we point out that our Legislature in conformity with its expressed desire that laws governing drugs and controlled substances be as uniform as possible throughout the states, included in the Nebraska act section 28-4,141, R. S. Supp., 1974, providing specifically that the act shall be so applied and construed as to effectuate its general purpose to make uniform the law among those states which enact it. There is little difficulty in following this mandate, as the decisions in other jurisdictions are consonant with the general intent of the Nebraska Legislature as evidenced by the purpose

expressed in the act itself and by the legislative history of the act.

The ruling of the District Court is reversed.

REVERSED.

ED STEFFEN, APPELLANT, V. COUNTY OF CUMING, NEBRASKA, ET AL., APPELLEES.

238 N. W. 2d 890

Filed February 19, 1976. No. 40000.

1. **Crops: Damages.** In case of the destruction of a perennial crop the measure of damages is the difference between the value of the land immediately before the injury, with the crop growing thereon, and the value of the land immediately after the destruction of the crop.
2. ———: ———. As to any crop that may have been injured, but not entirely destroyed, the measure of damages is the difference between the value at maturity of the probable crop if there had been no injury, and the value of the actual crop at the time injured less the expense of fitting for market that portion of the probable crop which was prevented from maturing.
3. **Injunction: Trial.** A party seeking injunction must establish by competent evidence every controverted fact necessary to entitle him to relief, and an injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
4. **Premises, View of: Equity: Appeal and Error.** In the appeal of an equity case, the appellate court will give consideration to the fact that the trial court inspected the premises.

Appeal from the District Court for Cuming County: GEORGE W. DITTRICK, Judge. Affirmed.

Joseph M. Dea and Hurt & Gallant, for appellant.

John M. Thor and Moodie & Moodie, for appellees.

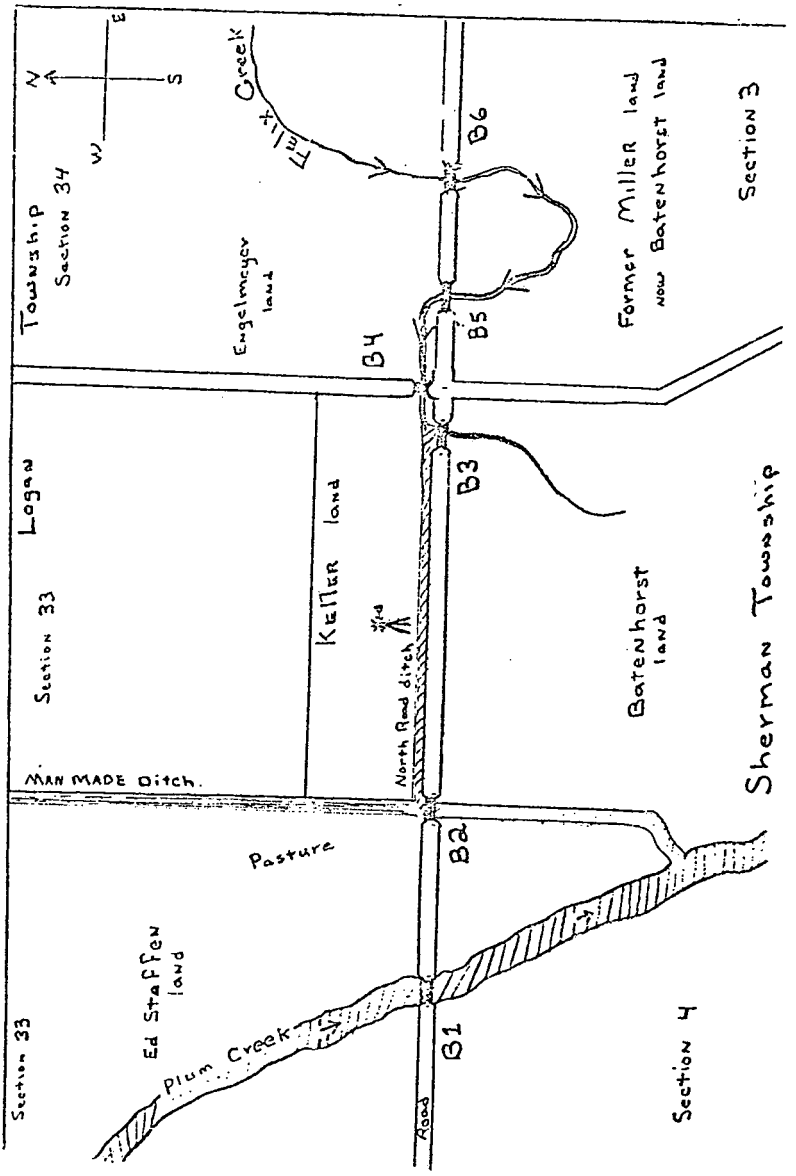
Heard before SPENCER, NEWTON, AND CLINTON, JJ., and HENDRIX and BUCKLEY, District Judges.

HENDRIX, District Judge.

Ed Steffen, plaintiff, appeals from the judgment of the District Court for Cuming County, Nebraska, denying money damages and an injunction against the County of Cuming, Nebraska; Logan Township, Cuming County, Nebraska; and Sherman Township, Cuming County, Nebraska, defendants. We affirm.

The plaintiff owns and resides on a 320-acre farm in Logan Township, Cuming County, Nebraska, about 4 miles north and 1 3/4 miles west of West Point, Nebraska. The farm and the surrounding lands make up the situs of the controversy. We are including a plat of the area, which will be a part of this opinion.

There is an east-west road running along the south line of plaintiff's property and to the east thereof. This road divides Logan Township on the north and Sherman Township on the south. Plum Creek runs through the plaintiff's land from northwest to southeast. It is the principal watercourse of the area and continually carries waterflow. To the immediate east of plaintiff's land is a man-made ditch running from north to south. It has been in existence for perhaps 40 years and carries runoff water south to Plum Creek. One-half mile to the east of plaintiff's land and the man-made ditch there is a north-south road which intersects the east-west road. For many years it has been the practice for Logan Township to maintain the road east of this intersection, and for Sherman Township to maintain the road west of this intersection. Felix Creek, which carries water intermittently, approaches the east-west road from the northeast about 3/8 of a mile east of the road intersection. Felix Creek goes south under the east-


N
S
E
W
Township
Section 34
Engelmeyer land
Tilt Creek
B6
B5
B4
B3
B2
B1
Former Miller land
now Batenhorst land
Section 3
Logan
Section 33
Keller land
North Road ditch
Batenhorst land
Sherman Township
MAN MADE Ditch.
Pasture
Ed Staffen land
Plum Creek
Section 33
Road
Section 4

west road at B6, runs back north and under the east-west road at B5, runs west under the north-south road at B4, and runs back south to the east-west road at B3. In 1963, defendant Sherman Township did work west of B3. The evidence as to work done is somewhat conflicting. Some of the evidence is to the effect that the north road ditch was only cleaned and widened beginning at a point 100 feet west of B3 and running to the west. Some of the evidence is to the effect that the ditch was cleaned, widened, and deepened, and the road raised west of B3. Plaintiff claims that this work diverted the waters of Felix Creek at a point near B3 by which waters were caused to flow west in the north road ditch until they spilled out to the north upon the pasture of the plaintiff causing damage in the amount of $5,600 and irreparable injury entitling plaintiff to an injunction. The defendants deny that the work caused any flooding or damages.

At the outset, we will dispose of the monetary damage question. Proof of damages was confined to evidence that two or three times a year the plaintiff's pasture was flooded causing silt to be deposited on the grass. Later, the silt would be washed off by rain. On one occasion the ASC Office paid an unnamed amount for flood damage. This does not establish damages from which this court can allow any recovery in money. The rules regarding crop damage by flood were announced in Wischmann v. Raikes, 168 Neb. 728, 97 N. W. 2d 551. These rules require that the measure of damages to a perennial crop is the difference between the value of the land immediately before the injury with the crop growing thereon, and the value of the land immediately after the destruction of the crop. As to any crop that may have been injured, but not entirely destroyed, the measure of damages is the difference between the value at maturity of the probable crop if there had been no injury, and the value of the actual crop at the time injured less the expense of fitting for

market that portion of the probable crop which was prevented from maturing. The evidence in this case does not establish a before and after value of either the land or the crop.

Moving to the injunction question, it is well-established that a party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle him to relief, and an injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. Shepardson v. Chicago, B. & Q. R.R. Co., 160 Neb. 127, 69 N. W. 2d 376.

There is no clear showing that the defendants diverted waters at Felix Creek at B3 by road and ditch work in 1963. During its history, Felix Creek has run under the road at B3 and south to Plum Creek. While plaintiff does not subscribe to such position, the weight of the evidence establishes that prior to the work by defendant Sherman Township in 1963, the principal waters of Felix Creek had already been diverted to the north road ditch and they were then running toward B2, the man-made ditch and plaintiff's farm. Albert Stuthman, formerly a member of the Sherman Township board, so testified. Mr. Batenhorst, a farmer of the area, so testified. Mr. Weiler, a Cuming County supervisor, so testified. The plaintiff relies upon his own testimony, upon the testimony of Raymond Bailey, Cuming County surveyor, and upon the testimony of his son, Donald Steffen, to establish that the principal waters of Felix Creek were running south at B3 in 1963 just before the work by Sherman Township. On direct examination, the plaintiff did answer two questions to this effect, but on cross-examination he stated that the diversion had already been made in 1963 and the following appears:

"Q Had it been running along the road since 1959?
A Approximately.
Q Well, what did—what they did in 1963, how did that

effect it? Did that change the course of the water?
A No.
Q It didn't? It still continued to run west?
A Right. They never—there was nothing there to stop it from going west."

Reliance upon Mr. Bailey's testimony in that regard appears to stem from an interpretation of his answer to a question on direct examination as to whether the water ran to the north road ditch in 1963. He responded, " '63 yes, it done that there in '63, but years before that it hadn't run there." That he did not mean that the change was made in 1963 is made clear by his later testimony on both direct and cross-examination where he stated definitely that he did not know when the change took place. Mr. Donald Steffen did state that prior to the road and ditch work in 1963 the water ran south at B3, but upon cross-examination stated that the plank work (not done by any of the defendants) caused the waters to run west. Since the evidence does not sustain the position that the diversion was accomplished by the work in 1963, it is only logical that the work done by the defendant Sherman Township was to take care of an existing problem, and that a new one was not created. Plaintiff additionally claims a judicial admission as to the flow of waters south from B3. Neither party holds the position that quantities of water now flow south from B3, and we deem this to be only an allegation and admission of the location of Felix Creek.

There are other difficulties with finding that the activity of the defendant Sherman Township in 1963 was the proximate cause, or a proximately contributing cause, of any damage which may have occurred to plaintiff's pasture. For one, the record reveals that there were a great number of situations and activities at work in the area which caused water to be on plaintiff's land. These were waters in the man-made ditch, flooding from Plum Creek, and from changes made by

Mr. Miller, Mr. Englemeier, Mr. Keller, and Mr. Batenhorst. There was no clear showing that these other factors were not the sole cause of any flooding which may have occurred. Other difficulties concern the lack of a clear demarcation between flooding before and after the work in 1963, and the failure of witnesses to delineate the means and volume of any diversion of waters.

Finally, it should be noted that the trial court made an inspection of the area. In the appeal of an equity case, the appellate court will give consideration to the fact that the trial court inspected the premises. Keim v. Downing, 157 Neb. 481, 59 N. W. 2d 602.

AFFIRMED.

FRANK MCGILL, INC., APPELLEE AND CROSS-APPELLANT, v. NUCOR CORPORATION, APPELLANT AND CROSS-APPELLEE.
238 N. W. 2d 894

Filed February 19, 1976. No. 40198.

1. **Contracts: Evidence.** Where negotiations between parties result in an agreement and that agreement is reduced to writing, executed, and delivered, the writing, in the absence of fraud, mistake, or ambiguity, is the only competent evidence of the contract.
2. **Contracts: Courts: Intent.** Where a contract is ambiguous, the court must determine the intent of the parties and the ambiguity must be resolved so as to give effect to that intent.
3. **Contracts.** A provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one.
4. **Contracts: Interest.** In the absence of agreement to the contrary, liquidated demands bear interest whereas unliquidated demands do not.
5. **Interest.** Where a reasonable controversy exists as to the plaintiff's right to recover and the amount of such recovery, a claim is generally considered to be unliquidated and prejudgment interest is not allowed.
6. **Interest: Evidence.** Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right.

7. ———: ———. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount, without reliance upon opinion or discretion.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Peter E. Marchetti of Nelson, Harding, Marchetti, Leonard & Tate, for appellant.

