REPORTS OF CASES

DECIDED BETWEEN

MARCH 30, 1968 and FEBRUARY 7, 1969

IN THE

Supreme Court of Nebraska

JANUARY TERM 1968, SEPTEMBER TERM 1968,
and
JANUARY TERM 1969

VOLUME CLXXXIII

WILLIAM E. PETERS

OFFICIAL REPORTER

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1969

By William E. Peters, Reporter of the Supreme Court
For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

PAUL W. WHITE, Chief Justice
EDWARD F. CARTER, Associate Justice
HARRY A. SPENCER, Associate Justice
LESLIE BOSLAUGH, Associate Justice
ROBERT L. SMITH, Associate Justice
HALE McCOWN, Associate Justice
JOHN E. NEWTON, Associate Justice

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

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1968

STATE OF NEBRASKA, APPELLEE, V. LANNIE ROSS, APPELLANT.
157 N. W. 2d 860

Filed April 5, 1968. No. 36513.

1. **Criminal Law: Evidence.** Where the court properly admits evidence of a confession challenged as involuntary by defendant's evidence, it is prejudicial error to fail to submit to the jury for its determination, under appropriate instructions, the factual question of whether defendant's alleged confession was voluntary, in which event it would be considered as any other evidence, or whether it was involuntary, in which event it should be wholly rejected and disregarded.
2. **Trial.** The rule is well established in this jurisdiction that it is the duty of the trial court to instruct the jury on the law of the case whether requested to do so or not.
3. **Criminal Law: Evidence.** The question of the voluntariness of an oral or written confession is an essential fact issue. Our law requires its ultimate resolution by the jury.
4. ———: ———. Custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
5. **Criminal Law: Constitutional Law.** The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not inquire in individual cases whether the defendant was aware of his rights without a warning being given.
6. ———: ———. Whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Reversed and remanded.

Lannie Ross and John E. North, for appellant.

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

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

SPENCER, J.

This is an appeal from a manslaughter conviction which arises out of an incident on March 2, 1966, at the Gridiron Bar in Omaha, Nebraska.

The defendant arrived at the bar sometime around 3 p. m., and spent the next 3 hours drinking beer and playing pool. Sometime after 6 p. m., defendant became involved in a dispute with a woman at the bar, accusing her of taking $10 of his change which he had left on the bar when he went to the restroom. This woman, who was a friend of the bartender, testified that both she and the defendant were intoxicated at the time. The bartender, Robert Goedert, the deceased, became involved in the argument when he refused to call the police in connection with the dispute. Goedert, who had been serving someone seated at a table, walked behind the serving bar, picked up a 45-caliber revolver, and fired it either at the floor or at the defendant. There is a dispute as to whether this bullet hit the floor near the defendant or struck the defendant. It was the defendant's testimony that the bullet struck him in the left shoulder, fracturing his clavicle. He further testified that after this shot, he went about 3 feet to his jacket which was hanging on a nearby booth, secured a 22-caliber automatic from the jacket, and began shooting at Goedert and continued to do so until the gun was empty, when he fell down. Without question, Goedert fired the first shot. There is a dispute as to whether defendant was hit a second time bfore he started shooting, and

whether he pulled the gun from his pant's pocket or secured it from his jacket.

A police officer took a statement from defendant about 8 p. m. that same night at the hospital while the defendant was in the operating room being prepared for surgery. The officer testified that defendant told him the bartender fired a shot into the floor, and that defendant then reached into his right front pocket for his gun and started shooting. The officer admitted under cross-examination that defendant was squirming and moaning, was in quite a bit of pain, and possibly was under sedation. The attending doctor testified defendant was in considerable pain from his wounds; that the resident doctor had been giving him fluids and blood; and that he was in shock at the time he entered the hospital.

The officer's testimony, which is uncorroborated is that he advised the defendant who he was; told him he wanted to talk to him in regard to the shooting at the Gridiron Bar; that under the Constitution defendant had a right not to answer any question that he asked him; and that defendant interrupted him, saying: " 'Well, I know this, I know that. I will tell you about what I know.' Then I says, 'You also have a right to an attorney.' He says, 'I am aware of this. I just want to tell you about what happened.' " The officer then recited what he claims the defendant told him, including the following: "He said he had been in the bar all day, drinking; * * * The argument became very violent, and the bartender took and picked up a gun from behind the bar and fired a shot into the floor at him. He said he walked—reached in his right front pocket and pulled his gun and shot the bartender." On cross-examination, this officer stated defendant told him his jacket was out in his car. All the other testimony, both for the State and for the defense, has the jacket hanging near the third booth from the west in the bar.

Another officer went to the hospital at 5:30 p. m. the next day, ostensibly to question defendant about a coat

found in the bar. When he arrived in the room, there were two other police officers present. He testified that defendant was conscious, and that he told defendant he was a police officer and wanted to ask some questions regarding a coat picked up at the bar following the shooting. On cross-examination, the officer admitted he had been told defendant was under sedation. The doctor testified defendant was being given demerol.

This officer testified he attempted to advise defendant of his constitutional rights and defendant got angry, told him he knew his rights better than the officer did, and explained them to him. The officer was not asked what the defendant told him his rights were, nor were the other two officers who were present called to corroborate this testimony. A portion of the statement taken is as follows: "He said the bartender and he engaged in an argument, and the bartender told him if he wanted the police the phone was at the door, to call them himself. He told me that they argued further and the bartender produced a gun from behind the bar and fired a shot. He told me that he then returned to the area of the pool table where he had a jacket hung and took a gun from the pocket of the jacket. He then returned toward the bar, and he was shooting as he came toward the bar. He said he continued walking and walked on out of the bar. He had been hit by some shots from the bartender as he was returning the fire. He told me he continued from the bar to the apron of a service station, where he fell down." The officer was then asked: "Q. With reference to the first shot that the bartender fired, did the defendant, Ross, say that this shot hit him? A. No, sir." Defendant has no recollection of either officer ever talking to him. The testimony of the State's eyewitness is that defendant fell to the floor of the bar. This witness further observed defendant lying on his stomach in the back doorway. Defendant was subsequently found lying on the apron of a nearby service station.

Doctor Carl W. Sasse, Jr., who was the doctor on call at the Douglas County Hospital when defendant was brought in, testified that defendant was shot in the left shoulder; that this bullet went through his clavicle and lodged in his back; and that he also had a bullet hole in the right side of his abdomen and several bullet holes in his left side. The entrance to the wound in the shoulder was from the front. The entrance to the wound to the abdomen was on the right. It went through the large bowel and through the blood supply of the small bowel, and out the left side. There were several bullet holes in the small bowel. Doctor Sasse was asked if the stomach wounds could have beeen caused by one shot which entered the abdomen. He answered "Yes," and was then asked if it could have been caused by two bullets. The State objected on the grounds that the question was speculative, and the objection was erroneously sustained. This was an important point for the defense, because Goedert only fired three times and the State was contending one of the bullets went into the floor, but made no effort to produce the spent slug.

Three spent shells and three live cartridges were found in Goedert's gun. Defendant testified his gun had six live cartridges at the time he entered the bar. Five empty 22-caliber casings were found at the scene. The gun was empty when found. Goedert's death was due to a massive hemorrhage, secondary to a gunshot wound of the chest. The pathologist testified: "I thought he was hit five times, but one of the wounds was a through-and-through wound, which would make six. I think six openings is all I found. Q. It is possible that one bullet could cause two openings, isn't that correct? A. Yes."

Defendant's plea was self defense. It cannot be denied that the oral confessions to the two officers were a vital and essential part of the State's evidence, and contradicted the trial testimony of the defendant in material respects. In passing, it might be noted that in some

respects this testimony contradicted the testimony of the State's eyewitnesses.

The question immediately apparent is whether these statements may be considered as voluntary confessions as a matter of law on the record herein. Without question, defendant at all times was under sedation. At the time of the first statement he was being prepared for surgery; was receving blood and fluid; was in shock, squirming, and moaning; and admittedly was in considerable pain. We do not question the propriety of the officer who interviewed him on the operating table in attempting to learn what happened. The defendant appeared to be fatally shot and might conceivably never recover sufficiently to be able to tell what happened. What we do question is the finding that a statement taken under such circumstances can be considered voluntary as a matter of law.

For some unaccountable reason, defense counsel did not require a preliminary determination of the voluntariness of the confessions nor object to their admission nor raise the issue of their voluntariness when they were introduced in evidence. However, the issue of voluntariness was presented by cross-examination as well as by direct evidence. In Kitts v. State, 151 Neb. 679, 39 N. W. 2d 283, we determined that where the court properly admits evidence of a confession challenged as involuntary by defendant's evidence, it is prejudicial error to fail to submit to the jury for its determination, under appropriate instructions, the factual question of whether defendant's alleged confession was voluntary, in which event it would be considered as any other evidence, or whether it was involuntary, in which event it should be wholly rejected and disregarded. The trial court herein failed to submit this instruction, nor did the defendant request its submission. This fact, however, is immaterial. Under the evidence, the voluntariness of the confessions was an important issue in the case and required an instruction.

The rule is well established in this jurisdiction that it is the duty of the trial court to instruct the jury on the law of the case whether requested to do so or not. State v. Breaker, 178 Neb. 887, 136 N. W. 2d 161.

The question of the voluntariness of an oral or written confession is an essential fact issue. Our law requires its ultimate resolution by the jury. The failure of the court to instruct on this material issue when it was raised by the defendant's evidence constituted a withdrawal of this vital issue by the trial court from the consideration of the jury. By failing to submit this issue, the trial court determined the confessions to be voluntary as a matter of law.

The trial herein began August 31, 1966. Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, was released June 13, 1966, and therefore is applicable herein. That case holds: "* * * the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

Without specifically detailing the facts, other than that defendant was under constant observation and that two officers were present in his room after his surgery, we are satisfied that we are dealing with custodial interrogation herein. The question then is presented as to whether the warnings given were sufficient to constitute a waiver of those required by Miranda v. Arizona, *supra*. Without considering, in either case, the condition of defendant at the time, we still find they were not.

The operating table warnings told the defendant that he had a right not to answer questions, as well as the right to have an attorney. He was not told that any-

thing he said could be used against him in a court of law, and that if he could not afford an attorney one would be appointed for him prior to any questioning.

The testimony as to the hospital bed interrogation the next day is to the effect that the defendant said he knew his rights better than the officer. The officer testified defendant explained his constitutional rights to him, but did not testify as to what the defendant told him they were. There is, therefore, no way to know whether or not the defendant actually understood what those constitutional rights were. The following from Miranda v. Arizona, *supra,* is pertinent: "The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clear-cut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

"The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest. * * *

"In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him."

The argument is made that the defendant stated he knew his rights. Forgetting for a moment the circumtances under which the statement may have been made, can anyone be sure that he was fully informed of those rights unless the full Miranda warning was given? As the court said in Miranda v. Arizona, *supra:* "The mere fact that he signed a statement which contained a typed-in clause stating he had 'full knowledge' of his 'legal rights' does not approach the knowing and intelligent waiver required to relinquish constitutional rights."

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

REVERSED AND REMANDED.

WILLARD I. FRIEDMAN ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.
157 N. W. 2d 855

Filed April 5, 1968. No. 36738.

1. **Appeal and Error.** It is mandatory and jurisdictional, under section 25-1901, R. R. S. 1943, that a petition in error be filed in the appellate court and a properly authenticated transcript be filed within 1 calendar month after the rendition of the judgment or final order.
2. ———. When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly.
3. ———. An appellate court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Affirmed.

Jacob J. Friedman and John J. Powers, for appellants.

Clarence A. H. Meyer, Attorney General. Harold S. Salter, Warren D. Lichty, Jr., and Thomas H. Dorwart, for appellee.

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

WHITE, C. J.

This is a condemnation action. On January 25, 1965, a condemnation award was filed by appraisers in county court. Under section 76-715, R. R. S. 1943, the time for plaintiffs to file notice of appeal to the district court expired on February 24, 1965, and the last day for commencing error proceedings in the district court under sections 25-1901 and 25-1931, R. R. S. 1943, was February 25, 1965. Plaintiffs filed notice of appeal and appeal bond on *April 6, 1965,* and a "Petition in Error and on Appeal" on *April 9, 1965.* On motion, the district court dismissed the case on the grounds that it lacked jurisdiction. We affirm the judgment of the district court.

Either as an error proceeding or as an appeal the district court lacked jurisdiction. It is mandatory and jurisdictional, under section 25-1901, R. R. S. 1943, that a petition in error be filed in the appellate court and a properly authenticated transcript be filed within 1 calendar month after the rendition of the judgment or final order. §§ 25-1901, 25-1905, and 25-1931, R. R. S. 1943; Brown v. City of Omaha, 179 Neb. 224, 137 N. W. 2d 814; Adams v. City of Omaha, 179 Neb. 684, 139 N. W. 2d 885; Anania v. City of Omaha, 170 Neb. 160, 102 N. W. 2d 49; Frankforter v. Turner, 175 Neb. 252, 121 N. W. 2d 377; Longe v. County of Wayne, 175 Neb. 245, 121 N. W. 2d 196; Harms v. County Board of Supervisors, 173 Neb. 687, 114 N. W. 2d 713; Keedy v. Reid, 165 Neb. 519, 86 N. W. 2d 370.

The statute on appeal, section 76-715, R. R. S. 1943, provides in part: "Such appeal shall be taken by filing a

notice of appeal with the county judge within thirty days from the date of filing of the report of appraisers as provided in section 76-710." It is mandatory and jurisdictional that notice of appeal be filed within the time required by statute. When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly. An appellate court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law. Brown v. City of Omaha, *supra;* Morrill County v. Bliss, 125 Neb. 97, 249 N. W. 98, 89 A. L. R. 932; Ricketts v. Continental Nat. Bank, 169 Neb. 809, 101 N. W. 2d 153; McDonald v. Rentfrow, 171 Neb. 479, 106 N. W. 2d 682; Campbell v. Campbell, 168 Neb. 533, 96 N. W. 2d 417. It follows that there is no merit to appellants' contentions.

Appellants' argument, in effect, asks us, in a constitutional context, to reexamine these holdings. The above holdings, construing and upholding the various statutes involved, are the fundamental procedural law of this state, necessary to establish certainty and eliminate confusion in the judicial process, and we adhere to them.

In a quite elusive argument, appellants attack the constitutionality of certain appeal provisions of our eminent domain act as being a violation of due process. The appeal provisions are valid and the notice and appeal provisions provide procedural due process. May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448; Weiner v. State, 179 Neb. 297, 137 N. W. 2d 852; Webber v. City of Scottsbluff, 155 Neb. 48, 50 N. W. 2d 533; Moser v. Turner, 180 Neb. 635, 144 N. W. 2d 192.

The judgment of the district court dismissing the appeal from county court and reinstating the award of the appraisers is correct and is affirmed.

AFFIRMED.

LOUIS E. MARX ET AL., APPELLEES, V. HARTFORD ACCIDENT AND INDEMNITY COMPANY, APPELLANT, IMPLEADED WITH FEDERAL SECURITIES COMPANY, INC., A NEBRASKA CORPORATION, APPELLEE.

157 N. W. 2d 870

Filed April 5, 1968. No. 36756.

1. **Insurance.** In the absence of a statute to the contrary, the risks insured against under a policy of liability insurance are determined by the terms of the policy and not by the liability of the insured. And, if plainly expressed, insurers are entitled to have such limitations construed and enforced as expressed.
2. **Words and Phrases.** A "professional" act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.
3. ———. In determining whether a particular act is of a professional nature or a "professional service" we must look not to the title or character of the party performing the act, but to the act itself.
4. **Insurance.** Generally, the obligation of an insurer to defend is no broader than the insuring agreement.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Reversed and remanded.

Cline, Williams, Wright, Johnson, Oldfather & Thompson, for appellant.

Chambers, Holland & Dudgeon, for appellees Marx et al.

Heard before WHITE, C. J., CARTER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

WHITE, C. J.

This is a declaratory judgment action. The question involved is whether Hartford, plaintiffs' malpractice insurer, is liable for fire damage to plaintiffs' offices resulting from the negligence of an employee technician. The district court entered judgment for plaintiffs against Hartford. We reverse the judgment.

In refilling the hot water sterilizer, plaintiffs' employee mistakenly poured benzine instead of water into the sterilization container. Fumes exploded causing a fire, and extensive damage to the building resulted. Routine sterilization is accomplished by boiling for 15 minutes in water. No patient was present or being treated.

Hartford's policy provided: "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury arising out of: (a) malpractice, error or mistake of the insured, or of a person for whose acts or omissions the insured is legally responsible * * * *in rendering or failing to render professional services,* * * * committed during the policy period in the practice of the insured's profession described in the Declarations." (Emphasis supplied.)

Generally, the plaintiffs are legally liable for the damage caused by the negligent act of their employees during the course of employment. But the precise question is whether the damage arose out of the rendering or failure to render professional services. In the absence of a statute to the contrary, the risks insured against under a policy of liability insurance are determined by the terms of the policy and not by the liability of the insured. And if plainly expressed, insurers are entitled to have such limitations construed and enforced as expressed. Lonsdale v. Union Ins. Company, 167 Neb. 56, 91 N. W. 2d 245; 45 C. J. S., Insurance, § 824, p. 872; 29 Am. Jur., Insurance, § 250, p. 632.

The insurer's liability is thus limited to the performing or rendering of "professional" acts or services. Something more than an act flowing from mere employment or vocation is essential. The act or service must be such as exacts the use or application of special learning or attainments of some kind. The term "professional" in the context used in the policy provision means something more than mere proficiency in the performance of a task and implies intellectual skill as contrasted with that used in an occupation for production or sale of com-

modities. A "professional" act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. Steinbeck v. Gerosa, 4 App. Div. 2d 302, 151 N. E. 2d 170; People v. Sterling Optical Co., Inc., 209 N. Y. S. 2d 953, 26 Misc. 2d 412; State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P. 2d 1; Maryland Casualty Co. v. Crazy Water Co. (Tex. Civ. App.), 160 S. W. 2d 102; Howarth v. Gilman, 365 Pa. 50, 73 A. 2d 655; 34 Words and Phrases (Perm. Ed.), Profession, p. 379 et seq. In determining whether a particular act is of a professional nature or a "professional service" we must look not to the title or character of the party performing the act, but to the act itself. Robertson v. Maher (La. App., 1965), 177 So. 2d 412; D'Antoni v. Sara Mayo Hospital (La. App., 1962), 144 So. 2d 643.

The boiling of water for sterilization purposes alone was not an act requiring any professional knowledge or training. It was a routine equipment cleaning act which any unskilled person could perform. The act was not a part of any patient's treatment per se any more than any other routine cleaning or arranging procedure incidental to the proper general operations of the plaintiffs' offices. It was no more of a "professional service" than the routine activity of a housewife engaged in sterilizing baby bottles or canning jars. We come to the conclusion that the negligent act performed here required no special training or professional skill and in no sense constituted the "rendering or failing to render professional services." Consequently there is no liability under the express terms of the risk assumed under the policy, and the judgment must be reversed.

The parties raise pertinent and interesting questions as to proximate cause and whether the risk assumed under the policy provisions could be fairly interpreted to extend to liability to a nonpatient landlord. These

questions are unnecessary to a decision herein and are therefore not discussed.

The district court also ordered Hartford to assume the defense of the landlord's action for damages of Federal Securities Co. v. Marx in the district court for Lancaster County. This was error. The obligation of an insurer to defend is no broader than the insuring agreement. Pickens v. Maryland Casualty Co., 141 Neb. 105, 2 N. W. 2d 593; Smith v. United States Fidelity & Guaranty Co., 142 Neb. 321, 6 N. W. 2d 81; Iowa Mutual Ins. Co. v. Meckna, 180 Neb. 516, 144 N. W. 2d 73.

The judgment of the district court is reversed. Costs are taxed to plaintiffs Louis E. Marx and Paul E. Marx.

REVERSED AND REMANDED.

DOROTHY K. MUSTARD, APPELLEE, V. ST. PAUL FIRE AND MARINE INSURANCE COMPANY, A CORPORATION, APPELLANT.

157 N. W. 2d 865

Filed April 5, 1968. No. 36760.

1. **Trial: Evidence.** Where reasonable minds may draw different inferences or conclusions from the evidence it is within the province of the jury to decide the issues of fact and this court may not set aside or direct a verdict in such a situation.
2. **Death: Evidence.** The presumption against death by suicide is rebuttable and such presumption is overcome and disappears when either direct or circumstantial evidence is introduced showing that the death was caused by suicide, and the burden is then upon the party asserting such to adduce evidence that the death was accidental and not from suicide.

Appeal from the district court for Merrick County: C. THOMAS WHITE, Judge. Affirmed.

Wagoner & Grimminger, for appellant.

Philip T. Morgan, for appellee.

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

WHITE, C. J.

Plaintiff recovered a jury verdict and judgment for $5,000 as beneficiary of a policy insuring against accidental death. Defendant, asserting suicide by the deceased insured, appeals. We affirm the judgment.

Defendant assigns error in the district court's failing to direct a verdict because of the insufficiency of the evidence.

Deceased insured was killed by the engine of a nonscheduled freight train while he was standing or walking in the middle of the railroad track crossing running through the town of Clarks, Nebraska. The incident occurred about 4:30 p.m. on May 3, 1965, a clear, dry day. The tracks run east and west; the road north and south. Deceased was an elderly man who used a cane, had driven his car to Clarks on the day of his death, and had visited his doctor who gave him some medication for a chronic stomach discomfort. There is no testimony by the doctor, or any other witnesses, that furnishes any evidence of depression, mental instability or illness, or any serious physical illness. The deceased's sight and hearing were normal. Other than the use of the cane, he had no difficulty in movement. He visited the doctor numerous times. The doctor testified that on the day of his death "He didn't act any different than he had any other time. Perfectly—about the same as he had always. He came in very unruffled and got his medicine and went out." The deceased's car had been stalling and at times had to be pushed. He drove the car to the crossing and at the time of his death it was stalled with the hood up south of the tracks at the crossing. The train was unscheduled, he did not know it was coming, and his car was parked there before the train could have become visible to him. Several witnesses testified that he was walking slowly south toward his parked car when he was hit as he crossed the tracks. The engineer testified that the train was unscheduled; that it was going east at about 55 miles per hour; that he first saw the deceased when the

train was about 2 blocks west of the crossing; that the deceased walked to the center of the tracks and turned his back; that he blew the train whistle; and that the deceased *never moved* until the engine was within two car lengths when he turned sideways and looked south and "glanced up." He testified that between 15 and 20 seconds elapsed between his first observation and the impact. The brakeman testified substantially to the same effect and that the deceased "stood" on the tracks. However, the brakeman told the county attorney at the time of the death that the decedent was coming from the north toward the car, thus corroborating the plaintiff's witnesses.

Disregarding any presumption of accidental death, the evidence clearly supports the inference of accidental, nonsuicidal death. The walking movement to the south infers a normal action, either knowingly to get out of the path of the train, or simply to return to the stalled car. The inference of suicide rests primarily on the engineer's evidence that he "stood" in the middle of the tracks with knowledge of the approaching train. The evidence is conflicting and contrary to the presumption that the decedent's acts were nonsuicidal in purpose. A jury could infer from the engineer's testimony, considering speed and feet per second, reaction time, time distance of the sound, and that the blowing of the whistle would only give the deceased warning for 3 or 4 seconds, which is contrary to the engineer's own estimate of 15 to 20 seconds. Unexplained nonsuicidal railroad crossing deaths at familiar crossings are quite common. The deceased may have been old, slow moving, nonperceptive, and negligent, but not conclusively suicidal. Bolstering this conclusion is an entire absence in the record of any evidence showing any conditions of environment or health that would lead to even a suspicion of suicide.

The evidence in this case clearly comes within the applicable rule that where evidence is conflicting or where reasonable minds may draw different inferences or con-

clusions from it, it is within the province of the jury to decide the issues of fact and this court may not set aside or direct a verdict in such a situation. Mills v. Bauer, 180 Neb. 411, 143 N. W. 2d 270; Countryman v. Ronspies, 180 Neb. 76, 141 N. W. 2d 425.

Defendant assigns as error the giving of instruction No. 4. It reads as follows: "You are instructed that the burden of proof is upon the plaintiff to prove the material allegation of her petition by a preponderance of the evidence before she may recover. This material allegation is that the decedent, Earl A. Mustard, met his death by accidental means on May 3, 1965, in Clarks, Merrick County, Nebraska. If you find that the plaintiff has proved this material allegation of her petition by a preponderance of the evidence, you will find for the plaintiff. If, however, you find that the evidence bearing upon such material allegation of the petition is evenly balanced or preponderates in favor of the defendant, then the plaintiff cannot recover, and your verdict should be for the defendant."

The defendant asserts that its evidence clearly rebutted the presumption against suicide, the presumption therefore disappeared, and the plaintiff's burden therefore was to establish accidental death unaided by the presumption. Haith v. Prudential Ins. Co., 171 Neb. 281, 106 N. W. 2d 169. The instruction given above, if anything, was error in favor of the defendant of which it may not complain. The court did not precisely fix the point where the presumption disappeared and the plaintiff's burden began, because he placed the full burden of proof on the plaintiff at all times and all points, unaided by any presumption. In fact the record reveals that the court submitted this case to the jury without at any time giving the plaintiff the aid of any presumption. There is no merit to this contention.

Defendant complains of instruction No. 8, defining "accidental," asserting it is contrary to our definition in Railway O. & E. Assn. v. Drummond, 56 Neb. 235, 76

N. W. 562. The reasons for such claimed nonconformity are not elucidated and we cannot find one. The instruction given reads: "Suicide is the intentional taking of one's own life. A death may be said to be accidental when it occurs without the expectation of the person affected, and is to be distinguished from one deliberately taking one's own life." This instruction was correct and there is no merit to this contention. See Walden v. Bankers Life Assn., 89 Neb. 546, 131 N. W. 962.

The judgment of the district court is affirmed and plaintiff is allowed an attorney's fee of $500 in this court. § 44-359, R. R. S. 1943.

AFFIRMED.

BOSS HOTELS COMPANY, A CORPORATION, APPELLEE, V. COUNTY OF HALL, STATE OF NEBRASKA, BOARD OF EQUALIZATION, APPELLANT.

157 N. W. 2d 868

Filed April 5, 1968. No. 36804.

Taxation. There is a presumption that a board of equalization has properly performed its official duties and in making an assessment acted upon sufficient competent evidence to justify its action. The presumption of correctness disappears when there is competent evidence to the contrary and thereafter the reasonableness of the valuation is one of fact to be determined by the evidence.

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

Gerald B. Buechler and Robert E. Paulick, for appellant.

Frank B. Morrison, Sr., and Eisenstatt, Morrison, Higgins, Miller, Kinnamon & Morrison, for appellee.

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

McCOWN, J.

This case involves the valuation of plaintiff's property for tax purposes. The property consisted of the parking lot and hotel building, known as The Yancy Hotel, in Grand Island, Nebraska. The trial court found that the actual value of the property was $295,000, with an assessed value of $103,250. The defendant has appealed.

This action is a statutory proceeding under the provisions of sections 77-1510 and 77-1511, R. R. S. 1943. For the 1967 tax year, the Hall County board of equalization initially fixed the actual value of the property at $553,457 with an assessed value of $193,710. After protest by plaintiff, the county board of equalization reduced the assessed value to $154,334. The plaintiff appealed to the district court under the provisions of section 77-1510, R. R. S. 1943. In the district court, most of the evidence was introduced and received by stipulation. It included two complete and detailed appraisal reports made by two expert witnesses. One was for the plaintiff taxpayer and one for the defendant board of equalization initially fixed the actual value of the property at all statutory criteria in arriving at the actual value figures. The specific testimony of both appraisers was then taken with reference to the main points of variance in the appraisals. These variances were in three principal areas. Computation of reproduction or replacement costs was one, and the effect on income of reduced taxes was another. The third was that plaintiff's appraiser took into account comparable sales of comparable property while defendant's appraiser did not, although he acknowledged a "slow market." The evidence and testimony of the defendant's expert witness was that the actual value of the property was $350.000, which would fix an assessed value of $122,500. The evidence and testimony of the plaintiff's expert witness was that the actual value of the property was $295,000, which would fix an assessed value of $103,250. The court found that no evidence was introduced by either party in support

of the action of the defendant board of equalization, and that the evidence established that the action of the board was arbitrary and unreasonable. The court determined that the actual value of the property was the sum of $295,000, and reduced the assessed value to $103,250.

The only real issue properly presented to this court is whether or not the judgment is sustained by the evidence. We conclude that it is. On this issue, the defendant relies on LeDioyt v. County of Keith, 161 Neb. 615, 74 N. W. 2d 455, and particularly on statements in that case that the burden imposed on the complaining taxpayer is not met merely by showing a difference of opinion between his interested witnesses and the county assessor or the board of equalization. The LeDioyt case has no application here. Basically, that case involved a problem of discriminatory assessment in comparison with other property generally, and not a valuation of specific property in excess of its actual value. The statements with respect to witnesses were made with respect to interested witnesses, and not disinterested expert witnesses.

The applicable rule has been stated many times. In Richards v. Board of Equalization, 178 Neb. 537, 134 N. W. 2d 56, we said: "There is a presumption that the county board of equalization properly performed its official duties in determining the actual value of the subject property for tax purposes, and that it acted on sufficient evidence in fixing its actual value. The presumption disappears when there is competent evidence to the contrary, as there is in the instant case. The reasonableness of the valuation made by the county board of equalization then becomes a question of fact to be determined from all the evidence tending to establish the actual value of the property." See, also, Josten-Wilbert Vault Co. v. Board of Equalization, 179 Neb. 415, 138 N. W. 2d 641.

In this case, the defendant's own expert witness intro-

duced competent evidence to destroy the presumption, and the only question remaining for determination was a question of fact as to the actual value of the property. No evidence was introduced by either party which would support the action of the board of equalization, and any presumption that its action was correct or reasonable was totally destroyed.

The defendant assigns numerous errors involving matters prior to hearing. These issues largely involve interlocutory action or orders subsequently changed or waived, and they are without merit.

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

AFFIRMED.

SMITH, J., participating on briefs.

JIMMY JOE ROOT, BY AND THROUGH HIS FATHER AND NEXT FRIEND, LOYD ROOT, APPELLANT, V. SCHOOL DISTRICT NO. 25 OF CUSTER COUNTY ET AL., APPELLEES.

157 N. W. 2d 877

Filed April 5, 1968. No. 36808.

1. **Trial: Appeal and Error.** Where a plaintiff did not elect to stand upon his petition after defendants' demurrer to it was sustained, and no judgment of dismissal was thereafter rendered by the trial court disposing of the case and terminating the litigation in that court, the order sustaining the demurrer is not a final order reviewable on appeal.
2. ———: ———. An order overruling a special appearance is not a final order from which an appeal can be taken.

Appeal from the district court for Custer County: WILLIAM F. MANASIL, Judge. Appeal dismissed.

Thomas O. David and Thomas H. Dorwart, for appellant.

Johnson, Kelly, Evans & Spencer, Tedd C. Huston, and Dier & Ross, for appellees.

Person & Dier, for amicus curiae.

Heard before WHITE, C. J., CARTER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

CARTER, J.

This is an action by Jimmy Joe Root by his father and next friend against School District No. 25 of Custer County, the members of its school board, and the superintendent and principal of the schools of the district, to recover damages for personal injuries suffered by Jimmy Joe Root through the alleged negligence of the defendants. The trial court overruled special appearances by all of the defendants and subsequently sustained a general demurrer to the petition.

The petition alleges Jimmy Joe Root was a student in the school district's high school and, while starting down a stairway of the junior high school building, a large and unruly mob of students suddenly rushed down the hall and stairs, striking Jimmy Joe Root from behind and causing him to fall down a stairway to his injury. The specific acts of negligence were: (1) In failing to provide adequate supervision in the halls of the school building, and (2) in failing to keep the stairway in proper condition for use by the pupils attending the school.

It is evident from the briefs that the demurrers were sustained on the basis of the immunity of the school district from tort liability while acting in a governmental capacity. In any event, the appeal is taken from the sustaining of the demurrers and the overruling of the special appearances which is not a final order, no dismissal of the action having been entered. The cases are legion which hold that the sustaining of a demurrer or the overruling of a special appearance is not a final order from which an appeal can be taken.

To entitle a party to a review, there must have been a final order rendered in the cause. Reynolds v. City of Tecumseh, 48 Neb. 785, 67 N. W. 792. The Supreme Court has no jurisdiction to entertain an appeal from an

order which is not a final one. Barkley v. Pool, 102 Neb. 799, 169 N. W. 730. In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority or jurisdiction to act, and in the absence of such judgment or order the appeal will be dismissed. Busboom v. Gregory, 179 Neb. 254, 137 N. W. 2d 825. An order sustaining a general demurrer to a petition, not followed by a judgment of dismissal or other final disposition of the case, is not a final order or judgment, and is not reviewable in this court. Shipley v. Shipley, 154 Neb. 872, 50 N. W. 2d 103. See, also, Koehn v. Union Fire Ins. Co., 151 Neb. 859, 39 N. W. 2d 808; § 25-1902, R. R. S. 1943. An order overruling a special appearance is not a final order. In re Estate of Greenamyre, 133 Neb. 693, 276 N. W. 686. Where plaintiff did not elect to stand upon his petition after defendants' demurrer to it was sustained, and no judgment was rendered by the trial court disposing of the case and terminating the litigation in that court, the order sustaining the demurrer was not a "final order" reviewable on appeal. Lindquist v. Towle, 164 Neb. 524, 82 N. W. 2d 631. Under the foregoing holdings, this court is without jurisdiction to review the purported appeal in this case and it is dismissed.

APPEAL DISMISSED.

SPENCER, J., participating on briefs.

ROBERT G. NICHOLSON, APPELLANT, V. MAURICE H. SIGLER, WARDEN NEBRASKA PENAL AND CORRECTIONAL COMPLEX, APPELLEE.

JIMMY D. MADDOX, APPELLANT, V. MAURICE H. SIGLER, WARDEN NEBRASKA PENAL AND CORRECTIONAL COMPLEX, APPELLEE.

157 N. W. 2d 872

Filed April 5, 1968. Nos. 36851, 36852.

1. **Habeas Corpus.** Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court impos-

ing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose.

2. ———. Habeas corpus is a collateral, not a direct, proceeding when regarded as a means of attack upon a judgment sentencing a defendant.
3. ———. Habeas corpus cannot be used as a substitute for a writ of error.
4. **Criminal Law: Judgments.** A judgment or sentence of a court of record in a criminal case is supported by the usual presumption of validity and regularity when thus attacked.
5. **Habeas Corpus.** To obtain release from a sentence of imprisonment by habeas corpus, such sentence must be absolutely void.
6. ———. A writ of habeas corpus is not a writ for the correction of errors and its use will not be permitted for that purpose.
7. **Habeas Corpus: Indictments and Informations.** An inquiry by habeas corpus into the sufficiency of an information is limited to a determination of whether there is enough on the face of the information to charge an offense known to law and whether such offense is within the jurisdiction of the trial court.
8. ———: ———. An information charging the accused with the commission of an offense substantially in the language of the statute is not subject to attack on habeas corpus.
9. ———: ———. A prisoner will not be set at liberty by a writ of habeas corpus because the complaint on account of which he is held in custody states an alleged offense so defectively that it is or may be subject to successful attack by demurrer or motion to quash, if it contains enough substantially to accuse him of an act justifying his arrest and detention.
10. **Habeas Corpus: Criminal Law.** The regularity of the proceeding leading up to a sentence in a criminal case cannot be inquired into on an application for a writ of habeas corpus.
11. **Criminal Law: Appeal and Error.** Where a sentence has been imposed by the district court within statutory limits it will not be disturbed in the absence of an abuse of discretion.
12. **Habeas Corpus.** Legal cause must be shown to entitle a petitioner to the remedy of habeas corpus. It is not demandable as a matter of course.

Appeals from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Robert G. Nicholson and Jimmy D. Maddox, pro se.

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

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

SPENCER, J.

The appellants, who are prisoners serving sentences in the Nebraska Penal and Correctional Complex, petitioned in these proceedings for writs of habeas corpus. These are separate actions but involve identical issues arising out of the same transaction. They will, therefore, be discussed together.

The district court properly found that the petitions did not state facts sufficient to state causes of action in habeas corpus, and dismissed them. This is at least the third time habeas corpus actions have been filed by petitioners. In the last ones, appeals from the Lancaster County district court, the judgments were affirmed April 28, 1967. See Maddox & Nicholson v. Sigler, 181 Neb. 690, 150 N. W. 2d 251, in which certiorari was denied by the United States Supreme Court, 389 U. S. 874, 88 S. Ct. 171, 19 L. Ed. 2d 161. Portions of the briefs of appellants are devoted to the issues raised in the previous appeals. Those issues are disposed of therein and will not be discussed herein.

On October 24, 1964, each of the appellants entered pleas of guilty to informations charging them with two separate offenses: Felonious assault with intent to commit rape, and feloniously and forcibly putting in fear to take from the person money of value with intent to rob and steal. Appellants, who were arrested in Wisconsin, were represented by counsel at all times after their arrival in Nebraska.

Appellants' petitions set out portions of both the state and federal Constitutions, as well as portions of the statutes of the State of Nebraska. They then allege that the complaints, warrants, and informations in their cases were totally deficient because the names of the purported victims were not specifically set out therein, and because the names of the witnesses were not endorsed

thereon. They further allege that the records fail to sustain the fact of the crimes and the involvement of appellants therein; and that the trial court passed cruel, excessive, and unusual punishments in the premises. Appellants have three more allegations which are based on their misinterpretation of the ruling on a demurrer in a previous habeas corpus action in Buffalo County, no part of which is included in the records herein, but which would be immaterial if included. It is apparent, however, that they have confused the parties in said action and there is no merit to their contention even if it could be material.

It is obvious that appellants are attempting to use habeas corpus to secure an appellate review of their convictions. That is not its purpose in this jurisdiction. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of defendant, and the sentence was within the power of the court to impose. Hawk v. Olson, 146 Neb. 875, 22 N. W. 2d 136. In that case we held: " ' "Habeas corpus is a collateral, not a direct, proceeding when regarded as a means of attack upon a judgment sentencing a defendant. It cannot be used as a substitute for a writ of error." * * * "A judgment or sentence of a court of record in a criminal case is thus supported by the usual presumptions of validity and regularity when thus attacked. To obtain release from a sentence of imprisonment by habeas corpus, such sentence must be absolutely void." * * * "A writ of habeas corpus is not a writ for the correction of errors and will not be allowed to be used for that purpose." ' "

The law is well settled that an inquiry by habeas corpus into the sufficiency of an information is limited to a determination of whether there is enough on the face of the information to charge an offense known to law and whether such offense is within the jurisdiction of

the trial court. In re Caldwell, 82 Neb. 544, 118 N. W. 133. The information herein meets both tests.

Appellants' main thrust is directed to the fact that the county attorney, obviously to protect the complaining witnesses, described them as three teen-age girls rather than using their names in the information. The information in each case, however, charges two separate offenses in the language of the statute. An information charging the accused with the commission of an offense substantially in the language of the statute is not subject to attack on habeas corpus. 39 C. J. S., Habeas Corpus, § 20, p. 462.

In State v. Shrader, 73 Neb. 618, 103 N. W. 276, 119 Am. S. R. 913, we held: "A prisoner will not be set at liberty by a writ of habeas corpus because the complaint on account of which he is held in custody states an alleged offense so defectively that it is or may be subject to successful attack by demurrer or motion to quash, if it contains enough substantially to accuse him of an act justifying his arrest and detention."

Section 29-1502, R. R. S. 1943, provides: "Whenever on trial of any indictment for any offense there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof in the Christian name or surname, or both Christian name and surname, *or other description whatever of any person whomsoever therein named or described,* or in the name or description of any matter or thing whatsoever therein named or described, such variance shall not be deemed ground for an acquittal of the defendant, unless the court before which the trial shall be had shall find that such variance is material to the merits of the case or may be prejudicial to the defendant." (Italics supplied.)

The informations charged offenses in the language of the statute. Appellants, although represented by counsel, did not deny the offenses but rather pled guilty thereto. They could have required the State at any time to set out the names of the complaining witnesses on the informa-

tions. They were not deceived nor misled nor prejudiced in any particular. They knew that they were being charged with offenses committed against three teen-age girls. The description used, while subject to motion, was not a variance material to the merits or prejudicial in any way to the defendants.

This case is no different in substance from Sledge v. State, 142 Neb. 350, 6 N. W. 2d 76, in which the information used an assumed name for the complaining witness to protect a 13-year-old as long as possible. Defendant stood trial, and on trial an amendment was permitted to show the true name of the witness. We there held: "It is not prejudicially erroneous to allow an amendment to an information where there is a variance between the information and the proof as to a matter of description, where it would have been proper to submit the case to a jury without amendment notwithstanding the variance."

The failure to endorse the names of witnesses on the informations is an irregularity which appellants waived by their pleas of guilty. In any event, it cannot be raised by habeas corpus. "The regularity of the proceedings leading up to a sentence in a criminal case cannot be inquired into on an application for a writ of habeas corpus, that matter being assailable only in a direct proceeding." Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124, 165 A. L. R. 932.

Section 29-1602, R. R. S. 1943, does require the endorsement of the names of witnesses on an information, and the failure in a contested case to endorse those known at the time the information is filed is error, but not necessarily prejudicial error. Even if appellants had not pled guilty herein and had gone to trial on the present informations, the description in the informations, in the absence of motions, would have been sufficient. See Waite v. State, 169 Neb. 113, 98 N. W. 2d 688.

Appellants' allegation that the records fail to sustain the fact of the purported crimes or the involvement of

appellants therein needs no further answer than that it is frivolous to the extreme. Appellants were represented by counsel, pled guilty to both counts of the informations, and the records clearly show their involvement in the crimes to which they pled.

Appellants further contend that their sentences are so excessive that they constitute cruel and unusual punishment in the premises. This issue cannot be raised by habeas corpus in this jurisdiction. Hawk v. Olson, 146 Neb. 875, 22 N. W. 2d 136. We observe, however, that in any event the sentences imposed are within the limits prescribed for the offenses involved. The law is well settled in this jurisdiction that where a sentence has been imposed by the district court within statutory limits it will not be disturbed in the absence of an abuse of discretion. State v. Paul, 177 Neb. 668, 131 N. W. 2d 129.

Appellants complain that they were given no evidentiary hearings herein. In this jurisdiction, a legal cause must be shown to entitle a petitioner to the remedy of habeas corpus. It is not demandable as a matter of course. Case v. State, 177 Neb. 404, 129 N. W. 2d 107.

The judgments of the district court should be and hereby are affirmed.

AFFIRMED.

SYRIAS GUERIN, APPELLANT, V. INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION, ET AL., APPELLEES.
157 N. W. 2d 779

Filed April 5, 1968. No. 36856.

1. **Workmen's Compensation.** Compensation for disability resulting from an injury to the phalanges and metacarpal bones of the hand may be based upon a loss of use of the hand where the disability is not limited to a loss of the use of the fingers.
2. ———. Compensation for disability resulting from a schedule injury is ordinarily limited to the amount specified in the statute.

3. ———. Where the injury is to a thumb only, and the effect of the injury is the usual and natural one, compensation must be based upon the loss of use of the thumb and not the hand.
4. ———. An award of compensation for permanent total disability cannot be based upon the loss of use of one hand and the loss of use of the thumb on the other hand.

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

Frank B. Morrison, Sr., and Eisenstatt, Morrison, Higgins, Miller, Kinnamon & Morrison, for appellant.

Cline, Williams, Wright, Johnson, Oldfather & Thompson and Charles M. Pallesen, Jr., for appellees.

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

BOSLAUGH, J.

This is a proceeding under the Workmen's Compensation Act brought by Syrias Guerin against the Geo. Cook Construction Co. and the Insurance Company of North America. The plaintiff was employed as a carpenter. The accident occurred when a power saw, operated by another employee, injured the plaintiff's left hand and right thumb.

The controversy concerns the amount of compensation which the plaintiff should receive for permanent disability. The principal issue is whether the plaintiff has sustained a permanent total disability.

The injury to the plaintiff's left hand resulted in the loss of all of the fourth finger and metacarpal bone except its base at the wrist; all of the third finger and approximately one-half of the metacarpal bone; destruction of the metacarpal phalangeal joint of the second finger; and partial destruction of the metacarpal phalangeal joint of the first finger. The injury to the plaintiff's right thumb resulted in destruction of the metacarpal phalangeal joint with injury to the extensor mechanism and the sensory nerve of the thumb.

A single judge of the compensation court awarded the plaintiff compensation for 75 percent loss of use of the left hand and 15 percent loss of use of the right hand. Upon rehearing before the full compensation court, the plaintiff recovered an award of compensation for 70 percent loss of use of the left hand and 20 percent loss of use of the right hand, one judge dissenting. The judge who dissented stated that compensation for the disability resulting from the injuries to the right thumb should be based on a 45 percent loss of use of the right thumb.

The district court upon appeal found that the record did not support the findings of the compensation court, and awarded compensation for 75 percent loss of use of the left first finger; 75 percent loss of use of the left second finger; 100 percent loss of use of the left third finger; 100 percent loss of use of the left fourth finger; 20 percent loss of use of the left hand; and 45 percent loss of use of the right thumb. From this award the plaintiff has appealed.

The plaintiff is still employed as a carpenter but is unable to do finish work. He is unable to hold small nails or handle doors with his left hand, and he cannot hold a hammer properly with his right hand. The plaintiff testified that he has pain in the area of the carpal-metacarpal joint of the right hand.

Dr. F. S. Webster estimated the disability to the plaintiff's left hand to be 70 percent loss of use. In arriving at his opinion he considered the multiple finger loss; the partial loss of the metacarpal bones and soft tissue reducing the breadth of the hand; and damage to nerves, tendons, muscles, and blood vessels.

Dr. H. R. Horn estimated the disability to the plaintiff's left hand separately from the disability to the fingers. He estimated the disability to be 20 percent loss of use of the hand; 75 percent loss of use of each of the first and second fingers; and 100 percent loss of use of each of the third and fourth fingers.

The injury to the plaintiff's left hand was extensive and

included the loss of a substantial portion of two metacarpal bones and adjacent soft tissue. Under the facts and circumstances in this case, we believe the disability to the plaintiff's left hand should be considered a disability to the hand as a unit. See, National Surety Corp. v. Winder (Tex. Civ. App.), 333 S. W. 2d 450; American Employers Ins. Co v. Climer (Tex. Civ. App.), 220 S. W. 2d 697.

Dr. Horn estimated the disability to the plaintiff's right thumb to be 45 percent loss of use of the thumb. Dr. Webster fixed the disability resulting from the injury to the plaintiff's right thumb at 20 percent loss of use of the right hand. It is clear from Dr. Webster's testimony, however, that the disability which he described resulted from the partial loss of use of the plaintiff's thumb.

Under the Nebraska Workmen's Compensation Act, compensation for disability resulting from a specific injury listed in subdivision (3) of section 48-121, R. S. Supp., 1965, is limited to the amount specified in that subdivision. Where the injury is to a thumb only and the effect of the injury is the usual and natural one, compensation must be based upon the loss of use of the thumb and not the hand. Runyan v. Lockwood Graders, Inc., 176 Neb. 676, 127 N. W. 2d 186. The loss of a thumb is not the loss of a member within the meaning of section 48-121, R. S. Supp., 1965, for which an award of compensation for permanent total disability may be made.

Dr. Webster testified that it is probable that there will be a degenerative change involving the base of the metacarpal bone at the wrist of the right hand as a result of the fusion of the metacarpal phalangeal joint of the right thumb. This is a change that he believes will occur in the future.

In the event that there is an increase in the disability to the plaintiff, he may become entitled to receive additional compensation. This matter may be determined in

a later proceeding. As we view the record in this case, there is no basis at this time upon which the plaintiff may recover compensation for permanent total disability.

The judgment of the district court should be modified to provide that the plaintiff shall receive compensation for a 70 percent loss of use of his left hand. The judgment as modified is affirmed.

AFFIRMED AS MODIFIED.

SMITH, J., participating on briefs.

GEORGE THOMAS ISKE, APPELLEE AND CROSS-APPELLANT, IMPLEADED WITH GLADYS E. ISKE ET AL., APPELLEES AND CROSS-APPELLEES, V. METROPOLITAN UTILITIES DISTRICT OF OMAHA, APPELLANT AND CROSS-APPELLEE.

157 N. W. 2d 887

Filed April 12, 1968. No. 36558.

1. **Eminent Domain: Evidence.** An expert witness may be permitted to use and testify concerning the factors which a well-informed buyer would use in arriving at the price he would pay for the property.
2. ———: ———. When land taken by eminent domain has valuable deposits of gravel, this circumstance may be considered so far as it may affect the market value of the land, but part of the realty cannot be separately valued for its materials as an item in addition to the market value of the land.
3. ———: ———. An expert witness may consider the quantity of a mineral in place and its unit price as a factor in determining the fair market value of the land.
4. **Evidence: Trial.** As a general rule, exhibits which are practically instructive to explain the evidence or aid in its interpretation or application by the jury may be admitted.
5. **Eminent Domain: Evidence.** Generally, an expert witness, otherwise properly qualified, may be permitted to use and to testify concerning the different factors affecting valuation which a well-informed buyer would use in arriving at the price which he would pay for the property at the time of the taking.
6. ———: ———. Generally, an expert witness, when properly qualified, may testify as to the valuation of the property, and the weight and credibility of what the witness considers in com-

ing to his conclusion is for the jury to determine.

7. ———: ———. Jurors are not bound by the testimony of expert witnesses. Their evidence is to be weighed as that of all other witnesses.

8. ———: ———. Where a prospective use for recreational or subdivision uses is not merely speculative and not too remote to influence present market value, an exhibit consisting of a plat or plan of such reasonable prospective use may be admissible in evidence.

9. ———: ———. The capitalizing of an estimate of the net rents from a probable use of the property is an accepted method of valuation.

10. ———: ———. Where land taken by eminent domain has a reasonable prospective use for recreational and subdivision purposes, this circumstance may be considered so far as it may affect the market value of the land, at the time of the taking, and that part of the realty cannot be separately valued for its prospective use for recreational and subdivision purposes as an item in addition to the market value of the land.

11. ———: ———. Capitalization of income of rentals from a reasonably prospective use of the property is an acceptable method of arriving at the value of the property as a factor in the determination of its present market value, and an expert witness may testify as to the quantity and unit price resulting from such reasonably prospective use and sale of all or part of said property.

12. **Evidence: Appeal and Error.** A party may not successfully complain of the introduction of evidence of a like character to that which it subsequently introduced.

13. **Witnesses: Trial.** An expert witness' testimony is purely advisory and is not binding on the triers of fact.

14. **Damages: Trial.** The amount of damages sustained by a landowner is peculiarly of a local nature and ordinarily is to be determined by the jury, and this court will not ordinarily interfere with the verdict of the jury when the evidence is conflicting unless it is clearly wrong.

Appeal from the district court for Cass County: VICTOR H. SCHMIDT, Judge. Affirmed in part, and in part reversed and remanded.

Cecil S. Brubaker, Willis L. Strong, and James F. Begley, for appellant.

Crosby, Pansing, Guenzel & Binning, Harold R. Leb-

ens, and Walter, Albert, Leininger & Grant, for appellees.

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

WHITE, C. J.

This is a proceeding in eminent domain. The defendant, Metropolitan Utilities District of Omaha, which furnishes water service to the metropolitan area of Omaha, Nebraska, is constructing a well field adjacent to the Platte River south of Omaha. As a part of that project, the defendant condemned a 284-acre tract of land owned by the plaintiff, George Thomas Iske.

The Iske tract contains Cedar Island, which has an area of 173 acres and is approximately 1¼ miles in length, and river-bed land amounting to 111 acres. Cedar Island is separated from the north bank of the Platte River by a narrow chute or waterway. Cedar Island is subject to a gravel lease owned by the Gerhold Company, a corporation

The appraisers appointed by the county judge awarded $190,380 to the plaintiff and $36,660 to the Gerhold Company. The plaintiffs' Iske and the defendant separately appealed to the district court where the appeals were consolidated. The issue tried there was the fair market value of the land and leasehold taken by the defendant. The jury returned a verdict for the plaintiff in the amount of $510,150, and for the Gerhold Company in the amount of $26,850. The defendant's motion for new trial was overruled and it has appealed.

The evidence shows that the highest and best use of Cedar Island is for the production of sand and gravel followed by use for recreational purposes. There is sand and gravel to a depth of approximately 50 feet under Cedar Island with an overburden of from 1½ to 3 feet. The sand and gravel deposit could also be used to supply a large volume of water for industrial purposes. The area in Sarpy County immediately north of Cedar Island is zoned for industrial use.

The plaintiff produced two expert witnesses who testified that in their opinion the fair and reasonable market value of the Iske land was between $825,000 to $925,000, and $1,500,000 respectively. The defendant later moved to strike this testimony. The rulings on the motions to strike and on other objections made to this evidence are the basis for the defendant's principal assignments of error.

The plaintiff's first expert witness, Glenn Chase, testified that he had made a detailed study of the Cedar Island area and of the real estate sales in Cass and Sarpy Counties; and that there were no comparable sales of real estate which could be used as the basis for an appraisal. He based his appraisal upon an "income approach." The parties stipulated that the opinion testimony of this expert witness was not based on the "prices of other sales of property."

Chase testified that he considered that the gravel would be exhausted in 12 years; that he computed an annual income by applying the royalty specified in the Gerhold Company lease to this estimate of the gravel which would be produced each year; and that he then applied a "discount or capitalization rate" of 7 percent (factor 7.943) to arrive at the value of this income. He further considered that Cedar Island would be available for recreational use after the gravel had been removed; that he computed an annual income from this use by assuming that there would be 232 lots to be rented and applying a rental rate of $2 per front foot less an amount for "Losses and administration"; and that he then applied a discount factor to this amount to obtain a present value of this income.

The plaintiff's second expert witness, F. Pace Woods, considered the possibility of industrial use as well as sand and gravel production and recreational use. In valuing the property for sand and gravel production, Woods testified that he considered that it would yield a royalty in excess of $1,000,000. In valuing the prop-

erty for recreational use he testified that he used the "income method" although his testimony does not show any computations used in arriving at a value. His opinion as to its value for industrial uses was based upon the factors that he considered necessary for industrial property.

The defendant contends that the testimony of the plaintiff's expert witnesses should have been stricken because their testimony was, in part, based upon an improper measure of damages. The defendant argues that these expert witnesses should not have been allowed to testify concerning the quantity of sand and gravel available and the royalty rate specified in the Gerhold Company lease.

Where land taken by eminent domain has valuable deposits of gravel, this circumstance may be considered so far as it may affect the market value of the land, but part of the realty cannot be separately valued for its materials as an item in addition to the market value of the land. Pieper v. City of Scottsbluff, 176 Neb. 561, 126 N. W. 2d 865; Medelman v. Stanton-Pilger Drainage Dist., 155 Neb. 518, 52 N. W. 2d 328. Evidence may be received to show that the lands involved contain gravel deposits that are adaptable to commercial development and the fair market value of the lands in view thereof.

An expert witness may consider the quantity of a mineral in place of its unit price as a factor in determining the fair market value of the land. Pieper v. City of Scottsbluff, *supra;* United States v. Land in Dry Bed of Rosamond Lake, 143 F. Supp. 314; State Highway Commission v. Nunes, 233 Or. 547, 379 P. 2d 579. An expert witness may be permitted to use and testify to the factors which a well-informed buyer would use in arriving at the price he would pay for the property. Clark v. United States, 155 F. 2d 157.

The record in this case indicates that the plaintiff's expert witnesses did not value the sand and gravel in place as an item separate from the value of the land, but

used this information as a factor in arriving at the value of the land.

In determining the value of the plaintiff's land, after the production of sand and gravel had been completed, at least one of the plaintiff's expert witnesses assumed that the property would be developed in accordance with a plan that had been described by a previous witness, John J. Thompson.

Thompson is a civil engineer who has had experience in planning and developing property for recreational use. He testified that he was familiar with Cedar Island and had prepared a design for development of recreational lots on the island. Exhibit 16, which was received over objection, is a design or preliminary plat prepared by Thompson. It is an overlay, drawn over an aerial photograph of Cedar Island. The admission of exhibit 16 is assigned as error.

As a general rule, exhibits which are practically instructive to explain the evidence or aid in its interpretation or application by the jury may be admitted. Dawson v. City of Lincoln, 176 Neb. 311, 125 N. W. 2d 908.

But giving defendant's objection its maximum range, the exhibit is challenged as being irrelevant because it is speculative, conjectural, and highly prejudicial. The determination of this question overlaps and partially embraces the larger question of the admissibility of the testimony of the expert witness Glenn Chase as to the capitalization of income on the recreational and residential lots as being a relevant factor in the determination of the present market value. In approaching this question we must remember that a direct issue was drawn in this case as to whether Cedar Island could reasonably be developed into a residential or recreational area. Was it a reasonably prospective use of the property? The plaintiff had alleged, and the defendant denied, that Cedar Island was "peculiarly adapted to development into a recreational area." The plaintiff was attempting to show that a reasonably prospective use of Cedar Island would

be its development for recreational purposes after sand and gravel production had been completed and that this factor would affect the considerations influencing the present market value of the property. The resolution of this question was primarily for the jury under conflicting issues and evidence, and should be decided like any other question of fact at issue in a case. It is not for the court to determine under the guise of a determination of the admissibility of evidence. In Medelman v. Stanton-Pilger Drainage Dist., *supra*, this court held that in a condemnation proceeding, where evidence was conflicting as to adaptability of lands for a prospective use, it was a fact issue for the jury to determine under the evidence. This court said in that case as follows: "If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which made up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating compensation." The evidence shows that the witness Chase is an expert appraiser who spent approximately 36 days and made an exhaustive examination of the land, zoning regulations, and many other factors relevant to the determination of whether this land had a prospective use for recreational or residential lot purposes. Exhibit 16 was no more than an illustration and a depiction in graphic form of the logical development of this testimony. If the prospective use was a relevant consideration, a graphic portrayal of the plan of such use was also relevant. The exhibit does not overreach the scope of the oral testimony. It particularizes, explains, and serves to establish the accuracy and credibility of the expert witnesses' testimony. Such an exhibit would be highly relevant on cross-examination. We can see no reason why it could not be introduced on direct examination. In considering this question we observe that the expert witnesses for both the plaintiff and the defendant are in agreement that this island, both in

its present and future state after the development of lakes, had recreational possibilities. From the evidence the jury, therefore, could reasonably infer that the development for recreational or residential lot purposes is a prospective use which, in turn, is a factor that affects the present market value of the property. See, 27 Am. Jur. 2d, Eminent Domain, § 280, p. 70; Medelman v. Stanton-Pilger Drainage Dist., *supra;* Pieper v. City of Scottsbluff, *supra;* Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168.

We are aware that there is considerable authority supporting the holding that such a plat or exhibit is not admissible in evidence. See, 5 Nichols (3d Ed.), Eminent Domain, § 18.11(2), pp. 159, 160, 161; State Highway Commission v. Deal. 191 Or. 661, 233 P. 2d 242; Earl M. Kerstetter, Inc. v. Commonwealth, 404 Penn. 168, 171 A. 2d 163. But the recent cases hold that such evidence is admissible on the issue of the suitability of the tract for subdivision purposes, which, as we have pointed out, was a direct issue in this case. Arkansas-Louisiana Gas Co. v. Lawrence, 239 Ark. 365, 389 S. W. 2d 431; Commonwealth Dept. of Highways v. Denny (Ky. App), 385 S. W. 2d 776; State Highway Commission v. Conrad, 263 N. C. 394, 139 S. E. 2d 553, 12 A. L. R. 3d 553; Cherokee Pipe Line Co. v. Jury (Okla.), 393 P. 2d 503; Hawaii Housing Authority v. Rodrigues, 43 Hawaii 195. Such evidence is admissible even in the jurisdictions that hold generally that such a plat or evidence is not admissible, when there is an issue of the suitability of the tract for subdivision purposes in the case. State Highway Commission v. Deal, *supra;* Forest Preserve Dist. v. Krol, 12 Ill. 2d 139, 145 N. E. 2d 599. There is both disagreement and diversity of approach in the authorities on this problem. However, much of the confusion can be resolved by pointing out that such evidence is inadmissible as speculative and conjectural when the only showing is that the property *could* be used for subdivision purposes. Where, on the other hand, as here, the use for

subdivision purposes is not merely speculative and not too remote to influence present market value, such evidence is admissible. See, 29A C. J. S., Eminent Domain, § 273 (2), p. 1197; Arkansas State Highway Commission v. O. & B., Inc., 227 Ark. 739, 301 S. W. 2d 5; Santa Clara County Flood Control & Water Conservation Dist. v. Freitas, 177 Cal. App. 2d 264, 2 Cal. Rptr. 129; Oakley v. State (Tex. Civ. App.), 346 S. W. 2d 943, 163 Tex. 463, 356 S. W. 2d 909, 95 A. L. R. 2d 1207; Buena Park School Dist. of Orange County v. Metrim Corp., 176 Cal. App. 2d 255, 1 Cal. Rptr. 250.

We now consider the problem of the competency of the valuation testimony of plaintiff's expert witnesses with reference to its use as a residential and recreational area. Again, this question overlaps the previous one discussed. Chase was an expert appraiser, had made a thorough inspection of the property, and testified in detail as to the various factors he took into consideration in valuing the property, both from the standpoint of the gravel deposits and of its use for recreational and subdivision purposes. It is stipulated there were no comparable sales. That being true, this witness used the "income approach." He computed the annual income from this use by assuming there would be 232 lots to be rented and applying a rental rate of $2 per front foot less an amount for "Losses and administration"; and then he applied a discount factor to this amount to obtain a present value of this income. The result he reached was not considered by him as a separate value of the property but as a factor that was taken into consideration in determining the present market value that he testified to was between $825,000 to $925,000. That capitalizing of an estimate of the net rents of a probable use of the property is an accepted method of valuation cannot be questioned. 27 Am. Jur. 2d, Eminent Domain, § 286, p. 87; 4 Nichols (3d Ed.), Eminent Domain, § 13.22, p. 418.

This testimony on behalf of the expert witness Chase came in without objection on the part of the defendant,

without any cross-examination of the witness as to foundation, and was not objected to until after this witness had been cross-examined. Whatever the rule may be in other jurisdictions, the rule in this state is that either lay or expert witnesses may be used to testify as to the value of a tract of land taken, or the value of the remainder thereof immediately before and immediately after the taking, if proper foundation is laid showing they have an acquaintance with the property and are informed as to the state of the market, *the weight and credibility of their testimony being for the jury.* Medelman v. Stanton-Pilger Drainage Dist., *supra;* Langdon v. Loup River Public Power Dist., *supra;* Wahlgren v. Loup River Public Power Dist., 139 Neb. 489, 297 N. W. 833. In the Medelman case we said: "What a witness considers in coming to his conclusion as to the value thereof can be brought out in cross-examination." It would seem, therefore, under the clear holdings in our cases, and there is no contention here that we should narrow it, that an expert witness once qualified may testify as to valuation, and that the weight and credibility of what the expert witness considers in coming to his conclusion as to value at the time of the taking, are matters for the jury to determine. Weight to be given to such expert testimony, assuming his proper qualifications and his examination of the property, is ordinarily a question for the jury. Jurors are not bound by the testimony of expert witnesses. Their evidence is to be weighed as that of all other witnesses. Langdon v. Loup River Public Power Dist., *spura;* Medelman v. Stanton-Pilger Drainage Dist., *supra;* McNaught v. New York Life Ins. Co., on rehearing, 143 Neb. 220, 12 N. W. 2d 108. We are aware of cases from other jurisdictions that vary from this holding, but the above holding is the law of the State of Nebraska and we see no reason for a departure therefrom. Our rule in condemnation cases in this state is consistent with that in other areas of litigation where it is well established that the data and reasoning upon which an expert

witness relies is admissible to the jury. And, as we have seen, the assumptions upon which Chase's valuation testimony is based, mainly, the probable and available use of the property for recreational and subdivision purposes, and its division into component units for that purpose, were submitted to the jury under competent evidence and furnish a basis for this testimony. We fully realize that there is a diversity of cases and confusion on this subject in the reported authorities. Many of these variations result from the application of different statutes and the application of different basic principles regarding the admission of expert testimony in condemnation cases. The cases, passing upon the question of whether the capitalization of income method may be applied by the multiplication of a unit rental value or sale price, follow three different patterns. There are cases holding that the multiplication unit method of capitalizing income may not be used at all. Some cases hold that it may be used but that the expert witness may not, on direct examination, testify as to the quantity and price per unit of the land or materials involved. And, third, some cases hold that the expert witness may not only use the multiplication method but he may also explain specifically how he used it by referring to the quantity and the price per unit and the data and evaluation methods employed. All courts agree, and of course the rule has been complied with here, that if the capitalization of income method is used by applying it to the multiplication of the different units of income, such a result cannot be taken as the value of the land but must be used only as a factor in evaluating the present market value of the land itself. See, Medelman v. Stanton-Pilger Drainage Dist., *supra;* Pieper v. City of Scottsbluff, *supra.*

Defendant complains in this case that various costs and expenses and other factors that should have been considered as a foundation for Chase's testimony were not considered by him. The essence of this complaint is that Chase failed to take into consideration the cost of the

development for recreational purposes and that, therefore, his capitalization of "income approach" was inadmissible. The difficulty of this argument is: First, that most of this testimony was brought out on cross-examination and there was no objection to the expert witness' direct testimony; and, second, and more important, the expert witness did testify as to some costs of development. The essence of the defendant's complaint is that there were more and other costs reasonably attributable and that they were not taken into consideration as the defendant developed on cross-examination. The difficulty of this argument is almost apparent. It would require the upsetting of every case in which it could be developed that there were some of the multiple and various elements in the cost of developing a subdivision that were not taken into consideration by the expert witness. Our rule, and the sensible rule, is that such matters go to the weight and credibility of an expert's testimony and not to its admissibility. This argument has the further difficulty that it would require this court to became a super expert and to lay down categorically what the different elements and principles were that must be considered by an expert appraiser in using the capitalization of "income approach." This holding would be akin to requiring a doctor to perform certain tests and to use certain equipment or machines, or to make other standards, purely technical in nature, as foundation for the admission of his testimony. Such a position is, of course, untenable. And we further point out that if such an "a priori" standard should be created then the application of the different factors involved would varv from case to case and that in many cases new and additional or different factors would probably be involved or be required. This would result in a guessing contest in the trial of every condemnation case as to the admissibility of an expert witness' capitalization income testimony, even though such expert witness was properly qualified. As we have said, the trial of a law suit should

not depend upon judicial speculation as an expert witness' credibility or on an expert witness' venture into judicial credulity.

As we have pointed out herein, an expert witness may consider the quantity of a mineral in place and its unit price as a factor in determining the market value of the land at the time of the taking. Pieper v. City of Scottsbluff, *supra;* United States v. Land in Dry Bed of Rosamond Lake, *supra;* State Highway Commission v. Nunes, *supra.* It is difficult to see any difference between the unit price of a prospective sale of minerals or gravel and the unit price of the prospective use of the units remaining in place. Can it be said in fact, much less as a matter of law, that there is any less prospective stability in the one than in the other? How, then, can it be said that the movement of the soil or minerals makes it more or less a capital expenditure than the same sale of the soil or minerals remaining in place? If unit price relates to value in one, it would seem that it must necessarily follow that it relates to value in the other. In 27 Am. Jur. 2d, Eminent Domain, § 286, p. 87, it is stated as follows: "Where such income is derived from the intrinsic nature of the property itself, and not from a business conducted on the property, the courts, as a general rule, accede to the view that income from property in the way of rents and profits is an element of consideration in arriving at the market value or measure of compensation to be paid. * * * The valuation of condemned property by capitalizing the net rents is said to be an accepted method of valuation." See, also, Pieper v. City of Scottsbluff, *supra,* and cases cited therein. We are unable to find an explanation of any such distinction as to the uses of unit prices in fixing valuation between these two types of available or prospective uses in the cases discussing this proposition.

Consequently, we hold that an expert witness, otherwise properly qualified, may be permitted to use and to testify concerning the different factors affecting valua-

tion which a well-informed buyer would use in arriving at the price which he would pay for the property at the time of the taking. We hold that where land taken by eminent domain has a reasonable prospective use for recreational and subdivision purposes, this circumstance may be considered so far as it may affect the market value of the land at the time of the taking, and that part of the realty cannot be separately valued for its prospective use for recreational and subdivision purposes as an item in addition to the market value of the land. We hold that capitalization of income of rentals from a reasonably prospective use of the property is an acceptable method of arriving at the value of the property as a factor in the determination of its present market value, and that an expert witness may testify as to the quantity and unit price resulting from such reasonably prospective use and sale of all or part of said property.

The defendant contends that the evidence does not sustain the verdict for the Gerhold Company. The Gerhold Company lease provided for a royalty of 15 cents per cubic yard for sand, sand gravel aggregate, and overburden material removed and sold, and 18 cents per cubic yard for road gravel. The defendant produced evidence of lower royalty rates for other leases in the area and expert testimony that the fair royalty rate for that area and for Cedar Island was from 12 cents to 13½ cents per cubic yard.

The Gerhold Company argues that the extent and quality of the gravel deposit under Cedar Island has been proven by the test wells which were drilled, and that the advantageous location of Cedar Island plus the fact that the supply of gravel in adjacent areas has been substantially exhausted, make its gravel lease on Cedar Island more valuable. The evidence shows that the cost of truck transportation is around 7 cents per cubic yard.

From our review of the record we conclude that the evidence presented a question for the jury and that it is

sufficient to sustain the verdict for the Gerhold Company.

The defendant also complains of instruction No. 12 and the form of verdict which was submitted to the jury. Instruction No. 12 advised the jury that its verdict concerning the taking of the leasehold interest "* * * will find for the plaintiff, Gerhold Company, A Corporation, and in assessing the amount of its recovery you will award to it such sum of money, if any, as you find it has proved by a preponderance of the evidence will be just compensation * * *." The verdict form followed the language of the instruction and contained a finding for the plaintiff and a blank for the amount of the recovery.

The defendant contends that the court should have permitted the jury to find for the defendant, and that the effect of the instruction and verdict form was to require the jury to award damages in some amount for the Gerhold Company.

The only issue in this case was the amount of damages, if any, that the landowner and lessee were entitled to receive from the defendant. Bushey v. French, 171 Neb. 809, 108 N. W. 2d 237, cited by the defendant, involved an issue of liability and is not in point. Instruction No. 12 contained the words "if any" and did not compel an award of damages for the Gerhold Company. We find no error in the instruction or in the form of the verdict.

The defendant complains that the Iske verdict is excessive. The plaintiff's expert witnesses testify to a range from $825,000 to $1,500,000. On the other hand, the defendant's expert witnesses testify to a range between $85,000 to $106,232. The jury verdict fell in between the two sets of conflicting expert testimony, being $510,150. The above situation is a frequent one in condemnation cases. Our court has often discussed the function of the jury in this kind of a situation. As we have pointed out, there was no error in the trial that could be asserted as properly related to an error in the

amount of the verdict. The weight and the credibility of the testimony of either lay or expert witnesses is for the jury. Expert opinion evidence, widely varying in this case, is to be considered and weighed by the triers of fact like any other testimony. The expert witnesses' testimony is purely advisory and is not binding on the triers of fact. The amount of damages sustained is peculiarly of a local nature and ordinarily is to be determined by the jury and this court will not ordinarily interfere with the verdict if it was based upon admissible testimony. When the evidence is conflicting the verdict of the jury will not be set aside unless it is clearly wrong. A landowner only has one day in court and he must recover all of his damages in this condemnation proceeding. Much of the testimony that the defendant now objects to as being incompetent was received in evidence without objection and the errors it now complains of were not specifically objected to. In this situation it ordinarily cannot complain of error with reference to an excessive verdict. The above rules of law are enunciated and promulgated in Medelman v. Stanton-Pilger Drainage Dist, *supra;* Kennedy v. Department of Roads & Irrigation, 150 Neb. 727, 35 N. W. 2d 781; Phillips Petroleum Co. v. City of Omaha, 171 Neb. 457, 106 N. W. 2d 727, 85 A. L. R. 2d 570; Connor v. State, 175 Neb. 140, 120 N. W. 2d 916; State v. Dillon, 175 Neb. 444, at pp. 452, 453, 122 N. W. 2d 223. We further point out that the defendant introduced like evidence to that it now complains of in this case as being objectionable because of an improper use of the capitalization of "income approach." It cannot now complain. A party may not successfully complain of the introduction of evidence of a like character to that which it subsequently introduced, even if it is developed on cross-examination. Johnson v. Airport Authority, 173 Neb. 801, 115 N. W. 2d 426; Tyrrell v. State, 173 Neb. 859, 115 N. W. 2d 459; Sump v. Omaha Public Power Dist., 168 Neb. 120, 95 N. W. 2d 209; Allen v. Massa-

chusetts Mutual Life Ins. Co., 149 Neb. 233, 30 N. W. 2d 885; 1 Wigmore on Evidence (3d Ed., 1940), § 18 (d) at 344; 5 C. J. S., Appeal and Error, § 1506C, p. 894; Mackie v. Hessell, 5 Mich. App. 559, 147 N. W. 2d 464.

We have examined the record and come to the conclusion that the verdict was not excessive. Among many other pertinent factors we note the following: The verdict of the jury was over $300,000 less than the minimum valuation by the plaintiff's expert witnesses. It is self-evident that it gave careful consideration to the weight and the credibility of plaintiff's expert testimony as it also did to the defendant's expert witnesses who placed a quite inadequate valuation of around $100,000 on the property. It was undisputed in the case that the whole island was underlaid with about 50 feet of the finest type of gravel; that it is the only land remaining close to the industrial part of Omaha that has large gravel deposits; that it is impervious to floods; that other gravel deposits south of Omaha have been depleted; that it is the only remaining site south of Omaha that is adaptable to industrial use requiring large volumes of high quality water; that it has accessible to it good highway, railroad, and river transportation; that this property is ideal for use for recreational lots and for subdivision purposes; that both parties introduced testimony that they had prospective use for recreational and subdivision purposes; and that such use was particularly valuable because of the development of a lake as a result of the gravel depletion. We note that the jury viewed the property and this has been given important significance in the determination of the excessiveness of a verdict in an eminent domain case. See, State v. Dillon, *supra*, and cases cited therein. Under these circumstances, and considering the applicable rules, this court cannot say that the verdict in this case was clearly wrong.

Other errors assigned by the defendant have been examined and have been found to be without merit.

On cross-appeal plaintiff Iske assigns as error the refusal to allow attorneys' and expert appraisers' fees under section 76-720, R. R. S. 1943. We sustain this contention. The evidence supporting this assertion was undisputed, and the defendant made no objection. No reason appears why such allowances should not have been made. While the statute says that the court "may" award such fees, it is clear that the word "may" may not be subverted to destroy the plain meaning and intent of the statute. There may, of course, be circumstances in which such an award should not be granted, but it is clear that the latitude permitted by the statute is directed primarily at the amount. See Pieper v. City of Scottsbluff, *supra.*

The judgments of the district court for plaintiffs Iske and Gerhold Company, a corporation, are affirmed. The order refusing the motion for the allowance of attorneys' and appraisers' fees is reversed and remanded.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

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

This case has been a difficult one to resolve. It has been before the court for many months and has received constant attention during that period. The opinion of White, C. J., now represents the thinking of a majority of the members of this court. I agree that the judgment obtained by the lessee Gerhold Company, a corporation, should be affirmed, but I respectfully dissent from that portion of the opinion which tends to affirm the judgment obtained by the plaintiff Iske.

The facts regarding the gravel bed found on plaintiff's property, Cedar Island, are adequately set forth in the majority opinion with the exception of the provisions contained in the Gerhold Company lease, the same being, in effect, a contract for the removal of the gravel on a royalty basis.

Evidence was received of the prevailing royalty rates paid to landowners for gravel by firms leasing properties

for the purpose of producing gravel. The plaintiff Gerhold Company, a corporation, held such a lease on Cedar Island, the island in question, providing for the payment of royalties considerably in excess of those found elsewhere in the area. At the time of the institution of this action, this company had not produced or sold any gravel from the Cedar Island site, but was engaged in preparations therefor. The Gerhold Company lease runs for 10 years, with an option for renewal for an additional 10 years. It provides for a payment of 15 cents per cubic yard for all sand, sand gravel aggregate, and overburden material removed and sold from the premises and for 18 cents per cubic yard for all road gravel removed and sold. It further provides that in the event the lessee fails to pump or excavate any materials from the leased premises for the period of 12 consecutive months, the lessor may terminate the lease and he may also terminate the lease if the lessee in any calendar year fails to produce sufficient sand and gravel to entitle the lessor to receive at least $750 in rental royalties. The lease contains no provision whatsoever for the creation of a lake as the result of any pumping activities in connection therewith.

Evidence was introduced by plaintiff showing that this site may have had possibilities as a recreation area, particularly upon any lake that might be left following completion of the gravel-mining operations. In this connection, plaintiff introduced an exhibit consisting of a plat overlaid on an aerial photograph of Cedar Island showing a perfectly formed lake and a subdivision of the area into lakefront and riverfront lots. There was also evidence of the value of such lots for rental or sale as observed on other nearby lake or riverfront areas.

Two expert witnesses testifying for plaintiff Iske fixed the market value of the island at the time of its taking at $825,000 to $925,000 and $1,500,000 respectively. They stated that they were unable to find and knew of no comparable areas which had been sold on the market in

recent years; that their opinions were based upon all attendant factors, including the quantity of gravel that could be recovered, the royalty rate provided in the Gerhold Company contract, the possibilities of developing the area, after the removal of the gravel, into a recreation area such as was revealed by the lake and 232 lots appearing in the plat designated as exhibit 16, the value of such lots for rental and sale purposes, the possibilities of use for industrial purposes, and all other surrounding factors. The evidence revealed that such recreation development could only be completed after the gravel-mining operations had been completed which would require a minimum period of 10 to 12 years although it would be possible to take advantage of or to partially develop the site for recreational purposes as the gravel mining progressed.

Expert witnesses produced by the defendant testified to numerous sites found in the general area of Cedar Island and Omaha which had been acquired by firms engaged in the mining or production of gravel on the open market. On the basis of such sales, they gave their opinions of the market value of Cedar Island at the time of its taking. These witnesses valued the property at $85,000, $90,000, and $106,232 respectively.

It is a general rule that a landowner, in an eminent domain action, is entitled to recover the value of his property for any purpose for which it is fitted or may be used in the immediate future. See, Sump v. Omaha Public Power Dist., 168 Neb. 120, 95 N. W. 2d 209; Lybarger v. State, 177 Neb. 35, 128 N. W. 2d 132. In this instance, it appears to be generally conceded that the most advantageous use to which Cedar Island could be put would be that of gravel production. It is contended that consideration should not be given to the development of recreational possibilities because that could not be done until after the gravel had been at least partially removed from the island.

Defendant urges that the trial court erred in permit-

ting the introduction of a plat purporting to show a theoretical lake created on Cedar Island and a subdivision of the remainder of the island into 232 waterfront lots, together with the possible sale or rental value of such lots. It is said that the development of the island after the removal of the gravel deposits for recreational purposes cannot be shown because such use was not so reasonably probable and so reasonably expected in the immediate future as to affect the market value of the land. Ordinarily any factor which affects the present market value of the property may be shown. See, 27 Am. Jur. 2d, Eminent Domain, § 280, p. 70; Pieper v. City of Scottsbluff, 176 Neb. 561, 126 N. W. 2d 865; Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168; Papke v. City of Omaha, 152 Neb. 491, 41 N. W. 2d 751.

As a general rule: "The uses which may be considered must be so reasonably probable as to have an effect on the present market value of the land; a purely imaginative or speculative value cannot be considered. There must be a possibility considerable enough to be a practical consideration and actually to influence prices. For example, although, when a tract taken by eminent domain is used as a farm, the owner is entitled to have its possible value for building purposes considered, the jury or other tribunal is not permitted to determine how it could best be divided into building lots, nor conjecture how fast they could be sold, nor at what price per lot. The fair market value of undeveloped land immediately before condemnation is not a speculative value based on an imaginary subdivision and sales in lots to many purchasers; it is the fair market value of the land as a whole in its then state according to the purpose or purposes to which it is best adapted and in accordance with its best and highest capabilities, and it is not proper for a jury to consider an undeveloped tract of land as though a subdivision thereon is an accomplished fact." 27 Am. Jur. 2d, Eminent Domain, § 280, p. 72.

"Evidence based on conjecture and speculation is inadmissible. The owner cannot base his estimate of value on the profits which he would expect to derive from a speculative enterprise; and it is improper on the issue of market value to admit evidence showing the number of building lots into which the tract could be divided, that a witness would be willing to buy lots if the land was subdivided, what such lots would be worth separately, or the value of the property based on the value of lots shown by a preliminary plat, where such lots did not exist, although such evidence is admissible on the issue of the suitability of the tract for subdivision purposes.

"On the other hand, where use for subdivision purposes is not merely speculative and too remote to influence present market value, evidence relative to the division of the property into residential lots and its net value for such purposes after deduction of improvement costs has been held admissible, and it has been held that evidence as to the number and value of lots in a going subdivision and their kind and character is admissible; however, the possible future value if subdivision were made may not be shown. Evidence of a subdivision made after the condemnor has made entry on the land but before the institution of the condemnation proceedings is inadmissible to establish the market value of the property." 29A C. J. S., Eminent Domain, § 273 (2), p. 1196.

As may be gathered from the foregoing, a division exists among the authorities on the question of admissibility of a plat of a *proposed* but nonexistent subdivision. Some authorities hold such a plat inadmissible for any purpose. Others admit it for the sole purpose of showing the susceptibility of the land *in its existing condition* to sudivision and its adaptability to commercial or residential use. See Commonwealth v. Evans (Ky. App.), 361 S. W. 2d 766. In the present case we do not have a situation such as is ordinarily encountered dealing with a tract of land immediately adjacent to a growing municipality

which is, *in its then or existing condition at the time of the taking,* adapted to platting and to commercial or residential use. Here we are dealing with a tract which it is conceded will be very materially altered by the removal of gravel before it can be platted. There is no way to ascertain its condition after the removal of the gravel or its adaptability to platting at that time. We are dealing, not with a *reality, but with an unknown and conjectural element.* The plat is not admissible in this case for any purpose.

Although the authorities diverge on the question of admissibility of a plat of a proposed subdivision, they are almost unanimous in holding that it is improper to show the value of lots in a prospective subdivision as an element to be considered in determining value.

In the case of E. M. Kerstetter, Inc. v. Commonwealth, 404 Pa. 168, 171 A. 2d 163, it was held: "Equally improper is evidence showing how many building lots the tract under consideration could be divided into, and what such lots would be worth separately." See, also, State Highway Commission v. Deal, 191 Or. 661, 233 P. 2d 242; Barnes v. Highway Commission, 250 N. C. 378, 109 S. E. 2d 219; Northern Ind. Pub. Serv. Co. v. McCoy, 239 Ind. 301, 157 N. E. 2d 181; Thornton v. City of Birmingham, 250 Ala. 651, 35 So. 2d 545, 7 A. L. R. 2d 773; Louisiana Ry. & Nav. Co. v. Baton Rouge Brickyard, 136 La. 833, 67 So. 922.

Further evidence of the prevalence of this rule may be found in the following recent decisions: City of Medina v. Cook (1966), 69 Wash. 2d 574, 418 P. 2d 1020. See, also, City of Corpus Christi v. Polasek (Tex. Civ. App. 1966), 404 S. W. 2d 826; State, by Lord v. Kohler (1964), 268 Minn. 77, 128 N. W. 2d 90; Arkansas State Highway Comm. v. Potts (1966), 240 Ark. 506, 401 S. W. 2d 3; Redondo Beach School Dist. v. Flodine (1957), 153 Cal. App. 2d 437, 314 P. 2d 581; Arkansas Louisiana Gas Co. v. Howard (1966), 240 Ark. 511, 400 S. W. 2d 488; Arkansas State Highway Comm. v. Watkins (1958), 229

Ark. 27, 313 S. W. 2d 86; Coral-Glade Co. v. Board of Public Instruction (Fla. App., 1960), 122 So. 2d 587; State Road Comm. v. Ferguson (1964), 148 W. Va. 742, 137 S. E. 2d 206; State v. Willey (Tex., 1962), 360 S. W. 2d 524. See, also. 5 Nichols (3d Ed.), Eminent Domain, § 18.11(2), pp. 159, 160, and 161.

The majority opinion states that the *recent* cases hold contrary to the propositions mentioned on admission of plats. The foregoing rules are still the rules in effect in a majority of the jurisdictions in this country and reference to those cited is convincing of the incorrectness of the statement made in the majority opinion. It will be noted that most of the cases cited are of very recent origin.

As a general rule, the capitalization of rents and profits derived solely from the intrinsic nature of the property and not from a business conducted thereon is a valid criterion of value. See, Annotation, 65 A. L. R. 455; Annotation, 134 A. L. R. 1125. It is also a general rule that *future* income from a use to which the property could be adapted, but for which it was never used, is too uncertain to be accepted. See, Annotation, 65 A. L. R. 464; Annotation, 16 A. L. R. 2d 1113. As heretofore pointed out, the quantity and value of minerals such as gravel may be shown. This is sometimes regarded as an exception to the foregoing rules, but is not such in fact. Income derived from a sale of gravel is not a rent or profit derived solely from the intrinsic nature of the property, but is rather income derived from a sale of a capital asset, that is of the property itself. How then are these rules applicable to the capitalization of rents from prospective lots which are not only yet to be platted but yet to be created? Obviously evidence in this regard is subject to exclusion under the rule that future income from a prospective use cannot be considered as a criterion of value.

This court has held that evidence of rentals received in the past is properly admissible as a criterion of value.

In the case of Graceland Park Cemetery Co. v. City of Omaha, 173 Neb. 608, 114 N. W. 2d 29, the court stated: "We point out that a capitalization of anticipated profits is not a proper method of fixing the value of property. Whether anticipated profits would actually be made ordinarily depends on so many contingencies that a verdict cannot be grounded on them. Experience teaches us that future paper profits are more often illusory than real." In direct contradiction of this statement, the majority opinion now holds that anticipated rents and profits from the rental or sale of recreation lots are properly admissible and a proper criterion of value.

It appears that even where a piece of property is readily and immediately available for subdivision purposes, it is not permissible to show the number of lots into which it could be subdivided and the values of such lots when separately sold. In the present instance, we are dealing with an island which, in its present condition as above cited, has some slight recreational possibilities and upon which additional recreational possibilities can possibly be developed. The evidence of the plat and subdivision introduced in this case by the plaintiff Iske *assumes* the creation of a perfectly formed lake *which is now nonexistent.* There is evidence in the record that the gravel-pumping operations *may* result in the creation of a lake on this island. There is *no evidence* that a lake of this particular size and type can or will result. On the contrary, there is evidence introduced by the defendant to the effect that the formation of such a lake would not be feasible. As a direct result of the removal of the gravel, the base would be destroyed. Attention is also called to the fact that the Gerhold Company contract does not require the construction of a lake of *any type* nor does it require that the gravel be removed *within any specific period of time.* The only binding provision in the contract is that it remove sufficient gravel each year so that the royalty payment to plaintiff Iske will amount to $750. Under this provision of the contract, it is con-

ceivable that the gravel may not be removed for a period of 25 to 50 years, if then, and the contract may be subject to forfeiture or abandonment. In fact, the contract itself appears somewhat speculative in that the amount of royalty that the Gerhold Company has agreed to pay is considerably higher than that paid anywhere else in the general area and it is possible that should the lessee find that he has priced himself out of the market, he may cease operations altogether.

