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# REPORTS OF CASES

DECIDED BETWEEN

FEBRUARY 8, 1969 and DECEMBER 12, 1969

IN THE

# Supreme Court of Nebraska

JANUARY TERM 1969, AND
SEPTEMBER TERM 1969

## VOLUME CLXXXIV

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WILLIAM E. PETERS

OFFICIAL REPORTER

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For the benefit of the State of Nebraska

# SUPREME COURT

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## ELLWOOD B. CHAPPELL

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And now, at the hour of nine o'clock a.m., on this twenty-sixth day of May, A.D. 1969, the same being the date fixed by the Court for hearing the report of the Committee appointed to draft resolutions in memory of Ellwood B. Chappell, the Court being in session and members of the bar in attendance, the Committee makes the following report:

HONORABLE GUY C. CHAMBERS.

MAY IT PLEASE THE COURT:

Your committee appointed to present a memorial service for the late Honorable E. B. Chappell presents to the Court the following:

You committee recalls the words uttered by Judge Chappell in this court room June 3, 1957, when a memorial was held to commemorate the life and career of the late Leonard A. Flansburg, a former Associate Justice. On that occasion Judge Chappell, speaking on behalf of the court said:

> "We recognize that mere speaking can add nothing to his immortal record already lived, spoken, and written, but we do not wish to remain silent lest posterity in the legal profession should fail to remember that record. Also, we speak of him and meditate upon his service to mankind because it enriches our own lives and stimulates a desire to emulate it."

No words could better express the intent of our attempt today to honor the memory of one who strove diligently, achieved much and has passed. To mourn his departure, he leaves his family and a very large number

of friends. The American Legion and other organizations whose development had his active support are also here to honor him.

Ellwood Blake Chappell was born at Osmund, Nebraska, May 4, 1889. He was a graduate of the local high school and earned three degrees at the University, an A.B., a degree in pharmacy and a degree in law. He was a member of the Delta Chi Fraternity, a Mason, 32nd degree, a Shriner, an Elk, member of Lincoln Lions Club, the American Legion and the 40 & 8 Society.

He married Myra Stenner April 10, 1918, at Plattsmouth, Nebraska. She and their three children, Dr. James W. Chappell of Tacoma, Washington, Mrs. Mary C. Bondarin of Great Neck, New York, and Mrs. True Sacrison of Tacoma survive.

He received his L.L.B. from the College of Law of the University of Nebraska in June, 1916. He had worked his way through college plying the trade of barber. This experience probably caused him to include in his address as President of the Nebraska Bar Association, December 27, 1940.

> "Abraham Lincoln once said, 'Let not him who is houseless pull down the house of another, but let him work diligently to build one for himself, thus by example assuring that his own shall be safe from violence when built.' "

Judge Chappell commenced practice of law in Lincoln, but was interrupted by the entry of the United States into World War I. After his return from service he reentered practice in Lincoln.

In 1920 Judge Chappell became the Second Commander of Lincoln Post Number Three of the American Legion. Under his enthusiastic guidance in its early years and his lifelong devotion to its affairs that post became one of the largest and most influential posts of the American Legion.

In 1923 Judge Chappell became Police Judge of the City of Lincoln and served until that Court was suc-

ceeded by the Municipal Court in 1925 when he became the first judge of that court. He was promoted from the Municipal Court to the District Court in 1929. As District Judge he kept things moving. While uniformly patient and courteous to lawyers and litigants, he controlled demeanor and procedure in his court. With some evidence of guidance, he caused matters before him to move to conclusions with a minimum of delay.

His service as district judge terminated when he was elected Associate Justice of this Court in 1943 where he remained until his retirement January 4, 1961. During his years on this bench the flow of opinions he authored gave evidence he was, as always, vigorously contributing at least his share of the work to be done. He sat with this court on numerous occasions while still a district judge. The volumes of the official reports carry a long list of his opinions marked by clarity, thoroughness and judicial scholarship.

When age of retirement compelled his departure from the court he again engaged in the practice of law in Lincoln. He enjoyed a long, successful and honorable career. He will long be remembered. His opinions written as a judge of this court will influence the law of this state as long as our form of government shall last.

Therefore, Be It Resolved that in the death of Honorable Ellwood B. Chappell we have lost a leader, a scholar, and a highly qualified judge.

Be It Further Resolved that we tender to his bereaved family our sympathy and condolences, and that these resolutions be made a part of the official records of this court.

Respectfully submitted,
Guy C. Chambers
Dale E. Fahrnbruch
C. M. Pierson
John J. Wilson
Farley Young

HONORABLE DALE E. FAHRNBRUCH.

MAY IT PLEASE THE COURT:

Although I became acquainted with Judge Chappell in 1941, it was not until after he retired from the Supreme Court in 1961 that this acquaintanceship developed into a close relationship of friend and co-worker.

One need look no further than the many opinions written by Judge Chappell during his eighteen years on the Supreme Court of Nebraska to realize that his contributions to the jurisprudence of this state are self-evident. By his labors, his devotion to law and justice, his search for truth, his compassion for his fellow man, all as recorded and reflected in his opinions written for the needs of his day but which can be used as guideposts for generations to come, Judge Chappell has left a living memorial to himself which will not be tarnished by age or dimmed by time. It is a memorial upon which those of us who, in our feeble efforts would like to improve, cannot improve.

Judge Chappell once remarked of a departed brethren of the bench that: "Justice to him was impersonal, injustice personal" and "He took justice for granted". So also it was with Judge Chappell even unto his death. Throughout his life, Judge Chappell was an avid champion of the rights of the individual and in his retirement, his interest in individual rights and law and order became more intense. After his retirement from the bench, his skillful analysis of the law in that regard helped more than one lawyer to protect and preserve the rights of the client.

After his retirement, he became "of counsel" to two Lincoln law firms. Although Judge Chappell counseled with young lawyers, it was not unusual to see even the older and more experienced lawyers walk into Judge Chappell's office to seek his advice and views upon a particular problem.

Judge Chappell was a man of convictions and courage —yet he maintained a gentlemanly and friendly man-

ner about him for everyone with whom he came in contact. He gave much to those with whom he was associated and asked little in return.

To those of us who knew him well and worked closely with him, Judge Chappell was a man of inspiration—a man whom we could emulate. To the world and future generations, Judge Chappell has left a better foundation for law and order based upon firm principles of law and justice.

HONORABLE C. M. PIERSON.

MAY IT PLEASE THE COURT:

Judge E. B. Chappell was a Judge of the District Court of Lancaster County when I first entered the practice of law in Lincoln. I remember him particularly from that time for the interest he took in young lawyers and his courtesy and kindliness to the new members of the Bar who appeared before him.

Judge Chappell was not only a very able District Judge, but he was also a Judge who actively enjoyed the interplay of fact and law and personality which took place in his courtroom. Jim Chappell, as a man and as a Judge, enjoyed and was concerned with people. This concern was manifest in his skillful and even-handed work as a trial judge. He was attentive to witnesses, considerate to lawyers, careful in his handling of juries, and painstaking in his application of the law. In short, he was a trial judge before whom lawyers were pleased to appear and whose courtroom gave litigants and laymen an impression of care and rectitude in the workings of the law.

I traveled with Jim Chappell on his first campaign for election to this Court. As could be expected, he spoke no ill of his opponent. But he campaigned hard and he was elected.

His service on the Supreme Court of Nebraska was marked by the insight he had gained as a District Judge. His opinions reflected a thorough examination of the

record and a due regard for those intangibles which are present in the trial court but may not be fully reflected in the transcript. His study of the law was diligent and continuous, and his opinions were consistently lawyer-like and clear.

Jim Chappell was a true family man, devoted to the interests of his wife and children and justly proud of their accomplishments.

I spent many hours with the Chappell family in Minnesota during summer vacations. Jim Chappell was a fisherman and approached fishing in much the same way as he did the law, with both enthusiasm and perseverance. He spent long hours on the water, enjoying the outdoors, and his catch consistently demonstrated his skill. I do not slight his accomplishments as a Judge in saying that one of his proudest moments was in landing a fifteen-pound northern pike on a bass hook with a light line. My son, Dave, was with him in the boat that day some twenty-five years ago, and I know whenever they were together over the years, they always caught that fish again.

E. B. Chappell was a fine man and an upright and distinguished Judge. I know that the Bench and the Bar join with his family in mourning his death after many years of service to the law and the people of this state.

HONORABLE JOHN J. WIILSON.

MAY IT PLEASE THE COURT:

It is my privilege to have the opportunity to say a few words concerning a close friend, a good citizen, and above all, an esteemed Judge.

My first impression of Ellwood B. Chappell was formed when his judiciary service first began as Police Judge of the City of Lincoln. At that time I was a law student and spent time between classes observing the temperament of the beginning life of one of our finest Judges.

Each case in the police court was considered and the

guilty or not guilty pleas with the evidence were well analyzed before the decision was reached. As time moved on, Judge E. B. Chappell advanced in court work from Police Judge to Judge of the Municipal Court, to Judge of the District Court and then to Judge of the Supreme Court. In all these steps, he was a judge most revered. As a judge, jurist and lawyer, he was willing to listen and gave much thought before rendering his decision. Why? Because he had a heart of kindness and fairness.

Through the years, I had an opportunity to better understand Judge E. B. Chappell. He was a sportsman of a quality to make him an expert fisherman. It was in this avenue of relaxation that he enjoyed helping others learn how, when and where to fish. He had the same temperament fishing as deciding litigation.

Having spent some summers with the Chappell family while fishing in Minnesota, I found the Judge to be a kind, loving and highly respected husband and father. His family was always foremost in his decisions.

In my many visits and associations with him, he often spoke of his father who was a Judge of the Criminal Court of Appeals in the State of Oklahoma. Being a respected Judge was rightfully born in him and many times he made the remark that he wanted to equal the respect of people, litigants and lawyers that his father had. Anyone who knew E. B. Chappell knew that this wish and desire was fully fulfilled.

Judge Ellwood B. Chappell will long be remembered for his courtesies, helping hand, tenderness of heart and the respect he had in the legal profession.

HONORABLE FARLEY YOUNG.

MAY IT PLEASE THE COURT:

It was my pleasure to have known Judge Chappell as "Jimmy" during the organization of Post #3 of the American Legion immediately after World War I. He was loved by all who worked with him in the early

days of this organization and to show their confidence and respect he was elected Commander of Post #3 of the American Legion in 1920.

When he was elected as the first Municipal Judge in Lincoln it was my duty as Deputy County Attorney to try many criminal cases before Judge Chappell. He was always attentive to the evidence and his findings were just and fair. It was his nature in both civil and criminal cases to protect the poor and unfortunate people of this community. He was always proud of having worked hard to attain an education at the University of Nebraska, and naturally had great compassion for people who were not blessed with the finer things in life.

The confidence and affection by the people of this County and State was bestowed upon Judge Chappell every time he ran for the judiciary. The Judge loved life and people and above all he had a patriotism for his country.

Many times while on the district bench he would call a short recess to straighten out an embarrassing situation for a young lawyer. He had affection for the young men in our chosen profession and it was his philosophy of life to protect those who needed a word of encouragement from those in authority.

Judge Chappell loved the great country we live in and he loved all of nature. When we were fishing he always took time to admire the beauties of his surroundings and the great outdoor life. At the same time he was stern with those who would attempt to destroy our way of life.

His wife, Myra, was a faithful worker for the Judge. It was my pleasure to be a classmate of this brilliant girl through high school and in the University. Her devotion to the Judge was to the very end.

It is an honor for me to be on this committee, to pause and reflect on our admiration for one who was a great friend and who has contributed so much to our community and our state.

The good Lord giveth and the good Lord taketh away.

HONORABLE ROBERT G. SIMMONS.

MAY IT PLEASE THE COURT:

I am grateful and honored by the invitation of the Court, extended through the Chief Justice, to be present and speak briefly on this occasion.

Over half a century ago Jim Chappell was a part time barber in the city of Lincoln. I was a dishwasher in a local boarding house. We were doing that work in order to earn a living while attending law school. No one told us that we were underprivileged. A beneficent government did not pay us for the cost of our going to school.

The people of this state offered us the privilege of going to law school. That opportunity was good. It was up to us to make use of it.

Our friendship began there. After graduation I returned to western Nebraska to practice economy in a law office. Jim began the practice in Lincoln. For a time our paths moved side by side in such activities as building the foundation of the American Legion and reviving a moribund Alumni Association and starting it on its way to its present service to the University.

Then Jim began to move through the chairs of the judiciary of Lancaster County. And now I refer to him as Judge Chappell. His work as a judge improved with each advancement. Finally it was my privilege to serve with him on this Court for many years.

He worked long hours, mastering the issues, the facts and the argument in cases assigned to him. He consulted other judges, the decisions of this Court, consulted with judges of other courts through their written opinions, studied the texts, seeking always the correct answer. Finally having reached a conclusion he wrote his opinions in long hand, corrected them, and dictated them to his efficient, capable secretary, as he sometimes said, to get the sound of them. They were then typed and after a final working over, submitted to the Court for its consideration. Such labors are

essential elements in the work of a great judge.

His opinions are in the printed records of this Court and the reports of the law decisions of the nation, for those, who seek his advice, to read. They are a part of his immortal heritage to others.

I received from Judge Chappell every support that as an administrator I had a right to expect. He often went the second mile.

There is one facet of Judge Chappell's life that I would mention. He was a faithful husband and father, loyal to and proud of those who bore his name. I doubt if he ever made an important decision without considering its impact on their welfare. To my knowledge it often controlled.

His love for the law remained with him. Shortly before his fatal illness I tried to contact him by phone and was told that he was at his office, working.

And so, too briefly, I pay my humble and sincere respects to a patriotic and loyal citizen, a devoted loving husband and father, a great judge and, to me by no means least, my friend.

One sentence in summary—Judge Chappell loved his fellowmen.

ASSOCIATE JUSTICE EDWARD F. CARTER.

The history of Judge Chappell's personal and professional life, I leave to others. I would say a few words about our association as contemporary members of this court.

For eighteen years we performed the same duties, faced the same problems, and enjoyed the same amenities as members of the Supreme Court of this State. He was competent, careful, and hardworking. I had great respect for his judicial integrity, his impartiality, and the thoroughness of his work. His one fear, if he had one, was the fear of being wrong.

Disagreement did not generate ill will or personal aloofness on his part. It did foster serious debate and

an honest attempt to solve differences. The integrity and dignity of the court was constantly a matter of the utmost moment to him. Whatever his thoughts and actions may have been in other walks of life, he was dedicated to the maintenance of the public confidence in the judiciary and the work it performs.

As I have said, we served together on this court for eighteen years. His qualities as an appellate judge were excellent. His respect for justice and law was great. It was a pleasurable experience to have been associated with him. I regret his passing very much, but I shall remember him for what he was with much pride. It is a privilege indeed to recall my long association with Judge Chappell and pay tribute to his integrity, impartiality, and honesty while serving as a judge of this court.

CHIEF JUSTICE PAUL W. WHITE.

There is little that I can add to what has already been said. It must be said that there are a multitude of others besides the distinguished gathering here this morning, who are of the same attitude and disposition. Continuously for over 40 years, through police, municipal, district and Supreme Courts, Jimmy Chappell symbolized the ideals and the traditions of a judge in Lincoln and this community. We idealize a government of law rather than men, but the revelation must come from the lips and the character of an individual human, and the personification of our ideals, be they religious, ethical or legal, is of the essence of humanness. The law becomes a jeering cacophony of tongues unless it has its cultural transmission and respect of the people in the integrity and character of the individual, be he a priest, a lawyer, an Egyptian scribe or vizier, a prophet, or a judge.

Before this group of friends this morning, all of this image is personified in Judge Chappell. In personal appearance, in conduct and demeanor, and in his speaking of the law, he exemplified a sanctified dedication to

the law and the moral principles it implements. The judge had the wisdom of knowing that the majesty of the law lies not alone in the principles it applies and expounds, but in the certainty that furnishes a guide to the law and order. He knew that only the majesty of the law could transcend the dictator, the monarch, or the whims of a transient innovating oligarchy. In Judge Chappell, we find the personification of the traditions of the law that in some way we must transmit to each generation if ordered liberty, as we conceive it, is to survive.

To one, like myself, who has fallen into the line of march quite recently, Justice Chappell has meant a lot. He was a real physician of applied liberty. With intellect, dispassionate temperament, and courageous resolution of decision, he spelled out in his record, a clear concept of the law and of the judicial power.

As a judge, in Socrates' terms, he heard courteously, answered wisely, considered soberly, and decided impartially. His hallmark was the same as Coke's, "that when the case should be, he would do that which should be fit for a judge to do."

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

CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

JANUARY TERM, 1969

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FRANCES MCCALL, APPELLANT, V. ST. JOSEPH'S HOSPITAL, APPELLEE.

165 N. W. 2d 85

Filed February 14, 1969. No. 36946.

1. **Negligence.** Generally, the doctrine of res ipsa loquitur is that the accident and the resulting injuries are such that in the ordinary course of things the accident does not happen if those who have the exclusive management or control of the instrumentality or agency, proximately causing such accident, or injuries, use proper care.
2. **Negligence: Pleading.** A pleading founded upon the doctrine of res ipsa loquitur does not permit allegations of specific acts of negligence.
3. **Negligence: Trial.** Generally, in an action founded on the doctrine of res ipsa loquitur, negligence may be inferred in three situations without affirmative proof thereof: (1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injury.
4. ———: ———. The exclusive control element of the doctrine of res ipsa loquitur is satisfied if it is shown that the injury resulted from an external force applied while the plaintiff was in the exclusive control or custody of the defendants, even though by subsequent explanation some of the defendants are exonerated from the charge of negligence.

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

Shrout, Nestle & Caporale, for appellant.

Kennedy, Holland, DeLacy & Svoboda, Joseph P. Cashen, Lyman L. Larsen, and William J. Riedmann, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and STUART, District Judge.

WHITE, C. J.

The question involved in this case is hospital liability under the doctrine of res ipsa loquitur for staphylococcus infection occurring after and in connection with an operation performed in the defendant hospital. The district court sustained the defendant's motion for summary judgment, holding that there was no genuine issue of fact presented by the pleadings and the evidence. We affirm the judgment of the district court.

The plaintiff, for reversal, relies on the contentions that there were genuine issues of fact on the propositions: (1) That the hospital was in exclusive control of the instrumentality or agency which caused the infection, and (2) that the injury complained of would not have occurred in the ordinary course of things if those who had control of the instrumentality or agency had used proper care.

On January 11, 1963, the plaintiff was hospitalized with a condition diagnosed as a herniated disc. The plaintiff was subsequently operated upon for that condition on January 28, 1963, by two doctors employed for that purpose by the plaintiff. The plaintiff was given sedation during the operation and although not fully conscious during its progress, she was partially aware of nurses, doctors, and others who were not identifiable in the operating room. The surgery was performed without incident. During the course of post-operative care the doctors examined the bandage on the wound but did not remove it. Three of four days after the operation the plaintiff was visited by staff doctors and interns, who

caused the surgical dressing to be removed for purposes of examining the incision area. A few days after the operation, the plaintiff complained of pains in her back and right leg together with a high temperature, chills, and vertigo. Subsequently, an infection found to be staphylococcus auerus, was found at the site of the surgery. Extensive injuries and disability are alleged as a result of this infection.

The evidence, by depositions and affidavit, is undisputed. Under the law, are there any inferences that may be reasonably and legally drawn that would present a genuine issue of fact for trial by the finders of fact? This is the test. Ingersoll v. Montgomery Ward & Co., 171 Neb. 297, 106 N. W. 2d 197 (1960). The affidavit of the assistant administrator of the hospital, Mr. Flickenger, is in the record and is undisputed. Flickenger had direct control and supervision of the operation of the hospital, and he had knowledge of the practices and procedures followed by the surgeons who are on the staff of the hosptal and who perform the operations therein. The undisputed evidence is that from the time the surgeon arrives at the surgical unit in the hospital, the surgeon has full and complete direction and supervision of the patient as well as all persons maintained and employed in the surgical room.

As mentioned, this case is founded on the doctrine of res ipsa loquitur. It should be carefully borne in mind in a discussion of this case that there are no allegations of specific acts of negligence. The examination of whether there is a genuine issue of fact must be related solely to the issues raised under the required elements of the doctrine of res ipsa loquitur. Much of the argument of the plaintiff herein seems to convert actually into an argument that there would be evidence to sustain findings of specific acts of negligence.

The doctrine of res ipsa loquitur simply stated is that the accident and the resulting injuries are such that in the ordinary course of things the accident does not

happen if those who have the exclusive management or control of the instrumentality or agency, proximately causing such accident, or injuries, use proper care. This is the rule in Nebraska. Miratsky v. Beseda, 139 Neb. 229, 297 N. W. 94; Watson Bros. Transp. Co. v. Chicago, St. P., M. & O. Ry. Co., 147 Neb. 880, 25 N. W. 2d 396; Asher v. Coca Cola Bottling Co., 172 Neb. 855, 112 N. W. 2d 252; Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N. W. 2d 224.

Research reveals continued adherence to the classic statement of the doctrine by Chief Justice Erle in Scott v. London & St. Katherine Docks Co., 3 H. & C. 596, where he stated: "There must be reasonable evidence of negligence. * * * But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendants, that the accident arose from want of care."

Our position appears to be substantially the same. In Miratsky v. Beseda, 139 Neb. 229, 297 N. W. 94, this court said: " 'Where the thing which caused the injury complained of is shown to be under the management of defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care.' "

Other jurisdictions which have considered the use of the doctrine in hospital cases have universally held that these same requirements must exist. Ybarra v. Spangard, 25 Cal. 2d 486, 154 P. 2d 687, 162 A. L. R. 1258; Frost v. Des Moines Still College of Osteopathy & Surgery, 248 Iowa 294, 79 N. W. 2d 306; Leach v. Ellensburg Hospital Assn., Inc., 65 Wash. 2d 925, 400 P. 2d 611; Gormley v. Montana Deaconess Hospital, 149

Mont. 12, 423 P. 2d 301; Horner v Northern Pacific Beneficial Assn. Hospitals, Inc., 62 Wash. 2d 351, 382 P. 2d 518.

As applied to hospital and malpractice cases, perhaps the best analysis of the evidence necessary to sustain an action for res ipsa loquitur is the case of Horner v. Northern Pacific Beneficial Assn. Hospitals, Inc., 62 Wash. 2d 351, 382 P. 2d 518. In that case the court stated as follows: "* * * negligence may then be inferred in three situations without affirmative proof thereof: (1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries."

In the light of these principles, we now examine the first issue presented in this case as to whether from the undisputed evidence there was a genuine issue of fact on the proposition that a staphylococcus infection at the surgical site does not ordinarily result if those who are in control use proper care. It seems obvious that an infection at the surgical site would not be "so palpably negligent" that it would require negligence to be inferred as a matter of law. Nor can it be inferred from the general experience and observation of mankind that infections on open wounds do not ordinarily occur unless negligence is present. The essence of res ipsa loquitur is that the facts speak for themselves and lead to a proper inference of negligence by the fact finder without further proof. Neither authority nor reason will sustain any proposition that negligence can reasonably be inferred from the fact that an infection originated at the site of a surgical wound. To permit a jury to infer negligence would be to expose every doctor and dentist to the charge of negligence every time an infection originated at the site of a wound. We note the complete absence

of any expert testimony or any offer of proof in this record to the effect that a staphylococcus infection would automatically lead to an inference of negligence by the people in control of the operation or the treatment of the patient. We come to the conclusion that there is no merit to this contention.

We deem it pertinent herein to examine the second issue raised by the plaintiff, namely, to the effect that there is a genuine issue of fact on the proposition that the defendant hospital was in exclusive control of the instrumentality or agency which caused the infection. This question has been a troublesome one for the courts in examining the issue with reference to its applicability to hospital surgical procedures. The courts seem to have had no difficulty where the issue of exclusive control revolved around an injury caused by a heating pad, a portable heat lamp, or other equipment commonly used and exclusively controlled by the employees of the hospital. When a particular instrumentality is not known by the plaintiff to have caused the injury complained of, the courts have relaxed the requirement that the plaintiff identify the specific instrument or instrumentality or agency which caused the injury. See Ybarra v. Spangard, 25 Cal. 2d 486, 154 P. 2d 687. The courts have held generally that the exclusive control requirement of the doctrine of res ipsa loquitur is satisfied if it is shown that the injury resulted from an external force applied while the plaintiff was in the control or custody of the defendants, even though by subsequent explanation some of the defendants are exonerated from the charge of negligence. The courts in examining this issue have generally held that control is exclusive if it is shown that there was no possibility that a third party, *not a defendant,* could have caused the injury. The plaintiff in her petition herein was unable to identify the specific instrumentality or agency which allegedly caused the infection. She alleged and contended, however, in her petition, that exclusive control

of whatever instrumentality it was that proximately caused the infection was vested in the defendant hospital at the exclusion of any third party. The undisputed evidence pierces this allegation. The evidence in this case does show that the infection occurred in the area of the surgical wound. But the surgeons are not defendants in this case. The undisputed evidence is that during the period of the operation, and immediately subsequent thereto, the surgeons had exclusive control and custody of the plaintiff and that during this period of time there was ample opportunity for the infection to be implanted. Stated conversely, the undisputed evidence presented forecloses any possible proof that the defendant hospital was in exclusive control of the plaintiff at all times when the infection could have occurred or been implanted. We deem it significant that the undisputed evidence affirmatively shows that a reasonable inference, if not a reasonable probability, could be drawn that the infection occurred during the period of the surgical operation. The bandages were not touched or removed by either the surgeons or the hospital staff until after the plaintiff suffered the symptoms leading to the discovery of the staphylococcus infection.

We come to the conclusion that the judgment of the district court sustaining the motion for summary judgment is correct; that under the pleaded doctrine of res ipsa loquitur as distinguished from a possible cause of action for specific negligence, and under the allegations of the pleadings and their piercing by the undisputed facts, there is no genuine issue of fact present. The judgment of the district court is correct and is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein for the reason that I believe there is an issue of fact which presents a jury question.

The case comes to this court on the sustaining of defendant's motion for summary judgment. As the major-

ity opinion says: "The plaintiff, for reversal, relies on the contentions that there were genuine issues of fact on the propositions: (1) That the hospital was in exclusive control of the instrumentality or agency which caused the infection, and (2) that the injury complained of would not have occurred in the ordinary course of things if those who had control of the instrumentality or agency had used proper care."

A summary judgment is permissible only when a party is entitled to it as a matter of law, where it is clear what the truth is, and that no genuine issue remains for the jury. This is not the situation herein.

There is evidence in this record from one of the surgeons that the infection could only have happened in surgery. In response to a question as to how that could be, he said: " 'Well, evidently it was an unsterile instrument.' " Regardless of the testimony of the hospital administrator that the surgeons had full and complete direction and supervision of the plaintiff as well as of processes maintained and employed by the hospital in the surgical room, it is a fact that members of the hospital staff prepare the surgical room before it is turned over to the surgeon. This necessarily must include the furnishing of sterile instruments.

I believe that res ipsa loquitur is applicable herein, and that the motion for summary judgment should not have been sustained.

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ALLEN SCHROEDER ET AL., APPELLEES, V. ELMER OELTJEN ET AL., APPELLANTS.
165 N. W. 2d 81

Filed February 14, 1969. No. 37005.

1. **Constitutional Law: Trial.** The Constitution of Nebraska preserves the right to trial by jury as it existed at common law or by statute but does not extend the right beyond the limits existing at the time of the adoption of the Constitution.

2. **Schools and School Districts: Trial.** On appeal from a decision of a county superintendent in a school reorganization matter, the cause is triable in the district court without a jury.
3. **Appeal and Error: Pleading.** In the absence of prejudice, error cannot be predicated on the overruling of a motion to make a pleading more definite and certain.
4. **Schools and School Districts: Statutes.** In determining the validity of an instrument filed for the purpose of complying with statutory procedures required in a reorganization of school districts, the substance and not the form of the instrument controls.
5. ———: ———. A change in the classification of a school district resulting from a change of boundaries does not necessarily create a new school district requiring compliance with section 79-402.01, R. R. S. 1943.
6. **Appeal and Error: Evidence.** In an equity case, when there is an irreconcilable conflict in the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other.
7. **Schools and School Districts: Property.** In determining the valuation of a school district, the assessed valuation of intangible as well as tangible property must be considered.
8. ———: ———. The correction of an error in the legal description of land lying within a school district occurring in a petition for the consolidation of districts is not subject to objection by one who is not a party to such petition.

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

Moyer & Moyer and Hal B. Hasselbalch, for appellants.

Edward Asche and Perry, Perry, Sweet & Witthoff, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and COLWELL, District Judge.

NEWTON, J.

This is an action involving the reorganization of school districts. Several Class I districts in Colfax, Platte, and Stanton Counties petitioned for a merger with school district No. 39, sometimes referred to as the Leigh District, a Class II district of Colfax County, Nebraska.

At a hearing before the county superintendents of the three counties involved, the petitions were granted and the merger prayed for ordered. Appeal was taken to the district court for Platte County which sustained the action taken by the three county superintendents. We affirm the judgment.

Appellants urged a number of grounds for reversal, several of which are found to be without sufficient merit to warrant discussion herein. It is asserted that appellants were wrongfully denied a jury trial in the district court. Article I, section 6, Constitution of Nebraska, states that the right to trial by jury shall remain inviolate. This constitutional provision merely preserves the right to trial by jury as it existed at common law or by statute, but does not extend this right beyond the limits existing at the time of the adoption of the Constitution. See State v. Hauser, 137 Neb. 138, 288 N. W. 518.

The right to trial by jury in cases such as the one before us was unknown to the common law and was not provided for by statute at or prior to the time of the adoption of our state Constitution. In regard to our present statutes, it may be noted that section 25-1104, R. R. S. 1943, which is our general statute providing for jury trials, fails to specify this type of case as one in which a jury trial may be had as a matter of right. Section 25-1105, R. R. S. 1943, provides that all issues of fact other than those specified in section 25-1104, R. R. S. 1943, shall be tried by the court. It is true that in some instances special statutes provide for trial by jury. There is no such special statute applying to the issues before us. Sections 25-1937, 24-544, and 27-1301 et seq., R. R. S. 1943, provide for appeals from the action taken by a county superintendent in such cases and specify how such appeals shall be completed. We are unable to find anything in these statutes which takes this type of case out of the purview of section 25-1104, R. R. S. 1943, or

which could reasonably be interpreted as requiring a jury trial.

Complaint is made that a motion of appellants to make appellees' petition in the district court more definite and certain was erroneously denied. It is not contended and it does not appear that appellants were prejudiced thereby. In the absence of prejudice, error cannot be predicated upon such a ruling. See, Chicago, B. & Q. R.R. Co. v. Oyster, 58 Neb. 1, 78 N. W. 359; Vaughan v. Omaha Wimsett System Co., 143 Neb. 470, 9 N. W. 2d 792.

It is urged that appellees failed to allege and prove that the petitions of the Class I districts were duly accepted by the Leigh district by "the petition of the school board or the board of education of the accepting district." The petitions were actually accepted by the board of education of the Leigh district, but the acceptances were in the form of resolutions rather than petitions. This contention is without merit. In determining the sufficiency of the proceedings had under the statute, the substance and not the form of the instrument controls. There was an unconditional acceptance of the Class I petitions within the meaning of the statute.

It is contended that the proceedings had necessarily created a new school district because the result effected a change of the Leigh district from a Class II to a Class III district. Due to this change in class, appellants urge that a new district has been created and that the reorganization of the districts involved must fail because the proceedings are not in compliance with requirements of section 79-402.01, R. R. S. 1943, which provides a procedure to be followed when "a new district is to be created from other districts." Appellants overlook the fact that section 79-402, R. R. S. 1943, provides an alternative procedure making it possible to "change the boundaries of any district." It was the apparent intent of all parties to effect a change of boundaries in compliance with the last-mentioned section. The petitions of

the Class I districts are, in substance, for a *change of school district boundaries to effect a merger* and not for the formation of a new school district. A mere change in the classification of a school district does not necessarily result in a new school district being created. A change in classification may result simply from a change of boundaries of an existing district or from a growth of population within a district without any boundary changes. In either event, the original district remains in existence unless specifically dissolved.

It is said that the petition from one of the Class I districts, district No. 37 of Stanton County, Nebraska, is invalid for the reason that two of the petitioners, without whose signatures the petition would fail, received a pecuniary inducement to sign the petition. The evidence on this proposition is in conflict. The trial court found that the petitioners did not sign as the result of any pecuniary inducement or reward. It does not appear that this finding on the part of the trial court is necessarily erroneous and we are inclined to accept this finding. Where the evidence is in irreconcilable conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. See, Onstott v. Olsen, 180 Neb. 393, 142 N. W. 2d 919; Webb v. Lambley, 181 Neb. 385, 148 N. W. 2d 835.

The petitions of the Class I districts provide that they shall be "void unless a total combined valuation of $4,200,000.00 is attained." This provision or condition was complied with but only by the inclusion of intangible as well as tangible property in the valuation. This was a correct procedure for the determination of the valuation of the district. See, School Dist. No. 49 v. Kreidler, 165 Neb. 761, 87 N. W. 2d 429; Reid v. Slepicka, 182 Neb. 485, 155 N. W. 2d 799. The contention that petitioners were misled into believing that the petitions referred only to tangible property valuations cannot be

sustained. The petitions do not limit the valuation to that of tangible property and signers are presumed to know the law which fixes the meaning of the term "valuation" as used in school reorganization proceedings.

It appears that the petition circulated in district No. 23 of Platte County, Nebraska, omitted one 80-acre tract of land from the legal description of the district. The error was corrected prior to the filing of the petition with the county superintendent. The error and its correction were circumstances material only to such persons as may have signed the petition prior to its correction and they alone are in a position to make objections to the petition on this ground. No such objections appear and the record does not disclose that this error in any manner affected the actions of petitioners or was an inducement to their signing the petition.

A motion to dismiss this appeal was filed and presented herein. Because of the nature of this action, the motion was taken under advisement until the case could be heard on its merits. A determination on the merits having been made favorable to the moving party, it becomes unnecessary to pass upon the merits of such motion.

No valid grounds for a reversal appearing, the judgment of the district court is affirmed.

AFFIRMED.

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DAVID J. PICKARD, APPELLANT, V. DIRECTOR OF MOTOR VEHICLES OF THE STATE OF NEBRASKA ET AL., APPELLEES.
165 N. W. 2d 96

Filed February 14, 1969. No. 37018.

**Automobiles: Appeal and Error: Evidence.** In an implied consent case, where there is irreconcilable conflict in the evidence on a material issue, this court will consider the fact that the trial court observed the witnesses and their manner of testify-

ing and must have accepted one version of the facts rather than the other.

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

Lester A. Danielson, for appellant.

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

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

McCOWN, J.

The Director of the Department of Motor Vehicles revoked the driver's license of the appellant for a period of 1 year for refusal to submit to a chemical test under the Implied Consent Law. §§ 39-727.03 to 39-727.12, R. R. S. 1943. On appeal, the district court for Scotts Bluff County affirmed the order. The only issue tried was whether the appellant refused to take the test provided for by the Implied Consent Law.

On March 5, 1966, the appellant, David J. Pickard, was arrested for driving while intoxicated. A friend of the appellant, Thomas O. Lally, was a passenger. Appellant was taken to the police station by Officer Gerald Mowry, and Mr. Lally came along although Lally was not under arrest.

Officer Mowry's testimony was that he arrested the appellant at approximately 4:30 p.m. After they had arrived at the police station, Officer Mowry read the implied consent rules to the appellant. After he had completed the reading of the rules, Officer Mowry asked if he would take the test, and the appellant said he would not. At that time the appellant did not ask to call an attorney. Afterward when the officer started to ask a series of questions from a questionnaire, the appellant said he would not answer any questions until he saw his attorney. Officer Mowry then gave him a telephone. The appellant dialed a number, a voice said "Hello."

Officer Mowry asked: "Aren't you going to answer?" The appellant said: "They don't answer," and hung up. Officer Mowry testified that he asked the appellant to take the test about 5 p.m.; that he was offered the test at least twice after the statement as to the Implied Contest Law was read to him; and that he refused on both occasions. The appellant was booked at 5:22 p.m.

The testimony of the appellant and Mr. Lally was that the original arrest was after 5 p.m., rather than 4:30; that they arrived at the station at approximately 5:20 p.m.; and that the appellant was not asked to take the test until approximately 5:45 p.m. The appellant and Lally testified that at the time of the request, the appellant did not refuse to take the test, but stated he wanted to talk to his lawyer. Lally testified that appellant called the attorney, but he was not in. Lally thereafter called an attorney for the appellant. The attorney arrived a few minutes after 6 p.m., and was there approximately 40 minutes. The appellant was not asked to take the chemical test after the appellant's attorney arrived.

The district court found that the appellant refused to take the test, and that the refusal was not reasonable; and affirmed the order of the Director of Motor Vehicles revoking the operator's license of appellant.

The sole issue here is a factual one of whether the appellant unreasonably refused to take the chemical test. The evidence was in direct conflict. Under the appellant's version, he did not refuse to take the test, but requested an opportunity to consult a lawyer. Under the appellee's version, the appellant affirmatively refused to take the test on at least two occasions after a proper request.

The credibility of witnesses and the weight to be given to their testimony is ordinarily for the trier of facts. The mere number of witnesses is not determinative on a factual issue. Even in an equity case where this court is required to reach an independent conclusion without reference to the findings of the district court, this court

will, in determining the weight of the evidence where there is irreconcilable conflict therein on a material issue, 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 other. See Lunzmann v. Yost, 182 Neb. 101, 153 N. W. 2d 294.

In an appropriate factual context, a request for a brief delay in making the decision to accept or refuse the chemical test in order to consult with a lawyer should be granted where the delay is short and does not jeopardize the effectiveness of the test. However, a refusal to take a chemical test does not disappear or become something else because of a later request to consult with a lawyer. The taking of a chemical test authorized by the Implied Consent Law is not ordinarily required to be delayed by a request of the arrested motorist that he be permitted to contact legal counsel. See State v. Oleson, 180 Neb. 546, 143 N. W. 2d 917.

The evidence here amply supports the finding of the district court that the appellant refused to take the chemical test required under the provisions of the Implied Consent Law, and that the refusal was not reasonable. The judgment of the district court is affirmed.

AFFIRMED.

NEWTON, J., concurring.

I concur in the result arrived at in this case but disagree with some of the implications to be found in the foregoing opinion.

The court first states that consultation with a lawyer prior to deciding whether or not to take a test for intoxication must be permitted if it does not jeopardize the effectiveness of the test. It then goes on to say that the taking of such a test "is not *ordinarily* required to be delayed" by a request that the arrested motorist be permitted to contact legal counsel. (Emphasis supplied.)

The obviously ambiguous statements can only result in confusion and uncertainty. They will render law enforcement officials uncertain of the proper method of

procedure and will confuse arrested motorists as to the extent of their rights under such circumstances. In some instances, delays encountered may render the tests ineffective and arrested motorists may deliberately insist upon consulting counsel for that purpose.

There is an attempt here to place the Implied Consent Law on the same footing as "in-custody interrogation" where a request for counsel must be honored. I know of no law to that effect. There is no constitutional right to counsel in taking tests under the Implied Consent Law. See State v. Oleson, 180 Neb. 546, 143 N. W. 2d 917.

WHITE, C. J., and CARTER, J., join in this concurrence.

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PROPERTY SALES, INC., A NEBRASKA CORPORATION, APPELLEE, V. IRVINGTON ICE CREAM & FROZEN ARTS, INC., A NEBRASKA CORPORATION, APPELLANT.

165 N. W. 2d 78

Filed February 14, 1969. No. 37037.

1. **Frauds, Statute of: Contracts.** The Statute of Frauds requires that every contract for the sale of lands between the owner thereof and any broker shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker.
2. **Contracts: Brokers.** Generally, a broker's contract which by its own terms has expired, cannot thereafter be extended by parol. Any renewed relationship between the parties must be established by a valid new contract.
3. **Contracts.** If a contract by its terms is legally defunct, there is nothing on which an extension agreement may legally operate to revive the original contract. To bring the terms of an extinguished contract into renewed existence requires a new contract embodying such terms.
4. ———. As long as a contract remains executory, and has not by its own terms expired, the parties thereto, acting upon sufficient consideration, may by agreement rescind, alter, modify, supplement, or replace it; but when the contract has terminated or been extinguished, it is no longer subject to extension by subsequent oral agreement.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Reversed and remanded with directions to dismiss.

Crossman, Barton & Norris, for appellant.

Steven J. Lustgarten, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and WILLIAM C. SMITH, JR., District Judge.

WHITE, C. J.

The question involved in this case is whether Hetzel v. Lyon, 87 Neb. 261, 126 N. W. 997 (1910), should be overruled. In the above case this court held that a contract in writing executed pursuant to the statute of frauds, now section 36-107, R. R. S. 1943, between a landowner and broker for the sale of the land of the former, which by its terms limits the time for its continuance, may be extended by parol after the contract has been terminated, so as to extend the time of the existence of the broker's authority to sell under the terms of the written contract. The district court followed the above rule and entered judgment for the broker based upon an oral extension entered into after expiration of the written contract. We reverse the judgment and remand the cause with directions to dismiss the action.

In this case the parties entered into a valid written brokerage contract, a "UNIFORM LISTING CONTRACT," on March 4, 1966, for the sale of defendant's ice cream business. The property did not sell during the term of the listing contract which, by its own terms, expired on September 1, 1966. Giving maximum import to the trial judge's findings, sitting as a trier of fact in a law action, the parties, over 6 months later, entered into an oral extension agreement. The plaintiff located a buyer who later closed a deal with the defendant personally without the participation of the plaintiff in the

negotiations and the closing of the deal on July 1, 1967.

The ultimate facts in Hetzel are identical with those of this case and ordinarily would require affirmance. But the court in Hetzel did not decide precisely any new question of law. Its decision was based unequivocally on the case of Rank v. Garvey, 66 Neb. 767, 92 N. W. 1025 (1902). The court said: "We consider that this question has already been determined by this court. In Rank v. Garvey, 66 Neb. 767 * * *." Even a cursory reading of Rank v. Garvey, *supra,* reveals that the broker's contract *had not expired* and was in full force and effect at the time the contract was modified, by an oral agreement as to the listing price, a term not required to be in writing under the Statute of Frauds. These facts strike a clear distinction between the Rank and Hetzel cases. It, therefore, appears to be beyond argument that the Hetzel case stands entirely upon a misconception of the rule in the Rank case which we consider to be sound law. Consequently we feel that the question is an open one for our decision on the merits.

The problem presented is how can a contract which has expired by its own terms, and is legally defunct, be extended? It would seem quite apparent that in order to extend a contract, there must be a contract in existence to extend by parol, lest the parol agreement fall for failure to comply with the Statute of Frauds, section 36-107, R. R. S. 1943. In 17A C. J. S., Contracts, § 373, p. 422, it is stated: "A contract which by its terms has expired is legally defunct, and there is nothing on which an extension agreement may legally operate. To bring the terms of an extinguished contract into renewed existence requires a new contract embodying such terms." In 17A C. J. S., Contracts, § 449, p. 561, it is stated: "* * * the fact that the parties by their acts and declaration indicate an intention to treat a written contract as continuing after the time prescribed in it for its termination will not have the effect of continuing such contract, although it may show a subsequent oral

agreement on the same terms." Section 450, page 562, of the same work states: "The time for giving notice of renewal, when unspecified, does not extend beyond the date of the expiration of the contract."

In 49 Am. Jur., Statute of Frauds, § 301, p. 609, it is stated as follows: "A different question arises when an attempt is made orally to modify a written contract embraced within that statute; while not all the authorities are in accord, the broad general doctrine as announced by most authorities is that a contract required by the statute of frauds to be in writing cannot be validly changed or modified as to any material condition therein by subsequent oral agreement so as to make the original written agreement as modified by the oral one an enforceable obligation. To state the rule differently, where an original agreement comes within provisions of the statute of frauds requiring certain agreements to be in writing, the statute of frauds renders invalid and ineffectual a subsequent oral agreement changing the terms of the written contract. * * * The rule that the statute of frauds prevents the oral modification of a writing has been applied in the case of a writing which was insufficient under the statute, but in any case, where the parties have failed to put sufficient of the agreement in writing to comply with the statute, any subsequent oral modification the parties agree upon is ineffective, because there is no enforceable contract to be modified." The rule would appear to be the same in Nebraska with exceptions not applicable here. See, Bowman v. Wright, 65 Neb. 661, 91 N. W. 580; Hylton v. Krueger, 138 Neb. 691, 294 N. W. 485; Swanson v. Madsen, 145 Neb. 815, 18 N. W. 2d 217.

In examining the authorities dealing with this situation, and they are numerous, perhaps the most persuasive is a case directly in point, Pavey v. Collins, 31 Wash. 2d 864, 199 P. 2d 571. In that case, there was a valid broker's contract in writing for the sale of real estate which expired by its own terms on December 31,

1946. Washington's Statute of Frauds was substantially like Nebraskas, requiring a contract between broker and owner for the sale of real estate to be in writing. On January 12, 1947, the owner wrote a letter to the broker confirming the expiration of the original written contract, but advising the broker that if he had a buyer for a lesser price than in the original agreement, the owner would still pay the broker a commission, provided the property was not previously sold. The broker contended that the original contract had been extended, both orally and in writing, the writing being the letter of January 12, 1947. The trial court, without a jury, awarded the broker a judgment on the theory of an extension of the original contract.

In reversing the judgment of the trial court and dismissing the action, the Supreme Court of Washington said: "It is apparent that whatever may be said or held with respect to the statutory sufficiency of the original exclusive option agreement, executed July 1, 1946, that agreement does not and cannot, in and of itself, apply to the sale in this case or warrant recovery thereon by the respondents (broker), for the simple reason that this agreement expired by its own express terms on December 31, 1946, and all negotiations for the sale involved in the present action took place after January 12, 1947."

The theory upon which the Washington trial court decided the case in favor of the broker was, as clearly appears from the court's finding, that by his letter of January 12, 1947, the owner granted the broker an extension of the original brokerage agreement and right to sell, but without the exclusive feature thereof. For several reasons, we disagree with the theory of extension of the Supreme Court of Washington. In the first place, the letter of January 12, 1947, on its face negated any extension of a prior agreement, and categorically declares that the prior agreement has expired and no longer exists. The second reason was that a contract

which by its terms has expired is legally defunct and, since the vitality which it once had had ceased, there was nothing upon which an extension might legally operate. So long as the contract remained executory, the parties thereto, acting upon sufficient consideration, could by agreement rescind, alter, modify, supplement, or replace it; but when the contract had terminated or been extinguished, it was no longer subject to extension, for extension implies an existing agreement. To bring the terms of an extinguished contract into renewed existence requires a new contract embodying such terms.

Further elaboration of the law and facts in the present case are unnecessary. It is clear that the listing contract expired by its own terms on September 1, 1966. From that date on, there was nothing to extend; and if the listing contract were to be reestablished, it had to be done with a new contract, in writing, which complied with section 36-107, R. R. S. 1943. There was no such contract.

From all that has been said, it is clear that the Hetzel holding was based on a misconception of the holding and decision in the earlier Rank case, and that reason and the authorities overwhelmingly demand its reversal and a return to a position consonant with law of contract and an enforcement of the basic purposes of section 36-107, R. R. S. 1943, of the Statute of Frauds.

For the reasons given the judgment of the district court is reversed and the cause remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

BOSLAUGH and MCCOWN, JJ., concur in result.

WILLIAM D. PESTER, JR., ET AL., APPELLEES, V. HAROLD S. LOWE ET AL., APPELLANTS, IMPLEADED WITH NEBRASKA SAVINGS AND LOAN ASSOCIATION, OMAHA, NEBRASKA, APPELLEE.

165 N. W. 2d 95

Filed February 14, 1969. No. 37169.

1. **Motions, Rules, and Orders: Actions.** An order striking a counterclaim is not a final order which may be reviewed upon appeal while the main action is otherwise pending in the district court.
2. ———: ———. When appellant fails to file a brief as required by the rules of this court, a motion to dismiss the appeal will be sustained.

Appeal from the district court for Douglas County: JAMES P. O'BRIEN, Judge. On motion to dismiss appeal. Appeal dismissed as premature.

Frost, Meyers & Farnham and Patrick F. Moylan, for appellants.

Morsman, Fike, Sawtell & Davis and Renne Edmunds, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and NEWTON, JJ., and HASTINGS, District Judge.

NEWTON, J.

Plaintiffs commenced an action in the district court for Douglas County, Nebraska, to foreclose a real estate mortgage. Defendants Harold S. Lowe and Winnifred M. Lowe, husband and wife, are the owners of the mortgaged property. Said defendants filed an answer and cross-petition. The cross-petition was dismissed on motion to strike and defendants Lowe have appealed to this court.

Perhaps there is merit to defendants' position that the ruling of the court was erroneous, but we cannot consider that element of the case. Plaintiffs have moved for dismissal of the appeal on the grounds that the dismissal of the cross-petition is not a final order and that defendants have failed to file a brief in this court as

required by Rule 11a (1), Revised Rules of the Supreme Court, 1967. The motion must be sustained on both grounds.

In Benes v. Matulka, 182 Neb. 744, 157 N. W. 2d 382, it was ruled that an order striking a counterclaim is not a final order which may be reviewed upon appeal while the main action is otherwise pending in the district court.

Rule 11 a (1), Revised Rules of the Supreme Court, 1967, requires appellant to file his brief within 2 months from the date the appeal is docketed in this court whenever there is no bill of exceptions ordered. The time allotted has long since expired, but a brief has not been filed. When appellant fails to file a brief as required by the rules of this court, a motion to dismiss the appeal will be sustained. See, Larson v. Chicago, B. & Q. Ry. Co., 78 Neb. 434, 110 N. W. 1015; Rea v. Pierson, 114 Neb. 173, 206 N. W. 760.

APPEAL DISMISSED AS PREMATURE.

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CHARLES J. HURYTA ET AL., APPELLEES, V. WILLIAM G. WHITE, APPELLEE, IMPLEADED WITH GILBERT E. DEITEMEYER ET AL., APPELLANTS, IMPLEADED WITH NATIONAL MANAGEMENT CORPORATION, INC., A CORPORATION, APPELLEE.

165 N. W. 2d 354

Filed February 20, 1969. No. 36927.

1. **Evidence.** A status once proved to exist is presumed to continue as long as is usual with things of that nature in the absence of evidence to the contrary.
2. **Sales: Corporations.** An officer or director of a seller who knew, or in the exercise of reasonable care should have known, of the facts by reason of which civil liability existed, may be individually liable with the seller to a purchaser of securities under provisions of the Blue Sky Law.
3. **Sales: Contracts.** A contract for sale or a sale of securities in violation of the provisions of the Blue Sky Law is not void but voidable by the purchaser, and the purchaser's remedies

embrace enforcement or rescission whichever is appropriate.

4. Sales: Fraud. Any issuance, assignment, sale, exchange, or transfer of any securities in violation of any of the terms, provisions, or purposes of the Blue Sky Law shall, in any civil action involving said acts of issuance, assignment, sale, exchange, or transfer, be deemed prima facie evidence of fraud upon the part of the issuer, assignor, transferor, or seller.

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

Higgins, Higgins & Huber, Crosby, Pansing, Guenzel & Binning, and Donn E. Davis, for appellants.

Moller R. Johnson, for appellees Huryta.

William G. White, pro se.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and KOKJER and ACH, District Judges.

KOKJER, District Judge.

This is an action brought under the provisions of the Blue Sky Law, effective at the time involved but since repealed. Charles J. Huryta and Maud E. Huryta, who had purchased 250 shares of stock issued by the National Management Corporation, Inc., sought to rescind the sale, return the stock to defendants, and recover the purchase price of $2,500. Defendants, in addition to the corporation, were William G. White, president, Gilbert E. Deitemeyer, vice president, Frank Marsh, secretary-treasurer, Robert W. York and F. Stanton Brown, directors, and Marvin Wilson. After a trial in the district court, judgment was rendered against all defendants. The defendants, other than the corporation and William G. White have appealed.

Appellants claim that the district court erred in finding: (1) That there had been any violation of the Blue Sky Law under the circumstances of this case; (2) that the defendants failed to obtain "necessary permits and licenses"; (3) that appellant Marvin Wilson sold securities in violation of law; (4) that defendants Deitemeyer,

York, Marsh, and Brown were at the time of the transaction officers and directors of the corporation; (5) that defendants Deitemeyer, York, Marsh, and Brown, as officers and directors, were "also liable for the acts and representations" of the defendant Marvin Wilson; and (6) that plaintiffs were entitled to recover under sections 81-347, R. R. S. 1943, and 81-348, R. S. Supp., 1963, against each of the appellants the sum of $2,500 plus interest from August 2, 1965. Further in assignments of error Nos. (7) and (8), appellants assert that the decision of the trial court is contrary to law and to the evidence.

After adducing evidence sufficient to make a prima facie case and to support each of the findings now complained about, the plaintiffs rested. The defendants then rested without offering any evidence.

There is little if any dispute in the evidence. The stock was issued by the National Management Corporation, Inc. No one obtained authorization from the Department of Banking to sell the stock, nor did any of the defendants obtain a permit to do business as a broker or salesman to deal in it. On August 2, 1965, Marvin Wilson went to the home of plaintiffs; told them he was selling stock in the corporation; showed them a prospectus; told them what a wonderful deal it would be; stated that it was going to be a lasting deal so they should put down their heirs; told them the names of those who were in it; and said that if this company did not get off the ground by the first of next May, plaintiffs would get their money back. The check for the $2,500 purchase price was made out by Mr. Wilson and signed by Charles Huryta. The check was made payable to "National Mang. Corp. Inc"; and on the lower left-hand corner has the words, "For 250 shares Pref. Stock." It was endorsed, "Frank Marsh - Secy - National Management Corp." It bears the stamp of a Lincoln bank dated August 4, 1965, and a stamp by the bank on which it was drawn showing it was paid on August 5, 1965. The stock certificate shows that it was issued by the

National Management Corporation, Inc., and signed by William G. White, president, and Frank Marsh, secretary. The certificate of stock was deposited with the clerk of the district court for the use and benefit of the defendants on the day this action was filed. No income nor recovery has ever been received thereon by plaintiffs.

Section 81-314, R. R. S. 1943, provided that: "No person or persons shall issue, sell, exchange, offer to sell or exchange, or solicit or promote the offer, sale or exchange * * * of any security * * * unless * * * specifically exempt pursuant to the provisions of section 81-312 * * * or unless * * * authorized for sale or exchange by the Department of Banking, * * *."

There is no evidence to show that the stock was exempt. It is clear that assignments of error Nos. (1), (2), and (3) are not valid.

The Articles of Incorporation of National Management Corporation, Inc., were dated May 27, 1965, and filed in the office of the Secretary of State of Nebraska on June 1, 1965. In the articles, defendants Deitemeyer, Marsh, York, and Brown are listed as directors; and defendants White, Deitemeyer, and Marsh are named as officers. The articles provide that the directors and officers named therein shall serve until the annual meeting of the stockholders in February 1966, or until their successors are elected and qualified. It is, of course, true that they might have resigned before August 2, 1965, when the stock was sold. Had they done so, they could have offered evidence to that effect and been relieved of liability, as were some of the directors in the case of Davis v. Walker, 170 Neb. 891, 104 N. W. 2d 479. Their status as directors and officers having been proved to exist on May 27, 1965, is presumed to have continued as long as is usual with things of that nature, in the absence of evidence to the contrary. Kidder v. Stevens, 60 Cal. 414. Assignment of error No. (4) is not valid.

Assignment of error No. (5) is also invalid, both upon the facts proved and on the basis of the holding in Davis

v. Walker, *supra,* to the effect that an officer or director of a seller who knew, or in the exercise of reasonable care should have known, of the facts by reason of which civil liability existed, may be individually liable with the seller to a purchaser of the securities under the provisions of sections 81-347, R. R. S. 1943, and 81-348, R. S. Supp., 1963.

A contract for the sale or a sale of securities in violation of the provisions of the Blue Sky Law is not void but voidable by the purchaser, and the purchaser's remedies embrace enforcement or rescission, whichever is appropriate. Loewenstein v. Midwestern Investment Co., 181 Neb. 547, 149 N. W. 2d 512.

The right of plaintiffs to rescind and recover their $2,500 was provided in section 81-347, R. R. S. 1943, as follows: "Any person, except a person who shall have obtained from the Department of Banking a permit to do business as a broker or salesman, who shall within the State of Nebraska sell, issue, exchange, or transfer any security or interest therein in violation of sections 81-302 to 81-346, shall be liable to the purchaser of the security for the value of the consideration paid by the purchaser less the amount of any income or recovery received thereon."

Section 81-348, R. S. Supp., 1963, provided in part that: "At the time such an action is commenced, the plaintiff shall deposit with the clerk of the district court for the use and benefit of the defendant the security involved in the action." The evidence shows that this requirement was met.

The appellants argue that plaintiffs were not defrauded. The Blue Sky Law was enacted for the protection of purchasers of stock. It required that the stock be submitted to the Department of Banking, with information from which it could be determined whether or not the stock represented a reasonably sound investment or only "Blue Sky." In this case a sale in violation of the Blue Sky Law was proved and no evidence was adduced by

defendants tending to show that the sale was not fraudulent. Section 81-335, R. R. S. 1943, provided: "Any issuance, assignment, sale, exchange or transfer of any securities in violation of any of the terms, provisions or purposes of sections 81-302 to 81-346, shall, in any civil action involving said act of issuance, assignment, sale, exchange or transfer, be deemed prima facie evidence of fraud upon the part of the issuer, assignor, transferor or seller." Assignment of error No. (6) is not valid.

From the foregoing discussion of the other assignments of error, it becomes clear that the general assignments of error Nos. (7) and (8) are not well-founded.

The trial court was correct in his findings of fact and the judgment based thereon should be and is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. HERBERT C. STOCK, APPELLANT.
165 N. W. 2d 111

Filed February 20, 1969. No. 36938.

**Criminal Law: Courts.** Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion.

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

Yost & Yost, for appellant.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and KOKJER and ACH, District Judges.

WHITE, C. J.

From a maximum sentence of 10 years for man-

slaughter, the defendant appeals. § 28-403, R. R. S. 1943. The only question presented is the excessiveness of the sentence. We affirm the judgment and sentence of the district court.

The facts are that the defendant deliberately assaulted his 20-month old daughter in the middle of the night in an attempt to stop her from crying and that the blows on the chest and back resulted almost immediately in her death. The defendant was charged with first degree murder. He was represented by counsel. Later the charge was reduced to manslaughter and the defendant pleaded guilty. After a full hearing at the time of sentencing, the maximum penalty of 10 years was imposed. The county attorney recommended the maximum sentence. There was evidence before the district court warranting the conclusion that the defendant was generally known as a man of violent temper; that his conduct was subject to discipline while in the service; that he had damaged the roof of the mouth of another child in an attempt to stop her crying; that he had beaten his first wife during pregnancy causing a miscarriage.

There was also evidence that he had beaten his children at other times. The defendant had served a 30-day jail sentence for contributing to the delinquency of a minor.

The thrust of defendant's argument is the attempt to color match sentences in some of our previous manslaughter cases. Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349; Ford v. State, 71 Neb. 246, 98 N. W. 807; Pembrook v. State, 119 Neb. 417, 229 N. W. 271; Howard v. State, 113 Neb. 67, 201 N. W. 968; Banks v. State, 114 Neb. 33, 206 N. W. 18. These cases are readily distinguishable and present no basis for a reduction of sentence. Moreover, there is nothing binding as precedent in a sentence imposed on a different individual arising from a different set of facts. The broad sweep of the manslaughter statute and the recognized concepts of individualized sentencing destroy most of the force of an

argument derived from color matching previous sentences.

The statute contemplates an offense on which the maximum sentence is warranted. Surely the facts of this case warrant such a sentence unless we are to say the maximum should never be imposed.

This case is controlled by the following rule: Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion. Young v. State, 155 Neb. 261, 51 N. W. 2d 326; State v. Ohler, 177 Neb. 418, 129 N. W. 2d 116. No abuse of such discretion has been shown.

The judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

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BERENICE G. WHITCOMB, APPELLEE, V. NEBRASKA STATE EDUCATION ASSOCIATION, A CORPORATION, ET AL., APPELLANTS.
165 N. W. 2d 99

Filed February 20, 1969. No. 37014.

1. **Libel and Slander: Malice.** In a libel action the truth itself and alone shall be a complete defense unless it shall be proved by the plaintiff that the publication was made with actual malice.
2. ———: ———. Actual malice shall not be inferred or presumed from publication.
3. ———: ———. To the extent that it placed the burden of disproving a presumption of actual malice on the defendant, Hall v. Rice, 117 Neb. 813, 223 N. W. 4, 78 A. L. R. 1421, is overruled.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Reversed and remanded.

Crosby, Pansing, Guenzel & Binning and Theodore L. Kessner, for appellants.

Kennedy, Holland, DeLacy & Svoboda and Thomas R. Burke, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and MORAN, District Judge.

SPENCER, J.

This is an action to recover damages claimed to have resulted from the publication of libelous matter by the defendants. The trial court held the published statements were actionable and libelous per se. The jury returned a verdict for the plaintiff in the amount of $38,500, and the defendants have perfected an appeal to this court.

The Nebraska State Education Association, hereinafter referred to as Association, is a nonprofit corporation organized to protect the educational interests of Nebraska and the welfare of the members of the teaching profession. John Lynch is its executive secretary, and Paul Belz is its director of research and staff consultant to the Commission on Professional Rights and Responsibilities of the Association, hereinafter referred to as Commission.

The plaintiff, Berenice G. Whitcomb, during the 1964-1965 school term and for some years prior thereto, was a guidance counsellor and librarian at the Winnebago, Nebraska, public schools. She had resided in the town for 25 years and had previously been in business therein.

In October 1961, a complaint was made to plaintiff by an Indian grandmother that the superintendent of the Winnebago public schools, who will hereinafter be referred to as superintendent, had been molesting a small Indian girl. Plaintiff did not communicate this information to any member of the school board, but 3 days after receiving the complaint she confronted the superintendent with the accusation. The basis of the Association's action is that plaintiff, rather than bringing the information to the attention of the Winnebago school board, used it to intimidate the superintendent for her own

purposes. When her contract was not renewed by the Winnebago school board 4 years later, she brought the accusation into the open and forced the resignation of the superintendent.

Plaintiff testified that when she confronted the superintendent with the accusation she told him that she did not believe the story but she insisted that the private reading lessons at which the occurrence was alleged to have taken place should be stopped, and he agreed to this. Plaintiff further testified that the superintendent collapsed on the desk and asked her to leave his office because he was going to cry. In December 1961, she mentioned the incident to another teacher in the Winnebago schools and thereafter visited with two other teachers about it, but did not give the information to the school board until her contract was not renewed in 1965.

In early March 1965, plaintiff was informed by a member of the Winnebago school board that she would not be rehired for the 1965-1966 school year. Plaintiff demanded a written statement to that effect. She thereafter was advised in writing that she would not be rehired because she had been causing dissension and was dissatisfied with the superintendent.

Within a day or two after being so informed, plaintiff contacted Association, of which she was a member, and requested that an investigation of the personnel policies of the Winnebago public schools be undertaken. Pursuant to this request Association sent a staff man to the community to visit with plaintiff. He interviewed plaintiff on March 18, 1965. She told him that the superintendent had continuously abused her since a 1961 incident, and had finally had her fired. Plaintiff then told the investigator about the incident and her conversation with the superintendent in October 1961. The investigator's report is that plaintiff told him: "'. . . I had put him (the superintendent) under wraps and laid down some rules which he probably didn't like—being dictated to by a teacher, but I didn't know what I could

do otherwise, because this was just almost like trying to fight the Lord, you know,—in this town.' " Plaintiff admitted on cross-examination that she had told the investigator that she had put the superintendent under wraps. On April 23, 1965, plaintiff, in a letter to an employee of Association, referring to the superintendent, said: "I compromised with the viper four years ago, much to my sorrow."

Subsequent to the oral notification that her contract would not be renewed plaintiff brought the 1961 conduct of the superintendent to the attention of the school board. Subsequently, through an attorney, she obtained affidavits which were presented to the school board and resulted in the resignation of the superintendent. On March 19, 1965, plaintiff circulated a letter to the parents of the 1962, 1963, 1964, and 1965 graduates, stating that the school board had refused to renew her contract, and requesting their assistance. Her contract was not renewed.

Subsequently, on request of the new superintendent of the Winnebago public schools, the chairman of the Commission, composed of 15 educators from throughout the State of Nebraska, directed a preliminary inquiry team to go to Winnebago to make an inquiry concerning conditions and problems in that school system. This inquiry team made its report to the full Commission. The Commission then determined that an investigation committee, consisting of five members of Association, composed of educators from various parts of the state, should be sent to Winnebago. This committee heard evidence submitted by various members of the community, including members of the school board, the new superintendent, the plaintiff, and her attorney. The committee report, which is exhibit No. 7 herein, was accepted by Commission. The report recommended that plaintiff's membership, and that of the previous superintendent of the Winnebago schools, in Association be terminated and that action be taken to revoke their teaching certificates.

The report also made recommendations to the Winnebago board of education and to the new superintendent concerning policies and programs. This action is based essentially on the statements and findings in that report.

Previous to the amendment in 1957 of section 25-840, R. R. S. 1943, when a publication was libelous per se, malice was presumed. The presumption made a prima facie case on malice so that the burden of rebutting the presumption was on the defendant. See Hall v. Rice, 117 Neb. 813, 223 N. W. 4, 78 A. L. R. 1421. In 1957, the following was added to the statute: "The truth in itself and alone shall be a complete defense unless it shall be proved by the plaintiff that the publication was made with actual malice. Actual malice shall not be inferred or presumed from publication." This changed the law by eliminating any presumption of malice and transferring the burden to the plaintiff on that issue.

So far as we are able to determine, no attempt was made by the plaintiff to comply with section 25-840.01, R. R. S. 1943, which was also added to the statute in 1957, and which, in the absence of actual malice limits recovery to special damages as therein defined, unless correction is requested as set out therein. We assume, therefore, that plaintiff's cause of action is predicated on actual malice. As stated above, section 25-840, R. R. S. 1943, now places the burden of proving actual malice on the plaintiff, and specifically provides that such malice shall not be inferred or presumed from publication.

The instructions by the trial court defined actual malice and stated that it could not be inferred from the fact of publication alone. The damage instruction included the following: "In addition thereto, if you find that defendants in publishing the matters complained of were motivated by actual malice toward the plaintiff, then in addition to the special damages, you may award plaintiff general damages for any pain, humiliation and distress of mind that you find was caused thereby."

At no place in the instructions was the jury advised

as to who had the burden of proving actual malice. This was particularly prejudicial because the trial court directed that the statements made "are actionable and libelous per se, which entitle plaintiff to recover damages as hereinafter specified in instruction No. 11, * * *." All of the burdens were placed on the defendants. From the size of the verdict, it is evident the jury considered the matters complained of to have been motivated by actual malice.

The plaintiff tendered an instruction on the issue of malice which included the following language: "If the jury finds that the defendants' publication was substantially true, then the burden is upon the plaintiff to prove that the publication was made with actual malice. Actual malice shall not be inferred or presumed from publication." This instruction was refused by the trial court, and only the last sentence was covered by the instructions given.

For the reason given, the judgment herein is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

SMITH, J., concurring.

The Nebraska Bill of Rights, section 5, reads: "* * * in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense." Section 25-840, R. R. S. 1943, reads: "The truth * * * shall be a complete defense unless it shall be proved by the plaintiff that the publication was made with actual malice. Actual malice shall not be inferred or presumed from publication."

The district court refused to allocate risks of nonpersuasion in harmony with the statute. It instructed the jury that defendants were to carry the risk on issues of good motives and justifiable ends. The instruction is traceable to an interpretation of the Constitution in Wertz v. Sprecher, 82 Neb. 834, 118 N. W. 1071. Wertz decided that for justification defendant must prove good

motives and justifible ends. It has received trenchant criticism for establishing an absolute and not a minimum standard. See Franklin, "The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law," 16 Stan. L. Rev. 789. The jury instruction was prejudicially erroneous.

No constitutional issue of a federal dimension having been raised, the majority opinion does not answer this question: Is the judgment under review a product of an unconstitutional interference with free expression? See, Puentes v. Board of Education, 392 U. S. 653, 88 S. Ct. 2271, 20 L. Ed. 2d 1341; Pickering v. Board of Education, 391 U. S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811; Beckley Newspapers Corp. v. Hanks, 389 U. S. 81, 88 S. Ct. 197, 19 L. Ed. 2d 248; Curtis Publishing Co. v. Butts, 388 U. S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094; New York Times Co. v. Sullivan, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686.

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

Our Constitution provides that in all trials for libel, "the truth when published with good motives, and for justifiable ends, shall be a sufficient defense." Art. I, § 5, Constitution of Nebraska. This provision has been generally construed to mean that the burden is upon the defendant to establish both the truth of the statement and that it was published with good motives and for justifiable ends.

In Wertz v. Sprecher, 82 Neb. 834, 118 N. W. 1071, it was noted that prior to 1875 the Constitution did not refer to truth as a defense in civil actions, and that it was unnecessary to provide that truth alone should be a defense in civil suits for libel. This court then said: "Now, if it was not the intention of the men who formed the constitutional convention in 1875 to compel the defendant in civil as well as criminal cases, if he attempted to justify, to prove good motives and justifiable ends, as well as the truth of his charges in publishing a libel, the

inclusion of the words 'both civil' in the later constitution was and is senseless and surplusage."

In 1957, the Legislature amended section 25-840, R. R. S. 1943, to provide that in libel cases: "The truth in itself and alone shall be a complete defense unless it shall be proved by the plaintiff that the publication was made with actual malice. Actual malice shall not be inferred or presumed from publication."

The effect of the opinion of the court in this case is to abandon the previous construction of the constitutional provision and adopt a construction which would have been appropriate under the provision contained in the Constitution of 1866.

But if now there is no burden of proof upon a defendant in a libel case to establish that the publication was with good motives and for justifiable ends, then the judgment should be reversed because the instructions of the court placed that burden upon the defendant.

McCOWN, J., dissenting.

I concur in Judge Boslaugh's opinion with respect to the interpretation of the constitutional provisions of Article I, section 5, of the Nebraska Constitution. If that interpretation is correct, the Legislature had no power to alter the constitutional interpretation of Wertz v. Sprecher, 82 Neb. 834, 118 N. W. 1071, although this court obviously might do so.

Section 25-840, R. R. S. 1943, applies only to a libel in which the truth of the matter published is asserted and established. In this case, the falsity of the publication was alleged, and there was evidence from which the jury might have found that one or more of the statements about the plaintiff were false. Even though the presumption of malice arising merely from publication be blocked off, the existence of actual malice, when the fact is in issue, may be inferred from falsity, absence of probable cause, or other relevant circumstances. 33 Am. Jur., Libel and Slander, § 266, p. 248.

Even under the rule of New York Times Co. v. Sulli-

van, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, actual malice is defined as the publication of a statement with knowledge that it was false or with reckless disregard of whether it was false or not. Mere negligence in discovering misstatements of fact is not sufficient. The case at bar was tried by both parties on the assumption that the New York Times rule was not applicable. For that reason alone, the rule should not be applied here, at least without reargument. Even if the Times rule were applicable, there is sufficient evidence to go to the jury on the issue of actual malice. Neither do I think that rule as to "public officials" was intended to extend to a school teacher whose duties do not extend to policy establishing functions. See footnote No. 23, New York Times Co. v. Sullivan, *supra*. To apply the Times rule in this situation and treat it as official conduct would, for all practical purposes, make any public employee paid from tax funds a "public official."

It is also apparent in this case that the trial court's instructions, as well as the opinion of the majority, proceed on the assumption that the provisions of section 25-840.01, R. R. S. 1943, apply to this case. That section limits recovery to special damages unless a correction is requested and not published, but it does not apply where the plaintiff alleges and proves that the publication was prompted by actual malice. It should be noted here that under Nebraska law no punitive or exemplary damages are allowable in any event.

Section 25-840.01, R. R. S. 1943, applies to "the publication of a libel by any medium, * * *." To apply it to any publication of a libel ignores the words "by any medium." The statement of the Judiciary Committee to the 1957 Legislature with respect to L. B. 318 states that the bill provides for changes in the libel law "affecting newspapers." The complete legislative statement refers only to newspapers and newspaper libel laws. The provisions for publication of a correction are clearly aimed at a public purveyor of news and information. In such

media, the correction provided for presumably is as broad and effective a way of retracting or correcting as could reasonably be required.

The term "medium" in the connotation of this section of the statute might well include newspapers, radio, television, and magazines. In some contexts it applies to a vehicle used to carry advertising. See Webster's Third New International Dictionary.

I do not believe the Legislature intended the section to apply to false and defamatory matter published in reports which had no circulation to the general public and in which a correction or retraction would not effectively undo the harm which the law ordinarily presumes in awarding general damages for a libel per se. This is particularly true where, as here, there is no issue of honest mistake or error in identity. The publications in newspapers which followed defendants' publication of the defamatory material emphasize the point.

Other states have approved similar statutes limiting general damages in libel actions with respect to newspapers. See Werner v. Southern California Associated Newspapers, 35 Cal. 2d 121, 216 P. 2d 825, 13 A. L. R. 2d 252, and the annotation following at page 277. The policy involved in such statutes is, of course, for the Legislature. However, to interpret section 25-840.01, R. R. S. 1943, as indicating a legislative intent that it applies to any and all libel, flies directly in the face of its specific legislative history, and also requires that we ignore the words "by any medium." This violates the ordinary rules of statutory construction.

Prior to the 1957 legislative changes, Nebraska, and most other states, held that malice in law is presumed from the publication of an article libelous per se and that presumption becomes conclusive unless the truth of the libel is established. Rimmer v. Chadron Printing Co., 156 Neb. 533, 56 N. W. 2d 806. See, also, 33 Am. Jur., Libel and Slander, § 266, p. 247. Unless libel per se has now been abolished in Nebraska, the burden of

proof as to malice was satisfied here unless the defendants established the truth of the defamatory matter.

The majority opinion here reverses the trial court upon the ground that the instructions failed to place the burden on the plaintiff to prove actual malice. If the instructions were prejudicial, it would appear that they were prejudicial to the plaintiff in restricting the plaintiff to special damages unless the jury found actual malice. As a practical matter, the instructions required proof of actual malice before the plaintiff could recover any general damages, even though they did not specify who had to prove it. This was not prejudicial to the defendants.

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JOHN WATTS, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
165 N. W. 2d 104

Filed February 20, 1969. No. 37027.

1. **Mandamus: Administrative Law.** A writ of mandamus may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. Although it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion.
2. **Mandamus.** A writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law.
3. **Mandamus: Administrative Law.** The rule is well established that mandamus will lie against a public board to compel the performance of purely ministerial duties, but not to control the exercise of judicial functions.
4. ———: ———. A duty is deemed to be of a judicial nature when it calls for the determination of a question of fact involving the examination of evidence and passing on its probative force and effect.
5. ———: ———. A writ of mandamus will not be allowed to compel officers vested with discretionary powers to make a particular decision or to set aside one already made, notwith-

standing such decision is erroneous in the sense that it may be reversed upon appeal, writ of error, or other appellate proceeding.

6. ———: ———. Mandamus will not lie to coerce judicial discretion of an inferior court, nor to predetermine the character of the judgment that the court shall enter. Mandamus will not issue to review the action of an inferior court where there is an adequate remedy at law, and the writ may not be used to usurp or take the place of an appeal or writ of error. This rule is as applicable to a city council as it is to a county court.

7. ———: ———. While in matters involving official discretion, mandamus may be used for the purpose of compelling the exercise thereof, it will not ordinarily be extended beyond that, so as to interfere with the manner in which the discretion shall be exercised or to influence or coerce a particular determination.

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

Shrout, Nestle & Caporale, for appellant.

Herbert M. Fitle and Walter J. Matejka, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN and NEWTON, JJ., and WALTER H. SMITH, District Judge.

SMITH, Walter H., District Judge.

This is an appeal from a judgment of the district court for Douglas County denying a writ of mandamus. Appellant John Watts, hereinafter referred to as Watts, brought this action to compel appellees, hereinafter referred to as the City of Omaha, to pass a resolution to pay full monthly salary benefits for permanent disability received by Watts while in line of duty.

Watts, a man 55 years of age, joined the Omaha Police Department in 1934 and served on the police force for 33 years. During this period he sustained personal injuries in the line of duty on December 27, 1934, September 10, 1937, August 16, 1952, and on February 11, 1959, and, because of his disability, he has been off duty from August 2, 1967. The Police, Fire and Pension Board, on December 21, 1967, granted Watts a disability pension

under section 7.38.180 of the Omaha Municipal Code, also known as ordinance No. 21668, which was passed on March 28, 1961, and he was found by the board to be permanently unfit for active duty in his division. The amount of the monthly pension granted by the Police, Fire and Pension Board was in the amount of one-half of the average monthly pay for the period of his 5 highest pay years. It was stipulated by the parties that section 7.38.180 of the Omaha Municipal Code is as follows: "Any member of the system who, while in the line of duty, has sustained or shall sustain injuries or sickness, arising out of the immediate or direct performance or discharge of his duty, which immediately or after a lapse of time permanently unfit him or her for active duty in his or her Division, shall receive a monthly accidental disability pension as long as he or she remains unfit for active duty in his or her Division, equal to fifty per cent of his or her average final monthly compensation. In addition thereto, he or she shall be paid all medical, surgical, and hospital expenses which may be incurred as a result of such sickness or injury, but the pension and other benefits, being in excess of benefits under the Workmen's Compensation Act, shall be in lieu thereof.

"Nothing contained in this section shall be construed as limiting, altering, repealing or affecting the authority of the City Council to grant full salary payments pursuant to Section 7.36.195 of the Omaha Municipal Code, provided however, any member receiving full salary payments shall not be entitled to the benefits of this section during the period full salary payments are authorized and paid. (Ord. 21668 § 1; March 28, 1961)."

On February 7, 1968, Watts made application to the City Council of the City of Omaha for full monthly salary disability pension under section 7.36.195 of the Omaha Municipal Code, as amended, also known as ordinance No. 24441, which was passed on October 17, 1967, and became effective 15 days after its passage. By

stipulation of the parties, ordinance No. 24441 was admitted into evidence, the pertinent parts of which are as follows: "Notwithstanding the provisions of Section 7.36.060, Section 7.36.180, Section 7.36.190 and Section 8.24.010 of the Omaha Municipal Code, or any other Section or provision of the Omaha Municipal Code in conflict herewith, any member of the Police or Fire Division of the Public Safety Department, who, while in the line of duty, has sustained or shall sustain injuries or sickness, arising out of the immediate or direct performance or discharge of his duty, which render him permanently and totally unfit for active duty in his department, and to perform or follow other gainful pursuits or employments, shall be paid his full salary for the period of such permanent total disability, provided however, such full salary payments shall not be paid after such disability shall cease; and provided further, that such full salary payments shall not be paid until and after the City Council shall determine by Resolution, from the evidence and the facts and circumstances of each case presented to it for consideration, that the injured party was in line of duty; that the injuries or sickness sustained by the injured party arose out of the immediate or direct performance or discharge of his duty; that the injured party is permanently and totally unfit for active duty in his department, and to perform or follow other gainful pursuits or employments, and by resolution, authorizes the full salary payments. The full salary payments herein provided for shall accrue and be payable only from and after the date the City Council authorizes them."

A hearing was held before the City Council of the City of Omaha on February 13, 1968, on the application of Watts under section 7.36.195, as amended, also known as ordinance No. 24441, and the request for full monthly salary disability pension was denied by the City Council. Thereupon Watts filed a petition for writ of mandamus to direct the City of Omaha to pass a resolution

authorizing payment of full monthly salary benefits to him and, after hearing thereon, the petition was dismissed by the trial court and appeal taken to this court.

The principal question to be decided is whether the determination made by the City Council of the City of Omaha, in denying the application for a full salary disability pension under section 7.36.195, was judicial or ministerial in nature. If such action is ministerial, then mandamus is the proper remedy; on the other hand, if it is judicial in nature then mandamus will not lie and it is reviewable in the district court by way of petition in error or appeal. § 25-1901, R. R. S. 1943; Little v. Board of County Commissioners, 179 Neb. 655, 140 N. W. 2d 1.

Watts contends that a writ of mandamus should have been granted by the district court compelling the City of Omaha to pass a resolution ordering that full monthly salary pension be paid to Watts on the basis of total permanent disability and that the passage of said resolution is a ministerial and not a quasi-judicial act and that mandamus is the proper remedy. The position of the City of Omaha is that mandamus does not lie inasmuch as the City Council of the City of Omaha was acting in a quasi-judicial capacity and not ministerial and that Watts has an adequate remedy at law by writ of error or regular appeal.

The evidence before the City Council of the City of Omaha consisted of a written statement from Watts in which he stated: "The purpose of this letter is to make application to the City Council of the City of Omaha for full salary during the period of permanent total disability under Section 7.36.195 as amended of the Omaha Municipal Code." The statement also set forth his injuries received in the line of duty and the medical examinations and treatments given by various doctors and at the County Hospital. The report of Dr. Kenneth M. Reighter, dated December 18, 1967, one of the physicians who examined Watts, which was received as evidence by the

City Council, concluded with the statement: "From what I understand now, these injuries have practically disabled Sgt. Watts from further police duty." Relative to the injuries received by Watts, a photocopy of a newspaper story of December 28, 1934, pertaining to the accident on December 27, 1934, a written statement of a city patrolman pertaining to the injuries received by Watts on September 10, 1937, and the casualty report of the Omaha Police Department relative to the accident on February 11, 1959, were also received as evidence by the City Council. Watts did not personally testify before the council.

Section 25-2156, R. R. S. 1943, provides: "The writ of mandamus may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station. Though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion." Section 25-2157, R. R. S. 1943, provides in part: "The writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law."