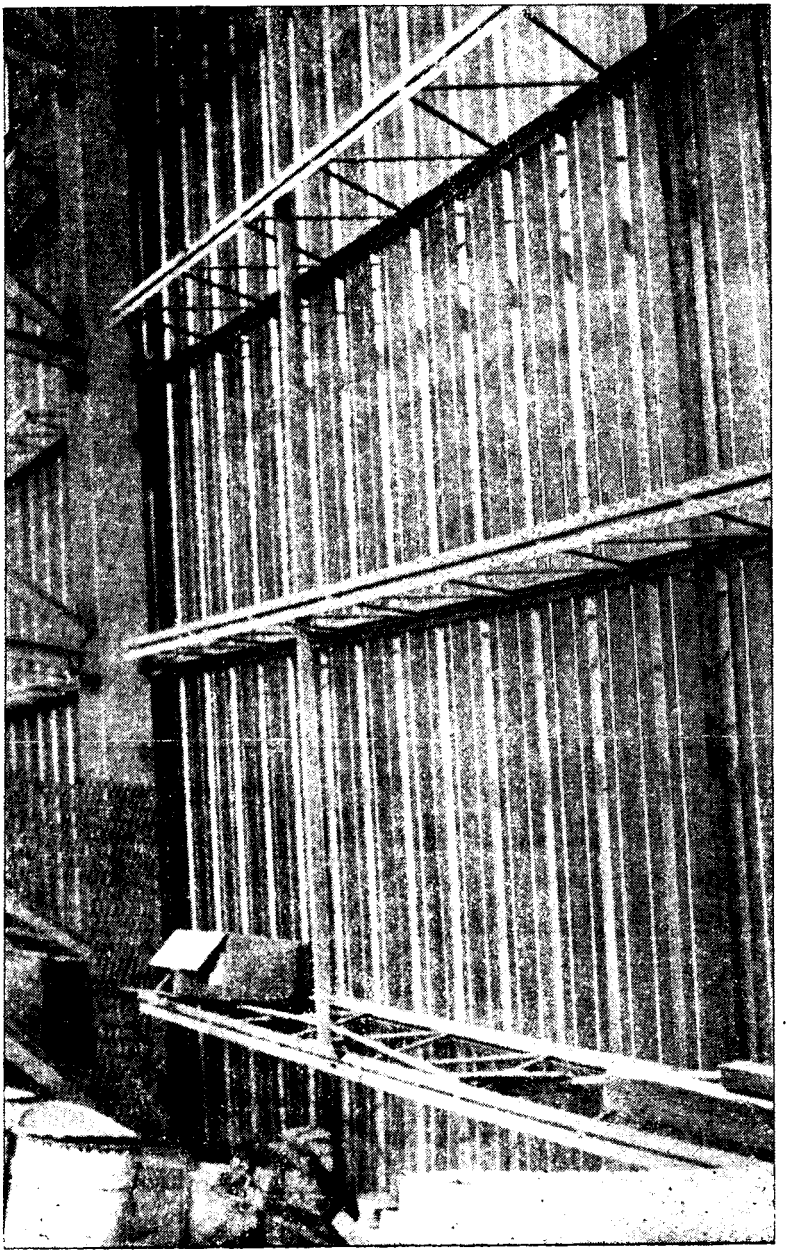
Stephen T. McGill of McGill, Koley & Parsonage, for appellee.

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

SPENCER, J.

This action involves the construction and interpretation of a written contract. The essential question presented is whether the trial court erred in holding the contract sufficiently ambiguous to permit the introduction of evidence of negotiations, conversations, and correspondence preceding the contract. The jury found for the plaintiff, Frank McGill, Inc., and the defendant, Nucor Corporation, appeals. Plaintiff cross-appeals from the refusal of the trial court to allow prejudgment interest. We affirm.

In the spring of 1973, Nucor built a steel plant rolling mill near Norfolk, Nebraska. The building is L-shaped. The east-west building forms the long side of the L, and the north-south building forms its short side. The walls and ceilings are constructed of a roll-form metal material not unlike corrugated steel siding. This siding is attached to vertical support studs or purlins, and horizontal trusses placed at regular intervals. The studs and trusses protrude from the siding surface into the building some 6 inches. To understand the question involved, we include the following photograph. It is a copy of a photograph of a portion of the wall in the east-west building.



While the plant was under construction, McGill's officers became aware of Nucor's plans to insulate the interior of the building with a foam product. Frank McGill, McGill's president, and Jim Anderson, its estimator, went to the plant to see Nucor's construction manager. They were given a set of blueprints and began figuring the areas involved. They toured the plant and observed the walls, ceilings, trusses, and studs. According to Frank McGill's testimony, they were told by the construction manager that only the "east-west" building was to be insulated. Jim Anderson testified that the area he "took off" the plans was that area the walls would comprise if they were a smooth box shape. This area, according to his testimony, was 260,000 square feet.

On March 13, 1973, Anderson submitted a bid of $93,800 for the work, figuring the area to be covered, including the truss and stud surfaces, was approximately 320,000 square feet. He arrived at this figure by multiplying 260,000 by a "factor" of 1.2, to account for the surface irregularities. The propriety of this "factoring" was documented by an estimating guide prepared and published by the Painting and Decorating Contractors of America, which was admitted into evidence.

After subsequent negotiations, McGill's bid price was reduced to $69,000. This reduction took into account some changes in the nature of the work to be done, which included the elimination of a bonding agent for the walls and a reduction from 1 inch to 3/4 of an inch thickness of the insulation to be used. This second bid was submitted on March 29, 1973. It stated in part: "The area included shall be all the metal siding and ceilings of *the east-west building* that parallels the road from the far west end to the east and that attaches to the north-south running building. All structural steel that is directly attached to the metal siding shall be insulated also. This insulation shall be applied to a point approximately six inches away from the metal

siding. This area is approximately 320,000 square feet of metal wall and ceiling *surfaces.*" (Emphasis added.)

A few days after McGill's $69,000 bid was submitted, a Nucor employee prepared the contract involved in this lawsuit. The pertinent sections of that contract are the first two paragraphs and numbered paragraph 6. They are as follows: "This agreement, entered into this 4th day of April, 1973, by and between Nucor Corporation (hereinafter referred to as Nucor) and Frank McGill, Incorporated (hereinafter referred to as Contractor). "WITNESSES:

"That the parties hereto agree that the Contractor shall carry out work generally described as furnishing and applying Polyurethane Foam Insulation for Nucor's steel mill buildings located on property owned by Nucor's and located in Stanton County Nebraska in consideration of the sum of sixty nine thousand dollars and no cents ($69,000.00) to be paid to him by Nucor upon completion of all items of work as described hereunder. (Emphasis added.)

"6) Contractor agrees that the work to be done covers approximately three hundred and twenty thousand square feet and includes all structural metal directly attached to the metal siding and siding. Any additional coverage called for by Nucor Manager of Construction shall be done on the same unit cost basis as the original work. Any less coverage than that called for in this contract (320,000 square feet) will be rebated by the Contractor or on the same basis. The Contractor agrees that this cost is twenty-one and one half cents ($0.215) per square foot."

McGill entered into the performance of the contract and continued until its workmen caught up with the general contractor's finished work. At that time, work was discontinued until such time as the general contractor completed the east-west building. At this time it became evident the parties had different interpretations of the contract. McGill contended the 320,000 square

feet involved was the actual surface area of the east-west building, as set out in its bid. This Nucor disputed.

Nucor contended the square foot calculation was on a dimensional area or the area embraced if the surface was entirely smooth, taking no account of the purlins, trusses, corrugations, or other irregularities. This, according to Nucor, would give a figure of 245,505 square feet for the east-west building. It contended the remainder of the work was to be done in the north-south building, which it figured had a dimensional area of 84,864 square feet. Nucor's evidence was the dimensional area of both buildings totalled 330,985 square feet. McGill, as noted, contended the area embraced was only the east-west building surface, considering all the irregularities involved as well as the trusses and purlins that were to be covered. The fact that the word "buildings" was used in the opening portion of the contract set out heretofore, and these diverse contentions, made an issue of the meaning of "square feet," as used in the contract.

Shortly subsequent to the work stoppage, Nucor learned that the foam it had specified for the contract created a potential fire hazard and officially terminated the contract. At that time, McGill calculated that 86 percent of what it considered the job to be done had been completed. This calculation was based upon a percentage of that portion of 320,000 square feet of the surface area it had covered. Nucor did not contest the 86 percent completion of the east-west building. It contended that the square footage of the east-west building on its dimensional area calculation was only 245,505 square feet, and applied the 86 percent completion to that figure. The dollar amount involved in the different interpretations of the parties was $13,839.55.

We agree with defendant, where negotiations between parties result in an agreement and that agreement is reduced to writing, executed, and delivered, the writing, in the absence of fraud, mistake, or ambiguity, is the

only competent evidence of the contract. Bitler v. Terri Lee, Inc. (1957), 163 Neb. 833, 81 N. W. 2d 318.

Conversely, where a contract is ambiguous, the court must determine the intent of the parties and the ambiguity must be resolved so as to give effect to that intent. Knight Bros., Inc. v. State (1972), 189 Neb. 64, 199 N. W. 2d 720. In Knight, we also held a provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one.

The contract herein was drafted by a nonlawyer, an employee of the defendant, possibly in response to the bid submitted by the plaintiff. We say possibly because the inference from Nucor's argument is that the contract was strictly a counteroffer. A skilled draftsman would have been more specific. It seems obvious that the ordinary painting contractor, in submitting a bid on irregular surfaces, on a square foot basis, would expect the bid to apply to the surface as it existed and not to a smooth surface. McGill offered expert testimony that in the painting and spray-on insulation trade, square feet refers to square feet of surface area and it is the custom and practice to apply factors in computing surface areas. This evidence was undisputed.

The contract calls for a certain amount of work to be done in clear, concise terminology. The problem is not whether square feet means dimensional area or total surface area, but rather how much of Nucor's plant is contemplated by the phrase "320,000 square feet." Nowhere in the contract is the area to be covered specifically described. The use of the word "buildings" rather than "building" is the basis for Nucor's claim. In its answer to one of plaintiff's interrogatories it said: "The projected approximately 320,000 square feet was contained in the areas in defendant's buildings identified as the roll mill, the roll shop and the billet storage area." These descriptions are not found in the contract, nor are they mentioned in the bid proposals. The only

reference to area in the contract is the one made in paragraph 6 that the contractor agrees that the work to be done covers approximately 320,000 square feet, and includes all structural metal directly attached to the metal siding. Consequently, other evidence is necessary to determine the area embraced by the 320,000 square feet covered by the contract.

In order to discover the intent of the parties and to define the scope of the work to be rendered in return for the $69,000 specified in the contract, the trial court permitted the jury to view the bid letters and to hear evidence of the negotiations. The bid letters by specifically referring to the east-west building, quite clearly indicated the intent of McGill in its bid. The March 29, 1973, bid submitted by McGill embraced the language set out heretofore. It specifically states the area included and states this area is approximately 320,000 square feet of metal wall and ceiling surfaces. It would seem to us this bid, together with some of the previous dealings of the parties, was sufficient to put Nucor on notice that the McGill bid contemplated work only in the east-west building, and was phrased exclusively in terms of surface areas.

We conclude that the trial court was correct in permitting the introduction of evidence of negotiations, conversations, and correspondence to explain the area embraced by the language "320,000 square feet."

The remaining question presented is plaintiff's cross-appeal for prejudgment interest. The generally accepted rule is that, in the absence of agreement to the contrary, liquidated demands bear interest whereas unliquidated demands do not. Mid States Engineering v. Rohde (1968), 182 Neb. 590, 156 N. W. 2d 149. Where a reasonable controversy exists as to the plaintiff's right to recover and the amount of such recovery, a claim is generally considered to be unliquidated and prejudgment interest is not allowed. See K & R, Inc. v.

Crete Storage Corp. (1975), 194 Neb. 138, 231 N. W. 2d 110.

In Abbott v. Abbott (1972), 188 Neb. 61, 195 N. W. 2d 204, we held: "Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right." In that case we also held: "A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount, without reliance upon opinion or discretion."

Plaintiff recovered the exact amount of its bill, and the evidence furnished data from which that amount was readily computable without reliance on opinion or discretion. If it were not for the use of the word "buildings" in the contract we would have no hesitancy in allowing prejudgment interest. While the evidence was otherwise, that word gave substance to the defendant's claim, whether the use of the word was deliberate or inadvertent. The contract was ambiguous and subject to construction to resolve the ambiguity. On this record, we sustain the trial judge's determination that prejudgment interest should not be allowed.

The judgment is affirmed.