In the recent case of Lybarger v. State, *supra*, it was stated: " 'The evidence as to the adaptability of property for certain uses must be limited to uses reasonably anticipated in the immediate future.

" 'The adaptability for uses which may be considered must be so reasonably probable and so reasonably expected in the immediate future as to affect the reasonable market value of the land at the time the land is taken or damaged.' " Can it be said, with due consideration to logic and common sense, that the creation of a recreational area such as is evidenced by the plat in this case is either "reasonably probable" or "reasonably expected in the immediate future?"

Whether or not a satisfactory lake would result from the gravel-pumping operations and the property could be satisfactorily subdivided is entirely without foundation, theoretical, and speculative as is also the value of such lots in the somewhat distant future, particularly in view of the fact that exhibits in evidence disclose there are a considerable number of such undeveloped lakes existing in the area. It would, therefore, appear that the present case is a much more exaggerated one than those to which the foregoing rules are ordinarily applied. I conclude that this evidence was not admissible and was not a factor which could be reasonably considered by an expert witness in arriving at an opinion as to the present value of the land in question. In this case both of plaintiff's expert witnesses testified that in arriving at their estimates of value, they considered, as a material

element of such value, the recreational features evidenced by the proposed subdivision and plat. Such evidence being inadmissible, it is apparent that there was not a proper foundation for the evidence of these witnesses. The opinion of an expert witness has no probative force unless the assumptions for it are shown to be true. Blobaum v. State, 179 Neb. 304, 137 N. W. 2d 855; Cover v. Platte Valley Public Power & Irr. Dist., 167 Neb. 788, 95 N. W. 2d 117; Pueppka v. Iowa Mut. Ins. Co., 165 Neb. 781, 87 N. W. 2d 410.

In an attempt to nail down the decision arrived at in the majority opinion, the following rule followed in a few jurisdictions is mentioned: "A party may not successfully complain of the introduction of evidence of a like character to that which it subsequently introduced, even if it is developed on cross-examination." I submit that this is entirely too broad a statement of the rule. Such a rule, so broadly interpreted, simply provides a ready vehicle for an appellate court to dispose of almost any case without regard to its merits and leads to unfairness and injustice. Were this rule to be literally interpreted, it would mean that in an eminent domain case after the plaintiff had rested, the defendant who also seeks to introduce evidence of the value of the property taken, would be deemed to have waived any error whatsoever found in plaintiff's evidence of value if he, the defendant, introduced evidence on a like subject. The rule has been altogether too broadly interpreted in a number of jurisdictions. 1 Wigmore on Evidence (3d Ed.), § 18, p. 344, states: "Another instance is the curing of an error of admission by the opponent's *subsequent use of evidence similar* to that already objected to (except where this was done merely in self-defense, to explain or rebut the original evidence)." It will be noted that Wigmore definitely qualifies the rule so that a litigant who has objected to improper evidence and whose objection has been overruled may still seek to comply with the order of the court and at the same time protect

himself by means of cross-examination and rebuttal evidence. This is still the general rule in this country where incompetent evidence is admitted over objection, and where it becomes expedient to rebut the same in order to avoid any unfair prejudice which might arise, resort may be had to the same type of objectionable evidence without waiving the original error. In re Estate of Cheney, 78 Neb. 274, 110 N. W. 731; See, also, Sayner v. Sholer, 77 N. M. 579, 425 P. 2d 743; Williams v. Dawidowicz, 209 Md. 77, 120 A. 2d 399; Standard Accident Ins. Co. v. Terrell, 180 F. 2d 1; State v. Kile, 29 N. M. 55, 218 P. 347; Smith v. State, 247 Ala. 354, 24 So. 2d 546; Hoel v. City of Los Angeles, 136 Cal. App. 2d 295, 288 P. 2d 989; Fred J. Brotherton, Inc. v. Kreielsheimer, 22 N. J. Super. 385, 92 A. 2d 57; Goodale v. Murray, 227 Iowa 843, 289 N. W. 450, 126 A. L. R. 1121; Sevener v. Northwest Tractor & Equipment Corp., 41 Wash. 2d 1, 247 P. 2d 237; Parker v. T. O. Sutton & Sons (Tex. Civ. App.), 384 S. W. 2d 433.

This judgment should be reversed and the cause remanded for a new trial insofar as plaintiff Iske's cause of action is concerned.

CARTER, J., dissenting.

The sole issue in this case is the reasonable market value of plaintiff's land at the time it was taken on August 26, 1963. It is my contention that certain evidence permitted by the trial court was inadmissible and so prejudicial as to require a new trial. I concur fully with the dissent of Newton, J., in this respect. His dissent is not only the law of this state, as the cases cited therein demonstrate, but it is reasonable and logical in its application to the peculiar facts of the case. I do not direct this dissent to the damages awarded to the Gerhold Company nor to plaintiff's claim of enhanced value because of the gravel deposits with which the land was underlaid. It is my contention that the evidence of the value of the property for recreational use after the gravel is removed is speculative, conjectural, imaginative,

and too remote, and consequently inadmissible.

I submit that the correct rule for determining the value of property taken by eminent domain is its reasonable market value at the time it is taken. Such reasonable market value includes its adaptability for some particular use which is reasonably anticipated in the immediate future. The adaptability for such use must be so reasonably probable and so reasonably expected in the immediate future as to affect the reasonable market value of the land at the time it is taken. Sump v. Omaha Public Power Dist., 168 Neb. 120, 95 N. W. 2d 209. I contend that the evidence of future use for recreational purposes is too remote in time and so speculative and conjectural in character as to make it inadmissible.

Plaintiff's land consists of 284 acres of land in and along the banks of the Platte River in Sarpy County. It includes Cedar Island which is about 1¼ miles long, containing 173 acres. This island is covered by scrub trees and brush. It is underlaid with a gravel bed approximately 50 feet in depth which has considerable commercial value. The remaining 111 acres was low riverbed land. It lay in the chute and the bed of the river. Cedar Island was subject to a gravel lease owned by the Gerhold Company. This lease was for a period of 10 years with an option to renew for a period of 10 years, and, at the end of the two 10-year leases, the lessee was to have the right to renegotiate a new lease. The lessee was given the exclusive right to pump and excavate gravel during the period of such leases. The evidence is that it would take a minimum of 12 years to remove the gravel deposits although the lessee could take up to 20 years to do so. Can it reasonably be said that a purchaser would be so influenced by the possibility of a recreational area that he would pay more than a half million dollars for the unmined gravel and the mere possibility that after 12 to 20 years a subdivision of residence lots on a nonexistent lake in a mined-out gravel pit would enhance its value? I think not.

In permitting this evidence, speculation reigns supreme, remoteness becomes telescopic nearness, and the opinions of the experts on land values tend only to give substance to unreality.

It must be presumed that this speculative, conjectural, and remote evidence contributed to the size of the verdict to the prejudice of the appellant. The trial court permitted a plat of nonexistent land, bordering a nonexistent lake, in an imagined recreational area, which could not approach reality for 12 to 20 years, if ever, to prove reasonable market value. I can find no case that will sustain the admission into evidence of such a plat. To thus convert a mined-out gravel pit into a modern recreational area by such a prophesy of the future has no standing as substantive evidence of the reasonable value of the land in 1963.

It must be borne in mind that the scheme of the recreational area testified to has no basis in fact, but is a mere possibility invented to increase the size of the verdict in this case. Can it be said that such a possible scheme after a period of 12 years is so reasonably probable and so reasonably anticipated in the immediate future as to influence its reasonable market value at the time of the taking? Can it reasonably be said that such a possible use after 20 years, the actual situation here, is so reasonably probable and so reasonably expected in the immediate future as to influence its reasonable market value? The asking of these questions points to the proper answers, to wit: An emphatic "NO."

Rules of evidence are established to insure the consideration of cases on the pertinent facts. They constitute a shield to protect against evidence that tends to prejudice a jury but which has no pertinency to the issues involved. But when such rules are given a theoretical application rather than a practical one, their purpose is thwarted and they become a sword rather than a shield. The majority opinion extends applicable rules much further than this court has even gone before by

unduly extending existing rules, by citing authorities from other states inconsistent with generally accepted rules, and by applying a theoretical construction of existing rules rather than a practical one. By this means, the majority opinion arrives at a result inconsistent with the long-established law of this state. Thus, under the guise of law, speculative, conjectural, and remote evidence is permitted to be considered by the jury and to authorize a verdict not based on the relevant and material facts. In this manner, the majority opinion stresses strained theories of the law, but gives little attention to their application to the hard, cold facts of the case. I submit that the verdict in this case can be sustained only on such approach. The gates have been swung open for the future for the admission of speculative and remote evidence and permit verdicts not based on the reasonable market value of the property at the time of taking.

The majority opinion gives lip service to the rule prohibiting speculative and remote evidence by the following quote: "However, much of the confusion can be resolved by pointing out that such evidence is inadmissible as speculative and conjectural when the only showing is that the property could be used for subdivision purposes." No statement could better fit the facts of this case. The opinion, however, disposes of the matter contrary thereto by the following conclusional statement which has no application to the facts of this case: "Where, on the other hand, as here, the use for subdivision purposes is not merely speculative and too remote to influence present market value, such evidence is admissible." Speculation, conjecture, and remoteness, as used in the rule, appear rather meaningless if it does not apply to the present case. The plan of development after the gravel has been excavated some 12 to 20 years in the future calls for the creation of a circular lake within the depleted gravel pit containing a central island connected to the outer portion of Cedar Island by a bridge to provide egress and ingress to and from 166 lakefront

lots and 66 riverfront lots, all of which is nothing more than pure speculation and conjecture. In no other way can a jury visualize a depleted gravel pit, after 20 years of gravel excavation, as the valuable residence area which the plaintiff and his witnesses prophesy. Such imagination approaches pure fantasy, and when given the semblance of reality by judicial ruling, necessarily misleads the jury and produces a verdict that is unrealistic and erroneous.

In addition to the foregoing, I submit that the verdict is not sustained by the evidence. One of plaintiff's two expert witnesses fixed the value at $1,500,000, and the other from $825,000 to $925,000. One of defendant's experts fixed the value of the land at $85,000, the second at $90,000, and the third at $106,232. The verdict of the jury was $510,150. It will be noted that no expert witness for either party valued the land within $300,000 of the jury verdict. In fact, there is no evidence of value by any witness within $300,000 of the verdict returned. The majority opinion makes the point that juries need not believe an expert witness; that their expert opinions are advisory only to the jury. Granting the correctness of this statement, what evidence remains other than the expert testimony to sustain this verdict? There is none other than that of the plaintiff who testified to the grandiose value of $2,000,000. The majority opinion, other than pointing out that the evidence of experts is advisory and not binding on the jury, does not point up the evidence that sustains this verdict. The opinion assumes that if a verdict falls within the minimum and maximum values fixed by experts, the evidence sustains the verdict no matter how unreasonable, imaginary, or illusory it may be. But this is not a rule of law, but rather, a legal cliché for sustaining a verdict when the competent evidence is in conflict and sufficient to sustain a verdict within the limits of the competent evidence. I submit that a verdict must be supported by competent evidence which is not the case here.

In my opinion the verdict is based on incompetent evidence. It is also erroneous in that it is not supported by evidence sufficient to sustain the amount of the verdict. I would reverse the judgment and remand the cause for a new trial.

BOSLAUGH, J., dissenting in part.

The expert witnesses called by the plaintiff Iske were allowed to testify as to value based upon the capitalization of income. A part of the income was to be derived from lots rented for recreational purposes.

At least one expert witness assumed that the property would be developed in accordance with a plan described by the witness Thompson. But there was no evidence to correlate the operations under the Gerhold Company lease with the development suggested by Thompson. The defendant produced evidence that the island could not be developed to conform to the Thompson plan during the production of sand and gravel. The result was that there was no adequate provision for the cost of development for recreational purposes, and a failure to consider a major cost involved in the production of the income. That part of the testimony which was based upon the capitalization of lot rentals should have been excluded.

FLORENCE D. DRAHOTA, EXECUTRIX OF THE ESTATE OF JAMES J. DRAHOTA, DECEASED, APPELLANT, V. VIOLA C. WIESER ET AL., APPELLEES.

157 N. W. 2d 857

Filed April 12, 1968. No. 36766.

1. **Evidence: Trial.** In determining the sufficiency of the evidence to sustain a verdict, 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. ———: ———. Opinion evidence is generally admissible where

it is necessary and advisable as an aid to the jury even though it may bear directly on the main issue.

3. ———: ———. Opinion evidence should be excluded whenever the point is reached at which the trier of fact is being told that which it is itself entirely equipped to determine.
4. **Trial.** The trial court is not required to give instructions in the precise language requested.
5. **Trial: Appeal and Error.** Alleged improper conduct of the trial judge in the presence of the jury will not be reviewed on appeal in the absence of a timely objection.

Appeal from the district court for Madison County: FAY H. POLLOCK, Judge. Affirmed.

James F. Brogan, for appellant.

Deutsch & Hagen, for appellees.

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

BOSLAUGH, J.

This is an action to recover damages for the wrongful death of James J. Drahota brought by the executrix of his estate against Viola C. Wieser, Harold Wieser, and Burt Ray, Jr. The action was dismissed as to Burt Ray, Jr., before trial. The jury returned a verdict in favor of the defendants Wieser. The plaintiff's motion for new trial was overruled and she has appealed.

The plaintiff challenges the sufficiency of the evidence to sustain the verdict. In determining this question the evidence must be considered in the light most favorable to the defendants, every controverted fact must be resolved in their favor, and they are entitled to the benefit of every inference that can reasonably be deduced from the evidence. Thompsen v. Miller, 177 Neb. 530, 129 N. W. 2d 498.

The accident in which the plaintiff's decedent was injured occurred at about 1 p. m. on October 13, 1962, on U. S. Highway No. 81, approximately 9 miles south of Norfolk, Nebraska. The highway at this point is surfaced with black-top approximately 24 feet wide. The

highway is straight but slopes down gradually to the north from a point more than one-half mile south of where the accident occurred. The weather was clear and the road was dry.

The deceased was the deputy sheriff of Madison County, Nebraska, and was riding as a passenger in his 1962 Ford automobile which was being operated by the sheriff, Burt Ray, Jr. The sheriff and the deceased were returning to Madison from Norfolk and had passed a vehicle which had turned into an orchard located west of the highway. The sheriff decided to question the driver of this vehicle and was in the process of making a "U" turn when the accident occurred.

The sheriff testified that in making the "U" turn he drove off the black-top to a point near the west fence line, then turned to the left, and stopped headed east about 5 or 6 feet west of the black-top. He looked to the north and the south, saw no vehicle approaching, and then started to cross the road. The deceased shouted, " 'Stop' " or " 'Hold it.' " The sheriff stopped the automobile, which was then on the black-top headed slightly northeast. He looked to the north, then looked to the south where all he could see was a shadow, and the impact occurred.

The defendant Viola Wieser testified that she was driving their 1962 Ford automobile north on U. S. Highway No. 81 at around 50 to 55 miles per hour; that she saw the Drahota automobile off to the west; that it came "out of the ditch and turned right in front" of her; that it did not stop at the west edge of the highway before entering the highway; that it occupied the entire northbound lane; and that she applied her brakes and attempted to stop.

The front of the Wieser automobile collided with the right side of the Drahota automobile near the center of the northbound lane. The Drahota automobile traveled to the northeast and collided with a power pole approximately 69 feet from the point of impact. The Wieser

automobile stopped on the edge of the highway, facing northeast, approximately 17 feet north of the point of impact. The Wieser automobile left 65 feet of skid marks leading up to the point of impact.

The jury could find from this evidence that the accident was caused by the negligence of the sheriff in driving the Drahota automobile onto the black-top in front of Mrs. Wieser without any warning, and that she was not negligent in failing to stop or turn aside in time to avoid the accident.

The plaintiff complains that the jury disregarded a statement made by Mrs. Wieser while in the hospital to the effect that when she first saw the Drahota vehicle it was stopped in the road in front of her. The statement, at best, only presented a question for the jury. Whether Mrs. Wieser had ample time in which to slow down or stop was a question of fact to be resolved by the jury. The evidence, when considered in the light most favorable to the defendants, is sufficient to sustain the verdict.

The defendants produced an expert witness, Professor David I. Cook, a graduate in mechanical engineering, who testified, over objection, that in his opinion the Drahota vehicle was moving at the time of the impact. The plaintiff argues that this was error because the witness was allowed to express an opinion concerning the ultimate fact at issue.

The general rule is that opinion evidence is admissible where it is necessary and advisable as an aid to the jury. McNaught v. New York Life Ins. Co., on rehearing, 143 Neb. 220, 12 N. W. 2d 108. Opinion evidence which may be of aid to the jury may be admitted even though it bears directly on the main issue. Such evidence should be excluded whenever the point is reached at which the trier of fact is being told that which it is itself entirely equipped to determine. Sears v. Mid-City Motors, Inc., on rehearing, 179 Neb. 100, 136 N. W. 2d 428.

The expert testimony related to what effect forward movement, or lack of forward movement, of the Drahota

automobile at the time of impact would have upon the direction taken by the vehicles following the impact, the damage they would sustain, and the skid marks they would make upon the highway. These were matters relating to motor vehicle dynamics which were within the competency of the witness and not matters presumed to be within the knowledge of the average juror. We have previously held that opinion evidence as to the character of contact of vehicles and results following the contact is admissible. Caves v. Barnes, 178 Neb. 103, 132 N. W. 2d 310. It was within the discretion of the trial court to receive the testimony of Professor Cook in this case.

The plaintiff requested an instruction concerning reasonable lookout which was refused. An instruction given by the trial court on its own motion stated the rule correctly but in slightly different language. This was permissible since the trial court is not required to give an instruction in the precise language requested. Eden v. Klaas, 166 Neb. 354, 89 N. W. 2d 74.

The trial court also instructed on the sudden emergency doctrine and reckless driving. The sudden emergency doctrine was applicable if the jury believed the testimony of Mrs. Wieser. The instruction concerning reckless driving was properly limited to the defendant Ray because there were no allegations or proof that Mrs. Wieser drove in such a manner as to indicate an indifferent or wanton disregard for the safety of others.

The last assignment of error concerns an admonition by the trial court to the sheriff during the cross-examination of Professor Cook. The trial court, on its own motion, directed the sheriff to cease any expression of approval or disapproval of the testimony being given. The plaintiff argues that the effect of the admonition was to lessen the credibility and effectiveness of the testimony of the sheriff.

The plaintiff did not move for a mistrial and made no other objection to the action of the court until the mo-

tion for new trial. This precludes consideration of the assignment at this time. Chicago Lumber Co. v. Gibson, 179 Neb. 461, 138 N. W. 2d 832.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF ANDY MOSS, DECEASED.
DONLEY E. MOSS, APPELLANT, V. MILDRED EATON ET AL., APPELLEES.
157 N. W. 2d 883

Filed April 12, 1968. No. 36789.

1. **Wills: Executors and Administrators.** A person nominated in a will as executor is not "legally competent" to act in that capacity, where his duties would require him to prosecute on behalf of adversary litigants, a suit which he would at the same time defend as an individual.
2. ———: ———. Where there exists at the time of the hearing on appointment of executor, a conflict of interest of a nature sufficiently adverse or antagonistic that the exercise of proper judicial discretion would require the immediate removal of an executor if he were appointed, the named executor is not legally competent under section 30-302, R. R. S. 1943, and should not be appointed.
3. ———: ———. There must be a measure of judicial discretion in determining whether a particular conflict of interest is sufficiently serious, adverse, or antagonistic to prevent appointment or compel removal of an executor.

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

Van Steenberg, Winner & Wood, for appellant.

Deutsch & Hagen, for appellees.

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

MCCOWN, J.

Donley E. Moss appealed from an order of the county court which sustained objections to his appointment as

executor of the will of his father, and appointed instead an administrator with the will annexed. The district court affirmed on the ground that Donley E. Moss was not legally competent to act as executor.

The decedent, Andy Moss, died June 9, 1966. His will, executed September 25, 1963, nominated and appointed his son, Donley E. Moss, as executor. Objections to the appointment of Donley E. Moss as executor were filed by Mildred Eaton and Irene McCartney, his two sisters, who were equal beneficiaries with him of the residue of the property under the terms of the will. The will was admitted to probate, and thereafter the county court entered its order finding that Donley E. Moss was not legally competent to act as executor, and appointed James W. Rooney as administrator with the will annexed. This was the order which was appealed to the district court.

Thereafter James W. Rooney was appointed special administrator and filed suit in the district court on behalf of the estate against Donley E. Moss for an accounting. The grounds for denying appointment to Donley E. Moss and the grounds for suit by the special administrator centered around a business enterprise started by Donley E. Moss with his father in 1956. It was known as Moss Livestock and also as Moss Cattle Company. The deceased father had contributed substantial sums of cash at various times. The assets of the business were in the possession and control of Donley E. Moss, and the business continued to be operated by him after his father's death. The objectors asserted that it was a partnership and that they had been unable to secure a comprehensive accounting of the business and of the interest of the deceased in it. Donley E. Moss denied that a partnership existed, but admitted that he was indebted to the estate, and would make a detailed accounting if appointed executor. The evidence indicated varying and undetermined amounts as the value of the decedent's interest in the business enterprise, or the amount of the

indebtedness of Donley E. Moss, as the case might be. He testified in the district court that he could not tell from his own records exactly what he owed his father. The evidence also established that a dispute and conflict existed as to the amount or amounts due to the estate and that extensive efforts to negotiate the dispute or settle the conflict had failed, and that antagonism had resulted between the beneficiaries of the estate. If Donley E. Moss were appointed executor, he would, of necessity, be required to pit the interests of the estate, which he would represent as a fiduciary, against his own individual interests in a directly adversary confrontation.

It is the appellant's position that section 30-302, R. R. S. 1943, makes it mandatory that a named executor be appointed unless he is expressly disqualified by statute, and that he is "legally competent" within the meaning of that section.

The appellant relies primarily on the case of In re Estate of Haeffele, 145 Neb. 809, 18 N. W. 2d 228, and particularly on the following language in that case: "Under the provisions of section 30-302, R. S. 1943, the court is under mandatory duty to appoint the person or persons named by the deceased as executor or executors of his estate when the will is proved and allowed to probate, unless such person or persons named are expressly disqualified by statute, or are, for good cause shown, not legally competent within the provisions thereof."

In that case property was disposed of in the will of a husband and also in the will of his wife. The husband predeceased his wife by some years and her estate was being probated. Under the provisions of the two wills, the rights of the named executor and also the wife's estate and some of its beneficiaries would be different depending on whether the interest received by the wife from her husband was a fee title or only a life estate. The named executor had not taken any action to assert a position adverse to the best interests of the wife's estate or in conflict with his duties as executor. This court

said: "That the named executor is interested in the estate and this his interests may become hostile to that of the others interested therein as legatees, devisees or otherwise does not necessarily render him legally incompetent."

The Haeffele case expressly acknowledged the rule of In re Estate of Blochowitz, 124 Neb. 110, 245 N. W. 440. There a special administrator had sued the named executor and two other brothers for an accounting, contending that they claimed, as their own, personal property belonging to the estate. It was specifically held that a person nominated in a will as executor is not "legally competent" to act in that capacity, where his duties would require him to prosecute on behalf of adversary litigants, a suit which he would at the same time defend as an individual. This court said: "The legislature wisely left the court free to interpret those words and to exercise a proper judicial discretion on the issue of competency under the circumstances of each particular case."

The Blochowitz case is controlling here. The only plausible ground for differentiation would be that here the suit by the special administrator for an accounting against Donley E. Moss was filed after his appointment as executor had been denied in the probate court. We do not think the rationale of the Blochowitz case is limited to a situation in which a suit is actually pending against an individual named as executor at the time of hearing on appointment.

Where a court is held or conceded to be invested with power or discretion to refuse an appointment on the ground of an adverse interest or position, the question is whether the interest or position of the nominee is so adverse to the interests of the estate or the beneficiaries thereof as to warrant or require the refusal of the appointment. See Annotation, 18 A. L. R. 2d 633, "Adverse interest or position as disqualification for appointment as personal representative." An analysis of the numerous

cases on the subject establishes that the mere existence of an adverse interest or position, or the mere fact that an executor is either a creditor or debtor of the estate, is not, in and of itself, a ground for disqualification. The law requires deference be given to the confidence a testator has placed in a particular person. The law likewise recognizes the fiduciary nature of the executor's position and the obligations which arise from that relationship. The problem of whether a personal interest is of a nature sufficiently adverse or antagonistic to be deemed a disqualification can only be answered with reference to the nature or extent of such interest, the relationship of the parties, or other circumstances involved in the particular situation. The necessity for an accounting, the fact that an interest is disputed or contested, or in litigation, have all been considered as important elements in making such a determination.

We hold that where there exists at the time of the hearing on appointment of executor, a conflict of interest of a nature sufficiently adverse or antagonistic that the exercise of proper judicial discretion would require the immediate removal of an executor if he were appointed, the named executor is not legally competent under section 30-302, R. R. S. 1943, and should not be appointed.

The result here can be supported not only by the Blochowitz rule defining legal incompetency to include such a serious conflict of interest, but can also be supported on the theory that the particular conflict of interest is a sufficient and compelling ground for immediate removal and it would be a vain act to appoint solely in order to remove. See, In re Estate of Keske, 18 Wis. 2d 47, 117 N. W. 2d 575; In re Estate of Young, 4 Ohio App. 2d 315, 212 N. E. 2d 612. As to removal, see In re Estate of Marconnit, 119 Neb. 73, 227 N. W. 147.

Section 30-302, R. R. S. 1943, uses mandatory language in dealing with appointment of executors, and section 30-310, R. R. S. 1943, uses permissive language in

dealing with the removal of executors. They are separate statutes. However, they are obviously applicable in chronological order to the qualification or disqualification of executors. To hold that they are completely unrelated would lead to the absurdity that a court might be required to appoint an executor who should be immediately removed. Such an approach glorifies form at the expense of substance.

There must be a measure of judicial discretion in determining whether a particular conflict of interest is sufficiently serious, adverse, or antagonistic to prevent appointment or compel removal of an executor. We find no abuse of discretion here.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. JERRY J. TOMKA, APPELLEE, V. THEODORE J. "TED" JANING, APPELLANT.

158 N. W. 2d 213

Filed April 12, 1968. No. 36794.

1. **Elections.** It is unlawful for a candidate for public office, as compensation for a vote or votes or the promise of a vote or votes, with the intention to promote his election, to offer to pay out, give, contribute, or expend money or thing of value.
2. **Sheriffs and Constables.** Mileage fees accruing to a deputy sheriff by reason of necessary travel in his own automobile in connection with his official duties are the property of such deputy and not of his principal.
3. **Sheriffs and Constables: Public Funds.** Funds received by a sheriff through contributions from or assessments made against employees of his office are not county funds and the county has no interest therein.
4. ———: ———. Such funds not having been derived from the county cannot be "returned" to the county.
5. **Public Officers and Employees.** Assessments made against public employees as a necessary adjunct to their employment are in violation of public policy and unlawful.
6. **Elections.** One who advocates the abolition of corrupt prac-

tices cannot be deemed to be offering the pecuniary benefits derived from such practices to the public.

7. **Sheriffs and Constables.** It is the duty of a sheriff to supply the general necessaries of life to inmates of the county jail and he may make other items available when deemd advisable.
8. ———. In performing such duties, any profit derived therefrom is the property of the county.
9. **Public Officers and Employees.** The public officer must perform all the duties of his office for the compensation allowed by law and if none is authorized, the services are gratuitous.
10. **Public Officers and Employees: Public Funds.** Even in the absence of statute, public policy and sound morals forbid a public officer from receiving compensation other than the salary prescribed by law. When additional pay or perquisites are accepted by a public officer for performance of duties germane to his office, a taxpayer has a right to insist that the funds wrongfully received shall be returned to the public treasury.
11. **Elections.** Public policy requires that a candidate for office who condemns corrupt practices on the part of his predecessor in the absence of clear and convincing evidence to the contrary should not have his statements so narrowly interpreted as to require a finding that he is advocating a continuance of such practices.

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

Viren, Emmert & Epstein, for appellant.

McGowan & Troia, for appellee.

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

NEWTON, J.

This is an action in the nature of quo warranto brought by relator Jerry J. Tomka to test the right of respondent Theodore J. "Ted" Janing to hold or retain the office of sheriff of Douglas County, Nebraska. Respondent opposed the then incumbent of the office, Patrick E. Corrigan, in the general election held on November 8, 1966, received a majority of the votes cast for such office, was certified to be the duly elected sheriff of the county, qualified therefor, and has been the acting sheriff since

the commencement of the term for which he was elected. The trial court found for the relator; declared the election of respondent void and the office of sheriff vacant; and ordered that respondent be ousted and excluded from the office of sheriff. Respondent has appealed.

Relator contends that in the 1966 election campaign, respondent violated section 32-1101, R. R. S. 1943, in that he offered to pay, contribute, or expend money, or thing of value as compensation for votes with the intention to promote his election. Specifically, complaint is made regarding the content of certain public addresses made by respondent, handbills circulated, and an open letter printed in the Omaha World-Herald.

Respondent openly condemned certain practices of his opponent, sheriff Corrigan, connected with the operation of the sheriff's office. The sheriff operated a "jail concession" or "candy store operation." Such things as confections, playing cards, toothpaste, etc., were stocked at the sheriff's expense and sold to jail inmates. The concession was operated on county property, by county employees working in the sheriff's office. All profits were retained by the sheriff. Of the 10 cents per mile lawfully allowed deputy sheriffs as "mileage," sheriff Corrigan retained, or required his deputies to pay over to him, 3 cents. A fund, designated as a "flower fund" was maintained to which all employees of the sheriff's office contributed. Law enforcement officers were assessed $5 per month and civilian employees, $3 per month. This appears to have been regarded as a campaign fund. In a television appearance, respondent referred to a card which set out the mileage and mileage fees attributed to the sheriff's office, the estimated income from the jail concession, and the estimated amount collected for the "flower fund" over the 12-year period of sheriff Corrigan's incumbency.

Remarks attributed to respondent or found in his campaign literature and newspaper items consist of the following:

"Save taxpayers money by returning all profits the Sheriff now keeps to the general fund."

"Work for legislation that will abolish the 'gravy train' in the Sheriff's office."

"Another area in which Mr. Janing has pledged change is that of the additional income the Sheriff receives from jail concessions and mileage fees. * * * He's said that he will 'work for legislation that will prevent this continuing in the future. And, until such legislation passes there will be a full and true accounting, and the County, not the Sheriff, will receive all the gains.' "

References to "flower fund" and jail concession were followed by: "Do you agree with your opponent, Theodore 'Ted' Janing, and his avowed promise to the voters of Douglas County, that not one cent of these gains and profits will be retained by him? * * *

"Your opponent has given his avowed promise that all extra funds will be deposited in the Douglas County treasury and used solely for its needs."

" 'I pledge myself to return all extra and hidden income to the County Treasury, * * * I will work for my salary alone.' "

" '* * * large, shocking profits and special gains were pocketed by our Sheriff, * * *.' "

"* * * 'flower fund' has added more than 50 thousand dollars to his income and has been used 'mostly for election campaigns.' Each Sheriff's office employe (sic) must contribute * * *."

It is estimated that the sheriff had "a 'secret income' of 10 to 15 thousand dollars above his * * * annual salary."

The foregoing excerpts of statements attributable to respondent were intended to and did indicate that the three means adopted by sheriff Corrigan to secure additional income were improper and should be halted.

Regarding mileage, it was stipulated by the parties that where mileage was incurred in connection with the duties of the deputy sheriffs, they, in all instances, made

use of their own automobiles. Section 23-1112, R. R. S. 1943, provides that: "When it is necessary for any county officer or his deputy or assistants, except any county sheriff or his deputy, to travel on business of the county, he shall be allowed mileage * * *." Section 33-117, R. S. Supp., 1965, provides: "(1) The several sheriffs shall charge and collect * * * traveling expenses for each mile actually and necessarily traveled within or without their several counties in their official duties, ten cents; * * *." Deputies, excepting only in matters involving discretion, are vested with the same authority as the sheriff. See, 80 C. J. S., Sheriffs and Constables, § 37, p. 206; 47 Am. Jur., Sheriffs, Police, and Constables, § 154, p. 929. The foregoing statute providing for mileage allowance for a sheriff does not mention deputies, but in view of the general authority vested in such deputies, it is apparent that a deputy has the same lawful authority to collect the mileage provided by law where the deputy has himself performed the travel involved in connection with his official duties and made use of his own automobile as does the sheriff. The mileage fees earned by the deputy traveling in his own conveyance are the property of the deputy and not of the sheriff. The sheriff could not retain these fees as a matter of right. He did so either by virtue of voluntary contributions on the part of the deputies or by unlawful assessments levied against them. Insofar as such mileage fees of the deputies are concerned, not being the property of the sheriff, they cannot lawfully be disposed of by him or returned to the county and, indeed, many of these fees being incurred in civil actions and paid by private individuals were never derived from the county in the first instance. Having been received from the deputies, not the county, they were not subject to a *return* to the county. In regard to these fees, it is evident that respondent could not, if elected sheriff, give away something that was not his to give and as hereinafter mentioned, his statements are not subject to such interpretation.

Regarding the "flower fund," no portion of this fund was derived from the county either directly or indirectly and, consequently, could not be *returned* to the county. One can "give back," "turn back," or "return" something only by a redelivery to the party from whom it was received. Respondent's statements that he would return "all profits," "all extra and hidden income," or "extra funds" in the absence of a strained, unusual, and inaccurate interpretation of the word "return," can scarcely be interpreted to mean that respondent was planning to give these funds to the county.

The mileage assessments and contributions to the "flower fund" represent activities which are forbidden under the federal Hatch Act and by statute in many of the states, but in Nebraska that may or may not be unlawful. If they represent voluntary donations by employees, they are not subject to criticism, but if they represent sums extorted from employees as a prerequisite to holding their jobs, it would be deemed unlawful as such acts are contrary to public policy. The evidence is not conclusive on this point. In any event, these were private funds of the individuals concerned as distinguished from public funds and the county had no interest in or claim to them.

To interpret the statements of respondent in regard to mileage fees and the "flower fund" as evidencing an intent to return such funds to the county treasury can only be arrived at if respondent's statements that he would " 'work for legislation that will prevent this continuing in the future' " and to "abolish the 'gravy train' " are completely ignored. These statements connote, and their plain meaning evidences, an intention on his part not only to seek legislation to render such activities illegal in the future, but also to abolish such funds and not to continue them for the benefit of the county, the taxpayer, or anyone else. Considering respondent's statements as a whole, rather than taking certain phrases out of context, makes it clear that it was his intention to

put a stop to these practices and to do away completely with the mileage and "flower fund" collections.

The "jail concession" or "candy store," and the profits derived from its operation, present a different picture. This was an operation which represented a definite accommodation to the inmates of the county jail and a convenience to the sheriff and his employees in that it provided a simple and time-saving method of supplying the wants or needs of the inmates for many articles. This proposition clearly deals with a "profit" in the common, ordinary, and accepted meaning of the word. It is obvious that respondent felt that such profits did or should belong to the county and his statements regarding a return of profits and extra funds or income, were applicable. He promised the voters that he would turn over such income to the county and "work for my salary alone."

Whether or not such promise represents a violation of section 32-1101, R. R. S. 1943, necessarily depends on whether he was promising to return to the county treasurer something to which the county was not entitled. If these funds belonged to the county, he was simply agreeing to perform his legal duty and was not promising the taxpayers anything to which they were not already entitled. On the other hand, if these were not county funds, he was clearly in violation of the statute.

Could the concession profits be legally retained by the sheriff or was he required to account for them to the county? The inventory or merchandise was purchased with the sheriff's personal funds. The business was operated on county property in space for which the county provided all the utilities such as heat, light, janitor service, etc. It was operated by persons employed and paid by the county. It was intended to serve the inmates of the county jail who were under the direct charge of the sheriff and it was so directly connected with the sheriff's office that no one else could have operated it without the cooperation and consent of the sheriff. It

was a service rendered in the performance of his duties. It was as much the duty of the sheriff to provide the other necessaries of life as it was to feed the inmates and as a practical matter, it was his privilege to make other items available, at the inmates' expense, when deemed advisable.

The general rules applicable to this situation may be found in 67 C. J. S., Officers, § 88, p. 325: "Where the duties of an officer are increased by the addition of other duties germane to the office without provision for compensation, the officer must perform such duties without extra compensation. So, an officer is not entitled to extra compensation because additional duties pertaining to the office have been assumed by him or imposed on him by the exigencies of the office. Services required of officers by law for which they are not specifically paid must be considered compensated by the fees allowed for other services.

"On the other hand, an officer is not obliged, because his office is salaried, to perform all manner of public service without additional compensation, and for services performed by request, not part of the duties of his office, and which could have been as appropriately performed by any other person, he may recover a proper remuneration. In this connection, although service not required by the law cannot be classed as official duties, nevertheless public policy requires that courts should not favor nice distinctions in order to declare certain acts of public officers extraofficial."

In Ehlers v. Gallagher, 147 Neb. 97, 22 N. W. 2d 396, this court said: "It is well settled in this state that an officer can charge only such fees for the performance of services as are allowed by law, and that services performed by an officer for which the statute does not expressly authorize a charge must be performed gratuitously." In Johnson v. Johnson, 141 Neb. 239, 3 N. W. 2d 414, it was stated that: "In Nebraska a public officer must perform all the duties of his office for the com-

pensation allowed by law and if none is authorized the services are gratuitous." In Neisius v. Henry, 142 Neb. 29, 5 N. W. 2d 291, affirmed in 143 Neb. 273, 9 N. W. 2d 163, the court held: "Even in the absence of statute, public policy and sound morals forbid a public officer from receiving compensation other than the salary prescribed by law. When additional pay or perquisities are accepted by a public officer for performance of duties germane to his office, a taxpayer has a right to insist that the funds wrongfully received shall be returned to the public treasury."

The service rendered does not appear to have been performed "by request." The operation of the concession was not a duty imposed by law on the sheriff, but making provision for the reasonable or necessary wants of the inmates of the jail is an official duty of the sheriff and the operation of the concession was simply a convenient means of performing such duty and of supplying other desired but harmless articles. We must necessarily conclude that the sheriff is not entitled to any income, other than the salary and fees provided by law, for the performance of duties directly connected with the operation of his office, required by the inherent nature of his office, and with which he is charged under the law. The concession profits were the property of the county for which it was entitled to an accounting. This being true, there was no violation in regard to the promise to account to the county for such funds.

This is an unusual case and differs materially from the ordinary action brought under the Corrupt Practices Act. Ordinarily offers of money or property made to the electorate are simple and direct, having but one clear purpose, namely the election of the offeror. It is contended that this is true in the present instance, but obviously this is not correct. Respondent was no doubt interested in his own election, but what was his purpose in pointing out the acts of his opponent, the then incumbent of the office, which respondent deemed to be corrupt

and unlawful? Was he seeking to bribe the electorate or was he seeking to convince the electorate of the corruptness of his opponent? If the first, he was acting unlawfully. If the second, he was not only acting lawfully, but in the best interest of the public and in accord with morality and good conscience. Common sense and practicality would indicate that it was the second course he was seeking to pursue. It is common knowledge that the electorate almost invariably denounces corruption and, if convinced of its existence, respondent's election was assured.

As heretofore pointed out, many jurisdictions have denominated the type of practices criticized by respondent as corrupt and unlawful. Even in the absence of statute, sound morals forbid encouraging them, and by the same token, public policy requires that a candidate for office who condemns these practices, in the absence of clear and convincing evidence to the contrary, should not have his statements so narrowly interpreted as to require a finding that he is advocating a continuance of such practices.

The judgment of the trial court is reversed and the cause is dismissed.

REVERSED AND DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. DELBERT BARNES, APPELLANT.

157 N. W. 2d 879

Filed April 12, 1968. No. 36801.

Evidence: Trial. Conflicting opinion testimony of expert witnesses ordinarily raises a question of fact.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Hal W. Bauer, for appellant.

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

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

SMITH, J.

On a finding of sexual psychopathy defendant was committed by the district court to Lincoln State Hospital. After a hospitalization of nearly 11 years he petitioned in this proceeding for a writ of habeas corpus. The district court denied relief, and defendant has appealed. The issue is whether his fitness for parole or discharge has been established as a matter of law.

The age of defendant was 61 in March 1956, when he joined in an application for examination under the sexual psychopath law. The joinder was precipitated by two complaints and his desire for medical treatment. Defendant related a history of deviate sexual behavior in indiscriminately fondling girls under age 14. He filed an affidavit concluding as follows: "* * * affiant has for a number of years and particularly since 1939 followed a continuous and habitual course of * * * abnormal sexual behavior * * * affiant lacks the power to control his sexual impulses, and * * * his desires are uncontrolled and uncontrollable."

Two physicians having found defendant to be a sexual psychopath, the court entered the commitment order on April 23, 1956. A physician examining defendant at the hospital that day diagnosed "sociopathic personality disturbance, sexual deviation." Four days later Dr. F. M. Swartwood, a general practitioner, reported in part as follows: "*Prognosis:* Guarded. *Recommendations for treatment:* Continued hospitalization with general medical care * * * and discharge as soon as the court will allow it." In June 1959, the hospital superintendent, Dr. F. L. Spradling, recommended that the district court discharge defendant. No action was taken. In May 1960, the hospital superintendent, Dr. Richard W. Gray, filed an

application stating that defendant was a fit subject for discharge. The court denied the application. In January 1962, Dr. Gray filed another application for discharge of defendant. It was denied. On February 9, 1965, defendant was seen in staff conference which was noted in part as follows:

"The patient * * * lives in an open ward building for Men and has full ground privileges. * * * Evidence of insight has not been profound. The patient tends to be somewhat grandiose. * * * his IQ in the past has been about 130. * * * The patient was previously staffed on May 22, 1956 at which time the diagnosis of sociopathic personality disturbance, sexual deviation was continued; prognosis was considered poor; recommendation—institutional care was advised. The patient had psychiatric testing in May of 1956, January of 1962, December of 1963. * * * It is felt, as of now, no additional recommendations for discharge are advisable."

Dr. Edwin A. Coats, superintendent of the hospital since January 1965, examined defendant at the staff conference on February 9. He testified that he was not recommending release and that he had not received a contrary opinion of any psychiatrist.

Dr. Kenneth O. Hubble, a general practitioner and resident in psychiatry at the hospital in 1967, made an interim psychiatric reevaluation of defendant. The report, dated February 21, reads in part: "General mood is one of a certain flavor of excitement and elation. * * * Voice seemed to be normal. No unusual posturing was noted. * * * The patient exhibited an over-productive stream of mental activity in speech * * *. Reaction in responding to questions was trigger-like. * * * In general, * * * emotional reactions seemed within normal limits * * *. It is impossible * * * to say that the patient will or will not have behavior * * * of anti-social degree * * * one could say that in all probability * * * a man of this patient's age, circumstances, and situation, and length of hospitalization would probably not act out in

a sexual deviate way in the future. * * * the patient does not use alcohol. He is 72 years of age. * * * At the present time * * * I do not have an opinion * * * whether the patient is a good candidate for release * * *. The examiner has hearsay from the ward attendant that the 'patient has a peculiar and faraway look in his eyes and facial expression' when small * * * girls * * * visit * * * in the * * * Hospital especially out on the grounds or sidewalk. The patient states that this is a feeling * * * of 'always having a great like for children.' "

Dr. Charles W. Landgraf examined defendant in June 1967, the interview lasting 3 hours. The doctor found evidence of emotional instability, lack of self-awareness, egocentrism, immaturity, overreaction to external stimuli, lack of empathy, some evidence of deviation from reality, and moderate evidence of brain damage. While defendant was taking the Rorschach test, he made no sexual responses, and he appeared wary of the subject. He was a "rather crude * * * primitive individual." Dr. Landgraf diagnosed "schizophrenic reaction, chronic undifferentiated type, mild, of long standing, and with some paranoid features." Lack of evidence of sexual deviate behavior in the past 11 years led him to conclude that defendant was not a sexual psychopath. He preferred, however, release of defendant under supervision to outright discharge.

Dr. C. H. Farrell had made a neuropsychiatric examination of defendant in December 1963. His report reads in part: "* * * in view of the fact that he has not become involved in any further sexual psychopathic acts, even though he had an opportunity in the last * * * seven years by virtue of * * * ground parole privileges; * * * he should be considered favorable for a trial, on at least a parole status. *DIAGNOSIS:* Sexual psychopath who appears to have made a satisfactory adjustment."

There is no evidence of deviate sexual behavior of defendant since his confinement. Over the years he par-

ticipated in group recreation off the hospital grounds. About once a week in 1966-67, he had permission to leave the grounds to visit his wife, and he did so without supervision. They have been happily married since 1926. She is a cripple working at Goodwill Industries. During the first 2½ years of defendant's confinement she visited him 3 days a week, and afterward, on weekends. She has been longing for his release.

Conflicting testimony of expert witnesses ordinarily raises a question of fact. Fremont Farmers Union Coop. Assn. v. City of Fremont, 179 Neb. 576, 139 N. W. 2d 369. To state the rule is easier than to apply it to this record for two reasons. First, no one should discount the evidence of defendant's advanced age and abstinence from alcoholic liquors, the absence of abnormal sexual acts of defendant during confinement, recommendations of superintendents Spradling and Gray, and other expert opinions favorable to parole or discharge. Second, Dr. Coats was not asked why defendant was unfit for parole or discharge; and counsel did not require the doctor to specify the data upon which the opinion rested. The evidence of course did not establish that the opinion was without basis. We conclude that fitness of defendant for parole or discharge was a question of fact and not a question of law.

The judgment is affirmed.

AFFIRMED.

LARRY L. MORSE, APPELLANT, V. RICHARD MAYBERRY AND NORMA RICHARDSON MAYBERRY, DOING BUSINESS AS OASIS TAVERN AND COCKTAIL LOUNGE, APPELLEES.

157 N. W. 2d 881

Filed April 12, 1968. No. 36814.

1. **Partnership.** The mere allegation that parties are coowners, standing alone, is not sufficient to allege a partnership.

2. ———. In Nebraska a partnership is an entity distinct from its members and is recognized in law as a person.
3. **Partnership: Torts.** Partners are jointly and severally liable for wrongful acts and omissions committed by a partner in the ordinary course of business of the partnership or with the authority of the copartners.
4. **Partnership: Words and Phrases.** The words "doing business as" are merely descriptive and do not bind the business or alleged partnership as a separate entity.
5. **Judgments: Pleading.** An order or decree sustaining a demurrer will be affirmed if any one ground of the demurrer is well taken.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Judgment of dismissal affirmed.

Gerald B. Buechler, for appellant.

Kenneth H. Elson, for appellee Norma Richardson Mayberry.

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

SPENCER, J.

Plaintiff filed this action against Richard Mayberry and Norma Richardson Mayberry, doing business as Oasis Tavern and Cocktail Lounge, for damages as a result of an assault and battery committed by Richard Mayberry. Richard Mayberry failed to answer or otherwise plead, and his default was entered. Norma Richardson Mayberry filed a general demurrer which was sustained. After the action was dismissed as to her, plaintiff perfected this appeal.

Plaintiff alleged that Richard Mayberry and Norma Richardson Mayberry are husband and wife; that they own and operate the Oasis Tavern and Cocktail Lounge within the city of Grand Island, Nebraska; that plaintiff was hired by them as a bartender and was subsequently promoted to manager; and that early in the morning of January 3, 1967, while the plaintiff was on duty pursuant to his employment, Richard Mayberry approached

him from behind and willfully, maliciously, and wrongfully assaulted him without just cause or provocation. Plaintiff further alleged the extent of his injuries, and, so far as material herein, alleged as follows: "* * * that said assaults were committed upon Plaintiff by one of his employers for the benefit of both employers; that Defendant, Norma Richardson Mayberry, acquiesed (sic) in and failed to prevent said assaults by Defendant, Richard Mayberry, upon Plaintiff, and that both Defendants are responsible for the resulting damages and liable therefor."

Much of defendant's brief is predicated on the premise that a partnership existed and is involved herein. The allegations of plaintiff's petition do not allege a partnership. The mere allegation that parties are coowners, standing alone, is not sufficient to allege a partnership. Burlington & Mo. River R.R. Co. v. Dick & Sons, 7 Neb. 242. In Nebraska a partnership is an entity distinct from its members and is recognized in law as a person. Clay, Robinson & Co. v. Douglas County, 88 Neb. 363, 129 N. W. 548, L. R. A. 1915C 922. Partners are jointly and severally liable for wrongful acts and omissions committed by a partner in the ordinary course of the business of the partnership or with the authority of the copartners. § 67-313, R. R. S. 1943. The words "doing business as Oasis Tavern and Cocktail Lounge," are merely descriptive and do not join the business or alleged partnership as a separate entity. In Independent Elevators v. Davis, 116 Neb. 397, 217 N. W. 577, we held: "An action against 'A and B., copartners doing business as A. & B. Co.,' is not a suit against the partnership as a separate entity; * * *." This action is an action against the defendants as individuals.

Defendant Norma Richardson Mayberry filed a general demurrer alleging in part: "3. The Petition does not state facts sufficient to constitute a cause of action against Defendant Norma Richardson Mayberry." The court did not announce the grounds on which the de-

murrer was sustained. The rule in this jurisdiction, however, is: "An order or decree sustaining a demurrer will be affirmed if any one ground of demurrer is well taken, even though the ground on which the ruling is based is not well taken or the order or decree sustaining the demurrer is general and does not indicate the ground on which it is based." Valentine Oil Co. v. Powers, 157 Neb. 71, 59 N. W. 2d 150.

The allegations set out as to defendant Norma Richardson Mayberry are no more than conclusions. There are no allegations which in any way connect her with the assault. How it could possibly benefit her as alleged we are unable to understand. Merely because a wife may be present when her husband assaults another does not make her liable. Neither does the fact that she fails to intercede. There is no liability unless she takes some affirmative action. The petition does not state facts sufficient to state a cause of action against Norma Richardson Mayberry when tested by demurrer. The demurrer was properly sustained.

JUDGMENT OF DISMISSAL AFFIRMED.

SMITH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. ELWIN M. FENDER, APPELLANT.

158 N. W. 2d 222

Filed April 19, 1968. No. 36701.

Criminal Law: Appeal and Error. This court, in a criminal action, will not interfere with a verdict of guilty based upon conflicting evidence unless it is so lacking in probative force that, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

A. Q. Wolf and Lynn R. Carey, Jr., for appellant.

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

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

McCOWN, J.

The defendant, Elwin M. Fender, was found guilty of the crime of burglary by a jury. He was sentenced to a term of 6 years, and has appealed.

The first issue involved is the defendant's contention that the evidence is insufficient to support the verdict because it did not establish criminal intent except from conjecture. This contention rests on the defendant's own testimony. The defendant admitted his participation in the burglary. He testified, however, that he was forced to participate by one of the other men involved who threatened him with death at gun point. He also asserts that the testimony of the officers who arrested the other man and found a 22-caliber tear gas pistol on his person corroborates the defendant's testimony. However, an eyewitness observed virtually all the action from his home directly across the street. The testimony of that witness did, to say the least, contradict the defendant's claim that he was forced to participate. The court specifically and correctly instructed the jury on the defendant's claim of participation under duress or compulsion and no complaint is made here as to the instruction.

This court, in a criminal action, will not interfere with a verdict of guilty based upon conflicting evidence unless it is so lacking in probative force that, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Eberhardt, 179 Neb. 843, 140 N. W. 2d 802.

Defendant's remaining assignment of error is directed at in-court identification of the defendant, which he contends resulted solely from an in-custody lineup without a showing that he had counsel. He relies upon United

States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149.

An eyewitness who had watched the activities in connection with the burglary while it was in progress, made an in-court identification of the defendant. The time span for his independent observation was somewhat indefinite, but covered at least 10 minutes. The store being burglarized was completely lighted inside. There was also a floodlight in front at the corner of the building, and there was a streetlight across the street. The lineup identification was made 45 minutes to an hour after the commission of the crime.

It is evident that no post-indictment lineup was involved. On the evidence here, even if the rules of Wade applied, there would be issues of whether the in-court identification had an independent source, or whether the introduction of the additional lineup identification was harmless error. In any event, Wade was applied prospectively only and was effective June 12, 1967. The case at bar was tried before that date and Wade was not applicable. See Stovall v. Denno, 388 U. S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199.

The judgment is affirmed.

AFFIRMED.

DOROTHY A. RITCHIE, APPELLANT, V. BEVERLY J. DAVIDSON, APPELLEE.

158 N. W. 2d 275

Filed April 19, 1968. No. 36719.

1. **Automobiles: Statutes.** Section 39-773, R. R. S. 1943, requires that every motor vehicle shall be equipped with brakes, including two separate means of applying the brakes, each of which shall be effective and so constructed that no part which is liable to failure shall be common to the two.
2. **Automobiles.** An automobile operator is required to be familiar with the proper use of the braking system on his vehicle and to use it in a proper manner, if necessary, to avoid accidents.

3. **Automobiles: Negligence.** It is a general rule, subject to exceptions not applicable to this case, that it is negligence as a matter of law for a motorist to drive an automobile on a public highway, at any time, at a speed or in such manner that it cannot be stopped or its course changed in time to avoid a collision with an object or obstruction discernible within his range of vision in the direction he is traveling.
4. ———: ———. The basis of the foregoing general rule is that the driver of an automobile is legally and mandatorily obligated to keep such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid collision with any object in front of him.
5. **Trial.** It is the duty of the district court, on its own motion, to submit to the jury only the issues upon which there are controverted questions of fact which must be determined by the jury in order to properly arrive at its verdict.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Reversed and remanded with directions.

John J. Lawler, for appellant.

Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

WHITE, C. J.

This is an automobile accident case in which the defendant failed to apply her emergency footbrake and ran into the rear end of plaintiff's car which was stopped at a stop sign. The jury verdict and judgment thereon were for the defendant and plaintiff appeals. We reverse the judgment.

There are several questions presented and argued. The only one necessary for a determination of this case is the question of the sufficiency of the evidence to sustain the verdict and judgment.

The accident occurred at Fifty-second and Blondo Streets, Omaha, Nebraska, at about 4:30 p.m., June 16, 1965, a clear, dry, sunny day. The intersection is pro-

tected by four stop signs and plaintiff, going east, stopped her car at the west stop sign on Blondo Street. Defendant, also proceeding east on Blondo Street, was coming down a slight incline at 15 to 25 miles per hour, started to slow for the stop sign and the plaintiff's parked car, her regular footbrake did not hold, and instead of using her emergency footbrake, she pulled at the brake release lever, she was unable to stop or turn her car aside, and collided with the rear end of plaintiff's vehicle. Defendant had 15 years' experience as a driver, and since March 1965 had driven almost daily the automobile she was operating. The regular footbrake failed because of a sudden leak in the hydraulic system. The "emergency" footbrake was in good working order. There is no allegation or suggestion in the evidence of negligence on plaintiff's part.

Our statute, section 39-773, R. R. S. 1943, requires that every motor vehicle be equipped with brakes, "including *two* separate means of applying the brakes, each of which means shall be effective * * * and so constructed that no part which is liable to failure shall be common to the two, * * *." (Emphasis supplied.) The defendant's car was equipped with dual brakes. They had an obvious statutory and practical purpose. It seems self-evident to us that the other or "emergency" braking system is for the purpose of bringing a car to a stop in a sudden or unexpected occurrence or circumstance, and is particularly designed for the very situation we have here, where the footbrake failed. And elementary due care as to brakes requires that the operator be familiar with their use and that he use them, if necessary, to avoid accidents.

A case directly in point is Davis v. United Services Automobile Assn. (La. App., 1963), 159 So. 2d 398, wherein it is said: "* * * The resolution of this case turns upon whether or not the accident was entirely caused by the eruption of the brake cylinder without any advance warning. This also raises a question as to whether

or not the operator was afforded timely opportunity to control the vehicle by use of the emergency brake. Miss Johnson, after conceding that her emergency or hand brake was in good working order, testified that her failure to use it was due to her momentary forgetfulness in that she 'just did not think about it.' She stated that she was some *three or four car lengths away from the point of impact when she realized that her footbrake was not holding and at that time she was traveling at a speed of not more than fifteen or twenty miles per hour.* Under these circumstances, in our opinion, she could and should have used the emergency brake. * * * the statute required every motor vehicle to be equipped with an emergency brake. The need of a dual braking system is recognized by the Highway Regulatory Act, and we can think of no regulation more conducive to the safety of motorists traveling upon the highway. The failure of Miss Johnson to use her emergency brake under the circumstances above stated, was, in our opinion, *inexcusable and constitutes an act of negligence which was the sole proximate cause of the accident.*" (Emphasis supplied.)

Consequently, resolving all inferences in favor of the defendant, we hold that the defendant was guilty of negligence as a matter of law under the circumstances of this case.

We further hold that her negligence was the sole proximate cause of this accident. In Stanley v. Ebmeier, 166 Neb. 716, 90 N. W. 2d 290, we said: "'It is a general rule, subject to exceptions not applicable to this case, that it is negligence as a matter of law for a motorist to drive an automobile on a public highway, at any time, at a speed or in such manner that it cannot be stopped or its course changed in time to avoid a collision with an object or obstruction discernible within his range of vision in the direction he is traveling. * * * The basis of the foregoing general rule is that the driver of an automobile is legally and mandatorily obligated to keep such a look-

out that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid collision with any object in front of him.'" See, also, identical holdings in Guynan v. Olson, 178 Neb. 335, 133 N. W. 2d 571; Guerin v. Forburger, 161 Neb. 824, 74 N. W. 2d 870; Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N. W. 2d 669; Dryer v. Malm, 163 Neb. 72, 77 N. W. 2d 804; Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250; Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106.

The question here is not negligence from the sudden failure of the whole regular braking system with the resulting question of the possible application of the sudden emergency doctrine. See 2 Blashfield, Automobile Law and Practice, Brakes, § 107.4, p. 461, et seq. The question here clearly is the negligence of the defendant in the operational failure to properly use the statutorily commanded dual braking system. There was an "emergency" brake but no legal emergency flowing from lack of fault of the driver.

It is clear that the issue of negligence and the "sudden emergency" doctrine should not have been submitted to the jury. It is the duty of the district court, on its own motion, to submit to the jury only the issues upon which there are controverted questions of fact which must be determined by the jury in order to properly arrive at its verdict. Strnad v. Mahr, 165 Neb. 628, 86 N. W. 2d 784; Bezdek v. Patrick, 167 Neb. 754, 94 N. W. 2d 482; Cappel v. Riener, 167 Neb. 375, 93 N. W. 2d 36.

The judgment of the district court is reversed and the cause remanded for a new trial solely on the issues of the amount of damages and injuries, if any, and whether they were proximately caused by the accident. See Caster v. Moeller, 176 Neb. 446, 126 N. W. 2d 485.

REVERSED AND REMANDED WITH DIRECTIONS.

HELEN MARIE LUND, APPELLEE, V. HAROLD MANGELSON, DOING BUSINESS AS BEN FRANKLIN 5 AND 10 CENT STORE, APPELLANT.

158 N. W. 2d 223

Filed April 19, 1968. No. 36727.

1. **Trial: Evidence.** In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
2. ———: ———. A motion for a directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
3. **Trial: Negligence.** In an action for damages for negligence the burden is on the plaintiff to show by direct or circumstantial evidence that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it.
4. **Pleadings: Negligence.** The doctrine of res ipsa loquitur proceeds on the theory that, under special circumstances which invoke its operation, the plaintiff is unable to specify the particular act of negligence which caused the injury, but if the petition alleges particular acts of negligence, then the plaintiff, in order to recover, must establish the specific negligence alleged, and the doctrine of res ipsa loquitur cannot be applied.
5. **Buildings: Negligence.** The owner of a business establishment has a legal duty to exercise ordinary care to keep his premises reasonably safe for the use of a business invitee. This, however, does not make him an insurer of his safety.
6. **Negligence.** Negligence and the duty to use due care do not exist in the abstract but must be measured against a particular set of facts and circumstances.
7. ———. In an action for negligence based on specific acts of negligence, the plaintiff, in order to recover, must establish at least one of the specific acts of negligence alleged.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Reversed and dismissed.

Sodoro & Meares and Jon S. Okun, for appellant.

Matthews, Kelley & Cannon, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

SPENCER, J.

This is an action for damages as a result of an accident which occurred at the Ben Franklin 5 and 10 Cent Store at 3457 South Eighty-fourth Street, Omaha, Nebraska. At the close of the evidence defendant filed a motion for a directed verdict. This was overruled and the case was submitted to the jury which returned a verdict for the plaintiff. Defendant thereafter filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial. When this motion was overruled, defendant perfected an appeal to this court.

The incident occurred on October 8, 1965, when plaintiff's foot came in contact with one of the doors of defendant's place of business. Defendant's place of business has two sets of doors, both of which open to the west. Plaintiff entered the store through one of the south pair of doors. The weather was extremely windy. Plaintiff testified she had trouble getting in the store and to do so had to pull the door "awfully hard." Plaintiff left the store through one of the north pair of doors. Her testimony on her exit is as follows: "Q. When you got to that door, what did you do? A. Well, I pushed the door. I was standing like this (indicating), and I pushed the door, and I had my purse here (indicating). I pushed the door and then I just put my foot out. I expected the door to go open and come back like regular doors. I thought, Well, I can go out. I pushed the door, and here come a gust of wind and brought the door back. Q. At the time the gust of wind came up, were you holding the door open for yourself? A. Yes, Q. And did you feel the pressure of the wind against the door? A. Yes. Q. Now, was the action of the door slowed by

any mechanism that you could feel? A. No. That was what I expected. When the door flew open, like, I expected it to go back like regular doors do. Q. You expected it to go slowly? A. Yes. Q. What did it do? A. It came back real fast. Q. What happened to you? A. It caught my foot. Q. Now, just a minute, I want to know what caught your foot, what part of the door. A. The edge of the aluminum door. Q. Where with relation to the swinging lower corner of the door? A. Right in the corner. Q. Was it the corner of the door? A. Yes, right in the corner."

Plaintiff's amended petition sets out the following specific allegations of negligence, all of which were submitted to the jury: "1. In permitting said door, which opened onto an unprotected and very windy area, to remain for many months without any effective retarder to sudden closing; 2. In failing to repair or replace the retarder thereon, when the defendant knew it was inoperative, and he had ample opportunity to repair; 3. In failing to warn plaintiff of the danger incident to the uncontrolled nature of the door."

The defendant alleges eight assignments or error. We condense them to two: First, the court erred in ruling that there was sufficient evidence of defendant's negligence to go to the jury; and, second, the court, erred in giving instruction No. 2, which set out the allegations of negligence listed above.

We have set out the testimony of plaintiff in detail because it is the only evidence in the record offered by the plaintiff to prove a defective retarder, failure to repair, and failure to warn or protect plaintiff from an uncontrolled door. There is not a scintilla of evidence in this record to prove that the door remained for even an hour without any effective retarder to sudden closing. Except for the happening of the accident, as described by the plaintiff and the testimony of plaintiff's expert witness that the outside paving was not level so the bottom of the door was not flush with the sidewalk, there is

nothing from which it can be inferred the door was in an unreasonably dangerous condition. Plaintiff's expert testified he walked into the store through the door and back out without making any measurements or tests of any kind. He did not testify that the retarder was deficient, but merely testified to a conclusion that the door shouldn't slam if the closer was properly adjusted. He also testified he didn't notice any molding or dulling of the corners and edges of the door at the bottom, if any were present. He further testified that if there was a door of this type with rounded edges he was not familiar with it. He produced a cross-section of a door similar to the one in question, which is a Tubelite door distributed by Pittsburgh Plate Glass Company. The edges of it, rather than being sharp, are smooth.

Defendant's son and two employees who were present at the time of the accident testified that the door was operating normally. A repairman who had installed a retarder on the door in question sometime previous to 1965, and who was familiar with the door, inspected it after the accident and found nothing wrong. He testified the retarder was functioning, the door operated normally, and that no repairs or adjustments of any nature were made on it. The testimony for the defendant is to the effect that the door was in the same condition at the time of the trial as it was on and immediately before October 8, 1965.

It is apparent that the evidence was not sufficient to justify the submission of all of plaintiff's specific allegations of negligence, as was done in instruction No. 2. Even if there was some evidence to justify the submission of the case to the jury on any of those allegations, the instruction as given was prejudicially erroneous. However, before this problem is reached, there is the preliminary question as to the sufficiency of the evidence to raise a jury question.

In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to

decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Weston v. Gold & Co., 167 Neb. 692, 94 N. W. 2d 380.

A motion for a directed verdict or for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Egenberger v. National Alfalfa Dehydrating & Milling Co., 164 Neb. 704, 83 N. W. 2d 523.

In an action for damages for negligence the burden is on the plaintiff to show by direct or circumstantial evidence that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it. Egenberger v. National Alfalfa Dehydrating & Milling Co., *supra*.

Plaintiff's evidence is that her foot caught in a space between the door and the sidewalk. This fact alone does not prove defendant negligent. Plaintiff still has the burden of proving some act of negligence on the part of the defendant which was the proximate cause of her injury or which proximately contributed to it. The doctrine of res ipsa loquitur is not applicable, because plaintiff is relying on specific allegations of negligence. This case, on the facts, is not too far different from Weston v. Gold & Co., 167 Neb. 692, 94 N. W. 2d 380, in which this court reversed a judgment for an infant who caught his foot in an escalator. In that case, the plaintiff's mother testified to a widening of the space between the end of the steps and the sidewall, and that plaintiff's foot was caught in this space. We there held: "The doctrine of res ipsa loquitur proceeds on the theory that, under

special circumstances which invoke its operation, the plaintiff is unable to specify the particular act of negligence which caused the injury, but if the petition alleges particular acts of negligence, then the plaintiff, in order to recover, must establish the specific negligence alleged, and the doctrine of res ipsa loquitur cannot be applied."

Plaintiff's expert testified to a space caused by an uneven sidewalk, but made no measurements or tests. Defendant's son testified that he measured the space between the door and the sidewalk when the door was opened at a 45-degree angle, and that the space was 1⅛ inches; that when the door was opened at a 90-degree angle, which is fully open, the measurement was between 1¼ inches and 1⅜ inches. This fact in and of itself does not import improper maintenance. The photographs of the door in evidence, particularly exhibit No. 4, show a doorsill approximately 1 inch in height which is not shown to be unusual construction and does not raise any presumption of negligence. The photograph shows the door to be flush with the doorsill and consequently at least the height of the doorsill above the sidewalk.

The plaintiff was an invitee on the premises. Consequently, defendant had a legal duty to exercise ordinary care to keep his premises reasonably safe for her use. This, however, did not make him an insurer of her safety. See Beck v. Ideal Super Markets of Nebraska, Inc., 181 Neb. 381, 148 N. W. 2d 839. It was the plaintiff's duty to prove a failure to exercise ordinary care. There is no evidence in this case that the door was either defective or that the defendant had knowledge of any defect.

Negligence and the duty to use due care do not exist in the abstract but must be measured against a particular set of facts and circumstances. Gorman v. World Publishing Co., 178 Neb. 838, 135 N. W. 2d 868.

In an action for negligence based on specific acts of negligence, the plaintiff, in order to recover, must estab-

lish at least one of the specific acts of negligence alleged. Sankey v. Williamsen, 180 Neb. 714, 144 N. W. 2d 429. This the plaintiff has failed to do. The motion of the defendant for a directed verdict, made at the close of the evidence, should have been sustained.

For the reasons given, the judgment is reversed and the cause dismissed.

REVERSED AND DISMISSED.

DONALD D. NEEMAN, APPELLEE, V. BESSIE E. NEEMAN, APPELLANT.
158 N. W. 2d 236

Filed April 19, 1968. No. 36737.

1. **Divorce.** Where the evidence in a divorce suit sustains a finding of cruelty on the part of one spouse toward the other, and is corroborated as required by law, the action of the district court in granting a divorce to the aggrieved spouse is proper and ordinarily will not be interfered with by this court on appeal.
2. ———. Factors to be considered in an award of alimony or a division of property in a divorce case are the age and health of the parties; their earning ability; their relative conduct leading up to the divorce; the duration of the marriage; the social standing of the parties; the property of the parties and its value at the time of the divorce, its income-producing capacity, the manner in which it was acquired, and the respective contributions that each party has made thereto; the property of the parties and its value at the time of the marriage; and all other relevant facts and circumstances.
3. ———. The fixing of the amount of alimony rests, in each case, within the sound discretion of the court.

Appeal from the district court for Otoe County: WALTER H. SMITH, Judge. Affirmed.

Spencer & Hoch, for appellant.

Wellensiek, Morrissey & Davis, for appellee.

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

NEWTON, J.

This is an action for a divorce brought by Donald D. Neeman as plaintiff against Bessie E. Neeman, defendant. Plaintiff was 40 years of age and defendant, 47 years of age. In his petition, plaintiff alleged that the parties were married on August 20, 1949, and that there were no children born of the marriage. Plaintiff further stated that without just cause or excuse, defendant had been guilty of extreme cruelty toward plaintiff in that she continuously used abusive language toward him, "* * * openly criticized and accused the plaintiff of diverse wrong, the defendant often has fits of temper and rage at which time she berates, insults and belittles the plaintiff, that defendant continually embarrasses the plaintiff, by creating disturbances with neighbors and friends and all these various actions of the defendant has inflicted upon the plaintiff grievous mental sufffffering, by reason of which the plaintiff has been unable to perform his duties at work efficiently and it has interferred with his work. That the course of cruel treatment accorded plaintiff by the defendant has been such as to destroy the happiness of the plaintiff, and make it impossible for the plaintiff and defendant to live together as husband and wife, * * *." Defendant filed an answer and cross-petition.

The court found generally that the allegations contained in plaintiff's petition were true and that plaintiff was entitled to an absolute divorce from the defendant.

It was stipulated that the only property owned by these parties was their residence property valued at $15,500, subject to mortgages amounting to $10,763.51 and taxes of $562.21, an automobile valued at $500, and other personal property of the value of $1,000. The record further discloses that plaintiff, at the time of separation, drew $400 out of a joint checking account, defendant withdrew the balance of $79.88, and defendant also withdrew a savings account of $3,920. At the time of trial, defendant still had the full amount in the savings

account, and a checking account of $200. Plaintiff had a checking account of $80.

At the time of separation of the parties, they were indebted to St. Mary's Hospital in the sum of $908, to the Mayo Clinic in the sum of $429, the Nebraska City Medical Group in the sum of $145.60, and to Jessup Drug in the sum of $26.80. Subsequent to the separation, defendant incurred the following indebtedness: Dr. Brown, $830; Pathology Lab, $65; Jessup Drug, $50; Dr. Reese, $5; Nebraska City Medical Group, $20; Methodist Hospital, $837.95; and Dr. Hamsa, $5.

The court awarded to plaintiff the automobile, his personal checking account, and two insurance policies, one with a cash surrender value of $597.35 and the other, $498. Awarded to defendant was the residence property, subject to the mortgage encumbrances and taxes, the contents thereof valued at $1,000, her personal checking account of $200, and the $3,920 savings account. Plaintiff was ordered to pay the outstanding accounts due at the time of the separation of the parties and defendant was ordered to pay the remaining accounts which she had incurred subsequent to the separation. Costs, including fees for defendant's attorneys, were taxed to plaintiff. The order for temporary support of defendant entered September 2, 1966, directing plaintiff to pay to her $30 per week and to make mortgage payments in the sum of $86.12 per month on the residence indebtedness was terminated as of June 2, 1967, the date of the decree.

Defendant assigns as error the granting of an absolute divorce to plaintiff rather than to defendant, the imposition of a portion of the indebtedness upon defendant, and the failure to grant defendant further financial relief in the nature of permanent alimony.

No attempt will here be made to set out the facts found in the rather voluminous record presented in this case. Suffice it to say that the record amply sustains the finding of the trial court. "Where the evidence in

a divorce suit sustains a finding of cruelty on the part of one spouse toward the other, and is corroborated as required by law, the action of the district court in granting a divorce to the aggrieved spouse is proper and ordinarily will not be interfered with by this court on appeal." Vollbrecht v. Vollbrecht, 178 Neb. 31, 131 N. W. 2d 651.

Regarding the division of property and permanent alimony, it will be noted that plaintiff received only an automobile valued at $500 and a checking account of $80 in addition to his two insurance policies, one with a cash surrender value of $597.35 and the other, $498. Defendant received the residence property valued at $4,174.28 in excess of encumbrances thereon, the contents of the home valued at $1,000, her personal checking account of $200, and the savings account of $3,920. She also receives the benefit of the requirement that plaintiff pay medical expenses incurred by her prior to the separation in the sum of $1,509.40, and the costs of suit including attorneys' fee. It is evident that plaintiff leaves the marriage with a small indebtedness and that although defendant has been obligated to pay certain other medical expenses incurred by her subsequent to the separation of the parties, she, nevertheless, has received practically all of the property accumulated by the parties which amounts to a substantial sum. "Factors to be considered in an award of alimony or a division of property in a divorce case are the age and health of the parties; their earning ability; their relative conduct leading up to the divorce; the duration of the marriage; the social standing of the parties; the property of the parties and its value at the time of the divorce, its income-producing capacity, the manner in which it was acquired, and the respective contributions that each party has made thereto; the property of the parties and its value at the time of the marriage; and all other relevant facts and circumstances." Gartside v. Gartside, 181 Neb. 46, 146 N. W. 2d 777.

Under the circumstances presented by this record, we cannot conclude that the trial court dealt unfairly or unreasonably with the defendant in this respect and its decision is approved. "The fixing of the amount of alimony rests, in each case, within the sound discretion of the court." Ivins v. Ivins, 171 Neb. 838, 108 N. W. 2d 99.

The defendant is awarded for the services of her attorney in this court a fee in the amount of $250.

AFFIRMED.

LEON B. SHIPLEY, APPELLANT, V. AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN, A FOREIGN INSURANCE CORPORATION, APPELLEE.
158 N. W. 2d 238

Filed April 19, 1968. No. 36752.

1. **Insurance.** An uninsured motorist endorsement should be interpreted in light of statutory requirements concerning coverage.
2. ———. An insurance policy should be interpreted in accordance with reasonable expectations of the insured at the time of the contract.
3. ———. In an uninsured motorist endorsement that is inapplicable to bodily injury to an insured in the operation of an automobile owned by him without applicable bodily injury liability coverage, the word "automobile" in the exclusion clause ordinarily includes motorcycles.

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

Michael J. Dugan and Haney, Walsh & Wallentine, for appellant.

Boland, Mullin, Walsh & Cooney, for appellee.

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

SMITH, J.

An uninsured motorist endorsement issued in March

1966, formed part of plaintiff's automobile policy with provisions for bodily injury liability coverage. The declaration described a Chevrolet automobile but not the "BSA" motorcycle that plaintiff also owned. While he was operating the motorcycle in May 1966, it collided with a Honda motorcycle driven by Terry Lee Santo, who was uninsured. This action on the uninsured motorist endorsement was dismissed on the ground that no cause of action was stated. Plaintiff has appealed.

Defendant promised in the endorsement "To pay all sums which the insured * * * shall be * * * entitled to recover as damages (for bodily injury) from the * * * operator of an uninsured automobile * * *." The endorsement did not apply, however, "to bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by the named insured * * *." Those provisions are central to the controversy.

The parties concede that the phrase "uninsured automobile" in effect includes motorcycles, but they do so for different reasons. Defendant contends that "automobile" throughout the endorsement includes motorcycles and that the endorsement does not apply in view of the exclusion clause. Plaintiff contends that a motorcycle is not an automobile but that coverage exists because the Legislature framed section 60-509.01, R. S. Supp., 1965, in terms of motor vehicles. The relevant part of the statute generally prohibits delivery of an automobile liability policy "unless coverage is provided * * * for the protection of persons insured thereunder who are legally entitled to recover damages from * * * operators of uninsured motor vehicles * * *."

The significance of "automobile" may be affected by other provisions of the endorsement as follows: "This endorsement forms a part of the policy * * *. II. Definitions * * * The term 'insured automobile' means an automobile to which the Bodily Injury Liability coverage of the policy applies, provided such automobile is: (1) owned by the insured named in the declaration of the

policy * * *. * * * The term 'uninsured automobile' shall not include: * * * (iv) a land motor vehicle or trailer, if operated on rails or crawler-treads * * *. * * * CONDITIONS * * * None of the Insuring Agreements * * * of the policy shall apply to the insurance afforded by this endorsement * * *."

Declarations of the policy and endorsement contain the following: "Item 2. Described Automobile * * * 49 CHEV COUP * * *." A definition in provisions for liability coverage reads: " 'automobile,' except where stated to the contrary, means 1. Described Automobile—The motor vehicle or trailer described in this policy."

"Automobile" is a popular word in uninsured motorist endorsements made prior to 1967. See, Widiss, "Perspectives on Uninsured Motorist Coverage," 62 Nw. U. L. Rev. 497 (1967); Notman, "A Decennial Study of the Uninsured Motorist Endorsement," 43 Notre Dame L. 5 (1967); Notman, "Handling Uninsured Motorist Claims in New York," 32 Albany L. Rev. 96 (1967). Judicial interpretations of endorsements without sufficient signs of a broad meaning of "automobile" have excluded motorcycles. Westerhausen v. Allied Mut. Ins. Co., 258 Iowa 969, 140 N. W. 2d 719; Askey v. General Acc. Fire & Life Assur. Corp., 54 Misc. 2d 63, 281 N. Y. S. 2d 669; Elliott, "The Insurance Definition of 'Automobile,' " 46 Neb. L. Rev. 3 (1967).

There is some evidence here that "automobile" includes motorcycles. The definition of "uninsured automobile" in the endorsement excludes motor vehicles operated on rails or crawlers. Other insuring agreements define "Described Automobile" as the motor vehicle described in the policy. We should consider the latter definition, although the endorsement explicitly precludes application of the other insuring agreements. The declarations which provide for uninsured motorist coverage contain the phrase "Described Automobile." The endorsement defines "insured automobile" in terms of the bodily injury liability coverage. The relation

among the definitions and the exclusion clause is close.

An uninsured motorist endorsement should be interpreted in light of statutory requirements concerning coverage. The statute was designed to protect innocent victims of negligent and financially irresponsible motorists. "The uninsured motorist on the highway is a real risk." Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N. W. 2d 133. An overriding public policy of protecting an owner-operator who inexcusably has no applicable bodily injury liability coverage is not presently discernible.

An insurance contract should be interpreted in accordance with reasonable expectations of the insured at the time of the contract. See Stephens v. Allied Mut. Ins. Co., *supra*. Plaintiff does not assert that he had bodily injury liability coverage applicable to his motorcycle under any contract. He might expect the uninsured motorist endorsement to cover loss while he was operating his motorcycle, but such expectations are unreasonable.

The judgment is affirmed.

AFFIRMED.

EVA E. LOEFFELHOLZ, APPELLEE, V. ALLIED MUTUAL INSURANCE COMPANY, A CORPORATION, ET AL., APPELLANTS.
158 N. W. 2d 219

Filed April 19, 1968. No. 36841.

1. **Workmen's Compensation.** Where a truckdriver worked under a contract of hire for one-fourth of the proceeds of the trip, such truckdriver is not a pieceworker nor an employee whose compensation is based on output.
2. ———. A truckdriver who worked for his employer on a day-to-day basis only when needed, without specified days of work and without any assurance of future employment, is ordinarily an intermittent and not a continuous employee.
3. ———. A workmen's compensation award for the death of an intermittent truckdriver who worked under an agreement for

payment of earnings at the rate of $13.94 per trip should be based on a weekly wage of $69.70 where the trip ordinarily took 1 day to complete it.

Appeal from the district court for Merrick County: C. THOMAS WHITE, Judge. Affirmed as modified.

Luebs, Tracy & Huebner, Vincent L. Dowding, and William A. Garton, for appellants.

Munro, Parker, Munro & Grossart, for appellee.

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

CARTER, J.

This is an appeal from a judgment of the district court for Merrick County awarding compensation benefits to the plaintiff in the amount of $42 per week for 325 weeks under the provisions of the Nebraska Workmen's Compensation Act. The award is the result of the accidental death of Frank A. Loeffelholz, the deceasd husband of the plaintiff, who at the time of his death was in the employ of the defendant, Earl Gibbons. The issue is the amount of compensation to be awarded. The trial court found that the deceased was engaged in intermittent employment on a contract of hire for $13.94 per day on the day of the accident resulting in his death. The defendants have appealed.

The defendant Gibbons was engaged in trucking and farming. In the past, the deceased had been hired as the occasion demanded to fix fence and haul hay, gravel, seed corn, and other farm products. Gibbons was the owner of two trucks. When need existed for the use of both trucks, he used the deceased to operate the second truck. When Gibbons had no work to be done, deceased worked elsewhere. On January 12, 1966, the deceased, while hauling a load of seed corn from Kearney to Fremont for Dekalb Agricultural Association, Inc., was killed in a highway accident. No question arose as to his employment by Gibbons. The issue raised

is the nature of the employment contract and the rate of compensation to which the widow of the deceased is entitled.

Gibbons was the operator of a commercial trucking business. He hauled for anyone who requested his services. Since 1960, he had hauled for Dekalb during its busy season when its own trucks had been unable to perform all its hauling. The trucking agreement with Dekalb did not specify the amount of seed corn to be hauled nor the number of trips to be made. When a load was ready to be transported, Dekalb called Gibbons, and occasionally the deceased, with Gibbons' truck, proceeded to make the haul. Most of the trips were from the main place of business in Kearney to distribution points in Fremont and North Platte. The transportation rates were understood over the years and new agreements were not made for each trip as the nature of the haul and the price to be paid therefor were well understood. The hauls were made on the basis of need, each trip in effect being a new contract. When the deceased was called to drive on one of the trips, he was to receive one-fourth of the transportation charges paid to Gibbons, plus his expenses, as compensation for his services as truckdriver. On trips from Kearney to Fremont, the pay of the deceased amounted to $13.94 for the day it took to make the trip. The record shows that Dekalb was under no obligation to call Gibbons to do the hauling. It sometimes used other truckers. Gibbons sometimes drove himself and was under no obligation to call the deceased.

The defendant Gibbons contends that, on the day of the accident, the deceased was a pieceworker or an employee whose pay is based on output. A pieceworker or one whose earnings are based on output is an employee whose pay depends upon his capacity, skill, or good fortune. Such employees are described in Gardner v. Kothe, 172 Neb. 364, 109 N. W. 2d 405, and Riggins v. Lincoln Tent & Awning Co., 143 Neb. 893, 11 N. W.

2d 810. In the instant case, the deceased was paid by the trip. In actuality he was paid more on a mileage basis than any other element of the contract of hire. In any event, deceased was not a pieceworker or an employee whose compensation is based on output.

Defendant Gibbons alleges that deceased was engaged in continuous employment and that the award of compensation should be pursuant to section 48-126, R. R. S. 1943. The contract of hire terminated in this case at the end of every trip. Gibbons was under no obligation to again use the deceased. See, Gruber v. Stickelman, 149 Neb. 627, 31 N. W. 2d 753; Newberry v. Youngs, 163 Neb. 397, 80 N. W. 2d 165. Examples of continuous employment, although not full-time employment, are found in Johnsen v. Benson Food Center, 143 Neb. 421, 9 N. W. 2d 749, and Redfern v. Safeway Stores, Inc., 145 Neb. 288, 16 N. W. 2d 196. The deceased in the present case was engaged in intermittent employment as distinguished from continuous employment.

Death benefits under the Workmen's Compensation Act are fixed by section 48-122, R. S. Supp., 1965. Copple v. Bowlin, 172 Neb. 467, 110 N. W. 2d 117. Under this section, the award to be made is based on a percentage of the wages paid under the contract of hire within a minimum and maximum provided in the statute. In the instant case, the deceased was not being paid wages within the ordinary use of the term. He was being paid as compensation for his services one-fourth of the transportation charges. The compensation court, and the district court as well, solved the problem by converting such compensation into a daily wage and fixed the award on that basis.

The evidence shows that the deceased had made the trip from Kearney to Fremont many times during the 2 years previous to his death. It is well established as a 1-day trip for which he had continuously received $13.94 for his services. We find no error by the trial court in converting deceased's earnings into a daily wage rate

and then to a 5-day weekly wage rate under the evidence in this case. See Calascibett v. Highway Freight Co., 18 N. J. Misc. 144, 11 A. 2d 408. We think such a method of determining an award of compensation, under the circumstances here shown, is consistent with the Workmen's Compensation Act and the liberal construction we are required to give it.

It is plain, therefore, that the earnings of the deceased on January 12, 1966, were the equivalent of a daily wage of $13.94 and a weekly wage of $69.70. This entitles the plaintiff to an award of $42 per week for 325 weeks.

Through oversight, the award made in the district court failed to give credit for payments of compensation made. While the error is recognized as a mistake by both parties and should cause little concern, we direct the correction of the district court judgment to give the defendant credit for the compensation and funeral expenses paid in the estimated amount of $1,439.98.

The judgment of the district court is affirmed as modified and the costs are taxed to the defendant Gibbons, including an attorney's fee of $500.

AFFIRMED AS MODIFIED.

INLAND DRILLING COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. DAVIS OIL COMPANY, A PARTNERSHIP, ET AL., APPELLANTS AND CROSS-APPELLEES.
158 N. W. 2d 536

Filed April 26, 1968. No. 36823.

1. **Trial: Evidence.** In testing the sufficiency of the evidence to support a judgment, the evidence must be considered in the light most favorable to the successful party.
2. **Contracts.** A written contract expressed in unambiguous language is not subject to interpretation or construction and the intention of the parties to such a contract must be determined from its contents.

3. ———. Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it.
4. **Interest.** Recovery of interest on an unliquidated claim, the subject of reasonable controversy and incapable of being fixed by computation, may be had only from the date of determination of the right of recovery and the ascertainment of the amount.

Appeal from the district court for Kimball County: JOHN H. KUNS, Judge. Affirmed in part, and in part reversed and remanded.

Clarence A. Davis, for appellants.

Van Steenburg, Myers & Burke, Thomas D. Smart, and Ernest S. Baker, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

NEWTON, J.

This is an action brought by Inland Drilling Company, a corporation, plaintiff, against Davis Oil Company, a partnership and the individual partners, defendants, for the purpose of recovering on a contract to drill an oil well. This was a law action tried to a jury. After all of the evidence in the case had been adduced and the parties had rested, each of them moved for a directed verdict whereupon the trial court, without objection, dismissed the jury and took the case under advisement. Trial was completed on May 19, 1964, but judgment was not entered therein until April 12, 1967, at which time the court found that there was due plaintiff $55,045.08, with interest thereon at the rate of 6 percent per annum from June 1, 1961, to the date of judgment. The interest amounted to $19,357.71 and judgment was entered for the plaintiff in the total amount of $74,402.79. Defendants appeal.

The contract provided for the drilling of an oil well by

plaintiff for defendants at a specified location in the State of Wyoming. Defendants agreed to procure all third party services and materials not specifically to be furnished by the plaintiff. Plaintiff was to supply a rotary drilling rig, including blowout preventer, and all other machinery, tools, equipment, materials, services, and labor necessary except such as was to be supplied by defendants. The hole was to be 7⅞ inches in diameter and drilled to a depth of 8,000 feet or through the Second Frontier formation, whichever was lesser. Plaintiff was to be paid $8.50 per foot drilled and in addition thereto, the sum of $950 per day while drill stem was in use and $850 per day when drill stem was not in use. Plaintiff was to furnish water amounting up to $2,000 and in excess of that figure, the water was to be furnished by defendants. Defendants were also to furnish the drilling mud and trucking, and crude oil for mud, together with drill bits and other items. The contract contained the following clause: "C. *LOST CIRCULATION CLAUSE:* Should abnormal pressures be encountered, or should a cavity or other formations preventing the maintenance of circulation be encountered for an accumulative period of more than Twenty-four (24) hours during the drilling of this well, operations shall thereupon be on a day work basis until the difficulty is overcome or the hole is lost or abandoned, provided that Contractor notifies Owner promptly upon encountering such difficulty."