In State ex rel. Gaddis v. Bryan, 102 Neb. 506, 167 N. W. 783, in rendering its decision on an application for a fireman's pension the court held that the governing board of the city exercised judicial discretion that would not be controlled by mandamus and said: "The rule is well established that mandamus will lie against a public board to compel the performance of purely ministerial duties, but not to control the exercise of judicial functions. State v. Churchill, 37 Neb. 702. A duty is deemed to be of a judicial nature when it calls for the determination of a question of fact involving the examination of evidence and the passing on its probative force and effect." In State ex rel. Ensey v. Churchill, 37 Neb. 702, 56 N. W. 484, the court stated that a "* * * writ of mandamus will not be allowed to compel officers vested

with discretionary powers to make a particular decision or to set aside one already made, notwithstanding such decision is erroneous in the sense that it may be reversed upon appeal, writ of error, or other appellate proceeding."

As stated in State ex rel. Garton v. Fulton, 118 Neb. 400, 225 N. W. 28: "Mandamus will not lie to coerce judicial discretion of an inferior court, nor to predetermine the character of the judgment that the court shall enter. Mandamus will not issue to review the action of an inferior court where there is an adequate remedy at law, and the writ may not be used to usurp or take the place of an appeal or writ of error." This rule is as applicable to a city council as it is to a county court. See, also, State ex rel. Cuming County Farm Bureau v. Tighe, 124 Neb. 578, 247 N. W. 419. A writ of mandamus may be issued to require an inferior tribunal or board to exercise its judgment, or proceed to the discharge of any of its functions, but it cannot control its judicial discretion. § 25-2156, R. R. S. 1943; State ex rel. Davis v. Hoctor, 98 Neb. 15, 151 N. W. 923.

While in matters involving official discretion, mandamus may be used for the purpose of compelling the exercise thereof, it will not ordinarily be extended beyond that, so as to interfere with the manner in which the discretion shall be exercised or to influence or coerce a particular determination. 34 Am. Jur., Mandamus, § 68, p. 856. "As generally stated, writs of mandamus will not issue to control the exercise of official discretion or judgment or to alter or review action taken in the proper exercise of such discretion or judgment, for the writ cannot be used as a writ of error or other mode of direct review. With respect to duties that are not peremptory, the officer must be left free to decide whether he will perform the act demanded or secure by appropriate procedure a judicial determination of the extent of his duty. In such cases, where, as to the facts, there exists any admissible doubt or reasonable men might

conscientiously differ with respect thereto, the courts have with practical unanimity declined to interfere by mandamus, and whenever an element of discretion enters into the duty to be performed, the functions of mandatory authority are shorn of their customary potency and become powerless to dictate terms to that discretion. In so far as their decision is purely judicial and it appears that they have kept within their jurisdiction, notwithstanding it may appear to another tribunal that their judgment was not sound and that their decisions were erroneous, no writ of mandamus will lie to oblige them to adopt any other mode of decision than that which their own judgment sanctions." 34 Am. Jur., Mandamus, § 68, p. 856.

Section 7.36.195 of the Omaha Municipal Code, as amended, also known as ordinance No. 24441, being the provision of the code under which Watts filed his application before the City Council of the City of Omaha for a full monthly salary disability pension, contemplates a hearing, the presentation of proof by evidence not only that Watts was permanently and totally unfit for active duty in his department but also to perform or follow other gainful pursuits or employments, and a decision based thereon by the City Council is a condition precedent to his right to the pension under said section. In this regard it must be noted that the City Council, under section 7.36.195, had an additional finding to make that the Police, Fire and Pension Board did not have to make under section 7.38.180. In passing on the application of Watts, the City Council not only had to determine that he was permanently and totally unfit for active duty in his department but also that he could not perform or follow other gainful pursuits or employments. This necessarily required the City Council to examine and give consideration to the evidence and make decisions of law and fact and in rendering its decision such body was exercising a judicial discretion that will not be controlled by mandamus. Its duty was to consider evidence

and apply the law to the facts as found which comprehends the exercise of discretion or judgment guided by the circumstances and the law and which required the exercise of a discretion or judgment judicial in nature on evidentiary facts. The determination of the City Council must necessarily be the product or result of investigation, consideration, and deliberate human rational judgment, based upon evidentiary facts of some sort; its determination must depend upon and requires the existence or nonexistence of certain facts which must be ascertained and the investigation and determination of such facts causes its act to be quasi-judicial in character. As previously stated, evidentiary facts which the members of the City Council were required to examine necessarily related to not only whether Watts was permanently and totally unfit for active duty in his department but also whether he could perform or follow other gainful pursuits or employments and this necessitated an examination of questions of law and fact and the exercise of judicial discretion. The City Council had to determine from the evidence and the law whether Watts was in fact totally unfit for active duty in his department and that he could not perform or follow other gainful pursuits or employments. This is a function quasi-judicial and not ministerial. State ex rel. Gaddis v. Bryan, *supra;* State ex rel. Garton v. Fulton, *supra;* State ex rel. Cuming County Farm Bureau v. Tighe, *supra;* State ex rel. Davis v. Hoctor, *supra;* Kurth v. City of Lincoln, 162 Neb. 643, 76 N. W. 2d 924; 55 C. J. S., Mandamus, § 124b(2), p. 212; McFeely v. Board of Pension Commissioners of City of Hoboken, 1 N. J. 212, 62 A. 2d 686; Hoyt v. Hughes County, 32 S. D. 117, 142 N. W. 471; Oakman v. City of Eveleth, 163 Minn. 100, 203 N. W. 514.

We have examined each of the cases cited by Watts in support of his petition for writ of mandamus and we find they are clearly distinguishable from the facts in this case or are not pertinent and it would serve no

useful purpose to review them in this opinion. In these cited cases the writ was either denied or the facts and circumstances did not involve the exercise of discretion or judgment judicial in nature. Watts seems to further contend that although the City Council may be acting in a quasi-judicial capacity in determining his eligibility for a full monthly salary disability pension under section 7.36.195 it loses this character at some stage of its deliberations and its function then becomes ministerial in nature. Such an argument defies logical reasoning and explanation. The duty of the City Council under the application of Watts and its function thereunder was either ministerial or quasi-judicial in nature; it was not and could not be both.

In view of our holding in this case all other contentions of Watts need not be considered.

We are of the opinion that the City Council acted quasi-judicially and that the remedy of Watts was to have the action reviewed directly and not by this collateral attack. Mandamus will not lie in such a state of facts.

The judgment of the district court is therefore affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. JAMES MCINTIRE, APPELLANT.
165 N. W. 2d 110

Filed February 20, 1969. No. 37043.

**Criminal Law: Burglary.** In a prosecution for burglary, the unlawful entry may be shown by circumstantial evidence.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

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

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

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and NEWTON, JJ., and HASTINGS, District Judge.

BOSLAUGH, J.

The defendant was convicted of burglary and sentenced to 9 years' imprisonment. On this appeal the only assignment of error relates to the sufficiency of the evidence to sustain the judgment.

The record shows that the Sowl residence in Omaha, Nebraska, was entered on February 22, 1968, and a small amount of money stolen. Mrs. Sowl testified that she left the house at approximately 10:30 a.m. to go downtown; that both doors were locked when she left the house; that she returned to the house at about 12:40 p.m., unlocked the front door, and entered the living room; that she saw a tall white man running through the doorway between the dining room and kitchen; that she went outside and saw the defendant near the yard light in front of the house; that she asked the defendant what he was doing "in there" and " 'What did you take?' "; that when she asked the defendant to go with her to a neighbor's house so that she could call the police, the defendant said: " 'Lady, I have a gun; I'll shoot you' "; and that the defendant drove away in a Buick automobile that had been parked in front of the neighbor's house. Mrs. Sowl positively identified both the defendant and his automobile.

The defendant argues that the evidence is insufficient to show an unlawful entry. Mrs. Sowl testified that she had not given the defendant permission to enter the house, but there was no direct evidence that her husband or children had not given the defendant permission to enter the house.

An unlawful entry may be shown by circumstantial evidence. Pointer v. State, 114 Neb. 13, 205 N. W. 574; Larson v. State, 161 Neb. 339, 73 N. W. 2d 388.

The testimony of Mrs. Sowl shows that the locked house was entered during the middle of the day; that

upon inquiry, the defendant gave no reasonable explanation as to why he had not been in the house but did not deny that he had been in the house; and that upon suggestion that the police be called, the defendant threatened to shoot Mrs. Sowl. The evidence was sufficient for the jury to find that the defendant had unlawfully entered the house.

The judgment of the district court is affirmed.

AFFIRMED.

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IN RE APPLICATION OF EARL A. CANADA, DOING BUSINESS AS CANADA TRANSPORT.

IN RE APPLICATION OF CANADA TRANSPORT, INC.

EARL A. CANADA, DOING BUSINESS AS CANADA TRANSPORT, ET AL., APPELLEES, V. PEAKE, INC., ET AL., APPELLANTS, IMPLEADED WITH WYNN TRANSPORT SERVICE, INC., APPELLEE.

165 N. W. 2d 587

Filed February 28, 1969. No. 36883.

1. **Public Service Commissions: Administrative Law.** An order of the Nebraska State Railway Commission is not res judicata as to another application of the same nature subsequently filed, nor does it require an independent proceeding.
2. **Public Service Commissions: Administrative Law: Res Judicata.** In proceedings which involve either directly or as a necessary consequence the annulment, modification, or alteration of a previous order entered by the Nebraska State Railway Commission, the doctrine of estoppel or res judicata, as usually applied to judicial decisions of courts of record, has no application whatever.
3. **Public Service Commissions: Administrative Law.** Evidence of operations under color of authority may be considered by the Nebraska State Railway Commission in determining whether or not the proposed service is or will be required by the present or future public convenience and necessity.
4. ———: ———. The issue of public convenience and necessity is ordinarily one of fact and where there is evidence in the record to sustain the Nebraska State Railway Commission's order, this court cannot say that it is unreasonable and arbitrary.

5. ———: ———. A ruling by the Nebraska State Railway Commission on the issuance or denial of a certificate of public convenience and necessity constitutes the exercise of administrative and legislative powers and functions.

6. **Public Service Commissions: Administrative Law: Appeal and Error.** On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.

Appeal from the Nebraska State Railway Commission. Affirmed.

James E. Ryan and Robert E. Powell, for appellants.

Nelson, Harding, Leonard & Tate, for appellee Canada.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and STUART, District Judge.

SPENCER, J.

The Nebraska State Railway Commission granted operating rights to Earl A. Canada as a common motor carrier of petroleum products over irregular routes. The certificate described his territorial authority ambiguously, and in subsequent proceedings for extension and interpretation, final orders went against Canada. In the present proceeding the commission extended his territory on the ground that he had been operating under color of authority. Competing motor carriers have appealed.

The order under review continues Canada's old operating rights which have three parts. Part A, covering liquid petroleum products, authorizes irregular routes "from Superior, to Benedict, Lincoln, Holdrege, and Fairmont, Nebraska, occasionally to and from various points within the State * * * at large. NOTE: Construed to mean from Superior * * * to and from all points * * *." Part B, covering petroleum products, authorizes irregular routes from Superior, to and from Curtis, McCook, In-

dianola, Orafino, and Stockville. Part C, covering refined petroleum products, authorizes irregular routes (1) from McCook to Grant and Hayes Center and (2) from Curtis to Stockville and Moorefield.

The order under review grants new rights to Canada. Part D, covering petroleum products in bulk in tank vehicles, authorizes irregular routes from all refining, loading, and distributing points, to all points in Nebraska. It is this portion of the order that is specifically being attacked in this appeal.

The evidence establishes that since 1935 Canada has successfully conducted operations as a common carrier. At the time Canada first commenced operations there were no Nebraska origin points for petroleum products. In the ensuing years numerous petroleum products distribution points were established in Nebraska. The first such point was a pipe line terminal at Superior, Nebraska, over irregular routes to and from Maywood, Nebraska. Subsequent to this initial grant of authority, numerous other petroleum products shipping points sprang up in Nebraska. To meet increased demand, Canada acquired additional authority from the commission. This authority generally authorized Canada to transport commodities from and to various Nebraska points, and occasionally to and from all points. The exact scope of this authority was disputed and was not authoritatively determined by the commission until its order of March 2, 1966. Prior to the entry of this order, Canada conducted operations generally on a statewide basis, serving numerous Nebraska origin and destination points.

Appellants rely in large part upon In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507, in which this court reversed an order of the commission interpreting Canada's certificate extending his operating authority. It is appellant's contention that the proceeding before the court is identical to the proceeding involved in the previous case. This premise we do not accept.

In the previous case the issue of continuing operation under color of right was not even mentioned as bearing upon convenience and necessity. In the instant case, it is one of the major factors considered by the commission. The previous opinion observed that the commission had made a bare conclusionary finding that public convenience and necessity required the authorization and was destitute of evidential integrity. That cannot be said of the present proceeding in which additional evidence, including shipper support, was adduced.

An order of the Nebraska State Railway Commission granting or denying application for a certificate of public convenience and necessity is the act of the commission and not of the court. It would seem clear that the commission has continuing jurisdiction over its orders and the right to modify, annul, and vacate them thereafter. The fact that the commission has jurisdiction to sustain motions for rehearings or reconsideration has been recognized by this court. See Miller v. Consolidated Motor Freight, Inc., 168 Neb. 712, 97 N. W. 2d 265.

An order of the Nebraska State Railway Commission is not res judicata as to another application of the same nature subsequently filed, nor does it require an independent proceeding. In Holmberg v. Chicago, St. P., M. & O. Ry. Co., 115 Neb. 727, 214 N. W. 746, this court said: "* * * in proceedings which involve either directly or as a necessary consequence the annulment, modification or alteration of a previous order entered by the commission, the doctrine of estoppel or res judicata, as usually applied to judicial decisions of courts of record, has no application whatever."

The commission specifically found: "Prior to the entry of the Order of March 2, 1966, Canada conducted operations generally on a statewide basis serving numerous Nebraska origin and destination points. The evidence indicates that Canada served approximately 14 origin points and 45 destination points throughout the state of Nebraska."

The commission further found: "We find that Canada's long established operations were conducted under color of authority and create a presumption that the present and future public convenience and necessity require continuation of those operations. We find further that this presumption has gone unrebutted by protestants."

"Evidence of operations under color of authority may be considered by the Nebraska State Railway Commission in determining whether or not the proposed service is or will be required by the present or future public convenience and necessity." Andrews Van Lines, Inc. v. Nielsen & Petersen, Inc., 180 Neb. 764, 145 N. W. 2d 584.

Where, pursuant to a misinterpretation of an ambiguous certificate, a carrier has long provided the services for which authority is sought, openly without subterfuge and absent official challenge, such operations are under color of right and cannot be said to have been in bad faith, with no legal justification. See, Andrews Van Lines, Inc. v. Nielsen & Petersen, Inc., 180 Neb. 764, 145 N. W. 2d 584; Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865; Rapid Film Service, Inc. v. Bee Line Motor Freight, 181 Neb. 1, 146 N. W. 2d 563. These same authorities sustain the proposition that an applicant for a lawful certificate to continue in business which he has been operating under some color of authority is not required to make the same showing as an applicant for a new certificate who has never engaged in the business previously.

"The issue of public convenience and necessity is ordinarily one of fact and where there is evidence in the record to sustain the Nebraska State Railway Commission's order, this court cannot say that it is unreasonable and arbitrary." Andrews Van Lines, Inc. v. Nielsen & Petersen, Inc., 180 Neb. 764, 145 N. W. 2d 584.

A ruling by the Nebraska State Railway Commission on the issuance or denial of a certificate of public con-

venience and necessity constitutes the exercise of administrative and legislative powers and functions. Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865.

On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. Shanks v. Watson Bros. Van Lines, 173 Neb. 829, 115 N. W. 2d 441.

It is true that protestants produced substantial evidence in an attempt to sustain their position. The commission found against protestants on their presentation. The policy or the wisdom of the action cannot be reviewed by this court. Where there is evidence to sustain the finding of the commission, this court cannot say that its action was unreasonable and arbitrary. See Ferguson Trucking Co., Inc. v. Rogers Truck Line, 164 Neb. 85, 81 N. W. 2d 915.

"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.

We look with favor upon the evolutionary process which has changed the findings of the commission so radically from those which appellants cite as involving reversal in the previous cases. We note that Canada is not a johnny-come-lately. He has been actively in business as a Nebraska motor carrier since 1935. As the distribution points for petroleum products have been

changed, he has sought and received, over objection, authority to change his operation. This was essential to meet the competition of large interstate carriers. This court has no power to regulate public utilities. Its function on appeal is limited to an examination of the findings of the commission in such matters and a determination of whether or not the order is reasonable as distinguished from an arbitrary action.

There is evidence to sustain the order of the commission herein. We cannot say that the order of the commission is arbitrary or capricious. It is therefore affirmed.

AFFIRMED.

SMITH and MCCOWN, JJ., dissenting.

On Canada's application for statewide authority the commission in 1950 broadened his territory to 13 counties, not the entire state. This court reversed: "The application was clearly for a new unlimited certificate * * *. The ambiguous provision * * * obviously was not intended to authorize * * * operations to and from all locations in the state. If it was, the specifications * * * were meaningless * * *. '* * * If the commission allowed one carrier to thus broaden its rights and territory * * *, it would be impossible for the commission to regulate such carriers * * *.'" In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507.

Canada summarized his transportation business for 1958 and 1961 through 1965. The abstract, inflated with shipments to Canada himself as jobber at Bertrand and Lexington, discloses:

| Points of Origin | Unloading Points | Number of Trips 1958 1961-1963 | 1964-65 | Total |
|---|---|---|---|---|
| Doniphan | Lexington | 36 | 7 | 43 |
| " | (other) | 11 | 24 | 35 |
| Geneva | Bertrand | 97 | 51 | 148 |
| " | Curtis | 411 | 151 | 562 |
| " | Giltner | 40 | 74 | 114 |
| " | Hendley | 111 | 54 | 165 |

| | | | | |
|---|---|---|---|---|
| " | Lebanon | 164 | 71 | 235 |
| " | Loomis | 49 | 114 | 163 |
| " | (other) | 265 | 0 | 265 |
| Greenwood | Loomis | 3 | 13 | 16 |
| " | (other) | 108 | 0 | 108 |
| North Platte | Cambridge | 201 | 42 | 243 |
| " " | (other) | 219 | 0 | 219 |
| (six others) | (all) | 136 | 0 | 136 |
| | Total | 1,851 | 601 | 2,452 |

The finding on color of authority is not supported by sufficient evidence. Canada's abstract negates statewide operations for purposes of this extension proceeding. After our former opinion Canada continued for 13 years to violate his certificate restrictions without excuse. The majority opinion in warning against monopoly confuses ethical issues. We agree that concomitants of the state overcontrolling entry and extension in the motor carrier field are costly administration and enterprise inefficiency. Still, we disapprove wrenching ethical requirements for color of authority in order to relax those controls.

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ELY CONSTRUCTION COMPANY, A CORPORATION, APPELLANT, V. S & S CORPORATION, A CORPORATION, APPELLEE.

165 N. W. 2d 562

Filed February 28, 1969. No. 36964.

1. **Contracts: Evidence.** When two parties have made a contract and have expressed it in writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.
2. **Contracts.** A written contract expressed by clear and unambiguous language is ordinarily not subject to interpretation or construction.
3. **Contracts: Evidence.** In interpreting a written contract, the

meaning of which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings is admissible to discover the meaning which each party had reason to know would be given to the words by the other party.

4. **Contracts: Trial.** Where evidence relating to ambiguities and contradictory provisions in a written contract is conflicting, the interpretation to be given the contract is for the jury.
5. **Contracts: Evidence.** A written instrument is open to explanation by parol evidence when its terms are susceptible of two constructions or where the language employed is vague or ambiguous.
6. ———: ———. Parol evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties.

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

Swarr, May, Royce, Smith, Andersen & Ross and William E. Morrow, Jr., for appellant.

Edward Shafton and Bernard E. Vinardi, for appellee.

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

MCCOWN, J.

The plaintiff, Ely Construction Company, instituted this action against the defendant S & S Corporation, to recover damages for breach of a written contract. The defendant cross-petitioned for loss of expected profits. The jury found against the plaintiff on its petition and against the defendant on its cross-petition, and the plaintiff has appealed.

The specific issue is the application of the parol evidence rule to a written subcontract to furnish and install window units for a dormitory addition at Offutt Air Force Base.

The plaintiff is a Nebraska corporation engaged in a general contracting business. The defendant was a Nebraska corporation engaged in the business of selling aluminum building products. It did not sell anything other than aluminum products.

In early February 1965, the plaintiff informed the defendant's sales representative that plaintiff would be interested in having defendant bid on certain construction jobs. Among them was the Offutt dormitory addition. On February 26, 1965, the defendant delivered proposals on two other jobs, both of which involved aluminum products. The defendant's sales representative obtained a copy of the plans and specifications for the Offutt dormitory addition sometime in February, and on March 8, 1965, submitted a bid proposal to the plaintiff for furnishing and installing the window units. The bid proposal was on a printed form of the defendant, S & S Corporation. The typewritten portion of the form proposed to furnish and install: "24 Mark '1', 6 Mark '2', 22 Mark '4', 27 Mark '6', 4 Mark '5' and 2 Mark '5A' consisting of: Alenco series 900 hopper vents, shop glazed w/DSB. glass. Alenco series 1600 panel frames, shop glazed w/⅝" insulating glass. Alenco series 1600 panel frames, shop glazed w/1⅛" porcelain panels (porcelain one side).

"We *include* #608 closure @ heads & jambs, #1742-B mullions, screens for operating vents and clip anchors at sills.

"All in 204-R1 alumilite finish.

"We *include* necessary labor, tools, insurance and equipment to erect.

"We *exclude:* opening preparation, cleaning or protection of aluminum surfaces.

"We *include* perimeter caulking.

"All work to be done in standard 40 hour work week."

The bid price was $17,397.88. Alenco was the tradename of the aluminum manufacturing company.

This bid proposal was delivered to the plaintiff on March 8, 1965, and at that time, Mr. Harold Stinson, defendant's sales representative also delivered an architectural kit containing advertising and architectural information about the aluminum units defendant was bidding. He also advised plaintiff's representative, Mr.

Anderson, that the plans and specifications called for steel units and that defendant's bid was on aluminum, which should be used as an alternate.

Mr. Anderson also knew from the defendant's bid proposal itself, that it was for aluminum products and not for steel, and he knew this prior to the time the plaintiff submitted its bid for the general contract. Plaintiff had received at least one other bid proposal on the window units which was from Porter Trustin Company, which ultimately furnished and installed the windows. There is no evidence as to which proposal was used as the basis of plaintiff's bid, and there was an obvious and substantial difference in price. The plaintiff was the successful bidder on March 11, 1965, and on April 29, 1965, plaintiff executed a contract with the United States Army Corps of Engineers for the general construction in the sum of $429,330.

On May 5, 1965, at the plaintiff's offices, the defendant's representative, Mr. Stinson, was told that the subcontract was prepared and ready for signature. The subcontract had been prepared by the plaintiff on its printed form with typed additions, and was handed to Mr. Stinson for signature. He checked the heading and the typewritten section and also the price stated. He noted the price was 12 cents higher than his bid proposal, and the plaintiff's representative, Mr. Anderson, explained that this had been done to facilitate plaintiff's bookkeeping by eliminating pennies. Mr. Stinson testified that: "* * * assuming that the subcontract had been prepared according to my proposal, I signed it."

The typewritten portion of the printed subcontract form was: "Furnish & install window units according to plans & specifications, including closures at head & jambs, mullions, screens for operating vents, clip anchors at sill, glazing, porcelain panels, perimeter caulking & necessary labor, tools, insurance & equipment to erect. Opening preparations, cleaning & protection by others. Approximate Quantities 24 - Mark 1, 6 - Mark 2, 22 -

Mark 4, 27 - Mark 6, 4 - Mark 5, 2 Mark 5A."

Section 10 of the government specifications is titled "METAL WINDOWS." Section 10-01 provided: "APPLICABLE PUBLICATIONS. The following publications of the issues listed below, but referred to thereafter by basic designation only, form a part of this specification to the extent indicated by the references thereto: *a* * * * *b*. STEEL WINDOW INSTITUTE PUBLICATION. Recommended Standards for Steel Windows - (1964)."

Section 10-02 of the specifications provided: "MATERIALS AND TYPES. Unless otherwise indicated, windows and window wall shall match existing windows and insulated panels in every detail. Existing windows are Fenmark II by Fenestra, Inc., and insulated panels are Davidson Enamel Products, Inc."

Section 10-06 provided: "STEEL WINDOWS shall conform to the S.W.I. Recommended Standards for Steel Windows, except as modified herein."

Paragraph 9 of the General Provisions of the specifications, in brief, provided that reference to any material was regarded as a standard of quality and permitted substitution of any material, article, or process which, in the judgment of the contracting officers, was equal to that named. It required submission of various data to the contracting officer and his specific approval. There was evidence that on occasion the government had permitted substitution of aluminum for steel under this provision, and that the parties were aware of that fact.

Section 10-03 of the specifications required complete shop drawings to be submitted to the contracting officer for approval prior to acquisition of materials and equipment.

The plans designated the window units as "Type 1, Type 2, Type 4, Type 5, Type 5A and Type 6." The plans do not designate any material such as wood, steel, aluminum, or metal for the window units, although an experienced builder could determine that they required

metal. The quantities of each type of window may be obtained only from the plans.

Albritton Engineering Corporation, which produced the aluminum window walls involved in the March 8, 1965, proposal of the defendant, prepared complete shop drawings for the window units. These drawings also showed the material to be aluminum. The defendant delivered these to the plaintiff sometime prior to June 9, 1965, and on that date, the plaintiff forwarded the shop drawings to the Corps of Engineers for approval. Plaintiff's submittal stated: "Equipment and Materials covered by this transmittal conform in all respects to the contract plans and specifications." On June 21, 1965, the government returned the shop drawings without acceptance and stated as the reason: "1. The contract specifications require steel windows, without option. The shop drawings are for aluminum windows which are not permitted by the specifications.

"2. Specifications Paragraph 10-02 requires that the windows shall match in every detail those on the existing dormitories. The submitted windows are different in appearance from the existing windows to the extent that this difference would be immediately recognized.

"Shop drawings shall be resubmitted showing windows conforming to the requirements of Section 10 of the Contract Specifications."

On several occasions, beginning on March 11, 1965, Harold Stinson, the representative of the defendant, had conferred with Mr. Anderson, the representative of the plaintiff, as to who would talk to the government about approving the aluminum substitution, and on each occasion, Mr. Anderson had said that he would. Even after the rejection of the shop drawings by the government, there is testimony that Mr. Anderson informed Mr. Stinson that Mr. Anderson was going to see the Corps of Engineers to try once more to have the specifications changed from steel to aluminum. Another employee of the plaintiff also talked to the government representa-

tive about accepting and approving aluminum units after the shop drawings were returned. Apparently in late June or early July 1965, Mr. Anderson informed Mr. Stinson that the government would not accept aluminum windows. Thereafter the plaintiff obtained the material and labor for the window construction from Porter Trustin Company, on its original proposal, with glazing from another company, at a cost of $35,075, or $17,677 more than the defendant's subcontract price.

The jury was instructed that among the requirements to be proved by the plaintiff was that the May 5, 1965, subcontract was to furnish and install steel window units; and that among the requirements to be proved by the defendant on its cross-petition was that the subcontract was to furnish and install aluminum window units. No assignment of error is directed at any of the instructions as given. The jury returned its verdict against the plaintiff on its petition and against the defendant on its cross-petition.

The only real issue on this appeal is whether the plaintiff was entitled to a directed verdict on the basis of the parol evidence rule. Unless it was, the evidence is sufficient to sustain the verdict.

The parol evidence rule is well analyzed in 3 Corbin on Contracts, c. 26, §§ 573-596, p. 356 et seq. That work states the rule in substance to be: "When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." § 573, p. 357.

A fundamental and indispensable basis of any enforceable agreement is that there be a meeting of the minds of the parties. Farmers Union Fidelity Ins. Co. v. Farmers Union Co-op Ins. Co., 147 Neb. 1093, 26 N. W. 2d 122.

Ordinarily there must be a clear and unequivocal ac-

ceptance of a certain and definite offer in order to constitute a contract. See Joseph v. Donover Company, Inc., 261 F. 2d 812. See, also, 1 Corbin on Contracts, § 107, p. 478.

A written contract expressed by clear and unambiguous language is ordinarily not subject to interpretation or construction. Hansen v. E. L. Bruce Co., 162 Neb. 759, 77 N. W. 2d 458. Obviously, where the language and meaning of a written contract are not clear and unambiguous, it must be interpreted or construed.

If the written agreement of May 5, 1965, had said only: "Furnish and install window units in accordance with plans and specifications" there might well have been no ambiguity. Ambiguities were introduced not only by the descriptions of the window units as "Mark" rather than "Type," but by the addition of many other items contained in the proposal of March 8, 1965, which had reference to aluminum only. The references to that proposal, together with the evidence as to execution, might well be interpreted as referring to both the proposal and the plans and specifications. If so, the ambiguity and conflict is obvious. It is of interest to note that the subcontract plaintiff made on July 28, 1965, with the company which finally furnished and installed the window units for the Offutt dormitory contained a typewritten portion which read: "Furnish and install window units as per proposal of March 9, 1965 and according to plans and specifications."

A cardinal principle of construction of written instruments is that an interpretation shall be made which will reflect the true intention of the parties. U. P. Terminal F.C.U. v. Employers M. L. Ins. Co., 172 Neb. 190, 109 N. W. 2d 115.

In interpreting a written contract, the meaning of which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings is admissible to discover the meaning which each party had reason to know would be given to the words by the other

party. Podewitz v. Gering Nat. Bank, 171 Neb. 380, 106 N. W. 2d 497; 3 Corbin on Contracts, § 579, p. 418. See, also, Restatement, Contracts, § 230, p. 310, § 231, p. 312, § 242, p. 341. As stated in the latter section: "Previous negotiations by the parties to an integrated agreement, whether the negotiations relate to that agreement or another, are admissible to show that the agreement has any meaning which is not impossible under the standard stated in § 230, although that meaning would not otherwise have been given to the agreement."

Where evidence relating to ambiguities and contradictory provisions in a written contract is conflicting, the interpretation to be given the contract is for the jury. State v. Commercial Casualty Ins. Co., 125 Neb. 43, 248 N. W. 807, 88 A. L. R. 790. As this court said there: "A written instrument is open to explanation by parol evidence when its terms are susceptible of two constructions, or where the language employed is vague or ambiguous. * * * Such evidence is admitted, not for the purpose of contradicting the terms of the contract, but for ascertaining and giving effect to the true intent of the parties."

Parol evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties. Fitzsimmons v. Frey, 153 Neb. 124, 43 N. W. 2d 531.

In discussing the parol evidence rule, Corbin states: "The use of such a name for this rule has had unfortunate consequences, principally by distracting the attention from the real issues that are involved. These issues may be any one or more of the following: (1) Have the parties made a contract? (2) Is that contract void or voidable because of illegality, fraud, mistake, or any other reason? (3) Did the parties assent to a particular writing as the complete and accurate 'integration' of that contract?

"In determining these issues, or any one of them, there is no 'parol evidence rule' to be applied. On these

issues, no relevant evidence, whether parol or otherwise, is excluded. No written document is sufficient, standing alone, to determine any one of them, however long and detailed it may be, however formal, and however many may be the seals and signatures and assertions. No one of these issues can be determined by mere inspection of the written document." 3 Corbin on Contracts, § 573, p. 358.

Virtually all of the issues that are raised in the application of the parol evidence rule are issues of fact. See 3 Corbin on Contracts, § 595, p. 570.

This court cannot say, as a matter of law, that there was a meeting of minds and mutual assent sufficient to establish that a contract was made; that there were no mistakes or that whatever mistakes there were, were so negligible that they could not render the contract, if made, voidable; nor that the parties assented to the particular writing as the complete and accurate integration of the agreement; nor that the language used in the writing is so definite and unambiguous that it can have only one legal meaning. Yet every one of these issues must be determined affirmatively, as a matter of law, if the parol evidence rule is to be applied here to overturn the verdict of the jury to whom these issues were submitted.

The factual issues here were properly for the jury, the evidence is sufficient to sustain the verdict, and the judgment of the district court is affirmed.

AFFIRMED.

WHITE, C. J., dissenting.

I respectfully dissent. The appellant was a general contractor for the government, and the appellee was a subcontractor, employed to install windows. The contract, of course, had to meet government specifications. The appellee submitted a proposal which by its terms was not to become a contract until it was signed by the appellant and delivered to appellee at its office in Gretna,

Nebraska. The proposal was never accepted and this is admitted. The evidence is conclusive that the appellee was aware of the prime contract requirements for the window units. It is also clear that the appellee knew that the subcontract tendered to it, and executed and delivered by it, was not the same as the proposal which it had made.

The parties here were dealing at arms length, and we have no issue concerning unequal position, fraud, misrepresentation, or estoppel. It is my opinion that the parol evidence rule as stated by this court in many cases should be enforced. See, Master Laboratories, Inc. v. Chesnut, 157 Neb. 317, 59 N. W. 2d 571; Frentzel v. Siebrandt, 161 Neb. 505, 73 N. W. 2d 652. This case would appear to be complex from the involved arguments of the appellee herein. I feel that its position is nothing more than an ingenious attempt to weave its rejected proposal into the terms of the finally executed written subcontract. The attempt to place the proposal under the umbrella of the executed contract by the assertion of ambiguity cannot be accepted. These proposals or "prior negotiations" are inconsistent with the final contract which provided by proper interpretation for steel windows. In Gerdes v. Omaha Home for Boys, 166 Neb. 574, 89 N. W. 2d 849, this court said as follows: "The correct doctrine in that regard means that if there is a provision in one instrument affecting a provision of another, they will be given effect * * * so that the whole agreement actually made may be determined and effectuated. It does not mean that a provision of one document is imported bodily into another contrary to the intent of the parties or the express provision of the latter. * * * The statement that contemporaneous instruments may be treated as one means only that this will be done when it will effectuate the intention and if the provisions of the two instruments if put together will not be incompatible. *The court may not do violence to a complete, unambiguous contract by consolidating it*

*with another writing if the effect of doing so would be to avoid an essential part of the contract.*" (Emphasis supplied.)

As far as I can discover, there is no effective evidence to support a finding that any legal mistake occurred in the formation of this contract. In any event it is clear that if a party has taken a position that there is in fact a contract he cannot claim a mistake that negates the contract. His remedy is by rescission which is not pleaded or contended here. Sack Lumber Co. v. City of Sargent, 179 Neb. 848, 140 N. W. 2d 796.

For the reasons given, I dissent from the majority opinion. It is my conviction this judgment should be reversed and the petition dismissed.

I am authorized to say that Spencer, J., concurs in this dissent.

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STATE OF NEBRASKA, APPELLEE, V. FRANCIS S. CAHA, APPELLANT.

165 N. W. 2d 362

Filed February 28, 1969. No. 37009.

1. **Criminal Law: Confessions.** A confession given to a police officer in a patrol car while defendant was being questioned concerning an unsolved crime of statutory rape was not the product of a process of interrogation aimed at eliciting incriminating statements from the defendant and was admissible, despite the lack of a warning to the defendant of his right to remain silent where the police officer merely asked the defendant to explain any relationship he may have had with the prosecutrix.
2. **Criminal Law: Trial.** In a prosecution for rape where no request for such an instruction is made, it is not error for the trial court to fail to instruct on the lesser included offenses.

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

A. Q. Wolf and Bennett G. Hornstein, 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.

CARTER, J.

The defendant was convicted in the district court for Douglas County of the crime of statutory rape and sentenced to a term of imprisonment. The defendant has appealed.

There is no contention that the evidence is insufficient to sustain the verdict. In fact, there is little dispute in the facts except that defendant asserts that the prosecutrix, a girl of the age of 14 years, voluntarily participated and that there was no penetration. Whether or not the prosecutrix voluntarily participated is not a material issue in the case. Whether or not there was penetration is a material issue on which the evidence is in conflict. On the issue of penetration, the prosecutrix testified that there was, which is supported by the evidence of a medical expert that male sperm was found in her vaginal canal shortly after the incident occurred. Defendant denies that there was any penetration which is supported to some extent by the testimony of the medical expert to the effect that the hymen of the prosecutrix was not ruptured. The medical expert further stated that a ruptured hymen does not always result from penetration. Statements made by the defendant to a police officer in which he admitted sexual relations with prosecutrix were received in evidence, the admissibility of which constitutes one of the assignments of error in the appeal.

The evidence shows that defendant persuaded or forced the prosecutrix to enter his car a short distance from her home. Defendant was a stranger to her and she described him to the police shortly after the occurrence. She described him primarily as wearing an army jacket. She had difficulty in describing defendant other-

wise because of darkness and poor eyesight. She described the car as a two-door 1961 or 1962 red Chevrolet. The interior was black with black headrests. With this information, the police searched for a car with the description given. Such a car was found parked in a parking lot on the north side of the Taylor Florist Shop, although it was a later model than stated by the prosecutrix. The investigating officer observed an army fatigue jacket on the front seat of the locked car by looking through the window. The car belonged to the defendant who was employed by the Taylor Florist Shop.

The officer, Detective Sergeant John B. Gallagher, went into the Taylor Florist Shop and found that defendant worked there. Gallagher waited for defendant to return from making a delivery at which time he was asked to come outside. Gallagher testified that he talked with the defendant about his car, his family, and matters of general interest. He then gave the Miranda warnings which he recited on the witness stand in which he made no mention of defendant's right to remain silent. Defendant then told the officer about picking up the prosecutrix and engaging in sexual relations with her down near the Missouri River, some distance from the point of the pickup. He said the girl voluntarily participated in the sexual act.

Defendant was taken to the police station where, admittedly, the Miranda warnings were properly given before he was interrogated. The contention here is that Gallagher talked to defendant in his police cruiser car, that he was then in custody, and the Miranda warnings were required to be given at that time. We point out, however, that Gallagher had found a car meeting the description as given by the prosecutrix. He obtained the name of the owner of the car and proceeded to locate the owner without any information connecting it or its owner with the crime of statutory rape. He says he gave the Miranda warnings before inquiring about the alleged rape and, when asked to repeat what he

told the defendant in the way of warnings, failed to mention that defendant had a right to remain silent.

The issue here is whether or not the action of the officer was investigative or an in-custody interrogation. If it was purely investigative, the Miranda warnings are not required to be given. If it was in-custody interrogation, they are required to be given. Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974. In the last-cited case it is said: "In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

In Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, the court said: "Nothing we have said today affects the powers of the police to investigate 'an unsolved crime,' * * * by gathering information from witnesses and by other 'proper investigative efforts.' * * * We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."

Officer Gallagher testified that he asked defendant to come outside the flower shop in order that he might

talk to him. They sat in the cruiser car which was parked beside defendant's car in the parking lot. The officer testified that defendant was under arrest, but the time of the arrest is not stated. Defendant was never told, so far as the record shows, when he was placed under arrest. Before asking the defendant about having the prosecutrix in his car the night before, the officer positively asserts that he gave the Miranda warnings in accordance with the Rights Advisory Form used by the Omaha Police Department. He was then asked what was contained in the Rights Advisory Form and he left out the requirement that defendant be informed of his right to remain silent. The officer testified that after giving the Miranda warnings, he said: " 'Tell me about the girl you had in your car last night," and defendant told the story to which the officer testified. With reference to the nature of the interrogation, the officer was asked: "Now at the time you talked to Mr. Caha did you consider him a suspect?" Answer: "Only from the description of the car, and then after I talked to him I considered him a suspect." The officer's answer is supported by the record and fixes the time of the arrest as subsequent to defendant's statement. Until that statement was made, the officer had no information whatever that defendant was the driver of the car that participated in the alleged crime; in fact, he did not know that he had found the right car. The evidence complained about was discovered during the investigative process which shifted to the accusatory process only after defendant's statement to the investigating officer. True, the officer says he gave the Miranda warnings. Whether he thought they were necessary, or whether he gave them out of an abundance of caution, or for some other reason, is not material here. In our opinion, the evidence was acquired during the investigative process and does not relate to the evils that Escobedo and Miranda were intended to correct. Here the defendant, so far as the evidence shows, was not in custody nor other-

wise deprived of his freedom until after his admissions were made to the officer. To hold that defendant in this case was subject to the warnings of the Miranda case would move the application of the rule from the point where the evidence of guilt focused on the defendant to any point where the defendant was interrogated in the investigative process, a rule that finds no support in any of the cases, state or federal.

The defendant was interviewed in the cruiser car as a matter of convenience. He was under no restraint whatsoever. The time of defendant's arrest is a question of fact. He was not informed formally at any time that he was under arrest. The officer had no basis for an arrest until defendant made his statement. He was interviewed only because his car fitted the description given by the prosecutrix. He was asked to tell the officer about the girl he had in the car the night before and he volunteered a complete statement. Crimes such as the one before us are usually not committed in the presence of eyewitnesses and if the rule in Miranda is to extend into the investigative process, it is more than a protection of the defendant's constitutional rights; it becomes a shield against any prosecution at all. The defendant at the time he gave his statement had not been charged with any crime, he was not in a police station, nor in any other place with a police atmosphere. It is clear that he was being investigated regarding an unsolved rape and not for the purpose of obtaining a confession. It does not involve the deliberate interrogation of a defendant after the initiation of judicial proceedings against him, nor does it involve the pressures of the police or the police station where one may be in custody, held incommunicado, or subjected to improper coercive psychological approaches.

The evidence in this case shows that the defendant observed this 14-year-old girl board a bus in the business district of Omaha. He followed the bus until he saw the prosecutrix alight therefrom. He then followed

her for 2 blocks and then forced or enticed her into his car. It was only through an effective police investigation stemming from a general description of the car that the police detective found the car that led him to its owner, the defendant. He talked with the defendant only because the car appeared similar to the description given by the prosecutrix. In continuing the investigation, the defendant told the investigator that he had picked up the girl the night before, stating that the engaging in sexual relations was mutually agreeable, and that he did not think there was anything wrong in what he did.

Defendant asserts that his constitutional rights were violated. We point out, however, that the victim has some constitutional rights which are to be protected. With only two parties to the incident and, the girl being unable to identify her assailant, it would defeat the purpose of police investigation if Miranda applied to the investigative process. The investigative process is not subject to these rules, otherwise rapists could roam the streets at will through the simple expedient of requiring that the Miranda warnings must be given to everyone in the course of the investigation for fear that a person investigated may make statements subsequently found to be incriminating. The protection of the right of nonincrimination has not been so extended in either the federal or state courts.

The foregoing is supported by the following cases: In United States v. Agy, 374 F. 2d 94 (1967), it was said: "These admissions need not have been excluded by the district court because the doctrine of Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) applies only to in-custody interrogation, * * *." In People v. Cotter, 63 Cal. 2d 386, 405 P. 2d 862, the California court said: "The more crucial conversation (the fourth) with the officers in the police car, was admissible for the further reason of absence of one of the conditions deemed essential to render the statement in-

admissible under the rules laid down in Escobedo, Dorado and Stewart. Clearly, the statement made in the police car was not the product of a process of interrogation aimed at eliciting incriminating statements from defendant. The police merely asked him what had happened at the Buus residence. They were affording him an opportunity which police officers normally and routinely offer to any person whom they are taking into custody to give any explanation of his conduct which he may desire to give. It is a routine means of commencing an investigation." See, also, People v. Jacobson, 63 Cal. 2d 319, 405 P. 2d 555. In Miranda, the court said: "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." Miranda v. Arizona, *supra*. Since Miranda, the case has been interpreted very restrictively by the federal courts. The requirement of the Miranda warnings has been limited to cases of in-custody interrogation, to wit, cases in which the defendant has been arrested or detained and subjected to informal interrogation by the police. No case has been cited, nor have we found one, that requires that the Miranda warnings be given in such a case as the one before us.

The trial court held a hearing during the trial on a motion to suppress the evidence. After taking evidence and determining all the facts, it held, in effect, that the evidence was voluntary and admissible, and not a violation of the rules in the Miranda case. We can see no reason for interfering with the court's findings on this point.

Defendant claims error in the failure of the trial court to instruct the jury that it could find the defendant guilty of a lesser crime, assault with intent to commit rape, since the evidence was in conflict as to whether or not a penetration was accomplished. The defendant requested no such instruction. It has long been the rule

in this state that it is not error not to instruct on lesser offenses in the absence of request. Haynes v. State, 137 Neb. 69, 288 N. W. 382; Mulder v. State, 152 Neb. 795, 42 N. W. 2d 858. This contention is without merit.

We find no prejudicial error in the record and the judgment of the district court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. JAMES EDWARD BOTTS, APPELLANT.

165 N. W. 2d 358

Filed February 28, 1969. No. 37029.

**Criminal Law: Trial.** An argument by a prosecuting attorney which is based on the evidence and inferences drawn therefrom does not ordinarily constitute misconduct.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

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

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

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and NEWTON, JJ., and HASTINGS, District Judge.

SPENCER, J.

Defendant has perfected an appeal from a conviction of the crime of robbery.

A few minutes after midnight on January 3, 1968, Leroy A. Desmond, the night manager and cashier for the Easy Parking Garage at the Redick Tower in Omaha was talking to his wife on the telephone. A man identified as the defendant came up to him and said: " 'There's two things you can do right now, hang up that phone and empty that cash register.' " After complying with

the request, Desmond was ordered to the men's restroom and was instructed as follows: " 'Stay here for 10 minutes or I'll blow your brains out.' "

Mrs. Desmond, who had heard the order to her husband, told her daughter to call the police. Two officers within one-half block of the scene heard a police broadcast that a robbery was in progress. They drove their patrol car into the garage in the Redick Tower, apprehended the defendant who they met in the garage, and released Desmond from the restroom. Desmond identified the defendant as the man who had held him up. The officers then removed the stolen money from the defendant's pocket.

Defendant complains that the court committed reversible error in three particulars: (1) In permitting an amendment to the information and proceeding with the trial on the amended information; (2) in failing to grant a mistrial; and (3) in instructing the jury on the defendant's failure to testify. There is no merit to any of these claims.

The trial court permitted the county attorney to amend the information only to the extent that it changed the name of Desmond's employer from Redick Tower Garage to Easy Parking Company, a corporation. The amendment was proper and the defendant could not possibly have been prejudiced by it.

In Nicholson v. Sigler, 183 Neb. 24, 157 N. W. 2d 872, we said: "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 defendant did not take the witness stand in his own defense and the trial court gave the following instruction on the failure of the defendant to testify: "The defendant has not testified in this case, and you are instructed that the law does not require that he take the stand and testify. You are instructed that his failure to do so is not to be considered by the jury in any manner, and the jury is not at liberty to draw any inference by reason of his failure to take the stand, either for or against him, or to speculate in any manner because of such failure to testify." The defendant and his attorney had previously advised the court that they did not want this instruction given to the jury, and the trial court agreed not to give it.

During the course of the final argument of the county attorney, defense counsel made an objection in front of the jury that the county attorney was commenting on the defendant's failure to testify, and subsequently moved for a mistrial on the same grounds. The statement made by the county attorney was: " 'What evidence is there to contradict the State's evidence? There is no evidence to contradict the State's evidence.' " This remark in the course of the county attorney's argument was not misconduct or improper. It was no more than an attempt to comment on the evidence adduced.

As we said in Kennedy v. State, 171 Neb. 160, 105 N. W. 2d 710: "In Jackson v. State, 133 Neb. 786, 277 N. W. 92, this court held that: 'Remarks of the prosecutor in final summation of the evidence to the jury which do not mislead and unduly influence the jury and thereby prejudice the rights of the defendant do not constitute misconduct.' See, also, Cramer v. State, 145 Neb. 88, 15 N. W. 2d 323, wherein we held: 'An argument by a prosecuting attorney, which is based on the evidence and inferences drawn therefrom, does not ordi-

narily constitute misconduct.' "

After the court overruled the motion for a mistrial, he advised counsel that in view of the objection in the presence of the jury, on his own motion he was going to give an instruction on the defendant's failure to testify. It is obvious that under the circumstances the instruction was proper. See State v. Cook, 182 Neb. 684, 157 N. W. 2d 151. If the instruction had not been given, the defendant could have urged reversal for that reason.

There being no merit to the defendant's assignments of error, the judgment herein is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. WARFIELD GOINGS, APPELLANT.

165 N. W. 2d 366

Filed February 28, 1969. No. 37048.

1. **Criminal Law: Arrest: Probable Cause.** When an arrest is made without a warrant, it therefore must be based upon probable cause which exists from facts and circumstances within the officers' knowledge or of which they had reasonably trustworthy information which was sufficient to warrant men of reasonable caution in the belief that an offense has been, or is being committed.
2. **Criminal Law: Searches and Seizures.** A search and seizure incident to a lawful arrest is not violative of the Fourth Amendment.
3. **Criminal Law: Probable Cause.** The existence of probable cause must be determined by a practical and not by any technical standard.
4. **Criminal Law: Probable Cause: Evidence.** Information given by an informer to an officer leading to the search and subsequent arrest of the defendant for a violation of the carrying of a concealed weapons law, even though hearsay, and even though not legally competent evidence in a criminal trial, can be considered in determining whether the officer had probable cause and reasonable grounds to search and subsequently arrest defendant without a warrant.

Appeal from the district court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed.

E. A. Anderson, for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and WILLIAM C. SMITH, JR., District Judge.

WILLIAM C. SMITH, JR., District Judge.

This is a criminal prosecution, charging the defendant with the offense of carrying a concealed weapon in Sheridan County, Nebraska. A gun and a box of shells taken from defendant were admitted in evidence. A jury found the defendant guilty and he was sentenced to 17 months in the Nebraska Penal and Correctional Complex. Defendant has appealed. He contends that no probable cause existed for the warrantless search, prior to defendant's arrest, and that hearsay evidence was admitted to establish probable cause for a search of the defendant. For these reasons, he says the district court should have suppressed the gun and box of shells from evidence.

The evidence of the State can be summarized as follows: M. J. Talbot, a state deputy sheriff was at his home in Rushville over the noon hour on February 17, 1968, when he received a telephone call from George Poshon, the county sheriff of Sheridan County, Nebraska, asking him to go to Whiteclay with him "on this concealed weapon."

Talbot and Poshon arrived in Whiteclay at about 1 p.m. As the two entered Stabler's Bar, the defendant left the bar. Inside the bar, the officers had a conversation with a Mr. Stabler, the proprietor of the bar. He advised the officers that the defendant was carrying a concealed weapon. Talbot had known Mr. Stabler for more than 15 years and had previously obtained reliable

information from him concerning criminal activities. Talbot did not know the defendant prior to this time.

At the time the officers left the Stabler Bar, the defendant was across the street talking to a party. The defendant then walked to the Norman Bar and entered it. The officers drove Poshon's automobile and parked across the street from the Norman Bar. The defendant came out of the Norman Bar and proceeded to walk north, toward the Stabler Bar. The officers observed the defendant pull up his right pant deg, put an object into his boot, and then pull his pant leg down over the boot. Talbot inferred the object placed in the right boot was metalic as the sun glistened on the object. Talbot was some 60 feet from defendant and had him under observation all the time. The defendant walked with a limp after placing the object in his boot but walked normal prior to that time. The officers drove up beside the defendant, stopped, advised him that they had information that he was carrying a concealed weapon, and asked him to place his hands on the police car. Talbot pulled up the defendant's right pant leg and removed a .22 caliber revolver. Talbot then advised the defendant that he was under arrest for carrying a concealed weapon.

Defendant urges two assignments of error: First, the court erred in overruling the defendant's motion to suppress the evidence taken from the person of the defendant; and second, the court erred in admitting hearsay evidence to establish probable cause for a search of the defendant prior to his arrest. A proper motion to suppress was made by the defendant, hearing had thereon by the court, and that motion was overruled. Subsequently on the trial of the case the exhibits were introduced in evidence.

According to the evidence adduced by the State on hearing of motion to suppress, the officers had been informed by a Mr. Stabler, who was known to be a reliable informant, of the concealed weapon carried by the defendant. This information was first by telephone and

then later given officers at Whiteclay by the informant. The defendant was identified to the officers. The officers observed the defendant go to the Norman Bar, and while in their automobile, observed defendant leave the Norman Bar and proceed up the street north. They observed defendant pull up his right pant leg and put an object into his right boot that they inferred was metallic as the sun glistened on the object. The officers drove up beside the defendant, stopped and advised him that they had information he was carrying a concealed weapon, and asked him to place his hands on the police car. Talbot pulled up defendant's right pant leg and removed a .22 caliber revolver. Defendant was then advised by Talbot he was under arrest for carrying a concealed weapon, which was identified at the hearing and later at the trial as exhibit 1. Exhibit 2 was a box of shells taken from defendant's left pants pocket after arrest and was introduced at the trial.

The officers had information from an informant, whom they considered reliable, of defendant's illegal activity and the arresting officer saw defendant put a metalic object in his boot that the sun glistened on. The circumstances were sufficient to convince a person of reasonable caution that an offense was being committed and to justify defendant's arrest. An arrest based upon probable cause derived from facts and circumstances within an officer's knowledge or of which he has reasonable trustworthy information sufficient to warrant a man of reasonable caution in believing an offense has been, or is, being committed, may be made without a warrant. See, State v. Perez, 182 Neb. 680, 157 N. W. 2d 162; State v. Cook, 182 Neb. 684, 157 N. W. 2d 151; State v. Watson, 182 Neb. 692, 157 N. W. 2d 156. A search and seizure incident to a lawful arrest is not violative of the Fourth Amendment. See, Agnello v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409; Reed v. United States, 364 F. 2d 630 (9th Cir.); United States v. Tucker, 380 F. 2d 206 (2d Cir.).

There was probable cause for the arrest in this case prior to the detention and the detention was legal under section 29-829, R. S. Supp., 1967. Therefore the information secured as the result of the legal detention further established probable cause for the arrest. Each case must be decided on its own facts and circumstances in order to determine the existence of probable cause. The evidence in this case overwhelmingly establishes probable cause for defendant's arrest. State v. Huffman, 181 Neb. 356, 148 N. W. 2d 321; State v Carpenter, 181 Neb. 639, 150 N. W. 2d 129.

The facts in the present case are stronger than those in State v. Carpenter, *supra*. In that case the court said as follows: "The existence of probable cause must be determined by a practical and not by any technical standard."

In the present case, the officers had the information from the informer and also their own observation of the defendant and, in the light of all this, had probable cause to think that the defendant was committing a crime, that of carrying a concealed weapon.

An arrest is a wholly different kind of intrusion upon an individual freedom from a limited search for weapons, and the interest each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution.

Informal detention is permissible in spite of a lack of probable cause for custody in the tradition of arrest. See, § 29-829, R. S. Supp., 1967; State v. Huffman, *supra*. The interference with defendant's freedom of movement was lawful, and the officers geared their actions to the state of their knowledge. The search was reasonable under the facts in the instant case and the officers had probable cause for an arrest which makes the case much stronger than State v. Huffman, *supra*.

The defendant further contends that the information provided to the law enforcement officers by Mr. Stabler was hearsay, and therefore could not be considered

in support of the search and subsequent arrest without a warrant. The statements were not hearsay from a judicial point of view. They were admitted to determine not the truth of the statements, but whether or not the statements were made. In the present situation, the statements from the informer do not constitute part of the proof of the defendant's guilt. This testimony of the officers involved is relevant to establish that the informer did in fact make the statements and, therefore, to establish that their actions based on the statements were reasonable. The general rule in this situation is stated in 22A C. J. S., Criminal Law, § 718, p. 998, as follows: "Generally, the hearsay rule excludes extrajudicial utterances when, and only when, offered as evidence of the truth of the matter asserted; it does not operate to exclude evidence of a statement, request or message offered for the mere purpose of proving the fact that the statmeent, request, or message was made or delivered, where such occurrence establishes a fact in issue or circumstantially bears on such a fact. In other words, if an utterance can be used as circumstantial evidence, the hearsay rule is not applicable, and testimony that certain information was given the witness may be admissible as original evidence although the information itself would be objectionable as hearsay."

In 29 Am. Jur. 2d, Evidence, § 497, p. 555, it is stated: "Where the mere fact that a statement was made or a conversation was had is independently relevant, regardless of its truth or falsity, such evidence is admissible as a verbal act."

In Draper v. United States, 358 U. S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327, the use of hearsay evidence in support of "warrantless arrests" is discussed as follows: "Information given by an informer to a government agent leading to arrest of defendant for violation of federal narcotics laws, even though hearsay, and even though not legally competent evidence in a criminal trial, could be considered in determining whether government agent had

probable cause, and reasonable grounds to arrest defendant without a warrant."

In cases involving the application for search warrants, hearsay has been held proper to form part of the basis for the issuance of such warrants. The court said in United States v. Ventresca, 380 U. S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684, as follows: "While a warrant may issue only upon a finding of 'probable cause,' this Court has long held that 'the term "probable cause" * * * means less than evidence which would justify condemnation,' Locke v. United States, 7 Cranch 339, 348, and that a finding of 'probable cause' may rest upon evidence which is not legally competent in a criminal trial. Draper v. United States, 358 U. S. 307, 311. As the Court stated in Brinegar v. United States, 338 U. S. 160, 173, 'There is a large difference between the two things to be proved [guilt and probable cause], as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them.' Thus hearsay may be the basis for issuance of the warrant 'so long as there [is] a substantial basis for crediting the hearsay.' Jones v. United States, supra, at 272. And, in Aguilar we recognized that 'an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant,' so long as the magistrate is 'informed of some of the underlying circumstances' supporting the affiant's conclusions and his belief that any informant involved 'whose identity need not be disclosed * * * was "credible" or his information "reliable."' Aguilar v. Texas, supra, at 114."

We conclude that the search without a warrant based on hearsay evidence and observations of the officers was legal as well as was the subsequent arrest. The revolver and box of shells were properly admitted in evidence.

The motion to suppress the evidence was properly overruled by the trial court.

For reasons stated, the judgment herein is affirmed.
AFFIRMED.

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HERSCHEL HAUSMAN, APPELLEE, V. JUDI SHIELDS, ALSO KNOWN AS JUDI SHIELDS HAUSMAN, APPELLANT.
165 N. W. 2d 581

Filed February 28, 1969. No. 37058.

1. **Habeas Corpus: Infants.** In Nebraska, habeas corpus may be maintained by a complete stranger to a child to test the question of custody between the stranger and the natural parent.
2. ———: ———. In a habeas corpus action, where the custody of minor children is involved, 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. **Infants: Parent and Child.** Ordinarily, custody of a child of tender years should be awarded to the mother, unless it is shown that she is unsuitable or unfit to have such custody, or through some peculiar circumstance is unable to furnish a good home.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed.

William L. Monahan and Dennis L. Kemp, for appellant.

Dale T. Kirby, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and WALTER H. SMITH, District Judge.

WHITE, C. J.

This is a habeas corpus action. The question involved is whether the mother of 4-year-old Terry Joe Hausman, born October 12, 1964, is entitled to his custody. The plaintiff, Herschel Hausman, was living with the defendant, Judi Shields, at the time Terry Joe was born, subsequently took custody of the child during the period of the defendant's commitment to the State

Reformatory for Women at York, Nebraska, then relinquished its custody to the defendant for 2 weeks after her release from commitment and parole, and now seeks to regain its custody. The district court awarded the custody of the child to the plaintiff. We affirm the judgment of the district court.

The defendant, Judi Shields, first contends that there is no jurisdiction of court to entertain the habeas corpus action on the behalf of the plaintiff herein. Her testimony is that she was not living with the relator at the time she became pregnant and that he is not the father of the child. Plaintiff himself does not assert that he is the father and is uncertain as to its paternity. We need inquire no further as to the jurisdictional question. There are some states that hold to the contrary, but in Nebraska habeas corpus may be maintained by a complete stranger to a child to test the question of custody between the stranger and the natural parent. Lakey v. Gudgel, 158 Neb. 116, 62 N. W. 2d 525; Barnes v. Morash, 156 Neb. 721, 57 N. W. 2d 783; Clarke v. Lyon, 82 Neb. 625, 118 N. W. 472, 20 L. R. A. N. S. 362; In re Application of Schwartzkopf, 149 Neb. 460, 31 N. W. 2d 294; In re Burdick, 91 Neb. 639, 136 N. W. 988, 40 L. R. A. N. S. 887.

In a similar case involving a habeas corpus action between complete strangers and the natural mother of a child of tender years, our court laid down the applicable rules to be applied to the determination of custody. In Lakey v. Gudgel, *supra*, this court said as follows: "The legal principles on which the determination of this case must depend have been well stated in the opinions of this court. In Norval v. Zinsmaster, 57 Neb. 158, 77 N. W. 2d 373, 73 Am. S. R. 500, it was said: 'The statute and the demands of nature commit the custody of young children to their parents rather than to strangers, and the court may not deprive the parent of such custody unless it be shown that such parent is unfit to perform the duties imposed by the

relation or has forfeited the right.' See, also, In re Application of Schwartzkopf, 149 Neb. 460, 31 N. W. 2d 294.

"In the supplemental opinion in Gorsuch v. Gorsuch, 143 Neb. 572, 11 N. W. 2d 456, which was an action to modify a portion of a decree relating to the custody of a child, it was said: "The proper rule * * *, 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. Where both parents are affirmatively found to be unfit, the custody of the child will be determined solely by the welfare and best interests of the child. * * * But this court has never deprived a parent of the custody of a child merely because, on financial or other grounds, a stranger might better provide.' See, also, Barnes v. Morash, *supra*.

"Custody of a child of tender years should be awarded to the mother, unless it is shown that she is unsuitable or unfit to have such custody, or through some peculiar circumstance is unable to furnish a good home. See, In re Application of Reed, 152 Neb. 819, 43 N. W. 2d 161; Bath v. Bath, 150 Neb. 591, 35 N. W. 2d 509; Hodges v. Hodges, 154 Neb. 178, 47 N. W. 2d 361; Barnes v. Morash, supra."

The plaintiff's evidence in this case is largely undisputed on the material facts. Herschel and Judi first met in 1960. Their relationship ripened into cohabitation. They were never married nor does it appear that they ever seriously contemplated marriage. They lived together at various times in South Dakota, in Bellevue, Nebraska, and finally in Council Bluffs, Iowa, at the time Terry Joe was born. From the time of the birth of the child until about December 1965, the evidence is very uncertain as to the relationship between the parties and the status of the child. It appears that sometime after the birth of the child, Judi left Herschel, took the child, and moved to Omaha, Nebraska. It also appears

that during this period of time of over 1 year she saw Herschel from time to time, and they would take the child to St. Helena, Nebraska, and leave it with Herschel's mother, Clara Hausman, who lived on a 214-acre farm with her husband, Herschel's father, and another single son. It appears that the child was with Mrs. Hausman and with the Hausman family all during the summer of 1965. We particularly note the lack of evidence on Judi's behalf as to exactly where the child was, how it was kept, and what its condition was during this period of time when she had left Herschel and moved to Omaha. Herschel testified that she was running around with other men, both during the period of time they were living in Council Bluffs and later, and this testimony is undisputed by Judi. In any event, in the fall of 1965, Judi became involved in serious trouble. Around Christmas 1965, Herschel received a call from Judi about the trouble she was in. His testimony in this respect is undenied in the record. It is as follows: "Q. Did she tell you what trouble she was in? A. Yes, then. Q. What did she tell you? A. That she had got in trouble with some niggers or colored people and they stole a bunch of money orders, government, something, signed a bunch of them, and they got in trouble. Q. And she needed a lawyer? A. Yes." Judi was convicted of uttering a forged instrument and was sentenced on January 13, 1966, for a period of 2 years in the York reformatory. She was in the York reformatory from January 13, 1966, until September 21, 1967. From September 21, 1967, until April 1, 1968, she was on parole and was released at that time. Herschel took the child to his family farm home near St. Helena, Nebraska, in late December 1965, or early January 1966. It was a 214-acre farm and he and his single brother are engaged in farming it, renting it from their mother, with whom they live in the family home. The evidence is undisputed that the child has the best of care; that Herschel's attitude toward, attention to, and

love for the child are the same as of a natural parent; that the child is healthy and well; and that it has developed an attachment for Herschel and his mother. There is a reasonable inference from the record that this child is being raised in a stable atmosphere of love and comfort which a normal child should and is entitled to have.

After release from parole, Judi contacted Herschel and his mother, and they relinquished the child under the impression or representation that Judi, being the mother, had an absolute legal right to possession and custody. Judi had the child for a period of 2 weeks until the present habeas corpus action was instituted. The record is undisputed that Herschel has returned to the farm at St. Helena, Nebraska, has stayed there continuously since then, has not left the farm, and has been engaged in the continuous farming operation with his mother and brother.

The evidence shows that Judi was charged in 1964 with contributing to the delinquency of a minor and served 5 days in jail. It also shows that she was charged with an insufficient fund check in 1965 and was sentenced to 15 days in jail. There is also evidence in the record that sometime after her release from parole in April 1968, after casually meeting a man in a restaurant where she was present with other people, she left the restaurant, got into his pick-up truck, accompanied him about one-half mile out on a farm road, had intercourse with him, and took some amount of money from his billfold at the time. The man involved in this incident testified directly as to the facts. This testimony and evidence is denied in toto by Judi. At the time of the trial, Judi had a job as a maid in a Lincoln motel and was living in an apartment with another woman. Before that, she lived in a trailerhouse in Springfield, Nebraska, and took care of the illegitimate child of her cotenant in the trailer who testified in her behalf. The evidence is that since her release from the reformatory

at York she has worked in the Whitehall School for Children as a cook; that she quit there because of unsatisfactory conditions in the home; that at the time of the trial she had worked 2 weeks at the Topper Motel at a salary of $70 per week; that prior to that she had worked at the Stockade Cafe in Millard, Nebraska, for a period of 6 weeks; and that prior to that she had worked as a cook at "Eddy's" restaurant in Springfield, Nebraska.

There is other evidence in the record which we do not deem necessary to detail herein. Under the circumstances presented we are loath to disturb the judgment of the trial court as to the custody of this child. There could be little question, under the evidence presented in this record, that the best interests of this child demand that it be kept in its present, stable environment of normal love and comfort which a child of such tender years deserves. The evidence amply warrants an inference that Judi, at least for the time being, has forfeited her right to the custody of this child, and is unfit under the present circumstances to render it the proper care and affection, either upon a comparative or a minimal basis. This is not a case of wrenching a child from a close and normal attachment to its natural mother which has developed over a long period of time and granting the custody to some stranger merely because he is able to give it better, more convenient, and more luxurious surroundings. We feel that considering the primary question before us, that is the best interests of the child, the mother here has failed to demonstrate, under all of the circumstances, the minimal fitness from the standpoint of the stability of a proper home for a child, from the standpoint of moral background, the capacity to adequately and physically take care of the child and give it the close attention and care that a child needs at Terry Joe's age. In reaching these conclusions we are aided by the rule, particularly applicable in a child custody case, that the

trial judge saw and heard the witnesses, observed their demeanor and conduct while testifying, and his conclusions under those circumstances will be given great weight by this court in making an independent determination of the facts as we are required to do.

In light of our conclusion it becomes unnecessary to decide other questions argued and presented in this case. The judgment of the district court is correct and is affirmed.

AFFIRMED.

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TRINIDAD MENDOZA, ADMINISTRATRIX OF THE ESTATE OF JESSE MENDOZA, DECEASED, APPELLANT, V. EDMUND J. AGUILERA, APPELLEE.
165 N. W. 2d 360

Filed February 28, 1969. No. 37063.

1. **Negligence.** A person of mature years and of ordinary intelligence is assumed to know the operation of familiar laws of gravitation.
2. ———. 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.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Alfred A. Fiedler and Stephen E. Sturek, Jr., for appellant.

John P. Mullen, Joseph R. Moore, and Gaines, Spittler, Neely, Otis & Moore, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and WALTER H. SMITH, District Judge.

MCCOWN, J.

Jesse Mendoza was struck on the leg by a falling

branch while assisting the defendant, Edmund Aguilera, in trimming trees in the yard of the Aguilera residence. Plaintiff administratrix brought this action for negligence. At the conclusion of the plaintiff's evidence, the defendant's motion to dismiss was sustained.

The defendant had requested Jesse Mendoza to help trim some trees in the yard of the defendant's residence. Mendoza was the husband of Trinidad Mendoza, who was the mother-in-law of the defendant. Jesse Mendoza was 64 years of age and had retired in July 1966, after 38 years of active employment. There is no evidence that he suffered from any physical or mental infirmities. The work of trimming three trees was done November 26, 1966. The defendant would climb a tree, tie a rope around the portion of the limb or branch to be trimmed, and drop or loop the rope over another branch referred to as the "leverage branch." He would then saw the branch or limb to be trimmed until it was about ready to come down. Mendoza, who remained on the ground, would then pull on the rope and the branch or limb would come down. By sometime in the afternoon, defendant and Mendoza were nearing the last of the work. The defendant tied the rope around the branch he was going to work on and put the "leverage" rope over a branch of another tree some 5 feet away, and commenced sawing. When he thought the branch was about ready to give, defendant told Mendoza the limb was ready to come down; that defendant was going to come down; and that Mendoza should wait for him. Defendant's legs were numb when he reached the ground and he was standing apparently rubbing his legs to get them back to normal. Mendoza pulled the rope, the branch fell and hit and broke the leverage branch. Mendoza lost his balance and fell down, and the branch which had been sawed hit him on the leg. The branch was about 5 feet long, and weighed approximately 100 pounds. On this occasion the leverage branch was a couple of feet lower than the branch being trimmed

while previously the leverage branches had been higher. The leverage branch in this instance turned out to be dead although that could not be told by looking at it prior to the accident. The leverage branch, however, did not break from the pull of the rope, but was knocked down by the other branch as it fell. There is no evidence of any defect of any kind in any of the equipment which the men were using. Mendoza had never trimmed trees before, and the defendant had done so a few times. On some occasions during the work, when the defendant chose a leverage branch, Mendoza would tell the defendant if Mendoza did not think it was right. Neither of the men could be said to be experienced tree trimmers.

Plaintiff's contention is that there was an issue for the jury as to the defendant's negligence and Mendoza's contributory negligence. The legal conclusion is that contributory negligence of Mendoza in comparison with the negligence of the defendant bars recovery. The existing conditions were equally obvious and apparent to both. The risk and possible sources of harm were also obvious. A person of mature years and of ordinary intelligence is assumed to know the operation of familiar laws of gravitation. Runge v. Travis, 178 Neb. 562, 134 N. W. 2d 291.

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. Fritchley v. Love-Courson Drilling Co., Inc., 177 Neb. 455, 129 N. W. 2d 515. See, also, Costello v. Simon, 180 Neb. 35, 141 N. W. 2d 412.

The judgment is affirmed.

AFFIRMED.

GENE B. JAMESON ET AL., APPELLANTS, V. FRED PLISCHKE ET AL., APPELLEES, COUNTY OF BUFFALO, INTERVENER-APPELLANT.
165 N. W. 2d 373

Filed February 28, 1969. No. 37074.

1. **Counties: Actions.** A county must be sued in the name designated by statute.
2. **Parties: Actions.** When a defect of misjoinder of parties appears on the face of the petition, it must be raised by special demurrer.

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

Oscar A. Drake and Andrew J. McMullen, for appellants.

Dier & Ross, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and WALTER H. SMITH, District Judge.

SPENCER, J.

This action seeks to cancel a deed from the county board of supervisors to Fred and Neta Plischke and to rescind the motion on which said deed is predicated.

The appellants herein are the successors in interest of Charles A. Jameson, and the area involved is the same area described in the opinions in Plischke v. Jameson, 180 Neb. 803, 146 N. W. 2d 223, and 182 Neb. 153, 153 N. W. 2d 359. For an understanding of this case reference is made to those opinions. For convenience hereafter we will refer to the appellants as Jameson and the appellees as Plischke.

By the previous opinions, which are now the law of this case, title was quieted in Jameson to all land south of the fence line not embraced in the public road or in the prescriptive road. It was also determined that because the county made no provision as to the disposition of the land covered by either road in the vacation reso-

lution, by virtue of section 39-1725, R. R. S. 1943, title remains in Buffalo County until a period of 10 years of nonuse has elapsed.

The motion in question was passed November 29, 1966, by the county board of supervisors of Buffalo County and was recorded in the miscellaneous records of the office of the register of deeds of said county on November 21, 1966. It reads: " 'Moved by Judy, seconded by Thornton that the surveyor be authorized to survey in the center of a vacated road located Section 27-10-17 between the NW¼ and SW¼ one-half mile long and the vacated road be granted to abutting owners of 33 feet on each side of ½ section line and the land be deeded to the property owners,' * * *."

On November 29, 1966, the county board of supervisors of Buffalo County executed a quitclaim deed conveying to Plischke the following property: " 'A strip of land 33 feet wide from the north to the south lying north of the half-section line described as follows: Beginning at the west section north and south line of Section 27 and at the half-section line between the NW¼ and the SW¼ of said section, thence along the half-section line for a distance of 1904.5 feet, thence north 33 feet, thence west parallel to the section line 1904.5 feet, thence south 33 feet to the point of beginning, all in Section 27, Township 10 North, Range 17, West of the 6th P.M., Buffalo County, Nebraska,' * * *."

The present action is brought on the theory that the action of the county ignores the judgments rendered in the previous litigation. The defendants are Fred Plischke and Neta Plischke, his wife, and the county board of supervisors of Buffalo County, Nebraska.

Before answer day a general demurrer was filed, purportedly on behalf of Buffalo County by Dier and Ross, attorneys, for the stated reason that the petition fails to allege a cause of action against the county. Subsequently the county, through its county attorney Andrew J. McMullen, filed an answer to the petition as an in-

tervener, praying for the same relief requested in the petition. Dier and Ross have been and still are the attorneys for Plischke. Andrew J. McMullen had been one of the attorneys for Jameson in the previous litigation. The record indicates that the following motion was passed by the Buffalo County board of supervisors on April 9, 1968: " 'It was moved, seconded and passed that Dier and Ross be appointed to defend Buffalo County in the Case Jamison (sic) vs Buffalo County.' "

We do not decide whether the conflict of interest question is such that neither Dier and Ross nor the county attorney should represent Buffalo County. Ignoring that issue, it is to be noted that the action runs against the board of supervisors and that the county was not made a party therein. Section 23-101, R. R. S. 1943, provides how the county may sue and be sued, and an action against the board of supervisors does not make the action one against the county within the ambit of that statute. A county must be sued in the name designated by statute. 20 C. J. S., Counties, § 327, p. 1288.

Subsequent to the filing of the answer by Buffalo County as an intervener, both the attorney for Jameson and the county attorney each filed motions to strike the demurrer filed by Dier and Ross for Buffalo County from the files, for the reason that Buffalo County was not a party defendant and had not been served with summons.

On June 28, 1968, the court determined that the motions to strike the demurrer should be overruled. The court further found that the board of supervisors of Buffalo County employed the firm of Dier and Ross to represent it, and its appearance was duly accepted for that purpose in this case. The county attorney then announced his withdrawal from any further participation in the case, and the court stated that Buffalo County having withdrawn from said case by the action of the county attorney, the answer of Buffalo County filed by

him was stricken. The court then considered the demurrer filed on behalf of Buffalo County by Dier and Ross, and sustained it on the grounds that the county board of supervisors of Buffalo County was an improper party defendant. Jameson refused to plead further and perfected an appeal to this court.

It is to be noted that the demurrer was a general demurrer and that a general demurrer does not raise defect of parties. When a defect of misjoinder of parties appears on the face of the petition, it must be raised by special demurrer. Johnson v. Platte Valley Public Power & Irr. Dist., 133 Neb. 97, 274 N. W. 386.

We have gone into detail to show the confused state of the record herein. The Jameson petition pleads conclusions and not the facts on which those conclusions are based, and is subject to demurrer. The board of supervisors was not a proper party and no cause of action was stated against it. The deed from Buffalo County is only a quitclaim deed, and the county is not a necessary party herein. The real issue herein is between Jameson and Plischke and involves the question as to whether the deed is a cloud on the Jameson title in the light of the previous litigation.

For the reasons stated, we affirm the judgment sustaining the demurrer.

AFFIRMED.

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PAUL BURKE, APPELLANT, V. GAIL SHAFFER, APPELLEE.
165 N. W. 2d 352

Filed February 28, 1969. No. 37079.

**Accord and Satisfaction: Claims.** A settlement between the parties involved in an accident without an express reservation of rights against the parties executing a release generally operates as an accord and satisfaction of all claims of the immediate parties to the settlement arising out of the accident.

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

Marks, Clare, Hopkins & Rauth and Charles I. Scudder, for appellant.

Harry E. Stevens, for appellee.

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

BOSLAUGH, J.

The plaintiff, Paul Burke, and the defendant, Gail Shaffer, were involved in an automobile accident near Fremont, Nebraska, on May 29, 1963. The plaintiff, who carried no automobile liability insurance at the time of the accident, consulted a lawyer and obtained a form of release to be signed by the defendant and the passengers in the defendant's automobile.

On July 5, 1963, the plaintiff reimbursed the defendant for the damage to the automobile operated by the defendant and paid the medical and hospital expenses of the defendant and his passengers. At the same time the defendant and the passengers executed and delivered a release to the plaintiff.

This action was commenced on May 29, 1967, to recover the damages sustained by the plaintiff in the accident of May 29, 1963. The defendant moved for summary judgment, alleging that the plaintiff had admitted liability for the accident; that the plaintiff was estopped from bringing the action; and that the settlement completed on July 5, 1963, was an accord and satisfaction of all claims arising out of the accident of May 29, 1963.

The trial court sustained the defendant's motion and dismissed the action. The plaintiff's motion for new trial was overruled and he has appealed.

The case turns on the effect of the transaction between the parties on July 5, 1963. The plaintiff was faced with the necessity of furnishing proof of financial responsibility. He chose to do so by obtaining a release from the

other parties to the accident. The release did not contain any reservation of rights against the defendant but did recite: "* * * this settlement is in compromise of a doubtful and disputed claim and that the payment is not to be construed as an admission of liability on the part of Paul Burke, by whom liability is expressly denied."

The general rule is that a settlement between the parties involved in an accident without an express reservation of rights against the parties executing a release operates as an accord and satisfaction of all claims of the immediate parties to the settlement arising out of the accident. Wm. H. Heinemann Creameries, Inc. v. Milwaukee Auto. Ins. Co., 270 Wis. 443, 71 N. W. 2d 395, rehearing denied, 270 Wis. 452a, 72 N. W. 2d 102. See, also, Mensing v. Sturgeon, 250 Iowa 918, 97 N. W. 2d 145; Kelleher v. Lozzi, 7 N. J. 17, 80 A. 2d 196; Eberting v. Skinner (Mo. App.), 364 S. W. 2d 829; Farmer v. Arnold (Mo.), 371 S. W. 2d 265; Lugena v. Hanna (Mo.), 420 S. W. 2d 335.

The theory of the rule is that it is logically and factually impossible to reconcile a valid claim by one party with a valid claim by the adverse party. The fact that the release contains a recital that the release is given pursuant to the settlement of a disputed claim and that the party obtaining the release denies liability does not prevent the release from operating to bar a later action by the party obtaining the release.

The plaintiff argues that the rule should not apply in this case because the plaintiff did not indicate his intention to hold the defendant liable when the settlement was made on July 5, 1963. It is the absence of a reservation of rights that now bars the plaintiff's action against the defendant.

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

AFFIRMED.

EDWARD PRIGGE, APPELLANT, V. LARRY C. JOHNS, DIRECTOR OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

165 N. W. 2d 559

Filed February 28, 1969. No. 37082.

1. **Affidavits: Venue.** Where the venue of an affidavit is laid in one county, and the acknowledgment taken by a notary public in a different county, it will be presumed that the acknowledgment was taken by the notary public in the county where he had authority to act.
2. **Administrative Law.** The findings of fact required by the Administrative Procedures Act consist of a concise statement of the conclusions upon each contested issue of fact.
3. ———. An order of the director of motor vehicles under the implied consent law, containing inadequate findings of fact and conclusions of law, is not void because of the failure of the director to make basic findings of fact in the order upon which the ultimate facts rest. Such an order is irregular only and will be set aside on appeal.

Appeal from the district court for Otoe County: WALTER H. SMITH, Judge. Reversed and remanded with directions.

William B. Brandt and Healey & Healey, for appellant.

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

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

CARTER, J.

This is a suit in which plaintiff asked the court to find that his operator's license permitting him to operate an automobile on the streets and highways of the state is valid and in force; that his privilege to so operate an automobile be reinstated; and that the order of the director of motor vehicles of the state terminating such privilege be held invalid. Subsequently a restraining order was issued against the director of motor vehicles to enjoin the enforcement of the order. After a hear-

ing, the trial court found against the plaintiff and entered judgment accordingly. The plaintiff has appealed.

On December 3, 1967, Patrolman Baumhover of the Nebraska Safety Patrol arrested the plaintiff 1½ miles west of Unadilla, Nebraska, for driving an automobile on the public highway while under the influence of intoxicating liquor. Plaintiff was taken to Nebraska City by Baumhover where they were joined by Patrolman LeGrande. Baumhover and LeGrande testified that plaintiff was under the influence of intoxicating liquor. Both of the two patrolmen testified that they demanded of the plaintiff that he take a urine or blood test in accordance with the Nebraska implied consent law. Plaintiff refused. The evidence sustains the foregoing facts.

Pursuant to section 39-727.08, R. R. S. 1943, Patrolman Baumhover made a sworn report to the director of motor vehicles stating that he had reason to believe that plaintiff was operating a motor vehicle on the public highways while under the influence of alcoholic liquor and stating the facts upon which such belief was based. The director of motor vehicles set the matter for hearing, gave notice to the plaintiff, and held a hearing. The director thereupon entered an order revoking the operator's license of plaintiff for 1 year from January 24, 1968. Plaintiff appealed to the district court from this order, and to this court from the adverse judgment of the district court.