AFFIRMED.

R. WENDELL MOUSEL, APPELLANT, V. IRVIN TEN BENSEL ET AL., APPELLEES.

238 N. W. 2d 632

Filed February 19, 1976. No. 40200.

1. **Adverse Possession: Evidence.** A claim of title by adverse possession must be proved by a preponderance of the evidence showing actual, open, exclusive, and continuous possession under a claim of ownership for a period of 10 years.
2. **Witnesses: Evidence.** Expert evidence is not ordinarily required to lay a foundation for the introduction of an aerial photograph. It is sufficient that some witness familiar with the subject matter can testify that it is an accurate and true representation of the scene depicted.

3. **Trial: Pretrial Conference.** A pretrial conference is neither designed nor intended to arbitrarily exclude noncumulative evidence pertinent to the issues simply because it was not mentioned at the pretrial hearing.
4. ———: ———. The District Court has a broad discretion in regard to the amendment of pretrial orders.

Appeal from the District Court for Furnas County: JACK H. HENDRIX, Judge. Affirmed.

Ronald D. Mousel, for appellant.

Eric Eisenhart and James R. Harper, for appellees.

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

NEWTON, J.

This is an action to quiet title based on a claim of adverse possession. The District Court entered judgment for the defendants who held the record title. We affirm the judgment of the District Court.

The tract involved is a part of the north half of Lot 10 of Hammond's Subdivision adjacent to the city of Cambridge, Nebraska. The north half of Lot 10 comprises an area 255.75 feet north and south by 189.65 feet east and west. To the east lies a paved road constructed in the late 1960's which was formerly Lot 9. All of Lots 9 and 10 were formerly owned by Frieda Hollingsworth who deeded Lot 9 and the south half of Lot 10 to her daughter who, in turn, conveyed it to Dick Bargman who retained it until it was conveyed by the executor of his estate in September 1962. Frieda Hollingsworth conveyed the west 137.37 feet of the north half of Lot 10 to Alvin Hollingsworth and it was acquired by plaintiff in 1955. The strip in dispute is the east 52.28 feet of the north half of Lot 10. Frieda Hollingsworth apparently thought she had conveyed all her interest and made no further disposition of the disputed property until she conveyed it to defendants in 1969 when it was discovered that the tract did not appear on the tax rolls.

There is a house in the northwest corner of plaintiff's property in which he had various tenants after he acquired it. His claim is that through his tenants he made use of the disputed tract by sowing down all the north half of Lot 10 and mowing the grass and alfalfa on it. He contends there was an old fence on the east boundary of Lot 10 and that he used the property to the fence for many years commencing in 1955.

Defendants' evidence indicates that the fence was not on the east boundary of Lot 10 but was on the east boundary of the part owned by plaintiff. The evidence given by the witnesses is very conflicting but aerial photographs taken in 1956 and 1963 are in evidence and definitely show a difference in the use of plaintiff's land and the disputed tract. They support defendants' contention that the disputed tract was farmed by Dick Bargman and was not in grass from 1956 to 1963 as plaintiff contends.

It is basic that a claim of title by adverse possession must be proved by a preponderance of the evidence showing actual, open, exclusive, and continuous possession under a claim of ownership for a period of 10 years. See Onstott v. Olsen, 180 Neb. 393, 142 N. W. 2d 919. Plaintiff has not sustained this burden of proof.

Objection was made to the admission in evidence of aerial photographs on the ground that they were admitted without interpretation by an expert witness and were not provided for in the pretrial conference. In order to lay a foundation for the admission of an aerial photograph: "* * * it is not necessary that the person who took the picture should testify to its accuracy, but it is sufficient that some witness familiar with the subject matter can testify that it is an accurate and true representation of the scene depicted." Annotation, Evidence - Aerial Photographs, 57 A. L. R. 2d, § 2, p. 1352. See, also, 29 Am. Jur. 2d, Evidence, § 796, p. 876; Bedford v. Herman, 158 Neb. 400, 63 N. W. 2d 772.

The rule of this court in regard to pretrial procedure

specifies that its purpose is the formulation of issues, the obtaining of admissions of fact and documents to avoid unnecessary proof, the limitation of cumulative testimony, and other matters aiding in the disposition of the action, and may be modified at the trial to prevent manifest injustice. As stated in Western Pipe & Supply, Inc. v. Heart Mountain Oil Co., Inc., 179 Neb. 858, 140 N. W. 2d 813: "The purpose of a pretrial conference is to simplify the issues; amend the pleadings, when necessary; and avoid unnecessary proof of facts at the trial." In relation to evidence it is designed for and primarily used to restrict evidence to the issues formulated, secure admissions or stipulations, avoid unduly cumulative evidence and the necessity of proving foundation in regard to clearly competent evidence. It is neither designed nor intended to arbitrarily exclude noncumulative evidence pertinent to the issues simply because it was not mentioned at the pretrial hearing. The District Court has a broad discretion in regard to the amendment of pretrial orders. Here the amendment was not prejudicial.

We conclude that other assignments of error pertaining to the sufficiency of the defendants' pleading and the disqualification of defendants' attorney are not meritorious.

The judgment of the District Court is affirmed.

AFFIRMED.

CLYDE CAMP, APPELLANT, V. BLOUNT BROS. CORPORATION, AND STATE OF NEBRASKA, SECOND INJURY FUND, APPELLEES.
238 N. W. 2d 634

Filed February 19, 1976. No. 40226.

1. **Workmen's Compensation.** Under the Workmen's Compensation Act an award which is payable periodically for 6 months or more is subject to modification on the ground of increase of incapacity due solely to the injury. § 48-141, R. R. S. 1943.

2. **Workmen's Compensation: Time.** In a modification proceeding in a workmen's compensation case, the whole question of the employee's physical condition can again be inquired into as of that time.
3. **Workmen's Compensation.** 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 (Reissue 1968).
4. ———. Total disability, as used in section 48-128, R. R. S. 1943 (Reissue 1968), means total disability in fact. 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 section 48-128.
5. ———. An employee who has permanent total disability as a result of a combination of injuries sustained in separate accidents is entitled to compensation out of the Second Injury Fund even though the injuries sustained in the separate accidents were schedule injuries which would otherwise be compensated under subdivision (3) of section 48-121, R. R. S. 1943.
6. ———. In making an award for rehabilitation services it is proper for the Workmen's Compensation Court to prescribe the procedure for the employee to follow if he wants to obtain rehabilitation services.

Appeal from the District Court for Nemaha County: WILLIAM F. COLWELL, Judge. Affirmed in part, and in part reversed and remanded with directions.

Baylor, Evnen, Baylor, Curtiss & Grimit, for appellant.

R. M. Dustin of Pilcher, Howard & Dustin, for appellee Blount Bros. Corp.

Paul L. Douglas, Attorney General, and Harold S. Salter, for appellee State of Nebraska, Second Injury Fund.

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

BOSLAUGH, J.

This is an appeal in a proceeding to modify a previous award under the Workmen's Compensation Act. The plaintiff, Clyde Camp, was employed as a carpenter by the defendant, Blount Brothers. On March 9, 1970, the plaintiff fell from a building while working for the defendant and fractured his right heel. As a result of this accident the plaintiff sustained a 25 percent permanent partial disability to his right foot.

The plaintiff returned to his regular work for the defendant on May 22, 1970. On September 1, 1970, while at work, the plaintiff was struck by a large beam and fell about 25 feet injuring his left foot and back. As a result of this injury a triple arthrodesis was performed on his left foot in July 1971. The plaintiff sustained a 25 percent permanent partial disability to his left foot as a result of the accident on September 1, 1970. The plaintiff also sustained a compression fracture of the first lumbar vertebrae in the accident on September 1, 1970. There is some evidence the back injury resulted in a 5 percent permanent partial disability to the body as a whole.

In 1972 the plaintiff commenced an action in the compensation court which resulted in an award on rehearing on July 19, 1973, of compensation for a 25 percent permanent partial loss of use of the left foot and a 25 percent permanent partial loss of use of the right foot together with compensation for temporary total disability and medical and hospital expenses. The plaintiff attempted to appeal from this award but the appeal was dismissed in the District Court for failure to file a petition on appeal within the time required by section 48-182, R. R. S. 1943.

As a result of the injury to his right foot on March 9, 1970, the plaintiff developed traumatic arthritis. In November 1973, a triple arthrodesis was performed on plaintiff's right foot in an effort to alleviate the pain and disability he was then suffering. Post-operative

complications developed which eventually resulted in an increase in disability to a 40 percent permanent partial disability to his right foot.

The plaintiff commenced this action on March 21, 1974, to obtain a modification of the award of July 19, 1973. The award was subject to modification on the ground of increase of incapacity due to the injury of March 9, 1970. § 48-141, R. R. S. 1943. The operation performed on the right foot in November 1973, resulted in an increase in disability occurring after July 19, 1973, but attributable to the original injury. In the modification proceedings the issue to be determined was the compensation to which the plaintiff was then entitled under the facts existing at the time the proceeding was commenced. In a modification proceeding "the whole question of plaintiff's physical condition can again be inquired into as of that time." Great Western Sugar Co. v. Hewitt, 127 Neb. 790, 257 N. W. 61.

The plaintiff alleged that he was totally and permanently disabled as a result of the injuries sustained in the accidents on March 9 and September 1, 1970. After a hearing before a single judge of the compensation court the plaintiff received an award of compensation for a 15 percent increase in permanent partial disability to his right foot together with compensation for temporary total disability and medical and hospital expenses.

Upon rehearing before the compensation court en banc the award was modified in regard to medical expenses but otherwise affirmed, one judge dissenting. The court specifically found the plaintiff was not totally and permanently disabled and dismissed the proceeding as to the State of Nebraska, Second Injury Fund.

The plaintiff appealed to the District Court where the award of the compensation court was affirmed. The plaintiff has now appealed to this court. He contends that he is entitled to compensation for total and permanent disability and is entitled to rehabilitation benefits as provided in the statute.

The plaintiff is 55 years of age and has a 12th grade education. He was employed by Blount Brothers to do rough carpenter work. He is not trained as a cabinetmaker or to do finish carpenter work. The plaintiff has also farmed.

Since the accident of September 1, 1970, the plaintiff has been unable to work as a carpenter or do farm work except that he is feeding a few cattle in exchange for the right to occupy a farmhouse. Feeding the cattle consists of scooping grain from a wagon into feed bunks using a bucket. This takes about 1/2 hour each day. The plaintiff estimates a bucket of grain weighs about 20 pounds.

The plaintiff is unable to stand for more than about 30 minutes at a time. He can not operate a tractor. He can not walk on rough ground or on reinforcing bars or climb ladders. He can not lift anything weighing more than about 20 pounds and can not work in a bent-over position. The medical testimony is that the disability to the plaintiff's feet prevents him from doing rough carpenter work, and the only work he could do would be sitting down at a bench, not moving around or lifting anything.

The disability resulting from either accident considered alone, would not prevent the plaintiff from doing his usual work although he would be handicapped to some extent. It is the combination of injuries from the separate accidents that results in his present disability.

At the time of the second accident, September 1, 1970, the compensation act provided 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 (Reissue 1968).

Total disability, as used in section 48-128, R. R. S. 1943 (Reissue 1968), means total disability in fact. 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 section 48-128. Franzen v. Blakley, 155 Neb. 621, 52 N. W. 2d 833; Kelly v. Peter Kiewit Sons Co., 175 Neb. 621, 122 N. W. 2d 501; Runyan v. State, 179 Neb. 371, 138 N. W. 2d 484. The evidence in this case sustains a finding that the plaintiff is permanently totally disabled within the meaning of section 48-128.

The defendants contend the plaintiff is not entitled to compensation from the Second Injury Fund because the injuries the plaintiff sustained on March 9, 1970, and September 1, 1970, were schedule injuries which are to be compensated under subdivision (3) of section 48-121, R. R. S. 1943. A similar contention was considered and rejected in Franzen v. Blakley, *supra*. The employee in that case had fractured her wrists in separate accidents. Although the first injury was not compensable because it was not work-related, it was a schedule injury which if compensable would have been compensated under subdivision (3) of section 48-121. In holding that the employee was entitled to compensation for total disability this court said the purpose of section 48-128, R. R. S. 1943, is not to provide compensation for the previous disability but to provide compensation for permanent total disability resulting from a combination of the previous fact condition with a compensable injury. The opinion then quoted from Elliott v. Gooch Feed Mill Co., 147 Neb. 309, 23 N. W. 2d 262, as follows: "For workmen's compensation purposes, 'total disability' does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was

trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.

"A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law."