Actual drilling of the well commenced on September 23, 1960, and ceased on November 17, 1960, at which time the well had been drilled to a depth of 2,407 feet and plaintiff was informed by defendants' representatives that the drilling was to be stopped and that the well was to be plugged. The evidence indicates that in drilling a well with a rotary drill, mud must be constantly pumped down the center of the casing connected with the drill where it is forced out under pressure for the purpose of lubricating the drill. The mud, together with

the debris loosened by the drill, is then sucked back up on the outside of the casing, cleaned and reused resulting in a continuous circulation of the mud. The mud itself is a special-type preparation of a rather expensive nature ordinarily mixed with water or oil. It is not uncommon to lose the circulation if cavities or other difficulties are encountered beneath the surface. In the present instance, circulation problems were encountered almost from the start and became serious at a depth of 69 feet. This was called to defendants' attention and because circulation was not being regained, defendants made arrangements for another drilling rig to come in and take over temporarily. This rig was what was referred to as a "spudder." It drilled by means of percussion or hammering and did not require mud for its operation. This rig drilled to a depth of 142 feet, was then removed, and plaintiff resumed operations. At that point, circulation had been regained and although other circulation problems were encountered from time to time, plaintiff drilled to the 2,407-foot depth where work was stopped.

The record quite clearly reflects the foregoing facts, but any slight conflict in the evidence must be resolved in favor of plaintiff. "In testing the sufficiency of the evidence to support a judgment, the evidence must be considered in the light most favorable to the successful party." Lundt v. Parsons Constr. Co., 181 Neb. 609, 150 N. W. 2d 108.

The assignments of error set out by defendants contain three propositions. First, that plaintiff was not entitled to be paid while the spudder or percussion drill was operating; second, that plaintiff was obligated to pay for the use of the spudder; and third, that the court erred in allowing interest.

In regard to the question of payment while the spudder was in operation, it appears that the contract provided that when circulation of the mud was lost, defendants were to pay plaintiff on a day-work basis after circula-

tion had been lost for an accumulative period of more than 24 hours. This provision appears to clearly cover the situation presented. The spudder was brought in because of lost circulation, and after the first 24 hours, plaintiff was entitled to be paid on a day-work basis or, in other words, at the daily rate provided while the drill stem was not in use.

Regarding payment for the use of the spudder, the contract provided that the defendants shall "* * * procure all third party services and materials used in the testing, completion, or equipping of the test well which are not specifically furnished * * *" by plaintiff. Nowhere in the contract is the plaintiff obligated to furnish any type of drilling rig except the rotary rig which it did furnish. Defendants do not deny that they made all arrangements for bringing in the spudder. Attention is also called to a further provision in the contract which provided that if plaintiff was unable to complete the contract, defendants could then take over, use the plaintiff's equipment free of cost, and continue the drilling, or could remove such equipment and employ another contractor to continue the work at plaintiff's expense. This provision became operative only in the event plaintiff ceased work for a period of 5 days. There is no contention on the part of defendants that plaintiff ever ceased work or became subject to this provision.

No ambiguities appear in this contract. "A written contract expressed in unambiguous language is not subject to interpretation or construction and the intention of the parties to such a contract must be determined from its contents." Mid States Engineering v. Rohde, 182 Neb. 590, 156 N. W. 2d 149. In the event any ambiguity could conceivably be attributable to this contract, attention is called to the fact that the contract was prepared by defendants. "Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time

supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it." Podewitz v. Gering Nat. Bank, 171 Neb. 380, 106 N. W. 2d 497.

Defendants' third assignment of error wherein it is contended that interest on the judgment should not have been allowed appears to be meritorious. On November 30, 1960, plaintiff presented defendants with a statement amounting to $76,973.03. This was the amount prayed for in plaintiff's original petition. In its amended petition, plaintiff prayed for judgment in the amount of $82,301.32. Defendants offered $29,368 and the trial court found that there was actually due plaintiff the sum of $55,045.08. It is readily apparent that this was not a liquidated claim which was fixed and determined or readily determinable, but was, in fact, the subject of reasonable controversy and incapable of being fixed by computation. In the present case, the question of interest is magnified entirely out of proportion due to the fact that the trial court retained this matter under advisement for a period of almost 3 years, a practice which must be disapproved. Under the existing circumstances, plaintiff is entitled to interest only from the date of the judgment entered on April 12, 1967. "Recovery of interest on an unliquidated claim, the subject of reasonable controversy and incapable of being fixed by computation, may be had only from the date of determination of the right of recovery and the ascertainment of the amount." Lundt v. Parsons Constr. Co., *supra.*

Plaintiff has cross-appealed and assigns as error the action of the trial court in finding the amount due plaintiff on a footage basis. The contract provided that, in addition to day rates, defendants were to pay plaintiff $8.50 per foot drilled. It was stipulated that the well was drilled to a depth of 2,407 feet and the undisputed evidence shows that this drilling was done entirely by plaintiff with the exception of the distance from the 69-foot depth to 142 feet. The trial court found that

plaintiff was entitled to payment for 1,833 feet or the sum of $15,580.50 therefor. On the undisputed evidence in this case, plaintiff was entitled to be paid for 2,334 feet and to the additional sum of $4,258.50. Plaintiff is, therefore, entitled to judgment in the sum of $59,303.58, with interest thereon at 6 percent per annum from April 12, 1967, and costs.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

H. DWAIN RIDDLE, APPELLANT, V. ARTHUR ERICKSON, SPECIAL ADMINISTRATOR OF THE ESTATE OF PAUL H. EATON, DECEASED, ET AL., APPELLEES.
158 N. W. 2d 608

Filed April 26, 1968. No. 36816.

1. **Sales: Fraud.** One who solicits a sale has a duty to disclose all pertinent facts within his knowledge affecting his representations when he knows or ought to know that they are not within the reach of a reasonably diligent and observing buyer and would readily mislead the purchaser as to the true condition of the property.
2. ———: ———. A prospective purchaser is justified in relying on a representation made to him where it is a representation of an existing fact and an investigation would be required to discover the truth.
3. ———: ———. A prospective purchaser may not rely on a meaning that he gives to a representation which he knows is beyond the power of the seller to make.
4. ———: ———. The intent or good faith of a person making false statements in such a case is not material, nor may he avoid liability for a positive misrepresentation of fact by disclaiming accuracy in his offering communication.
5. **Words and Phrases: Insurance.** The words "total annual premium volume" contained in an offer to sell an insurance agency mean not only the cash income from policies written on an annual basis, but include as well the proportionate annual share of premiums on policies written for 3 and 5 year terms, whether or not paid when the policy was issued or paid on an annual basis during the term of the policy.

6. **Insurance.** The opportunity to collect unpaid installment premiums and to renew an existing policy on its expiration is a valuable asset of an insurance agency.
7. **Appeal and Error: Evidence.** In testing the sufficiency of the evidence to support a judgment, the evidence must be considered in the light most favorable to the successful party.

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

Wright, Simmons & Hancock, for appellant.

Robert J. Bulger, for appellees.

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

CARTER, J.

Plaintiff H. Dwain Riddle brought this action for damages against the defendant, Arthur Erickson, personally and as executor of the estate of Paul H. Eaton, deceased, for misrepresenting the sale of an insurance agency belonging to the deceased at the time of his death. The trial court found for the defendant and plaintiff has appealed.

On July 29, 1963, Erickson advised Riddle by letter that he was authorized to sell the insurance business of Paul H. Eaton to the highest bidder for cash within the following 10 days. Riddle was urged, if interested, to submit his bid as soon as possible. The business being sold was described and represented in the letter to be as follows:

"The business covered auto insurance, fire and related coverages on buildings, liability insurance and surety policies with a total annual premium volume of $9,562.58 and an annual commission to the agency of $2,420.28 as shown by a survey made since Mr. Eaton passed away. This survey was made from Mr. Eaton's records and from the best information available, and although we believe it to be accurate, I can not personally guarantee the exact accuracy of the figures.

"The companies represented in the agency are Union Insurance Company, National Fire Insurance Company, Employers Mutual Insurance Company, Home Insurance Company, Western Surety Company and Northern British and Mercantile Insurance Company, with a few scattered policies in other companies."

On August 7, 1963, Riddle wrote to Erickson in which he made a cash bid of $2,720 for the insurance agency on the terms on which it was offered for sale. The bid was accepted and a bill of sale delivered effective as of July 16, 1963, the date of Paul Eaton's death.

The evidence shows that Riddle, at and prior to July 29, 1963, conducted a life insurance agency. He had had no previous experience in the fire, liability, and surety business. He understood that the purchase of the agency did not carry with it the franchises in the insurance companies represented in the agency; and that such franchises were matters between the companies and the agent or agency. Riddle requested Erickson to see the books of the agency and was refused because of the possibility of revealing expiration dates of policies in force to the damage of the agency. Erickson was the president of the Bridgeport State Bank and was experienced in the type of insurance involved here. The survey of the agency referred to in the offering letter was made by Thomas H. Olson, also a banker experienced in general insurance. The Olson survey of the agency was made with the approval of Erickson and was relied on by him.

It is the contention of the plaintiff that the trial court was in error in holding that there was no misrepresentation in the offering letter received from the defendant on which he allegedly relied to his damage. It is the general rule that one who solicits a sale has a duty to disclose all pertinent facts within his knowledge affecting his representations when he knows or ought to know that they are not within the reach of a reasonably diligent and observing buyer and would readily mislead the purchaser as to the true condition of the property. Dar-

gue v. Chaput, 166 Neb. 69, 88 N. W. 2d 148. A prospective purchaser is justified in relying on a representation made to him where it is a representation of existing fact and an investigation would be required to discover the truth. Falkner v. Sacks Bros., 149 Neb. 121, 30 N. W. 2d 572. The intent or good faith of a person making false statements in such a case is not material. Dargue v. Chaput, *supra*. A seller does not ordinarily avoid liability for a positive misrepresentation of fact by disclaiming accuracy in his offering communication. Wineberg v. Baker, 123 Neb. 411, 243 N. W. 122.

Plaintiff asserts that the offering letter was false in stating that the Home Insurance Company and North British and Mercantile Insurance Company were represented in the agency. The evidence shows that on January 17, 1961, the Home Insurance Company discontinued its representation with the Eaton agency insofar as the writing of new policies and the renewal of existing policies were concerned. The Eaton agency retained a limited representation with the Home Insurance Company for the purpose of collecting premiums on policies in force with that company until they terminated and with the opportunity of writing the insurance in other companies upon their termination. The rule applicable to North British and Merchantile Insurance Company will be controlled by our disposition of the alleged misrepresentation as to the Home Insurance Company.

The plaintiff testified that he was in the business of writing life, health, and accident insurance for some years prior to July 29, 1963. He said that in the furtherance of that business, he often had inquires concerning fire, compensation, and other forms of insurance. He concluded that he desired to acquire an agency that would permit him to serve his customers with all kinds of insurance. In order to do this he desired to obtain an agency with companies that were recognized as good companies and that the Home Insurance Company and North British and Mercantile Insurance Company were

such companies. He said that he relied on obtaining the agencies for these companies and that without them he would be unable to write liability and compensation insurance, and that he would not have placed a bid for the agency if he had known that their representation in the agency had been canceled. There is evidence in the record that when Home Insurance Company decided to close out with the agency there were other companies represented by the agency which could have written renewals of their policies and that such companies were still represented by the agency in 1963. The plaintiff knew, as he admits, that the representation of an insurance company is a matter of negotiation and agreement between the company and the prospective agent, and that the sale of an agency is not a sale of insurance company franchises represented by the agency. The commissions on premiums on policies in force retained by the agency would belong to the plaintiff. The expirations of such policies were a valuable asset to the agency for the purposes of renewal in other companies represented by the agency. Even if plaintiff construed the offering letter as a representation that the agency for existing insurance companies in the insurance agency would come to him, it was a representation on which plaintiff had no right to rely in view of his own knowledge that it was a matter between the company and the agent. The representation in the offering letter that Home Insurance Company was represented in the agency was true even though such representation was more limited than plaintiff anticipated. But it being a representation on which he knew he had no right to rely, he is in no position to assert there was a misrepresentation of fact when he knew, as he admits, that defendant could not assign the insurance company's franchise. He was not misled by placing a technical construction on the offering letter which he fully understood was not the fact.

Plaintiff asserts that the offering letter was false in stating the agency had "a total annual premium volume

of $9,562.58 and an annual commission to the agency of $2,420.28." Plaintiff alleges that the 1 year premiums on policies in force in the agency on July 16, 1963, amounted to $6,809.74 on which the 1 year commissions were $1,900.37. There is little conflict in the evidence dealing with the annual premium volume and annual commissions previously earned by the agency. The figures contained in the offering letter were the premium volume and commissions earned by including the proportionate share of 3 and 5 year policies whether prepaid or not while those asserted by the plaintiff are those shown by the cash return of the agency as shown by the records of the agency as of July 16, 1963, the date of the death of Paul Eaton. It is the contention of the defendant that the annual premium volume and commission as calculated by the defendant more nearly fix the value of the agency for purposes of sale, while the plaintiff argues that the cash items shown on the records of the agency at the time of sale more clearly fix the value and that this is clearly misrepresented in the offering letter.

The proper disposition of the case necessarily depends upon the meaning of "total annual premium volume" contained in the offering letter. We think the term means not only the cash income from policies written for a term of 1 year, but in addition thereto, the proportionate share of premiums on policies written for 3 and 5 year terms whether or not such premiums were paid when the policy was issued or paid on an annual basis during the term of the policy. It cannot be said, as we view it, that a 3 or 5 year policy paid for when issued does not contribute to the total annual premium volume in determining such volume for the purpose of selling an insurance agency. The opportunity to renew such a policy on its expiration is a valuable asset of an insurance agency. True, the immediate financial return to a purchaser is greater when a 3 or 5 year policy is paid on an annual basis, but, assuming a renewal on the same terms, the returns even out in the long run. If

this were not the proper view, a purchaser would obtain the opportunity to renew a 3 or 5 year cash policy without compensation to the seller. We cannot overlook the fact that the opportunity to renew a policy issued by an agency upon its expiration is a prime asset, if not the chief one, in the sale of an insurance agency such as we have here. We necessarily conclude that there is no actionable misrepresentation in the offering letter. See Musgrove v. Eskilsen, 127 Neb. 730, 256 N. W. 883. The method used in determining the total annual premium volume as a means of fixing the value of the agency is an acceptable one and, under the evidence, supports a finding that the offering letter is free from misrepresentation.

The evidence in this case generally is not in dispute. There are some minor conflicts therein which were resolved by the trial court adversely to the plaintiff. The judgment of the trial court has the effect of a jury verdict, a jury having been waived. Under such circumstances, such conflicts in the evidence must be resolved in favor of the successful party. McGerr v. Beals, 180 Neb. 767, 145 N. W. 2d 579. The evidence is sufficient to sustain the judgment. The judgment, including the judgment on defendant's cross-petition, is correct.

The judgment should be and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EDGAR BOBBIE RICH, APPELLANT.
158 N. W. 2d 533

Filed April 26, 1968. No. 36671.

1. **Criminal Law: Burglary.** In a prosecution for burglary with intent to commit rape, there must be evidence of an unlawful breaking and entering with a felonious intent. Such breaking and entering and the intent with which it was done may be proved by direct or circumstantial evidence.
2. **Criminal Law: Evidence.** Evidence of another crime, similar

to that charged, is relevant and admissible if it tends to prove a particular criminal intent which is necessary to constitute the crime charged.

3. ———: ———. Whether or not such other crimes are too remote rests largely in the discretion of the trial court. The extent to which the discretion of the trial court will be permitted to be exercised in this regard depends upon the facts of each case.

4. **Criminal Law: Appeal and Error.** In a criminal action this court will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

A. Q. Wolf and Thomas D. Carey, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

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

CARTER, J.

The defendant, Edgar Bobbie Rich, was convicted by a jury of the crime of breaking and entering with intent to rape. He was sentenced to 10 years' imprisonment, and he has appealed.

On the early morning of December 17, 1966, Mrs. Judith Holden was awakened from her sleep by a noise. In investigating the cause of her disturbance, she became suspicious that someone was in the house even though she had locked all outside doors. With a flower vase in her hand, she went into the living room and was then grabbed by a man who had been hiding behind a reclining chair. She struck the man on the head with the vase and caused a flow of blood. The man thereafter had blood on his head and face and she had it on her legs, hands, and robe. After much physical resistance she was forced down on a davenport and the man demanded sexual relations. She agreed thereto provided

she was permitted to quiet her 5-year-old son who had been awakened by the commotion. She went into the bedroom ostensibly for that purpose, but called the police from the bedroom instead. He called her out of the bedroom and away from the telephone. At this time she thought she saw a police car arriving and turned on the lights and opened the door. The man made his escape.

The next morning, police detectives interviewed Judith Holden. Carol Underwood, a next door neighbor, and some children were also there. The police produced some "mug shots" from which Judith and Carol identified the defendant. The second morning after the crime, Judith and Carol were taken to the police station where each identified defendant in a police lineup. They identified the defendant as the wanted man.

Carol Underwood testified that she lived next door to Judith Holden. She testified that on June 25, 1966, at about 10:30 p.m., she was awakened by a man sitting on her and holding a knife at her throat. After a difficult struggle, the man left without accomplishing his purpose. She reported the assault to the police, but she was unable to identify her assailant with certainty. She identified the defendant as her assailant in the present trial.

Defendant's evidence was that he had suffered a cut on his head while at work, which was verified by fellow employees. His wife testified that defendant was at home when she got home from work at 12:30 a.m., and that defendant did not leave the home during the rest of the night. A policeman testified that he went to defendant's home at 2 a.m., the morning of December 18, 1966, and that there was no one there. At 5:30 a.m., the same policeman went back to defendant's home and was told by defendant's wife that he was not there. The policeman found defendant hiding behind a bedroom door and made the arrest at that time. There is evidence in the record that defendant had a mustache on

December 17, 1966, which does not show on the "mug shots" offered in evidence. The defendant did not testify.

On this evidence, the jury returned a verdict of guilty. Defendant asserts that the evidence does not sustain the verdict. It was for the jury to resolve the conflicts in the evidence which it did adversely to the defendant. The evidence was sufficient. Buckley v. State, 131 Neb. 752, 269 N. W. 892; State v. Hizel, 179 Neb. 661, 139 N. W. 2d 832.

Defendant contends there is no proof of unlawful breaking and entering. The evidence was that the house was locked immediately before the assault. The door was open when the intruder's presence was discovered. The evidence of the assault is proof enough of the intent for which the entry into the house was made. The proof was adequate under the rule stated in Young v. State, 133 Neb. 644, 276 N. W. 387, wherein it is said: " 'The act of breaking may be shown by proof, either direct or circumstantial. * * * The breaking must be accompanied by an unlawful intent; if not, it is not burglary. This intent may also be proved by direct or circumstantial evidence. * * * These rules are fundamental and well understood, are included in the statute,' etc. It is for the jury to say, under proper instructions, whether or not the defendant was guilty as charged in the information beyond a reasonable doubt."

Defendant contends that the evidence of the previous crime testified to by Carol Underwood was too remote and not admissible. The general rule is that another crime, similar to that charged, is relevant and admissible if it tends to prove a particular criminal intent which is necessary to constitute the crime charged. Such previous crimes tend to show his inclination or disposition to commit such crimes and fix the pattern of previous conduct which in cases such as rape and intent to commit rape is relevant and material in establishing the intent with which an act was done. State v. Easter,

174 Neb. 412, 118 N. W. 2d 515; State v. Dodd, 175 Neb. 533, 122 N. W. 2d 518. Whether or not such other crimes are too remote rests largely in the discretion of the trial court. In Sall v. State, 157 Neb. 688, 61 N. W. 2d 256, this court said: "Evidence of a separate and distinct crime committed by the accused is admissible in a prosecution of a crime that has an element of motive, criminal intent, or guilty knowledge. Henry v. State, 136 Neb. 454, 286 N. W. 338; Turpit v. State, 154 Neb. 385, 48 N. W. 2d 83. An exception to the general rule important in considering the objection made in this case is stated in Foreman v. State, 126 Neb. 619, 253 N. W. 898: 'Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. Whether such other alleged crimes are too remote rests largely in the discretion of the trial court.' See, also, Turpit v. State, supra. Defendant has referred to many Nebraska decisions on this subject, but an examination of them has failed to disclose that a reversal in any one of them was had because of the remoteness of the prior similar offenses. Independent research has not led to a case in this jurisdiction where a reversal was made on the ground of remoteness. The extent to which the discretion of the trial court will be allowed to be exercised in this regard has not been fixed by any decision of this court. Probably it cannot be but depends upon the facts of each case. * * * The doctrine generally accepted is that remoteness in point of time may weaken the evidential value of the evidence but does not justify its exclusion. State v. France, supra (146 Kan. 651, 72 P. 2d 1001); State v. Ridgway, 108 Kan. 734, 197 P. 199." The evidence is not too remote. The defendant, however, is entitled to an instruction limiting the evidence of such former crimes to the sole purpose of determining the issue of intent. Such an instruction was given in this case.

We find no error in the record and the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD H. JONES, APPELLANT.
158 N. W. 2d 278

Filed April 26, 1968. No. 36832.

1. **Criminal Law: Trial.** A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof.
2. ———: ———. A defendant in a criminal case who becomes a witness subjects himself to the rules applicable to other witnesses.
3. **Trial.** All instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.

Appeal from the district court for Furnas County: VICTOR WESTERMARK, Judge. Affirmed.

William H. Sherwood, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

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

SPENCER, J.

The defendant, who was convicted of the crime of burglary and sentenced to a term of 3 years in the Nebraska Penal and Correctional Complex, perfected an appeal to this court.

On the evening of March 6, 1967, a witness from a window across the street observed the municipal building at Holbrook, Nebraska, being burglarized and copper wire being removed therefrom by two men and placed in the trunk of an automobile. This witness telephoned

to another part of the municipal building where the village board was meeting. Two of those present at the board meeting immediately went to the scene. They apprehended Clinton Jones who was getting into the car which he owned and in which the copper wire was loaded. The other participant escaped. Clinton Jones, who had previously pleaded guilty, testified at the trial, implicating the defendant in the burglary. The witness who observed the burglary testified that she observed each of the men pushing a roll of copper wire to the car.

Defendant was positively identified as the man who ran from the building by Doctor Robert L. Stear, one of the men who assisted in the capture of Clinton Jones and thereafter chased the escaping participant. Defendant admitted that he was on the scene of the crime and that he ran away, but testified that he had not engaged in the burglary which was planned and carried out by his cousin without his prior knowledge, consent, or participation. Defendant's testimony is that he left when he learned what Clinton planned to do but came back to insist that Clinton take him away. He observed the wire in the trunk and before he could leave two men came around the corner and defendant took off.

Defendant alleges three assignments of error: (1) That he was denied a fair and impartial trial because he was asked if he had ever previously been convicted of a felony; (2) that he was denied a fair and impartial trial because of the volunteer statements of two witnesses suggesting a previous burglary; and (3) that the court erred in refusing defendant's requested instruction on the effect of his presence at the scene of the burglary.

Defendant testified in his own defense. On cross-examination the prosecuting attorney asked him the following question: "Mr. Jones, have you ever been convicted of a felony?" Defendant's counsel objected to the question and moved for a mistrial. The trial court sustained the objection but overruled the motion for a

mistrial. We are at a loss to understand the reason the trial court sustained the objection to the question. It was strictly in accord with section 25-1214, R. R. S. 1943. Defendant's credibility was definitely an issue, and the question was in proper form.

In Latham v. State, 152 Neb. 113, 40 N. W. 2d 522, we said: "The statute (§ 25-1214, R. R. S. 1943) provides that: 'A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof.' A defendant in a criminal case who becomes a witness subjects himself to the rules applicable to other witnesses." See, also, State v. Clingerman, 180 Neb. 344, 142 N. W. 2d 765. There is no merit to this assignment of error.

Defendant's next assignment of error is directed to the following testimony of Doctor Robert L. Stear: "A. We received a telephone call at the Town Board Meeting, a telephone call from Mrs. Hines, *and she said they are doing it again,* they are rolling wire—" and to the following testimony of George Robert Shackelton: "A. Well, to start out, Sheriff Babcock, he had come up to Holbrook that evening and we rode around, cruised in his car for awhile. Then, he said he had to get back to Beaver City, and so he got in his car and left. I got back in my own car and started cruising town. They were having Village Board meeting this evening at the light plant and like I say I was cruising the town, and I cannot tell you the exact time, but I came down around the depot and swung back to main street, and there was a commotion in behind the light plant and I drove in and *they said that they had struck again.*" (Italics supplied.)

Defendant's objections to the testimony in both instances were sustained. Defendant also moved that Shackelton's answer be stricken. The court sustained this motion and instructed the jury to disregard the statement "struck again."

In addition to the fact that defendant's objections were sustained, we are unable to understand how defendant could be prejudiced by these statements. The testimony did not connect him with any previous burglary. The testimony did not refer to the defendant. The "they" used by the witnesses was never identified. Further, the court specifically instructed the jury as follows: "You should not make any inferences from questions asked, and as to which objections were sustained; and you must disregard any evidence that was ordered stricken; * * *." There is no merit to defendant's second assignment of error.

Defendant's third assignment of error involves the following requested instruction, which was denied by the court: "The mere presence of an accused at the scene of a crime is not sufficient to make him a participant, nor is he guilty merely because he does not act to prevent the crime; however, his presence at the scene of the crime is a circumstance tending to support a finding that he is a principal." The trial court adequately and fully instructed the jury on the issues involved and the law of the case. It required the jury to do much more than find that the defendant was present at the scene of the crime. The jury was required to find that the defendant was not only present but that he actually participated in the burglary. The instructions were more favorable to the defendant than they would have been had the requested instruction been given as submitted. As the trial court suggested in overruling defendant's motion for a new trial, if he had given the instruction as submitted by the defendant it would have necessitated the giving of an instruction on "flight," which was not given. All instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error. State v. Nichols, 175 Neb. 761, 123 N. W. 2d 860.

For the reasons given, we find no prejudicial error in

this case. The judgment and sentence of the trial court is affirmed.

AFFIRMED.

GEORGE FRANZ ET AL., APPELLANTS, V. GLEN D. NELSON ET AL., APPELLEES.
158 N. W. 2d 606

Filed April 26, 1968. No. 36882.

1. **Deeds: Evidence.** While it is true that a deed must describe land so that it can be identified, yet that is certain which by evidence aliunde can be made certain.
2. **Deeds.** If the description in a deed identifies, or furnishes the means of identifying, the property conveyed, it performs its function, it being sufficient when from it the property can be identified.
3. **Trespass.** In order to maintain trespass to land the plaintiff must be the owner, or in possession thereof, when the acts complained of were committed.
4. ———. The burden of proof in an action in trespass is upon the plaintiff to prove ownership or possession.

Appeal from the district court for Clay County: NORRIS CHADDERDON, Judge. Affirmed.

John A. Bottorf and David J. Maser, for appellants.

John E. Sullivan and John J. Sullivan, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

NEWTON, J.

Plaintiffs and appellants are the owners of the south half of the southwest quarter of Section 10, Township 8 North, Range 6 West of the 6th P.M., in Clay County, Nebraska. Defendants and appellees are adjoining landowners.

In 1912, former owners of plaintiffs' property conveyed to Eldorado Township in said county a strip of ground to be used as a drainage ditch described as

follows: "* * * a strip of land commencing 425 feet East of the middle of the public highway/ betwee (sic) section Nine (9) and Ten (10) Eldorado Township and 900 feet North of the Quarter line of the South west Quarter of section Number Ten (10), Eldorado Township, and running thence due South 2200 feet/ through the South West Quarter of sec. 10 Eldorado Twp. same to be a strip in width 10 feet during the whole of said course." Immediately upon receipt of the deed, the township board made provision for the opening of a ditch through plaintiffs' 80-acre tract and it is not disputed that the ditch runs on the line described. The ditch serves to drain surface waters from the property of defendants and other adjoining landowners. The undisputed evidence indicates that this ditch has been maintained from 1919 to the present time. Defendants have owned the property adjoining plaintiffs' land since 1949. During the ensuing years, defendants made it a practice to keep the ditch open, cleaning it out at least every 2 years, and on occasion, twice in the same year. The ditch is at present 6 feet wide and well within the 10-foot strip claimed by Eldorado Township.

Plaintiffs seek to enjoin defendants from maintaining the ditch and from draining surface waters into and along the ditch. The trial court found generally for defendants and dismissed the action.

Plaintiffs contend that the conveyance to Eldorado Township is ineffective because the description is not sufficiently definite. It will be noted that the starting point is definitely fixed and that the line runs thence due south 2,200 feet through the southwest quarter of Section 10. It is specified that the strip shall be 10 feet wide and shall be used as a drainage ditch. Logically, the line described was intended as the center of the ditch. "While it is true that a deed must describe land so that it can be identified, yet that is certain which by evidence aliunde can be made certain." City of Warsaw v. Swearngin (Mo.), 295 S. W. 2d 174. "If the

description in a deed identifies, or furnishes the means of identifying, the property conveyed, it performs its function, it being sufficient when from it the property can be identified." Harrison v. Everett, 135 Colo. 55, 308 P. 2d 216. Regardless of whether or not the deed is deemed to be valid, this argument is of no avail to plaintiffs. The evidence clearly shows that the 10-foot strip has been claimed by the township since 1912 and has been used for drainage-ditch purposes since that time. It is apparent that the township has either acquired title by adverse possession or, at least, an easement, but assuming that this is not true, the undisputed evidence indicates that defendants have maintained a drainage ditch through the land of plaintiffs, at the point in question, for a period in excess of 10 years and, but for the public interest, have acquired an easement in their own right. See § 25-202, R. R. S. 1943.

Under such circumstances, plaintiffs' petition must fail. This action, although sounding in injunction, is essentially an action in trespass. "In order to maintain trespass to land the plaintiff must be the owner, or in possession thereof, when the acts complained of were committed." Nelson v. Jenkins, 42 Neb. 133, 60 N. W. 311. See, also, Chicago, R. I. & P. Ry. Co. v. Shepherd, 39 Neb. 523, 58 N. W. 189. The burden of proof is upon the plaintiff to prove ownership or possession. See 87 C. J. S., Trespass, § 86 b, p. 1039.

Plaintiffs have failed to maintain their burden of proof and the judgment of the district court must be affirmed.

AFFIRMED.

CHARLES O. RICKUS, APPELLEE AND CROSS-APPELLANT, V. RENA IRENE RICKUS, APPELLANT AND CROSS-APPELLEE.

158 N. W. 2d 540

Filed May 3, 1968. No. 36732.

1. **Husband and Wife: Divorce.** Ordinarily, acts of personal violence by the husband toward his wife are not justified by conduct on the part of the wife that does not threaten bodily harm.
2. **Divorce.** It is impossible to lay down any general rule as to the degree of corroboration necessary in a divorce action as each case must be decided on its own facts and circumstances.
3. ———. Condonation is dependent upon future good conduct and a repetition of the offense revives the wrong condoned.
4. ———. On appeal to the Supreme Court in a divorce action the cause is for trial de novo.

Appeal from the district court for Scotts Bluff County: JOHN D. ZEILINGER, Judge. Affirmed as modified.

Wright, Simmons & Hancock, for appellant.

Lovell & Raymond, for appellee.

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

SPENCER, J.

Charles O. Rickus, hereinafter referred to as plaintiff, and Rena Irene Rickus, hereinafter referred to as defendant, filed separate actions on June 29, 1965, praying for absolute divorces. The actions were consolidated by order of the court into the one filed by the plaintiff, which was the first one filed. The plaintiff later filed an amended petition to which the defendant filed an answer and a cross-petition.

Plaintiff alleged that the parties owned real estate and personal property in their joint names which had been acquired through the sole efforts of the plaintiff, most of which had been accumulated prior to the marriage, and prayed that all such property be quieted in him. Defendant alleged that she had substantial property at the time of the marriage which had enhanced the

joint property of the parties, and prayed for restoration of the property she had at the time of the marriage, together with a share of the property accumulated during the marriage.

The parties were married July 12, 1963. Their marriage of less than 2 years was a very turbulent one. During that period the parties lived together as husband and wife for less than a year. Plaintiff filed a petition for divorce January 4, 1964. The parties were separated for 60 days or longer, and then resumed marital relations. The plaintiff filed a second petition June 26, 1964. The defendant had moved back to Sheridan, Wyoming, in May 1964, and did not return to Scottsbluff until the middle of September 1964, at which time the parties again resumed marital relations. On November 3, 1964, the defendant filed a petition for divorce and the parties did not resume marital relations until April 1, 1965, and, as stated, both parties filed separate divorce actions on June 29, 1965.

This was the plaintiff's second marriage and the defendant's fourth or fifth. The defendant failed to answer an interrogatory as to her previous marriages. The complaint in the divorce action in defendant's last marriage alleges she had been married at least four times. The decree in defendant's last divorce was filed September 28, 1962. Plaintiff married defendant soon after his first divorce decree became final.

It will serve no useful purpose to detail the evidence adduced in the six-volume record herein. Plaintiff's original petition alleged extreme cruelty, and the amended petition alleged extreme cruelty and adultery. Defendant alleged extreme cruelty, both mental and physical.

The Saturday night before the petitions were filed herein, the parties had a violent argument and the plaintiff struck the defendant. While plaintiff's provocation may have been great, this does not excuse him. Ordinarily, acts of personal violence by the husband toward

his wife are not justified by conduct on the part of the wife that does not threaten bodily harm. Humann v. Humann, 180 Neb. 719, 144 N. W. 2d 723. Plaintiff admits he slapped the defendant, and alleges she ran into the bathroom and slipped, at which time she may have bruised her left side. He went in to pick her up and she screamed, which brought her daughter to the scene. Defendant alleged plaintiff knocked her down and kicked her in the left side. We do not deem it necessary to discuss this incident further, other than the reference hereafter to defendant's alleged injuries.

The record amply sustains the plaintiff's allegation that the defendant continually called him vile and obscene names and held him up to ridicule. The record, except for the fact that the trial court who observed the witnesses did not so find, would sustain the allegation of adultery. In any event, it can be said that the record does sustain a finding of extreme indiscretion on the part of the defendant.

Defendant questions the sufficiency of the corroboration to support a decree for plaintiff. It is impossible to lay down any general rule as to the degree of corroboration necessary in a divorce action as each case must be decided on its own facts and circumstances. Applegate v. Applegate, 182 Neb. 342, 155 N. W. 2d 337. We find the corroboration sufficient herein.

Defendant argues that the acts of cruelty testified to by plaintiff's witnesses were condoned when the parties resumed marital relations after a reconciliation agreement in March 1965. Condonation is dependent upon future good conduct and a repetition of the offense revives the wrong condoned. Fletcher v. Fletcher, 182 Neb. 549, 156 N. W. 2d 1. On the record herein, we find there was no condonation.

Defendant at the time of the marriage owned a residence in Sheridan, Wyoming, which she sold during the marriage for $12,000. At the time of the sale the balance due on the purchase money mortgage was $7,352.88.

The sale expense was $1,418.51. The proceeds were put into bonds which defendant testified she later cashed and used during the marriage.

Defendant had two teen-age children by a previous marriage. These children lived with the parties but were not adopted by the plaintiff. Defendant at the time of the marriage was receiving child support in the amount of $100 a month from the father of the children. This subsequently was increased to $150 a month.

One of defendant's chief contentions is that she had $18,000 in cash at the time she married the plaintiff, much of which she loaned to the plaintiff at various times before the fall of 1964. She testified she kept this $18,000 in a locked suitcase in her bedroom, and that no one, including the plaintiff or her children, had ever seen it. She further testified that she had never used a bank until she borrowed $150 from the First National Bank at Scottsbluff on June 26, 1964. Her testimony on having $18,000 in cash at the time of her marriage at the very least puts a severe strain on credulity.

Defendant testified that she had this $18,000 in cash when she divorced her previous husband, but that it was not considered in the divorce because he had no claim to it. Defendant married that husband June 7, 1960. The divorce petition was filed by the husband but the parties entered into a property settlement, and by agreement the decree was entered on the defendant's cross-petition. It is of interest to note that the former husband alleged that the defendant had liabilities which she failed to disclose until after the marriage. In answer to an interrogatory in that action, the defendant stated as follows: "* * * Plaintiff has not been asked to pay any of Defendant's debts due and owing prior to marriage as all said debts that accrued prior to marriage were totalled and money borrowed from Pacific Finance, and were paid off with child support checks received from Warren Gilbert. The Defendant is merely

requesting that all present bills that were incurred during the marriage to Plaintiff be paid by Plaintiff."

Plaintiff testified his wife told him before the marriage that she was without funds and was having difficulty meeting her obligations, and that he gave her money to help on expenses. The day after the marriage plaintiff gave her $1,500 for repairs on her Sheridan, Wyoming, house. Defendant admits receiving this $1,500, but alleges it was to pay back money she had loaned him. Defendant also admits that the plaintiff paid off a furniture loan of approximately $700 to the Pacific Finance Company in Sheridan, Wyoming, so that she could move her furniture to Scottsbluff, Nebraska, as well as paying her moving expenses. The evidence is undisputed that from the time she moved to Scottsbluff, which was in January 1963, until the marriage on July 12, 1963, plaintiff gave defendant $125 each week for expenses.

Defendant's story is that plaintiff would come to her, usually on Saturday morning, needing money to meet his payroll, and she would give him between six and seven hundred dollars. She also told of an instance when she alleged she loaned plaintiff $3,000 cash to make a payment on equipment. She testified that on this occasion she demanded a receipt after she had given him the money; that he threw it back at her; and that she picked up the money and returned it to her suitcase. Plaintiff later came back and she again gave him the money when he told her he would make out a receipt after he had made the payment. Defendant testified: "I paid cash and I have receipts for every dime I have ever spent all my life," but she never secured any receipts for any of the money she claims she advanced to the plaintiff.

When defendant was asked how she knew she had $18,000 at the time of her marriage to plaintiff, she said: "Because I am a miser, for one thing, and I know where every penny I spend goes." However, she kept no record of this $18,000 because, as she said, it "wasn't supposed

to have been used." During the trial defendant referred to day-to-day notations on calendars she kept through the years, but these calendars had no notations as to any alleged loans. If defendant's testimony is to be believed, she loaned her husband approximately $18,000 during the first year of their marriage. During this period two divorce petitions were filed by the plaintiff, and the parties were separated at least 2 months before the defendant moved back to Sheridan, Wyoming, in May 1964. Further, when the parties discussed a divorce settlement with their attorneys in November 1964, no contention was made by defendant that she had ever loaned plaintiff any money which she wanted back out of the marriage.

Plaintiff denies ever borrowing money from the defendant. He denies ever paying any of his employees in cash or making cash payments on equipment purchases. This testimony is corroborated by his records. His accountant testified that the records indicate that plaintiff's employees were always paid by check and never by cash, and that no cash payments were ever made on any equipment purchases. Plaintiff's deposit slips were also produced for the period of the marriage and there are no unexplained cash deposits.

Defendant's testimony on the extent of the injuries she received during the altercation with her husband on June 26, 1965, also strains credulity. Doctor Gentry, who saw her that evening, testified to some contusions on the left side of her head and chest. He put an Ace bandage on her chest. This bandage is in evidence. An X-ray was negative for any fractures. Defendant testified she wore the Ace bandage night and day until she consulted Doctor Baker on July 13, 1965. She testified that Doctor Baker at that time prescribed a new brace or harness which she wore night and day for 5 or 6 months, even wearing it to bed. This harness also is in evidence. Doctor Baker testified that he never prescribed a harness or brace for defendant, and that he

has no recollection of her ever wearing one. It is apparent from an inspection of the harness allegedly prescribed by Doctor Baker that it has never been worn, not even for 1 hour. The Ace bandage prescribed by Doctor Gentry may have been worn an hour or two, but certainly it could not have been worn night and day from June 26 to July 13, 1965. It shows absolutely no evidence of any wear except for the briefest period, has no soil marks, and has never been washed.

The credibility gap in defendant's testimony is so great in so many particulars and the contradictions so many that we are unable to discern from the record before us when she may have been testifying truthfully. On appeal to the Supreme Court in a divorce action the cause is for trial de novo. Kuta v. Kuta, 180 Neb. 443, 143 N. W. 2d 751. In spite of the unreliability of the defendant's testimony, we accept the finding of the trial court on the incident at Lake Minatare on which plaintiff based his allegation of adultery. As suggested heretofore, however, the evidence does justify a finding of extreme indiscretion on the defendant's part. We also note that defendant admits having dinner with a gentleman friend on at least one occasion in a Melbeta bar, and admits that they visited frequently. We accept plaintiff's version of the altercation on June 26, 1965, and while we do not condone his action, in view of his provocation we do not find it sufficient to deny him a divorce.

We do not deem it necessary to discuss the transfers of property made by plaintiff to meet defendant's demands. The record herein would indicate that from the first defendant never seriously endeavored to make a success of this marriage. She testified she married plaintiff only because he threatened her with a breach of promise action. After the marriage she was reluctant to use her married name, Rickus, but continued in many instances the use of the name Gilbert. She borrowed money on the rings plaintiff had given her, not because she needed money but, as she testified: "Actually, I

didn't want the rings." On the other hand, to the date of the final altercation, June 26, 1965, plaintiff's accessions to the demands of the defendant would indicate he was doing everything possible to save the marriage. We sustain the finding of the trial court in granting a divorce to the plaintiff and dismissing defendant's cross-petition.

The trial court was overly generous with the defendant. She had a $50 per week temporary alimony allowance from July 14, 1965, to the date of the trial, or $5,050. Plaintiff was additionally required to keep up the payments on the house in which the defendant was living. Defendant also was allowed $50 temporary attorneys' fees, and $333.50 for court costs and expenses. In the final decree, defendant was awarded $7,500 permanent alimony, $700 attorneys' fees, and plaintiff was required to pay $1,140.63 in obligations incurred by her subsequent to the separation of the parties.

On the record, $2,000 is a very generous permanent alimony allowance for defendant to be paid as directed by the trial court, and the judgment of the trial court is modified to that extent. In all other respects the judgment is affirmed as modified. Defendant's attorneys are allowed $750 for services in this court, to be taxed as costs.

AFFIRMED AS MODIFIED.

IN RE ESTATE OF KATHERINE KENT GRASSMAN, DECEASED. WADE W. GRASSMAN, APPELLEE, V. CAROL JENSEN, EXECUTRIX OF THE ESTATE OF KATHERINE KENT GRASSMAN, DECEASED, APPELLANT.

158 N. W. 2d 673

Filed May 3, 1968. No. 36757.

1. **Husband and Wife: Fraud.** Fraud in the inducement of an antenuptial agreement between prospective spouses is sufficient ground for avoidance of the agreement in the absence of contravening equitable considerations.

2. **Husband and Wife: Exemptions.** A wife contributing to the support of her dependent husband ordinarily qualifies as the head of the family within the meaning of the exemption in section 25-1552, R. R. S. 1943.
3. **Husband and Wife: Estates.** The interval of time between grant of administration and timely application by a surviving spouse for a maintenance allowance may be included in the period of the allowance.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Affirmed as modified.

Joseph L. Krause, for appellant.

Warren S. Zweiback, Dana C. Bradford III, and Monsky, Grodinsky, Good & Cohen, for appellee.

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

SMITH, J.

The county court adjudged that an antenuptial promise of Wade W. Grassman, surviving husband of Katherine Kent Grassman, was not binding. The court also granted Wade's application for statutory allowances. On appeal the district court rendered a judgment identical with that of the county court, and the executrix has appealed. The issues are related to the antenuptial promise; allowances in lieu of homestead and for maintenance; and the award of wearing apparel, ornaments, and household furniture of the deceased.

Wade and Katherine, acquaintances since childhood, began keeping company in 1948 at Alliance, Nebraska, where they had grown up. Each one had children of a former marriage. At age 47 he was senior to her by 5 years. The association continued to 1956 when Wade removed to Omaha, Nebraska. From then up to August 1960, they were together once a month.

The marriage ceremony was set for August 17, 1960, at 10 a.m. Although Wade arrived at the Alliance depot at 7:30 a.m. that day, according to his testimony, an accident delayed the ceremony several hours. A test

tube containing a specimen of Wade's blood had been broken in shipment, and another premarital examination was necessary. For that purpose Wade proceeded to Scottsbluff, Nebraska, in company with Richard Frech, Katherine's son-in-law.

While Wade was returning from Scottsbluff, he first learned that he must stop at the office of William Hein, an Alliance lawyer. Wade was to sign some papers, Richard said, "to protect the girls." The men arrived at the office at 11:40 a.m., 10 minutes after the conversation. There Wade hurriedly read, signed, and acknowledged a document handed him by Hein. The only other signature on the document is that of Hein as the notary public who took Wade's acknowledgment. The document reads: "The undersigned, Wade W. Grassman, who is contemplating marriage to Katherine Kent, of Alliance, Nebraska, hereby agrees and contracts that he shall receive no part of the estate of said Katherine Kent should he survive her. He hereby completely and without any reservation renounces and surrenders any and all rights he might acquire in her property by reason of being her husband should she precede him in death.

"He hereby acknowledges that he has been informed of the nature, value and extent of the property of said Katherine Kent."

The transaction in Hein's office lasted 3 minutes. No description or valuation of Katherine's property was given to Wade, and no material fact except home ownership, according to his testimony, was then known to him. Katherine's property was worth $83,000 which included $13,000 for the home and $38,000 for the inheritance from her father, F. W. Harris, who had died in June 1960. Her debts were trifling. Wade, a high school graduate working as a railroad clerk, was generally inexperienced in business and legal affairs.

Antenuptial conversations about Katherine's property are described in testimony of Katherine's daughter, Kath-

erine Sue Frech. A resident of Wyoming, she visited her mother at Alliance for 2 weeks immediately prior to August 17, 1960. On two days between August 3 and 10, the value of the Harris estate and Katherine's one-third share of it were topics of seven conversations in Wade's presence. During the evening of August 16, Wade again visited at Alliance. He, Katherine, and the Frechs talked about the antenuptial agreement as follows:

"A. Dick had suggested an agreement would be a good idea, an agreement in regard to Mother's wish that my sister and me receive her holdings, and Wade thought this was a good idea too. Q. Is that what he said? A. Yes, he said he was interested in my Mother for herself alone. Q. How long did this conversation last? A. I'd say about half an hour. Q. And what did your Mother say? A. That this was her wish too; she wanted her two daughters to be taken care of. Q. Did Mr. Grassman say anything else * * *? A. That he, in loving Mother, wished this too. * * * Q. * * * what do you mean? A. That my sister and me be taken care of and that whatever holdings Mother might have would go to Carol and me."

In August 1960, Wade lived in Omaha where he worked for the Chicago, Burlington & Quincy Railroad Company. Burlington records in evidence were kept in the regular course of business. Reports dated and handwritten by Wade reveal that he worked in Omaha every day from August 2 through August 16. During that period one railroad pass was issued to him. He departed from Omaha on train No. 19 at 9:45 p.m., August 16, and the train arrived at Alliance the next day at 7:30 a.m. The conclusion is inescapable. Whether or not Katherine Sue was overcome with greed, her testimony is incredible.

Wade retired in December 1963, on account of disability. On February 11, 1966, the day of Katherine's death, his monthly railroad benefits amounted to $320.

During that period Katherine had contributed $100 per month for his maintenance because of his circumstances.

Katherine died owing no one. Her property comprised wearing apparel, ornaments, household furniture, and intangibles. Intangible property in her name alone was valued at $56,115.17. Intangible property owned in joint tenancy with Wade was valued at $27,606.30.

Katherine died without issue of the second marriage. The will admitted to probate had been executed on August 16, 1960, the day before the marriage of Wade and Katherine. She bequeathed all her property in equal shares to her two daughters, naming them as executrices.

Fraud in the inducement of an antenuptial agreement between prospective spouses is sufficient ground for avoidance of the agreement in the absence of contravening equitable considerations. The decisive test is factual. In re Estate of Maag, 119 Neb. 237, 228 N. W. 537; In re Estate of Enyart, 100 Neb. 337, 160 N. W. 120. The question whether an antenuptial agreement may be avoided by a surviving husband is open in Nebraska. It has been said that a widow's claim is usually stronger than a widower's claim because of sympathy for the widow. 2 Lindey, Separation Agreements and Ante-Nuptial Contracts (1967 Supp.), § 90, p. 133. In recent decisions we did not assume that the intended wife usually bargained from a position of weakness. See, Strickland v. Omaha Nat. Bank, 181 Neb. 478, 149 N. W. 2d 344; Caprette v. Spieth, 181 Neb. 11, 146 N. W. 2d 746. The sex of the surviving spouse is one of many elements to be considered. Some of the other facts that may be significant are age, prior marriage, amount of business experience, strength of the confidential relation, knowledge of the nature and extent of the property, adequacy of consideration, and opportunity for investigation and deliberation. We conclude that Wade's promise is not binding. It is therefore unnecessary for us to consider section 30-106, R. R. S. 1943.

The argument against the allowance in lieu of homestead is that Katherine was not the head of the family. The exemption statute, section 25-1552, R. R. S. 1943, contains no definition of the phrase "heads of families." A similar phrase is defined in the homestead law, but the definition is restricted to sections 40-101 to 40-117, R. R. S. 1943. The exemption statute should receive a liberal construction consistent with its purpose to benefit the family of the debtor. Frazier v. Syas, 10 Neb. 115, 4 N. W. 934. See, also, Thomas v. Sternhagen, 178 Neb. 578, 134 N. W. 2d 237. A wife contributing to the support of her dependent husband ordinarily qualifies as the head of the family within the meaning of the exemption. See, State ex rel. Lucas v. Houck, 32 Neb. 525, 49 N. W. 462; Roberts v. Moudy, 30 Neb. 683, 46 N. W. 1013; Schaller v. Kurtz, 25 Neb. 655, 41 N. W. 642. Allowance of this item to Wade was correct.

The executrix complains that the period of the maintenance allowance includes an interval prior to Wade's filing his application on November 10, 1966. On December 21 the county court ordered the allowance, $100 a month, to commence April 8, 1966, when the court had granted administration of the estate. The statute provides for "such reasonable allowance * * * as the county court shall judge necessary for * * * maintenance during the progress of the settlement of the estate * * *, which shall not be longer than one year after granting administration, nor for any time after the personal estate shall be assigned to the surviving husband or wife * * *." § 30-103 (2), R. R. S. 1943.

The executrix relies upon Smith v. Estate of Bayer, 95 Neb. 532, 145 N. W. 1029. In that proceeding the county court denied the application filed by the widow nearly a year after her husband's death. She subsequently died, having taken no steps to appeal. The administrator of her estate prosecuted an appeal to the district court which dismissed the action on demurrer. This court affirmed the judgment, saying: "* * * she

waived her right to the year's support, and the administrator of her estate succeeded to no right which could be enforced by him against the estate of her deceased husband."

The practice followed by both courts in the allowance to Wade is common. It is within the language and the spirit of the statute. To remove doubt, we disapprove the contrary implication of the Smith case. The interval of time between grant of administration and timely application by a surviving spouse for a maintenance allowance may be included in the period of allowance.

The judgment requires the executrix to deliver deceased's wearing apparel, ornaments, and houshold furniture to Wade. A few hours after Katherine died, Carol received deceased's diamond ring, earrings, watch, and rocking chair from Wade. He also delivered deceased's fur coat to Katherine Sue the next day and other clothing to Carol on April 8.

On April 9, 1966, Wade wrote Katherine's sisters a letter that read in part: "Yesterday * * * They (Carol and Katherine Sue) took the rest of their mother's clothes but I gave them all information that nothing else would leave without you * * * having a voice on many things—unless court forces me to give everything up—Such as gold rim plates, amber plates, goblets. sterling silver with (H) and pearl handle knives & forks." In July 1966, Wade delivered the silverware and china to Carol.

Wade testified that he had voluntarily delivered the items to Carol as executrix, but he admitted that he had never mentioned her official capacity. Other testimony discloses that Wade in delivering the property made gifts. The transactions were open and fair. Carol should not be charged with the gifts.

We modify the judgment by excluding the above gifts from the property that the executrix is to deliver to

Wade. The judgment is affirmed as modified.

AFFIRMED AS MODIFIED.

CARTER and SPENCER, JJ., concurring in the result in part, and dissenting in part.

We concur in the result of that part of the opinion holding the purported antenuptial agreement unenforcible on the ground of fraud. It would have been better, in our opinion, to have voided the purported antenuptial agreement for failure to comply with section 30-106, R. R. S. 1943, for the reason that it was not signed by both of the parties to the proposed marriage and acknowledged in the manner required by law for the conveyance of real estate. Such is the clear holding of this court in Dorshorst v. Dorshorst, 174 Neb. 886, 120 N. W. 2d 32. By so holding, the inference that the purported antenuptial contract is valid except for the fraud would be avoided.

We dissent from that part of the opinion holding that the wife, under the facts as recited in the opinion, is the head of the family within the meaning of the exemption provided for in section 25-1552, R. R. S. 1943. There is but one head of a family and but one exemption allowable. The holding that the wife is the head of the family and entitled to the exemption in lieu of homestead under the facts shown is contrary to the previous holdings of this court. The mere fact that a wife makes some contribution to the family living costs, or to the husband's personal living expenses, does not, ipso facto, make her the head of the family and entitled to the statutory exemption in lieu of homestead. In this day of working wives, whatever her contributions to family maintenance may be, a wife may, under the holding of this opinion, claim to be the head of the family or not, depending on where the interests of the parties lie. This is not the intent of the statute providing for the exemption in lieu of homestead.

WHITE, C. J., concurring with Carter and Spencer, JJ.

I concur in what Carter, J., says. I would add further

what seems to me to be plainly apparent. The statute is in derogation of the common law, must be strictly construed, and creates a new right to antenuptially contract which was nonexistent before. By its terms it is limited to real property. We have no right to inquire into the policy or wisdom of this legislative declaration. And, even if we did, the statute is designed, in the premarital context, to free the fixed, separately inalienable inchoate interest of the spouse in real estate from testamentary restriction. A spouse's unfettered power to dispose of his or her personal property, inter vivos, contrasts sharply. A premarital contract, with a disclosure required (as it is), and only partially freeing personal property from the descent statute, could lead to problems invading the transcendent considerations present in preserving the freedom of alienation of personal property inter vivos.

IN RE ESTATE OF MARY SCHRACK, DECEASED.
BERNICE BIGGER MITCHELL, APPELLEE, V. BEULAH TUCKER, APPELLANT.

158 N. W. 2d 614

Filed May 3, 1968. No. 36806.

1. **Wills: Appeal and Error.** When an appeal is taken from a judgment of the county court denying the admission of a will to probate, the party appealing is required to file a petition on appeal within 50 days from the date of the rendition of such judgment unless the court, on good cause shown, shall otherwise order.
2. ———: ———. Whether good cause has been shown is ordinarily a question of fact.

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

Bertrand V. Tibbels, for appellant.

Lovell & Raymond, for appellee.

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

BOSLAUGH, J.

This is an appeal in an estate proceeding. The appellant petitioned the county court of Scotts Bluff County, Nebraska, to admit the will of Mary Schrack, deceased, to probate. Objections were filed, a hearing was held, and the will was refused probate.

The proponent appealed to the district court but failed to file a petition in that court within 50 days. Upon the motion of the contestant, the appeal was dismissed. The proponent has now appealed to this court.

The proponent contends that new pleadings are not required in the district court in appeals in probate proceedings; that the contestant is the "plaintiff" in an appeal in a will contest where the will has been denied probate; and that the trial court abused its discretion in refusing to set aside the order dismissing the appeal and grant the proponent leave to file a petition on appeal.

The proponent's first contention is based, primarily, upon the statute relating to appeals in probate matters. Ch. 30, art. 16, R. R. S. 1943. The statute itself does not require that new pleadings be filed in the district court. But the decisions of this court, since at least 1935, have held that the practice is to file new pleadings in the district court. Weideman v. Estate of Peterson, 129 Neb. 74, 261 N. W. 150; In re Estate of Lindekugel, 148 Neb. 271, 27 N. W. 2d 169.

The proponent's contention that the contestant is the "plaintiff" in a will contest is based upon the theory that a probate proceeding is not a "civil action"; and that the proceedings are not adversary until objections have been filed. Although the argument may have some merit, the matter is not an open question at this time. In Leu v. Swenson, 174 Neb. 591, 119 N. W. 2d 68, this court said: "When an appeal is taken from a judgment of the county court denying the admission of a will to

probate, the party appealing is required to file a petition on appeal within 50 days from the date of the rendition of such judgment unless the court, on good cause shown, shall otherwise order."

The proponent's third contention is based upon the argument that it was unfair to deny the proponent leave to file a petition on appeal after the appeal had been dismissed because the question was debatable and proponent's counsel acted in good faith. A similar argument was rejected in City of Seward v. Gruntorad, 158 Neb. 143, 62 N. W. 2d 537.

Whether there has been "good cause shown" is ordinarily a question of fact. Here, no evidentiary showing was made or preserved.

The purpose of the 50-day requirement in section 27-1307, R. R. S. 1943, is to expedite the disposition of appeals. Anoka-Butte Lumber Co. v. Malerbi, 180 Neb. 256, 142 N. W. 2d 314. In view of the clear statement made in Leu v. Swenson, *supra*, it is difficult to understand the proponent's argument that the law was confused or uncertain. The relitigation of procedural rules which have become well settled should not be encouraged. The record does not show an abuse of discretion.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. THEODORE L. CARLSON, SPECIAL DEPUTY ATTORNEY FOR DOUGLAS COUNTY, NEBRASKA, APPELLANT, V. EDWARD HATFIELD ET AL., APPELLEES.

158 N. W. 2d 612

Filed May 3, 1968. No. 36838.

1. **Nuisances.** The operation and maintenance of a cafe which serves as a gathering place for hoodlums, prostitutes, gamblers, and other disorderly persons is a public nuisance.
2. ———. The jurisdiction of an equity court to abate a public nuisance exists independent of statute.

3. ———. It is within the power of an equity court to do whatever is reasonably necessary to abate a public nuisance. It includes the power to enjoin the use of the premises for any purpose for a reasonable period of time.

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

James E. Fellows and George S. Selders, Jr., for appellant.

Paul E. Watts, for appellees.

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

BOSLAUGH, J.

This is an action in equity to abate a public nuisance. The relator is an assistant city prosecutor of the city of Omaha and a special deputy county attorney of Douglas County, Nebraska. The defendant Hatfield is the owner of the property. The defendant Johnson is a lessee and in possession of the property. The trial court dismissed the action and the relator has appealed.

The evidence shows that the defendant Johnson has operated a cafe, known as the Seventh Ward Improvement Club, at 2923 Q Street in Omaha, Nebraska, for about 2½ or 3 years. The location is in an industrial area with a high incidence of crime. The area was characterized by the defendants' attorney as one in which "you take your life in your hands" if entered after dark. The cafe opens at about 7:30 p.m. or later and stays open until late the following morning. It is a gathering place for hoodlums, prostitutes, gamblers, and other disorderly persons and is a constant source of trouble for the police. The cafe is checked nightly by the vice squad, and numerous arrests have been made. The record includes evidence of some 40 convictions resulting from arrests made at the premises over a period of about 16

months. The defendant Johnson was convicted of keeping a disorderly house on three occasions.

The lieutenant in charge of the vice detail testified that 2923 Q Street is their "biggest problem" in South Omaha. The night sergeant assigned to the vice detail testified that the Seventh Ward Improvement Club is the most troublesome spot in the South Omaha area. This evidence was corroborated generally by the testimony of the other police officers.

The evidence establishes that the cafe operated by the defendant Johnson is a public nuisance. There is evidence that the defendant Johnson has attempted to maintain order in his establishment and has cooperated with the police, but these efforts have not been successful. As stated in State ex rel. Towle v. Eyen, 130 Neb. 416, 264 N. W. 901: "When we consider the character and propensities of the persons who congregated at the defendant's place, as shown by the evidence, we are convinced that, however hard the defendant may have tried to do so, it was beyond his power to control their conduct and behavior."

The judgment of the district court is reversed and the cause remanded with directions to enter a judgment in favor of the relator. We do not at this time determine the extent of the relief to be granted, but leave that to the sound discretion of the district court.

The jurisdiction of an equity court to abate a public nuisance exists independent of statute; and it is within the power of the court to do whatever is reasonably necessary to abate the nuisance. State ex rel. Wilcox v. Ryder, 126 Minn. 95, 147 N. W. 953, 5 A. L. R. 1449; State ex rel. Haugan v. Denis, 40 S. D. 219, 167 N. W. 151; State ex rel. Davenport v. Henry (Mo. App.), 270 S. W. 2d 88. This includes the power to enjoin the use of the premises for any purpose for a reasonable period of time.

REVERSED AND REMANDED WITH DIRECTIONS.

LILA WOLTER, APPELLEE, V. CLARENCE WOLTER, APPELLANT.
158 N. W. 2d 616

Filed May 3, 1968. No. 36847.

1. **Divorce.** The remarriage of a divorced wife does not automatically, in and of itself, terminate her right to receive alimony payable periodically and not in gross; but it does establish a prima facie case which requires the court to terminate it in the absence of proof of some extraordinary circumstance justifying its continuation.
2. ———. Where the court has power to revise, alter, or terminate an alimony award upon remarriage of the wife, her remarriage operates to hold in abeyance her right to receive further alimony payments until a final judicial determination. Installments of alimony accruing after remarriage of the wife do not vest nor have the finality of a judgment until such determination, and the court has jurisdiction and authority to cancel or modify arrears of such alimony retrospectively back to, but not beyond, the date of remarriage.

Appeal from the district court for Dixon County: JOSEPH E. MARSH, Judge. Reversed and remanded with directions.

McFadden, Kirby & Swoboda, for appellant.

Addison & Addison, for appellee.

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

MCCOWN, J.

The basic issues presented in this case are the effect of a wife's remarriage upon a divorce decree providing for a monthly alimony award to her limited only "until further order of the Court"; and whether a modification of the decree as to alimony, based on such remarriage, may be retroactive or only prospective.

Plaintiff and defendant were divorced on January 17, 1957. The decree ordered the defendant husband to pay plaintiff $50 per month for support and maintenance of the two children and $25 per month as alimony, support, and maintenance of the plaintiff, both payments

to continue until further order of the court. No issue of child support is involved here. On February 21, 1958, some 13 months after the divorce, the plaintiff wife remarried. Plaintiff's new husband has provided for the plaintiff since her remarriage. On September 5, 1962, the trial court was advised in some fashion that plaintiff was remarried, and the trial court thereupon entered an order terminating the monthly alimony payments as of September 1, 1962. A fair presumption from the entire record is that the plaintiff, through her attorney, advised the trial judge in open court of plaintiff's remarriage; the termination was entered on the trial court's own initiative; and no notice was served upon the defendant or his counsel. No amounts have been paid.

On March 17, 1967, the defendant filed an application to modify the original divorce decree of January 17, 1957, by terminating the defendant's obligation to pay alimony as of February 21, 1958, the date that plaintiff was remarried. The district court denied the application for modification; and found that the alimony payments up to September 1962, were due and owing. This appeal followed.

The specific question here is, therefore, limited to the defendant's liability for alimony from the date of plaintiff's remarriage in February 1958, until September 1962, when the obligation to pay alimony was terminated by the further order of the court. No issue is raised as to the liability for alimony until the date of remarriage and the sole ground for modification of the decree is the remarriage of the wife.

Similar problems have produced extensive judicial discussions and varied results. See, Annotation, 48 A. L. R. 2d 270 to 311; 24 Am. Jur. 2d, Divorce and Separation, §§ 645 to 648, pp. 765 to 768, §§ 690, 695 to 697, pp. 805, 809, 810; 27A C. J. S., Divorce, § 239c, p. 1141; 27B C. J. S., Divorce, § 251(3), 251(4), pp. 60 et seq.; 2A Nelson (Rev. Ed., 1961 2d Ed.), Divorce and Annulment, § 17.11, p. 58.

This court has not specifically passed on the effect of a remarriage on a periodic alimony award in a decree where there is no limitation, either of time or amount, nor any reference to remarriage. No statute requiring termination of alimony on remarriage is involved.

We have held that an unqualified allowance of alimony in gross, whether payable immediately or periodically in installments, is a vested absolute judgment not subject to modification. Ziegenbein v. Damme, 138 Neb. 320, 292 N. W. 921.

We have likewise held that an alimony award, unless it is an allowance of alimony in gross, may be revised and altered as to future payments. Dunlap v. Dunlap, 145 Neb. 735, 18 N. W. 2d 51.

The plaintiff relies upon the law, well established in this state, that installments of alimony become vested as they accrue; and that past-due installments become final judgments, which courts have no authority to cancel or reduce. Sullivan v. Sullivan, 141 Neb. 779, 4 N. W. 2d 919, and cases there cited.

It is now almost undisputed that remarriage affects a decree for indefinite periodic alimony. There are two separate views as to the effect of remarriage on an alimony decree. One is that it automatically terminates alimony. The other is that remarriage does not ipso facto terminate alimony but ordinarily justifies an application for termination of alimony. In courts taking the latter position, a judicial determination is almost universally required as to whether alimony continues with or without modification, or terminates. There is also the question of whether the court may cancel alimony which has accrued in the period between remarriage and the subsequent application for modification or termination.

The basic principle that supports both views is that it is against public policy that a woman should have support or its equivalent during the same period from each of two men. On this issue, this court said: " 'Aside

from positive unseemliness, it is illogical and unreasonable that she should have the equivalent of an obligation for support by way of alimony from a former husband and an obligation from a present husband for an adequate support at the same time. It is her privilege to abandon the provision made by the decree of the court for her support under sanctions of the law for another provision for maintenance which she will obtain by a second marriage; and when she has done so, the law will require her to abide by her election since there is no reason why she should not do so.'" Bowman v. Bowman, 163 Neb. 336, 79 N. W. 2d 554.

With this basic principle we agree. The problem is complicated by other considerations. Even cases which adopt the automatic termination approach tend to concede that there may be exceptional circumstances under which alimony might be considered as continuing, or that, at least, judicial determination of the question as to whether it continues might be advisable. This is perhaps due to problems involved in the use of the term "alimony" in decrees or orders as representing an allowance for support or property division or settlement, or both. For example, see comments in Bowman v. Bowman, *supra,* indicating that the alimony award represented, in whole or in part, repayment to the wife for her material contributions to the marriage and to the assets of the husband. Other courts have indicated concerns in the area of the validity of the remarriage, particularly where the mental capacity of the wife to contract the second marriage is in issue. The obvious result of an automatic termination would be that the court would lose all jurisdiction and the wife would have no judicial recourse, even though there were extraordinary equities.

The responsibility of the court which severed the marriage relation to continue its jurisdiction so as to avoid inequitable results also supports the view that remarriage does not ipso facto terminate alimony. In the ab-

sence of a statute expressly providing for termination of alimony upon the wife's remarriage, there seems to be no reason why the court should lose its power to continue, modify, or terminate such alimony if the circumstances of the parties change. The difficulty lies in determining whether the court, if permitted to act, would, in fact, be acting retroactively upon vested rights amounting to final judgments.

The essential keystone that supports a decree for "true" alimony payable in the future for support and maintenance of a divorced wife is the continued unmarried status of the wife. The public policy considerations already discussed verify it. Our courts have specific statutory power to revise and alter a decree as to alimony at any time. The final sentence of the statute authorizing alimony revision is: "The court may make any decree respecting any of the matters which such court might have made in the original suit." § 42-324, R. R. S. 1943.

Under these circumstances, the right of the wife to demand and receive alimony payments accruing after remarriage is discretionary with the court which rendered the decree. The extent of this discretion and power is such that after remarriage no absolute or vested right attaches to receive the installments ordered to be paid until judicially determined. This is true even though no application to modify has been made prior to the installments becoming due. Where the fact of remarriage justifies the modification or termination of alimony upon application, there is no justifiable reason to hold that the court has no power to relate its order back to the remarriage which gave rise to the right to terminate or modify.

We hold that the remarriage of a divorced wife does not automatically, in and of itself, terminate her right to receive alimony payable periodically and not in gross; but it does establish a prima facie case which requires the court to terminate it in the absence of proof of some

extraordinary circumstance justifying its continuation.

We also hold that where the court has power to revise, alter, or terminate an alimony award upon remarriage of the wife, her remarriage operates to hold in abeyance her right to receive further alimony payments until a final judicial determination. Installments of alimony accruing after remarriage of the wife do not vest nor have the finality of a judgment until such determination, and the court has jurisdiction and authority to cancel or modify arrears of such alimony retrospectively back to, but not beyond, the date of remarriage.

For the reasons stated, the judgment of the trial court is reversed and the cause remanded with directions to modify the original divorce decree of January 17, 1957, by terminating the defendant's obligation to pay alimony as of February 21, 1958.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. MARDEN MAYES, APPELLANT.

159 N. W. 2d 203

Filed May 24, 1968. No. 36710.

1. **Arrest: Evidence.** Evidentiary statements made subsequent to an illegal arrest are not ipso facto tainted by it.
2. **Constitutional Law: Appeal and Error.** For a question of constitutionality to be considered in this court, it must be previously raised in the trial court. If it is not raised in the trial court it may not be considered in this court.
3. **Criminal Law: Evidence.** Evidence of another crime, similar to that charged, is relevant and admissible if it tends to prove a particular criminal intent which is necessary to constitute the crime charged.
4. **Criminal Law: Appeal and Error.** Where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless there appears to be an abuse of discretion.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

A. Q. Wolf, Lynn R. Carey, Jr., and Marden Mayes, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

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

SPENCER, J.

Defendant, after a jury trial, was convicted of uttering a forged instrument and sentenced to the Nebraska Penal and Correctional Complex. He has perfected an appeal to this court. His printed brief sets out two assignments of error: (1) The insufficiency of the evidence; and (2) the admission of certain alleged oral statements.

The sufficiency of the evidence is not argued in defendant's brief except as it may be inferred from defendant's contention that all evidence should be excluded because defendant's arrest was illegal and that his statement must be excluded as the fruit of an illegal arrest.

There is no merit to defendant's first assignment of error. He rested at the close of the State's case, and consequently produced no proof to rebut the State's evidence which is fairly conclusive of his guilt.

Defendant, whose name is Marden A. Mayes, cashed a $10 check payable to M. A. Mayes, dated February 22, 1967, and purportedly executed by one Ilona Tway, Tway Van & Storage, for expenses at an Omaha bar. He had been employed by Tway Van & Storage Company, operated by Iola G. Tway, for approximately 3 weeks, but terminated his employment January 28, 1967. Two bartenders from other bars in the vicinity of the bar in question testified defendant had earlier attempted to

cash a similar check in their respective bars but they had refused to cash it.

The check in question was cashed before 7 a.m. on February 22, 1967, and deposited in the bank on which it was drawn sometime after noon. Defendant was arrested on February 23, 1967. The check was returned by the bank through the United States mail. There are three dates stamped on the back of the check, with the endorsements: February 23, February 24, and February 27. The evidence is undisputed that defendant was arrested without a warrant on February 23, 1967, and that a police officer, investigating the alleged uttering of a forged instrument at the bar in question, talked to defendant about the check on the morning of February 24, 1967. This officer fully advised defendant of his constitutional rights, and thereafter defendant voluntarily admitted writing and passing the check at the bar in question.

Defendant's printed brief is entirely premised on the theory that his arrest on February 23, 1967, was illegal and that the record reflects no evidence of a crime previous to February 27, 1967. The only reasonable inference from the record is that probable cause existed on February 23, the date of defendant's arrest, and that he was specifically interrogated as to the specific crime on the morning of February 24. Defendant argues: "Nowhere in the record is there any evidence that a crime was suspected until after February 27. (Which, as suggested above, is erroneous.) The arrest was consequently illegal and the alleged oral confession of Defendant should have been excluded pursuant to the ruling in Wong Sun v. United States, 341 (371) U. S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441."

Assuming, for the sake of argument, an illegal arrest, evidentiary admissions are not ipso facto tainted by it. In United States v. McGavic, 337 F. 2d 317, certoriari denied 380 U. S. 933, 85 S. Ct. 940, 13 L. Ed. 2d 821, the trial court ruled the arrest illegal, ruling out certain

physical evidence obtained by the illegal search, but admitting certain statements given by the defendant some 2½ hours after his arrest. In that case, the court, commenting on the "poisonous tree" doctrine in Wong Sun v. United States, 371 U. S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441, stated: "In the Wong Sun case the statements of Toy made simultaneously with the illegal arrest and the unsigned confession of Wong Sun made several days thereafter are at opposite ends of the pole in considering the fruit of the poisonous tree. Between these two extremes there is a line, on one side of which the fruit is contaminated by the illegal arrest, and on the other side of which the taint has been dissipated. Where this line shall be drawn is a question of fact to be determined in each case. In our case the district judge found that the statements of the appellant were not contaminated by the illegal arrest and, applying the rule of evidence on admissions against interest, permitted agent Dickerson to give testimony of the statements now in question.

"Considering all of the facts and circumstances of this case, we conclude that the factual finding of the district judge was not clearly erroneous and that there *there* was no error in the admission of this testimony."

In any event, the issue of illegal arrest was not raised or presented in the trial court but is raised for the first time in this court. For a question of constitutionality to be considered in this court, it must be previously raised in the trial court. If it is not raised in the trial court, it may not be considered in this court. State v. Schwade, 177 Neb. 844, 131 N. W. 2d 421.

What we stated in State v. Erving, 180 Neb. 824, 146 N. W. 2d 216, is pertinent herein: "The defendant's contention that his arrest was illegal is based upon the absence of a showing in the record rather than an affirmative showing that grounds for his arrest did not exist. The legality of the arrest was not an issue in the case until the appeal to this court. Under such circumstances this court will not assume that probable cause

for the arrest of the defendant did not exist at the time it was made. * * * It is unnecessary to consider further the defendant's contention that the arrest in some way made the statements inadmissible." There is no merit to defendant's second assignment of error.

Defendant on his own prepared and filed a supplementary typewritten brief, raising two issues not covered in the printed brief, neither of which is argued but merely stated in conclusional form. The first concerns exhibit 2, a similar check cashed by the defendant at another bar, and dated February 21, 1967. This evidence was produced for the sole purpose of showing intent, and was clearly admissible. See State v. Rich, *ante* p. 128, 158 N. W. 2d 533, in which we held: "Evidence of another crime, similar to that charged, is relevant and admissible if it tends to prove a particular criminal intent which is necessary to constitute the crime charged."

Defendant's second conclusional statement is that an excessive sentence was imposed upon him. Defendant was sentenced to a term of 7 years in the Nebraska Penal and Correctional Complex, and ordered to pay a fine of $1 and costs of prosecution. Section 28-601, R. R. S. 1943, under which he was prosecuted, provides for a penalty of 1 to 20 years and a fine not exceeding $500. The record on sentencing indicates that the defendant was a recidivist with seven prior felony convictions. The sentence imposed was well within the limitation provided by the statute.

Where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Escamilla, 182 Neb. 466, 155 N. W. 2d 344. The sentence imposed was well within the limits set by the statute, and under the circumstances herein more on the side of leniency than might be justified by defendant's record.

We find no error in the record and the judgment is affirmed.

AFFIRMED.

PETER J. TRAHAN, JR., ET AL., APPELLANTS, V. COUNCIL BLUFFS STEEL ERECTION COMPANY OF DODGE COUNTY, NEBRASKA, A PARTNERSHIP, ET AL., APPELLEES.
159 N. W. 2d 207

Filed May 24, 1968. No. 36796.

1. **Statutes: Dedication.** The main statutes affecting the property interest granted in dedication by plat are those in force at the time of dedication.
2. **Dedication.** An acceptance is ordinarily necessary to complete a dedication by plat.
3. ———. The party asserting dedication by plat carries the risk of nonproduction of evidence sufficient to sustain a finding of dedication.

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

Rohn & Rohn and Gordon C. Gobel, for appellants.

Ray C. Simmons, for appellees.

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

SMITH, J.

The city of Fremont, Nebraska, vacated a nominal street of a platted addition, and defendant company subsequently purchased the vacated tract from the city. In this action to quiet title against defendants' claim, plaintiffs have based their title on ownership of lots that adjoin both sides of the vacated tract. The district court dismissed their petition, defendants requesting no affirmative relief. Plaintiffs have appealed. They contend: (1) The evidence of dedication by plat was

insufficient, and (2) a statutory provision for municipal ownership and sale of vacated streets was inapplicable.

The vacated tract had been a nominal part of Twelfth Street, an east-west street. The tract extended westerly from the west side of Pierce Street to the west boundary of Morrell's Addition to the city. Plaintiffs acquired title to four lots in Morrell's Addition by warranty deed dated December 10, 1957, and recorded April 30, 1958. Two of the lots were located at the northwest and southwest corners of the intersection of Pierce Street with platted Twelfth Street. The warranty deed also conveyed the grantor's interest in the intervening strip, which is in controversy, to plaintiffs.

On October 13, 1964, the city without plaintiffs' consent vacated the part of platted Twelfth Street located between the corner lots owned by plaintiffs. The vacating ordinance did not specify that the city retained any interest. On May 13, 1966, the city over plaintiffs' objection sold the vacated tract by quitclaim deed to defendant company.

It is conceded that no inference of dedication may be drawn from use of the land. In 1938 the strip in controversy lay in a farmyard with a well, a grain shed, a brooder house, and an old two-story barn. Perhaps none of those structures was situated on the strip, but the farmyard was enclosed with a fence. In 1957 two or three buildings and fencing were located on the premises.

The main statutes affecting the property interest granted in a dedication by plat are those in force at the time of dedication. Dell v. City of Lincoln, 170 Neb. 176, 102 N. W. 2d 62; Village of Weeping Water v. Reed, 21 Neb. 261, 31 N. W. 797. An acceptance is ordinarily necessary to complete a dedication by plat. Village of Maxwell v. Booth, 161 Neb. 300, 73 N. W. 2d 177. See, also, Johnson v. Buhman, 98 Neb. 236, 152 N. W. 403; Edwards v. Gill, 96 Neb. 761, 148 N. W. 965; Hart v. Village of Ainsworth, 89 Neb. 418, 131 N. W. 816. The party asserting dedication by plat carries the risk of non-

production of evidence sufficient to sustain a finding of dedication. Edwards v. Gill, *supra;* 11 McQuillin, Municipal Corporations (3rd Ed. Rev.), §§ 33.37 and 33.59, pp. 721 and 788; 6 Powell on Real Property (1968), § 935, p. 370.1.

It may be true that the strip vacated by the city was dedicated, but operative facts of dedication are unknown to us. The bill of exceptions contains no plat of Morrell's Addition. Date of the plat, date of recordation, and acceptance by municipal act or public user are highly conjectural. Assuming dedication at an unknown date, we cannot ascertain what statutes were then in force or what property interest the city acquired.

The argument over municipal ownership and sale is related to the following legislative provisions: "Power is hereby given to such city * * * to vacate any such existing plat and addition * * * or such part * * * as such city may deem advantageous and best for its interests, and the power * * * shall be exercised by such city upon the petition of the owner or all the owners of lots * * * in such plat or addition. Such ordinance vacating such plat or addition shall specify whether, and, if any, what public * * * streets * * * are to be retained by such city; otherwise, such * * * streets * * * shall upon such vacation revert to the owner * * * of lots * ** abutting the same * * *." § 16-113, R. R. S. 1943.

"Upon the vacation of any street, avenue or part of either, the same so vacated shall be and remain the property of the city, but may be sold and conveyed by the city * * *." § 16-611, R. R. S. 1943; Laws 1903, c. 19, § 7, p. 237.

The section of the 1903 act relating to municipal ownership prescribed an eminent domain procedure for establishing and opening streets. The Legislature substituted the ownership provision for a curious mixture of title and damages in an earlier act as follows: "* * * whenever any street * * * shall be vacated, the same shall revert to the owner of the adjacent real estate * * *;

* * * and * * * the land so reverting shall be taken by such adjacent owner in lieu of and in the place of * * * damages * * *." Laws 1901, c. 18, § 48 (4), p. 245. Both acts contained other provisions that are now incorporated in section 16-113, R. R. S. 1943.

The arrangement of topics in the 1903 act restricted municipal ownership. The ownership provision was not applicable to vacation of a paper street on the common plat of an addition by a private landowner. See, Dell v. City of Lincoln, *supra;* Hart v. Village of Ainsworth, *supra.* In such circumstances, an owner of a bordering lot possessed a future interest in land of the unopened street. We express no opinion on the question whether such an interest enjoys constitutional protection.

Defendants acquired nothing under the quitclaim deed from the city. The judgment is reversed and the cause remanded with directions to quiet plaintiffs' title against defendants' claim.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. JAMES WILLIAMSEN, APPELLANT.
159 N. W. 2d 206

Filed May 24, 1968. No. 36824.

Appeal and Error. Where a notice of appeal is not filed within 1 month from the entry of the judgment or final order appealed from as required by section 25-1912, R. R. S. 1943, this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Appeal dismissed.

Baylor, Evnen, Baylor & Urbom, Robert R. Gibson, and James Williamsen, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ.

CARTER, J.

The defendant entered a plea of guilty in the district court for Lancaster County, Nebraska, to the charge that he, on July 18, 1967, did feloniously, forcibly, and by violence take from the person of Hugo Fritts money of value with the intent to rob and steal. On August 4, 1967, accompanied by his attorney, he entered a plea of guilty to the charge. On August 18, 1967, he appeared in court for sentence, accompanied by his attorney, and was sentenced by the court to serve a term in the Nebraska Penal and Correctional Complex.

On September 19, 1967, defendant gave notice of appeal to this court. It is the contention of the Attorney General that the notice of appeal is out of time and that this court is without jurisdiction to hear the appeal.

It is provided by section 25-1912, R. R. S. 1943, that proceedings to obtain a reversal or modification of a judgment or final order of the district court, including judgments and sentences upon conviction for felonies and misdemeanors under the criminal code, shall be by filing in the office of the clerk of the district court in which the judgment or final order was rendered, within 1 month from the rendition of the judgment or final order, a notice of intention to prosecute such appeal. The judgment appealed from was entered on August 18, 1967, and the time to appeal therefrom terminated on September 18, 1967, a Monday. See § 25-2221, R. R. S. 1943. The filing of a notice of appeal on September 19, 1967, is out of time and cannot invest this court with jurisdiction to hear the appeal. Morimoto v. Nebraska Children's Home Society, 176 Neb. 403, 126 N. W. 2d 184; Ruan Transport Corp. v. Peake, Inc., 163 Neb. 319, 79 N. W. 2d 575. In the last-cited case, this court quoted the following with approval: "As we held in the early case of Glore v. Hare, 4 Neb. 131: 'We can no more

extend the time one day than six months.' "

We conclude that this court has no jurisdiction of the appeal in this case and the appeal must be dismissed.

APPEAL DISMISSED.

ROBERT G. SIMMONS, SR., ET AL., APPELLANTS, V. MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, A CORPORATION, APPELLEE.

159 N. W. 2d 197

Filed May 24, 1968. No. 36830.

1. **Appeal and Error.** Section 26-1,104.01, R. S. Supp., 1965, provides that in an appeal from the municipal court to the district court, the party appealing shall, within 10 days after the entry of judgment in the municipal court, file a notice of appeal and serve a copy of the same upon all parties bound by the judgment from which the appeal is taken. The provisions are mandatory and jurisdictional.
2. ———. Section 26-1,104.01, R. S. Supp., 1965, provides that proof of service of a copy of the notice of appeal in accordance therewith shall be made by the affidavit of the appellant filed with the municipal court within 5 days after the filing of the notice of appeal. Such provision is directory, and not mandatory or jurisdictional.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Reversed and remanded with directions.

Ray C. Simmons, for appellants.

Fraizer & Fraizer, for appellee.

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

CARTER, J.

Plaintiffs brought this action against the defendant in the municipal court of Lincoln, Nebraska, to recover benefits alleged to be due under a health and accident insurance policy issued by the defendant. On April 26,

1967, the municipal court entered a judgment for the plaintiffs. On May 5, 1967, defendant filed a notice of appeal and appeal bond for the purpose of perfecting an appeal to the district court. Plaintiffs filed a motion to dismiss the appeal to the district court and also a motion to quash the appeal for noncompliance with section 26-1,104.01, R. S. Supp., 1965, effective November 18, 1965. The motions were overruled by the trial court. A judgment for the defendant was subsequently entered in the district court from which plaintiffs have appealed.

The plaintiffs contend that jurisdiction was not acquired by the district court from the municipal court and, consequently, no jurisdiction acquired by this court for the reason that a copy of the notice of appeal was not served on the plaintiffs as required by section 26-1,104.01, R. S. Supp., 1965, and further, that proof of such service by affidavit was not made within 5 days after the filing of the notice of appeal as required by the same section. The record shows that the notice of appeal and bond were filed on May 5, 1967, within 10 days after the entry of judgment in the municipal court on April 26, 1967, but a copy of the notice of appeal was not served on the plaintiffs until May 24, 1967, and the affidavit of service of the notice of appeal was not filed until June 28, 1967. It is contended that the service of a copy of the notice of appeal within 10 days after the entry of the municipal court judgment and the service by affidavit within 5 days after the filing of the notice of appeal stating such fact are jurisdictional requirements, and the failure to comply has the effect of defeating the appeal.

The failure to serve a copy of the notice of appeal on the plaintiffs within 10 days after the entry of judgment in the municipal court is a jurisdictional defect which has been decided by this court in Radil v. State, 182 Neb. 291, 154 N. W. 2d 466. In that case, involving a similar provision contained in section 76-715.01, R. R. S. 1943, effective November 18, 1965, this court said: "The former statute required the timely filing of a notice of

appeal and the filing of an undertaking to lodge jurisdiction in the district court. The 1965 amendment added a further provision, a requirement that a copy of the notice of appeal be served on all parties bound by the award. These provisions are mandatory and must be complied with in perfecting an appeal to the district court. The language is clear and definite, and not arbitrary, unreasonable, and capricious within any constitutional provision or rule of law with which we are familiar. The failure to comply with the mandatory provision of the statute to serve a copy of the notice of appeal on the Department of Roads within 30 days after the filing of the appraisers' award is fatal to the acquiring of jurisdiction by the district court to hear the appeal." Under the statute before us, the failure to serve a copy of the notice of appeal within 10 days after the entry of judgment in the municipal court is fatal to the acquiring of jurisdiction by the district court to hear the appeal.

It is further contended that the failure to file the affidavit of service of the notice of appeal within 5 days after service of such notice is likewise a mandatory jurisdictional provision and would of itself defeat the appeal to the district court. With this we do not agree. It is plainly the purpose of the legislation to afford notice of the filing of a notice of appeal to the adverse party. The purpose of the legislation has been accomplished by the giving of such notice as the statute requires. The proof of the service of such notice is incidental only to the accomplishment of the purpose of the statute, is directory only, and may be relied on only when the failure to file results in prejudice to the adverse party. No such prejudice being shown, we cannot say the failure to file the affidavit of service affects the result of this case. See, 72 C. J. S., Process, § 90, p. 1128; Pitman v. Heumeier, 81 Neb. 338, 115 N. W. 1083; Graves v. Macfarland, 58 Neb. 802, 79 N. W. 707.