Plaintiff contends that the sworn report of Patrolman Baumhover is fatally defective in that the venue of the report is shown as Otoe County rather than Lancaster County where it was actually sworn to. The jurat shows that the report was sworn to the 5th day of December 1967, before Myrna Cottom, notary public. It is conceded that Myrna Cottom is a resident of Lincoln and that the report was sworn to before her in Lincoln, Lancaster County, Nebraska. The sworn report shown in the record is a photostat of the original and does not show the impression of a notarial seal for that reason.

It is clear that the venue was inadvertently shown as Otoe instead of Lancaster County probably due to the fact that the arrest occurred in Otoe County. Where the venue of an affidavit is laid in one county, and the acknowledgment taken by a notary public in a different county, it will be presumed that the acknowledgment was taken by the notary in his own county. Goodnow v. Litchfield, 67 Iowa 691, 25 N. W. 882; Salzer Lumber Co. v. Claflin, 16 N. D. 601, 113 N. W. 1036. No prejudice is shown because of this inadvertent mistake and reversible error does not follow.

It is next contended that the order entered by the director of motor vehicles is void and of no force and effect for the reason that it contains no findings of fact as required by section 84-915, R. R. S. 1943, which provides: "Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or his attorney of record." The order of the director of motor vehicles provided: "Under authority of sections 39-727.03, through 39-727.12, RRS, Nebraska, 1943, the operator's license and the operating privileges of the above-named person are hereby revoked for a period of one year from the 24th day of January, 1968, for the reason that the above-mentioned person failed to show cause why such license should not be revoked as a result of the failure of such person to submit to a test as is provided in the above-mentioned sections."

The department of motor vehicles is an administrative agency and the orders of its director in revoking an

operator's license for driving on the public highways while under the influence of intoxicating liquor is within the purview of section 84-915, R. R. S. 1943. For the implied consent of a person to be effective, as provided in section 39-727.03, R. R. S. 1943, the person must have been arrested or taken into custody before the test may be demanded. Otte v. State, 172 Neb. 110, 108 N. W. 2d 737. By statute, the person so arrested or taken into custody may choose whether the test so required shall be a chemical test of his blood or urine. By statute, after granting the person an opportunity to be heard on such issue, if it is not shown to the director of motor vehicles that a refusal to submit to the tests was reasonable, the director shall summarily revoke the motor vehicle operator's license of such person for a period of 1 year from the date of the order. Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N. W. 2d 75, 88 A. L. R. 2d 1055.

In the instant case, the director failed to find that plaintiff was under arrest or in custody; that the arresting officer requested that one of the tests be taken; that plaintiff refused to take the test; and that the refusal of the plaintiff to take the test was not reasonable under the circumstances. The order of the director is not in compliance with the provisions of the statute requiring that, "The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact." The statement in the order of revocation of the license, "* * * for the reason that the above-mentioned person failed to show cause why such license should not be revoked as a result of the failure of such person to submit to a test * * *," does not meet the requirements of section 84-915, R. R. S. 1943. The findings of fact must be such as will show the validity of the order made.

In some cases a finding in the words of the statute is sufficient, a matter dependent upon the specifications contained in the statute. Young v. Morgan Drive Away,

Inc., 171 Neb. 784, 107 N. W. 2d 752; Basin Truck Co. v. All Class I Rail Carriers, 172 Neb. 28, 108 N. W. 2d 388. But the language of the statute here does not lay down the controlling elements so as to permit a holding that the language of the statute constitutes sufficient findings of fact. See, Skeedee Independent Tel. Co. v. Farm Bureau, 166 Neb. 49, 87 N. W. 2d 715; Oakdale Tel. Co. v. Wilgocki, 171 Neb. 425, 106 N. W. 2d 486; In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418. An order of the director unsupported by adequate findings of fact is not void. In Ferguson Trucking Co., Inc. v. Rogers Truck Line, 164 Neb. 85, 81 N. W. 2d 915, we said: "An order of the Nebraska State Railway Commission, making ultimate findings of fact in the language of the statutes, is not void because of the failure of the commission to make basic findings of fact in the order upon which the ultimate facts rest."

We necessarily conclude that the order of the director in the present case is irregular for failure to make findings of fact and conclusions of law as required by section 84-915, R. R. S. 1943, and must therefore be set aside on appeal. The judgment of the district court is reversed and the cause remanded with directions to the district court to remand the case to the director of motor vehicles to make findings of fact and conclusions of law supporting the order which he may issue.

REVERSED AND REMANDED WITH DIRECTIONS.

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STATE OF NEBRASKA, APPELLEE, V. PAUL WAYNE GERO, APPELLANT.

165 N. W. 2d 371

Filed February 28, 1969. No. 37086.

1. **Criminal Law: Witnesses: Evidence.** In a prosecution for rape, if the prosecutrix testifies to the facts constituting the crime and the accused unequivocally denies the commission of the offense, the testimony of the prosecutrix must be corroborated

on material points by other evidence to sustain a conviction of the accused.

2. ———: ———: ———. It is not essential that the prosecutrix be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.

3. ———: ———: ———. The fact that the evidence does not show that prosecutrix made complaint to others within a reasonable time under the circumstances does not affect the validity of the conviction where ample corroborating evidence is otherwise shown by the record.

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

Kelly & Kelly, for appellant.

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

Heard before CARTER, SPENCER, BOSLAUGH, SMITH, and NEWTON, JJ., and HASTINGS, District Judge.

CARTER, J.

This is a prosecution in the district court for Hall County for forcible rape against the defendant, Paul Wayne Gero. The jury returned a verdict of guilty and defendant was sentenced to serve a term of 20 years in the Nebraska Penal and Correctional Complex. The defendant has appealed to this court.

On the evening of April 17 and the early morning of April 18, 1968, Hazel McAlvey, her daughter, and 1-year-old granddaughter were residing in a trailer house in the rear of another daughter's home in Wood River, Nebraska. During this period, the daughter residing with the prosecutrix was working and the prosecutrix and her little granddaughter were alone in the trailer house. In the early morning hours a man entered the trailer house, struck the prosecutrix several times, and forced her to engage in sexual relations. About 7 a.m.,

prosecutrix escaped from the trailer house and hurried to the house on the premises, taking the little granddaughter with her. She entered the house at the instance of the teenage grandchildren who were its sole occupants at the time. The eldest of these children, Darryl Fisher, age 17 years, testified that the prosecutrix had physical injuries to her head and arm and was covered with blood. Prosecutrix was taken to a hospital in Grand Island the same day in which she remained until May 1, 1968. That she suffered serious physical injuries is established by witnesses and pictures taken of her in the hospital.

Prosecutrix testified that during the early morning hours, she heard a noise and snapped on her reading lamp. She says she was immediately struck at least four times, was immediately pinned down by the intruder, and was sexually assaulted several times during the balance of the night. About 7 a.m., the man went to sleep and she was able to escape with the baby girl as we have heretofore recited.

The town marshal arrived on the scene shortly after 7 a.m., went into the trailer house, and saw a man lying on the bed in the nude. He left the trailer house to seek assistance and on his return was looking over the rear of the trailer when the man, fully dressed, came out of the trailer and made a break for his pickup truck parked in the street. The marshal fired a shot in the air, called on the man to stop, and, on his failure to do so, shot at the tires on the pickup, hitting a tire. The man kept going. The marshal got into a passerby's car and gave chase. The tire on the truck went down and the man kept going until the tire and rim collapsed. After some 33 miles of chase, the man drove into a dead end road and he was apprehended. He was the defendant.

Defendant testified that he was working for a contractor in Central City. After work on April 17, 1968, he went to his motel and changed his clothes. He patronized a couple of bars in Central City before and

after the evening meal. He then went to Grand Island where he engaged in drinking until the bars closed. He started for Central City in his pickup. He had difficulty in driving because of his intoxicated condition. He said he picked up a hitchhiker who took over the driving while he slept. He remembered being helped into some living quarters. No light was turned on and he immediately sat down and went to sleep. When he awoke the next morning, he was lying on the bed in the nude. The bed was soaked with blood and he had blood on his own arms. He said he was too drunk to know what happened and that he did not know where he was when he awoke. His testimony concerning his escape from the trailer corresponds to the testimony of the marshal. He said he ran to his pickup and tried to get away because he was being shot at by a man in plain clothes whose intentions he did not know. He admitted he had previously been convicted of a felony.

The jury heard the evidence and did not believe the story told by the defendant. On appeal he contends that the verdict and judgment are not supported by the evidence for the reason that the testimony of the prosecutrix is not corroborated. No other issue is presented by this appeal.

"In a prosecution for rape, if the prosecutrix testifies to the facts constituting the crime and the accused unequivocally denies the commission of the offense, the testimony of the prosecutrix must be corroborated on material points by other evidence to justify or sustain a conviction of the accused." Peery v. State, 163 Neb. 628, 80 N. W. 2d 699. "It is not essential that the prosecutrix be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." Texter v. State, 170 Neb. 426, 102 N. W. 2d 655.

We think the testimony of the prosecutrix was amply corroborated to sustain a conviction. The evidence is clear that prosecutrix suffered serious injuries to her head and hand as the result of the attack. The defendant was found by the town marshal in the trailer house in the nude on a bed covered with blood. The defendant fled from the scene of the crime and, although he claims he ran because he was shot at, it is clear that he ran and was then shot at in an attempt to halt his flight. The foregoing evidence corroborates the testimony of the presecutrix that she was attacked and forcibly raped. State v. Hunt, 178 Neb. 783, 135 N. W. 2d 475; Miller v. State, 169 Neb. 737, 100 N. W. 2d 876.

In a prosecution for rape, testimony that prosecutrix made complaint to others within a reasonable time under all the circumstances is admissible, although the details of such complaint may not be given. But this is but one of many ways to establish corroboration. The fact that no complaints by the prosecutrix were established by the evidence does not affect the validity of the conviction where other corroborating evidence is shown by the record.

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

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. THEOPHILIS LEWIS, ALSO KNOWN AS THEOPHILIS X, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. CLARENCE JACKSON, ALSO KNOWN AS CLARENCE 3X, APPELLANT.
165 N. W. 2d 569

Filed March 7, 1969. No. 36888.

1. **Criminal Law: Trial.** The credibility of the witnesses and the weight of the evidence in a criminal case are for the jury and a verdict will not be set aside if the evidence sustains some rational theory of guilt.

2. **Appeal and Error: Trial.** If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issue from consideration of the jury, error cannot be predicated on failure to charge on some particular phase of the case, unless proper instruction has been requested by the party complaining.
3. **Criminal Law: Evidence.** Evidence which does not tend to impeach any witness on a material point and which is not substantive proof of any fact relevant to the issues is properly excluded in the trial of a criminal case.
4. **Criminal Law: Statutes.** In a penal statute it is not necessary that it be so written as to be beyond the mere possibility of more than one construction.
5. ———: ———. Although a penal statute is required to be strictly construed, it should be given a sensible construction and general terms therein should be so limited in their construction and application so as not to lead to injustice, oppression, or an absurd consequence.
6. ———: ———. It is the duty of this court to give a penal statute an interpretation which meets constitutional requirements if it can reasonably be done.
7. **Words and Phrases: Statutes.** Ordinarily, words of common usage need not be defined in the statute or in an instruction of the court.

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

Edward Jacko, Ray C. Williams, and Eugene D. O'Sullivan, Jr., for appellants.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN and NEWTON, JJ., and MORAN, District Judge.

WHITE, C. J.

In a consolidated jury trial, the defendants Lewis and Jackson were convicted of forcibly assaulting or resisting a law enforcement officer while engaged in the performance of his official duty and while in the commission of said act of using a deadly or dangerous weapon. §§ 28-729, R. R. S. 1943, and 28-729.01, R. S. Supp., 1967.

The defendant Lewis was also convicted of assault with intent to inflict great bodily injury upon a police officer, Robert Mahoney. Jackson was sentenced by the court to a period of 2 years in the Nebraska Penal and Correctional Complex and Lewis was sentenced to concurrent terms of 5 years on the two counts of the information described above. From the judgments of conviction and the resulting sentences, both defendants appeal. We affirm the judgments and sentences of the district court.

The pertinent sections of the statute, under which the defendants were prosecuted, are as follows. Section 28-413, R. R. S. 1943: "Whoever assaults another with intent to inflict a great bodily injury shall be punished upon conviction thereof * * *." Section 28-729.01, R. S. Supp., 1967, provides as follows: "Whoever forcibly assaults or resists any law inforcement officer while engaged in or on account of the performance of his official duties shall be guilty of a felony and shall, upon conviction thereof, * * *. Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be guilty of a felony and shall, upon conviction thereof, be punished * * * by a fine * * * or by imprisonment * * *." The defendants complain of the insufficiency of the evidence. There is ample evidence in the record to sustain the following facts and reasonable inferences therefrom: Lewis, free on bond, appeared in the company of Jackson for a preliminary hearing in municipal court of Omaha, Nebraska. Prior to the hearing an Omaha police officer, Lieutenant Robert Mahoney, had served a warrant on Lewis. He then accompanied Lewis, who was in the company of Jackson and one Zachary, into the courtroom where the preliminary hearing took place. At the end of the preliminary hearing the municipal judge bound Lewis over to district court, and upon surrender by the bondsman, directed the police officer to remand Lewis to the county jail. A mittimus was secured. The order to remand Lewis to the county jail was issued directly by the judge in the courtroom.

Mahoney, pursuant to this order, instructed police Sergeant Barrett to call for uniformed police officers to do the actual transporting of Lewis to the county jail. He ordered them to handcuff Lewis. When the uniformed police officers arrived and moved forward to execute the order Lewis insisted that he was not going to jail or to be placed in handcuffs. He bolted forward, thrashing his arms about, bounced off the wall, and attacked Mahoney directly. Mahoney was dressed in a civilian suit but was armed with a .38 caliber snub-nosed pistol which he carried in a holster on his left side under his coat. In the assault on Mahoney, the officer testified that he felt Lewis' hand down around his waist and he immediately placed his own hand on the butt of his gun; that Lewis put his hand on top of the officer's hand and the gun came out of the holster; that thereafter a struggle for possession of the gun continued; that the gun at various times pointed upward, downward, and at times in the general direction of the officer's chest and his head; that the officer had his thumb on the hammer of the pistol and his finger on the trigger; and that Lewis' finger was inside the trigger guard and over the top of his own finger. The evidence shows that a general melee ensued with Zachary striking Mahoney on the back of the shoulders and with Jackson swinging and striking at the other officers who were coming to Mahoney's assistance. Mahoney testified that he was unable to control the gun and he allowed his thumb to come off the hammer which permitted the gun to fire. The gun discharged into Lewis' left leg. Lewis and Mahoney both fell to the floor wresting for control of the gun and that at one point Lewis was on top of Mahoney and that while Mahoney was on his back the gun fired once more; that at this time the gun was pointed toward the shoulders and chest of Lewis when it discharged; and that the struggle continued for a considerable period of time, proceeded from the courtroom, through the door, and out into the corridor or hall. The

evidence shows that after the second shot struck Lewis that Lewis' hand came free from the gun thus allowing Mahoney to break loose; and that he got to his feet and assisted another officer by the name of Mead in putting handcuffs on Lewis. Mahoney, Lewis, Jackson, Zachary, and several police officers were involved in the continuous fray in the courtroom and out in the hall which lasted for several minutes. There is voluminous testimony corroborating and filling in the details of the previous skelton outline of the essential testimony. It is unnecessary to burden this opinion with a recital of it. Suffice it to say that the evidence was ample to sustain the finding that Mahoney was in the process of executing a lawful order to take Lewis into custody; and that Lewis initiated an attack against Mahoney stating, in effect, that his purpose was to resist the arrest and the handcuffing. The use of force in accomplishing this objective is obvious from the above recital. The evidence is conclusive that Lewis knew Mahoney was a police officer, and the inferences are at least reasonable that at the beginning of his attack upon Mahoney he was attempting to control and intended to use the .38 caliber snub-nosed pistol being carried on Mahoney's left hip. Indeed, it may be readily observed, considering the number of officers and people involved, it was indeed fortunate that this unprovoked and highly aggravated assault with the attempt to gain control of the officer's gun did not result in death or serious injury to the participants.

The evidence with reference to Jackson may be succinctly summarized by the direct testimony of Timothy Mead, an Omaha police officer. This witness testified that he was on duty on April 3, 1967; that he was directed along with officer Raisanen to go to courtroom No. 4 on the third floor of the interim city hall; that they both went to the courtroom at about 2:50 p.m.; that there they were ordered by Mahoney to take Lewis to the county jail; that when they approached Lewis and attempted to handcuff him, Lewis backed up; that when

Mahoney and Raisanen touched Lewis, he kicked out and knocked him (Mead) to the floor; that when he got back up the other parties were scuffling in the hallway and finally out into the main corridor outside of the courtroom; that when he took a few steps out of the courtroom he heard a shot, felt pain in his right ankle, and again fell to the floor; that he saw Lewis and Mahoney scuffling for control of Mahoney's gun; that he got to his feet, drew his revolver, waited until he had a clear shot at Lewis; that when he did fire at him, he missed; that then things seemed to calm down and he stood with his gun covering Lewis who was being handcuffed; that when he lowered his gun to his side, Jackson bent his arm back and grabbed the gun from his hand; that someone immediately grabbed Jackson and Mead grabbed his gun back again; and that he was taken to the county hospital, treated there for the gunshot wound, and released about 2 hours later. There is ample testimony from many other witnesses directly corroborating the above testimony and elaborating it into a detailed picture that interrelates persuasively and is amply sufficient to speak the truth beyond a reasonable doubt. The elements necessary to establish the commission of this offense are simply described in the statute and easily understood by the average person. The defendants were attempting to and offered to use the weapon. Although not articulated as such it seems the defendants' theory is that the frustration by the police officers of their attempt to get final and complete control and the use of the gun should now be considered as a defense. Exclusive control of a weapon and either the firing or the threat are not elements required under the terms of the statute. To place such a construction on the statute would be irrational and emasculate its obvious purpose.

The defendants' evidence, of course, conflicts with the testimony of the State. As we have said many times, the credibility of the witnesses and the weight of the evidence in a criminal case are for the jury and a verdict

will not be set aside if the evidence sustains some rational theory of guilt. State v. Reeder, 183 Neb. 425, 160 N. W. 2d 753; Sedlacek v. State, 166 Neb. 736, 90 N. W. 2d 340; Williams v. State, 115 Neb. 277, 212 N. W. 606.

The defendants challenge instruction No. 7 given by the trial court. Instruction No. 7 is a recital of the pertinent portions of the applicable statutes given in the same words as recited previously at the bginning of this opinion. They complain that this instruction introduces an element of speculation in the case by misleading the jury into a possible conclusion that it was not necessary to find that a deadly weapon was used by the defendants against the officers involved. The language of the statute quoted on its face refutes this argument, but in any event, instructions must be considered together and instructions No. 9 and No. 10 included the following element the court required the State to prove beyond a reasonable doubt: "5. That at the time the defendant did so, he intended to forcibly assault or resist said Robert Mahoney, and while in the commission of said act *did use a deadly or dangerous weapon;* * * *." (Emphasis supplied.) It is difficult to understand how the court could have more clearly or more accurately stated the requirement of the statute as to this element. There is no merit to this contention.

Jackson complains that he was entitled to a self-defense instruction because he was defending himself from an attack by Barrett during the course of the involved and extended melee heretofore described. Jackson requested no instruction on this and the evidence in this respect is as follows: "Q. When you got down near the elevators did you still have your service revolver? A. Yes, I did. Q. In your hand? A. Yes, it was. Q. What happened then? A. I was standing over where Theopholis X and Lieutenant Mahoney were. They seemed to be calmed down and just about under control, and I stood covering Theopholis X, and I had seen that the handcuffs were almost on Theopholis X

when I lowered my gun to my side, and then at this time another party came up behind me and bent my arm back and took my gun. Q. What happened then? A. Someone grabbed this party from behind almost as soon as this party had taken the gun, and I grabbed the gun back again. Q. Do you have any idea who the party was that grabbed your gun? A. Yes. Q. Who was that? A. Clarence 3-X." There is insufficient evidence to sustain the giving of any such instruction and moreover, the court fully and clearly instructed as to all of the essential elements necessary to be proved by the State. We have often held that if the court has instructed the jury generally on the law of the case and has not withdrawn any essential issue from consideration of the jury, error cannot be predicated on failure to charge on some particular phase of the case, unless proper instruction has been requested by the party complaining. See, State v. Brown, 179 Neb. 386, 138 N. W. 2d 465; Kucera v. State, 170 Neb. 368, 102 N. W. 2d 635.

The defendants next contend that the trial court, by its rulings on certain offers of testimony, prevented them from developing their theory of the case. We summarize these contentions. First, they contend they attempted to offer evidence inquiring into the duty of police officers to transport prisoners to the Douglas County jail. This is clearly immaterial and serves no purpose in proof of the issues in this case. It is undisputed and there is no question that the municipal court judge gave a direct order to Mahoney in the courtroom to remand Lewis to the county jail. Second, they attempted strenuously to go into the particulars of the crime Lewis was charged with that gave rise to the preliminary hearing at which the incidents giving rise to this case occurred. The circumstances of the charge and of the crime accused of at the preliminary hearing are entirely immaterial and have no bearing on the commission of the offense charged in this case and were properly excluded by the trial court. Third, Lewis

suggests that there was a denial of his rights and that he was not represented by counsel at the preliminary hearing which was the occasion of the incident leading to the charges involved in this case. Again that issue is entirely immaterial to the issues present in this case. It could not be disputed that Lewis was lawfully detained and the order committing him to county jail was a legal one. We know of no rule which would permit defendants to contend that they were entitled to counsel during the time they were engaged in the commission of the offenses alleged in this case. The evidence which does not tend to impeach any witness on a material point and which is not substantive proof of any fact relevant to the issues is properly excluded in the trial of a criminal case. State v. Wilson, 174 Neb. 86, 115 N. W. 2d 794.

Last, defendants contend that section 28-729.01, R. S. Supp., 1967, is unconstitutional under the "void for vagueness" doctrine. It is contended, in effect, that the use of the terms "forcibly resist," "use," "deadly," "dangerous," and "weapon" are not specifically defined. They contend that the meaning of these words is left to the speculative discretion of the jury and furnish no ascertainable standard for the determination of guilt or innocence. The defendants' arguments in this respect are ingenious but untenable. They consist of possible constructions of the word "use," of constructions out of the context of the language of the statute, and of hypothetical situations where perhaps the meaning of these words might be in doubt. We have said many times that in a penal statute it is not necessary that it be so written as to be beyond the mere possibility of more than one construction. State v. Simants, 182 Neb. 491, 155 N. W. 2d 788; State v. Levell, 181 Neb. 401, 149 N. W. 2d 46. A statute should be construed in the context of the object sought to be accomplished, the evils and mischiefs that are sought to be remedied, and the purpose for which it serves. Although a penal statute is required to be strictly construed, it should be given a sensible

construction and general terms therein should be so limited in their construction and application so as not to lead to injustice, oppression, or an absurd consequence. State v. Simants, *supra;* Macomber v. State, 137 Neb. 882, 291 N. W. 674; State v. Tatreau, 176 Neb. 381, 126 N. W. 2d 157. It is the duty of this court to give a penal statute an interpretation which meets constitutional requirements if it can reasonably be done. State v. Simants, *supra.* It is apparent that the words attacked in the context of this statute are words of common usage, and commonly used in penal or criminal statutes. It might be said that they are words in common context that descend to the level of an irreducible minimum of definition. Ordinarily such words of common usage need not be defined in the statute or in an instruction of the court. State v. Holland, 183 Neb. 485, 161 N. W. 2d 862. We see nothing in the use of the word "forcibly" either in context or as a word that needs further definition. And, we see no need for a further definition of the term "forcibly resist." If the element of force is included by implication in the word "resist" then we see nothing unconstitutionally vague or void by any redundancy involved in the use of the word "forcibly." The application of these terms to the specific facts involved in this case leaves no doubt that they furnish a clear example of what the average person would understand as being "forcible resistance." We do not have a case here of a borderline doubt in which distinctions must be drawn as to the meaning of these terms. But, even if that were so, the proper attack would be a restriction on the construction of the terms to the specific case and not on the unconstitutionality of the act on its face for being void or vague. We come to the conclusion that there is no merit to these contentions as to the unconstitutionality of this statute.

There are other errors assigned but not argued and various contentions made in the brief unsupported by

any assignment of error or propositions of law. There is no merit to any of these.

The judgments and sentences of the district court are correct and are affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. SETH E. BLACKWELL, SR., APPELLANT.
165 N. W. 2d 730

Filed March 7, 1969. No. 36936.

1. **Criminal Law: Constitutional Law: Evidence.** Photographs taken of a defendant without his permission or consent do not infringe the constitutional prohibition of Article I, section 12, of the Constitution of Nebraska, against compelling defendant to give evidence against himself.
2. **Criminal Law: Evidence.** A photograph proved to be a true representation of the person, place, or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for a witness to give a verbal description.
3. **Homicide: Evidence.** In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence to show the nature or extent of wounds or injuries thereon.
4. **Criminal Law: Evidence.** The fact that a photograph might present a gruesome spectacle does not prohibit its admission in evidence.
5. **Homicide: Malice.** Malice and a purpose to kill are essential elements of murder in the second degree. The burden is upon the State to prove both of the elements beyond a reasonable doubt.
6. ———: ———. The continuity and violence of the stabbing, although gruesome, may be shown as relevant to prove the elements of malice and a purpose to kill in a prosecution for second degree murder.

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

Norman Langemach and Farley Young, for appellant.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and KOKJER and ACH, District Judges.

WHITE, C. J.

The defendant, Seth E. Blackwell, Sr., was sentenced to life imprisonment for second degree murder for killing another person by stabbing. The defendant appeals, attacking the admission of certain exhibits and testimony in evidence, the striking of certain testimony of the defendant, the failure to grant a mistrial because of emotional outbursts of the defendant, and the length of the sentence imposed. We affirm the judgment and the sentence of the district court.

Defendant first complains of the admission in evidence of three photographs of defendant taken at the police station shortly after the crime showing the defendant disrobed from the waist up. Such photographs taken of the defendant without his permission or consent do not infringe the constitutional prohibition of Article I, section 12, of the Constitution of Nebraska, against compelling defendant to give evidence against himself. State v. Oleson, 180 Neb. 546, 143 N. W. 2d 917. The exhibits being otherwise relevant as to the ability of the defendant to commit the crime and the absence of marks or scratches which would negate a prior assault on the part of the deceased, the admission in evidence did not constitute error.

Complaint is made of the admission in evidence of seven photographs which show the porch upon which deceased was found by police officers following the stabbing. Defendant alleges that these exhibits had no evidentiary value except to inflame the minds of the jurors by showing a "bloody mess." It must be conceded that these show a "bloody mess," but that is what the witnesses saw; and it might be added that such a scene is not an unusual occurrence when a victim is slashed in the throat and stomach causing said victim's death. "A photograph proved to be a true representa-

tion of the person, place, or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for a witness to give a verbal description." Davis v. State, 171 Neb. 333, 106 N. W. 2d 490. We have examined the exhibits challenged and find there was no error in their admission. No showing is made that the number of these exhibits was so excessive so as to prejudice the defendant. The admission of cumulative evidence of this nature rests within the sound discretion of the court and there was no abuse of discretion in this respect. We also note that in a criminal case, often the failure to introduce all of the exhibits of this nature lays open the prosecution to the attack that evidence is being withheld or secreted.

Complaint is also made of the admission in evidence of two additional photographs showing deceased on a stretcher, and the wounds which the pathologist testified to as being the cause of death are clearly visible. The pictures are gruesome, there is a stab wound in the throat and the slash in the stomach from which a portion of the small intestine is protruding. These photographs were admissible. Photographs of the victim, upon proper foundation, may be received in evidence to show the nature or extent of wounds or injuries thereon. Vaca v. State, 150 Neb. 516, 34 N. W. 2d 873; Reizenstein v. State, 165 Neb. 865, 87 N. W. 2d 560. The fact that a photograph might present a gruesome spectacle does not prohibit its admission in evidence. MacAvoy v. State, 144 Neb. 827, 15 N. W. 2d 45.

In a homicide case the admission in evidence of photographs of this type is particularly relevant because the prosecution must establish beyond a reasonable doubt the elements of malice and purpose to kill in murder of the second degree. The continuity and violence of the stabbing, although gruesome, may be shown as relevant to prove these essential elements. In State v. Walle, 182 Neb. 642, 156 N. W. 2d 810, a case involving five photographs taken at the scene of the crime and in

the morgue, this court said: "Malice and a purpose to kill are essential elements of murder in the second degree. * * * The burden was upon the State to prove both of the elements beyond a reasonable doubt. * * *

"The evidence shows * * * (type) wounds. The hotel photographs served to illustrate testimony concerning the scene of the crime. The pathologist used the morgue photographs to illustrate his testimony, and this enabled the jury to visualize the wounds. The photographs were relevant and material to the issues concerning the cause and manner of death of the victim and were properly admitted."

Defendant also assigns as error that the trial court erred "in not properly considering the report of the psychologists and psychiatrists."

Prior to the defendant's trial, a psychiatric report requested by the defendant found that the defendant was mentally competent and able to make a plea to the court.

Following the trial, defense attorneys requested and received permission for psychiatric and psychological examination of the defendant "to determine whether the defendant was capable of going to trial, because of his apparent mental distress during the trial."

The psychiatrist reported: "It was my impression that the outburst which occurred in the courtroom was due to his impulsiveness and explosive qualities. I do not feel that this was a psychotic episode.

"It is my psychiatric opinion that Mr. Blackwell is aware of his surroundings, that he is able to comprehend things happening around him. It is also my opinion that Mr. Blackwell has known and does know the nature and quality of his actions and that he does know and has known right from wrong."

The psychological report concluded: "In summary, Mr. Blackwell is a cautious and guarded individual of essentially average intelligence who is not overly psychotic at this time. It is speculated that his personality constriction, slowness and difficulty in effectively mo-

bilizing his energy and resources, and at least some of his guardedness and caution, are the result of his efforts to prevent disturbing underlying, unconscious material, likely psychotic in nature, from entering his conscious awareness. Under severe stress Mr. Blackwell may develop transient psychotic episodes."

The record shows a careful and conscientious protection of the defendant's rights with reference to his contention of mental disturbance during the trial. We do not hold that in every case where a defendant creates a disturbance during the trial that it is required that the court conduct or that the court permit or require such a psychiatric or psychological examination. We only hold that the evidence here gathered from the psychiatric and psychological examinations amply sustains the trial court's findings in this respect. No abuse of discretion appears.

In an assignment of error that overlaps the contention just discussed, the defendant alleges reversible error by the trial court in not directing a mistrial because of prejudice to the jury resulting from the defendant's outbursts in the presence of the jury during the trial. The record shows that defendant, during the cross-examination by defense counsel of the first police officer to arrive at the scene of the crime, suddenly stood up and stated in a loud voice that he was not going through any more of this trial and continued to mumble some words that were not completely intelligible. Then during the direct examination of a defense witness, defendant stood and said in a loud voice: "They are trying to send me to the penitentiary; my wife won't have anybody to support her; she will be on the street being raped by every man on the street; there isn't anything I can do, because if I try to escape they will shoot and kill me; my case is getting all screwed up."

After each outburst, the defendant was escorted from the courtroom by deputy sheriffs, the second time in handcuffs. The record further shows that defendant was

not seated at the counsel table, but was seated against the wall near the counsel table between two deputy sheriffs. This arrangement was at the specific request of defense counsel to "better aid in his defense."

The record shows that the outbursts of defendant were completely his own doing. The record also shows that the conduct of the trial was exemplary, not only on the part of defense counsel, but on the part of the prosecution, the trial judge, the jury, and the audience as well. Defendant's conduct affords no basis for a new trial. The ruling of the trial judge was correct. See State v. Polakoff, 361 Mo. 929, 237 S. W. 2d 173. See, also, People v. DeSimone, 9 Ill. 2d 522, 138 N. E. 2d 556.

Defendant also complains that the sentence imposed was excessive. A sentence within the limits prescribed by statute will not be disturbed on appeal in the absence of abuse of discretion by the trial court. The record in this case demonstrates the commission of a serious and violent crime. The trial court was aided by its observation of the conduct and demeanor of the defendant during the trial. We assume that he was aided also by a comprehensive presentence investigation that is provided by law in cases of this type. The disposition or tendency to commit sudden violent crimes of this nature is a major consideration for a court to evaluate because the very purpose of the criminal law is to protect society. We can find no abuse of discretion to have occurred in the imposing of this sentence, therefore, it may not be disturbed. State v. Stock, *ante* p. 29, 165 N. W. 2d 111; Young v. State, 155 Neb. 261, 51 N. W. 2d 326; State v. Ohler, 177 Neb. 418, 129 N. W. 2d 116.

An examination of the record and the assignments of error reveal no prejudicial error. The judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

DORIS E. NEWKIRK, APPELLANT, V. CHRIS S. KOVANDA ET AL., APPELLEES.

165 N. W. 2d 576

Filed March 7, 1969. No. 36942.

1. **Automobiles: Negligence.** Ordinarily, a driver of an automobile is legally 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 a stationary object openly visible and known to him to be in his line of travel.
2. ———: ———. Where the presence of frost, ice, snow, mist, fog, or smoke are known, or should have been reasonably anticipated, they are mere conditions and not intervening or proximate causes in a legal sense.
3. **Trial: Pleadings.** The charge of a trial court to the jury should be confined to the issues presented by the pleadings and supported by the evidence.
4. ———: ———. Ordinarily, it is error to submit to the jury an issue which is not pleaded in the case.
5. ———: ———. Instructions should be considered and construed together and if on the whole they fairly state the law as applied to the issues pleaded, and the evidence received, there can be no prejudicial error in the giving of any one instruction.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Reversed and remanded.

Healey & Healey, for appellant.

Wilson, Barlow & Watson, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and KOKJER and ACH, District Judges.

WHITE, C. J.

This is a personal injury automobile accident case. A Chevrolet automobile, in which the plaintiff was a passenger, struck the rear end of a Dodge automobile. While the plaintiff was still sitting in the Chevrolet about 5 to 10 minutes later, the defendants' Ford struck the tail end of the Chevrolet. Plaintiff sued the operator and the owner of the Ford, and after a jury verdict and a judgment for the defendants, the plaintiff has appealed.

Plaintiff complains that the trial court was in error: In denying her motion for a proper instruction that the defendant operator of the Ford negligently caused the second collision, and (2) in refusing her tender of an instruction relating to indivisible injury produced by separate, independent acts.

Plaintiff was a passenger in the Chevrolet traveling east on O Street toward the intersection with Lyncrest Drive, Lincoln, Nebraska, near noon, December 1, 1966. Leaving slushy traffic lanes, the Chevrolet entered a left-turn lane that extended 350 feet to Lyncrest Drive. This lane sloped steeply to the east and was icy and slippery. While the Chevrolet was approaching the intersection, a Dodge Dart was waiting at the east end of the lane for a traffic control signal to change. Timely anticipating a collision, plaintiff braced herself with hands on the dash and feet against the floor. The car in which plaintiff was riding collided with the rear end of the Dodge Dart and stopped. According to plaintiff's testimony she did not bump or hit anything from movement of her body in the car and in her own opinion she was not hurt by this first collision or accident. The impact drove the Dodge Dart into the intersection. It came to rest 20 feet east of the Chevrolet, which remained west of the intersection. From this accident, the rear bumper and trunk lid of the Dodge, and the front grille, hood, bumper, and headlight of the Chevrolet were damaged.

Five or ten minutes later the plaintiff was still sitting in the Chevrolet when Chris Kovanda, hereinafter referred to as defendant, approached from the rear in a Ford Mustang. Unaware of the previous collision, he stopped a few feet behind the Chevrolet. The evidence shows that defendant was driving on streets that he knew to be icy and slippery and in broad daylight. It conclusively shows that he saw and observed the automobile in which plaintiff was sitting for a considerable period of time before the collision occurred. It shows that he stopped some distance, a few inches or 2 to 3

feet behind the automobile in which plaintiff was sitting. His own testimony is that he decided "to get out of there"; that he put his car in reverse; that his foot was on the accelerator; and that in the performance of this operation, his car went forward and collided with the rear end of the car in which plaintiff was sitting as a passenger. The defendant's own version of how this occurred was that his rear wheels turned backwards and his front wheels slid forward. After the accident the bumpers of the two automobiles remained in contact. The damage to the Chevrolet in which the plaintiff was sitting was slight but significant. The bumper was damaged and beneath the bumper the gravel guard or shield had dents in it. In Doleman v. Burandt, 160 Neb. 745, 71 N. W. 2d 521, the plaintiff's automobile had already collided with a third automobile during a snow storm when the defendant, coming from the rear in the snow storm, on icy pavement, ran into the rear of the plaintiff's automobile. This court, in that case, held that the first collision could not in any way have been a proximate cause of the second one, and held that the defendant, by running into the rear of a stopped car was guilty of negligence as a matter of law. This court said: "The defendant, by his own testimony, is guilty of negligence as a matter of law. In Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106, it was held: '* * * a driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and that he cannot relieve himself of that duty. And, in conjunction therewith, he must so drive his automobile that when he sees the object he can stop the automobile in time to avoid it.' "

This court very recently affirmed this holding and its application to facts substantially similar to those present in the case at bar. In Ritchie v. Davidson, 183 Neb. 94, 158 N. W. 2d 275 (April 19, 1968), this court held a driver who, in broad daylight, ran into an automobile parked at a stop sign, was guilty of negligence as a mat-

ter of law. Therein we held as follows: "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 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." ' "

As is plainly apparent from the reading of the above cases, we are not dealing in this case with a situation where there is any possibility of the application of any of the exceptions to the rule. The undisputed evidence is that it was broad daylight, that the automobile in which the plaintiff was sitting was in plain sight, and that, in fact, the defendant had already stopped behind it. The facts here are undisputed. We know of no rule that would permit a holding that because the defendant's degree of inadvertence was small, that it would be, therefore, nonnegligent. The only inference that can be drawn from the evidence is that the defendant so managed and operated his automobile as to drive into the rear end of a vehicle ahead of him in plain sight and plainly visible to him.

Nor can there be any relief from liability because of the icy and slippery condition of the street. It should be pointed out that it was this very condition and the de-

fendant's inability or inadvertence in managing and controlling his automobile, when he knew the icy condition was present, which was the proximate cause of this accident. We have held within the meaning of the applicable rule involved here that ice or snow upon a highway is not considered an independent, intervening factor that relieves a motor vehicle operator from the responsibility for the results of his negligence in the operation and control of his automobile. Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683; Doleman v. Burandt, *supra;* Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250; Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825. In Kuffel v. Kuncl, 181 Neb. 770, 150 N. W. 2d 908, this court said: "At least where the presence of frost, ice, snow, mist, fog, or smoke were known, or should have been reasonably anticipated, they have consistently been held (under our cases) to be conditions rather than intervening or proximate causes in the legal sense."

In Guynan v. Olson, 178 Neb. 335, 133 N. W. 2d 571, this court directly held that the presence of frost, ice, snow, mist, or fog was not sufficient to present a jury question in the application of the rule of being able to stop an automobile within the range of vision of a discernible object ahead. This court said: "We point out that no matter what the conditions of visibility were, the defendant did discover the plaintiff and his cattle over a city block away. He was unable to avoid them and he struck them on the west and wrong side of the road. Nor does frost, ice, mist, or fog excuse such action. These are conditions and not intervening causes and require drivers to exercise a degree of care commensurate with the circumstances. Guerin v. Forburger, supra; Bramhall v. Adcock, 162 Neb 198, 75 N. W. 2d 696; Murray v. Pearson Appliance Store, supra; Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825; Fischer v. Megan, 138 Neb. 420, 293 N. W. 287." Consequently we come to the conclusion that the plaintiff's request for a peremptory in-

struction on negligence of the defendant should have been granted and the court's failure to do so was prejudicial error.

Turning now to the claimed error in the instruction on damages and injuries, we briefly review the facts. According to the plaintiff the second accident happened when the plaintiff was turning left in the seat to brace herself. It threw her into a post between the windshield and the door. Her testimony is that a large bump immediately appeared on the right side of her head and was visible until December 2, 1966, the next day. Plaintiff was hospitalized between December 1 and 6, 1966, for treatment of a cervical strain. Summarizing the evidence, there is conflicting medical testimony and other evidence that would permit a reasonable man to find that the strain resulted from the first but not the second accident, or from the second but not the first accident. The court refused plaintiff's requested instruction which is as follows: "If separate, independent acts of negligence combine to produce an injury, each party involved therein is responsible for the entire result even though the act of one alone might not have caused the injury. If you find that the injuries to plaintiff were proximately caused * * * both by the first collision and the negligence of defendants * * * and that the injury is single and indivisible and cannot logically be apportioned between the two collisions, then defendants are liable for the whole extent of the injuries sustained."

The charge of a trial court to the jury should be confined to the issues presented by the pleadings and supported by the evidence. It is error to submit to the jury an issue which is not pleaded in the case. Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683. The plaintiff's theory of this case is easily ascertained both from her evidence and her pleadings in this case. Her evidence is that she was not hurt in the first accident. She states that she braced herself with her hands on the dash and

her feet against the floor and she was not thrown against anything by the first collision. In her pleadings she does not claim that she received an indivisible injury as the result of the two accidents nor was it alleged that she was injured as a result of the combined or concurrent negligence of defendant and the driver of the car in which she was riding. Rather, in her petition, she alleged that her injuries were a proximate result of the second accident. The instructions that the court gave in this case specifically and faithfully follow the theory pleaded by the plaintiff. The jury was instructed that the plaintiff claimed that the defendant was negligent; that she was injured as a proximate result of that negligence; that the plaintiff had the burden of proving this allegation and that such negligence was the proximate cause of the collision; and that as a direct and proximate result of such negligence and resulting collision the plaintiff sustained damages. The trial court properly defined and instructed on proximate cause and negligence. The court in another instruction required a verdict for the defendants in the event of the failure of the plaintiff to prove the "nature, extent and amount of damages thus sustained by the plaintiff." There is no contention in this case by the plaintiff that the driver of the car in which she was riding at the time of the first accident was negligent, or that any negligence on the first driver's part continued on and concurred with the alleged negligence of the defendant. The only issue presented by the plaintiff is whether the negligence of the defendant in proximately causing the second accident was a proximate cause of her injuries and damages. We conclude, therefore, that there was no basis in the evidence or pleadings that injury to the plaintiff was the result of separate, independent acts of negligence by different persons combined to proximately cause the injuries of the plaintiff. Consequently, there was no prejudicial error in refusing to give the requested instruction.

For the reasons given above, the judgment of the dis-

trict court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

KOKJER, District Judge, dissenting.

I respectfully dissent. The rule set out in syllabus number 1 of the majority opinion is correct but it should not be applied as a matter of law in this case. Had defendant driven his car into the left-turn lane at such a speed that he was unable to stop, even under the icy conditions existing, before hitting the car in which plaintiff was a passenger, he would have been guilty of negligence as a matter of law. The rule would also apply as a matter of law if he failed to maintain a proper lookout and ran into the car which was in plain view ahead. In this case the evidence indicates that defendant was driving slowly; and that he saw the car ahead and stopped without coming into contact with it. The question then is, did he stop, as claimed, before hitting the car; or, after having stopped, was he negligent in any way when he released his brakes and tried to back up? This is a question of fact. It was submitted to the jury, as it should have been, by the trial court and decided by the jury in favor of defendant. The trial court committed no error and the judgment should be affirmed.

SMITH and MCCOWN, JJ., concur in this dissent.

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MARY TRAUSCH, APPELLANT AND CROSS-APPELLEE, V. ROBERT LEE KNECHT, APPELLEE AND CROSS-APPELLEE, RESERVE INSURANCE COMPANY, GARNISHEE-APPELLEE AND CROSS-APPELLANT.

165 N. W. 2d 738

Filed March 7, 1969. No. 37044.

1. **Insurance: Process.** Violation of a provision in an insurance policy requiring insured to forward summons or other process, in the absence of a showing of prejudice or detriment to insurer, is not a valid defense to an action on the policy.

2. ———: ———. Where prejudice results from a failure of insured to forward process as required by the terms of the policy, such violation is a good defense to an action on the policy.
3. **Insurance.** A violation or breach of the terms of a contract of insurance is not subject to waiver prior to its occurrence.
4. **Estoppel: Parties.** Estoppel cannot arise where all parties interested have equal knowledge of the facts, or where the party setting up estoppel is chargeable with notice of the facts, or is equally negligent or at fault.

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

Edward Shafton and Bernard Vinardi, for appellant.

John R. Douglas and Cassem, Tierney, Adams & Henatsch, for garnishee-appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and NEWTON, JJ., and HASTINGS, District Judge.

NEWTON, J.

This is an action in garnishment involving a question of liability under an insurance policy issued by the garnishee, Reserve Insurance Company.

On March 13, 1965, plaintiff was a guest passenger in an automobile involved in an intersection accident. She alleged that she sustained personal injuries as the result of a collision between the automobile in which she was a passenger and an automobile operated by Robert Lee Knecht. Knecht carried insurance with the Reserve Insurance Company providing coverage of $10,000 for injuries to any one person.

The record is completely void of any evidence regarding the circumstances of the accident. The only evidence appearing regarding damages are medical reports of plaintiff's doctors showing her condition following the accident and medical expenses incurred. The reports indicated at least part of her difficulty was due to a congenital defect which may or may not have been aggravated by the accident and are not clear as to the ex-

istence or extent of any permanent disability.

Knecht notified garnishee of the accident and extensive negotiations were conducted by plaintiff's attorneys with garnishee commencing May 1965 and continuing into May 1967. Commencing August 5, 1966, plaintiff's attorneys made continuous threats of legal action but did not file suit until June 19, 1967. Service of summons was obtained on Knecht in the Nebraska Penal and Correctional Complex of which he was then an inmate. Knecht failed to notify garnishee of the commencement of suit and service of summons. On August 2, 1967, default was entered against Knecht and on October 16, 1967, judgment was entered in the sum of $45,000, all during the July 1967 term of the district court. No further proceedings were had until the commencement of a garnishment action against garnishee at the January 1968 term of court. Subsequently, the court entered an order to show cause why the default judgment should not be set aside. Knecht failing to plead thereafter, the judgment was not set aside. In the meantime, the garnishee had appeared and answered in the garnishment action. Judgment for plaintiff in the sum of $10,000 was entered against the garnishee. Both parties moved for a new trial. The motion of plaintiff was overruled and the motion of garnishee sustained. Plaintiff appealed and garnishee cross-appealed.

The defense of garnishee is based upon the provisions of the Knecht policy requiring insured, if claim is made or suit brought against him, to immediately forward every "demand, notice, summons or other process received by him * * * ," and further providing that no action should be brought against insurer unless, "as a condition precedent thereto," the preceding provision has been complied with. Plaintiff maintained that the policy provisions were waived when insurer garnishee's representative called on Knecht following the accident, obtained his version of the circumstances attendant upon the accident, and, as Knecht said, informed him: "I will

take care of everything from now on." Garnishee did not thereafter contact Knecht in any manner.

"The rule firmly established by weight of authority is that where provisions relating to notice of accident and forwarding of a summons or other process are made conditions precedent to recovery, the failure to act with reasonable timeliness will release the insurer from the contractual obligation, although no prejudice may have resulted." 2 Long, The Law of Liability Insurance, § 13.18, p. 13-45. It is then stated that there is a present-day tendency to consider automobile insurance as not only a contract between the insurer and the insured, but also a contract for the benefit of the public, and to hold the insurer liable in the absence of prejudice. Nebraska appears to follow the latter rule. In MFA Mutual Ins. Co. v. Sailors, 180 Neb. 201, 141 N. W. 2d 846, it is held that: "An insurer cannot assert a breach of the cooperation clause as a policy defense in the absence of a showing of prejudice or detriment to the insurer."

In the present instance, it would appear that insurer was definitely prejudiced. It had no notice of suit until a final default judgment had been entered and the term at which it was entered had expired. It is true that after garnishee had denied liability, the court entered an order to show cause why the judgment should not be set aside, but it is doubtful if grounds justifying a setting aside of the judgment at a subsequent term were present. In any event, Knecht did not see fit to make any showing and insurer could not. In Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N. W. 2d 623, this court ruled that: "An insurer does not have the right without consent of the insured to retain control of the defense of an action indemnifiable under the apparent terms of an insurance policy and at the same time reserve the right to disclaim liability on the policy."

On the record in this case, it is not possible to conclude that there may not have been meritorious defenses

to the action against Knecht and to plaintiff's claim that she sustained substantial damages amounting to or exceeding coverage under the policy.

Plaintiff contends that garnishee is estopped from insisting upon compliance with the requirement that it be given notice of suit. In this respect, plaintiff relies upon the statement of the adjuster allegedly made to Knecht soon after the accident that: "I will take care of everything from now on."

This could not have constituted waiver by garnishee of the policy provision since at the time the words were spoken, no breach of the policy provision had occurred. A violation which has not occurred cannot be waived. Waiver is an intentional relinquishment of a known and existing advantage and there can be no waiver unless the party against whom it is invoked was in possession of material facts and acted with intent to waive. See, George v. Guarantee Mutual Life Co., 144 Neb. 285, 13 N. W. 2d 176; Armbruster v. Stanton-Pilger Drainage Dist., 169 Neb. 594, 100 N. W. 2d 781.

Did the statement of garnishee's agent provide a ground for estoppel? Insured notified garnishee of the accident and garnishee proceeded to investigate in regard thereto. In the course of the investigation, garnishee's agent consulted with Knecht, the insured, presumably obtained his version of the accident, and allegedly stated: "I will take care of everything from now on." The policy contained a requirement that insured must give notice in the event suit was brought against him in addition to the notice of accident. As in any other contract, insured was bound to know the terms of the policy. Having given notice of the occurrence of the accident, Knecht had a right to expect that garnishee would cause it to be investigated and, in the event liability on his part was determined and claim made, that garnishee would negotiate for settlement. At the time it is claimed garnishee's agent made the statement in question, the matter was in the investiga-

tive stage. Liability had not been determined or conceded by garnishee. There had been no threat of suit or legal action. Under such circumstances, was the insured justified in assuming that the statement made was intended to mean that if he were sued he need not forward notice of the suit? To so hold would place a strained construction on the words used and frequently, as in this case, make it impossible for the insurer to fulfill its obligation of defending insured in the action brought against him. It would also tend to render possible collusion between the injured party and the insured. Here we have only the word of the insured relative to the alleged conversation with the adjuster. Estoppel was not pleaded nor was that issue tried and apparently the trial court deemed the record made inadequate to sustain a finding of estoppel. In this we concur. Estoppel cannot arise where all parties interested have equal knowledge of the facts, or where the party setting up estoppel is chargeable with notice of the facts, or is equally negligent or at fault. See, Scottsbluff Nat. Bank v. Blue J Feeds, Inc., 156 Neb. 65, 54 N. W. 2d 392; Watkins v. Dodson, 159 Neb. 745, 68 N. W. 2d 508. Plaintiff's right to estoppel is derivative in nature and can be no more extensive than that enjoyed by Knecht. Knecht knew or should have known that his insurance contract required him to give notice to his insurer of any legal action brought against him and that in the absence of such notice, his insurer had no certain means of ascertaining the pendency of such action or where it was brought. The words upon which he claims to have relied are commonly used in like situations to assure the insured that insurer will take care of all matters preliminary to suit and of the suit itself when notified of it. No ordinarily prudent person would interpret them as did Knecht.

The action of the district court in sustaining garnishee's motion for new trial is affirmed and that court

is directed to dismiss plaintiff's action in garnishment.

AFFIRMED WITH DIRECTIONS TO DISMISS.

WHITE, C. J., and BOSLAUGH, J., dissenting.

We respectfully dissent from the holding of the majority opinion directing the total dismissal of the garnishment action. A new trial should be granted, as the trial court directed, to try and dispose of the issues raised by the garnishee.

WHITE, C. J., separately dissenting.

Properly interpreted the insurance company's sole claim of prejudice is the excessiveness of the default judgment entered against it. We now hold in this garnishment action that it was prejudiced because it did not receive the notice and summons of suit. Therefore, I feel, its relief should go no further than the degree of prejudice that it suffers from the entry of the claimed excessive default judgment. The remedy granted should not overreach the mischief sought to be prevented. It would appear that the plaintiff should be given a full opportunity to remove the mischief of the default judgment in the garnishment action by an offer to stipulate to the setting aside the entry of the default judgment, or by its consent to such entry, or by giving the garnishee a full opportunity to prove the amount and the nature of the prejudice that it has suffered as a result of the entry of the excessive default judgment.

The trial court properly granted a motion for a new trial in order to determine these issues. Although this court has the authority to do so, I believe that it is a grave injustice to the plaintiff in this case to arbitrarily dismiss the garnishment proceedings and completely exonerate the insurance company from liability.

If the law in Nebraska is that an insurance company, under the language of the policy present in this case, is completely exonerated from liability under the policy because of its failure to have been notified of suit, then the result in this case should be as the majority holds. However our rule that prejudice must be shown cannot

logically extend beyond relief for the prejudice actually demonstrated by an excessive default judgment.

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JOHN JONES, A MINOR, BY AND THROUGH SHIRLEY A. JONES, HIS MOTHER AND NEXT FRIEND, APPELLANT, V. ARNOLD E. PETERSON ET AL., APPELLEES.
165 N. W. 2d 713

Filed March 7, 1969. No. 37051.

1. **Trial: Evidence.** Where evidence is presented which could, if accepted by the jury, give rise to application of the sudden emergency rule, an instruction on that rule is proper.
2. **New Trial.** Error in specific instructions must be objected to and called to the attention of the trial court in the motion for new trial before it may be properly presented to this court for consideration.
3. **Trial.** Instructions which properly present the theory of a party as pleaded and present the applicable law thereto are not erroneous merely because they contain assumptions of fact favorable to the party claiming error or because, in the absence of a request, do not more completely instruct on the subject matter in issue.
4. ———. It is error to submit to the jury an issue upon which there is no material dispute.

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

Daniel G. Dolan and Lathrop & Albracht, for appellant.

John J. Respeliers, for appellees.

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

WHITE, C. J.

Fourteen-year-old plaintiff John Jones was injured when the horse he was riding collided with the automobile defendant Arnold E. Peterson was driving. A jury verdict and judgment was for defendants and plaintiff appeals. We affirm the judgment of the district court.

For purposes of this appeal, we accept the version of the facts testified to by plaintiff's witness as to liability. Plaintiff himself remembers nothing of the accident. Defendant, proceeding northeast on an asphalt county road, rounded a curve onto the east-west highway at 40 to 45 miles per hour and in so doing swerved into the westbound lane of the highway. Plaintiff's horse, off the traveled portion of the road on the south and going west, shied or jumped and backed onto the traveled portion of the road in front of defendant's approaching automobile and the collision ensued. There was much evidence as to location of houses, driveways, and distances relevant to whether the scene of the accident was in a "residential" district.

We discuss only assigned error in instructions No. 15 and No. 16 asserted in plaintiff's motion for new trial and therefore presented to us for consideration.

Although not requested, plaintiff contends the trial court should have instructed on the issue of whether the accident occurred in a residential district. The plaintiff pleaded defendant was negligent: "c) In operating his vehicle at a rate of speed in excess of that which was reasonable and prudent under the conditions existing and in excess of 25 miles an hour in a residential district." In instruction No. 16, the court charged: "1) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. * * * 3) The following speeds shall be prima facie lawful, but in any case when such speed would be unsafe, they shall not be lawful: * * * (b) *Twenty-five miles per hour in any residence district.*" (Emphasis supplied.)

Further, in no other instruction did the court give the defendant the advantage of an instruction permitting a nonresidential area speed. The court submitted this issue exactly as the plaintiff pleaded it and the instruction assumed defendant was traveling in a residential area, an assumption which, if erroneous, was favorable

to the plaintiff. There is no merit to this contention.

The court, in instruction No. 15, gave the standard instruction on sudden emergency. It is asserted there is no evidence to support it. Even taking the testimony of plaintiff's witness Schaaf to be true, there is a reasonable inference that the proximate cause of this accident was the sudden jumping and backing out of plaintiff's horse onto the traveled road in front of defendant's automobile. There was ample, if not conclusive evidence, that a sudden emergency was precipitated without fault by defendant. The court in its instruction, carefully protected the plaintiff by pointing out that the claim of sudden emergency could not be asserted if the jury found that it was caused by the defendant's own negligence or precipitated by his own acts. There is no merit to this contention.

Error is asserted because the court failed to instruct the jury as to the family purpose doctrine and that the father owner of the defendant's vehicle was liable in the event of a finding of defendant's negligence. The parties stipulated that it was a family purpose driver automobile. There was no fact to present to the jury. A verdict for plaintiff would have automatically ripened into judgment against defendant father. It would have been error to submit this issue when there was no evidence to support a finding otherwise.

Plaintiff asserts instruction No. 3 submitting plaintiff's contributory negligence as unduly repetitious and thus mislead the jury into giving undue weight to defendant's contention. Error in this instruction was not assigned in the motion for new trial and therefore is not properly before us. Moreover, an examination reveals a typical pleading situation where the allegations do overlap. Faced with the necessity of fully submitting a party's theory, repetition is sometimes inevitable. But we find nothing here that reaches the level of court-insinuated preference for defendant on the facts.

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

AFFIRMED.

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THE J. R. WATKINS COMPANY, A CORPORATION, APPELLANT, V. DELL K. WILEY ET AL., APPELLEES.

165 N. W. 2d 585

Filed March 7, 1969. No. 37087.

1. **Principal and Agent: Evidence.** The declarations of an alleged agent are not admissible in evidence for the purpose of establishing or enlarging his authority.
2. ———: ———. The party alleging the existence of the agency relationship assumes the burden of proving the agent's authority and that the acts of the agent, for which liability against the principal is sought, must be shown to be within the scope of the agent's authority.
3. **Trial: Evidence.** Circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom.

Appeal from the district court for Madison County: FAY H. POLLOCK, Judge. Reversed and remanded.

Moyer & Moyer and Mapes & Mapes, for appellant.

McFadden & Kirby, for appellees.

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

NEWTON, J.

This is an action on a contract. Dell K. Wiley became a dealer for plaintiff The J. R. Watkins Company and entered into the retail sale of plaintiff's products. He defaulted in payment for goods purchased and judgment against him was obtained by plaintiff. The present action is against defendant Fearn R. Bartee, a surety on

the Wiley contract with plaintiff. Defendant contends his signature on the contract was fraudulently obtained. Verdict and judgment for defendant were entered in the trial court and plaintiff appeals.

Defendant admitted the execution of the contract. The undisputed evidence shows that Wiley was employed on defendant's farm but did not reside there. Wiley wished to become a Watkins dealer. Whether or not he and other sureties had signed the contract at the time defendant did so is not clear. A stranger to defendant called at his home and assured him the instrument to be signed was simply a recommendation of Wiley. Defendant signed the instrument, relying on the representation made, took it to his house, and had his wife sign it. A copy of the contract was left with defendant. Defendant can neither read nor write but his wife can. The individual who called on defendant has not been identified. The only direct evidence that he was an agent of plaintiff is found in defendant's testimony. Defendant testified in regard to this person: "Q. Did he say anything to you about being with the Watkins Company? * * * A. Yes." Objection was made to this question and overruled. The court stated: "I think that what he said may become quite material here, but there might be a question as to whether or not his representation of agency make it such. Subject to its being connected up and the agency being established, the evidence will be received.

"I think that his statements and representations generally speaking out there would be quite material." Objection was renewed at the end of defendant's testimony and ruling deferred. No further ruling appears, but the court instructed: "However, since available evidence upon this subject is limited, the Court submits to you the question of whether or not the person who allegedly induced Fearn Bartee to sign Exhibit 1 was an agent or representative of plaintiff with authority to procure

signatures to such agreements. Agency could not be established by what this person said."

A representative of plaintiff testified that plaintiff had no agents in the area who were authorized to obtain dealer's contracts. Its dealers were customers, not agents. The form of contract in question is furnished to dealers and dealers sometimes contact prospective new dealers. A dealer *may have* dealt with defendant. Who forwarded the contract to plaintiff does not appear.

Evidence of the declaration of the alleged agent regarding his representation of plaintiff was erroneously admitted. "The declarations of an alleged agent are not admissible in evidence for the purpose of establishing or enlarging his authority." Fitzgerald v. Kimball Bros. Co., 76 Neb. 236, 107 N. W. 227. See, also, Rodine v. Iowa Home Mut. Cas. Co., 171 Neb. 263, 106 N. W. 2d 391; Anoka-Butte Lumber Co. v. Malerbi, 180 Neb. 256, 142 N. W. 2d 314. Under the circumstances presented, the error was not cured by the instruction given.

Two other rules appear to be pertinent. "'* * * The party alleging the existence of the agency relationship assumes the burden of proving the agent's authority and that the acts of the agent, for which liability against the principal is sought, must be shown to be within the scope of the agent's authority.'" Nebraska Tractor & Equipment Co. v. Great Lakes Pipe Line Co., 156 Neb. 366, 56 N. W. 2d 288. The burden of proving agency in this case rested upon the defendant and since he sought to establish agency by circumstantial evidence, he is required to comply with the rules pertaining thereto. "* * * circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom." Popken v. Farmers Mutual Home Ins. Co., 180 Neb. 250, 142 N. W.

2d 309. See, also, Mullikin v. Pedersen, 161 Neb. 22, 71 N. W. 2d 485.

In the present instance, an unidentified stranger is said to have perpetrated the fraud upon the defendant. Not only was such party not identified, but no connection between this person and plaintiff was shown. Ordinarily, when a principal to a contract is required to furnish a surety for his performance of the contract, it is such principal, and not the other contracting party, who seeks out the surety. Under the evidence in this case, it is entirely possible, and indeed logical, that Wiley would have sent someone to obtain defendant's signature as surety for him. The evidence merely establishes a *possibility* that such person was representing plaintiff. It is highly speculative and insufficient to support the verdict returned by the jury.

The judgment of the district court must be reversed and the cause remanded with instructions to enter judgment for plaintiff for the amount due on the contract.

REVERSED AND REMANDED.

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JAMES A. MCCAIN ET AL., APPELLEES, V. EDNA C. COOK ET AL., APPELLANTS, IMPLEADED WITH JOHN DOE, REAL NAME UNKNOWN, APPELLEE.

165 N. W. 2d 734

Filed March 7, 1969. No. 37094.

1. **Adverse Possession: Boundaries.** It is the established law of this state that, when a fence is constructed as a boundary line between two properties, and parties claim ownership of land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own.
2. **Adverse Possession.** It is not necessary that possession be accompanied by an express declaration or claim of title; it is sufficient if the party in possession has acted so as to clearly indicate he did claim title.

3. ———. The intention to claim title is usually manifested by acts, not words.
4. ———. The fact that one claiming title by adverse possession never intended to claim more land than is called for in his deed is not a controlling factor.
5. ———. It is the intent with which possession is held, rather than the intention to hold in accordance with the deed, that is controlling.
6. ———. After the running of the statute, the adverse possessor has an indefeasible title which can only be divested by his conveyance of the land to another, or by a subsequent disseisin for the statutory limitation period. It cannot be lost by a mere abandonment, or by a cessation of occupancy, or by an expression of willingness to vacate the land, or by the acknowledgment or recognition of title in another, or by subsequent legislation, or by survey.
7. ———. The law is well settled that recognition of title in the former owner by one claiming adversely, after he has acquired a perfect title by adverse possession, will not divest him of title.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded with directions.

Wright, Simmons & Hancock, for appellants.

Marvin L. Holscher, for appellees McCain.

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

WHITE, C. J.

This is a boundary dispute turning on the overlapping questions of adverse possession and mutual recognition of a boundary line fence for the statutory period of 10 years.

Plaintiffs McCain are the record title holders of two lots of unbroken pasture land bordered by the west line of Section 6, Township 22 North, Range 55 West of the 6th P.M., Scotts Bluff County, Nebraska. Adjoining on the west the defendants Cook own (and have since 1945) Lots 1 and 6, Section 1, Township 22 North, Range 56 West of the 6th P.M., Scotts Bluff County, Nebraska.

South of both properties is rough, partially tree-covered accretion land stretching to the bank of the North Platte River. The cleared Cook land is largely cultivated, there being a strip or sliver of pasture land lying between the north and south areas of cultivation. Until quite recently (1965-1966), the Cook land was cultivated only to the true surveyed section line. It is this central fact around which much of the dispute turns. To the east of the surveyed section line (and until recently the line of cultivation), there is an existing fence, beginning at the northwest section corner that runs slightly to the southeast to the edge of the accretion land to the south, forming a triangular strip of 5.09 acres that is the precise area in dispute in this action. There is no existing fence on the section line. There is much evidence in this case concerning different fences that had existed in the past for short distances on the true section line.

There are a few significant and almost undisputed facts that we deem controlling in the disposition of this case. The existing fence line on the east border of the triangular strip has been in uninterrupted existence for at least 40 or 50 years, and probably since the 1880's. Samples of the barbed wire from this fence show that they were brand patented in 1880 and 1877 and are not galvanized or rust protected. Modern barbed wire is. The aerial photographs reveal a clearly marked, dark-appearing fence running in a straight unbending line from the northwest corner post to the border of the tree-covered accretion land. This fence line is and has been for many years heavily interlaced with brush, high grass, and other indications of a permanent existence much longer than the statutory 10-year period.

The evidence is undisputed that Cooks and their predecessors in title had repaired and strengthened this fence, and had at times installed sheep tight woven wire. Many years ago new posts had been installed. The evidence, although somewhat disputed, shows by a preponderance that the land in the strip had a swale or slough running

through it, was lower and rougher than the cultivated land which for many years has been leveled and is crop producing. The evidence is overwhelming that this triangular strip and the east-west strip intervening between the cultivated areas has been used by Cooks and their predecessors for running and pasturing cattle and sheep for more than 20 years. The fence was strengthened and tightened to retain them on the Cook property.

Perhaps the most significant testimony in this case is that of James Haycraft, former livestock business partner of plaintiff James A. McCain, who has been on the property for over 27 years and who, although first refusing, finally and reluctantly appeared as the last witness in the case. This witness testified that in the 27 years he was on the property the east fence had been in existence; that either the Cooks or Johannes (Cooks' predecessor) had run sheep and cattle in the disputed area to the existing fence line; and that when he came on the property he regarded this east fence as the boundary line. During all of this period he ran cattle to this fence line and Cooks and Johannes ran cattle "up against it" from the west. There was a slough running through the disputed area. This now has been leveled and filled in by the Cooks.

This witness' evidence and other testimony establish that there had been a fence running north on the east edge of the alfalfa or cultivated land close to the true section line. This fence was not over 100 to 200 yards long running north to south. It was an old fence, so undiscernible that Haycraft became caught in it with his horses, and he asked Johannes, then the owner, why he had it there. It was only there about 2 years. It was used with the east existing fence as a channel or conduit to run cattle and sheep back and forth to the north and south and to the east of the crop land. There was at one time an east-west cross fence joining this fence on the north, that was used as a "catch pen" and at least on one occasion Haycraft had used it to separate

his strayed cattle and return them to the McCain property east of the east fence line.

There is much evidence concerning Cooks' recent action (1967-1968) in removing trees, posts, and wire in the area of this old fence, McCains contend that Cooks moved the boundary line fence. Haycraft's testimony undercuts this contention and there is no evidence of the use of this fence as a boundary line or as separating the use of the properties. The fact that it was erected a few feet from the surveyed section line is the only support to be found for this contention. Also significant is that it never ran from the northwest section corner. The east existing fence always ran and began at the northwest corner post.

Summarizing, the evidence overwhelmingly supports the conclusion that for many more than 20 years the east existing fence line has been in existence, has been used and in fact recognized as the true boundary line by the parties and their predecessors in title, and that the 5.09-acre disputed strip has been used exclusively, continuously, and adversely under a claim of ownership by the Cooks and their predecessors.

In Olson v. Fedde, 171 Neb. 704, 107 N. W. 2d 663, this court said: "It is the established law of this state that, when a fence is constructed as a boundary line between two properties, and parties claim ownership of land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own. See, Pfeiffer v. Scottsbluff Mortgage Loan Co., 105 Neb. 621, 181 N. W. 533; Krumm v. Pillard, 104 Neb. 335, 177 N. W. 171; Hallowell v. Borchers, supra; Konop v. Knobel, 167 Neb. 318, 92 N. W. 2d 714; McGowan v. Neimann, 144 Neb. 652, 14 N. W. 2d 326." See, also, Hakanson v. Manders, 158 Neb. 392, 63 N. W. 2d 436. The evidence, as outlined, fully establishes Cooks' title under the above holding. Nor is a party required to expressly

declare during his occupancy, that he claims to be the owner to the existing fence line. It is not necessary that the possession be accompanied by an express declaration or claim of title; it is sufficient if the party in possession has acted so as to clearly indicate he did claim title. The intention to claim title is usually manifested by acts, not words. Woodcock v. Unknown Heirs of Crosby, 92 Neb. 723, 139 N. W. 646; Krumm v. Pillard, 104 Neb. 335, 177 N. W. 171. See, also, 3 Am. Jur. 2d, Adverse Possession, § 101, p. 184; Konop v. Knobel, 167 Neb. 318, 92 N. W. 2d 714.

McCains rely heavily, as we feel the trial court did, on a conversation James A. McCain had with the then owner, in 1966, in which the owner stated: "When are we going to get that fence line surveyed? If it is on me I will pay for it; If it is on you you pay for it. My health isn't the best and I would like to get this straightened up." In Converse v. Kenyon, 178 Neb. 151, 132 N. W. 2d 334, a strikingly similar case on the facts, this court said: " 'The fact that one claiming title by adverse possession never intended to claim more land than is called for in his deed is not a controlling factor. *It is the intent with which possession is held, rather than the intention to hold in accordance with the deed, that is controlling.*' * * *

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

"In Martin v. Martin, 76 Neb. 335, 107 N. W. 580, 124 Am. S. R. 815, this court held: 'One who has acquired absolute title to land by adverse possession for the statu-

tory period does not impair his title by thereafter paying rent to the owner of the paper title.' In the opinion of the cited case it was stated: 'The law is well settled that recognition of title in the former owner by one claiming adversely, after he has acquired a perfect title by adverse possession, will not divest him of title.'" (Emphasis supplied.)

As we have demonstrated, Cooks in 1966 had long since acquired title to this property, either by boundary line acquiescence or adverse possession, or both. Their title could be divested by nothing short of a validly executed deed, by adverse possession, or by other legal means not pertinent here.

The judgment of the district court quieting title in McCains is reversed and the cause remanded with directions to dismiss McCains' action and quiet title to the disputed acreage in the Cooks.

REVERSED AND REMANDED WITH DIRECTIONS.

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LEONARD F. JUNG, APPELLANT, V. JACK COLE, DOING BUSINESS AS COLE SIGN CO., ET AL., APPELLEES.
165 N. W. 2d 717

Filed March 7, 1969. No. 37099.

1. **Summary Judgments: Evidence.** As a prerequisite to its examination in this court evidence adduced on a summary judgment hearing must be embodied in a bill of exceptions.
2. **Summary Judgments: Evidence: Pleadings.** In the absence of a bill of exceptions in a summary judgment proceeding it is presumed that the evidence sustains the trial court's holding that there was no issue of fact presented by the proceeding; that it was correctly decided; and that the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment.
3. **Parties: Appeal and Error.** In the absence of a statute which by its terms or as construed by the courts permits an appeal from an interlocutory order it is generally held that an order requiring or permitting or refusing to permit the joinder of additional parties is not appealable.

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

John F. McCarthy, for appellant.

Kelly & Kelly, for appellee Cole.

Tye, Worlock, Tye & Jacobsen, for appellees Goodyear Tire & Rubber Co., Inc., and Trade Marketeers, Inc.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and NEWTON, JJ., and HASTINGS, District Judge.

SPENCER, J.

This is a workmen's compensation action. The present appeal is from the sustaining of a summary judgment for Goodyear Tire and Rubber Company and the overruling of a motion to make Trade Marketeers, Inc., an additional party defendant.

The action as originally filed in the Nebraska Workmen's Compensation Court was against Jack Cole, doing business as Cole Sign Company. After the 1-year statute of limitations had run, Goodyear Tire and Rubber Company was added upon plaintiff's motion as an additional party defendant. After hearing, Goodyear Tire and Rubber Company was dismissed as a party defendant, and an award was entered against Jack Cole. Plaintiff waived rehearing in the compensation court, and filed a petition on appeal in the district court. Plaintiff thereafter filed a motion in district court to make Trade Marketeers, Inc., an additional party defendant. This motion was overruled on July 11, 1967. On November 24, 1967, plaintiff filed a motion for new trial, which was overruled. On November 15, 1967, the district court sustained a motion of Goodyear Tire and Rubber Company for a summary judgment. On November 24, 1967, plaintiff filed a motion for a new trial, which was also overruled.

Plaintiff filed a transcript on appeal herein but failed to file a bill of exceptions covering the summary judgment proceeding. The record indicates that the defend-

ant offered exhibits on the hearing, but with no bill of exceptions those exhibits are not a part of the record herein.

As a prerequisite to its examination in this court, evidence adduced on a summary judgment hearing must be embodied in a bill of exceptions. See Arla Cattle Co. v. Knight, 174 Neb. 360, 118 N. W. 2d 1.

In the absence of a bill of exceptions in a summary judgment proceeding it is presumed that the evidence sustains the trial court's holding that there was no issue of fact presented by the proceeding; that it was correctly decided; and that the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment. See Ehlers v. Church of God in Christ, Inc., 173 Neb. 670, 114 N. W. 2d 716.

While we do not speculate on the basis on which the summary judgment was sustained it is obvious that there is nothing in the pleadings which would indicate that Goodyear Tire and Rubber Company could be considered an additional employer of plaintiff.

Plaintiff has attempted to appeal herein from the overruling of his motion to add Trade Marketeers, Inc., as an additional party in the district court. We do not consider this ruling on the merits for the reason that it is not an appealable order. It is an interlocutory order. There has been no hearing on the merits of the case in the district court. As we said in Lund v. Holbrook, 157 Neb. 854, 62 N. W. 2d 112: "In the absence of a statute which, by its terms or as construed by the courts, permits an appeal from an interlocutory order of the kind herein discussed, it is generally held that an order requiring, or permitting, or refusing to permit, the joinder of additional parties is not appealable, since it is interlocutory and not final in nature. See, Annotation, 16 A. L. R. 2d 1028; Kaplan v. City of Omaha, 100 Neb. 567, 160 N. W. 960; Hall v. Vanier, 7 Neb. 397."

For the reasons given, the judgment herein is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HAROLD W. RAPP, APPELLANT.
165 N. W. 2d 715

Filed March 7, 1969. No. 37101.

1. **Criminal Law: Courts.** A sentencing judge has a wide discretion as to the sources and types of information used to assist him in determining the sentence to be imposed within statutory limits.
2. ———: ———. A sentencing judge may properly consider reports of probation officers, police reports, affidavits, and other relevant information including his own observations of the defendant.
3. ———: ———. The due process clauses of the state and federal Constitutions do not require that a person convicted after a fair trial be confronted with and permitted to cross-examine witnesses as to his prior criminal record considered by the judge in determining the sentence to impose pursuant to the wide discretion vested in him under the law.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Joseph P. Caniglia and Harold Rapp, 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.

CARTER, J.

Defendant was convicted in the district court for Douglas County of the crime of burglary. He was sentenced to imprisonment for a term of 10 years and he appeals to this court from the sentence imposed.

On July 22, 1968, defendant entered a plea of guilty to the charge of burglary. The trial court delayed sentencing until a presentence investigation could be made. On August 2, 1968, defendant appeared in the district court for sentencing, accompanied by legal counsel.

Defendant at the time of sentencing was a single man 40 years of age. He quit school at the age of 15 years

and joined the Navy. After reenlisting in the Navy, he went AWOL and served a 1-year sentence at Mare Island as the result of a court-martial. The latter part of 1949 he received a bad conduct discharge from the Navy. Since this date, he has been convicted of grand larceny in Colorado and sentenced to 1 to 5 years; in Texas he was convicted of petit larceny and sentenced to serve 30 days in jail and pay a fine of $75; in Iowa, he was convicted of breaking and entering and sentenced to 10 years; in Kentucky, he was convicted of grand larceny and sentenced to serve 18 months; in Kentucky, he was convicted of violating the Dyer Act and sentenced to 18 months; in Louisiana, he was convicted of vagrancy and served 10 days in jail; in Kansas, he was convicted of grand larceny and sentenced to 1 to 5 years; in Kansas, he was convicted of escaping custody and was sentenced to 1 to 5 years; all in addition to other arrests for similar crimes, the disposition of which are not shown in the presentencing report.

It is not contended that defendant was not fully advised of his rights at all critical stages of the case and the possible effect of his plea of guilty. Prior to sentencing, the trial court disclosed information that had come to it to the effect that defendant attempted to escape from the county jail after his plea of guilty and before the pronouncement of sentence. The defendant contends that he has a right to refute or explain the incident. The case is controlled by State v. Rose, 183 Neb. 809, 164 N. W. 2d 646. In that case we said: "It is a long accepted practice in this state that before sentencing a defendant after conviction a trial judge has a broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. Highly relevant, if not essential, to his determination of an appropriate sentence is the gaining of knowledge concerning defendant's life, character, and previous conduct. In gaining this information,

the trial court may consider reports of probation officers, police reports, affidavits, and other information including his own observations of the defendant. A presentence investigation has nothing to do with the issue of guilt. The rules governing due process with respect to the admissibility of evidence are not the same in a presentence hearing as in a trial in which guilt or innocence is the issue. The latitude allowed a sentencing judge at a presentence hearing to determine the nature and length of punishment, other than in recidivist cases, is almost without limitation as long as it is relevant to the issue."

While we think it is immaterial here, it is noteworthy that defendant does not even contend in his briefs that the statement of the trial judge as to an attempted escape is false. It must be assumed, we think, that a trial judge knows the difference between information that is pertinent to the issue before him and that which is unfounded rumor. The law invests a trial judge with a wide discretion as to the sources and types of information used to assist him in determining the sentence to be imposed within statutory limits. The record is free of prejudicial error.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. ANTHONY AGOSTINE, APPELLANT.
165 N. W. 2d 353

Filed March 7, 1969. No. 37108.

**Criminal Law: Courts.** 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 Hall County: DONALD H. WEAVER, Judge. Affirmed.

John Story, 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.

NEWTON, J.

Defendant entered a plea of guilty to a charge of breaking and entering and was sentenced to a term of from 2 to 10 years in the Nebraska Penal and Correctional Complex. He appeals on the ground that the sentence received is unduly severe. We affirm the judgment.

The defendant was 19 years of age and had not been previously convicted of a felony. He had in the past been subject to some psychiatric disturbance, had been expelled from high school, was carrying a concealed weapon at the time of his arrest, and had created some disturbance while confined in the county jail.

The sentence imposed is not a particularly severe one and appears to have been well within the discretion vested in the district court. We have held on numerous occasions that: "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. Lenz, 183 Neb. 496, 161 N. W. 2d 710.

The judgment of the district court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. DENNIS LAVERN HARDING, APPELLANT.
165 N. W. 2d 723

Filed March 14, 1969. No. 37020.

1. **Constitutional Law: Searches and Seizures.** The Fourth Amend-

ment to the Constitution of the United States prohibits unreasonable searches and seizures and requires that probable cause exists for an arrest before a warrantless search can be made of the premises or other property of a suspect.

2. **Criminal Law: Arrest.** Probable cause for arrest in Nebraska without a warrant exists when it appears that a felony has been committed and there are reasonable grounds to believe that the person involved is guilty of the offense.
3. **Criminal Law: Drugs, Narcotics, and Poisons.** The statute which permits a peace officer having probable cause to believe that a vehicle is being used for the unlawful transportation of narcotic drugs, to make a search with or without a warrant incorporates the same standard of probable cause for police action without warrant in crimes relating to narcotics as governs police action in other criminal areas.
4. **Criminal Law: Searches and Seizures.** It is not necessary that an actual formal arrest occur before a search is undertaken as long as probable cause for arrest does exist prior to the search.
5. ———: ———. In determining probable cause for a warrantless search, it is not significant whether the search preceded or followed the formal arrest.
6. ———: ———. The controlling factor in a warrantless search is whether the officer had reasonable grounds before the search to make an arrest.
7. ———: ———. In determining whether the officer acted with probable cause, the essential test is whether the facts available to the officer at the moment of the search or of the seizure would warrant a man of reasonable caution in the belief that the action taken is appropriate.
8. **Criminal Law: Confessions: Evidence.** An adequate foundation for the admissibility of a written document purported to be the written confession of a defendant may not be made unless there is the proof of the signature or acknowledgment of the purported confessor or unless the person or officer who took the notes and transcribed them testifies as to their accuracy.
9. ———: ———: ———. Generally a purported written confession is inadmissible unless a defendant is accorded the constitutional right of confrontation and the right to cross-examine the stenographer or person who took and transcribed the notes of the oral statements and admissions which furnished the basis for the purported written confession.

Appeal from the district court for Holt County: WILLIAM C. SMITH, JR., Judge. Reversed and remanded for a new trial.

Edward E. Hannon, for appellant.

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

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and NEWTON, JJ., and HASTINGS, District Judge.

WHITE, C. J.

From a jury conviction and a sentence to a prison term of 2 years, for the possession of marijuana under section 28-452, R. R. S. 1943, the defendant appeals. We reverse the judgment of the district court and remand the cause for a new trial.

On appeal three questions are presented for determination: (1) That the search of an automobile owned by the defendant Harding, which search yielded substances identified as marijuana, was without probable cause and unreasonable and that therefore the evidence obtained by the search was erroneously admitted in evidence; (2) that the written confession of Dennis Harding, the defendant, which was transcribed by the district court reporter, who was deceased at the time of the trial, was erroneously admitted in evidence; and (3) that certain expert opinion testimony identifying the material found in his possession as marijuana should have been excluded.