The fact that the first injury in this case was a compensable injury does not prevent the plaintiff from being compensated from the Second Injury Fund. Section 48-128, R. R. S. 1943 (Reissue 1968), makes no distinction between a compensable first injury or a noncompensable injury. It is the previous fact condition combined with a second compensable injury causing permanent total disability in fact that establishes the right of the employee to compensation from the Second Injury Fund.

Section 48-162.01, R. R. S. 1943, provides that one of the primary purposes of the Workmen's Compensation Act shall be the restoration of the injured employee to gainful employment. An employee who has suffered a compensable injury is entitled to medical and physical rehabilitation services. If as a result of the injury he is unable to perform work for which he has previous training and experience he is entitled to vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him to suitable employment.

The compensation court may refer an injured employee to a qualified physician or facility for evaluation or report as to the practicability of, need for, and kind of service, treatment, or training necessary and appropriate to render him fit for a remunerative occupation. The court itself is authorized to employ specialists in physical, medical, and vocational rehabilitation.

The award of July 19, 1973, contained a provision

finding there was a reasonable probability that with appropriate training, rehabilitation, or education, the plaintiff might be rehabilitated to the extent he could significantly increase his earning capacity. The award further provided that if the plaintiff desired an evaluation of his suitability for rehabilitation services he was to report to the Rehabilitation Specialist of the Workmen's Compensation Court within 30 days. If the plaintiff failed or declined without reasonable excuse to request rehabilitation services within the time and manner specified, he was deemed to have waived his rights to such services at the expense of the employer.

In the first action the plaintiff alleged he was not capable of being rehabilitated. He made no request for rehabilitation services until after the time fixed in the award of July 19, 1973, had expired.

The compensation court made no finding in regard to rehabilitation services in this proceeding other than to note that the award of July 19, 1973, awarded vocational rehabilitation services subject to conditions and limitations. The District Court found the plaintiff had without good cause failed to comply with the conditions set out in the award of July 19, 1973, and made no award of rehabilitation service benefits.

Although the statute itself contains no procedural limitations, it was proper for the compensation court to prescribe a procedure for the plaintiff to follow if he wanted to obtain rehabilitation services. The finding of the District Court that the plaintiff failed without good cause to comply with the conditions set out in the award of July 19, 1973, is sustained by the record. The plaintiff has waived the right to rehabilitation services at the expense of Blount Brothers.

Since there is a possibility that rehabilitation services might reduce the liability of the Second Injury Fund we believe the State of Nebraska should be given an opportunity to request that the plaintiff be required to submit to an evaluation at its expense.

The judgment of the District Court is affirmed as to the defendant Blount Brothers, Corporation; the judgment is reversed as to the defendant State of Nebraska, Second Injury Fund, 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.

STATE OF NEBRASKA, APPELLEE, V. GLEN A. BOSS, JR., APPELLANT.

238 N. W. 2d 639

Filed February 19, 1976. No. 40263.

1. **Words and Phrases.** The word "abuse" insofar as it includes verbal abuse in section 28-729, R. S. Supp., 1974, is construed to include only those which have been described as "fighting" words, i.e., those which by their very utterance tend to inflict injury or tend to incite an immediate breach of the peace. As so construed the statute violates neither the First Amendment to the Constitution of the United States, nor Article I, section 5, of the Constitution of Nebraska.
2. ———. Whether any particular use of abusive language constitutes "fighting words" depends not only upon the words, but also upon the circumstances in which they are used.
3. **Words and Phrases: Constitutional Law.** The word "resist" as used in section 28-729, R. S. Supp., 1974, is not so vague as to make the statute unconstitutional.
4. **Criminal Law: Trial: Witnesses: Evidence.** When the State calls a witness to challenge defendant's claim of truth and veracity, a line of inquiry directed toward the defendant's previous character is firmly forbidden the State on direct examination.
5. ———: ———: ———: ———. When a defendant testifies on his own behalf, the prosecuting attorney may question him as to his previous convictions for felony and the number thereof, but no details as to the nature of the charges or other details may be elicited or received.
6. **Criminal Law: Trial: Evidence.** A defendant is entitled to offer

evidence of his reputation for truth and veracity. The prosecution is entitled to dispute that evidence only by evidence of bad reputation for truth and veracity.

7. **Criminal Law: Trial: Prosecuting Attorneys.** A prosecutor in his argument is entitled to refer to previous convictions of felony only for the purpose of arguing the defendant's credibility. He is not entitled to use the conviction for the purpose of inferring the probability of the defendant's guilt of the crime charged.
8. **Criminal Law: Trial: Prosecuting Attorneys: Waiver.** Ordinarily a party who does not object to an argument of the prosecutor which is alleged to constitute misconduct will be held to have waived his right to complain.
9. **Trial: Instructions.** Error may not be predicated on the refusal to give an instruction which either erroneously or only partially covers the applicable law.
10. **Trial: Jury: Evidence.** Jurors are judges of the credibility of witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their duty to determine the truth.
11. ———: ———: ———. Resolutions of conflicts in evidence and credibility of witnesses are not for the reviewing court, but for the jury.

Appeal from the District Court for Platte County: C. THOMAS WHITE, Judge. Affirmed.

R. Steven Geshell of Robak & Geshell, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

CLINTON, J.

A jury verdict of guilty was rendered against defendant, Glen A. Boss, Jr., in the county court of Platte County on the charge of resisting or abusing an officer in the execution of his office, contrary to the provisions of section 28-729, R. S. Supp., 1974. He was sentenced to 30 days in the county jail. Defendant thereafter appealed to the District Court where the judgment

and sentence of the county court were affirmed. He then appealed to this court.

The issues for consideration on this appeal are: (1) Is section 28-729, R. S. Supp., 1974, constitutional; (2) did the court below err in admitting evidence that defendant had probation violations on his record; (3) should the court below have granted a mistrial because of improper final argument by the prosecuting attorney; (4) did the court below err in failing to give an instruction requested by the defendant; (5) was the judgment sustained by sufficient evidence; and (6) was the sentence excessive. We affirm.

The versions of the police officer and of the defendant and his companion as to what occurred were in most respects in direct conflict. Defendant and his companion admitted they had been drinking beer for a period of about 3 hours. The occurrence in question happened as the defendant and his companion were traveling in the defendant's car to a restaurant.

The police officer's version was that the car, with the defendant at the wheel, passed the police patrol car (both traveling in the same direction) on an icy, snow-packed street at a speed in excess of the posted limit and as the defendant's car passed it fishtailed two or three times. The officer then turned on his flashing red lights and gave chase. The defendant pulled his car to the curb and stopped. The officer asked for the defendant's license and automobile registration and informed him that he was going to give him a ticket for speeding. As the officer turned to go back to the patrol car to get his summons book, the defendant got out of his car, grabbed the wrist and hand of the officer in which the officer held the license, and said to the officer: ". . . you dirty son-of-a-bitch." The officer pulled away and attempted to turn the defendant to handcuff him. The defendant struggled and hit the officer on the side of his head with his arm and elbow, knocking off the officer's hat and spectacles. The of-

ficer attempted to subdue the defendant by striking him with the flashlight and spraying him with mace. The defendant escaped and ran, but almost immediately came back and submitted to arrest.

The defendant's version was that as he reached into his car to comply with the officer's request to get his auto registration, he (the defendant) said ". . . you son-of-a-bitch I wasn't speeding—if anything you was impeding traffic." At that time, while the defendant's back was turned, the officer began beating him over the head with his flashlight. The defendant sought to protect his head with his hand, shoved the officer out of the way, and, because he was being sprayed with mace, ran. The testimony of the defendant's companion tended to verify defendant's version of the incident.

Defendant's first assignment of error challenges the constitutionality of section 28-729, R. S. Supp., 1974, which provides: "Whoever abuses any judge or resists or abuses any sheriff, constable or any other officer in the execution of his office, shall be fined in any sum not exceeding one hundred dollars or be imprisoned in the jail of the county not exceeding three months."

Defendant is specifically concerned with that portion of the statute which makes it a misdemeanor to *resist or abuse* any officer in the execution of his office. He argues that the words *resist or abuse* are so vague as to be unconstitutional because they sweep within their coverage constitutionally protected speech without sufficient definition of what is and is not criminal. No person, defendant contends, could read section 28-729, R. S. Supp., 1974, and know with any degree of certainty what he can or cannot say to an officer without fear of being arrested.

The defendant argues that the statute is unconstitutional on its face and as applied to him in this particular case. He relies upon Gooding v. Wilson, 405 U. S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408; and Lewis v. City of New Orleans, 415 U. S. 130, 94 S. Ct. 970, 39 L. Ed.

2d 214. The term "abuse" may include verbal injury as well as physical. One of the primary meanings of the word is "to attack or injure with words." Webster's Third New International Dictionary (Unabr., 1961). See, also, State v. Neubauer, 2 Conn. Cir. 169, 197 A. 2d 93; Campf v. State, 80 Ohio St. 321, 88 N. E. 887. The word abuse and similarly broad terms in like statutes have been held to pass constitutional muster under the First Amendment to the Constitution of the United States only if they are construed so as to apply the statute to punish only what have been called "fighting words." Chaplinsky v. New Hampshire, 315 U. S. 568, 62 S. Ct. 766, 86 L. Ed. 1031; Gooding v. Wilson, *supra;* Lewis v. City of New Orleans, *supra.* "'[F]ighting' words [are] 'those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.'" Gooding v. Wilson, *supra.* In accordance with the principles announced by the Supreme Court of the United States in Lewis v. City of New Orleans, *supra,* we construe the term abuse in the statute, insofar as it includes the use of words, to apply only to words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace." We find that under the circumstances shown by the undisputed evidence the words here used were fighting words, being, as they were, directed at the officer by the person being investigated or arrested and, so to speak, in face-to-face confrontation while the officer was in the execution of his office.

We specifically reject the authority of Williams v. District of Columbia, 419 F. 2d 638, and the concurrence of Mr. Justice Powell in Lewis v. City of New Orleans, *supra,* wherein it is suggested that the words here used cannot be fighting words when directed to a police officer because he is trained to accept such abuse without violent reaction. Such words, of course, do not justify violent reaction, but we can find no constitutional basis for the distinction made. On the other

hand, we agree that whether any particular use of abusive language constitutes "fighting words," depends not only upon the words, but upon the circumstances as well. As so construed by this opinion, we hold that section 28-729, R. S. Supp., 1974, is constitutional and does not violate the First Amendment to the Constitution of the United States, nor Article I, section 5, of the Constitution of Nebraska.

The contention of the defendant that the word "resist" is so vague as to be unconstitutional is without merit. Our holding in State v. Lewis, 184 Neb. 111, 165 N. W. 2d 569, is controlling. See, also, State v. Holland, 183 Neb. 485, 161 N. W. 2d 862.

The defendant's second and third assignments of error, pertaining respectively to the admission of certain testimony over objection and to improper final argument by the prosecutor, are given overlapping treatment in the defendant's brief and we will do likewise in this opinion. Defendant contends that the trial court erred in allowing the State to present evidence indicating that he had, during a period while on probation, not complied with the terms of the probation order and that his period of probation had, on that account, been extended. Defendant took the stand and on direct examination his attorney asked him if he had ever pled guilty or been convicted of a felony. Defendant responded in the affirmative, and under further questioning stated that he had been placed on probation, that he had completed his probation, and that his civil rights had been restored. The State called up defendant's probation officer as a rebuttal witness. He testified that while defendant was on probation, his reputation for truth and veracity in the community had been "fair." Defendant's attorney then offered into evidence an order terminating defendant's probation "with all civil rights restored as if a pardon had been issued." This order apparently was issued under the provisions of section 29-2264, R. S. Supp., 1974. At that point

the prosecutor on redirect asked if the fact the defendant had completed his probation meant that the officer "never had any reports of wrong doing." The probation officer responded, "A. No it doesn't." Objection was made that this was "improper redirect." The objection was overruled, but when the prosecutor sought to develop the matter further, objection was made before any answers were given and the objection was sustained. The court, of course, properly sustained the objection. When the State calls a witness to challenge defendant's claim of truth and veracity, "a line of inquiry directed towards the defendant's previous character is firmly forbidden the State on direct examination." State v. Newte, 188 Neb. 412, 197 N. W. 2d 403. When a defendant testifies on his own behalf, the prosecuting attorney may question him as to his previous convictions for felony and the number thereof, but no details as to the nature of the charges or other details may be elicited or received. See State v. Craig, 192 Neb. 347, 220 N. W. 2d 241. A defendant is entitled to offer evidence of his reputation for truth and veracity. The prosecution is entitled to dispute that evidence only by evidence of bad reputation for truth and veracity. State v. Craig, *supra.* The prosecution was not entitled to go into the reasons why defendant's probation was extended.