The trial court was in error in failing to sustain the

motion to dismiss and the motion to quash the appeal to the district court. The judgment of the district court is reversed and the cause remanded with directions to sustain the motion to dismiss the appeal from the municipal court.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF MARGARET L. KANDLBINDER, DECEASED. RAYMOND K. CALKINS, ADMINISITRATOR OF THE ESTATE OF JOHN W. PARDE, DECEASED, ET AL., APPELLANTS, V. DONALD R. WITT, ADMINISTRATOR OF THE ESTATE OF MARGARET L. KANDLBINDER, DECEASED, ET AL., APPELLEES.
159 N. W. 2d 199

Filed May 24, 1968. No. 36835.

1. **Estates.** Jurisdiction for administration of a nonresident decedent's estate requires property in this state.
2. ———. A decedent's claim is an asset within a state if there is jurisdiction over the person or property of the one against whom the decedent may assert the claim.
3. **Insurance: Estates.** A tort-feasor decedent's ownership of an automobile liability policy, with the insurer reachable by process in this state, justifies administration and the litigating of the tort claim against the estate.
4. **Insurance: Due Process.** Within the meaning of due process it is recognized that a state has a legitimate interest in all insurance policies protecting its residents against risks, an interest which the state can protect even though the state action may have repercussions beyond state lines.
5. **Executors and Administrators: Estates.** Where the want of authority to make the appointment is disclosed by the record the validity of the letters of administration may be questioned collaterally.
6. **Courts: Parties.** A question of fact once litigated on its merits is settled as to the litigants and may not be relitigated directly or collaterally by the litigants or their privies.
7. ———: ———. Where a court has jurisdiction of the subject matter of the action, and its jurisdiction over the parties to the action depends on the existence or nonexistence of a fact, a final determination of such fact issue by a court of competent jurisdiction is not subject to collateral attack.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Reversed and remanded.

Healey & Healey and Leslie H. Noble, for appellants.

Baylor, Evnen, Baylor & Urbom and Robert T. Grimit, for appellees.

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

WHITE, C. J.

In a Kansas automobile collision a Nebraska resident and decedent Margaret Kandlbinder, domiciled in a foreign state, were killed. Decedent, otherwise with no property or Nebraska contacts, was covered by a California issued foreign insurance policy of liability insurance, which company had a local agent and was doing business and was reachable by process in Lancaster County, Nebraska. The problem involved is whether the doctrine of Cox v. Kresovich, 168 Neb. 673, 97 N. W. 2d 239, authorizes administration and litigation of the tort claim of the Nebraska decedent in this state.

In Kresovich, a nonresident decedent was killed in an automobile collision in this state. Jurisdiction for administration of a nonresident decedent's estate requires property in this state (section 30-314, R. R. S. 1943). In Kresovich we held that a tort-feasor decedent's ownership of an automobile liability policy, with the insurer reachable by process in this state, justified administration and litigating the tort claim against the estate. Noting the conflict in authority, this court rejected the contention that the contingent liability of the insurance company and the postponement of the right of action until the tort claim had ripened into judgment, precluded a holding that the insurance contract was an asset of the estate. Our holding was based on the reasoning that the contractual assumption of prospective liability of the decedent insured was an asset of the deceased during his lifetime and of his estate on his death. As to

whether such claim was an asset in the State of Nebraska, in Kresovich we held that it was, because the insurer, as here, was amenable to process in this state.

The soundness of the reasoning and authorities cited in Kresovich is demonstrated by the later and recent cases. In In re Estate of Gardinier, 40 N. J. 261, 191 A. 2d 294 (1963), the Supreme Court of New Jersey overruled In re Roche, 16 N. J. 579, 109 A. 2d 655 (1954), one of the cases cited in Kresovich as supporting the no-asset holding. In doing so it stated its rationale and the review of the authorities as follows: "Hence we must face the question whether Roche should be followed. We think it should not, for the reasons we have given. We add that the decided weight of authority elsewhere holds the policy of insurance will support letters of *administration as to a nonresident in a state in which the carrier is authorized to do business.* Campbell v. Davis, Ala., 145 So. 2d 725 (Sup. Ct. 1962); Tweed v. Houghton, 103 Ga. App. 57, 118 S. E. 2d 496, 135 A. L. R. 558 (Ct. App. 1961); Furst v. Brady, 375 Ill. 425, 31 N. E. 2d 606 (Sup. Ct. 1940); In re Lawson's Estate, 18 Ill. App. 2d 586, 153 N. E. 2d 87 (D. Ct. App. 1958); In re Fagin's Estate, 246 Iowa 496, 66 N. W. 2d 920 (Sup. Ct. 1954); Liberty v. Kinney, 242 Iowa 656, 47 N. W. 2d 835 (Sup. Ct. 1951); Gordon v. Shea, 300 Mass. 95, 14 N. E. 2d 105, (Sup. Ct. 1938); In re Kresovich's Estate, 168 Neb. 673, 97 N. W. 2d 239 (Sup. Ct. 1959); Power v. Plummer, 93 N. H. 37, 35 A. 2d 230 (Sup. Ct. 1943); Robinson v. Dana's Estate, 87 N. H. 114, 174 A. 772, 94 A. L. R. 1437 (Sup. Ct. 1934); Kimbell v. Smith, 64 N. M. 374, 328 P. 2d 942 (Sup. Ct. 1958); Miller v. Stiff, 62 N. M. 383, 310 P. 2d 1039 (Sup. Ct. 1957); In re Riggle's Estate, 11 N. Y. 2d 73, 226 N. Y. S. 2d 416, 181 N. E. 2d 436 (Ct. App. 1962); In re Vilas' Estate, 166 Ore. 115, 110 P. 2d 940 (Sup. Ct. 1941); Davis v. Cayton, 214 S. W. 2d 801 (Tex. Civ. App. 1948); In re Breese's Estate, 51 Wash. 2d 302, 317 P. 2d 1055 (Sup. Ct. 1957); see in re Klipple's Estate, 101 So. 2d 924, 67 A. L. R. 2d 932

(Fla. D. Ct. App. 1958); In re Leigh's Estate, 6 Utah 2d 299, 313 P. 2d 455 (Sup. Ct. 1957)." (Emphasis supplied.)

It is true that in most of these cases, as in Kresovich, that the situs of the accident or tort claim was in the same state where administration was sought. This, of course, is a normal coincidence. But the rationale of the decisions supporting administration, including Kresovich, is not based on this fact. And it has not been pointed out to us where there is any rational connection between the situs of the tort claim and the issue of the determination of assets for the purpose of administration. An accident does not produce assets in a tort-feasor, but a contractual claim against a reachable insurer does. We note further that in most of the cases cited above, the residence of the claimant was in the state where administration was sought, as it is in this case, but that in Kresovich the court granted administration even when the claimant was a nonresident administrator.

Since the decedent has no residence or personal contacts in Nebraska, a sophisticated argument is presented as to the doctrine of "forum non conveniens." A decedent's claim is an asset within a state if there is jurisdiction over the person or property of the one against whom the decedent may assert the claim. Restatement, Conflict of Laws, § 467, p. 565, comment e. Within the meaning of due process it is recognized that a state has a legitimate interest in all insurance policies protecting its residents against risks, an interest which the state can protect even though the "state action may have repercussions beyond state lines." Travelers Health Assn. v. Virginia ex rel. State Corp. Com., 339 U. S. 643, 70 S. Ct. 927, 94 L. Ed. 1154. See, also, Osborn v. Ozlin, 310 U. S. 53, 60 S. Ct. 758, 84 L. Ed. 1074; International Shoe Co. v. Washington, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A. L. R. 1057. Piercing the form to the realities of this situation, the insurance company should be required to respond in forum where its contractual risk reaches and where it does business. The

policy protects Nebraska residents no matter where an accident occurs and the tort action resulting therefrom is transitory in nature The tort-feasor claimant resides in Nebraska and the insurer is in the business of contracting for risks in the State of Nebraska. If the burden of litigation is a public policy consideration in the determination of the forum non conveniens, that burden is equal in the State of Nebraska. This is a transitory tort action and in any realistic sense we see no reason why the ultimate determination of liability should not be permissible in this forum the same as if the decedent were alive and reachable by process in this state. We have so held. See, Missouri P. Ry. Co. v. Bradley, 51 Neb. 596, 71 N. W. 283; Missouri P. Ry. Co. v. Lewis, 24 Neb. 848, 40 N. W. 401, 2 L. R. A. 67.

While we have reached the issues presented on the merits, this case is reversed solely on the procedural issue. In the county court the deceased's spouse and the insurer, the Farmers Insurance Group, objected to administration on the grounds that there were no assets of the deceased ("no property of or debts") in Lancaster County, Nebraska. These objections were overruled and the county court found that deceased left an estate in Lancaster County. No appeal was taken from this finding or the order granting administration. The tort claim was filed, denied, and on appeal to the district court from disallowance of the claim, the same parties in district court collaterally attacked the jurisdiction of the county court for the same reason—that there were no assets of the deceased in Nebraska.

The appellee's contention was decided in Missouri P. Ry. Co. v. Bradley, *supra*. In an almost identical situation as present in this case, this court held as follows: "Where the want of authority to make the appointment is disclosed by the record the validity of the letters of administration may be questioned collaterally. But if such letters are issued on the estate of a deceased person by a *court of competent jurisdiction upon a petition*

containing proper allegations, and the requisite notice has been given, they cannot be collaterally attacked, but are binding until reversed, vacated, or revoked in a proper proceeding." (Emphasis supplied.)

The case here is much stronger than in Missouri P. Ry. Co. v. Bradley, *supra,* because the appellees litigated the fact issue of the existence of assets in the county court. The county court had jurisdiction of the subject matter and determined the fact issue between the same parties. The order granting administration was an appealable order. In re Appeal of Miller, 32 Neb. 480, 49 N. W. 427. No appeal was taken. The appellees are now precluded by the rules of res judicata from relitigating the issue of the existence or absence of that fact. A question of fact once litigated on its merits is settled as to the litigants and may not be relitigated directly or collaterally by the litigants or their privies. Frey v. Hauke, 171 Neb. 852, 108 N. W. 2d 228. A court's jurisdiction of the subject matter may be raised directly or collaterally but here the matter of fact of the existence of an asset was litigated and the determination became final. To permit relitigation and redetermination would violate the first principles res judicata and the necessity for finality in the litigation of fact issues.

The district court was in error in finding that it had no jurisdiction to hear and determine the appeal from the disallowance of the claim herein. Consequently, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. FRED H. RICHARDS, JR., RESPONDENT.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. BERNARD T. SCHAFERSMAN, RESPONDENT.

159 N. W. 2d 317

Filed June 7, 1968. Nos. 36653, 36654.

1. **Attorneys at Law.** Canon 38, Canons of Professional Ethics, states that a lawyer should accept no compensation, commissions, rebates, or other advantages from others without the knowledge and consent of his client after full disclosure.
2. ———. Neither harm to the client nor insufficiency of the consideration for the compensation received from others is an essential element of a violation of Canon 38.
3. ———. Willfulness or wrongful intent to violate the canons may be proved by circumstantial evidence.

Original actions. Judgment of suspension.

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

Robert D. Mullin, for respondents.

Charles H. Yost, Lawrence H. Yost, and William G. Line, for amici curiae.

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

SMITH, J.

In these disciplinary proceedings against two lawyers, relator alleged that respondents had violated Canon 38, Canons of Professional Ethics, which reads: "A lawyer should accept no compensation, commissions, rebates or other advantages from others without the knowledge and consent of his client after full disclosure." Evidentiary hearings were followed by findings of fact and conclusions of law against respondents on all counts of the complaints. Respondents excepted to the report of the referee.

Contentions that respondents obeyed Canon 38 run as follows: (1) The canon is ambiguous. (2) Respondents' conduct was harmless. (3) Respondents earned the fees in question. (4) Respondents had no willful intent to bring the profession into disrepute, to perpetrate fraud on the courts, or to corrupt the administration of justice.

The referee's findings focus on compensation paid by an auctioneer firm in connection with sales of property in divorce suits and deceaseds' estates. In 1959 respondent Richards, executor of a deceased's estate valued at $34,710.38, employed the firm of Taylor and Martin to auction the deceased's residence. After the sale Taylor and Martin paid him $329.83 which represented 50 percent of the auctioneer's net commission. The payment was not disclosed to any of the 14 beneficiaries of the estate or to the court. The court allowed Richards an executor's fee of $467.21 and an attorney's fee of $1,042.76.

Richards represented the executors and proponents of the will of Elizabeth Middaugh, deceased, whose estate exceeded $281,000. There was considerable litigation. See, Kimmel v. Roberts, 179 Neb. 8, 136 N. W. 2d 208; Kimmel v. Roberts, 179 Neb. 25, 136 N. W. 2d 217. In September 1964, Richards and counsel for contestants stipulated that the special administrator hire Taylor and Martin to auction the real estate. On the sale a commission of 5 percent, the customary rate, was paid to Taylor and Martin. In January 1965, Taylor and Martin paid Richards $2,710.21 which represented 50 percent of the net commission. In November the court allowed Richards a minimum fee of $6,787.76 and an additional fee of $5,670.61 for extraordinary services. The former special administrator, the beneficiaries, and the court had no knowledge of the Taylor and Martin payment to Richards.

As executor with power of sale under a deceased's will, Richards stipulated with others for auction of estate property by Taylor and Martin. In August 1965, Taylor and Martin paid Richards $122.35 which repre-

sented 50 percent of the net commission. While the court and other parties interested in the estate knew nothing of the payment, Richards took executor's and attorney's fees allowed by the court.

In 1965 Richards represented the wife in a divorce suit. Pursuant to a stipulation approved by the court, property was auctioned by Taylor and Martin which was paid a 5 percent commission. Richards received $397.35, 50 percent of the net commission, from Taylor and Martin without disclosure to plaintiff, defendant, or the court. He also received a fee for representing the wife.

Respondent Schafersman, a partner of Richards, was paid $69.25 and $1,570.50 by Taylor and Martin on January 14, 1964. Each sum represented 50 percent of the auctioneer's net commission on sale of property in a deceased's estate. Schafersman, who was coexecutor of one of the estates and executor of the other, received executor's and attorney's fees. His coexecutor, the beneficiaries, and the court did not know about the split of Taylor and Martin's commission.

In July 1964, Taylor and Martin paid Schafersman $299.37, 50 percent of the auctioneer's net commission on sale of property in a deceased's estate. Schafersman, who was counsel for the personal representative of the estate, also received an attorney's fee allowed by the court. The payment by Taylor and Martin was not disclosed to the beneficiaries of the estate or to the court.

Schafersman was coexecutor of a deceased's estate, the will directing sale of the real estate. Taylor and Martin received an auctioneer's commission on the sale, and the firm paid Schafersman $1,863.90, 50 percent of the net commission. Schafersman received executor's and attorney's fees without disclosing his other compensation to his coexecutor, the beneficiaries, or the court.

Schafersman was counsel for plaintiff in a divorce suit in which the court ordered a sale of the real estate. He was also administrator c.t.a. of a deceased's estate with property to be sold. At both sales Taylor and

Martin was the auctioneer. On September 29, 1965, it paid Schafersman $287.86 and $395.75, 50 percent of the net commissions. He took a fee in each case without disclosing his other compensation.

In nearly every transaction Richards or Schafersman participated in the discussions that led to employment of Taylor and Martin. Many of those contracts were the handiwork of respondents. The findings leave it open whether Taylor and Martin's employment preceded or followed the Taylor and Martin—respondent contract which called for 50 percent of the net commission. Respondents rendered services in connection with the sales. The value of the services measured either by the contract or by the actual compensation was debatable, the referee making no finding. The good faith of Taylor and Martin was unquestioned.

Canon 38 is clear enough. We cannot square the ambiguity argument with a rule generally applicable to administration of trusts. "The trustee violates his duty to the beneficiary if he accepts for himself from a third person any bonus or commission for any act done by him in connection with the administration of the trust. * * * if he is employed by an insurance company with which he insures trust property, receiving as compensation a commission for placing the insurance, he is accountable for the commission." Restatement, Trusts 2d, § 170 (1), Comment o, p. 370.

Two opinions by the A.B.A. Committee on Professional Ethics (1967 Ed.), are significant. "It is improper for an attorney to retain one-fourth of the charge for an abstract examination and forward three-fourths of the charge to an abstract company which performs the abstract examination unless such an arrangement is with the full knowledge and consent of the client." Op. 196, p. 477. "An attorney may not receive a commission for recommending or selling title insurance without fully disclosing to the client his financial interests in the transaction." Op. 304, p. 667.

A lawyer may violate Canon 38, although he causes no harm to his client. The truth that an undisclosed rebate may not increase the cost to the client has a surface appeal. The canon rests, however, on another truth. Anticipation of a rebate from a company may tempt the lawyer to recommend that company to his client. See, Abbot, "Some Actual Problems of Professional Ethics," 15 Harv. L. Rev. 714; Restatement, Trusts 2d, § 170 (1), Comment o, p. 370.

A former attorney for executors and trustees in In re Clarke's Estate, 12 N. Y. 2d 183, 188 N. E. 2d 128, was denied compensation and held accountable for the undisclosed rebate of 10 percent of a broker's commission on sale of estate property. The court said: "The agreement * * * put the attorney in a position of divided loyalty. An attorney for a fiduciary has the same duty of undivided loyalty to the *cestui* as the fiduciary himself * * *. And it matters not that no actual harm was done the estate; the vice is placing himself in a position where self interest presents a second master to serve."

Respondents were under a duty of disclosure to the court. "When a lawyer seeks a fee from the court in a matter in which a court has an interest such as * * * executors * * *, and indeed any situation in which an application must be made to a court for a fee * * *, the attorney must make a complete disclosure of all the circumstances. He must disclose * * * whether or not he received or will receive compensation or other direct or indirect benefits of any kind from the client or from others, and any other fact * * * bearing on the propriety of the compensation he seeks." Wise, Legal Ethics, p. 122. See, also, Golden v. Taft, 344 Mass. 152, 181 N. E. 2d 544.

The foregoing rationale exposes a weakness in the argument that the fees received from Taylor and Martin were earned. Respondents do not assert that they received inadequate compensation. Isolating the transaction, they assume that evidence of their services shows

the consideration, the absence of gratuity. The assumption is erroneous. Client and court with no knowledge of the Taylor and Martin—respondent contract might well consider such services in connection with the allowance of fees. It was not for respondents to decide that they were duplicating no service, that they might properly accept the allowance without disclosure.

Willfulness or wrongful intent may be proved by circumstantial evidence. Zitny v. State Bar of California, 64 Cal. 2d 787, 51 Cal. Rptr. 825, 415 P. 2d 521. The referee's report manifests reliance on circumstantial evidence and rejection of respondents' testimony to good faith and undisputed evidence of good reputation. Respondents deliberately withheld information in spite of their duty to disclose. Personal interest and fiduciary duty were inextricable, and the inducement was substantial. The referee, a former judge with wide experience, declined to ascribe the pattern of nondisclosure to inexperience, misunderstanding, forgetfulness, or negligence. The report itself convinces us that he made an impartial, painstaking search for the truth. The evidence fully sustaining his findings, we confirm the report.

Richards has been practicing law since 1923, and Schafersman, since 1947. Their reputations for honesty and ethical practice, apart from the conduct in question, are good. We find that justice will be served by suspending them from further practice of law for a period of 1 year from the effective date of our judgment. If a respondent affirmatively shows compliance with the order of suspension at the expiration of the 1-year period, he will then be reinstated. In the event a respondent fails to comply with the order of suspension, his suspension shall become permanent.

Judgment of suspension accordingly. All costs are taxed to respondents.

JUDGMENT OF SUSPENSION.

HERBERT M. BRUGH, ADMINISTRATOR OF THE ESTATE OF DENNIS E. BRUGH, DECEASED, APPELLANT AND CROSS-APPELLEE, V. OWEN D. PETERSON ET AL., APPELLEES AND CROSS-APPELLANTS.
159 N. W. 2d 321

Filed June 7, 1968. No. 36689.

1. **Automobiles: Negligence.** Gross negligence within the meaning of the motor vehicle guest statute means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others.
2. **Automobiles: Witnesses.** A qualified expert, upon laying a proper foundation, may give his opinion as to the minimum speed which a vehicle must have been traveling to lay down the skid marks shown in the evidence.
3. **Automobiles: Evidence.** A hypothetical question as to the rate of speed of a vehicle must include all factors necessary for a reasonably accurate opinion, and all such factors must be supported by the evidence.
4. ———: ———. Skid marks, distance traveled after impact, and force of impact are pertinent factors for the consideration of the jury in determining speed in a proper case.
5. **Evidence: Trial.** Opinion evidence is generally admissible where it is necessary and advisable as an aid to the jury, but it should be excluded whenever the point is reached at which the trier of fact is being told that which it is itself entirely equipped to determine.
6. **Automobiles: Negligence.** Although a driver may have the technichal right-of-way, if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed in part, and in part reversed and remanded with directions.

Barney, Carter & Buchholz, for appellant.

Baylor, Evnen, Baylor & Urbom and J. Arthur Curtiss, for appellee Peterson.

Healey & Healey, for appellee Fischer.

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

BOSLAUGH, J.

This is an action for wrongful death brought by the administrator of the estate of Dennis E. Brugh, deceased, against Owen D. Peterson and Lloyd K. Fischer. The jury returned a verdict in the amount of $35,000 against each defendant. The defendants' motions for judgment notwithstanding the verdict were overruled, but their motions for new trial were sustained. The plaintiff has appealed and the defendants have cross-appealed.

The plaintiff's decedent, Dennis, died as the result of injuries sustained in an automobile accident that occurred near Lincoln, Nebraska, at about 10 p.m. on March 12, 1966. The weather was clear and the road was dry. Dennis was riding in a 1965 Pontiac station wagon owned by the defendant Fischer and operated by his son Kenneth. The Fischer automobile was proceeding east on Pioneers Boulevard and had entered the intersection at Seventieth Street when it was struck by a 1965 Plymouth automobile operated by the defendant Peterson and proceeding south on Seventieth Street.

Pioneers Boulevard east of the intersection was a gravel road. The intersection, Seventieth Street, and Pioneers Boulevard west of the intersection are surfaced with black-top. Seventieth Street from the north has a slight incline, approximately 2 percent, as it approaches the intersection. Pioneers Boulevard slopes down as it approaches the intersection from the west, and an embankment along the north edge of Pioneers Boulevard gradually diminishes toward the intersection. Seventieth Street is an arterial protected by stop signs on each side of the intersection. There is a "Stop Ahead" sign on Pioneers Boulevard approximately 400 feet west of the stop sign and a "Pavement Ends" sign approximately 1,000 feet west of the intersection. The posted speed

limit on Seventieth Street is 45 miles per hour.

Kenneth Fischer, who was driving the Pontiac station wagon, has no recollection of the accident. The last thing he remembers is turning east onto Pioneers Boulevard from Forty-eighth Street. Linda Weiderspan, a passenger in the Fischer automobile, also has no memory of the accident.

Frank Campbell testified that he was sitting on the right side of the front seat of the Fischer automobile at the time the accident happened. Campbell also testified that Kenneth Fischer intended to turn north on Seventieth Street and was going about 30 or 35 miles per hour; that Campbell did not see the "Pavement Ends" sign or the "Stop Ahead" sign; that he is not sure that he saw the stop sign but he knew that it was there; that he said to Fischer, " 'I think we passed a stop sign back there' "; that Fischer said, " 'Did I?' "; that the impact then occurred; and that the automobile began to spin. On cross-examination Campbell testified that the Fischer car had entered the intersection when he said that he thought they had passed a stop sign.

The defendant Owen Peterson testified that he was driving the 1965 Plymouth automobile south on Seventieth Street at approximately 45 miles per hour; that he first saw the Fischer automobile when he was 75 to 100 feet north of the intersection; that the Fischer automobile was then about the same distance west of the intersection; that he applied his brakes immediately; that the Fischer automobile proceeded into the intersection without stopping or slowing down; and that the impact occurred.

The front of the Peterson car struck the left side of the Fischer automobile near the rear wheel. The point of impact was in the west lane of Seventieth Street near the center of the intersection. The Peterson automobile left skid marks of from 24.5 feet to 56 feet leading up to the point of impact. There was extensive damage to the

front end of the Peterson automobile and to the left side of the Fischer automobile.

The Fischer automobile came to rest in the ditch southeast of the intersection, headed to the southwest, with its left side against a utility pole. The left front wheel of the Fischer automobile was 47 feet from the center of the intersection.

The Peterson automobile came to rest on the east shoulder of Seventieth Street, headed to the south. The left rear wheel of the Peterson automobile was 63 feet from the center of the intersection.

The plaintiff's decedent was riding as a guest in the Fischer automobile. Before the plaintiff could recover from the defendant Fischer it was necessary to establish gross negligence in the operation of the Fischer automobile. § 39-740, R. R. S. 1943.

Gross negligence within the meaning of the motor vehicle guest statute means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. Callen v. Knopp, 180 Neb. 421, 143 N. W. 2d 266.

The failure to stop at the stop sign or see the Peterson automobile, alone, was not sufficient to establish gross negligence. Callen v. Knopp, *supra*. The failure to observe the warning signs did not establish gross negligence. Boismier v. Maragues, 176 Neb. 547, 126 N. W. 2d 844.

There was evidence of a warning from the passenger Campbell, but this occurred after the Fischer automobile had entered the intersection and was just before the impact. There was evidence of testimony by Campbell at a previous hearing in another proceeding concerning an earlier warning, but this evidence was admitted only for the purpose of impeachment.

There is no evidence in this case of negligent conduct

extending over a period of time. The negligence of Fischer is characterized as momentary in nature. As we view the record, the evidence failed to establish gross negligence. The motion of the defendant Fischer for judgment notwithstanding the verdict should have been sustained.

With respect to the defendant Peterson, the plaintiff alleged that Peterson operated the Plymouth automobile at an excessive speed; that he failed to reduce its speed; that he failed to keep a proper lookout; and that he failed to maintain a reasonable control.

On cross-examination the defendant Peterson admitted that he had stated, in a previous deposition, that he had not looked to the left or to the right as he approached the intersection. Although this admission was subject to explanation and interpretation, it tended to support the plaintiff's allegation of the failure to keep a proper lookout.

On the issue of speed the plaintiff produced an expert witness, David I. Cook, an Associate Professor of Engineering Mechanics. Professor Cook was allowed to testify, over objection, in answer to a hypothetical question, that the Peterson automobile was traveling at not less than 52 miles per hour before the accident.

Professor Cook testified that he had determined a coefficient of friction by experimentation; and that upon the basis of the skid marks made by the Peterson automobile prior to the impact, it had a minimum speed of not less than 30 miles per hour if it was assumed that the Peterson automobile had stopped at the point of impact. This evidence was proper. A qualified expert, upon laying a proper foundation, may give his opinion as to the minimum speed which a vehicle must have been traveling to lay down the skid marks shown in the evidence. Flory v. Holtz, 176 Neb. 531, 126 N. W. 2d 686.

Professor Cook's determination of the speed of the Peterson automobile in this case, including the impact,

involved an application of the law of conservation of energy, the law of conservation of momentum, and the law of recovery. It was essentially a mathematical calculation in which it was necessary to determine a large number of factors and variables. Some were determined by experimentation. Others were determined by inspection of photographs taken at the scene of the accident. Others were determined by assumption.

As an example, Professor Cook assumed that both drivers had no control over their vehicles after the impact. There was no direct evidence concerning this factor, a factor which could be of great significance because direction and distance traveled after the impact are of importance in the calculation made.

The situation in this case is comparable to that which was presented in Flory v. Holtz, *supra*. There we held that similar testimony by this same witness was properly excluded. The case points out that the foundation for the opinion was inadequate, that it depended in part upon inferences based upon assumptions, and that there were many unknown factors which might have influenced the result.

The evidence here is such that the jury might infer that the Peterson automobile was traveling at an excessive speed as it approached the intersection. Flory v. Holtz, *supra*. But the expert opinion depends upon the resolution of so many variables that it is, in effect, a statement of a possibility. Under the circumstances in this case the expert testimony was neither necessary nor advisable as an aid to the jury. See Drahota v. Wieser, *ante* p. 66, 157 N. W. 2d 857.

We think that the trial court erred in permitting Professor Cook to state his opinion as to the speed of the Peterson automobile in this case, including the impact, and that his tesitmony should have been confined to speed based upon skid marks only.

Some criticism is made of instruction No. 13 relating to the duty of a driver to yield the right-of-way if neces-

sary to avoid a collision. Perhaps a more accurate statement of the rule is that, although a driver may have the technical right-of-way, if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way. See Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571.

It is unnecessary to consider the other assignments of error.

The order of the district court sustaining the motion of the defendant Peterson for a new trial is affirmed. The order of the district court sustaining the motion of the defendant Fischer for a new trial is reversed and the cause remanded with directions to sustain the motion of the defendant Fischer for judgment notwithstanding the verdict.

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

SMITH, J., participating on briefs.

McCOWN, J.

I respectfully dissent. In considering a motion for a directed verdict, the party against whom the motion is made is entitled to have every disputed question of fact in the evidence resolved in his favor and to have the benefit of every inference that can reasonably be drawn therefrom. Carley v. Meinke, 181 Neb. 648, 150 N. W. 2d 256.

There was no dispute whatever but that a statement to the driver about a stop sign was made by the passenger Campbell. His direct testimony as to the wording was: " 'I think we passed a stop sign back there.' " The driver responded: " 'Did I?' " and then the accident happened. On cross-examination, Campbell conceded that he might have, or probably did, testify under oath in a previous proceeding that he saw a stop sign ahead and that he believed he said: " 'There is a stop sign ahead,' "

and that he did not recall any response from the driver. Campbell also conceded, without reference to any statements, that he may have seen the sign that said "Stop Ahead" but did not recall specifically, or may have looked at it but it did not register in his mind. All of this evidence was admitted without objection. The majority opinion terms the evidence on cross-examination "admitted only for the purpose of impeachment" and, in effect, holds that no inference could be drawn that the statement as to a stop sign was made at any earlier time, or in any different form than that testified to on direct examination.

There was considerably more involved here than momentary inattention or inadvertence, even aside from the problem of a warning. Certain facts are undisputed. The radio in the car was not on. There was no conversation in the automobile to divert the driver's attention in any respect. The accident occurred about 10 p.m. The driver drove past a reflectorized "Pavement Ends" sign 1,000 feet west of the intersection at which he expected to turn. He passed a reflectorized "Stop Ahead" sign approximately 400 feet from the intersection. He drove through a reflectorized "Stop" sign at the intersection. He failed to see the headlights of another vehicle approaching the intersection at approximately the same time. A statement was made about a stop sign by the passenger Campbell but the driver never applied his brakes. At no time during the entire 1,000 feet traveled did the defendant Fischer change or reduce his speed or apply his brakes.

The majority opinion here divides the total factual picture into segments and relies upon prior cases holding certain facts insufficient to establish gross negligence. Callen v. Knopp, 180 Neb. 421, 143 N. W. 2d 266, is relied on to establish that failure to see a stop sign or the Peterson automobile was not gross negligence. In that case, the accident was in the daytime and the driver was driving on an arterial street generally protected by

stop signs. He did not realize he was entering an intersection where there was a stop sign on the arterial, and was looking in the opposite direction from the approaching vehicle. Under such circumstances, his negligence was characterized as momentary in nature rather than persisting over a period of time.

Boismier v. Maragues, 176 Neb. 547, 126 N. W. 2d 844, is relied on to establish that failure to observe warning signs is not gross negligence. In that case, the accident was at night and involved a "T" intersection, and no other vehicles. None of the signs involved any illumination qualities; the location of the only sign apparently not at the intersection itself was not shown; and the driver put on his brakes as soon as he recognized the danger ahead.

In Carley v. Meinke, *supra,* this court held that while each of several acts standing alone may not exceed the bounds of ordinary negligence, yet, when considered together, they may constitute evidence of gross negligence. In such a case, whether or not gross negligence exists is for the jury.

Where the violation of a stop sign is intentional or where there are other breaches of the host driver's duties in conjunction with a failure to stop for a stop sign, the situation may well be one in which a jury might properly find gross negligence. See Annotation, 3 A. L. R. 3d 180, particularly sections 42 and 43 at page 430.

Negligence and gross negligence cannot be determined in the abstract. "The rule is that in each case the existence or nonexistence of gross negligence must be ascertained from the facts of each particular case, and that in case of doubt the existence of evidence as to gross negligence must be resolved in favor of its existence in which event the question is for the jury, otherwise it is one of law for the court." Boismier v. Maragues, *supra.*

It should also be obvious that standards of care by which both negligence and gross negligence are measured may, and do, change with the passage of time and the de-

velopment and experience of society. Negligence and gross negligence, and standards of due care are all grounded on the legal concept of the "reasonable man." "The reasonable man" should not be bound in a legal straitjacket laced with prior precedents. Under the facts in this case, this court should not say, as a matter of law, that there was insufficient evidence upon which a jury could properly find there was gross negligence on the part of Fischer. The issue was properly submitted to the jury by the trial court and the defendant Fischer's motion for judgment notwithstanding the verdict was properly overruled.

The majority opinion also holds that a hypothetical question as to the rate of speed of a vehicle, put to an expert witness, must include all factors necessary for a reasonably accurate opinion. The opinion also concludes that the testimony of an expert witness, who was an Associate Professor of Engineering Mechanics, was essentially a mathematical computation in which it was necessary to determine a large number of factors and variables, none of which can be assumed, and all of which must be established by the evidence. This approach treats expert testimony in the field of physics as though it were an exact science which did not involve elements of knowledge, skill, or experience in applying its laws to the specific factual circumstances of an automobile accident. This position also requires a court to be expert itself in every field in which an expert witness may testify in order to determine what factors are necessary for the witness to give a reasonably accurate opinion.

It is conceded by the majority opinion that various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile. The answer to the objections that some necessary factors were not established is found in the record.

The expert witness conducted a skid test at approximately the same location, on the same highway, approximately 1 year after the accident. The length of skid marks of all four wheels to the point of impact was established. The point of impact on the highway and the point of impact of the Peterson vehicle on the Fischer vehicle were established. The physical movement and relative distance and direction of movement of both vehicles after the impact were established. The weight of both vehicles, the speed of the Fischer automobile, and the relative directions of movement of both vehicles prior to impact were established. The physical marks on the highway following the impact were established. Photographs of both vehicles were examined. All of these factors were taken into account in the testimony of the expert witness. In response to cross-examination as to the effect of application of brakes continuing after the collision, the effect of striking other objects, or of parts dragging on the roadway and similar matters, they were all conceded to have some effect on some methods of computations, but that if any allowances were made for such factors, it would increase the minimum speed of the automobile to be determined. The expert witness explained that the method he used did not make any adjustment for such factors for that reason. His opinion was that the minimum speed of the Peterson vehicle at the time it commenced to skid would be 57 miles an hour, plus or minus 5 miles an hour, or an absolute minimum speed of 52 miles per hour. Neither his opinion nor his assumptions were contradicted in any way by any other expert witness.

The majority opinion also holds that such opinion evidence should be excluded whenever the point is reached at which the trier of fact is being told that which it is itself entirely equipped to determine. The same objection might be made as to any expert opinion evidence as to speed. The basic question is whether or not the testimony of an expert witness will be of aid to the jury

in determining the facts it is required to determine, and ordinarily the trial court has broad discretion in determining that basic issue.

Whether the opinion of a qualified expert witness is based on sufficient facts or evidence to sustain it is a question of law for the court. The dividing line is difficult to determine. In this case, the opinion of the expert witness was based on and supported by sufficient facts and evidence to sustain it. The objections sustained by the majority opinion go to issues of credibility rather than to admissibility.

IN RE APPLICATION OF O. E. POULSON, INC.
O. E. POULSON, INC., APPELLANT, IMPLEADED WITH WYNNE TRANSPORT SERVICE, INC., ET AL., APPELLEES, V. HARGLEROAD VAN & STORAGE CO. ET AL., APPELLEES.
159 N. W. 2d 302

Filed June 7, 1968. No. 36707.

1. **Public Service Commissions.** Ordinarily the only questions to be determined on appeal from the Nebraska State Railway Commission are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.
2. **Public Service Commissions: Motor Carriers.** In determining the issue of public convenience and necessity, in cases where new or extended operating rights are sought, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest.
3. ———: ———. The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Its purpose was not to create monopolies in the transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Legitimate competition is a normal attribute of our free enterprise

system. It must be permitted to exist and the law contemplates that it shall.

Appeal from the Nebraska State Railway Commission. Reversed.

Nelson, Harding, Acklie, Leonard & Tate, for appellant.

Robert E. Powell, John E. Wenstrand, and James E. Ryan, for appellees.

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

SPENCER, J.

This is an appeal by O. E. Poulson, Inc., from an order of the Nebraska State Railway Commission denying an application for an extended certificate of public convenience and necessity. On February 24, 1966, O. E. Poulson, Inc., filed its application requesting authority to transport acids and chemicals in bulk in tank or hopper-type vehicles between all points in Nebraska. On the same date, identical applications were filed by Wynne Transport Service, Inc., and Paul Abler, doing business as Central Transport Company, and on March 17, 1966, by D & R Bulk Carriers, Inc. Thereafter, on March 21, 1966, applications were filed by Ruan Transport Corporation, Peake, Inc., and Wheeler Transport Service, Inc., for authority to transport acids and chemicals (except those which are derived from petroleum or petroleum products) in bulk, in tank or hopper-type vehicles. Ward Transport, Inc., filed an identical application on April 4, 1966. On April 12, 1966, Bridge Brothers filed an application identical with that of the four companies first-above mentioned. All nine applications were combined for hearing purposes although separate orders were subsequently entered with reference to each application. Appearances were made by Hargleroad Van & Storage Co. and Herman Bros., Inc., protesting all applications. For convenience, the parties

interested will hereafter be referred to as Poulson, Wynne, Abler, D & R, Ruan, Peake, Wheeler, Ward, Bridge Brothers, Hargleroad, and Herman Bros. Ruan, Peake, Wheeler, and Ward also protested with reference to the applications of all the other parties interested.

During the course of the hearing, all applicants amended their applications to ask authority to transport "Fertilizers and fertilizer materials (with or without pesticides), feed ingredients, liquid feed supplements, anhydrous ammonia and urea, between points in Nebraska." Then the applications of Poulson, Wynne, Abler, and D & R were further amended by the insertion of the word "chemical" immediately ahead of the words "feed ingredients" so that the applications would read "chemical feed ingredients." A lengthy hearing was had on the nine applications and the protests in regard thereto. At the conclusion of the hearing, all applications were granted, excepting that of Poulson which was rejected. Poulson appeals and protestants appear as appellees herein.

The record discloses that Bridge Brothers, prior to this hearing, held authority to transport fertilizers and anhydrous ammonia between all points in Nebraska. The seven other successful applicants had authority to transport petroleum products, but such authority was limited as to the territories which could be so serviced in the cases of Wheeler, Abler, Wynne, D & R, and Ruan. Wheeler and Ruan also had authority to transport liquid fertilizers between all points in Nebraska. All of the carriers authorized to transport petroleum products, except those with liquid fertilizer authority, had made it a practice to transport anhydrous ammonia on the theory that it was a petroleum product, but there being considerable doubt on this point, it became apparent during the course of the hearing that there was a need of a determination by the commission of the authority to transport anhydrous ammonia as a petroleum product. The evidence in fact discloses that anhydrous ammonia is

generally derived as a product of natural gas but is sometimes produced from coal and other sources and that it cannot correctly be considered a petroleum product. This was a matter that apparently had not been previously investigated by the commission and it had acquiesced in the transportation of anhydrous ammonia by those carriers holding authority to transport petroleum products. Poulson did not have authority to transport either petroleum products or fertilizers. It is apparent that, generally speaking, all applicants sought an extension of their respective authorities to permit the handling of the materials mentioned in the amended applications. Those applicants which held authority to transport petroleum products wanted that authority broadened and clarified so that they could transport anhydrous ammonia which would be included in the term fertilizer and fertilizer materials. All applicants except one with general fertilizer transporting authority, including two with authority to transport liquid fertilizers, desired their authorities expanded to include all fertilizers and fertilizer materials. Generally speaking, all applicants desired a further expansion of their respective authorities to include feed ingredients and liquid feed supplements. All requested authority to transport the products in question on a statewide basis between all Nebraska points. All nine of the applicants held interstate authority to transport the materials involved in this proceeding.

Hargleroad, one of the protestants, is in the process of selling its business to the other principal protestant, Herman Bros., and the evidence indicates that the tractors and trailers or motorized equipment held by Hargleroad are not being transferred to Herman Bros. It appears that Hargleroad is probably no longer a real party at interest in this action and that it is possible that the Hargleroad equipment may be removed from service in Nebraska.

There is some evidence in the record by protestants

that they are capable of handling all of the Nebraska intrastate business involving the products mentioned in the amended applications, but all parties conceded that there has been an extraordinary and phenomenal growth in the fertilizer business in Nebraska during recent years; that it increased about 25 percent in each of the past 2 or 3 years; and that it would continue such a rapid rate of development. Several new plants have been constructed in the area in the past 2 years and more are in the process of construction with old plants being rapidly enlarged. For example, a large storage facility is in the process of construction in Blair, Nebraska, on the Missouri River, with fertilizer products to be barged in on the river and thence to be distributed in Nebraska.

Representatives of shippers testified. These included Standard Chemical which handles feed products, Phillips Petroleum Company, Cominco American, Incorporated, Fel-Tex, Incorporated, Consumers Cooperative Association, and Gulf Oil Company which handle fertilizers and fertilizer materials. These witnesses testified in detail to the rapid expansion of the industry and contrary to the evidence given by the protestants, they stated that during busy seasons they were frequently unable to get their products moved by the existing carriers authorized to transport such products. They further indicated that they expected this difficulty to continue; that it was frequently detrimental to their business, as fertilizers constitute a product that is seasonal and must be made available promptly during the seasonal demand therefor; and that when unable to move their products, it resulted in a loss of business to their respective firms. Four of these shippers specifically supported the granting of all applications, including that of Poulson. The Phillips Petroleum Company representative recommended all except the Poulson application but refused to give any reason whatsoever for failing to endorse this application. The sixth, Gulf Oil Company, did not specifically endorse any particular application but stated

that it was primarily interested in seeing to it that sufficient transportation facilities were available for its use and that it certainly desired a continuance of the authority to handle its products insofar as the applicants were concerned with whom it had been doing business. It had not previously done business with Poulson, and possibly, inferentially, the testimony of this witness could be construed as not endorsing the application of Poulson, but on the other hand he was not objecting thereto.

It will be noted that in its original action, the commission granted authority to Poulson, Wynne, Abler, and D & R to transport anhydrous ammonia between all Nebraska points and withheld decision on the balance of the applications. This order was entered on March 14, 1967. On March 22, 1967, the commission countermanded the order of March 14, 1967, and authorized all nine applicants to transport: "Acids and chemicals used in the manufacture of fertilizers, feeds and feed supplements, insecticides, herbicides and the liquid finished products thereof, including anhydrous ammonia, in bulk in tank or hopper type vehicle" between all Nebraska points. The orders contained no reservation but a motion for rehearing was filed by protestants. Thereafter, on April 5, 1967, the March 22, 1967, orders were set aside and the orders of March 14, 1967, were reinstated with a similar reservation for further hearing regarding products other than anhydrous ammonia. On May 18, 1967, the orders of April 5, 1967, were set aside and the final orders heretofore referred to were entered granting all applications except that of Poulson. In each of its previous orders, the commission found that Poulson was: "* * * fit, willing and able properly to perform the service proposed, and to conform to the provisions of Sections 75-301 to 75-347, R. R. S., 1943, and the requirements, rules and regulations thereunder." It further found: "That the proposed service is or will be required by the present or future public convenience and

necessity * * *." In view of the previous findings of the commission, of the fact that eight of the nine applications were granted, and that no specific reason is given by the commission to justify its discrimination against Poulson, the question is posed as to what lies behind the broad finding that in the case of Poulson, public convenience and necessity do not require its services.

Appellees seek to justify the rejection of the Poulson application on three grounds: First, that it is a small concern; second, that it had not previously been transporting petroleum products and fertilizers; and third, a lack of shippers' support. To ascertain the validity of these objections, resort must be had to the record.

Ordinarily the only questions to be determined on appeal from the Nebraska State Railway Commission are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. Petroleum Transp. Co. v. All Class I Rail Carriers, 173 Neb. 564, 114 N. W. 2d 34. The only question to be determined here is whether the finding of the commission that the proposed service offered by Poulson is not required by the present and future public convenience and necessity is arbitrary and unreasonable under the evidence.

Regarding the first objection, it is true that it appears from the record that Poulson was a small operator; however, it may be pointed out that at one time probably all parties concerned were small operators and remained such until opportunities for growth were found in line with the increased demands of shippers and expanded certificates of public convenience and necessity were obtained from the commission. In the present instance, the evidence of the shippers completely refutes the statements of protestants to the effect that they can handle all business in the rapidly growing fertilizer and feed industry. Protestants have not been, and it is not anticipated that they will be, able to meet the

shippers' demands. It is, therefore, apparent that there is room for a newcomer on the scene. "In determining the issue of public convenience and necessity, in cases where new or extended operating rights are sought, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest." Petroleum Transp. Co. v. All Class I Rail Carriers, *supra*. The only reasonable conclusion to be drawn from the evidence in this case is that the services offered by Poulson will serve a useful purpose responsive to a public demand or need, that this purpose cannot be served by existing carriers, and that the issuance of a certificate to Poulson will not endanger or impair existing carriers adversely to the public interest. In this respect, it may be pointed out that we have an unusual situation presented in this case. Ordinarily existing carriers will grow to meet the growing requirements of the companies or people they serve. Here we have an industry expanding so rapidly that existing carriers have not kept up with it and apparently they can not do so as they had not been able to satisfy anticipated demands of the shippers up until the time of hearing. The entry into the field of another carrier will not result in a loss of business to the existing carriers but will simply enable it to participate in the unprecedented growth of the business in respect to the transportation of the products in question here.

Regarding the second objection to the effect that Poulson had not been in this particular branch of the transportation business, it would seem that the statements made with reference to the first objection would be sufficient to show the invalidity of this argument. However, it may also be pointed out that each and every one of the successful applicants under the authority re-

ceived in the recent orders entered by the commission are authorized to enter into certain fields in which they had not been previously operating, and several of them have had their field of operations widened so that they are no longer restricted to certain specified territories, but may now do business between all Nebraska points. Those that had been previously transporting anhydrous ammonia under their petroleum product authority now appear to have been handling this commodity without authority, and the fact that they had previously so handled anhydrous ammonia does not appear to be pertinent to the present situation or to justify the exclusion of other applicants, particularly in view of the fact that Poulson had interstate authority to handle the same commodity and had been doing so for some time.

Regarding the third objection of lack of shippers' support, as previously pointed out, four out of the six shippers definitely supported the Poulson application. One objected thereto but refused to give any reason for such objection, and one adopted what might be considered a neutral attitude on the subject, but all shippers agreed that in the past and at the present time existing carriers had not been able to meet their demands and thereby inferentially supported the Poulson application.

"The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Its purpose was not to create monopolies in the transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Legitimate competition is a normal attribute of our free enterprise system. It must be permitted to exist and the law contemplates that it shall." Shanks v. Watson Bros. Van Lines, 173 Neb. 829, 115 N. W. 2d 441.

As observed in the foregoing quotation, it is not the purpose of the Nebraska Motor Carrier Act to promote unnecessary monopolies or to indiscriminately limit

competition. It would appear that the natural consequence of the commission's action in the present case would do just that and it must be concluded that the denial of the Poulson application was arbitrary and unreasonable.

REVERSED.

CARTER, J., dissenting.

The Nebraska State Railway Commission had before it nine applications for extended certificates of public convenience and necessity. The commission granted the application of eight of the applicants and denied the other made by the appellant in this appeal. It is conceded at the outset that all the applicants were equally qualified in all respects to enter into the common carrier field here involved. The real issue is whether or not, under these circumstances, this court has the power to direct or coerce the grant of a certificate of public convenience and necessity after the commission, after notices and hearings, has declined to do so.

The creation of the commission is by virtue of Article IV, section 20, Constitution of Nebraska, as implemented and limited by Chapter 75, R. R. S. 1943. By this constitutional amendment, the commission was given plenary and absolute power over common carriers except to the extent the Legislature has occupied the field or limited the powers of the commission by statute. While it is true that the commission has certain legislative and judicial powers, it is, in a broad sense, an administrative agency. Yellow Cab Co. v. Nebraska State Railway Commission, 175 Neb. 150, 120 N. W. 2d 922. The commission has the sole original jurisdiction to grant or deny a certificate of public convenience and necessity to a common carrier. In re Application of Effenberger, 150 Neb. 13, 33 N. W. 2d 296. See, also, Marconnit v. Effenberger, 135 Neb. 564, 283 N. W. 226. True, an objector may appeal from the grant of a certificate of public convenience and necessity on the basis that it is not supported by evidence and consequently arbitrary, and

will unjustly injure the reasonable financial return of those in the field which the commission is required to protect. True, also, the revocation of a certificate in whole or in part may be reviewed by this court to determine if such action is arbitrary as not being supported by evidence. But the denial of an application for a certificate of public convenience and necessity is something else and must be considered on a different basis.

As I have stated, the commission has absolute and plenary power over common carriers except where limited by statute. By section 75-311, R. R. S. 1943, a certificate is required to be issued by the commission, after notice and hearing, if the applicant is fit, willing, and able to properly perform the proposed service and conform to the provisions of sections 75-301 to 75-347, R. R. S. 1943, if it is consistent with the public interest. By section 75-301, R. R. S. 1943, the commission must regulate common carriers by motor vehicle in intrastate commerce to foster sound economic conditions in such transportation among such carriers in the public interest. It is required by the same statute to promote adequate economical and efficient service to the public at reasonable charges. These sections mean that adequate common carrier service must be furnished to the public at a reasonable charge and, on the other hand, the financial stability of common carriers already in the field must also be protected. Both are in the public interest. And in protecting the rights of each, a balance must be maintained between the volume of business and the number of common carriers required to perform the service at a reasonable charge. In making such a balance to protect the rights of users of the service and those performing the service, it is necessary that applicants for certificates be limited, however qualified they may be, to the number of carriers needed. This necessarily means that in the case of more applicants than needed, some must be denied certificates. The determination of the number of certificates to be granted rests exclusively

with the commission. This determination by the commission is an administrative or legislative function, and not a judicial one. The commission has the facilities, such as the requiring of reports and the making of investigations, to provide the expertise to make such administrative decisions. This court has neither the facilities to acquire such expertise, nor the expert knowledge to determine these questions which were granted solely and exclusively to the administrative agency.

This court has never had the precise point before it, although our cases point the way. The question has been raised in other jurisdictions. There are cases holding that the determination of the right to a certificate is for the commission and the court is bound by the commission's findings on that question. Pirie v. Public Utilities Commission, 72 Colo. 65, 209 P. 640. A denial of a certificate in the public interest is a purely administrative question from which an unsuccessful applicant cannot appeal. Modeste v. Public Utilities Commission, 97 Conn. 453, 117 A. 494. The question of which petitioners could best serve the public is a matter left by the Legislature to the sound judgment and discretion of the Public Utilities Commission. It is not a judicial question subject to review by the courts. In re The Samoset Co., 125 Me. 141, 131 A. 692. Commission orders "purely negative—negative in form and substance—are not subject to review by this court or any other." Sparta Foundry Co. v. Michigan Public Utilities Commission, 275 Mich. 562, 267 N. W. 736. Under the laws of Missouri, matters of public service are directly under the legislative agency and the granting of certificates of public convenience and necessity do not come within the jurisdiction of any of the courts of that state. State ex rel. Ringo v. Public Service Commission, 234 Mo. App. 549, 132 S. W. 2d 1080. It was within the province of the commission to determine from the proof which of the applicants was best equipped to render the service needed. There was ample evidence offered by each of the applicants to jus-

tify the commission in deciding that question either way, depending on where the public convenience and necessity would be best served. The courts would not be justified in such case to substitute their judgment for that of the commission. Tri-State Transit Co. v. Mobile & Ohio Transp. Co., 191 Miss. 364, 2 So. 2d 845. But the denial of an application as not being in the public interest is *not* a refusal to exercise the power granted to it, and is not reviewable.

The majority opinion cites no case from any court anywhere where the denial of a certificate by a railway or public utilities commission was reversed by the court. I have not found such a case and I am confident there is none. The appellant cites Northwestern Bell Tel. Co. v. Pleasant Valley Tel. Co., 181 Neb. 799, 150 N. W. 2d 922, in support of its position. In that case the area involved had no service at all and a qualified applicant was denied a certificate to serve the community. The underlying principle of that case is that the commission is required by law to furnish adequate service at a reasonable charge. It may not arbitrarily deny a qualified applicant to render service under such circumstances, although the remedy in some states is by quo warranto and not by appeal as here.

I submit that by the majority opinion, this court determines the public interest involved in the denial of the application for a certificate of public convenience and necessity, a matter placed by the Constitution solely and exclusively in an administrative agency. This is so even if it appears that the denial of the application is unreasonable, discriminatory, and arbitrary, for in no other way can the financial stability of certificate holders already in the field be protected from a saturation of the area by the issuance of new certificates to the damage or destruction of their investments in stations, offices, equipment, and other necessary facilities. The order made by this court is nothing less than an en-

croachment on the exclusive powers of the commission given it by constitutional provision.

The majority opinion appears to assume that discrimination and arbitrariness are always bad and that the courts have inherent power to correct all discriminatory or arbitrary orders. But this is not so. The Constitution, by Article IV, section 20, vested the commission with absolute power over common carriers, including the making of discriminatory and arbitrary orders, subject only to limitations provided by the Legislature. The Legislature has provided for the issuance of certificates to all qualified persons except where it would be contrary to the public interest to so do. The purposes of commission control of common carriers would be completely defeated if the commission lacked the power to limit the number of qualified applicants and to select the applicants from those qualified which, in its judgment, would best serve the public interest. Without the powers granted by the constitutional amendment, the issuance of arbitrary and discriminatory orders would violate the fundamental concepts of our free enterprise system and the right of every person to pursue the trade, business, or profession of his choice.

The Constitution grants to the commission the power to determine the public interest. The Legislature has not restricted this power in this area as is evidenced by section 75-301, R. R. S. 1943, when it refers to "*unjust* discriminations" and "*undue* preferences or advantages." (Emphasis supplied.) The majority opinion avoids the constitutional issues by the simple expedient of ignoring them and citing a rule of law, correct as a general statement of the law, but having no application whatever to the situation before us. By the majority opinion, this court undertakes to determine the public interest involved in the denial of a certificate of public convenience and necessity, and assumes this power unto itself when the Constitution places it exclusively in the hands of the commission. It is fundamental that it is one of the duties

of the courts to restrain the executive and legislative branches of government against the exercise of power that is constitutionally denied them. But it is just as important that the courts restrain themselves from the exercise of powers constitutionally denied them. It is hardly a justifiable reason to assume such an unjustified exercise of power by the simple expedient of ignoring the limitations imposed on the courts by the Constitution in placing the power elsewhere exclusively.

The law involved and the manner in which administrative orders are reviewed in the courts, is summarized in the following authorities: Jaffe, Judicial Control of Administrative Action, c. 14, p. 565; Gray v. Powell, 314 U. S. 402, 62 S. Ct. 326, 86 L. Ed. 301; National Labor Rel. Bd. v. Hearst Publications, 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170; Universal Camera Corp. v. National Labor Rel. Bd., 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456. In this case the commission found in effect that the grant of eight certificates was all that was required and determined that the eight applications granted would best serve the public interest. This is the exclusive prerogative of the commission. In a similar case in principle, the Supreme Court of the United States said: "In our view, the Court of Appeals in this case indulged in an unwarranted incursion into the administrative domain. The Commission's order had adequate support in the record and should have been affirmed." Securities & Exchange Commission v. New England Electric System, 390 U. S. 207, 88 S. Ct. 916, 19 L. Ed. 2d 1042.

The order appealed from in this case is an administrative order from an administrative agency. The power to deny an application for a certificate of public convenience and necessity is solely and exclusively that of the commission in determining the public interest. The courts are devoid of power under the constitutional provision to determine that the commission was in error in deciding that only eight certificates should be granted and the further determination that the eight granted

would best serve the public interest. The reversal of the order of the commission in this case is not only a direct violation of the constitutional power conferred on the commission, but it will have the effect of defeating one of the fundamental purposes of commission control over common carriers. It purports to reverse or coerce the commission in an area over which the commission has the sole and exclusive constitutional power to act. The majority opinion unlawfully encroaches on the exclusive power of the commission as an administrative agency. In my judgment, the applicant whose application was denied in the public interest has failed to present a justiciable issue to this court and its appeal should be dismissed.

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

JANE A. BALL, APPELLEE, V. STANLEY E. BALL, APPELLANT.
159 N. W. 2d 297

Filed June 7, 1968. No. 36818.

1. **Words and Phrases: Divorce.** An unqualified allowance of "alimony in gross," whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment, and survives the death of the husband. Such an allowance is not subject to modification.
2. ———: ———. In the absence of an allowance of "alimony in gross," the court has power to revise and alter its awards of alimony as to future payments under the provisions of section 42-324, R. R. S. 1943, and such right will be held automatically to exist, unless the decree defines and limits the rights of parties with such completeness and finality as to be clearly capable of and intended as a present vesting, and hence to possess in its scope the attributes of a final judgment.
3. ———: ———. "Alimony," which signifies literally nourishment or sustenance, is an allowance for support and maintenance, or, as has been said, a substitute for marital support.

It is the allowance which a husband may be compelled to pay to his wife or former wife for her maintenance when she is living apart from him or has been divorced.

4. ———: ———. "Alimony in gross," or "lump-sum alimony," is fundamentally the award of a definite sum of money; and if the sum is payable in installments the payments run for a definite length of time. The sum is payable in full, regardless of future events such as the death of the husband or the remarriage of the wife. Gross alimony becomes a vested right from the date of the rendition of the judgment, and the manner of its payment in no wise affects its nature or effect.
5. ———: ———. "Alimony in general," or "installment alimony," contemplates periodic payments of a definite sum for the indefinite future, and terminates on the death of either party or the remarriage of the wife.
6. ———: ———. The phrase "'alimony in gross" or "gross alimony" is always for a definite amount of money, the payment is always for a definite length of time, and it is always a charge on the estate of the husband and is not modifiable.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed as modified.

Kneifl, Kneifl & Byrne, for appellant.

Abrahams, Kaslow & Cassman, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

NEWTON, J.

The present action results from an application for reduction in alimony payments. Plaintiff Jane A. Ball obtained a decree of divorce from the defendant Stanley E. Ball on June 18, 1965. The decree of divorce adopted, and made a part thereof, an agreement regarding custody of the minor child of the parties, payment of child support, division of property, and the payment of alimony. The only question presented for decision is whether or not the alimony provisions require the payment of "alimony" or "alimony in gross."

The provisions of the agreement and decree pertinent to a resolution of the question presented may be

summarized. Defendant was required to pay plaintiff alimony of $150 per month, with the provision that such payments should terminate on the death or remarriage of plaintiff. Certain child support payments were also to be made by defendant and it was provided that when such child support ceased on the death, marriage, or coming of age of the minor child that the alimony payments should be increased to $200 per month. All alimony payments were to cease when plaintiff attained the age of 65 years. Defendant was to maintain life insurance with appropriate provisions to render the proceeds available to discharge any of the alimony obligations which he might still have at the time of his death. It was further provided that the agreement should constitute a release of any and all claims either might have against the property of the other which might then be held or should be acquired in the future, and should be a release and satisfaction of all claims either "can, shall, or may have in the future against the other."

In view of the foregoing provisions, does this agreement and decree provide for "alimony in gross"? The district court found that it did and also that there had been a sufficient change in circumstances to otherwise justify and require a reduction in the alimony payments. The court decreed that child support payments should be reduced from $150 per month to $75 per month and that the alimony payments should be reduced, for a period of 6 months, from $150 per month to $100 per month, but that there should be no reduction in the gross amount owed by defendant under the original decree. In other words, although defendant's payments were temporarily reduced, he still owed and would have to pay the additional $50 per month provided for in the original decree of divorce. On the overruling of his motion for new trial, defendant has appealed.

It is a well-settled rule that: "An unqualified allowance of alimony in gross, whether payable immediately in full or periodically in installments, and whether in-

tended solely as a property settlement or an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment, and survives the death of the husband." Spencer v. Spencer, 165 Neb. 675, 87 N. W. 2d 212. Such an allowance is not subject to modification. See Ziegenbein v. Damme, 138 Neb. 320, 292 N. W. 921. In the absence of an allowance of "alimony in gross," the court has power to revise and alter its awards of alimony as to future payments under the provisions of section 42-324, R. R. S. 1943, and such right will be held automatically to exist, unless the decree defines and limits the rights of parties with such completeness and finality as to be clearly capable of and intended as a present vesting, and hence to possess in its scope the attributes of a final judgment. See Dunlap v. Dunlap, 145 Neb. 735, 18 N. W. 2d 51.

The distinction between "alimony" and "alimony in gross" may be gathered from the accepted definitions of the two terms. " 'Alimony,' which signifies literally nourishment or sustenance, is an allowance for support and maintenance, or, as has been said, a substitute for marital support. It is the allowance which a husband may be compelled to pay to his wife or former wife for her maintenance when she is living apart from him or has been divorced." 24 Am. Jur. 2d, Divorce and Separation, § 514, p. 640. "Alimony in gross, or 'lump-sum alimony,' is fundamentally the award of a definite sum of money; and if the sum is payable in instalments the payments run for a definite length of time. The sum is payable in full, regardless of future events such as the death of the husband or the remarriage of the wife. Gross alimony becomes a vested right from the date of the rendition of the judgment, and the manner of its payment in no wise affects its nature or effect. The fact that the award is payable in instalments is not determinative of the question whether it is gross alimony

or periodic alimony. On the other hand, alimony in general, or instalment alimony, contemplates periodic payments of a definite sum for the indefinite future, and terminates on the death of either party or the remarriage of the wife." 24 Am. Jur. 2d, Divorce and Separation, § 614, p. 735. See, also, 27A C. J. S., Divorce, § 202, p. 868, § 235, p. 1076. The generally accepted rule may be found in the case of Walters v. Walters, 341 Ill. App. 561, 94 N. E. 2d 726. The phrase "alimony in gross" or "gross alimony" is always for a definite amount of money, the payment is always for a definite length of time, and it is always a charge on the estate of the husband and is not modifiable. It, therefore, appears that a decree providing for "alimony in gross," constituting a final judgment not subject to modification, must incorporate each and every one of the following propositions to meet the recognized requirements for this type of judgment, to wit: (1) The award must be for a definite sum or for installments payable over a definite period of time; (2) it must be payable in full regardless of the death or remarriage of the judgment creditor; and (3) it cannot terminate on the death of the judgment debtor.

Examining the facts in the present case in the light of the foregoing rules, it appears that the alimony judgment entered is lacking in several of the features required in an award of "alimony in gross." This decree provides that the monthly payments of $150 per month shall terminate on the death or remarriage of the wife and that such payments shall be increased to $200 per month when the obligation for support of the minor child ends with the death, marriage, or coming of age of such child. It will be noted that both of these provisions are directly contradictory of an intent to make the payments payable for a definite and certain period of time as the time of the death or remarriage of the wife cannot be ascertained nor can the time of the death or marriage of the child be ascertained. It is true that the decree contains a somewhat contradictory provision that all

payments shall cease when the wife attains the age of 65, but nevertheless, the uncertainties still exist in that she may remarry or die before attaining that age and the payments remain subject to variance in the event of the death or marriage of the child prior to attaining her majority. It will also be noted that the decree provides that the defendant husband shall maintain life insurance, made payable, in the event of his death, in such manner as to cover any obligations remaining under the decree at the time of his death. This provision indicates that the judgment was not intended or understood to be one surviving his death or constituting a valid claim against his estate. The provision that each party releases the property of the other whether such property was held at the time of the decree or should thereafter be acquired also indicates an intent to release the estate of the judgment debtor and serves as verification of the fact that the judgment was not intended to survive his death.

The decree does contain a general provision bearing some of the aspects of a judgment for "alimony in gross." It releases and satisfies all claims either party "can, shall, or may have in the future against the other." In a determination of whether or not this judgment is one for "alimony in gross," it appears that this provision is directly contradictory of the more specific provisions above mentioned. Under such circumstances, we believe that the specific provisions must control inasmuch as they clearly demonstrate that this judgment is lacking in several of the essentials required to constitute a judgment for "alimony in gross."

Plaintiff has relied primarily on two cases. The first, Ziegenbein v. Damme, *supra,* is readily distinguishable in that it clearly meets all the requirements of "alimony in gross," the award in that case being one for a gross amount payable in installments. The second is the case of Card v. Card, 174 Neb. 124, 116 N. W. 2d 21. In that case the award was for a gross sum payable in install-

ments with a provision that the obligation to pay further installments ceased on the death or remarriage of the plaintiff. That case did not determine that the judgment was one for "alimony in gross." The case was determined on the basis of an insufficient change in circumstances to justify a modification of the decree. This court stated: "In order to secure a revision of a divorce decree having such completeness and finality as to possess the attributes of a final judgment, new facts occurring since the decree was entered must be shown. * * * It is only where a divorce decree lacks the attributes of a final judgment, or reservations are contained in it that lay the foundation for modification, or where changed circumstances can be shown, that a divorce decree, otherwise final, may be modified after 6 months from the rendition of the decree. In the instant case the petition fails to show that any of the factors exist which would authorize a modification of the decree. The general demurrer was properly sustained and the action dismissed." These cases are not applicable to the present situation.

There is no issue in this court regarding the sufficiency of the evidence to show a change in circumstances justifying a modification of the original decree or regarding the exercise of a sound discretion by the trial court in fixing the terms of such modified decree. We, therefore, affirm the decree entered in the trial court with the exception that the reduction in payments provided for in such decree shall be effective for all purposes from the date of the decree and defendant shall not be obligated to reimburse plaintiff for the difference between the amount of the reduced payments and the original payments. Plaintiff is allowed $350 for the services of her attorney in this court and costs of appeal are taxed to defendant.

AFFIRMED AS MODIFIED.

VIOLA JONES, APPELLEE, V. JAMES JONES, APPELLANT.
159 N.W. 2d 544

Filed June 7, 1968. No. 36834.

1. **Parent and Child: Divorce.** An application for a change with respect to care and custody of minor children, which has been provided for in a decree of divorce, made at any time after the decree has been entered must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances the matter will be deemed res judicata.
2. ———: ———. The proper rule in a divorce case, where the custody of minor children is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents.
3. ———: ———. The natural rights of a parent to the custody of his child are not absolute. They must yield to the best interests of the child where the preferential right has been forfeited.
4. **Appeal and Error: Trial.** When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
5. **Parent and Child: Appeal and Error.** The discretion of the lower court with respect to awarding or changing the custody and support of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

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

Beynon, Hecht & Fahrnbruch and Michael W. Brown, for appellant.

Hal W. Bauer, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

NEWTON, J.

On January 2, 1964, defendant James Jones obtained

a decree of divorce from the plaintiff Viola Jones. The custody of their minor daughter Vickie Marie Jones was awarded to the defendant. The present action results from an application of plaintiff praying for a modification of the decree of divorce insofar as it pertains to the custody of the minor child and that custody be awarded to plaintiff. The application was heard on August 30, 1967, at which time Vickie was 12 years of age. The trial court awarded Vickie's legal custody to Mrs. Helen Cox, chief juvenile probation officer of Lancaster County, Nebraska, but provided that the physical care and custody of the child should remain with the defendant. Defendant has appealed. Plaintiff, not having cross-appealed, the question of her fitness to have custody is not at issue.

The rules governing the situation presented are clear. "An application for a change with respect to care and custody of minor children, which has been provided for in a decree of divorce, made at any time after the decree has been entered must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances the matter will be deemed res judicata." Young v. Young, 166 Neb. 532, 89 N. W. 2d 763.

" 'The proper rule in a divorce case, where the custody of minor children is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents.' * * * 'The natural rights of a parent to the custody of his child are not absolute. They must yield to the best interests of the child where the preferential right has been forfeited.' " Caporale v. Hale, 169 Neb. 751, 100 N. W. 2d 847.

" 'When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts

rather than the opposite.' " Stohlmann v. Stohlmann, 168 Neb. 401, 96 N. W. 2d 40.

" 'The discretion of the lower court with respect to awarding or changing the custody and support of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.' " Johnson v. Johnson, 177 Neb. 445, 129 N. W. 2d 262.

Defendant has not remarried. He has found it necessary, when away from home due to his employment or for other reasons, to employ various women to look after his daughter. These women were accustomed to live in his home at various times. Although the evidence of the existence of an improper relationship between the defendant and some of these women is not conclusive, there is evidence from which the trial court may well have concluded that such a relationship existed and was detrimental to the welfare of his daughter. The evidence conclusively demonstrates that the animosity existing between plaintiff and defendant did not abate and resulted in constant bickering and quarreling between them in regard to plaintiff's visitation rights and the custody of the child, with the result that the child was sometimes ill-advised, disobedient, and was rendered unduly nervous. Vickie, nevertheless, expressed a desire to remain with her father.

Under the existing conditions, we find that there has been a sufficient change in circumstances to justify a modification of the original decree and that Vickie's welfare, which is the paramount consideration, required such change. The order entered by the trial court permits Vickie to live with her father, to attend the school with which she is familiar, and to continue such friendships as she may have entered into. The change in her legal custody simply means that her home conditions will remain under the surveillance and superintendence of a competent individual and will result in the removal

of any threat to her moral well-being. It should also reduce, and perhaps bring to an end, the constant bickering between her parents which rendered life difficult for her and resulted in her nervous condition. Under such circumstances, we find that the decree of the trial court is not against the weight of the evidence and that there has not been an abuse of discretion.

The decree of the district court is affirmed. The sum of $200 is allowed plaintiff for the services of her attorney; the sum of $100 is allowed the guardian ad litem; and costs of appeal are taxed to defendant.

AFFIRMED.

BERNARD L. BOYER, APPELLANT, V. JUDITH RAE BOYER, APPELLEE.

159 N. W. 2d 546

Filed June 7, 1968. No. 36855.

1. **Parent and Child: Divorce.** After a divorce decree, if the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody, and maintenance of the children or any of them.
2. ———: ———. Ordinarily, custody of minor children awarded to their mother in a divorce action will not be disturbed unless by changed circumstances it is affirmatively shown that the mother is an unfit person to have their custody, or that the best interests of the children require such action.
3. **Parent and Child: Appeal and Error.** The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed as modified.

Baskins, Baskins & Schneider, for appellant.

Maupin, Dent, Kay, Satterfield & Gatz, Donald E. Girard, and Gary L. Scritsmier, for appellee.

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

SPENCER, J.

This is an action to modify a divorce decree by changing the custody of minor children from the appellee mother to the appellant father. The parties, who were 18 years of age at the time of the marriage August 16, 1960, were divorced March 1, 1965. Two children were born to said marriage, Jeffery Scott Boyer, March 19, 1961, and Kevin Louis Boyer, January 23, 1963. The divorce was granted to appellee and custody of the children was awarded to her.

Section 42-312, R. R. S. 1943, provides as follows: "If the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them."

The change of circumstances on which the application herein is predicated is that subsequent to the divorce, appellee gave birth to an illegitimate child at the Booth Memorial Hospital in Omaha, Nebraska, and the allegation that appellee abandoned the care of the children to other parties. Appellee admitted that she gave birth to an illegitimate child, but alleged that at all times the children were provided with a good and sufficient home. Five months before the birth of the illegitimate child, appellee entrusted the care of the children to her parents in Lincoln, Nebraska, and she went to the hospital in Omaha where she stayed until after the birth of the child. Upon her release from the hosptal, she returned to the home of her parents where she and the Boyer children reside.

It will serve no useful purpose to discuss the details

of appellee's indiscretion except to note that her explanation of the incident would indicate rape. Accepting her version, as the trial court must have done, she is still subject to censure for permitting herself to get into the situation described by her. The question arises, however, as to whether this is sufficient to constitute a change of circumstances within the meaning of the statute. If there were evidence that this was habitual conduct, there could be little question. However, the record covers only this one incident and indicates that appellee's conduct is otherwise above reproach.

There is no evidence in the record that the children were neglected in any way. The trial court specifically found that the appellee had been providing adequate care for the children. He found her to be a fit and proper person to have their custody and determined that the best interests of the children would be served by permitting them to remain in her custody. In this regard, it is appropriate to observe that the trial court not only saw but visited with the children in the presence of counsel.

Ordinarily, custody of minor children awarded to their mother in a divorce action will not be disturbed unless by changed circumstances it is affirmatively shown that the mother is an unfit person to have their custody, or that the best interests of the children require such action. State ex rel. Speal v. Eggers, 181 Neb. 558, 149 N. W. 2d 522.

The only basis for a change of custody herein is the single fact that appellee gave birth to an illegitimate child, and while the matter is before us for trial de novo (see Caporale v. Hale, 169 Neb. 751, 100 N. W. 2d 847), we cannot entirely ignore the fact that the able trial judge who heard the matter herein had an opportunity to observe the witnesses and to visit with the children.

We have said many times the discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of

the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Johnson v. Johnson, 177 Neb. 445, 129 N. W. 2d 262.

We cannot say that the trial court abused its discretion herein or that on the present record its decision is clearly against the weight of the evidence. If the situation should change, the decree of the court, insofar as the minor children are concerned, is never final in the sense that it cannot be changed.

We do find, however, that the appellant did have some reason to submit the question of a change of circumstances to the court. Under the peculiar circumstances herein, we believe that appellant should not be required to pay any portion of the fees of appellee's attorney but all other costs are taxed to him. With this exception, the judgment herein is affirmed.

AFFIRMED AS MODIFIED.

IN RE APPLICATION OF SAMARDICK OF GRAND ISLAND-HASTINGS, INC., OMAHA, NEBRASKA.
SAMARDICK OF GRAND ISLAND-HASTINGS, INC., APPELLEE, V. B.D.C. CORPORATION, APPELLANT.
159 N. W. 2d 310

Filed June 7, 1968. No. 36863.

1. **Records: Motions, Rules, and Orders.** The proper function of a nunc pro tunc order is to correct the record which has been made so that it will truly record the action actually taken but which through some inadvertence or mistake has not been truly recorded.
2. **Administrative Law: Motions, Rules, and Orders.** The rules relating to nunc pro tunc orders are generally applicable to administrative and quasi-judicial commissions.
3. **Motor Carriers: Public Service Commissions.** In considering an application for a permit to operate as a contract carrier, the burden is upon the applicant to show that the proposed service is specialized and fits the need of the proposed contracting shippers, that the applicant is fit, willing, and able to per-

form the service, and that the proposed operation will be consistent with the public interest.

4. ———: ———. Where the transportation of specified commodities can be performed as well by common carriers as by contract carriers, a need for contract carriers is not established.
5. ———: ———. If competent proof is made by the applicant showing the proposed service to be specialized and needed, and by protesting common carriers showing a willingness and ability to perform it, the applicant must then establish that he is better equipped and qualified to meet the special needs of the proposed contracting shippers than the protesting common carriers.
6. ———: ———. The adequacy of existing services to perform the normal needs of proposed contracting shippers is not conclusive where the new service is better designed to fit the special requirements of the proposed contracting shippers.
7. ———: ———. The ability of a contract carrier to provide special service at a lower cost cannot ordinarily of itself justify a finding of need for specialized service although it is one of the factors to be considered.
8. ———: ———. Where there is evidence to sustain the factors for and against the issuance of a permit to a contract carrier, which is required to be considered by the Nebraska State Railway Commission by sections 75-301 and 75-311, R. R. S. 1943, the determination of the public interest is for the commission and not the courts.

Appeal from the Nebraska State Railway Commission. Affirmed.

W. W. Wallin and Robert E. Powell, for appellant.

Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellee.

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

CARTER, J.

This is an appeal from an order of the Nebraska State Railway Commission authorizing Samardick of Grand Island-Hastings, Inc., to engage in operations as a contract carried by motor vehicle to transport "Cash, letters, checks and other commercial papers, data processing materials, and other documents and records thereto re-

lated," over two regular routes. The objector and appellant is B.D.C. Corporation, a common carrier, who contends that the order of the commission granting the application is not supported by evidence and is therefore unreasonable and arbitrary. We shall refer to the applicant as Samardick and the objector as B.D.C.

On May 4, 1967, Samardick filed its application with the commission under the provisions of section 75-311, R. R. S. 1943, seeking a permit to operate as a contract carrier authorizing operation in Nebraska intrastate commerce over routes described in the application to transport cash, letters, checks and other commercial papers, data processing materials, and other documents and records thereto related, for the Omaha National Bank of Omaha. On June 6, 1967, a formal protest to the granting of the application was filed by B.D.C. A hearing was held on July 10, 1967. On October 23, 1967, the commission entered its order granting the application and B.D.C. has appealed to this court.

The order of the commission on October 23, 1967, granted the application. In showing the service authorized, the commission stated, "Cash letters, checks and other commercial papers, data processing materials, and other documents and records related thereto," instead of "Cash, letters, checks and other commercial papers, data processing materials, and other documents and records related thereto," as applied for. On March 19, 1968, after the appeal to this court was perfected, the commission, on its own motion, entered an order nunc pro tunc correcting the October 23, 1967, order by inserting the comma between the words "cash" and "letters" after finding that the absence of the comma in the original order was a typographical error and that the order as corrected stated the actual decision rendered on October 23, 1967. This it is authorized to do. "An appeal or error proceeding, properly perfected, deprives the trial court of any power to amend or modify the record as to matters of substance, but the pendency of an

appeal or writ of error ordinarily does not deprive the trial court of the power to correct its record so that it will truly set forth the proceedings as they actually occurred, even though the correction of the error deprives the appellant of his ground of appeal." 4 Am. Jur. 2d, Appeal and Error, § 354, p. 832. See, also, Andresen v. Lederer & Strauss, 53 Neb. 128, 73 N. W. 664. The same rule applies to an administrative agency such as the Nebraska State Railway Commission. Andrews v. Nebraska State Railway Commission, 175 Neb. 222, 121 N. W. 2d 32.

Samardick is a new corporation, having filed its articles of incorporation on March 23, 1967, and at the time of the hearing in this case held no permit or certificate from the commission. It is an independent corporation although it has common stockholders with Samardick and Company which operates in Omaha, Lincoln, Grand Island, Sioux City, and Sioux Falls in serving the public with armored car service for transporting cash, coins, and currency, but holds no authority to transport the additional commodities listed in the present application nor to perform contract service for the Omaha National Bank.

Samardick supported its application with the evidence of Darrell J. Dunham, its vice president charged with the supervision of the activities of the company including the securing of new business. He had had 5 years' experience with Samardick and Company before associating with the present applicant. His testimony is to the effect that Samardick and the Omaha National Bank have agreed upon a proposed contract by which Samardick will transport cash, cash letters, data processing materials, and documents to and from the Omaha National Bank and its data processing center at Grand Island and the correspondent banks of the Omaha National Bank now serviced by the Grand Island processing center. The service would require the establishment of two routes designated in the record as the "north run"

and the "south run." The north run would service nine correspondent banks between Grand Island and Bancroft via Columbus, Albion, Neligh, Wayne, and Pender. The south run would service four banks between Grand Island and York via Hastings, Lawrence, and Geneva. In the transporting of data processing materials the scheduling of the service is important in that the pickup of the materials must occur after the banks have closed and must be returned from the processing center at Grand Island before the banks open the following day. The data processing materials from some of the correspondent banks must go to the Grand Island processing center because of the type of materials used which could be processed in Grand Island but not in Omaha. It is the testimony of Dunham also that Samardick plans a complete service by transporting cash, coin, and currency in addition to data processing materials, cash letters, and related documents. Assurances were made that needed and required equipment and facilities would be provided and the scheduling of the service would be that fitting the particular needs of the correspondent banks using the Omaha National Bank's data processing center in Grand Island. The service would be on a regular route basis best fitting the needs of users under the contract of carriage. He gave assurance that, if the permit is granted, necessary capital and equipment would be available to fulfill its purposes in accordance with the needs of its users.

Five representatives of the affected correspondent banks testified in support of the application. One or more of them testified as follows: It would be a convenience to be able to obtain coin or currency from Grand Island along with transporting of data processing materials. A lesser cost of the service would be a pertinent factor. The time factor in scheduling would be important in alleviating tight schedules that cannot be avoided in common carrier service. One representative testified that the common carrier rate charged his bank

was substantially reduced when the present application was filed by changing a 17 cents per mile rate to the minimum tariff rate; and that the cost of transporting cash letters at the minimum rate of 40 cents per day by common carrier was abandoned by his bank in favor of the use of the mail at 10 or 15 cents a day. The witnesses admitted that the carrying of cash was important largely in emergency situations of little frequency. One witness testified that his bank was transporting its data processing material to the Omaha National Bank in Omaha for want of adequate transportation service to Grand Island and that it would be more convenient to ship to Grand Island which is much closer. One witness on the south run stated that its data processing material formerly was transported to Grand Island by contract with a local resident. The expense was prohibitive and its shipment goes to Omaha, an additional distance of 75 miles, because of a lack of adequate service to Grand Island. The assistant data processing officer of the Omaha National Bank testified that discussions with Dunham indicated scheduling could be made to accommodate all of the correspondent banks here involved at the Grand Island processing center; and further, that arrangements would be made at Grand Island for transporting cash with the data processing materials. He further stated that the rate to be charged by Samardick was still to be negotiated but that it would be considerably less than the common carrier rate now being paid to B.D.C.

The objector offered the testimony of Thomas M. McQuaid as the sole witness for B.D.C. McQuaid is the regional manager of B.D.C. in general charge of its operations. It holds a certificate authorizing it to transport cash letters, data processing materials, commercial papers and documents, dental supplies, optical supplies, and exposed and processed film and prints between all points in Nebraska over irregular routes. It has no authority to transport coins, currency, or negotiable secur-

ities. It has established routes which it alleges would be affected by the grant of the Samardick application. These are designated in the record as routes 559, 560, 561, and 565. His testimony is that the grant of the application would require the starting of route 559 at Norfolk instead of Bancroft and that route 565 would have to be abandoned, thereby leaving some banks not included in Samardick's application without service. He stated further that routes 560 and 561, composing the southern run, would not be changed, but a loss of revenue would result. McQuaid testified to the service rendered, the number of vehicles owned and operated, and the depository boxes furnished its customers. He said the Omaha National Bank is one of its largest customers and the transfer of its business to Samardick would create a large loss of revenue and the total abandonment of route 565 operating from Neligh to Grand Island via Albion, Genoa, Columbus, St. Paul, and intermediate points. He has had complaints as to rates and some minor complaints on scheduling. At one time, B.D.C. had a regular route between Grand Island and Seward via Hastings, Lawrence, and Geneva, which was abandoned because of high rates on a mileage basis. There is no conflict in this area with the proposed route by Samardick. He testified to the loss of revenue by the grant of the application, the real loss being the abandonment of route 565. He estimated the revenue loss by the abandonment of route 565 as approximately $1,600 per month. However, nothing in the record shows substantial loss of income or that the loss of income is detrimental to the continued operations of the objector. He testified that its certificate authorizes it to go anywhere anytime over irregular routes in the performance of service at common carrier rates. McQuaid stated that B.D.C. has established new routes and schedules as its business increased and has made specific changes at the request of the Omaha National Bank. He stated further that B.D.C. is willing to provide any type of equipment to transport commodi-

ties it is authorized to haul and that it has never been requested to transport cash, coins, or currency.

"A contract carrier by motor carrier has been generally defined by this court as one who furnishes transportation service to meet the special needs of specified shippers which cannot be adequately provided by common carriers. It is the duty of the commission to weigh the special needs of shippers desiring contract carrier service against the adequacy of the existing common carrier service. The effect on a protesting carrier of a grant of the application and the effect on shippers of a denial are factors to be weighed in determining if the grant of the application would be consistent with the public interest." Midwest Mail Service, Inc. v. Bankers Dispatch Corp., 174 Neb. 809, 119 N. W. 2d 692.

"The issuance of a permit by the commission to an applicant seeking authority as a contract carrier is controlled by section 75-235, R. R. S. 1943. In substance, this section provides that a permit will be granted if the applicant is found to be fit, willing, and able to perform the service in accordance with statutory requirements and the rules and regulations of the commission, and that the operation authorized will be consistent with the public interest. In determining the question of public interest, the commission is required to consider the number of competing operators, and not the number of motor vehicle units being operated by competing operators." Hagen Truck Lines, Inc. v. Ross, 174 Neb. 646, 119 N. W. 2d 76.

The burden is on the applicant to affirmatively establish the conditions precedent to the grant of a permit as a contract carrier. It must show that it is fit, willing, and able to perform the service in compliance with the rules and regulations of the commission and that the proposed operation is consistent with the public interest and the legislative policy expressed in sections 75-301 and 75-311, R. R. S. 1943. The term "consistent with the public interest" is quite different in its meaning than

the term "public convenience and necessity." The former means only that the proposed contract carrier service does not conflict with the legislative policy of the state in dealing with transportation by motor carriers, while the latter requires a consideration of the present service being rendered in the territory, the need of additional service, and the facilities which the applicant can provide. Consistent with the public interest simply means that it is not contrary to the public policy of the state as expressed in the Motor Carrier Act. Hagen Truck Lines, Inc. v. Ross, *supra.*

It is the general rule that an applicant for a contract carrier permit must show that the proposed service is specialized and fits the need of the contract shippers. If the service can be performed as well by common carriers a need for a contract carrier is not established. The evidence does not show that benefits will accrue to the contract shippers in the instant case. The evidence also shows that B.D.C. will suffer a revenue loss if the application is granted. Among the benefits accruing to the users of the service of the contract carriers is a reduction in the cost of carriage. The rate factors are not controlling. Rates are, however, one of the important factors proper to be considered. The evidence as to where the public interest lies in the present case is in conflict. The determination of the public interest in such a case is one that is peculiarly for the determination of the commission. If there is evidence to sustain the findings of the commission, this court cannot intervene. It is only where the findings of the commission are against all the evidence that this court may hold that the commission's findings on the evidence are unreasonable and arbitrary. Where the evidence is in conflict, as here, the weight of the evidence is for the determination of the commission and not for this court. Neylon v. Petersen & Petersen, Inc., 181 Neb. 143, 147 N. W. 2d 488.

Under the foregoing rules, the evidence is sufficient to support the following findings: The applicant is fit,

willing, and able to perform the proposed service. There is a need for the specialized service on the part of the supporting shippers. The interested shippers are willing to contract with the applicant for the specialized service if the application is granted. The existing common carrier, B.D.C., will suffer some revenue loss by a grant of the application but not such as is inconsistent with the public interest. The grant of the application is consistent with the public interest and legislative policy.

We hold that the commission was acting within its powers in determining the issue on the conflicting evidence it had before it. The grant of the application is not, therefore, arbitrary or unreasonable, and the commission's findings and order are affirmed.

AFFIRMED.

ARTHUR W. CAMPBELL ET AL., APPELLEES, V. CITY OF OGALLALA ET AL., APPELLANTS.

LESTER NYE ET AL., APPELLEES, V. CITY OF OGALLALA ET AL., APPELLANTS.

159 N. W. 2d 574

Filed June 7, 1968. Nos. 36876, 36877.

1. **Records: Motions, Rules, and Orders.** The record of the trial tribunal in all appellate proceedings imports absolute verity. If such record is incomplete or incorrect, the remedy shall be by appropriate proceeding to secure correction thereof in the trial court.
2. **Statutes: Municipal Corporations.** Where section 17-568.01, R. R. S. 1943, requires an engineer's estimate of the cost of the proposed improvement, its submission to the city council is jurisdictional.