On the afternoon of November 9, 1967, Duane Henn, the deputy sheriff of Holt County, received a note from a prisoner in the county jail which advised him that a second prisoner had knowledge of the defendant's possession of marijuana. The deputy sheriff had reason to believe the first informer because he had provided reliable information concerning the purchasing of liquor for a minor on a previous occasion. He talked with the second informer who stated that several days prior, the defendant identified a weed as marijuana and told him that marijuana had been smoked in the defendant's apartment and that upon one occasion he had smoked

marijuana with the defendant. He also stated that during the preceding weeks, he had gone hunting with the defendant and upon several occasions he and the defendant had stopped on county roads and picked what the defendant identified as marijuana and placed it in the back of a green 1956 model Chevrolet station wagon.

The second informer also advised that a brother or a friend from California was staying with the defendant and was returning shortly to California and might take the marijuana with him. Later the same afternoon, on the basis of the above information, the deputy sheriff filed an affidavit requesting a search warrant. A search warrant was issued by the county judge authorizing a search of the defendant's apartment. The search was delayed until the early morning of November 10, 1967, when a state narcotics agent arrived to aid in the search. At that time, the deputy sheriff, a state narcotics agent, the chief of police of O'Neill, Nebraska, and two state troopers served the warrant on the defendant and proceeded to search the apartment. No evidence was found in the initial search except what appeared to be marijuana seeds or particles in the bottom of a vase in the defendant's apartment. After the search of the apartment, the deputy sheriff proceeded to a green 1956 Chevrolet station wagon parked in front of the defendant's apartment. After checking the registration and finding it to identify the defendant as owner of the automobile, the deputy sheriff searched the automobile and in the rear storage compartment where the spare tire is normally stored found several plastic bags filled with the material which was later identified as marijuana.

The deputy sheriff confronted the defendant with this evidence and the defendant thereafter produced from the bedroom of the apartment other plastic bags filled with what appeared to be marijuana. At that point the defendant was arrested and given the Miranda warnings.

The defendant was then removed to the county jail

and evidenced an intention to give a voluntary statement to Mr. McElhaney, the district court reporter. The Miranda warnings were again given and a statement was given in the presence of Mr. McElhaney, the court reporter, which was stenographically taken and later transcribed. Others who were present at the time the voluntary statement was made after the Miranda warnings were given were the deputy sheriff, a state trooper, and two of the city's police officers.

At the preliminary hearing on motion to suppress, the district judge sustained the motion with respect to all evidence obtained in the apartment on the grounds that the affidavit for the search warrant was insufficient and at the same time overruled the motion with respect to the evidence obtained by a search of the automobile. The plastic bags of marijuana found in the defendant's green Chevrolet 1956 station wagon were admitted in evidence at the trial.

The central issue here is whether the independent search of the automobile, not based upon or connected with the invalid search of the apartment, and conducted without a search warrant, conformed to the constitutional safeguards in the Fourth Amendment prescribed for warrantless searches and seizures. The search of the defendant's automobile must be carefully scrutinized because of the lack of the "detached, neutral scrutiny of a judge" that is always present when a search warrant based upon an affidavit showing probable cause is first issued. See Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889.

The United States Supreme Court requires that probable cause exists for an arrest before a warrantless search can be made of the premises or other property of the suspects. Ker v. California, 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726; Draper v. United States, 358 U. S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327; Beck v. Ohio, 379 U. S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142. Probable cause for arrest in Nebraska without a warrant exists when it appears

that a felony has been committed and there are reasonable grounds to believe that the person involved is guilty of the offense. State v. O'Kelly, 175 Neb. 798, 124 N. W. 2d 211 (1963). In State v. O'Kelly, *supra*, this court concluded: (1) That whether an arrest without a warrant satisfied probable cause depends upon the reasonableness of the actions of the police officer, and (2) that the definition of probable cause in Nebraska conformed to the constitutional criteria expressed under the decisions of the United States Supreme Court.

The probable cause requirement as it relates to the State's control of narcotics is found under section 28-472.01, R. R. S. 1943, which permits a peace officer having probable cause to believe that a vehicle is being used for the unlawful transportation of narcotic drugs, to make search with or without a warrant and that "where a search is made without a warrant the officer shall take the vehicle and the person in charge thereof into custody." Since possessing narcotics or having them under control is a felony in Nebraska, the above statute incorporates the same standard of probable cause for police action without a warrant in crimes relating to narcotics as governs police action in other criminal areas.

It is not necessary that an actual formal arrest occur before a search is undertaken as long as probable cause for arrest does exist prior to the search. In Lavato v. People, 159 Colo. 223, 411 P. 2d 328 (1966), involving a search of the defendant for narcotics before formal arrest, the court said: "It is not significant whether the search here preceded or followed the formal arrest procedure. As is pointed out by Justice Traynor writing for the California Supreme Court in People v. Simon, 45 Cal. 2d 645, 290 P. 2d 531, 533, '* * * if the officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested and the place where he is arrested, there

is nothing unreasonable in his conduct if he makes the search before instead of after the arrest.' The controlling factor is whether the officer had reasonable grounds before the search to make an arrest and whether the search and seizure incident thereto were justified under the rules we have laid down."

Justice Harlan, concurring in Sibron v. New York, 392 U. S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917, recognizes this same concept: "Of course, the fruits of a search may not be used to justify an arrest to which it is incident, but this means only that probable cause to arrest must precede the search. If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is *no* case in which a defendant may validly say, 'Although the officer had a right to arrest me at the moment when he seized me and search my person, the search is invalid because he did not in fact arrest me until afterwards.' "

The constitutional issue therefore turns on the issues of whether, at the moment prior to a search of the defendant's automobile, the deputy sheriff had probable cause to believe that a felony had or is being committed and that the defendant was the person believed to be guilty of the offense, and whether the deputy sheriff acted reasonably in searching the automobile.

The deputy sheriff had information from an informant that defendant possessed a 1956 green Chevrolet station wagon and that several days prior had picked what the defendant defined as marijuana with the informant and had placed such marijuana in the rear of the automobile. The informant also disclosed that he and the defendant had smoked what defendant defined as marijuana in his apartment, and that defendant's brother or friend from California was staying with the defendant and was about to return to California with the marijuana. The deputy sheriff had sufficient reason to believe that the information was substantially correct because of the informer's participation with the defendant.

In Draper v. United States, 358 U. S. 307, 79 S. Ct. 329, 3 L. Ed 2d 327 (1959), the United States Supreme Court held that probable cause to arrest and search without a search warrant does exist where information to constitute probable cause is given by an informer who is proven to be reliable.

In the recent case of McCray v. Illinois, 386 U. S. 300, 87 S. Ct. 1056, 18 L. Ed. 2d 62, the Supreme Court would not disturb a finding of probable cause for issuance of an arrest and search warrant if the police officer had reason to believe the information from an informer was reliable, and stated: "There can be no doubt, upon the basis of the circumstances related by Officers Jackson and Arnold, that there was probable cause to sustain the arrest and incidental search in this case. (Citations omitted.) Unlike the situation in Beck v. Ohio, 379 U. S. 89, each of the officers in this case described with specificity 'what the informer actually said, and why the officer thought the information was credible.' The testimony of each of the officers informed the court of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable."

In the present case the admission by the informer of participation in the smoking of marijuana with the defendant, and of the gathering of the marijuana with the defendant, would justify the belief that the defendant had possessed marijuana.

There were other considerations immediately prior to the search of the automobile which would justify the deputy sheriff's belief that probable cause did exist for arrest and search and that a search should be made without the delay pursuant to obtaining a search warrant for the automobile. The inherent mobility of the automobile made it unrealistic to follow the procedure in obtaining another search warrant for the automobile in

view of the fact that the defendant was at that time put on notice by the presence of the law enforcement officers and their belief that narcotics were somewhere in the possession of the defendant. The deputy sheriff also had a description from the informant of defendant's automobile and that it had been used to transport marijuana. That description matched the description of the automobile parked in front of defendant's apartment.

The recent case of State v. Dillwood, 183 Neb. 360, 160 N. W. 2d 195 (1968), announces the test of reasonableness in judging a police officer's actions based on probable cause in searching and seizing without a search warrant. "* * * 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?"

Police officers must be given reasonable latitude in judging whether probable cause exists. Unless their actions are based on an unwarranted belief that probable cause exists and are therefore unreasonable, their arrests and searches conform to constitutional guidelines. The right of an individual to be free from unwarranted intrusions on his person and property should be balanced against the need for effective law enforcement which can only exist where an officer's actions are measured objectively against a standard of reasonableness.

The actions of the deputy sheriff in searching defendant's automobile without a search warrant satisfied the constitutional requirement of probable cause.

The defendant also contends that his alleged written confession, taken stenographically and transcribed by Ted McElhaney, the Holt County district court reporter, should not have been admitted. The defendant, although making a voluntary statement before trial, neither signed nor in any way acknowledged what was purported to be his statement. McElhaney died before trial and therefore could not testify as to its accuracy. The statement as transcribed was admitted after foundation was laid

through the testimony of the deputy sheriff and the state trooper who were present at the time the statement was taken. Each testified, in effect, that the statement as transcribed was a complete and accurate reproduction of the questions asked of and answered by the defendant, but conceded that they did not have a positive recollection of each question and answer. The written statement was admitted over the objection of defendant's counsel.

The issue is whether, in a criminal case, a written confession, taken stenographically and subsequently transcribed, which was neither signed nor acknowledged by the defendant, and which cannot be tested for accuracy by examination of the stenographer is admissible. We hold that it is inadmissible. It is inadmissible not because of the method by which it was obtained. It was shown to be voluntary. It is inadmissible because the right of confrontation and right of cross-examination were not present to assure its accuracy.

We are dealing here with an extra-judicial statement which purports to be the confession of a crime to another person, not present in the courtroom and not subject to the right of confrontation. We are dealing with a situation where there is no acknowledgment in any way by the declarant to assure its accuracy. The right of cross-examination, of course, is completely absent. The physical and mental condition of the reporter, the opportunity for the jury to test his credibility, and the procedure by which the original shorthand notes are transcribed cannot be ascertained. It is common knowledge that such shorthand notes often are orally transcribed into a dictating machine and may be retranscribed by several people before they reach their final form in the purported written confession. There is no opportunity available to the defendant to examine this procedure. The extra-judicially signed and unacknowledged statement of the transcriber to the effect that it does contain a true and accurate statement of the con-

fession taken is subject to the same indictments. Nor does such a statement or purported confession contain any of the coloring sanctity of a legally prescribed procedure which protects the authenticity and integrity of regular court proceedings. This, despite the fact that it appears that the statement was actually taken by an officer, whose certificate in another context, when statutory requirements were met, would carry judicial and evidentiary weight under the law. The above considerations all have peculiar weight in light of the fact that a written transcribed document purporting to be a written confession of a criminal defendant carries peculiar weight in the minds of jurors and, indeed, of any judicial fact finder. We point out that nothing we have said herein negates the admissibility of independent evidence verifying the authenticity of oral statements or admissions the defendant made at the same time the testimony was transcribed by the reporter. What we are dealing with here is the admissibility of the written document itself into evidence as purporting to carry weight on the central issue of proof beyond a reasonable doubt as to the essential facts of the crime committed. It carries a much greater significance than a corroborated oral statement, confession, or admission which means in particular that it must be subjected to the historic rights of confrontation and cross-examination.

In a search of decisions in all other jurisdictions, including the federal courts, we have been unable to find any cases which have held that an adequate foundation for the admissibility of a written confession may be made extraneous to the signature or acknowledgment of the purported confessor or without the testimony of the person who took the notes and transcribed them. State v. Terrell, 175 La. 758, 144 So. 488; State v. Eisenhardt, 185 La. 308, 169 So. 417; State v. Cleveland, 6 N. J. 316, 78 A. 2d 560, 23 A. L. R. 2d 907; State v. Folkes, 174 Ore. 568, 150 P. 2d 17; People v. Kenny, 20 App. Div. 2d 578, 246 N. Y. S. 2d 92; Williams v. State (Fla. App.),

185 So. 2d 718; People v. Duffy, 23 App. Div. 2d 699, 258 N. Y. S. 2d 209. Many jurisdictions prohibit the admission of any written confession which is not signed or acknowledged, regardless of whether the person transcribing the statement testifies as to its accurary. Williams v. State, *supra;* State v. Cleveland, *supra;* 2 Wharton (12th Ed.), Criminal Evidence, § 340, p. 19.

The general rule governing the admissibility in evidence of a written document purporting to be the unsigned written confession of a defendant is stated as follows: "When an oral confession is taken down stenographically and then transcribed, the admissibility of the written transcript in evidence when it was neither read nor shown to the accused between the making of such transcript and its offer in evidence is generally denied." 2 Wharton (12th Ed.), Criminal Evidence, § 340, p. 19.

The above authorities also generally hold that the admission of such an invalid written confession is prejudicial error. This is because of the peculiar weight of the written document itself being admitted and subjected to the constant view of the jury. Again we point out that there is nothing in our holding which prevents a court reporter or other competent witness to testify to the oral admissions and confessions of the defendant, provided, of course, adequate foundation in other respects is laid. The courts have generally held that the written confession carries a particular weight of its own and the courts will no examine into the uncertain question of whether it carried the balance of proof or may have been the "fulcrum upon which the verdict turned." See State v. Cleveland, *supra.*

We note the case of Fields v. State, 125 Neb. 290, 250 N. W. 63 (1933). In that case this court held that a stenographer who had not transcribed her notes taken of a confession of a defendant could testify upon the witness stand as to the statements made by the defendant by reading from her notes. This case, of course, is far different from the admission of the written document

itself purporting to be a confession, based upon testimony by persons other than the stenographer or the court reporter who actually took the testimony in shorthand and transcribed the notes. We come to the conclusion that the admission of the purported written confession in this case was prejudicial error and that a new trial must be granted.

The defendant next contends that proper foundation was not laid for the admissibility of Dr. McConnell's written opinion that the bags found in the automobile contained marijuana. The evidence shows that Dr. McConnell conducted the tests on several of the bags personally and that he supervised the tests on the other bags made by his assistants. We have examined this contention and find it to be without merit.

Finally, the defendant contends error in the admitting in evidence of one bag of dry marijuana found in his automobile. The trial court, at the preliminary suppression hearing, had suppressed all of the evidence (that found in the apartment), except the six bags of "raw" marijuana found in the automobile. There were actually seven instead of six bags of "raw" marijuana found in the automobile. We find no error in this deviation from the suppression order because adequate foundation was laid for this additional bag along with all the others. In any event, it could not be asserted that such an error was prejudicial in nature.

For the reasons given, the judgment of the trial court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

SPENCER, J., concurs in the result.

MERVIN D. EVANS, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT OF OMAHA, NEBRASKA, ET AL., APPELLEES.
166 N. W. 2d 411

Filed March 14, 1969. No. 37021.

1. **Public Corporations: Actions.** The requirement of a demand to sue and a subsequent refusal or a waiver of demand by an indication on the part of the public corporation of an intent not to sue are conditions precedent to a representative or derivative suit on behalf of public corporations.
2. **Trial: Demurrer.** Statute relating to the right of a party to amend after the sustaining of a demurrer does not declare an absolute right of amendment.
3. ———: ———. The right to amend a petition after the sustaining of a demurrer rests within the sound discretion of the district court.

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

Foulks, Wall & Wintroub, for appellant.

Cecil S. Brubaker, Herbert M. Fitle, Schmid, Ford, Snow, Green & Mooney, and John E. Rice, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and MORAN, District Judge.

WHITE, C. J.

This is an appeal from a Douglas County district court order sustaining a demurrer to the plaintiff's petition and dismissing his petition. The action was brought as a class action on behalf of the plaintiff and other affected rate payers of the defendant Metropolitan Utilities District, hereinafter referred to as M.U.D. The petition of the plaintiff seeks a declaratory judgment of the unconstitutionality of L.B. 425 of the 1967 Legislative Session, Laws 1967, c. 47, p. 178. This bill amended former section 14-1041, R. R. S. 1943, now cited as section 14-1041, R. S. Supp., 1967, and created section 14-1042, R. S. Supp., 1967. For purposes of this opinion, L.B. 425 will be used to refer to sections 14-1041 and 14-1042, R. S. Supp., 1967. L.B. 425 requires M.U.D.

to pay 2 percent of its gross retail sales to the municipalities which it serves. The demurrer was sustained and the action was dismissed on the grounds that the cause of action stated in plaintiff's petition was derivative, and that plaintiff did not allege facts essential to his bringing the action.

On appeal, plaintiff contends: (1) That the action is direct rather than derivative, (2) that the trial court erred in determining that the plaintiff had not alleged the necessary facts essential to his bringing this action, and (3) that the trial court erred in not permitting the plaintiff to amend his petition to set forth more specifically the facts permitting him to bring the action. We affirm the trial court's order sustaining the demurrer and dismissing the action.

The plaintiff, Mervin D. Evans, is a resident of Omaha, Douglas County, Nebraska, and is a user and rate payer for gas and water utilities of M.U.D. Since 1947, and pursuant to section 14-1041, R. R. S. 1943, M.U.D. has been required to pay to the City of Omaha varying sums of money. L.B. 425 requires payments of 2 percent of gross retail sales of M.U.D. to be made to all municipalities which it serves. The plaintiff alleges that M.U.D. has indicated it will correspondingly increase by 2 percent the monthly bill of each water and gas consumer inside the municipalities covered by the provisions of L.B. 425.

The petition filed by the plaintiff named as defendants M.U.D., Sam Howell, treasurer of the City of Omaha, and the municipalities of Omaha, Bennington, Springfield, Fort Calhoun, Boys Town, and Bellevue. The petition prayed for an injunction freezing the 2 percent required to be paid to the municipalities until the constitutionality of L.B. 425 was determined, and upon a declaration of unconstitutionality that the money so impounded and frozen be returned to M.U.D., "upon such conditions as it (the court) may direct."

Section 25-301, R. R. S. 1943, provides that, "Every

action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 25-304, R. R. S. 1943." (Section 25-304, R. R. S. 1943 is not relevant to the disposition of any issues in this case.) The use of a demurrer is a proper method to object to a defect in the parties. Cunningham v. Brewer, 144 Neb. 218, 16 N. W. 2d 533. The demurrer filed herein specifically raised the issue that the plaintiff and all others similarly situated were not the real parties in interest.

The issue, therefore, is whether users of utilities furnished by M.U.D. are real parties in interest in an action challenging the constitutionality of a statute requiring M.U.D. to pay additional sums to municipalities in which it operates and to seek an injunction against collection of such additional funds from M.U.D., in the absence of a demand on M.U.D. to seek the same relief. We hold that they are not the real parties in interest.

In Dafoe v. Dafoe, 160 Neb. 145, 69 N. W. 2d 700 (1955), this court stated the general law defining a real party in interest. In substance, we held that a real party in interest is the person "entitled to the avails of the suit," that the person who is asserting the cause of action has a "remedial interest which the law of the forum can recognize and enforce," and that he has a "justiciable interest in the subject matter in litigation, either in his own right or in a representative capacity."

No demand was made on M.U.D. asking it to seek an injunction against the collection of the additional sums of money by the municipalities. Nor is there any allegation of a demand on M.U.D. to seek to have L.B. 425, declared unconstitutional. There is no allegation either expressly or indirectly that M.U.D. has waived the necessity for demand by indicating that it would not sue if a demand were made on it. The law in this respect is clear. The requirement of a demand to sue and a subsequent refusal or a waiver of demand by an indication on the part of the public corporation of an intent not

to sue are conditions precedent to a representative or derivative suit on behalf of public corporations. See, 18 McQuillan, Municipal Corporations, § 52.41, p. 83; Madison Metropolitan Sewer Dist. v. Committee, 260 Wis. 229, 50 N. W. 2d 424; Niklaus v. Abel Constr. Co., 164 Neb. 842, 83 N. W. 2d 904. It seems to be quite obvious that plaintiff and the others in his class have no standing as parties to bring this suit for the simple reason that they cannot be considered real parties in interest. As far as this action is concerned they are not sui juris and neither do they have any justiciable interest in this controversy at the present time because the action exists on the part of M.U.D., and M.U.D. has not refused to bring it. Further, of course, they have no interest or right to the avails of any suit of this nature, since M.U.D. itself would be the proper party plaintiff and would be entitled to all avails in the event of the successful determination that L.B. 425 is unconstitutional.

The petition of the plaintiff alleges no direct injury. By maximum inference from the allegations of the petition, plaintiffs as rate payers, have a prospective, contingent, and indirect interest because action that M.U.D. may or may not take could have an effect upon the policy or management decision of M.U.D. with respect to utility rates. It is obvious that they have no direct cause of action against M.U.D. or the other parties concerned and, therefore, cannot be the real parties in interest on the basis of having a direct cause of action for a wrong done to them individually. The petition only alleges a possibility of injury by the statement that M.U.D. has indicated that it will raise its rates by 2 percent for those parties living within the municipalities collecting the 2 percent from M.U.D. If the rates are raised, it must be on the basis of a managerial or policy decision that is not prompted or legally related or authorized in any manner by the statute sought to be declared unconstitutional. While a rate increase may

be made by M.U.D., an indirect burden of 2 percent placed on the plaintiff and others in his class, the burden will then be caused by M.U.D., and not by statute.

We point out that L.B. 425 does not require that the 2 percent be passed on. It might well be determined by M.U.D., as was apparently the assumption of the Legislature in passing the statute, that the present rates were adequate; or that the 2 percent payments might be paid out of reserves; or possibly M.U.D. might have other assets or income to meet the payments. There is neither any legally probable or fixed obligation to raise rates to meet these payments. In fact, it might be argued that the only party, other than M.U.D. itself, that might suffer would be the bond holders and not the rate payers.

At the risk of belaboring this point, we note the petition of the plaintiff in no way points out how the plaintiff and others will obtain any relief by an ultimate determination that the statute is unconstitutional which will not be obtained by the determination of the M.U.D. cross-petition. It prays that the money received by the municipalities by the 2 percent charge on gross retail sales be returned to M.U.D. *if* the statute is declared unconstitutional and *prays for the allowance of attorney's fees*. The petition does not, by any recognizable standards, ask any relief for the plaintiff and others equally situated. It is abundantly clear that the trial court's action in sustaining the demurrer was correct.

The final question is whether the court erred in failing to permit the plaintiff to amend his petition. Section 25-854, R. R. S. 1943, provides: "If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion shall direct." This section of the statute does not declare an absolute right of amendment. Weiner v. Morgan, 175 Neb. 656, 122 N. W. 2d 871; Coverdale & Colpitts v. Dakota County,

144 Neb. 166, 12 N. W. 2d 764. The trial court did not abuse its discretion in refusing or failing to grant permission to amend the petition. We note in the record of this case that the plaintiff at no time requested permission to amend his petition prior to the time of filing a motion for a new trial in this case. It seems to us the reason for this failure is obvious. By cross-petition, M.U.D. in this case has effectively refuted the basic claim of plaintiff with respect to his right to bring this action. In its cross-petition it asks affirmatively for the same relief that the plaintiff purportedly seeks to secure by a direct action with reference to the unconstitutionality of L.B. 425. This being true the possibility of the plaintiff to amend his petition to allege a cause of action and stay within the same subject matter of the action is foreclosed permanently. The subject matter of plaintiff's cause of action is not that M.U.D.'s rates are unreasonably high, or any attack upon managerial policy or decision in this respect, but is instead solely for a determination of the constitutionality of L.B. 425. If it subsequently is determined that the statute is unconstitutional, a decision based upon M.U.D.'s cross-petition herein, and if M.U.D. has decided not to lower its rates to correspond to the rates of users outside the different municipalities, a possibly different cause of action would be available to the plaintiff and others similarly situated against M.U.D. It is clear, of course, that such an action could not be maintained at the present time and is not available within the range of the subject matter of this action.

We point out that nothing said herein, either directly or indirectly, should be construed as a determination in any respect as to the constitutionality of L.B. 425. It has become necessary in discussing the issues in this case, arising on demurrer, to assume the unconstitutionality of this statute.

We come to the conclusion that the trial court's judg-

ment in sustaining the demurrer and dismissing the action is correct and is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. ROBERT WILLIAM LOSIEAU, APPELLANT.
166 N. W. 2d 406

Filed March 14, 1969. No. 37059.

1. **Constitutional Law: Criminal Law.** The Habitual Criminal Law does not violate the constitutional guaranties of due process and equal protection.
2. **Criminal Law: Trial.** The Habitual Criminal Law does not set out a distinct crime, but provides that the repetition of criminal conduct aggravates the guilt and justifies heavier penalties. The fact that a defendant has been guilty of a second felony does not make him guilty under the Habitual Criminal Law of an offense for which he may be separately sentenced, but increases the punishment for the last felony. The increased punishment for the latest felony is a court determination and not one for a jury.
3. ———: ———. "Habitual criminality" is, under the Habitual Criminal Law, a state rather than a crime, and warrants greater punishment because of past conduct.

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

Robert William Losieau, pro se.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and WALTER H. SMITH, Distrist Judge.

WALTER H. SMITH, District Judge.

This is an appeal from the overruling of a motion to vacate and set aside a conviction and sentence for burglary and a sentence under the Habitual Criminal Law

and from the overruling of a motion for new trial, brought under the provisions of the Post Conviction Act.

The record shows that the defendant, Robert William Losieau, was found guilty by a jury of the crime of burglary under section 28-532, R. R. S. 1943, as alleged in Count I, and was found by the trial court to be a habitual criminal as alleged in Count II of the information. On January 12, 1962, defendant was sentenced for a term of 20 years in the Nebraska State Penitentiary. On June 6, 1968, defendant filed a motion to vacate and set aside said sentence alleging as reasons that he was deprived of a constitutional right to a trial by jury on the habitual criminal charge and that subsection (2) of the habitual criminal statute, section 29-2221, R. S. Supp., 1967, is unconstitutional in that it deprives an accused of a trial by jury. The trial court overruled this motion on June 10, 1968, on June 17, 1968, defendant filed a motion for a new trial which was overruled on June 18, 1968, and appeal taken to this court.

Defendant contends that he was denied a constitutional right to trial by jury on the habitual criminal charge and that subsection (2) of section 29-2221, R. S. Supp., 1967, was and is unconstitutional in that it deprives an accused of a right to a jury trial on serious offenses where the penalty is 2 years or more. In support of his position defendant cites Duncan v. Louisiana, 391 U. S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491. This case holds that the defendant, accused under the Louisiana law of simple battery, a misdemeanor punishable by 2 years imprisonment and $300 fine, was entitled under the Sixth and Fourteenth Amendments to a jury trial and that a crime punishable by 2 years in prison is a "serious crime" and not a "petty offense," so that the Sixth and Fourteenth Amendments require the State to grant a jury trial. This case is no authority for the proposition here contended for by the defendant and is inapplicable to the question before the court. As will be hereinafter set forth, the hearing on Count II

as to habitual criminal was not the trial of a new or separate offense. Another case cited by defendant is Chewning v. Cunningham, 368 U. S. 443, 82 S. Ct. 498, 7 L. Ed. 2d 442. This was a habeas corpus proceeding commenced by a state prisoner in which the Supreme Court held that in the trial on a charge of being a habitual criminal the rule followed by the court concerning appointment of counsel in other types of criminal trials is equally applicable to proceedings under the Virginia statute, and denial of counsel where defendant requested one entitled him to a release on habeas corpus. The issue of trial by jury was not raised or decided by the court. It must be recognized that a defendant's right to counsel is not coextensive with the right to a jury trial. Similarly, other cases cited by the defendant do not support his contentions and no good purpose can be served by reviewing them here.

Subsection (2) of section 29-2221, R. S. Supp., 1967, known as the Habitual Criminal Law, provides as follows: "Where punishment of an accused as an habitual criminal is sought, the facts with reference thereto must be charged in the indictment or information which contains the charge of the felony upon which the accused is prosecuted, but the fact that the accused is charged with being an habitual criminal shall not be an issue upon the trial of the felony charge and shall not in any manner be disclosed to the jury. If the accused is convicted of a felony and before sentence is imposed, a hearing shall be had before the court alone as to whether such person has been previously convicted of prior felonies. The court shall fix a time for the hearing and notice thereof shall be given to the accused at least three days prior thereto. At the hearing, if the court shall find from the evidence submitted that the accused has been convicted two or more times of felonies and sentences imposed therefor by the courts of this or any other state, or by the United States, the

court shall sentence such person so convicted as an habitual criminal."

This court has repeatedly sustained the constitutionality of the Habitual Criminal Law. In State v. Huffman, 181 Neb. 356, 148 N. W. 2d 321, this court said: "The contention that the recidivist statute, section 29-2221, R. R. S. 1943, violates constitutional guaranties of due process and equal protection is not persuasive. See, State v. Konvalin, 179 Neb. 95, 136 N. W. 2d 227; Poppe v. State, 155 Neb. 527, 52 N. W. 2d 422; Rains v. State, 142 Neb. 284, 5 N. W. 2d 887; Davis v. O'Grady, 137 Neb. 708, 291 N. W. 82." See, also, Spencer v. Texas, 385 U. S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606.

In Davis v. O'Grady, 137 Neb. 708, 291 N. W. 82, this court held: "This court is committed to the doctrines, viz.: * * * The legislature may enact an habitual criminal law punishing habitual offenders. * * * The habitual criminal law does not set out a distinct crime, but provides that the repetition of criminal conduct aggravates the guilt and justifies heavier penalties. * * * The fact that a defendant has been guilty of a second felony does not make him guilty under the habitual criminal law of an offense for which he may be separately sentenced, but increases the punishment for the last felony. * * * 'Habitual criminality' is, under the habitual criminal law, a state rather than a crime, and warrants greater punishment because of past conduct." See, also, State v. Solano, 181 Neb. 716, 150 N. W. 2d 585; Haffke v. State, 149 Neb. 83, 30 N. W. 2d 462; Gamron v. Jones, 148 Neb. 645, 28 N. W. 2d 403; Jones v. State, 147 Neb. 219, 22 N. W. 2d 710; State v. Sheldon, 179 Neb. 377, 138 N. W. 2d 428.

In Nebraska, under the Habitual Criminal Law and the holdings of this court, a charge that one accused of a crime as a habitual criminal is not a charge of a distinct offense or crime but is rather a direction of attention to facts which under the statute and the crime charged in the information are determinative of the

penalty to be imposed. The Habitual Criminal Law of this state does not purport to create a new and separate criminal offense, but provides merely that the repetition of criminal conduct aggravates the guilt and justifies greater punishment. The increased punishment for the latest felony is a court determination and not one for a jury.

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

AFFIRMED.

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LESLIE C. LANDMESSER, JR., APPELLANT, V. RONALD AHLBERG ET AL., APPELLEES.
166 N. W. 2d 124

Filed March 14, 1969. No. 37080.

1. **Appeal and Error: New Trial.** A holding of this court on a first appeal becomes the law of the case on a retrial of the same issues unless on a second trial the facts are materially and substantially different.
2. **Trial.** The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of the instruction is reasonably clear.
3. ———. Where the meaning of an instruction is clear and a correct statement of the law, error cannot be predicated on the selection of words.

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

Barney, Carter & Buchholz and Herbert M. Brugh, for appellant.

Clinton & McNish, for appellees.

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

MCCOWN, J.

Plaintiff was injured by the detonation of a tear gas

projectile that had been fired some 3 days before. The negligence action here was against eight separate individual defendants who were all police officers or deputy sheriffs. Under special findings, the jury, by a 5/6's verdict, found that each of the defendants was negligent, but that such negligence was not a proximate cause of the plaintiff's injuries; and that plaintiff was negligent, but that such negligence was not a proximate cause of the injuries. The court dismissed plaintiff's action as to each defendant and the plaintiff has appealed.

This is the second appearance of this action in this court. In the prior case, the City of Sidney and the County of Cheyenne were also defendants. Dismissal as to the public entities was affirmed. The case was remanded for retrial as against the individual defendants on the ground that the case should have been submitted to the jury as to them. The evidence, which is essentially the same, is set out in Landmesser v. County of Cheyenne, 182 Neb. 345, 154 N. W. 2d 760, and will not be completely restated.

Condensed and summarized, the evidence is that seven of the individual defendants participated in various aspects of a police operation at the home of Ramona Rhoden in Sidney, Nebraska. Following the operation, one unexploded tear gas projectile was overlooked and left in the house. The eighth defendant was a communications officer who had a telephone conversation with Mrs. Rhoden after her discovery of the projectile. Through a series of events in which Mrs. Rhoden and other individuals not defendants participated, the projectile reached the hands of the plaintiff some 3 days later, on the porch of Lily Langdon's residence some distance away.

The plaintiff, Leslie C. Landmesser, Jr., and a friend, Bob Rankin, began disassembly in an effort to open a supposed valve. "Plaintiff finally held with one hand the shell nose on a porch floor and with the other hand a punch in the shell cavity. Bob lightly tapped the

punch once with a hammer, and the projectile exploded." The plaintiff's injuries were a mangled left hand and severe tear gas burns to the face and eyes resulting in permanent impairment of vision.

Plaintiff contends that the court should have directed a verdict in his favor on the issue of contributory negligence, and that issue should not have been submitted to the jury; that the court erred in overruling plaintiff's motion for a directed verdict against each of the defendants on the issue of liability; and that there was error in the instructions.

On the issue of contributory negligence, the defendants assert that our former decision established the law of the case and that the issue was for the jury. The plaintiff, however, raises the implication that the evidence in the two cases is materially different in that the testimony of Mrs. Rhoden as to what she told the plaintiff and Rankin about the projectile was excluded in the former case but admitted in the present case. Boiled to its essence, the plaintiff's position is that because Mrs. Rhoden told the plaintiff that the tear gas projectile had been fired and was harmless, the plaintiff cannot be guilty of contributory negligence here. In effect, it is contended that the plaintiff should be treated as a small child who could not be expected to know anything about gas, firearms, or some ordinary laws of physics. This ignores the evidence. Plaintiff was 19 years old; had completed 1 year of college; owned a firearm; and knew the functions of primer, firing pin, and hammer. Plaintiff had been told by Mrs. Rhoden that the object was a tear gas projectile, but that it was harmless because it had already been fired. Plaintiff and Rankin thoroughly examined, and on two occasions removed the fins and some parts of the rear assembly. The metal body of the projectile was intact. Plaintiff and Rankin had shaken the object before dismantling it and heard the sound of liquid inside. Plaintiff knew that gas under pressure is sometimes a liquid. Plaintiff's testimony

was that at the time he and Rankin applied the punch and hammer, he anticipated that tear gas would come out although they expected it to seep out. They "were just going to smell it and then move back." Under the facts here, the issue of whether the plaintiff was or was not negligent in doing what he did was a question for the jury.

The plaintiff also contends that a verdict should have been directed against each of the defendants on the issue of liability. It is probably sufficient to quote our former opinion as to this issue. We said there: "The claim against the individual defendants should have gone to the jury." Landmesser v. County of Cheyenne, *supra.*

A holding of this court on a first appeal becomes the law of the case on a retrial of the same issues unless on a second trial the facts are materially and substantially different. Muller Enterprises, Inc. v. Samuel Gerber Adv. Agcy., Inc., 182 Neb. 261, 153 N. W. 2d 920. On the issue of the defendants' conduct, the evidence here is virtually identical with that on the first trial.

The plaintiff contends that since the jury found that each of the defendants was negligent, it could not properly find, as it did, that the negligence of each defendant separately was not a proximate cause of plaintiff's injury. The essence of the argument is that the finding that a defendant was negligent establishes his liability. This ignores the finding of the jury that the plaintiff was contributorily negligent. It also ignores the fact that this was a complicated chain of events in which the independent conduct of many individuals was involved. The jury was required to consider the evidence as it related to each of the eight defendants separately. Even where conduct is negligent, it is still required that the conduct be a substantial factor in bringing about the harm. Causation in this sense inevitably involves the idea of responsibility, and it is not enough that the harm would not have occurred had the indi-

vidual defendant not been negligent. See Restatement, Torts 2d, § 431, p. 428, Comment a., p. 429. See, also, Leon Green, The Causal Relation Issue in Negligence Law, 60 Mich. L. Rev., No. 5, p. 543 et seq.

Among the considerations which are important in determining whether an actor's conduct is a substantial factor in bringing about harm to another is the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it. See Restatement, Torts 2d, § 433, p. 432, and Comment on Clause (a), p. 433.

The court did not err in overruling plaintiff's motion for a directed verdict on the issue of liability.

The plaintiff contends that instruction No. 10 dealing with the issue of plaintiff's contributory negligence was erroneous and prejudicial. A portion of the instruction dealing with reasonable care directed the jury to consider plaintiff's "age, intelligence, capacity, training and experience as shown by the evidence, the nature of and appearance of the projectile, his familiarity, if any, with objects with explosive possibilities, the possible danger of tampering with an unfamiliar object, any statements which you find were made to him by Mrs. Rhoden, and any other circumstances shown by the evidence." The plaintiff objects to the use of the word "tampering" and the words "explosive possibilities" with reference to the projectile. The inference is that the instruction was slanted unfavorably. We do not believe the instructions were slanted in the defendants' favor nor that the use of these words in context was prejudicial to the plaintiff.

"The true meaning of a set of instructions will be determined from a consideration of all that is said in them and not from picking out and emphasizing one errant word." Lang v. Kerr, 180 Neb. 106, 141 N. W. 2d 759.

The plaintiff also contends that instruction No. 12 was erroneous and prejudicial. The instruction dealt with

proximate cause. It was quite long, which is understandable in the context of the involved and complicated factual situation. Paragraph 6 was: "If the conduct of two or more persons operates together at the same time to produce a result, the conduct of each is a concurrent cause."

Plaintiff asserts that this requires concurrence of conduct in space and time, and is misleading. We think the language does not mean that the conduct must concur in space and time, but only that the effects of the conduct are operating at the same time to produce a result.

The plaintiff also contends that paragraph 7 of instruction No. 12 defined proximate cause as the cause most closely and directly connected in time or space to the result, and was, therefore, erroneous and misleading. The full paragraph was: "Proximate cause is the cause most closely and directly connected in time or space to the result; when later causes are reactions to or consequences of an earlier cause, such earlier cause is the proximate cause. A cause is remote when it does not concur with, but precedes a proximate cause in time or space. Several causes acting concurrently may amount to a proximate cause."

The interpretation of an instruction on proximate cause is difficult enough for lawyers and even more so for laymen. The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of the instruction is reasonably clear. Myers v. Willmeroth, 151 Neb. 712, 39 N. W. 2d 423.

Where the meaning of an instruction is clear and a correct statement of the law, error cannot be predicated on the selection of words. Hiner v. Nelson, 174 Neb. 725, 119 N. W. 2d 288.

Instructions to a jury should be considered as a whole and if they fairly submit the case that is all the law requires. Hiner v. Nelson, *supra*.

In deciding whether or not there is error in a sen-

tence or phrase of an instruction it will be considered with the instruction of which it is a part and the remainder of the charge to the jury and the meaning thereof will be determined not from the sentence or phrase alone but by consideration of all that is said upon the subject. Bryant v. Greene, 166 Neb. 520, 89 N. W. 2d 579.

We believe the instructions here fairly submitted the case to the jury. For the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.

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KRESHA CONSTRUCTION COMPANY, INC., A CORPORATION, APPELLEE, V. ADOLPH KRESHA ET AL., APPELLANTS.

166 N. W. 2d 589

Filed March 14, 1969. No. 37088.

1. **Trial: Courts.** The proper method of presenting a case to the jury is a clear and concise statement by the court of those issues which find support in the evidence, and not by substantially copying the pleadings of the parties.
2. ———: ———. The instructions of the court must be considered in toto and if so considered they cover the issues raised by the pleadings and supported by the evidence, they are adequate.
3. **Trial: Courts: Witnesses.** It is the duty of the trial court to control the propounding of hypothetical questions to expert witnesses and to regulate the form, length, and content of the questions. In the exercise of this power the court exercises a judicial discretion which ought not be overriden unless it very clearly appears to have been wrongly exercised.

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

John E. Dougherty, for appellants.

Robak & Geshell and Barney, Carter & Buchholz, for appellee.

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

SPENCER, J.

This is an action to recover the balance due upon a written construction contract and for alleged extras and additions claimed to have been subsequently ordered by the defendants. The jury returned a verdict for plaintiff in the sum of $6,037.64 and defendants perfected an appeal to this court.

Plaintiff, a construction company owned by Arthur J. Kresha, a half brother of the defendant Adolph Kresha, agreed to build a house for defendants for $28,000. There is a serious conflict in the evidence as to the type of house to be built. It is defendants' position that plaintiff agreed to build a house according to plans and specifications used to build one in Gresham, Nebraska, owned by Mark Romohr, which plans they furnished to it. Plaintiff's contention is that it advised defendants that the Romohr house could not be duplicated for the amount defendants were willing to spend, and that new plans and specifications were drawn for a house within the amount defendants wished to pay. These are the plans which plaintiff insists were the basis for the contract. Defendants are equally insistent they were to have had the exact Romohr house, less changes necessary to exclude one bedroom.

Plaintiff further contends that after construction started, defendants ordered many extras and additions for which they agreed to pay. Defendants testify that the only changes suggested by them, with three exceptions for which they paid, were to conform the house to the Romohr specifications and were within the contract. No purpose will be served by detailing the respective claims of the parties except to note that defendants also claim there are 26 serious defects in the construction which would cost $11,815.47 to remedy,

which defendants claim constitute a substantial breach of the contract.

Defendants set out 13 assignments of error. We consider only those specifically discussed in defendants' brief.

Defendants, in their amended answer, substantially deny and allege as follows: (1) Deny the allegations of plaintiff's petition; (2) allege that defendants agreed the house was to be built by plaintiff in accord with the Mark Romohr plans, for $28,000; (3) that they paid $29,382.97 upon the contract and were allowed $1,000 credit for used lumber stored at the defendants' farmstead; (4) that there are 26 defects in the construction, each set out separately and numbered, which defendants allege constitute a failure to perform the contract in those particulars; (5) that there were certain other items ordered for which the defendants paid but have not received credit; (6) that the patio on the outside of the house was settling, and that water and rain overflowed into the living room and down into the basement, necessitating a repair cost of $400; (7) that plaintiff failed to enclose the upper part of the basement walls which will entail a cost to the defendants of $750; (8) that the garage double door has not functioned and the floor of the garage slopes gently to the north so that surface waters flow into the garage, to correct which will cost $300; and (9) that the fireplace in the basement smokes and because it has never been finished will require an additional expenditure of $200.

The trial court, in instruction No. 2, stated those issues as follows: "Defendants for their Answer to *plaintiffs'* Petition deny each and every allegation therein and allege that the house was to be built by plaintiff according to the Mark *Romar* plan for the sum of $28,000.00 and was to be constructed in a good and workmanlike manner; that defendants have paid plaintiff a total of $29,382.97 and, in addition thereto, *plaintiffs were* to be allowed a credit upon used lumber of defendants' used

by plaintiff in the sum of One Thousand Dollars; that plaintiff failed to complete said house in a good and workmanlike manner, in accord with the plans and specifications, in various ways, as detailed in the evidence; and that the fair and reasonable cost to place said house in substantially its condition as provided by the plans and specifications is the sum of $11,815.47; that certain extras were ordered but were paid for by the defendants, as has been detailed in the evidence; that certain damages have been caused to defendants by reason of claimed omissions and unworkmanlike construction; and that, for all of the above, defendants claim plaintiff should pay them $15,848.44 and that plaintiff's Petition should be dismissed."

Defendants urge that they were entitled to have each of the items set out in their answer specifically set forth in the instructions so that the jury would know exactly what the contested issues were as between the parties. Defendants do not attempt to point out how instruction No. 2 was prejudicial. It is true it does not go into defendants' claims with any specificity. The purpose of instructions is to summarize the issues presented by the parties, and not to attempt to list them in every detail. The instruction of the court sufficiently stated the issues covered by the pleadings and supported by the evidence. This court has on many occasions condemned the practice of copying pleadings into instructions. The proper method of presenting a case to the jury is a clear and concise statement by the court of those issues which find support in the evidence, and not by substantially copying the pleadings of the parties. Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831.

Defendants assign as error the overruling of their attack on plaintiff's petition at three separate stages of the proceedings on the grounds it failed to state a cause of action. Defendants filed a demurrer ore tenus before the introduction of testimony; a motion for a directed verdict at the close of plaintiff's evidence; and a

motion for a directed verdict at the close of all of the evidence. Defendants' attack is predicated on the premise that there is no specific allegation in the petition of substantial performance of the contract within the meaning and intent of section 25-836, R. R. S. 1943, which reads: "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance."

On this point, the trial judge in his ruling stated as follows: "The Court: I am going to overrule the Motion, and partly for this reason—the Petition, I think, is not quite complete but at the time of the pre-trial conference, and this was not included in the pre-trial Order, it was stated by the attorney for the defendants that there was no question that the work had been done but it was a question of whether or not the extras were included within the ambit of the contract; and then there was the question raised of the unworkmanlike carrying out of the work; and at that time it was my understanding that the issue would be as to what the contract was; and that the house was completed substantially and had been moved into." We believe that under the circumstances present in this case the ruling was correct.

Defendants attack instructions Nos. 4 and 5 given by the trial court. In instruction No. 4 the trial court laid out plaintiff's burden of proof, first on the contract, then on the claimed extras and additions. We do not agree with defendants that it was confusing or that it "almost instructs a verdict for the plaintiff." Instruction No. 5 must be read in conjunction with instructions Nos. 6 and 7. These clearly cover all of the defendants' contentions. The instructions of the court must be considered in toto and if so considered they cover the issues raised by the pleadings and supported by the evidence,

they are adequate. Frank H. Gibson, Inc. v. Omaha Coffee Co., 179 Neb. 169, 137 N. W. 2d 701.

Defendants complain of the refusal of the trial court to give their tendered instructions Nos. 2 and 3. There is no merit to these assignments. The substance of instruction No. 2 is covered in the trial court's instructions Nos. 5, 6, and 7, and the trial court's instruction No. 7 is almost identical to tendered instruction No. 3.

Defendants allege that the court erred in permitting a contractor to answer a hypothetical question. We do not agree. It is the duty of the trial court to control the propounding of hypothetical questions to expert witnesses and to regulate the form, length, and content of the questions. In the exercise of this power, the court exercises a judicial discretion which ought not be overridden unless it very clearly appears to have been wrongly exercised. 58 Am. Jur., Witnesses, § 852, p. 481.

The question propounded was a short one, was a proper hypothetical question, and while there was a dispute in the evidence on one of the assumptions, the ruling was clearly within the discretion of the trial court. Even if the question had been erroneously admitted, a review of the testimony leads us to the conclusion that it could not have prejudiced the defense.

Defendants argue that the evidence is insufficient to sustain the verdict returned by the jury. It would seem that the jury allowed plaintiff the $5,537.64 claimed for extras and additions, and possibly a disputed item of $2,000, and then gave the defendants credit for the old lumber used by the plaintiff, which could have been either $250, $500, or $1,000, and that the balance of the $1,500 difference represents an attempt to make some allowance for defects the jury found to exist. There is no question the defendants were allowed credit for the $1,382.97 paid for appliances. While we might have been more liberal on allowance on defects, we cannot say the jury was too restrictive. The jury heard the testimony and we are reading a cold record. In any

event, the questions presented are ones of fact, and solely within the province of the jury. We cannot say that the evidence is insufficient to sustain the verdict herein.

For the reasons given, the judgment herein is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. HENRY REICHEL, APPELLANT.
165 N. W. 2d 743

Filed March 14, 1969. No. 37098.

1. **Criminal Law: Motions, Rules, and Orders.** The trial court has a broad discretion in ruling upon a discovery motion in a criminal case.
2. ———: ———. Such a motion should be granted where required by the interests of justice, but the burden is on the defendant to show why the motion should be granted.

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

William A. Wieland, 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.

BOSLAUGH, J.

The defendant, Henry Reichel, was convicted of burglary and sentenced to 10 years' imprisonment. The judgment was affirmed by this court in State v. Riley, 182 Neb. 300, 154 N. W. 2d 741.

The defendant then filed a motion under the Post Conviction Act alleging that the denial of his pretrial discovery motion had violated his constitutional right to a fair trial. This issue was not raised in the prior appeal. State v. Riley, *supra*.

The trial court ordered that cause be shown why the relief prayed for should not be granted. The State filed a return stating that the motion failed to allege grounds upon which relief could be granted. The trial court found that the defendant was not entitled to post conviction relief and overruled the motion without a hearing. The defendant has appealed.

The defendant was charged with breaking and entering a building where a smelter was operated. The smelter produced large quantities of dust and there was a heavy layer of black dust on the window sill of one of the windows broken in the burglary. When the defendant was apprehended in the vicinity of the premises soon after the burglary there was "a lot of black dirt or dust" all over his clothing.

The purpose of the pretrial discovery motion was to allow the defendant to inspect and copy a chemical analysis laboratory report which the State had obtained from the Federal Bureau of Investigation. The report concerned an analysis of dirt samples taken from the premises where the burglary occurred and dirt samples taken from the clothing of the defendant.

The trial court has a broad discretion in ruling upon a discovery motion in a criminal case. State v. Novak, 181 Neb. 90, 147 N. W. 2d 156. Such a motion should be granted where required by the interests of justice. Cramer v. State, 145 Neb. 88, 15 N. W. 2d 323. The burden is on the defendant to show why the motion should be granted. Linder v. State, 156 Neb. 504, 56 N. W. 2d 734. See Annotation, 7 A. L. R. 3d 8.

The report referred to in the defendant's motion was not produced at the trial and no expert testified concerning the tests made or the results of the tests. However, the defendant called the deputy county attorney as a witness and proved that some of the defendant's clothing and samples of dirt from the premises had been sent to a laboratory for examination. On cross-examination this witness testified that tests had been made

and a report received. The defendant objected to questions as to the results of the tests or what the report stated, and his objections were sustained.

The defendant made no request during the trial to examine the report and no effort was made in this proceeding. The record suggests that the defendant's trial strategy was to obtain the benefit of the inference that might be drawn from the failure of the State to use the results of the scientific investigation in its case.

The defendant now relies upon Brady v. State, 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215, and claims that the State suppressed evidence favorable to him. The Brady case involved the suppression of the confession of an accomplice in which the accomplice admitted the actual homicide.

There is no showing in this case as to what the contents of the laboratory report might be. But it cannot be said that the State suppressed the report in view of the attempt of the State to show the results of the tests and what the report stated during the cross-examination of the deputy county attorney.

The record sustains the denial of post conviction relief. The judgment of the district court is affirmed.

AFFIRMED.

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MELVILLE L. CHALOUPKA, APPELLANT, V. AREA VOCATIONAL TECHNICAL SCHOOL NO. 2 ET AL., APPELLEES, KEITH COUNTY, NEBRASKA, ET AL., INTERVENERS-APPELLANTS, LINCOLN COUNTY, NEBRASKA, INTERVENER-APPELLEE.

165 N. W. 2d 719

Filed March 14, 1969. No. 37165.

1. **Schools and School Districts: Administrative Law.** When petitions for withdrawal are presented to the State Board of Vocational Education pursuant to section 79-1445.21(2), R. S. Supp., 1967, there is no adjudicative fact at issue within the principle that a trial type of hearing is required for disputes of adjudicative facts.

2. ———: ———. The State Board of Vocational Education in such situation does not act judicially or quasi-judicially but performs a purely administrative act.
3. **Schools and School Districts: Administrative Law: Constitutional Law.** The action of the State Board of Vocational Education in the certification of the validation of signatures to the governing board of an area vocational technical school is not affected by the constitutional guarantees of procedural due process.
4. **Schools and School Districts: Constitutional Law: Statutes.** Section 79-1445.21(2), R. S. Supp., 1967, is found to be constitutional.

Appeal from the district court for Lincoln County: NORRIS CHADDERDON, Judge. Reversed and remanded with directions to dismiss.

Baylor, Evnen, Baylor & Urbom, for appellant.

Frank B. Svoboda, for interveners-appellants.

Maupin, Dent, Kay, Satterfield & Gatz, for appellees Area Vocational Technical School No. 2 et al.

W. R. Mullikin, for intervener-appellee.

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

SPENCER, J.

This is an action to enjoin an election on the issue of withdrawal of counties from the geographical boundaries of Area Vocational Technical School No. 2, hereinafter referred to as vocational school.

The plaintiff is a resident, legal voter, and taxpayer in Custer County, Nebraska, which is within the geographical boundary of vocational school. All of the defendants except vocational school and Irene M. James are members of the governing board of vocational school. Irene M. James is the county clerk of Custer County and an election official of that county. Keith County, Lincoln County, and Barbara Anderson, an elector and taxpayer of Keith County, appear as interveners in the action.

The action raises the constitutionality of subsection (2) of section 79-1445.21, R. S. Supp., 1967, which subsection was added by Legislative Bill 832, Laws 1967, c. 553, § 1, p. 1822, and provides a method of withdrawal from a vocational school area. The action also raises the sufficiency of the petitions relating to the withdrawal of some of the counties; the power and authority of the State Board of Vocational Education to act in validating petitions for withdrawal; the allowance of a motion for a supersedeas bond by two interveners; and the propriety of disallowing a supersedeas bond on behalf of the plaintiff after allowance of the supersedeas bond on behalf of the two interveners.

The trial court found that section 79-1445.21(2), R. S. Supp., 1967, was not violative of any constitutional provision, but that the State Board of Vocational Education was without power and authority to act in validating the petitions for withdrawal and thereafter certifying such validation to the governing board of vocational school, for the reason that such board had failed to adopt, publish, and file rules in accordance with sections 84-901 to 84-916, R. R. S. 1943, relating to a hearing and notice and that the purported validation and certification of such validation were null and void.

The trial court issued a permanent injunction against the governing board of vacational school, two intervening counties within the geographical boundaries of said school, and Irene M. James, county clerk of Custer County, enjoining them from taking any action to submit the question of the withdrawal of such counties to the electors of the area encompassed by such vocational school. Interveners Barbara Anderson and Keith County were permitted to post a supersedeas bond to supersede the injunction, and the motion of plaintiff for a supersedeas bond was denied. The trial court further directed that the election be held, but because of the failure of Irene M. James and the intervener Lincoln County to file a supersedeas bond, the trial court

enjoined the counting of ballots in Custer County and Lincoln County pending the determination of the appeal.

Section 79-1445.21(2), R. S. Supp., 1967, is as follows: "(2) One or more counties within the geographical boundaries of an area vocational technical school may withdraw from such area by filing petitions requesting withdrawal signed by the legal voters of the county or counties in which the area vocational technical school is located. Such petitions shall contain signatures of legal voters equivalent to at least twenty per cent of the total number of votes cast at the last general election for Governor within the county or counties proposed to be withdrawn; Provided, that when the petitions request withdrawal of more than one county, the petitions shall also contain signatures equivalent to not less than fifteen per cent of the votes cast at the last general election for Governor in each of the counties petitioning for withdrawal. The petitions for withdrawal shall be presented to the State Board of Vocational Education, and upon validation of the signatures of the petitions the state board shall certify such validation to the governing board of the area vocational technical school which shall then take the necessary action to submit the question of withdrawal to the electors of the entire area vocational technical school at the next general election. A majority of the votes cast in such election shall be required to withdraw from such area or transfer to another area vocational technical school."

Plaintiff argues that the above section is violative of the due process provisions of Article I, section 3, Constitution of Nebraska, and the Fourteenth Amendment to the Constitution of the United States, in that it fails to require a hearing and a notice of such hearing by or before the State Board of Vocational Education to determine the validity of the signatures on the withdrawal petitions.

Plaintiff relies on several school district cases which are not applicable to the situation herein. Two recent

school district cases, School Dist. No. 23 v. School Dist. No. 11, 181 Neb. 305, 148 N. W. 2d 301, and Frye v. Haas, 182 Neb. 73, 152 N. W. 2d 121, are more nearly analogous, and point the way herein. In School Dist. No. 23 v. School Dist. No. 11, *supra,* pursuant to section 79-408.01, R. R. S. 1943, where the river had changed its channel so that the original boundaries of the school district changed so that the district was less in area than four full sections of land and had fewer than 20 persons of school age, the county superintendent attached said district to an adjoining district. In that case we held that no adjudicative fact was involved which required the superintendent to act in a judicial manner.

In Frye v. Haas, *supra,* we held that a determination by county officials preparing the tax lists of the number of school age children residing in each county where there is a joint school district comprised of parts of two or more counties is not an adjudicative fact, and required no judicial hearing.

When petitions for withdrawal are presented to the State Board of Vocational Education pursuant to section 79-1445.21(2), R. S. Supp., 1967, there is no adjudicative fact at issue within the principle that a trial type of hearing is required for disputes of adjudicative facts. The board does not act judicially or quasi-judicially, but performs a purely administrative act of exactly the same type as that performed by the Secretary of State precedent to the action of the electorate in passing on initiative and referendum petitions.

The board is not passing on the question of withdrawal of a county from the area. It is not making a final determination on the ultimate fact but is merely certifying the signatures to the governing board of the vocational school which takes the necessary action to submit the question to the electors of the vocational area. The action of the State Board of Vocational Education in the certification of signatures is not affected by the constitutional guarantees of procedural due proc-

ess. Those opposed to the withdrawal of counties from the vocational area, if the petitions are inadequate and invalid, are not without adequate remedy.

In the trial court plaintiff contended that the provision requiring signatures of legal voters equivalent to 20 percent of the total number of votes cast at the last general election for Governor if the petition requested the withdrawal of one county but requiring only an equivalent to 15 percent if the petition requested the withdrawal of more than one county, was unconstitutional for the reason that it creates an unreasonable classification. The trial court determined otherwise, and we affirm that finding.

Plaintiff's last point on constitutionality involves the claim that the subject or subjects are not clearly expressed in the title of the act. Article III, section 14, Constitution of Nebraska, provides in part: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." The title of Legislative Bill 832 was as follows: "AN ACT to amend section 79-1445.21, Reissue Revised Statutes of Nebraska, 1943, relating to area vocational technical schools; to provide for county withdrawal from area vocational technical schools as prescribed; and to repeal the original section." Plaintiff's argument is addressed to the fact that the last sentence of the act set out heretofore, reads as follows: "A majority of the votes cast in such election shall be required to withdraw from such area or transfer to another area vocational technical school." His complaint is that transfer to another area vocational school is not included in the title. Actually, transfer is one method of withdrawing from the district. We consider the title to be adequate. We have said on many occasions that the title is not intended to be a synopsis of the act but is intended to be descriptive of the subjects embraced within the act. Legislative Bill 832 meets this test.

There is no merit to plaintiff's attack on the constitu-

tionality of section 79-1445.21(2), R. S. Supp., 1967. Further, if no hearing or notice are required on the validation of the signatures, as we here determine, the fact that the State Board of Vocational Education failed to adopt, publish, and file rules pursuant to sections 84-901 to 84-916, R. R. S. 1943, as found by the trial court, is immaterial herein and that finding of the trial court must be reversed.

The only evidence submitted regarding the validity of petitions pertained to Custer County. The trial court made no determination thereon, but applying rules recently enunciated in State ex rel. Morris v. Marsh, 183 Neb. 521, 162 N. W. 2d 262, we find the petitions for Custer County to be sufficient.

In view of the conclusions we have reached herein, there is no need to consider the assignments pertaining to supersedeas bonds of either party.

For the reasons enumerated above, we reverse the judgment herein and remand the cause with directions to dismiss the plaintiff's petition and direct that the results of the election be ascertained.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

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HAROLD TRAUTMAN, APPELLEE, V. LOUISE TRAUTMAN, APPELLANT.
166 N. W. 2d 415

Filed March 21, 1969. No. 36983.

1. **Parent and Child: Infants.** The allowance made for the support and maintenance of a child should be fair and reasonable under the circumstances of every case.
2. ———: ———. The court will take judicial notice of the cost of living and medical, dental, and other expenses incident to the support of a child.
3. ———: ———. The liability for the support of a child is the primary responsibility of the father.
4. **Divorce: Attorney and Client.** Under the statute, the allowance

or refusal to allow attorney's fees in a divorce action is discretionary, but in the absence of unusual circumstances, they are ordinarily allowed as a matter of course to the wife.

5. **Divorce: Parent and Child.** In determining reasonable visitation rights in a divorce action, the court should consider the rights of the parents in light of the paramount needs of the child for stability and continuity in its home and school environment.

Appeal from the district court for Fillmore County: JOSEPH ACH, Judge. Affirmed as modified.

John E. Dougherty, for appellant.

Kier, Cobb & Luedtke and Swartz & Wieland, for appellee.

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

WHITE, C. J.

In April 1955, defendant Louise Buller, middleaged and widowed with five children, owner of a 160-acre improved farm, married plaintiff Harold Trautman, middleaged, previously unmarried, parent oriented, and owner of a 160-acre unimproved farm. The parties are the parents of a 12-year-old son, Leroy James. In 1968, as the result of incompatibility that ripened into extreme cruelty, Harold was granted a divorce decree, his 160-acre farm, cattle and machinery thereon, and his $1,100 bank account. Louise was granted her 160-acre farm, 90 acres now irrigated, a $20,000 home ($5,000 to $6,000 mortgage), all household goods, furniture, and appliances, $4,350 alimony, custody of the boy, except for two weekends a month and 6 weeks during the summer, and $45 per month child support, with no award of attorney's fees. On appeal by Louise, we affirm the decree of the district court with some modification.

No serious question appears as to the alimony award. It appears ample. Both parties are frugal and hard working. Harold now has his farm clear, some farm

machinery worth about $4,000, cattle worth $6,000 to $8,000, and a small checking account. Louise has her clear, improved 160-acre farm, now 90 acres irrigated, from earnings during the marriage, a $20,000 fully furnished and equipped home with $5,000 to $6,000 against it, and an income of about $8,000 per year ($5,000 to $6,000 from the farm and about $2,280 from a nursing home job). During the marriage they treated their properties separately, and at least part of the time Harold farmed Louise's 160 acres in whole or in part and received one-fourth share for his services. Louise had three children from her previous marriage at home, and the amount of their joint contribution to payment of expenses is in some dispute, but they both contributed substantially. Louise, over his objection, built the $20,000 Henderson home, using proceeds of a jointly bought previous home, and with Harold paying about one-half on the appliances, furniture, etc.

No physical abuse is present in this case. Incompatibility ripened into Louise's refusal of intercourse and written demand that he leave the home premises. She sent him two checks, one for $3,000 and one for $1,500, which he never cashed. She does not resist the divorce. Further analysis would only obscure the basic outline of the case. It appears that the larger amount of the net increase of the value of the property is with Louise. Her own conduct in sending the checks to Harold suggests and confirms this. There is nothing in the evidence to suggest any award to Louise on the basis of the conduct of Harold, when measured in proportion or against her admitted or undisputed attitude and conduct. There is no cross-appeal by Harold as to the amount of alimony and we can find no reason to disturb the discretion and judgment of the district court.

Independent of the assets of the wife and mother, the father is primarily liable for the support of his children. Jones v. Jones, 173 Neb. 880, 115 N. W. 2d 462; Upah v. Upah, 175 Neb. 606, 122 N. W. 2d 507; Dimond v. State,

110 Neb. 519, 194 N. W. 725; Wassung v. Wassung, 136 Neb. 440, 286 N. W. 340.

Louise's testimony is that it requires $75 a month to support Leroy James, apparently independent of her own time and care invested in the endeavor. The court takes judicial notice of the ordinary costs of living and dental, medical, and other familiar costs of living. Schrader v. Schrader, 148 Neb. 162, 26 N. W. 2d 617. We direct that the decree be modified to provide for $75 per month child support during the time Leroy James is in the custody of his mother.

The custody provision of the decree provides that Leroy James be with the father 6 weeks in the summer between school terms. We agree. We direct the provision for transfer of custody to the father on the weekends be eliminated. No question arises as to Louise's fitness and stability, and tranquility of Leroy James' environment should be served. It appears that reasonable visitation rights to Leroy James at Louise's home will be amply sufficient, together with the summer provision for custody, to preserve the father's rights and relationship to Leroy James.

The allowance of attorney's fees to Louise is discretionary. § 42-308, R. R. S. 1943. Our cases demonstrate a uniform practice to allow attorney's fees to the wife in the absence of unusual circumstances. Nothing frivolous or overreaching appears either in the appeal here where we are granting some further relief, or in the necessity in the district court to have counsel in the adjustment of their property and custody rights after 13 years of marriage. Harold has ample assets to finance the reasonable costs of the litigation to dissolve this marriage. The decree should be modified to provide for the payment to Louise of attorney's fees in the sum of $500 as a total sum for services in the district court and this court.

The decree and judgment of the district court are affirmed as modified herein.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. JEWEL A. HOUP, APPELLANT.

166 N. W. 2d 117

Filed March 21, 1969. No. 37041.

**Criminal Law: Evidence.** Evidence is sufficient to sustain a verdict of guilt in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Edward F. Carter, Jr., for appellant.

Clarence A. H. Meyer, Attorney General, and Calvin E. Robinson, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, and NEWTON, JJ., and HASTINGS, District Judge.

SMITH, J.

A jury found defendant guilty of larceny. He contends on appeal that the evidence is insufficient to sustain the finding.

A white trailer owned by Melvin Kastanek for transportation of grain had been stolen from Rapid Service Parking at Twenty-seventh Street and Cornhusker Highway, Lincoln, Nebraska. The trailer which had been seen there at 2 a.m., Saturday, October 29, 1966, was missing at 4 a.m. During the night, but prior to 4 a.m., someone had parked an old, red trailer with a Missouri license plate on the lot.

Defendant on two occasions had driven a truck-tractor with Florida license plates to the repair and service shop operated by Peter Sweinimer in Lincoln. The unit was somewhat distinctive: Manufacture, White; series 3000 in a year between 1959 and 1962; green color; tilt cab; and snub nose. On September 19, 1966, it was pulling a white trailer of undisclosed ownership. On October 27, it was pulling a red trailer. Defendant at the time purchased 50 gallons of fuel, delivering a truck jack to

Sweinimer for security. At 10 or 11 p.m., Sunday, October 30, Sweinimer again saw the tractor. It was parked on the east side of Ninth Street near K Street in Lincoln. Coupled to it was a white trailer similar to the one owned by Kastanek.

The jury heard testimony that defendant had been lodged far distant from Lincoln at the time of the asportation. A clerk of the Alton Hotel, Kansas City, Missouri, according to its proprietor, had accepted a guest registration of defendant at 9 p.m., October 28, 1966. Between 1 and 2 a.m. the next morning, defendant retired to his room where he remained until 7 or 8 a.m. He had spent some time that night in association with Albert W. Pavey in the vicinity of Kansas City, according to Pavey. Each witness and defendant were acquaintances of long standing.

Defendant was the lessee of the tractor and the red trailer which was equipped with an odometer. When he entered the Rapid Service Parking lot, Sunday, October 30, 1966, at 2:15 p.m., he learned of a hold on the trailer. The information caused him to telephone Lieutenant Lynn V. Parks, Nebraska State Patrol, and 15 minutes later Parks met defendant. Denying knowledge of the whereabouts of Kastanek's white trailer, defendant gave this account. He had uncoupled his semitrailer on the lot at 10:30 p.m., Friday, October 28. He then went downtown, parking the tractor near Ninth and K Streets. Saturday morning he drove to Beatrice and Wymore in an unsuccessful search for an old acquaintance. He returned to Lincoln Sunday at 2. p.m.

Defendant's tractor and Kastanek's trailer were seen at 6:40 a.m., November 4, 1966, by Robert R. Johns, a special agent in the United States Department of Agriculture. The place was a service station on U. S. Highway No. 71, one-half mile east of Belton, Missouri, and 10 to 15 miles south of Kansas City. The trailer which Kastanek had licensed in Nebraska exhibited an Iowa plate. Defendant uncoupled the units, obtaining per-

mission to park the trailer there. He left the morning of November 5, in the coupled tractor-trailer to drive north. He was arrested later that day.

Evidence is sufficient to sustain a verdict of guilt in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt. Compare State v. Reeder, 183 Neb. 425, 160 N. W. 2d 753, with State v. Faircloth, 181 Neb. 333, 148 N. W. 2d 187. See, generally, Goldstein "The State and the Accused: Balance of Advantage in Criminal Procedure," 69 Yale L. J. 1149; Note, 55 Colum. L. Rev. 549. The evidence in this case is sufficient.

AFFIRMED.

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T. H. LUNDT, DOING BUSINESS AS T. H. LUNDT CONSTRUCTION COMPANY, APPELLEE, V. INSURANCE COMPANY OF NORTH AMERICA, APPELLANT.

166 N. W. 2d 404

Filed March 21, 1969. No. 37064.

1. **Insurance: Attorney and Client.** Section 44-359, R. R. S. 1943, permits the recovery of an attorney's fee only when judgment has been rendered against an insurer upon a policy of insurance.
2. ———: ———. An insurer, like any other party, is entitled to its day in court and to a judicial determination of liability on its policy before being subjected to the payment of costs and an attorney's fee.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Reversed and dismissed.

Cassem, Tierney, Adams & Henatsch, for appellant.

Foulks, Wall & Wintroub, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, SMITH, MCCOWN, and NEWTON, JJ., and KOKJER, District Judge.

NEWTON, J.

This is an action for an attorney's fee brought by T. H.

Lundt, doing business as T. H. Lundt Construction Company, against Insurance Company of North America. Judgment was entered for plaintiff in the district court. We reverse the judgment and dismiss the cause.

Plaintiff brought an action against Parsons Construction Company which had engaged in the construction of a sanitary sewer for Sanitary & Improvement District No. 35 of Douglas County, Nebraska. Defendant furnished a performance bond for Parsons and was joined as a defendant in the action against Parsons. On demurrer, the trial court ruled there was a misjoinder of parties and directed that the suit against this defendant be separately docketed. Basis of the action was damage done by Parsons to a storm sewer being constructed by Lundt for the city of Omaha, Nebraska. Judgment was rendered against Parsons. See Lundt v. Parsons Constr. Co., 181 Neb. 609, 150 N. W. 2d 108. The judgment was promptly paid by Parsons' liability insurer. An attorney's fee was not allowed in that case and plaintiff now seeks to recover the fee from the defendant on the Parsons' performance bond.

Parsons' contract with the Sanitary District required Parsons to post a performance bond as security for the faithful performance of the contract and for the payment of all persons performing labor on the project and furnishing materials in connection with the contract. It further required Parsons to carry workmen's compensation insurance, and public liability and property damage insurance. These provisions were fully complied with and, as mentioned, the Parsons' liability and property damage carrier promptly paid the Lundt judgment against Parsons.

Plaintiff's theory is that the trial court erred in sustaining the demurrer for misjoinder, that it should have been permitted to join the defendant in the original action, and that had this been done, an attorney's fee could have been recovered against the defendant under section 44-359, R. R. S. 1943. No motion was made to

consolidate for trial the redocketed case against defendant with the case against Parsons.

The bond contained the following provisions: "SECOND: The Principal shall protect and hold harmless the Owner from any and all suits and actions of every description that may be brought against said Owner on account of injuries to or death of persons or damage to property received or sustained by any person or persons through the negligence of the Principal or his agents: * * *."

No judgment has been obtained against the defendant as is required by statute. The statute authorizes the assessment of attorney's fees, as costs, *only when judgment is rendered* upon a policy of insurance. The liability of the insurer, surety, or guarantor on its agreement must first be determined and adjudged. Plaintiff maintains that this is not required in the present case because defendant prevailed upon the trial court to erroneously sustain the demurrer on the ground of a misjoinder of parties and defendant was thereby dismissed as a defendant in the original case. This contention is ingenious, but is not sound. We are asked to tax an attorney's fee or costs against a party whose primary liability has never been, and cannot now be, determined. A party cannot be denied its day in court. It is always entitled to insist upon a determination of its liability under its guaranty or suretyship agreement before being subjected to the taxation of costs. Plaintiff now has no standing to insist upon a primary judgment against the defendant because a judgment recovered against the principal for the damage sustained has been fully paid.

In the case of Gipson v. Metropolitan Life Ins. Co., 112 Neb. 302, 199 N. W. 541, this court held: "Where an insurance company offered to pay to the beneficiary the amount due upon the contract upon the furnishing of proofs of loss as required by the contract, and where after proofs of loss were furnished the insurer with due diligence in the usual course of business was proceed-

ing to pay the amount due, and where within a few days after mailing proofs of loss an action was commenced upon the contract, and where before answer day the insurer tendered the amount due, which was refused unless an attorney's fee of $100 was added, and where the insurer offered to confess judgment for the amount due, which was accepted, an attorney's fee is not properly taxable as costs under section 7811, Comp. St. 1922." In that case the court found that even though judgment was obtained on a policy of insurance, the suit was unnecessary to recovery and that, therefore, an attorney's fee could not be recovered. In the present case, no judgment has been obtained upon a policy of insurance because settlement was promptly made following judgment against the principal obligor. There is no judgment as to which costs may be deemed to be ancillary.

The case of Morton v. Travelers Indemnity Co., 171 Neb. 433, 106 N. W. 2d 710, presents an analogous situation arising under section 44-381, R. R. S. 1943. Therein the court held that in order to recover attorneys' fees, there must first be a judgment recovered against an insurance company upon a policy of insurance, that costs will not be taxed to a party in the absence of statutory authority, and that statutes of this nature must be strictly construed and applied. On consideration of these authorities and of the statute upon which plaintiff bases his action, we are constrained to find that his contentions are without merit.

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

REVERSED AND DISMISSED.

GENERAL ELECTRIC CREDIT CORPORATION, A CORPORATION, APPELLANT, V. WESTERN CRANE & RIGGING CO., A PARTNERSHIP, ET AL., APPELLEES.
165 N. W. 2d 409

Filed March 21, 1969. No. 37083.

1. **Conflict of Laws: Sales.** If the chief place of business of a debtor is not in this state, the law, including the conflict-of-laws rules, of the jurisdiction where such chief place of business is located governs perfection of a security interest and possibility and effect of proper filing with regard to construction machinery.
2. ———: ———. The interest acquired in movables by a buyer in ordinary course of business under the Uniform Commercial Code may be subject to a pre-code security interest in the movables.

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

Wright, Simmons & Hancock, for appellant.

Lovell & Raymond, for appellee Western Crane & Rigging Co.

Dawson, Nagel, Sherman & Howard, for appellee American Nat. Bank of Denver.

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

SMITH, J.

The district court declared that plaintiff had no property interest in a truck crane. Plaintiff on appeal contends it had perfected a security interest by filing a contract and assignment for conditional sale of the equipment under pre-code law of Colorado. Defendant contends: (1) Local law of New Mexico, not Colorado, governed perfection of the security interest and possibility and effect of filing; (2) plaintiff failed to file the contract and assignment in the county prescribed by Colorado law; and (3) subsequent transfer of the truck crane from a merchant to defendant, a buyer in ordi-

nary course of business under the Uniform Commercial Code, cut off the security interest.

The debtor, Robert Deline, had been a bridge contractor maintaining his chief place of business at Broomfield, Boulder County, Colorado. The conditional seller, Fincham Equipment Company, Inc., was maintaining its chief place of selling, leasing, and servicing heavy construction equipment at Commerce City, a Denver suburb located in Adams County. Fincham contracted there for conditional sale of the truck crane to Deline on November 23, 1965. Fincham's interest was assigned to plaintiff the same day.

The truck crane was situated in New Mexico on November 23, 1965, the date of the conditional sale. About December 3 Deline moved it to a job site in Arizona. It was never situated in Boulder County during the time covered by the evidence. Plaintiff recorded the conditional sale contract and assignment in Boulder County on December 3, when the equipment was in New Mexico, Arizona, or both states.

Deline in early 1966 transferred his chief office to the Arizona job site, storing materials on a lot owned by his mother-in-law and located in Commerce City, Colorado. On August 1 he delivered the truck crane to Fincham for repair and repaint — a job which Fincham finished in the first half of September.

Charles Rickus, a member of defendant, a partnership, personally inspected the truck crane in Fincham's yard September 20, 1966. After inspection Rickus as agent purchased the equipment from Fincham which issued defendant a bill of sale. The next day Deline signed an agreement renting the equipment to Fincham for a term of approximately 28 months. Soon after the death of its president in February 1967, Fincham went into bankruptcy and Deline defaulted on the conditional sale contract. Defendant qualified as a buyer in ordinary course of business. The evidence, including some not summarized, is concededly insufficient to support a find-

ing of consent by plaintiff to the Fincham-defendant transaction.

Regarding applicability of New Mexico local law to determine enforceability of plaintiff's security interest, defendant looks to pre-code choice-of-law rules. The reference is erroneous. The Code which went into effect in Nebraska on September 2, 1965, provides for choice of law: "(2) If the chief place of business of a debtor is in this state, this article governs the validity and perfection of a security interest and the possibility and effect of proper filing with regard to general intangibles or with regard to goods of a type which are normally used in more than one jurisdiction (such as * * * construction machinery * * *) if such goods are classified as equipment or classified as inventory by reason of their being leased by the debtor to others. Otherwise, the law (including the conflict of laws rules) of the jurisdiction where such chief place of business is located shall govern. * * *." § 9-103 (2), U. C. C.

Colorado in 1965 generally provided for recordation of a security agreement in the county in which the collateral was situated. §§ 21-1-4 and 21-1-16, C. R. S. 1963. Recordation of a mortgage on a diesel tractor in the county of situs was approved in Rosenthal v. Whitehead, 159 Colo. 565, 413 P. 2d 909. The court earlier in another case had approved a filing on October 18, 1954, of a purchase money mortgage on truck tires in the county of the debtor's residence. The sale, mounting of the tires on the truck, and delivery of the mortgage had occurred September 27, 1954, in another county of Colorado. Between September 27, 1954, and April 1, 1955, the debtor operated the truck on a route with terminals in the states of Florida and Washington. Situs of the truck during that period was otherwise unknown. The court said: "* * * 'the words "shall be situated" * * * mean permanently situated.' * * * Regardless of the fact that it may be in constant movement, a motor vehicle, presumptively at least, should

have its situs under the circumstances here presented at the residence of the owner." Rabtoay General Tire Co. v. Colorado Kenworth Corp., 135 Colo. 110, 309 P. 2d 616.

The truck crane in the present case had no permanent situs from November 23 to December 3, 1965. Plaintiff in our opinion of Colorado law recorded the conditional sale contract and assignment in the proper county. Defendant would prevail, nevertheless, if Code law alone were applicable. See, §§ 155-2-403 (2) and 155-9-307 (1), C. R. S. 1963; Official Comment 4, § 9-306, U. C. C. A pre-code security interest may, however, survive the interest subsequently acquired by a buyer in ordinary course of business. "Transactions validly entered into prior to the effective date of this chapter and the rights, duties, and interests flowing from them remain valid thereafter and may be terminated, completed, consummated, or enforced as required or permitted by any statute or other law amended or repealed by the enactment of this chapter as though such repeal or amendment had not occurred." § 155-10-101 (2), C. R. S. 1963.

Defendant purchased the truck crane subject to plaintiff's security interest. The judgment is reversed and the cause remanded for proceedings in accordance with this opinion.

REVERSED AND REMANDED.

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GERALD HORST ET AL., APPELLANTS, V. HOUSING AUTHORITY OF THE COUNTY OF SCOTTS BLUFF, NEBRASKA, APPELLEE.
166 N. W. 2d 119

Filed March 21, 1969. No. 37097.

1. **Property: Covenants.** Lawful covenants restricting the use of land and binding upon successors in title constitute an interest in the land, and property in the constitutional sense.
2. **Property: Eminent Domain.** Where the taking of the land by

eminent domain permits a use violative of the restrictions and extinguishes such interest, there is a taking of the property of the owners of the land for whose benefit the restrictions were imposed, and such an owner is entitled to compensation for the damage, if any, to his property.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded for further proceedings.

Van Steenberg, Winner & Wood, for appellants.

Robert L. Gilbert, for appellee.

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

MCCOWN, J.

The Housing Authority of the County of Scotts Bluff commenced condemnation proceedings to acquire 24 lots in Highland Park Second Addition, for the purpose of erecting multiple unit dwellings. Each of the appellants, some 40 in number, owned a lot in the addition. Their lots were not included in the 24 lots being acquired by condemnation. The appellants were joined as condemnees because of their interest in covenants affecting all lots in the addition and restricting each lot to single family residential use. In the condemnation proceeding, each of the 40 appellants received $200 damages. The award was signed by 2 of the 3 appraisers. In an appeal to the district court by the appellants, the Housing Authority filed a motion for summary judgment on the ground that the appellants did not own an interest in the property acquired by the Housing Authority, and were not entitled to compensation. The district court sustained the motion, entered judgment for the Housing Authority, and directed the damages awarded be returned.

The issue involved is whether a condemnation of real property, which extinguishes a covenant restricting the use of the property condemned, may constitute the tak-

ing or damaging of property of owners of other land for whose benefit the restrictions were imposed. The issue is one of first impression in this state. There is a direct conflict of judicial authority. See, Annotation, Eminent Domain: Restrictive Covenant or Right to Enforcement Thereof as Compensable Property Right, 4 A. L. R. 3d 1137; 122 A. L. R. 1464; 67 A. L. R. 385; 17 A. L. R. 554.

Lines of decision are sufficiently extensive and contrasting that the positions of the courts are expressed as a majority view and a minority view. See 2 Nichols on Eminent Domain (3d Ed.), § 5.73, p. 125, et seq. The position of the Housing Authority and the judgment of the lower court reflect the minority view. The Housing Authority contends that restrictive covenants are not enforceable against the government; that such covenants are made subject to the powers of government, including the power of eminent domain; and are, therefore, void as against the government and not compensable. It is also contended that the rights of the appellants arising from such restrictive covenants are negative rights not known at common law, and, therefore, not property rights in the lots being acquired.