The only matter raised by defense counsel in his cross-examination of the State's witness was the introduction into evidence of a certified copy of the order releasing defendant from probation. This was properly admissible under the explicit provisions of section 29-2264(5)(c), R. S. Supp., 1974. The defendant, by the introduction of the order, did not open up any new matter. However, we do not believe that the erroneous introduction of the answer, "No it doesn't," is so prejudicial that it requires reversal.

In the course of this prosecution, the defense counsel, apparently in his opening statement, seems to have con-

ceded that the defendant had previously been convicted of a felony of a type similar to that here charged. The prosecutor, in his closing argument, made various references to this admission.

A prosecutor in his argument is entitled to refer to previous convictions of felony only for the purpose of arguing the defendant's credibility. He is not entitled to use the conviction for the purpose of inferring the probability of the defendant's guilt of the crime charged. State v. Kallos, 193 Neb. 113, 225 N. W. 2d 553.

The question before us is whether the prosecutor made improper use of the admission of the prior conviction and whether the defendant properly preserved his claim of error.

A fair reading of that portion of the prosecutor's closing arguments contained in the bill of exceptions leads us to the conclusion that, with one exception, the tenor of the argument was that the verdict depended upon the jury's determination of the credibility of the witnesses. The prosecutor called specific attention to the instruction of the court defining the charge and to instruction No. 6 which was the standard instruction making the jurors the sole judges of the credibility of the witnesses. This was the focus of his argument. In this respect the argument was proper. Then followed a complicated statement, the gist of which was that if, in fact, the defendant resisted, he should not be acquitted merely because the jury might think that the officer himself "went a little too far." The prosecutor then argued that if the officer went too far the proper recourse for the jury was not the acquittal of the defendant, but complaint to the police chief, mayor, and Governor. At that point, defense counsel made objection and moved for a mistrial. The motion was overruled. Prosecutor then completed his argument. Defense counsel then responded and again in his argument the credibility of witnesses was the key. The prosecutor then closed and in the course of his rebuttal referred

to the fact that the defendant's probation had been extended for 6 months and then said: "Now Mr. Geshell's told you about his previous conduct that is substantially similar to what he's charged with here today. Ladies and gentlemen, we simply state if a dog bites you once, you know it's a dog's fault; but if it bites you twice, it's your own fault and this has happened again." This argument seems clearly to imply that because the defendant had admitted having previously committed a like offense he was therefore guilty of the charge on which he was being tried. However, no objection was made to this argument either at the time it was made, nor at any time before the matter was submitted to the jury. Neither was there a motion for a mistrial nor a request for a special cautionary instruction to the jury. Ordinarily a party who does not object to an argument of the prosecutor which is alleged to constitute misconduct will be held to have waived his right to complain. Parker v. State, 67 Neb. 555, 93 N. W. 1037; Swartz v. State, 118 Neb. 591, 225 N. W. 766; Benton v. State, 124 Neb. 485, 247 N. W. 21; State v. Suggett, 189 Neb. 714, 204 N. W. 2d 793. We hold that the failure to object in this case waived the right to complain.

Defendant further argues that the court erred in refusing an instruction requested by him. The instruction requested was in three parts and the effect of it would have been to require the jury to acquit the defendant if the words he used did not tend to cause an immediate breach of the peace. The requested instruction did not take into consideration that evidence which tended to prove that defendant had physically resisted the officer. This instruction also would have submitted to the jury questions of law, i.e., was the arrest valid, without giving any guidelines for determining the validity of the arrest. Error may not be predicated on the refusal to give an instruction which either erroneously or only partially covers the applicable law. State v. Reeder, 183 Neb. 425, 160 N. W. 2d 753; Sherrick v. State, 157

Neb. 623, 61 N. W. 2d 358; Clements v. State, 80 Neb. 313, 114 N. W. 271.

It is not necessary to discuss the contention of the defendant that the evidence was insufficient to support the verdict except to note two elementary principles. Jurors are judges of the credibility of witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their duty to determine the truth. State v. Godinez, 190 Neb. 1, 205 N. W. 2d 644. Resolutions of conflicts in evidence and credibility of witnesses are not for the reviewing court, but for the jury. State v. Bohannon, 187 Neb. 594, 193 N. W. 2d 153.

The defendant argues that the sentence of 30 days in the county jail is excessive. The penalty prescribed by statute is a fine "in any sum not exceeding one hundred dollars or [imprisonment] in the jail of the county not exceeding three months." The record shows that the defendant was once previously convicted on a plea of guilty to a felony assault on a police officer; that he has another conviction on a charge of disorderly conduct; that he forfeited bond on a petty larceny charge; and that he has numerous convictions on traffic charges. Under the circumstances the imposition of a jail sentence by the county judge was not an abuse of discretion.

AFFIRMED.

MICHAEL HOEFER, BY AND THROUGH ARLO HOEFER, HIS FATHER AND NEXT FRIEND, APPELLANT, V. EDWARD J. MARINAN ET AL., APPELLEES.

ARLO L. HOEFER, APPELLANT, V. EDWARD J. MARINAN ET AL., APPELLEES.

238 N. W. 2d 900

Filed February 26, 1976. Nos. 40208, 40209.

1. **Negligence: Trial.** The burden of proof is on the plaintiff to prove negligence on the part of the defendant by a preponderance of the evidence.
2. ———: ———. Negligence must be proved by direct evidence or by facts from which negligence can reasonably be inferred. In the absence of such proof, negligence will not be presumed.
3. **Trial.** A motion for a directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
4. ———. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law rather than to submit it to a jury for determination.

Appeals from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Philip M. Kneifl and Charles O. Forrest of Kneifl, Kneifl & Forrest, and Jon J. Gergen, for appellants.

William E. Gast and Emil F. Sodoro, for appellees.

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

SPENCER, J.

This is a consolidated personal injury action brought by Michael Hoefer, hereinafter referred to as Hoefer, by and through Arlo Hoefer, his father and next friend, and Arlo Hoefer, against Edward J. Marinan, hereinafter referred to as Marinan or defendant, and Truck

& Refrigeration Repair Company, Inc. Motions by Truck & Refrigeration Repair Company, Inc., for summary judgment were sustained. The case proceeded to trial against Marinan. At the close of the plaintiffs' case defendant moved for a directed verdict. After defendant indicated he would adduce no further evidence, plaintiffs moved for a directed verdict on liability. Plaintiffs' motion was overruled. Defendant's motion was sustained. Plaintiffs prosecute these appeals. We affirm.

On August 24, 1973, about 8 o'clock in the evening, Hoefer was riding his motorcycle northbound on 42nd Street in Sarpy County. At the same time Marinan, in a pickup truck owned by Truck & Refrigeration Repair Company, Inc., was southbound on 42nd Street approaching Patricia Lane. Patricia Lane abuts 42nd Street and extends to the east. Forty-second Street, a two-lane north and south street, has a rather steep uphill incline from north to south past Patricia Lane, rising to a crest some 150 feet south of the intersection where the grade reverses and becomes a decline. The speed limit on 42nd Street at that point is 25 miles per hour.

At the time and place mentioned the motorcycle operated by Hoefer collided with the truck operated by Marinan. This occurred in the south-east portion of the intersection of 42nd Street and Patricia Lane. Hoefer, who sustained serious injuries, has no recollection of the collision. Defendant was the only eyewitness to the actual collision.

Marinan, who is president of the defendant corporation, was returning from work to his home on Patricia Lane. He testified he turned his blinkers on to indicate a left turn onto Patricia Lane about a block from the intersection. He approached the intersection at 15 miles per hour. Before entering the intersection he stopped to see if any traffic was coming, saw none, and turned. When he was partially into his turn he first saw the headlights of Hoefer's motorcycle coming down the hill.

At that time the front of his truck was in the northbound lane on 42nd Street, blocking the northbound lane. He was then traveling 3 to 4 miles an hour but immediately accelerated in an attempt to avoid a collision. He was unsuccessful.

Mrs. Jeannie Frederick, who lived in a home at the crest of the hill on 42nd Street, testified that she was standing at the front door of her home and observed Hoefer's motorcycle go past on 42nd Street. She testified she continued to observe the motorcycle as it traveled across her field of vision from left to right from the moment it appeared until it left her field of vision. In her opinion the speed of Hoefer's motorcycle was 50 miles per hour.

Keith Frederick testified that the intersection of 42nd Street and Patricia Lane is located approximately 1/2 block or 200 feet north of his driveway which is north of his home. The exhibits in evidence would indicate that the approximate distance from the driveway is 150 feet. He did not see the accident but went to it immediately thereafter. He observed the defendant's truck in a stationary position facing east and sitting somewhat over the eastern curb line of 42nd Street. He observed debris on 42nd Street, "where it appeared the vehicles had come together." This was in the northbound lane of 42nd Street in the intersection of that street with Patricia Lane. He placed the truck past the centerline of 42nd Street with the rear approximately 4 or 5 feet to the west of the east curb line of 42nd Street. He saw skid marks sideways from the truck's wheels. He estimated these skid marks to be approximately 5 feet. It looked as though the truck had been pushed sideways by the impact.

The deputy sheriff, who investigated the accident, placed the point of impact between the two vehicles at approximately the eastern-most edge or curb line of 42nd Street in the intersection of Patricia Lane.

The above is only a very fragmentary sketch of the

facts, but will suffice for our purposes. The first question we meet is whether there is any evidence of negligence on the part of the defendant. The burden of proof is on the plaintiff to prove negligence on the part of the defendant by a preponderance of the evidence. Negligence must be proved by direct evidence or by facts from which negligence can reasonably be inferred. In the absence of such proof, negligence will not be presumed. See Price v. King, 161 Neb. 123, 72 N. W. 2d 603 (1955).

A motion for a directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Where, however, the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law rather than to submit it to a jury for determination. See Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co., 161 Neb. 451, 73 N. W. 2d 679 (1955).

In reviewing the record we do not find even a scintilla of evidence to suggest that Marinan was negligent in any particular. Mrs. Frederick, plaintiffs' witness, gave the speed of Hoefer's motorcycle at 50 miles per hour. Plaintiffs object to the admission of this testimony. We find it was properly admitted. They attempt to impeach it by questioning her estimate of time. They premise most of their argument on that point, assuming that the time factor was sufficient to raise a question. We do not so view it.

Plaintiffs called Marinan as their witness. They attempt to attack his testimony by some alleged contradictions from his deposition. Marinan's testimony was not confused or contradictory so far as the events lead-

ing up to the collision are concerned. It is evident to us that Marinan properly entered the intersection before Hoefer came into view, and did everything possible to avoid a collision when one became imminent. The physical facts as well as the testimony clearly demonstrate that Marinan was properly in the intersection. A collision would not have occurred in the absence of negligence on the part of Hoefer. Ignoring the question of the negligence of Hoefer, plaintiffs have failed to prove negligence on the part of Marinan sufficient to present a submissible issue. Certainly plaintiffs have not proved negligence by a preponderance of the evidence. The motion for a directed verdict was properly sustained. The judgment is affirmed.

AFFIRMED.

ROBERT BREZINA, APPELLANT, V. EVERETT J. HILL, AS AGENT FOR THE HATTIE HILL ESTATE, ET AL., APPELLEES.
238 N. W. 2d 903

Filed February 26, 1976. No. 40235.

1. **Brokers: Contracts.** When an owner lists his property with a business broker for sale, it is generally understood that the broker's duties are merely to find a customer. A listing by the owner does not constitute an offer to any third party, but is merely an employment contract between owner and broker.
2. ———: ———. To the extent that Seberger v. Wood (1921), 106 Neb. 272, 183 N. W. 363, may permit a broker to sign a sales agreement for the owner without express authorization, it is hereby overruled.
3. ———: ———. If the parties intend that an agent shall have authority to execute a sales contract, it should be expressly so stated. It should not be left to the construction of vague statements or ambiguous circumstances. The authorization should be specifically spelled out in a definite written statement.

Appeal from the District Court for Butler County: HOWARD V. KANOUFF, Judge. Affirmed.

Johnston, Grossman & Johnston and Terry K. Barber, for appellant.

Edward Asche, for appellees Hill et al.

William L. Walker, for appellees Grubaugh et al.

Edgar V. Thomas, for appellees McDonald et al.

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

SPENCER, J.

In this equity action the trial court granted judgment on the pleadings to the defendants, Everett J. Hill, as agent for the Hattie Hill Estate, Everett J. Hill, Alice M. Staggs, and Mabel L. Fisher. The question involved is whether the petition sufficiently alleged authority by a broker to enter into a binding contract for the sale of real estate on behalf of the owners of said real estate. We affirm.