Appeals from the district court for Keith County: JOHN H. KUNS, Judge. Affirmed.

Firmin Q. Feltz, for appellants.

J. Cedric Conover and W. C. Conover, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

SPENCER, J.

These cases involve appeals from judgments of the district court sustaining petitions in error in two separate paving districts and determining the special assessments levied therein to be null and void. Both cases involved the same issues and were consolidated for briefing and argument in this court.

On February 23, 1960, the city council of the city of Ogallala passed an ordinance creating street improvement district No. 44 in said city, which is involved in appeal No. 36877. The ordinance which created street improvement district No. 58 in said city involved in appeal No. 36876 was passed on December 12, 1960. The improvements were completed by January 13, 1964. On February 24, 1964, the city council, purportedly sitting as a board of equalization, levied special assessments on the lots and parcels of land abutting the improved streets. The appellees in both cases filed notices of appeal.

On March 23, 1964, appellees in both cases filed their petitions in error, together with what purported to be full and complete transcripts of the proceedings certified by the city clerk. On June 14, 1965, the matters came on for hearing, and after argument were taken under submission by the court. Thereafter, on June 23, 1965, appellants filed motions requesting leave to file supplements to the transcripts of appellees, alleging that said transcripts were not complete and for the further reason that the petitions in error allege that the defendant city did not require estimates of the cost of said projects from the city engineer prior to entering into a contract for the construction of said projects. Attached to the motions were copies of such alleged estimates, copies of agreements between the city of Ogallala and the State of Nebraska, and the minutes of the

regular meeting of the council on September 10, 1962. Appellees filed motions to strike the supplemental transcripts because they were immaterial and filed out of time. Subsequently, on July 6, 1965, appellants again moved the court to permit them to supplement the transcripts by attaching certified copies of the minutes of the special meeting of the city council of June 1, 1962, for the same reasons alleged previously.

The trial court on September 18, 1967, denied the motions for leave to file supplemental transcripts and sustained the motions to strike. It then entered judgments voiding the assessments on two grounds: (1) That the mayor and city council of Ogallala had no jurisdiction to levy the special assessments because no special meeting was ever called for that purpose as required by section 17-524, R. R. S. 1943; and (2) that no estimate of costs was submitted by the city engineer and accepted by the council previous to entering into the contracts for the improvements, as required by section 17-568.01, R. R. S. 1943. We discuss only the second point because it raises a jurisdictional question at the inception of the contract for the improvement, which precludes the possibility of special assessments herein.

We are committed to the rule in this jurisdiction that the record of the trial tribunal in all appellate proceedings imports absolute verity. If such record is incomplete or incorrect, the remedy shall be by appropriate proceeding to secure correction thereof in the trial court. Drier v. Knowles Vans, Inc., 144 Neb. 619, 14 N. W. 2d 222.

It is appellants' contention that the city engineer's estimates of the cost of the projects were filed with the city council and approved at a special meeting held on June 1, 1962. The minutes of the special meeting of June 1, 1962, are included in both original transcripts, and are exactly the same as those attached to appellants' supplemental transcripts. Nowhere in the minutes of that special meeting, in either the original transcripts

or in the supplemental transcripts, is there any record that the engineer's estimates were submitted at that meeting and approved by the council. It is true that the estimates tendered with the first supplemental transcripts bear the word "approved," the date June 1, 1962, and the signature of Donald E. Lenker, as mayor of the city of Ogallala. This, however, is not sufficient. The minutes in the transcript must show that the tendered estimates were actually submitted to the city council. Approval by the mayor alone does not prove, even if the transcripts could be collaterally attacked, that the estimates were submitted to the council. This was required in these matters by the statutes as it existed in 1962, and the failure of the record to so indicate is a fatal jurisdictional defect. The present statute only requires the submission of an engineer's estimate if the improvement exceeds $5,000 rather than the $2,000 limitation previous to the 1967 amendment. These matters, however, are much in excess of the present figure.

Section 17-568.01, R. R. S. 1943, came into our law in 1873. The first case thereunder, Fulton v. City of Lincoln, 9 Neb. 358, 2 N. W. 724, was adopted in 1879. It held that the council had no power to contract for grading until it enacted an ordinance therefor after an estimate of the cost has been made by the city engineer and submitted to the council.

In Moss v. City of Fairbury, 66 Neb. 671, 92 N. W. 721, this court approved a Commissioner's opinion determining that the provision for an engineer's estimate is jurisdictional, and held that the engineer's estimate must be submitted to and approved by the council before it makes a contract for the improvement. That case held that the cost of a sidewalk laid without a compliance with this provision could be made the basis of a special assessment against the adjacent property.

In Sanitary & Improvement Dist. v. City of Ralston, 182 Neb. 63, 152 N. W. 2d 111, we said: "The engineer's estimate of costs is jurisdictional, and must be sub-

mitted to and approved by the city council before a contract may be made."

We are unable to understand why this matter was held under advisement for more than 2 years. Matters taken under advisement should be promptly decided.

The voiding of the special assessments herein was proper and the judgments are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRANCIS TUNENDER, APPELLANT.

159 N. W. 2d 320

Filed June 14, 1968. No. 36621.

SUPPLEMENTAL OPINION

Appeal from the district court for Holt County: WILLIAM C. SMITH, JR., Judge. On motion for rehearing. See 182 Neb. 701, 157 N. W. 2d 165, for original opinion. Motion for rehearing denied. Former opinion adhered to.

McFadden, Kirby & Swoboda, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

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

MCCOWN, J.

The original opinion in this case stated: "We recommend that upon tender of a guilty plea the court inquire about plea discussions and any plea agreement between counsel. 'Such inquiry will disclose whether there is reason for the court to caution the defendant of the court's independence from the prosecutor. * * * See People v. Baldridge, 19 Ill. 2d 616, 169 N. E. 2d 353 * * *.'

A.B.A. Project, Standards Relating to Pleas of Guilty, Tent. Dr. § 1.5, p. 30."

Plea discussions, plea agreements, the relationship between defense counsel and client, and the responsibility of the trial judge are interwoven with the constitutional issues of the voluntariness of a guilty plea in this case.

The court has under consideration the adoption of Standards Relating to Pleas of Guilty. Prompt study and comment have been requested from the Nebraska District Judges Association, the Nebraska County Attorneys Association, and the Nebraska State Bar Association.

The attention of members of the bar generally is directed to "Standards Relating to Pleas of Guilty," American Bar Association Project on Minimum Standards for Criminal Justice, Tentative Draft February 1967, with amendments as finally adopted February 1968.

MOTION FOR REHEARING DENIED.
FORMER OPINION ADHERED TO.

WHITE, C. J., CARTER and NEWTON, JJ., dissenting.

We dissent to the order overruling the motion for rehearing for the same reasons set out in our original dissents herein. We concur in the proposal of the supplemental opinion that this court consider and adopt a procedural rule governing the acceptance of guilty pleas in felony cases.

IN RE STERILIZATION OF GLORIA CAVITT.
STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. GLORIA CAVITT ET AL., APPELLEES AND CROSS-APPELLANTS.
159 N. W. 2d 566

Filed June 14, 1968. No. 36648.

SUPPLEMENTAL OPINION

Appeal from the district court for Gage County: WILLIAM F. COLWELL, Judge. On motion for rehearing. See 182 Neb. 712, 157 N. W. 2d 171, for original opinion. Mo-

tion for rehearing denied. Former opinion adhered to.

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

Vincent L. Dowding and Luebs, Tracy & Huebner, for appellees.

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

SPENCER, J.

Appellee sets out 17 assignments of error in her motion for rehearing, several of which are merely restatements of her argument on the merits, although some are directed to alleged misstatements in specific findings.

Appellee's whole case is premised on the fact that the sterilization statute does not define who is a mentally deficient patient. Section 83-501, R. R. S. 1943, provides: "No mentally deficient patient, physically capable of bearing or begetting offspring, shall be paroled or discharged from the Beatrice State Home except as provided in sections 83-502 to 83-507 or by order of a court of competent jurisdiction." This statute must be read in connection with Chapter 83, article 2, R. R. S. 1943, which is the article providing for the Beatrice State Home. This article provides that only the feeble-minded may be committed to the home, and section 83-219, R. R. S. 1943, specifically defines who may be considered a feeble-minded person. Appellee was committed to the home as a feeble-minded person. The sterilization statute is only operative for those persons committed to the Beatrice State Home, so that mentally deficient as used in the statute must be defined as one who is feeble-minded.

Appellee seems to feel that the federal constitutional issue was not considered by this court. The federal constitutional issue is embraced in two points, that the act fails to provide due process, and that it permits cruel and unusual punishment. Both of these points are an-

swered in our opinion. Actually, the procedure outlined is, if anything, more specific than that approved by the United States Supreme Court in the opinion by Justice Holmes in Buck v. Bell, 274 U. S. 200, 47 S. Ct. 584, 71 L. Ed. 1000. Our statutes specifically provide that a notice of the time and place of hearing shall be served upon the patient, and make provision for a guardian. It provides for the attendance of the patient at the hearing; the right to be represented by counsel; requires that the evidence be reduced to writing; provides for the furnishing of a copy to the patient or his guardian; and the time for appeal. Our statute adequately meets the tests of due process provided by federal law.

The following from Skinner v. Oklahoma ex rel. Williamson, 316 U. S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655, is appropriate herein: "It was stated in Buck v. Bell, supra, that the claim that state legislation violates the equal protection clause of the Fourteenth Amendment is 'the usual last resort of constitutional arguments.' 274 U. S. p. 208. Under our constitutional system the States in determining the reach and scope of particular legislation need not provide 'abstract symmetry.' Patsone v. Pennsylvania, 232 U. S. 138, 144."

As to the question of permitting cruel and inhuman punishment, this argument is now merely one of form applied to these statutes. Twenty-seven states have compulsory sterilization laws for the feeble-minded and eighteen for the insane. The cases are fairly uniform in holding that a sexualization operation is not a cruel punishment. Sterilization has been sustained not only for the mentally deficient but also in cases of habitual criminality. Our statute requires the sterilization to be done at the Beatrice State Home under the direction of a board member. We would interpret the statute to require the simplest procedure possible to effect sterilization.

Buck v. Bell, *supra,* answered the question that in no

circumstances can an order of sterilization be provided. As Justice Holmes said: "It would be strange if it (society) could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."

Appellee urges that the statute is unconstitutional because there is no requirement for a specific finding that offspring will likely be defective. It is true this requirement was in the previous statute, but we fail to find any law which makes this requirement a condition precedent to legality of the act. Some states permit sterilization of habitual criminals. The requirement of defective offspring is not required in those instances. There are only two requirements for sterilization in our statute, and both of them are present herein: (1) The patient has been found to be mentally deficient; and (2) the patient is apparently capable of bearing offspring. The evidence is undisputed that appellee has a very low IQ; has been a behavioral problem at the institution; before being institutionalized she had eight illegitimate children; is still able to procreate; and desires more children.

Appellee suggests that we erred in stating that the Beatrice State Home is the only institution to which mentally defective persons may be committed, and calls attention to a provision which permits the transfer of the feeble-minded from other institutions to the Beatrice institution. Actually, the Beatrice State Home is the home provided for the feeble-minded, and there is no undue discrimination in requiring sterilization only at that institution. We suggest the following quotation from Justice Holmes in Buck v. Bell, *supra,* is a sufficient answer to this contention: "But, it is said, however it

might be if this reasoning were applied generally, it fails when it is confined to the small number who are in the institutions named and is not applied to the multitudes outside. It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached."

Appellee suggests that we erred in failing to consider the fact that appellee has not requested release or parole from the Beatrice State Home. It is true that appellee did not make such a request, and that the superintendent recommended to the board that she might be a subject for parole if sterilized. The board found, after careful psychiatric and medical examination, that appellee should not be paroled or discharged from the Beatrice State Home unless she was sterilized. The order does not require her sterilization. It does provide, in accordance with the statute, that she shall not be released unless she is sterilized. *The choice is hers.*

MOTION FOR REHEARING DENIED.
FORMER OPINION ADHERED TO.

BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., dissenting.

STATE OF NEBRASKA, APPELLEE, V. TERRY LOUIE FOSTER, APPELLANT.
159 N. W. 2d 561

Filed June 14, 1968. No. 36721.

1. **Criminal Law: Evidence.** The affirmative evidence supporting the finding of voluntariness must show that the confession was

freely and voluntarily made and exclude any other reasonable hypothesis.

2. **Criminal Law: New Trial.** Where error as to one defendant in a criminal prosecution requires that a new trial be granted him, the rights of his codefendant to a new trial depend upon whether that error was prejudicial as to the codefendant.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

A. Q. Wolf and Thomas D. Carey, for appellant.

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

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

WHITE, C. J.

In a joint jury trial, defendant Foster and Cleon Montgomery were convicted of robbery. They were represented by the same counsel and we reversed the judgment as to Montgomery (State v. Montgomery, 182 Neb. 737, 157 N. W. 2d 196), because of denial of effective counsel stemming from Foster's confession implicating Montgomery and error in failing to grant severance.

Foster claims his confession was involuntary and should not have been admitted because of inadequate foundation for voluntariness. The affirmative evidence supporting the finding of voluntariness must show the confession was freely and voluntarily made and exclude any other reasonable hypothesis. State v. Long, 179 Neb. 606, 139 N. W. 2d 813; State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66. The record shows that the confession was taken after Foster had been fully advised as to his Miranda rights, and otherwise was voluntarily given without threats, promises, or inducements. The defendant signed the statement which included the advisory statements and questions required by Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, as well as Foster's responses. The af-

firmative evidence clearly discloses all that occurred prior to and at the time of the taking of the confession. The affirmative evidence presents no other conclusion than that the confession was freely and voluntarily made after full Miranda warnings. The most that is presented in opposition thereto is the uncorroborated conflicting evidence of Foster that the confession was obtained by threats, violence, and a promise of leniency.

All of this testimony was denied by the police officers. The record amply justifies the submission of the confession to the jury for a final determination as to voluntariness. And even if we were to weigh the evidence in the context of the totality of the circumstances it would be almost impossible to upset the court and jury determination of voluntariness, except by accepting, carte blanche, the uncorroborated conflicting evidence of the defendant. The resolution of such a swearing match belongs ordinarily where our doctrine of judicial review of fact questions puts it, with the trial court and the jury. See, State v. Long, *supra;* Parker v. State, 164 Neb. 614, 83 N. W. 2d 347.

The main thrust of Foster's argument is that severance should have been granted because of conflicting interest of counsel, who also represented Montgomery at the joint trial. Severance, under our procedure, is not a matter of right. § 29-2002, R. R. S. 1943; State v. Montgomery, *supra.* In Glasser v. United States, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680, a confession was involved and the question was presented on the conflicting interest of a joint counsel in a conspiracy case, flowing from the use of a confession implicating another defendant. While granting a new trial as to Glasser, the Supreme Court said, in denying a new trial as to the other defendants: "But this error does not require that the convictions of the other petitioners be set aside. To secure a new trial they must show that the denial of Glasser's constitutional rights prejudiced them in some manner, for where error as to one defendant in a con-

spiracy case requires that a new trial be granted him, the rights of his co-defendants to a new trial depend upon whether that error prejudiced them. * * * Kretske does not contend that he was prejudiced by the appointment, and we are clear from the record that no prejudice is disclosed as to him. Roth argues the point, but he was represented throughout the case by his own attorney. We fail to see that the denial of Glasser's right to have the assistance of counsel affected Roth."

There is no showing of prejudice in this case. The record shows not only that Foster repudiated his confession (which implicated Montgomery), but that he was given detailed and effective assistance of counsel at the evidentiary hearing on voluntariness and at all times during the trial. Unless we were to hold that joint representation of codefendants denies the effective assistance of counsel per se, this case requires affirmance. Essentially Montgomery was denied the effective assistance of counsel because of the necessity of attacking the credibility of Foster, to whom he owed the duty of equal loyalty. The conflict is obvious. But nothing Montgomery said or did required counsel to betray or repudiate Foster. Foster repudiated his confession, including the implication of Montgomery. There is no merit to this contention.

The judgment and sentence of the district court as to Foster is correct and is affirmed.

AFFIRMED.

ETHEL L. LIEBERS ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.
SKYLINE FARMS CO., A NEBRASKA CORPORATION, OWNER, ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.
159 N. W. 2d 557

Filed June 14, 1968. Nos. 36781, 36782.

1. **Trial: Appeal and Error.** Instructions must be considered to-

gether and if, when considered as a whole, they correctly state the law, error cannot be predicated thereon.

2. **Eminent Domain: Trial.** The giving of an instruction on the burden of proof in an eminent domain action relating to damage to that part of plaintiff's property which was not taken, when the fact of the presence of such damage was conceded and not an issue, does not constitute prejudicial error.
3. **Eminent Domain: Evidence.** Whether or not evidence of a comparable sale is near enough in point of time to furnish a test of the present value is a matter within the sound discretion of the trial court.
4. ———: ———. There could be no better evidence of the true market or going value of land than the prices paid for other, similar and similarly situated lands sold at about the same time when, by evidence, it is shown that the prices so paid for the other lands depend upon market or going value rather than other considerations.
5. ———: ———. The questions of admission of the sale prices of other lands and the sufficiency of the foundation for their admission were within the sound discretion of the court.
6. ———: ———. Where the value of real estate is an issue, evidence of particular sales of other lands is admissible as independent proof on the question of value when a proper foundation has been laid indicating that the prices paid represented the market or going value of such lands; that the sales were made at or about the time of the taking by condemnation; and that the lands so sold were substantially similar in location and quality to that condemned.
7. ———: ———. In an eminent domain action, before evidence of the sale prices of other lands is admissible, a proper foundation must be laid; and such evidence in the absence of a proper foundation may not be introduced by subterfuge on cross-examination.

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

Crosby, Pansing, Guenzel & Binning, Lawrence L. Reger, and Asa A. Christensen, for appellants.

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

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

NEWTON, J.

Here are two actions in eminent domain which were consolidated for purposes of trial and for submission to this court. The plaintiffs Liebers were the owners of a tract containing approximately 78 acres. The plaintiff Skyline Farms Co., a corporation, was the owner of a tract containing approximately 118 acres constituting that portion of a quarter section lying to the north and west of the Rock Island Railroad tracks which severed the southeast corner of the quarter. These tracts will hereinafter be referred to as the Liebers tract and the Skyline tract. The Skyline tract lies directly south of the Liebers tract, being separated therefrom by a county road and both tracts were adjacent to U. S. Highway No. 77. These properties are adjacent to the south edge of the city of Lincoln, the Liebers tract and the north 150 feet of the Skyline tract being within the city limits. The relocation of U. S. Highway No. 77 made it necessary for defendant to acquire additional land for right-of-way across the two tracts. Four and seventy-seven one hundredths acres adjoining old U. S. Highway No. 77 were taken from the east side of the Liebers tract, the part taken being considerably wider at the south boundary than it was at the north boundary of the Liebers tract due to a sweeping curve to the southwest across this property. The relocated highway straightened out as it entered the Skyline tract and ran generally on a straight line in a southwesterly direction across this tract, leaving a triangular area containing approximately 40 percent of the remainder lying to the north and west of the relocated highway. The balance of the tract remaining lies to the south and east of the relocated highway, being bounded on the east by old U. S. Highway No. 77 and on the southeast by the Rock Island Railroad right-of-way. Both tracts had been platted and subdivided for residential purposes, but at the time of the taking remained entirely unimproved and constituted raw farm lands.

On trial in the district court, the jury returned a ver-

dict for Liebers in the sum of $12,694 and for Skyline in the sum of $32,255. Plaintiffs filed motions for new trial in each case. These were overruled and they have appealed to this court. Three assignments of error are urged. It is contended that the trial court erred in giving the standard instruction on the burden of proof regarding the depreciation in value of those portions of the tracts remaining after the taking, in permitting defendant to introduce evidence of certain other real estate sales, and in restricting the cross-examination of an expert witness called by defendant.

In regard to the first assignment of error, it appears that defendant's witnesses, as well as those of the plaintiffs, conceded that there were consequential damages sustained by each of the two tracts by reason of a depreciation in their respective values as a result of portions thereof having been taken by defendant. The questioned instruction states that before plaintiffs can recover consequential damages, they must prove that: "(1) The severance of said tracts has caused a depreciation in the value of the property remaining after said severance, and (2) The amount of said depreciation in value, if any." It further directs that if plaintiffs have proved such propositions by a preponderance of the evidence, they are entitled to recover for consequential damages to the portions of the tracts not taken by defendant, but if the evidence thereon is equally balanced or preponderates in favor of defendant, plaintiffs cannot recover such damages.

Under the circumstances, it would, perhaps, have been the better practice had the trial court instructed that such damages had been established by the undisputed evidence and that it remained only for the jury to ascertain the amount or extent of such damages. It is, nevertheless, difficult to follow the contention of plaintiffs that the giving of the instruction misled and confused the jury to the prejudice of plaintiffs. Instructions must be considered together and if, when considered as a

whole, they correctly state the law, error cannot be predicated thereon. Zawada v. Anderson, 181 Neb. 467, 149 N. W. 2d 329. In this case, the court submitted the usual standard instructions which clearly stated that if the jury found that such consequential damages were incurred, plaintiffs were entitled to recover for any depreciation in value, as a result of the taking, of the portions of the tracts not taken by defendant. Under such circumstances, the jury clearly understood that if such damages existed, plaintiffs were to recover therefor. The fact that defendant conceded in its evidence, and doubtless also in its argument to the jury, that such damages had been incurred simply made the proposition clearer to the jury and insured plaintiffs recovery of such damages. It must be borne in mind that the same standard instructions are invariably used in every case where the question of consequential damages is a contested issue. These instructions have been repeatedly approved as making the right to recover for consequential damages clear to the jury. Under such circumstances, it cannot reasonably be contended that the giving of such instructions is capable of confusing and misleading the jury. How then, when the defendant *concedes* the presence of such damage, can such instructions be deemed to confuse and mislead the jury to the prejudice of plaintiffs? Obviously, no prejudice could result.

For their second assignment of error, plaintiffs contend that the trial court erroneously admitted in evidence the prices for which certain other tracts of land had been sold. On this point, this court has held: "Whether or not evidence of a comparable sale is near enough in point of time to furnish a test of the present value is a matter within the sound discretion of the trial court." Schmailzl v. State, 176 Neb. 617, 126 N. W. 2d 821. In O'Neill v. State, 174 Neb. 540, 118 N. W. 2d 616, it is stated: " 'It seems that there could be no better evidence of the true market or going value of land than the price paid for other, similar and similarly situated land

sold at about the same time when, by evidence, it is shown that the price so paid for the other lands depends upon market or going value rather than other considerations.'" In State v. Mahloch, 174 Neb. 190, 116 N. W. 2d 305, it is stated that: "The questions of admission of the sale prices of other land and the sufficiency of the foundation for their admission were within the sound discretion of the court." This court has repeatedly held that where the value of real estate is an issue, evidence of particular sales of other lands is admissible as independent proof on the question of value when a proper foundation has been laid indicating that the prices paid represented the market or going value of such lands; that the sales were made at or about the time of the taking by condemnation; and that the land so sold was substantially similar in location and quality to that condemned. See Langdon v. Loup River Public Power Dist., 142 Neb. 859, 8 N. W. 2d 201. In the present cases, the fact that the real estate experts who testified to the question of sales were duly qualified is conceded. A proper foundation was laid establishing that in each instance the sales had been made for the going or market value. The time when the sales were made and the fact that it was necessary to make some adjustment for the variation in real estate prices in the interim between the date of such sales and the date of the taking in the present cases were established. The properties were duly compared with those at issue in the present cases. The proximity of the respective tracts and of those at issue to other residential, commercial, or industrial developments, the topography, the drainage areas, the availability of public utilities, the existence of highways and railroads, and other features were pointed out and the advantages or disadvantages discussed. Under the circumstances, it does not appear that there was any abuse of discretion on the part of the trial court in admitting this evidence.

Plaintiffs' last assignment of error deals with an al-

leged restriction of plaintiffs' cross-examination of one of defendant's expert witnesses. Plaintiffs sought to impeach the evidence of this witness by questioning him in regard to the sale prices of certain other tracts of land in the general vicinity of plaintiffs' properties. In this manner, plaintiffs sought to introduce into evidence the sale prices of these tracts without establishing a proper foundation for such evidence. As hereinbefore pointed out, before such evidence is admissible, a proper foundation must be established. Plaintiffs, in this instance, neither attempted nor offered to establish that the sales were bona fide transactions for market value or the comparability of the several tracts with the lands of plaintiffs. Under such circumstances, evidence of the sale value of such tracts was clearly inadmissible and it was not permissible for plaintiffs to introduce this evidence by subterfuge through cross-examination.

No error appearing, the judgment entered by the district court in each of the cases involved herein is affirmed.

AFFIRMED.

BOSLAUGH, J., dissenting.

The evidence in these cases was such that findings of no consequential damage could not have been sustained. Swanson v. State, 178 Neb. 671, 134 N. W. 2d 810. But the jury was instructed as follows:

"You are instructed that the burden of proof is on the plaintiff to prove, by a preponderance of the evidence, the fair and reasonable market value on the date of the taking of the two tracts of land taken for highway right of way purposes, and that before the plaintiff can recover any further amount in consequential damages for any alleged depreciation in value to property remaining after severing the aforesaid tracts, he must prove, by a preponderance of the evidence, that:

"(1) The severance of said tracts has caused a depreciation in the value of the property remaining after said severance, and

"(2) The amount of said depreciation in value, if any.

"If the plaintiff has established both of the aforesaid propositions, (1) and (2), by a preponderance of the evidence, then the amount of damages awarded the plaintiff may include said damages for depreciation in value, if any. However, if the evidence on said propositions (1) and (2) is equally balanced, or preponderates in favor of the defendant, then said plaintiff cannot recover any damages for the depreciation in value to the remaining property after severance of the aforesaid tracts of land, and the plaintiff can then only recover the fair and reasonable market value of the aforesaid tracts taken by the defendant as hereafter defined."

In my opinion the instruction was both erroneous and prejudicial. The verdicts in these cases, although within the range of the testimony, were much lower than the awards made by the appraisers. I am unable to say that it is obvious that no prejudice resulted.

McCOWN, J., concurring in dissent.

STATE OF NEBRASKA, APPELLEE, V. CARL GOODWIN WILLIAMS, APPELLANT.
159 N. W. 2d 549

Filed June 14, 1968. No. 36798.

1. **Criminal Law: Evidence.** The defense counsel in a criminal prosecution have no right to inspect or compel the production of evidence in the possession of the State unless a valid reason exists for so doing. The defendant has no inherent right to invoke this means of examining the State's evidence merely in the hope that something may be uncovered which would aid his defense.
2. ———: ———. In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce written confessions, statements, and other documentary evidence for the inspection of defendant's counsel before the trial. Error may be predicated only for an abuse of such discretion.
3. ———: ———. A person charged with crime may be convicted on circumstantial evidence only.

4. ———: ———. It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.
5. ———: ———. To justify a conviction on circumstantial evidence it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and when taken together must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence.
6. ———: ———. After a jury has considered the evidence in the light of the foregoing rules and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt.

Appeal from the district court for Adams County: EDMUND NUSS, Judge. Affirmed.

Fred R. Irons, Lawrence S. Dunmire, and David N. Shepherd, for appellant.

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

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

SPENCER, J.

Defendant was convicted of murder in the first degree while attempting to perpetrate a burglary, and has perfected an appeal to this court.

Mae Ritchie, an 81-year-old woman, hard of hearing, and living alone on the outskirts of the city of Hastings, was found dead in her home about 9:35 a.m., December 10, 1966. She had last been seen alive around 9 o'clock Thursday morning, December 8, 1966. She was found lying on the floor near her bed, with her body covered by clothing and other articles, including the contents of a dresser drawer. She was clothed in a silk night-

gown and a flannel housecoat. She had been severely beaten and had numerous contusions about her head and face, particularly the eyes, nose and mouth. Death was attributed to asphyxiation, or the inability to breathe because of obstruction by bloody mucus. The medical examiner testified that she had apparently received numerous blows by a blunt instrument. No instrument was ever found.

The defendant, an itinerant worker, was temporarily staying at the Harry D. Johnson residence which is approximately 100 feet north and east of the Ritchie residence. On two or three previous occasions he had done farm work and chores for Johnson. Defendant returned to Hastings sometime in November 1966, but because Johnson had no work for him he was doing occasional chores for his board and room until he could make other arrangements.

The window in deceased's bedroom, which was located about 5 feet above the surface of the ground on the south side of the house, was open approximately 15 or 16 inches. The storm cloth covering the outside portion of the window had been cut and ripped down the east side, and apparently pulled or pushed back out of the way. Fingerprints were found inside the house, but they were smudged and could not be classified. While checking the bed for fingerprints, an officer discovered a man's tan winter cap which appeared to have bloodstains on it. This cap was later identified by several witnesses as belonging to the defendant.

A pathologist who performed an autopsy on the deceased fixed the time of the death somewhere between a maximum of 48 hours and a minimum of 36 hours before the time of his examination, which was at 1:30 p.m. on December 10, 1966. He considered the minimum of 36 hours as the more logical figure. This would place the murder at sometime after 1:30 p.m., December 8, and before 1:30 a.m., December 9, 1966, with the more likely time the evening of December 8, 1966.

Raymond Hock, who was living at the Johnson residence, took defendant to town shortly before 3 p.m., December 8, 1966. Hock next saw defendant at approximately 5 p.m. Defendant at that time was under the influence of intoxicating liquor, but Hock continued with his chores and paid no attention to him.

Harry Johnson testified defendant had come home about 5 p.m., staggering, and was almost incoherent. Johnson finally made out that someone had hit the defendant, and he noticed that defendant was bleeding under the jaw. Johnson told defendant to go up to the house, get the bleeding stopped, clean up and rest, and if he wanted to get his things and go it was all right with him.

Mrs. Johnson saw defendant about 6:30 p.m., sitting on the floor of his room, apparently asleep. Defendant came downstairs where Hock was watching television about 8 p.m., and Hock bandaged up his wound. At that time, defendant was obviously still under the influence of liquor, fell off a chair, but was able to get up without assistance.

Defendant left the Johnson residence about 9 p.m., December 8, 1966. Hock testified that when defendant left he was wearing the cap in evidence. Defendant attempted to impeach this testimony by some alleged oral inconsistent statements previously made to defendant's attorneys, but Hock was positive defendant had his cap when he left at 9 p.m. Defendant returned to the Johnson residence at approximately 11 p.m. that evening. When he came in the house, he got down on his knees in front of Hock, started to cry, and said: "'Ray' * * * 'You're my friend,' * * *." At this time defendant told Hock he had lost his cap and subsequently he was apparently looking around the house for it. At approximately 1 a.m., December 9, 1966, defendant told Hock: "'I'm going downtown.'" Hock told him: "'Carl, there ain't nothing downtown open.'" Defendant said: "'I don't care. I'm going down anyway.'" Defendant left,

and was not seen by anyone at the Johnson residence until approximately noon on December 9, 1966.

The Johnsons' daughter and granddaughter who were visiting the Johnson home Saturday morning, December 10, 1966, had noticed some activity at the Ritchie residence, and commented on it. While they were watching that activity with the defendant from a window in the Johnson residence, the defendant said: " 'Probably someone thought she had a lot of money living here alone, but they probably got "a foolin".' " This was at a time when no one present at the Johnson residence had any idea there had been an attempted burglary and murder.

Defendant left the Johnson residence sometime late Monday morning, December 12, 1966, ostensibly to go to the employment office in Hastings, and was not seen again. He did not take his suitcase and other belongings. He had left clothes at the Johnson residence before but never his suitcase.

Defendant was apprehended in Denver, Colorado, January 13, 1967, by an FBI agent who told him he had a warrant for his arrest for unlawful flight to avoid prosecution from the State of Nebraska. When the agent told defendant he was wanted on charges in Nebraska, defendant said: "* * * he didn't have anything to worry about; he hadn't been in Nebraska since June of 1966."

Defendant's first assignment of error is the overruling of his motion for discovery, in which he sought copies of the original notes of the arresting officers; all police reports containing statements of witnesses and copies of all statements of the defendant and other witnesses; autopsy reports; chemical analyses; blood tests; fingerprints; and all physical evidence in the possession of the State. Essentially, the motion requested an inspection of all of the State's evidence. We have not yet reached the point in this state where the county attorney is required to give his entire work product to the defense. In Cramer v. State, 145 Neb. 88, 15 N. W. 2d 323, we said: "The defense counsel in a criminal prose-

cution have no right to inspect or compel the production of evidence in the possession of the state unless a valid reason exists for so doing. The defendant has no inherent right to invoke this means of examining the state's evidence merely in the hope that something may be uncovered which would aid his defense."

Cramer v. State, *supra*, enunciated the rule, which is still the law in this jurisdiction: "In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the state to produce written confessions, statements and other documentary evidence for the inspection of defendant's counsel before the trial. Error may be predicated only for an abuse of such discretion." There was no abuse of discretion herein.

Defendant's second assignment of error is the contention that the trial court should have sustained his motion for dismissal at the close of the State's case. Admittedly, the evidence herein is not wholly without some doubt, being strictly circumstantial, but it certainly is sufficient for its submission to a jury and for a jury to reach a conclusion that the defendant was guilty beyond a reasonable doubt. "A person charged with crime may be convicted on circumstantial evidence only." State v. Ohler, 178 Neb. 596, 134 N. W. 2d 265. In that case we said: "It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed."

Crimes such as murder are usually secretive, and it is the unusual case which occurs in the presence of witnesses. Consequently, there can always be some doubt as to whether a defendant should be convicted on circumstantial evidence. As we said in State v. Ohler, *supra*: "To justify a conviction on circumstantial evi-

dence it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and when taken together must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence."

In State v. Ohler, *supra*, we restated what has long been the rule in this jurisdiction: "After a jury has considered the evidence in the light of the foregoing rules and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt."

In this case it was clearly established that decedent met her death sometime between 1:30 in the afternoon of Thursday, December 8, and 1:30 a.m., Friday, December 9, 1966. A man's cap with blood splatters on it was found in the bed of decedent. Several witnesses identified the cap as belonging to the defendant, and one witness had defendant wearing the cap at 9 p.m., Thursday, December 8, 1966. Defendant was emotionally upset when he returned at 11 p.m. without his cap. After he could not find his cap at the Johnson residence, he left at 1 a.m., Friday, December 9, ostensibly to go downtown, and was not seen until late that morning. An FBI expert, who had conducted an analysis of defendant's hair and hairs from the cap, testified that the hairs from the cap were those of the defendant or of someone whose hair was identical with his.

When defendant was arrested in Colorado and advised of the charges against him, he denied having been in Nebraska during the period involved. It is also of more than passing interest that at a time when no one had been informed that a crime had been committed, the defendant, in looking out of a window in the Johnson residence at the activity in the home of the deceased, stated: " 'Probably some one thought she had a lot of money

living here alone, but they probably got "a foolin'." "

Defendant left the Johnson residence Monday morning, stating that he was going down to the employment agency, and disappeared. While it was not unusual for the defendant to leave the Johnsons on sudden impulse, it was unusual for him to leave without taking his suitcase. Defendant's motion to dismiss was properly overruled.

Defendant's third assignment of error is that the State failed to disclose the existence of a witness whose testimony was material to his defense. Subsequent to the trial, defendant's attorneys learned the name of a witness who had fought with the defendant near the Johnson residence on the afternoon of December 8, 1966, and who was responsible for the cut under defendant's jaw. It is the defendant's contention that the State suppressed this evidence by not disclosing the name of the witness to the defendant before or at the trial.

The affidavit of the witness was filed herein. It indicates that the witness was contacted by the county attorney a week before the trial and informed that he was to be a rebuttal witness in the case. The witness was present at the Adams County courthouse during the trial and at all times was available as a witness. After the defendant rested his case without putting on any testimony, the county attorney informed this witness that he would no longer be needed because he could not be used as a rebuttal witness.

The affidavit of defendant's attorney states that this witness told him he didn't think defendant had a cap on when he struck him, but thought the cap was lying on the ground; and that after he struck the defendant, and while the defendant was still lying on the ground, he left the scene. If this testimony had been adduced, it would have confirmed that the defendant had been in a fight before 5 p.m., December 8, 1966, and that his cap was on the ground with the defendant when the

witness departed. The affidavit of the witness states that he at no time saw the cap. However, the State's case is premised on the fact that defendant was wearing the cap found in the bed of the deceased when he left the Johnson home at 9 p.m., December 8, 1966, or more than 4 hours after that fight. This is the incriminating link to the defendant. Also, the reasonable inference from the testimony of the pathologist is that the murder was committed in the evening or night rather than the afternoon of December 8, 1966.

We do not feel that this record supports defendant's contention that the county attorney willfully suppressed any evidence. The trial strategy of the county attorney involved the production of this witness as a rebuttal witness. The failure of the defendant to adduce any testimony in his defense foreclosed the possibility of rebuttal testimony.

For the reasons given above, we find no merit to any of the defendant's assignments of error, and affirm the judgment.

AFFIRMED.

SMITH and MCCOWN, JJ., concurring in result.

The State offered little or no evidence of some tests, and defendant says that the State may have suppressed evidence of his innocence. Although we cannot now approximate some effects of nondisclosure, the denial of inspection in view of our prior decisions was not erroneous. Precedent has almost given the district court *carte blanche* to refuse inspection. That policy which is reinforced by the majority opinion should be prospectively revised. An accused should ordinarily have a right at least to inspect and copy reports on scientific tests of physical objects and conditions. Cf. Fed. R. Crim. p. 16.

ROSE MARIE MATZ, APPELLEE, V. FLOYD J. MATZ, APPELLANT.
159 N. W. 2d 568

Filed June 14, 1968. No. 36802.

Divorce. Cruelty, which by itself is not sufficient to constitute grounds for divorce, may justify a separation and permit a later action for divorce upon the grounds of abandonment and nonsupport.

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

Richard J. Bruckner, for appellant.

Margaret A. Lawse, for appellee.

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

BOSLAUGH, J.

This is a divorce action brought by Rose Marie Matz against Floyd J. Matz. The trial court granted a divorce to the plaintiff, and the defendant has appealed.

The parties were married in Council Bluffs, Iowa, on February 18, 1953. The plaintiff was then 19 years of age. The defendant was 43 years old but represented his age to be 28.

On August 11, 1964, while the parties were living in Council Bluffs, they had an argument that, in the words of the plaintiff, developed into a "knockdown-drag-out battle." The plaintiff sustained a shoulder separation, bruises on her throat, a split lip, and cut under her eye. The plaintiff left the house later that morning and moved to Omaha where she has lived since that date. The plaintiff testified that she is afraid of the defendant, that she believes that he tried to kill her, and that there is no chance for a reconciliation.

The plaintiff commenced an action for divorce in Iowa which was tried in Council Bluffs on December 10, 1964. The judgment of the Iowa court was not pleaded or

proven, but a record of the testimony heard in that case was received as an exhibit in this case without objection. At the conclusion of the hearing, the Iowa court denied a divorce, stating that the parties were left to "work out their own problems." The record indicates that the Iowa court seemed to feel that the assault upon the plaintiff was justified to some extent by the conduct of the plaintiff.

This action was filed April 7, 1967. The petition as amended alleges extreme cruelty, abandonment, and nonsupport. The answer is a general denial.

The evidence shows that the parties have been separated since August 1964. The defendant has not supported the plaintiff and has made no real effort at reconcilation. The parties have no children. There is no dispute concerning property, and the plaintiff does not ask for alimony. The sole issue is whether the plaintiff is entitled to a divorce.

The case turns upon the question of whether the plaintiff can claim constructive abandonment where the separation occurred before she was denied a divorce by the Iowa court in 1964. This court has held that where a wife sues for divorce on the grounds of cruelty, and the suit is finally determined against her on the merits, she cannot afterwards, in a suit brought by her husband charging her with desertion, plead the facts upon which she depended to establish the charge of cruelty as an excuse for such desertion. Wilkins v. Wilkins, 84 Neb. 206, 120 N. W. 907, 133 Am. S. R. 618.

In this case the plaintiff does not rely upon the same grounds as in the former action; and the Iowa court did not determine that the defendant was blameless. The former action determined only that the plaintiff was not entitled to a divorce at that time upon the facts proved. A number of courts, including Iowa, hold that cruelty, which by itself is not sufficient to constitute grounds for divorce, may justify a separation and permit a later action for divorce upon the grounds of abandonment and

nonsupport. See, Bunger v. Bunger, 249 Iowa 938, 90 N. W. 2d 1; Gordon v. Gordon (Fla.), 59 So. 2d 40; Leahy v. Leahy, 208 Or. 659, 303 P. 2d 952; 24 Am. Jur. 2d, Divorce and Separation, § 116, p. 276; 27A C. J. S., Divorce, § 36 (3), p. 107, and § 56 (4) (b), p. 184.

The decree in this case was filed on August 17, 1967. On November 13, 1967, the trial court filed a supplement to the decree which states in part: "* * * it is patently clear that the legitimate ends and objects of this marriage have been permanently and irreparably destroyed. * * * the plaintiff and defendant are separated by vast differences in age, emotion, personality and interests of life. * * * up to the time of trial, a period of over three years, the parties have remained apart; that for well over two years the defendant has not contributed to the plaintiff's support nor has he attempted a reconciliation. * * * the defendant's stated desire for a reconciliation and his profession of love for the plaintiff lack sincerity; that the plaintiff has been nervous and in a state of mental turmoil since at least August 11, 1964; that the defendant's resistance to a divorce is an effort to further disappoint and annoy the plaintiff; and that the best interests of everyone require that a decree of absolute divorce be granted." The foregoing summary of the evidence is supported by the record.

Under the particular facts and circumstances in this case, we believe that the judgment of the district court was correct. It is, therefore, affirmed.

AFFIRMED.

DONNA J. WADE, APPELLEE, V. WILLIAM P. WADE, APPELLANT.
159 N. W. 2d 570

Filed June 14, 1968. No. 36811.

1. **Divorce: Evidence.** In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict, and the deter-

mination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by this court on review.

2. **Divorce.** Condonation is forgiveness for the past upon condition that the wrong will not be repeated.

Appeal from the district court for Cass County: WALTER H. SMITH, Judge. Affirmed.

Ronald D. Svoboda, William L. Walker, and Earl Ludlam, for appellant.

Francis M. Casey and Dale T. Kirby, for appellee.

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

NEWTON, J.

This is a divorce action brought by Donna J. Wade as plaintiff against William P. Wade defendant. The trial court granted plaintiff a decree of divorce, custody of the 4 girls ranging in age from 5 to 15 years, offspring of this marriage, and granted defendant visitation privileges. Provision was also made for child support payments, permanent alimony, and a division of property. We affirm the judgment of the trial court.

Defendant has appealed and contends that the evidence is insufficient to sustain plaintiff's allegation of cruelty. The parties were married on April 14, 1950. The evidence is conflicting, but the record reflects that frequent arguments occurred between the parties, that on occasion some degree of physical violence was resorted to, that defendant was frequently quarrelsome, critical, and sarcastic in dealing with his wife and children, and that on one occasion, without voicing any threats, but by securing and wielding a shotgun, he placed plaintiff and the children in fear of bodily harm. These facts were testified to by the plaintiff and were fully corroborated by the 15-year-old daughter. Defendant admits most of the occurrences complained of al-

though he sought to place his actions in a more innocent light.

It is true that the record in this case does not reflect such a serious situation as to necessarily require a separation of the parties and that perhaps many married couples would have found it possible under similar circumstances to reconcile their differences. It is regrettable that these parties were unable to do this. Nevertheless, there is substantial evidence in this case, duly corroborated, to support the charge of cruelty. Although this evidence was contradicted in some respects, the trial court, which had the opportunity to hear and observe the witnesses, arrived at the conclusion that plaintiff was entitled to the relief prayed for. We cannot say that the decision arrived at was erroneous. "In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by this court on review." Scholz v. Scholz, 172 Neb. 184, 109 N. W. 2d 156.

Defendant also contends that any wrongful acts committed by him were condoned by plaintiff. Condonation was not pleaded and this record reflects that the acts constituting cruelty continued up to the time of the separation of the parties. Under such circumstances, there was no condonation. "Condonation is forgiveness for the past upon condition that the wrong will not be repeated." Sewell v. Sewell, 160 Neb. 173, 69 N. W. 2d 549. Defendant further complains of the provisions embodied in the decree of the trial court with reference to permanent alimony, division of property, and child support. The parties owned their home in joint tenancy. It was stipulated to be of the value of $13,000 and subject to a mortgage of $5,700. Monthly payments amounted to $83.29. The home contained the usual household goods. Defendant was employed by Tomco Seed, Inc., as a plant manager; his salary was $750 per month;

and he had a trust account with the company which amounted to $3,528.92. They also owned a 1962 Chevrolet and their total indebtedness, aside from the home loan, amounted to $456. Plaintiff was working part-time and earned $50 per month. The decree awarded the 1962 Chevrolet and the household goods to plaintiff. It provided that plaintiff should also be permitted to occupy the home, title to which was to remain in joint tenancy, until she remarried, voluntarily abandoned the home, or the youngest child was graduated from high school, became self-supporting, or was emancipated by marriage or otherwise, at which time the home should be sold and the proceeds divided equally between the parties. The trust account of defendant with Tomco Seed, Inc., was awarded to defendant, but he was required to pay the $456 in outstanding bills, to pay the monthly mortgage installments on the home amounting to $83.29, to maintain life and health and accident insurance policies covering the children, total premiums on which amounted to $33.28 per month, to pay $75 per month each for the support of the 2 older children, and $50 a month each for the support of the 2 younger children, as well as to keep the home in repair. The total monthly payments required of defendant amount to $366.57 which, in view of his present monthly earnings, do not appear to be unreasonable nor do we find that the provisions for permanent alimony and division of property are unreasonable.

The judgment is affirmed. Costs are taxed to defendant and plaintiff is allowed the sum of $500 for attorneys' fees in this court.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. LAD V. TESAR, A MEMBER OF THE NEBRASKA STATE BAR ASSOCIATION, RESPONDENT.
159 N. W. 2d 572

Filed June 14, 1968. No. 36840.

1. **Attorneys at Law.** The ethical standards relating to the practice of law in this state are the Canons of Professional Ethics of the American Bar Association as adopted by the Nebraska Supreme Court, and those which may from time to time be approved.
2. ———. Lawyers who are granted licenses to practice their profession in this state thereby voluntarily assume certain obligations and duties as officers of the courts, and in the performance thereof they must conform to certain standards in relation to clients, to the courts, to the profession, and to the public.

Original action. Judgment of censure and reprimand.

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

Robert C. McGowan and Joseph H. McGroarty, for respondent.

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

MCCOWN, J.

This is a disciplinary proceeding initiated on the relation of the Nebraska State Bar Association against the respondent, Lad V. Tesar.

The formal complaint contained two counts. Count One in substance charges respondent with failure to institute legal proceedings to administer an estate although the respondent had agreed to perform the work, and numerous requests and demands had been made on him to perform for a period of more than 3 years. Count Two in substance charges that the respondent failed to prosecute an action on behalf of a client for alienation of affections although the respondent had agreed to prosecute such action. It also alleges that the

petition in the action was prepared by the respondent and signed by the client, but never filed. The respondent mistakenly believed that a longer statute of limitations applied. When he very belatedly discovered that the statute of limitations had barred the filing of the action, he "panicked" and told the client that the petition had been filed. The client did not discover that the petition had not been filed until after the action was barred by the statute of limitations.

With respect to Count One, there is no allegation or evidence that the estate suffered any appreciable or substantial loss by reason of the delay involved. As to Count Two, the extent of the loss, if any, to the client because of the failure to file the petition within the statutory period cannot be reasonably ascertained. The respondent must, of course, accept the responsibility for his failure to institute the action. The respondent had not received nor demanded payment of any costs or fees from the clients involved under either count.

The improper professional conduct here involved was charged as violations of portions of Canons Nos. 15, 21, 22, 29, and 32 of the Canons of Professional Ethics adopted by this court. The ethical standards relating to the practice of law in this state are the Canons of Professional Ethics of the American Bar Association and those which may from time to time be approved by this court. Canons of ethics and rules governing professional conduct of lawyers are recognized and applied by this court in proper cases. State ex rel. Nebraska State Bar Assn. v. Bates, 162 Neb. 652, 77 N. W. 2d 302.

Lawyers who are granted licenses to practice their profession in this state thereby voluntarily assume certain obligations and duties as officers of the courts, and in the performance thereof they must conform to certain standards in relation to clients, to the courts, to the profession, and to the public. State ex rel. Nebraska State Bar Assn. v. Dunker, 160 Neb. 779, 71 N. W. 2d 502.

The basic misconduct here can be characterized as an improper failure to act, not involving moral turpitude except as to the factual misrepresentations to the client in Count Two. Admittedly, the respondent violated the Canons of Professional Ethics. He is subject to disciplinary action. His improper conduct cannot be justified, condoned, or disregarded. It must be, and is, condemned.

The respondent has been engaged in the practice of law in this state for approximately 18 years. He should have been, and obviously was, aware of the Canons of Professional Ethics which govern his professional conduct while engaged in the practice of law. He has acknowledged that his conduct has not conformed to the Canons of Professional Ethics and has apologized to the court and bar for such conduct. In view of the circumstances disclosed by the record, we believe the imposition of censure and reprimand is the proper disciplinary action.

The order of the court is that respondent should be and hereby is censured and reprimanded. Costs are taxed to the respondent.

JUDGMENT OF CENSURE AND REPRIMAND.

FRANCES M. WORTMAN, APPELLEE, V. HANS H. JESSEN ET AL., APPELLANTS.
159 N. W. 2d 564

Filed June 14, 1968. No. 36850.

Contracts. A condition in a contract may be excused without other reason if its requirement (1) will involve extreme forfeiture or penalty, and (2) its existence or occurrence forms no essential part of the exchange for the promisor's performance.

Appeal from the district court for Dakota County: JOSEPH E. MARSH, Judge. Affirmed.

Leamer & Galvin, for appellants.

McCarthy & Kneifl, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

SMITH, J.

In purchasing land defendants gave plaintiff seller, Frances M. Wortman, their promissory note in part payment of the price. The note, secured by a mortgage on the land, contained an express condition qualifying defendants' promise to pay. In this suit the district court foreclosed the mortgage, and defendants have appealed. The question relates to excuse for nonperformance of the condition.

The sum payable in the note, dated June 22, 1964, was $5,000 with interest at 2 percent a year. The qualifying condition protected defendants from claims by Frances and her husband, Harry A. Wortman, who was not a party to the sale. Defendants promised to pay on 30 days' notice of any of the following events: "A. Six months after the entry of a final decree in * * * (the divorce suit between the Wortmans), wherein * * * Frances * * * is awarded all of the real estate * * *; and * * * Frances * * *, then as a single person executing a quitclaim deed to the * * * (land) to Hans H. Jessen * * *. B. At any time upon delivery of a quitclaim deed executed by * * * (Frances and Harry) on the * * * (land) to Hans H. Jessen * * *. C. Upon a certificate of death of Harry * * *, and * * * Frances * * * surviving him."

The note also provided: "* * * this note shall become null and void in the event of the death of * * * (Frances) prior to the occurrence of the events described above at A, B or C. * * * in the event that none of the occurrences listed as A, B or C are complied with or occur prior to July 1, 1965, then this note to be void and unenforceable."

The facts have been stipulated, but the stipulation is sketchy. We infer that Frances delivered possession of the land to defendants. On May 7, 1965, the court in the

suit between the Wortmans rendered a divorce decree. We infer that the court awarded the land to Frances and that the decree became operative in November. See § 42-340, R. R. S. 1943. On August 5 a quitclaim deed was executed in Potter County, Texas, by Harry, "formerly the husband of Frances M. Wortman." On August 9 defendants refused Frances' tender of the deed. The condition in the note was not otherwise performed.

No party claimed power to avoid the conveyances. Neither Frances nor Harry had color of title or right to possession when Frances commenced this suit. Defendants were in no position to justify security for title on the ground of an outstanding interest. Indeed they alleged that Frances had no right, title, or interest in the land. The security, $5,000, was substantial, although counsel's statement of a sale price of $13,000 is rejected for lack of evidence.

Defendants' contention concerning nonperformance of the condition is correct. The method of clearing the title did not strictly comply with subparagraph A, B, or C. Frances also failed to perform prior to July 1, 1965, the date when the note by its terms became unenforceable. Defendants concede that passage of time has not increased their risk in the transaction. At the closing no one would have contemplated an increase of defendants' risk by the running of time. The unperformed parts of the condition were penal and excusable.

"A condition may be excused without other reason if its requirement (a) will involve extreme forfeiture or penalty, and (b) its existence or occurrence forms no essential part of the exchange for the promisor's performance. * * * The questions involved are those of degree, and in deciding them some margin of discretion must be allowed to the court. A contract may be framed so that what is in form a condition will, if given effect, involve the consequences of a collateral agreement for a penalty in case of breach. Enforcement of such a collateral agreement is confessedly opposed to public policy

and provisions creating a condition that would produce the same result should be no more operative because put in the form of a condition." Restatement, Contracts, § 302, p. 447. See, also, Randall v. National Building, Loan & Protective Union, 43 Neb. 876, 62 N. W. 252; cf. § 2-302, U. C. C.

"A condition may be as penal in its effects as a promise to pay a penalty. * * * if * * * the promisee is deprived of all rights whatever, though he has materially enriched the promisor, the provision is obviously penal in character." 5 Williston on Contracts (3d Ed.), § 793, pp. 779 to 781.

The judgment is affirmed.

AFFIRMED.

NEWTON, J., not participating.

IN RE CONSERVATORSHIP OF THE ESTATE OF HENRY SCHURMANN.

HENRY SCHURMANN ET AL., APPELLANTS, V. DAVID W. CURTISS, CONSERVATOR OF THE ESTATE OF HENRY SCHURMANN, APPELLEE, PAUL SCHURMANN ET AL., INTERVENERS-APPELLEES.

159 N. W. 2d 554

Filed June 14, 1968. No. 36975.

1. **Statutes.** An act not complete in itself, but which is clearly amendatory in its character and scope, must set forth the section or sections as amended, and repeal the original section or sections.
2. ———. In construing an act of the Legislature, all reasonable doubt must be resolved in favor of constitutionality, and if a statute is subject to more than one construction, the court will adopt the one which will make the act constitutional.
3. **Statutes: Appeal and Error.** The provisions of section 27-1301.01, R. S. Supp., 1965, do not apply to appeals in probate matters.

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

Max W. Goetz and Addison & Addison, for appellants.

David W. Curtiss, pro se.

Ryan & Scoville and P. F. Verzani, for interveners-appellees.

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

SPENCER, J.

This is a conservatorship proceeding wherein the ward and three of his next of kin seek to appeal from the refusal of the county court to terminate the conservatorship. Appellants perfected an appeal to the district court and upon motion of some of the appellees, the appeal was dismissed.

The sole issue involved is whether or not the provisions of section 27-1301.01, R. S. Supp., 1965, apply to appeals in probate matters. The trial court applied the statute and dismissed the appeal.

What is section 27-1301.01, R. S. Supp., 1965, was enacted as Legislative Bill 828, Laws 1965, chapter 108, page 432, effective November 18, 1965. L. B. 828 is as follows: "An Act relating to courts; to provide for notice of appeal from county courts or a justice of the peace; and to provide for filing and service of such notice.

"Be it enacted by the people of the State of Nebraska,

"Section 1. The party appealing from a decree, judgment, or order of a justice of the peace or county court, or part thereof, shall, within ten days from the rendition of judgment, file a notice of appeal with the justice of the peace or county court, specifying the parties taking the appeal, the decree, judgment, order or part thereof appealed from, and shall serve a copy of the same upon all parties bound by the judgment who have appeared in the action or upon their attorneys of record. Service may be made by mail, and proof of such service shall be made by an affidavit of the appellant filed with the

justice or county court within five days after the filing of the notice stating that such notice of appeal was duly mailed, or after diligent search that the addresses of such persons or their attorneys of record are unknown."

There is no question the statute clearly applies to appeals in civil matters from the county court. The question presented is whether it also applies to appeals in probate matters. Appeals in civil matters from county court are authorized by section 24-544, R. R. S. 1943, making the justice of the peace appeal procedure applicable. Section 27-1302, R. R. S. 1943, of that procedure requires the filing of an appeal bond within 10 days. Section 27-1301.01, R. S. Supp., 1965, adds the additional jurisdictional requirement for the filing of a notice of appeal within 10 days. See, Radil v. State, 182 Neb. 291, 154 N. W. 2d 466; Simmons v. Mutual Benefit Health & Accident Assn., *ante* p. 175, 159 N. W. 2d 197. Appeals in probate matters are authorized by section 30-1601, R. R. S. 1943. Section 30-1602, R. R. S. 1943, provides that probate appeals shall be taken within 30 days, and section 30-1603, R. S. Supp., 1965, allows 30 days for the filing of the appeal bond.

It is evident therefore that if L. B. 828 were intended to apply to appeals in probate matters it would shorten the time for an appeal in probate matters from 30 days to 10 days because the jurisdictional notice of appeal would need to be filed within that time, as appellees insist herein.

We are convinced that there was no intent to include appeals in probate matters within L. B. 828. The following paragraph from the Judiciary Committee's statement on L. B. 828 would so indicate: "Under the proposed bill, the party appealing must give notice that an appeal is being taken. *The procedure on appeal is not disturbed* but an additional precaution out of fairness is provided." (Italics supplied.) The procedure on appeal in civil matters is not disturbed. In probate matters, if applicable, it is.

There is, however, a much more compelling reason for holding that probate appeals are not encompassed within the provisions of L. B. 828. Article III, section 14, Constitution of Nebraska, provides in part: "And no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed." If probate appeals were intended, L. B. 828 would repeal or at the very least constitute an amendment of section 30-1602, R. R. S. 1943. As will be noted above, L. B. 828 makes no reference either in the act or the title to amending or repealing any statute.

We said in Tukey v. Douglas County, 129 Neb. 353, 261 N. W. 833: "This court has frequently held that a legislative act which is amendatory of existing laws is unconstitutional where such act does not contain the section or sections amended and does not repeal said original section."

We held in Thompson v. Commercial Credit Equipment Corp., 169 Neb. 377, 99 N. W. 2d 761: "An act not complete in itself, but which is clearly amendatory in its character and scope, must set forth the section or sections as amended, and repeal the original section or sections."

If L. B. 828 does not apply to appeals in probate matters the question of constitutionality does not arise. We apply the rule enunciated in Terry Carpenter, Inc. v. Wood, 177 Neb. 515, 129 N. W. 2d 475: "In construing an act of the Legislature, all reasonable doubt must be resolved in favor of constitutionality, and if a statute is subject to more than one construction, the court will adopt the one which will make the act constitutional."

We therefore hold that probate appeals are not embraced within the provisions of L. B. 828, and reverse the judgment and remand the cause herein.

REVERSED AND REMANDED.

DENNIS D. GOODWIN, APPELLANT, V. EPSEN LITHOGRAPHING COMPANY ET AL., APPELLEES.
160 N. W. 2d 183

Filed June 21, 1968. No. 36731.

1. **Workmen's Compensation: Actions.** Where a plaintiff employee comes within the provisions of the Workmen's Compensation Law, its remedies are exclusive of his right to bring an action for damages against his employer based upon the provisions of the Nebraska Factory Act.
2. **Workmen's Compensation: Evidence.** Evidence that a printing or die cutting press is old and is hand-fed rather than automatic is not evidence of improper design and does not, in and of itself, establish a violation of the Nebraska Factory Act.
3. ———: ———. Evidence that the Department of Labor has inspected and approved a particular machine is prima facie evidence that its use is not in violation of the Nebraska Factory Act.

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

White, Lipp, Simon & Powers and Steven R. Bloch, for appellant.

Cassem, Tierney, Adams & Henatsch, L. J. Tierney, and Theodore J. Stouffer, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

McCOWN, J.

This is an action by Dennis D. Goodwin against Epsen Lithographing Company for personal injuries resulting when Goodwin's hand was caught in a press.

Defendant Epsen Lithographing Company is in the business of manufacturing labels and cartons. Its plant occupies about one-half of a city block at Twentieth and California Streets in Omaha, Nebraska. The production area of Epsen is one large open room. Because of the confidential nature of the material produced, it is a "closed plant," restricted to "employees only." Wesley Ehresman is both a part-time employee of Epsen

and the self-employed operator of a die making and cutting business. He has operated under the name of Diamond Die Company since 1960. Ehresman's place of business is in a certain area within the boundaries of the Epsen production area. The area was estimated as 1,000 to 1,500 square feet. It was a definite area but was not marked nor partitioned off from the production area of Epsen's own lithographing operation. Ehresman and Epsen had executed a written agreement on February 2, 1960, which was still in effect at the time of the accident. It provided:

"1. Wes Ehresman will take care of all Epsen die work when and as we need it, as a part time employee at $5.00 Hr. charge. All materials furnished by Epsen.

"2. Wes Ehresman may use our equipment for personal use as listed below:

"(A) May install private telephone in Die Department for his personal use.

"(B) Has full personal use of equipment to be charged for on a rental basis of 5% of his (Wes) billing. There will be no rental paid on jobs done for Epsen. He may also use our material for his personal use and pay these on a cost basis.

"(C) Wes Ehresman will forward a check to Epsen on the 1st & 15th of each month to cover the above, rental, 5% of his billing and to cover material used."

Ehresman hired his own employees and introduced them to the personnel of Epsen in order to obtain clearance for their coming into the area. In the area assigned to Ehresman, some of the machinery and equipment was owned by Ehresman and some was owned by Epsen. No Epsen employee ever used the equipment owned by Ehresman, but they would occasionally use some of the Epsen equipment in his area and Epsen employees occasionally went through a passageway in the area with forklift equipment of Epsen.

In 1962, Ehresman purchased a used National Machine Company die cutting press. It had been designed, and

originally used, for both printing and die cutting. He moved it into his area of the plant in February 1964. The press weighed 2,000 to 3,000 pounds. The immobile bed of the press is vertical and to the center or rear of the machine. The platen moves from an almost horizontal position at the front of the machine up and back against the bed of the press. The operator stands in front of the machine and places a single piece of cardboard on the platen in guides fastened to the platen. When the platen returns from the bed of the press, the operator removes the cut sheet with one hand and replaces it with another sheet of cardboard with the other hand. The press has a capacity of approximately 15 or 16 cycles per minute. It is powered by an electric motor with a belt drive to a large flywheel.

Ehresman had installed a foot brake on the flywheel when he moved it into his area of the plant. The machine had a bar underneath the platen which could be pulled to prevent the press making a complete impression. It would not prevent the press from closing entirely, but kept it approximately 1/16 inch from the bed of the press. Except for this bar, the machine had no guards on it at the time Ehresman purchased it and the manufacturer had provided no place for putting on any guards involving the closing of the press. The patents on the machine were from the late 1800's although the year of manufacture is not shown. There was testimony, however, that many presses manufactured in recent years are constructed in the same way with no automatic turn-off devices.

Some 9 or 10 days before September 28, 1964, Ehresman had hired Goodwin. On that date, Goodwin was operating the press for Ehresman on the business of Ehresman which had no connection with Epsen. While operating the press, Goodwin's right hand was caught and crushed and later amputated.

Ehresman and his compensation insurance carrier, Transamerica Insurance Company, had paid workmen's

compensation benefits to Goodwin, and they were named as defendants in this suit against Epsen because of their subrogation interest. See § 48-118, R. S. Supp., 1967. At the conclusion of Goodwin's evidence, the motion of Epsen to dismiss Goodwin's petition was sustained, and he has appealed.

Goodwin's charges of negligence against Epsen are based on an alleged violation of the Nebraska Factory Act, Chapter 48, article 4, R. R. S. 1943, and that Epsen was negligent in permitting Goodwin to operate the press when it knew he was inexperienced, and in failing to warn him of the dangerous character of the press.

Goodwin takes two alternative positions. The first is that he was an employee of Epsen because he was hired by Ehresman who was a part-time employee of Epsen, and that Epsen was the operator of the plant where the press was being used. The evidence is uncontradicted that Goodwin was an employee of Ehresman and not Epsen. Even if Goodwin's position were supported by the evidence, and even if a violation of the Nebraska Factory Act were proved, he would still not have a common law action for negligence against the employer. Where a plaintiff employee comes within the provisions of the Workmen's Compensation Law, its remedies are exclusive of his right to bring an action for damages against his employer based upon the provisions of the Nebraska Factory Act. See Navracel v. Cudahy Packing Co., 109 Neb. 506, 191 N. W. 659.

Goodwin's alternative argument is that he was an invitee of Epsen, rather than an employee, and that a violation of the Nebraska Factory Act constitutes negligence as to an invitee giving rise to an action for damages based on negligence. The only negligence as to an invitee chargeable to Epsen is based on an alleged violation of the Nebraska Factory Act, Chapter 48, article 4, and, in particular, section 48-409, R. R. S. 1943. The Nebraska Factory Act applies to "occupants" and "operators" of "plants" and, under the facts here, it would be

difficult to find that Epsen rather than Ehresman was subject to the act as to the particular machines or "plant" involved. See Quist v. Duda, 159 Neb. 393, 67 N. W. 2d 481. Even if it be assumed that Epsen was "operating" the "plant" where this press was used, the evidence fails to establish a violation of the act. Section 48-409, R. R. S. 1943, requires guards to protect against injury from certain specified things which do not include press equipment. Roll guards are required on roll feed machines fed by hand, but this press is not a roll feed machine. Evidence that a printing or die cutting press is old and is hand-fed rather than automatic is not evidence of improper design and does not, in and of itself, establish a violation of the Nebraska Factory Act.

The evidence is also undisputed that the Department of Labor, which is given responsibility for inspection and enforcement of the Nebraska Factory Act, had inspected this machine and had stated that it was like any other printing press and they did not know what could be put on it for protection or guards. The machine was still in use and the only conclusion to be drawn from the evidence is that the particular machine had been inspected and approved. Evidence that the Department of Labor has inspected and approved a particular machine is prima facie evidence that its use is not in violation of the Nebraska Factory Act.

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

AFFIRMED.

MFA MUTUAL INSURANCE COMPANY, APPELLANT, V. JERRY A. MEISINGER ET AL., APPELLEES.
159 N. W. 2d 829

Filed June 21, 1968. No. 36815.

1. **Insurance: Fraud and Deceit.** A misrepresentation by an ap-

plicant in negotiation for an insurance policy is not a ground for avoidance of the policy unless the misrepresentation deceived the insurer to its injury. § 44-358, R. R. S. 1943.

2. ———: ———. An attempt by a person to verify false statements and to form a judgment upon the facts that he discovers is evidence that he did not rely upon the false statements.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed.

Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellant.

Lathrop & Albracht and Kneifl, Kneifl & Byrne, for appellees.

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

SMITH, J.

Plaintiff insurance company sued Jerry A. Meisinger and others for a declaration of nonliability on an automobile policy issued by plaintiff to Meisinger. Plaintiff claimed power to avoid the contract on the ground of misrepresentation of accidents and traffic violations in the application for the policy. After a trial the district court dismissed the action, and plaintiff has appealed.

Meisinger applied for the policy on July 17, 1966. Plaintiff's agent filled out the application which comprised two pages, one on each side of a sheet of paper. Meisinger signed it in the space specified, and he did so immediately below this statement set in boldface print: "I hereby make application * * * on the basis of the statements and answers to questions made above and I represent that such statements and answers to questions are true." The information appearing on that page was correct. It disclosed: (1) birth date, January 16, 1946; (2) occupation, laborer; (3) use of alcoholic beverages; (4) ownership of a 1960 Oldsmobile mortgaged to Murphy Finance Co. for $500; (5) previous insurer, "Dairyland Mutual"; (6) no insurance policy under the assigned

risk plan; and (7) no cancellation or other refusal of a policy in the past 5 years.

The page with Meisinger's signature also included the following instructions, questions, and answers: "(If answer to question 6, 7, 8, 14 or 15 is 'yes'—explain fully on back) * * * 6. Has any driver, in the past 5 years: * * * (b) Had any auto accidents? Yes. 7. Has any driver EVER been arrested for any offense or convicted in any court? Yes. * * * 14. During the past 5 years has the applicant * * * been convicted of a moving traffic violation or had any license or permit to drive or the registration of any automobile suspended, revoked or refused? Yes."

In the space provided on the other page for full information concerning answers 6(b), 7, and 14, the disclosure was incomplete. The agent wrote: "6-b- Jerry had a blowout and struck a stop sign 1966"; "7- Jerry received a ticket for # 6-b. 1 speeding ticket 1965;" "14- same as # 6b & 7." Meisinger testified to a conversation with the agent about other offenses as follows: "I said, '* * * I have had minor things that didn't amount, you know, to any great damage,' and that was then understood that it wasn't important." His testimony was contradicted by the agent and her husband.

Meisinger's record kept by the Director of Motor Vehicles disclosed 5 accidents and 5 traffic violations between February 1962 and June 7, 1966. Four of the violations had occurred subsequent to November 17, 1965, and regarding them the director had recorded "Traffic Sign," "Negligent Drive," "Speeding," and "Stop Sign." On June 17, 1966, he suspended Meisinger's license for failure to report a minor property damage accident. He removed that ground of suspension on July 20. Meanwhile, on July 14, he had revoked the license because Meisinger had accumulated 8 points from the 4 violations. Meisinger was not notified of the revocation until July 21, 4 days after his application but approximately a week before delivery of the policy.

There is general testimony that plaintiff did not issue policies to applicants with records of more than 3 accidents, violations, or both in the preceding 5 years. When plaintiff's underwriter Steinmets examined Meisinger's application, he considered the following data: (1) Meisinger was a laborer 20 years of age. (2) The Oldsmobile was mortgaged. (3) Throughout the insurance industry Dairyland Mutual was known as an insurer of substandard risks. (4) Meisinger had a record of one accident and two violations in 1965-66, but none in 1961-64. Steinmets probably knew that he might obtain the record from the Department of Motor Vehicles. The statute reads in part: "The department shall, upon request of any applicant, furnish a certified abstract of the operating record of any person and shall be entitled to charge such applicant a fee of seventy-five cents therefor." § 60-412, R. S. Supp., 1967.

The disclosure allerted Steinmets, and plaintiff by order form hired Retail Credit Company to investigate Meisinger and his wife. No copy of the message was kept. According to Steinmets, it specifically requested information about Meisinger's driving habits. The report by Retail Credit Company indicated, however, no examination of "Police/Traffic Rec." and no "MVR" requested by plaintiff. It disclosed a direct interview only with Meisinger's wife and no accidents or traffic violations. The investigator commented, "Both drivers are considered safe and capable drivers."

While Meisinger was operating the Oldsmobile on October 1, 1966, and during the period of license revocation, he struck and killed a boy. Plaintiff was immediately informed. Regarding the accident the Director of Motor Vehicles on January 3, 1967, mailed Meisinger a letter of clearance under the Safety Responsibility Act. The clearance was rescinded on March 8, because liability coverage, according to plaintiff, had not been afforded. No payment of a claim under the policy was shown.

Section 44-358, R. R. S. 1943, reads in part: "No * * * misrepresentation * * * made in the negotiation for a * * * policy of insurance by the insured * * * shall be deemed material or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation * * * deceived the company to its injury."

An applicant's misrepresentation may induce an insurer to issue a policy, although the insurer made an independent investigation. See Wainwright v. Washington Nat. Ins. Co., 142 Neb. 372, 6 N. W. 2d 368. The investigation may still be evidence that the insurer did not rely on the misrepresentation. "Where one to whom false statements are made attempts to verify them and form a judgment upon the facts he discovers, this is evidence that the false statements were not relied upon; but the evidence is not conclusive, since the statements may have been given material weight. Again, the falsity of statements may be so obvious as to render it doubtful or even impossible that action can have been based on them." Restatement, Contracts, § 476, Comment d, p. 910. See, also, 5 Williston on Contracts (Rev. Ed.), § 1515, p. 4226.

The paramount purpose of plaintiff's hiring Retail Credit Company should be obvious. It is obscure. Steinmets remembered that he had specifically requested information about Meisinger's driving habits, plaintiff having destroyed its copy of the order. The report of investigation indicated no accidents or traffic violations, no examination of "Police/Traffic Rec.," and no customer request for "MVR". Steinmets may have mistakenly relied on this expectation: Should the statement in the application turn out to be untrue, equity would grant rescission. We note the possibility only to emphasize the absence of any satisfactory explanation.

The record fails to persuade us that plaintiff in fact relied on the incomplete statement in the application. The judgment is affirmed.

AFFIRMED.

CARTER, J., dissenting.

Defendant Meisinger made a written application for a policy of automobile insurance on July 17, 1966. The policy was issued to him July 25, 1966. On July 21, 1966, Meisinger received notice from the state that his license to operate a motor vehicle on the public highways was revoked. He failed to inform the insurance company of this fact before or at the time of the issuance of the policy.

It is contended in appellant's brief, and supporting authorities are cited, holding that a duty rests upon an applicant to inform the insurance company of facts discovered between the date of application and the date of issuance of the policy which materially affect the acceptance of the risk. Carroll v. Preferred Risk Ins. Co., 60 Ill. App. 2d 170, 208 N. E. 2d 836; Stipcich v. Metropolitan Life Ins. Co., 277 U. S. 311, 48 S. Ct. 512, 72 L. Ed. 895; Millar v. New Amsterdam Casualty Co., 248 App. Div. 272, 289 N. Y. S. 599; Strangio v. Consolidated Indemnity & Ins. Co., 66 F. 2d 330.

In my opinion, the failure of Meisinger to inform the insurance company of the pertinent fact that his driver's license had been revoked, under the circumstances shown, has the effect of voiding the policy. In any event, the issue is raised and should be determined by the court's opinion.

GEORGE WHITAKER ET AL., APPELLEES AND CROSS-APPELLANTS, V. GERING IRRIGATION DISTRICT, APPELLANT AND CROSS-APPELLEE.

160 N. W. 2d 186

Filed June 21, 1968. No. 36828.

1. **Courts: Parties.** When the determination of a controversy cannot be had without the presence of new parties to the suit, the court should order them brought in.
2. ———: ———. In an equity case, the court is authorized on

its own motion to make a necessary party a defendant.

3. ———: ———. When it appears that all indispensable parties to a proper and complete determination of an equity cause were not before the district court, the Supreme Court will remand the cause for the purpose of having such parties brought in even though no proper objection was made by any party litigant.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Judgment set aside and cause remanded for new trial.

Lyman & Gallawa, for appellants.

Van Steenberg, Winner & Wood, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

McCOWN, J.

This is an action in equity to recover damages resulting from the backing-up of surface waters caused by the obstruction of a natural drainway, and for a mandatory injunction requiring the sole defendant, Gering Irrigation District, to restore the drainage to its natural state or, alternatively, to provide an adequate escape for surface waters flowing in the natural drainway. The district court dismissed the cause of action for damages and granted the injunction as prayed for in plaintiffs' petition. The defendant has appealed from the judgment granting the injunction, and the plaintiffs have cross-appealed from the judgment dismissing the cause of action for damages.

The evidence is either in direct conflict or is wholly or partially determinable only by inference on several crucial issues. The plaintiffs George and Florence Whitaker were the owners of the south half of the northwest quarter of Section 35, Township 21 North, Range 54 West of the 6th P.M., Scotts Bluff County, Nebraska. Alex Kaufman and his wife, Clara, who were not parties to this suit, were the owners of 80 acres of land immediately adjoining the land of the Whitakers on the north.

There is a natural drainway for surface waters which flowed from the plaintiffs' land north and onto the Kaufman land. In late 1945, the Kaufmans constructed a dike on the Kaufman land and along the northerly boundary of the plaintiffs Whitakers' land. The defendant Gering Irrigation District constructed an irrigation lateral on top of the dike. When the defendant constructed its irrigation ditch on the dike, it installed a 12-inch tube or culvert under the dike and irrigation lateral to provide for drainage of the water from the plaintiffs Whitakers' property to the Kaufman property. The tube to provide drainage was installed without the knowledge or consent of the Kaufmans, according to their testimony. The Kaufmans also constructed their own irrigation lateral on top of the dike, some 3 or 4 feet to the north of the defendant irrigation district's lateral. Although there are no deeds or easements nor written agreements in evidence, the construction of the dike and the defendant's irrigation lateral was apparently done under an agreement between the Kaufmans and the defendant district, probably amounting to an easement.

As early as 1948, Alex Kaufman attempted to plug the drainage tube at the north end with gunny sacks and dirt. From the evidence, it is reasonable to conclude that there were discussions or arguments and difficulties from time to time between Kaufman and Alex Reisig, who was a tenant on the Whitaker farm, about obstructing the drainage tube. A reasonable inference from the evidence would be that Kaufman would plug his end of the tube and Reisig would open it from his side. In early July 1957, the plaintiff George Whitaker and his attorney and Alex Kaufman and his attorney appeared at a board of directors meeting of the defendant irrigation district. The minutes of the meeting of July 2, 1957, stated in part: "Mr. Van Steenberg, attorney for Mr. Whitaker, requested that a 24" drainage tube be installed under our lateral to replace the present 12" tube that he claimed was to (sic) small to carry flood water.

Mr. Jack Lyman, attorney for Mr. Kaufman, said the present 12" tube was large enough to carry the water if the tube was kept open. It was agreed that the attorneys would try and get together on the matter and that the Board would cooperate in any way that they could, but did not assume any liability as to flood water."

There is a complete conflict in the evidence as to whether water did or did not drain through the tube between 1948 and 1959. The Kaufmans testified that there was no drainage through it after 1948, while the plaintiffs' witnesses testified that there was drainage through the tube at various times up to 1959. In 1957, Kaufman and his son plugged the tube with concrete blocks and burlap sacks filled with dirt and pulled out and removed the north section of the tube. The evidence of the plaintiffs' witnesses was that after rains the surface water would pond upon some 4.3 acres of the Whitaker land south of the drainage tube and that crops were damaged or destroyed in the years 1963 through 1966, resulting from the obstruction of the natural drainway. This damage was sought to be recovered in the first cause of action.

The defendant pleaded that it had had exclusive adverse possession of the real estate on which its irrigation lateral was constructed for more than 20 years; that no water had drained through any culvert or otherwise under the dike on which its lateral was located for more than 17 years; and that it had gained an easement by adverse possession to maintain and continue its lateral and dike on the real estate on which it was constructed without drainage under or through the same at any point. It also cross-petitioned against the plaintiffs to quiet its title to its easement as against the plaintiffs. The evidence, however, is concededly undisputed that the dike and both irrigation laterals are on the Kaufman land. On the present state of the record, the defendant had not claimed or asserted any prescriptive right to obstruct the drainage from plaintiffs' land prior to its

answer and cross-petition, but in fact, had installed a tube to provide for such drainage, although it had apparently done nothing affirmatively to keep it open. The defendant's claim of adverse possession of the Kaufman real estate, whether it be limited to an easement or not, certainly could not be established as against the Kaufmans when they are not parties to the action. While the plaintiffs' assertion might be correct that there is a judicial admission in the pleadings which might be binding if only the plaintiffs and defendant were involved, the evidence establishes that the Kaufmans were the fee owners of the real estate, and had an interest in the property separate and distinct from the interest of the defendant.

The plaintiffs rely upon the rule that a lower proprietor cannot place any obstruction in an obvious drainage channel which has been formed by nature and carries the water from a higher to a lower estate. However, the evidence here concededly is that the Kaufmans were the fee owners of the lower property. It is also apparent that if any prescriptive rights to obstruct the drainage channel were obtained by anyone, it was by the Kaufmans, and they had asserted such a claim, but are not parties. The obstructions in the drainage tube which caused the damage the plaintiffs suffered were placed there by the Kaufmans. It is also clear that whatever interests the defendants had in the real estate were derived from the Kaufmans, and the duty to provide for the passage of water in the drainageway fell upon both the defendant and Kaufmans to the extent of their respective rights of ownership and control.

At the close of the plaintiffs' evidence, the defendant moved to dismiss plaintiffs' petition upon the ground that Alex Kaufman was the one who had constructed the dike and that the plaintiffs had brought the action against the wrong party. This motion was quite properly overruled. In its motion for new trial, the defend-

ant for the first time asserted that all necessary parties were not before the court.

Section 25-323, R. R. S. 1943, provides: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in."

When the determination of a controversy cannot be had without the presence of new parties to the suit, the court should order them brought in. See, Cunningham v. Brewer, on rehearing, 144 Neb. 218, 16 N. W. 2d 533; Midwest Laundry Equipment Corp. v. Berg, 174 Neb. 747, 119 N. W. 2d 509.

In an equity case, the court is authorized on its own motion to make a necessary party a defendant. Toop v. Palmer, 108 Neb. 850, 189 N. W. 394.

When it appears that all indispensable parties to a proper and complete determination of an equity cause were not before the district court, the Supreme Court will remand the cause for the purpose of having such parties brought in even though no proper objection was made by any party litigant. Burke Lumber & Coal Co. v. Anderson, 162 Neb. 551, 76 N. W. 2d 630.

For the reasons stated, the judgment is set aside as to both causes of action and the cause remanded to the district court for new trial and for the purpose of making Alex Kaufman and Clara Kaufman parties defendant. Costs assessed equally to appellant and appellees.

JUDGMENT SET ASIDE AND CAUSE REMANDED FOR NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. ALFRED CREIG GILES, APPELLANT.
159 N. W. 2d 826

Filed June 21, 1968. No. 36833.

Criminal Law: Appeal and Error. In the absence of an abuse of discretion, a sentence within statutory limits will not be disturbed.

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

Robert V. Hoagland, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

BOSLAUGH, J.

The defendant, Alfred Creig Giles, pleaded guilty to assault with intent to inflict great bodily injury and was sentenced to 3 to 5 years' imprisonment. He has appealed and contends that the sentence is excessive.

The defendant is a ranch hand 22 years of age. He has been living with Bonita Koch, a divorced woman with five children. The record shows that the defendant committed a number of assaults upon Bruce, the youngest Koch child, who was 14 months of age. These assaults included slapping and striking the child with the defendant's fist; burning the child with lighted cigarettes; and fracturing his arms by twisting. A psychiatric evaluation disclosed no basis for leniency.

In the absence of an abuse of discretion, a sentence within statutory limits will not be disturbed. State v. Mayes, *ante* p. 165, 159 N. W. 2d 203. The record fully sustains the sentence which was imposed in this case. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. CLARENCE A. H. MEYER, ATTORNEY GENERAL, PLAINTIFF, V. M. O. STEEN, SECRETARY OF THE GAME AND PARKS COMMISSION OF THE STATE OF NEBRASKA, ET AL., DEFENDANTS.

160 N. W. 2d 164

Filed June 21, 1968. No. 36872.

1. **Constitutional Law: Revenue and Taxation.** One purpose of the constitutional limitation upon state indebtedness is to prevent the anticipation of revenue by the creation of obligations to be paid from revenue to be received in future fiscal periods. Art. XIII, § 1, Constitution of Nebraska.
2. ———: ———. Obligations which are to be paid from revenue subject to appropriation by future Legislatures are subject to the state debt limitation provision.
3. ———: ———. The special fund doctrine is applicable generally to an indebtedness incurred in the construction of a project which is payable from the revenue arising from the operation of the project.
4. ———: ———. In this state the special fund doctrine is not applicable to obligations payable from excise taxes or other revenue subject to the control of the Legislature and available for any legal use.
5. ———: ———. The Legislature is prohibited from making a continuing appropriation in this state. Art. III, § 22, Constitution of Nebraska.
6. ———: ———. An act is unconstitutional and void which authorizes the construction of a state office building to be financed by the issue of revenue bonds, payable from the proceeds of the sale of permits and licenses to hunt, trap, and fish.

Original action. Judgment for the plaintiff.

Clarence A. H. Meyer, Attorney General, and Gerald S. Vitamvas, for plaintiff.

Kutak, Rock & Campbell and Nixon, Mudge, Rose, Guthrie, Alexander & Mitchell, for defendants.

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

BOSLAUGH, J.

This is an original action brought by the Attorney General at the request of the Governor to determine the

validity of the 1967 Game and Parks Commission State Headquarters Construction Act. §§ 81-805.04 to 81-805.30, R. S. Supp., 1967. The defendants are the members and secretary of the Game and Parks Commission.

The act in question provides that the Game and Parks Commission may undertake a state headquarters construction program to be financed by bonds or notes issued by the commission and payable from the State Game Fund. The act further provides that the commission may pledge the fund for the payment of the bonds and notes and that the Legislature "pledges and agrees" with the holders that "it shall not repeal, diminish or apply to any other purpose the amount of fees imposed pursuant to sections 37-201 to 37-228, and allocated to the fund" so long as any bonds or notes remain outstanding and unpaid unless other provision for payment has been made.

The petition alleges that the act violates the constitutional limitation upon state indebtedness, Article XIII, section 1, and authorizes a continuing appropriation in violation of Article III, section 22, of the Constitution of Nebraska. The answer admits the facts alleged in the petition and prays that the act be declared valid. The case has been submitted upon the motion of the plaintiff for judgment on the pleadings.

The limitation upon state indebtedness which is contained in Article XIII, section 1, of the Constitution of Nebraska, is as follows: "The state may, to meet casual deficits, or failures in the revenues, contract debts never to exceed in the aggregate one hundred thousand dollars, and no greater indebtedness shall be incurred except for the purpose of repelling invasion, suppressing insurrection, or defending the state in war, and provision shall be made for the payment of the interest annually, as it shall accrue, by a tax levied for the purpose, or from other sources of revenue, which law providing for the payment of such interest by such tax shall be irrepealable until such debt be paid."

The present limitation came into our Constitution in 1875. Prior to that time, an indebtedness in excess of $50,000 could be authorized by a vote of the people. Art. II, § 32, Constitution of Nebraska, 1866. Proposals to liberalize the present constitutional limitation were considered by the Constitutional Convention of 1919-1920 and rejected.

The defendants rely upon the "Special Fund Doctrine" and contend that the debt limitation provision of the Constitution is not applicable because the bonds and notes authorized by the act are payable only from the State Game Fund and not from revenue derived from general taxation.

The State Game Fund is derived from the sale of permits and licenses to hunt, trap, and fish. Under present legislation the game fund is devoted to the development and protection of wildlife in the state. But the revenue received from the sale of such permits and licenses is subject to the control of the Legislature and may be used for support of the schools or some other legal use. Wilcox v. Havekost, 144 Neb. 562, 13 N. W. 2d 889. In this respect, the revenue which constitutes the State Game Fund is similar to other revenue collected and received by the state.

The special fund doctrine appears to have had its origin in a case where the construction of a waterworks system by a municipality was financed by obligations payable only from revenue derived from the operation of the system. Winston v. City of Spokane, 12 Wash. 524, 41 P. 888. The court in that case held that such a plan was not subject to a constitutional limitation upon indebtedness because there was no liability upon the city to pay the debt out of its general funds. This court has held the special fund doctrine applicable to the improvement of a light plant, Carr v. Fenstermacher, 119 Neb. 172, 228 N. W. 114; and to the construction of a toll bridge, Kirby v. Omaha Bridge Comm., 127 Neb. 382, 255 N. W. 776.

In some states, the special fund doctrine has been extended to obligations payable exclusively from a special fund created by the imposition of fees, penalties, or excise taxes if the general credit of the state is not pledged and resort may not be had to property taxation. See Annotation, 100 A. L. R. 900. The defendants urge a similar result in this case.