On the technical issue of whether such a restriction is an interest in the land being taken and, therefore, compensable, Restatement, Property, is definitive. In 1944, Restatement adopted the view that such a restrictive covenant, insofar as it creates an obligation binding upon successors, constitutes an interest in land which is extinguished by the taking of the land by eminent domain to the extent to which the taking permits a use violative of the restriction. See Restatement, Property, § 565, p. 3316. "Upon a condemnation of land subject to the obligation of a promise respecting its use in such manner as to extinguish the interest in the land created by the promise, compensation must be made to those entitled to the benefit of the promise." Restatement, Property, § 566, p. 3320.

Housing Authority also contends that if such restrictive covenants are treated as property rights in the property actually condemned, eminent domain proceedings might involve many owners in a large subdivision and make the administrative and financial burden on condemning units excessive. It is also argued that since the landowners in an adjoining addition, which had no restrictive covenants, would not be entitled to compensation if the property being condemned was located in that addition, the appellants should be in no better position because of the existence of the contractual covenants.

Housing Authority relies on the rule that a landowner whose land is not being taken is not entitled to compensation for damages of the same kind as that suffered by the public in general, even though the inconvenience and the injury to the particular landowner may be greater in degree than that to others. This argument, in effect, is that people should not be allowed to increase the value of their property by these covenants, or that the restrictive covenants here should be treated as though they did not exist, because the government is exercising its power of eminent domain. Such policy arguments are not impressive when weighed against the language of Article I, section 21, Constitution of Nebraska: "The property of no person shall be taken or damaged for public use without just compensation therefor."

It is tacitly conceded that these covenants could be enforced by the appellants against a private individual or corporation either by injunctive relief or by an action for damages for breach. It is also obvious that no injunctive relief is available against the governmental unit, and that the acquistion of the property by eminent domain extinguishes the restrictive obligation as to the land acquired. Under such circumstances, we cannot accept the premise that the government should be permitted to inflict damage without liability simply because it is the government. The constitutional language pro-

vides an effective shield. As Mr. Justice Holmes said in 1910: "It (the Constitution) does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained." Boston Chamber of Commerce v. Boston, 217 U. S. 189, 30 S. Ct. 459, 54 L. Ed. 725.

The nature of some public works might ordinarily warrant little, if any compensation. Even where substantial damages might be warranted to some owners, it would seem that the amount of damages would rapidly diminish as the distance of a claimant's lot from the condemned tract increased. See Aigler, Measure of Compensation for Extinguishment of Easement by Condemnation, 1945 Wis. L. Rev. p. 5, et seq.

Whether the interests involved here be treated as negative easements, equitable easements, equitable servitudes, or contractual covenants running with the land, they constitute property in the constitutional sense and must be compensated for if their extinguishment results in damage to the owners. We therefore hold that lawful covenants restricting the use of land and binding upon successors in title constitute an interest in the land, and property in the constitutional sense. Where the taking of the land by eminent domain permits a use violative of the restrictions and extinguishes such interest, there is a taking of the property of the owners of the land for whose benefit the restrictions were imposed, and such an owner is entitled to compensation for the damage, if any, to his property.

For the reasons stated, the judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE JOINT APPLICATION OF THE AMERICAN COMMUNICATION COMPANY, INC., A CORPORATION, ET AL. AMERICAN COMMUNICATION COMPANY, INC., A CORPORATION, APPELLEE, V. FRITZ BUNTEMEYER ET AL., APPELLEES, THE HAMILTON TELEPHONE COMPANY, A CORPORATION, INTERVENER-APPELLANT.

166 N. W. 2d 116

Filed March 21, 1969. No. 37110.

**Common Carriers: Telecommunications.** A company furnishing communication services for hire in Nebraska intrastate commerce is a common carrier subject to general control of the Nebraska State Railway Commission.

Appeal from the Nebraska State Railway Commission. Reversed.

Adams & Carstenson and Baldwin & Coady, for appellant.

Baylor, Evnen, Baylor & Urbom, J. Arthur Curtiss, and Arnold E. Rawn, for appellees.

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

SMITH, J.

American Communication Company and officers of Deshler Telephone Company agreed that American would purchase 24 shares of Deshler stock from the officers. The agreement being subject to aproval by the Nebraska State Railway Commission, the parties applied to the commission for approval or in the alternative for disclaimer of jurisdiction. The application met resistance from Hamilton Telephone Company which had been negotiating for Deshler assets. The commission found that Deshler was not a common carrier, ordering dismissal for lack of jurisdiction. Hamilton on appeal contends that the evidence is insufficient to sustain the finding.

Deshler, incorporated under general law, furnishes

local exchange telephone service in Nebraska. Its lines which occupy public ways serve a territory where no other telephone service is available. Ownership of a telephone and one share of Deshler stock have been conditions of eligibility for the service. The share, freely negotiable, sold initially for $25 and subsequently for $40. A letter to Deshler in 1935 described company practices as follows:

"Your actual activities consist in operating a local exchange for the benefit of your stockholders. You state that you have no income from nonmembers; that an annual assessment is levied against your members, part of which together with the commissions received on toll services handled for other companies, is used to defray your operating costs; that the balance of your annual assessment is credited to surplus, but does not inure to the benefit of any private stockholder or individual; and that you do not pay interest or dividends on your capital stock."

Deshler offered to serve all who would fulfill conditions of eligibility, and its president assisted applicants in straitened circumstances by purchasing shares of stock for their benefit. He also sold shares to other applicants. The number of shares owned by Deshler officers on December 1, 1967, was: President, 11; vice president, 1; and secretary-treasurer, 12. American then agreed to purchase each share at a price of $400.

American and Deshler officers on December 1, 1967, conceded that upon purchase of the 24 shares American would or might gain control of Deshler. In July 1967, Deshler had served 585 customers. In November it listed 494 stockholders and 543 shares issued and outstanding. Deshler assets totaling $88,040.39 on December 31 included (1) receivables due from subscribers and agents $6,337.78; (2) cash, $9,826.86; and (3) securities, $29,863.04. Cash receipts of $53,628.67 for the year included $31,252.61 in tolls and taxes. The surplus reserve at the close of 1967 was $60,516.26.

A company furnishing communication services for hire in Nebraska intrastate commerce is a common carrier subject to general control of the commission. § 75-109, R. R. S. 1943. An essential part of the definition is the phrase "for hire." See, State v. Southern Elkhorn Telephone Co., 106 Neb. 342, 183 N. W. 562; Northwestern Bell Tel. Co. v. Pleasant Valley Tel. Co., 181 Neb. 799, 150 N. W. 2d 922; cf. City of Bayard v. North Central Gas Co., 164 Neb. 819, 83 N. W. 2d 861. A cooperative or mutual company operating an exchange offering telephone service in Nebraska may be under a duty to file maps of service territory with the commission. See § 75-605, R. R. S. 1943. A service area boundary between American and Deshler was considered in Sherdon v. American Communication Co., 178 Neb. 454, 134 N. W. 2d 42. The commission has not otherwise asserted jurisdiction over Deshler.

The commission, the parties concede, necessarily based the dismissal for lack of jurisdiction on the finding that Deshler was not a common carrier. The evidence in our opinion is insufficient to sustain the finding. We imply no opinion on any other issue.

The order of the commission is reversed.

REVERSED.

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STEVEN H. SCHREINER, APPELLANT, V. IRBY CONSTRUCTION COMPANY, A FOREIGN CORPORATION, ET AL., APPELLEES, OMAHA PUBLIC POWER DISTRICT, GARNISHEE-APPELLEE.

166 N. W. 2d 121

Filed March 21, 1969. No. 37114.

1. **Public Corporations: Garnishment.** Omaha Public Power District is subject to garnishment process to the same extent as any electric light and power company by virtue of section 70-667, R. R. S. 1943.
2. **Trial: Appeal and Error.** If any fact issue was presented, in the absence of a bill of exceptions there is a presumption the

trial court's determination of that issue is correct.

3. **Corporations: Statutes.** Section 21-20,106, R. S. Supp., 1967, gives a foreign corporation obtaining a certificate of authority the same standing in the eyes of the law as a domestic corporation except where specifically prohibited by law.
4. **Corporations: Bonds.** When a foreign corporation has domesticated or has obtained a certificate of authority to do business in Nebraska, it is not subject to the waiver of bond provisions of section 25-1003, R. R. S. 1943, and a bond is required in any attachment proceeding involving it.

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

Foulks, Wall & Wintroub, for appellant.

Malcolm D. Young and Cassem, Tierney, Adams & Henatsch, for appellees.

Fraser, Stryker, Marshall & Veach, for garnishee-appellee.

Heard before WHITE, C. J., CARTER, SPENCER, SMITH, MCCOWN, and NEWTON, JJ., and KOKJER, District Judge.

SPENCER, J.

Plaintiff, on his own behalf and that of all persons similarly situated, sued Irby Construction Company, a foreign corporation, hereinafter referred to as Irby, and Insurance Company of North America, a foreign corporation, hereinafter referred to as I.N.A., and simultaneously instituted garnishment proceedings against the Omaha Public Power District, hereinafter referred to as O.P.P.D., covering payments due or to become due Irby. Motions to quash and discharge the garnishment as being contrary to law and issued without the existence of proper grounds, filed by Irby and garnishee, O.P.P.D., were sustained. Plaintiff perfected an appeal to this court.

Irby is a Mississippi corporation, with its principal place of business in Jackson, Mississippi. Service of process was made by serving its registered agent in Ne-

braska. Irby contracted with the O.P.P.D. for the construction of an electric power transmission line from the vicinity of Rulo, Nebraska, to an area south of Omaha, Nebraska. As part of that contract, Irby as principal, and I.N.A. as surety, executed a payment performance bond in the amount of $852,465.

Plaintiff, who had been employed by Irby as a construction worker from February 25, 1968, to April 23, 1968, alleged Irby violated his agreement to abide by the Fair Labor Standards Act whereby Irby would pay the wage rate to its employees paid by 50 percent or more of the contractors engaged in power line construction in the State of Nebraska. Plaintiff alleged because of Irby's failure to comply, approximately $204,000 is due from Irby to its employees.

Two questions are presented by this appeal: (1) Is O.P.P.D. exempt from garnishment process other than as provided in section 25-1012, R. R. S. 1943, which covers only earnings of officers and employees; and (2) is the waiver of bond provision of section 25-1003, R. R. S. 1943, applicable to a foreign corporation with a certificate of authority to do business in Nebraska?

We determine that O.P.P.D. is subject to garnishment process to the same extent as any electric light and power company by virtue of section 70-667, R. R. S. 1943, which provides in part: "All laws applicable to works of internal improvement, and all provisions of law now applicable to electric light and power corporations, or to irrigation districts, or to privately owned irrigation corporations, the use and occupation of state and other public lands and highways, the appropriation, or other acquisition, or use of water, water power, water rights, or water diversion or storage rights, for any of the purposes contemplated in such statutory provisions, the manner or method of construction and physical operation of power plants, systems, transmission lines and irrigation works, as herein contemplated, shall be applicable, as nearly as may be, to districts organized under sec-

tions 70-601 to 70-672, and in the performance of the duties conferred or imposed upon them under such statutory provisions."

In enacting this statutory provision it must be presumed that the Legislature had in mind the disabilities of public power districts, as political subdivisions of the state, and intended to put them on the same basis as private power corporations, and we so hold. See State ex rel. Dawson County Feed Products, Inc. v. Omaha P. P. Dist., 174 Neb. 350, 118 N. W. 2d 7.

Plaintiff proceeds herein on the assumption that the court sustained the motions to quash only because it held O.P.P.D. was not subject to garnishment. This fact cannot be ascertained from the record presented. No bill of exceptions was filed herein. The motions to quash specifically alleged that said garnishment was contrary to law and that no proper grounds existed for its issuance. If any fact issue was presented, in the absence of a bill of exceptions there is a presumption the trial court's determination of that issue is correct. Blanco v. General Motors Acceptance Corp., 180 Neb. 365, 143 N. W. 2d 257.

In any event, it is evident from the record that service was had on Irby in Nebraska by serving its resident agent. It is immaterial herein whether Irby complied with the provisions of section 21-20,105, R. S. Supp., 1967, by procuring a certificate of authority to do business in Nebraska, or with section 21-20,122, R. S. Supp., 1967, the domestication procedure. In the latter event, it would become a body corporate of this state. In the former, it secures the benefits of section 21-20,106, R. S. Supp., 1967, which provides, so far as material herein: "A foreign corporation which shall have received a certificate of authority * * * shall * * * enjoy the same * * * rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; and * * * shall be subject to the same duties, restrictions, pen-

alties and liabilities now or hereafter imposed upon a domestic corporation of like character, except corporations not incorporated under the laws of this state are subject to all prohibitions applied to them contained in any other laws or acts of this state."

Section 21-20,106, R. S. Supp., 1967, was obviously intended to give the foreign corporation obtaining a certificate of authority the same standing in the eyes of the law as a domestic corporation except where specifically prohibited by law. In Ford v. Transocean Airlines, Inc., 28 Ill. App. 2d 234, 171 N. E. 2d 225, the Illinois court, in a closely analogous situation, held that a foreign corporation which had duly obtained a certificate of authority in that state, enjoyed all the rights and privileges of a domestic corporation and was not liable to attachment on the grounds of nonresidency as a foreign corporation.

Plaintiff calls specific attention to the last sentence of the statute as negativing Irby's exemption from section 25-1003, R. R. S. 1943. We do not so construe it. We determine that when a foreign corporation has domesticated or has obtained a certificate of authority to do business in Nebraska, it is not subject to the waiver of bond provisions of section 25-1003, R. R. S. 1943, and a bond is required in any attachment proceeding involving it.

For the reasons given, the motion to quash was properly sustained and the judgment is affirmed.

AFFIRMED.

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DAVID L. FELDMAN, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
166 N. W. 2d 421

Filed March 28, 1969. No. 37013.

1. **Municipal Corporations: Property: Damages.** A property owner whose property does not abut upon the portion of a street which is to be vacated has no right of action to restrain the

vacation unless he suffers a special or peculiar damage differing in kind from that of the general public.

2. **Municipal Corporations: Property: Ordinances.** The fact that the vacation is made at the instance and request of certain owners whose property will be benefited is not ground for declaring the vacation ordinance void.

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

Stern, Harris, Feldman & Becker, for appellant.

Herbert M. Fitle and Edward M. Stein, for appellees City of Omaha et al.

Abrahams, Kaslow & Cassman and Hunter, Venteicher & Kasher, for appellee N. P. Dodge Building Co.

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

BOSLAUGH, J.

The City of Omaha, by ordinance, vacated a part of Capitol Avenue between Fiftieth and Fifty-first Streets. This action was brought by David L. Feldman, a property owner residing at 5113 Capitol Avenue, to declare the vacation ordinance void and enjoin its enforcement. The defendants are the City of Omaha, its mayor and councilmen, and the N. P. Dodge Building Company. The N. P. Dodge Building Company owns the property on each side of Capitol Avenue which abuts upon the part which was vacated.

The trial court sustained the motions of the defendants for summary judgment and dismissed the action. The plaintiff's motion for new trial was overruled and he has appealed.

Capitol Avenue runs east and west between Forty-sixth and Fifty-second Streets and is the first street north of Dodge Street. The part which was vacated lies betwen the west property line of Fiftieth Street and a point approximately 250 feet west of Fiftieth Street. The plaintiff's residence is located between Fifty-first

and Fifty-second Streets and is approximately 710 feet west of the west line of the vacated portion of Capitol Avenue. Both Fifty-first and Fifty-second Streets are open to the north and south of Capitol Avenue and the plaintiff has access to his property over these streets.

The amended petition alleged that the portion of Capitol Avenue which was vacated will revert to the N. P. Dodge Building Company; that the vacated street is valuable property for which the city will receive no compensation; that the vacation was illegal because the petition filed did not contain the signatures of the required number of property owners; and that the ordinance results in a misappropriation of public property.

The defendants' motions alleged that the plaintiff had not sustained any special or peculiar damage different in kind from that of the general public and had no right to maintain the action.

The record in this case shows, and the plaintiff concedes, that he has suffered no damage, special or peculiar in nature, and different in kind from that of the general public. A property owner whose property does not abut upon the portion of a street which is to be vacated has no right of action to restrain the vacation unless he suffers a special or peculiar damage differing in kind from that of the general public. Hanson v. City of Omaha, 157 Neb. 403, 59 N. W. 2d 622. See, also, Kraft & Sons, Inc. v. City of Lincoln, 182 Neb. 187, 153 N. W. 2d 725; Kittle v. Fremont, 1 Neb. 329; 11 McQuillin, Municipal Corporations (3d Ed.), § 30.200, p. 154; 64 C. J. S., Municipal Corporations, § 1672c, p. 50. The plaintiff did not have standing to challenge the validity of the vacation ordinance.

The fact that the portion of the street being vacated is valuable property which will revert to the abutting owners and that the city will receive no compensation for the property does not alter the situation. Statutory provisions that the title to a street shall revert to he abutting owners upon vacation are common. The fact

that the vacation is made at the instance and request of certain owners whose property will be benefited is not ground for declaring the vacation ordinance void. Dell v. City of Lincoln, 170 Neb. 176, 102 N. W. 2d 62; Village of Bellevue v. Bellevue Improvement Co., 65 Neb. 52, 90 N. W. 1002. See, also, Enders v. Friday, 78 Neb. 510, 111 N. W. 140; State ex rel. City of Lincoln v. Chicago, R. I. & P. Ry. Co., 93 Neb. 263, 140 N. W. 147; Karlin v. Franciscan Sisterhood, 109 Neb. 711, 192 N. W. 122.

The plaintiff cannot avoid the effect of the general rule by relying upon his status as a taxpayer. Blanding v. City of Las Vegas, 52 Nev. 52, 280 P. 644, 68 A. L. R. 1273.

The judgment of the district court is affirmed.

AFFIRMED.

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FLORENCE RUPE, APPELLEE, V. MARY OLDENBURG ET AL., APPELLEES, DON NIELSEN, BIDDER-APPELLANT.
166 N. W. 2d 417

Filed March 28, 1969. No. 37016.

1. **Judicial Sales.** An upset bid following a judicial sale and before a final confirmation should be considered only when it affords convincing proof that the property was sold at an inadequate price and that a just regard for the rights of all concerned and the stability of judicial sales permits its acceptance.
2. ———. The confirmation of judicial sales is within the judicial discretion of the trial court. Such discretion may not be arbitrarily exercised but must be one which is sound and equitable under the circumstances.
3. **Judicial Sales: Partition.** In partition proceedings, it is the duty of referees and trial courts to secure the highest possible price for property sold for the benefit of those persons lawfully entitled to the proceeds of the sale.
4. ———: ———. Where there has been an upset bid before a final confirmation of a partition sale, the matter of confirmation of the sale is left to the judicial discretion of the trial court with due regard to the stability of judicial sales. Such discretion is a judicial one which may not be arbitrarily exercised. This court will not intervene except in the case of an abuse of such discretion by the trial court.

5. **Judicial Sales.** In the absence of an abuse of judicial discretion the district court on motion has the power within the term to set aside an order confirming a judicial sale of real estate.
6. ———. When the district court has an upset bid before it which is found to be substantial, all interested parties are in open court, and there is no evidence that a new sale would produce a greater sum than the upset bid, it is not error for the trial court to deny confirmation of the high bidder at the public sale and to confirm the sale in the upset bidder.

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

Berreckman & Nelsen, for appellant.

Smith Brothers and Robert E. Roeder, for appellees.

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 Frontier County confirming an upset bid following a judicial sale in a partition suit.

On March 11, 1968, pursuant to an order of the district court, the land described in the petition for partition was sold to Paul A. Gruber, Donald H. Nielsen, and Donald J. Gruber for the sum of $150,500, the bid being placed by Nielsen. The sum of $30,100 was paid in cash to the referees pursuant to the court's order of sale, the balance to be paid on confirmation of the sale. On March 21, 1968, Wallace L. Rupe, Carl Haegele, Carl F. Braun, Dennis A. Berke, La Raye Schurr, and Kent A. Brockmeier tendered an increased bid in the amount of $160,500 to the referees and paid the sum of $32,100, being 20 percent of the increased bid as required by the order of sale. On March 25, 1968, the court confirmed the original sale in the amount of $150,500. A motion for a new trial was filed and on April 3, 1968, the six upset bidders filed a bid of $165,600 with the clerk of the district court accompanied by the payment of $33,120, the same being 20 percent of such upset bid. On April 5, 1968, the trial

court sustained the motion for a new trial, set aside the confirmation, and reopened the bidding. On April 8, 1968, the original bidders informed the trial court in writing through their legal counsel that they would not increase their original bid. On the same day, the court confirmed the sale of the real estate in the six upset bidders in the amount of $165,600, and ordered a distribution of the proceeds. A motion for a new trial was filed on April 11, 1968, and on April 18, 1968, it was overruled. Nielsen, the high bidder at the judicial sale held on March 11, 1968, has appealed.

The high bid at the judicial sale was $150,500. The upset bid which was confirmed was $165,600. The amount of the increase over the amount bid at the judicial sale is $15,100, an increase of more than 10 percent. This presents the issue as to whether or not it is a case where the court should secure the highest price possible for the property or, on the other hand, maintain the stability of judicial sales by making the highest accepted bid at such sale a final one.

It is the position of the high bidder at the March 11, 1968, sale that his bid should have been confirmed. The evidence shows that such sale was regularly held and fairly conducted. There is some evidence in the record that the bid of $150,500 constituted a fair and reasonable price for the land at the time it was made although there is evidence to the contrary. In County of Lancaster v. Schwarz, 152 Neb. 15, 39 N. W. 2d 921, this court said: "The upset bid to be effective must be substantial and material, and not merely nominal; otherwise it would not tend to establish fraud or unfairness at the judicial sale or the inadequacy of the highest bid procured at such sale. Whether such a bid is sufficient to warrant a resale or a reopening of the bidding is largely a discretionary matter with the trial court. It follows that the discretion of the court to reject the high bid at the judicial sale gains latitude as the upset bids become larger. * * * In determining whether an upset bid is sufficient to

sustain a finding that the price obtained at judicial sale was inadequate, the court must exercise the discretion vested in it in accordance with established legal principles."

The rights of the highest bidder at the judicial sale whose bid has been accepted ought not to be lightly disregarded. It is true, of course, that such bid is subject to confirmation by the court. If upset bids were permitted and accepted under all circumstances, the holding of a judicial sale would be nothing more than preliminary bidding and not a method of purchasing the land. Such a practice would chill the bidding at the judicial sale by encouraging the filing of upset bids and render the judicial sale a mere formality and the elimination of the primary purpose of judicial sales. This is most harmful to the stability and true purpose of judicial sales which trial courts should not lightly disregard.

On the other hand, a partition suit often involves the sale of interests of minors in the real estate, as was the case here, which the court is duty bound to protect by securing the highest possible price for the property. Oftttimes the sale of the real estate is against the wishes of some holding property interests. In performing this duty to owners of the real estate, the maintenance of the stability and true purpose of the judicial sale as such comes in conflict with the obtaining of the highest possible price for the real estate being sold. The balancing of these two conflicting theories creates the problem which the present case presents.

In Siekert v. Soester, 144 Neb. 321, 13 N. W. 2d 139, 152 A. L. R. 527, this court said in dealing with a similar problem: "Each of these two theories has its weak points. Therefore, we find in the cases supporting them a certain amount of judicial discretion necessarily vested in the court to shield and promote justice under all circumstances. * * * By analogy, from our own cases, in partition proceedings it is the duty of referees and trial

courts to endeavor to secure the highest possible price for property sold for the benefit of those persons lawfully entitled to the proceeds of the sale. Therefore, substantially increased offers to a referee for property sold by him, made before confirmation of the sale to the highest bidder, are sufficient evidence to support a finding of the trial court in the exercise of its judicial discretion that confirmation should be denied and a new sale ordered."

The discretion of the court to be exercised in such a case is broad in scope but is not an arbitrary one. It must be one that is sound and equitable under the circumstances. The court must act in the interest of fairness and prudence, and with a just regard to the rights of all concerned and the stability of judicial sales. Michelson v. Wagner, 170 Neb. 28, 101 N. W. 2d 498; Hull v. Hull, 183 Neb. 773, 164 N. W. 2d 455.

In the instant case, the highest accepted bid at the public judicial sale was $150,500. The upset bid was in excess of this amount by $15,100. It is clearly within the scope of the discretion lodged in the district court to set aside the confirmation of the sale and reopen the bidding under the circumstances. There is some evidence in the record that the upset bidders and others as well did not want to bid on the land at the public sale as long as the tenant, Hueftle, the second high bidder, was bidding. As one potential bidder aptly stated, the land was worth more "beings the neighbor didn't get it." Favoritism for such reasons can result in a chilling of the bidding which the trial court can properly consider. In any event, the trial court determined that the upset bid was substantial after a consideration of all the circumstances. This finding under the evidence is within the trial court's discretion and with which this court cannot properly interfere where an abuse of discretion is not shown.

It is contended that the trial court erred in setting aside the confirmation of sale to the successful bidders

at the judicial sale held on March 11, 1968. This precise point was determined by this court in First Nat. Bank v. First Trust Co., 145 Neb. 147, 15 N. W. 2d 386, where in the syllabus it is stated: "In the absence of abuse of judicial discretion the district court on motion has the power within the term to set aside an order confirming a judicial sale of real estate."

It is further contended that the trial court erred in confirming the sale to the upset bidders. It is not disputed that the upset bid exceeded the bid obtained at the sale of March 11, 1968, by $15,100. All persons interested were informed of the upset bid, particularly the high bidder who represented himself and two others at the March 11, 1968, sale. The latter informed the court through his legal counsel that he would not bid more than his bid of $150,500. There is no evidence in the record that the land on resale would probably sell for more than the upset bid of $165,600. Under such circumstances, the trial court did not err in confirming the sale to the upset bidders. See, Siekert v. Soester, *supra;* State ex rel. Spillman v. American State Bank, 122 Neb. 42, 239 N. W. 214; Knouse v. Knouse, 157 Neb. 748, 61 N. W. 2d 388.

We have examined other assignments of error and find them to be without merit.

AFFIRMED.

BOSLAUGH and MCCOWN, JJ., concurring.

We agree that it was within the discretion of the district court to set aside the confirmation and reopen the bidding under the particular facts and circumstances in this case. We are of the opinion that it would have been preferable to have ordered a resale after public notice with the upset bid as the opening bid. The owners could have been protected against possible loss by requiring the upset bidders to remain bound until the resale had been completed. 50 C. J. S., Judicial Sales, § 61 d, p. 684; 30A Am. Jur., Judicial Sales, § 138, p. 981.

There is an element of fairness in the immediate sale

as well as the effect on future sales that must be considered. We believe that the theory of a public sale is sound and that ordinarily, upon the reopening of bids, the sale should be open to all bidders.

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ROCKLAND CHEMICAL CO., INC., A CORPORATION, APPELLEE, V. F & F MANUFACTURING, INC., A CORPORATION, APPELLANT.
166 N. W. 2d 735

Filed March 28, 1969. No. 37049.

1. **Depositions: Witnesses.** Under the provisions of the statute, the requirement that a deposition be signed by the witness is not a mandatory provision.
2. ———: ———. The provisions of the statute, providing the procedure to be followed where the witness does not sign the deposition in the event of nonwaiver, must be substantially complied with in order to warrant the admission of the deposition in evidence, over proper objection on motion to suppress.

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

Robert E. Paulick, for appellant.

E. Harold Powell, for appellee.

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

WHITE, C. J.

The principal question involved in this case, an action for payment for goods sold and delivered, is whether unsigned depositions, where the signatures have been waived by the parties, are admissible in evidence. Plaintiff, a foreign corporation, took the depositions, consisting almost entirely of foundation testimony and identification of exhibits, in the State of New Jersey. Defendant signed no waivers and the depositions of the witnesses were unsigned.

Generally this problem turns on whether the statu-

tory provisions as to signature are mandatory or directory in nature. Are they for the benefit of the parties or the witness? The cases are in conflict on this point and the matter is not clear because of different statutes. In New York, signature is mandatory and liability for contempt enforces the rule. Dale Factors Corp. v. Jay Kay Metal Specialties Corp., 46 Misc. 2d 392, 259 N. Y. S. 2d 643; McNerney v. New York Polyclinic Hospital, 238 N. Y. S. 2d 729, 18 App. Div. 2d 210. In Missouri and Maine, signature is a formality, is for the benefit of the witness, and does not bar admissibility. Will Docter Meat Co. v. Hotel Kingsway (Mo. App.), 232 S. W. 2d 821; Hoyberg v. Henske, 153 Mo. 63, 55 S. W. 83; Bean v. Camden Lumber & Fuel Co., 125 Me. 260, 132 A. 892.

Our problem is solved by the express words and clear purpose of our statute. Our statute, section 25-1267.25, R. R. S. 1943, declares, "The deposition shall then be signed by the witness," unless "the parties by stipulation waive the signing * * *." The statute specifies precisely the procedure on nonsignature in the event of waiver, illness (death), absence, or refusal to sign. It says, "If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under section 25-1267.35 the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part."

The meaning of the statute is clear. Signature is not mandatory. But a procedure is definitely established to eliminate the uncertainty and confusion reflected in the case holdings and general statutory language. By its terms the statute requires what shall be done when there is no signature. The signature is not mandatory but these requirements for testing on motion to suppress must be substantially complied with, lest the statutory

commands be meaningless and the very purpose of the requirements be emasculated from the statute, and this court adopt an independent rule. This we cannot do. The record establishes conclusively that there was no waiver by the parties, and there is no certification or statement as to illness, death, absence, or refusal to sign, or any reason given therefor. Further, by its terms, these conditions must be met before a deposition may be admitted. The statute says, "* * * and the deposition may then be used as fully as though signed * * *." We are aware that the depositions consist almost entirely of routine and formal foundation testimony and of identification of exhibits, but the substantial minimum of the statute must be met to guarantee the authenticity of the testimony, and that has not been done. This position is reinforced by the observation that the statute requires waiver, not just by the witness or for his benefit, but by *the parties*.

Other objections are without merit and in light of our holding of inadmissibility become unnecessary to discuss.

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

REVERSED AND REMANDED.

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R-R REALTY COMPANY, A NEBRASKA CORPORATION, APPELLEE, V. METROPOLITAN UTILITIES DISTRICT OF OMAHA, NEBRASKA, ET AL., APPELLANTS, IMPLEADED WITH SAM J. HOWELL, COUNTY TREASURER, ET AL., APPELLEES.

166 N. W. 2d 746

Filed March 28, 1969. No. 37107.

1. **Taxation: Constitutional Law.** In order for the state Constitution to restrict the plenary power of the Legislature to tax, the language of restriction must be clear.
2. ———: ———. A statute authorizing or requiring a city or

county to levy a property tax for local fire protection purposes does not contravene the constitutional prohibition against a state levy of a property tax for state purposes.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Reversed and remanded with directions.

Cecil S. Brubaker, W. L. Strong, Lester R. Seiler, Herbert M. Fitle, and Edward M. Stein, for appellants.

Ross & O'Connor and McGowan & Troia, for appellee R-R Realty Co.

Donald L. Knowles, for appellees Howell et al.

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

MCCOWN, J.

The plaintiff filed this class action challenging the constitutionality of a one-half mill levy for what is commonly referred to as the "hydrant tax" in a metropolitan water district. § 14-1026, R. R. S. 1943. It is contended that this tax statute violates Article VIII, section 1A, Constitution of Nebraska, which provides: "The state shall be prohibited from levying a property tax for state purposes." The tax is a property tax. The district court found that the tax was levied by the state, for a state purpose, and violated the constitutional provision. The judgment held the tax void and enjoined its collection.

Section 14-1026, R. R. S. 1943, defines the water fund of a metropolitan water district as including a "water tax" levied by a municipality or county at the same time and in the same manner as other funds for municipal or county purposes, and then provides: "The amount of the tax shall be certified * * * by the board of directors of the metropolitan water district * * * and shall not exceed * * * the sum produced by computing each fire hydrant now or hereafter installed in the streets or

alleys of said municipality or precinct at the following rates per hydrant: Regular fire hydrants, sixty dollars; intermediate fire hydrants, ten dollars. The gross amount of such tax shall not exceed the sum of three mills on the dollar upon the assessed value of all the taxable property in such water district, except intangible property, and it shall be mandatory upon such municipal authorities or county commissioners to levy same as above provided."

Preceding sections of the statutes provide that a metropolitan water district shall maintain free of charge hydrants for fire protection established or installed as provided; and, in its discretion, afford, free of charge, water required for public use by municipalities and schools within limitations specified. See §§ 14-1023 and 14-1024, R. R. S. 1943.

Plaintiff contends that the obligation to make the levy is imposed upon the municipality or the county by the Legislature, and the tax is, therefore, levied by the Legislature; that the tax is for governmental as opposed to corporate purposes; and consequently is for state rather than local purposes and, therefore, unconstitutional. We cannot agree.

Plaintiff relies on State ex rel. Metropolitan Utilities Dist. v. City of Omaha, 112 Neb. 694, 200 N. W. 871. That case upheld this same tax against a challenge based on Article VIII, section 7, Constitution of Nebraska: "The Legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes." That case was a mandamus action by the Metropolitan Utilities District to require the City of Omaha to levy the water tax certified by the board of directors of the district. The court treated the statute as mandatory with respect to the levying of the tax by the city after certification by the district; treated the tax as "imposed" directly by the Legislature; and assumed for those purposes that the tax was "levied" by the Legislature. The essential holding of the case was that

fire protection was a "governmental" purpose, rather than a "corporate" purpose.

The language of the statute is clear and mandatory in requiring a city or county to make a tax levy sufficient to produce the amount certified by the water district if that amount does not exceed the maximum limits provided by section 14-1026, R. R. S. 1943. It is not at all clear that the statute requires the board of directors of the water district to certify some amount every year. Even if it be assumed that the language requires some amount to be certified every year, that amount is still entirely within the discretion of the board of directors of the water district if it does not exceed the maximum set out in the statute. Such a tax is no different than many other taxes previously assumed to be strictly local levies for local purposes in which amounts are certified by school districts or other bodies to the local governmental authority required to make the levy.

If we were to accept the reasoning urged by the plaintiff, any property tax for governmental purposes levied by a city or county under legislative directions fixing a maximum amount and a maximum levy would become a tax levy by the state for state purposes. In order for the state Constitution to restrict the plenary power of the Legislature to tax, the language of restriction must be clear. Craig v. Board of Equalization, 183 Neb. 779, 164 N. W. 2d 445.

The levy of a property tax by a local governmental unit should not be treated as a state levy for state purposes merely because the Legislature has authorized or required the local governmental unit to make the levy. Neither should the fact that the tax is for a "governmental" purpose make it automatically for state purposes rather than local.

A statute authorizing or requiring a city or county to levy a property tax for local fire protection purposes does not contravene the constitutional prohibition against

a state levy of a property tax for state purposes. See Craig v. Board of Equalization, *supra*.

The judgment of the district court is reversed and the cause remanded with directions to dismiss plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., concurring.

The majority opinion holds that in order for the state Constitution to restrict the plenary power of the Legislature to tax, the language of restriction must be clear.

While the foregoing statement is true, it leaves the inference that any constitutional restriction on the power of the Legislature to tax is a valid one if the restriction is clear. I submit that this is not always so. The power of the state to tax is a sovereign one which cannot be unduly restricted by constitutional provision. If this were not so, a state government could be destroyed by the terms of the very instrument of its creation by denying it the necessary funds on which to operate. The Legislature may provide the means, or no means at all, for the maintenance or destruction of a governmental subdivision whose very existence is at the sufferance of the Legislature. But the sovereign power of the Legislature to tax takes precedence over a constitutional provision only as to a statewide tax necessary to the very existence of the state; otherwise it would contain the seeds of its own dissolution. It would be a calamity of the greatest magnitude if a constitutional provision provided, or was construed to provide, for the collapse of the very object of its creation. Such a necessity tax is within the plenary power of the Legislature and is supported by the sovereign power growing out of its constitutional creation irrespective of specific constitutional provisions.

WHITE, C. J., and SPENCER and NEWTON, JJ., join in the foregoing concurrence.

ELMER B. E. DUERFELDT ET AL., APPELLANTS, V. STATE OF NEBRASKA, GAME AND PARKS COMMISSION, ET AL., APPELLEES.
166 N. W. 2d 737

Filed March 28, 1969. No. 37121.

1. **Words and Phrases.** The word "entity" means a real being, existence. "Legal entity," therefore, means legal existence. The Game and Parks Commission, created by statute, is a department of state government having an actual legal existence and is a legal entity.
2. **Statutes: Constitutional Law.** Where the title of an act fairly gives expression to the general subject-matter contained in the act, such act will not be held invalid as being broader than its title.
3. ———: ———. The provisions of the Constitution relating to titles are to be liberally construed so as to admit of the insertion in a legislative act of all provisions which, although not specifically expressed in the title, are comprehended within the objects and purposes of the act as expressed in the title, and to admit all provisions which are germane, and not foreign, to the provisions of the act as expressed in its title.
4. ———: ———. The Legislature may make a reasonable classification, resting on grounds of public policy, or some substantial difference of situation or circumstance that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified. If the statute operates equally upon all persons or objects of a class so constituted, it is enough and it is not void as being a special or local law.
5. **Eminent Domain: Constitutional Law.** The Legislature has the right to delegate the power of eminent domain and to restrict or limit the extent of its use.
6. ———: ———. It is generally deemed sufficient if an act authorizing eminent domain specifies the purposes for which property may be acquired, provides for just compensation, and satisfies the demands of due process by providing for adequate notice and hearing.
7. **Statutes.** Specific statutory provisions, relating to a particular subject, control over general provisions.

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

Mattson, Ricketts & Gourlay, for appellants.

John P. McKnight and Richard Van Steenberg, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, SMITH, McCOWN, and NEWTON, JJ., and KOKJER, District Judge.

NEWTON, J.

In this action plaintiffs seek to enjoin the appropriation by eminent domain proceedings of a certain tract of land. The Game and Parks Commission of the State of Nebraska seeks to obtain the land for park purposes. Plaintiffs assert the applicable legislative act is unconstitutional and that defendant has failed to comply with its terms. Judgment was entered for defendant in the district court. We affirm the judgment.

Plaintiffs are the owners of certain lands sought by defendant for inclusion in Indian Cave State Park in Richardson County, Nebraska. The land in dispute is included in the lands described in section 81-815.26, R. S. Supp., 1967. It is the site of a unique cave known as "Indian Cave" which is a primary inducement to the establishment of the park. Acquisition of the land was approved by the commission and eminent domain proceedings authorized. Sufficient funds for the purpose were contained in the budget of the commission. Consent of the Governor to the acquisition of this land was not obtained.

In essence, plaintiffs' contentions are: (1) Defendant is not a legal entity which may be clothed with the power of eminent domain; (2) Laws 1967, chapter 587, page 1985 (L.B. 560), which promulgates section 81-815.26, R. S. Supp., 1967, is void because a restriction on the disposition of properties acquired by eminent domain proceedings is not mentioned in the title of the act; (3) the act is void as being a special or local law; (4) the act is void for failing to establish standards for the exercise of eminent domain; and (5) the Governor's consent to the acquisition of the land has not been obtained.

Section 76-701, R. R. S. 1943, provides in part that: "(1) Condemner means any legal entity that by law has been granted the right to exercise the power of eminent domain, and includes the state and any governmental or poltical subdivision thereof."

Section 76-704, R. R. S. 1943, authorizes such condemners to bring eminent domain proceedings. In Department of Banking v. Hedges, 136 Neb. 382, 286 N. W. 277, the same question was raised in regard to the Department of Banking. The court stated: "The word 'entity' means a real being, existence. 'Legal entity,' therefore, means legal existence." The commission, created by Chapter 81, article 8, R. R. S. 1943, is a department of state government having an actual legal existence and is a legal entity.

Section 81-815.26, R. R. S. 1943, as amended in 1967, contains a clause requiring the consent of the Legislature to the sale or trading of any real estate acquired by the commission by eminent domain. This restriction is not specifically mentioned in the title of L.B. 560. The title states: "AN ACT to amend section 81-815.26, Reissue Revised Statutes of Nebraska, 1943, relating to state administrative departments; to authorize the Game, Forestation and Parks Commission with the consent of the Legislature to use eminent domain until August 18, 1971, for acquisition of certain sites as prescribed; to give such consent as to prescribed property; to repeal the original section; and to declare an emergency." It is apparent that the Legislature, in conferring upon the commission the power of eminent domain, intended to insure against the exercise of the power for unauthorized purposes or the acquiring of trading stock and to see to it that no property was taken which was not required for a proper development of the state park system and other authorized purposes. The restriction is in the nature of a limitation on the general powers conferred by the act. The inclusion in the act of a restriction on the general powers conferred does not in-

dicate that it contains more than one subject or that the subject of the act is not clearly expressed in the title. "Where the title of an act fairly gives expression to the general subject-matter contained in the act, such act will not be held invalid as being broader than its title." Mehrens v. Bauman, 120 Neb. 110, 231 N. W. 701. "The provisions of the Constitution relating to titles are to be liberally construed so as to admit of the insertion in a legislative act of all provisions which, although not specifically expressed in the title, are comprehended within the objects and purposes of the act as expressed in the title, and to admit all provisions which are germane, and not foreign, to the provisions of the act as expressed in its title." In re Application of Rozgall, 147 Neb. 260, 23 N. W. 2d 85. The title to the act is sufficiently broad to meet constitutional requirements.

It is said that section 81-815.26, R. S. Supp., 1967, is a special or local law in that it gives legislative consent to the appropriation of certain described properties. It cannot be successfully disputed that the Legislature has authority to confer the power of eminent domain on any governmental or political subdivision or legal entity thereof. Ordinarily, the right to select the tracts necessary to be acquired is vested in the entity upon which such power is conferred. Nevertheless, there is no constitutional prohibition against the Legislature requiring that its consent first be obtained before the power is exercised as to any particular piece of property. The power conferred upon the commission by the statute is a general power to condemn private property for park and other stated purposes. It is not limited to particular tracts, but does require legislative consent before any tract is so acquired. It then gives legislative consent to the taking of certain specified properties. Such consent may be extended to other properties by future legislative acts. The principle is the same as that found in the former act which required the Governor's consent. The failure to exclusively vest authority in the

commission to select the lands to be appropriated in this manner is not material. "* * * the legislature may make a reasonable classification, resting on grounds of public policy, or some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified. * * * If the statute operates equally upon all persons or objects of a class so constituted, it is enough." Dougherty v. Kubat, 67 Neb. 269, 93 N. W. 317. "The Legislature has the right to delegate the power of eminent domain and to restrict or limit the extent of its use." Burnett v. Central Nebraska Public Power & Irr. Dist., 147 Neb. 458, 23 N. W. 2d 661. The present act confers upon the commission the power of eminent domain for the purpose of acquiring sites of "scenic, historic or recreational value or unique natural areas, or access thereto," subject only to legislative consent in each instance. This power is general and not special in nature.

Plaintiffs assert that the act is unconstitutional in that it fails to set up standards for the use of the power of eminent domain. As has been pointed out, the act specifically states that the power conferred may be exercised only for the purpose of acquiring property for public use deemed to have "scenic, historic or recreational value." It further provides the manner in which the power shall be exercised. None of our statutes conferring the power of eminent domain are any more explicit. It is generally deemed sufficient if an act specifies the purposes for which property may be acquired, provides for just compensation, and satisfies the demands of due process by providing for adequate notice and hearing. See May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448.

Section 81-805, R. S. Supp., 1967, provides that with the consent of the Governor, the commission may by purchase, when funds on hand or appropriated therefor are sufficient, or by gift, devise, or otherwise, acquire

title to sites for purposes similar to those mentioned in section 81-815.26, R. S. Supp., 1967. The two statutes were amended in separate acts by the 1967 Legislature. Prior to the 1967 amendment, the latter section dealing with eminent domain contained a similar provision requiring the Governor's consent. The 1967 act changed this to require legislative consent, but left the original provision requiring the Governor's consent in section 81-805, R. S. Supp., 1967. The 1967 change in this respect, substituting legislative for the previously required Governor's approval, definitely indicates a legislative intent to do away with the requirement that the Governor's consent be obtained prior to exercising the right of eminent domain. Superficially there appears to be some conflict or inconsistency between the two statutes. It will be noted that section 81-805, R. S. Supp., 1967, deals generally with the acquisition of property by the commission, whereas section 81-815.26, R. S. Supp., 1967, deals specifically with property to be acquired by eminent domain. Under such circumstances, the latter section controls. "Specific statutory provisions, relating to a particular subject, control over general provisions * * *." Lackaff v. Department of Roads & Irrigation, 153 Neb. 217, 43 N. W. 2d 576. See, also, State ex rel. Agricultural Extension Service v. Miller, 182 Neb. 285, 154 N. W. 2d 469.

The judgment of the district court is affirmed.

AFFIRMED.

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ST. PAUL FIRE AND MARINE INSURANCE COMPANY, APPELLANT, V. WILLIAM JOSEPH HOFFMAN ET AL., APPELLEES.

166 N. W. 2d 731

Filed April 4, 1969. No. 37035.

1. **Trial: Instructions.** A district court is under an initial duty

without request to define issues of ultimate fact for a jury.
2. ———: ———. It is error for a district court to frame a jury issue over an untimate fact that no reasonable man can fail to find.
3. **New Trial: Instructions.** To preserve instructional objection at the step of filing a motion for new trial, a party may simply allege that the court erred in giving the particular instruction.

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

Emil F. Sodoro, Jon S. Okun, Richard P. Jeffries, and David A. Johnson, for appellant.

McCormack & McCormack and Michael McCormack, for appellees.

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

SMITH, J.

Plaintiff, a subrogee, claimed that motorist William Hoffman had negligently damaged a building owned by plaintiff's insured. Issues of negligence, causation, and damage went to the jury which returned a verdict for defendant. Plaintiff has appealed. It contends that submitting negligence to the jury was error while defendant contends in part that the record is inadequate for review of the alleged error.

Direct evidence concerning the conduct of Hoffman, who died prior to the trial, consists of a stipulation and testimony of William Skaleske, a distinterested eyewitness. The stipulation discloses (1) that the building was located at the northwest corner of Fiftieth and Center Streets, Omaha, Nebraska, and (2) that an automobile operated by Hoffman on August 11, 1963, struck the east wall of the building.

Skaleske's testimony is as follows: At 12:30 a.m., August 11, 1963, he saw Hoffman and a woman in a car eastbound on Center Street. The car stopped at the Fiftieth Street intersection until an automatic traffic

signal changed from red to green. It then executed a semicircle in which it struck a curb, a sign, or other object, and finally the east wall of the building. The woman, not Hoffman, was the driver. Skaleske heard Hoffman in another court, however, testify to loss of control of the car at the time and place in question.

Both parties having rested at the trial, plaintiff moved for a directed verdict on liability because the evidence conclusively established Hoffman's negligence. The motion was overruled. The jury learned from instruction No. 4 that lack of an affirmative finding of negligence required a verdict for defendant. After return of the verdict plaintiff filed a motion for a new trial alleging: (1) Errors of law occurring at the trial, and (2) error in the giving of instruction No. 4. The motion was overruled.

The stipulation from which defendant sought no relief precluded controversy over identity of the driver of the collision car. Considering the latitude for testimonial inferences, the mistaken identification by Skaleske, and all other evidence, we conclude: No reasonable man could disbelieve Skaleske's account of the movement of the car. Hoffman's conduct was negligent as a matter of law in light of Newkirk v. Kovanda, *ante* p. 127, 165 N. W. 2d 576. A district court is under an initial duty without request to define issues of ultimate fact for a jury. It is error for the court to frame a jury issue over an ultimate fact that no reasonable man can fail to find. See Ritchie v. Davidson, 183 Neb. 94, 158 N. W. 2d 275. To preserve objection to the error at the step of filing of a motion for new trial a party may simply allege that the court erred in giving the particular instruction. See Robinson v. Meyer, 165 Neb. 706, 87 N. W. 2d 231.

The judgment is reversed and the cause remanded for new trial limited to damage issues.

REVERSED AND REMANDED.

MARGARET ELIZABETH BAUER LOVE ET AL., APPELLANTS, V. PAUL E. FAUQUET, TRUSTEE, ET AL., APPELLEES.

166 N. W. 2d 742

Filed April 4, 1969. No. 37085.

1. **Trusts: Courts.** The supervision and review of a testamentary trustee's acts in the execution of such trust is a jurisdiction concurrently lodged in the district and county courts.
2. ———: ———. The concurrent and original jurisdiction of the district court to supervise and control the execution and the administration of testamentary trusts is ordinarily limited to unusual situations where there is a failure of proper exercise of the concurrent jurisdiction of the county court in which ordinarily the administration of the trust can be coordinated and given the continual scrutiny and supervision necessary.
3. **Sales: Property.** A bona fide purchaser of land is one who purchases for a valuable consideration, paid or parted with, without notice of any suspicious circumstances which would put a prudent man on inquiry.
4. **Trusts: Property.** Generally, where the trustee, by the terms of the trust, has general and unrestricted power to transfer or encumber property of the trust estate, one dealing with him in good faith is not bound to go further and ascertain whether in fact the act of the trustee is justified.
5. **Trusts: Sales.** Where a general power of sale is given a testamentary trustee for the sale of land, a bona fide purchaser is not affected by secret restrictions on the power to sell; and to entitle a purchaser from a trustee, having general power to sell for reinvestment or the like, to claim protection as a bona fide purchaser, no duty rests upon the purchaser to see to the due application of the purchase money by the trustee.
6. ———: ———. The beneficiaries of a trust have only an equitable interest in the trust property, and if the trustee transfers the property in breach of trust to a bona fide purchaser the transferee is entitled to hold the property free of the trust and is under no liability to the beneficiaries.

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

Hotz, Hotz, Moylan & Kellogg, for appellants.

Pierson & Pierson and Thomas J. Fitchett, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, SMITH, McCOWN, and NEWTON, JJ., and KOKJER, District Judge.

WHITE, C. J.

This is an equity action by remaindermen beneficiaries to set aside a deed to defendant Stoehr executed by a testamentary trustee under a general unrestricted power of sale granted in the trust instrument. The district court sustained a motion to dismiss at the close of plaintiffs' case. We affirm the judgment of the district court.

The testamentary trust devised the 80-acre farm in trust for the life support and maintenance of Emma Bauer Egenberger, and granted the trustee general unrestricted power of sale of the farm on the consent of Emma. In 1961 Emma failed in a district court action to compel then trustee Davis to sell the farm. In 1962 defendant Paul E. Fauquet was appointed trustee. The liquid assets became depleted. On September 3, 1965, Fauquet, trustee, sold the farm to defendant Stoehr for $26,000 ($325 per acre) and the plaintiffs' own evidence undisputedly established this price as the fair and perhaps maximum price obtainable.

In the administration of the trust in county court, Fauquet filed no reports until December 1966. They are now filed and there is no evidence of breach of fiduciary duty in the handling or expenditure of the funds or any complaint by Emma, the life beneficiary. Fauquet, a lawyer, had prepared tax returns for Stoehr, Stoehr had purchased some insurance from him, and Stoehr was the tenant on the farm in question. Fauquet had been Emma's attorney in the action to force the sale, but since his appointment his only contact outside the trust has been preparing her tax returns. Other peripheral and trace contacts with the parties by Fauquet are without significance.

Seizing on the broad sweep of the principles of equity jurisdiction in scrutinizing and enforcing its trust juris-

diction (see John A. Creighton Home v. Waltman, 140 Neb. 3, 299 N. W. 261), the plaintiffs seek to void the sale. No case or authority is cited holding that the filing of late reports by a trustee automatically voids his otherwise proper or legal acts as trustee. There is not the remotest evidence of any conflict of interest; nor is there any act by the trustee relating to or affecting the sale or the price that could or did diminish the legitimate interest of the remainder beneficiaries. There is no evidence of mismanagement or fraud in the handling or disposition of the funds involved. Just how such purported mismanagement of the funds could have voided the sale of the real estate involved herein is not spelled out by the plaintiffs.

The supervision and review of the trustee's acts in handling the funds, and the maintenance and support of the life beneficiary, is a jurisdiction concurrently lodged in the district and county courts in the case of testamentary trusts. In re Estate of Grblny, 147 Neb. 117, 22 N. W. 2d 488. The remainder beneficiaries, if aggrieved by mismanagment or fraud in the disposition of the funds of the trust, have their remedy in county court. There is no evidence here that would warrant the exercise of that jurisdiction by the district court. District courts are reluctant to interfere with the county court's day-by-day jurisdiction and control of the administration of testamentary trusts because of the confusion resulting and other evils incident to divided responsibility and authority. On the other hand, the district court has exclusive jurisdiction over the title of real estate and the review of the power of sale granted by the testamentary trust. The trust here grants a general power of sale which may not be interfered with or limited by any of the remainder beneficiaries. The purpose of the trust was to provide for Emma, with residuals in the remainder beneficiaries. There is no evidence to warrant an interference on the grounds of fraud, overreaching, or that the sale was consummated otherwise than in full

compliance with the duty of loyalty by the trustee.

The record here reveals an understandable self-centered desire by the remainder beneficiaries to preserve the trust corpus intact and restrict Emma and the trustee to the income from the land during Emma's life. By its terms the trust permits and directs the invasion of its corpus to accomplish its objectives. The risk of a necessary invasion of the trust corpus is on the remainder beneficiaries and does not require pauperization of Emma. There is here at most a dispute as to the exercise of discretion in selling the land. The power to sell was vested in the trustee and beneficiary, subject to the reviewing discretion of the district court. By the terms of the trust it was not vested in or in any way controlled by the remainder beneficiaries. The price on its face appears ample and there is no suggestion of an inadequate consideration. There is no merit to plaintiffs' contention that there was either a breach of trust or any act of the trustee sufficient to authorize the court to disturb the trustee's express power of sale.

It also appears that defendant Stoehr's title is not vulnerable to attack since he is a bona fide purchaser for value under the evidence. In Miller v. Vanicek, 106 Neb. 661, 184 N. W. 132, it is said: "A bona fide purchaser of land is one who purchases for a valuable consideration paid or parted with, without notice of any suspicious circumstances which would put a prudent man upon inquiry."

In 54 Am. Jur., Trusts, § 270, p. 214 (1945), it is said: "Where the trustee, by the terms of the trust, has power to transfer or encumber property of the trust estate, *one dealing with him in good faith is not bound to go further and ascertain whether in fact the act of the trustee is justified,* and that no breach of trust is intended, unless the transaction in view of the trust relation is an unusual one. Where a general power of sale is given a trustee in a deed of trust to secure an indebtedness, a bona fide purchaser is not affected by

secret restrictions on the power to sell; and to entitle a purchaser from a trustee, having general power to sell for reinvestment or the like, to claim protection as a bona fide purchaser, no *duty rests upon the purchaser to see to the due application of the purchase money by the trustee.*" (Emphasis supplied.)

In IV Scott on Trusts (3d Ed.), § 284, p. 2342 (1967), it is said: "The beneficiaries of a trust have only an equitable interest in the trust property, and if the trustee transfers the property in breach of trust to a bona fide purchaser the transferee is entitled to hold the property free of the trust and is under no liability to the beneficiaries."

The applicability of the above authorities is apparent. The duty of inquiry and investigation urged by plaintiffs would effectively inhibit purchases, impede the sale of trust property, prevent a trustee from performing his duties and responsibilities in performing the express mandate of the trust, and rewrite the unrestricted terms of the power of sale granted in the testamentary trust.

The judgment of the district court in dismissing the action is correct and is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. GLENN E. COFFEN, JR., APPELLANT.
166 N. W. 2d 593

Filed April 4, 1969. No. 37096.

1. **Post Conviction: Evidence.** In a post conviction proceeding, the burden of proof is on the movant to establish a basis for relief, and where such burden is not met, a denial of relief is required.
2. **Courts: Motions, Rules, and Orders.** The purpose of an order nunc pro tunc is to correct the record which has been made so that it will truly record the action actually taken, but which through inadvertence or mistake has not been truly recorded.

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

Van Steenberg, Myers & Burke, for appellant.

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

Heard before WHITE, C. J., CARTER, SPENCER, SMITH, MCCOWN, and NEWTON, JJ., and KOKJER, District Judge.

CARTER, J.

This is a civil proceeding under the Post Conviction Act in which the defendant seeks to vacate and set aside his conviction for the crime of breaking and entering and stealing property. After an evidentiary hearing, the trial court denied defendant's motion and defendant has appealed.

On September 12, 1966, the defendant, while awaiting trial on a criminal charge, broke custody and escaped from the county jail of Kimball County. An information was filed against the defendant on three counts as follows: Breaking custody and escaping from the county jail; maliciously damaging or destroying property; and breaking and entering and stealing property of value. The count alleging the malicious damage or destruction of property was dismissed upon restitution for the damage being made. Defendant entered a plea of guilty to the first and third counts of the information. Defendant was sentenced to serve 3 years' imprisonment on each of the two counts, to be served consecutively.

The record discloses that the journal entry filed on October 4, 1966, reciting the facts concerning the sentencing of the defendant, that defendant was sentenced under counts one and two instead of counts one and three. The county attorney filed a motion to correct the journal nunc pro tunc to make it show the actual sentences pronounced at the time of sentencing. The trial docket notes of the presiding judge show that defendant was sentenced to 3 years' imprisonment on each of counts one and three, to be served consecutively.

The error was clearly a clerical mistake proper to be corrected by an order nunc pro tunc. Complaint is made that the judge's trial docket notes were not offered in evidence, but we point out that the judge may take judicial notice of the court's records in the case before him. It is proper for the court by order nunc pro tunc to show on a subsequent date what was in fact done on October 4, 1966. Quinton v. State, 112 Neb. 684, 200 N. W. 881.

On September 10, 1966, a date prior to the commission of the offenses involved in the present case, defendant was arrested and lodged in jail. He alleges that he was not engaged in an unlawful act at the time and that the arrest was unlawfully made. We assume that probable cause for the arrest did not exist and that the officer did not have a warrant as alleged. The trial court excluded this evidence as being immaterial. The ruling of the trial court was correct. The legality of an arrest for a prevoius crime in a previous case has no bearing on subsequent offenses. Even though it might have eventually been determined that a person is wrongfully held in jail, it does not lessen in any degree the jail breaking and the breaking and entering charges subsequently committed. The defendant entered his plea of guilty to both counts one and three. He now contends that his plea was not a voluntary one. The defendant was taken into custody after his escape from jail and the committing of the offense of breaking and entering. He requested the appointment of counsel at state expense and on September 16, 1966, legal counsel was appointed. His counsel interviewed him first on September 19, 1966, and between that date and October 4, 1966, counsel interviewed him on nine occasions. Defendant complains that he was not permitted to hold private conferences with his lawyer except in two or three instances. Defendant's counsel made no complaint. The sheriff testified that defendant was a trouble maker and, having once escaped, he took precautions against a

recurrence. Defendant complains that he was not addressed directly by the court when the effect of a plea of guilty was being explained to him. The record shows that defendant's counsel was asked if he had explained to defendant the possible sentences resulting from a plea of guilty who informed the court that he had. Defendant was then asked by the court if he had been so informed by his counsel and his answer was, "Yes."

Defendant complains that he was coerced into a plea of guilty by the threat of the county attorney that he would otherwise file a habitual criminal charge against him. Defendant had twice been previously convicted of felonies and was subject to such a charge. He states that he gained knowledge of this threat only through his own counsel. The county attorney testified that he had not talked with defendant except during court proceedings in open court, that he had never intended to file a habitual criminal charge, and that he had never told anyone, including defendant's counsel, that such a charge would be made if a plea of guilty was not forthcoming. Defendant's counsel testified and confirmed the county attorney's statement. Defendant's counsel further testified that he explained to defendant that he was subject to such a charge and the complete situation of the sentences that could be imposed, including the possibility of them being imposed consecutively. He further stated that he did not advise the defendant to plead guilty, that no deals were made, or reported by him to the defendant as having been made.

Defendant complains that he was mistreated while in the county jail in that it was allowed to become dirty and filthy and, we assume, it carries the implication that its condition was coercive to a plea of guilty. The evidence shows that the defendant and other inmates deliberately threw cigarette butts and other trash on the floor, threw coffee served them around the place, and became so noisy and belligerent that the sheriff would not let them out of the cell block to clean the place up.

It became necessary to remove many articles from that portion of the jail to still the continuous ruckus going on in the jail. The defendant admitted on the witness stand: "I was raising hell." The dirty condition of the jail was corrected on the departure of the defendant. We know of no rule that permits a person to complain of a condition for which he is entirely responsible.

We have carefully examined this record and find that defendant was fairly treated, that he had the assistance of competent legal counsel, and that there is not a semblance of proof, other than his own self-serving statements, that defendant did not voluntarily enter his plea of guilty to counts one and three of the information. In a post conviction proceeding, the burden of proof is on the defendant to establish a basis for relief, and where such burden is not met, a denial of relief is required. State v. Raue, 182 Neb. 735, 157 N. W. 2d 380. The findings of the trial court are supported by the evidence.

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

AFFIRMED.

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JERRY TODD, APPELLEE, V. MER-DEL ENTERPRISES, INC., A CORPORATION, APPELLANT.
166 N. W. 2d 598

Filed April 4, 1969. No. 37103.

**Workmen's Compensation: Evidence.** In a workmen's compensation case, the plaintiff has the burden of establishing by a preponderance of the evidence that the accident in his employment in reasonable probability contributed in some material and substantial degree to cause the injury.

Appeal from the district court for Chase County: VICTOR WESTERMARK, Judge. Reversed and remanded with directions.

Kier, Cobb, Luedtke, Swartz & Wieland, for appellant.

Curtis & Curtis, for appellee.

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

MCCOWN, J.

This is a workmen's compensation case. The Workmen's Compensation Court dismissed the plaintiff's petition because of failure to establish causal connection between the accident and the ultimate injury. Plaintiff appealed to the district court. That court awarded workmen's compensation benefits, and the defendant has appealed.

The plaintiff, Jerry Todd, was 45 years old and had been a diabetic for approximately 15 years on September 22, 1965. On that date, he was installing a propane tank. While he was pumping liquid propane from a tank, a small amount of it spewed on the upper part of his body, and he suffered propane burns to the right chest and left elbow. He continued working, but consulted his physician the following day and again on September 25, 1965. At that time, the doctor applied a dry dressing to the burn on his chest. There was a large blister on the right side of his chest, which the plaintiff described as two blisters, 2 to 2½ inches long by 2 inches wide. There was a red area on the left elbow, but no blister. Plaintiff continued to work regularly through October 1, 1965.

On the evening of October 1, 1965, the plaintiff discovered lesions on his feet. No propane had gotten on his feet, nor on any part of his body below the waist. He returned to the doctor on October 2, 1965. The doctor found that the burn on his chest was healing well, but prescribed medication for his feet. The doctor's examination on October 2, 1965, noted a vascular disturbance in the form of a diminished peripheral pulse in plaintiff's foot and plaintiff also complained of losing sensation in his feet. The chest burn healed in 10 days to 2 weeks, but remained discolored for some months.

There was no further treatment for the chest burn after September 25, 1965.

Plaintiff was placed in the hospital on October 3, 1965. He was transferred to a hospital in Denver for further evaluation on October 11, 1965, and returned to the Community Hospital in Imperial on October 19, 1965, where he remained until October 30, 1965, when he was discharged. During the hospitalization, the condition of his feet and his diabetes and its complications were the objects of treatment. He was treated with drugs for dilating the blood vessels and improving the circulation in his feet. Lesions and ulcers on his feet were treated and dead tissue removed from time to time. He was treated by his physicians in Denver and in Imperial after his discharge from the hospitals, with some improvement in the toes until March 9, 1966, when he was released to return to work. At this time he still had an ulcer on the right big toe. Defendant paid compensation and medical expense for this period. Plaintiff returned to work March 10, 1966, and worked until June 3, 1966. At that time he again returned to the doctor and at this time there was an abscess on the right big toe. He did not again return to work.

On November 12, 1966, the plaintiff returned to one of his doctors in Denver and was admitted to the hospital with gangrene in the right foot. He remained there until December 19, 1966. Some bones were removed from his right big toe. He had osteomyelitis, as well as gangrene, in that toe. Sometime later, the toe was completely removed and at the time of trial, his feet were healed up and he had had no further difficulty.

The plaintiff had been treated for lesions on his feet on two occasions before September 1965. In late July 1964, the plaintiff cut his foot, developed an abscess, and had a piece of glass removed from his foot. He was treated until August 14, 1964. On April 21, 1965, the plaintiff had a puncture wound of the left foot from a large tack. He was admitted to the hospital on April

24, 1965, and remained there until May 21, 1965. On at least one of these occasions, he lost all the skin on one toe. The physician who treated him on both occasions testified that the treatment was made much longer by reason of the complications of diabetes, and that the delayed healing was because of the preexisting impairment in his blood vessels.

It is the plaintiff's contention that the propane burn on his chest in September 1965, threw his diabetes out of control; further interfered with the peripheral blood supply in his feet; and combined with his diabetes to produce the gangrene and osteomyelitis, which ultimately caused the removal of his toe. Plaintiff contends that the evidence establishes a direct cause and effect relationship between the propane chest burn and the loss of his toe.

The issue involved is one of medical causation. All of the doctors agree that the correct diagnosis of plaintiff's "injury" to his feet was diabetes mellitus, with diabetic gangrene. All of the doctors agree that a diabetic is prone to infection, particularly in the extremities where the disease commonly causes a restriction in the blood supply.

The area of medical disagreement here is with respect to the possible causal relationship between the propane chest burn which the plaintiff received in the course of his employment, and the ultimate "injury" to his feet, for which his action is brought. The doctors seem to agree that the possible causal relationship depends upon whether the burn on the chest was sufficient to restrict the circulation of the blood in the feet, either by reason of traumatic shock or by throwing his diabetes badly out of control.

On these issues, the physician who treated the plaintiff at the time of his propane burn and thereafter never found any evidence that the plaintiff went into traumatic shock as a result of the burn. The only evidence that the burn might have adversely affected the controlled

condition of plaintiff's diabetes in any way was plaintiff's testimony as to the number of units of insulin he was taking immediately before the burn and the number of units he was taking in the hospital some 12 days thereafter. This evidence is outweighed by the history of insulin dosage from medical and hospital records both before and after the accident and propane burn. No doctor testified that plaintiff's diabetes was badly out of control at any time.

Only one doctor testified that, in his opinion, there was a direct cause and effect relationship between the propane burn on plaintiff's chest and the condition of his right foot. His opinion was primarily based upon a history given him by the plaintiff which conflicted with other established medical evidence. One doctor testified that there was a possibility of such a connection here. Several other physicians found no medical causal relationship or testified that the plaintiff's difficulties with his feet and the loss of his toe were entirely due to the diabetes and its complications.

In a workmen's compensation case, the plaintiff has the burden of establishing by a preponderance of the evidence that the accident in his employment in reasonable probability contributed in some material and substantial degree to cause the injury. Brokaw v. Robinson, 183 Neb. 760, 164 N. W. 2d 461.

The Workmen's Compensation Court was correct in finding that the plaintiff failed to maintain the burden of proving a causal connection between the burn on his chest on September 22, 1965, and the condition of his feet for which compensation is sought.

For the reasons stated, the judgment of the district court is reversed and the cause remanded with directions to dismiss plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

TED YOST, APPELLANT, V. CITY OF LINCOLN, NEBRASKA, APPELLEE.

166 N. W. 2d 595

Filed April 4, 1969. No. 37130.

1. **Workmen's Compensation.** A workmen's compensation case is considered de novo upon the record in this court.
2. **Workmen's Compensation: Evidence.** The plaintiff must prove that he sustained a personal injury as the result of an accident arising out of and in the course of his employment and that his disability was caused by the accident.
3. **Workmen's Compensation: Words and Phrases.** An "accident" 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.
4. **Workmen's Compensation.** An injury and resulting disability is not compensable if it is due to natural causes or is the result of a natural progression of any preexisting condition.
5. **Trial: Evidence.** Direct expert testimony is not indispensable if the issue can be determined from the evidence presented and the common knowledge and usual experience of the trier of fact.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Reversed and remanded with directions.

Hal W. Bauer, for appellant.

Ralph D. Nelson, Jack B. Lindner, Carl C. Kopines, and Charles D. Humble, for appellee.

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

BOSLAUGH, J.

The plaintiff, Ted Yost, was employed by the City of Lincoln, Nebraska, as a maintenance repairman. At about 4:30 p.m. on June 9, 1967, the plaintiff was cutting plywood with an 8-inch skill saw. As the plaintiff was completing a cut across the center of a sheet of plywood, a "burst" of sawdust struck him in the face, some of which entered his right eye making it "sting."

The plaintiff stopped the saw, removed his glasses, wiped his eye with his handkerchief, and then washed

his eye with cold water. The plaintiff then completed the cut, put his tools away, and did nothing more until 5 p.m.

When the plaintiff arrived at his home his eye was bloodshot, watering, and throbbing. At about 6:30 p.m., a neighbor, who had been a nurse's aide, washed out the eye with a boric acid solution. At about midnight she washed the eye again and at that time it was starting to fester. The eye was very painful during the night and she washed it again at about 6:30 a.m. on Saturday. It was then shut tight and hard where matter had dried onto the eye. She washed the plaintiff's eye again on Sunday.

On Monday morning the plaintiff consulted Dr. H. O. Paulson who found a "very severe acute infection of the right eye" but no foreign body present. His report, which was received in evidence, states: "There was a very small corneal ulcer at 7:30 of the cornea which was on a (probable) infectious basis. Subsequent treatment showed the eye to clear up * * *. On 3 July 1967 (the previous ulcer had cleared up but the infection still persisted) a new corneal ulcer appeared at 12 o'clock of a branching nature across the pupillary area. This was typical of a virus infection of the eye (Herpes) and the subsequent treatment along this line showed a moderate response."

The infection continued and the plaintiff was hospitalized on July 18, 1967. The plaintiff was hospitalized again on August 21, 1967, at which time the eye was removed. It was the opinion of the then treating physician that removal of the eye was imperative at that time.

This action was brought to recover benefits under the Workmen's Compensation Law. After the hearing before one judge of the compensation court, and upon rehearing before the full compensation court, the action was dismissed. Upon appeal to the district court the court found in favor of the defendant and dismissed the

action. The plaintiff's motion for new trial was overruled and he has appealed to this court. We review the record de novo.

The plaintiff must prove that he sustained a personal injury as the result of an accident arising out of and in the course of his employment and that his disability was caused by the accident. Harrington v. Missouri Valley Constr. Co., 182 Neb. 434, 155 N. W. 2d 355. An "accident" 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. R. S. 1943; Harmon v. City of Omaha, 183 Neb. 352, 160 N. W. 2d 189. An injury and resulting disability is not compensable if it is due to natural causes or is the result of a natural progression of any preexisting condition. Cook v. Christensen Sand & Gravel Co., 183 Neb. 602, 163 N. W. 2d 105.

The evidence in this case establishes an accidental injury arising out of and in the course of the employment. The problem is whether the infection which eventually resulted in the loss of an eye is traceable to the accidental injury.

The evidence shows the infection developed rapidly following the injury. Within an hour the eye had become painful. Within 6 hours it had begun to fester. The evidence as to the difficulties which developed immediately following the injury supports a finding that the infection developed as a result of the injury and was not due to natural causes or the natural progression of a preexisting condition. Nellis v. Quealy, 237 Iowa 507, 21 N. W. 2d 584.

The medical evidence in this case is less than satisfactory. It consists of brief reports by three of the treating physicians with no statement of opinion as to the source or cause of the infection. But direct expert testimony is not indispensable if the issue can be determined from the evidence presented and the common knowledge and usual experience of the trier of fact.

Clark v. Village of Hemingford, 147 Neb. 1044, 26 N. W. 2d 15; Yount v. Seager, 181 Neb. 665, 150 N. W. 2d 245. There is nothing unusual about infection following the introduction of a foreign body into an eye. Sparks v. Long Bell Lumber Co. (La. App.), 175 So. 134. The fact that the infection developed immediately following the accident and continued until the loss of the eye supports an inference that the infection is traceable to the injury.

As we view the record, the evidence supports a finding that the plaintiff is entitled to compensation for permanent disability for the loss of his right eye together with reimbursement for his medical and hospital expenses as shown in the record.

The judgment of the district court is reversed and the cause remanded with directions to enter an award for the plaintiff in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

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LUCILLE H. MARTIN, APPELLEE, V. H. G. FREAR, DOING BUSINESS AS SUPERIOR TRANSFER, ET AL., APPELLANTS.
LUCILLE H. MARTIN, ADMINISTRATRIX OF THE ESTATE OF MATHEW E. MARTIN, DECEASED, APPELLEE, V. H. G. FREAR, DOING BUSINESS AS SUPERIOR TRANSFER, ET AL., APPELLANTS.
167 N. W. 2d 69

Filed April 11, 1969. Nos. 36990, 36992.

1. **Witnesses: Evidence.** The opinion of a physician or surgeon as to the condition of an injured or diseased person is not rendered incompetent by the fact that it is based upon the history of the case given by the patient to the physician or surgeon on his examination of the patient, when the examination was made for the purpose of the treatment and cure of the patient.
2. ———: ———. Where an expert witness gives an opinion based upon facts established by the record upon a matter recognized as a proper subject of expert opinion, unless im-

peached to such an extent as to have no probative value, it is ordinarily sufficient to sustain a judgment.

Appeals from the district court for Nuckolls County: JOSEPH ACH, Judge. Affirmed as modified.

Wagoner & Grimminger and John E. Dougherty, for appellants.

Eisenstatt, Morrison, Higgins, Miller, Kinnamon & Morrison and Downing & Downing, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and COLWELL, District Judge.

COLWELL, District Judge.

These cases involve claims made under the Workmen's Compensation Act, and the two actions were consolidated for purpose of trial. Plaintiffs claim that Mathew E. Martin was injured in an accident on December 20, 1964, which resulted in his death on February 22, 1966. Defendants admit that Martin received a compensable injury from the accident as the same resulted in injury to Martin's neck, shoulder, and elbow, and for these injuries compensation was paid up to May 9, 1965. Defendants deny any further liability under the Workmen's Compensation Act for any other condition, complaint, medical expense, treatment, or the death of Martin. An award was made for both plaintiffs at a hearing before one judge of the compensation court, and on appeal to the district court for Nuckolls County, an award was affirmed in the plaintiffs, together with costs and additional attorneys' fees. Defendants' motion for new trial having been denied, appeal was made to this court.

On November 29, 1965, Martin, age 51 years, consulted with Dr. Maurice Edward Stoner, Omaha, Nebraska, for treatment. Dr. Stoner is a physician specializing and restricting his practice to diagnosis and internal medicine; and he is certified by the American Board of Internal Medicine. Martin gave the following personal history: On December 20, 1964, Martin was

employed by H. G. Frear, doing business as Superior Transfer, Superior, Nebraska, as a truck driver, and while being so employed was injured in an accident when the truck which he was driving overturned. He was treated by Dr. Paul Hallgrimson, Superior, Nebraska, beginning on December 21, 1964, for injury to his cervical region, shoulder, and right elbow. Treatment included massage, heat application, and also taking prescribed drugs for pain, muscle relaxant, and tranquilizers. He was dismissed by Dr. Hallgrimson on February 19, 1965. The pain and disability continued, and on February 25, 1965, Martin consulted with Dr. John G. Yost, Hastings, Nebraska, and was treated with physiotherapy until April 30, 1965. Martin was then referred to Dr. C. R. Weber, Hastings, Nebraska, who on May 8, 1965, performed a subtotal gastric resection (Billroth I) at the Mary Lanning Hospital, Hastings, Nebraska; Martin was dismissed from that hospital on May 15, 1965; and on the same night the operative incision was disrupted and there was a partial evisceration. Martin was returned to the hospital for corrective surgery by Dr. F. J. Rutt, Hastings, Nebraska, who resected a portion of the gangrenous bowel. Martin was dismissed from the hospital on May 26, 1965, but was readmitted for opiate addiction from May 30 to June 9, 1965. Prior to the accident on December 20, 1964, Martin had no unusual stomach trouble, his appetite was good, he used no aspirin or other drugs, and could eat anything. Beginning 2 or 3 weeks after the accident Martin began to experience abdominal and epigastric pain radiating to his back, which continued without interruption. Since June 9, 1965, he had constant abdominal discomfort, nausea and vomiting approximately weekly when his food intake was more than a minimal amount; he stated that he had a good appetite but that he was afraid to eat, because if he did he had a recurrence of nausea and vomiting, regardless of what kind of food he ate.

Following the personal history, Dr. Stoner also took

a family history and a past medical history, and made a detailed physical examination of Martin. Dr. Stoner observed that he was very nervous and agitated. Martin had several different kinds of drugs and aspirin with him that he said he was taking. Dr. Stoner identified some of the drugs as capable of causing ulceration of the intestional tract by ingestion, or ulceragenic. The next day radiology tests were made, and Dr. Stoner diagnosed Martin's condition as a perforation of a viscus in the abdomen. That night Martin was admitted to Creighton Memorial St. Joseph's Hospital, Omaha, Nebraska, where Dr. John Courtney, Omaha, Nebraska, in the presence of Dr. Stoner, surgically repaired a perforation of the viscus of the abdomen; a peritonitis condition was found; and Martin's general condition steadily deteriorated until his death on February 22, 1966.

At the trial in the district court, plaintiffs' evidence included witnesses Lucille H. Martin, widow of Mathew E. Martin, deceased, Dr. Paul Hallgrimson, and Dr. Maurice Edward Stoner, all appearing and testifying in person; Dr. Stoner heard the testimony of the other witnesses; after Dr. Stoner testified, the deposition of Dr. John G. Yost, was also received in evidence. Defendants offered no evidence.

Mrs. Martin's testimony shows that prior to Martin's accident, he had a good appetite, ate anything, and had no stomach trouble; that beginning 2 or 3 weeks after the accident Martin became nervous and began to have an upset stomach; that he took the medicines prescribed by the doctors as directed; that Martin took aspirin, but she did not know in what quantity; and that Martin experienced stomach upset, nausea, vomiting, and nervousness continually from June 9, 1965.

Dr. Hallgrimson's testimony shows that he treated Martin for his complaint of discomfort in the neck and shoulder; he prescribed drugs for pain, muscle relaxant, and sleeping; Martin made no other complaint; he discharged Martin to return to work on February 19, 1965;

and he told Martin that he could have the prescribed drugs as he needed them.

Dr. Yost, an orthopedic surgeon, testified that he treated Martin for a complaint of soreness in an area of the neck and shoulder; physiotherapy was used; this condition improved steadily, but on April 9, 1965, Martin's principal complaint was that he could not eat; no medication was then prescribed by Dr. Yost, but when Dr. Yost took Martin's personal history on February 25, 1965, Martin told him that he was taking pain and sleeping pills; Dr. Yost could not recall if he had prescribed aspirin for Martin; Martin's general condition deteriorated gradually; and X-rays were taken of the stomach and from the examination of these Martin was referred to Dr. Weber.

The only direct evidence supporting plaintiffs' claim of the amount and type of prescription drugs used by Martin was a statement from Chard Drug Store for the period December 26, 1964, to February 19, 1965, showing 11 different purchases of 9 different types of drugs. Dr. Stoner identified two of these drugs to be ulceragenic and the same kind that Martin said he was taking at the time of the original consultation.

Defendants urge that the trial court erred in admitting certain opinion evidence of Dr. Stoner for the reason that the opinions were predicated in part on facts not in evidence and medical reports either not in evidence, or received after the opinion was given. Dr. Stoner was a qualified medical expert and the treating doctor. His opinions were founded on a complete personal history, direct evidence heard by Dr. Stoner in the courtroom, a detailed physical examination, and observation and treatment of the patient. The rule is well settled in this state that: "The opinion of a physician or surgeon as to the condition of an injured or diseased person is not rendered incompetent by the fact that it is based upon the history of the case given by the patient to the physician or surgeon on his examination

of the patient, when the examination was made for the purpose of the treatment and cure of the patient." McNaught v. New York Life Ins. Co., 145 Neb. 694, 18 N. W. 2d 56. See, also, Annotation, 51 A. L. R. 2d 1057. The trial court properly received and considered this evidence.

Defendants complain that the evidence will not sustain the judgment for the reason that plaintiffs failed to prove that Martin's death resulted from an accident arising out of and in the course of his employment. Further, that the causal connection between the injury and the accident was based upon possibilities, probabilities, and speculative evidence. We are directed to the testimony of Dr. Stoner:

"Q And in your opinion, Doctor, based upon your care and treatment and examination of Mr. Martin, did the diagnosis that you made on December 3rd of 1965 have any relationship within a reasonable degree of medical certainty in your opinion, Doctor, to the operation of May 3, 1965? * * *

"A After I saw the surgery, yes, I would say there was a reasonable connection. * * *

"Q Dr. Stoner, I would ask you, sir, based upon your examination and the history that you obtained from Mr. Martin and based upon the care and treatment that you gave him and your observation of him in the hospital, from the date of your first examination, up until the date of his expiration, February 22, 1966, do you have an opinion, Doctor, within a reasonable degree of medical certainty as to whether or not the condition which resulted in the death of Mr. Mathew Martin was causally related to the injury he received in the automobile accident of December 20, 1964? * * *

"A It is my opinion that the whole chain of circumstances began with the accident in December, 1964, and that this man was doomed by the events that followed, just as certainly as though you had known in advance

that you could have predicted all of this. One placed upon the other."

"Q Doctor, would you state the basis for that opinion * * *?

"A He suffers a painful injury, an injury of the cervical spine and dorsal spine, despite the fact that very little can be demonstrated on X-ray and physical examination; but because of the very nature of the neck it is a very painful thing causing him to take large quantities of analgesic drugs. These analgesic drugs then react into his system producing an ulcer. The ulcer requires surgery because a gastric ulcer—common medical practice dictates a gastric ulcer be removed because many times it is cancerous, and the only chance you have to cure them is by early removal. So his ulcer, being a gastric ulcer, necessitated surgery. The surgery was followed by a disruption and the disruption was followed by more surgery. The pain continues in his neck, the pain continues in his abdomen. He takes more drugs. He perforates again. This time the perforation produces such widespread peritonitis and his general condition by this time has become so deteriorated that he is unable to make a recovery from this final assault and he goes downhill and dies on February 22, 1966."