Everett J. Hill, as agent for the Hattie Hill Estate, signed a listing contract with Grubaugh Bros., a real estate agency, under which certain farm ground owned by the Hill estate was to be offered for sale. The contract read, so far as is pertinent, as follows:

"IN CONSIDERATION of your agreement to list, and to offer for sale the property hereinafter described and to use your efforts to find a purchaser, I hereby give you the sole and exclusive right until July 24, 1974 to sell (the farm property) * * *

"I agree to pay you a cash commission of 3% per cent of the gross sale price, said commission to be payable on the happening of any one or more of the following events, to wit:

"If a sale is made, or a purchaser found, who is ready, willing and able to purchase the property before the expiration of this listing, *by you, myself, or any other person,* at the above price and terms or for any other price and terms I may agree to accept, or if this agree-

ment is revoked or violated by me, * * *." (Italics supplied.)

Grubaugh Bros. advertised the farm in local newspapers and during the period of the agreement signed an agreement for the sale of the property. The contract of sale was signed "Everett Hill, Agent, by Dick Grubaugh," and by the plaintiff. Defendants refused to consummate the sale and this action for specific performance ensued.

Section 36-105, R. R. S. 1943, provides: "Every contract for the leasing for a longer period than one year, or for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made."

Section 36-409, R. R. S. 1943, provides: "Every instrument required by any of the provisions of sections 36-101 to 36-106, 36-201, 36-202, 36-204 to 36-206, 36-301, 36-303, and 36-401 to 36-409 to be subscribed by the party, may be subscribed by his agent thereunto authorized by writing."

In Gould v. Rockwell (1921), 105 Neb. 724, 181 N. W. 655, this court said: "It is generally conceded that the only duty of a real estate broker is to find a purchaser who is ready, willing and able to enter into a contract according to the terms that have been fixed by his principal, and that such a broker does not have authority to proceed further and to enter into the contract as agent for the principal or in the principal's stead, but that the contract, listing the property with him, in order to authorize him to enter into a contract for the sale of the land, must by its terms indicate unequivocally that the owner of the land intended that the broker should have that authority. Such authority will never be inferred nor presumed, and the burden is upon the party seeking the benefit of the contract of sale of the land to prove that the written authority of the agent did affirmatively authorize the agent to make the contract."

Plaintiff premises his action herein on his contention that the wording of the listing contract set out heretofore authorized Grubaugh Bros., as agent for Hill and the estate, to execute the sales contract in their name. We disagree.

Plaintiff places considerable reliance on Seberger v. Wood (1921), 106 Neb. 272, 183 N. W. 363, which held as follows: "Where the owner of real estate signs a writing authorizing an agent to bargain and sell real estate within a certain time, at a stated price, and upon certain terms, and further agrees to furnish abstract and convey the lands on sale of same, held, that the agent was authorized to enter into a contract for sale of said lands." Seberger turned upon the following language in the agreement: "and do hereby agree that I will convey as above said lands on sale of the same."

While we doubt the present efficacy of the Seberger case, it can be readily distinguished from the instant one by the specific statement in the listing contract of an agreement to convey the lands on sale of the same. The present case involves a listing contract executed by an agent giving the broker an exclusive right to sell the property for a specific period of time. However, the language quoted still permitted the owners or someone else to sell the property. It merely sought to protect the broker on the commission. There is no way the listing contract may be construed to grant authority by Everett J. Hill, assuming he had such right, to Richard Grubaugh to sign a contract of sale for the owners of said land.

We held in Preisendorf v. Jenkins (1975), 193 Neb. 611, 228 N. W. 2d 591: "When an owner lists his property with a business broker for sale, it is generally understood that the broker's duties are merely to find a customer. * * * A listing by the owner does not constitute an offer to any third party, but is merely an employment contract between owner and broker."

To the extent that Seberger v. Wood (1921), 106 Neb.

272, 183 N. W. 363, may permit a broker to sign a sales agreement for the owner without express authorization, it is hereby overruled.

If the parties intend that an agent shall have authority to execute a sales contract, it should be expressly so stated. It should not be left to the construction of vague statements or ambiguous circumstances. The authorization should be specifically spelled out in a definite written statement.

The motion for judgment on the pleadings was properly sustained and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARK L. RATHBURN, APPELLANT.

239 N. W. 2d 253

Filed February 26, 1976. No. 40247.

1. **Criminal Law: Searches and Seizures.** A consent, freely and intelligently given, validates a search even if the suspect was not under arrest or if the officer did not have a search warrant.
2. **Criminal Law: Searches and Seizures: Trial: Evidence.** The voluntariness of a consent to search is a question of fact to be determined by the totality of the circumstances.
3. **Searches and Seizures: Trial: Evidence.** The State has the burden of proving that a consent to search was freely and voluntarily given.
4. ———: ———: ———. An officer's statement that he will obtain a search warrant is not per se coercive and will not alone vitiate the voluntariness of a consent.
5. **Controlled Substances: Intent: Evidence.** Intent to distribute may be inferred from the equipment and quantity of controlled substance seized, the manner of packaging, the form of drug, and testimony of knowledgeable witnesses.
6. **Trial: Evidence.** The admission of irrelevant evidence will be considered "harmless error," not requiring reversal of a judgment, unless it affects the "substantial rights of the adverse party," when considered in connection with other evidence properly adduced. § 29-2308, R. R. S. 1943.

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

Robert J. Bulger, for appellant.

Paul L. Douglas, Attorney General, and Chauncey C. Sheldon, for appellee.

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

BRODKEY, J.

Mark L. Rathburn appeals to this court from his conviction by a jury in the District Court for Morrill County of possession of marijuana weighing more than 1 pound, as charged in count I of the information, and of lysergic acid diethylamide (commonly known as LSD), with the intent to distribute that controlled substance, as charged in count II. Following a commitment to the Division of Corrections of the State of Nebraska for evaluation for a period of 61 days, pursuant to section 83-1,105(3), R. S. Supp., 1974, he was sentenced by the court to imprisonment in the Nebraska Penal and Correctional Complex for a period of 2 years on each count, the sentences to run concurrently with each other, and was further given credit for the time he spent in confinement during evaluation by the Division of Corrections.

His appeal to this court involves three principal issues. The first involves the validity of the search of his vehicle made by the officer at the time of his arrest, it being appellant's contention that the court erred in overruling his motion to suppress the evidence removed from his automobile because it was obtained by an illegal search and seizure contrary to the provisions of both the federal and state Constitutions. Secondly, he assigns as error that the evidence adduced at his trial does not support a verdict of guilty of possession of LSD "with intent to distribute." Thirdly, he assigns as error the action of the court in receiving in evidence a certain coke spoon, State's exhibit 4, it being his contention it was not rele-

vant to the charges for which he was being tried, and was prejudicial to him. We conclude his contentions are without merit, and affirm the judgment of the District Court.

The material facts of this case, as reflected by the record, are as follows. On October 4, 1974, state trooper Sam Frandsen stopped the car driven by Rathburn for exceeding the speed limit while traveling north on U. S. Highway No. 385. Frandsen testified that when he approached appellant's car to inform him that he had been speeding, he smelled the odor of "burnt marijuana." He also observed some Zig-Zag cigarette papers on the car floorboard by Rathburn's feet. Rathburn got out of his car and accompanied Frandsen to his cruiser where he sat on the passenger side of the car while Frandsen prepared the speeding citation. Rathburn had produced a valid license and registration. While they were seated in the cruiser, the officer again noticed the odor of burned marijuana.

After appellant had signed the citation, Frandsen informed him that he could smell burned marijuana on him and asked him if he had been smoking marijuana. Rathburn replied "No, I haven't," and consented to a search of his person. Frandsen found no drugs, but did find a roach clip and coke spoon on Rathburn's key chain. These were returned to appellant at that time. The officer then requested permission to search the car, which Rathburn gave. As a result of Frandsen's search of the interior of the car, he discovered the previously mentioned cigarette papers, as well as additional cigarette papers under the front passenger seat. Frandsen then asked Rathburn to open the trunk. Rathburn refused. Frandsen then stated, "Okay, I will get a search warrant." He started back to his cruiser, and had just opened the door when appellant said, "All right, you son-of-a-bitch, I will open it." The trunk lock was missing and Rathburn used a screwdriver to open the lid. Inside the trunk the officer found a brown paper grocery

sack which he opened. Two opaque white plastic bags were inside the sack along with an envelope. The white bags contained marijuana. The envelope contained four separate baggies each with a quantity of about 100 purple pills, later identified as LSD. The officer then advised Rathburn he was under arrest, and they drove their respective vehicles to the sheriff's office at Bridgeport.

Under the above facts, did Officer Frandsen obtain the drugs and other evidence referred to in violation of Rathburn's constitutional rights against unreasonable searches and seizures, with the result that its subsequent use against him during the trial was illegal? We conclude he did not. Initially it should be noted that Officer Frandsen's stop of Rathburn's vehicle was perfectly legal. It was his duty to enforce the traffic laws of this state, and he had observed Rathburn in the act of speeding, which was confirmed by his mobile radar unit. At that point, it is also clear that he would have had probable cause to search the car as he smelled the odor of burned marijuana in the car when he requested Rathburn to produce his driver's license and registration certificate. He also saw in plain view on the floor of the automobile at that time Zig-Zag cigarette papers. While these papers, concededly, could have been used for the purpose of rolling ordinary cigarettes, there is evidence in the record that they are very frequently used for rolling marijuana cigarettes, and the officer knew that fact. Subsequently, while in the officer's cruiser, the officer again noticed the smell of burned marijuana about Rathburn's person, and obtained consent from Rathburn to search his vehicle. The totality of the circumstances was clearly sufficient to authorize the officer to search the car itself. State v. Wood, *ante* p. 353, 238 N. W. 2d 226 (1976); State v. Romonto, 190 Neb. 825, 212 N. W. 2d 641 (1973). Additional Zig-Zag cigarette papers were found as the result of that consent search.

While there was undoubtedly probable cause for Frandsen to search the car itself, he justifies his search of the trunk on an entirely different ground, that is, upon the consent of Rathburn. It has long been the rule in this state that a warrantless search of a defendant's automobile and seizure of materials found therein is reasonable and lawful when the defendant has consented freely and intelligently to the search, even though he is not under arrest at that time. State v. Forney, 181 Neb. 757, 150 N. W. 2d 915 (1967); State v. Fiegl, 184 Neb. 704, 171 N. W. 2d 643 (1969); State v. Holloway, 187 Neb. 1, 187 N. W. 2d 85 (1971); State v. Van Ackeren, 194 Neb. 650, 235 N. W. 2d 210 (1975); State v. Skonberg, 194 Neb. 550, 233 N. W. 2d 919 (1975); State v. Wood, *supra*. However, when a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. State v. Van Ackeren, *supra;* Schneckloth v. Bustamonte, 412 U. S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); Bumper v. North Carolina, 391 U. S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968). The voluntariness of the consent to search should be determined from the totality of all the circumstances surrounding it. State v. Van Ackeren, *supra;* Schneckloth v. Bustamonte, *supra*. A question of whether a consent to search is voluntarily given is a question of fact. Schneckloth v. Bustamonte, *supra*; State v. Skonberg, *supra*; State v. Van Ackeren, *supra*; State v. Holloway, *supra*. We have also held that a consent is not voluntary if it is the result of duress or coercion, either actual or implied. State v. Forney, *supra*. In Schneckloth v. Bustamonte, *supra,* the United States Supreme Court makes it clear that the consent to search must "be free from any aspect of official coercion."

Applying the above rules to this case, it is clear from the evidence that Rathburn originally refused to open the trunk of the car when he was requested to do so by the officer. The officer then stated "Okay, I'll get a

warrant." Rathburn then consented to and did open the trunk of the car. It is his contention that his action in so doing did not constitute a free and voluntary consent to search but was the result of offical coercion, because of the statement relative to obtaining a warrant. We do not agree. There is no doubt that false assertions that one already *has* a warrant will vitiate a consent to search. Bumper v. North Carolina, *supra*. However under the facts of the instant case, all the officer said was that he would *get* a warrant. In situations where the searching officer has stated that he could obtain or was in the process of getting a warrant, the courts have never found such a statement coercive per se. Rather, the courts have generally looked at the statement made by the officer to determine if it was coercive in the particular factual situation. In United States v. Culp, 472 F. 2d 459 (8th Cir., 1973), in footnote 1, on page 461, Judge Lay lists many cases, both federal and state, to the effect that where law enforcement officers indicate only that they will attempt to obtain or are getting a warrant such a statement cannot serve to vitiate an otherwise consensual search. See, particularly, United States v. Boukater, 409 F. 2d 537 (5th Cir., 1969); United States v. Manarite, 314 F. Supp. 607 (S.D.N.Y., 1970); United States v. Fitzpatrick, 289 F. Supp. 767 (N.D. Utah, 1968); State v. Douglas, 260 Ore. 60, 488 P. 2d 1366 (1971); Barlow v. State, 280 A. 2d 703 (Del., 1971). See, also, United States v. Faruolo, 506 F. 2d 490 (2d Cir., 1974), citing additional cases, and also holding that well-founded advice of a law enforcement agent that, absent a consent to search, a warrant can be obtained does not constitute coercion. See, also, United States v. Savage, 459 F. 2d 60 (5th Cir., 1972).