Other courts have held that the debt limitation is applicable to obligations to be paid from sources of revenue other than the property tax. State ex rel. Washington State Finance Committee v. Martin, 62 Wash. 2d 645, 384 P. 2d 833; Boe v. Foss, 76 S. D. 295, 77 N. W. 2d 1; People ex rel. City of Chicago v. Barrett, 373 Ill. 393, 26 N. W. 2d 478.

The ultimate incidence of any debt which consumes an existing public income or resource is on the taxpayer. He cannot be insulated from that impact by the device

By a constitutional amendment, adopted in 1966, the

By a constitutional amendment, adopted in 1966, the Legislature in this state is prohibited from levying a property tax for state purposes. Art VIII, § 1A, Constitution of Nebraska. The principal sources of state revenue are now the income tax and the sales tax. If the Legislature is free to authorize unlimited indebtedness payable from special funds derived from excise taxes, it is apparent that the constitutional limitation upon indebtedness is ineffective.

One purpose of the constitutional limitation upon state indebtedness is to prevent the anticipation of revenue by the creation of obligations to be paid from revenue to be received in future fiscal periods. Obligations which are to be paid from revenue subject to appropriation by future Legislatures are subject to the state debt limitation provision.

We think the act in question is a clear violation of Article XIII, section 1, of the Nebraska Constitution. It is an attempt to authorize the spending of the revenue to be received from the sale of permits and licenses to

hunt, trap, and fish far in advance of the receipt of the revenue. It is a form of financing which the constitutional provision was intended to prevent.

The act in question also conflicts with the Constitution in that it attempts to make a continuing appropriation of the revenue from the sale of permits and licenses to hunt, trap, and fish. The act contemplates that the appropriation will continue until all the bonds or notes have been paid.

It has long been the law in this state that continuing appropriations of "public revenue" are prohibited by Article III, section 22, Constitution of Nebraska, which provides in part: "Each Legislature shall make appropriations for the expenses of the Government until the expiration of the first fiscal quarter after the adjournment of the next regular session, and all appropriations shall end with such fiscal quarter." See, Rein v. Johnson, 149 Neb. 67, 30 N. W. 2d 548; Power Oil Co. v. Cochran, 138 Neb. 827, 295 N. W. 805; State ex rel. Norfolk Beet-Sugar Co. v. Moore, 50 Neb. 88, 69 N. W. 373, 61 Am. S. R. 538; State ex rel. M. C. Bullock Mfg. Co. v. Babcock, 22 Neb. 33, 33 N. W. 709; Opinion of the Judges, 5 Neb. 566.

The defendants cite numerous cases from other jurisdictions where different rules prevail. Such cases are not applicable in view of our particular constitutional provision and the interpretation which has been made of it since 1875.

It is the duty of this court to apply and enforce the Constitution as it is written. If the limitation upon state indebtedness is no longer necessary or desirable, the Constitution may be amended to express the present will of the people. But if the Constitution is to be amended, that is the privilege of the electorate and not of this court.

The plaintiff's motion for judgment on the pleadings is sustained.

JUDGMENT FOR THE PLAINTIFF.

STATE OF NEBRASKA EX REL. CLARENCE A. H. MEYER, ATTORNEY GENERAL, PLAINTIFF, V. RICHARD M. DUXBURY, CHAIRMAN, NEBRASKA CLEAN WATERS COMMISSION, ET AL., DEFENDANTS.

160 N. W. 2d 88

Filed June 21, 1968. No. 36873.

1. **Constitutional Law: Revenue and Taxation.** One purpose of the constitutional limitation upon state indebtedness is to prevent the anticipation of revenue by the creation of obligations to be paid from revenue to be received in future fiscal periods. Art. XIII, § 1, Constitution of Nebraska.
2. ———: ———. An obligation payable from revenue subject to the plenary control of the Legislature and available for any legal purpose is subject to the constitutional limitation upon indebtedness.
3. ———: ———. The special fund doctrine is applicable generally where an indebtedness incurred in the construction of a project is payable from revenue arising from the operation of the project.
4. **Constitutional Law: Revenue and Taxation: Bonds.** Municipal bonds, including interest and principal payments thereon, which are purchased with the proceeds of revenue bonds issued by a state agency, may be pledged to secure the payment of the revenue bonds. Such municipal bonds are not revenue within the meaning of the constitutional limitation upon state indebtedness.
5. ———: ———: ———. Fees and charges received by an agency of the state, which remain unspent at the end of the biennium, lapse and become unavailable until reappropriated. Such funds may not be pledged to secure the payment of revenue bonds issued by the agency.
6. **Money, Appropriation of.** A specific appropriation is one expressly providing funds for a particular purpose.
7. **Statutes: Constitutional Law.** Where a statute is susceptible of two constructions, one of which renders it constitutional and the other unconstitutional, it is the duty of the court to adopt the construction which, without doing violence to the fair meaning of the statute, will render it valid.
8. ———: ———. A severability clause is a declaration of the intent of the Legislature that it would have passed the act with the invalid parts omitted.
9. ———: ———. Where the unconstitutional portions of an act can be separated from the valid portions and the latter enforced independent of the former, and the invalid portions do 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.

Original action. Motion sustained. Judgment in accordance with the opinion.

Clarence A. H. Meyer, Attorney General, and Gerald S. Vitamvas, for plaintiff.

Kutak, Rock & Campbell and Nixon, Mudge, Rose, Guthrie, Alexander & Mitchell, for defendants.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

BOSLAUGH, J.

This is an original action brought by the Attorney General at the request of the Governor to determine the validity of the 1967 Nebraska Clean Waters Commission Act. Ch. 71, art. 42, R. S. Supp., 1967. The defendants are the members of the commission.

The act creates the Nebraska Clean Waters Commission which is to assist municipalities in the planning and financing of waste water treatment works, waste water collecting systems, and solid waste disposal facilities. The commission is authorized to issue bonds and notes and to loan money to municipalities to accomplish the purposes of the act. The principal questions presented relate to the financing authority of the commission.

It is important to note that the commission is an agency of the state and not a separate corporation. This results in the commission being subject to constitutional requirements and restrictions that would not be applicable to a separate corporation.

The petition alleges that the act is invalid because it violates Article XIII, section 1, of the Constitution of Nebraska, limiting state indebtedness; that it attempts to make a continuing appropriation in violation of Article III, section 22, Constitution of Nebraska; that it attempts to authorize an expenditure of state funds without a specific appropriation in violation of Article III, section

25, Constitution of Nebraska; that it authorizes the giving or loaning of credit of the state in violation of Article XIII, section 3, Constitution of Nebraska; that it makes an unlawful delegation of legislative powers in violation of Article II, secton 1, and Article III, section 1, Constitution of Nebraska; and that it makes an unlawful delegation of judicial powers in violation of Article II, section 1, and Article V, section 1, Constitution of Nebraska. The answer admits the facts alleged in the petition and prays that the act be declared valid. The case has been submitted upon the motion of the plaintiff for judgment on the pleadings.

Article XIII, section 1, of the Constitution of Nebraska, provides as follows: "The state may, to meet casual deficits, or failures in the revenues, contract debts never to exceed in the aggregate one hundred thousand dollars, and no greater indebtedness shall be incurred except for the purpose of repelling invasion, suppressing insurrection, or defending the state in war, and provision shall be made for the payment of the interest annually, as it shall accrue, by a tax levied for the purpose, or from other sources of revenue, which law providing for the payment of such interest by such tax shall be irrepealable until such debt be paid."

The plaintiff's theory is that the commission is an agency of the state and any indebtedness of the commission is, therefore, a debt of the state; and that the proceeds received from the sale of bonds issued by the commission is state "revenue." The defendants rely upon the "Special Fund Doctrine" and contend that the debt limitation provision of the Constitution is not applicable because the obligations of the commission are not general obligations of the state and are not payable from taxation.

The special fund doctrine is generally applicable where an indebtedness incurred in the construction of a project is payable from revenue arising from the operation of the project. It has been held applicable in this state

to the improvement of a light plant, Carr v. Fenstermacher, 119 Neb. 172, 228 N. W. 114; and to the construction of a toll bridge, Kirby v. Omaha Bridge Comm., 127 Neb. 382, 255 N. W. 776.

The act involved here is somewhat similar to an Arkansas law which was held valid in Davis v. Phipps, 191 Ark. 298, 85 S. W. 2d 1020, 100 A. L. R. 1110. The Arkansas statute authorized the Arkansas State Board of Education to issue bonds and loan the proceeds to school districts. The school district bonds were then to be pledged to secure the bonds issued by the State Board of Education. The Arkansas Constitution prohibited bonds pledging the faith and credit of the state "or any of its revenues" without a vote of the people. The Arkansas court held that the school district bonds, and the interest derived from them, were not "revenues" within the meaning of the constitutional provision and that the law was valid.

One purpose of the limitation upon indebtedness in the Nebraska Constitution is to prevent the anticipation of revenue by the creation of obligations to be paid from revenue to be received in future periods. Municipal bonds purchased by the commission with the proceeds received from issuing its own bonds, and funds received by the commission from the payment of interest and the repayment of principal on such municipal bonds are not "revenues" within the meaning of the constitutional limitation upon state indebtedness. Davis v. Phipps, *supra.*

But the act involved here authorizes a pledge of more than municipal bonds to secure the payment of the bonds issued by the commission. The act provides that the commission may pledge all or any part of the fees and charges to be received by the commission and all or any part of the assets of the commission as security for the payment of the bonds and notes issued by the commission. The act also provides that the commission may establish debt service reserve funds, to secure the pay-

ment of its bonds, and that the Legislature may appropriate supplemental funds from the general revenue fund of the state to supply any deficiency so that the debt service reserve funds may be maintained at the full amount prescribed in the act. The act further provides that: "It shall be the policy of the state and it does hereby pledge and agree that, to the extent appropriations may be made from state funds for the limited purposes herein indicated, the provisions hereof are intended as compensation to the commission as an agent of the state for the accomplishment of a state governmental purpose."

Since the commission is an agency of the state, any fees and charges or "compensation" received by the commission and remaining unspent at the end of each biennium would lapse and become unavailable to the commission unless reappropriated by the Legislature. Such funds would become "public revenue" under the plenary control of the Legislature and available to be used for any legal purpose. This has long been the law in Nebraska. Rein v. Johnson, 149 Neb. 67, 30 N. W. 2d 548; Power Oil Co. v. Cochran, 138 Neb. 827, 295 N. W. 805; State ex rel. Norfolk Beet-Sugar Co. v. Moore, 50 Neb. 88, 69 N. W. 373, 61 Am. S. R. 538; State ex rel. M. C. Bullock Mfg. Co. v. Babcock, 22 Neb. 33, 33 N. W. 709; Opinion of the Judges, 5 Neb. 566.

To the extent that the act authorizes the pledging of such funds for the payment of the bonds and notes of the commission, the act violates the constitutional limitation upon indebtedness. To that extent, the act also violates the constitutional provision against continuing appropriations. Article III, section 22, Constitution of Nebraska, provides that all appropriations shall expire at the end of the first fiscal quarter after the adjournment of the next regular session of the Legislature.

The plaintiff's contention that the act is invalid as authorizing the expenditure of funds without a specific appropriation is based upon Article III, section 25, of

the Constitution of Nebraska, which provides in part as follows: "No money shall be drawn from the Treasury except in pursuance of a specific appropriation made by law, * * *." A specific appropriation is one expressly providing funds for a particular purpose. State ex rel. Cline v. Wallichs, 15 Neb. 609, 20 N. W. 110.

A fair construction of the act indicates that the Legislature intended that the fees and charges received by the commission would constitute a fund in the nature of a cash fund which the commission is authorized to use to carry on the work of the commission. The act itself is a sufficient appropriation, at least for this biennium. The proceeds received from the issuing of bonds and notes, and from municipal bonds, are not revenue requiring a specific appropriation.

The plaintiff's contention that the act is invalid because it authorizes the giving or loaning of the credit of the state is based upon Article XIII, section 3, of the Constitution of Nebraska, which provides as follows: "The credit of the state shall never be given or loaned in aid of any individual, association, or corporation."

The act, to the extent that it is valid, does not authorize the giving or loaning of the credit of the state to municipal corporations. The securities which may be pledged to secure the payment of the bonds and notes to be issued by the commission are the bonds and notes of municipal corporations. The bonds and notes issued by the commission actually represent the combined or collective credit of the municipal corporations which have borrowed money from the commission. The act specifically provides that the bonds and notes issued by the commission shall be general obligations of the commission, payable solely from funds of the commission available for that purpose, and not a liability of the state.

The plaintiff's contention that the act makes an invalid delegation of legislative powers to the commission has reference to the powers conferred upon the commission

and standards prescribed as to how the powers may be exercised.

Without question, the commission has very broad powers within its field of operation. For example, there is no absolute limit upon the amount of money which it may borrow, or the amount of money which it may loan to any municipality, or the rate of interest to be paid or charged, or the time within which such loans must be repaid. The act does require that the fees and charges of the commission be reasonable and that loans to municipalities must not exceed the cost of construction.

In School Dist. No. 8 v. State Board of Education, 176 Neb. 722, 127 N. W. 2d 458, this court said: "The difference between a delegation of legislative power and the delegation of authority to an administrative agency to carry out the expressed intent of the Legislature and the details involved has long been a difficult and important question. Increased complexity of our social order, and the multitude of details that necessarily follow, has led to a relaxation of the specific standards in the delegating statute in favor of more general ones where a specialized state agency is concerned. It is almost impossible for a legislature to prescribe all the rules and regulations necessary for a specialized agency to accomplish the legislative purpose. The delegation of authority to a specialized department under more generalized standards has been the natural trend as the need for regulation has become more evident and complex."

The field of operation of the commission is quite narrow. Its powers are limited to assisting municipalities in the planning and financing of waste water collecting systems and treatment works and solid waste disposal facilities. We conclude that the act does not make an invalid delegation of legislative powers to the commission.

The plaintiff's contention that the act makes an invalid delegation of judicial powers has reference to subsection

(9) of section 71-4215, R. S. Supp., 1967, which provides that a resolution of the commission authorizing bonds or notes may contain a provision, which shall be a part of the agreement with the holders, as to: "Vesting in a trustee or trustees such property, rights, powers and duties in trust as the commission may determine, which may include any or all of the rights, powers and duties of the trustee appointed by the bondholders pursuant to sections 71-4201 to 71-4234, and limiting or abrogating the right of the bondholders to appoint a trustee under sections 71-4201 to 71-4234 or limiting the rights, powers and duties of such trustee; * * *."

The only provision in the act for the appointment of a trustee by the bondholders is contained in section 71-4227, R. S. Supp., 1967, which refers to proceedings in the district court for Lancaster County after default by the commission. The plaintiff argues that the commission cannot restrict the authority of the court to appoint a trustee.

The defendants suggest that subsection (9) of section 71-4215, R. S. Supp., 1967, refers only to a trustee appointed *prior to default*, and that the act does not authorize the commission to limit or abrogate the right of the bondholders to request the appointment of a trustee after default. This construction would eliminate the constitutional objection.

Where a statute is susceptible of two constructions, one of which renders it constitutional and the other unconstitutional, it is the duty of the court to adopt the construction which, without doing violence to the fair meaning of the statute, will render it valid. Anderson v. Tiemann, 182 Neb. 393, 155 N. W. 2d 322; State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N. W. 2d 63. We construe subsection (9) of section 71-4215, R. S. Supp., 1967, to be applicable only to trustees to be appointed prior to default and not invalid.

Having determined that the act is partially invalid, the question remains as to whether the remaining por-

tions of the act are valid. The act contains a severability clause. Such a clause is an aid to interpretation, and is a declaration of the intent of the Legislature that it would have passed the act with the invalid parts omitted. Terry Carpenter, Inc. v. Wood, 177 Neb. 515, 129 N. W. 2d 475.

Where the unconstitutional portions of an act can be separated from the valid portions and the latter enforced independent of the former, and the invalid portions do 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 Comm., 179 Neb. 817, 140 N. W. 2d 668.

The invalid portions of the act relate to the pledging of fees and charges and other assets of the commission, and the appropriation of general revenue funds to supplement the debt service reserve funds. These provisions may be eliminated without destroying the entire plan of the act. The commission can still function as intended by the Legislature although there may be greater difficulty in providing the financial assistance which the act contemplates. We conclude that the invalid portions of the act do not require that the entire act be held invalid.

The motion of the plaintiff for judgment on the pleadings is sustained. Judgment in accordance with the opinion.

MOTION SUSTAINED; JUDGMENT IN ACCORDANCE WITH THE OPINION.

CECIL WRIEDT, APPELLEE, V. DONALD BECKENHAUER ET AL., APPELLEES, NORFOLK MUTUAL INSURANCE COMPANY, INTERVENER-APPELLANT.

159 N. W. 2d 822

Filed June 21, 1968. No. 36874.

1. **Insurance.** In the absence of a provision in the policy to the contrary, a change of title to the property insured, in whole or in part, does not avoid the policy if at the time of a loss the insured has an insurable interest, but an alienation of the insured property will end the policy as to the insured if he retains no further interest in the property.
2. ———. In general it may be said in property insurance that an insurable interest must exist when the policy is issued and when a loss occurs, although interest at the time of loss need not be identical with that existing at the time of the issuance of the policy, and while an insurable interest at the time of the issuance of the policy and at the time of loss is essential, it need not exist in the interim, in the absence of a definite provision in the policy.
3. **Insurance: Mortgages.** As the mortgagor and mortgagee each has an insurable interest in the mortgaged property, insurance taken by one on his own interest and in his own favor alone does not inure to the benefit of the other.
4. ———: ———. Where the mortgagee procures insurance on his separate interest, for his own benefit and at his own cost, and without any agreement with the mortgagor with respect thereto, the mortgagee is entitled to the proceeds, the mortgagor having no interest therein.
5. ———: ———. If the insurer has no liability to the mortgagor, the proceeds of insurance on the mortgaged property, when paid to the mortgagee, need not be applied in reduction of the mortgage debt.
6. ———: ———. If the mortgagee, or one in like position, is the party insured and the policy is written so as to cover his interest only, insurer, on payment to the mortgagee, becomes subrogated pro tanto to the rights of the mortgagee against the mortgagor, even though the policy contains no subrogation clause purporting to give such right to insurer.

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

Hutton, Hutton & Garden, for intervener-appellant.

Addison & Addison, for appellee Wriedt.

McDermott & McDermott, for appellees Beckenhauer et al.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

NEWTON, J.

This is an action brought by Cecil Wriedt, plaintiff, against Don Beckenhauer, Roy Day, and John H. Mohr, defendants, to recover $3,610.72 paid to defendants by Norfolk Mutual Insurance Company, intervener, on an insured fire loss. Plaintiff obtained judgment in the district court and intervener appeals.

Defendants were the owners of a tract of land in the county of Wayne, Nebraska. They insured the improvements thereon against fire as evidenced by a policy issued by intervener expiring February 12, 1971, with premium paid to February 12, 1967. The house was covered by insurance in the sum of $8,000. An option to purchase the premises for $16,000 was obtained by plaintiff on March 15, 1966, and exercised on April 15, 1966. The sale was closed on June 30, 1966, at which time plaintiff received a warranty deed conveying the property to him and a mortgage back was executed and delivered by plaintiff and his wife to defendant Beckenhauer. The mortgage was for $12,000.

Defendants were permitted to retain temporary possession of the house and during their occupancy, on August 11, 1966, a fire occurred as a result of which the house was partially damaged. Intervener's local agent was notified of the loss. He, in turn, notified the home office of intervener and a director of the company called on defendants. The policy of insurance had not been assigned to plaintiff, nor did he at any time request such an assignment, and although he had inquired of defendants as to insurance carried, he had indicated his intention to obtain other insurance. No other insurance was obtained and plaintiff now contends that he relied on defendant Beckenhauer's statement that

the property was adequately insured until August 15, 1966. The mortgage contained the usual printed provision requiring the mortgagor to maintain insurance on the mortgaged property, but was not filled out to specify the amount to be carried.

Intervener was not notified of the change of title and the execution of the mortgage until after the fire. At that time the local agent and the director who adjusted the loss were fully informed of the transfer of the property and instructed defendants to file a proof of loss. This was done and the sum in dispute was promptly remitted to defendants, who divided the money equally, and subsequently paid it into court. The policy of insurance does not contain the standard provision voiding the policy on a change of title to the insured property without insurer's knowledge and consent. Defendants have not cross-appealed. The only issue to be resolved pertains to the respective rights of plaintiff and intervener to the sum in dispute.

It is apparent that defendants Roy Day and John H. Mohr, having conveyed their entire interest in the property, did not have an insurable interest in the property, and were not entitled to collect on the policy issued by intervener. Also, that defendant Don Beckenhauer, by virtue of the mortgage, retained an insurable interest and the right to recover. "In the absence of a provision in the policy to the contrary, a change of title to the property insured, in whole or in part, does not avoid the policy if at the time of a loss the insured has an insurable interest, but an alienation of the insured property will end the policy as to the insured if he retains no further interest in the property." 29A Am. Jur., Insurance, § 825, p. 59. "* * * in general it may be said in marine insurance as well as in other property insurance that an insurable interest must exist when the policy is issued and when a loss occurs, although interest at the time of loss need not be identical with that existing at the time of the issuance of the

policy, and while an insurable interest at the time of the issuance of the policy and at the time of loss is essential, it need not exist in the interim, in the absence of a definite provision in the policy." 29 Am. Jur., Insurance, § 439, p. 783. See, also, Bassett v. Farmers & Merchants Ins. Co., 85 Neb. 85, 122 N. W. 703.

As noted above, the insurance was secured by defendants, who paid the premium therefor, for their own protection; the policy was not assigned; and defendant Beckenhauer being the only one retaining an insurable interest was the only one entitled to recover on the policy. Plaintiff had not requested an assignment of the policy nor had he offered to pay that proportion of the premium attributable to the unexpired term the policy was to run. The amount the mortgagee might require the mortgagor to insure the property for was left blank in the mortgage which indicates that plaintiff was not intending or intended to acquire any interest in the policy held by the mortgagee Beckenhauer. In addition, Beckenhauer testified that he had not insisted on the mortgagor carrying insurance because he thought his security was ample. We must necessarily conclude that the insurance carried by defendant Beckenhauer was in the nature of separate insurance carried for his protection only, and that plaintiff mortgagor had no interest therein, and no right to have the insurance paid credited on the mortgage. "As the mortgagor and mortgagee each has an insurable interest in the mortgaged property, insurance taken by one on his own interest and in his own favor alone does not inure to the benefit of the other. * * * where the mortgagee procures insurance on his separate interest, for his own benefit and at his own cost, and without any agreement with the mortgagor with respect thereto, the mortgagee is entitled to the proceeds, the mortgagor having no interest therein." 46 C. J. S., Insurance, § 1146, p. 26. See, also, Ponder v. Gibson-Homans Co., 166 Ark. 591,

266 S. W. 682; Le Doux v. Dettmering, 316 Ill. App. 98, 43 N. E. 2d 862.

"If the insurer has no liability to the mortgagor, the proceeds of insurance on the mortgaged property, when paid to the mortgagee, need not be applied in reduction of the mortgage debt." 59 C. J. S., Mortgages, § 328, p. 453.

In view of the foregoing, it is clear that plaintiff has no interest in or right to the insurance proceeds. They are the property of the mortgagee Beckenhauer, but since the only interest of Beckenhauer was, in essence, the insuring of his mortgage security, he has an insurable interest only to the extent of the amount owing under the mortgage. If this indebtedness is reduced, the mortgagee's interest is reduced in like measure. As to him, the insurance contract is a contract of indemnity. In the event of a loss by fire of the insured property, or a part thereof, the mortgagee is entitled to be compensated by his insurance, but if the mortgage indebtedness is subsequently paid in full, he has not sustained a security loss and insurer is entitled to recover the insurance paid. "If the mortgagee, or one in like position, is the party insured and the policy is written so as to cover his interest only, insurer, on payment to the mortgagee, becomes subrogated pro tanto to the rights of the mortgagee against the mortgagor, even though the policy contains no subrogation clause purporting to give such right to insurer; * * *." 46 C. J. S., Insurance, § 1213, p. 183. See, also, Aetna Life Ins. Co. v. National Union Fire Ins. Co., 98 Neb. 446, 153 N. W. 553, L. R. A. 1916A 784; Le Doux v. Dettmering, *supra*.

It appearing that the money in dispute is the property of the defendant Beckenhauer and that intervener is entitled to subrogation pro tanto, or in other words, to a proportionate interest in said defendant's mortgage, subject to defendant's right to recover fully his investment therein, it is necessary that this judgment be reversed and the cause remanded.

Plaintiff urges that since the defendant Beckenhauer has not cross-appealed, no relief may be granted him. Generally speaking, this position is correct. However, in the present instance, this court does have jurisdiction of all parties to the original action and the relief prayed for by intervener is so inextricably interwoven with the rights of said defendant, it necessarily presents the entire matter for review.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. FRED DABNEY, APPELLANT.
160 N. W. 2d 163

Filed June 21, 1968. No. 36896.

1. **Post Conviction.** In a post conviction proceeding a petitioner is required to allege facts which if proved would constitute an infringement of his constitutional rights.
2. **Criminal Law: Appeal and Error.** A motion to set aside a judgment of conviction or a sentence cannot serve the purpose of an appeal to secure a review of the conviction. Our appellate review procedures are adequate and must be used in an appeal if desired.
3. **Post Conviction: New Trial.** An adequate procedure is provided by our law to secure a new trial on the grounds of newly discovered evidence if one is entitled to it, and the Post Conviction Act cannot be used for that purpose.

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

Fred Dabney, pro se.

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

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

SPENCER, J.

This is an appeal from the overruling of defendant's

motion to vacate and set aside his sentence, which was treated as a proceeding under the Post Conviction Act. State v. Dabney, 181 Neb. 263, 147 N. W. 2d 768, is a previous post conviction proceeding filed by the defendant, and involves some of the same issues now raised.

In the present proceeding defendant attempts to raise three issues: (1) Suppression of evidence by not calling two alleged eyewitnesses to the shooting who defendant alleges would have given testimony which would have tended to corroborate his testimony; (2) the loss of a knife found at the scene and placed in the evidence vault; and (3) a denial of a fair trial by reason of the amendment of the information at the close of the State's evidence to reduce the charge from first to second degree murder.

Issue (2) above was included in the previous proceedings, and is fully discussed in that case. Issue (3) suggests that defendant was denied a fair trial because the effect of the reduction of the charge during the trial was to prejudice the defendant in the eyes of the jury. Defendant does not allege other than in conclusional form as to how the amendment prejudiced his theory of defense. It would appear that a reduction in the charge should operate to the benefit of the defendant. A petitioner is required to allege facts which if proved would constitute an infringement of his constitutional rights. State v. Clingerman, 180 Neb. 344, 142 N. W. 2d 765.

In issue (1) above, defendant claims that he was deprived of a fair trial because the State suppressed the testimony of two girls, who were babysitting at a house a short distance from the scene of the shooting, by not calling them as witnesses. A review of the trial proceedings indicates that a young man, Thomas L. Terry, a boy friend of one of the girls, who was with them on that occasion, was called as a witness by the State. The name of this young man was endorsed on the information and was available to the defendant before the trial. The names of the girls were elicited from him in the State's

case. Even if defendant's conclusional statement had some merit, the State was under no obligation to call these witnesses. There is no merit to defendant's allegation of suppression of evidence.

Defendant is attempting to use these procedures to give him the appeal he failed to take from his conviction. A motion to set aside a judgment of conviction or a sentence cannot serve the purpose of an appeal to secure a review of the conviction. Our appellate review procedures are adequate and must be used if an appeal is desired. State v. Clingerman, 180 Neb. 344, 142 N. W. 2d 765.

If it might be inferred that defendant is attempting to secure a new trial on the grounds of newly discovered evidence, we observe that the existence of the alleged favorable witnesses was known to the defendant at the time of the trial and they should have been produced by the defense. In any event, there is an adequate procedure provided by our law to secure a new trial on the grounds of newly discovered evidence if one is entitled to it, and the Post Conviction Act cannot be used for that purpose.

For the reasons set out above, the judgment of the trial court is correct and is affirmed.

AFFIRMED.

JIM CAMPBELL ET AL., APPELLANTS, V. AREA VOCATIONAL TECHNICAL SCHOOL NO. 2 ET AL., APPELLEES.
159 N. W. 2d 817

Filed June 21, 1968. No. 36899.

1. **Constitutional Law: Schools and School Districts.** The Area Vocational Technical Schools Act, Laws 1965, c. 508, p. 1622, is not in violation of the Fourteenth Amendment to the Constitution of the United States, or of Article I, section 1, of the Constitution of the State of Nebraska, and does not deny to any person the equal protection of the law.

2. **Constitutional Law: Municipal Corporations.** Questions of public policy, convenience, and welfare, as related to the creation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, or any change in the boundaries thereof, are, in the first instance, of purely legislative cognizance and, when delegated to any public body having legislative power, any action in regard thereto does not come within the due process clause of either the state or federal Constitutions.
3. **Constitutional Law: Schools and School Districts.** Assuming that the "due process" clauses of the state and federal Constitutions were applicable, the Area Vocational Technical Schools Act is in compliance therewith in that it provides for a public hearing and for adequate notice of such hearing.
4. ———: ———. The Area Vocational Technical Schools Act does not provide for an unconstitutional delegation of the legislative taxing power.
5. ———: ———. A school district is a creation of the Legislature. Its purpose is to fulfill the constitutional duty placed upon the Legislature "to encourage schools and the means of instruction" and it is a governmental subdivision to which authority to levy taxes may properly be delegated under the Constitution.
6. **Schools and School Districts.** The Legislature has plenary power and control over school districts including provision for the appointment or election of governing bodies thereof.
7. **Constitutional Law: Taxation.** The maxim of no taxation without representation has a very restricted meaning since it is not contained in the Constitution, and representation is not a condition precedent to the levy of an authorized tax.
8. **Schools and School Districts: Taxation.** Taxes levied by an appointive school board are not subject to challenge as taxation without representation. The parties concerned were represented in the Legislature that enacted the law and thereby had the representation required by the maxim.

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

Stevens & Berry, for appellants.

Maupin, Dent, Kay, Satterfield & Gatz, Donald E. Girard, and Gary L. Scritsmier, for appellees.

Dewayne Wolf and Cline, Williams, Wright, Johnson, Oldfather & Thompson, for amicus curiae.

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

NEWTON, J.

In this action appellants, who are electors and resident taxpayers within the boundaries of Area Vocational Technical School No. 2, seek to have declared unconstitutional the legislative act under which the school is organized and a tax for school purposes levied. The act in question was enacted in 1965 and, since the organization of Area Vocational Technical School No. 2, has been amended in some respects by the 1967 Legislature. It is comprised of sections 79-1445.15 to 79-1445.33, R. R. S. 1943, and R. S. Supp., 1967. The trial court found in favor of appellees and dismissed appellants' petition. We affirm the judgment.

Appellants urge that the act contravenes the constitutional guarantee of equal protection as it violates the "one man, one vote" principle in that it does not require apportionment of representation on the governing board on a population basis.

In view of the pronouncements of the United States Supreme Court in such cases as Baker v. Carr, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 691, and Reynolds v. Sims, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506, the "one man, one vote" factor has become an essential element of the representative process and must be enforced. It will be noted, however, that in all instances where the courts have found that this principle was violated, as in the cited cases, neither the governing bodies affected nor their official acts were voided. Rather, the courts have limited judicial intervention by simply commanding a correction of existing unconstitutional practices and leaving the solution to the appropriate legislative bodies.

In the present case, we are unable to agree that section 79-1445.23, R. R. S. 1943, was in violation of the "one man, one vote" principle. In determining the feasi-

bility of the proposed school and whether or not the petition therefor should be approved, the State Board of Vocational Education was required to take into consideration: "(12) Whether the proposed apportionment of the board of trustees would provide satisfactory representation for the entire area; * * *." § 79-1445.18, R. R. S. 1943. It is apparent that the statute contemplated a constitutional distribution of the members of the board of trustees. If, in actual practice, a violation occurred in this respect, an adequate remedy at law was available as indicated by the Baker and Reynolds cases. But, as heretofore pointed out, were we to find the apportionment deficient in such constitutional requirement, we would not be justified in abolishing the board of trustees or in voiding its official acts. The proper remedy would be to require correction in the event any improper apportionment should appear.

It is urged that the act providing for the creation of area vocational technical schools violates the "due process" requirements of the state and federal Constitutions in that it permits the county commissioners of a county to join in the petition for such a school, thereby subjecting the people of the county to an area-wide election on the proposition of organizing a school of this type and binding them by a majority vote of the electors of the included area. The question presented is primarily one of whether sufficient notice and opportunity for hearing is afforded.

The act provides: "The governing boards of any educational service unit, any one or more counties, or any educational service unit and any one or more counties may petition the State Board of Vocational Education for the establishment of an area vocational technical school * * *." The State Board of Vocational Education: "* * * shall set a time and place for public hearing thereon, and shall give notice thereof in writing to each of the governing bodies joining in the petition and shall also cause notice thereof to be published twice, at an interval of one

week, in one or more newspapers of general circulation in the area proposed to be included. The last publication to be not less than five nor more than ten days prior to the date set for the hearing." Following the hearing, the State Board of Vocational Education is required to determine the feasibility of the proposed school and in making such determination to give consideration to certain factors specifically mentioned in the act and: "Such other pertinent factors as may be developed at the hearing * * *." After the hearing, the State Board of Vocational Education may approve or disapprove the petition, or recommend modifications of the proposal. Upon final approval, if such is forthcoming, the proposition must be submitted to a vote of the electors of the area proposed to be included and majority vote governs.

The act requires a consideration of certain factors by the State Board of Vocational Education, but does not require a finding of any specific fact or facts. It is limited to a determination of the desirability or feasibility of the proposed school. The situation presented is indistinguishable from that found in the case of Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566, wherein it is stated: "Questions of public policy, convenience, and welfare, as related to the creation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, or any change in the boundaries thereof, are, in the first instance, of purely legislative cognizance and, when delegated to any public body having legislative power, any action in regard thereto does not come within the due process clause of either the state or federal Constitutions. * * * Under the situation here the duties of the county committee do not fall within the category to which the due process clause of either the state Constitution or the federal Constitution has application." But assuming for the purpose of discussion only, as in the Nickel case, that a hearing and notice are required, such notice and hearing are afforded before approval of the proposed

school by the State Board of Vocational Education and a majority vote of the qualified electors of the area included in the proposed school district is required to create such district. It may well be of interest to note that in the Area Vocational Technical Schools Act, the petition for establishment of such a school may only be initiated by the duly elected governing boards of counties or educational units, whereas in the Reorganization of School Districts Act, §§ 79-426.01 to 79-426.26, R. R. S. 1943, considered in the Nickel's case, the reorganization program is initiated by the "state committee," an appointive body. We conclude that the act is not in violation of "due process."

Appellants contend that the act is an unconstitutional delegation of the legislative power of taxation to a school board. The act provides for appointment of the members of the governing board of any new school organized under the act, authorizes such board to levy a tax of not to exceed 2 mills, and *to certify the same directly to the county treasurers for collection.*

Article VIII, section 1, Constitution of Nebraska, provides: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct." Article I, section 4, Constitution of Nebraska, requires the Legislature: "* * * to encourage schools and the means of instruction." Article VII, section 6, Constitution of Nebraska, states: "The legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." "A school district or other local school organization is a subordinate agency, subdivision or instrumentality of the state, performing the duties of the state in the conduct and maintenance of the public schools." 78 C. J. S., Schools and School Districts, § 24, p. 656. "School districts, like municipal corporations, obtain their franchises from the state and are created for public purposes." Eason v. Majors, 111 Neb. 288, 196

N. W. 133, 30 A. L. R. 1419. "The school district in Nebraska is a unit of local self-government, * * *." Schulz v. Dixon County, 134 Neb. 549, 279 N. W. 179, 119 A. L. R. 1294. A school district is a creation of the Legislature. Its purpose is to fulfill the constitutional duty placed upon the Legislature "to encourage schools and the means of instruction" and it is a governmental subdivision to which authority to levy taxes may properly be delegated under the Constitution.

Appellants insist that section 79-1445.23, R. R. S. 1943, as found in the 1965 legislative act, is unconstitutional in that it fails to specify the length of terms to be served by the individuals appointed to the governing board of the school and fails to provide the methods of election of their successors. In other words, it is alleged that the statute fails to specify when and how members shall be elected to the governing board to succeed the initially appointed members thereof. It is further said that in view of the unconstitutionality of this section, the governing board appointed in conformity with this section is an unconstitutionally created body and that its act in levying a tax for school purposes is therefore void. It is not necessary to determine at this time whether or not the provisions contained in this section which deal with the election of successors to the original members of the governing board are constitutional. The Legislature has plenary power and control over school districts and complete control over their organization, function, and finances. See, Galstan v. School Dist. of Omaha, 177 Neb. 319, 128 N. W. 2d 790; Ratigan v. Davis, 175 Neb. 416, 122 N. W. 2d 12. In the same manner the Legislature may determine and provide for the appointment or election of the governing bodies of school districts. It is within the power of the Legislature to provide for the administration of school districts by appointive rather than elective boards and to authorize such an appointive board to levy taxes. This is invariably done where new districts are created and

is a well-established form of procedure. The levying of taxes by such a body is not subject to challenge as "taxation without representation." This point was raised in the case of Ratigan v. Davis, *supra,* wherein the court said: "Maxims of government, not contained in the Constitution, are given a very restricted meaning." The court further stated: "It seems clear * * * since plaintiffs were represented in the Legislature that enacted the law, that they had the representation required by the maxim of no taxation without representation." It is apparent that the Legislature properly provided for the appointment of the original governing board of the school. This provision clearly does not constitute an unconstitutional delegation of the legislative power and cannot be affected by the proper or improper means adopted for selecting their successors. The fact remains that the appointive board was properly created and had the authority to levy the tax provided by statute for school purposes.

Finally, appellants contend that the act is unconstitutional in that it fails to provide for limitations, standards, or rules of guidance with reference to the power of the State Board of Vocational Education to promulgate rules and regulations. Section 79-1421, R. R. S. 1943, provides that the State Board of Education shall also be the State Board of Vocational Education. The rule-making authority of this body and the broad powers vested in the Legislature to delegate such rule-making power to this board are adequately specified in the case of School Dist. No. 8 v. State Board of Education, 176 Neb. 722, 127 N. W. 2d 458. We find this contention to be without merit.

The judgment of the trial court is affirmed.

AFFIRMED.

JACK ANDERSON, APPELLANT, V. KENNETH DAVIS, APPELLEE.
160 N. W. 2d 94

Filed June 21, 1968. No. 36900.

1. **Torts.** Where the reasonable character of the actor's conduct is in question, its utility is to be weighed against the magnitude of the risk which it involves.
2. **Torts: Weapons and Firearms.** A person using a firearm is required to exercise the closest attention and the most careful precautions.
3. **Trial: Evidence.** Production of a greater amount of evidence does not necessarily discharge the burden of persuasion.

Appeal from the district court for Nance County: C. THOMAS WHITE, Judge. Affirmed.

Wagoner & Grimminger, for appellant.

Philip T. Morgan, for appellee.

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

SMITH, J.

A jury found for defendant on plaintiff's claim of negligent injury during a pheasant hunt, and this appeal followed. The question is whether the district court should have directed the jury to return a verdict for plaintiff.

Plaintiff, defendant, defendant's two sons under age 12, and Floyd Hinrich went pheasant hunting in plaintiff's automobile near Fullerton, Nebraska, on October 24, 1965. From the southwest corner of a stubble field the hunters saw pheasants that were alighting on the field at approximately 7 a.m. The party quickly motored easterly a distance of approximately 200 yards to a place where plaintiff parked. There are several versions of what subsequently happened.

According to plaintiff, he parked his automobile due south of the place where the pheasants had alighted. The two boys, unarmed, and defendant were walking north while plaintiff was walking east. When plaintiff

reached a point 75 yards away from the automobile, he looked northwest and saw their positions. The boys, facing east, were standing south of defendant. Defendant, facing east, was holding his 12-gauge shotgun at chest level in a firing position. Plaintiff's version continues: "I proceeded a little ways farther to the edge of the * * * field * * *. At that point, I turned north. I heard the shot; looked to the northwest; I seen the bird coming my direction; and about that time felt a pellet, and I dropped to the ground."

Except members of this hunting party, no one with a firearm was present in the vicinity. Plaintiff, wearing a blanket-lined jacket, felt only one pellet. It penetrated his right eye. The penetration necessitated enucleation of the eye in January 1967.

According to defendant, plaintiff had parked his automobile southwest or south-southwest of the place where the pheasants had alighted. The pace of defendant away from the automobile had been slower than that of plaintiff, defendant intending to form a line. The two men and the boys subsequently formed a line moving north-northeast. The distance between defendant at the left end and plaintiff at the right end was 80 to 100 yards. The distance between defendant and the boys was 30 yards. In the line the boys flushed a pheasant in front of them. It got up, flew north, and as it turned east at an altitude "half as high as this ceiling," defendant fired one shot. The pheasant fell dead at a place 30 or 100 yards from defendant.

Hinrich's course from the automobile had been between east and east by south. The other four, according to Hinrich, formed a "pretty good line going northeast," with the boys in the middle. Hinrich did not see the pheasant until the boys picked it up at a place 50 yards northwest of the place where plaintiff had fallen.

At the scene the three men could not account for what had happened. They discussed the possibility that the pellet had ricocheted. It was impossible, plaintiff said,

for defendant to have been at fault. Later in the morning a conversation among the three men at the Fullerton airport was overheard by Gerald Nathan, a pilot who flew plaintiff to a hospital. Nathan testified: "* * * I do remember Jack (plaintiff) saying that it was an accident, it could have happened to anybody. * * * they were all discussing as to how it could have possibly happened."

"* * * where the reasonable character of the actor's conduct is in question, its utility is to be weighed against the magnitude of the risk which it involves. * * * The amount of attention and caution required varies with the magnitude of the harm likely to be done if care is not exercised, and with the utility of the act. * * * if the act involves a risk of death or serious bodily harm, and particularly if it is capable of causing such results to a number of persons, the highest attention and caution are required even if the act has a very considerable utility. Thus those who deal with firearms, explosives * * * are required to exercise the closest attention and the most careful precautions, not only in preparing for their use but in using them." Restatement, Torts 2d, § 298, Comment b, p. 69. See, also, Naegele v. Dollen, 158 Neb. 373, 63 N. W. 2d 165, 42 A. L. R. 2d 1099; Bianki v. Greater American Exposition, 3 Neb. (Unoff.) 656, 92 N. W. 615.

The evidence established the level terrain, defendant's unobstructed view of plaintiff, and the hunting line. The location of the target relative to the positions of the parties at the time of the firing was, however, in substantial dispute. A jury might reasonably find that defendant had not been negligent. Production of a greater amount of evidence does not necessarily discharge the burden of persuasion. Beavers v. Christensen, 176 Neb. 162, 125 N. W. 2d 551.

The judgment is affirmed.

AFFIRMED.

COUNTY OF KEARNEY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
160 N. W. 2d 179

Filed June 28, 1968. No. 36790.

1. **Taxation: Administrative Law.** A final order of the State Board of Equalization and Assessment is presumptively valid and will not be reversed except where it is shown that such order or action was illegal, arbitrary, capricious, or unreasonable.
2. ———: ———. A sales assessment ratio study consisting of a relatively small number of sales or sales nonrepresentative in character is not sufficient upon which to base a comparison of market or actual value and the value used for purposes of taxation.
3. ———: ———. The constitutional and statutory power of the State Board of Equalization and Assessment is to equalize values uniformly on a statewide basis and equalization as between counties within a district or intracounty equalization is not authorized.
4. **Appeal and Error.** A party may not complain of error which he has invited.
5. ———. A litigant who asks relief, which is granted, cannot appeal from such decree because the effect is different from that he anticipated.
6. **Taxation: Administrative Law.** The State Board of Equalization and Assessment may rely on and is entitled to act on the presumption that the abstracts of assessment returned by the various counties have conformed to the law.

Appeal from the State Board of Equalization and Assessment. Affirmed.

Jesse T. Adkins and William H. Meier, for appellant.

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

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

WHITE, C. J.

Kearney County, claiming in this appeal that it is entitled to a reduction of the valuations expressed in its own abstract of assessment furnished the State Board of

Equalization and Assessment in 1967, appeals from the order of the Board fixing the values, without change, as recited in its abstract of assessment. We affirm the order of the Board.

If the Board's action is arbitrary, based on the record before us, it will be reversed. County of Blaine v. State Board of Equalization & Assessment, 180 Neb. 471, 143 N. W. 2d 880; Fromkin v. State, 158 Neb. 377, 63 N. W. 2d 332. The main thrust of the county's argument is a familiar one. It argues that because the Tax Commissioner's sales assessment ratio shows a rural ratio of 31 percent for Kearney County and a group of surrounding counties an average of 24 percent, that it is entitled to a commensurate reduction of 23 percent. We first note that this argument fails to recognize that under our Constitution and law, equalization must be on a statewide basis and, as we have noted in previous cases, consideration must be given to all counties with an equal or higher sales assessment ratio. The argument that its ratio is sufficiently disproportionate to the statewide mean or median ratio as to be arbitrary or capricious is not presented. Furthermore, the county assessor, in asking that no change be made, testified that the Tax Commissioner's sales assessment ratio only represented 18 rural sales out of 3,500 parcels of rural property, and that its own sales assessment ratio computed on the basis of 1967 sales, showed a ratio of 26.71 percent. We point out further that there was evidence, State's exhibit 15, based on United States census figures that the values in Kearney County are the same as in adjoining Phelps County and lower than the values in at least six adjoining or nearby counties. And the State's exhibit 14 indicates that the average selling price per acre of rural property is higher than all but one of the adjacent counties. In the light of this alone it can hardly be said that it was arbitrary to conclude that the proposed Tax Commissioner's sales assessment ratio did not properly reflect a disparity sufficient to command a reduc-

tion, much less on a statewide equalization basis.

But the argument that the Board's action was arbitrary on the record must fail on deeper and more cogent grounds. The Tax Commissioner's recommendations, upon which the county now relies, were based, in the words of the Tax Commissioner himself, almost exclusively on the sales assessment ratio (State's exhibit 6). The members of the Board, after listening to expert testimony that this new and refined ratio was, in principle, accurate and valid, then heard the testimony of the assessors and other county officials from the 93 counties summoned to the hearing. In independent and vigorous attacks, although strikingly similar in analyses, these officials effectively undermined the validity of the proposed sales assessment ratio for any basis of statewide equalization. Not the least, if not the best, presentation was made by the Kearney County assessor, the only representative of the county appearing and testifying for it. The Tax Commissioner's office specifically commended the assessor and took special precautions to preserve his testimony. At the conclusion of all of the evidence from all of the counties, the Board found, with the Tax Commissioner (a constitutional member of the Board), concurring, both generally and as to Kearney County, as follows: "The present sales-assessment data are insufficient and inadequate to serve as a basis for valuation adjustments."

Supporting these findings were a multitude of factors found in the evidence. We generalize a few. The study was based on 1966 sales study alone. We called attention to the possible error in this method in Hanna v. State Board of Equalization & Assessment, 181 Neb. 725, 150 N. W. 2d 878. A consideration of the sales used showed that in many counties they constituted one percent or less or were clearly unrepresentative. See, County of Lincoln v. State Board of Equalization & Assessment, 181 Neb. 744, 150 N. W. 2d 884; Hanna v. State Board of Equalization & Assessment, *supra* (concurring

opinion); H/K Company v. Board of Equalization, 175 Neb. 268, 121 N. W. 2d 382. In many counties there was over-valuation in the small towns and a disparity between various classes of property. In some counties the undisputed testimony indicated that certain sales were not representative but no indication that revised figures had been used after proper objection had been made. Disparity and disruption of equalization it was alleged would arise by using the ratio when county appraisals were in the process of completion. Application of the ratio would disrupt, according to undisputed testimony, an already existing fair equalization between some adjoining counties. There was considerable testimony that many of the sales reflected an inflationary trend due to loss investments for tax purposes, or where individuals were adding to existing units and willing to pay an inflated price. Special markets for certain types of land in some counties also existed. Besides all of these factors there was much evidence as to factors called attention to in Carpenter v. State Board of Equalization & Assessment, 178 Neb. 611, 134 N. W. 2d 272. From all of this it is abundantly clear that there was ample, if not a preponderance, of evidence to support the Board's finding that there was no adequate basis before it to change the county's valuation.

The county next argues perimeter valuations and attaches exhibits to its brief in support of this argument. But there were no perimeter studies or exhibits in evidence or in the record in this case and they may not be considered. Moreover, the evidence shows that they were specifically rejected by the Tax Commissioner's office as a basis for equalization and their questionable character has been noted previously by this court in other cases.

The county argues that at a minimum this court should order equalization between adjoining counties, because of overlapping school districts, educational service units, and other subdivisions crossing county lines. As we

have seen, there is ample evidence to support the finding that there is no rational basis in the record for doing this. Further, there is no authority in the law or the Constitution for the Board or this Court to carve out special districts and equalize within them. The only power of the Board is to equalize on a statewide basis; district or intracounty equalization is not authorized. See, Carpenter v. State Board of Equalization & Assessment, *supra,* and cases cited therein. The confusion and inequality that would be created is apparent. There is no merit to this contention. And we fail to understand an argument that while an invalid ratio will not justify an increase, that by the operation of some magical factor not elucidated, that the same ratio is valid for accomplishing a decrease in county valuations.

We have labored at some length with the contentions of the county. Appearing of record in this case is a situation that would require affirmance of the Board's order in any event. The county assessor of Kearney County was the only witness for the county, and the only official appearing for it. At the end of his testimony he stated as follows: "In conclusion, I wish to thank you for allowing me to testify in behalf of Kearney County. I respectfully submit that a *no change* decision be granted Kearney County for reasons and evidence submitted in my testimony." (Emphasis supplied.)

There are no formal pleadings required or filed by the county before the Board. Without belaboring the theory of the law of judicial admissions, this position by the county should be considered binding, especially with relation to the reasonableness of the action of the Board. It was entitled to rely on this position, apparently did, and the county is in no proper legal position to now urge a change in position, especially in the context of statewide equalization. A party may not complain of error which he has invited. And one who asks relief, which is granted, cannot appeal from such decree because the effect is different from that anticipated by the party. A

party cannot be heard to complain of an error which he himself was instrumental in bringing about. Miller v. Dixon, 176 Neb. 659, 127 N. W. 2d 203; Crunk v. Glover, 167 Neb. 816, 95 N. W. 2d 135; Campbell v. Crone, 10 Neb. 571, 7 N. W. 334.

In conclusion it is necessary for the county to establish arbitrariness or unreasonableness of the order of the Board. This has not been done. The Board's order comes to this court with a presumption of validity and its reasonableness affirmatively appears when we consider the fundamental rule that the Board may rely on and is entitled to act on the presumption that the abstracts of assessment returned by the various counties have conformed to the law. County of Grant v. State Board of Equalization & Assessment, 158 Neb. 310, 63 N. W. 2d 459; Fromkin v. State, *supra;* Carpenter v. State Board of Equalization & Assessment, *supra.* When the officials who compiled and presented a basis for equalization to the Board rejected it themselves as a standard for equalization, we fail to see how this court is in a position to declare that it was arbitrary and unreasonable on the part of the Board to reject it, with the Tax Commissioner himself so voting, as a proper standard for performing its duty.

The order of the Board is not arbitrary, capricious, or unreasonable and therefore is affirmed.

AFFIRMED.

BOSLAUGH, J., dissenting.

ZENDA L. BAUDENDISTEL, APPELLANT, V. DONALD R. BAUDENDISTEL, APPELLEE.
159 N. W. 2d 827

Filed June 28, 1968. No. 36812.

1. **Divorce: Evidence.** When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of evidence, consider the fact that the trial

court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

2. ———: ———. Where the evidence in a divorce suit sustains a finding of cruelty on the part of one spouse toward the other, and is corroborated as required by law, the action of the district court in granting a divorce to the aggrieved spouse is proper and ordinarily will not be interfered with by this court on appeal.

3. **Divorce: Parent and Child.** The discretion of the lower court with respect to awarding or changing the custody and support of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

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

Kelly & Kelly, for appellant.

Wagoner & Grimminger, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

McCOWN, J.

The plaintiff, Zenda L. Baudendistel, filed an action for separate maintenance against the defendant, Donald R. Baudendistel, which petition was later amended to a petition for absolute divorce on the grounds of extreme cruelty. The defendant filed a cross-petition asking for an absolute divorce, also on the grounds of extreme cruelty. The court awarded a decree of absolute divorce to the defendant on his cross-petition; awarded custody of the three minor sons to the defendant with reasonable visitation rights to the plaintiff; and provided for a division of property. The plaintiff has appealed.

The plaintiff's grounds for divorce were primarily based on the excessive use of alcoholic liquor by the defendant. The defendant's grounds for divorce were primarily based on the misconduct of the plaintiff with other men. The evidence is in substantial dispute in

many respects and in direct conflict in others.

When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Stohlmann v. Stohlmann, 168 Neb. 401, 96 N. W. 2d 40.

Where the evidence in a divorce suit sustains a finding of cruelty on the part of one spouse toward the other, and is corroborated as required by law, the action of the district court in granting a divorce to the aggrieved spouse is proper and ordinarily will not be interfered with by this court on appeal. Neeman v. Neeman, *ante* p. 105, 158 N. W. 2d 236.

The discretion of the lower court with respect to awarding or changing the custody and support of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Jones v. Jones, *ante* p. 223, 159 N. W. 2d 544.

The decree of the district court is affirmed. The plaintiff is awarded the sum of $250 for the services of her attorney in this court.

AFFIRMED.

GODFREY M. HAZUKA AND HELEN HAZUKA, DOING BUSINESS AS HAZUKA'S FRIENDLY CORNER, APPELLEES AND CROSS-APPELLANTS, V. MARYLAND CASUALTY COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLEE.
160 N. W. 2d 174

Filed June 28, 1968. No. 36837.

1. **Insurance.** In a policy indemnifying insured for loss by burglary for "the felonious abstraction of insured property within a vault or safe * * * by a person making felonious entry into

such vault or safe * * *, when all doors thereof are duly closed and locked by all combination locks thereon, provided such entry shall be made by actual force and violence, of which force and violence there are visible marks made by tools, explosives, electricity or chemicals upon the exterior of (a) all of said doors of such vault or such safe and any vault containing the safe, if entry is made through such doors, * * *," such visible marks requirement was intended to be and is a limitation on liability and not an attempt to determine the character of evidence to show liability.

2. ———. Such limited liability provision is not ambiguous and there is no room for the rule that insurance contracts will be construed most favorably to the insured.

3. ———. To recover upon a policy of insurance of limited liability, insured must bring himself within its express provisions.

4. ———. Under a burglary insurance policy requiring entry into a safe to be made by actual force and violence of which there are visible marks, if actual force and violence were used in connection with opening a safe, even though the safe was not opened by such actual force and violence alone, the policy applies, provided actual force and violence were contributing factors to opening of the safe and without which the safe could not have been opened.

5. Insurance: Evidence. Markings, scratches, or other damages showing actual force and damage within the safe do not establish a case under the terms of a policy requiring visible marks of actual force and violence on the exterior walls of the safe.

6. ———: ———. Where policy of burglary insurance indemnified insured only for loss of property extracted from safe, if the safe had been duly locked by use of combination or time lock, and the safe was entered by force and violence, and, as result of force and violence, there was visible evidence on exterior doors or outer walls of the safe, of that force and violence, which either effected entry or contributed to effecting the entry, and the locked safe was opened in some manner without any marks being made on exterior of the safe, and money was stolen, the loss was not covered by the policy.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Reversed and remanded with directions to dismiss.

Herbert E. Story, for appellant.

Martin A. Cannon and Matthews, Kelley & Cannon, for appellees.

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

CARTER, J.

This is an action to recover a loss alleged to have occurred under the provisions of a safe burglary policy of insurance. The jury returned a verdict for the plaintiffs for $2,000, the maximum liability assumed by the insurer. The defendant has appealed.

The plaintiffs were the owners and operators of a tavern in Omaha known as Hazuka's Friendly Corner. During the early morning of August 11, 1964, the plaintiff, Godfrey Hazuka, testified that he closed the tavern, placed money in excess of $2,000 in a safe in his basement, threw the bolt to a closed position, and turned the combination on the door of the safe to lock it. The next morning, a hole was found in one of the brick walls of the building large enough for a man to enter. The door of the safe was open, a metal inside door had been pried open, and a large screw driver was found on the floor near the safe.

The safe was described as real heavy and about 2 feet in width on each side. The steel safe was incased in concrete which had been painted a dark color. The front of the steel safe was a round steel door about 6 inches in diameter. In the center was a combination lock common to safes of this kind. A heavy lever or handle protruded from the steel door which was used for the purpose of throwing the bolt in opening and closing the safe. Inside the heavy door of the safe was a second metal door that required two keys to open which were kept hidden in the tavern for use by the person closing up at night and opening the tavern in the morning.

Godfrey Hazuka testified there were some white marks on the concrete around the safe before the rob-

bery and more of them the morning after the robbery. There were no marks or fingerprints on the front of the steel safe, the combination lock was intact, the door was not sprung but the lever could not be pushed down to throw the bolt. The lock was broken on the outside basement door and on an upstairs door. Two policemen and a safe and time lock expert testified that they saw no marks or other evidence of force used in opening the outside door of the steel safe.

The defendant contends that the evidence will not sustain a finding of liability on its part under the terms of the policy. The policy provision provides: " 'Safe Burglary' means (1) the felonious abstraction of insured property from within a vault or safe described in the declarations and located within the premises by a person making felonious entry into such vault or such safe and any vault containing the safe, when all doors thereof are duly closed and locked by all combination locks thereon, provided such entry shall be made by actual force and violence, of which force and violence there are visible marks made by tools, explosives, electricity or chemicals upon the exterior of (a) all of said doors of such vault or such safe and any vault containing the safe, if entry is made through such doors, or (b) the top, bottom or walls of such vault or such safe and any vault containing the safe through which entry is made, if not made through such doors, or (2) the felonious abstraction of such safe from within the premises."

It will be noted that the language of the policy carefully limits the liability of the insurer to losses sustained through forcible or violent entry into the safe by the use of actual force and violence, of which force and violence there are visible marks made by tools, explosives, electricity, or chemicals upon the exterior doors of the safe if entry is made through such doors. The liability is further limited to those cases where all the doors of the safe were closed and locked by all combination locks thereon. It impliedly excludes burglary

or theft by anyone who knew the combination to the safe and entered the safe by the use of it alone whether he be someone connected with the business of the insured and legitimately in possession of the combination or a stranger who acquired it surreptitiously. The risk assumed was not against burglary or robbery in whatever manner accomplished. The tools, explosives, electricity, and chemicals referred to are those such as are employed by burglars in forcing an entrance into a safe. This is a limited liability policy and, to recover under it, the plaintiff must establish that his loss was suffered in the manner insured against. See Komroff v. Maryland Casualty Co., 105 Conn. 402, 135 A. 388, 54 A. L. R. 463.

The liability in the instant case is for all loss by burglary from a safe by a person who shall have made entry to it by the use of tools, explosives, electricity, or chemicals when the doors were previously closed and locked and when visible evidence on the safe shows that it was entered by force and violence. The policy does not protect against the burglary of a safe by the use of a key or combination whether or not legitimately obtained. The insurance is, in effect, a guaranty of the sufficiency of the safe against the tools, explosives, electricity, and chemicals of burglars. In other words, the visible marks on the outside of the safe must be such as would indicate that entry to the safe was made by actual force and violence.

In Swanson, Inc. v. Central Surety & Ins. Corp., 343 Mo. 350, 121 S. W. 2d 783, the court, in dealing with a similar provision in an insurance policy, said, as summarized in the first section of the syllabus: "In a policy indemnifying insured for loss by burglary * * * by any person or persons making feloniously entry into the premises by actual force and violence when such premises are not open for business, *'of which force and violence there shall be visible marks made upon such premises at the place of such entry by tools,'* etc., that *visible*

marks requirement was intended to be a limitation on liability and not an attempt to determine the character of evidence to show liability. * * * Such provision is not ambiguous and there is no room for the rule that insurance contracts will be construed most favorably to the insured." See, also, 10 Couch on Insurance (2d Ed.), § 42:129, p. 762.

In Prothro v. Commercial Cas. Ins. Co., 200 S. C. 432, 21 S. E. 2d 1, the court, in a similar case, said: "The policy properly interpreted must be held to mean that if actual force and violence is used in connection with the opening of a safe, then even though the safe was not opened by such actual force and violence alone, the policy provision applies, provided the actual force and violence were contributing factors to the opening of the safe, and without which the safe could not have been opened."

It is not every burglary which constitutes a basis for liability, but a burglary as defined in the contract of insurance. The language of the contract is not unclear or ambiguous and consequently does not require construction. It is therefore to be given effect in accordance with the ordinary and generally accepted meaning of its words. It is not a policy which insures against mysterious disappearance, nor does it cover manual operation of the safe's combination in the absence of visible evidence of the use of force thereon. It establishes liability under the insuring clause of the contract only for loss of property extracted from a safe which has been duly locked by use of a combination or time lock, has been entered by force and violence, and as a result of the force and violence there is visible evidence upon the exterior doors or outer walls of the safe of that force and violence which either effected the entry or contributed to effecting the entry. Markings or scratches showing force and violence within the safe are not included within the terms of the insuring clause of the policy, but only those which appear upon the exterior.

Inglis v. General Casualty Co., 211 Or. 116, 316 P. 2d 546. See, also, 10 Couch on Insurance (2d Ed.), §§ 42:130 and 42:131, pp. 762 and 763. In a case very similar on its facts, this court denied a recovery as a matter of law where it was shown that the marks on the safe did not contribute to the forcible entry of the safe. Grayson v. Maryland Casualty Co., 100 Neb. 354, 160 N. W. 85.

In the instant case, the only visible marks on the exterior of the safe were some white marks on the concrete which encased the safe. As near as can be determined from the record, they were the result of ordinary chipping or wearing through the paint which had been applied to the concrete. They did not contribute to the means of entry to the safe and there is no evidence that they did. Two policemen, who examined the exterior of the safe, found no marks indicating a forcible entry to the safe. A safe and time lock expert testified that he found no exterior markings indicating a forcible entry to the safe. The combination lock was neither marked nor damaged. It is true that the inner doors of the safe were pried open and the bolt or bolts locking the safe were bent and had to be repaired, but they were a part of the internal operation of the safe and do not come within the insuring clause of the policy. As we have stated, the policy is one of limited liability. It does not protect against entry to the safe by one who knew the combination to the safe however obtained. It did not, for obvious reasons, protect against "inside" jobs or carelessness in permitting the combination to the safe to become known to others. Past experience has been such that the insurers will not assume such risks. As we said in Grayson v. Maryland Casualty Co., *supra*, the evidence is unsatisfactory and it does not sustain the verdict under the terms of the policy.

The trial court erred in failing to sustain the defendant's motion for a directed verdict at the close of the evidence. The judgment of the district court is reversed

and the cause remanded with directions to sustain defendant's motion for a directed verdict and to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

DORMAN K. IMUS, APPELLANT, V. BEAD MOUNTAIN RANCH, INC., A CORPORATION, ET AL., APPELLEES.
160 N. W. 2d 171

Filed June 28, 1968. No. 36859.

1. **Statutes.** The fundamental principle in construing statutes is to ascertain from their language the purpose and intent of the legislative body.
2. **Workmen's Compensation.** Under section 48-106, R. R. S. 1943, an employer of farm or ranch labor, by the act of obtaining workmen's compensation insurance, becomes an employer within the meaning of the section and subject to the liabilities imposed by the Workmen's Compensation Act.
3. ———. An employer of farm or ranch labor, being excepted from the Workmen's Compensation Act, who elects to subject himself to it becomes subject to all of the provisions of the act to the same extent as an employer who is not excepted from it.

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

Dwight Elliott, Holtorf, Hansen & Kortum, and Leland K. Kovarik, for appellant.

Lovell & Raymond, for appellees.

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

WHITE, C. J.

This is a workmen's compensation case. The employer rancher, exempt from the compulsory provisions of the Workmen's Compensation Act, insured voluntarily and represented coverage to the plaintiff employee at the time of employment. Subsequently, the

employer inadvertently permitted the policy to lapse, and a few days after lapse reinsured. In the gap period plaintiff was injured. The trial court denied recovery, holding that the employer was not bound by the election provisions of the act. We reverse the judgment.

The problem appears quite clearly from a reading of the two pertinent provisions of the Workmen's Compensation Act: "(2) The following are declared not to be hazardous occupations and not within the provisions of this act: Employers of household domestic servants and employers of farm or ranch laborers, except as hereinafter provided; Provided, that any such employers may elect to provide and pay compensation for accidental injuries sustained by any of his employees *by insuring and keeping insured* his employees in some corporation, association, or organization authorized and licensed to transact the business of workmen's compensation insurance in this state. * * * (3) The procuring by any such employer of such a policy of insurance, referred to in subsection (2) of this section, which is in full force and effect at the time of an accident to any of his employees, shall be conclusive proof of such employer's and his employees' election to be bound by sections 48-109 to 48-147, to all intents and purposes as if they had not been specifically excluded by the terms of this section; Provided, that any employee of such employer shall have the right, prior to the accident sustained by him, to elect not to accept or be bound by the provisions of this act, the procedure being the same as indicated in section 48-112." (Emphasis supplied.) § 48-106, R. R. S. 1943. "In the occupations described in section 48-106 all contracts of employment shall be presumed to have been made with reference, and subject to the provisions of sections 48-109 to 48-147, unless otherwise expressly stated in the contract, *or unless written or printed notice has been given by either party to the other,* as hereinafter provided, *that he does not accept* the provisions of said sections. *Every such em-*

ployer and every employee is presumed *to accept and come under said sections,* unless prior to the accident he shall signify his election not to accept or be bound by the provisions of said sections. This election shall be by notice as follows: (a) The *employer* shall post and thereafter keep continuously posted in a conspicuous place about the place or places *where his workmen* are employed *a written or printed notice* of his election *not to be bound by said sections,* and shall file a duplicate thereof with the compensation court; (b) the employee shall give written or printed notice to the employer of his election not to be bound by said sections, and shall file a duplicate with proof of service attached thereto with the compensation court." (Emphasis supplied.) § 48-112, R. R. S. 1943.

The defendant employer, giving a narrow semantical interpretation of the words "by insuring and keeping insured" and other clauses of section 48-106, R. R. S. 1943, ingeniously argues a result which in effect is that coverage is a mere gratuity on his part, and that there is an automatic termination of coverage, without notice to the employee or the Compensation Court, if he cancels, fails to pay his premium, or otherwise permits the policy to lapse.

The fundamental rule in construing statutes is that they shall be construed in pari materia and from their language as a whole to determine the intent of the Legislature. All subordinate rules are mere aids in reaching this fundamental determination. By its terms (especially the italicized portions of section 48-112, R. R. S. 1943), the Legislature intended, both for the protection of the employer and employee, that, once subject to the provisions of the act, the other party should be given notice of withdrawal and the consequent change of his substantial rights in case of injury and disability. The rights of the employer and employee are interrelated. Whether coverage originally is mandatory or optional, it is only reasonable that the obvious statutory purpose

was to notify the parties in the event those rights are changed. We cannot perceive an intention that the optionally covered employee shall have any less rights than others, and it is no answer to such discrimination that the employer did not need to extend coverage in the first instance. Moreover, the election to insure is not a mere gratuity, as there are benefits to the employer from coverage such as incentive to employment, relief from common law tort liability, etc., which, in turn, substantially affect the employee as is recognized specifically in his right to elect not to be covered (subsection (3), section 48-106, R. R. S. 1943). Manifestly, in the present case, the representation of coverage to the employee and the procuring of insurance constituted an election to be bound by all of the provisions of sections 48-109 to 48-147, as sections 48-106 (3) and 48-112, R. R. S. 1943, specifically provide for. An election "sub silentio" without notice to the employee is contrary to the expressed purpose and policy of the Workmen's Compensation Act and the statutes therein, as well as the reasonable intendment of the precise language expressed therein.

We further point out in this case that the employer at all times intended coverage, as his own testimony is that as soon as he discovered the lapse, he immediately reinsured. Defendant's interpretation would impute a sub silentio election or choice without notice which, in fact, never occurred. The statutory language, (section 48-106(3), R. R. S. 1943) providing that coverage at the time of the accident shall be "conclusive proof" of election, does not in any way negate proof of an election to be bound otherwise.

The problem involved in this case has been passed on in principle in the case of Keith v. Wilson, 165 Neb. 58, 84 N. W. 2d 192 (1957), wherein we said: "By Kiewit's *act of obtaining workmen's compensation insurance* he became an employer within the meaning of the section and subject to the liabilities imposed by the Workmen's

Compensation Act. All of this becomes clear from a reading of the statute itself. This cannot well be disputed." (Emphasis supplied.)

We therefore hold, as we did in Keith v. Wilson, *supra,* that an employer of farm or ranch labor, being excepted from the Workmen's Compensation Act, who elects to subject himself to it becomes subject to *all* of the provisions of the act to the same extent as an employer who is not excepted from it.

In the light of our interpretation and holding herein, it becomes unnecessary to discuss the various other arguments and contentions of the parties.

As to appellee, Employers Mutual Casualty Company, no service of process was ever secured against it and the judgment of dismissal as to it is affirmed.

The judgment of the district court is reversed and the cause remanded for a determination of liability on the merits.

REVERSED AND REMANDED.

BOSLAUGH, J., concurring.

I concur in the decision in this case upon the ground that the record shows a continuing election by the employer to be subject to the Workmen's Compensation Act.

CARTER, J., joins in this concurrence.

ROSCOE LINCOLN, APPELLANT, V. MAURICE SIGLER, APPELLEE.

160 N. W. 2d 87

Filed June 28, 1968. No. 36893.

1. **Criminal Law: Pardons and Paroles.** Commutation of punishment is substitution of a milder punishment known to the law for the one inflicted by the court.
2. ———: ———. The Board of Pardons possesses authority in extending clemency to grant a commutation of punishment for escape from custody.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Roscoe Lincoln, pro se.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

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

SMITH, J.

Petitioner, who had gained a commutation of a consecutive term of imprisonment to a concurrent term, completed the requirements of the commutative order. On the ground that those facts discharged him from further liability under the first sentence, he petitioned for a writ of habeas corpus. The district court disallowed the writ without an adversary hearing, and petitioner has appealed.

Petitioner had received two sentences, a 15-year term imposed in 1951 and a consecutive term of 1 year imposed in 1960 for escape from custody. On March 13, 1963, the Board of Pardons ordered that the 1-year term run concurrently with the 15-year term. In October 1963, the board discharged petitioner from further liability under the second sentence, and it released him on parole from confinement under the first sentence. Petitioner was subsequently returned to custody.

Without considering possible alternative grounds, we put our decision on one ground. Petitioner asserts that the change from the consecutive to the concurrent term necessarily violated this statute: "The Board of Pardons shall in no case assume to act as a court of review to pass upon the correctness, regularity or legality of the proceedings of the trial court, but shall confine itself to a hearing and consideration of those matters only which properly bear on the propriety of extending executive clemency." § 29-2612, R. R. S. 1943. Prior to passage of the statute in 1921, judicial views on the sub-

ject were expressed in Hubbard v. State, 72 Neb. 62, 100 N. W. 153, and Evers v. State, 87 Neb. 721, 127 N. W. 1066.

Commutation of punishment is substitution of a milder punishment known to the law for the one inflicted by the court. See, Whittington v. Stevens, 221 Miss. 598, 73 So. 2d 137; Black's Law Dictionary (4th Ed.), "commutation," p. 351. By common understanding a change from a consecutive term to a concurrent term is a commutation. See, In re Hall, 34 Neb. 206, 51 N. W. 750; Duehay v. Thompson, 223 F. 305. The Board of Pardons possesses authority in extending clemency to grant a commutation of punishment for escape from custody. See, Art. IV, § 13, Constitution of Nebraska; §§ 29-2604, 29-2605, 29-2606 (1), 29-2612, and 29-2636, R. R. S. 1943. The board in this case acted well within its authority.

The judgment is affirmed.

AFFIRMED.

HUGH J. BEATY ET AL., APPELLANTS, V. E. R. BAKER ET AL., APPELLEES.
160 N. W. 2d 199

Filed June 28, 1968. No. 36898.

1. **Municipal Corporations: Nuisances.** Section 16-240, R. R. S. 1943, authorizes a city of the first class to regulate by ordinance and to make and prescribe regulations for the construction and location of stables, barns, and other places where offensive matter is kept or is likely to accumulate within the city's corporate limits.
2. ———: ———. Municipal power extends to the regulation and prohibition of the keeping of livestock where the regulation or prohibition is reasonable and related to the public health, safety, or welfare.
3. ———: ———. A municipality has the power to regulate the keeping of livestock in the neighborhood of dwelling houses and other inhabited buildings.
4. ———: ———. A regulation fixing the distance within which

livestock may be kept in the neighborhood of dwelling houses is a proper exercise of the police power and does not necessarily await the exigencies of an existing nuisance.

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

Bayard T. Clark, Paul P. Chaney, and Richard L. Edgerton, for appellants.

Archibald J. Weaver, for appellees.

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

WHITE, C. J.

This action seeks to declare invalid, void, and unconstitutional an ordinance of the City of Falls City which declares: "No person shall stable or pasture any horse, mule, cattle, sheep or goats within three hundred feet of any residence located within the City of Falls City." The district court held that the ordinance was valid and constitutional. We affirm the judgment of the district court.

The plaintiffs generally attack the ordinance as being an unlawful exercise of the police power in that it is an unwarranted infringement upon private rights and is an unreasonable classification for the purposes of regulation and control. Falls City is a city of the first class, and the statute, section 16-240, R. R. S. 1943, specifically authorizes the enactment of such an ordinance, stating: "A city of the first class by ordinance may make regulations to make secure the general health of the city, * * * make and prescribe regulations for the construction, *location,* and keeping in order of all slaughterhouses, * * * sheds, stables, barns, dairies, or other places where offensive matter is kept, or is likely to accumulate, within the corporate limits, * * *." (Emphasis supplied.)

The ordinance prohibits the keeping of the classes of livestock enumerated within 300 feet of a residence.

Does such a classification bear a reasonable relation to the public health, safety, or welfare? The courts generally, and almost without exception, have upheld similar distance requirements as being related to the public health and welfare. In 7 McQuillin, Municipal Corporations (3d Ed.), § 24.291, p. 141, it is stated: "Municipal power extends to the regulation and prohibition of the keeping of livestock where the regulation or prohibition is reasonable and related to the public health, safety, or welfare. This is true with respect to cattle, goats, kids, hogs, sheep, horses and other livestock and animals, including poultry and bees. * * * Ordinances excluding from restricted areas the keeping of livestock are usually upheld. This is true of zoning ordinances. Regulations relating to the keeping of livestock sometimes prohibit such keeping within certain distances of dwelling houses."

The rule is stated as follows in an annotation in 32 A. L. R. at page 1372: "It is generally held that a municipality has power to regulate the keeping of live stock in the neighborhood of dwelling houses and other inhabited buildings, * * *."

Specific cases upholding ordinances requiring minimum distances that livestock may be kept in the neighborhood of dwelling houses are: In re Application of Mathews, 191 Cal. 35, 214 P. 981; State v. Stowe, 190 N. C. 79, 128 S. E. 481, 40 A. L. R. 559; Mitchell v. City of Roswell, 45 N. M. 92, 111 P. 2d 41; Ex Parte Naylor, 157 Tex. Cr. 355, 249 S. W. 2d 607; State v. Mueller, 220 Wis. 435, 265 N. W. 103; City of Corsicana v. Wilson (Tex. Civ. App.), 249 S. W. 2d 290.

We observe that such classifications and regulations pursuant thereto have been sustained by the courts for many years, and the considerations of public health and welfare apply with increased force under modern congested urban living conditions. And the argument as to economic necessity must give way to the public health and welfare.

The ordinance is presumptively valid and is constitutional on its face. Moreover, in this case there is specific evidence in the record by a veterinarian that the keeping of domestic animals within the close confines of city living is a definite health hazard, and residents testified that they are plagued by odors, flies, and rats from a neighboring stable. The plaintiffs' medical witness testified on cross-examination that stables could be breeding places for flies and rats.

What was said in Union Pacific R. R. Co. v. State, 88 Neb. 247, 129 N. W. 290, where this court upheld an ordinance regulating the location of a stockyards, is applicable here: "Apparently the ordinance is on its face a sanitary measure adopted by the city for the purpose of promoting public health, comfort and welfare. The exercise of the police power for such a purpose is an essential function of municipal government and does not necessarily await the exigencies of an existing nuisance. When opportunely and wisely exercised, the police power generally prevents nuisances."

The ordinance is in all respects a valid and constitutional exercise of properly delegated police power to the city. The judgment of the district court is correct and is affirmed.

AFFIRMED.

MAUDENE HARMON, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.

160 N. W. 2d 189

Filed June 28, 1968. No. 36918.

1. **Workmen's Compensation.** An "accident" within the meaning of the Workmen's Compensation Act, as amended, is an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. § 48-151, R. S. Supp., 1967.
2. ———. All acts reasonably necessary or incident to the per-

formance of the work are included within the scope of the employment.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Affirmed.

Allen L. Morrow and Theodore J. Clements, for appellant.

D. M. Murphy, Jr., and Gray & Brumbaugh, for appellee.

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

BOSLAUGH, J.

This is a proceeding under the Nebraska Workmen's Compensation Act. The plaintiff was injured while employed as a swimming instructor by the defendant, City of Omaha, Nebraska.

The plaintiff arrived at the Miller Park Pool, her place of employment, at about 8:30 a.m. on August 12, 1966. She entered the bath house for the purpose of changing from her street clothes in the central part of the building. While walking through a hallway leading to the central part of the building she came upon nine wire clothing baskets scattered about the floor of the hallway. She stopped to pick up the baskets so that she would not have to "kick them out of the way or stumble over them." She stacked the baskets and picked up five of them with her left hand and placed them on a counter. As she started to bend over to pick up the other four baskets, her left foot "started to slip." She "quickly jerked up" and experienced an intense pain in her back. She was then taken to a hospital where her injury was found to be a herniated intervertebral disk.

After a hearing before a single judge of the compensation court, the action was dismissed. Upon rehearing before the full compensation court, the plaintiff

recovered compensation for temporary total disability, a 20 percent permanent partial disability to her body as a whole, and medical and hospital expenses, one judge dissenting. Upon appeal to the district court the award of the compensation court was affirmed and the plaintiff was allowed $250 attorney's fees. The defendant has appealed.

The defendant contends that the evidence does not show that the plaintiff was injured as a result of an accident arising out of and in the course of her employment as required by the compensation act.

The term "accident" is now defined in the compensation act to be "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 act further provides that the term "injury" shall not be construed to include disability due to natural causes, "nor to mean an injury, disability or death that is the result of a natural progression of any preexisting condition." § 48-151, R. S. Supp., 1967.

The act formerly defined an accident as an unexpected or unforeseen *event* happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. The substitution of the word *injury* for *event* has eliminated the necessity of proof of an event external to the body as a cause of injury. The effect of the amendment is to liberalize the act and bring it into conformity with the compensation laws of many other states. See, Gradwohl, Workmen's Compensation: An Analysis of Nebraska's Revised "Accident" Requirement, 43 N. L. R. p. 27; 4 Schneider, Workmen's Compensation (Perm. Ed.), § 1240, p. 384; 1A Larson, Workmen's Compensation Law, § 38.20, p. 521; Horovitz, Workmen's Compensation: Half Century of Judicial Developments, 41 N. L. R. p. 1.

The defendant contends that the plaintiff's injury did not arise out of her employment because it was not her

duty to clean up the bathhouse. The defendant argues that an employer is not liable for an injury caused by an act which is not within the contemplation of the parties to the employment contract.

All acts reasonably necessary or incident to the performance of the work are included within the scope of the employment. Appleby v. Great Western Sugar Co., Inc., 176 Neb. 102, 125 N. W. 2d 103; Uzendoski v. City of Fullerton, 177 Neb. 779, 131 N. W. 2d 193. The plaintiff was violating no rule of her employer; and although it was not her express duty to pick up clothing baskets which were on the floor, it was an act reasonably incident to her employment.

The evidence sustains a finding that the plaintiff sustained an injury arising out of her employment which was an accident within the meaning of the compensation law as now amended. The judgment of the district court is affirmed. The plaintiff is allowed the sum of $500 as attorney's fees for the proceedings in this court.

AFFIRMED.

WESTHAVEN PROPERTIES, INC., A NEBRASKA CORPORATION, APPELLEE, V. JURGEN C. PAHL, APPELLANT.

160 N. W. 2d 168

Filed July 5, 1968. No. 36793.

1. **Reformation of Instruments: Equity.** To decree reformation of a written instrument for mistake, equity insists that the parties shall have come to a complete mutual understanding of all the essential terms of their bargain.
2. **Reformation of Instruments: Evidence.** In order to warrant reformation of a written instrument for mistake, the evidence must be clear and convincing.
3. **Damages: Property.** The measure of damages for breach of covenants for title to part of a tract is (1) reasonable expenses and (2) such proportion of the consideration as the value of the part lost bears to the total value of the tract.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Viren, Emmert & Epstein and Joseph L. Leahy, Jr., for appellant.

Lane, Baird, Pedersen & Haggart, for appellee.

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

SMITH, J.

A contract for a deed between defendant seller and plaintiff's assignor ambiguously described the land. In performing the contract defendant delivered a warranty deed to his tract and also to .61 acre that he did not own. In this suit he sought reformation of the deed for mistake. Plaintiff claimed damages for breach of covenants for title to the .61 acre. After a trial judgment went for plaintiff on both claims, and defendant has appealed. He contends that on de novo review we should (1) reform the deed and (2) find for him on the issue of damages.

Defendant owned a tract of land lying north of Spring Branch Creek in the east half of the northeast quarter of Section 34, Township 15 North, Range 12 East of the 6th P. M., Douglas County, Nebraska. The .61 acre in question lay north of Papio Creek and immediately south of defendant's tract and Spring Branch Creek.

On March 26, 1963, defendant received a written offer from plaintiff's assignor to purchase "40.5 acres * * * lying north of Papio Creek * * *." He did not accept. On the same day he and his wife made a counteroffer to sell: "That part * * * devised to * * * (him) in the * * * Will * * * of Hans Pahl, deceased, containing 40.5 acres, more or less, which * * * is not represented or warranted * * * to be accurate, except that Sellers warrant that it contains no less than 35 acres and contains all property owned by Sellers in said NE¼ * * *." The devise, which does not appear in the agreement, reads:

"* * * that portion * * * described as the South * * * 42 acres North of the creek, being approximately 40.5 acres * * *." Plaintiff's assignor accepted the counter-offer which was unlike the offer in description, price, and other respects.

A certificate to defendant's abstract of title on April 2, 1963, described land "lying North of Creek." Papio Creek, but not Spring Branch Creek, then appeared on plats in the abstract. An entry of a warranty deed dated in 1870 contained the phrases "a spring branch; * * * its intersection with the big Papillion Creek"; and "being the Southerly portion of the East half of the North East quarter * * *." The abstractor had noted, "Shown for reference only." The description included the .61 acre, but the abstract on April 2, 1963, traced no chain of title to the grantee of the 1870 deed. The abstract in that condition was submitted to buyer's counsel, John W. Delehant, Jr., for examination.

On April 9, 1963, Delehant wrote an opinion of title to land "lying North of Papio Creek." Noting ambiguity in the Pahl devise, he suggested that residuary beneficiaries under the will execute quit claims. Upon inquiry by defendant's counsel, Einar Viren, Delehant furnished a land description for use in preparation of the quit claims. It designated a tract "lying north of Papio Creek." The warranty deed in question was drafted in identical language by Viren, who had been counsel in the probate of the Pahl will in 1956. The deed included the .61 acre.

The transaction was closed on May 1, 1963. Several days later, Delehant learned that the Y.W.C.A. was claiming record title to the .61 acre. On May 8 he notified Viren of the claim. Defendant took no action, and in September 1964, plaintiff brought a quiet title suit against the Y.W.C.A., the Pahls, and others. In November, Viren, as counsel for the present defendant, filed an answer that alleged title by the devise and adverse possession until the conveyance to plaintiff. In Sep-

tember 1965, immediately prior to trial of the quiet title suit, defendant superseded the allegations with an amended answer. The court quieted the title of the Y.W.C.A. to the .61 acre against the claims of the present parties.

The tract described in the warranty deed was surveyed in August 1963, months after the closing. The acreage was 36.48. Without the .61 acre the area, 35.87 acres, exceeded the minimum 35 acres called for in the contract. The parties had negotiated without locating important boundaries on the ground. The "reference" deed of 1870 in the abstract was insufficient for a careful title examiner to doubt marketability. The phrase "North of the creek" was ambiguous. By subsequent conduct the parties reasonably interpreted the agreement to include the .61 acre. The evidence fails to persuade us that either party had superior knowledge at the closing.

In his argument for reformation defendant states that plaintiff acquired more land than the 35 acres it bargained for. The statement is correct in a sense, but it does not explain away a further agreement by delivery of the deed. The original agreement was ambiguous in distributing risks of title. Defendant assumed the risk of title only to 35 acres and that with undescribed boundaries. He has requested reformation of the deed to convey 35.87 acres with covenants for title to the whole. He has been willing to take the risk of title to 35.87 acres instead of 36.48 acres. The evidence is neither clear nor convincing that the parties intended to exclude the .61 acre or any other definite part of the sale tract from the covenants. Even if defendant mistakenly assumed the risk, no reference point exists for correction. Equity insists "that the parties shall have come to a complete mutual understanding of all the essential terms of their bargain, for, otherwise, there would be no standard by which the writing could be reformed." 5 Williston on Contracts (Rev. Ed.), § 1548, p. 4339.

See, also, Slobodisky v. Phenix Ins. Co., 52 Neb. 395, 72 N. W. 483. In order to warrant reformation of a written instrument for mistake, the evidence must be clear and convincing. Koepplin v. Pfeister Hybrid Co., 179 Neb. 423, 138 N. W. 2d 637. We are not persuaded that the deed to plaintiff should be reformed.

The decree awarded damages of $15,150 with interest from May 1, 1963, for the .61 acre to which title failed. The only expert witness to testify on the subject of value was William L. Otis, a qualified real estate appraiser. Having inspected the 36.48 acres, he accepted the sale price of $145,000 as the fair market value. The .61 acre had a frontage on Eighty-fourth Street of 250 feet or approximately 24 percent of the total frontage of the 36.48 acres. It was zoned first commercial. The Y.W.C.A. had sold it together with a disconnected parcel of 3 acres to the rear for $15,150. The latter parcel was worth little because it had no street frontage. Otis estimated the fair market value of the .61 acre at $22,500.

The measure of damages for breach of covenants for title to part of a tract is (1) reasonable expenses and (2) such proportion of the consideration as the value of the part lost bears to the total value of the tract. Cf. Campbell v. Gallentine, 115 Neb. 789, 215 N. W. 111, 61 A. L. R. 1; Pauley v. Knouse, 109 Neb. 716, 192 N. W. 195. See, also, McGinley v. Martin, 275 F. 267; Holcomb v. McClure, 211 Miss. 849, 52 So. 922; 5 Williston on Contracts (Rev. Ed.), § 1402, p. 3909; Rawle on Covenants for Title (5th Ed.), § 187, p. 265. Plaintiff is entitled to recover the damages awarded by the district court.

Assignments of error relating to other parts of the judgment are not well taken. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARVIN DILLWOOD, APPELLANT.
160 N. W. 2d 195

Filed July 5, 1968. No. 36817.