A hypothetical question was propounded to Dr. Stoner which included a fair summary of the evidence in the record and plaintiffs' theory of the case:

"Q * * * Based upon those facts and assuming those facts to be true, Doctor, do you have an opinion based upon a reasonable degree of medical certainty as to whether or not those conditions resulting in the death of this man on February 22nd of 1966 were causally related to the injury * * *? * * *

"A I would feel that there was a direct causal relationship between the accident and his death."

In Sandall v. Otto, 100 Neb. 263, 159 N. W. 406, we held: "In propounding a hypothetical question, a party may assume the existence of facts in accordance with

his theory, if there is evidence in the record to sustain it, notwithstanding there may be a conflict of evidence on the point raised." In addition to Dr. Stoner being the treating doctor, he was an expert on the subject matter included in the hypothesis; the answer was responsive and properly received by the trial court.

"When the question is medical, medicine must give us the answer." Campbell v. City of North Platte, 178 Neb. 244, 132 N. W. 2d 876. To recover in a workmen's compensation case, a claimant must offer proof which preponderates in his favor on each of the indispensable elements of his claim. See Seger v. Keating Implement Co., 157 Neb. 560, 60 N. W. 2d 598. "Where an expert witness gives an opinion based upon facts established by the record upon a matter recognized as a proper subject of expert opinion, unless impeached to such an extent as to have no probative value, it is ordinarily sufficient to sustain a verdict." McNaught v. New York Life Ins. Co., *supra*. See, also, Campbell v. City of North Platte, *supra*.

Defendants rely entirely on their cross-examination of plaintiffs' witnesses to establish their defense, which did not affect the probative value of their testimony. There is no support from the record of defendants' claim that the causal connection is based on possibilities, probabilities, and speculative evidence. Such conclusion would ignore the record and particularly the opinions of Dr. Stoner. From a review of the record we conclude that the plaintiffs have sustained the burden of proof that the accident caused the disability and the death of Mathew E. Martin.

The trial court included in its award an allowance of $500 for burial expenses. This is an error since the applicable statute applying in this case, section 48-122, R. S. Supp., 1963, provides for a maximum allowance of $400, and in that respect the award should be amended.

The award and judgment of the district court should be affirmed as modified, consistent with this opinion. Plain-

tiffs' attorneys are allowed a fee of $600 for their services in this court. § 48-125, R. R. S. 1943.

AFFIRMED AS MODIFIED.

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STATE OF NEBRASKA, APPELLEE, V. VICTOR C. HOWARD, APPELLANT.
167 N. W. 2d 80

Filed April 11, 1969. No. 37011.

1. **Constitutional Law: Criminal Law: Searches and Seizures.** The State may develop workable rules governing searches and seizures to meet the practical demands of effective criminal investigation and law enforcement in the state, provided that those rules do not violate the constitutional processes of unreasonable searches and seizures.
2. **Criminal Law: Public Officers and Employees.** When the performance of his duty requires an officer to enter upon private property, his conduct, otherwise trespass, is justifiable.
3. **Constitutional Law: Criminal Law.** The protection of the Fourth Amendment to the United States Constitution is a restriction on governmental action only.
4. **Criminal Law: Searches and Seizures.** A search implies some exploratory investigation. It is not a search to observe that which is open and patent either in daylight or in artificial light.
5. **Criminal Law: Public Officers and Employees.** Firemen entering upon premises in response to a call to duty do so rightfully under license of law.
6. **Affidavits: Oaths and Affirmations.** When attention of the person making an affidavit is called to the fact that it must be sworn to and, in recognition of this, he is asked to do some corporal act and he does it, the instrument constitutes a statement under oath, irrespective of other formalities.
7. **Affidavits: Oaths and Affirmations: Probable Cause.** An affiant's asserted personal observation of the facts and circumstances supporting a finding of probable cause is sufficient.
8. **Affidavits: Probable Cause.** When a magistrate has found probable cause, the court should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense, manner.
9. **Affidavits: Probable Cause: Searches and Seizures.** Observations by fellow officers engaged in a common investigation are

a reliable basis for issuance of a search warrant on application made by one of their number.

10. **Affidavits: Probable Cause.** Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

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

Munro, Parker, Munro & Grossart, for appellant.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and COLWELL, District Judge.

COLWELL, District Judge.

Victor C. Howard was found guilty by the district court for Sherman County of the crime of fourth degree arson, a felony, in violation of section 28-504.04, R. R. S. 1943. Defendant pleaded not guilty and waived jury trial. Probation was imposed for a term of 2 years. Motion for a new trial was denied and an appeal perfected to this court.

Defendant lived and was employed at Poole, Buffalo County, Nebraska; he owned and possessed a small acreage on the edge of Rockville, Sherman County, Nebraska, improved by a vacant house in poor condition, a barn and a chicken house, the area around the improvements was fenced; and he kept some cattle there. Between 4 and 5 p.m., on August 27, 1967, Laverne Thompsen, accompanied by Samuel Sullivan, went to defendant's acreage to examine the house as an interested buyer. Thompsen had hearsay information that the defendant wanted to sell the house. They opened the gate, entered the premises, lifted the latch on a broken screen door, and entered the house. The door and several windows were open. After a brief inspection they detected the

odor of smoke, which directed them to the basement where they observed two bales of straw on a ledge near the floor joists concealing an electric light bulb connected to a socket and an electrical cord extending out of the basement through a window; and they observed a small pile of ashes near the bales of straw and that the floor joists showed some evidence of burning. They left the premises and immediately reported their observations to Ruppert Claussen, fire chief for the Rockville volunteer fire department and the Rockville rural fire protection district. Chief Claussen, Thompsen, and Sullivan immediately returned to the Howard acreage and reentered the premises in the same manner. Chief Claussen made an inspection and verified the information given him; in addition he determined that the electrical cord reentered the house through a bedroom window and was coiled in a space between the window and the screen; he also determined that there was electrical power "on" in the house. These three men then returned to Rockville about 6 p.m. Chief Claussen contacted Virgil J. Kaminski, county sheriff of Sherman County, Nebraska, who arrived in Rockville at about 10 p.m. Claussen informed Kaminski of the facts known to him; and these officers relayed this information by telephone to the office of the State Fire Marshal, Lincoln, Nebraska. Between 3 and 4 a.m. on the following morning assistant state fire marshal Wallace Barnett and deputies William Watson and Harley J. Mannier arrived in Rockville and conferred with sheriff Kaminski and chief Claussen. No surveillance had been maintained of the Howard premises; and there was concern among the officers whether or not a fire might then be burning. Sheriff Kaminski, fire marshals Barnett, Watson, and Mannier went to the Howard property at about 4 a.m., stepped over the fence, shined flashlights on the house and into the basement, looked into the basement, and walked around the house. They did not enter the house and no fire was observed. These four officers left the premises and returned to

Loup City, county seat of Sherman County, Nebraska. Later that morning Barnett consulted with county attorney Robert M. Martin, who prepared an affidavit for Barnett to apply for a search warrant. About 10 a.m. the affidavit was filed by Barnett with P. J. Kowalski, county judge of Sherman County, Nebraska, who issued a search warrant directed to Wally Barnett, assistant state fire marshal, to search defendant's premises and seize property, both being described. Immediately thereafter Barnett, Watson, Mannier, and Kaminski went to the Howard acreage, entered the premises, and made a search of the house. Photographs were taken; and the investigation further revealed in a closet on the main floor of the house a pile of paper, feed sacks, and other papers covering another light bulb connected to a socket and electric extension cord. Two drop cords with recepticles and light bulbs and one gallon jug with oil were seized and inventoried. Later on in the afternoon defendant was located at Poole, Nebraska; he was taken into custody and Miranda warnings were given; and, after a brief interview, defendant made oral admissions. Defendant was taken to the sheriff's office in Loup City, Nebraska, where further Miranda warnings were given him, and the defendant on the same day executed a written confession. At the preliminary hearing before the county judge, P. J. Kowalski, defendant did not testify and he offered no evidence. Defendant was represented by his own counsel at the preliminary hearing and at the trial.

Prior to trial, defendant filed a plea in abatement and a motion to suppress evidence. Upon hearing, the plea in abatement was denied and the motion to suppress granted as to witness Wallace Barnett. Appeal from this ruling on the motion was taken by the State pursuant to sections 29-824 and 29-826, R. R. S. 1943, for ruling by one Judge of the Supreme Court. Ruling of the trial court was reversed, and defendant's motion to suppress was denied.

The main thrust of defendant's argument is that there was an unlawful search and seizure made; that evidence obtained thereby, both physical evidence, instruments of the crime, and the admissions subsequently obtained from the defendant, was unlawfully considered both at the preliminary hearing and at the trial of the case. We will consider this argument in the several areas covered in defendant's brief, being mindful that both the Fourth Amendment to the United States Constitution and Article I, section 7, of the Nebraska Constitution, relate to the right of the people to be secure against *unreasonable* searches and seizures, and that search warrants shall issue only upon *probable cause* supported by oath or affirmation.

The original discovery of the property later seized was made by Thompsen and Sullivan who trespassed upon the premises for a purpose unrelated to the crime and they removed no property. Defendant cites no cases supporting his view that this entry was an unlawful search. The protection of the Fourth Amendment is a restriction on governmental action only. Burdeau v. McDowell, 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A. L. R. 1159.

A search implies some exploratory investigation. It is not a search to observe that which is open and patent, in either sunlight or artificial light. State v. Carpenter, 181 Neb. 639, 150 N. W. 2d 129.

Fire is a destructive burning involving combustion which manifests itself in heat and flame. Fire consumes and destroys. Fires, reports of fires, the existence of incendiary devices, and fire prevention demand the urgent and emergency response and vigilance of all firemen and law enforcement officers to protect the public.

In Shypulski v. Waldorf Paper Products Co., 232 Minn. 394, 45 N. W. 2d 549, that court said: "The first thing to be recognized is that firemen, policemen, and similar personnel have a status sui generis. * * * Firemen make their entry under license of law, * * *. Firemen are re-

garded as making their entry primarily for the purpose of performing a duty owed to the public. Although the benefit of their services may accrue entirely to an individual property owner, that fact is regarded as incidental."

When Thompsen and Sullivan reported to chief Claussen, they told him what was there, that there had been a fire, that it smelled like smoke, and it looked like it was set to start again. Claussen knew that the house was vacant and he made an immediate investigation. Firemen have a duty to promptly investigate fire reports; and they have the duty and right to enter property to combat fires. Is their duty and right any less when, after entry, their investigation reveals that there is no fire? We think not. Chief Claussen properly performed his duties here; and there was no search and no trespass.

"The States are not * * * precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of reasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain." Ker v. California, 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726.

"The right of an individual to be free from unwarranted intrusions on his person and property should be balanced against the need for effective law enforcement which can only exist where an officer's actions are measured objectively against a standard of reasonableness." State v. Harding, *ante* p. 159, 165 N. W. 2d 723.

Giacona v. United States, 257 F. 2d 450 (5th Cir.), is similar in part to this case. Federal officers received information that marijuana was concealed in the foundation blocks under a store building; a surveillance was maintained; and one of the officers crawled up to the

building, reached underneath it, and removed a paper bag containing marijuana. The bag was inspected, initialed, and replaced; and thereafter one of the officers filed an affidavit and obtained a search warrant. The court said: "When the performance of his duty requires an officer of the law to enter upon private property, his conduct, otherwise a trespass, is justifiable. 52 Am. Jur., Trespass, § 41. In any event, evidence is not rendered inadmissible merely because it has been obtained by a simple trespass upon land. The protection of the Fourth Amendment is not that extensive. * * * The Fourth Amendment protects against 'unreasonable searches and seizures.' Reasonableness is often a question of degree as to 'when the right of privacy must reasonably yield to the right of search.' Johnson v. United States, 1948, 333 U. S. 10, 14, 68 S. Ct. 367, 369, 92 L. Ed. 436. * * * 'Reasonableness is in the first instance for the District Court to determine.' United States v. Rabinowitz, 1950, 339 U. S. 56, 63, 70 S. Ct. 430, 434, 94 L. Ed. 653. See, also, Harris v. United States, 1947, 331 U. S. 145, 150, 67 S. Ct. 1098, 91 L. Ed. 1399. * * * What may be unreasonable in a search of a man's house, may be entirely reasonable in a search of his place of business. Harris v. United States, supra. * * * The nature of the search also is an important circumstance in determining reasonableness. (The) preliminary search was not of a general exploratory nature but might more accurately be considered a mere inspection to verify the information which he had received."

Section 81-502, R. S. Supp., 1967, provides: "It shall be the duty of the State Fire Marshal * * * (1) to enforce all laws of the state relating to the suppression of arson and investigation of the cause, origin and circumstances of fires; * * *." Section 81-505, R. R. S. 1943, provides: "The duties of the first assistant and the deputy fire marshals shall be to operate under the direction of and to assist the State Fire Marshal * * *." Section 23-1710, R. R. S. 1943, provides: "It shall be the duty of the sheriff

by himself or deputy to preserve the peace in his county, to ferret out crime, to apprehend and arrest all criminals, and insofar as it is within his power, to secure evidence of all crimes committed in his county, * * * and to perform all other duties pertaining to the office of sheriff."

As to the entry upon the premises by sheriff Kaminski, and fire marshals Barnett, Watson, and Mannier, defendant argues that the entry was a trespass under a pretext of investigating a possible fire, that it was unlawful, and that the evidence obtained by trespass could not be used as a basis for an affidavit to obtain a search warrant, citing United States v. Bush, 283 F. 2d 51. Although defendant does not claim the entry to be an unreasonable search, the reasonableness of the acts of the officers under the circumstances will be examined. Defendant cites Camara v. Municipal Court of San Francisco, 387 U. S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930, as authority that the inspection was unlawful requiring a search warrant. Camara is distinguished from the facts here, it prohibits warrantless nonemergency inspections by housing code inspectors. In the present case, none of these officers had ever been at the Howard property; but they had reliable information about the existence of an incendiary device in the basement of the Howard property which could have been "triggered" at any time by connecting the cord to the electrical source available by any so designing person. A felony had been committed; no surveillance had been maintained at the scene; they had no information whether a fire might be then burning; and they were concerned about the possibility of a fire at the Howard property. They took the precaution of inspecting the premises to determine whether or not there was a fire; they did not enter the house; their inspection furnished them with no added information; they made no search for either evidence or instruments of the crime; and finding no fire they left the premises to await search warrant process. We are not persuaded that the officers entered the premises under pretext. The

entry of these officers was not a search; at most, it was a technical trespass, more in the nature of an inspection, made in the proper performance of their duties, reasonable and justified by the circumstances. Any information gained by them could be lawfully used in an affidavit for a search warrant.

Next the defendant claims that the search and seizure accomplished by the officers with the use of a search warrant was unlawful because the affidavit was void for the following reasons: (1) No oath was administered, and (2) the stated grounds for probable cause were based on hearsay and observations made by unlawful trespass.

County attorney Martin prepared the affidavit for the signature of Wally Barnett, assistant state fire marshal. These two men went to the office of county judge Kowalski. Martin introduced Barnett to judge Kowalski and announced the purpose of their presence. Barnett was wearing the regular uniform of a state fire marshal with badge. Barnett handed the affidavit to judge Kowalski who read it, and then asked Barnett if he was the affiant. Barnett acknowledged that he was, the affidavit was returned to Barnett who signed it, and judge Kowalski then signed the jurat and affixed the seal of his office. The following testimony of Kowalski is pertinent: "Q Now, at this time that he signed this affidavit you did not at that time ask him specifically, 'Do you swear to this'? A No, that probably is one of my weaknesses, because I feel that a man signs it right in my presence and is—how would I say that?—anyhow it is authentic; that's what I mean."

As to the first claim that Barnett was not placed on oath, the first paragraph of the affidavit recites: "The Complaint and Affidavit of Wally Barnett of the Office of the State Fire Marshal * * * who being first duly sworn, on oath, says: * * *." The jurat recites: "Subscribed and sworn to before me this 28th day of August, 1967. P. J. Kowalski." An affidavit is a written declaration under oath, made without notice to the adverse party.

§ 25-1241, R. R. S. 1943. We have held that an affidavit must bear upon its face by the certificate of the officer before whom it was taken evidence that it was duly sworn to by the party making the same. Sebesta v. Supreme Court of Honor, 77 Neb. 249, 109 N. W. 166. "Oaths to affidavits ordinarily are not required to be administered with any particular ceremony, but affiant must perform some corporal act before the officer whereby he consciously takes upon himself the obligation of an oath; but it is not essential that he raise his hand." 2 C. J. S., Affidavits, § 20, p. 959. "If the attention of the person making the affidavit is called to the fact that it must be sworn to and, in recognition of this, he is asked to do some corporal act and he does it, the instrument constitutes a statement under oath, irrespective of any other formalities." 3 Am. Jur. 2d, Affidavits, § 11, p. 389. See, also, Dalbey Bros. Lumber Co. v. Crispin, 234 Iowa 151, 12 N. W. 2d 277. The affidavit here meets the requirements of execution under oath.

As to the second claim we have disposed of the objection of trespass, and now direct our attention to whether the affidavit stated grounds for probable cause. Recently in Spinelli v. United States, 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637, the court stated: "In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, Beck v. Ohio, 379 U. S. 89, 96, 85 S. Ct. 223, 228, 13 L. Ed. 2d 142 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, McCray v. Illinois, 386 U. S. 300, 311, 87 S. Ct. 1056, 1062 (1967); that in judging probable cause issuing magistrates are not to be confined by nigardly limitations or by restrictions on the use of their common sense, United States v. Ventresca, 380 U. S. 102, 108, 85 S. Ct. 741, 745 (1964); and that their determination of probable cause should be paid great deference by

reviewing courts, Jones v. United States, 362 U. S. 257, 270-271, 80 S. Ct. 725, 735-736 (1960)." In a concurring opinion in Spinelli, Justice White discusses some further guides: "An investigator's affidavit that he has seen gambling equipment being moved into a house * * * will support the issuance of a search warrant. * * * Personal observation attests to the facts asserted * * *. But if the officer simply avers, without more, that there is gambling paraphernalia * * *, the warrant should not issue, even though the belief of the officer is an honest one, * * * and even though the magistrate knows him to be an experienced, intelligent officer who has been reliable in the past. This much was settled in Nathanson v. United States, 290 U. S. 41, 54 S. Ct. 11, 78 L. Ed. 159 (1933) * * *. What is missing in Nathanson and like cases is a statement of the basis for the affiant's believing the facts contained in the affidavit—the good 'cause' which the officer in Nathanson said he had. If an officer swears that there is gambling equipment at a certain address, the possibilities are (1) that he has seen the equipment; (2) that he has observed or perceived facts from which the presence of the equipment may reasonably be inferred; and (3) that he has obtained the information from someone else. If (1) is true, the affidavit is good. But in (2), the affidavit is insufficient unless the perceived facts are given, for it is the magistrate, not the officer, who is to judge the existence of probable cause. Aguilar v. Texas, 378 U. S. 109, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); Giordenello v. United States, 357 U. S. 480, 486, 78 S. Ct. 1245, 1250, 2 L. Ed. 2d 1503 (1958); Johnson v. United States, 333 U. S. 10, 14, 68 S. Ct. 367, 369, 92 L. Ed. 436 (1947). With respect to (3), where the officer's information is hearsay, no warrant should issue absent good cause for crediting that hearsay."

In United States v. Ventresca, 380 U. S. 102, 85 S. Ct. 741, 13 L. E. 2d 684, the court stated: "Observations of fellow officers of the Government engaged in a common

investigation are plainly a reliable basis for a warrant applied for by one of their number." In Giacona v. United States, *supra,* the court stated: "Whether or not the information * * * received 'from a reliable source' would have sufficed need not be decided. Certainly, after that information had been verified by * * * personal inspection, it constituted 'probable cause'."

Defendant urges that the affidavit is void because it recites the conclusion of the sheriff, "* * * that the Sheriff had reason to believe that an act of arson might be committed or might have been committed." This is a conclusion and hearsay; however, this recitation can be disregarded in considering this issue here since the affidavit also recites an inspection made of the premises, which defendant concedes was an inspection made by the affiant, deputy fire marshals Watson and Mannier and sheriff Kaminski. The inspection relates a personal observation and that is sufficient. For the same reason we disregard defendant's argument that State v. McCreary, 179 Neb. 589, 139 N. W. 2d 362, controls here. In McCreary, a part of the information related in the affidavit was attributed to a "reliable informant"; here the information is personal observation.

From reading the affidavit in its entirety, the county judge had a substantial basis for finding probable cause by independent judgment. We cannot say that the finding of probable cause was improper. The search warrant was properly issued to Wally Barnett, a law enforcement officer under section 29-814, R. R. S. 1943. The search conducted pursuant to the search warrant was lawful.

Defendant contends that a preliminary hearing conducted by a county judge not an attorney and not trained in the law is in violation of his equal protection of the laws and due process of law guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 3, of the Constitution of Nebraska. Section 29-1607, R. R. S. 1943, provides:

"No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefore * * * before a *justice of the peace or other examining magistrate or officer,* * * *." (Emphasis supplied.) In State v. Sheldon, 179 Neb. 377, 138 N. W. 2d 428, we said: "The purpose of a preliminary hearing is to ascertain whether a crime has been committed and whether there is probable cause to believe that the accused committed it. It is not a trial of the person accused * * *." Defendant had available to him procedures to test the sufficiency of the evidence at the preliminary hearing which he did by plea in abatement. We find no merit in this contention.

The claim of the defendant that the admissions made by him were the "fruit" of an unlawful search finds no support in the evidence.

We find no prejudicial error in the record. The motion to suppress and the plea in abatement were properly denied; and the motion for new trial was properly denied.

The judgment of the trial court is affirmed.

AFFIRMED.

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HUBERT G. MUFF, APPELLANT, V. MAHLOCH FARMS CO., INCORPORATED, ET AL., APPELLEES.
167 N. W. 2d 73

Filed April 11, 1969. No. 37057.

1. **Waters.** An upper proprietor has the right to change the course of surface waters falling or flowing on his land, but he may not collect them and cast them on a lower proprietor to his damage except in a natural watercourse.
2. ———. The owner of real estate may grade his land and apply irrigation water to it as an incident of ownership and an act of good husbandry of natural resources.
3. **Injunctions: Damages.** In a suit for an injunction, a failure to show damages, presently or in the future, operates to defeat an application for injunctive relief. A court of equity will not grant injunctive relief unless it be shown that an injury has

been or will be suffered by the party seeking such relief.

4. **Equity: Courts.** It is a well-settled principle of equity jurisprudence that, where a court of equity has obtained jurisdiction of a cause for any purpose, it will retain it for all and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation.

5. **Equity: Courts: Judgments.** An equity court in making a final determination of a case, may properly limit its decree to the issues actually determined, by findings of fact or otherwise, and thereby limit the rule of res judicata to the issues actually tried without binding the parties to issues not litigated or intended to be litigated.

Appeal from the district court for Saline County: ERNEST A. HUBKA, Judge. Affirmed.

Jack L. Craven and Herman Ginsburg, for appellant.

Steinacher & Vosoba, for appellees.

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

CARTER, J.

This is a suit in equity by Hubert G. Muff, against Mahloch Farms Company, an adjoining upper proprietor, to enjoin the upper proprietor from casting irrigation water on the lower proprietor's land. The trial court found for the defendants and denied an injunction. The plaintiff has appealed.

The plaintiff is the owner of that part of the northeast quarter of Section 9, Township 8 North, Range 4 East of the 6th P.M., in Saline County, Nebraska, lying south and west of the Big Blue River, comprising 138 acres. The principal defendant, Mahloch Farms Company, is the owner of the northwest quarter of said Section 9 which abuts plaintiff's land on the west. The Mahloch land has a higher elevation than plaintiff's land and plaintiff's land is subject to the flow of surface waters across the Mahloch land and adjoining lands totaling approximately 300 acres. The adjoining lands to the north of Mahloch

are owned by one Keller and play a prominent part in the present controversy.

A natural drain, admitted by the parties to be such, arises along the west line of the Mahloch land and turns east at the northwest corner of Section 9. A short distance east of this corner, the drain dips south in a semicircular fashion onto the lands of Mahloch and crosses back north into the Keller land within the northwest quarter of the northwest quarter. This section of the natural drain is referred to in the record as the horseshoe bend. The drain proceeds north into the Keller land, turns sharply to the south after a confluence with a natural drain from the northwest which carries no water from the Mahloch land, and proceeds into and across the northeast corner of the Mahloch land. At or near this point the drain flows into and across plaintiff's land in a well-defined drainage channel or draw to the southeast into the Big Blue River. There is evidence that surface waters flow north into this drain and other evidence that some surface waters flow to the southeast in what the plaintiff designates as a watercourse. There is little or no dispute as to the location of this natural drain and the directional flow of surface waters that find their way to or are dumped into it.

At the time of the commencement of this suit, the defendant was engaged in grading his land in preparation for pump irrigation. The defendant, Glen Schwisow, was the contractor in charge of the land leveling operation and has no other interest in the suit. It is the contention of the plaintiff that the land leveling will change the course of surface waters through existing natural drains and dump them on plaintiff's land to his damage. It is also asserted that the leveling of the land with a grade from west to east in the direction of plaintiff's adjoining lands, will cast both surface and irrigation waters on plaintiff's land greater in amount and velocity than existed in a state of nature to plaintiff's damage. It is further contended that a ridge of land running north and

south exists to the west of the center of defendant's land which is to be cut down and used to fill existing natural drains, thereby permitting surface waters, and irrigation water as well, to flow east where they were not wont to go in a state of nature. It is also asserted that the leveling of the land will have the effect of closing the mouth of the horseshoe bend on defendant's land and, by shortening the natural drain at this point, will increase the velocity of such water and result in a pile up of the water where it flows into the big draw with a consequential erosion of plaintiff's land. These contentions of the plaintiff are supported to some extent at least by the testimony of an engineer called by the plaintiff.

The north 80 acres of the Mahloch land drain to the east and north into the natural watercourse hereinbefore described. The south 80 acres drain mostly to the southeast and have little bearing on the issues of this case because its surface waters reach the Big Blue River by watercourses that do not enter plaintiff's lands. The north 80 acres and approximately 250 acres of land belonging to adjacent landowners drain into the natural watercourse previously described and is generally referred to as the south drainage area. Surface waters on other more distant lands belonging to adjacent landowners in an area of about 465 acres, which includes none of the Mahloch land, flow onto the Keller land and forms what is generally referred to as the north watercourse. These two watercourses meet on the Keller land, flow back into the northeast corner of the Mahloch land, are cast into the big draw, and are carried to the Big Blue River to the southeast across plaintiff's land.

The evidence shows that Mahloch had commenced the grading of the north 80 acres of his land for the purpose of preparing it for pump irrigation when this suit was started. It is not disputed that the land sloped from the west to east and that the grade of the slope was reasonable for irrigation purposes. The plan of the irrigation project was to water from the west end to the

east end by running the water between the crop rows. To do this, defendant intended to fill the horseshoe bend which invaded his land and relocate it with a ditch on the north boundary on his own land. The horseshoe bend would be filled and his crop rows would conduct the irrigation water across the land from west to east. Such a construction would carry the surface water in the horseshoe bend from the point of entry to his land to the point of exit. Plaintiff contends that this would damage him when the water was dropped into the big draw some distance to the east. The evidence will not sustain such a conclusion. The testimony of expert engineers was that this straightening of the watercourse would not increase the volume of flow and that any increased velocity due to the shortening of the watercourse would be so negligible as not to change the result. The evidence reveals no proper cause of complaint by plaintiff by the elimination of the horseshoe bend along the north line of the north 80 acres.

Plaintiff's next contention is that if irrigation water is caused to flow between the crop rows from west to east, that the waste water spilling out at the ends of the rows would flow onto the lower adjacent lands of the plaintiff to his damage. The defendant testified, however, that it was his intention to construct a ditch and terrace across the east end of the 80 acres on his own land and conduct such waste waters north to the watercourse heretofore described and dump such waters into the natural drain from where it would flow in the big draw across plaintiff's lands into the Big Blue River. This was recognized as a feasible and proper method of controlling these waste waters without encroachment upon plaintiff's farm operations. It was also pointed out that this method of handling would eliminate a watercourse presently carrying water onto plaintiff's lands to the south of the watercourse in the northeast corner of the north 80 acres. In addition thereto, the defendant testified that if for any reason water was ac-

cumulated and cast upon plaintiff's lands, he would install a sump pump and reuse the water for irrigation purposes, a method in rather common use by pump irrigators under such circumstances. Defendant's engineer testified that this was a recognized method of controlling wasted irrigation water. We think the evidence sustains the findings of the trial court on this issue.

Plaintiff complains that he is injured by water being conducted north from what is referred to as a "lagoon" located on defendant's land. The "lagoon" is a low area to the west of the old building site on the north 80 acres. It consists of an area of 1½ acres and results from a ponding of diffused surface waters in wet weather. When it fills up and overflows some of the water goes north to the south drain, but more goes to the south without reaching plaintiff's land. The grading operation would fill the "lagoon" in order for irrigation water to flow through from west to east in accordance with the general irrigation plan. Plaintiff contends that the overflow water that formerly drained south will drain north and increase the amount of water he will receive in the big draw. We point out, however, that the source of water in the "lagoon" area was diffused surface waters which the defendant may use in such manner as he sees fit, provided of course that he does not concentrate them and dump them unlawfully on the land of another to his damage. He may change their course, store them, or reuse them, but he may divert them on the land of another only through depressions, draws, or other drainways as they were wont to flow in the state of nature.

The overall picture in this case shows that the north 80 acres are being graded to make the land suitable for irrigation. The disposition of surface waters arising on the land or carried on the land is consistent with Nichol v. Yocum, 173 Neb. 298, 113 N. W. 2d 195, and cases therein cited.

The primary issue remaining relates to the use of the land in increasing production of crops and the enhance-

ment of the value of the land by pump irrigation. When the suit for an injunction was commenced there was no irrigation on the farm, but prior to the hearing on the merits an irrigation well had been drilled by the defendant. No water had been applied to the land at the time of trial. It is asserted, however, that plaintiff would be damaged by wasted irrigation water. The evidence of the expert witnesses is to the effect that wasted irrigation waters in the instant case would be trivial and nondamaging to the plaintiff, a position which is sustained by the evidence in the case.

The fundamental question on the issues before the court is whether or not an anticipated damage which may or may not occur affords a basis for injunction. The evidence of the defendant that if waste irrigation waters caused damage to the plaintiff's lands, he would pond and reuse them for irrigation purposes by means of a sump pump is a fact to be considered. The trier of fact believed defendant's general plan of operation as being nondamaging to the plaintiff. We find no reason to disagree with these factual findings and the consequent dismissal of the suit. It is fundamental that an injunction will not lie if the right thereto is unclear or the damage complained of is nonexistent. State v. Merritt Bros. Sand & Gravel Co., 180 Neb. 660, 144 N. W. 2d 180. It appears to us that plaintiff's right to an injunction is unclear as being based on an unwarranted anticipation of damage. Here the plaintiff has suffered no damage from waste irrigation water because there has been none, nor will the evidence sustain a finding that defendant's irrigation plan will result in any damage in the future. The right of an owner to apply irrigation water to land is recognized as good husbandry of natural resources and if no damage or threat of damage from such water is established by a party seeking injunctive relief, injunction will be denied. Spurrier v. Mitchell Irr. Dist., 119 Neb. 401, 229 N. W. 273.

Plaintiff complains of the form of the judgment of dis-

missal entered in that any future application for an injunctive order to restrain the defendant from an improper disposition of waste irrigation water to the damage of the plaintiff would be subject to the defense of res judicata. The basis for the dismissal is not shown in that no findings of fact were made on which the order of dismissal was predicated. Under such circumstances we cannot say that plaintiff's complaint is not without logical support. Here the defendant has testified to specific procedures to protect the plaintiff from damage from defendant's irrigation waters. The suit ought not to have been dismissed without plaintiff being afforded protection against the failure of defendant to carry out his proposals for protecting plaintiff against damages resulting from the unlawful encroachment of irrigation water.

It is a fundamental principle of law that material facts or questions which were in issue in a former action and were there admitted or judicially determined, and all points which properly belonged to the subject of litigation which might have been brought at the time with reasonable diligence, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action. Wischmann v. Raikes, 168 Neb. 728, 97 N. W. 2d 551. Adequate findings of fact, even in a judgment of dismissal, serve to properly limit the broad sweep of the rule of res judicata and to properly protect the rights of the parties in a case such as we have before us.

It appears to us that the plan of the defendant for pump irrigating his land is sustained as against the allegations of the plaintiff largely on the basis of the promised construction of the ditch and terrace across the east end of defendant's land and the ponding and reuse of waste irrigation water by means of a sump pump, all of which Mahloch testified he would do to avoid damaging the lands of the plaintiff. If this testimony was believed

and found to be true, as it evidently was, findings of fact should so state and thus make the plans testified to as a defense to injunctive relief a condition precedent, in effect, to the dismissal of the suit. To this extent, we modify the order of dismissal and affirm the judgment.

AFFIRMED.

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DUPLEX MANUFACTURING CO., A CORPORATION, APPELLANT, V. ATLAS LEASING CORPORATION, A CORPORATION, APPELLEE.
166 N. W. 2d 732

Filed April 11, 1969. No. 37062.

1. **Contracts: Guaranty: Sales.** Under a contract to manufacture goods according to specifications, where the completed goods do not correspond to the contract requirements, there was no transfer of title to such goods, under the Uniform Sales Act, now repealed.
2. ———: ———: ———. The purchaser of personal property, under an implied warranty, has a reasonable time to test the same to ascertain whether or not it is as warranted, and ordinarily this would be a question for the jury.
3. **Sales: Damages.** The particular need of a seller for the money due is not a proper element of damage.
4. **New Trial: Instructions.** Instructions objected to must be specifically designated by number in a motion for a new trial in order for such alleged error to be considered on appeal. Otherwise, such instructions will be taken as the law of the case.

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

Frost, Meyers and Farnham, for appellant.

John W. Delehant, Jr., and Robert J. Huck, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, SMITH, MCCOWN, and NEWTON, JJ., and KOKJER, District Judge.

MCCOWN, J.

This is an action to recover the contract price for the manufacture of a custom-built mobile feed mill. The

jury returned a verdict for the defendant on plaintiff's petition, and against the defendant on defendant's cross-petition. The plaintiff has appealed from the overruling of its motion for new trial and there is no cross-appeal.

This is the second appearance of this case in this court. See Duplex Mfg. Co. v. Atlas Leasing Corp., 180 Neb. 851, 146 N. W. 2d 205.

The plaintiff, Duplex Manufacturing Company, entered into negotiations with Elvin Lamb in the fall of 1962, out of which this contract arose. The defendant, Atlas Leasing Corporation, was engaged in the business of financing machinery and equipment acquisitions. Duplex suggested to Lamb that he visit with Atlas for purposes of financing the purchase. Arrangements for Atlas to buy the mill and lease it to Lamb were made. Duplex and Atlas entered into the contract for the custom-built mobile feed mill on November 29, 1962. The price was $17,110 cash. The order stated: "This is a custom built Mill especially for Mr. Elvin Lamb to his exact specifications and therefore, this order is non-cancellable." The specifications for the machine included among its components, "a metering device for weighing or metering grain." Duplex commenced the manufacture and assembly of the mill. The feed mill, although not fully completed, was taken to Mr. Lamb's place of business in Missouri on March 9, 1963, for an advertising and promotion project arranged by Duplex. It was then returned to the Duplex plant in Omaha for completion and testing.

On April 5, 1963, an employee of Elvin Iamb came to Omaha; signed a delivery receipt which contained the words "received and accepted"; and took the mobile feed mill from the Duplex plant and drove it to Missouri. There was a conflict in the evidence as to the reasons for delivery before completion and testing, but the evidence is undisputed that the weighing or metering device was not on the mill at that time; and that both Duplex and Elvin Lamb were aware of that fact.

Duplex immediately attempted to obtain payment from Atlas, but Atlas refused to pay for the mill until Mr. Lamb certified that the mill had been completed and built to his exact specifications which Mr. Lamb never did.

Meanwhile, after April 5, 1963, representatives of Duplex went to Missouri to train Lamb's employees in the use and operation of the machine and to test it as it was being used in the field. There is a sharp conflict in the evidence as to how the machine operated in the field as well as to the reasons for various items of damage to or malfunction of various components of the feed mill.

Duplex' evidence was that the malfunctioning and damage was due to the inexperience of Lamb's employees and their poor handling and operation of the mill. The evidence of Atlas and Lamb was that the malfunctioning and damage was due to the failure to conform to specifications, and to faulty material and workmanship by Duplex. Lamb had instructed Atlas not to pay for the mill until the machine was complete and worked according to the warranties.

On May 2 or 3, 1963, Lamb had the machine brought to the Duplex plant in Omaha and left there. He concurrently advised both Duplex and Atlas that he would not accept the machine under any circumstances. Duplex' evidence was that the mill was to be returned to it on May 3, 1963, for repairs to certain components and also for installation of the weighing and metering device, which was then at its plant and ready for installation. The mobile feed mill remained at the Duplex plant thereafter, although the weighing or metering device was never installed on it.

Duplex contends that the issue of acceptance should not have been submitted to the jury because it was uncontroverted on the evidence. Duplex also contends that section 69-419, Rule 4 (1) of the Uniform Sales Act, then in effect, applied. Rule 4(1) provided: "Where there is a contract to sell unascertained or future goods

by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made."

It is uncontroverted in this case that the feed mill never had installed on it the weighing and metering device which was an essential element of the description of the goods. Under a contract to manufacture goods according to specifications, where the completed goods do not correspond to the contract requirements, there is no transfer of title to such goods under section 69-419, Rule 4(1), R. R. S. 1943. See Inland Products Corp. v. Donovan, Inc., 240 Minn. 365, 62 N. W. 2d 211, at page 220. On the issue of the intention of the parties and whether or not there was an acceptance, the evidence was in direct conflict and the issue was properly submitted to the jury.

Duplex also contends that Lamb should not have been allowed to return the mill and, on behalf of Atlas, rescind the contract, pursuant to section 69-469, (1) (d) and (3), R. R. S. 1943, because the mill was badly damaged. Section 69-447 (1), R. R. S. 1943, provided: "Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract." Duplex' position is that the time from April 5 to May 3 was too long to be reasonable, even though Duplex' representatives were endeavoring to repair the feed mill and have it operate as warranted during a large part of that time. The purchaser of personal property, under an implied warranty, has a reasonable time to test the same to ascertain whether or not it is as warranted, and ordinarily this would be a question for the jury. Von

Dohren v. John Deere Plow Co., 71 Neb. 276, 98 N. W. 830. The determination of what was a reasonable amount of time here was for the jury, and the trial court properly submitted the issue to the jury.

Duplex also assigns as error that the court failed to submit the proper measure of damages by excluding consideration of its claim for loss of credit and damage to manufacturing reputation, allegedly caused by Atlas' failure to pay the purchase price. The particular need of a seller for the money due is not a proper element of damage. See, Scheer v. Nelson, 113 Neb. 821, 205 N. W. 250; 46 Am. Jur., Sales, § 622, p. 754.

Some assignments of error are directed generally to omissions or errors in the instructions as a whole, but neither the motion for a new trial nor the assignments of error specify by number the alleged erroneous instructions. Instructions objected to must be specifically designated by number in a motion for a new trial in order for such alleged error to be considered on appeal. Otherwise, such instructions will be taken as the law of the case. Robinson v. Meyer, 165 Neb. 706, 87 N. W. 2d 231; Law v. Gilmore, 171 Neb. 112, 105 N. W. 2d 595.

When the evidence is conflicting, the verdict of a jury will not be set aside unless it is shown to be clearly wrong. Schimonitz v. Midwest Electric Membership Corp., 182 Neb. 810, 157 N. W. 2d 548.

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

AFFIRMED.

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LEON HASCHKE ET AL., APPELLEES, V. SCHOOL DISTRICT OF HUMPHREY IN THE COUNTY OF PLATTE IN THE STATE OF NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.
167 N. W. 2d 79

Filed April 11, 1969. No. 37081.

1. **Public Funds: Injunctions.** A resident taxpayer without proof

of an interest peculiar to himself may enjoin illegal expenditure of money by a public board.

2. **Schools and School Districts: Powers.** A school district in this state possesses no powers other than those granted by the Legislature.

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

Walker, Luckey & Whitehead and Brogan & Monen, for appellants.

Moyer & Moyer, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, SMITH, McCOWN, and NEWTON, JJ., and KOKJER, District Judge.

SMITH, J.

The Humphrey school district and Pebco, Inc., agreed on construction of a school building by Pebco for lease to Humphrey. The district court on petition of resident taxpayers found that the agreement was void, enjoining performance. Contentions of defendants on appeal are that plaintiffs had an adequate remedy at law and that the agreement was valid.

Humphrey, a nonaccredited member of Class III, had been maintaining inadequate school facilities. Assessed valuation of taxable property in the district December 1, 1967, totaled $5,484,437. The Pebco agreement, dated March 19, 1968, stipulated minimum rentals based on construction costs of $250,000. Rentals were $20,000 in advance and $1,922 a month during a lease term of 20 years from September 1, 1968. Humphrey also agreed to obligate itself for taxes, losses, and insurance.

Humphrey under the agreement had an option exercisable during the lease term after September 1, 1973, to purchase the building. The price was fixed at "a sum equal to the difference between the total consideration for this lease of $250,000.00, plus any amounts due to change orders * * *, and the actual rental payments made, being the amounts of the monthly payments in-

clusive of interest on the amortized basis, * * *." Otherwise the building was to remain personal property situated within the district.

From an approximate balance of $17,500 in Humphrey's sinking fund, $15,000 was paid in March 1968, to Pebco on account of advance rental. The Humphrey board made the agreement and part payment without approval of the electorate.

Statutory sections governing school districts of Class III are as follows. The district reports its budget to the county board which levies on taxable property to provide the revenue. § 79-810, R. R. S. 1943. The budget may include an item for erection of school buildings, and the section fixes no ceiling on indebtedness. On the other hand, purchase of land for educational facilities outside the district for more than $5,000 requires voter approval. § 79-4,153, R. R. S. 1943. The board may annually levy a maximum of 4 mills to fund construction of school buildings. § 79-811, R. R. S. 1943. It may within limits incur short-term indebtedness. § 79-520, R. S. Supp., 1967. Issuance of bonds for erection of a school building must receive voter approval. § 10-701, R. R. S. 1943; § 10-702, R. S. Supp., 1967.

Another section, 79-422, R. R. S. 1943, reads: "Whenever it shall be deemed necessary (1) to erect a * * * school building * * *, the * * * board * * * may, and upon petition of not less than one-fourth of the legal voters * * * shall, submit to the people * * * a proposition to vote a special annual tax for that purpose of not to exceed five mills * * * for a term of not to exceed 10 years."

A resident taxpayer without proof of an interest peculiar to himself may enjoin illegal expenditure of money by a public board. Niklaus v. Miller, 159 Neb. 301, 66 N. W. 2d 824; see Farrell v. School Dist. No. 54, 164 Neb. 853, 84 N. W. 2d 126. Plaintiffs here had no adequate remedy at law.

A school district in this state possesses no powers

other than those granted by the Legislature. The Pebco agreement was beyond the authority of the Humphrey officers and board, and the judgment was correct. Cf. State ex rel. School Dist. v. Board of Equalization, 166 Neb. 785, 90 N. W. 2d 421.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. RANDALL HARRIS, APPELLANT.
167 N. W. 2d 386

Filed April 18, 1969. No. 36937.

1. **Criminal Law: Juries.** Denial of a continuance on the ground that defendant could not have a fair and impartial trial before the regular panel of jurors, because a jury selected therefrom had previously found his companion guilty of another offense, was not prejudicially erroneous where the record shows that each juror selected for the second trial was duly qualified to act as such.
2. ———: ———. A defendant who fails to challenge jurors for disqualification and passes the jurors for cause waives his right to object to their selection and cannot later object after receiving an unfavorable verdict.
3. **Criminal Law: Appeal and Error.** The verdict of the jury rendered in a criminal prosecution will not be reversed in the absence of a showing of prejudice to a substantial right of defendant.

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

Richard J. Spethman, 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.

NEWTON, J.

Defendant and a companion were arrested in Douglas

County, Nebraska, on a charge of burglary. While awaiting trial, the companion was tried and convicted on a felony charge unconnected with the burglary for which defendant was tried. Defendant's trial was had to the same jury panel which had heard his companion's case. Defendant moved for a continuance on the ground that he could not receive a fair trial before the jury panel from which a jury had been selected which had tried and convicted his companion on a different charge. The motion was overruled by the court and on its own motion, the court dismissed any jurors called who had served as jurors in the case of defendant's companion. In doing so, the court avoided any reference to the connection between the two cases. Jurors called were examined on voir dire by the defendant's attorney and passed for cause. We affirm the judgment of the district court.

There is absolutely no showing of prejudice to any substantial right of the defendant in the record before us. It does not appear that any juror had any knowledge that defendant's companion had been previously convicted on a felony charge separate and distinct from the burglary charge on which defendant stood trial. Under such circumstances, it appears that defendant's assignment of error must be rejected on several grounds.

In the case of Crawford v. State, 116 Neb. 125, 216 N. W. 294, the facts were very similar to those in the present case. The court there held: "Denial of a continuance on the ground that defendant could not have a fair and impartial trial before the regular panel of jurors, because a jury selected therefrom had on a previous day found him guilty of another offense, *held* not prejudicially erroneous, where the record shows that each juror selected for the second trial was duly qualified to act as such."

In State v. Eggers, 175 Neb. 79, 120 N. W. 2d 541, the court held that by passing the jurors for cause, the defendant waived any objection to their selection as

jurors and could not later successfully object after an unfavorable verdict.

Even if it were to be conceded that the trial court acted erroneously in overruling the defendant's motion for a continuance, no ground for reversal would be presented. The verdict of the jury rendered in a criminal prosecution will not be reversed in the absence of a showing of prejudice to a substantial right of defendant. See, § 29-2308, R. R. S. 1943; Mason v. State, 132 Neb. 7, 270 N. W. 661; State v. Burton, 174 Neb. 457, 118 N. W. 2d 502.

The judgment of the district court is affirmed.

AFFIRMED.

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IN RE INTEREST OF STEVEN WILLIAM DAHLBERG.
GORDON M. DOESCHOT, APPELLEE, V. STEVEN WILLIAM DAHLBERG, APPELLANT.
167 N. W. 2d 190

Filed April 18, 1969. No. 37076.

1. **Infants: Appeal and Error.** The review in the Supreme Court of a proceeding under the Juvenile Court Act is by trial de novo.
2. **Infants.** A child under the age of 18 years who deports himself so as to injure or endanger seriously the morals or health of himself or others is a child in need of special supervision under the Juvenile Court Act.

Appeal from the separate juvenile court of Douglas County: SEWARD L. HART, Judge. Affirmed.

Charles H. Truelsen, for appellant.

Donald L. Knowles and J. Thomas Rowen, for appellee.

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

BOSLAUGH, J.

The appellant, Steven William Dahlberg, was adjudicated to be a child in need of special supervision and

placed on 6 months probation by the separate juvenile court of Douglas County, Nebraska. The appellant's motion for new trial was overruled and he has appealed. The principal assignments of error relate to the sufficiency of the evidence to sustain the findings and order of the juvenile court.

The review in this court is de novo upon the record. State ex rel. Weiner v. Hans, 174 Neb. 612, 119 N. W. 2d 72; Mullikin v. Lutkehuse, 182 Neb. 132, 153 N. W. 2d 361.

The petition alleged that on May 4, 1968, the appellant maliciously damaged a Ford automobile owned by Gary Mann and assaulted Larry Spratlin. The allegations refer to separate incidents which occurred on the same night.

The evidence shows that the appellant was driving a green 1957 Chevrolet station wagon south on Seventy-second Street in Omaha, Nebraska, at about 11 p.m., on May 4, 1968. Between Cass and Dodge Streets the station wagon, while passing the Mann automobile, swerved toward it. As it did so, a youth named Weiss leaned out of the station wagon and shouted obscenities at the Mann automobile. The incident was repeated about a block south of Dodge Street and again just north of Pacific Street. At this time, a beer bottle thrown from the Ford automobile struck the station wagon. The station wagon passed the Mann automobile again near the entrance to Ak-Sar-Ben, and at that time Weiss had a tire iron in his hand. When the Mann automobile stopped for a traffic light at Mercy Road, the station wagon stopped about a half block ahead and Weiss came back and struck the right door of the Ford automobile with the tire iron, damaging it.

The evidence relating to the assault is not as clear. Spratlin testified that he was driving west on Dodge Street when a green or blue 1957 Chevrolet station wagon passed him. The passengers in the station wagon were looking at the Spratlin automobile and motioning

toward it. While Spratlin was stopped for the traffic light at Seventy-eighth Street, Weiss got out of the car behind Spratlin and struck Spratlin twice in the face. Spratlin could not see who the driver was, but he took the license number of the car, and the driver was identified later at the police station.

The appellant testified in his own behalf and denied that he purposely swerved the station wagon toward the Mann car. His explanation was that the brakes pulled to the right. The appellant admitted that Weiss was shouting obscene words from the station wagon but claimed that he did not know that Weiss did such things. He admitted that he had been with Weiss for about 3 hours that evening.

The evidence establishes, clearly, that the appellant was a participant in the incident involving the Mann automobile. The evidence fully sustains the finding of the juvenile court that the appellant is a child in need of special supervision because he deports himself so as to injure or endanger seriously the morals or health of himself or others. § 43-201 (5) (c), R. R. S. 1943.

It is unnecessary to consider the assignment of error with respect to the standard of proof applied by the juvenile court. The review here is de novo and the evidence is sufficient to sustain a finding against the appellant beyond a reasonable doubt. See Guy v. Doeschot, 183 Neb. 557, 162 N. W. 2d 524.

The judgment of the juvenile court is affirmed.

AFFIRMED.

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WAYNE T. SACHER, APPELLANT, V. LARRY A. PETERSEN, APPELLEE.

167 N. W. 2d 384

Filed April 18, 1969. No. 37105.

**Evidence: Trial.** Where different minds may draw different con-

clusions or inferences, or where there is a conflict in the evidence, the matter at issue must be submitted to the jury.

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

Schrempp, Rosenthal, McLane & Bruckner and James R. Welsh, for appellant.

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

Heard before WHITE, C. J., CARTER, SPENCER, SMITH, MCCOWN, and NEWTON, JJ., and KOKJER, District Judge.

MCCOWN, J.

This is an action to recover for personal injuries and property damage allegedly resulting from an automobile accident. The jury verdict was for the defendant, and the plaintiff has appealed.

On August 24, 1964, at 4 p.m., a dry, clear day, the plaintiff, Wayne T. Sacher, was traveling south on Seventy-second Street in Omaha, Nebraska. There were four lanes of traffic, two southbound and two northbound. The plaintiff, in his small Goliath automobile, was proceeding south in the traffic lane next to the centerline. The defendant, Larry A. Petersen, in his standard size Chrysler, was following the plaintiff's vehicle in the the same traffic lane and approximately three car-lengths behind. The vehicles were proceeding at a speed of 25 to 30 miles per hour down a slight grade extending for several blocks. The defendant had been following the plaintiff for some distance.

When the cars were approximately 200 feet north of Burt Street, and at a point where there was no intersection near, the plaintiff's car suddenly stopped. The defendant put on his brakes and attempted to stop, but before he had completely stopped, he bumped the rear of plaintiff's vehicle. There was some traffic in the other southbound lane and in the northbound lanes.

There is a conflict in the evidence as to the force of

the bump. The plaintiff testified that the impact knocked his vehicle 10 feet forward, while the defendant testified it moved a few inches. There was no damage of any kind to the defendant's automobile, and the repair estimate for the plaintiff's vehicle was $78.70. The plaintiff did not give a signal of any kind and had not looked to see if there was any traffic behind. He did testify that his brake lights were working, but the defendant testified that he did not see any hand signal or brake lights, and that he had no warning of any kind that plaintiff was going to make an abrupt stop.

The evidence is also in direct conflict as to the reason for plaintiff's sudden stop. Plaintiff testified that a car ahead of him stopped, but that it went on again after the accident. According to the plaintiff, that car made a "very slow stop, a gradual stop, and I just stopped behind it." The defendant testified that just before the accident occurred, he saw no car immediately ahead of the plaintiff's automobile, and that there was nothing about the plaintiff's car or about the visibility that would have precluded the defendant from seeing a car immediately ahead of plaintiff's car if there had been one there.

Plaintiff's assignments of error are solely that the court erred in submitting to the jury the question of plaintiff's contributory negligence, and erred in instructing the jury on the issue of plaintiff's negligence and contributory negligence. There is no assignment of error nor issue raised as to the form of the instructions given.

It appears to be plaintiff's contention that the driver of a motor vehicle who stops his car on the street in moving traffic without giving any signal of any kind, as a matter of law, cannot be guilty of negligence or contributory negligence, where his vehicle is struck by another vehicle approaching from the rear. We cannot agree.

The court quite properly instructed the jury that it is the law of Nebraska that no person shall stop or

suddenly decrease the speed of a vehicle without first giving an appropriate signal to the driver of any vehicle immediately to the rear when there is an opportunity to give such signal, and also instructed the jury as to an ordinance of the City of Omaha providing that: "A driver of any vehicle before stopping, decreasing speed, changing lanes, or turning such vehicle from the direct course upon a street or highway, shall first see that such action can be taken with reasonable safety and, if any pedestrian or vehicle may be affected by such movement, shall give an appropriate signal * * *."

O'Brien v. J. I. Case Co., 140 Neb. 847, 2 N. W. 2d 107, involved a rear-end collision. This court said: "Whether or not the proper signals were given and whether or not the driver of either car, under the circumstances, was negligent are, ordinarily, jury questions. * * * The driver of an automobile following another, while he must obey the law, * * * is not bound to anticipate that the driver of the car ahead is going to come to a sudden and abrupt stop for the purpose of picking up hitchhikers."

We think it also should be for the jury to determine, under the circumstances here, whether the defendant was bound to anticipate that the driver of the car ahead, in the inside lane of moving city traffic, between intersections, is going to come to a sudden and abrupt stop without signaling, if there is no reasonable or apparent cause for doing so.

Brazier v. English, 177 Neb. 889, 131 N. W. 2d 601, also involved a rear-end collision. In that case we said: "Assuming the defendant was guilty of some negligence * * * that fact does not preclude the jury, on the evidence adduced, from also finding the plaintiff guilty of contributory negligence. It is only when the evidence is undisputed, or but one reasonable inference or conclusion could be drawn from the evidence, that the question is one of law for the court. Where, as here, from the testimony before the jury, different minds may draw different conclusions or inferences, or where there

is a conflict in the evidence, the matter at issue must be submitted to the jury."

The plaintiff's position is that we must accept, as established fact, the plaintiff's testimony that an automobile immediately ahead of him stopped, and that he stopped behind it, and argues that this fact relieved him of any responsibility. This requires that we ignore the defendant's testimony that he saw no vehicle immediately ahead of plaintiff's automobile, and there was nothing to preclude the defendant from seeing such a car if there had been one. It also requires that we accept plaintiff's own testimony that the car ahead of him made a very slow, gradual stop, as opposed to defendant's testimony that plaintiff made a sudden, abrupt stop without a signal. The jury was not required to accept plaintiff's testimony that there was a car which stopped immediately in front of him any more than it was required to accept the circumstantial evidence of the defendant that he saw none. The admitted failure of the plaintiff to keep any lookout to the rear, coupled with the lack of signal, add weight to the conclusion that the issues were for the jury.

There was sufficient evidence from which the jury could find negligence upon the part of the plaintiff which was the proximate cause of the collision. Contributory negligence was, therefore, one of the issues to be submitted to the jury. It was properly submitted, and the judgment is affirmed.

AFFIRMED.

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TRANSPORTATION EQUIPMENT RENTALS, INC., A CORPORATION, APPELLEE, V. A. E. MAUK, DOING BUSINESS AS MAUK TRANSFER, APPELLANT.
167 N. W. 2d 183

Filed April 18, 1969. No. 37112.

1. **Fraud.** The essential elements required to sustain an action for fraud are, generally speaking, that a representation was

made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage.

2. ———. Fraud must relate to a present or preexisting fact and may not generally be predicated on an inference concerning any event in the future or acts to be done in the future unless such representations as to future acts are falsely and fraudulently made with an intent to deceive.

3. **Contracts: Evidence.** If parties to a transaction have put their engagement in writing in such terms as import a legal obligation without uncertainty of the object or extent of the engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing, and any parol agreement is merged in the written contract and testimony of prior or contemporaneous conversations is incompetent.

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

Fraser, Stryker, Marshall & Veach and Stephen G. Olson, for appellant.

Silverman & Silverman, for appellee.

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

NEWTON, J.

This is an action on a contract providing for the purchase by plaintiff of trucks owned by the defendant, the leasing of trucks to defendant, and the repurchase by defendant, on termination of the leasing contract, of the trucks which defendant had sold to the plaintiff. Among other matters, defendant pleaded fraud attendant upon the execution of the contract. On trial, a verdict was rendered for defendant and, subsequently, plaintiff's motion for a new trial was sustained. We affirm the order granting a new trial.

Plaintiff is engaged in the business of leasing trucks and trucking equipment. Defendant had operated a

trucking business for many years and in connection with this business owned and operated several trucks. The parties entered into an agreement whereby defendant sold seven of his truck-tractors to plaintiff. Plaintiff repaired or reconditioned five of the tractors and leased them back to defendant under a written leasing contract. The contract provided that on its termination, defendant lessee was to repurchase the leased equipment for a specified sum, less an annual specified allowance for depreciation, but such sum was not to be in any event less than 15 percent of the value placed on the equipment at the time the contract was entered into. Plaintiff lessor agreed to provide fuel, oil, lubricants, tires, tubes, and other operating supplies and to reimburse defendant lessee at the rate of 25.5 cents per gallon for fuel, oil, and lubricants necessarily purchased away from plaintiff's garage. Defendant terminated the contract but refused to repurchase the trucks and failed to pay certain other items claimed to be due under the contract. One defense pleaded and relied upon by defendant was that there was fraud in the inducement of the contract. He contends, in substance, that he had been assured by plaintiff's agent that the provisions of the contract relating to the repurchasing of the trucks and to the 25.5 cents per gallon reimbursement for supplies purchased away from plaintiff's garage would not be enforced.

Defendant was a man 63 years of age who, together with his family, had engaged in the trucking business since 1925. He had the contract in question examined by his attorney. He discussed with his attorney the provisions relating to the repurchase of the leased trucks on termination of the contract and to the 25.5 cents per gallon rate of reimbursement for items purchased away from plaintiff's garage. He also discussed these items with plaintiff's representative before he signed the contract. In support of his contention that he was led to believe that these provisions of the contract were to be

disregarded, he was permitted to introduce evidence of statements alleged to have been made by plaintiff's representative to this effect. Defendant does not deny and, in fact, admits he was given to understand that these provisions had to be included in the contract or it would not be accepted and executed by the plaintiff company.

Defendant is, in effect, saying that he knew and understood the terms of the contract but had reason to believe that it would not be enforced or held to be binding upon him. He was neither deceived nor in doubt about the nature, contents, and legal effect of the contract he entered into. In fact, knowing that the plaintiff company would not accept or sign the contract if the provisions he objected to were deleted, defendant was put on notice that the plaintiff company considered these provisions to be important elements of the contract and was relying upon them. Statements of plaintiff's agent to the effect that these provisions would not be enforced, if made, could not have been taken seriously or relied upon by defendant. He knew that such was not the case.

In this respect, there was no fraud. The parol agreements asserted by defendant tend to directly vary and contradict the terms of the written contract. Evidence in regard thereto was erroneously admitted, prejudicial in nature, and a new trial is required.

The essential elements required to sustain an action for fraud are, generally speaking, that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage. 37 Am. Jur. 2d, Fraud and Deceit, § 12, p. 34; Campbell v. C & C Motor Co., 146 Neb. 721, 21 N. W. 2d 427.

"Fraud must relate to a present or preexisting fact and may not generally be predicated on an inference concerning any event in the future or acts to be done

in the future unless such representations as to future acts are falsely and fraudulently made with an intent to deceive." Sterner v. Lehmanowsky, 173 Neb. 401, 113 N. W. 2d 588.

In the present instance, the misrepresentation charged to plaintiff's agent does not deal with a present or pre-existing fact, but with acts to be done in the future. Since defendant was aware that the agent's principal would not approve a contract in which the disputed provisions had been deleted, any attempt to deceive defendant in this manner would have been futile and it is apparent that there was no intent to deceive. Due to the same situation, it is also apparent that defendant could not have relied upon such representations, if made, and, consequently, the essential elements of fraud do not exist in the present instance.

As heretofore pointed out, the statements attributed to plaintiff's agent are in the nature of a contemporary oral agreement which is in direct contradiction of, and seeks to vary certain provisions contained in the written contract. This court has consistently held: "'* * * that if persons to a transaction have put their engagement in writing in such terms as import a legal obligation without uncertainty of the object or extent of the engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing, and any parol agreement is merged in the written contract and testimony of prior or contemporaneous conversations is incompetent.'" Parsons Constr. Co. v. Metropolitan Utilities Dist., 170 Neb. 709, 104 N. W. 2d 272. See, also, Preferred Pictures Corp. v. Thompson, 170 Neb. 694, 104 N. W. 2d 57.

In view of the fact that evidence of a prejudicial nature was erroneously admitted at the trial of this case before a jury, it was incumbent upon the trial court to sustain plaintiff's motion for a new trial and the trial

court's action in that regard must be affirmed.

AFFIRMED.

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IN RE ESTATE OF FRED WULF, DECEASED.
EGGERT WULF ET AL., APPELLANTS, V. ANNA MARIE IBSEN, APPELLEE.

167 N. W. 2d 181

Filed April 18, 1969. No. 37147.

1. **Parent and Child: Adoption: Descent and Distribution.** An adopted child is, in a legal sense, the child both of its natural and of its adoptive parent, and is not, because of the adoption, deprived of its right of inheritance from its natural parents, unless the statute expressly so provides.
2. ———: ———: ———. A statute which includes as a principal or dominant feature the establishing of the child as an heir of the adoptive parent, without making reference to the inheritance from natural parents, will not be construed as depriving the child of that inheritance.

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

Haney & Spire, for appellants.

Webb, Kelley, Green & Byam, for appellee.

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

NEWTON, J.

This is an appeal from an order determining heirship in an intestate estate. The question presented is whether or not an adopted child remains an heir of a natural parent who died subsequent to the adoption proceeding. The trial court adjudged that an adopted child may inherit from her natural parents notwithstanding the adoption. We affirm the judgment of the trial court.

Fred Wulf died intestate April 30, 1967, a resident of Washington County, Nebraska. He was the father of

four children. Two of his children, Freddie Wulf and Anna Marie Wulf, were the issue of his first marriage. The remaining children, Eggert Wulf and Earl Wulf, were the issue of his second marriage. As an infant, Anna Marie Wulf, during the last illness of her mother, was placed in the care of Mr. and Mrs. Carl Reeh, Mrs. Reeh being a sister of Fred Wulf. She was ultimately adopted by Mr. and Mrs. Reeh and subsequently married, her present name being Anna Marie Ibsen. Throughout his lifetime, her father, Fred Wulf, maintained close contact with his daughter. Her adoptive father, Carl Reeh, died testate and she shared in his estate. Subsequently the adoptive mother, Mrs. Carl Reeh, died intestate and Anna Marie Ibsen inherited the remaining estate of her parents by adoption.

Adoption was unknown to the common law, is a creature of statute, and rights accruing or sacrificed by reason of adoption are to be determined by reference to the statutes of the state having jurisdiction. There are certain general rules on the subject which are almost uniformly recognized. "Consanguinity is fundamental in statutes of descent and distribution, and the right of a child to inherit from his natural parents or to share in the intestate personalty of their estates is affected by the legal adoption of the child by another only to the extent that such rights are taken away or limited by the terms of the applicable statutes of adoption and descent and distribution, or by necessary implication therefrom. To state the rule another way, an adopted child is, in a legal sense, the child both of its natural and of its adopting parents, and is not, because of the adoption, deprived of its right of inheritance from its natural parents, unless the statute expressly so provides." 2 Am. Jur. 2d, Adoption, § 103, p. 944. See, also, Annotation, 37 A. L. R. 2d 333.

The statutes of the various states pertaining to adoption and the position in which the parties are left subsequent to adoption vary greatly. In some, the right of

the adopted child to inherit from its natural parents is specifically preserved. In others, this right is specifically barred. In many others, the statutes do not pass upon the subject by specific language and such statutes remain subject to interpretation. This appears to be true with reference to the Uniform Adoption Code which has been adopted by the State of Oklahoma. In Stark v. Watson (Okl.), 359 P. 2d 191, it was held that the Uniform Adoption Code did not reveal a legislative intent to destroy the rights of an adopted child to inherit from its natural parents. Ordinarily, "A statute which includes as a principal or dominant feature the establishing of the child as an heir of the adopting parent, without making reference to the inheritance from natural parents, is not likely to be construed as depriving the child of that inheritance." Annotation, 37 A. L. R. 2d 340.

The statutes of Nebraska do not specifically refer to this question of inheritance by an adopted child from its natural parents. Nevertheless, it would appear that the legislative intent is reasonably clear. The Nebraska statutes provide: "After a decree of adoption is entered, the usual relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between such adopted child and the person or persons adopting such child and his, her or their kindred." § 43-110, R. R. S. 1943. "Except as provided in section 43-106.01, after a decree of adoption has been entered, the natural parents of the adopted child shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such adopted child or to his or her property by descent and distribution." § 43-111, R. R. S. 1943. "When a child shall have been relinquished by written instrument, as provided by sections 43-104 and 43-106, to the Department of Public Welfare or to a licensed child placement agency and the agency has, in writing, accepted full responsibility for the child, the person so relinquishing shall be

relieved of all parental duties toward and all responsibilities for such child and have no rights over such child. *Nothing contained in this section shall impair the right of such child to inherit.*" (Emphasis supplied.) § 43-106.01, R. R. S. 1943.

It will be noted that although all rights of the natural parent over his or her adopted child, including the right to inherit from such child, are clearly barred by the statute, the statute does not likewise bar the right of the adopted child to inherit from its natural parents. Since the Legislature here dealt in part with the inheritable rights of the parties concerned and specifically outlined them in part, the failure to restrict the right of the child to inherit from its natural parents cannot be deemed an oversight but rather an act evidencing the legislative intent to preserve this right in the child. This legislative intent is even more clearly evidenced by the language contained in section 43-106.01, R. R. S. 1943, which provides in substance that a child who has been relinquished for adoption to the Department of Public Welfare or to a licensed child placement agency shall not thereby have its right to inherit impaired. To assume that this preservation of the right of the adopted child to inherit from its natural parents was to be limited only to those cases involving relinquishments of the type referred to in the statute would be to strain the credulity of any reasonable person.

It may be of interest to consider the construction placed upon the Utah statute on adoption which is to all intents and purposes identical with section 43-111, R. R. S. 1943. The court stated in In re Benner's Estate, 109 Utah 172, 166 P. 2d 257: "The statute does not in express terms say that an adopted child may not inherit from its natural parents, nor do we think that it is a necessary implication from the fact that the legislature has said that natural parents lose all rights over its child when it is adopted, nor from the fact that the child becomes the legal child of its adopting parent and sustains

all the rights and is subject to all of the duties of that relationship. The more reasonable import of these statutes is that they were enacted for the benefit of the adopted child and to define the relationship between it and its adopting and natural parents insofar as the custody and control of the child is concerned. We cannot say it is a necessary implication from the language used by the legislature that it intended the adopted child to lose certain rights which it otherwise would have. By being born to its natural parents its status was established under our succession statutes and it became entitled to inherit from them." Other somewhat similar statutes have been likewise construed. See, In re Roderick's Estate, 158 Wash. 377, 291 P. 325; In re Ballantine's Estate (N. D.), 81 N. W. 2d 259.

This is a case of first impression in Nebraska. We are convinced that it was the legislative intent to permit an adoptive child to inherit from its natural parents and that the judgment of the district court is correct. The judgment of the district court is affirmed.

AFFIRMED.

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NELLE SADLER, APPELLEE, V. PERRY J. SADLER ET AL., APPELLANTS.

167 N. W. 2d 187

Filed April 18, 1969. No. 37173.

1. **Husband and Wife: Descent and Distribution: Wills.** If a married man by his will disposes of all his property, real and personal, to others, and gives nothing to his wife, she will be entitled to take the distributive share given her by section 30-101, R. R. S. 1943, as though he had died intestate.
2. ———: ———: ———. Section 30-107, R. R. S. 1943, undertakes to give the widow the right of election, but gives her such right only in case provision is made for her in the will. The right of election is applicable only when the widow prefers the property given her by law to that given her by the will.
3. ———: ———: ———. Under section 30-101, R. R. S. 1943,

a wife has an interest in the real estate of her husband which he cannot alienate without her consent.

4. **Statutes: Courts.** Where there is no obscurity or ambiguity in a statute and the Legislature has spoken in plain and ordinary language, it is not for this court to interpret that which needs no interpretation. Under such circumstances, it is the court's duty to declare what has been plainly written into the law.

5. **Wills: Mistake.** A testator is bound to employ apt words to express his meaning, and if, knowing the words intended to be used, he approves them and executes his will, he thereby knows and approves the contents of his will even though such approval be due to a mistaken belief of his own, or the honest advice of others, as to their true meaning and legal effect.

6. ———: ———. It is more important that the probate of wills of dead persons be effectively shielded from the attacks of a multitude of fictitious mistakes than that it be purged of wills containing a few real ones. The testator can avoid the latter by due care in his lifetime while against the former he would be helpless.

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

Stevens & Berry and Francine Berry, for appellants.

Daniel E. Owens, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, SMITH, McCOWN, and NEWTON, JJ., and RONIN, District Judge.

CARTER, J.

This is a partition suit in which the plaintiff seeks to partition 80 acres of land and a residence property in Hitchcock County, Nebraska, all of which is accurately described in the petition. The trial court granted partition and the defendants have appealed.

The record discloses that Perry W. Sadler died testate on April 10, 1967, leaving a widow, the plaintiff; a son, Perry J. Sadler; a daughter, Luella McDonald; and a grandson, the son of a deceased daughter. By the terms of his will, the deceased devised the 80 acres of land to Perry J. Sadler and the residence property to Luella McDonald. The will made no provision for his widow,

Nelle Sadler, but it did provide as follows as to her: "I am now married to Nellie Sadler and I understand that she is entitled to a part of my estate and within the past few weeks I have transferred to her my bank account in the approximate amount of $2500.00, and also government bonds in the amount of $3500.00, and Hamilton Funds in the amount of $1000.00, and United Funds in the amount of $1000.00, and I consider and maintain that said transfers amount to one-fourth (¼) of my estate and I therefore give and bequeath no further property to her." Nelle Sadler is not the mother of the children of deceased and is entitled to one-fourth of his estate of which he died seized as provided by section 30-101, R. R. S. 1943. It is admitted that the property given the wife prior to the death of her husband as described in the will amounted to one-fourth of his total estate at the time of its transfer.

The will was executed on March 20, 1967, and was admitted to probate following the death of Perry W. Sadler. On July 14, 1967, the widow filed an election to take under the statute which did not meet the requirements of section 30-107, R. R. S. 1943. It is contended by the widow, however, that an election to take under the will was not required for the reason that no provision was made for the widow in the will. The applicable statute, section 30-107, R. R. S. 1943, undertakes to give the widow the right of election only in case provision is made for her in the will. This has been the construction placed upon this statute for many years. In Gaster v. Estate of Gaster, 92 Neb. 6, 137 N. W. 900, this interpretation was placed on the statute in the following language: "Section 7 of the act undertakes to give the widow the right of election, but gives her such right only in case provision is made for her in the will; so that, if these provisions are taken literally, she has the right of election if she is remembered in the will; but, if nothing is given her in the will, she has no right of election nor any other right in the property of the hus-

band other than the homestead." If this were not so, the affirmative action of the widow not mentioned in the will would be required in order for her to become a beneficiary under section 30-101, R. R. S. 1943. This is not the intention of the statute, and the right of election is applicable only when the widow prefers the property given her by law to that given to her by the will.

The record shows that Perry W. Sadler executed his last will on March 20, 1967, and died on April 10, 1967. According to the will, Sadler transferred cash and bonds to his wife within a few weeks prior to the making of his will. It is stipulated that the cash and bonds were equivalent to one-fourth of Sadler's estate at the time of the transfer. The recitation in the will shows that Sadler knew that his wife was entitled to a one-fourth interest in his estate which he could not effectively dispose of by will. The quoted provision in the will shows that Sadler transferred the cash and bonds to his wife in lieu of the widow's interest under the law at the time of his death. The inference is clear that the widow has retained the cash and bonds, and, in addition thereto, is demanding a one-fourth interest in Sadler's estate which accrues upon the death of the husband. The question arises whether a widow may claim her interest under section 30-101, R. R. S. 1943, who has received a gift from the husband shortly before the will was made by a nontestamentary act of the husband with the intention of transferring her statutory interest in his estate to her before his death.

The statement of intention contained in the will that the testator intended to transfer the cash and bonds to his wife inter vivos in satisfaction of her interest in his estate as provided by section 30-101, R. R. S. 1943, in order that he could devise the 80 acres to his son and the residence to his daughter, is ineffective for any purpose. While he understood that his widow could not be divested of a one-fourth interest in his estate, he was

mistaken in assuming that the transfer of cash and bonds in his lifetime accomplished that purpose. When he transferred the cash and bonds to his wife, they were no longer a part of his estate and are conclusively presumed to be a gift inter vivos under the record before us. But such gifts from a husband to his wife do not affect a widow's interest by law in the husband's estate, although it was the result of a mistake of law. "The testator is bound to find and employ apt words to express his meaning; and if, knowing the words intended to be used, he approves them and executes his will, then he knows and approves the contents of his will, even though such approval may be due to a mistaken belief of his own, or to honestly mistaken advice from others, as to their true meaning and legal effect." Thompson on Wills (3d Ed.), § 136, p. 215. "* * * it is against sound public policy to permit a pure mistake to defeat the duly solemnized and completely competent testamentary act. It is more important that the probate of the wills of dead people be effectively shielded from the attacks of a multitude of fictitious mistakes than that it be purged of wills containing a few real ones. The latter a testator may, by due care, avoid in his lifetime. Against the former he would be helpless." In re Gluckman's Will, 87 N. J. Eq. 638, 101 A. 295.

It is provided by section 30-101, R. R. S. 1943, that when a husband shall die, leaving a wife surviving, all the real estate of which he was seized of which he possessed, either legal or equitable, shall descend subject to debts, one-fourth part to the wife if she is not the parent of all the children of the deceased and there be one or more children or the issue of one or more deceased children surviving. In McCormick v. Brown, 97 Neb. 545, 150 N. W. 827, it was held that a wife under this provision has an interest in the real estate of her husband which he cannot alienate without her consent. In the instant case, there is no evidence of consent by the wife even if it would be competent and material. The

contention that the transfer of cash and bonds in the lifetime of the testator had the effect of a compliance with the statute is untenable. The defendants cite no authority to sustain their position, nor have we been able to find such authority. The transfer of cash and bonds cannot be treated as an advancement, an ademption, an estoppel, a satisfaction, or a post-nuptial agreement which is void in this state. The meaning of the statute is clear, On this latter point, we said in Arent v. Arent, 104 Neb. 562, 178 N. W. 205: "If the meaning of the statute were obscure or its language ambiguous, it would be the duty of the court to ascertain and declare its meaning in a proper case, but where there is no obscurity or ambiguity, and the legislature has spoken in plain and ordinary language, it is not for the court to interpret language that needs no interpretation, but it is its duty to declare what has been plainly written as the law."

Irrespective of the inter vivos gift made by testator to his wife in his lifetime, and for whatever purpose, including that included in the recitation in his will, the widow is entitled to a one-fourth interest in his estate of which he died seized. The trial court was therefore correct in sustaining the right of the widow to partition the lands described in her petition.

AFFIRMED.

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SWANSON PETROLEUM CORPORATION, A NEBRASKA CORPORATION, APPELLANT, V. GEORGE CUMBERLAND, APPELLEE.

167 N. W. 2d 391

Filed April 25, 1969. No. 37034.

1. **Bankruptcy: Fraud.** A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as are liabilities for obtaining money or property by false pretenses or false representations.

2. **Bankruptcy: Debts and Debtors.** The Bankruptcy Act is very liberal towards the bankrupt as to his discharge and the act insofar as it relates to his discharge is to be given a strict construction in favor of the bankrupt. The purpose of the act is to release honest debtors from the burden of their debts.
3. **Bankruptcy: Banks and Banking: Fraud.** A check drawn upon a bank in which the account of the maker has been overdrawn does not constitute a materially false statement in writing which will bar discharge in bankruptcy of the maker.
4. **Bankruptcy: Fraud.** The frauds included in the portion of the Bankruptcy Act are those which involve moral turpitude or intentional wrong; fraud implied in law, which may exist without imputation of bad faith, or immorality is insufficient.
5. **Fraud.** Debts in creation of which there was actual, overt, false pretense or representation are the only kind of fraud which will prevent a discharge.
6. **Bankruptcy: Fraud.** The burden of proof is on the plaintiff to prove that the property was obtained by false pretenses or false representations to prevent the bankrupt from being discharged.
7. **Fraud: Damages: Evidence.** In order to maintain an action for damages for false representation, the plaintiff, in substance, must allege and prove by a preponderance of the evidence the following elements: (1) What representation was made; (2) that it was false; (3) that the defendant knew it was false, or else made it without knowledge as a positive statement of known fact; (4) that the plaintiff believed the representation to be true; (5) that the plaintiff relied and acted upon the representation; (6) that the plaintiff was thereby injured; and (7) the amount of damages.
8. **Fraud: Actions.** The general rule is that where ordinary prudence would have prevented the deception, an action for the fraud perpetrated by such deception will not lie.
9. **Notice.** Where one is put upon inquiry, he is charged with notice of all such facts as he would have learned by reasonable inquiry.
10. **Fraud: Bankruptcy.** Actual or intentional fraud in obtaining property is necessary to save the liability from the operation of the discharge; fraud implied in law is insufficient.
11. ———: ———. The character of the fraud necessary to save a claim from the operation of the discharge is an actual or positive fraud knowingly and intentionally committed.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Dan J. Whiteside, for appellant.

John P. Kelly and Atkinson & Kelly, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and WILLIAM C. SMITH, JR., District Judge.

SMITH, WILLIAM C. JR., District Judge.

This is an action by Swanson Petroleum Corporation, plaintiff and appellant herein, against George Cumberland, defendant and appellee herein, commenced in the district court for Douglas County, Nebraska, consisting of five causes of action in which plaintiff sought to recover $3,848.54, plus interest and costs, for the value of goods and merchandise obtained by the defendant and paid for by certain insufficient fund checks, and alleged to have obtained the goods by false pretenses. A demurrer to plaintiff's petition was sustained and plaintiff filed an amended petition, in which plaintiff sought damages in the amount of $3,848.54, plus interest and costs, for the value of the goods obtained by the defendant and paid for by insufficient fund checks, allegedly obtained by false pretenses.

Defendant answered and alleged he filed a voluntary petition in bankruptcy wherein plaintiff was listed as a creditor and that plaintiff had received a dividend on its claim filed therein, and defendant's legal liability thereon was discharged by operation of law. Defendant further alleged that plaintiff was aware of defendant's financial condition and had no right to rely on a representation, if any, made by the defendant and plaintiff could not believe it to be true because of plaintiff's knowledge of defendant's financial condition. The answer further stated that defendant was charged three-quarters of a cent per gallon of gas which was applied to defendant's indebtedness, which plaintiff increased by the amount of the insufficient fund checks from defendant to plaintiff, and that plaintiff waived any right of

action against the defendant by increasing the open account.

A reply was filed by plaintiff, which admitted the defendant's discharge in bankruptcy, admitted receiving payment on the debt both before and after September 1, 1954, alleged it believed the alleged false representations to be true, and denied all other allegations of the defendant.

The trial court entered judgment that plaintiff had not sustained its burden of proving that the property was obtained by false pretenses, and consequently, the indebtedness did not come within Title 11, U. S. C. A., § 35, p. 271. Motion for new trial was overruled by the order of the trial court. From this judgment an appeal has been taken.

The errors assigned as grounds for reversal are that the court erred in finding that plaintiff did not sustain its burden of proving that the property was obtained by false pretenses, and in its consequent finding that the indebtedness did not come within Title 11, U. S. C. A., § 35, p. 271.

Before proceeding with a consideration of the assignments of error the evidence adduced herein will be reviewed.

The evidence discloses that plaintiff, as a corporation, was a wholesale distributor of Phillips 66 products and the defendant was a dealer of plaintiff, located at 3526 Q Street, Omaha, Nebraska, from December 10, 1962, until September 1965, and did business under the name of "George's 66 Service."

Defendant gave five checks to plaintiff between September 1, 1964, and through June 23, 1965, in a total amount of $3,848.54. The evidence of the president of plaintiff corporation was that it had received insufficient fund checks prior to September 1, 1964, from the defendant that were eventually paid. The check identified as exhibit 1, dated September 1, 1964, in the sum of $1,125.70, and the check identified as exhibit 2 dated

September 17, 1964, in the sum of $1,031.43, were returned insufficient funds and these were added to the ledger account kept by the plaintiff. The evidence also showed that the defendant already had an unpaid account with plaintiff of some $3,000. The evidence discloses that an agreement was then made by plaintiff and defendant to place a surcharge of three-quarters of a cent per gallon on each gallon purchased thereafter, to apply against total indebtedness of defendant to the plaintiff, along with other surcharges not material in this case. This was also testified to by the defendant and defendant's wife and was conceded by the plaintiff. Further evidence discloses that plaintiff contacted defendant's wife about the difficulty and some negotiations took place about turning over titles of a truck and automobile to plaintiff as security, but this never was done as the parties all agreed in their testimony. Plaintiff informed defendant according to testimony of its president that the defendant was on a cash basis from now on and also stated that he had so informed defendant prior to September 1, 1964, because of earlier insufficient fund checks.