As previously stated, the determination of whether a consent to search is voluntarily given is a question of fact. State v. Van Ackeren, *supra;* State v. Holloway, *supra*. The facts were presented to the court in its fact-finding capacity at its hearing on the motion to

suppress the evidence, and were decided adversely to the appellant. The court was correct in refusing to suppress the evidence in question.

We next consider the question of whether the evidence supported a verdict on the charge of possession of LSD with intent to distribute. We conclude it did. It appears from the evidence that about 400 LSD tablets were seized. They were divided into lots of about 100 and each group was separately packaged in a small plastic bag. Intent to distribute may be inferred from circumstantial evidence. State v. Turner, 192 Neb. 397, 222 N. W. 2d 105 (1974). While the quantity seized is not the only criterion in raising a permissible inference of intent, it is relevant along with the equipment and supplies seized, the place where it was found, the manner of packaging, and the testimony of knowledgeable witnesses. State v. Turner, *supra,* at 399. The evidence indicated that the quantity of pills seized would afford a user a daily trip of between 8 to 10 hours for over 1 year's time, obviously not a normal supply for personal use. Also, unless one is pressing the tabs out of powdered substances, no additional equipment would be necessary, except containers for the pills to be distributed. In State v. Sullivan, 190 Neb. 621, 211 N. W. 2d 125 (1973), this court stated that: "The possession of a large quantity of a controlled substance packaged in a form customarily used for distribution will support an inference of possession with intent to distribute," citing Turner v. United States, 396 U. S. 398, 90 S. Ct. 642, 24 L. Ed. 2d 610 (1970). The "form customarily used for distribution," as referred to in State v. Sullivan, *supra,* is the individually wrapped lot. In any event, the evidence raised a jury question, and this court will not overturn a jury verdict if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Lacy, *ante* p. 299, 237 N. W. 2d 650 (1976).

Finally, we consider Rathburn's assignment that the

court's admitting into evidence the coke spoon constituted prejudicial error.

After Rathburn was arrested, the coke spoon and roach clip found on his key chain were seized and offered in evidence at the trial. There is no question that the roach clip, described as an instrument used in the smoking of marijuana cigarettes, was properly received in evidence, and no error is assigned in that regard. Counsel for appellant, however, voiced repeated objections of irrelevancy and immateriality to the introduction of the coke spoon, an instrument used for sniffing cocaine, which, although a controlled drug, was not involved in this case. The twin concepts of relevancy and materiality have been combined in Nebraska by case law and by the new Nebraska Evidence Rules. This court has said that evidence is relevant when it has an actual and substantial tendency to establish or disprove a fact being litigated or where it tends to establish a fact from which the existence or nonexistence of the fact in issue can be directly inferred. Rickertsen v. Carskadon, 169 Neb. 744, 100 N. W. 2d 852 (1960). Section 27-401, R. S. Supp., 1975, of the new Nebraska Evidence Rules applicable in all trials commenced after December 31, 1975, states: "Relevant evidence means evidence having any tendency making the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Section 27-403, R. S. Supp., 1975, also provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." See, also, McCormick on Evidence, (2d Ed., 1972), § 184, pp. 433, 434. The State argues that even if the coke spoon is not used in connection with marijuana or LSD, which are the drugs involved in this case, it is still relevant

and was properly admitted, as it tended to indicate a general disposition toward drug involvement. Appellant, on the other hand, claims that the only possible purpose for its introduction was to prejudice the jury. We are inclined to believe that the introduction of the coke spoon was not relevant under the facts of this case, but we conclude that the error was harmless error under section 29-2308, R. R. S. 1943. We have carefully read the entire record in this case and have concluded that it contains convincing evidence of Rathburn's guilt of both charges beyond a reasonable doubt. We also note that the trial court imposed the identical sentence of 2 years for each offense and ordered them to run concurrently. This being so, Rathburn, as a practical matter received only a 2-year sentence. Had he been convicted by the jury of only the offense of possession of marijuana weighing more than 1 pound, as charged in count I of the information, he could have received, and in fact did receive, the same sentence.

We affirm the judgment and sentence of the District Court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HARLEY L. MILLIGAN, APPELLANT.

238 N. W. 2d 906

Filed February 26, 1976. No. 40255.

1. **Criminal Law: Probation and Parole.** Suspension of sentence and granting of probation is discretionary with the trial court.
2. ———: ———. In the absence of an abuse of discretion the trial court's determination will not be disturbed on appeal.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

Healey, Healey, Brown, Wieland & Burchard, for appellant.

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellee.

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

SPENCER, J.

Pursuant to a plea bargain, defendant Harley L. Milligan pled guilty to a complaint for fondling a minor. He was sentenced to an indeterminate term of 1 to 3 years in the Nebraska Penal and Correctional Complex. Defendant's only assignment of error is abuse of discretion in not placing him on probation. We affirm.

In January 1970, defendant was arrested in Aberdeen, South Dakota, on six counts of indecent molestation of minors. He was sentenced to 2 years in the South Dakota Penitentiary. He served 45 days and then was granted a bench parole under supervision.

The present offense contained two counts, involving 9-year-old and 11-year-old boys. Count II was dismissed pursuant to the plea bargain. The presentence investigation indicates several offenses involving children since defendant came to Lincoln in August of 1973. Defendant concedes he is a homosexual and admits involvement with three boys, including the 9-year-old victim in the offense charged. In his visit with the probation officer he said: "I actually feel the boy solicited me far more than I solicited him."

Defendant's counsel argues the trial court clearly abused its discretion in failing to recognize the best interests of society and defendant by its denial of a probationary sentence which would permit defendant to continue and complete an intensive psychiatric treatment.

Defendant quotes from an article in 13 Am. Crim. L. Rev. 69, suggesting that the uniform severity and frequency of incarceration of child molesters is not consonant with an enlightened understanding of the offender or his offense, and treatment of the offender is the proper focus. We read the article suggested with in-

terest and acknowledge its merit in some instances, but doubt if this is one of them.

The protection of society in cases of this kind should be a predominate issue. The defendant, who is 51 years of age, has a history of child molesting. On a previous conviction he was placed on parole after serving 45 days, with the idea that under supervision he could be rehabilitated. Obviously he was not.

Since August of 1973, defendant has been a resident of Lincoln and concedes involvement with at least three boys. How many children he has led astray during his adult years will never be known. Counsel argues his previous treatment was at best nominal and ineffective and that defendant be given another chance for intensive treatment. He admits that no one can be certain it will be wholly effective but argues imprisonment would be dangerous for the defendant.

This court has frequently held: "Suspension of sentence and granting of probation is discretionary with the trial court and in the absence of an abuse of discretion the trial court's determination will not be disturbed." State v. Clifton (1972), 187 Neb. 714, 193 N. W. 2d 558. On the present record the trial court not only did not abuse its discretion but would have done so if it had placed the defendant on probation.

The judgment is affirmed.

AFFIRMED.

JO ANN SUTTON, APPELLEE, V. JESSE SUTTON, APPELLANT.

238 N. W. 2d 907

Filed February 26, 1976. No. 40290.

Divorce: Infants: Parent and Child. In the absence of an abuse of discretion the amount of an award of child support will not be disturbed on appeal.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Charles Ledwith, for appellant.

John E. Rice, for appellee.

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

BOSLAUGH, J.

The marriage between the parties was dissolved on July 20, 1973. Custody of their three minor children was awarded to the petitioner with child support in the amount of $50 per week per child until each child became of age under Nebraska law or was emancipated. The award conformed to a property settlement agreement which was approved by the court and incorporated in the judgment.

On November 1, 1974, the judgment was modified to eliminate further child support payments because the oldest child, Denise, had reached her majority and the other two children, Frank and Toni, were living with the respondent. Custody of Frank and Toni was transferred to the respondent.

In January 1975, Frank returned to Ohio to live with his mother, the petitioner. On February 19, 1975, the petitioner filed a motion to modify the judgment to return custody of Frank to her and reinstate the child support payment in the amount of $50 per week. The motion was heard on July 2, 1975. The trial court transferred custody of Frank from the respondent to the petitioner and ordered the respondent to pay child support in the amount of $125 per month from July 15, 1975, through January 15, 1976; $62.50 per month from February 15, 1976, through January 15, 1977; and $125 per month from February 15, 1977, through September 15, 1977. The respondent has appealed.

Frank was born January 21, 1958, and will be 19 years of age on January 21, 1977. The order of the trial court

was designed to allow child support at the rate of $200 per month for the 5-month period from February through June 1975, but defer payment of this amount until February 15, 1977, and permit the respondent to discharge the obligation at the rate of $125 per month for 8 months.

Frank was graduated from high school in Ohio in June 1975. He has part-time employment and has been earning $50 to $60 per week. He plans to attend college in Ohio and hopes to obtain a federal grant to defray a part of the expense.

The petitioner is working part-time and earns $190 per week when she is able to work. The respondent is employed by Mutual Construction Company at a salary of $350 per week. The respondent has remarried. His new wife is employed part-time and receives child support for her children from a prior marriage.

There is no issue with respect to the change of custody. The child support awarded the petitioner does not exceed the amounts fixed in the original judgment. The amounts awarded commencing in July 1975, are a substantial reduction from the amounts awarded in the original judgment.

We find no abuse of discretion. In the absence of an abuse of discretion the amount of an award of child support will not be disturbed on appeal. Kockrow v. Kockrow, 191 Neb. 657, 217 N. W. 2d 89.

It is unnecessary to consider the other errors assigned. The judgment of the District Court is affirmed. The petitioner is allowed $200 for the services of her attorney in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEE T. HIGHLY, APPELLANT.

238 N. W. 2d 909

Filed February 26, 1976. No. 40293.

1. **Courts: Records.** A judgment will not be reversed because the trial court failed to set forth findings for the reason for its decision to overrule a motion to transfer the case to juvenile court where no record of the hearing upon the motion in the trial court is filed in this court.
2. **Judgments.** A judgment will not be reversed because a lower court gave an incorrect reason for its decision if the result reached was correct.
3. **Judgments: Records: New Trial.** A judgment will not be reversed because the trial court failed to set forth findings for the reason for its decision to overrule a motion to transfer the case to juvenile court where the defendant failed to direct the attention of the trial court to the requirement of the statute at any time by motion for new trial or otherwise.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Frank B. Morrison and Stanley A. Krieger, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

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

BOSLAUGH, J.

The defendant appeals from a sentence of 2 years imprisonment for assault with intent to rob.

After the defendant had been arraigned in the District Court, he filed a motion to quash the information alleging that he was less than 18 years of age at the time of the alleged offense and the information should be quashed or the case transferred to the juvenile court of Douglas County, Nebraska. The motion was heard and overruled on January 28, 1975. The defendant now contends the judgment should be reversed because the trial

court failed "to set forth findings for the reason" for its decision to overrule the defendant's motion to transfer the case to juvenile court.

The record shows the defendant and George Lewis entered a Kwik Shop in Omaha, Nebraska, on November 20, 1974. The manager was the only other person in the store at that time. They pointed a gun at the manager and asked to count the money in the cash register. There is some confusion in the record as to whether the defendant or George Lewis had the gun and asked to count the money. The State's evidence tended to show Lewis had the gun and the defendant stood near the door and warned Lewis when a customer drove into the parking lot. The defendant and Lewis then left the store without taking any money. The gun used in the assault was actually a starter's pistol.

Both the defendant and Lewis were apprehended immediately because the police had the store under surveillance. Lewis pleaded guilty to a similar charge and was sentenced to imprisonment for 2 to 9 years. See State v. Lewis, *ante* p. 80, 236 N. W. 2d 831.

The sole issue on this appeal is whether the judgment should be reversed because the trial court did not set forth findings for the reason for its decision on the motion to transfer the case to juvenile court. Section 29-1816, R. S. Supp., 1974, provides that in deciding such a motion the court shall consider, among other matters, the matters set forth in section 43-202.01, R. S. Supp., 1974, and shall set forth findings for the reason for its decision.