1. **Criminal Law: Searches and Seizures.** In evaluation of the reasonableness of a search or seizure without warrant it is imperative that the facts be judged against an objective standard: Would the facts available to the officer at the moment of the search or the seizure warrant a man of reasonable caution in the belief that the action taken was appropriate?
2. ———: ———. Objects falling in the plain view of a peace officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.

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

A. Q. Wolf and Fred J. Montag, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

SMITH, J.

In prosecution of defendant for burglary of a fur store, furs taken from defendant's Ford automobile were admitted into evidence. A jury found him guilty, and he has appealed. He contends that no probable cause existed for the warrantless search and that the search was incident to an illegal arrest. For those reasons, he says, the district court should have suppressed the furs from evidence.

Aulabaugh Fur Store, 2951 Farnam Street, Omaha, Nebraska, was located at the southwest corner of the intersection of Farnam Street with Park Avenue. Employees of the store placed three furs in a front display window during the morning of Saturday, February 11, 1967. Tape attached to the window, which faced north toward Farnam Street and east toward Park Avenue, formed part of the "ADT" alarm system.

On Monday, February 13, 1967, detective Dragoun, an Omaha officer, was cruising alone in an unmarked Plymouth automobile on Park Avenue. An ADT alarm at 2:40 a.m. sent him from a point only 1½ blocks south of Farnam Street to the fur store. Without a stop he noticed broken glass of the display window and part of a mannequin in front. Seeing no vehicular traffic or pedestrian in the vicinity, Dragoun drove northward across Farnam Street and up a hill toward Douglas Street. While he was climbing the hill, he saw an automobile with round taillights a block ahead. It was moving northward on Park Avenue at the top of a hill between Douglas Street and Dodge Street. The grades of the two hills were 20 to 25 percent.

Dragoun accelerated in pursuit, but when he reached the top of the second hill, the automobile with round taillights was out of sight. At Dodge Street, which was one-way westward, he turned left toward Thirtieth Street and Turner Boulevard. As he crossed Thirtieth Street, he saw only two automobiles. One, located west of the boulevard, did not have round taillights. The other had round taillights similar to those on the automobile he was pursuing. It was moving northward on Thirtieth Street. Dragoun immediately returned via the boulevard to Thirtieth Street where he again saw the automobile. It appeared to accelerate. Dragoun followed it northward to Cass Street, then eastward to Twenty-eighth Avenue, and then northward to California Street which was protected by stop signs on the avenue. The chase ended there.

The ADT alarm had also been received by detective Chamberlin. From his location on Thirtieth Street approximately 16 blocks north of the fur store, he had immediately proceeded southward in an unmarked Plymouth automobile. In radio communication with Dragoun, Chamberlin drove 8 blocks to California Street where he turned eastward. Nearing Twenty-eighth Avenue, he identified Dragoun's Plymouth which was

following a Ford automobile northward toward California Street. When the Ford stopped at the stop sign, the detectives parked so as to block the avenue. The occupants of the Ford were defendant driver and one other man.

Defendant exited on the run. At approximately the same time the detectives jumped out with pistols drawn. Defendant ran westward 20 feet where he stopped upon the detectives' threats to shoot him. While Dragoun was covering the passenger, who had stepped out, Chamberlin with pistol in hand led defendant by the arm back to the Ford. Patting defendant's clothing revealed a loaded revolver in his waistline, and he was placed under arrest. Chamberlin then looked through the open window of the Ford. Plainly visible on the back seat were 3 furs that proved to be those taken from the display window. Dragoun without entry had seen the furs through an open door prior to the end of defendant's flight.

We apply the fundamental criteria of constitutional search established by the United States Supreme Court. Ker v. California, 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726. An officer with probable cause to believe that an automobile is carrying stolen property ordinarily possesses authority for a warrantless search of the automobile. See, Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A. L. R. 790; Rios v. United States, 364 U. S. 253, 80 S. Ct. 1431, 4 L. Ed. 2d 1688. The standard for determining probable cause for search and seizure is practical and not technical. Beck v. Ohio, 379 U. S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142.

"The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is

imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Terry v. Ohio, — U. S. —, 88 S. Ct. 1868, 20 L. Ed. 2d —.

With knowledge of the alarm, the broken window, and the mannequin's location Dragoun would have been naive to believe that an accident had occurred. Stopping the Ford precipitated kaleidoscopic events: The hasty exits, the drawn pistols, and short flight. Dragoun and Chamberlin, wearing plain clothes and driving unmarked automobiles, initially had no opportunity to announce their authority or purpose. Their conduct and defendant's conduct up to some point in the flight were in part independent of each other. It was almost impossible for the drawn pistols in particular to be either a cause or a consequence of defendant's decision to flee. The commands to halt, reinforced by threats to shoot, were strong measures; yet they were necessary for the detectives to freeze the situation. The forcible stops of the Ford and defendant were reasonable.

Defendant argues that Chamberlin's taking him by the arm to return to the Ford constituted an arrest. We think not. A similar argument was made in Terry v. Ohio, *supra*: "Petitioner * * * does not say that an officer is always unjustified in searching a suspect to discover weapons. Rather, he says it is unreasonable for the policeman to take that step until such time as the situation evolves to a point where there is probable cause to make an arrest." Petitioner's point of view was rejected:

"There are two weaknesses in this line of reasoning, however. First, it fails to take account of traditional limitations upon the scope of searches, and thus recognizes no distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons. * * *

"A second, and related, objection to petitioner's argument is that it assumes that the law of arrest has already worked out the balance between the particular interests involved here—the neutralization of danger to the policeman in the investigative circumstance and the sanctity of the individual. But this is not so. An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. * * * It does not follow that because an officer may lawfully arrest a person only where he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest."

Visual observation without physical entry into the Ford led to seizure of the furs. The detectives had a right to stand next to the Ford, and the furs were in plain view. The seizure was permissible under the general rule that has been recently applied to random observation. "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." Harris v. United States, 390 U. S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067. See, also, State v. Carpenter, 181 Neb. 639, 150 N. W. 2d 129; State v. Huffman, 181 Neb. 356, 148 N. W. 2d 321.

The judgment is affirmed.

AFFIRMED.

WAYNE W. LYON, APPELLANT, V. PAULSEN BUILDING & SUPPLY, INC., A CORPORATION, APPELLEE.

160 N. W. 2d 191

Filed July 5, 1968. No. 36884.

1. **Highways: Negligence.** A highway contractor is not required in the exercise of reasonable care to place signals or flares at intermediate places on a highway under construction in order to give notice that machinery is being used thereon or that defects due to construction exist, where warning signals and barricades at the termini thereof give notice that the highway is under construction and the condition of the highway itself shows that it is under various stages of completion.
2. ———: ———. Where a highway undergoing construction has not been completed by the contractor or accepted by proper authorities, and is being used permissively in a limited manner by local residents, it is only required that the highway be kept and maintained in a reasonably safe condition for the use of those traveling thereon who are at the time exercising reasonable care, under the peculiar circumstances and conditions by which they are at the time confronted, by keeping a constant lookout and vigilant caution for obstructions incident to the progress and completion of the work.
3. ———: ———. When a user of a public highway is warned by proper notice, barricades, and the condition of the road itself of obstructions or excavations in the road and he voluntarily elects to continue, without knowledge of the conditions existing in and around an obstruction or excavation, thus placing himself in a position of danger, such conduct constitutes contributory negligence as a matter of law sufficient to bar a recovery.
4. **Negligence: Evidence.** In an action based on negligence to which the comparative negligence rule has application wherein the evidence shows beyond reasonable dispute that the plaintiff's negligence was more than slight in comparison with that of the defendant the action should be dismissed or a verdict directed.

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

Johnson, Kelly, Evans & Spencer, for appellant.

Maupin, Dent, Kay, Satterfield & Gatz, Donald E. Girard, and Gary L. Scritsmier, for appellee.

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

CARTER, J.

This is an action by Wayne W. Lyon against the Paulsen Building & Supply, Inc., to recover damages for personal injuries and property damage sustained when Lyon drove his pickup truck into an excavation in a public highway under construction. At the close of plaintiff's evidence, the trial court directed a verdict for the defendant and plaintiff has appealed.

The accident occurred on May 26, 1964. On this date, defendant was engaged in reconstructing a section of State Highway No. 2 between Merna and Anselmo under a contract with the state. The plaintiff was a farmer living 1 mile north and ½ mile west of Merna. His farm home is approximately ½ mile west of State Highway No. 2 and is visible from the scene of the accident. On the day of the accident, the highway between Merna and Anselmo, a distance of 11 miles, was under construction which included the replacing of culverts across the road. This section of the highway was closed to traffic, except local traffic, by barricades and signs located at Merna and Anselmo, all of which the plaintiff knew.

On May 26, 1964, plaintiff left his home about 4 p. m., in his father's pickup truck to join his farm help at what he terms the Northeast Field some 7 or 8 miles distant. He went east, crossed State Highway No. 2, and continued on to the county road, followed it to the township road on which he proceeded east to the Northeast Field. He found the township road poorly maintained and for this reason did not return home by the route taken in going to the Northeast Field.

Plaintiff and his son-in-law, Jack Rush, left the Northeast Field about 8:30 p. m. It was then dusk. It was a cloudy, damp day. Plaintiff was driving his 1963 International pickup truck and Rush was occupying the

right side of the seat as a passenger. They proceeded 1 mile north, there turned and proceeded directly to State Highway No. 2, and turned south on this highway, the one under construction.

Plaintiff proceeded south on the right-hand side of the road at a speed of 45 to 50 miles per hour. His headlights were on. After driving a short distance it began to rain and he turned on his windshield wipers. He testified that thereafter he had visibility for 150 to 200 feet.

Plaintiff further stated that as he approached the place where the accident occurred, he first saw two dark, rusty, tubular culverts lying across the left lane, one of which extended a few feet into his driving lane. He reduced his speed by hitting his brakes rather sharply, determined that his lane was open to permit his passage, and continued on. He failed to observe a bypass road to the west, his right, a short distance north of the tubular culverts. He testified that he first thought the tubular culverts were a barricade, determined that they were not, released his brakes, and proceeded on. He saw dirt on the pavement ahead, assumed that it was a fill left high for settling, and decided to roll through it. He stated that the terrain ahead appeared to be rough and he braced himself, held his wheels straight ahead, and prepared for a rough, jostling ride in the pickup. He went through the dirt and into a culvert excavation which he said he did not see until he was within 4 to 6 feet from it and too late to stop. It is for his personal injuries and the damages to the pickup thus sustained that constitute the basis of the present action.

For the purposes of this case, we assume that negligence by the defendant is established. The issue before us is whether or not the plaintiff was guilty of such contributory negligence as a matter of law as to defeat a recovery. The trial court found that he was and we affirm the judgment.

In Miller v. Abel Constr. Co., 140 Neb. 482, 300 N.

W. 405, this court said: "We are merely holding that the duty to use reasonable and ordinary care on the part of a traveler on a highway under construction requires the exercise of a greater degree of caution than on an open highway open to the general public. * * * In view of this duty of a traveler on an uncompleted highway, the correct rule prescribing the duty of the defendant contractor is that, where a highway undergoing construction has not been completed by the contractor or accepted by proper authorities and is being used permissively in a limited manner by local residents, it is only required that the highway be kept and maintained in a reasonably safe condition for the use of those traveling thereon who are at the time exercising reasonable care, under the peculiar circumstances and conditions by which they are at the time confronted, by keeping a constant lookout and vigilant caution for obstructions incident to the progress and completion of the work."

A highway contractor is not required in the exercise of reasonable care to place signals or flares at intermediate places on a highway under construction in order to give notice that machinery is being used thereon or that defects due to construction exist, where warning signals and barricades at the termini thereof give notice that the highway is under construction and the condition of the highway itself shows that it is under various stages of completion. In the instant case the plaintiff knew that the highway was under construction and he is in no position to complain of the failure to give notice of a fact which he had actual knowledge. See Miller v. Abel Constr. Co., *supra*.

In Ellingson v. Dobson Brothers Constr. Co., 173 Neb. 659, 114 N. W. 2d 522, we said: "Under the decisions of this court it must be said that the plaintiffs had the right to use this highway though it was under repair. This right however was not without limitation. The duties of the party making the repairs and of the plain-

tiffs were stated in Fahrenbruch v. Peter Kiewit Sons' Co., 148 Neb. 460, 27 N. W. 2d 680, as follows: '* * * where a highway under construction or repair is being used permissively in a limited manner by adjacent residents, it must be kept and maintained by the contractor in a reasonably safe condition for the use of those driving thereon, who are at the same time required to exercise reasonable care under the peculiar circumstances and conditions confronting them by keeping a constant lookout and vigilant caution for obstructions incident to the progress and completion of the work.' "

The plaintiff in this case knew that the highway was under construction. He proceeded on the highway at a speed of 45 to 50 miles per hour until he saw the tubular culverts lying across the left-hand lane of the road 150 to 200 feet ahead. Thinking that they were a barricade, he applied his brakes. On discovering their true nature and seeing that he had room to pass, he released his brakes and continued on. In the meantime he had failed to observe the by-pass road. He ignored the tubular culverts partially across the surface of the road as a warning and continued on his way. He saw the dirt on the near side of the excavation and assumed that it was a fill left high for settling. Instead of proceeding with a constant lookout and with vigilant caution, he elected to roll through the dirt pile without any knowledge of what lay beyond it. With these existing evidences of dangerous conditions in plain sight, he proceeded into the area of danger. This is negligence and constitutes contributory negligence more than slight as a matter of law. Instead of proceeding with due care and caution with warnings of danger in plain view, he braced himself for a rough ride, rolled on through the dirt pile and into the open excavation. With knowledge that the highway was under construction, with warnings of possible danger ahead, and without any knowledge of the condition of the road beyond the dirt pile, the plaintiff, by his own negligent acts, pur-

sued a course of conduct that could reasonably be expected to produce personal injury and property damage. Such conduct constitutes contributory negligence sufficient to bar plaintiff's claim for damages as a matter of law.

When a user of a public highway is warned by proper devices or barricades of an obstruction or excavation in the road and he voluntarily elects to continue, without knowledge of the conditions existing around the obstruction or excavation, thus placing himself in a position of danger, such conduct constitutes contributory negligence as a matter of law sufficient to bar a recovery. Carson v. Dobson Bros. Constr. Co., 181 Neb. 287, 147 N. W. 2d 797.

"In an action based on negligence to which the comparative negligence rule has application wherein the evidence shows beyond reasonable dispute that the plaintiff's negligence was more than slight in comparison with that of the defendant the action should be dismissed or verdict directed." Rogers v. Shepherd, 159 Neb. 292, 66 N. W. 2d 815. See, also, Kirchner v. Gast, 169 Neb. 404, 100 N. W. 2d 65.

An affirmance of the judgment of the district court is required.

AFFIRMED.

DEPARTMENT OF BANKING OF THE STATE OF NEBRASKA, AS RECEIVER OF NEBRASKA STATE BANK OF VALENTINE, VALENTINE, NEBRASKA, INSOLVENT, APPELLEE, V. EUGENE P. KEELEY, APPELLANT.

160 N. W. 2d 206

Filed July 12, 1968. No. 36665.

SUPPLEMENTAL OPINION

Appeal from the district court for Cherry County: ROBERT R. MORAN, Judge. On motion for rehearing. See

182 Neb. 645, 156 N. W. 2d 803, for original opinion. Motion for rehearing overruled. Former opinion adhered to.

Michael V. Smith, for appellant.

Smith Brothers and Murphy, Peterson & Piccolo, for appellee.

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

SPENCER, J.

Appellant, by new counsel, has filed a motion for rehearing. Essentially, the new issue raised is that the appellant as guarantor can only be liable for so much of the face amount of the note as would be a liability against the maker. We overrule the motion for rehearing and adhere to our former opinion.

The present action, as set out in our former opinion (182 Neb. 645, 156 N. W. 2d 803), is solely against the guarantor on a note signed "Valentine Hearts Per E. P. Keeley President," which consolidated a previous indebtedness where he alone was liable with a current indebtedness of a corporation, Valentine Hearts, Inc., of which he was president and managing officer. As set out in our opinion, the ball club had been known as Valentine Hearts for several years.

It must be conceded that the corporation could not be held for the old indebtedness, which was the personal obligation of appellant and which was consolidated with the current indebtedness on December 18, 1963. At the time this consolidated note was taken, the old notes bearing appellant's guaranty were returned to him. It cannot be disputed that at the time the notes were consolidated appellant was liable on his guaranty on all of them. While the case is not analogous, some of the discussion in Home Savings Bank v. Shallenberger, 95 Neb. 593, 146 N. W. 993, is pertinent herein.

The consolidated note became due and payable June

18, 1964. Four months thereafter the note in suit was executed to renew it, and again the old note was delivered to appellant. At this time appellant gave a personal financial statement as described in our former opinion. It is appellant's testimony that on this occasion the bank president told him, "I want a good financial statement to support the baseball note."

The courts uniformly agree that where there is no fraud, duress, or violation of law in procuring the contract, the surety or guarantor of a principal who is incapable of contracting is bound although the principal is not. See, Annotation, 24 A. L. R. 838, for a discussion on this topic; and Gates v. Tebbetts, 83 Neb. 573, 119 N. W. 1120, 20 L. R. A. N. S. 1000, applying the general rule. This same rule applies where the obligation is executed by a public or private corporation without authority. See cases collected at 24 A. L. R. 847.

There is no merit to appellant's contention that because he could not bind the corporation beyond the extent of its liability on the current indebtedness, the guaranty cannot be enforced against him for any excess above the corporate liability.

The general rule is stated at 38 Am. Jur. 2d, Guaranty, § 52, p. 1056, as follows: "If the principal obligation is not void (* * *), but is merely unenforceable against the debtor because of some matter of defense which is personal to the debtor, the guarantor may not successfully set up this matter to defeat an action by the creditor or obligee seeking to hold the guarantor liable on the contract of guaranty."

MOTION FOR REHEARING OVERRULED.
FORMER OPINION ADHERED TO.

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

160 N. W. 2d 221

Filed July 12, 1968. No. 36800.

1. **Criminal Law: Appeal and Error.** The jurisdiction of this court in criminal cases is appellate in nature and the Supreme Court acquires no jurisdiction of a criminal appeal unless the mandatory requirement of section 29-2306, R. R. S. 1943, that a notice of appeal be filed within 1 month of a final judgment and sentence of the district court is complied with.
2. **Criminal Law: Post Conviction.** Where, with full knowledge of his rights in the matter and represented by counsel, a defendant fails to allege or assert that he was unconstitutionally deprived of his right to appeal, a post conviction action filed more than 2 years after the time of his original conviction in which he first alleges a deprival of the right to appeal, comes too late to invest this court with any appellate jurisdiction.

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

Kerrigan, Line & Martin, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

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

WHITE, C. J.

This is a post conviction proceeding in which the court denied post conviction relief but granted a right of direct appeal, despite the lapse of more than 2 years from the time of sentencing on the overruling of the motion for a new trial in the original case. The record shows that the defendant was represented by competent counsel at the original trial. The defendant was sentenced on February 4, 1965. No notice of appeal was filed within 1 month as required by statute. On February 26, 1965, the defendant petitioned the district court for copies of the preliminary hearing commitment papers

and other documents including a copy of the transcript. On June 21, 1965, the defendant filed a motion which in substance was a motion for post conviction relief and the court appointed counsel to represent him in that proceeding. The district court on November 12, 1965, dismissed the defendant's motion. On November 3, 1965, the defendant filed a motion for a new trial on the ground of newly discovered evidence under section 29-2101, R. R. S. 1943. He was represented by counsel in that second proceeding and the motion was overruled on November 10, 1965. The defendant, represented by counsel, took an appeal to this court and the opinion affirming the trial court's dismissal appears in State v. Wycoff, 180 Neb. 799, 146 N. W. 2d 69. The present proceeding was initiated by a motion for post conviction relief filed on March 11, 1967, in the district court for Dodge County, Nebraska, more than 2 years after the original conviction.

Apparently, the district court's granting of a direct appeal in this case was based upon the case of State v. Williams, 181 Neb. 692, 150 N. W. 2d 260. In that case we granted an appeal out of time because "under the circumstances" to apply the time limitation of jurisdictional requirements for appeal would have been an unconstitutional deprivation of the defendant's right to appeal. The decisive circumstances in that case were that the defendant did file a notice of appeal within the statutory time and he did, in fact, within the time required demand of his trial counsel that an appeal be taken and his counsel refused to do so. The situation here, of course, is entirely different. No notice of appeal of any nature whatsoever was filed. The most that appears is the advising of defendant by his trial counsel at the time he was found guilty that defendant would have to perfect his own appeal and a request for copies of some of the papers and the transcript in the case. More significant, in his motion for relief filed on June 21, 1965, there is an utter failure to allege a denial

of a right to appeal, or of the furnishing of counsel on appeal, or any contention whatsoever that his right to appeal was in any way constitutionally denied. And, as we have noted, subsequent to that time, the defendant filed a motion for a new trial on the ground of newly discovered evidence and perfected an appeal to this court, represented at all times by counsel, which appeal was denied in a previous opinion of this court as mentioned above. In none of these proceedings did he claim or assert that he was denied the right to appeal, denied the right to counsel on appeal, or that his right to appeal was in any manner infringed upon. Under these circumstances, to permit a direct appeal more than 2 years later would not only be a plain violation of our mandatory jurisdictional statute for the taking of appeals in criminal cases but would create confusion and uncertainty in the final disposition of criminal cases and permit a defendant to vicariously destroy any semblance of order in the judicial process. To permit appeal under these circumstances over 2 years after the original conviction and throw the finality of the conviction open to the possibility of a new trial, with the consequent probability of the absence of witnesses, destruction or mutilation of physical evidence, and the failure of memory of witnesses, would be to allow a party to play horse with the courts and the administration of justice.

While the parties have not raised the issue discussed in this opinion, this court will, of course, note a jurisdictional defect appearing on the face of the record on its own motion.

For the reasons given the appeal herein is dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. ALEX REIZENSTEIN, APPELLANT.
160 N. W. 2d 208

Filed July 12, 1968. No. 36831.

1. **Post Conviction.** In a post conviction proceeding, petitioner has the burden of establishing a basis for relief.
2. **Criminal Law: Evidence.** The law of Nebraska in operation at the time of defendant's offense and trial did not require that he be warned that any statements he might make might be used against him as a necessary prerequisite to their admission in evidence.
3. ———: ———. It was sufficient if the statement was voluntarily made and not induced by threats or promises.
4. ———: ———. The recent requirements laid down by the United States Supreme Court regarding in-custody interrogations were not in effect at the time of defendant's trial and are not retroactive.
5. **Post Conviction: Evidence.** An evidentiary post conviction hearing at which the issue of voluntariness of defendant's admissions is tried and determined is a sufficient finding by the judge on such issue to satisfy the requirements of Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A. L. R. 3d 1205.
6. **Post Conviction: Appeal and Error.** An application for a hearing under the Post Conviction Act is not a substitute for an appeal.
7. **Post Conviction: Constitutional Law.** In the absence of a violation or infringement of a constitutional right no relief may be had under the Post Conviction Act.

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

Robert L. Gilbert, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

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

NEWTON, J.

On November 30, 1956, defendant's wife was fatally wounded with a shotgun. Defendant was taken into

custody immediately after the shooting and was subsequently charged with murder in the first degree in connection with the death of his wife. He was tried, convicted, and the conviction affirmed on appeal. See Reizenstein v. State, 165 Neb. 865, 87 N. W. 2d 560, and 166 Neb. 450, 89 N. W. 2d 265.

The present proceeding is one under the Post Conviction Act. Defendant was denied relief, after an evidentiary hearing, and has appealed. His assignments of error refer to certain exculpatory statements or admissions and present the following questions: (1) Were they voluntary? (2) Was there a judicial determination of voluntariness, and if not was error committed? (3) Was it error for the court to fail to submit the question of voluntariness to the jury?

"In a post conviction proceeding, petitioner has the burden of establishing a basis for relief." State v. Sagaser, 181 Neb. 329, 148 N. W. 2d 206. It is urged that defendant was mentally defective, that at the time he made the statements in question he was intoxicated and not responsible, that he was afraid of the officers questioning him, and that trickery was resorted to.

Defendant was questioned on the evening of the shooting after being taken into custody and removed to the county attorney's office. The pertinent statements made by him may be summarized. He admitted quarreling with his wife, getting a shotgun, and loading it. He said a scuffle ensued and that his wife was shot, but at all times insisted that he intended to use the gun to commit suicide, that he had no intention to shoot or kill his wife, did not pull the trigger, and did not know how the gun was discharged.

In determining the voluntariness of the foregoing statements the circumstances surrounding the event must be kept in mind. Two of defendant's children were in the house at the time. They were witnesses to the quarrel between defendant and his wife, saw him get and load the gun, and heard the shot. Immediately there-

after two police officers arrived and found the defendant, with the gun, bending over his wife as she lay on the floor. Defendant does not now and never has contended that any one else shot his wife. Under these circumstances it is apparent that defendant would have, and must have known that he would have, difficulty in satisfactorily explaining his actions except on the ground of an "accidental shooting." Obviously he could not successfully deny the shooting and his statement is entirely consistent with the "accident" theory which comprised one of the defenses presented at his trial. The statement presents the only logical noncriminal explanation of the occurrence other than a defense of insanity. On the face of it, it presents just such a voluntary explanation as any ordinary person might offer under similar circumstances.

That defendant was below normal intellectually was not disputed. One neuropsychiatrist classified him as a middle-grade moron, and the second that he was subject to a mild, mental retardation. It was conceded that he knew the difference between right and wrong, and was legally sane. On the evening when he was questioned he had been drinking and the evidence regarding whether or not he was intoxicated at that time was conflicting. He now states that he was "under pressure" because about a year earlier his wife had sent for the police and he was beaten about the head while resisting arrest. None of the officers involved in that incident were present when he was questioned, he was not threatened in any manner, but on the contrary was well acquainted with, and on a friendly basis with, several of the officers present. It is said that he was subjected to trickery in that he was asked, with reference to pulling the trigger, why his little 7-year-old son Randy said he did. Defendant's response was that he did not pull the trigger.

No threats or promises were made or any inducements offered. Do these circumstances warrant a finding by this court, in a post conviction proceeding, that

defendant's statements were involuntary? We think not. The alleged trickery, if such it is, was obviously unavailing and came about after the defendant had already made the statements now objected to. For the reasons mentioned above his contention that he was afraid of the officers is not entitled to credence. His mental retardation was not sufficient to prevent his successfully engaging in a minor contracting business wherein he employed a number of people to pick potatoes and paid for their labor, or to earn a living as a laborer in various pursuits. Nor was it such as to prevent his offering a reasonable theory of accidental shooting in explanation of what had occurred. Regarding the extent of his intoxication at the time of the shooting the jury found, under proper instructions, that he was not sufficiently intoxicated to prevent his forming a criminal intent. It was several hours after the shooting, and presumably when he was more sober, that he was questioned. The jury likewise found against defendant on the issue of insanity. He has not, in this proceeding, sustained the burden of proving that his statements were involuntary. See Johnson v. Commonwealth of Massachusetts, 390 U. S. 511, 88 S. Ct. 1155, 20 L. Ed. 2d 69.

The law of Nebraska in operation at the time of defendant's offense and trial did not require that he be warned that any statements he might make might be used against him as a necessary prerequisite to their admission in evidence. See, Holthus v. State, 138 Neb. 200, 292 N. W. 603; Bush v. State, 112 Neb. 384, 199 N. W. 792. It was sufficient if the statement was voluntarily made and not induced by threats or promises. Schlegel v. State, 143 Neb. 497, 10 N. W. 2d 264. Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, now requires that a defendant be warned of his right to remain silent; and Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, which now places restraints on in-custody interrogations, were not then in effect and are not retroactive. See Johnson

v. New Jersey, 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882.

It is said that there was not a judicial determination of the voluntariness of defendant's statement. The record discloses that the trial court sustained several objections to the admission of this evidence. The objections were based on a lack of foundation and a failure to show that the statement was voluntarily made. On additional proof in this regard the evidence was admitted and the ruling of the court comprises a judicial finding of sufficient evidence to establish voluntariness.

Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A. L. R. 3d 1205, requires a determination by the court of the voluntariness of an admission or confession before it can be received in evidence. The court remanded the cause with orders to grant an evidentiary hearing to determine if the confession was voluntary, and stated if it was found to be voluntary a new trial was not necessary but should be granted if the confession was found to be involuntary. A similar procedure has been employed in the present instance.

The question of the voluntariness of defendant's statements was a primary issue at the evidentiary post conviction hearing. In denying defendant's prayer for relief the court necessarily found that the statements were voluntary.

Defendant complains that instruction No. 22 given by the court in the original trial was prejudicial to the defendant in that it advised the jury that defendant's statement was voluntary. The instruction is as follows: "You are instructed that the State, having introduced the admissions and declarations made by the defendant Alex Reizenstein, the truth of any exculpatory or mitigating facts embraced in the declarations or admissions so introduced would be presumed, unless their falsity was shown by the evidence in the case." This is an instruction requested by defendant and would appear to be a beneficial one from his standpoint. Neither this propo-

sition, nor the included complaint that the court failed to submit to the jury the question of whether or not the statement was voluntary may now be heard. Defendant at no time denied participation in the incidents leading to and resulting in the death of his wife. In view of the situation as it existed it was apparent that he could not successfully deny such participation. The admission of his statement was not prejudicial to him but constituted self-serving statements which substantiated his defense of "accidental shooting." The only other defenses urged were those of insanity and intoxication.

These issues might properly have been presented on the appeal from the original trial, but it is now too late for their consideration. "An application for a hearing under the Post Conviction Act is not a substitute for an appeal * * *." State v. Erving, 180 Neb. 680, 144 N. W. 2d 424.

In any event the foregoing factors do not present a constitutional issue. In Jackson v. Denno, *supra,* the court approved the final determination of the issue of voluntariness by the trial judge and indicated it was not necessary to submit such question to the jury. "In jurisdictions following the orthodox rule, under which the judge himself solely and finally determines the voluntariness of the confession, * * * the judge's conclusions are clearly evident from the record since he either admits the confession into evidence if it is voluntary or rejects it if involuntary." In the absence of a violation or infringement of a constitutional right no relief may be had under the Post Conviction Act. See, State v. Erving, *supra;* State v. Clingerman, 180 Neb. 344, 142 N. W. 2d 765.

Defendant also assigns as error the "knowing use of false evidence" by the state. This assignment is without merit. The first statement of the witness Lee Shipley which is complained of must be considered in context. Shipley quoted defendant as saying "that he did get the gun and that he did load it, and he said that he

didn't intend to kill his wife with it; that he intended to commit suicide, himself; that he done it to scare her—got the gun to scare her, but he intended to commit suicide, himself." Defendant's implication that the witness inferred defendant got the gun to threaten his wife is unfounded. The second assertion that Shipley misquoted defendant when he said defendant "didn't state whether he discharged it or not" (referring to the gun) is likewise unfounded. Defendant was quoted as saying on one occasion that his wife pulled the trigger, on another that "he didn't know how the gun went off," and again as repeatedly saying "he didn't know how the gun happened to be discharged." Obviously there was no attempt to knowingly use false testimony to imply that defendant did not know whether or not he discharged the gun or was evading the issue.

The appeal is without merit and the judgment is affirmed.

AFFIRMED.

McCOWN and SMITH, JJ., dissenting.

We respectfully dissent. The defendant's original trial was in April 1957. The basic facts are set out in Reizenstein v. State, 165 Neb. 865, 87 N. W. 2d 560. Some additional facts relevant here are reflected in the supplemental opinion in Reizenstein v. State, 166 Neb. 450, 89 N. W. 2d 265.

The shooting of defendant's wife occurred at their home sometime after 7 p.m. on November 30, 1956. The only persons in the room when the shooting occurred were the defendant and his wife. Their 7-year-old son and 12-year-old daughter were in the home at the time of the shooting and testified as to events before and just after the shooting. There was also evidence of statements by decedent admitted as part of the res gestae or as dying declarations. The defendant was arrested at the home at approximately 8 p.m., and was still in the room where the shooting occurred at the time of his arrest. The fundamental issue was whether the shoot-

ing occurred unintentionally in the course of a struggle or in an effort by the defendant to kill himself; or whether it was done purposely and maliciously but without deliberation and premeditation; or whether it was done purposely and of deliberate and premeditated malice.

The defendant's motion here centers around the constitutional issues involved in the admissibility and the method of admission in evidence of a statement made by the defendant on the same evening between 8:30 p.m. and approximately 10:40 p.m. The statement was in question and answer form and was taken at the county attorney's office in the courthouse and reported by the official court reporter except for a small portion taken by a stenographer before the reporter arrived. The statement was taken in the presence of the county attorney, the sheriff, the chief of police of the City of Scottsbluff, the assistant chief of police, a police officer, the stenographer, and the court reporter. The defendant was not represented by counsel nor given any warnings.

The defendant's physical and mental condition at the time are vital in assessing the totality of the circumstances. Defendant's 15-year-old son testified that the defendant was drunk when the son left the home at 6:30 or 6:45 p.m. Another witness testified that sometime in the afternoon the defendant was intoxicated and the witness would not talk to him. At the time the statement was taken, the testimony of the persons present indicated varying degrees of intoxication. The court reporter stated that he was drunk. The county sheriff described the defendant as being "in drunken daze." The secretary of the county attorney stated that: "He was in a daze" and "He was incoherent a little bit." The chief of police testified: "He had been drinking but he wasn't drunk." One of the police officers stated: "He had the appearance of a man that had been drinking; there was the odor of liquor on his breath, his face

was flushed, his eyes were watery and blurry" and that "taking the statement he was not too coherent, and just rambled on." It is quite apparent from the 69-page question and answer statement, that the defendant was in a state of emotional shock and more than once inquired as to whether or not his wife had died, and more than once expressed the desire to die himself if she were dead. His wife died in the hospital at 10:40 p.m., at approximately the time the statement was completed.

There is no dispute but that the defendant was mentally retarded. Dr. Farrell, a neuropsychiatrist, testified at the trial that the defendant was mentally retarded; that he had a mental age somewhere between 7 and 8 as compared to 12 to 14 years for normal adults, and that he would classify him as a middle-grade moron. Dr. Krush, a psychiatrist, testified for the State that the defendant had a full scale I.Q. of 76 which, under his classification, would be mild mental retardation. Both psychiatrists testified that the defendant knew the difference between right and wrong, or that he was legally sane. The defendant in his deposition at the penitentiary, testified that he had spent 4 or 5 years in the first grade; 3 or 4 years in the second; and passed to the third grade and quit school when he was 15 years of age.

The county attorney, the chief of police, the assistant chief of police, a police officer, and the sheriff all participated at one time or another in the questioning. Throughout the questioning, the defendant continuously insisted that he did not pull the trigger. He repeatedly said that he did not know how it happened or that there was a scuffle between himself and his wife and he didn't know how the gun went off. In the course of the interrogation, the defendant complained that other police officers, at an unrelated and unspecified prior time, had used a blackjack on him. Toward the end of the questioning, the defendant was told: "That's too bad. You know, there's a hard way and an easy way.

For goodness sakes, get it off your chest while you are doing it and get it done." Later: "Well, you have known me a long time, and there is a hard way and an easy way to get along with these boys." The defendant's answer was: "I know, but I didn't do it, Steve, and I didn't shoot her and I'll say that and I'll keep saying it. I didn't." It was also indicated to defendant that his son and other witnesses had said the defendant pulled the trigger. The use of psychological pressure and the undeviating intent of the officers to obtain a confession, if a confession was obtainable, are apparent.

The constitutional issues involved in the admissibility of a statement made by a defendant as the result of in-custody interrogation are further complicated here. The statement itself was never admitted in evidence. Instead, two police officers testified, summarizing their recollection of portions of the statement. Before the commencement of the trial, the defendant filed a motion for an order requesting the county attorney to produce for inspection written statements taken in shorthand to enable counsel to determine what the mental condition of the defendant was at the time the statements were made. On the hearing on the motion, the county attorney was called as a witness and objected to testifying. His right to refuse to testify and to refuse to submit the statement for inspection was sustained. At the trial, certain of the witnesses who had been present when the statement of the defendant was taken were called on behalf of the State. Two of them testified as to the statement made by the defendant. The principal witness was the assistant chief of police, Lee Shipley. The witnesses had refreshed their recollections from the question and answer statement. Defendant's counsel requested the production of the statement for purposes of cross-examination at the time. The request was denied. The defendant's counsel objected to the introduction of Mr. Shipley's testimony as to his recollection of the statement at least three times prior

to the court's overruling of the objections. The objections were based, among other things, on the ground that the statements or admissions had not been shown to be voluntary admissions nor that the defendant had capacity to make the admissions at that time. These objections were overruled. The defendant later called the reporter who took the statement and attempted to get the statement or shorthand notes containing the statement into evidence. Objection was made and sustained. The court later ordered the preparation and production of a transcript of the notes as a substitute for the notes, but the defendant's counsel did not have a transcribed copy until after the trial. At the trial, Mr. Shipley's testimony as to the statement requires two and a half pages in the record. The statement itself was contained in 69 pages. Mr. Shipley's summarized recollection of the statement did not reflect the physical condition of the defendant nor his mental nor emotional state at the time, nor the fact that he was "not too coherent, and just rambled on."

In some respects, Mr. Shipley's recollection and testimony was clearly faulty. He testified that the defendant had said: "That he done it to scare her—got the gun to scare her." A complete examination of the question and answer statement shows that it did not contain any such statement. Mr. Shipley also testified: "He was asked if he didn't bend over and make the statement to her that he was sorry for what he had done. His answer to that question was, 'You're darn right I did.'" As a matter of fact, the question actually asked was a double question and was repeated three times in essentially the same language. The record shows: "Q. Alex, just before I came there, didn't you tell your wife not to die; you were sorry for what you had done? A. You're darn right I did. Q. What? A. I don't want her to die. Yes. Q. You told her you didn't want her to die; you were sorry for what you did? A. I wanted her to live. I love her. Q. I just asked you if you told

her you didn't want her to die; that you were sorry for what you did. A. You're darn right I didn't want her to die because I didn't shoot her. I don't know how it happened."

Mr. Shipley, in his summarization of the statement, while he testified that the defendant had said that he didn't know how the gun happened to be discharged, specifically testified also: "He didn't state whether he discharged it or not." The actual question and answer statement is replete throughout with specific denials from the defendant that he ever pulled the trigger or discharged the gun.

At the time of the trial here, neither Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, nor Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694. 10 A. L. R. 3d 974, were then anything more than a vague possibility on the judicial horizon. Consequently, the determination of the voluntariness of a confession is to be judged by the totality of the circumstances in which the failure to give warnings is only one aspect. See, Johnson v. New Jersey, 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882. See, also, Haynes v. Washington, 373 U. S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513.

In Blackburn v. Alabama, 361 U. S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242, the determination of whether a confession is voluntary was measured by whether it was the product of a rational intellect and a free will. In Lisenba v. California, 314 U. S. 219, 62 S. Ct. 280, 86 L. Ed. 166, it was established that the Fourteenth Amendment forbids fundamental unfairness in the use of evidence whether true or false. In determining the totality of the circumstances, the factual matters already discussed are unquestionably attendant circumstances which the accused is entitled to have appropriately considered in determining the voluntariness and admissibility of his confession. See, Culombe v. Connecticut, 367 U. S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037; Townsend v. Sain, 372 U. S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770; Spano

v. New York, 360 U. S. 315, 79 S. Ct. 1202, 3 L. Ed. 2d 1265.

An altered or prejudicially inaccurate version of a defendant's statement, regardless of the cause of the distortion, raises serious questions as to whether the statement as introduced in evidence can be said to be the product of the defendant's free will and intellect. The due process clause of the Fourteenth Amendment forbids fundamental unfairness in the use of evidence whether true or false. See Blackburn v. Alabama, *supra.*

The record shows that the district court at the time of the original trial, made no separate judicial determination outside the presence of the jury as to the voluntariness of the statements made by the defendant. The county attorney, in argument on the objections to admission of the summarized statement, took the position that the statements were in the nature of admissions and not a technical confession, and that it was not necessary to show any further foundation as to whether they were voluntary.

Constitutional rights or tests for admissibility of a defendant's in-custody statements do not depend on technical distinctions between confessions, admissions, or statements. This is obvious where the statement tends to establish an essential fact or element necessary to prove guilt.

On the initial appeal to this court, the direct issue of voluntariness was not considered. This court said with respect to the statement: "It does not appear necessary to summarize the testimony since it is not contended that the information was not admissible but only that the method of disclosing it to the jury was improper."

In Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A. L. R. 3d 1205, the Supreme Court said: "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involun-

tary confession, without regard for the truth or falsity of the confession, Rogers v. Richmond, 365 U. S. 534, and even though there is ample evidence aside from the confession to support the conviction. Malinski v. New York, 324 U. S. 401; Stroble v. California, 343 U. S. 181; Payne v. Arkansas, 356 U. S. 560. Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession."

The court also stated: "A defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined."

The principle set out in Jackson v. Denno, *supra,* has long been followed in this state. See, Gallegos v. State, 152 Neb. 831, 43 N. W. 2d 1; State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66. In the latter case, we also reaffirmed the principles of Parker v. State, 164 Neb. 614, 83 N. W. 2d 347. "In a criminal trial a confession of guilt alleged to have been made by the defendant is not competent in evidence, unless first shown to have been voluntarily made. * * * If the court determines as a matter of law that no sufficient foundation has been laid, then the confession should be rejected, but where the confession is received in evidence, its voluntary character is still a question of fact for the jury."

At the original trial here, not only did the trial court fail to determine on evidence taken out of the presence of the jury whether or not it had been sufficiently shown that the statement was voluntarily made, but the issue of voluntariness was not even submitted to the jury for its determination. The only instruction pertaining to the statement read: "You are instructed that the State, having introduced the admissions and declarations made by the defendant Alex Reizenstein, the truth of any ex-

culpatory or mitigating facts embraced in the declarations or admissions so introduced would be presumed, unless their falsity was shown by the evidence in the case."

This instruction only compounded the failure of the court to instruct on the issue of voluntariness and effectively withdrew the issue of voluntariness from the consideration of the jury. The voluntariness of a confession or admission made in the course of in-custody interrogation is an essential fact issue which, under our procedure, must first be determined by the court, and if received in evidence, must also be submitted to the jury. See Parker v. State, *supra*.

A defendant has a constitutional right to a fair hearing and a reliable determination of the voluntariness of a confession not influenced by its truth or falsity. Jackson v. Denno, *supra*.

The error here which possibly influenced the jury adversely cannot be conceived of as harmless. Even if it be assumed that the error here might be subject to the harmless constitutional error rule of Chapman v. California, 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, it is impossible to satisfy ourselves beyond a reasonable doubt that the error did not contribute to the defendant's conviction. To say the least, it constituted an inseparable part of the evidence which supported his conviction for first degree murder as opposed to a lesser degree of homicide.

The proceedings here reveal the absence of the fundamental fairness essential to our concept of justice sufficient to constitute a denial of due process of law, whether we ignore retroactive constitutional decisions subsequent to 1957 or not. The totality of the relevant circumstances here compels the conclusion that the defendant's statement was involuntary and constitutionally inadmissible. The conviction and sentence should have been vacated, and the cause remanded for such further

proceedings as the county attorney of Scotts Bluff County might determine appropriate.

FRANK L. COLBURN ET AL., APPELLEES, V. CITY OF VALENTINE, A MUNICIPAL CORPORATION, APPELLANT.
160 N. W. 2d 203

Filed July 12, 1968. No. 36839.

Damages: Constitutional Law. A person whose property is damaged by the operation of a municipal dump may recover his damages from the municipal corporation operating the dump. Art. I, § 21, Constitution of Nebraska.

Appeal from the district court for Cherry County: ROBERT R. MORAN, Judge. Affirmed.

Edward E. Hannon, for appellant.

McFadden, Kirby & Swoboda, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

BOSLAUGH, J.

This is an action for damages brought by Frank L. Colburn and Harriett E. Colburn against the City of Valentine, Nebraska. A jury was waived and the action tried to the court. The trial court found for the plaintiffs, and the defendant has appealed.

The defendant operates a dump on the north half of the southwest quarter of Section 29. The plaintiffs are the owners of the west half of the southeast quarter of Section 29. The record shows that on April 30, 1965, a fire originating at the defendant's dump spread onto and over the plaintiffs' land damaging the grass, trees, fenceposts, and wire on the plaintiffs' land. The parties stipulated that the damage amounted to $2,726.50. The plaintiffs' theory of the case is that their property was "damaged for public use" and that they are entitled to

recover under Article I, section 21, Constitution of Nebraska.

The principal issue is whether the plaintiffs have a right to recover damages from the defendant. The defendant argues that the constitutional provision is not applicable to the facts in this case.

In Patrick v. City of Bellevue, 164 Neb. 196, 82 N. W. 2d 274, the plaintiffs were damaged by flooding and by refuse being washed onto their land as a result of the operation of a dump by the defendant. This court reviewed the prior cases and held that the temporary damage resulting from the operation of the dump was within the protection of the constitutional provision and the plaintiffs could recover their damage. The same rule is applicable here.

The defendant also complains that there is no evidence which shows how the April 30, 1965, fire at the dump was started. The evidence as a whole, including that concerning other fires at the dump, is sufficient to sustain a finding that the fire on April 30, 1965, was a result of the operation of the dump on the defendant's property. It was not necessary for the plaintiffs to show that the fire in question had been set by an employee of the defendant.

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

AFFIRMED.

JOHN W. MASON, ADMINISTRATOR OF THE ESTATE OF JOHN A. E. MASON, DECEASED, APPELLANT, V. WESTERN POWER & GAS COMPANY, A CORPORATION, APPELLEE.

160 N. W. 2d 204

Filed July 12, 1968. No. 36842.

1. **Negligence.** One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to

avoid defects and dangers which are open and obvious is negligent or contributorily negligent.

2. ———. One who knows of a dangerous condition, appreciates its dangerous nature, and deliberately exposes himself to the danger assumes the risk of injury from it.

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

Boland, Mullin, Walsh & Cooney and Robert E. McCormack, for appellant.

Chambers, Holland & Dudgeon, for appellee.

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

BOSLAUGH, J.

This is an action for wrongful death brought by the administrator of the estate of John A. E. Mason, deceased, against the Western Power & Gas Company. The trial court dismissed the action at the close of the plaintiff's evidence, and the plaintiff has appealed. The principal issue is whether the plaintiff's evidence was sufficient to create a question for the jury.

The deceased was employed as an officer of the guard at the Nebraska State Reformatory. He left his home at about 9:15 p.m. on April 27, 1966, to go to the reformatory. At about 10 p.m. that night he was found lying in an excavation in front of his home. The evidence indicates that he had fallen into the excavation and died as the result of injuries sustained in the fall.

On April 25, 1966, the wife of the deceased reported a gas leak to the defendant. Workmen came to the property later that day and dug an escape hole near the foundation of the house.

On the following day, April 26, 1966, the defendant's workmen opened an excavation 2 or 2½ feet wide, 7 or 10 feet long, and 3 to 5 feet deep. This excavation was east of and adjacent to the public sidewalk in front of the residence of the deceased. On April 27, 1966, the ex-

cavation was enlarged by digging 5 feet to the north and 10 feet to the south from the original hole. The excavation was also extended to the west and a portion of the public sidewalk removed.

The dirt removed from the excavation was placed along the sides of the excavation and metal barricades with blinker lights were placed on the south, east, and north sides of the excavation. There is some conflict in the evidence as to the location of the barricades, but it is clear that there were no barricades along the west side of the excavation where the sidewalk leading from the front door of the residence of the deceased joined the public sidewalk. There was some dirt piled on the sidewalk west of the excavation, but it did not form a continuous barrier. The evidence indicates that the workmen entered and left the excavation near the place where the sidewalk from the front of the house joined the public sidewalk.

On April 25 and 26, 1966, the deceased worked from 2 p.m. until 10 p.m. On April 27, 1966, he was to work from 10 p.m until 6 a.m. On April 27, 1966, the deceased arose at 8 a.m. He had breakfast and did some grocery shopping and then returned home. He rested in the afternoon and arose again about 6 p.m. At around 6:30 or 7 p.m. he left the house to get some cigars. He left the house again at about 9:15 p.m. to go to work and was not seen again until he was found in the excavation.

The plaintiff's theory is that the deceased fell into the excavation while walking from the front door of his house to his automobile which was parked on the driveway south of the house. There is evidence that it was his custom to walk out the "front walk" to the public sidewalk, then south to the driveway, and enter the automobile from the south.

If this was the path which the deceased followed on the evening of April 27, 1966, it was a dangerous and hazardous route. The photographs which are in evidence show very clearly that the deceased could have

walked directly to his car from the front steps of the house by following a diagonal path across the lawn. This route would have avoided the danger and hazard necessarily incident to following the sidewalk along the edge of the excavation.

The deceased was chargeable with knowledge of the excavation, although he may not have been fully advised as to its exact extent. He had been around the house on April 27, 1966, and had made a trip in his car to get cigars after the workmen had left for the day. The barricades with the blinking lights were in place and dirt was piled around the excavation.

One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent. One who knows of a dangerous condition, appreciates its dangerous nature, and deliberately exposes himself to the danger assumes the risk of injury from it. Fritchley v. Love-Courson Drilling Co., Inc., 177 Neb. 455, 129 N. W. 2d 515.

The answer in this case alleged both contributory negligence and assumption of risk. The evidence shows both assumption of risk and contributory negligence on the part of the deceased sufficient to bar recovery as a matter of law.

It is unnecessary to consider the other assignments of error.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES CARROLL WILLIAMS, APPELLANT.
160 N. W. 2d 201

Filed July 12, 1968. No. 36891.

Criminal Law: Appeal and Error. Where a sentence has been imposed by the district court within the statutory limits, it

will not be disturbed in the absence of an abuse of discretion.

Appeal from the district court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed.

Albert W. Crites, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

McCOWN, J.

The appellant, James Carroll Williams, pleaded guilty to the crime of robbery. After presentence investigation, he was sentenced to a term of 10 years in the Nebraska Penal and Correctional Complex. The sole issue raised on this appeal is the excessiveness of the sentence. We review under section 29-2308, R. R. S. 1943.

The appellant, between 4 and 5 p.m., on July 6, 1967, entered a store in Antioch, Sheridan County, Nebraska. He had a shiny instrument in his hand and threatened to kill the 87-year-old storekeeper if he did not open the cash register. The storekeeper opened one drawer of the cash register, and handed him one $10 bill. He demanded that the storekeeper open another drawer in the cash register and when the storekeeper told him he couldn't open that drawer without an instrument to open it with, the appellant struck the 87-year-old storekeeper twice, knocking him down. A companion of the appellant stood in the doorway and ignored the storekeeper's appeals for help. The appellant then pulled the telephone off the wall, took the money out of the cash register, and both men fled in an automobile. The storekeeper was hospitalized for approximately a week as a result of the blows inflicted by the appellant in the robbery.

The presentence investigation revealed that the appellant had at least six prior felony convictions and an extensive record of miscellaneous misdemeanor charges

and charges which were dismissed, several of which were for drunkenness. The record indicates that the appellant and his companion were chronic alcoholics, and were intoxicated at the time of the robbery.

The appellant contends that, in general, sentences in criminal cases are too long. He cites ABA Project, Standards Relating to Sentencing Alternatives and Procedures, Tent. Draft, 1967. However, those same standards recognize exceptions for particularly serious offenses. The standards, together with the Model Penal Code, also recognize the persistent offender as being in a particular category justifying additional penalties or extended terms of imprisonment. See, ABA Project, Standards Relating to Sentencing Alternatives and Procedures, Tent. Draft, 1967, comment, § 2.5 (b), (c), p. 83; Model Penal Code, §§ 6.06 to 6.09 and 7.03, Appendix B.

The appellant also relies on the rehabilitative needs of a chronic alcoholic. These arguments were essentially answered by the United States Supreme Court in Powell v. Texas (June 1968), 391 U. S. ——, 88 S. Ct. 2145, 20 L. Ed. 2d 1254. The appellant concedes that intoxication is no justification or excuse for crime.

The statutory range of sentence here is from 3 to 50 years. There is no evidence of current disparity of sentences nor that the particular facts here were not properly applied within the statutory range. We, therefore, adhere to the well-settled rule in this jurisdiction that where a sentence has been imposed by the district court within the statutory limits, it will not be disturbed in the absence of an abuse of discretion. See Nicholson v. Sigler, *ante* p. 24, 157 N. W. 2d 872. There was no abuse of discretion here.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MAX LOUIS GOULD, APPELLANT.

160 N. W. 2d 202

Filed July 12, 1968. No. 36890.

Appeal from the district court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed.

Albert W. Crites, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

McCOWN, J.

This is a companion case to State v. Williams, *ante* p. 395, 160 N. W. 2d 201. Max Louis Gould was the companion referred to in the factual statement in the Williams case. Gould had had two previous felony convictions and numerous misdemeanor convictions, including some for drunkenness, and he received a sentence of 7 years rather than 10 in the Nebraska Penal and Correctional Complex.

The issues raised are identical and the case is controlled by State v. Williams, *supra*.

The judgment is affirmed.

AFFIRMED.

R. K. RUTHERFORD ET AL., APPELLANTS, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES, ODDO'S DRIVE IN, INC., A NEBRASKA CORPORATION, INTERVENER-APPELLANT.

160 N. W. 2d 223

Filed July 19, 1968. No. 36750.

1. **Municipal Corporations: Public Utilities.** Statutes authorizing municipalities to establish equitable rates or charges for sewer

service declare the common law which prohibits unjust discrimination by a public utility.

2. ———: ———. A difference in utility rates under substantially similar conditions of service may constitute unjust discrimination.

3. ———: ———. Rate differences fairly proportionate to differences in cost or difficulty of service are valid.

4. ———: ———. In determining reasonable rate relationships, a municipality may sometimes take into account the purpose for which a customer receives the service.

5. ———: ———. Sewer use charges are not special assessments.

6. **Words and Phrases.** Legislative intent controls the construction of a phrase in an ordinance, although the phrase is inappropriate.

7. **Municipal Corporations: Public Utilities.** In collecting a sewer service charge unpaid at due date, a municipality may add a reasonable processing charge.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Affirmed.

Ross & O'Connor, for appellants.

Herbert M. Fitle, Edward A. Mullery, and Edward M. Stein, for appellees.

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

SMITH, J.

Plaintiffs' and intervener's petitions concerning sewer use charges made by the City of Omaha were dismissed after trial. Plaintiffs and intervener have appealed. Their contentions are: (1) The rates and charges were unjustly discriminatory. The city unduly preferred (a) the class of commercial and industrial users to the class of residential users, and (b) the large residential user and the large industrial user to the small commercial user. (2) The city imposed unenforceable special assessments and penalties, not sewer use charges.

Land use in Omaha in 1960 was 6 percent commercial, 42 percent residential, and 10 percent industrial. The industrial class numbered 12 members with indi-

vidual water consumption in excess of 1,500,000 cubic feet a month. One, the Kellogg Company, was located in the Papillion drainage area. The other 11 were located in the Missouri drainage area. The sewage from the Papillion area, relatively small and largely residential, flowed into a secondary treatment facility. All sewage from the Missouri area was discharged without treatment until 1964 when some sewage was received at a primary treatment facility.

In 1967 urban growth overloaded the Papillion treatment plant while the Missouri plant was operating at 22 percent of capacity. Small amount of sewage from 1 of the 11 large industrial consumers of water in the Missouri area received treatment. The sewage from 3 of the others was also processed. All other sewage from the 11 was discharged without treatment.

The city had divided users of the sewer service into a residential class and a commercial and industrial class. A residential user was one who received "water service from any supply source in any single family dwelling used exclusively as a place of abode." The city charged $.80 a month for service to a residential user within the city. Commercial and industrial users were generally subject to a scale based upon water supply each month as follows:

First	400 c.f.	$.80
Next	4,600 " "	.042 per c.c.f.
"	45,000 " "	.03 " "
"	50,000 " "	.026 " "
"	1,400,000 " "	.022 " "
Excess over	1,500,000 " "	.006 " "

To cover sewer service costs on delinquent accounts, the city in 1963 levied "special assessments" on lands in the city. Occupants of two of the parcels were a tenant of plaintiff R. K. Rutherford and a vendee or mortgagor of plaintiff Nebraska Investment Company. The city certified the amounts directly to the county treasurer. Each sum represented a 6-month charge of $4.80

and a processing charge of $3. "Special assessments" relating to other periods were subsequently levied in like manner against both parcels.

Intervener operated a restaurant using water quantities of 5,325 c.c.f. in 1964; 4,487 c.c.f. in 1965; and 1,565 c.c.f. in the first 5 months of 1966. For sewer service to the restaurant in 1965 the city charged $148.67 as follows: 264 c.c.f., $9.15; 255 c.c.f., $8.88; 280 c.c.f., $9.63; 301 c.c.f., $10.26; 314 c.c.f., $10.65; 378 c.c.f., $12.57; 422 c.c.f., $13.89; 478 c.c.f., $15.57; 674 c.c.f., $20.75; 395 c.c.f., $13.08; 354 c.c.f., $11.85; and 372 c.c.f., $12.39.

The sole public supplier of water to Omaha was Metropolitan Utilities District which also served areas outside the Omaha sewer system. All service areas of the district were included in a study made by a rate analyst to determine frequency distribution of water billings in 1965. The analyst selected customer classes described as large industrial, general industrial, large commercial, small or general commercial, and residential. Whether a customer belonged to the residential class or to the small commercial class depended upon the size of his metered service. The criteria differed somewhat from the criteria of classes of sewer users.

In the study the analyst prepared an exhibit showing (1) user class; (2) gradation of water use in units of 100 cubic feet in a column headed "STEP"; (3) at each step the cumulative number of billings, or "CUMLTV CUST"; and (4) cumulative water use connected with the billings and tabulated in a column headed "CUMLTV USE." Some of the statistics are:

CUSTOMER CLASS	STEP	CUMLTV CUST	CUMLTV USE
Res.		31,530	
"	1	60,497	28,967
* * *	* * *	* * *	* * *
Res.	7	525,140	2,253,811
"	8	599,091	2,845,419
"	9	665,824	3,446,016

* * *	* * *	* * *	* * *
Res	370	1,022,446	9,411,950
* * *	* * *	* * *	* * *
Res.	5501	1,022,502	9,459,684
Gen. Com.		4,348	
Gen. Com.	1	8,300	3,952
* * *	* * *	* * *	* * *
Gen. Com.	12	37,132	181,447
" "	14	39,996	220,111
* * *	* * *	* * *	* * *
Gen. Com.	55	63,232	898,988
" "	60	64,348	963,670
* * *	* * *	* * *	* * *
Gen. Com.	15001	78,957	4,405,994
Lg. Com.		24	
" "	1	28	4
* * *	* * *	* * *	* * *
Lg. Com.	15001	1,163	2,326,053
Gen. Ind.		17	
" "	1	21	4
* * *	* * *	* * *	* * *
Gen. Ind.	15001	586	2,190,106
Lg. Ind.	190	1	185
* * *	* * *	* * *	* * *
Lg. Ind.	15001	73	2,031,848

An ordinance in substance stated that the city reserved the right to deviate from normal sewer use rates in the interest of fairness to city and user alike. Decreases were granted to some customers on the ground that water use was an inaccurate indicator of use of the sewers and treatment facilities. Six of those customers were Falstaff and Storz breweries, O.P.P.D. steam plant, Quaker Oats Company, Campbell Soup Company, and Union Stock Yards Company. They were 6 of the 11 large industrial water consumers located in the Missouri drainage area. A comparison of water use in 1965 with sewer service charges paid by the 12 large industrial water consumers disclosed:

User	Water Use	Sewer Charge
Armour & Co.	2,083,872 c.c.f.	$15,468.79
Cudahy Packing Co.	693,264 "	7,127.79
Union Stock Yards Co.	2,427,627 "	10,091.75
Wilson & Co.	721,622 "	7,296.10
Swift & Co.	1,562,903 "	12,344.19
Kellogg Co.	213,411 "	2,551.16
Campbell Soup Co.	426,956 "	4,276.35
O.P.P.D. steam plant	434,388 "	1,389.37
Quaker Oats Co.	406,761 "	597.46
Storz brewery	173,312 "	2,212.49
Falstaff brewery	288,151 "	2,817.38
U.P.R.R. shops	526,377 "	6,125.01

The city has issued sanitary sewerage revenue bonds, series of 1957. From a federal grant of $250,000 and the proceeds of the bonds, the city then had $2,921,731 available for construction projects. It obligated $2,174,230 for construction of the Papillion plant and the balance for construction and improvement of sewers. In 1964 and 1965 the activity of the sewer revenue fund included the following:

	1964	1965
Receipts:		
Sewer service collections:		
Residential units	$ 726,943.02	$ 754,127.29
Commercial and industrial units	435,434.46	449,158.83
Other	114,708.93	95,817.31
Total	$1,277,086.41	$1,299,103.43
Disbursements:		
Sewer revenue operations and maintenance account	$236,535.45	$231,208.11
Papillion sewerage treatment account	217,076.87	216,974.34
Missouri sewerage treatment account	204,874.03	406,891.08

Sewer revenue improvement account	600,789.12	247,489.09
Sewerage collection account	95,285.54	95,428.38

We infer that in 1965 residential customers, whose share of water use was 34.4 percent, paid 62.7 percent of all sewer use charges.

The Legislature has authorized municipalities to establish equitable rates or charges for use of treatment plants and sewerage systems. See, § 14-365.03, R. S. Supp., 1967; § 18-503, R. R. S. 1943. The requirement that rates and charges be equitable is declaratory of the common law which prohibits unjust discrimination by a public utility. A difference in utility rates under substantially similar conditions of service may constitute unjust discrimination. On the other hand, rate differences fairly proportionate to differences in cost or difficulty of service are valid. See, Western Union Telegraph Co. v. Call Publishing Co., 44 Neb. 326, 62 N. W. 506, 48 Am. S. R. 729, 27 L. R. A. 622, affirmed 181 U. S. 92, 21 S. Ct. 561, 45 L. Ed. 765, 58 Neb. 192, 78 N. W. 519.

In determining reasonable rate relationships, a municipality may sometimes take into account the purpose for which a customer receives the service. Cornhusker Electric Co. v. City of Fairbury, 134 Neb. 248, 278 N. W. 379. See, also, Oradell Village v. Tp. of Wayne, 98 N. J. Super. 8, 235 A. 2d 905. Courts have recognized that differences in sewer use rates for residential customers and various other customers may be reasonable. Some customers may be subject to a flat rate while other customers are subject to rates based on water consumption or type and number of receptacles. See, Sharp v. Hall, 198 Okl. 678, 181 P. 2d 972; Gericke v. City of Philadelphia, 353 Pa. 60, 44 A. 2d 233; Hickory Township v. Brockway, 201 Pa. Super. 260, 192 A. 2d 231; Bexar County v. City of San Antonio (Tex. Civ. App.), 352 S. W. 2d 905; Town of Port Orchard v. Kitsap County, 19 Wash. 2d 59, 141 P. 2d 150; Antlers Hotel, Inc. v.

Town of City of Newcastle, 80 Wyo. 294, 341 P. 2d 951.

In form the Omaha rate structure with its user classes, flat rate, and scale rates satisfied the requirement of uniformity. In effect the structure failed to achieve perfect equality, but perfection is not the standard of municipal duty. The city might reasonably consider (1) the cost of construction and operation of the treatment facilities in connection with the city's inability to process all industrial wastes; (2) the substantial cost of construction, improvement, and maintenance of sewers for the principal beneficiary, the residential class; and (3) situations in which the degree of correlation between water consumption and sewer use was low. In light of present complaints and the evidence, the rate relationships were reasonable; there is no persuasive evidence of unjust discrimination against plaintiffs or intervener.

Statutes relating to collection of delinquent accounts have provided in part: "If any service charge * * * is not paid when due, * * * it may be certified to the tax assessor and assessed against the premises served, and collected or returned in the same manner as other municipal taxes are certified, assessed, collected, and returned * * *." § 14-365.03, R. S. Supp., 1967; § 18-503, R. R. S. 1943.

Sewer use charges are not special assessments. Michelson v. City of Grand Island, 154 Neb. 654, 48 N. W. 2d 769, 26 A. L. R. 2d 1346. We construe the statutes to authorize liens for payment of amounts overdue. It is unimportant for present purposes that the city described the unpaid charges as "special taxes" and "special assessments." See, City of Glendale v. Trondsen, 48 Cal. 2d 93, 308 P. 2d 1; Patterson v. City of Chattanooga, 192 Tenn. 267, 241 S. W. 2d 291; Murray City v. Board of Education of Murray City School Dist., 16 Utah 2d 115, 396 P. 2d 628. Legislative intent controls the construction of a phrase in an ordinance, although the phrase is inappropriate. See, Starman v. Shirley, 162 Neb. 613,

76 N. W. 2d 749; 6 McQuillin, Municipal Corporations (3d Ed.), § 20.56, p. 134. The omission of the city first to certify the amounts to the tax assessor was an inconsequential irregularity. Cf. Belza v. Village of Emerson, 159 Neb. 651, 68 N. W. 2d 272.

The processing charge of $3 did not defray the expense, of which publication constituted a substantial item. The city had authority to make necessary rules and regulations. See, § 14-365.03, R. S. Supp., 1967; § 18-503, R. R. S. 1943. In collecting a sewer service charge unpaid at due date, a municipality may add a reasonable processing charge. It is argued that the city wasted money by adopting such a procedure, but a better method is not suggested. The processing charge was reasonable.

The judgment is affirmed.

AFFIRMED.

JOHN G. BEVERIDGE ET AL., APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.

160 N. W. 2d 229

Filed July 19, 1968. No. 36822.

1. **Trial.** The primary responsibility for instructions is with the trial court and the parties cannot be required to approve them previous to their submission.
2. ———. Where, however, the parties elect to do so, they ordinarily thereafter cannot avoid the effect of their failure to point out defects.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., Gary R. Welch, Dick H. Hartsock, and Richard K. Spencer, for appellant.

Asa A. Christensen, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

SPENCER, J.

This is an eminent domain proceeding in which a small strip of land and controlled access were acquired for state highway purposes. The property fronted on the west side of U. S. Highway No. 83 in a developing commercial area. It was located south of the city of North Platte and immediately north of the South Platte River and of Interstate Highway No. 80. The jury awarded $570 for the strip taken, and $7,500 for remainder damage. The State perfected an appeal from the judgment entered on the verdict.

The State sets out nine assignments of error. Assignments of error Nos. 1, 2, and 3 complain about the content of certain of the court's instructions. Assignments of error Nos. 4, 5, 6, 7, and 8 allege the failure of the trial court to adequately instruct on certain features of the State's defense, and assignment of error No. 9 is an allegation that the alleged errors in the instructions resulted in an excessive verdict.

During the trial the court submitted the instructions to the respective counsel, and after both parties had rested visited with counsel about them. Plaintiffs' counsel made some observations on the instructions, and after discussion, the following took place: "THE COURT: Has the state any objections to the instructions as formulated? MR. WELCH: Your Honor, the state has examined the instructions prior to this, Instructions No. 1 through 10, and we have no objection to these instructions. THE COURT: Mr. Christensen, I think your comment on Instruction No. 2 is well taken, and I will, in accordance with your request, redraw No. 2 and we will meet again before you are expected to argue the case to the jury." Subsequently the following discussion took place: "THE COURT: Mr. Christensen, I have reformed Instruction No. 2 in accordance with the com-

ments that you made on it before lunch. With reference to Instruction No. 2, have you now had a chance to read the reformed version? MR. CHRISTENSEN: I have, Your Honor. THE COURT: Do you have any specific objection to voice to it now? MR. CHRISTENSEN: No. THE COURT: Have you, Mr. Welch, had a chance to read reformed Instruction No. 2? MR. WELCH: Yes, sir. THE COURT: Have you any specific objection to voice to it? MR. WELCH: I have no objection."

Without question, under our procedure it is the duty and the responsibility of the trial court to correctly instruct the jury on the issues presented by the pleadings and the evidence, whether requested to do so or not. Further, an instruction may be reviewed on appeal although no exception is noted on the record. Derr v. Gunnell, 127 Neb. 708, 256 N. W. 725. However, we have never permitted litigants to avoid the effect of action on their part which may have led the court into error, as the following quotations from Ballantyne v. Parriott, 172 Neb. 215, 109 N. W. 2d 164, will demonstrate: "* * * a trial court is entitled to assume that tendered instructions express the theory of the party tendering them on the point involved. * * *

"We regard it as a sound principle, as well as a salutary one, that a party cannot be heard to complain of an error which he himself has been instrumental in bringing about."

The situation herein is not too much different on the point involved from Baylor v. Tyrrell, 177 Neb. 812, 131 N. W. 2d 393, in which we said: "The court's instruction in this respect was in strict conformity with the legal definition of 'material allegation' as defined by the statute. The argument is ingenious that it could have misled the jury. But, if the defendant desired clarification, he should have called the court's attention to it by requesting a detailed instruction. Assuming, arguendo, that the instruction was not sufficiently specific in this

respect, it is the duty of counsel to offer requests to supply an omission, and unless this is done, the judgment will not be reversed for such defects. Graves v. Bednar, 171 Neb. 499, 107 N. W. 2d 12; Dorn v. Sturges, 157 Neb. 491, 59 N. W. 2d 751 (citing cases). In this case, the counsel for the defendant not only did not offer an instruction to supply the alleged 'omission' but when the court asked him if the instruction No. 3 was 'all right the way it is,' defendant's counsel responded, 'Yes.' "

Counsel for the State was given the opportunity and a reasonable time to examine and inspect the proposed instructions. He did so. Our law did not require him either to approve or disapprove the instructions. He was under no compulsion to do so in this instance. By telling the court, however: "Your Honor, the state has examined the instructions prior to this, Instructions No. 1 through 10, and we have no objection to these instructions," he elected to do so. After expressing his approval of the instructions, he should not be permitted to change his mind after an adverse verdict and object to the instructions he has specifically approved.

There is no question the trial court would have given full consideration to amplifying the instructions if any request had been made by the State. The purpose of submitting them to the parties was to give the parties an opportunity to suggest any modifications to the court. We repeat, however, the primary responsibility for instructions is with the trial court and the parties cannot be required to approve them previous to their submission. Where, however, the parties elect to do so, they ordinarily thereafter cannot avoid the effect of their failure to point out defects.

The verdict, while generous, was within the limits of the evidence, and we cannot say on the record herein that it was excessive.

For the reasons given, the judgment is affirmed.

AFFIRMED.

WHITE, C. J., BOSLAUGH, SMITH, and MCCOWN, JJ., concurring.

It is the duty and responsibility of the trial court to correctly instruct the jury on the issues presented by the pleadings and the evidence, whether requested to do so or not. It is the duty of counsel to assist the trial court by stating, upon inquiry, any specific objection that counsel may have to a proposed instruction.

The primary responsibility for instructions is with the trial court. But counsel cannot avoid their responsibility to the court by declining comment. The effect of the failure to object to erroneous instructions in a particular case must depend upon the seriousness of the defects, the difficulty involved in discovering the defects, and other similar factors.

To the extent that the opinion of the court implies that a different result might have obtained if counsel had refused to comment on the proposed instructions, we do not agree.

TOM AND JERRY, INC., A CORPORATION, ET AL., APPELLANTS, V. NEBRASKA LIQUOR CONTROL COMMISSION ET AL., APPELLEES.

160 N. W. 2d 232

Filed July 19, 1968. No. 36923.

1. **Intoxicating Liquors: Constitutional Law.** 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 and 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 provided by the state and federal Constitutions.
2. **Statutes.** While it is competent for the Legislature to classify for purposes of legislation, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest

the justice or expediency of diverse legislation with respect to the objects to be classified.

3. **Intoxicating Liquors: Constitutional Law.** The provisions of section 53-168, R. S. Supp., 1967, placing persons having retailer's licenses to sell beer in one class and persons having retailer's licenses to sell alcoholic liquors in another class, for purposes of legislation in regulating the liquor traffic, is not arbitrary or unreasonable and therefore valid.
4. ———: ———. Where an exemption from the operation of a general law dealing with intoxicating liquors is not made applicable to all persons in the same class similarly situated, such provision is invalid as granting special privileges or immunities.
5. **Statutes: Constitutional Law.** There is no vested right in an existing law which precludes its amendment or repeal, and there is no implied promise on the part of the state to protect its citizens against incidental injury occasioned by changes in the law.
6. ———: ———. Where it appears that an unconstitutional portion 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 portion did not constitute such an inducement to the passage of the valid parts that they would not have passed without them, the former may be rejected and the latter upheld.
7. **Statutes.** A severability clause in a statute is not a condition precedent to a determination of the question of severability.
8. ———. Where the title of an amendatory or supplemental act sufficiently indicates the nature of the legislation in it contained, or the nature of the changes or additions by it made, it is immaterial whether or not the provisions of the act amended are covered by the title of the amendatory act.
9. ———. Legislative intent, when apparent from the whole statute, is not to be thwarted by strained and unusual interpretations of particular words not required under the circumstances, nor because the statute previously was difficult in detail, or that a subsequent amendment has changed it in some respects.
10. ———. A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of the words of a statute in the connection in which they are used and in the light of the mischief to be remedied.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Seymour L. Smith, for appellants.

Clarence A. H. Meyer, Attorney General, and Robert R. Camp, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, MCCOWN, and NEWTON, JJ., and KOKJER, District Judge.

CARTER, J.

This is a suit for an injunction brought by Tom and Jerry, Inc., and others, against the Nebraska Liquor Control Commission and its members and secretary, to enjoin the enforcement of L.B. 330, now section 53-168, R. S. Supp., 1967, enacted by the 1967 session of the Legislature, for the reason that said act is violative of specified provisions of the Constitutions of Nebraska and of the United States. The trial court found the act to be constitutional with one exception not an inducement to its passage, and entered its judgment accordingly. The plaintiffs have appealed.

The act existing prior to the enactment of section 53-168, R. S. Supp., 1967, permitted the purchase of beer by a retailer licensed to sell it on credit for a period of 30 days and provided a penalty if it was not paid for within 30 days from the date of delivery. § 53-168, R. R. S. 1943. Section 53-168, R. S. Supp., 1967, effective October 23, 1967, provides that the purchase of beer by a licensed retailer must be paid for in cash on delivery and imposes a penalty on a licensed beer retailer not complying with the provision. It is this provision in the new act, among others, which is alleged to be unconstitutional by the plaintiffs.

Plaintiffs contend that the act is violative of Article I, section 25; Article III, section 18; and Article III, section 14, Constitution of Nebraska, and section 1 of the Fourteenth Amendment and the due process clause of the Fifth Amendment to the Constitution of the United States.

Plaintiffs assert that the new act, in prohibiting a re-

tailer from accepting credit for the purchase of beer from a wholesaler and permitting a 30-day credit on a retailer's purchases of other alcoholic liquors, violates the due process and equal protection clauses of the state and federal Constitutions and is discriminatory between the holders of retail licenses dealing in beer and those dealing in other liquors. As a corollary to these questions, it is also asserted that there is an unreasonable classification between beer and liquor licensees which is inhibited by constitutional provisions.

The Legislature has broad powers in the regulation and control of the liquor traffic. The control of the licensed liquor business is different than the ordinary exercise of the police power of an unlicensed business for the protection of the health, safety, morals, and welfare of the public. The engaging in the sale of intoxicating liquors is a mere privilege; and restrictive regulations or even a suppression of the traffic does not violate provisions of the state and federal Constitutions relating to the due process, privileges or immunities, uniformity, nor, unless wholly arbitrary in their discriminations between persons, the equal protection of the law. But even so, justification for classification must exist; purely arbitrary treatment cannot be sustained. Safeway Stores, Inc. v. Nebraska Liquor Control Commission, 179 Neb. 817, 140 N. W. 2d 668; Marsh & Marsh, Inc. v. Carmichael, 136 Neb. 797, 287 N. W. 616.

The very issues before this court were decided in Weisberg v. Taylor, 409 Ill. 384, 100 N. E. 2d 748. In that case, the court said: "Our first inquiry, therefore, is whether or not the imposition of credit restrictions has any relationship to the public health, safety, or welfare within the police powers of the State. The mere statement of the proposition that the extension of credit by a creditor to a debtor does impose on the debtor an interest, supervision, power and influence on the part of the creditor proves itself. Indeed, this has been judicially recognized in Sullivan v. Cann's Cabins, 309

Mass. 519, 36 N. E. 2d 371, 136 A. L. R. 1236, where the Massachusetts court stated: 'Its purpose appears to have been to avoid the evils believed to result from the control of retail liquor dealers by manufacturers, wholesalers, or importers through the power of credit. Those evils do not, as a rule, depend upon the nature of the consideration out of which the credit arose. They depend upon the power of the creditor over the debtor.' * * * The restriction or curbing of credit by legislative enactment is but a logical extension of these prohibitions and is directly connected with the evils long recognized in the 'tied house.' * * * Credit restrictions on a nationwide basis are inaugurated on the theory that they will ultimately reduce sales and the consumption of goods. If the legislature, therefore, believes that the restrictions here imposed will reduce the volume of sales and tend to promote temperance rather than intemperance, then we cannot say as a matter of law that such a conclusion has no connection with the public welfare, safety, or morals, even though we may doubt that it will accomplish in full such result. * * *

"Our next question is whether or not the no-credit provision with respect to beer and the fifteen-day credit limitation on distributors of beer discriminates between such dealers as compared with distributors and retail dealers of other alcoholic beverages. * * * Historically, therefore, there is a sound basis for distinguishing between beer and other alcoholic beverages. The volume of any single brand or product of any single distillery of whiskey, or wine, or spirits, used in a single tavern is hardly sufficient to interest the distillery in the active control and management of that establishment. Most of such products are shipped from a distance. Beer, on the contrary, is more localized than are other alcoholic beverages. The interest of the brewery in acquiring trade in its local area is considerably more self-evident. There is, however, we believe, historically and otherwise, a sound basis for the distinction and classification

here made by the legislature. We cannot say that, in drawing that distinction and imposing the credit restriction, the legislature has acted in an arbitrary or discriminatory manner in seeking to avoid a recurrence of the evil which was historically known to them. * * *

"We have already observed that the right to sell liquors is permissive only and the regulations may be much more stringent than those permitted in other businesses. We cannot here say that the means employed in this act by the legislature to secure obedience to the credit provisions of the act are unreasonable, discriminatory, or lack the necessary relation to the police power of the State. The act operates equally and impartially upon manufacturers, upon importing distributors, upon distributors, and upon retailers. It likewise operates equally and impartially upon the distributors of beer and upon the retailers of beer. The legislature may well say that we do not want anyone engaged in the retail sale of beer who has to depend upon credit for the operation of his business. * * * It, therefore, appears that the statute here complained of is not in violation of any of the constitutional provisions as here asserted."

The primary question in this case is whether or not the act discriminates between retailers of beer and retailers of other liquors which depends largely on the question whether or not the placing of retailers of beer in one class and retailers of whiskey, wine, and other spirits in another, are reasonable classifications for purposes of legislation. The record in this case discloses that liquors other than beer can be stocked by a retailer in larger quantities, that the stock turnover is not so frequent, and that the source of the stock supply is usually more distant and deliveries less frequent than beer. The evidence shows that beer, because of its nature, is more localized and requires deliveries to be made once or twice a week. The evidence also shows that the distribution of beer on the 30-day credit basis has created administrative problems. It is shown that the month preceding

the date of passage of the new act there were 163 violations of the credit provisions of the act and the Liquor Control Commission was required to inflict penalties on 44 retail licensees for failure to comply with the credit requirements of the controlling statute. In addition thereto, it is within the province of the Legislature to determine that it does not want anyone engaged in the retail sale of beer who has to depend upon credit for the operation of his business. There are differences in the business of retailing beer and in retailing other forms of alcoholic liquors that sustain their being differently classified for purposes of legislation.

Plaintiffs offered evidence to show that the payment for beer on a cash basis on delivery resulted in financial loss. They said that it requires more frequent deliveries, more trucks, and more employees. They said that they lose the use of their money for the credit period. They further say that cash on delivery has resulted both in the loss of customers and volume. But these alleged losses are incident to the regulation of the licensed business of selling beer that operate on all retailers of beer alike. It can afford no basis for constitutional objection.

In Beisner v. Cochran, 138 Neb. 445, 293 N. W. 289, this court said: "We think the rule is, that a citizen has no vested right in statutory licenses, permits and privileges. This being true, a license to carry on a particular trade may be recalled by legislative action at any time. No one has a vested right to be protected against consequential injuries arising from a proper exercise of public powers. That the state under its police power may regulate the use of motor vehicles on the public highways cannot be questioned. Consequently, any incidental damage resulting from a legislative invocation of its police power does not give rise to a right to enjoin the act or to claim compensation from the public. And, likewise, the amendment or repeal of an existing police regulation must necessarily follow the same principle."

The general rule as to classification for purposes of

legislation is: "While it is competent for the Legislature to classify for purposes of legislation, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified." Safeway Stores, Inc. v. Nebraska Liquor Control Commission, *supra*. We think the classifications were reasonable, operating on all licensed retailers of beer alike, and within constitutional requirements.

We hold under the authorities cited that section 53-168, R. S. Supp., 1967, is not violative of the equal protection, due process, privileges and immunities, nor the antidiscrimination clauses of the state and federal Constitutions, except as to one exception hereafter noted.

The exception mentioned in the previous paragraph refers to the claim that the following provision of subsection (1) of section 53-168, R. S. Supp., 1967, is unconstitutional: "* * * except the provisions of this section shall not apply to manufacturers, distributors, and licensees of beer when sold in stadiums where professional baseball is played," and that such unconstitutionality has the effect of invalidating the whole of section 53-168, R. S. Supp., 1967. The provision shows on its face that it is discriminatory and unconstitutional. This exception was in the old section, section 53-168, R. R. S. 1943, having been placed therein in 1953. It is clear, therefore, that it was not an inducement to the passage of the new act in 1967. In giving consideration to the new act and the purposes intended, we do not think it would have been an inducement to the passage of the new act even if it had originated therein.

The applicable rule is: "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 pas-

sage 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, *supra.*

There was no severability clause in the act before us. But a severability clause is merely an aid to construction and not an inexorable command. A severability clause in a statute is not a condition precedent to a determination of the question of severability. Hubbell Bank v. Bryan, 124 Neb. 51, 245 N. W. 20, 289 U. S. 753, 53 S. Ct. 785, 77 L. Ed. 1498; Safeway Stores, Inc. v. Nebraska Liquor Control Commission, *supra.*

It is alleged that the title to the act before us is insufficient and violative of Article III, section 14, Constitution of Nebraska. The title to the act is: "An Act to amend section 53-168, Reissue Revised Statutes of Nebraska, 1943, relating to alcoholic liquors; to make it unlawful for a person having a retailer's license to sell beer to accept credit for the purchase of beer from any manufacturer, distributor, or wholesaler of beer; and to repeal the original section." The title clearly states the amendment made to section 53-168, R. R. S. 1943. Plaintiffs urge, however, that the title to the present act should also have referred to the provisions of the act being amended. This question appears to have been decided in Miller v. Iowa-Nebraska Light & Power Co., 129 Neb. 757, 262 N. W. 855, wherein it is stated: " 'Where the title of an amendatory or supplemental act sufficiently indicates the nature of the legislation in it contained, or the nature of the changes or additions by it made, it is immaterial whether or not the provisions of the act are covered by the title of the act amended or supplemented.' " The title to the act meets the requirements of the constitutional provision providing that: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." Art. III, § 14, Constitution of Nebraska.

Some contention is made that the act is ambiguous,

contradictory, and unintelligible. In construing a legislative act, the provisions should be construed together and harmonized if possible. The intent of the Legislature in passing the act is plain and clear. When the intent of the Legislature is clear, it is the duty of the courts to construe it in accordance with such intent. A sensible construction will be placed upon it to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. In Safeway Stores, Inc. v. Nebraska Liquor Control Commission, *supra*, we quoted the following with approval from Grand Union Co. v. Sills, 43 N. J. 390, 204 A. 2d 853: " 'We are satisfied that the statute may not properly be stricken on the ground of vagueness; on the contrary, the legislative language may, within settled principles of statutory construction, readily be interpreted to effectuate the basic goal of the Legislature as it clearly appears from the history and context of the legislation. * * * There must be sensible rather than literal interpretation. * * * Notwithstanding its somewhat awkward terminology, section 1 is to be read as limiting the holding of retail liquor licenses to two per person, * * *.' "

"A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of the words of a statute in the connection in which they are used and in the light of the mischief to be remedied. While there is a rule requiring the strict construction of a penal statute that rule is not violated by giving to the words their full meaning in connection in which they are employed." State v. Buttner, 180 Neb. 529, 143 N. W. 2d 907.

"The legislative intent, when apparent from the whole statute, is not to be thwarted by strained and unusual interpretations of particular words not required under the circumstances, nor because the statute previously was different in detail, or that a subsequent amendment has changed it in some respects. We think when given

its usual accepted meaning, the language of the statute and the intent of the Legislature are clear." Schmeckpeper v. Panhandle Coop. Assn., 180 Neb. 352, 143 N. W. 2d 113.

We conclude that the statute is not defective for ambiguity or indefiniteness, and that it is not in violation of the constitutional provisions here asserted, except as to the one provision set out herein. The trial court came to the same conclusion and its judgment is therefore affirmed.

AFFIRMED.

FRANK DISNEY, APPELLANT, V. BUTLER COUNTY RURAL PUBLIC POWER DISTRICT, APPELLEE.
160 N. W. 2d 757

Filed August 23, 1968. No. 36761.

1. **Negligence.** One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.
2. ———. To constitute want of due care it is not required that a person should have anticipated the exact risk which occurred, or that the peril was a deadly one; it is sufficient that he has placed himself in a position of a known danger where there was no need for him to be or that he knew or should have known that substantial injury was likely to result from his act.

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

Snell & Winkle, Barney, Carter & Buchholz, Herbert M. Brugh, and John C. Whitehead, for appellant.

Mills, Mills & Mills and John E. Dougherty, for appellee.

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

WHITE, C. J.

The defendant's two-wire electric power transmission line (neutral wire 21 feet, 6 inches and hot wire 25 feet, 6 inches in height) crossed plaintiff's farmyard and driveway. Plaintiff sues for electric-shock-caused personal injuries occurring when a tractor pulling 70-foot irrigation sprinkler arms either contacted or arced with the hot line, throwing plaintiff off the tractor he was pulling the trailer sprinkler equipment with. The district court dismissed the cause primarily on the ground that the plaintiff was guilty of contributory negligence as a matter of law. We affirm the judgment of the district court.