Defendant continued to do business with plaintiff and on June 18, 1965, a check of $714.16, on June 23, 1965, a check of $578.48, and on June 23, 1965, a check of $398.77 were given to the plaintiff for invoices. The president of plaintiff also testified the merchandise would have not been delivered if he or its employees had known the checks given the plaintiff were not good. The testimony disclosed that each check was added to the ledger of the plaintiff. Plaintiff continued to sell to defendant until sometime in September 1965, for cash only.

The record shows that defendant filed a voluntary petition in bankruptcy on September 15, 1965, and obtained a discharge from bankruptcy on November 30, 1965. The plaintiff filed a claim in the bankruptcy proceedings for $6,809.62, on which the plaintiff received a dividend of $552.14, from the referee in bankruptcy.

Whether or not the assignments of error, or any of them, afford a basis for a reversal of the judgment depends on the record as it has been summarized and the applicable legal principles.

Title 11, U. S. C. A., § 35, p. 271, provides as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as * * * (2) are liabilities for obtaining money or property by false pretenses or false representations * * *."

The question here whether the giving of an insufficient fund check is obtaining money or property by false pretenses or false representations is sufficient to bar the discharge of the debt of the bankrupt. There seems to be no Nebraska case on this particular point.

However, in Blue Bonnet Creamery, Inc. v. Gulf Milk Assn., Inc. (La. App.), 172 So. 2d 133, the court said: "It must be conceded an obligation arising from property obtained by the issuance of worthless checks is dischargeable in bankruptcy unless the debtor was guilty of misrepresentation with intent to defraud in connection with the issuance of such checks. This is inevitably so because alleged non-dischargeability of such an obligation is predicated on 11 U. S. C. A., § 35 which requires proof of fraud to bar discharge." The above case has application in this case as will be pointed out subsequently in this opinion.

In this case the plaintiff seeks to recover damages on insufficient fund checks given for merchandise. Does the mere giving of such checks bar defendant's discharge in bankruptcy of the debt created? We think not.

In Robinson v. J. R. Williston & Co., 266 F. 970, the court stated: " 'The Bankruptcy Act is very liberal towards the bankrupt as to his discharge, and the act in so far as it relates to his discharge is to be given a strict construction in favor of the bankrupt. The purpose of the act is to release honest debtors from the burden of their debts.' " The court further stated: "It is true that

a check purports to be drawn upon a bank where the maker has funds or credit, and from his act in giving the check this may be inferred. If the bankrupt had made an oral statement at the time the check was given, that it was good, or would be paid when presented, or that his account was overdrawn, but that he had made arrangements with the bank on which it was drawn by which it would be paid, none of these oral statements would have been a bar to his discharge."

The syllabus in the above-cited case states: "The giving of a check drawn on a bank in which the account of the bankrupt has been overdrawn does not constitute a 'materially false statement in writing' within Bankruptcy Act * * * relating to denial of discharge."

So we must look further than the checks to determine if the defendant is barred from discharge in bankruptcy in this case, as there was no statement in writing other than the checks in question.

In 1 Collier on Bankruptcy (14th Ed.), § 17.16, p. 1634, it is stated: "The frauds included in the portion of clause (2) under discussion are those which involve moral turpitude or intentional wrong; fraud implied in law, which may exist without imputation of bad faith or immorality is insufficient. It must further affirmatively appear that such representations were knowingly and fraudulently made, and that they were relied upon by the other party." As stated in footnote 23, page 1638: "The court said that § 17 a (2) excepts from discharge only those debts in creation of which there was actual, overt, false prestense or representation, and the only kind of fraud which will prevent a discharge under this section is that committed by fraudulent misrepresentations of fact or by such conduct or artifice having a fraudulent purpose as will throw one off his guard and cause him to omit inquiry or examination which he would otherwise make. Thus, of course, actual misrepresentations of solvency in order to induce the sale of goods would render the claim for payment non-dis-

chargeable." 1 Collier on Bankruptcy (14th Ed.), § 17.16, p. 1628, follows Title 11, U. S. C. A., § 35, p. 271.

The burden of proof is on the plaintiff to prove that the property was obtained by false pretenses or false representations to prevent the bankrupt from being discharged of the debt in question. As pointed out hereinabove in Blue Bonnet Creamery, Inc. v. Gulf Milk Assn., Inc., *supra;* and 1 Collier on Bankruptcy (14th Ed.), § 17.16, p. 1634, and footnote 23, p. 1638, that fraud must be proved.

To prove fraud in Nebraska, we cite the rule laid down in Allied Building Credits, Inc. v. Damicus, 167 Neb. 390, 93 N. W. 2d 210, quoting Peterson v. Schaberg, 116 Neb. 346, 217 N. W. 586, where it was said: " 'To maintain an action for damages for false representation, the plaintiff, in substance, must allege and prove by a preponderance of the evidence the following elements: (1) What representation was made; (2) that it was false; (3) that the defendant knew it was false, or else made it without knowledge as a positive statement of known fact; (4) that the plaintiff believed the representation to be true; (5) that the plaintiff relied and acted upon the representation; (6) that the plaintiff was thereby injured; and (7) the amount of the damages.' " In the case before us the plaintiff must prove the above elements.

Before discussing these elements the court wishes to cite Dyck v. Snygg, 138 Neb. 121, 292 N. W. 119, in which the court held: " 'The general rule is that, where ordinary prudence would have prevented the deception, an action for the fraud perpetrated by such deception will not lie.' "

In Nathan v. McKernan, 170 Neb. 1, 101 N. W. 2d 756, the court stated: "Where one is put upon inquiry, he is charged with notice of all such facts as he would have learned by reasonable inquiry."

In this case the evidence showed that the plaintiff had been doing business with the defendant over a long

period of time and had received insufficient fund checks before, although they were later paid, and the plaintiff knowing this, and further knowing the financial difficulties of the defendant, it seems very improbable that plaintiff could or would place any reliance upon the checks in question as is required in an action for damages by false representation. Further there was no evidence that plaintiff believed or relied on any representations of the defendant or believed them to be true. The necessary elements have not been proven as required in Nebraska to prove fraud. Allied Building Credits, Inc. v. Damicus, *supra*. Certainly, the plaintiff in this case failed to exercise ordinary prudence based upon the facts as disclosed by the evidence herein as is required. Dyck v. Snygg, *supra*. Such facts as above stated being known by the plaintiff would put the plaintiff, or should have put plaintiff, on inquiry. Nathan v. McKernan, *supra*.

"Actual or intentional fraud in obtaining property is necessary to save the liability from the operation of the discharge; fraud implied in law is insufficient." 8B C. J. S., Bankruptcy, § 573 c, p. 55. This is quoted with approval in Horner v. Nerlinger, 304 Mich. 225, 7 N. W. 2d 281, in which the court goes on to say: " 'Not all frauds come within this exception to the operation of the discharge. * * * The character of the fraud necessary to save a claim from the operation of the discharge is an actual or positive fraud knowingly and intentionally committed; fraud implied in law or mere actionable or implied fraud which purported judgment with civil action without moral turpitude or intentional wrong is not sufficient to defeat such discharge.' "

To defeat the discharge of the bankrupt a showing of moral turpitude or intentional wrong must be also shown. The evidence in this case does not show the defendant guilty of either.

In the opinion of this court the plaintiff has not sustained its burden of proving that the property was ob-

tained by false pretenses as required in this state, and therefore the indebtedness does not come within Title 11, U. S. C. A., § 35, p. 271.

In accordance with this opinion, the judgment of the trial court dismissing plaintiff's action is affirmed. Costs are taxed to plaintiff.

AFFIRMED.

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IN RE FREEHOLDERS PETITION OF JOSEPH PISCHEL ET AL. JOSEPH PISCHEL ET AL., APPELLEES, V. MARVIN W. KREYCIK ET AL., APPELLANTS.
167 N. W. 2d 388

Filed April 25, 1969. No. 37093.

**Schools and School Districts.** The provision of section 79-403, R. R. S. 1943: "or that they have personally paid tuition for one or more of their children to attend school in the other district over a period of two or more consecutive years," is an independent alternative ground, under section (1)(d), for transferring land from one school district to another.

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

McFadden & Kirby, for appellants.

Moyer & Moyer, for appellees.

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

MCCOWN, J.

This is a proceeding for the transfer of land from one school district to another. The trial court found that the transfer was in accordance with section 79-403 (1), R. R. S. 1943. The objectors have appealed.

Joseph Pischel and Carol Pischel filed a freeholder's petition to transfer lands owned by them and described in the petition from School District No. 83R of Verdigre to School District No. 1R of Niobrara, both in Knox

County, Nebraska. After notice and hearing, the statutory board denied the petition. An appeal was taken to the district court for Knox County which, after trial, entered its decree detaching petitioners' lands from the Verdigre school district and attaching them to the Niobrara district.

The record shows that the Pischels are the owners of the land described. There are three children of school age residing on a portion of the land with their parents. At the time of trial in January 1968, one child was in the fifth grade, one in the fourth grade, and one in the second grade. The Pischel lands are located in the school district of Verdigre which adjoins the school district of Niobrara. The Pischel land also adjoins the Niobrara district. The distance from the petitioners' home to the schoolhouse in Verdigre, measured by the shortest distance on section lines or traveled roads open to the public is 22 miles. The distance from petitioners' home to the schoolhouse in Niobrara, measured by the shortest distance on section lines or traveled roads open to the public, is 15 miles. By petitioners' customary and most practicable route, the distance from their home to the schoolhouse in Niobrara is 18.4 miles, which is over hard-surfaced roads.

Each school district maintains kindergarten through the eighth grade and a fully accredited high school in the respective towns of Verdigre and Niobrara. The Verdigre school district also maintains a one-room, one-teacher school for kindergarten through the sixth grade, which is 5 miles from the home of the petitioners. Both school districts are Class III, fully accredited districts. Bus routes of both districts pass the home of the petitioners. It is apparent that the bus route of the Verdigre district is arranged primarily for bus service to the school in Verdigre. If petitioners' children rode the Verdigre bus to the one-room K-6 schoolhouse, they would arrive at school at 7:30 a.m., 1 hour before classes start, and the bus would not arrive to return petitioners'

children to their home until some 2 hours after school is dismissed.

This case turns on the application of section 79-403, R. R. S. 1943. The applicable portion of that section provides: "* * * The petition shall state the reasons for the proposed change and show: (a) That the land therein described is either owned by the petitioner or petitioners or that he or they hold a school land lease under section 72-232, are in possession or constructive possession as vendee under a contract of sale of the fee simple interest, or have made an entry on government land but have not yet received a patent therefor; (b) that the land is located in a district that adjoins the district to which it is to be attached; (c) that the territory proposed to be attached has children of school age residing thereon with the parents or guardians; and (d) *either* that they are each more than two miles from the schoolhouse in their own district, and at least one half mile nearer to the schoolhouse or a school bus route of the adjoining district, which distance shall be measured by the shortest route possible upon section lines or traveled roads open to the public or that the route to the schoolhouse in the adjoining district is more practicable and, for at least half its distance, over hard-surfaced roads *and* the distance to the schoolhouse in the adjoining district *does* not exceed the distance to the schoolhouse in their own district by more than six miles or that they have personally paid tuition for one or more of their children to attend school in the other district over a period of two or more consecutive years, *or* that * * *." (Emphasis ours.)

Section 79-403, R. R. S. 1943, was extensively amended in 1963. Subsection (1)(d) was amended again in 1965. The 1965 amendments added the word "either" as the first word of subsection (d); deleted a semicolon and the words "Provided, that," and substituted the word "and" immediately following the words "hard-surfaced roads"; and changed the word "shall" to "does." The word "or"

was added following the words "consecutive years." The changes between the 1963 and 1965 statute to which we refer are reflected by italics in the 1965 statute quoted above.

We construed the 1963 proviso involving the 6-mile distance or the payment of tuition in Johnson v. School Dist. of Wakefield, 181 Neb. 372, 148 N. W. 2d 592. We there held that payment of tuition did not provide an independent and sole ground for tranferring land from one school district to another under the 1963 statute.

The basic difficulty in construing subsection (1)(d) of the 1965 statute is in determining whether the various requirements of that subsection were intended to be cumulative or alternative. Legislative history indicates that the 1965 amendments of section 79-403 (1)(d), R. R. S. 1943, were intended to clarify the Legislature's intention, and make the requirements of that subsection alternative rather than cumulative. Obviously, the effort at clarification was not wholly successful. In the absence of appropriate punctuation or numbering, it is difficult to interpret a sentence of seventeen printed lines, to say the least.

Under the interpretation which we apply, we hold that the provision of section 79-403, R. R. S. 1943: "or that they have personally paid tuition for one or more of their children to attend school in the other district over a period of two or more consecutive years," is an independent alternative ground, under section (1)(d), for transferring land from one school district to another.

The petitioners had paid a total of $240 tuition for the school years 1966-67, and 1967-68, to the Niobrara school district. The first payment was June 15, 1966, and the last payment January 11, 1968. No other amounts had been charged or paid. The appellants contend that the tuition paid did not equal the per pupil cost in the Niobrara district, and that this evidence does not establish payment of tuition for 2 years. Section 79-445, R. R. S. 1943, provides in part: "The school board or board of

education may also admit nonresident pupils to the district school, may determine the rate of tuition of the pupils, and shall collect such tuition in advance." We think the evidence here established that the petitioners have personally paid tuition to the Niobrara district over a period of 2 or more consecutive years, whether "years" be interpreted to mean school years or calendar years.

The appellants also contend that only the 2½ acres of land designated as tract No. 1, on which the residence and buildings are located, is entitled to transfer in any event. This tract is a part of approximately 180 acres owned by petitioners in Section 25, although the small 2½-acre tract was purchased separately. Petitioners also own 92.44 acres of land in the adjoining Section 30, which was included in the petition and the decree. This land is separated from the land in Section 25 by less than half a mile.

The statutes do not require that the land or territory being transferred must be contiguous nor adjoining. Neither do they require that the land or territory be limited to a single parcel. Subsection (1)(c) of section 79-403, R. R. S. 1943, specifically requires that "the territory proposed to be attached has children of school age residing thereon * * *." As we said in McDonald v. Rentfrow, 176 Neb. 796, 127 N. W. 2d 480: "The Legislature has here seen fit to allow an owner to have his entire unit of property, in adjoining districts, taxed in the district where his children are to be educated."

There is no evidence or contention that the 92-acre tract in Section 30 is not a part of the petitioners' farm unit. The contention that land to be transferred must be limited to the smallest legally describable area on which the children actually reside would result in a completely chaotic application of the statute.

In view of these conclusions, it is not necessary to decide which schoolhouse is "the" schoolhouse where there are two or more schoolhouses in a single school district.

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

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. OLIVER R. DUBANY, APPELLANT.

167 N. W. 2d 556

Filed April 25, 1969. No. 37095.

1. **Automobiles: Words and Phrases: Intoxicating Liquor.** The word "operate" as used in section 39-727, R. R. S. 1943, relates to the actual physical handling of the controls of a motor vehicle by a person while under the influence of intoxicating liquor.
2. **Indictments and Informations: Witnesses.** The requirement that the names of witnesses for the State must be endorsed upon the information has no application to rebuttal witnesses.
3. **Criminal Law: Constitutional Law.** In on-the-scene investigations the law enforcement officers may interview any person not in custody and not subject to coercion, for the purpose of determining whether a crime has been committed and who committed it; and such interview would not be a violation of one's constitutional rights.

Appeal from the district court for Cherry County: ROBERT R. MORAN, Judge. Affirmed.

William S. Padley, for appellant.

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

Heard before WHITE, C. J., CARTER, SPENCER, SMITH, McCOWN, and NEWTON, JJ., and KOKJER, District Judge.

KOKJER, District Judge.

The amended information filed in this case charged that on July 8, 1967, in Cherry County, Nebraska, the defendant Oliver R. Dubany unlawfully operated or was in actual physical control of a motor vehicle while he was under the influence of alcoholic liquor.

At the trial, officer C. L. Zurcher testified that at approximately 4:15 p.m., on July 8, 1967, on U. S. Highway No. 20 about 10 1/10 miles west of Wood Lake, in Cherry County, Nebraska, he saw a pickup truck in the ditch on the lefthand side of the road; that one man was in the pickup under the wheel; that the gears were in operation, the wheels were turning, and the sand was flying; that the pickup was jumping up and down, backwards, and forward, but was not actually going anywhere; and that the pickup appeared to be stuck in the sand. Officer Zurcher asked the man for his driver's license and, upon receiving it, checked it over. He then asked the man if he had been drinking, and the man said, "Yes." The officer identified the man as the defendant Oliver R. Dubany. He asked the defendant to shut off the switch and get out of the car, which he did. The officer then asked defendant to go with him to the patrol car. He observed defendant walking and helped him as he was having trouble walking or staggering. Defendant appeared not to be feeling well. His eyes were bloodshot, his speech was slurred, and he had a very strong odor of alcohol on his breath. After defendant was in the patrol car he had trouble staying awake and, in fact, he fell asleep before officer Russell Luth, who had been called by radio, came in his patrol car to take him to Valentine. Officer Zurcher further testified that in his opinion defendant was under the influence of alcoholic liquor.

Officer Luth observed defendant as they put him in his patrol car, as he took him to Valentine, where a sample of defendant's blood was taken, and when he was placed in jail. In his opinion defendant was intoxicated. The blood sample was tested as provided by statute and contained .27 percent of alcohol by weight.

After the State completed its case-in-chief the defense adduced testimony of defendant and an employee, Lloyd DeCent, to the effect that defendant had not been drinking any alcoholic liquor up to the time he left Wood

Lake earlier in the afternoon of July 8, 1967. Defendant testified he left Wood Lake in the pickup while the employee DeCent and another regular employee, Ed Murray, and two local boys who had been hired to help, were loading a larger truck with store fixtures which defendant had purchased. Defendant stated that as he proceeded west on U. S. Highway No. 20 he came to a curve and there met a pickup coming from the west which was pretty well across the white line on the paving; and that defendant tried to give him some room and got the front wheel of his pickup off into the sand and went down into the "bar pit" where he became stuck. He was unable to get his pickup out. It was hot and he had nothing to drink, so he got to nibbling on a quart bottle of whiskey which contained a half pint or "maybe a little less," that he had in his pickup. He then threw the empty bottle away. He said that after he drank the liquor he did not operate the pickup because there was no way he could get loose.

Witness DeCent testified that after they finished loading and paid the two boys he drove the larger truck west on U. S. Highway No. 20 and came to the place where defendant was stuck. He and the other employee, Ed Murray, tried to get defendant's pickup out but it was impossible. When they arrived defendant had been drinking. He said it was "an awfully terrible hot day that afternoon." DeCent asked defendant if he had been drinking; and defendant replied that he got thirsty, that he had found a bottle of whiskey in the car, and that he took a drink out of it to try to quench his thirst. The state trooper arrived about 8 or 10 minutes after DeCent and Murray. The trooper at that time found defendant behind the wheel, gears of the pickup in operation, the wheels turning, the sand flying, and the pickup jumping up and down, backwards and forward, but not actually going anywhere.

Richard E. Sokol, who runs a service garage, was called to the scene by the patrolman. He testified that

he had to use a winch to get the pickup out of the sand.

After the defense rested the State called Garret Luth to the stand for rebuttal testimony. Defendant objected on the ground that his name had not been endorsed on the information as a witness. The objection having been overruled, Luth testified that at about 10 or 10:30 the morning of July 8, 1967, he and another boy had been asked by Mr. Dubany to help load shelves and furniture from a store in Wood Lake. He saw defendant and another man two times in the morning drinking whiskey and milk. At noon he went to lunch with defendant and the others. He said that defendant did not eat too much and, as they were leaving the cafe, defendant bought a fifth of whiskey. In the afternoon he again saw defendant drinking whiskey and milk. Just before he left, the defendant was staggering, had a hesitant voice, and smelled of whiskey; and, in the opinion of the witness, was under the influence of alcoholic liquor.

The jury found the defendant guilty. In a later hearing before the court it was found that this was a third offense. Defendant's motion for a new trial having been overruled, he filed this appeal.

Summarized and stated in different order, defendant's claims of error are that: (1) The court instructed the jury that the word "operate," as used in the statute, means the actual physical handling of the controls of a vehicle by a person; (2) in receiving in evidence the results of the blood test and limiting consideration of it to the time of taking; (3) in allowing the State to introduce the testimony of Garret Luth, claiming that his evidence was not rebuttal but constituted a change in the prima facie case, and that his name had not been endorsed on the information; (4) in refusing to grant a continuance after receiving the testimony of Luth; and (5) in admitting the testimony of patrolman Zurcher regarding statements made by defendant without warning him as to his constitutional rights.

Had this case involved an example such as was re-

ferred to in defendant's brief of a man who, while intoxicated, sat in a broken down vehicle in a junk yard with his hands on the steering wheel and gear shift, defendant might have good reason for his assigned error No. 1. Under the facts as developed by the evidence in this case, however, the jury properly found, under the definition complained of, which was taken from Uldrich v. State, 162 Neb. 746, 77 N. W. 2d 305, and cited later in Waite v. State, 169 Neb. 113, 98 N. W. 2d 688, that defendant was operating a motor vehicle and was in the actual physical control of it at the time patrolman Zurcher saw him.

Defendant sought to prove that he had nothing to drink before he became stuck in the sand. His theory was that the court limited consideration of the blood test to the time the sample was taken after his arrest; and that this was error because defendant's operation of the vehicle had ended before he became intoxicated. This claim of error falls with his theory that he was not operating a motor vehicle at the time patrolman Zurcher first saw him. By his own testimony he had then consumed about half a pint of whiskey. In the opinion of the two patrolmen he was intoxicated.

As to claimed errors Nos. 3 and 4, the testimony of Garret Luth was clearly offered to rebut the testimony of defendant that he had not had a drink of intoxicating liquor before he became stuck in the sand. The rule which requires the endorsement of the names of witnesses on the information does not apply to rebuttal witnesses (Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701); nor does it require a continuance after a rebuttal witness testifies. The testimony did not change the prima facie case on any theory except the untenable one advanced by defendant. The court committed no error in denying a continuance.

As to the fifth assignment of error, no warning as to defendant's constitutional rights were given to him by patrolman Zurcher. The only statement of defendant

mentioned by the patrolman in his testimony was defendant's answer of "Yes" to the inquiry as to whether he had been drinking. This inquiry was made when defendant was still in his own truck, not in custody, and while he was under no coercion. In on-the-scene investigations the police may interview any person not in custody and not subject to coercion for the purpose of determining whether a crime has been committed and who committed it. In Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, the Supreme Court of the United States wrote: "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." Defendant's claim that his constitutional rights were invaded is without foundation.

No error is found in the record and the judgment of the district court should be and is affirmed.

AFFIRMED.

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DAVID CITY HOSPITAL, A CHARITABLE CORPORATION, APPELLANT, V. TECKLA GILMORE ET AL., APPELLEES.

167 N. W. 2d 397

Filed April 25, 1969. No. 37146.

1. **Paupers: Public Welfare.** The common law imposes no quasi-contractual duty on children of a pauper to pay a supplier for necessaries furnished the pauper.
2. **Contracts.** Silence and inaction of an offeree who fails to reply to the offer constitute acceptance in the following cases alone: (1) The offeree takes the benefit of offered services with reasonable opportunity to reject them and with reason to know that the offeror expects compensation. (2) The offeror has given the offeree reason to understand that silence or inaction may manifest assent, and that offeree in remaining silent and inactive intends to accept the offer. (3) Previous dealings or other facts reasonably require the offeree to notify the offeror if he does not intend to accept the offer.

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

Krause & Howland, for appellant.

Haessler & Sullivan, for appellees.

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

SMITH, J.

David City Hospital sued Mrs. Gilmore on account of services it had rendered to her mother. It asserted the alternative of (1) quasi-contract based on a statute concerning support of the poor or (2) implied promise. The claims were dismissed at the close of plaintiff's evidence. Plaintiff on appeal contends that the evidence was sufficient to support a finding of liability.

Mrs. Gilmore, admittedly able to do so, supported her indigent mother, Mrs. Kaminski, the two living under one roof. Plaintiff rendered services to Mrs. Kaminski April 28 to May 1, and May 19 to July 15, 1963. The interruption resulted from an accident in which Mrs. Kaminski fractured her hip bone while she was climbing out of bed in plaintiff's hospital. After treatment of the fracture elsewhere she was readmitted to David City Hospital. Its administrator ascribed the May 19 to July 15 hospitalization to a chronic infection of Mrs. Kaminski's urinary tract.

Regarding responsibility of Mrs. Gilmore for plaintiff's charges, the administrator testified: "Q During Mrs. Kaminski's hospitalization did you . . . have any conversation with . . . (Mrs.) Gilmore with regard to the charges . . .? A . . . just the one time . . . . after Mrs. Kaminski had come back . . . . She had been there quite awhile. Her bill was getting quite large and I asked Mrs. Gilmore if it might be possible for us to turn in her insurance policy . . . ; and Mrs. Gilmore said that at that time she thought she would wait until the entire claim was ready to be

settled. . . . Q Did you present a hospital bill to Mrs. Kaminski . . .? A Yes, we did. Q . . . to Mrs. Gilmore? A . . . I don't know . . . . Naturally, we assumed that Mrs. Gilmore would be taking care of these matters because Mrs. Kaminski was pretty old and feeble and Mrs. Gilmore was taking care of all of her business; so we probably gave it to Mrs. Gilmore. . . . I just assumed that Mrs. Gilmore would make sure that the insurance was taking care of the bill; . . . ."

Plaintiff recovered judgment against Mrs. Kaminski in October 1965, for $1,000, the value of the services, together with $132.50 interest. The judgment remains unsatisfied.

The states have adopted different policies regarding suppliers who claim quasi or implied contracts with relatives, other than parents, of paupers. See, Mandelker, "Family Responsibility Under the American Poor Laws," 54 Mich. L. Rev., 607, 612 to 616; tenBroek, "California's Dual System of Family Law . . .", 16 Stan. L. Rev., 257, 312, 900, 905 to 907; Annotations, 116 A. L. R. 1281, 92 A. L. R. 2d 348. Quasi-contract in those situations forms no part of our common law. Dorsey v. Yost, 151 Neb. 66, 36 N. W. 2d 574, 14 A. L. R. 2d 544; Frontier County v. Palmer, 125 Neb. 716, 251 N. W. 830. The statutory section relied on by plaintiff reads:

"Every poor person, who shall be unable to earn a livelihood in consequence of an unavoidable cause, shall be supported by the father, grandfather, mother, grandmother, children, grandchildren, brothers, or sisters of such poor person if they . . . be of sufficient ability. Every person who shall refuse . . . when directed to do so by the county board . . ., shall forfeit and pay to such county board, for the use of the poor of the county . . ., such sum as may be by such county board adjudged adequate and proper to be paid, not exceeding . . . ($25) per week for each and every week for which such relatives . . . shall fail or refuse to pay, to be recovered . . ., for the use of the poor . . .; Provided, when-

ever any persons become poor persons from intemperance or any other bad conduct, they shall not be entitled to support from any relative, except parent or child. Any such poor person, entitled to support from any such relative, may bring an action against such relative for support in his or her own name and behalf." § 68-101, R. R. S. 1943.

Plaintiff's claim is peripheral to the traditional policies of public assistance and fiscal restraint. See, Howard County v. Enevoldsen, 118 Neb. 222, 224 N. W. 280; Riesenfeld, "The Formative Era of American Public Assistance Law," 43 Cal. L. Rev., 175, 199, 225 to 231. The statutory section creates legal relations among pauper, relatives, and county; but it confers no right on suppliers in the position of plaintiff.

Silence and inaction of an offeree who fails to reply to the offer constitute acceptance in the following cases alone: (1) The offeree takes the benefit of offered services with reasonable opportunity to reject them and with reason to know that the offeror expects compensation. (2) The offeror has given the offeree reason to understand that silence or inaction may manifest assent, and the offeree in remaining silent and inactive intends to accept the offer. (3) Previous dealings or other facts reasonably require the offeree to notify the offeror if he does not intend to accept the offer. Restatement, Contracts 2d, Tent. Dr. No. 1 (1964), § 72, p. 290.

The fact that relatives are under a legal duty to support the pauper sometimes implies a promise of payment for necessaries furnished him. See 3 Corbin on Contracts, § 566, pp. 313, 314. In the absence of court order and board directive Mrs. Gilmore owed no legal duty to support her mother. See, Howard County v. Enevoldsen, *supra;* Frontier County v. Palmer, *supra;* In re Estate of Allen, 147 Neb. 909, 25 N. W. 2d 757 (*semble*); Stone v. Brewster, 399 F. 2d 554.

The evidence in this case was insufficient to support

a finding of liability on quasi or implied contract.

AFFIRMED.

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PLUMFIELD NURSERIES, INC., A CORPORATION, APPELLANT, V. DODGE COUNTY, NEBRASKA, A BODY CORPORATE, ET AL., APPELLEES.

167 N. W. 2d 560

Filed April 25, 1969. No. 37151.

1. **Municipal Corporations: Annexation.** Under section 16-117, R. S. Supp., 1967, a city of the first class may annex contiguous or adjacent lands which are urban or suburban in character and are not agricultural lands that are rural in character.
2. ———: ———. The annexation of lands to cities and towns is a legislative function for the mayor and city council, and not the courts, to determine what lands are to be annexed.
3. ———: ———. The power delegated to cities of the first class to annex lands by ordinance is to be construed strictly and a failure to comply with the conditions prescribed or limitations imposed will ordinarily invalidate the ordinance.
4. ———: ———. The words "as are urban or suburban in character," as used in section 16-117, R. S. Supp., 1967, are not vague and indefinite terms having the effect of invalidating the act as unconstitutional.
5. ———: ———. The provisions in section 16-120, R. S. Supp., 1967, providing that adequate plans and necessary city council action to furnish benefits must be adopted not later than 1 year after the date of annexation is modified by the previous language stating that such benefits shall be received as soon as practicable. The section construed as a whole is reasonable and does not provide for such a lack of equality of benefits as to amount to a want of due process.

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

Sidner, Gunderson, Svoboda & Schilke, for appellant.

Lyle B. Gill and Richard H. Kuhlman, for appellees.

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

CARTER, J.

This is a suit for an injunction by Plumfield Nurseries, Inc., to enjoin Dodge County, the City of Fremont, and the former's treasurer and assessor, from assessing, levying, or collecting taxes or acting in any manner purportedly granted by its annexing ordinances in annexing 19.94 acres of land to the City of Fremont, which lands are specifically described in plaintiff's petition. Plaintiff further asserts that the statutes authorizing the annexation ordinances are unconstitutional and void, and that such annexation ordinances are therefore void and of no force and effect. The trial court denied an injunction and dismissed plaintiff's petition. Plaintiff has appealed.

Plaintiff is engaged in the wholesale nursery business near Fremont. It owns or leases approximately 400 acres of land, 19.94 acres of which were purported to have been annexed to the City of Fremont by ordinances No. 2568 passed on October 31, 1967, and No. 2584 passed on January 30, 1968. The tract of land in question is bounded by Twenty-third Street on the north, Twenty-first Street on the south, Nye Avenue on the east, and a line about a block east of Somers Avenue on the west, except a tract in the northeast corner and a smaller tract in the northwest corner, as shown by a plat identified as exhibit 34, which smaller tract was annexed by ordinance No. 2568. The balance of the tract was annexed by ordinance No. 2584.

The tract in question is surrounded by lands which lie within the city limits of the City of Fremont. It is in effect an island within the corporate limits of the city. There are residence and business properties abutting the tract or across the streets which bound it. Although such properties are not great in number, they adjoin or face the property on all sides. The property annexed was occupied by a residence, an office, a warehouse and dock, nine greenhouses, 58,000 square feet of lath houses, and other smaller buildings and other struc-

tures commonly used in a wholesale nursery business. The tract had a gravel road through its center from east to west, and other driveways for convenience. The area had never been platted and it contained no laid-out streets.

The property was annexed under the provisions of section 16-117, R. S. Supp., 1967, which provides in part as follows: "The corporate limits of a city of the first class shall remain as before, and the mayor and council may by ordinance, * * * at any time, include within the corporate limits of such city any contiguous or adjacent lands, lots, tracts, streets, or highways as are urban or suburban in character, and in such direction as may be deemed proper. Such grant of power shall not be construed as conferring power upon the mayor and council to extend the limits of a city of the first class over any agricultural lands which are rural in character." The plaintiff contends that the foregoing statute is violative of the due process clauses of the state and federal Constitutions, to wit, Article I, section 3, Constitution of Nebraska, and the Fourteenth Amendment to the Constitution of the United States.

It is plaintiff's contention that the words "as are urban or suburban in character" are so vague and indefinite that a court cannot determine without adequate standards whether or not the mayor and council performed their legislative function by finding that the land was urban or suburban in character. It is contended that when the court determines if the lands are urban or suburban in character under such circumstances, it is performing a legislative and not a judicial function. It is asserted that "urban or suburban in character" is a separate condition and cannot be found to exist because of facts indicating that the lands are contiguous or adjacent and are not agricultural or rural in character. The point is an ingenious one, but has no real substance. The words "urban" and "suburban" have a plain meaning and a common use that is well understood. "Urban"

means "of or belonging to a city or town." Shields v. City of Kearney, 179 Neb. 49, 136 N. W. 2d 174; City of South Pasadena v. City of San Gabriel, 134 Cal. App. 403, 25 P. 2d 516. The terms "urban or suburban in character" are not vague and indefinite as used in section 16-117, R. S. Supp., 1967.

Plaintiff argues that section 16-120, R. S. Supp., 1967, is also violative of the due process clauses of the state and federal Constitutions. It provides: "The inhabitants of territories annexed to such city shall receive substantially the benefits of other inhabitants of such city as soon as practicable, and adequate plans and necessary city council action to furnish such benefits as police, fire, snow removal, and water service must be adopted not later than one year after the date of annexation, and such inhabitants shall be subject to the ordinances and regulations of such city; Provided, that such one-year period shall be tolled pending final court decision in any court action to contest such annexation." The main constitutional objection is that benefits to be derived from the annexation need not be provided by the city until 1 year after the annexation. It is argued that the hiatus between the date of annexation and the date the benefits must be provided is not a reasonable basis to test the equality of benefits required to be furnished by annexation. It is claimed that this deprives those annexed of their property contrary to the mentioned due process clauses.

We think, however, that plaintiff's interpretation of the act is expanded beyond its true meaning. The act states that the benefits accruing to other inhabitants of the city shall be afforded and the property annexed as soon as practicable and that adequate plans and necessary city council action to provide such benefits as police, fire, snow removal, and water service must be adopted not later than 1 year after the annexation. It can hardly be expected that benefits of annexation could be afforded immediately after annexation and the re-

quirement that they be furnished as soon as practicable after the annexation meets the requirements of due process.

Plaintiff's argument assumes that it will receive no benefit from annexation for a year although its burdens, including the payment of higher taxes, will be imposed on it. As we have stated, plaintiff incorrectly assumes that it will be deprived of the benefits of annexation for 1 year. But this is not the meaning of the statute when considered as a whole. On annexation, the city is required to furnish benefits as soon as practicable but within a year. If the city fails in this respect plaintiff's remedy lies elsewhere than in a declaration of unconstitutionality of the authorizing statute. There is no want of due process or inequality of benefits in the legal sense.

Plaintiff urges that the acreage here involved was agricultural and not urban or suburban in character, and that it would receive no benefit from annexation. Plaintiff has a utility light line that provides electricity for inside lights and floods the outside area automatically during the hours of darkness. It has two water service lines, one for ordinary domestic use and the other for both an underground and overhead irrigation system. For these services, it pays the rate applicable to customers living outside the city. It wholesales 95 percent of its products although it maintains a retail store. It employs from 35 to 40 employees most of whom live within the corporate limits of the City of Fremont. These employees have a library, swimming pool, and other municipal facilities available to them.

By its annexation to the city, plaintiff's utility services will be paid for at the lesser rate applicable to residents of the city. Plaintiff will be entitled to police and fire protection which it now only gets in an emergency. True, it will pay more taxes, which in itself does not warrant annexation, but there are material benefits accruing.

The acreage is not agricultural land under all the circumstances here shown. The tract is used as a wholesale nursery business and as such it may be partially subjected to horticultural and agricultural pursuits in the same manner as in some rural territories, but it is nevertheless urban in character. It is a business in the ordinary sense and not an agricultural pursuit within the intent of the statute. This is almost conclusive for the reason that it lies wholly within the corporate limits of the City of Fremont.

"A city of the first class is authorized to annex territory which is contiguous or adjacent to it if it is urban or suburban in character and not agricultural land that is rural in character." City of Bellevue v. Eastern Sarpy County S. F. P. Dist., 180 Neb. 340, 143 N. W. 2d 62. The annexation of land to cities and towns is a legislative function and it is for their governing bodies to determine the facts which authorize the exercise of the power granted. Williams v. County of Buffalo, 181 Neb. 233, 147 N. W. 2d 776. The evidence in this case sustains the mayor and city council of Fremont in finding in effect that plaintiff's lands here involved were adjacent and contiguous to the corporate limits of the city, that they are urban or suburban in character, and that they are not agricultural lands that are rural in character.

We hold, therefore, that sections 16-117 and 16-120, R. S. Supp., 1967, are not violative of the due process clauses of the state or federal Constitutions, that the evidence is sufficient to sustain the annexation of the subject property, and that ordinances Nos. 2568 and 2584 are valid and constitute a proper exercise of the powers granted by the aforesaid statutes. We find no prejudicial error in the record and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HAROLD L. MCGHEE, APPELLANT.

167 N. W. 2d 765

Filed May 2, 1969. No. 36952.

1. **Criminal Law: Right to Counsel.** In a criminal case one has the right to represent himself after knowingly and intelligently waiving the assistance of counsel.
2. **Evidence: Appeal and Error.** Error may not be predicated on the admission of evidence to which no objection is made at the time it is offered.
3. **Trial: Appeal and Error.** Failure at trial to challenge a prior conviction on ground of constitutional defects forecloses its challenge on appeal.

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

Harold L. McGhee, pro se.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and MORAN, District Judge.

MORAN, District Judge.

Defendant was tried before a jury and was convicted on two counts of feloniously assaulting law enforcement officials while they were engaged in the performance of their duties, and a third count of feloniously assaulting a law enforcement official with a dangerous weapon while he was engaged in the performance of his duties. Defendant was also charged with being a habitual criminal and in a separate trial to the court was found to be such. He was then sentenced to concurrent terms of 10 years on each of the 3 counts. His motion for a new trial was overruled and he has appealed.

On August 20, 1967, William S. Miller, the night marshal for the Village of Inglewood, and his deputy, Joseph R. Kochensparge, observed an automobile run a stop sign in Inglewood. The automobile was driven by a

woman, and there were two other occupants, one of whom was the defendant, McGhee. The automobile was stopped at Miller's request; however as he walked to it, the automobile was driven away. Miller and Kochensparge pursued the automobile in their vehicle and shortly after located it parked in an alley. They parked directly behind it. At that time the driver was out of the car walking toward Miller and Kochensparge. At the same time they observed the defendant run out of a nearby house carrying a 22 caliber rifle. He ran to the police car, shouted "I am going to kill everyone of you," and shoved the barrel through the window pointing it at Kochensparge who was seated next to Miller in the front seat. Neither of the officers knew then whether the rifle was loaded or not. Miller seized the rifle barrel and attempted to pull it away from the defendant, and Kochensparge radioed Fremont for help. The defendant succeeded in pulling the rifle away from Miller. The woman placed herself between defendant and the police car and told the defendant to stop. Miller and Kochensparge then got out of the police car and Miller told the defendant to put his weapon down and stand by the police car. Defendant, however, went back into the house with the rifle. He came out of the house without the rifle. At this point the Fremont police arrived and the defendant began to run to the house. Miller shouted to the Fremont police not to let the defendant in the house because he had a gun. Miller moved toward the defendant, defendant reached the house porch, turned to face Miller, and backed into the arms of Kochensparge who had moved around in back of him. Defendant tried to get loose and two other Fremont police who had just arrived helped subdue the defendant. During this episode officer Stack of the Fremont police department was kicked in the groin and bitten in the neck by the defendant, and defendant also bit the right finger of officer Fisher of the Fremont police department.

Defendant was taken to the police station. There

Miller asked defendant if the rifle was loaded, stating that he wanted to know but that defendant did not have to tell him. Defendant said that it was.

On August 21, 1967, the defendant appeared before a justice of the peace in Dodge County and was advised of his right to counsel at county expense. The preliminary hearing was adjourned at defendant's request to give him an opportunity to secure counsel. On August 22, 1967, defendant again appeared, and indicated that he did not want counsel at that time. He waived preliminary hearing and was bound over to the district court for Dodge County.

On August 31, 1967, defendant appeared before the district judge and informed him that he wished an attorney and had no funds to retain one. The court then appointed Max Powell to represent the defendant, and continued the arraignment. On September 22, 1967, defendant appeared with his attorney, Powell. The information was read and, through his attorney, defendant pleaded not guilty to all counts. Defendant's attorney requested a reduction in bond which was denied.

In the afternoon of the same day the defendant and his attorney again appeared before the trial judge and defendant asked the court to dismiss his attorney. The court then released Powell, and at defendant's request appointed William Rohn to represent him. The court then reset the trial date from November 7, 1967, to November 14, 1967.

On October 25, 1967, defendant appeared in court. It developed that William Rohn had filed an affidavit stating the defendant informed Rohn he did not want him to represent him, that defendant had contacted Harry Stevens for the purpose of representing him, that Stevens had conferred with defendant, and that Stevens was unwilling to represent the defendant. Both Rohn and Stevens recommended a psychiatric evaluation. The court then committed the defendant to the State Hospital at Norfolk, Nebraska, for a psychiatric evaluation.

On December 6, 1967, defendant appeared in court. The results of the psychiatric examination were set forth in a letter to the court. The letter was admitted into evidence and the findings of the staff at the hospital were:

"1. Harold L. McGhee possesses average adult intellectual ability and capacity and is not mentally deficient;

"2. He is not psychotic and is not mentally incompetent by reason of mental illness;

"3. He is fully able to cooperate rationally with counsel in his own behalf."

At the request of the defendant, the court then appointed William G. Line to represent him.

On January 10, 1968, Mr. Line and the defendant appeared in court. Line informed the court that defendant wished to dismiss him as his attorney. The court asked the defendant about this and defendant stated that he wished to dismiss Line as his attorney; that he hoped the court would not change the trial date; and that he would proceed to trial without an attorney. At this point defendant was advised of the charges against him, the possible penalty, and his rights under Article I, section 11, of the Constitution of Nebraska, including the right to counsel at public expense. Defendant requested a trial by jury and stated that he was ready to go to trial on January 15, 1968. He voluntarily and intelligently waived the assistance of counsel.

On January 15, 1968, just prior to trial, defendant again informed the court that he wished to proceed without counsel. The court then advised the defendant that it would have to follow the rules of procedure bearing upon admission of evidence and other rules of procedure that are known to attorneys but would be disadvantageous to the defendant because he was not familiar with them.

At the trial the defendant exercised his peremptory challenges and cross-examined witnesses. He offered no

evidence. The jury returned a verdict against the defendant the same day.

On January 24, 1968, pursuant to notice to the defendant on January 17, 1968, the court convened for the purpose of hearing on the habitual criminal charge. The court then explained the nature of the hearing to the defendant and informed the defendant that he had a right to counsel. The defendant stated that he waived that right. On motion of the State a continuance was then granted to January 31, 1968.

On January 31, 1968, the defendant appeared and again informed the court that he waived counsel. Certified copies of defendant's conviction of two felonies and commitments thereon were received in evidence without objection by defendant. Defendant offered no evidence. The court found the defendant to be a habitual criminal and deferred sentencing pending a presentence investigation.

On February 1, 1968, defendant appeared in court. He was advised of his right to be represented by counsel at that stage of the proceedings. He informed the court that he did not desire counsel. Defendant was thereupon sentenced.

Defendant alleges several assignments of error. Most of them are so clearly without merit that they do not require discussion. We discuss four.

Defendant's first assignment of error is that he did not knowingly and intelligently waive his right to counsel. This is simply not supported by the facts. Counsel was offered to the defendant at every critical stage of the proceedings. A psychiatric examination was ordered and completed. It disclosed no basis for any suspicion that defendant was mentally incompetent. Defendant had a right to proceed without counsel. He chose to do so and it is clear that his waiver of counsel was made knowingly and intelligently. State v. Escamilla, 182 Neb. 466, 155 N. W. 2d 344.

Defendant contends that his statement that the rifle

was loaded was erroneously admitted into evidence because there was no showing that the admonitions required in custodial interrogations were given, understood, and waived. See Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974. Defendant did not object to this testimony at the trial and he cannot claim error at this point. State v. Brown, 174 Neb. 387, 118 N. W. 2d 328. In any event, whether the rifle was loaded is not an essential element of the crime charged.

The pointing of an unloaded weapon at another is an assault, if the person aimed at does not know but that it is loaded, and has no reason to believe that it is not. While the statement to that effect in Ford v. State, 71 Neb. 246, 98 N. W. 807, 115 Am. S. R. 591, was not necessary to the decision in that case, we think that it is a correct statement of the law.

Defendant contends that the evidence was insufficient to find him a habitual criminal. He maintains that the record of his conviction in Lancaster County in 1952 on a charge of car theft is constitutionally defective in that it fails to show that he was advised of his right to counsel at public expense if he was indigent. The record received in evidence is a journal entry which recites in part that defendant appeared in court and waived "right of counsel" before entering a plea of guilty. Defendant made no objection to the introduction of this document into evidence.

In support of his contention defendant cites State v. Snell, 177 Neb. 396, 128 N. W. 2d 823. In that case, over the timely objection of the defendant, the State offered in evidence the defendant's plea of guilty at the preliminary examination on the charge for which he was then being tried in district court. At the preliminary examination in the county court the county attorney advised the defendant that he had a right to counsel and the defendant said "he didn't care for counsel." There was no evidence that the defendant was advised

that he was entitled to counsel at the expense of the State. We held that the admission of the plea of guilty into evidence at the trial in district court was prejudicial to the defendant because of the absence of counsel at the preliminary hearing and the failure of the record to show affirmatively an effective waiver of the right to counsel by the defendant.

The State contends that the failure of the defendant to object to the introduction into evidence of the journal entry forecloses the defendant from attacking the sufficiency of the conviction at this time. We agree. Section 29-2222, R. R. S. 1943, provides that a duly authenticated copy of the former judgment and commitment shall be competent and prima facie evidence of such former judgment and commitment in hearings under the Habitual Criminal Act. The record of a conviction is ordinarily sufficient as such if it shows that the court had jurisdiction of the crime and of the person. See cases annotated in 5 A. L. R. 2d 1080.

Such cases as Burgett v. Texas, 389 U. S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319, indicate quite clearly that in a habitual criminal proceeding a prior conviction is subject to attack on constitutional grounds, but that case implicitly recognizes that the attack must be made initially in the trial court, not on appeal.

We think the best approach to the problem is that demonstrated in People v. Merriam, 66 Cal. 2d 390, 58 Cal. Rptr. 1, 426 P. 2d 161. There the defendant on appeal for the first time contended that his prior conviction was void because of constitutional defects as to right of counsel. There, as here, the prior conviction was not challenged in the trial court on those or any other grounds. The Supreme Court of California held that the defendant's failure to raise the constitutional issue in the trial court precluded its consideration by the Supreme Court. The court stated that the burden of initiating inquiry into the constitutional basis of a prior conviction lies with him who would challenge its validity rather

than with the trial court. It is extremely difficult for the prosecution or the trial court to anticipate every constitutional objection to the sufficiency of a conviction, and it is manifestly unfair to allow a defendant who makes no objection to the sufficiency of a conviction in the trial court to urge some constitutional defect on appeal.

We hold that the failure of the defendant to initate inquiry into the constitutional basis of his prior conviction at or prior to its offer into evidence forecloses him from challenging its validity on an appeal to this court.

Defendant also contends that his conviction as a habitual criminal is invalid because he was improperly advised that the maximum term of imprisonment was 60 years. It is true that the amendment to section 29-2221, R. R. S. 1943, increasing the maximum term of imprisonment for a habitual criminal to 60 years from 20 years was not in effect at the time the defendant committed the act for which he was charged. The statement to the defendant that he was subject to a maximum term of imprisonment of 60 years instead of 20 years was incorrect. This, however, is obviously error without prejudice for the reason that the defendant was sentenced to the minimum term of 10 years. This is the minimum term under both the old and the new act.

Other errors assigned by the defendant are without merit and the judgment is affirmed.

AFFIRMED.

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WATKINS PRODUCTS, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. WILFORD HENRY BUSCH, APPELLEE AND CROSS-APPELLANT, DON WALLRIDGE ET AL., APPELLEES AND CROSS-APPELLEES.

167 N. W. 2d 574

Filed May 2, 1969. No. 37022.

**Principal and Surety.** Sureties are not discharged from further

liability by the execution of a new agreement by their principal if in their undertaking they waive notice thereof.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed in part, and in part reversed and remanded.

Carl E. Willard, for appellant.

Robert E. Paulick, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and MORAN, District Judge.

MORAN, District Judge.

This is an action by Watkins Products, Inc., to recover from the principal and his sureties for merchandise sold and delivered to the principal, Wilford Henry Busch. All defendants denied generally, and Busch cross-petitioned for damages for failure of Watkins to accept return of merchandise on hand and for preventing him from disposing of it. At the close of the testimony Watkins' motion for a directed verdict was overruled. The jury returned a verdict for Watkins and against Busch in the amount of $4,189.58, but exonerated the sureties, Don Wallridge, Jerry Lallman, and Lavern Scarborough. Busch's motion for a new trial and Watkins' motion for judgment notwithstanding the verdict were overruled. Watkins appealed and Busch cross-appealed.

On December 31, 1962, Watkins and Busch entered into a written agreement whereby Watkins agreed to sell its products to Busch. The same date Wallridge, Lallman, and Scarborough executed a written undertaking to Watkins in which they insured, guaranteed, and promised payment not exceeding $5,000 of all indebtedness due Watkins then owing or thereafter incurred by Busch up to March 1, 1966. So far as is pertinent here, in the undertaking the sureties waived notice of the making of any sales contracts or agreements between Busch and Watkins or of the terms or conditions thereof. Busch

purchased products from Watkins from time to time. On June 1, 1965, Busch and Watkins executed a new contract which was similar to the 1962 contract, but changed the cost of products sold and the manner in which Busch could be reimbursed for products returned. Both contracts provided that the products could be returned for credit within 30 days of termination, and provided for termination by either party by written notice to the other. Watkins' testimony was that Busch owed $4,333.94 on June 1, 1965. Busch denied this, but did acknowledge signing and returning to Watkins an invoice stating that amount was due Watkins from him. On March 10, 1966, Busch acknowledged in a letter to Watkins that he owed $4,189.58. After the termination of the agreement Busch and Scarborough exchanged some correspondence with Watkins dealing with a return of products for credit, but none was ever returned.

The basis for Watkins' appeal is that the trial court should have sustained its motion for judgment notwithstanding the verdict. Busch's cross-appeal contends that errors in the admission of evidence prevented him from having a fair trial.

Busch attacks the sufficiency of foundation for the admission of documents, and admissions of defendants with respect to them. Foundation was laid by the reading into evidence of Watkins' request for admissions and defendants' answers concerning the execution, mailing, and receipt of designated documents. In the requests and admissions the documents were identified alphabetically. When the documents were offered at the trial they were identified numerically. Busch contends that the alphabetical identification of the documents in the requests and admissions was not correlated with their numerical identification when they were offered and received. He cites no specific authority, and we doubt that there is any. It is sufficient to say that sufficiency of foundation for admissibility is for the trial judge, and he obviously was not confused by the difference in the

means of identification. The documents were otherwise sufficiently identified during testimony so that the jury could not have been confused.

Watkins complains that the trial court should have sustained its motion for judgment notwithstanding the verdict. Busch admitted owing $4,189.58 to Watkins, and the only other issues were whether the sureties were liable, and whether Busch was entitled to recover on his cross-petition. Any recovery by Busch on his cross-petition would diminish the liability of the sureties, if they were otherwise liable. The jury found against Busch on his cross-petition, and the only remaining issue was the liability of the sureties. The trial court instructed the jury that the sureties were not liable for any purchase by Busch after June 1, 1965. There was no proof of all the transactions between Watkins and Busch after June 1, 1965. The jury apparently determined that Watkins had failed to prove that the purchases by Busch sued upon by Watkins took place before June 1, 1965, and it exonerated the sureties. We think the trial judge was in error. If there was a material difference between the first and second contract which would ordinarily release the sureties from further liability, the answer is that the sureties consented to the new contract. In their undertaking the sureties specifically waived "any notice * * * of the making of any sales contracts or agreements between the Purchaser (Busch) and the Seller (Watkins), or of the terms or conditions thereof." Where a contract is plain and unambiguous in its meaning it will be enforced according to its terms. Francis R. Orshek Co. v. State, 174 Neb. 668, 119 N. W. 2d 48.

The only submissible issue having been decided adversely to Busch, the trial court should have sustained Watkins' motion for judgment against all defendants notwithstanding the verdict.

The judgment against Busch is affirmed. The judgment exonerating defendants Lallman, Wallridge, and

Scarborough is reversed and the cause remanded with directions to enter judgment against all defendants in the amount of the verdict.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

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STATE OF NEBRASKA, APPELLANT, V. JOHN WESLEY SMITH, APPELLEE.

167 N. W. 2d 568

Filed May 2, 1969. No. 37089.

1. **Criminal Law: Searches and Seizures.** What is a reasonable search is not to be determined by any fixed formula, but is to be resolved according to the facts of the particular case.
2. **Criminal Law: Constitutional Law: Searches and Seizures.** The state and federal Constitutions prohibit only unreasonable searches and seizures.
3. **Constitutional Law: Searches and Seizures.** The opening of an automobile door by a police officer solely for the purpose of determining where and to whom the motor vehicle was registered, when the owner was not being investigated for or suspected of a crime, does not constitute an unreasonable search within the constitutional prohibitions against unreasonable searches and seizures.
4. **Trial: Evidence: Criminal Law.** Under section 29-822, R. R. S. 1943, where a motion for a suppression of evidence is filed more than 10 days prior to the commencement of trial and overruled by the court, it is not prejudicial error for the trial court at the trial to reconsider the motion to suppress the evidence. A waiver of objections to evidence on the ground that it was obtained by an unreasonable search occurs only when no objection is made more than 10 days before trial where the exceptions thereto have no application.

Appeal from the district court for Deuel County: JOHN H. KUNS, Judge. Exceptions sustained.

Robert E. Richards and Everett O. Richards, for appellant.

Gregory J. Beal, for appellee.

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

CARTER, J.

Defendant was charged in the district court for Deuel County with unlawfully possessing or having under his control a narcotic drug or drugs. The trial court directed a verdict of dismissal for want of sufficient evidence. This court granted the application of the county attorney to docket the proceedings for review by this court as authorized by section 29-2315.01, R. R. S. 1943.

During the early morning hours of January 4, 1968, defendant was found stumbling around in a wheatfield about 2 miles west of Big Springs Junction in Deuel County. His hands were frozen and he had the appearance of being intoxicated although there was no odor of liquor on or about him. He was incoherent. He was taken to a hospital in Julesburg, Colorado, where emergency treatment was given his hands. On the way to the hospital in Ogallala, to which defendant was being removed, defendant was asked what he was on or if he was on L.S.D. He stated that he had taken something to keep him awake and nothing more. His automobile had gone into the ditch and came to a stop 75 or 80 feet north of the highway.

About 7:30 a.m., state trooper Webb was directed to investigate the stranded automobile. The car was stuck in the snow and not locked. It bore an Illinois motor vehicle license. Webb opened the door of the car to observe the license and to find out to whom it belonged. He did not enter the car at any time on this occasion. He observed two rolled cigarettes on the console and a clear plastic bag on the seat of the car containing a "green vascilite" substance. After reporting his findings to the Sidney office, Webb took pictures of the inside and outside of the automobile. Upon the arrival of another trooper, Webb went to the hospital in Ogallala to talk to the defendant. The latter identified himself, was told

by Webb that a warrant was being issued for his arrest, and that he was being held for the possession of marijuana. Defendant was then given the Miranda warnings. Webb then questioned the defendant who said that he had never smoked, that he had never used drugs until the day previous when he went on a binge in Chicago, and that he did not know anything about any marijuana being found in his car. Webb then went to Chappell, obtained a search warrant, and searched the automobile in which marijuana was found among defendant's personal effects. Exhibits 4, 5, 6, and 7 were the articles taken from the defendant's automobile under the search warrant.

On June 25, 1968, the case came on for trial before a jury. During the course of the trial and during the presentation of the State's evidence, defendant moved to suppress exhibits 4, 5, 6, 7, 8, and 9 on the ground that such evidence was obtained as the result of an unlawful search and seizure. The trial court sustained the motion and, after the State's rest, dismissed the case for want of evidence. It is the contention of the defendant that the opening of the car door by trooper Webb and thereafter observing the subject exhibits in the car was an unlawful search and that subsequent search of the car under a search warrant was the result of the unlawful opening of the car door requiring the suppression of the evidence subsequently obtained by search warrant. The State contends that the opening of the car door to identify the owner of the car is not an unlawful search and that the exhibits found by search warrant are competent and should not have been suppressed. We limit our discussion to the competency of exhibits 4, 5, 6, and 7.

The evidence in this case is not disputed that trooper Webb was directed to investigate an automobile that had left the highway and had become stranded in a wheatfield 2 miles west of Big Springs Junction. He had no information that a crime had been committed or suspected. He looked the car over and, finding it un-

locked, he opened the door to determine where and to whom the car was registered. He at no time entered the car. In opening the door for the purpose stated, which is a usual procedure under such circumstances, he saw the rolled cigarettes and bag of green substance as before stated. A search warrant was later obtained and a search of the car was made. The important phase of this case is that Webb proceeded to the location of the car without any information that a crime had been committed. He was not looking for evidence of any crime, actual or suspected. He opened the car door to examine the license solely to secure the name of the registered owner, a common function of a police officer under such circumstances. He did not come to the car to search for anything and, in the course of a recognized duty, observed the contraband in the car in plain sight. There is not an iota of evidence to indicate that he opened the car door for the reason stated as a subterfuge to find incriminating evidence. The issue is whether the opening of the door under such circumstances constituted a search, or, if it was, was it reasonable.

The state and federal Constitutions prohibit only unreasonable searches and seizures. Cotton v. United States, 371 F. 2d 385 (1967); United States v. Rabinowitz, 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. 653.

In the Cotton case, it was held under the circumstances of that case that the mere opening of a car door was not an unlawful search or, in any event, not an unreasonable one. The court said: "Officer Pearns' check of the identification number on the door post, which involved opening the door, was not, we think, an unlawful search. * * * For reasons stated below, we do not think that the mere opening of the door of the car for the purpose of making such a record was, under the circumstances, a search, but if it was, the circumstances under which it was done make that search an entirely reasonable one." See, also, Weaver v. United States, 374 F. 2d 878 (1967).

We conclude that under the facts of the instant case the opening of the car door to examine the motor vehicle license was not a search, and, as the cases say, if it was a search, it was not an unreasonable one. The defendant devotes a large share of his brief to the argument that there was no probable cause for making the alleged search. The holding that the opening of the car door under the circumstances was not a search, or, at least, not an unreasonable one, precludes the necessity for a discussion of that point.

It is clear from the record that if Webb observed the rolled cigarettes and marijuana in the car in plain sight under the circumstances herein related, he was competent to testify to such facts even though they provided the basis for the search warrant subsequently issued.

It is the rule that objects falling within the plain view of an officer who has a right to be in the position to have such view does not constitute a search. In Harris v. United States, 390 U. S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067, the court said: "The sole question for our consideration is whether the officer discovered the registration card by means of an illegal search. We hold that he did not. * * * The precise and detailed findings * * * were to the effect that the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances. * * * Once the door had lawfully been opened, the registration card, with the name of the robbery victim on it, was plainly visible. 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." In People v. Mallory, 2 Mich. App. 359, 139 N. W. 2d 904, the court put it this way: "There is nothing in this record to support defendant's claim of illegal search and seizure. The evidence defendant sought to suppress was located not by

search but by the officer's senses." See, also, State v. Dillwood, 183 Neb. 360, 160 N. W. 2d 195; State v. Putnam, 178 Neb. 445, 133 N. W. 2d 605.

It is well established that it is not a search to observe what is open and patent either in daylight or artificial light. In the instant case, trooper Webb opened the door of the car for a lawful purpose. He saw the contraband in plain sight. Out of an abundance of caution, he did not seize it but proceeded to obtain a search warrant. Exhibits 4, 5, 6, and 7 were the product of what he found by the use of his natural senses. The exhibits were not the product of an unreasonable search and the trial court was in error in suppressing them as evidence in the case.

It is the contention of the State that the motion to suppress exhibits 4, 5, 6, and 7 was erroneously sustained during the trial for the reason that an identical motion to suppress exhibits 4, 5, 6, and 7 was made and overruled more than 10 days previous to the trial. The method and effect of an order suppressing evidence is contained in section 29-822, R. R. S. 1943. The foregoing statute provides as follows: "Any person aggrieved by an unlawful search and seizure may move for return of the property so seized and to suppress its use as evidence. The motion shall be filed in the district court where a felony is charged and may be made at any time after the information or indictment is filed, and must be filed at least ten days before trial or at the time of arraignment, whichever is the later, unless otherwise permitted by the court for good cause shown. * * * Unless claims of unlawful search and seizure are raised by motion before trial as herein provided, all objections to use of the property as evidence on the ground that it was obtained by an unlawful search and seizure shall be deemed waived; Provided, that the court may entertain such motions to suppress after the commencement of trial where the defendant is surprised by the possession of such evidence by the state, and also may in its discretion

then entertain the motion where the defendant was not aware of the grounds for the motion before commencement of the trial. In the event that the trial court entertains any such motion after the commencement of trial, the defendant shall be deemed to have waived any jeopardy which may have attached."

The motion to suppress exhibits 4, 5, 6, and 7 was made at the trial on June 25, 1968. On April 19, 1968, defendant filed a motion to suppress the evidence obtained as a result of an unlawful search and seizure. The factual situation is the identical one raised at the trial. After notice and hearing, the trial court on May 6, 1968, overruled the first motion to suppress. The incident involved being identical in the motion of June 25, 1968, with that recited in the motion of April 19, 1968, defendant was not surprised when the evidence was offered at the trial and he was fully aware of the grounds for the motion before the commencement of the trial at least as early as April 19, 1968. It is argued by the State that under the circumstances of the instant case, that the trial judge having determined the identical issue more than 10 days before the trial that the evidence sought to be suppressed was admissible, he is obligated to admit the evidence on the trial.

It is clearly the intention of section 29-822, R. R. S. 1943, that motions to suppress evidence are to be ruled on and finally determined before trial, even to permit an appeal before trial from an order suppressing evidence unless within the exceptions contained in the statute. We cannot, however, bring ourselves to hold that such an interpretation of the statute is paramount to the long-recognized right of trial courts to correct their errors during term time. It will be noted that an appeal under section 29-824, R. R. S. 1943, is authorized from an order suppressing evidence, but not from an order refusing to suppress evidence. Defendant therefore cannot be said to have lost his rights by a failure to appeal from his motion to suppress for he has no such right. A waiver

of objections to evidence on the ground that it was obtained by an unreasonable search occurs only when no objection is made more than 10 days before the trial, unless the exceptions to the 10-day provision apply. Here the defendant did object by filing a motion to suppress more than 10 days before trial and the waiver provision has no application. We conclude that section 29-822, R. R. S. 1943, intends, unless within the exceptions contained in the statute, that motions to suppress evidence should be finally determined before trial, but that a trial court is not precluded from correcting errors at the trial. The effectiveness of the statute to accomplish its intended purpose necessarily rests in the good judgment of the trial court in avoiding abuse of the statutory provisions in denying, by this means, the State's review of an order suppressing evidence as authorized by section 29-824, R. R. S. 1943. We do not intend to infer that the trial court in this case did not act in the utmost good faith in suppressing evidence at the trial even though we reach a different conclusion.

We think the trial court was in error in sustaining the motion to suppress exhibits 4, 5, 6, and 7 at the trial. To this extent the exceptions of the State are sustained.

EXCEPTIONS SUSTAINED.

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JULIE STEVENS, APPELLEE, V. DOUGLAS STEVENS, APPELLANT.
167 N. W. 2d 761

Filed May 2, 1969. No. 37136.

1. **Divorce.** Any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony constitutes extreme cruelty.
2. ———. The earning capacity of the husband is an element to be considered in the allowance of alimony.

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

Kerrigan, Line & Martin, for appellant.

Sidner, Gunderson, Svoboda & Schilke, for appellee.

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

BOSLAUGH, J.

This is an action for divorce brought by Julie Stevens against Douglas Stevens. The trial court granted the plaintiff a divorce, custody of the minor child, alimony, and child support. The defendant has appealed.

The parties were married October 23, 1965. They have one child, Stephanie, born November 21, 1966. The plaintiff is 24 years of age; the defendant is 28.

Early in 1968 the plaintiff sought marriage counseling but it was not successful. This action was filed March 11, 1968. After the case had been set for trial, the parties agreed to a postponement and sought further counseling, but without success. The counselors advised that there was no hope of reconciliation.

The plaintiff charges the defendant with extreme cruelty. The evidence describes a series of events which, if considered separately, are relatively minor in nature. Considered as a whole, the evidence shows a course of conduct by the defendant toward the plaintiff that destroyed her peace of mind and impaired her health.

The plaintiff's principal complaint centers around the attitude and conduct of the defendant toward their child. The defendant exhibited a lack of concern or love for the child and on several occasions was harsh with the child. The defendant is self-centered and preoccupied with satisfying his own desires. He showed little concern for the requirements of his wife and child. As a result the plaintiff's health was affected adversely.

Any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental

feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony constitutes extreme cruelty. Waldbaum v. Waldbaum, 171 Neb. 625, 107 N. W. 2d 407. The evidence in this case, although somewhat marginal, supports a finding of extreme cruelty as against the defendant.

The parties lived in a rented home and accumulated very little property during the marriage. The trial court allowed the plaintiff alimony in the amount of $7,800 and child support in the amount of $40 per week. The defendant contends that the amounts are excessive.

The defendant is employed as a foreman by Hormel and has an annual income now of approximately $11,000. The plaintiff is working 20 hours per week and has net earnings of $110 per month. The plaintiff estimates the living expenses for herself and the child at approximately $300 per month.

The alimony, which is payable at the rate of $30 per week, is not excessive when the earning capacity of the husband is considered. See Sowder v. Sowder, 179 Neb. 29, 136 N. W. 2d 231. We find that the child support should be fixed at $30 per week.

The judgment of the district court is modified to provide for child support in the amount of $30 per week, and as so modified is affirmed. The plaintiff is allowed the sum of $350 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

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EARL HAWTHORNE, APPELLEE, V. CHARLES HAWTHORNE, APPELLANT.
167 N. W. 2d 564

Filed May 2, 1969. No. 37140.

**Workmen's Compensation.** An employer engaged in custom com-

bining for the public as a regular commercial business is not an employer of "farm or ranch laborers," and an employee of such an employer is within the provisions of the Nebraska Workmen's Compensation Act.

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

Brower & Treadway, for appellant.

Sampson & Armatys and Kenneth H. Elson, for appellee.

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

McCOWN, J.

This is a workmen's compensation case. The primary issue presented on the appeal is whether the defendant was an employer of "farm or ranch laborers" within the provisions of section 48-106, R. R. S.1943, and therefore exempt from liability under the provisions of the Nebraska Workmen's Compensation Act. The one judge Workmen's Compensation Court dismissed plaintiff's action. The full Workmen's Compensation Court awarded compensation for loss of an eye. That award was affirmed on appeal to the district court. We affirm the district court judgment.

The plaintiff, Earl Hawthorne, was 65 years old in February 1968. After completing an eighth grade education, he had worked on farms in his early years. For some years prior to 1961, the plaintiff had worked in Oregon as a shop foreman doing all kinds of mechanical work in a repair shop. Apparently since 1961, and perhaps prior to the 1960's, he had again lived on a farm, and at the time of the accident here was living on a farm near Hordville, Nebraska. The plaintiff first started to work for the defendant in the early 1960's driving a truck. From at least 1963 on, the plaintiff worked for the defendant running a combine in defendant's custom combining business. His agreed wage was $2 per hour.

Plaintiff also, from time to time, did mechanical work on the combines. He also did mechanical work on defendant's trucks or vehicles from time to time. The plaintiff kept his own time record, in which he recorded each day the hours he had worked that day for the defendant. After the fall combining was completed each year, the defendant would settle with the plaintiff for the work done by the plaintiff, after deducting the regular contract price for combining grain for the plaintiff.

The defendant, Charles Hawthorne, was 63 years old and the brother of the plaintiff, Earl Hawthorne. Charles Hawthorne was in the business of trucking and custom combining. His income tax return shows his occupation as "Machine Work," and that in the year 1965, he purchased $9,804.92 worth of equipment qualified for investment credit. He filed no farm schedule. He did not own or operate a farm in any of the years 1961 through 1966. The defendant's combine work was done for the public and involved the combining of wheat, oats, milo, maize, and corn. The business was conducted primarily in Nance and Merrick Counties in Nebraska, but sometimes in the State of Kansas also. The defendant used two combines in his custom work prior to and during 1966. The defendant sold one of the combines to his son, Larry Hawthorne, in 1966, but both combines were still used for all of the custom combining work the defendant did in 1966.

The defendant's fall combining season began in early October. On October 3, 4, and 5, 1966, the plaintiff, Earl Hawthorne, worked on both combines, putting on cabs and getting them in condition for the fall season. They were located at the defendant's place when the plaintiff did this mechanical work. The plaintiff's time record shows continuous work for the defendant from October 3, 1966, to November 10, 1966, the day of the accident. On October 26, 1966, the plaintiff did mechanical work changing the combine heads for popcorn. The plaintiff

also did maintenance work on the machines from time to time.

On November 8, 1966, after finishing a combining job, the combining crew moved to a 90-acre farm of Larry Hawthorne, the defendant's son, where they worked about half an hour. They worked 9 hours there on November 9, 1966, and continued on November 10, 1966, until late in the morning, when the sieves on the combines plugged with snow and they shut down. On the combining crew, the plaintiff operated one combine, Larry Hawthorne operated the other, and the defendant, Charles Hawthorne drove a truck.

After they shut down, the Hawthornes had lunch. After lunch, the plaintiff began the work of changing the bearings on the combine owned by Larry Hawthorne. In doing this work, he hit the brace of the bearing with a hammer and a chip of steel struck him in the eye. The accident resulted in the loss of his eye, which was removed and replaced with an artificial eye.

There is direct conflict in the testimony as to the circumstances surrounding the work on the machine. The plaintiff testified that the defendant said to him: "Let's get the bearings put in." Plaintiff then got a tool and commenced the work while the defendant watched him.

The defendant's testimony was that he, the defendant, started to work on the combine himself, and that the plaintiff started work also. The defendant testified: "I didn't tell him to, and Larry didn't tell him to, no one did." Larry and the plaintiff both testified that Larry was not there when the accident happened. There is no dispute but that the combine was in need of repair at the time of the accident, and that there was other custom combining to be done after the current job was finished.

Aside from the major issue, it was defendant's contention that there was no employer-employee relationship between plaintiff and defendant at the time of the

injury, but that the plaintiff was performing casual or exchange labor and, in any event, was working for Larry Hawthorne and on Larry's combine. We think the plaintiff established that he was, at the time of his injury, an employee of the defendant and was not performing casual or exchange labor. The defendant, after the injury, personally completed the plaintiff's time book, crediting him with 4 hours of work on November 10, 1966, although the combining work on that day was only 2½ hours. The defendant paid the plaintiff for that work when they settled up a few weeks later. Larry Hawthorne had not hired or employed the plaintiff, nor paid him any wages. The defendant furnished and filed a W-2 income tax form showing that he had paid wages of $421.75 to the plaintiff in 1966. The trial court was correct in finding that the plaintiff was an employee of the defendant at the time of his injury.

The crucial issue here is whether or not the defendant was an employer "of farm or ranch laborers" within the meaning of the Nebraska Workmen's Compensation Act. Section 48-106, R. R. S. 1943, subsection (1), provides that the provisions of the Workmen's Compensation Act apply "to every employer in this state, including nonresident employers performing work in the State of Nebraska, employing one or more employees, in the regular trade, business, profession, or vocation of such employer, except railroad companies engaged in interstate or foreign commerce."

Subsection (2) provides in part: "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, * * *." The remainder of section 48-106, R. R. S. 1943, provides for elective coverage by the two categories of exempt employers.

There has been a wide range of diversity in the judicial decisions outlining the scope of farm or agricultural exemptions under Workmen's Compensation Acts. Vary-

ing statutes make direct comparisons difficult in many cases. The controversial or borderline cases which frame the boundaries of the exemption fall largely into two groups: "Those which involve classifying activities on the borderline between old-fashioned farming and commercial production or processing related to agricultural commodities, and those which involve employees who work at one time in agricultural and at another in nonagricultural pursuits." 1A Larson, Workmen's Compensation Law, § 53.30, p. 938. The case before us involves both categories.

As this court said in Campos v. Tomoi, 175 Neb. 555, 122 N. W. 2d 473: "The place where the work is being performed, the nature of the task the employee is performing at the time, and the purposes for which he was hired, and the nature of the employer's occupation have been deemed controlling in different cases."

That case held that a group of farmers operating a commercial hay grinding business may not, during the course of the operation of said separate business, be deemed employers of farm laborers within the meaning of the Nebraska Workmen's Compensation Act. In that case, we quoted with approval: "A workman is not a farm laborer simply because at the moment he is doing work on a farm; nor because the task on which he is engaged happens to be what is ordinarily considered farm labor. * * * Neither the pending task nor the place where it is being performed is the test. The whole character of the employment must be looked to to determine whether he is a farm laborer."

In the case before us there is little question but that the "regular trade, business, profession, or vocation" of the defendant employer was "Machine Work" for the public, and operated for commercial purposes. The plaintiff was hired to operate and keep combines in repair and to perform whatever work the defendant contracted for in the operation of the defendant's regular business of custom combining. The defendant's business is dis-

tinguishable from the regular trade, business, profession, or vocation of farming or ranching, even though his equipment and services were contracted for or used only by customers who were themselves engaged in farming or ranching operations. The defendant in this case was furnishing his regular business equipment and services to his son. The fact that no charge was made does not destroy the commercial nature of the business, nor remove the employee from the coverage of the Workmen's Compensation Act. Employees and employers do not dart in and out of coverage with every momentary change in activity. See 1A Larson, Workmen's Compensation Law, § 53.40, p. 946.

We take judicial notice of the fact that old-fashioned farming and ranching contemplated by the Legislature at the time of the adoption of the Workmen's Compensation Act has been extensively affected by mechanization, specialization, and scientific advancement. The growth in the size of farms and the constantly accelerating changes in methods and machines, together with spiraling costs, have spawned a multitude of commercial businesses which provide equipment and specialized services for farmers and ranchers. These developments have, in some cases, created a type and kind of regular commercial business separate and distinct from farming and ranching. As to commercial activities by farmers generally, see, 1A Larson, Workmen's' Compensation Law, §§ 53.33, 53.34, p. 944; Skreen v. Rauk, 224 Minn. 96, 27 N. W. 2d 869; Campos v. Tomoi, *supra*.

An employer engaged in custom combining for the public as a regular commercial business is not an employer of "farm or ranch laborers," and an employee of such an employer is within the provisions of the Nebraska Workmen's Compensation Act. A farmer engaged in doing his own combining or in combining for others casually, or upon an exchange work basis, does not come within the scope of this holding.

The findings and judgment of the trial court were

correct in all respects, and the judgment is affirmed.
AFFIRMED.

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ALPHONSE J. HEINE, APPELLANT, V. LEONARD T. FLEISCHER ET AL., APPELLEES.
167 N. W. 2d 572

Filed May 2, 1969. No. 37211.

1. **Frauds, Statute of: Contracts.** The memorandum required by the statute of frauds must contain the essential terms of the contract.
2. **Contracts: Time.** Time for performance is not ordinarily an essential term of the contract because the law implies that it shall take place within a reasonable time.
3. ———: ———. A provision concerning the time for delivery of possession in an oral contract for the sale of land is unenforceable unless it is included in the memorandum.
4. **Frauds, Statute of: Contracts: Real Property.** Payment of the entire consideration of an oral contract for the purchase of real estate is not alone sufficient part performance to prevent the application of the statute of frauds.
5. **Case Overruled: Contracts.** Ruzicka v. Hotovy, 72 Neb. 589, 101 N. W. 328, is overruled to the extent it is in conflict with the opinion in this case.

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

Rice, Rice & Roubicek and George F. Johnson, for appellant.

Deutsch & Hagen and Cleo F. Robak, for appellees.

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

BOSLAUGH, J.

The defendants, Leonard T. Fleischer and Kenneth W. Fleischer, granted an option to the plaintiff, Alphonse J. Heine, to purchase land in Knox County, Nebraska, owned by the defendants. The option was exercised and a deed delivered on March 30, 1962.

This action was brought to recover damages resulting from the failure of the defendants to deliver possession in accordance with their alleged oral agreement. The trial court sustained defendants' demurrer ore tenus and dismissed the action. The plaintiff's motion for new trial was overruled and he has appealed.

The second amended petition alleged that the option agreement, entered into on January 10, 1962, was partly written and partly oral; that the plaintiff had 90 days from January 10 in which to exercise the option but that the defendants had agreed, orally, to deliver possession on March 1; that the final payment was made and the deed delivered on March 30; that the plaintiff had agreed to extend the date for delivery of possession to March 30; and that "at said time it was agreed between the parties that the defendants would move their cattle and give immediate possession to plaintiff." It further alleged: "that as the proximate result of the defendants breach of their agreement to deliver possession of said ranch and remove their cattle therefrom in accordance with the agreement of March 30, 1962, the plaintiff * * *" was damaged.

The memorandum or writing which the defendants executed and delivered on January 10, 1962, contained no provision in regard to delivery of possession. It is clear from the record that the plaintiff was attempting to recover for the breach of an alleged oral agreement relating to the delivery of possession.

The memorandum required by the statute of frauds must contain the essential terms of the contract. Ord v. Benson, 163 Neb. 367, 79 N. W. 2d 713; Restatement, Contracts, § 207, p. 278. Time for performance is not ordinarily an essential term of the contract because the law implies that it shall take place within a reasonable time. But if the time for performance is specified, it must be included in the memorandum to be enforceable. Ord v. Benson, *supra*.

The plaintiff contends that the statute of frauds is

not applicable because he has fully performed his part of the contract. The plaintiff's performance consisted of the payment of the purchase price. Payment of the entire consideration of an oral contract for the purchase of real estate is not alone sufficient part performance to prevent the application of the statute of frauds. Baker v. Heavrin, 148 Neb. 766, 29 N. W. 2d 375.

To the extent that Ruzicka v. Hotovy, 72 Neb. 589, 101 N. W. 328, is in conflict with this opinion, it is overruled.

The judgment of the district court is affirmed.

AFFIRMED.

NEWTON, J., not participating.

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STATE OF NEBRASKA, APPELLEE, V. JOHN KENT HAKE, APPELLANT.
168 N. W. 2d 270

Filed May 9, 1969. No. 37047.

**Criminal Law: Courts.** Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Rollin R. Bailey and Keith A. McIntyre, 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.

SPENCER, J.

Defendant, John Kent Hake, was sentenced to life imprisonment for second-degree murder for killing his wife.

The only issue involved in this appeal is the severity of the sentence.

Defendant's version of the affair is that he and his wife consumed a large quantity of liquor during the course of the afternoon. Mrs. Hake left the apartment for a short period and upon her return told defendant she was going to leave. She didn't say where. Defendant asked her not to go, but she said they would probably get into an argument and that she was in no mood to argue. She was going someplace where she was appreciated. Defendant then testified: "I didn't know how to keep her there. I wanted her to stay there. I didn't know how to get her to stay there, so I went and got the gun. I thought if she would see me with the gun maybe—maybe she would get scared and stay home. Q. Go ahead. A. —Well, she had went down the stairs and I immediately followed her down the stairs and she had both doors open, the screen door and the inside door and I had the gun in my hands, and she said, 'You won't do anything with that gun. You won't do anything with that damn gun,' she said; and it seemed like at that time that I had never actually done anything that I had said I was going to do; and I just lost my head; and she started running out the door. If she hadn't of ran I don't believe I would have shot her."

Defendant's 15-year-old son testified that while he was eating supper his mother went to a public telephone a block away to make a phone call. While she was gone his dad got the rifle he had given to him, which was sitting in the corner of his bedroom. The gun was unloaded. The clip for it was in a dresser drawer in the bedroom. He heard the drawer opened. When his mother came home, she asked if he wanted to go to a show. He didn't and she said she would go by herself. His dad said: " 'You better not go by yourself to the show.' " His mother then went downstairs followed by his dad. He had the gun. Shortly thereafter he heard three shots. When he went downstairs, his mother was lying

by the doorway. When he arrived on the scene, his dad gave him the gun and told him to shoot him. He took the gun upstairs, unloaded it, and laid it on the bed. Defendant admits getting and loading the gun before his wife returned from her phone call. On cross-examination, defendant stated he thought maybe loading it was an automatic reaction.