The defendant relies on Kent v. United States, 383 U. S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84. In the Kent case the Juvenile Court for the District of Columbia had "waived" the jurisdiction of the petitioner without a hearing, without a ruling on motions that had been filed by the petitioner's counsel, and without a statement of the reasons for its decision. The United States Supreme Court held the order was invalid and did not satis-

fy the basic requirements of due process and fairness because it had been made without a hearing, without effective assistance of counsel, and without a statement of reasons. The case was remanded to the District Court for a hearing de novo on the waiver.

We think this case may be distinguished from the Kent case in several respects. In this case there was a hearing on the defendant's motion at which the defendant was represented by counsel. Although no record of that hearing has been filed in this court, the defendant was entitled to have the record preserved and presented to this court for review. If the findings of the trial court were announced from the bench in open court they would appear in the record of the proceedings upon the motion.

The defendant does not contend the ruling on the motion was erroneous because the result reached was incorrect but merely contends there was a failure to set forth reasons for the decision. If in fact the ruling was correct there could not have been any prejudice to the defendant. A judgment will not be reversed because a lower court gave an incorrect reason for its decision if the result reached was correct. 5 Am. Jur. 2d, Appeal and Error, § 785, p. 227.

We have recently held that the trial court need not state in writing the reasons for a revocation of probation because a complete record of a judicial proceeding may be made and preserved. State v. Jaworski, 194 Neb. 645, 234 N. W. 2d 221; State v. McFarland, *ante* p. 395, 238 N. W. 2d 237. A similar rule should be applicable here.

There is an additional reason why the defendant is not entitled to relief in this case. It does not appear that the defendant directed the attention of the trial court to the requirement of the statute at any time by motion for new trial or otherwise. The findings could have been made a matter of record at any time while the case was pending in the District Court.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH SAVIN, APPELLANT.

238 N. W. 2d 911

Filed February 26, 1976. No. 40308.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Paul E. Watts, J. Joseph McQuillan, Gerald E. Moran, and Robert C. Sigler, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

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

BOSLAUGH, J.

The defendant pleaded nolo contendere to embezzlement and was sentenced to imprisonment for 1 to 3 years. On appeal he contends the sentence was excessive and he was denied the equal protection of the law.

The defendant is 29 years of age. He is divorced and the father of three children. He is required to pay alimony and child support in the amount of $650 per month. He was graduated from law school in 1971 and practiced law until late in 1974. Since 1974 the defendant has not had steady employment but has worked at several jobs. He has no prior criminal record.

The embezzlement took place in 1974. The defendant represented the guardian of two minor children. During 1974 he withdrew and converted in excess of $18,000 from guardianship funds. The money was used to pay debts and personal expenses of the defendant. The defendant has been unable to make his alimony and child

support payments, and has made no restitution in any amount.

The defendant contends he should have been placed on probation so that he could support his family and make restitution to the guardianship. Although several employers appeared and testified for the defendant, the record indicates it is very doubtful the defendant would have been able to meet his financial obligations if probation had been granted.

The equal protection argument is based on the theory the defendant was dealt with more harshly because he was a lawyer. The fact the defendant was a lawyer and callously abused the trust that had been placed in him justified a greater sentence than might have been imposed upon a person not occupying the professional status of the defendant. We find no merit in the contention the trial court should have disregarded the defendant's status and treated him as a person not schooled in the law and sworn to uphold it.

The circumstances of the crime justify the sentence which was imposed. We agree with the trial court that a failure to sentence the defendant to imprisonment would depreciate the seriousness of the offense and tend to promote disrespect for the law.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ARTURO BARAJAS, APPELLANT.

238 N. W. 2d 913

Filed February 26, 1976. No. 40319.

1. **Searches and Seizures: Foreign Jurisdictions.** The exclusionary rule does not apply to evidence seized in a search made by Mexican authorities in Mexico at the request of a police officer of this state.
2. **Searches and Seizures: Standing: Trial.** In order for a de-

fendant to invoke the exclusionary rule as to evidence seized in the search of a premises, the evidence must indicate that the defendant has such interest in the premises as give rise to a reasonable expectation on his part that some right of his in the privacy of these premises will be respected.

3. **Criminal Law: Trial: Confessions.** To be admissible, a confession must be free and voluntary; that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.

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

James T. Hansen, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

CLINTON, J.

Defendant was found guilty by a jury of murder in the second degree. He was sentenced to 25 years in the Nebraska Penal and Correctional Complex. The following errors are assigned on appeal: (1) The trial court erred in denying defendant's motion to suppress certain evidence which the State had obtained from Mexican authorities. (2) The trial court erred in admitting evidence of oral statements made by defendant prior to his trial. (3) The sentence imposed by the trial court is excessive. We affirm.

A summary of the evidence introduced by the State, absent many details, will give the background necessary for a discussion of the errors assigned. On the evening of the murder, March 1, 1975, defendant and his girlfriend, Launa, were in a bar. While there, defendant showed decedent a .22 Ruger pistol he was carrying in his pants pocket and told decedent that he and Launa were planning to use it for target practice later that evening. At decedent's request, he was allowed to ac-

company defendant and Launa when they left the bar in defendant's car. En route to the target practice area, decedent made several advances toward Launa. She told defendant who became angry, stopped the car, and ordered decedent to get out. An altercation ensued and defendant shot decedent to death with the .22 pistol.

Defendant returned to his apartment, packed his belongings, and drove to Jaurez, Mexico, where he apparently stayed in the home of his sister. On March 11, 1975, Launa flew to El Paso, Texas, to meet defendant. Defendant was arrested earlier that day by American customs officials when he tried to enter the United States from Mexico to see Launa.

Sheriff Schleve of Scotts Bluff County followed Launa to El Paso with the expectation she would lead him to defendant. Upon his arrival, he was informed by the El Paso police that defendant was already in custody, but that a search of the person and vehicle of defendant at the border had failed to produce the .22 pistol. The afternoon of March 11, 1975, Sheriff Schleve requested the Mexican authorities, through the El Paso police, to look for the .22 pistol and a .32 revolver defendant was suspected of having carried into Mexico. He gave them the address that defendant had given when he was booked into custody. At approximately 6 p.m. on March 11, 1975, Mexican authorities informed the El Paso police the guns had been found at the address given, and Sheriff Schleve obtained the weapons that same evening. The serial number on the .22 pistol matched that of the suspected murder weapon.

Defendant's first assignment of error deals with the legality of the search and seizure made by the Mexican police. The question that must be answered is whether the Fourth Amendment and its accompanying exclusionary rule can be invoked by an American citizen to protect himself from a search and seizure by foreign authorities in a foreign land.

The United States Supreme Court has held that the

protections guaranteed by the Bill of Rights do extend beyond the boundaries of the United States to protect citizens living or traveling abroad. ". . . we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. . . . When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provided to protect his life and liberty should not be stripped away just because he happens to be in another land." Reid v. Covert, 354 U. S. 1, 77 S. Ct. 1222, 1 L. Ed. 2d 1148. The case at bar does not fall within the above language because Mexican authorities, rather than United States or State officers, carried out the challenged search and seizure in Mexico. The general rule in such a situation is that: ". . . the Fourth Amendment does not apply to arrests and searches made by Mexican officials in Mexico for violation of Mexican law, even if the persons arrested are Americans and American police officers gave information leading to the arrest and search. Decisions such as . . . Reid v. Covert . . . rest on a basis that the United States itself was acting abroad, as a result of military occupation or treaty; their reasoning, that the United States is bound by the Bill of Rights wherever it acts, is inapplicable to an action by a foreign sovereign in its own territory in enforcing its own laws, even though American officials were present and cooperated in some degree." Birdsell v. United States, 346 F. 2d 775, cert. den. 382 U. S. 963, 86 S. Ct. 449, 15 L. Ed. 2d 366. "Neither the Fourth nor the Fourteenth Amendments are directed at Mexican officials and no prophylactic purpose is served by applying an exclusionary rule (to evidence seized by Mexican police making a search in Mexico) . . . since what we do will not alter the search policies of the sovereign Nation of Mexico." Brulay v. United States, 383 F. 2d 345, cert. den. 389 U. S. 986, 88 S. Ct. 469, 19 L. Ed. 2d 478.

The courts have developed one exception to the gen-

eral rule that the Fourth Amendment is inapplicable to the activities of foreign agents: ". . . the Fourth Amendment could apply to raids by foreign officials . . . if Federal agents (or state) so substantially participated in the raids so as to convert them into joint ventures between the United States and the foreign officials." Stonehill v. United States, 405 F. 2d 738, cert. den. 395 U. S. 960, 89 S. Ct. 2102, 23 L. Ed. 2d 747. Defendant argues in the case at bar that the exclusionary rule is applicable to the weapons seized by the Mexican authorities because the "search and seizure was a joint venture by American and Mexican police." We disagree. The mere request made by Sheriff Schleve to the Mexican police that they search a residence in Jaurez, Mexico, for a weapon used in a homicide did not convert the resulting seizure made by the Mexican authorities into a joint venture. A greater activity by the American police is required before there is a joint venture which will trigger the application of the exclusionary rule. See Stonehill v. United States, *supra*. Since the search and seizure made by the Mexican authorities at Sheriff Schleve's request did not constitute a joint venture, the activities of the Mexican police did not fall within the restrictions of the Fourth Amendment and the exclusionary rule was therefore inapplicable. The trial court committed no error in refusing to suppress the two weapons found in the search.

Even if defendant had proved a joint venture existed, the evidence found would still have been admissible because defendant did not have standing to challenge the search and seizure made. Defendant did not take the stand in his suppression hearing to establish an interest in the goods seized or the place searched as he could have done without fear of self-incrimination. Jones v. United States, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697; Simmons v. United States, 390 U. S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247; Poindexter v. Wolff, 403 F. Supp. 723; State v. Rice, 188 Neb. 728, 199 N. W. 2d 480. Also,

he was not on the premises at the time of the search and seizure, nor was he charged with a possessory crime. Brown v. United States, 411 U. S. 223, 93 S. Ct. 1565, 36 L. Ed. 2d 208; Jones v. United States, *supra*; State v. Van Ackeren, 194 Neb. 650, 235 N. W. 2d 210. Defendant lacked standing to challenge the evidence seized by the Mexican authorities.

Defendant's second assignment of error challenges the admission of evidence of oral statements made by him to Sheriff Schleve the day after his arrest. His contention is that the statements should have been excluded because they were not voluntarily made. He argues that he was induced to make the statements by Sheriff Schleve's implied promise that he would be permitted to see Launa after questioning. The testimony of defendant and Schleve on this issue are in conflict. The District Court apparently chose to believe the testimony of Schleve. The findings of the District Court, which observed the demeanor of the witnesses and heard the oral testimony, will not be set aside unless clearly erroneous. State v. Van Ackeren, *supra*.

Defendant was questioned by Schleve the morning of March 12, 1975, the day after his arrest. He was aware that Launa was being held by the El Paso police. Schleve testified that as soon as defendant was escorted into the room for questioning: ". . . he asked if he could see Launa and I stated at that time it was not possible." Schleve also testified that defendant did not again ask to see Launa until they were "almost done" with the questioning, at which time he was permitted to see her. After talking to Launa, defendant refused to give a written statement or to answer any more questions. Previous to his interrogation, defendant had been given the Miranda warnings and had executed a written waiver.

This court has held that: "To be admissible, a confession must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor ob-

tained by any direct or implied promises, however slight, nor by the exertion of any improper influence." State v. McDonald, 187 Neb. 752, 194 N. W. 2d 183, quoting Brady v. United States, 397 U. S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747. We find that Sheriff Schleve made no "direct or implied promise" designed to induce defendant to make a statement. The only statement made to defendant concerning Launa prior to the time he was allowed to see her was made before the questioning started and was to the effect that "it was not possible" to see her. Such a simple declaration cannot be read to be a direct or implied promise by Schleve to induce defendant to make a statement. Defendant's oral statements were voluntarily made and evidence thereof was properly admitted by the trial court.

Finally, defendant asks that we reduce his sentence because it is excessive. The penalty for murder in the second degree is imprisonment "not less than ten years, or during life." § 28-402, R. R. S. 1943. The defendant has one prior conviction for the carrying of a concealed weapon for which he received a sentence of 1 year probation, which he successfully completed. The jury did not believe the defendant's claim of self-defense. The circumstances which motivated this killing might have justified some angry words. They certainly did not present any provocation which could occasion the display of a weapon, much less its use. A few hours before the slaying defendant fired a weapon into the ground near another individual. The record indicates he is violence prone. We cannot say the court abused its discretion in imposing a sentence of 25 years.

AFFIRMED.