The accident occurred around 6 a.m., July 21, 1960. Plaintiff was moving his irrigation equipment through his farmyard to irrigate another part of his farm. He had acquired the farm in 1955 and the irrigation sprinkler equipment in October 1959. The sprinkler system consisted of two wings extending approximately 72 feet from a trailer upon which the wings were mounted. He had acquired the farm in 1955 and at that time and at all times knew it had a 7,200 volt power line traversing the yard and driveway. The line had been constructed in 1946. Pulling into the yard with the irrigation trailer system arms elevated and behind him, he stopped the tractor without first looking to see how close the arms were to the line. He jumped off the tractor, apparently touched some part thereof, was shocked unconscious, was discovered by his wife who had been in the kitchen, and was taken to the hospital in Osceola, Nebraska. The plaintiff had farmed most of his life. He was familiar with the lines across his yard; knew there were two lines, one above and one below; knew the construction of and the height of the lines; observed that the lines had remained in the "same condition"; knew the length of the irrigation wings; and knew they were of the boom type, that they were set on the trailer, and were "loose." He testified that ordinarily he was careful when he went under high tension lines. He had moved the equipment many times

before. He knew the lines carried electricity, that it was dangerous to get anything in contact with or close to the lines, and that if he got close to the lines, "he was going to get in trouble." When he neared the high tension wires he was looking at the sprinkler. As to the exact circumstances of the accident he testified: "Q * * * But you knew all the time that those high tension lines were there, but you were busy being occupied by looking at something else, isn't that right? A Yes, the sprinklers. Q * * * But you didn't at anytime look up and see whether your sprinkler was going to be engaged with those high tension wires or whether it would be clear underneath them. That's right, isn't it? A Well, I pulled just on the end and stopped. Q But you knew at the same time that you were right underneath those high tension wires, didn't you, Frank? A Yes. Q And you weren't looking for those but you were looking down to watch that sprinkler? A Yes." Other testimony establishes without dispute that there was a slight breeze blowing; that the height of the lower neutral line was 21 feet, 6 inches, with the hot line 4 feet above that; that after the accident the boom which was unlocked and loose was 24 to 30 inches from the hot line; and that the line came in contact with the sprinkler arm 4 or 5 feet from the end of the boom, burned apart, and came down.

Other evidence generally establishes the prevalence of high tension lines along and crossing farms generally in Butler County, constant warnings of the hazards involved by the defendant to customers and owners, and that the lines were well above minimum heights established by the industry and regulations. There is considerable evidence as to "sag," but the actual height of the wires at the scene was conclusively established by the evidence and there is no evidence of an abnormal sag which would widen a wind or breeze-blown swing of the wires beyond normal expectations.

The applicable rule of law is set out in the recent

case of Fritchley v. Love-Courson Drilling Co., Inc., 177 Neb. 455, 129 N. W. 2d 515. In a substantially analogous situation this court said: "The plaintiff first saw the defendant's water tank in 1959. At that time the top rung of the ladder was broken loose from the pipe and the plaintiff considered the ladder to be dangerous. The plaintiff had climbed this ladder between three and five times before the accident happened. On the day that the accident happened, the ladder, including the top rung, was in the same condition that it was in when the plaintiff first saw it. The condition of the ladder was visible and could be seen from the ground. * * * The plaintiff did not inspect the ladder before climbing it and he did not have the broken rung in mind when he started to climb. The plaintiff was wearing overshoes which were muddy and he did not remove them before attempting to climb the ladder. * * * One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent. One who knows of a dangerous condition, appreciates its dangerous nature, and deliberately exposes himself to the danger assumes the risk of injury from it. Wertz v. Lincoln Liberty Life Ins. Co., 152 Neb. 451, 41 N. W. 2d 740, 17 A. L. R. 2d 629; Lownes v. Furman, 161 Neb. 57, 71 N. W. 2d 661; Anderson v. Evans, 164 Neb. 599, 83 N. W. 2d 59; Gamble v. Gamble, 171 Neb. 826, 108 N. W. 2d 92; Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041."

The general rule is accurately set out in 29 C. J. S., Electricity, § 53, p. 1115: "One who has notice of a dangerous condition of a wire or other electrical appliance and voluntarily or recklessly brings himself into contact with it, as by touching it with conductors of electricity, is guilty of negligence and cannot hold the company for the resulting injuries, and this is true of an adult although he is wholly unskilled in the handling of electricity. * * * To constitute want of due care on his

part it is not required that he should have anticipated the exact risk which occurred or that the peril was a deadly one; it is sufficient that he placed himself in a position of a known danger where there was no need for him to be or that he knew or should have known that substantial injury was likely to result from his acts."

The lack of care on the part of the plaintiff, according to his own testimony, is almost self-evident. According to his own testimony he was not paying any attention when he came with the sprinkler to the place where the lines were, because he was looking at the sprinkler. He never looked up at the lines to see precisely where they were, or gauged whether his equipment would likely come in contact with them, or, despite his knowledge, make any evaluation of danger or trouble in passing the lines. There was no reason why he could not lower the boom to irrigating position before going under the wires. He knew the wings were elevated and that their height was much above any possibility of marginal clearance. And after descending from the tractor there is no evidence that he made any observation of the wires, what position he was in, or the nature and character of the equipment with reference to coming in contact with the lines.

Unless we were to hold the defendant liable on the doctrine of absolute liability for injuries arising from the transmission of electricity, the facts in this case are conclusive of contributory negligence on the part of the plaintiff. Clearly the plaintiff was capable of understanding and discretion, at the time had knowledge of and was conscious of the danger involved, knew of the dangerous condition, and failed to exercise ordinary care to avoid dangers which were open and obvious.

The judgment of the district court dismissing the cause of action is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JEROLD REEDER, APPELLANT.

160 N. W. 2d 753

Filed August 23, 1968. No. 36827.

1. **Infants: Intoxicating Liquors.** Knowledge and consciousness of possession are essential elements of the crime of possession of alcoholic liquor by a minor.
2. **Evidence: Trial.** It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.
3. ———: ———. After a jury has considered the evidence in the light of the foregoing rules and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt.
4. ———: ———. Generally matters that go to the weight and credibility of the evidence are solely for the jury to determine as trier of the facts and do not relate to the question of the sufficiency of the evidence.
5. **Trial.** Instructions must be considered as a whole in determining whether a particular instruction or a part thereof is prejudicial.
6. ———. Error may not be predicated on the refusal to give an instruction which either erroneously or partially covers the applicable law.
7. **Arrest: Probable Cause.** A police officer may arrest for a misdemeanor committed or attempted in his presence.

Appeal from the district court for Platte County: C. THOMAS WHITE, Judge. Affirmed.

Moyer & Moyer, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

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

WHITE, C. J.

The defendant minor was convicted in county court

and by a jury in district court of possession of alcoholic liquor inside a vehicle while on a public street or highway, contrary to section 53-180.02, R. S. Supp., 1965. From the judgment of conviction and sentence thereon, he appeals to this court. We affirm the judgment and sentence of the district court.

The following facts, mainly undisputed, furnish the factual background of this case: On the night of April 6, 1967, at approximately 11:50 p.m., Jack L. Florendo, a city police officer, was taking three other police officers home upon terminating their tour of duty when he observed 17-year-old Jerold Reeder hanging out of a motor vehicle which was parked on a city street in Columbus, Nebraska. Officer Florendo stopped the vehicle he was operating and shone his spotlight on the defendant and upon doing so, defendant grabbed the steering wheel of the vehicle he was hanging out of and pulled him up into the vehicle. Officer Florendo then got out of the vehicle he was operating and walked over to the vehicle the defendant was sitting in. Upon doing so, officer Florendo observed three other persons, Westerbuhr, Tagwerker, and Miss Ramona Neuhaus sitting in the vehicle with the defendant. He also observed a bottle of beer between Westerbuhr's feet, who was sitting in the left rear of the vehicle, whereupon Florendo called to the other officers. Officer Molczyk responded and proceeded to the passengers' side of the vehicle in which the defendant was sitting. He first observed Tagwerker, who was sitting in the right rear, pouring beer out of a bottle. Officer Molczyk observed two beer bottles near the back window and another beer bottle on the floorboard to the right of the hump caused by the transmission and in front of Miss Neuhaus, who was sitting in the front seat next to the defendant who was sitting behind the steering wheel. The evidence is that Miss Neuhaus was not drinking and consumed none of the beer from the partially empty bottle on the floor next to the transmission hump. During the investigation, officer

Molczyk detected an odor of alcoholic liquor on the defendant. The defendant and the three other persons who were with him were advised that they were under arrest.

The main thrust of the defendant's argument is that the evidence is insufficient, as a matter of law, to support a conviction. It has long been the rule that knowledge and consciousness of possession of alcoholic liquor are essential elements of proof. See State v. Eberhardt, 176 Neb. 18, 125 N. W. 2d 1, and cases cited therein at p. 22. There is often, as here, very little direct evidence of knowledge and "conscious possession." Like intent, these elements remain hidden in the recesses of the human mind and must be proved by means of circumstantial evidence. With regard to judicial review of the sufficiency of circumstantial evidence to support a conviction, we have recently restated the rule with reference to circumstantial evidence. In State v. Williams, *ante* p. 257, 159 N. W. 2d 549, we said: "In State v. Ohler, supra, we restated what has long been the rule in this jurisdiction: 'After a jury has considered the evidence in the light of the foregoing rules and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence *if the evidence sustains some rational theory of guilt.*'" (Emphasis supplied.)

Do the inferences from the proved facts sustain some rational theory of conscious possession and therefore guilt of the accused? We hold that they do. Besides the inferences from the general circumstances of the conduct of the defendant and the pouring and drinking of beer by his companions, there are two circumstances which unerringly sustain a rational inference of knowledge and conscious possession. One is the presence of an opened and partially empty cooled bottle of beer lying within arm-reaching distance of the defendant just over the transmission "hump" immediately to his right on the floor in front of the front seat of the automobile. An-

other is the positive testimony of the police officer that at about the same time he smelled beer on the defendant's breath when about 2 feet from him. Unless we are to emasculate the statute by holding that direct evidence only is sufficient to support a conviction, the evidence herein is sufficient to support a conviction, as the county court and a district court jury found. Most of the rest of the defendant's argument is in essence a discussion of the weight and credibility of the evidence and testimony. It is true that the companions of the defendant testified unequivocally in his favor, and another officer did not smell liquor on defendant's breath. We point out that this officer's testimony was not based on a proper foundation, and even if it were, these are matters that go to the weight and credibility of the evidence, are solely for the jury as trier of the facts, and do not relate to the question of the sufficiency of the evidence. See State v. Knecht, 181 Neb. 149, 147 N. W. 2d 167.

Defendant contends that the court, in its instruction on circumstantial evidence, did not inform the jury that the circumstances must be proved beyond a reasonable doubt. As the court specifically instructed the jury in instruction No. 10, instructions must be considered as a whole in determining whether a particular instruction or a part thereof is prejudicial. See State v. Brown, 174 Neb. 393, 118 N. W. 2d 332. Instructions Nos. 8 and 9 informed the jury of the applicable law of circumstantial evidence and as to the law of reasonable doubt. The three instructions together could not have reasonably misled the jury to an incorrect application of the law. Defendant urges error in the refusal to give a requested instruction which he says contained *only* a portion of the law of circumstantial evidence. The instruction requested was fully covered in the instructions given and error may not be predicated on the refusal to give an instruction which either erroneously or partially covers the applicable law. Owens v. State, 152 Neb. 841, 43 N. W. 2d 168.

Defendant argues that the court did not instruct the jury that an additional independent factor linking the defendant with the alcoholic beverages must be shown besides the presence with others who were in possession. In instruction No. 5 the court fully and accurately informed the jury of the law of possession and the necessary elements thereof. Again, the jury in instruction No. 9 was informed as to the law of reasonable doubt. The argument of the defendant amounts to a contention that the court was under a duty to give an instruction, although technically accurate, slanted in his favor. There is no merit to this contention.

Defendant argues at length about the ambivalent nature of the evidence and argues that at a minimum it it is susceptible of a reasonable construction of the innocence of the accused. This argument basically flows from a misconception of the circumstantial evidence rule. It is only necessary that the evidence support some rational theory of guilt in order to be sufficient to require submission to the jury or to sustain a jury verdict. State v. Williams, *supra;* State v. Ohler, 178 Neb. 596, 134 N. W. 2d 265.

Defendant argues the illegality of his arrest without a warrant. A police officer may arrest for a misdemeanor committed or attempted in his presence. 5 Am. Jur. 2d, Arrest, § 30, p. 720. The same evidence that sustains the finding of the guilt of the accused amply supports the finding that it was being committed at the time the officer stepped up to the car and found the defendant in the driver's seat within arm-reaching distance of a partially emptied cold bottle of beer. The presence of the drinking companions and the smell of alcoholic liquor later discovered also demonstrate that an offense was being committed at the time the police officer appeared.

The judgment and sentence of the district court were correct and are affirmed.

AFFIRMED.

BARBARA BROWN, APPELLANT, V. CITY OF OMAHA, APPELLEE.
160 N. W. 2d 805

Filed August 30, 1968. No. 36846.

Municipal Corporations: Torts. Cities and all other governmental subdivisions and local public bodies of this state are not immune from tort liability arising out of the ownership, use, and operation of motor vehicles.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Reversed and remanded.

Lathrop & Albracht and Daniel G. Dolan, for appellant.

James E. Fellows and Frederick A. Brown, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

McCOWN, J.

This is an action at law against the City of Omaha, a municipal corporation, for personal injuries allegedly sustained by the plaintiff as the result of the negligence of a policeman in the operation of a police patrol car. The city filed a demurrer based upon governmental immunity from liability for tort actions. The demurrer was sustained by the trial court and the plaintiff has appealed. The issue is whether the traditional rule of governmental immunity from tort liability should be adhered to.

Sovereign immunity has been said to stem from the concept that "the King can do no wrong." The traditional judicial translation of this concept proceeds on the basis that it is better that a citizen injured by the negligence of the governmental entity should alone suffer the loss rather than the "sovereign" governmental unit. This court long ago adopted the traditional common law view that a public entity engaged in governmental activities is not liable for negligence. Immunity has been "based upon a public policy which subordinates mere

private interests to the welfare of the general public." Gillespie v. City of Lincoln, 35 Neb. 34, 52 N. W. 811, 16 L. R. A. 349. Why the "sovereignty" doctrine was ever extended to municipalities and local governmental units "is one of the mysteries of legal evolution." Borchard, Government Liability in Tort, 34 Yale L. J. 1, 4 (1924).

Even under the traditional common law rule of immunity, activities of a municipal corporation which were judicially classified as "proprietary" rather than "governmental" in nature were not immune. Greenwood v. City of Lincoln, 156 Neb. 142, 55 N. W. 2d 343, 34 A. L. R. 2d 1203. This concept has recently been extended to the state itself. See, Stadler v. Curtis Gas, Inc., 182 Neb. 6, 151 N. W. 2d 915.

The rationale behind the "governmental-proprietary" distinction is that when a public entity is involved in a governmental function, it is immune from tort liability, but when involved in a proprietary function, it loses its cloak of immunity. Under this rule, the citizen who has been negligently injured by a vehicle of the city water department may recover, but the citizen who has been negligently injured by a vehicle of the city health department of the same city cannot recover. Such distinctions defy logical explanation.

Particularly during the past 10 years, judicial opinions in increasing volume have pointed out the fact that the reasons underlying the traditional wide-sweeping rule of sovereign immunity have virtually disappeared in modern society. The rule is today no longer just, reasonable, nor defensible. The judicial attack on the traditional rule of governmental immunity has resulted in judicial abrogation of the doctrine in several states. See, Muskopf v. Corning Hospital Dist., 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P. 2d 457; Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N. E. 2d 89; Hargrove v. Town of Cocoa Beach (Fla.), 96 So. 2d 130, 60 A. L. R. 2d 1193; McAndrew v. Mularchuk, 33 N. J.

172, 162 A. 2d 820; Williams v. City of Detroit, 364 Mich. 231, 111 N. W. 2d 1; Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N. W. 2d 618; Stone v. Arizona Highway Comm., 93 Ariz. 384, 381 P. 2d 107. See, also, Hink and Schulter, Some Thoughts on the American Law of Governmental Tort Liability, 20 Rutgers L. Rev. 710 (1966); A Comment on Governmental Tort Immunity in Kansas, 16 Kan. L. Rev. 265 (Jan. 1968).

The major conflict is no longer whether the traditional doctrine of governmental immunity from tort liability is obsolete and unjust, but, instead, lies in the area of the responsibility and power of the courts to reform it. For a discussion of the relative responsibility of courts and legislatures in this area, see, The Role of the Courts in Abolishing Governmental Immunity, Duke L. J. (1964), 888; Peck, The Role of the Courts and Legislatures in the Reform of Tort Law, 48 Minn. L. Rev. 265.

Many courts in the past have held that any change in the doctrine of governmental immunity must be made by the legislature and not by the courts. More recently, although recognizing that the doctrine of governmental immunity was a court-made rule and of judicial origin, some courts have nevertheless refused to abrogate or modify it because of the fact that the doctrine has been adhered to for many, many years. See, for example, Boyer v. Iowa High School Athletic Assn., 256 Iowa 337, 127 N. W. 2d 606.

"The dozen or so state supreme courts that have recently abrogated the immunity doctrine have recognized that an unjust and irrational principle cannot be allowed to persist on the hollow ground that changing an antiquated rule is a job for the legislature." 16 Kan. L. Rev. 265 at page 273.

Section 49-101, R. R. S. 1943, provides: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state, is adopted

and declared to be law within the State of Nebraska."

In State v. Tautges, Rerat & Welch, 146 Neb. 439, 20 N. W. 2d 232, this court held: "The courts have power to modify the common law, adopting such of its principles as are applicable and rejecting such others as are inapplicable." This court cited with approval the reasons of the soundness of that rule: "The common law by its own principles adapted itself to varying conditions and modified its own rules so as to serve the ends of justice as prompted by a course of reasoning which was guided by these generally accepted truths. One of its oldest maxims was that where the reason of a rule ceased, the rule also ceased, and it logically followed that when it occurred to the courts that a particular rule had never been founded upon reason, and that no reason existed in support thereof, that rule likewise ceased, and perhaps another sprang up in its place which was based upon reason and justice as then conceived. No rule of the common law could survive the reason on which it was founded. It needed no statute to change it but abrogated itself."

Another reason sometimes relied on as supporting noninterference by the judiciary in the field of governmental immunity is the contention that the Legislature has preempted the field. The legislation in Nebraska dealing with removal of governmental immunity is extremely limited, and could properly be said to represent only a few isolated areas of a very large field. Justice Traynor of California effectively responded to the preemption argument in the following language. "We are not here faced with a situation in which the Legislature has adopted an established judicial interpretation by repeated re-enactment of a statute * * * Nor are we faced with a comprehensive legislative enactment designed to cover a field. What is before us is a series of sporadic statutes, each operating on a separate area of governmental immunity where its evil was felt most. Defendant would have us say that because the Legisla-

ture has removed governmental immunity in these areas we are powerless to remove it in others. We read the statutes as meaning only what they say: that in the areas indicated there shall be no governmental immunity. They leave to the court whether it should adhere to its own rule of immunity in other areas." Muskopf v. Corning Hospital Dist., *supra*. It should be pointed out also that at the time of the California decision, California had far more legislation on the subject than there is in Nebraska.

We are convinced that the rule of governmental tort immunity is of judicial or common law origin, and that this court has power to modify it in the absence of legislative action to the contrary.

Both the Legislature and this court have power to act to change the doctrine and it may well be that the Legislature will have the ultimate word. This would seem to be a poor reason to avoid the court's obligation to modify the common law to serve the requirements of justice in a modern society. We ought not to thrust upon the Legislature the sole responsibility for injustice on the ground that, "Thus it was said in the reign of Henry IV," nor even on the ground that any change would constitute the traditionally condemned heresy of judicial legislation.

We must recognize, however, that the doctrine of governmental immunity from tort liability underlies a very broad field and that the legislative process and procedures can be more effectively applied to a comprehensive solution, while the court's processes and procedures are more effectively directed to a solution more narrowly limited to specific facts framed in litigated cases. Any modification ultimately shaped by this court should be limited to torts, and should not be construed as imposing liability on any governmental body in the exercise of what might be termed "ministerial or discretionary functions" nor on the exercise of legislative or

judicial or quasi-legislative or quasi-judicial functions. See Holytz v. City of Milwaukee, *supra*.

The nature of the activities and the harm, fiscal consequences in general, analogies in private law, the public interest in effective, efficient governmental service, and the fact of a long-continued assumption of nonliability, together with the broad coexistent authority of the Legislature to act, all dictate a gradual judicial transition. That transition is preferably accomplished by the process of inclusion and exclusion, case by case, and step by step.

Automobile accidents do not fall within the category of reasonable exceptions to nonliability which might foreseeably be carved out of any future framework of modification. The general legislative policy to accept public financial responsibility in this area is already apparent in section 60-1008, R. S. Supp., 1967. That section requires liability insurance for all trucks, automobiles, snow plows, road graders, or other vehicles of state agencies.

The record here does not reveal whether or not the City of Omaha or other cities or governmental subdivisions carry liability insurance on motor vehicles. The existence of such insurance has in itself been treated as a waiver of immunity to the extent of such insurance in the states of Georgia, Indiana, Minnesota, Oregon, Wisconsin, North Carolina, Illinois, Kentucky, and Tennessee. See Annotation, Liability or Indemnity Insurance Carried by Governmental Unit as Affecting Immunity from Tort Liability, 68 A. L. R. 2d 1437, and supplement thereto. The availability of insurance eliminates one of the reasons sometimes used in support of traditional immunity—the catastrophic loss to smaller governmental units.

We therefore hold that cities and all other governmental subdivisions and local public bodies of this state are not immune from tort liability arising out of the ownership, use, and operation of motor vehicles. Contrary decisions are overruled to the extent of their inconsistency.

To enable the various public bodies to make financial arrangements to meet this liability, this holding applies to all causes of action arising after September 29, 1968, 30 days following the filing date of this opinion. In respect to other causes of action, the new rule applies if, but only if, the city or other governmental subdivision was insured against such liability on the date the claim arose, and then only to the extent of the maximum applicable amount of its insurance coverage. For the reasons set forth in Myers v. Drozda, 180 Neb. 183, 141 N. W. 2d 852, this decision is applicable to the case at bar.

The judgment is reversed and the cause remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

NEWTON, J., dissenting.

The present era has witnessed a more or less worldwide spread of the doctrines of paternalism. Peoples of many nations are no longer content with the old established practices of government. They are no longer content with such limited forms of government as provide the simple and essential governmental services such as streets, highways, and fire and police protection. The decline of personal initiative and responsibility, and the growth of governmental paternalism is apparent in the broad social security concepts now engrafted into everyday life. We now have medicare, social security, and an enormous expansion of a myriad of welfare programs, with new and broader programs of similar character, such as a guaranteed minimum income, being urged. Such programs are all administered, and many financed, by the public. The theory that government "owes each of us a living" and should care for us "from the cradle to the grave" has achieved widespread adoption. This type of thinking has also branched out into certain facets of the law and is resulting in the erosion of certain legal principles of long standing. The idea that human or individual rights stand supreme above all other considerations, including

those of society generally, has received great impetus. Today, from a practical legal standpoint, the word "sedition" has been deleted from the English language, and in some instances the personal privileges of confessed criminals take precedence over the interests and welfare of actual and potential victims. Rather than restrain the wrongdoer it is urged by some that we should recompense the victimized at public expense.

One outgrowth of this general social unrest has been the advocacy of public tort liability and the abolition of the "immunity doctrine." The "spread the loss" theory has become popular in a number of jurisdictions and many writers of legal theses urge in regard to governmental responsibility that the "fault" concept be abandoned and absolute liability for injury or damage adopted. Individual self-reliance and the interests of society must be subjected to other considerations in the interest of promoting the "cradle to the grave" philosophy.

As is generally true the elements of social philosophy mentioned are not entirely devoid of merit. The danger lies in extremism. As a pendulum swings from one extreme to another, just so do social movements swing from one extreme to another and the law which seeks to administer to modern needs likewise is in danger of adopting elements of an extremist philosophy.

A favorite cliché of the many who advocate a complete abolition of the immunity doctrine is that it is adopted from an English theory that "the King can do no wrong." The falsity of this statement is apparent. Long before the colonization and settlement of America, English law provided remedies against the crown. See, 77 Harvard Law Review 1, Jaffe, Suits Against Governments and Officers: Sovereign Immunity; and Muskopf v. Corning Hospital Dist., 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P. 2d 457. To the contrary, the immunity theory has been based on what was considered to be the necessity of protecting the interests of the public, and

the concept that since all rights were conferred by government it was illogical to hold the law giver liable in tort actions. Even today many of the most vigorous advocates of abolishment of the immunity doctrine concede that it is still necessary to place certain restraints upon it as the very nature of many governmental activities require such protection. See 10 U. C. L. A. Law Review 463 (1963), Van Alstyne, Governmental Tort Liability: A Public Policy Prospectus; 3 Davis, Administrative Law Treatise, § 25.11, p. 482.

The opinion offered in the present case, although it states that the rejection of the doctrine of governmental immunity should be dealt with on a case-by-case basis, in effect, at one fell swoop, completely abolishes the immunity rule in Nebraska. In this respect the proposed remedy is as extreme and unreliable as the evils it purports to cure. It must be borne in mind that many of our essential governmental activities are of a nature, and entailing such a great element of risk insofar as tort liability is concerned, that private enterprise would find them unprofitable and would refuse to indulge in them, yet the public must perforce do so. Governmental administration of fire and police protection, water and air pollution control, health hazards, water and soil conservation, and flood control, are but a few of such instances. Public and private entities are so significantly different that it woud be inadvisable to treat them alike for tort purposes. The broad scope of governmental activities and the benefits they confer on the public render it unwise in many instances to burden them with liability for damages in tort.

Also some consideration must be given to the ability of the public to bear the expense encountered. We have numerous small villages with assessed valuations of $100,000 or less. They do not have the ability or means to maintain streets, fire and police protection, etc., on an adequate basis. Yet it is not unlikely in the present day that such a village could be subjected to a

judgment of a half million dollars, many times exceeding the actual value of the entire village. Even larger governmental units might find it necessary at times to curtail essential public services. It is true that a certain measure of protection may, at least in some instances, be obtained through insurance, but insurance rates are based on risk and risk may render insurance unavailable or prohibitive. In any event, for the courts to direct governmental units to carry insurance, either directly or by generating conditions making it requisite, would be a clear invasion of the legislative function. Heretofore in recognition of the immunity rule, our statutes have specified certain instances in which municipalities and governmental subdivisions might be held responsible in actions for tort and either directly or by implication have authorized the payment of claims so authorized. The majority opinion now broadens the field of tort liability with reference to municipalities and governmental subdivisions. Yet, it does not and cannot authorize the payment of such claims. Even the majority must recognize that such authorization is exclusively a legislative function. The Legislature has in some instances prescribed limits on the taxing powers of these public bodies and in others, has authorized the expenditure of public money only for certain designated purposes. If these public bodies are to be made liable for judgments in tort, provisions for payment of such judgments and the raising of funds required must also be made, again a strictly legislative function.

A few of the problems that will be encountered deal with legislative, judicial, quasi-legislative, quasi-judicial, and discretionary acts of public departments, officers, and agents. Nearly every legislative act damages someone. The same is true of judicial acts and discretionary decisions. Businesses are often destroyed or severely damaged by such means. For example, zoning ordinances may damage property values, forbidding the sale of drugs or merchandise considered harmful may injure

a business, requiring a reduction in a public utility's rates is damaging, a President or Congressman may be negligent in issuing an unjust executive order or in voting for an ill-conceived bill, or a governmental board may wrongfully change interest rates or deny a certificate of public convenience and necessity. In addition a multitude of questions may arise in regard to war losses, negligence of the armed forces, enforcement of antitrust laws, law enforcement including the failure to properly enforce criminal laws and to apprehend criminals, negligent failure to maintain water pressures for fire fighting purposes, failure to quarantine or doing so wrongfully, failure of inspectors to detect and require guards against dangerous conditions, and an infinite variety of other situations.

The public cannot guarantee a citizen against all errors or defects he may encounter. Life in any organized community requires a certain number of sacrifices and risks. In those jurisdictions which have adopted Tort Claims Acts this has been recognized, as witness the exceptions found in the Federal Tort Claims Act. It is much simpler and more practical to lay out the circumstances under which recovery may be had than to generally abolish governmental immunity and then define the specific and endless cases in which recovery cannot be justified or allowed. It would take a court, working on a case-by-case basis, at least a century, and perhaps several, to work out an acceptable basis encompassing public tort liability. This points up the fact that issues dealing with governmental immunity and tort liability are essentially legislative in nature and from a practical standpoint cannot be satisfactorily resolved by judicial action. If the present system be deemed obsolete and unjust it will nevertheless not be helpful to plunge the public into a morass of uncertainty by the adoption of an activist judicial philosophy. Problems enough will arise even after the best-considered legislative action on the subject has been taken.

We should not lose sight of the fact that the doctrine of governmental immunity is an ancient one and well rooted in the common law of this country. Counties, cities, school districts, and other governmental subdivisions are to a large extent creations of the Legislature. In Nebraska a few of our laws governing such entities are of constitutional origin but most have resulted from legislative action, and *all* that are pertinent to the question under consideration came into being in recognition of the constitutional and common law precept of governmental immunity from tort liability. Examination of the statutes of Nebraska will reveal that the Legislature has not been completely insensitive to situations resulting from the application of the immunity rule. By statute, the rule has been suspended or waived in numerous instances specified by the Legislature. One of the better known exceptions is that authorizing recovery where injuries or damage is sustained by reason of the negligent and defective maintenance of highways. The destruction of that doctrine will require an extensive overhauling of all of our laws bearing on the duties and responsibilities of these entities in the field of torts. It is a major undertaking and one which I am informed is now under consideration. The Legislature alone, certainly not this court, can adequately cope with the situation.

Alexander Hamilton once wrote that courts " 'must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.' " This aptly describes the present situation.

WHITE, C. J., and CARTER, J., join in this dissent.

CARTER, J., dissenting.

I adhere to my dissent in Stadler v. Curtis Gas, Inc., 182 Neb. 6, 151 N. W. 2d 915, and the dissents of White, C. J., and Newton, J., filed in that case. It is not my intention to reiterate here what was said there.

Every state is inherently vested with certain sovereign powers necessary for its own preservation. Among these powers are the power to tax, the power to take property for public use, and the immunity from suit. The majority opinion chooses to deal with the sovereign immunity from suit doctrine under the old cliché, "The King can do no wrong." This cliché is nothing more than what it purports to be. It seems to me that we should call things by their right names in dealing with a matter as important as sovereign immunity from suit and not be misled into a discussion of clichés and hackneyed expressions that serve only to divert the court from the real issues of the case. Another contention usually advanced in attacking sovereign immunity from suit is that a court-made rule of law can be vacated by the courts that made it. But sovereign immunity is an inherent power of the political state, and, in so holding, the courts merely declare the existence of this inherent sovereign power which has been recognized since the beginning of law by English speaking peoples. In advancing the foregoing assertions, opponents of the doctrine are grasping for reasons to circumvent a well-established and long-followed sovereign power which offends their personal sense of justice.

Immunity from suit against a sovereign state has always resulted in hardship on those falling within its scope. It is true that the development of new means of transportation, our ever-increasing population, and the growing complexity of our social order has multiplied the hardships and uncompensated wrongs resulting from the immunity from suit doctrine. While this could and possibly should bring about a change in public policy as determined by the Legislature, it does not have the effect of changing the principle of law involved. Limitations of sovereign powers, absolute in character, are the province of the Legislature and not the courts.

But whether or not the rule of the state's sovereign immunity from suit originated under the common law

of England or whether or not it was judge made or merely declared, is of little consequence in this case for the simple reason that it has been preserved to the state by the Constitution. Article V, section 22, of the Constitution of Nebraska provides: "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought." This constitutional provision is not self-executing. In Gentry v. State, 174 Neb. 515, 118 N. W. 2d 643, this court, in referring to Article V, section 22, Constitution of Nebraska, said: "This provision permits the state to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe. This provision of the Constitution is not self-executing. Legislative action is necessary to make it available." See, also, State ex rel. Davis v. Mortensen, 69 Neb. 376, 95 N. W. 831; Anstine v. State, 137 Neb. 148, 288 N. W. 525; Callen v. State, 137 Neb. 192, 288 N. W. 547; Greenwood v. City of Lincoln, 156 Neb. 142, 55 N. W. 2d 343, 34 A. L. R. 2d 1203. In the Anstine case, we said: " 'It is usually said that statutes authorizing suit against the state are to be strictly construed, since they are in derogation of the state's sovereignty. Consequently, it is generally essential that the consent of the state to be sued be given expressly and by clear implication.' "

"The rule of non-liability of the state for the torts of its officers, agents, and servants applies to those agencies through which the state acts in the administration of government as well as to the state itself." 49 Am. Jur., States, Territories, and Dependencies, § 78, p. 291. "Generally, the political subdivisions of the state, just as the state itself, are not liable for torts committed in the exercise of governmental functions unless made liable by express enactments of the legislature, except where the acts complained of, in effect, constitute a taking of private property for public use without just compensation; * * *." 81 C. J. S., States, § 131, p. 1145. See, also, State ex rel.

Davis v. Mortensen, *supra;* Anstine v. State, *supra;* Greenwood v. City of Lincoln, *supra.*

In the instant case there is no statute providing in what manner and in what court the suit could be brought as required by the Constitution. The majority opinion makes no reference to Article V, section 22, Constitution of Nebraska, nor does it even purport to show compliance with this constitutional limitation on sovereign immunity of the state from suit. In plain terms, the majority opinion chooses to ignore the Constitution and to determine the case on the theory that the Constitution is applicable unless matters appearing to be of great public policy decree otherwise.

It is true that some courts have ventured into the thorny thicket of attempting to avoid the alleged inequitable results of the sovereign immunity doctrine. In most instances, such courts have created more problems than they have solved. It is quite clear that these courts have been led astray from fundamental concepts by activist writers in law journals and reviews who have become so obsessed with what they term the inequities of the doctrine that the end appears to justify the means. Most of these writers concede that the remedies for such inequities rest with the legislatures and, being dissatisfied with the inaction of legislatures in keeping pace with their ideas, seek a way to have the courts compensate for the alleged failures of legislatures in this area. In bringing this about, the fact that judicial legislation becomes necessary does not seem important as is so often the case by those who become obsessively compulsive in righting what they believe to be a great public wrong.

The doctrine of the immunity of the state from suit is generally conceded to be a legislative problem which can be limited by the Legislature in determining the public policy of the sovereign state. This is recognized by the majority opinion when it states: "* * * it may well be that the Legislature will have the ultimate word." The fact that the Constitution has already placed

the responsibility to limit or relax the sovereign immunity of the state from suit upon the Legislature hardly warrants the assumption that this court is thrusting upon the Legislature the sole responsibility "for injustice." That responsibility belongs with the Legislature by constitutional provision. The inference that this court should not restrain its sympathy for the Legislature and its problems in the immunity field and render its unsolicited and activist aid even though it would constitute the "traditionally condemned heresy of judicial legislation," hardly warrants the conversion of this court into a mythical House of Lords with both legislative and judicial powers.

One ought not feel obligated to suggest that our state government is divided into three branches no one of which shall perform the functions of the others. Nor ought one feel the necessity for suggesting our sworn duty is to support and defend the Constitution of Nebraska; not to subvert its provisions. Nor ought one be surprised at the eyebrow-lifting that would follow the announcement of this court that it will impose its unsolicited aid upon the Legislature notwithstanding that it "would constitute the traditionally condemned heresy of judicial legislation." In addition thereto the majority opinion arrogates to the court the right to pick and choose the case which shall and which shall not be subject to the doctrine of sovereign immunity. In the one instance the court in effect says that the state immunity from suit does not exist, in the other that it does. Rule by law instead of men will suffer a serious relapse with the release of this opinion.

The boundary between responsible self-government and arbitrary, irresponsible government is "the rule of law." Never has the line become so thin and shadowy as now. Ironically, it is within our courts that the most serious threat to the rule of law is developing. Too often, judges strain to arrive at a "just" result in a case in the light of their own philosophies and socio-economic

values with settled legal principles being accorded little or no weight. As a result, law is rapidly losing its certainty, stability, and continuity. Jurisprudence is becoming the handmaiden of sociology. As Justice Cardozo once sagely remarked: "Lawyers who are unwilling to study the law as it is, may discover, as they think, that study is unnecessary; sentiment or benevolence or some vague notion of social welfare becomes the only equipment needed. I hardly need to say that this is not my point of view."

Carried to the extreme such a philosophy is currently described as activism which is in fact a negation of the rule of law. Out of the vast testing by the human experiences of the past, we have erected a system of law and courts that it is our duty to support and improve. Its importance focuses on the judge. But if the mind of the judge is closed and he recognizes no law save his own predilections, then our shelves of law books, the marble columns of our temples of justice, and the black robes of judicial integrity are but superficial symbols cloaking a travesty. Among the fundamental obligations of the judge is the duty to separate the activist writings of pseudo-legal experts, seeking to give credence to their personal philosophy of "justice" and "right," from the established law as supported by the age-old principle of stare decisis until, as in the instant case, change is made by the proper authority. The twisting and stretching of law to accommodate the furtherance of a public policy, however meritorious it may be, is not the function of the courts.

It is for the foregoing reasons in answer to what I consider a basic attack upon our fundamental system that I voice my vehement dissent to the majority opinion of this court.

WHITE, C. J., and NEWTON, J., join in this dissent.

BOSLAUGH, J., concurring.

The City of Omaha, Nebraska, has never been immune from suit. It has been subject to suit since the date of

its incorporation in 1857. See Laws 1857 (Third Territorial Sess.), p. 193. The matter was not discussed in the opinion of the court because there was no issue concerning it.

STATE OF NEBRASKA, APPELLEE, V. WILLIE CRENSHAW, APPELLANT.
161 N. W. 2d 502

Filed October 4, 1968. No. 36805.

1. **Post Conviction.** Findings that are clearly erroneous in a post conviction proceeding will be set aside on appeal.
2. **Trial: Evidence.** In determining whether district court findings are clearly erroneous, this court takes into consideration the advantage of the district court in hearing oral evidence.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

A. James McArthur and Willie Crenshaw, for appellant.

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

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

SMITH, J.

This post conviction motion, based on a plea of guilt, was denied after an evidentiary hearing. Defendant has appealed. He assigns for error findings that the plea was voluntary.

On February 8, 1965, defendant had pleaded not guilty to a charge of second degree murder. The State reduced the charge on March 1 to manslaughter, to which

defendant pleaded guilty the following day. The court sentenced him on March 25 to 7 years imprisonment. The post conviction motion was filed on July 26, 1966.

The evidence is conflicting. It includes testimony on the witness stand at the post conviction hearing on July 27, 1967, by John W. Gallup, defense counsel retained by defendant in January 1965. The only other witness was defendant, who testified by deposition as follows: Gallup had remained confident of acquittal until February 15 or 20, when he advised defendant to plead guilty to a reduced charge of manslaughter. Judge Murphy, Gallup reported, had indicated the following views of plea and sentence: Plea of guilty of manslaughter, 1 or 2 years; conviction of second degree murder, 25 years to life. Defendant, who was illiterate and innocent, was pressed by Gallup for the plea of guilt every other day until he succumbed.

Gallup contradicted defendant; the plea of guilt had been knowing and voluntary. Reduction of the charge to manslaughter was freely explained by Gallup: "A few days before we were to try it, Mr. Pane (the prosecuting attorney) * * * told me he would reduce the charge to manslaughter in return for a guilty plea. I advised * * * (defendant) and told him to think it over * * *. I told him if we went to trial and he was convicted, then the penalty was 10 years to life; but if he pleaded guilty to manslaughter, it was 10 years and his sentence would be anywhere from 1 to 10. I told him if he went to trial on the second-degree-murder charge, the minimum is 10 and the maximum life."

Findings that are clearly erroneous in a post conviction proceeding will be set aside on appeal. See, State v. Raue, 182 Neb. 735, 157 N. W. 2d 380; State v. Tunender, 182 Neb. 701, 157 N. W. 2d 165, rehearing denied, *ante* p. 242, 159 N. W. 2d 320 (semble); cf. In re Estate of O'Connor, 105 Neb. 88, 179 N. W. 401, 12 A. L. R. 199. In determining whether district court findings are clearly erroneous, this court takes into con-

sideration the advantage of the district court in hearing oral evidence. Barth v. Metropolitan Life Ins. Co., 137 Neb. 676, 290 N. W. 902; Faulkner v. Simmons, on rehearing, 68 Neb. 299, 94 N. W. 113.

Although the weight of evidence alone is in issue, defendant's brief wholly disregards Gallup's testimony. The record is devoid of a compelling reason for us to believe defendant, and any argument that we must disbelieve Gallup is frivolous. For example, when Gallup testified, the propriety of plea agreements with the prosecuting attorney was not at all clear. See, A.B.A., Standards Relating to Pleas of Guilty, Tent. Dr., § 3.1 (a), Commentary, pp. 60-66 (Feb. 1967); Newman, Conviction, The Determination of Guilt or Innocence Without Trial (1966), pp. 38-42. Gallup's testimony probably reflected commendable courage.

State v. Tunender, *supra,* cited by defendant, is distinguishable; the conflicts of evidence there and here are nowise comparable. The findings in this case are correct.

AFFIRMED.

FRAZIER, INC., A CORPORATION, APPELLEE, V. HAROLD E. ALEXANDER ET AL., APPELLANTS.
161 N. W. 2d 505

Filed October 4, 1968. No. 36836.

1. **Judgments: Attorney and Client.** Where defendant is notified by certified mail of the immediate withdrawal of his counsel from the case and he takes no steps to procure another attorney for 20 days prior to the granting of a default judgment by the court, any harm resulting is due to the inexcusable negligence of the defendant, and, ordinarily, affords no basis for relief.
2. **Judgments.** Where a defendant is notified by mail that plaintiff will apply in open court for a default judgment on a day and hour fixed 7 days later, such defendant may not procure the vacation of the judgment on the day noticed without a showing that he has a meritorious defense.
3. **Judgments: Courts.** Where the evidence on an application to vacate a default judgment shows that defendant has no meri-

torious defense, it is not an abuse of discretion for the trial court to refuse to vacate the judgment although the application was made at the same term of court at which it was entered.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Foulks, Wall & Wintroub, for appellants.

Philip M. Kneifl and Kneifl, Kneifl & Byrne, for appellee.

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

CARTER, J.

This is an appeal from an order of the district court for Douglas County refusing to set aside a default judgment.

On August 25, 1966, plaintiff commenced its action to obtain a judgment against the defendants on their promissory note for $4,260.35, less two payments totalling $775, and accrued interest. After demurring to the petition, defendants filed their answer. Plaintiff filed its reply. After obtaining leave of court, defendants filed an amended answer to which plaintiff filed a motion to make it more definite and certain by stating if the contract therein alleged was oral or in writing and, if the latter, to set it out in the amended answer. The motion was sustained and defendants given 2 weeks to amend. The time to amend expired on August 9, 1967, without the amendment being made. On August 14, 1967, plaintiff filed a motion for a default judgment and noticed it for hearing on August 21, 1967. On the latter date the default was entered. On September 11, 1967, within the term but after the issuance of execution and a garnishment proceeding, defendants moved to vacate the default. On September 25, 1967, a hearing on the motion to vacate the judgment was had and evidence taken after which on September 29, 1967, the motion was

overruled. A motion for a new trial was filed and overruled, and an appeal taken to this court.

There is an issue raised growing out of the withdrawal of defendants' counsel. The record shows that defendants' counsel filed his notice of withdrawal from the case on August 9, 1967. The notice of withdrawal was dated August 1, 1967, and it contains the certificate of defendants' withdrawing counsel that a copy thereof was served by mail on August 1, 1967, on plaintiff's counsel and the defendants. The evidence shows a letter from defendants' counsel under date of August 1, 1967, to the defendants, sent by certified mail, advising of his withdrawal from the case which was admittedly received on August 2, 1967. The trial court on August 18, 1967, in view of the admitted receipt by defendants of the letter of withdrawal on August 2, 1967, entered an order allowing defendants' first counsel to withdraw as attorney of record for defendants. The motion for a default judgment filed by the plaintiff on August 14, 1967, shows a certificate of service by mail on defendants at their home address on August 14, 1967. Defendants state that they never received this copy. We see no abuse of discretion in this, the defendants having a period of 20 days to procure new counsel which they neglected to do. Defendants are in no position to assert their own negligence as a basis for securing a vacation of the default judgment.

Defendants complain that the notice of the motion for a default judgment was not for a period of 10 days in advance of the taking of the judgment as required by section 25-2007, R. R. S. 1943. The notice required by this section of the statute applies when a default is to be taken at chambers. We find no statute, and none is cited, which requires a 10-day notice for taking a default in open court. The complaint has no merit.

Defendants contend that since they had an answer on file a default judgment could not be taken and that their failure to amend within 2 weeks in accordance

with the court's order furnished no basis for the entry of the default. The rule in this state as to the time that a default judgment may be taken is stated in Sporer v. Herlik, 158 Neb. 644, 64 N. W. 2d 342, as follows: "To sum it all up, in the strict sense, a default judgment is one taken against a defendant who, having been duly summoned in an action, fails to enter an appearance in time; but the term is also now ordinarily applied where default occurs after appearance as well as before, and may be rendered where defendant fails to answer or plead or take some step required within the time limited by statute or authoritative order or rule of court, or after issues joined fails to appear at the hearing or trial when the same is called or set for trial, as required by statute or authoritative rule or order of court." See, also, Rhodes v. Crites, 173 Neb. 501, 113 N. W. 2d 611; 49 C. J. S., Judgments, § 187, p. 324. Under these holdings, defendants' complaint is not well founded.

The defendants assert that the trial court abused its discretion in refusing to vacate the default judgment at the same term, the motion to vacate being accompanied by the tender of an answer showing a meritorious defense. In overruling the motion to vacate, the court found that defendants did not have a meritorious defense to the action. The correctness of this finding determines the issue. Lacey v. Citizens Lumber & Supply Co., 124 Neb. 813, 248 N. W. 378.

At the hearing on the motion to vacate the default judgment, the defendants admitted signing the note. They also admitted making one payment of $275 and asserted that the payment of $500 shown on the note should have been for $1,000. The defendants admitted owing a substantial amount to the plaintiff on transactions not included in the note. The president of plaintiff testified to the receipt of $1,000 as claimed. It applied $500 on the note and $500 on the other indebtedness. Defendants admit owing the indebtedness claimed by plaintiff other than that represented by the note. De-

fendants did not direct plaintiff where to credit the $1,000 payment. Under such circumstances, the plaintiff could elect where to credit the payment. The tendered answer does not state a defense under defendants' own evidence. We hold that the trial court did not err in finding that a meritorious defense to plaintiff's action was not tendered and in refusing to vacate the default judgment on that ground.

We find no error in the record and the judgment of the district court is affirmed.

AFFIRMED.

ROBERT C. KRUGER, APPELLANT, V. HOMER BRAINARD, SHERIFF OF DODGE COUNTY, APPELLEE.

161 N. W. 2d 520

Filed October 4, 1968. No. 36909.

1. **Criminal Law.** Evidence that a crime has been committed and that there is probable cause to believe that the accused committed it is sufficient at a preliminary hearing.
2. **Criminal Law: Automobiles.** A leased automobile converted by the lessee with intent to steal is a stolen automobile within the meaning of section 28-522, R. R. S. 1943, prohibiting concealment of a stolen automobile.
3. **Criminal Law: Evidence.** The following rule of practice is adopted, to be effective upon the date of the filing of this opinion and to be applicable to all preliminary hearings held after that date: The sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceeding in the district court.

Appeal from the district court for Dodge County: C. THOMAS WHITE, Judge. Affirmed.

Kerrigan, Line & Martin, for appellant.

Richard L. Kuhlman, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

BOSLAUGH, J.

The petitioner, Robert C. Kruger, was charged with concealing a stolen automobile. A preliminary hearing was held and the petitioner was bound over to the district court for trial. The petitioner then commenced this action for a writ of habeas corpus alleging that the evidence before the magistrate was insufficient to show that the crime charged had been committed and that the petitioner had committed the crime.

The automobile involved in this case is a 1965 tan Plymouth Fury III, No. P 352306895, owned by the Chrysler Leasing Corporation. On August 17, 1966, it was rented to John Jefferson Sweeney by the Econo Car rental agency in Detroit, Michigan. Sweeney failed to return the automobile on August 24, 1966, as the rental agreement provided. On October 30, 1967, the automobile was found on the petitioner's property near Fremont, Nebraska, parked in a driveway in front of his residence. At that time the identification number shown on the metal plate located on the doorpost on the driver's side was P 352235224. The license plates on the automobile were No. 5-B6815.

Prior to August 2, 1967, a 1965 blue Plymouth Fury III automobile, No. P 352235224, was damaged beyond repair in an accident near West Point, Nebraska. On August 2, 1967, the blue Plymouth was purchased by Orletha Kruger, and she obtained a certificate of registration for license plates No. 5-B6815. On October 30, 1967, the blue Plymouth automobile was also on the defendant's property, but the identification number on the blue Plymouth automobile was P 352306895.

The petitioner was present at the time the tan Plymouth automobile was found upon his property and stated to a state patrolman, " 'I was going to paint this car.' "

The petitioner's principal contention is that the evidence failed to show that the tan Plymouth automobile was a "stolen" automobile. The question presented is

whether an automobile converted by a lessee is stolen within the meaning of section 28-522, R. R. S. 1943.

Section 28-540, R. R. S. 1943, provides that conversion of any goods or chattels by a lessee with an intent to steal shall be deemed larceny in the same manner as if the orginal taking had been felonious. We think that an automobile converted by a lessee with an intent to steal is a stolen automobile within the meaning of section 28-522, R. R. S. 1943. A similar construction has been adopted with reference to the Dyer Act. See United States v. Turley, 352 U. S. 407, 77 S. Ct. 397, 1 L. Ed. 2d 430, 56 A. L. R. 2d 1300.

The substitution of the identification number plates, together with the statement by the petitioner that he intended to paint the tan Plymouth automobile were highly incriminating circumstances. The evidence is such that an inference could be drawn that the petitioner knew that the automobile had been stolen and that he intended to defraud the owner. The evidence was sufficient for the magistrate to find that a crime had been committed and that there was probable cause to believe that the petitioner had committed it.

This proceeding was commenced by a petition for a writ of habeas corpus. The question could have been raised by a plea in abatement in the district court in the criminal proceeding. See, State v. Moss, 182 Neb. 502, 155 N. W. 2d 435; Hoffman v. State, 164 Neb. 679, 83 N. W. 2d 357; Jahnke v. State, 68 Neb. 154, 94 N. W. 158; Cowan v. State, 22 Neb. 519, 35 N. W. 405.

The decisions of this court have indicated that both remedies are available. The disadvantage to habeas corpus is that it allows a collateral issue to be litigated in a separate proceeding. It results in delay, a proliferation of litigation, and piecemeal review.

It is the considered judgment of this court that the interests of justice will be better served by the adoption of a rule that the question of the sufficiency of the evidence at a preliminary hearing may be raised only by

a plea in abatement in the criminal proceeding itself. We, therefore, adopt the following rule of practice to be effective upon the filing of this opinion and to apply to all preliminary hearings held after that date: The sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceeding in the district court.

The judgment of the trial court dismissing the petition is correct and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN GEORGE YOUNG, APPELLANT.
161 N. W. 2d 503

Filed October 4, 1968. No. 36913.

1. **Criminal Law: Evidence.** Where the State in a criminal trial attempts to lay the foundation for a confession which it fails to establish, such foundational evidence is not prejudicial to the rights of the defendant.
2. ———: ———. Where voluntary statements or confessions are not offered or received in evidence, the foundational requirements for such are not material and, on objection or motion, should be excluded or stricken if they are not otherwise relevant to the issues.

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

Fred J. Montag, for appellant.

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

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

CARTER, J.

The defendant was convicted of the crime of burglary and sentenced to a term of 1 to 3 years in the Ne-

braska Penal and Correctional Complex. The defendant has appealed.

The only assignment of error is the contention that the trial court erred in not sustaining defendant's motions for a mistrial during the trial and at the close of the evidence.

The record discloses that the alleged burglary was committed on the late evening of September 23, 1967. A police officer sought to interrogate the defendant during the early morning of September 24, 1967. The officer sought to advise the defendant of his constitutional rights as required by Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974. Defendant stated that he desired an attorney and the officer discontinued the interrogation. Later the same morning another officer interrogated the defendant and obtained a confession. It was the contention of defendant that the Miranda warnings were given and an attorney again demanded but, on the basis of promises of leniency, a confession was made. The officer denied that any such promises were made.

On the trial, the second officer was called as a witness and testified to the giving of the Miranda warnings without objection. At the first question bearing on the confession, defendant's counsel moved for a hearing outside the presence of the jury which was granted. At the hearing outside the presence of the jury, the trial court suppressed the confession for reasons that are not shown or material here. The defendant then moved for a mistrial on the ground that the Miranda warnings under such circumstances were prejudicial to the right of the defendant in that they left an inference of guilt with the jury.

It is not questioned here that defendant did give a confession to the officer. The prosecution laid a foundation for the statement by having the police officer testify to the giving of the Miranda warnings to the defendant. The laying of a foundation for the admission of a con-

fession in this manner is recognized procedure and, in the absence of bad faith, creates no prejudice to the defendant. If defendant felt otherwise, he could with propriety request the court to strike the evidence or for an instruction that the foundational questions were not to be considered in determining the guilt or innocence of the defendant.

Defendant relies on our holding in State v. Whited, 182 Neb. 282, 154 N. W. 2d 508. In that case no confession or admission was ever obtained. The prosecutor did, however, have a witness testify to the giving of the Miranda warnings without objection when both counsel knew that no confession or admission was obtained. It was the holding of this court that the Miranda warnings under such circumstances were not material and should be excluded or stricken from the evidence if proper objection is made thereto. That case further held that, under some circumstances, such evidence may be prejudicial to the defendant by developing an inference of guilt by the silence of the defendant. But such a situation does not exist in the present case. Here the prosecution was attempting to lay a foundation in accordance with the accepted method of procedure for the admission of a confession that had been made. While the defendant could have moved to strike the foundational evidence after the confession was suppressed, which was not done, there is no basis for the granting of a mistrial. The State cannot be forced into a dilemma where it must either establish a proper foundation or be faced with a mistrial. The case of State v. Whited, *supra,* does not support the contentions of the defendant in this case.

We find no error in the record and the judgment of the district court is affirmed.

AFFIRMED.

CLARENCE J. DEBACKER, APPELLANT, V. HOMER BRAINARD, SHERIFF OF DODGE COUNTY, NEBRASKA, APPELLEE.

161 N. W. 2d 508

Filed October 4, 1968. No. 36989.

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

Kerrigan, Line & Martin, for appellant.

Richard L. Kuhlman, for appellee.

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

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

PER CURIAM.

The petitioner was found to be a delinquent child and ordered committed to the Boys' Training School at Kearney. The facts alleged as the basis for the charge of delinquency constituted the crime of forgery if he had been charged under the general criminal laws. Petitioner asserts that section 43-206.03, R. S. Supp., 1967, a part of the Juvenile Court Act, is unconstitutional in that it denies him the right of a jury trial, and applies a "preponderance of the evidence" rule rather than a "beyond a reasonable doubt" rule to the adjudication of delinquency.

Four judges are of the opinon that the statute is unconstitutional as challenged. Three judges are of the opinion that it is constitutional. Article V, section 2, Constitution of Nebraska, provides in part: "No legislative act shall be held unconstitutional except by the concurrence of five judges."

The petition for habeas corpus here was dismissed by the district court. That judgment, must, therefore, be affirmed.

AFFIRMED.

McCOWN, J., joined by SPENCER, BOSLAUGH, and SMITH, JJ.

The constitutional rights of juveniles and the developing ramifications of In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (May 15, 1967), are at issue here. By habeas corpus, the petitioner, a 17-year-old minor, sought his discharge from the custody of the Dodge County sheriff under an order committing him to the Boys' Training School at Kearney. The denial of a jury trial and the statutory application of a preponderance of the evidence rule rather than the beyond a reasonable doubt rule are the basis of the constitutional challenge.

The county attorney filed a petition in the Dodge County court within its juvenile jurisdiction charging that Clarence J. DeBacker, a minor 17 years of age, was a delinquent child within the meaning of section 43-201(4), R. S. Supp., 1967. The basis for the charge of delinquency was the possession of a forged check with intent to utter it as genuine. The facts alleged in the petition constituted the crime of forgery under section 28-601(2), R. R. S. 1943, if he had been charged under the general criminal laws. The penalty for violation of that section is imprisonment in the Nebraska Penal and Correctional Complex not exceeding 20 years nor less than 1 year and a fine not exceeding $500.

The check bore the signature "Donald J. DeBacker," petitioner's father, and was given to the O. P. Skaggs store for groceries on January 26, 1968. The check was passed by the petitioner who said his father's signature was on the check. Petitioner's father and mother were known to the clerk at the store who had taken checks from petitioner's father previously. Petitioner, after full and complete Miranda warnings, gave a statement to the police in which he stated that his mother was determined she was going to have a birthday party for the petitioner and needed more food. His mother was very jittery and told petitioner to sign his father's name to a check blank which she had given him. Petitioner's

mother assured him that it was all right for him to go ahead and write the check so he did so, signing his father's name. Petitioner and his mother went to the store and petitioner went in and got groceries and approximately $10 change. It was stipulated that petitioner's father would testify that his wife could not write checks on his account; that he told the store the check was not signed by him; that his signature did not appear on the check; and that he told the police perhaps his wife and petitioner may have had something to do with the check.

Before the proceedings commenced, petitioner objected to the jurisdiction of the court because of the denial of his right to a jury trial. At the conclusion of the evidence, the county judge, as judge of the juvenile court, overruled the objection to the jurisdiction of the court, and found that petitioner was a delinquent child. Thereafter, the court ordered the petitioner committed immediately to the Boys' Training School at Kearney. Habeas corpus relief was denied by the district court, and this appeal followed.

Some background is necessary to provide a frame of reference for the constitutional issues raised here. Until the turn of the century, juveniles in the United States were generally treated as adults insofar as the criminal law was concerned, and, of course, had the same constitutional rights as adults. With the advent of juvenile court acts, which began in Illinois in 1899, the system of juvenile courts spread to every state in the union. The theory was that for their misconduct, children should not be handled, treated, or punished in the same fashion, nor under the same processes and procedures, as adult criminals. The theory also was that a child should not be determined to be guilty or innocent of criminal conduct and there should be a broad range of rehabilitation procedures. In brief, the juvenile court procedures were regarded as being beneficial to the child, and intended to remove and discard the technicalities of substantive and

procedural law for adults. Over 40 states have upheld the constitutionality of juvenile court laws erected on such concepts. Nebraska was one. See State ex rel. Miller v. Bryant, 94 Neb. 754, 144 N. W. 804 (1913). In that case, our court took the same approach as other states, and based the validity of the Juvenile Court Act on the doctrine of parens patriae. The state, through the juvenile court, was merely performing the duty of seeing that the child was properly cared for. The problems involved in denying to a juvenile the constitutional protections afforded to an adult charged with crime were avoided simply by declaring that the juvenile court procedure was civil rather than criminal in nature. This court said in State ex rel. Miller v. Bryant, *supra*: "The law is not of a criminal nature. The purpose of the criminal law is to punish, while the juvenile law is to help the child, and restraint is only imposed as a means of such help."

Some of the juvenile court acts made the jurisdiction of the juvenile court exclusive, and some provided for a waiver by the juvenile court to the adult criminal court. The Nebraska pattern created a concurrent jurisdiction as to criminal misconduct, and enabled the county attorney to determine whether to file an action under the general criminal laws of the state, or a delinquency proceeding in the juvenile court. See, State v. McCoy, 145 Neb. 750, 18 N. W. 2d 101; Fugate v. Ronin, 167 Neb. 70, 91 N. W. 2d 240.

At its inception in 1905, and until 1963, the Nebraska Juvenile Court Act, with respect to jury trials in juvenile court, provided: "In all trials under this act where a delinquent child is charged with a crime, any person interested therein may demand a jury or the judge of (on) his own motion may order a jury to try the case; * * *." See Laws, 1905, c. 59, § 2, p. 306, now § 43-402, R. R. S. 1943.

This specific provision for a jury trial was effectively eliminated by this court. We held that charging a child

with being delinquent did not charge him with a crime, even though the facts alleged would have constituted a specific charge of crime if made against an adult. Such charges, we said, merely set forth the necessary facts showing him to be delinquent. See Laurie v. State, 108 Neb. 239, 188 N. W. 110.

This position was reaffirmed on many occasions. See State ex rel. Weiner v. Hans, 174 Neb. 612, 119 N. W. 2d 72 (1963). It should be noted that in the Hans case, Chief Justice Simmons specifically dissented from that part of the court's opinion that approved the denial of a jury trial. He stated in that dissent: "By the device of charging that the accused is a delinquent and not a criminal, a jury trial is denied. The substance of the offense and not the form of the charge should control. The liberty and reputation of a person is involved. Youth as well as maturity are entitled to the benefits of the jury system. The statute and the Constitution so provide."

In 1963, in an extensive recodification of the Juvenile Court Act, the provision for jury trials was removed. Section 43-206.03, R. S. Supp., 1967, now provides in part: "(2) Hearings shall be conducted by the judge without a jury in an informal manner, applying the customary rules of evidence in use in civil trials without a jury in the district courts.

"(3) At the hearing the court shall first consider only the question of whether the minor is a person described by section 43-201. This shall be known as the adjudication. After hearing the evidence on said question, the court shall make a finding and adjudication entered in the minutes based on the preponderance of the evidence, whether or not the minor is a person described by section 43-201.

"(4) If the court shall find that the child named in the petition is not within the provisions of section 43-201 it shall dismiss the case. If the court finds that the child named in the petition is such a child, it shall make

and enter its finding and adjudication accordingly, designating which subdivision or subdivisions of section 43-201 said child is within; the court shall then proceed to an inquiry into the proper disposition to be made of the child."

Section 43-201, R. S. Supp., 1967, now establishes four different subdivisions: Dependent child, neglected child, delinquent child, and a child in need of special supervision.

This pattern was only typical of what happened in all the states. Form swallowed substance, and semantics disposed of the constitutional rights of juveniles charged with being "delinquent." The basic assumption that an adjudication of "delinquency" was in no sense criminal but only civil was reflected by both courts and legislatures. The result was that a child charged in juvenile court with misconduct which would have been criminal if he had been an adult became, in effect, a constitutional nonperson. And then came Gault!

In In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, it was stated: "Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."

The Gault case, which applied the due process standard to juvenile proceedings involving the adjudication of delinquency, was foreshadowed in Kent v. United States, 383 U. S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966). That case held that the hearing in juvenile court to waive the "exclusive" jurisdiction of the juvenile court to the adult criminal court under a District of

Columbia statute must measure up to the essentials of due process and fair treatment.

In re Gault has spawned an almost unending volume of comment. The holding in Gault refers only to the adjudicatory stage of the juvenile court process—the adjudication of delinquency where commitment to a state institution may follow and when the proceedings may result in incarceration in an institution of confinement. It does not require that juveniles be handled as adults, nor does it affect the dispositional process after an adjudication of delinquency. It clearly does not apply to procedures involving neglected or dependent children, nor to any proceeding except those by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution. As to the area of adjudication of delinquency circumscribed by Gault, it does require that the process must meet the standards of due process. We believe that an implicit foundation for the holding in Gault is the conclusion that juvenile proceedings to declare a juvenile "delinquent" as a result of his own misconduct are at least sufficiently criminal in nature that the constitutional rights involving due process in criminal cases must be applied. The due process requirements spelled out in Gault do not pass upon the issue of whether or not the right to a jury trial is a fundamental part of that due process. The problem here is whether the right to a jury trial is an essential part of due process in the area of adjudication of delinquency outlined by Gault.

So far as present research indicates, since the Gault decision, three states have passed upon the issue of whether a juvenile has a constitutional right to a jury trial in juvenile court at the adjudicatory stage of the juvenile court process of determining delinquency. Two of these cases have denied such right and one has upheld it on the basis of a statutory interpretation.

Commonwealth v. Johnson, 211 Pa. Super. 62, 234 A.

2d 9 (Sept. 15, 1967), held that denial of a jury trial to a juvenile on charges of rape, assault with intent to ravish, assault and battery, and indecent assault was not violative of the juvenile's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States. The court relied heavily on the fact that the United States Supreme Court had never held that the right to trial by jury was a fundamental part of due process imposed upon the states through the Fourteenth Amendment. The court also conceded that the change of the name of the offense from "rape" to "delinquency" did not of itself affect the constitutional right of the accused to a trial by jury.

Estes v. Superior Court, 73 Wash. 2d 272, 438 P. 2d 205 (March 5, 1968), held that jury trial in a juvenile delinquency proceeding was not a constitutional requisite. The Washington court relied upon the Johnson case and also concluded that Gault should not be considered as a mandate incorporating the right to a jury trial within the fundamental essentials of due process, and also reaffirmed its previous conclusion that the Washington constitutional requirements as to trial by jury were applicable only to criminal prosecutions, and that juvenile court proceedings should not be considered criminal.

Peyton v. Nord, 78 N. M. 717, 437 P. 2d 716 (Feb. 26, 1968), held that under the New Mexico juvenile court statute, a juvenile charged with violation of a state law is entitled to a trial by jury in juvenile court if there is no certification to district court and if the offense is one which would be triable by a jury if committed by an adult.

All of these cases were decided prior to Duncan v. Louisiana, 391 U. S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491, decided May 20, 1968.

In Duncan, for the first time, the Supreme Court held that the right to jury trial in serious criminal cases is a fundamental right, and hence must be recognized by

the states as a part of their obligation to extend due process of law to all persons within their jurisdiction. While Duncan avoids any clear-cut holding as to what will constitute a serious criminal case, it does indicate quite obviously that the dividing line may depend upon the maximum possible time of imprisonment provided as a penalty. It also indicates that the present federal rule of 6 months may be the appropriate measure.

In re Whittington was disposed of on the same date on which Duncan was decided. Whittington involved the issues of the right to trial by jury and standards of proof in adjudications of juvenile delinquency. Because of an intervening order binding the juvenile over for trial as an adult, the Supreme Court did not pass on the issues. It did, however, vacate the judgment and remand the cause to the Ohio court for consideration in light of Gault. See In re Whittington, 391 U. S. 341, 88 S. Ct. 1507, 20 L. Ed. 2d 625 (May 20, 1968).

If Gault is ultimately interpreted as meaning that any juvenile court proceeding to determine "delinquency" is a "serious" case because the child might be subjected to the loss of his liberty for more than 6 months, then every adjudication of juvenile delinquency would give rise to a constitutional right to a jury trial. Some language in Gault might be so interpreted. "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." In re Gault, *supra*, p. 36.

However, Gault did not impose the requirement of a jury trial as a part of due process in adjudications of delinquency. This omission might rest on two obvious facts. Duncan had not yet been decided, and, in Gault, the crime involved, if committed by an adult, could have resulted only in a fine of $5 to $50 or a jail sentence of not more than two months. It was, therefore, not a "serious" criminal case, and an adult would not have been entitled to a constitutional right to trial by jury,

even under Duncan. Therefore, Gault could also be interpreted as meaning that even though adjudications of delinquency are at least partially criminal in nature, a juvenile is only entitled to the same constitutional right to jury trial as an adult would be for the same actions in an adult criminal court.

The length of possible punishment may be an "objective" basis for dividing serious and petty crimes in the general criminal courts. There individual crimes are set out in dozens of variations and the punishments are applied to the specific acts constituting the individual crime. Under the Nebraska Juvenile Court Act, a "delinquent" is now defined as: "any child under the age of eighteen years who has violated any law of the state or any city or village ordinance." § 43-201, R. S. Supp., 1967. The complete range of disposition permitted by the Juvenile Court Act may be applied to the single category of "delinquent." A correlation between juvenile court and adult criminal court as to the constitutional right of trial by jury, based solely on possible length of "punishment," presents difficult alternatives. Faced with such alternatives, we see no present justifiable reason to declare that all proceedings to determine that a child is delinquent under the Juvenile Court Act are "serious criminal cases" giving rise to a constitutional right to trial by jury under the due process clause.

Four judges, a majority of this court, are of the opinion that a juvenile charged with violation of a state criminal law as the basis for an adjudication of delinquency is entitled to a constitutional right to a trial by jury in juvenile court if the offense is one which would give rise to a constitutional right to trial by jury if committed by an adult and triable in an adult criminal court. To the extent the provisions of section 43-206.03, R. S. Supp., 1967, are in conflict, we believe they are unconstitutional. This conclusion is also reinforced by the case of Nieves v. United States, 280 F. Supp. 994, decided March 5, 1968. This constitutional right, of course, may

be waived, although special problems may arise with respect to waiver. See In re Gault, *supra*.

Four judges are also of the opinion that a finding of delinquency, for misconduct which would be criminal if charged against an adult, is valid only when the acts of delinquency are proved beyond a reasonable doubt to have been committed by the juvenile charged. See In re Urbasek, 38 Ill. 2d 535, 232 N. E. 2d 716; United States v. Costanzo, 395 F. 2d 441 (4th Cir.). To the extent that those provisions of the Juvenile Court Act, section 43-206.03, R. S. Supp., 1967, incorporating a preponderance of the evidence standard for delinquency proceedings are in conflict, we also believe they are unconstitutional and void.

CARTER, J., joined by WHITE, C. J., and NEWTON, J.

This is an appeal from the denial of a writ of habeas corpus. The petitioner is a 17-year-old boy who sought a release from the custody of the county sheriff under an order committing him to the Boys' Training School at Kearney, Nebraska, as a juvenile delinquent. It is the contention of the petitioner that upon demand, which was made, he is entitled to a trial by jury and to have the issue of his delinquency determined under the rule in criminal cases requiring a finding of guilt beyond a reasonable doubt.

The first Juvenile Court Act was enacted in this state in 1905. The history of the act is set out in State v. McCoy, 145 Neb. 750, 18 N. W. 2d 101. Prior to 1963, the act and the amendments thereto did not provide for a trial by jury except where a delinquent minor child is charged with a crime. In 1963, the act was amended to provide in part: "(2) Hearings shall be conducted by the judge without a jury in an informal manner, applying the customary rules of evidence in use in civil trials without a jury in the district courts." § 43-206.03, R. S. Supp., 1967.

In a delinquency case such as the one before us in which a jury was demanded and denied, this court said:

"The act itself makes no provision for a trial by jury except where a delinquent child is charged with a crime. The complaint was intended to charge, and did charge, the boy with being a dependent, neglected and delinquent child. Dependent and neglected in this; that said Alton Laurie * * * has violated the laws of the state; * * * and was repeatedly guilty of operating a motor car in violation of law. It is evident the specific charges in the complaint of law violation were not made with the intention of charging him with crime, but to set forth and state the facts showing him to be a dependent, neglected and delinquent child. The statute defines dependent, neglected and delinquent children, and to bring the case within the statutory provision, it was necessary to make these allegations, and without such, or similar allegations, the petition would be subject to attack. It is not enough that the petition charge that the boy was a dependent, neglected and delinquent child, but it must go farther and set forth facts showing that he was such a child, and until such a petition was filed he would be uninformed of what he would have to meet. The petition in such cases must inform the defendant of the charge he is to meet, to enable him to prepare for his trial. And an examination of the petition brings us to the irresistible conclusion that the charge against the boy was that of delinquency. A commitment to the industrial school upon such a charge is not a conviction of a crime, or a commitment to a penal institution." Laurie v. State, 108 Neb. 239, 188 N. W. 110. In the foregoing case, Wisconsin Industrial School for Girls v. Clark County, 103 Wis. 651, 79 N. W. 422, is quoted with approval in part as follows: " 'The proceeding is not one according to the course of the common law in which the right of trial by jury is guaranteed, but a mere statutory proceeding for the accomplishment of the protection of the helpless, which object was accomplished before the Constitution without the enjoyment of a jury trial. There is no restraint upon the natural liberty of children contemplated

by such a law—none whatever; but rather the placing of them under the natural restraint, so far as practicable, that should be, but is not, exercised by parental authority. It is the mere conferring upon them that protection to which, under the circumstances, they are entitled as a matter of right. It is for their welfare and that of the community at large. The design is not punishment, nor the restraint imprisonment, any more than is the wholesome restraint which a parent exercises over his child. The severity in either case must necessarily be tempered to meet the necessities of the particular situation. There is no probability, in the proper administration of the law, of the child's liberty being unduly invaded. Every statute which is designed to give protection, care and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated, but one of the most important duties which organized society owes to its helpless members is performed just in the measure that the law is framed with wisdom and is carefully administered.' " See, also, Wheeler v. Shoemake, 213 Miss. 374, 57 So. 2d 267. The foregoing holdings of this court have remained the law of this state to the present time.

The original pleading filed in the delinquency proceeding is labeled a petition and alleges that the petitioner in the present case is a delinquent child within section 43-201(4), R. S. Supp., 1967, in that he was in the possession of a forged, false, and counterfeited bank check. I point out that petitioner was not charged with a crime, he was not and could not be tried on a criminal charge, no punishment for a crime was or could be inflicted, and the presumption of innocence as to the commission of crime is still applicable to him. It is argued here that a finding of delinquency is in practicable effect a conviction for crime in that some persons have

so construed it in transactions in the market place. But there is no evidence that any court has placed any such controlling construction upon it. It cannot be logically argued that because some persons may incorrectly choose to treat the proceeding as criminal in nature it then has the effect of making it so and thus affords a basis of unconstitutionality.

The position of the members of the court who would reverse and remand place the Juvenile Court Act in an unconscionable situation even if amended to conform to their views. A delinquent child may be committed to the training school whether or not the evidence points toward the commission of a crime by the juvenile. In either event, the juvenile may be committed until his conduct has been adequately corrected or until he has been placed in a suitable environment, but in no event beyond the age of 21 years. In other words, the corrective process is the same whether or not the supporting evidence indicates that the commission of crime may be involved. In requiring a jury trial when demanded, if there is evidence that some criminal act may be involved, the real purpose of the Juvenile Court Act is destroyed. It tosses the juvenile into a trial by jury where he is tried for all intents and purposes as a criminal when this is one of the things the Juvenile Court Act purports to eliminate. Instead of a hearing in juvenile court largely in the procedure of a court of equity, he is given a formal trial before a jury where the main issue will be whether or not he has committed a crime. This defeats the main purpose of the Juvenile Court Act, broadcasts to the world the evidence of a crime with which he has never been charged, and reinstates the evils of trying young juveniles on the same basis as adult criminals.

The purpose of juvenile courts must be reiterated here to gain a proper conception of the problem before us. The past several decades have produced a complete change in attitude of the state toward its offending chil-

dren. The problem of the delinquent child is, in its social significance, of great importance for on its wise solution depends the future of our youth as responsible citizens. The present thinking is that the juvenile who has begun to go wrong, who is incorrigible, who has violated some law or ordinance, is to be taken in hand by the state through a juvenile court, under the doctrine of parens patriae, as a guardian because of the unwillingness or inability of his natural parents to guide him toward responsible citizenship. Legislation establishing juvenile courts and providing methods to deal with dependent, neglected, and delinquent children shows a modern solicitude of the law for the best interests of such children. The juvenile court is not a criminal court; it does not punish for crime. Its purpose is corrective and reformative, and its ultimate purpose by its procedures is to permit the juvenile judge to best guide and control juvenile wrongdoers, with more consideration for the future development than for their past shortcomings. The creation of such courts has been characterized as the most outstanding development in the administration of criminal justice since the signing of the Magna Carta. 31 Am. Jur., Juvenile Courts, Etc., §§ 2 and 5, pp. 296, 297.

It is contended by the petitioner that a contrary view is required by the case of In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, and the asserted judicial history of that case. It is in the consideration of this issue where I must part company with the petitioner's contention.

No fault can be found with the granting of the writ of habeas corpus for failure to comply with conventional due process, i.e., the insufficiency of the petition in charging delinquency, the failure to give notice and hearing, and matters of that nature. The issue here is whether or not juvenile acts which have been held constitutional in some 40 states in fact violate constitutional due process under the Fourteenth Amendment to the Constitution

of the United States. I concede that the provisions of state juvenile acts must be complied with in accordance with their terms. The issue here does not involve any alleged failures in this respect. It may be true, and it probably is, that errors have been made by juvenile courts, but this is a condemnation of personnel and not the procedures that would justify a holding of unconstitutionality. If error in administration is a basis of a holding of unconstitutionality there would be few statutes which would escape. But the right of review for the correction of errors exists in this state and adequately protects against the ruthless administration of the act which the Gault opinion asserts as existing. The Gault opinion attacks the statutory efforts to conceal the deviational behavior of wayward juveniles as being "more rhetoric than reality." It questions the trial before a juvenile judge in affording due process by stating that "the condition of being a boy does not justify a kangaroo court," an implied criticism of juvenile judges that is wholly unwarranted. In the Gault case, the petitioner was a 15-year-old boy. The opinion indicates that the primary ground in finding him to be delinquent was the use of vile and lewd statements over a telephone, a misdemeanor for which, if convicted, would carry a penalty of $5 to $50 fine or a jail sentence for not more than 2 months. It is then asserted that under the juvenile act he was committed to custody for a maximum of 6 years. The comparison is simply not true, unless he fails to accept correction and continues as an incorrigible juvenile. The opinion plainly states that the rights of an adult under a criminal charge exceed those of a juvenile delinquent, but here the juvenile was not charged with crime. It is completely overlooked, however, that the juvenile received many advantages because of his youth that the criminal juvenile or adult does not possess, which is the very purpose of the Juvenile Court Act. In fact, the requirement of a jury trial defeats the very purpose of the act.

But irrespective of the foregoing, the Gault case does not hold or even infer that a jury trial is essential to due process in a delinquency case, even where the supporting evidence points to criminal conduct on the part of the juvenile. The most that is said by Gault with reference to a jury trial being essential to due process in a delinquency case is the following: "From the inception of the juvenile court system, wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles. In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles. In addition to the specific problems involved in the present case, for example, it has been held that the juvenile is not entitled to bail, to indictment by grand jury, to a public trial or to trial by jury." This latter statement is supported by Kent v. United States, 383 U. S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84, wherein it is said: "Because the State is supposed to proceed in respect of the child as parens patriae and not as adversary, courts have relied on the premise that the proceedings are 'civil' in nature and not criminal, and have asserted that the child cannot complain of the deprivation of important rights available in criminal cases. It has been asserted that he can claim only the fundamental due process right to fair treatment. For example, it has been held that he is not entitled to bail; to indictment by grand jury; to a speedy and public trial; to trial by jury; to immunity against self-incrimination; to confrontation of his accusers; and in some jurisdictions * * * that he is not entitled to counsel. * * * This concern, however, does not induce us in this case to accept the invitation to rule that constitutional guaranties which would be applicable to adults charged with the serious offenses for which Kent was tried must be applied in juvenile court proceedings concerned with allegations of law violation. The Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia

Circuit provide an adequate basis for decision of this case, *and we go no further.*" (Italics supplied.)

There is no holding by the Supreme Court of the United States that due process requires a jury trial in a delinquency proceeding under a juvenile court act. Three state Supreme Courts have passed on the issue since Gault and Kent. Some reference is made to Duncan v. Louisiana, 391 U. S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491, but this case is a criminal appeal in which the question of delinquency under a juvenile court act is not involved. In Peyton v. Nord, 78 N. M. 717, 437 P. 2d 716 (1968), the court held that a jury trial was required under the provisions of the state statute, and is therefore not pertinent here.

In Commonwealth v. Johnson, 211 Pa. Super. 62, 234 A. 2d 9 (1967), in dealing with the very question, that court said: "In summary, we are in full agreement with the holding of the Supreme Court that the constitutional safeguards of the Fourteenth Amendment guaranteed to adults must similarly be accorded juveniles. It is inconceivable to us, however, that our highest Court attempted, through Gault, to undermine the basic philosophy, idealism and purposes of the juvenile court. We believe that the Supreme Court did not lose sight of the humane and beneficial elements of the juvenile court system; it did not ignore the need for each judge to determine the action appropriate in each individual case; it did not intend to convert the juvenile court into a criminal court for young people. Rather, we find that the Supreme Court recognized that juvenile courts, while acting within the constitutional guarantees of due process, must, nonetheless, retain their flexible procedures and techniques. The institution of jury trial in juvenile court, while not materially contributing to the fact-finding function of the court, would seriously limit the court's ability to function in this unique manner, and would result in a sterile procedure which could not vary to meet the needs of delinquent children. Accordingly,

we reject appellant's request for a jury trial."

In Estes v. Superior Court, 73 Wash. 2d 272, 438 P. 2d 205 (1968), the court, in declining to construe Gault as requiring a jury trial in a dependency case, said: "While recognizing that in the instant case the above-mentioned requirements were met, and further that Gault did not specifically determine that jury trials are required in juvenile proceedings, petitioner nevertheless argues that, under the reasoning of Gault, a juvenile accused of an act which could lead to his institutionalization is entitled to the same procedural and constitutional rights as an adult accused of a crime, which rights would include a jury trial. * * * We do not believe that the Supreme Court's opinion in Gault, supra, is to be considered as a mandate to abandon this beneficial concept of the juvenile court system. Rather, it is a direction that the juvenile be offered the benefits of an informal hearing at which rules of fairness and basic procedural rights are observed. Such results can be obtained without the formality of a jury trial. One of the substantial benefits of the juvenile process is a private, informal hearing conducted outside the presence of a jury."

Summarizing my position, the Supreme Court of the United States has never held that a jury trial is essential to due process in a delinquency proceeding under a juvenile court act. Two state Supreme Courts have held that a jury trial is not required in such cases and that Gault and Kent do not hold otherwise. Since 1905, when our first Juvenile Court Act was enacted, this court has consistently held to the constitutional validity of our Juvenile Court Act including the provisions for a non-jury trial. There is no case authority holding that a jury trial is a requirement of due process in a delinquency proceeding.

The purport of the petitioner's position is that a jury trial is required by the holdings of the Supreme Court of the United States. But that court has not so held. To hold that it has, under such circumstances, has the

effect of overruling the previous holdings of this court without making reference to them and without regard to the fact that the two state Supreme Courts passing on the issue since Gault have determined that the Gault case does not hold that a jury trial is required in a delinquency case under the due process clause of the Fourteenth Amendment to the federal Constitution. An opinon to the contrary could be supported only by its own rhetoric. Such a holding can be based only on the assumption that the United States Supreme Court will eventually hold that a jury trial in juvenile delinquency cases is required to afford due process. To this I do not subscribe since that court, with opportunities to do so before it, has declined to so hold. Guessing with what that court may or may not do affords no basis under the rule of federal judicial supremacy to hold an otherwise valid act invalid by no less authority than peering into a crystal ball. By this process, the Juvenile Court Act, a legislative act which has been characterized as the most outstanding improvement in the administering of the affairs of delinquent juveniles in the last century, is held, in effect, to be unconstitutional.

It is the fuction of this court to protect its own jurisdiction against encroachment. It is my firm opinion that this court ought not to yield up its own powers to the Supreme Court of the United States until such court has made a final and binding judgment that can be imposed on this court under the doctrine of judicial supremacy. If and when such a judgment is entered by the Supreme Court of the United States, this court ought and will alter its position to comply therewith however much it may disagree with its soundness. But in the absence of a holding of unconstitutionality under the federal Constitution, this court is not bound by the rule of judicial supremacy, nor should it be voluntarily accepted in view of our own statute and the mass of authorities in this and other states upholding its constitutional validity.

I am not so naive as not to recognize that Kent, Gault,

and Duncan point to the eventual destruction of the juvenile court acts existing in most of the states of the union. This conclusion is based on statements in those opinions to the effect that a finding of delinquency is in practicable effect a conviction for crime; the attempt to forego criminal prosecution in favor of a civil corrective process is said to be "more rhetoric than reality"; it is asserted that due process is not provided by stating that "the condition of being a boy does not justify a kangaroo court"; and that juveniles are denied rights in criminal cases that are afforded to adults. I submit that a close examination of the situation reveals that these assertions simply are not true. The Supreme Court of the United States appears to be pointing toward a declaration of the unconstitutionality of the beneficent provisions of most juvenile court statutes. It appears willing to ignore the consistent holdings of constitutionality by state and federal courts over the past few decades and thereby rejects all the logic and reasoning supporting these holdings. It appears to take the position that its wisdom in this area exceeds in quality all the judicial pronouncements before it in the field of juvenile delinquency. The fact that a judge is a member of the highest court of the nation or state is not, of itself, proof of infallibility of decision. It might be well for members of such courts, on occasion, to step down from their ivory towers and recall with some humility that they were at the time of their appointment better than average lawyers with little judicial experience, of which there are many, who knew a President or Governor. In drafting the Constitution of the United States, our forefathers did not provide the states with a practical means of combating misconstruction of the Constitution or the encroachment of federal authority upon the sovereign power of the states. As I have before stated, it is the duty of this court to defend its own jurisdiction. The power of the pen is the only remedy left to us. When and if a decision of the Supreme Court of

the United States holds the Juvenile Court Act of this state to be unconstitutional under the federal Constitution, I want to make it clear that I shall recognize the power of that court to do so under the doctrine of judicial supremacy, but with the reservation of the privilege to protest its right to do so. But I shall neither bend the knee nor bow the head on mere inferences, speculations, or probabilities as to what that court will eventually do. Clear and plain holdings of unconstitutionality alone require us to apply the doctrine of judicial supremacy to the holdings of the Supreme Court of the United States. Having these views that I deem applicable to the case at bar, I concur in the affirmance of the judgment of the trial court.

SPENCER, J., joined by SMITH, J.

I am impelled to suggest that Judge Carter's opinion too casually brushes aside the impact of In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, particularly when read in conjunction with Duncan v. Louisiana, 391 U. S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491, which defined a misdemeanor punishable by 2 years imprisonment as a serious crime requiring a jury trial.

It is true we have previously said that a finding of delinquency is not punishment for a crime. However, the United States Supreme Court has questioned this legalistic fiction where constitutional rights are directly presented. It is the substance and not the form which will control.

Petitioner, who was 17 years of age, was charged with being a juvenile delinquent because of an alleged violation of the criminal law. He was found delinquent and was committed to the Boys' Training School at Kearney, where he may be confined until he becomes 21, and from which before that time he may be transferred to the Nebraska Penal and Correctional Complex. Our law authorizes the court to commit a delinquent child to the custody of the Department of Public Institutions. § 43-210, R. S. Supp., 1967. If he had been a few months

older, or 18 rather than 17, he could not have been charged as a juvenile, and without question would have been entitled to all constitutional safeguards.

I concede that In re Gault, *supra,* did not specifically pass upon the right to a trial by jury in a juvenile case, but do suggest it does conclude that the doctrine of parens patriae, which for years has been invoked to justify fewer constitutional safeguards for children, must be discarded.

The following quotations from In re Gault, *supra,* indicate that the conclusion supported by a majority of the court is the only one possible under the circumstances:

"Mr. Justice Douglas said, 'Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.' To the same effect is Gallegos v. Colorado, 370 U. S. 49 (1962). Accordingly, while these cases relate only to restricted aspects of the subject, they unmistakably indicate that, whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone. * * *

"* * * the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is —to say the least—debatable. * * *

"The juvenile offender is now classed as a 'delinquent.' * * * It is disconcerting, however, that this term has come to involve only slightly less stigma than the term 'criminal' applied to adults. * * *

"It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a build-

ing with white-washed walls, regimented routine and institutional laws * * *.' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide. * * *

"* * * juvenile proceedings to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings. Indeed, in over half of the States, there is not even assurance that the juvenile will be kept in separate institutions, apart from adult 'criminals.' In those States juveniles may be placed in or transferred to adult penal institutions after having been found 'delinquent' by a juvenile court. For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.' "

With a background of several years' experience in juvenile matters, I can appreciate the position of the many conscientious experts on juvenile problems who believe that it is to the best interests of the child that a public trial, with all it connotes, be avoided, and that the case of the juvenile be processed as informally as possible. Yet, I am persuaded that it is my duty to keep ever in mind that a child, as well as an adult, is entitled to all constitutional protections and that his rights cannot be determined by the criterion of what I may feel is best for him. The decision on the question of a waiver of his constitutional rights is a decision that must be made for him by his legal representative.