A neighbor who occupied the downstairs apartment testified that after he heard the shots, he heard the defendant say: " 'I have killed you, you dirty son of a bitch.' " Later he heard the defendant hollering to his son. On that occasion, he said: " 'David, come get the gun. I just shot your mother. Come get the gun and shoot me.' "

The deceased had two wounds in the left side of the head and neck, one in the head, and one on the neck. One bullet entered the left temple area and later was removed from the skull. The other entered the left posterior neck and exited on the right.

The testimony of the officers would indicate that the defendant was not intoxicated at the time of the shooting. One of them testified that he did not smell any intoxicants. Another detected the odor of intoxicants. Another testified that Hake was upset and crying but that he walked steadily. One of the officers testified as follows relative to what the defendant told him: "Q. And what did he say? A. Said that, 'I shot my wife. I killed my wife. I didn't mean to kill anybody. I' -- He said that she had been playing around for twenty years and he had taken all that he could take. He told her if she went out that he was going to hurt her. He told her—told her that lots of times and she wouldn't believe him. He said that—he told her if she started to leave the apartment he would shoot her; and that he had shot her; he meant to shoot her."

There is no question but that after the event, as defendant's attorney suggested, defendant felt remorse. It is also true that he voluntarily gave an extensive state-

ment to the police and was cooperative. He had had other felony convictions, but only for bad checks.

The sentence imposed was the maximum set by section 28-402, R. R. S. 1943, which provides for imprisonment of not less than 10 years or during life. The record demonstrates the commission of a serious and violent crime. Under defendant's version of the facts there are some mitigating circumstances. However, we cannot overlook the fact that the trial court had the opportunity to observe the conduct and demeanor of the defendant during the trial and also was aided by the comprehensive presentence investigation provided by section 29-2217, R. R. S. 1943, in this type of case. Further, the evidence would indicate that defendant procured and loaded the gun prior to his wife's return.

We have on many occasions reiterated the rule that where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to an abuse of such discretion. State v. Blackwell, *ante* p. 121, 165 N. W. 2d 730; State v. Stock, *ante* p. 29, 165 N. W. 2d 111.

We can find no abuse of discretion in the imposition of the sentence herein. Consequently, it may not be disturbed, and the judgment is affirmed.

AFFIRMED.

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FRANKLIN W. BAUMGARTNER, APPELLEE AND CROSS-APPELLANT, V. GULF OIL CORPORATION, APPELLANT AND CROSS-APPELLEE, STATE OF NEBRASKA, INTERVENER-APPELLEE AND CROSS-APPELLANT.

168 N. W. 2d 510

Filed May 9, 1969. No. 37092.

1. **Oil and Gas: Trespass.** Under the law of capture, an owner of

land acquires title to oil or gas which he produces from wells on his land although part of the oil or gas may have migrated from adjoining wells. He may thus appropriate the oil and gas that have flowed from adjacent lands without the consent of the owner of those lands and without incurring liability to him for drainage.

2. **Oil and Gas.** Where primary recoverable oil has been exhausted, all interested parties in the field must be offered an opportunity to join in any unitization project to recover secondary oil on a fair and equitable basis.
3. **Oil and Gas: Trespass.** Where a secondary recovery project has been authorized by the Nebraska Oil and Gas Conservation Commission, the operator is not liable for willful trespass to owners who refuse to join the project when the injected recovery substance moves across lease lines.
4. ———: ———. Orthodox rules and principles applied by the courts as regards surface invasions of land may not be appropriately applied to subsurface invasions arising out of the secondary recovery of oil and gas.
5. **Oil and Gas.** It is a basic and fundamental principle of all conservation legislation that the correlative and constitutional right of a landowner or leaseholder is not the right to drill but the right to recover his just and equitable share of the oil and gas underlying his property.
6. **Oil and Gas: Words and Phrases.** "Correlative rights," as used in oil and gas law, shall mean the opportunity afforded to the owner of each property in a pool to produce, so far as it is reasonably practical to do so without waste, his just and equitable share of the oil or gas or both in the pool.
7. **Oil and Gas: Damages.** Where a unitization agreement has been approved by the Nebraska Oil and Gas Conservation Commission, an operator refusing to join the project is limited in any recovery of damages to the amount he can prove by a preponderance of the evidence he could have obtained through his own efforts if he had drilled, developed, and operated his property outside the unitization project.

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

Martin, Davis, Mattoon & Matzke and James B. Diggs, for appellant.

Clinton & McNish and Raymond J. Gengler, for appellee.

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

Heard before WHITE, C. J., CARTER, SPENCER, SMITH, McCOWN, and NEWTON, JJ., and RONIN, District Judge.

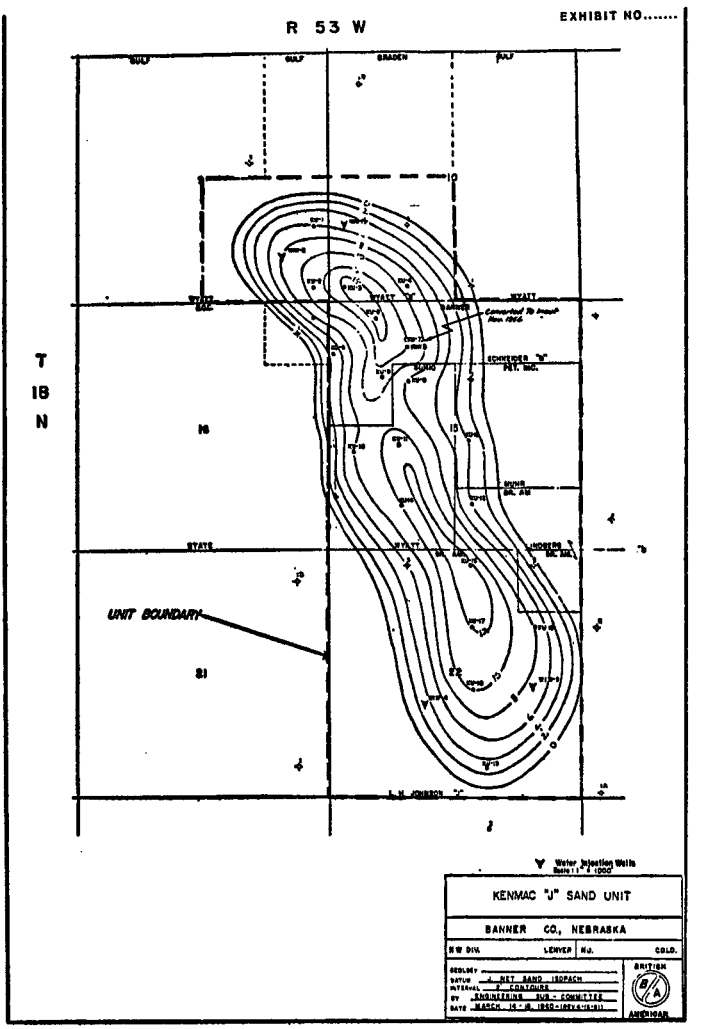
SPENCER, J.

This is an action at law for willful trespass and conversion. Plaintiff sued for the value of oil claimed to have been displaced and swept from land under lease to him by defendant into its waterflood unit recovery wells.

Plaintiff was the holder of an oil and gas lease granted by the State of Nebraska, the owner of the minerals underlying Section 16, Township 18 North, Range 53 West of the 6th P.M., Banner County, Nebraska. Plaintiff acquired the lease June 13, 1960, and allowed it to lapse June 13, 1965.

Defendant is the owner of the Kenmac "J" Sand Unit, Banner County, Nebraska, hereinafter referred to as Kenmac, which was formed to increase the ultimate recovery of oil and to prevent waste. In consequence of the depletion of the field the lessees thereon had, before plaintiff obtained his lease, commenced studies as to the feasibility of unitizing the field. This involved the merger of all of the interests in the oil pool and the designation of an operator for the unit. Defendant was so designated for Kenmac. Except for Kenmac there would have been no recovery of secondary oil. The Nebraska Oil and Gas Conservation Commission, hereinafter called the commission, entered an order April 24, 1961, approving the unit agreement, which provided for the secondary recovery of the oil by waterflooding. It was signed by all of the working-interest owners in the field except the plaintiff, and by the owners of more than 80 percent of the royalty interests, including the plaintiff's lessor, the Nebraska Board of Educational Lands and Funds. When the plaintiff refused to join the unit, Section 16 was excluded from it and plaintiff's lessor withdrew its consent.

Kenmac offsets plaintiff's lease on the east and the north. Exhibit 2, which is reproduced herewith, shows the boundaries of Kenmac as well as the outline of the oil-bearing stratum involved herein:




Waterflooding is the controlled introduction of water into an oil-producing stratum or oil reservoir for the

purpose of recovering oil which cannot be produced by normal primary methods. Water is injected into selected wells to create pressure to force the oil toward producing wells. In this instance water was injected on the north into wells 1 and 2, and on the south into wells 3 and 4. These wells forced the oil toward wells 10, 11, and 12, the final point of recovery. In November 1964, it was necessary to convert well 7 to an injection well. The introduction of water into an oil reservoir causes oil and water to migrate across lease lines and it is impossible to restrict the advance of the water to lease lines. Because of this encroachment it is necessary to unitize a field to protect the correlative rights of all those holding interests in the field.

A prior lessee of Section 16 had drilled a dry hole in the northeast quarter of the section. This dry hole and other wells on the adjoining sections had established that the oil-bearing sands under plaintiff's lease were in the northeast quarter of the northeast quarter of the northeast quarter, hereinafter referred to as NENENE, with a thin and narrow strip along the east edge of the section.

Plaintiff's engineer testified that prior to the formation of the unit, oil had been drained from Section 16 by the off-setting wells to the north and the east. The 23 producing wells shown on the plat had so depleted the field that the nearest well offsetting plaintiff's lease had been temporarily abandoned because of insufficient production. The parties stipulated that as of June 6, 1961, there were only 2,254.2 barrels of recoverable primary oil, worth $6,063, under the plaintiff's lease. The amount of oil underlying Section 16 for recovery by secondary methods was stipulated to be 36,624.1 barrels, while the recovery from the entire reservoir was 1,658,955 barrels. It is undisputed that the cost of drilling a well to recover the primary oil on Section 16 was far in excess of $6,063.

Plaintiff's engineer also testified that in the absence of Kenmac there would not have been any secondary

oil recovered on Section 16. Plaintiff refused to join the unit, and after it was approved he applied for a permit to drill a well in the NENENE. This permit was refused by the commission because plaintiff was able to include his section in Kenmac, but its order was subsequently reversed by the district court. No well was drilled because the recoverable oil by this time had been swept from the section. Plaintiff's engineer conceded that if plaintiff had been permitted to drill a well on the NENENE it would have resulted in the drainage of oil from Kenmac. The testimony clearly would indicate that plaintiff could not have profitably developed his lease. In the absence of Kenmac no secondary oil could have been recovered from Section 16 so the independent development of Section 16 would have resulted in an economic loss except for the waterflooding by Kenmac.

Plaintiff's manager of operations, who was his principal witness, actually had been instrumental in setting up the unit agreement and the operator's agreement for Kenmac. This was before he entered plaintiff's employment in June 1962. He admitted that Kenmac was properly formed; that a common-assessment formula was used for all undeveloped acreages; and that the assessment formula and the amount allocated to plaintiff's tract were fair and equitable. Plaintiff refused to join the unit unless this assessment was waived as to his section. This the other parties to the agreement would not do, and plaintiff's section was excluded from the unit.

If the plaintiff had joined Kenmac and borne his share of the development and operating costs, his profit would have been $27,455, and the State of Nebraska would have received $7,377 for royalties. The evidence would indicate that if plaintiff had drilled his own well, the highest estimate of his profit would be $12,224.

The trial court applied the common law doctrine of willful trespass, and entered judgment against the defendant in the amount of $89,933 for the value of the

oil drained from Section 16, without the deduction of any development or operating costs necessary to produce that oil. Defendant perfected an appeal to this court.

This is a case of first impression in this state. However, in view of the objectives of the Nebraska Oil and Gas Conservation Act, hereinafter referred to as act, and the apparent public policy inherent therein, as well as the nature of oil and gas, we cannot accept the premise on which judgment was rendered by the trial court.

Section 57-901, R. R. S. 1943, provides as follows: "It is hereby declared to be in the public interest to foster, to encourage and to promote the development, production and utilization of natural resources of oil and gas in the state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that the greatest ultimate recovery of oil and gas be had; and that the correlative rights of all owners be fully protected; and to encourage and to authorize cycling, recycling, pressure maintenance and secondary recovery operations in order that the greatest possible economic recovery of oil and gas be obtained within the state to the end that the landowners, the royalty owners, the producers and the general public realize and enjoy the greatest possible good from these vital irreplaceable natural resources.

"It is the intent and purpose of sections 57-901 to 57-921 to permit each and every oil and gas pool in Nebraska to be produced up to its maximum efficient rate of production, subject to the prohibition of waste as herein defined and subject further to the enforcement and protection of the correlative rights of the owners of a common source of oil or gas so that each common owner may obtain his just and equitable share of production therefrom."

Since the formation of Kenmac, our law has been amended to provide for compulsory unitization upon the approval of 75 percent of the production owners and

those required to pay 75 percent of the development costs. § 57-910.03, R. R. S. 1943. This case, however, must be decided under the law as it existed before the compulsory unitization amendment.

To appreciate the importance of the legislative policy, one needs only to understand the importance of secondary oil recovery in Nebraska. We quote herewith from reports made by the director of the commission to the Interstate Oil Compact Commission: "'As in previous years, the recovery of secondary oil formed a prominent part of Nebraska's producing picture. To January 1, 1966, Nebraska reservoirs had contributed over 36 million barrels of secondary oil. This volume was recovered as a direct result of the application of secondary energy for production. The quantity represents 15 percent of all oil produced in the state since the original oil discovery in 1939.' (The Interstate Oil Compact Bulletin, June 1966) * * *

"'At this time, 76 secondary recovery or pressure maintenance projects are underway in Nebraska—72 involve water injection, two involve miscible slugs while one project consists of gas recycling and one involves both gas recycling and water injection. Approximately 40 percent of Nebraska's current oil production comes as a direct result of the introduction of extraneous fluids into the State's reservoirs.' (The Interstate Oil Compact Bulletin, December, 1966)"

As plaintiff suggests, in Krone v. Lacy, 168 Neb. 792, 97 N. W. 2d 528, we quoted with approval the following from Broderick v. Stevenson Consolidated Oil Co., 88 Mont. 34, 290 P. 244: "'Oil remaining in the ground before recovery is a part of the land, and belongs to the owner of the land; * * *.'" This statement, however, is subject to the qualification well expressed in Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 S. Ct. 576, 44 L. Ed. 729: "No time need be spent in restating the general common law rule that the ownership in fee of the surface of the earth carries with it the right to the minerals

beneath, and the consequent privilege of mining to extract them. * * * The question * * * is this: Does the peculiar character of the substances, oil and gas, which are here involved, the manner in which they are held in their natural reservoirs, the method by which and the time when they may be reduced to actual possession or become the property of a particular person, cause them to be exceptions to the general principles applicable to other mineral deposits, and hence subject them to different rules? True it is that oil and gas, like other minerals, are situated beneath the surface of the earth, but except for this one point of similarity, in many other respects they greatly differ. They have no fixed situs under a particular portion of the earth's surface within the area where they obtain. They have the power, as it were, of self-transmission. No one owner of the surface of the earth, within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. The waste by one owner, caused by a reckless enjoyment of his right of striking the reservoir, at once, therefore, operates upon the other surface owners. Besides, whilst oil and gas are different in character, they are yet one, because they are unitedly held in the place of deposit. In Brown v. Spilman, 155 U. S. 665, 669, 670, these distinctive features of deposits of gas and oil were remarked upon. The court said:

" 'Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining, for coal and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are a part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner

drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property.' "

There is no claim for the oil which naturally migrated from Section 16 by reason of the offsetting wells to the north and east, because this is governed by the law of capture. Under the law of capture, an owner of land acquires title to oil or gas which he produces from wells on his land although part of the oil or gas may have migrated from adjoining wells. He may thus appropriate the oil and gas that have flowed from adjacent lands without the consent of the owner of those lands and without incurring liability to him for drainage. California Company v. Britt, 247 Miss. 718, 154 So. 2d 144.

The rule of capture is applied to oil which migrates without the introduction of extraneous substances into the oil-producing stratum to induce migration. Here an extraneous substance, water, was injected into wells on adjoining sections which induced migration. It is this inducement which plaintiff alleges constitutes a willful trespass as to his property.

We cannot ignore the fact that the operation of Kenmac was specifically authorized and approved by commission, effective April 18, 1961, and that the project was at all times conducted in conformity with the order of the commission. Plaintiff concedes this fact, but maintains that the order of commission was applicable to only the lands in the unit, and that Section 16 was not a part of it. Although Section 16 was excluded from the project, everyone involved, including the plaintiff, would understand that there was no way to seal off the oil under Section 16 from the pool, and that from its very nature water injected into wells 1 and 2 would eventually reach the narrow portion of the reservoir in Section 16 and sweep oil from it. It is this very fact which required that plaintiff be afforded an opportunity to join the project. Plaintiff was offered this opportunity on a fair and equitable basis. As an oil operator, he was fully

cognizant of the fact that unless the other operators in the field were willing to abandon the project and thus waste more than a million and a half barrels of recoverable oil, they would either be forced to meet his demand for an unreasonable return at their expense, or go ahead with the project without him and incur possible liability for sweeping oil from under his leased land in the process. They did the latter. Did they incur liability for willful trespass? We hold they did not. Plaintiff contends no issue of waste is presented in this case. We do not agree. Defendant's every action was premised on the prevention of waste.

We have reached the conclusion that where the primary recoverable oil has been exhausted, all interested parties in the field must be offered an opportunity to join in any unitization project to recover secondary oil on a fair and equitable basis, and if any interested party refuses to join he should not be permitted to capitalize on that refusal. To hold otherwise would discourage unitization and encourage rather than avoid waste. Consequently, we hold where a secondary recovery project has been authorized by the commission the operator is not liable for willful trespass to owners who refused to join the project when the injected recovery substance moves across lease lines.

While the fact situation is not analogous, some of the language in Railroad Commision of Texas v. Manziel (Tex.), 361 S. W. 2d 560, 93 A. L. R. 2d 432, is pertinent herein. That case was a waterflooding operation on a lease rather than a unit basis. The regular location for a lease input well was 660 feet from the property line, but the commission authorized the appellant to place an input well 206 feet from the Manziels' property line. The evidence indicated Manziels were producing far in excess of the original oil in place on their land and, without the specific limitations of the water input well, would continue to obtain more than their fair share. The following language is of interest herein: "To con-

stitute trespass there must be some physical entry upon the land by some 'thing,' Gregg v. Delhi-Taylor Oil Corp., Tex., 344 S. W. 2d 441 (1961); but is injected water that crosses lease lines from an authorized secondary project the type of 'thing' that may be said to render the adjoining operator guilty of trespass? * * *

"A problem analogous to the situation that confronts this court is found in instances where gas is produced, the gasoline content removed therefrom, and the dry gas reinjected into the original reservoir from whence it was produced to preserve bottomhole pressure; the process thus displacing the more valuable wet gas under adjoining leases with the dry reinjected gas. In Corzelius v. Harrell, 143 Tex. 509, 186 S. W. 2d 961, (1945), a person so reinjecting complained that the Commission's order did not reasonably adjust correlative rights. Apparently both parties assumed that when the substances were reinjected, the rules which were applicable before the original capture again applied. See: Note 1, Oil and Gas Reporter, 1171; Williams and Meyers: Oil and Gas Law, § 204.5, footnote 1.

"In considering the legal consequences of the injection of secondary recovery forces into the subsurface structures, one authority, Williams and Meyers, supra, has stated:

" 'What may be called a "negative rule of capture" appears to be developing. Just as under the rule of capture a land owner may capture such oil or gas as will migrate from adjoining premises to a well bottomed on his own land, so also may he inject into a formation substances which may migrate through the structure to the land of others, even if it thus results in the displacement under such land of more valuable with less valuable substances (e.g., the displacement of wet gas by dry gas).'

"Secondary recovery operations are carried on to increase the ultimate recovery of oil and gas, and it is established that pressure maintenance projects will re-

sult in more recovery than was obtained by primary methods. It cannot be disputed that such operations should be encouraged, for as the pressure behind the primary production dissipates, the greater is the public necessity for applying secondary recovery forces. It is obvious that secondary recovery programs could not and would not be conducted if any adjoining operator could stop the project on the ground of subsurface trespass. * * *

"The orthodox rules and principles applied by the courts as regards surface invasions of land may not be appropriately applied to subsurface invasions as arise out of the secondary recovery of natural resources. If the intrusions of salt water are to be regarded as trespassory in character, then under common notions of surface invasions, the justifying public policy considerations behind secondary recovery operations could not be reached in considering the validity and reasonableness of such operations. See: Keeton and Jones: 'Tort Liability and the Oil and Gas Industry II,' 39 Tex. Law Rev. 253 at p. 268. Certainly, it is relevant to consider and weigh the interests of society and the oil and gas industry as a whole against the interests of the individual operator who is damaged; and if the authorized activities in an adjoining secondary recovery unit are found to be based on some substantial, justifying occasion, then this court should sustain their validity.

"We conclude that if, in the valid exercise of its authority to prevent waste, protect correlative rights, or in the exercise of other powers within its jurisdiction, the Commission authorizes secondary recovery projects, a trespass does not occur when the injected, secondary recovery forces move across lease lines, and the operations are not subject to an injunction on that basis. The technical rules of trespass have no place in the consideration of the validity of the orders of the Commission."

Plaintiff, who seeks to distinguish Railroad Commission of Texas v. Manziel, *supra,* from the instant case,

calls attention specifically to the following language: "The Commission has two primary duties in the administration and the control of our oil and gas industry. It must look to each field as a whole to determine what is necessary to prevent waste while at the same time countering this consideration with a view towards allowing each operator to recover his fair share of the oil in place beneath his land."

California Company v. Britt, 247 Miss. 718, 154 So. 2d 144, involved a claim of willful trespass for drainage by owners of an unsigned fractional mineral interest against the operator of a voluntary unitization of an oil field, using a pressure maintenance program where their interest had been excluded upon their refusal to join the unit. The Mississippi Supreme Court held that the injection of gas into a unit well which swept oil from plaintiff's land onto the unit where it was produced by a unit recovery well, did not constitute a common law trespass. The following from that case is pertinent herein: "The theory of complainants' bill was a willful and malicious trespass by the defendant. Yet they failed to show that California committed any actionable wrong or breach of duty toward them. Is drilled no well on the 20 acres in which appellees owned an unleased one-fourth mineral interest.

"Sun had no lease from them after 1954. Prior to that time, California offered appellees participation in the unit. The Brookhaven Unit was validly created, and was approved by the State Oil and Gas Board. Unit wells have been drilled in accordance with permits from the board. The board found that the unitization agreements would conserve natural resources, prevent waste, and result in a larger ultimate recovery from the field. * * *

"Since there was no invasion of appellees' mineral interest by drilling a well on it, and all of California's activities have been in accord with the requirements of the conservation act and orders of the board. this is

one of those cases, somewhat unusual today, where the law of capture applies: The owner of land 'acquires title to the oil or gas which he produces from wells on his land, though part of the oil or gas may have migrated from adjoining lands. He may thus appropriate the oil and gas that have flowed from adjacent lands without the consent of the owner of those lands, and without incurring liability to him for drainage.' * * *

"Owners of royalty or unleased mineral interests are entitled to come into a unitization program under fair, reasonable, and equal terms with other participants in the unit, similarly situated. The ideal is that each operator's share of production from the unit should be in exact proportion to the contribution which he makes to the unit. * * * The basis of participation in production is a complex factor. Essentially, the unsigned or 'window' interest would have to join in the unitization on the basis of equal, proportionate participation with others who are parties to the agreement, * * *."

Plaintiff predicates much of his case on Tidewater Oil Co. v. Jackson, 320 F. 2d 157. As we view that case, it is readily distinguishable from the instant one. There the court, applying Kansas law, affirmed a substantial judgment for damages when water injected by Tidewater broke through a semipermeable barrier between the leased property of the two parties and damaged Jackson's wells, which were still producing primary oil. Here there were no producing wells on Section 16, and the evidence is conclusive it was not economically feasible to drill one in the absence of Kenmac.

Plaintiff throughout his brife asserts that he was precluded from drilling his unorthodox well by the objections of the defendant, and that this action indicates the willfulness of defendant's trespass. There is no merit to this suggestion. Without passing on plaintiff's right to drill a well, we find the evidence is conclusive that it could not have been profitable except for Kenmac, and even plaintiff's witness admits it would have re-

sulted in plaintiff recovering secondary oil from Kenmac. Suffice it to say that we consider it to be a basic and fundamental principle of all conservation legislation that the correlative and constitutional right of a landowner or leaseholder is not the right to drill but the right to recover his just and equitable share of the oil and gas underlying his property. "Correlative rights" are defined in section 57-903, R. R. S. 1943, of our Oil and Gas Conservation Act, as follows: "Correlative rights shall mean the opportunity afforded to the owner of each property in a pool to produce, so far as it is reasonably practical to do so without waste, his just and equitable share of the oil or gas, or both in the pool; * * *."

Plaintiff was given every opportunity to secure his just and equitable share of the oil in the pool by being offered fair, reasonable, and equal participation with the other interested parties in Kenmac. He refused to participate as he had every right to do. As an oil operator we must assume that he was fully aware of the consequences of his refusal. While we agree he had a perfect right to refuse to join the project, he should not be rewarded because he did. Neither should he be permitted to recover what he would have received if he had assumed the risks of that project. To hold either way would serve to defeat the purpose of our conservation act and would promote waste by effectively discouraging the formation of secondary recovery units which are so essential to the oil industry in this state.

The statute provides and plaintiff insists his correlative rights in the oil underlying his lease must be protected. That oil, however, was oil which could not be profitably produced by primary methods. The evidence is also conclusive that plaintiff could not have recovered secondary oil except for Kenmac. Under the facts herein the most that plaintiff should have a right to recover is what he can prove by a preponderance of the evidence he could have obtained through his own efforts if he

had drilled, developed, and operated his property outside the unitization project; that is, if no unitization had occurred. There is evidence that any operation by plaintiff would have resulted in an economic loss. If the testimony of his manager of operations is accepted, then the profit he could have realized from his own operations for both primary and secondary recovery would have been $12,224. This would be the limit of plaintiff's just and equitable share for oil displaced from Section 16 by Kenmac in the absence of other evidence.

The State of Nebraska originally signed the Kenmac agreement but was forced to withdraw its assent when plaintiff refused to sign. The State has made no attempt to prove the extent of lost royalty payments but has accepted in its entirety the plaintiff's presentation. Any recovery by the State must be determined under the rules enunciated above.

For the reasons enumerated, the judgment herein is reversed and the cause remanded to the district court for retrial under the rule of damages enunciated above. Costs are taxed to the plaintiff-appellee.

REVERSED AND REMANDED.

NEWTON, J., dissenting.

Notwithstanding that I heartily concur in the facts and the propositions of law set forth in the majority opinion, I find that I must respectfully dissent from the result reached. The majority opinion relies basically upon two propositions of law. The first is the law of capture which basically provides that one who drills an oil well upon his own land may, without liability, pump the oil out from under his neighbor's land. The second is the rule pertaining to correlative rights which means that each owner of property lying over a pool of oil shall be afforded an opportunity to obtain his just share of the oil.

The opinion is based upon the following facts. Plaintiff could not have profitably developed his lease. The amount of primary oil he could have recovered would not have paid for the expense of drilling. No secondary

oil whatsoever could have been recovered without the efforts of the other owners who joined together in the organization referred to as Kenmac and instituted measures for the recovery of the secondary oil, each contributing his or its respective share toward the expense of such secondary recovery and each taking a proportionate risk of a profitable result. Plaintiff, in accordance with the rule of correlative rights, was afforded an opportunity to join in Kenmac, contribute to the expense, and share in the profit to be derived from the recovery of secondary oil. He refused to do so. Had he joined, the venture would have been a profitable one for him and for his lessor, the State of Nebraska.

The picture presented is one in which it is apparent that plaintiff would have lost money had he drilled a well and sought to recover primary oil. If he had drilled the well when Kenmac instituted its secondary recovery process, plaintiff might have been able to recover from his own well sufficient secondary oil to have shown a profit, but this profit could only have been realized through the efforts of the other owners who joined in Kenmac. The majority opinion states: "We have reached the conclusion that where the primary recoverable oil has been exhausted, all interested parties in the field must be offered an opportunity to join in any unitization project to recover secondary oil on a fair and equitable basis, and if any interested party refuses to join he should not be permitted to capitalize on that refusal. To hold otherwise would discourage unitization and encourage rather than avoid waste." I concur in this statement of principle, but if this principle is to be applied, then plaintiff has no basis for recovery whatsoever and neither does plaintiff's lessor. Quite conclusively, plaintiff would have lost money had he made an attempt to recover his share of the primary oil and he could not have shown a profit without the efforts of Kenmac in producing secondary oil, a project in which he refused to join. If, therefore, he is permitted to recover, he is

then being permitted to capitalize on his refusal to cooperate and to join in Kenmac.

In my opinion, the judgment should be reversed and the cause dismissed.

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CLARENCE L. GUTTING, APPELLEE AND CROSS-APPELLANT, V. MADELINE JACOBSON ET AL., APPELLANTS AND CROSS-APPELLEES, IMPLEADED WITH MADELINE JACOBSON PROPERTIES, INC., A CORPORATION, ET AL., APPELLEES AND CROSS-APPELLEES.
167 N. W. 2d 762

Filed May 9, 1969. No. 36968.

1. **Principal and Agent: Joint Ventures.** An agent in connection with the agency ought not to deal with his principal as an adverse party, unless the principal knows or consents.
2. ———: ———. An agent who, to the knowledge of the principal, acts on his own account in a transaction in which he is employed has a duty to deal fairly with the principal and to disclose to him all facts which the agent knows or should know would reasonably affect the principal's judgment, unless the principal has manifested that he knows such facts or that he does not care to know them.
3. ———: ———. A principal may by acquiescence release his agent from liability for self-dealing.

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

Leo Eisenstatt, J. Patrick Green, and Eisenstatt, Morrison, Higgins, Miller, Kinnamon & Morrison, for appellants.

John W. Powers, White, Lipp, Simon & Powers, and Patrick J. Heaton, Sr., for appellee Gutting.

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

SMITH, J.

Clarence Gutting sought a joint venture accounting

from Eugene and Madeline Jacobson, husband and wife, and four corporations, styled Realty, Properties, Construction, and Investors. Madeline owned Realty, Properties, Construction, and most of Investors which listed two other stockholders, her sons. Managing the joint venture, composed of Clarence, Eugene, and Realty, to speculate in raw land, Madeline had platted Bel Air Village. Properties, the conduit of title, for substantial sums conveyed Lot 178 to Investors and other lots to Construction.

The district court found that Clarence had affirmed the transactions with Construction but not the conveyance to Investors. It ordered (1) an accounting by the Jacobsons, Realty, and Investors in respect to Lot 178 alone; and (2) dismissal of Clarence's petition against Properties and Construction. Appeal by the four defendants and cross-appeal by Clarence followed.

The coadventurers had agreed as of December 1, 1958, to purchase, develop, and otherwise exploit approximately 160 acres of raw land in Douglas County, Nebraska. Provisions for the speculators to furnish needed capital and to share profits and losses set Clarence's percentage at 25. Excess contributions of capital were to earn interest at 6 percent a year. Realty agreed to supply Madeline's services to operate and control the business for $1,000 a month. The coadventurers directed Realty as trustee, and therefore Properties, to execute deeds, contracts, and "all other matters only as authorized by the joint venture and with respect to normal transactions in the usual and ordinary conduct of the joint venture business."

Clarence having contributed $57,275 to capital, the coadventurers purchased the tract for $229,100. All but 10 acres were platted as Bel Air Village, bounded on the east by One Hundred Twentieth Street and on the south by West Center Road. Madeline had designed Lot 178, 20 acres forming the southeast corner of the subdivision, for a shopping center. A speculator could foresee com-

mercial values in adjoining areas like Lot 676, which measured 85 by 150 feet and fronted on West Center Road. It, part of Lot 677, and others were conveyed to Construction at fair prices for erection of model homes. Construction, after acquiring title in 1962, leased the parcel in Lots 676-77 upon which it built a Texaco station prior to November 1963.

Since the coadventurers, according to Madeline, could not realize $50,000 from selling Lot 178, she tested the lease market in 1963. While she was bargaining to lease 3.24 acres to "Food City," she organized Investors to acquire all of Lot 178. In September Properties conveyed the 3.24 acres to Investors which leased the land to Food City. The lessee began construction of a building on the premises prior to August 1964. Properties conveyed the remainder of Lot 178 to Investors in January 1964, after sale of 75 percent of the lots in the Village.

Madeline did not broach her plans for Investors to Clarence. Anxious about the fair market value of Lot 178, she consulted Coe Peppers, a builder and real estate agent employed by Construction. After deliberating days without other advice, she decided upon $80,000. It was paid in October 1964. At the trial the retrospective valuations ranged from $90,000 to $340,000. The district court correctly found $300,000 to $340.000.

Risks had been taken by Madeline and Investors on the Food City lease and other transactions unrelated to time frames of Clarence's conduct. They are sketched up to trial in August 1967. Investors subordinated ownership of three parcels to lessees' building mortgages. Food City monthly was paying $800 rental and $1,500 on its mortgage indebtedness. Investors also incurred expense in constructing Gold Street, a lighting system, storm sewer, and asphalt parking lot. Madeline obligated herself in connection with projects for three buildings to cost almost a million dollars. Success was not a foregone conclusion.

Clarence testified to reliance on Madeline, to great expectations from the enterprise. He and the Jacobsons had been close friends, the men owning an automobile sales agency in partnership from 1940 to 1965. Clarence was knowledgeable in business, but he possessed no special skill in land speculation. From 1958 through 1965 he complained to Madeline once, and then about expense to the joint venture in clearing the land of tall weeds. Without critical comment he accepted annual statements that summarized the financial condition of the joint venture, although the statements did not disclose details of sales. He knew generally of conveyances to Construction and of Madeline's interest in it. He silently watched Construction build the Texaco station. He protested after commencing this suit in May 1966.

Clarence believed, according to him, that the coadventurers would keep Lot 178. Yet no one called on him to contribute more capital. No financial statement suggested mortgage obligation or rental income. He kept well informed of the Food City construction project, for he lived nearby at 11940 West Center Road.

Clarence admitted that in late 1964 he had probably learned of the conveyance to Investors. However, he denied knowledge of the price or Madeline's interest in Investors prior to his return from a 4-month trip to Europe in October 1965. Witnesses recalled conversations with him about material facts of the transaction with Investors before October 1964. An accountant retained by all parties testified: During July through September 1964 he had informed Clarence of the price and of Madeline's intention to borrow money to pay it. Clarence, on the other hand, dated the accountant's disclosure in October 1965.

Distributions from the joint venture to Clarence totaled $126,736.87. He accepted none subsequent to these in 1964: January—$8,750; August 11—$8,000; and October 22—$15,000. In January 1966, he complained to Madeline about the price of Lot 178.

An agent in connection with the agency ought not to deal with his principal as an adverse party, unless the principal knows or consents. Restatement, Agency 2d, § 389, p. 205. See, also, Pike v. Triska, 165 Neb. 104, 127, 84 N. W. 2d 311, 325. "An agent who, to the knowledge of the principal, acts on his own account in a transaction in which he is employed has a duty to deal fairly with the principal and to disclose to him all facts which the agent knows or should know would reasonably affect the principal's judgment, unless the principal has manifested that he knows such facts or that he does not care to know them." Restatement, Agency 2d, § 390, p. 208. See, also, 2 Rowley on Partnership (2d Ed., 1960), § 52.23, p. 493; 5 Williston on Contracts (Rev. Ed., 1938), § 1499, p. 4185.

An empowered agent who violates fiduciary duty by selling his principal's property to himself individually, holds the property upon a constructive trust for the principal. Restatement, Restitution, § 192, p. 789. A principal may by acquiescence release his agent from liability for self-dealing. Restatement, Agency 2d, § 416, comment b, p. 276.

The findings of the district court on the issues whether Clarence was entitled to an accounting are correct. The judgment is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. CHARLES F. BUNDY, APPELLANT.
167 N. W. 2d 770

Filed May 9, 1969. No. 37127

**Criminal Law: Evidence.** When a witness gives testimony which as to material facts is in such obvious and irreconcilable conflict that if part of it be true the rest must be false, it ordinarily may not be accepted as the basis of a judicial conclusion.

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

Joseph H. Badami, 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.

SPENCER, J.

This is a proceeding brought under the Post Conviction Act. On March 8, 1966, petitioner was convicted by a jury of the crime of burglary. On April 19, 1966, he was sentenced to a term of 10 years for burglary and for being an habitual criminal. He prosecuted an appeal to this court where his conviction was affirmed. See State v. Bundy, 181 Neb. 160, 147 N. W. 2d 500.

Petitioner premises his present action on the following allegation from his petition: "* * * defendant was interrogated by Lincoln Police Captain Lowell Sellmeyer, subsequent to his arrest over a period of several days, and defendant was not represented nor advised by counsel and did not waive his constitutional right to counsel and the general inquiry into an unsolved crime focused upon defendant and all unvoluntary statements extracted by the police during such unlawful interrogation was used against him at trial thereby violating defendant's constitutional rights to the assistance of counsel in violation of the Sixth and Fourteenth Amendment to the Constitution of the United States."

Petitioner testified in this proceeding that in addition to not being advised as to his rights, he requested permission to contact an attorney and to make a telephone call, and that these requests were denied. It is his testimony that he was questioned by Captain Sellmeyer between 8 and 9 p. m. and at 11 p. m., January 9, 1966; between 2 and 3 a. m., January 10; between 3 and 4 a. m., January 11; and between 2 and 3 a. m., January

12. The robbery occurred sometime between 6:45 and 7:15 p. m., January 9, 1966.

Captain Sellmeyer, who was called as a witness by the State, testified that he was the captain in charge of the 10:30 p.m. to 7 a.m. police shift, and that on January 9, 1966, he did not come on duty until sometime after 10 p. m. He did not interview petitioner until 4:30 a. m., January 10. His testimony as to what occurred on that occasion is as follows: "I told Mr. Bundy that he had a right to contact an attorney, a right to remain silent, and a right to know that everything or anything that he might say could be used against him in a court proceeding. And I told him I wanted to discuss with him the burglary at 946 North 8th, and he agreed to discuss it with me, and told me that he had not committed the burglary and did not need an attorney. I offered him a telephone book as a guide to find an attorney in the yellow pages and he said that he did not need an attorney."

Petitioner at no time ever admitted any involvement in the burglary in question, but denied even knowing the location of the premises burglarized. The statements made covered his movements during the critical period and were exculpatory in nature. While there was a variance between petitioner's testimony at the trial and that of Captain Sellmeyer on those movements, it involved different versions of where petitioner was in the Cole home and whether or not Mrs. Cole admitted him when he came back into the house, as he said, after refusing to go with Mr. Cole. The testimony of Captain Sellmeyer was corroborated at the trial in several respects by the testimony of other witnesses and is challenged only by the testimony of the petitioner himself. Actually, the following testimony of petitioner at the trial tends to discredit his present contention and to support Captain Sellmeyer's testimony: "Q Did the officers question you as to what your whereabouts were on the evening of the 9th of January? A They had not.

Q You mean that all the time you have been in custody no officers asked you where you were on the 9th of January in the evening? A Not until I got to the police station and the police tried to say I did something that I didn't. Q Please try to answer my question. You listen real close. Did any officer talk to you on the evening of the 9th of January as to where you were on that particular evening? A No, not that I recall. They had asked me my name and that. Q Has any officer during the time that you have been in custody asked you what your activities were on the evening of the 9th of January? A Mr. Sellmeyer, I believe, later in the morning, about 3:00 or 4:00 o'clock in the morning, asked me what I was doing or something. Q And at that time did you ever tell Lt. Sellmeyer that you were minding a baby in the bedroom of the Cole home? A (No response) Q Did you ever tell him that? A I don't recall whether I did or not. Q You don't know whether or not you ever mentioned that to him? A No. I mentioned that I had drank—was drinking a gin and tonic that I had made. Q Right for the moment let's not get into what you did mention; let's see if you can tell me whether you recall mentioning these specific facts. Can you state whether or not you told Lt. Sellmeyer that you were watching a baby of Kathleen Dougherty's in the bedroom of the Cole home on the evening of the 9th of January at approximately 7:30 or thereabouts in the evening? Did you ever make such a statement to Lt. Sellmeyer? A No, because I don't believe he asked me."

Petitioner cites three federal cases to support his premise that his constitutional rights were violated: Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977; Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974; and Johnson v. New Jersey, 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882.

Petitioner's trial commenced March 4, 1966, so only

Escobedo, which was decided June 22, 1964, was applicable at that time. The decision in Miranda was not rendered until June 13, 1966. Johnson v. New Jersey, *supra,* is authority for the proposition that Escobedo and Miranda apply only to cases commenced after those decisions were announced. Escobedo requires that prior to custodial interrogation a suspect shall be warned of his absolute constitutional right to remain silent and, at least on request, the right to the assistance of counsel.

Petitioner testified in the post conviction hearing that Captain Sellmeyer interrogated him between 8 and 9 p.m. on the evening of his arrest, and again at 11 p.m. On both of those occasions he testified he made statements substantially like those made at the 4:30 a.m. interrogation January 10. This is in direct contradiction to his testimony at the trial and is the basis on which he seeks to sustain this action. He admits in this hearing that he did not request an attorney from Captain Sellmeyer on January 10, but now claims he did at the interrogation on January 9. Obviously, if his testimony at the trial is to be believed, then he could not have requested an attorney on January 9.

While inconsistency does not automatically destroy the credibility of a witness where it involves extremely relevant and material evidence, we cannot ignore the conclusion reached by the trier of the facts. When a witness gives testimony which as to material facts is in such obvious and irreconcilable conflict that if part of it be true the rest must be false, it ordinarily may not be accepted as the basis of a judicial conclusion.

Petitioner was not unfamiliar with criminal procedures. He had acquired sufficient experience in those procedures to merit an habitual criminal sentence herein. He had a prior acquaintance with Captain Sellmeyer. It strains credulity to believe, if the facts were as petitioner now contends, that he would have testified as he did at the trial.

On the record herein, we find that Captain Sellmeyer

adequately protected the rights of petitioner within Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, and further that it sustains a valid waiver by petitioner of the presence of counsel at his interrogation. Petitioner was represented by court-appointed counsel at all stages of his trial, and had court-appointed counsel in this proceeding.

The judgment overruling petitioner's motion to vacate and set aside the sentence is correct and is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. WILLIAM EUGENE SHARP, APPELLANT.

168 N. W. 2d 267

Filed May 16, 1969. No. 37042.

1. **Criminal Law: Searches and Seizures.** The reasonableness of a search or seizure in the first instance is a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the fundamental criteria laid down by the Fourth Amendment to the Constitution of the United States and in the opinions of the United States Supreme Court.
2. **Criminal Law: Searches and Seizures: Evidence.** It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged or which justify a search and seizure without a warrant even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.
3. **Criminal Law: Appeal and Error.** No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if this court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred.

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

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

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

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, and NEWTON, JJ., and HASTINGS, District Judge.

HASTINGS, District Judge.

Defendant was convicted by a jury of the crime of robbery and sentenced to imprisonment for from 5 to 7 years. Defendant appeals on the sole ground that the trial court admitted evidence of independent criminal acts which had no relation to the offense charged.

Mrs. Leona Mae Paulsen testified that at 11:30 a.m., on March 13, 1968, within the City of Omaha, she was accosted by a man who grabbed her purse and ran. She later identified the defendant as her assailant when she viewed him in a police lineup. Two other witnesses, John B. Harrington and Larry Smith, identified the defendant as the person whom they had observed in the vicinity of the crime at the time that it occurred.

Walter Morgan, Jr., a police officer from Centerville, Illinois, testified outside the presence of the jury for the purpose of laying a foundation for the seizure of exhibits 1 and 2, the victim's coin purse and billfold, from the possession of the defendant. Officer Morgan stated that he first arrested defendant in Illinois based on a tip that defendant was driving a stolen car and had had a traffic accident while driving a car with stolen plates. After requesting identification from the defendant the officer observed exhibits 1 and 2 in defendant's suitcase, which were seized by him and forwarded on to the Omaha police. At the conclusion of that portion of the testimony the trial court stated: "Your objections to the admissibility of Exhibits 1 and 2, that is, a billfold and coin purse, are overruled. We will now have the witness testify in front of the jury."

In his testimony before the jury officer Morgan stated

the time and place of his arrest of the defendant. He was then asked how he happened to place defendant under arrest and over objections by defendant's counsel stated: "Well, we had a tip that the man was in the area driving a stolen vehicle." Defendant's motion for a mistrial made immediately was overruled. Additional testimony of officer Morgan was as follows: "Q. Did you independently of this information have a wanted on Mr. Sharp? MR. CAREY: Objected to— A. He was wanted by our Department. MR. CAREY: I move for a mistrial again. This is the second time they showed suspicion at least of another crime. THE COURT: Overruled. A. He was wanted by our Department for traffic violations and driving a vehicle with stolen license plates."

The officer then went on to identify exhibits 1 and 2 as having been taken from the defendant and forwarded to Omaha, which exhibits were then received in evidence.

Defendant relies exclusively on the general rule that: "Evidence of crimes other than that with which the accused is charged is not generally admissible in a criminal prosecution." In State v. Fleming, 182 Neb. 249, 154 N. W. 2d 65, we said: "The statement could have no legitimate bearing on the question of the guilt or innocence of the defendant in the present trial, yet it puts the defendant at a distinct disadvantage and weakens his presumption of innocence."

The State insists that the particular testimony was necessary in order to prove a lawful search and seizure as incident to a lawful arrest and thereby eliminating the necessity of a warrant. This court in State v. O'Kelly, 175 Neb. 798, 124 N. W. 2d 211, in quoting from Ker v. California, 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726, laid down the appropriate rule: " 'We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and

in the light of the "fundamental criteria" laid down by the Fourth Amendment and in opinions of this Court applying that Amendment.' "

Defendant at all stages of the proceedings resisted efforts by the State to introduce in evidence the billfold and coin purse, contending that they were the fruits of an unlawful search and seizure. It was therefore incumbent upon the State to lay a proper foundation for their reception in evidence.

In People v. Howard, 166 Cal. App. 2d 638, 334 P. 2d 105, the defendant had been living with a woman who complained to the police of his treatment of her with the result that they called at defendant's residence for the purpose of apprehending him. They there found a quantity of stolen goods and defendant was tried on a charge of burglary. Defendant objected to the admission of the evidence regarding the mistreatment of his mistress on the ground that it constituted evidence of other crimes. The court, in holding that the evidence was properly admitted, stated: "Thus, this fact was relevant to explain the entry on the premises and defendant's subsequent arrest without warrants. Evidence to explain the arrest of the defendant and the circumstances surrounding it, even if other prior crimes are disclosed, is admissible." Similarly in the case of State v. Riley, 182 Neb. 300, 154 N. W. 2d 741, this court stated: "Where such evidence, however, is in fact relevant the 'other-crimes' rule does not apply. * * * 'It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the critical elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.' "

Possession of the stolen coin purse and billfold was strong evidence tending to identify defendant as the robber and the evidence regarding the circumstances of his arrest was not only incidental to proof of a major

element of the crime, but essential to support reception of the exhibits.

Even without this evidence, a jury would unquestionably have speculated on the circumstances of his arrest in Illinois and the normal inference would be that he had run afoul of the law there and been picked up on some other charge. The mere fact of his arrest in Illinois, without anything further, under circumstances showing he was not identified until his arrest, unavoidably established an inference that he had been guilty of some other crime, and evidence identifying the nature of the crime would not, therefore, appear to be prejudicial. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if this court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred. See State v. Riley, *supra*.

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

AFFIRMED.

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WILBERT BRUMMUND, APPELLANT, V. ROBERT VOGEL ET AL., APPELLEES.

168 N. W. 2d 24

Filed May 16, 1969. No. 37154.

1. Waters. The owner of land upon which springs are located and are the source of a watercourse does not have an exclusive right to control and use the waters to the injury of a lower riparian owner or senior appropriator.
2. ———. The right of a downstream user for domestic purposes has preference to an upstream appropriator's right to construct a dam to have a reservoir for either agricultural or recreational purposes, where such use will not result in any un-

reasonable diminution of water resulting in injury to the domestic user.

3. **Waters: Witnesses.** The effect of the proposed construction of a dam on the flow of water in a nonnavigable stream is affected by many factors and conditions and is generally a subject for the opinion of expert witnesses with special knowledge and experience in this field of engineering.
4. **Res Judicata.** An equity court has the right to limit the rule of res judicata to issues actually tried without binding the parties to issues not litigated or intended to be litigated.

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

T. L. Grady, for appellant.

Deutsch & Hagen, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, SMITH, McCOWN, and NEWTON, JJ., and RONIN, District Judge.

RONIN, District Judge.

This is an action in equity wherein Wilbert Brummund, plaintiff herein, seeks to enjoin Robert Vogel and Gloria Vogel, defendants, from constructing an earthen dam in a spring-fed creek on defendants' land. After trial, the district court entered judgment for the defendants and denied an injunction. From an order overruling his motion for new trial, the plaintiff has appealed.

Plaintiff is the owner of 200 acres of land in the west half of Section 23, Township 24 North, Range 1 East of the 6th P.M., in Stanton County, Nebraska. The defendants are the owners of the northeast quarter of Section 22, which tract lies immediately west of the north one-half of plaintiff's land and is separated by a county road on the section line.

There are two separate, small spring-fed creeks which have their sources on the defendants' farm, flow in a general southeasterly direction, and merge into one stream near the east section line of their land. This stream then proceeds under a bridge on the county road onto the plaintiff's farm and continues in a southerly di-

rection along the west edge of his farm and eventually flows into Pleasant Run Creek south of plaintiff's land. These two creeks on the defendants' land are identified as West Creek and East Creek. The springs which supply West Creek are larger than East Creek. Its ditch channel varies from 2½ to 6 feet deep and during rains or melting snows becomes a good-size creek. East Creek becomes dry during part of the summer when there is no run-off of surface water and after the merger of the two creeks, portions of the creek bed on plaintiff's land tend to become dry for some time in the summer. The proposed location of defendants' dam is on West Creek above its merger with East Creek. The evidence further shows that the plaintiff was pasturing 28 head of cattle and their calves whose main source of water was the creek that came from the defendants' land. Plaintiff also has a small spring-fed creek which source is on his land, but which dries up in summer weather.

Plaintiff testified he had never previously seen the plans for the proposed dam, which were received in evidence. The plans are for an earthen dam 16 feet high from the bottom of the West Creek bed, 520 feet in length, 10 feet wide at the top, and with a width of about 80 feet at its base. The primary overflow in the dam is a 30-inch vertical pipe or morning glory intake located 10½ feet above the bed of the creek, which connects with a 24-inch horizontal pipe for conducting water through the dam. There is a provision for an emergency spillway at 13½ feet above the creek bed. In addition, a 24-inch vertical pipe with gravel was placed 6½ feet above the bed of the stream, this being attached to a 1½-inch pipe which was 20 feet in length and which ran into the interior of the dam and joined with the 24-inch pipe which served the primary overflow outlet.

Plaintiff's engineer, Harvey Johnson, testified that he had made a visual inspection of the area surrounding the proposed dam, and made general reference to the

plans and specifications of the dam which are in evidence. He did not relate any measurements that he personally took. Neither did he measure the rate of flow of West Creek either above or below the proposed site of the dam, nor could he estimate it. Further, the witness was not informed as to the size and steepness of the run-off area, the usual amount of rainfall in this locality during the pasture season, the nature of the soil or of the terrain above the dam, nor the quantity of water that might percolate through, under, or around the dam, nor the depth of the bed of West Creek at the site of the dam. Plaintiff's engineer stated that there would be a loss of water by evaporation, and that by observation it was his opinion that the amount of water that would go through the 1½-inch pipe would not be as ample as the supply that generally flows downstream. He agreed with defendants' witness that ⅓-inch run-off would fill the pond, and once the pond was filled he could not positively state that there would be any impediment whatever to the normal flow of the stream below the dam just prior to its entry on plaintiff's land.

Gene Phillips, the Stanton County soil conservationist, was the only witness for the defendants. He related that he had 9 years of experience working with approximately 100 different dams, of which 25 to 30 dams had been in Stanton County. His signature as technician appears on exhibit 9B which is a profile of the drainway with detailed measurements of the immediate watershed involved. Exhibit 9A is a cross-section drawing of the proposed dam, giving detailed specifications. Phillips testified that the proposed dam met the requirements of the federal government; would provide for a pond 1.3 acres in maximum surface area with a maximum storage capacity of 3.6 acre feet; that the pond would be below and not reach the area of the fountainhead of the springs; and that the sources of the water would be a 155-acre drainage area of the defendants' land and the water from the springs of their land. The

witness took various readings on June 7, 1967, and determined the rate of flow of West Creek was 25 gallons per minute at the dam site and 20 gallons per minute below the dam site and just about the junction of these creeks, and that the rate of flow in the East Creek was 12 gallons per minute. Phillips testified that the 1½-inch pipe was usually not included in these dam structures, but occasionally were inserted as a device for livestock watering and he inferred that it was included for plaintiff's benefit; that 3/10 of an inch run-off water over the 155-acre drainage area would completely fill the pond if empty, independent of any water from the spring, and the water level would then be at the primary overflow 30-inch riser on the dam.

We find that the waters from the springs on defendants' land which are the source of West Creek flow generally, although not continuously, in a well-defined channel and in a sufficient quantity and direction across plaintiff's land into another stream of water to constitute a watercourse within the meaning of section 31-202, R. R. S. 1943. The owner of the land upon which springs are located whose waters are the source of a definite watercourse does not have an exclusive right to control and use the waters therefrom to the injury of a lower riparian owner or senior appropriator. Rogers v. Petsch, 174 Neb. 313, 117 N. W. 2d 771; Slattery v. Dout, 121 Neb. 418, 237 N. W. 301.

This being an action in equity, we are required to determine the issues of fact complained of de novo and reach an independent conclusion without reference to the findings of the district court. § 25-1925, R. R. S. 1943. The factual situation presented in this case involves a further application of competing water claims by an upstream appropriator with one who is a downstream domestic user under the guidelines detailed in Wasserburger v. Coffee, 180 Neb. 149, 141 N. W. 2d 738.

The evidence in this case is undisputed that plaintiff and his immediate predecessors have for many years

watered their cattle from the water that came from West Creek which flowed through or on their pasture land. Plaintiff does not plead nor prove facts entitling him to vested riparian rights under the common law which might precede April 4, 1895, the effective date of the irrigation act of 1895, which is the cut-off date for the acquisition of riparian rights and the invoking of the law of priority of application giving the better right as between those using the water for the same or different purposes, and preferring domestic use over other uses in cases of insufficient water. §§ 46-203 and 46-204, R. R. S. 1943; Wasserburger v. Coffee, *supra*. Plaintiff concedes that he has never applied for nor secured any water rights from the Department of Water Resources. The defendants are upstream appropriators having applied for and received on August 24, 1967, their priority of appropriation for storage of water for watering livestock and erosion control purposes. We hold that the defendants have the right to have a reasonable use of the waters of West Creek for domestic purposes which includes the watering of their stock even though this may result in the diminution of the water supply arising from a reduced water flow being available for domestic purposes for the plaintiff downsteam user. However the intended purpose of the defendants in constructing the dam to fill the pond is not primarily for domestic purposes. The plaintiff testified to an account in the newspaper that it was to serve as a fish pond which would be primarily for recreational purposes, while the defendants' application for authority recites that it is for domestic and soil erosion control purposes, the latter being agricultural in nature.

Article XV, sections 4 to 6, Constitution of Nebraska, incorporates a portion of the irrigation act of 1895 and particularly what is now section 46-204, R. R. S. 1943, in providing as follows: "* * * 'Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any

natural stream are not sufficient for the use of all those desiring to use the same, those using the waters for domestic purposes shall have preference over those claiming it for any other purpose, * * *.' " Wasserburger v. Coffee, *supra.*

Exhibit 11 is the certificate of the Department of Water Resources approving the defendants' application to impound the waters of this tributary to Pleasant Run Creek, but it expressly recites as a condition: "That the prior rights of all persons who, by compliance with the laws of the State of Nebraska, have acquired a right to the use of the waters in this stream must not be interfered with by the issuance of this permit." We hold that the right of plaintiff to use water from this stream for domestic purposes is superior to the defendants' right to construct a dam to have a reservoir for either agricultural or recreational purposes, and the fact that defendants may also use it for domestic purposes will not justify any unreasonable diminution of water resulting in harm to plaintiff.

The correlative rights of the parties to the use of the water in West Creek having been determined, we turn to the remaining issue of fact as to whether the construction of the proposed dam will result in an unreasonable shortage of water for plaintiff to his damage. The proposed construction of the dam is for obvious beneficial purposes. The defendants further contend it will actually benefit and not harm plaintiff. It is stated in 56 Am. Jur., Waters, § 27, p. 517: "* * * a dam may be constructed and maintained across a stream by a riparian proprietor, or by another with proper authority, provided that thereby he does not appreciably diminish the amount of water which should naturally flow onto or by the land of lower proprietors, or materially affect the continuity of the flow, * * *." The burden of proof is upon the plaintiff to establish that the upper proprietor will make an unreasonable use of the

waters of the stream to his damage. 93 C. J. S., Waters, § 37g, p. 678, § 36(9), p. 666.

The effect of the construction of a dam on the flow of water in a nonnavigable stream in this case is affected by many factors and conditions and is generally a subject for the opinion of expert witnesses with special knowledge and experience in this field of engineering. Olson v. City of Wahoo, 124 Neb. 802, 248 N. W. 304. The expert evidence offered by the plaintiff is indefinite and inconclusive as to what effect the proposed dam would have on the flow of water downstream, and we hold plaintiff has not met his required burden of proof.

At the time of the hearing on the motion for new trial, the plaintiff filed his affidavit in support thereof, but did not offer it in evidence. The affidavit does not appear in the bill of exceptions and will not be considered on appeal. Blanco v. General Motors Acceptance Corp., 180 Neb. 365, 143 N. W. 2d 257.

Plaintiff complains that the defendants have the right to control the shut-off valve on the 1½-inch pipe which was placed in the proposed dam 6½ feet above the bed of the stream. The evidence of the defendants is to the effect that this 1½-inch pipe was specially designed for the benefit of the plaintiff. Plaintiff is entitled to protection from any interference by the defendants as to the uninterrupted flow of water through this pipe which is provided for in the plans of the proposed dam, as well as any silting or other obstruction in the functional operations for the conducting of water through the various outlets of the dam.

We hold that plaintiff's complaint in regard to the fact that the 1½-inch pipe has a shut-off valve under the control of the defendants and the right to have an uninterrupted flow of water through this pipe was not an issue litigated between the parties so as to give rise to the defense of res judicata in any subsequent litigation. An equity court has the right to limit the rule of res

judicata to issues actually tried without binding the parties to issues not litigated or intended to be litigated. Muff v. Mahlock Farms Co., Inc., *ante* p. 286, 167 N. W. 2d 73. To this extent, we modify the order of dismissal and affirm the judgment of the trial court.

AFFIRMED AS MODIFIED.

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AGRI-TEK SUPPLY COMPANY, APPELLANT, V. DONALD D. GAETH, APPELLEE.
168 N. W. 2d 278

Filed May 23, 1969. No. 36970.

**Contracts: Interest: Usury.** Where a sales contract provides for usurious interest on a part of the purchase price and for legal interest on another part of the purchase price represented by a note, the illegal interest charged and paid may be offset against sums due on the note.

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

John L. Cutright, for appellant.

Yost & Yost, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and SCHMIDT, District Judge.

SCHMIDT, District Judge.

This is a suit on a note. The answer set up a claim of usury. Both sides moved for a summary judgment. The case comes here on appeal from an order of the trial court sustaining the defendant's motion for summary judgment and dismissing plaintiff's petition.

In the year 1961, the defendant purchased a portable feed mill and mixer from Champion Portable Mill Company under a written sales contract. The plaintiff, as a dealer for Champion, negotiated the sale. The price was $19,000. By the terms of the sales contract there

was to be a downpayment of $4,750 to consist of $2,000 in cash and a 90-day note for $2,750. The balance of $14,250 was to be paid in 36 monthly installments of $467 each, which included interest. The 36 monthly installments were paid in full to Champion or its assignee. So interest of $2,562 was charged and paid. This was usurious. See § 45-101, R. R. S. 1943.

As agreed, the defendant executed his $2,750 note payable to Champion and delivered it to Champion. Defendant made payments of principal and interest on this note and on September 18, 1964, the balance due was $1,764.31. Plaintiff guaranteed payment of the note at the time of the sale. Under its guarantee plaintiff paid Champion the $1,764.31 and on September 18, 1964, took an assignment of the note. Its claim here is for the $1,764.31 plus interest at 6 percent per annum from September 18, 1964.

The trial court in effect held that the interest of $2,562 that was paid on the $14,250 was usurious; that this tainted the $2,750 note; and that as the illegal interest paid to Champion or its assignee exceeded plaintiff's claim, plaintiff should take nothing. With this we agree. See Hall v. Mortgage Security Corp. of America, 119 W. Va. 140, 192 S. E. 145, 393, 111 A. L. R. 118 (1937).

Plaintiff has asked us to sever the good from the bad and enforce the good. In support of this plaintiff has cited 91 C. J. S., Usury, § 58, p. 640, which has some 19 cases there noted. All are distinguishable from the facts here.

A further contention of plaintiff is that as it received none of the illegal interest, such interest should not be offset against plaintiff's claim. But the plaintiff stipulated that any defense good against Champion was good against it. Technically it can be argued that an offset is not a defense, however we conclude that the word defense was not used in the stipulation in a technical sense, but in the sense that anything that would defeat recovery on the note in the hands of Champion would

defeat recovery by plaintiff. Clearly defendant had the right of offset as against Champion.

The judgment of the trial court is affirmed.

AFFIRMED.

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MONICA H. FOGEL, APPELLANT, V. DANNY L. FOGEL, APPELLEE.
168 N. W. 2d 275

Filed May 23, 1969. No. 37116.

1. **Divorce: Appeal and Error.** An appeal from a judgment modifying a decree of divorce by authority of section 42-324, R. R. S. 1943, is considered and decided by this court de novo upon the record made in the trial court.
2. **Divorce: Parent and Child.** While the discretion of the trial court with respect to awarding or changing the support of minor children is subject to review, 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.
3. ———: ———. A divorce decree does not freeze a father in his employment. One may in good faith make an occupational change even though that change may reduce his ability to meet his financial obligation to his children.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Fromkin, Fromkin & Herzog, for appellant.

Robert K. Silverman and Silverman & Silverman, for appellee.

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

SPENCER, J.

Appellant was granted a divorce from the appellee on October 1, 1965. Appellee was ordered to pay $600 per month for the support of three minor children, alimony of $325 per month, and to maintain an insur-

ance program for the benefit of the children, the cost of which is $150 per month.

Appellant remarried, terminating the provision for alimony. She now lives in Cincinnati, Ohio. Appellee has also remarried, and lives in San Diego, California.

Appellee, alleging that he was attempting to establish himself in a new field of endeavor with a better future, petitioned the court for a reduction in the amount of the child support because of reduced earnings. Appellant petitioned the court for a $200 increase in the amount of the monthly child support because of the increase in costs of caring for the children, who are now 12, 10, and 8 years of age. The trial court denied the application for an increase and reduced the child support to $133 for each child, or $399 per month, but did not disturb the insurance provision. Appellant perfected an appeal to this court.

At the time the divorce was granted, appellee was employed as a home improvement salesman, earning in excess of $20,000 annually. When appellee's sales work was curtailed because of managerial duties and he could not work out a satisfactory salary arrangement with his employer, he terminated that employment in March 1967. Appellee then moved to San Diego, California, and attempted to establish himself with an encyclopedia sales organization on the promise of an executive position. After 8 months, when it became evident that this promise would not be fulfilled and he would be restricted to door-to-door sales work, he sought other employment. During the course of the 8 months, his earnings averaged $300 weekly.

Appellee, who was then 35 years of age, decided to enter the real estate sales field. To qualify for a license he attended a training school for 6 weeks. He secured a real estate sales license in January 1968, and since that time has been associated with a real estate broker on a strictly commission basis. His earnings through July 1968, were $5,442.80, from which he paid his automobile

and personal expenses. He estimated his net earnings for 1968 would be at least $10,000. When he can qualify for the sale of commercial property he expects to increase his earnings substantially.

"An appeal from a judgment modifying a decree of divorce by authority of section 42-324, R. R. S. 1943, is considered and decided by this court de novo upon the record made in the trial court." Bowman v. Bowman, 163 Neb. 336, 79 N. W. 2d 554. However, while the discretion of the trial court with respect to awarding or changing the support of minor children is subject to review, 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.

Appellant predicates her opposition to appellee's application on the premise that appellee's voluntary change of circumstances regarding career, residence, and marital status are mere adjustments of life and are not changes of circumstance sufficient in law to permit and allow a reduction of child support and a denial of an increase of child support payments. We do not accept appellant's premise. The cases cited by appellant are those where a husband, acting in bad faith, erodes his financial position. That is not the present case.

There is no willful misconduct or neglect involved in the present application. Appellee did not leave his former employment for the purpose of evading his responsibility but because of circumstances which eventually could have affected his income. The record would justify an inference that he made serious efforts to establish himself in employment with better prospects for the future. There is no question appellee is a capable individual with the energy, intelligence, and enterprise to be highly successful in sales work. His present occupation can be a lucrative one, but he must have an opportunity to make the necessary adjustments to realize his potential.

A divorce decree does not freeze a father in his employment. One may in good faith make an occupational change even though that change may reduce his ability to meet his financial obligation to his children. Appellant ignores the fact that the judgment of what is fair includes not only a consideration of the circumstances of the children but of the father as well. Ordinarily, a man makes a change in his occupation with the hope of improving his prospects for the future. When parents are living together the standard of living of the children rises or falls with the changes in the father's fortunes. Should this readjustment be any different because divorce has separated them physically? We think not, unless the move is made to avoid responsibility or made in bad faith.

The following from Nelson v. Nelson, 225 Ore. 257, 357 P. 2d 536, 89 A. L. R. 2d 1, is pertinent herein: "But these cases refusing to recognize the husband's remarriage as a basis for modifying the decree are not applicable to the case before us. Here the defendant has remarried but he does not rely upon that change of circumstance in requesting a modification of the decree; he asks the court to adjust his obligation under the decree to his reduced earning power brought about by his change in employment. Where the divorced husband proposes to remarry it may be reasonable to leave him with a choice of celibacy on the one hand or the risk of financial hardship resulting from remarriage on the other. But the refusal to recognize a change in occupation or employment as a basis for modification would force the defendant to be frozen in his present employment unless he would accept the prospect of financial hardship. We do not believe that it would be sound policy to place such a restraint upon him. Admittedly he has a duty to support his children, and the decree which is sought to be modified expresses that duty in a fixed amount. But the amount is not fixed immutably in the decree; it is subject to modification if circum-

stances fairly warrant modification. The judgment of what is fair must include a consideration not only of the child's economic circumstances, but of his father's as well. In the proper case it may be just to reduce the child's standard of living if that is necessary to alleviate his father's financial hardship. The fact that such financial hardship is brought about through the father's change in employment, even though made with knowledge that it will result in a reduction of his financial resources, does not preclude the court from considering the change as a basis for a modification of the decree. The change must, of course, be made in good faith."

Appellant, in support of her application for an increase in the child support allowance submitted a monthly expense breakdown for the care of the children in the amount of $1,233.50. The itemization is as follows: $400 for a housekeeper; $122.50 for the childrens' share of the mortgage payment on a $55,000 home provided by her present husband; $66 for the childrens' share of taxes and insurance; $36 for their share of the utilities; $200 for their share of the food; $50 for clothing; $40 for laundry; $40 for transportation; $75 for religious expenses; $34 for public school expenses; $20 for books and supplies; $50 for medical expense; and $100 for summer camps, which is estimated to cost $1,200 for the summer season. In view of the conclusion we have reached, it is not necessary to discuss the propriety of several of the items listed. Suffice it to say that a decrease and not an increase is the proper remedy herein.

Appellee should have an opportunity to establish himself in his present occupation. When and if appellee reaches his potential, appellant is not without remedy. The trial court did not abuse its discretion herein, and the judgment should be and hereby is affirmed. Appellant is allowed $200 for the services of her attorney in this court, and costs are taxed to the appellee.

AFFIRMED.

GENE A. PINKERTON, APPELLANT AND CROSS-APPELLEE, V. LAMAR P. LEONHARDT ET AL., APPELLEES AND CROSS-APPELLANTS.
168 N. W. 2d 272

Filed May 23, 1969. No. 37122.

1. **Pleadings.** The defendant has a right to insist that all facts essential to the existence of a cause of action against him be stated in the petition.
2. **Pleadings: Conversion.** In an action for conversion the plaintiff must allege facts showing a right to immediate possession of the property at the time of the conversion.
3. **Pleadings: Contracts.** In an action for breach of contract the plaintiff must allege facts showing a promise and a breach thereof as the basis for recovery.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed.

William S. Padley, for appellants.

Murphy, Pederson & Piccolo, for appellee.

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

BOSLAUGH, J.

The plaintiff's petition, filed June 5, 1962, alleged that the defendants had loaned the plaintiff $1,000 to purchase a tractor and trailer; that to secure the loan, the titles to the tractor and trailer were taken in the name of the defendants; that the plaintiff made monthly payments to the Mack Truck Corporation and to the United States National Bank of Omaha, Nebraska, and repaid the sum of $1,000 to the defendants; that the defendants, without cause, "converted said vehicle to their own use without the consent of this Plaintiff," and upon demand, refused to return the truck and trailer to the plaintiff; and that "as a result of the conversion of said vehicle by the Defendants without the consent of the Plaintiff," the plaintiff had suffered damages of $8,500, that being the amount of the fair value of the vehicle in excess of

the unpaid balance of the mortgage "at the time of said conversion."

The trial court sustained a general demurrer to the petition and dismissed the action. The plaintiff's motion for new trial was overruled and he has appealed.

The petition attempts to allege a cause of action for damages for conversion. It is defective in that it fails to allege facts showing a right to immediate possession in the plaintiff. Jessen v. Blackard, 159 Neb. 103, 65 N. W. 2d 345.

The plaintiff argues that the petition should be considered as alleging a cause of action for breach of contract. But the petition fails to allege a contract and a breach thereof as the basis for recovery. There is no sufficient allegation of a promise on the part of the defendants in the petition filed in this case.

Pleadings perform a useful and necessary purpose. They frame the issues upon which the cause is to be tried and advise the adversary as to what he is called upon to meet. Johnson v. Ruhl, 162 Neb. 330, 75 N. W. 2d 717. The defendant has a right to insist that all facts essential to the existence of a cause of action against him be stated in the petition. Ainsworth v. County of Fillmore, 166 Neb. 779, 90 N. W. 2d 360. A pleading should be construed with reference to the general theory upon which it proceeds, and should not be uncertain as to which of two or more theories is relied on. Fellers v. Howe, 106 Neb. 495, 184 N. W. 122.

The demurrer was properly sustained. The judgment of the district court is affirmed. It is unnecessary to consider the cross-appeal.

AFFIRMED.

SPENCER, J., participating on briefs.

MARGARET STIFF, APPELLANT, V. MILDRED STIFF ET AL., APPELLEES.
168 N. W. 2d 273

Filed May 23, 1969. No. 37142.

1. **Joint Tenancy: Partition: Judgments.** The mere commencement of an action for the partition of property held in joint tenancy does not serve to terminate such tenancy; only the judgment or decree has that effect.
2. ———: ———: ———. The death of one of two joint tenants pending the obtaining of a judgment or decree of partition leaves nothing to be partitioned, the interest in the whole having passed to the survivor.

Appeal from the district court for Custer County: S. S. SIDNER, Judge. Appeal dismissed.

Berreckman & Nelsen, for appellant.

Keith Windrum and Darrell J. Stack, for appellees.

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

CARTER, J.

This matter arises on a motion to dismiss the appeal as moot. The factual situation is substantially as follows: Floyd M. Stiff died testate. By his will, he devised his real estate to his wife and mother by a provision which was brought to this court for construction after the trial court denied a partition of the property on the part of the mother. The issue was the nature of the estate devised and whether or not it was subject to partition.

On March 14, 1968, the mother filed a suit for a partition of the property which was denied and from which judgment the mother appealed. On April 15, 1969, after the argument on the merits in this court, the mother died. The wife thereupon filed a motion to dismiss the appeal in this court on the ground that the wife became the sole owner by survivorship and that there was no estate to partition. It is clear to us that whether the

estate was a joint tenancy or a tenancy in common with right of survivorship, the title to the whole of the property under the issues presented passed to the wife by survivorship on the death of the mother.

The filing of the suit in partition does not destroy the joint tenancy, if such it be, nor the right of survivorship, if it be a tenancy in common with right of survivorship. The filing of the partition suit in no manner changed the estate with which the parties were invested by the will.

The general rule is: "A joint tenancy may be terminated or severed by any act which destroys one or more of its unities. * * * A joint tenancy may also be severed by the act of the joint tenants in destroying the unity of possession, as by partition; but a mere temporary division, with no intention of partition, will not amount to a severance, nor will the mere institution of an action for partition." 48 C. J. S., Joint Tenancy, § 4, p. 927.

"Generally speaking, a joint tenancy is terminated by any act which is inconsistent with its continued existence or which operates to destroy one or more of its essential unities of interest, title, time, and possession. * * * Whenever such severance takes place the joint tenancy terminates and the right of survivorship is destroyed, for the rule is that anything which destroys the unity of title or interest without affecting the unity of possession will turn the interest severed from the others into a tenancy in common as regards the remaining joint tenants. * * * A joint tenancy terminates where a complete partition of the property has been obtained, whether by decree of court or otherwise. * * * Further, the mere commencing of an action for partition of joint-tenancy property does not serve to terminate the tenancy; only the judgment or decree has that effect, and the death of one of two joint tenants pending a petition leaves nothing to partition." 20 Am. Jur. 2d, Cotenancy and Joint Ownership, §§ 15 and 20, pp. 108 and 114.

The following cases support the above text statements: Teutenberg v. Schiller, 138 Cal. App. 2d 18, 291 P. 2d 53; Ellison v. Murphy, 128 Misc. 471, 219 N. Y. S. 667; Dando v. Dando, 37 Cal. App. 2d 371, 99 P. 2d 561; Sheridan v. Lucey, 395 Pa. 306, 149 A. 2d 444; 64 A. L. R. 2d, Anno: Joint Tenancy—Termination, § 28, p. 956. We conclude that the mere filing of a petition for partition does not have the effect of destroying a joint tenancy. Nor will the filing of such a petition have the effect of destroying a right of survivorship attached to a tenancy in common. It is the rule of this jurisdiction that a survivorship attached to a tenancy in common is indestructible except by the voluntary action of all the tenants in common to do so. Anson v. Murphy, 149 Neb. 716, 32 N. W. 2d 271.

In the resistance to the motion to dismiss, counsel for the deceased mother shows by affidavit that on January 28, 1969, pending the appeal of the case at bar, the mother conveyed all of her undivided interest in the real estate to her daughter, Gladys Lonn. It is contended that the conveyance of the real estate by the mother had the effect of destroying the joint tenancy, if such it be, leaving a tenancy in common. We point out that this issue is not raised by the pleadings or evidence and that the grantee of the deed is not a party to the action. The giving of the deed and its legal effect cannot be here decided and is not pertinent to the issue before the court.

We conclude, therefore, that the present appeal has become moot as to the issues raised and that the appeal must be dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. HENRY N. BROCKMAN, JR., APPELLANT.
168 N. W. 2d 367

Filed May 23, 1969. No. 37148.

**Criminal Law: Sentences.** Error in allocution may be harmless.

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

Henry N. Brockman, Jr., and Johnston, Grossman & Johnston, 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.

SMITH, J.

The sentence on defendant's guilty plea to a charge that he had unlawfully possessed a narcotic drug was 2 years imprisonment and a $3,000 fine. We review it on appeal in respect to allocution and legislative reduction of penalty during pendency of appeal.

Defendant, an Alabama college student appearing pro se, and the county attorney informed the sentencing court of these facts: Defendant had harvested 200 pounds of marijuana with intent to sell the cannabis, and the offense was his first. The court then inquired: "Do you have anything to say, Mr. Brockman, prior to sentence? Is there any statement you wish to make at this time?" Defendant answered: "No. Only until last Thursday, I didn't even know what the marijuana plant looked like, let alone the use of it."

The allocution statute requires the court to ask whether defendant has anything to say why judgment should not be passed against him. § 29-2201, R. R. S. 1943. Its major justification today is therapeutic effect. A. B. A. Minimum Standards, Sentencing (Approved Draft, 1968), § 5.4, Commentary c, p. 254. The error here

was harmless. Precedent has implied that every error in allocution is prejudicial. See, McCormick v. State, 66 Neb. 337, 92 N. W. 606; Evers v. State, 84 Neb. 708, 121 N. W. 1005. The implication is disapproved.

The information employed the phrase "narcotic drug" without further specification. It charged a crime punishable "for the first offense, by a fine not exceeding three thousand dollars and by imprisonment . . . for not less than two years nor more than five years; . . ." § 28-470, R. R. S. 1943.

During pendency of this appeal, L.B. 2, 80th Leg. Sess., 1969, became effective. It reads in part: "Sec. 2. A person possessing cannabis . . . with the intent to sell or distribute the same or who knowingly . . . possesses the same in an amount consisting of . . . substances of an aggregate weight of one half pound or more containing any cannabis shall be guilty of a felony and, upon conviction thereof, shall be imprisoned . . . not less than one year nor more than five years . . . . Section 4. The penalties . . . shall apply to all . . . informations . . . pending on the effective date of this act against any individual for violation of . . . this act."

Under our Rule 8a 2 (3) and section 29-2308, R. R. S. 1943, we modify the judgment by vacating the fine and reducing the term of imprisonment to 1 year. So modified the judgment is affirmed.

AFFIRMED AS MODIFIED.

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FLORENCE GILL, APPELLANT, V. JOHN S. HRUPEK, DOING BUSINESS AS JOHNNY HRUPEK'S CAFE, APPELLEE.
168 N. W. 2d 377

Filed May 23, 1969. No. 37180.

1. **Workmen's Compensation.** The waiting time in section 48-125, R. R. S. 1943, begins to run when the employer receives notice

of the disability, not when notice is given to the compensation carrier.

2. ———. The Nebraska Workmen's Compensation Act is remedial in nature and its purpose is to do justice to workmen without expensive litigation and unnecessary delay.

Appeal from the district court for Douglas County: JOHN C. BURKE. Judge. Reversed and remanded.

Robert C. Vondrasek, for appellant.

Emil F. Sodoro and Jon S. Okun, for appellee.

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

SPENCER, J.

This action arises under the provisions of the Nebraska Workmen's Compensation Act. It is here for trial de novo.

The case was tried before one of the judges of the Nebraska Workmen's Compensation Court who rendered an award finding plaintiff sustained a compensable injury and that she was temporarily totally disabled for a period of 2 weeks. Compensation was allowed for 1 week, in the amount of $42, together with medical expenses of $18, $21 as a penalty on the award, and $100 attorney's fees. The defendant-employer appealed directly to the district court where the award was sustained but the penalty and attorney's fees were disallowed. Plaintiff perfected an appeal to this court.

The injury occurred on August 20, 1967, but was not reported by the defendant to his compensation carrier until after a petition was filed in the compensation court. The defendant was billed for medical services rendered in the amount of $18. On February 6, 1968, the treating physician advised plaintiff that the defendant had ignored his two requests for payment, and requested payment from the plaintiff. Plaintiff consulted an attorney who on February 22, 1968, 6 months after the injury, made a written demand on the defendant for

payment of the medical bill and for $42 for 1-week's compensation. Defendant paid the medical bill but ignored the claim for compensation. Plaintiff filed her petition in the compensation court on May 22, 1968, 3 months after her counsel had made written demand on the defendant for payment. Defendant filed a first report of the injury with his compensation carrier June 7, 1968. This report listed plaintiff's length of disability at 2 weeks. The compensation court so found and assessed a penalty pursuant to section 48-125, R. R. S. 1943. The district court sustained the award but erroneously disallowed the penalty. We sustain the assessment of the penalty and the allowance of attorney's fees.

Section 48-125, R. R. S. 1943, provides as follows: "Except as hereinafter provided, all amounts of compensation payable under the provisions of this act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death; Provided, fifty per cent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability. Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed the employee by the court. In the event the employer appeals to the district court from the award of the compensation court, or any judge thereof, and fails to obtain any reduction in the amount of such award, the district court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court."

The plaintiff's claim was not disputed in the compensation court. On appeal from the award defendant raised a question as to the extent of plaintiff's disability. As we view the record, there was no reasonable con-

troversy until defendant's compensation carrier attempted to raise one on a technicality after the award in the compensation court. It would be a travesty on justice to conclude that defendant in good faith pursued his remedy with proper diligence, as argued in his brief. He is confusing his action with that of his compensation carrier after plaintiff filed her petition. The waiting time in section 48-125, R. R. S. 1943, begins to run when the employer receives notice of the disability, not when notice is given to the compensation carrier.

There has never been any issue herein other than plaintiff's claim for 1-week's compensation and payment of medical services. Defendant paid plaintiff's medical bill sometime after the letter of February 22, 1968, and not only ignored her claim for compensation but failed to report the accident and claim to his compensation carrier until 16 days after plaintiff filed her petition in the compensation court. This was more than 9 months after the accident and more than 3 months after plaintiff's attorney had made a demand for payment. Defendant, in his report to his carrier on June 7, 1968, stated that plaintiff's probable length of disability was 2 weeks.

The Workmen's Compensation Act is remedial in nature and its purpose is to do justice to workmen without expensive litigation and unnecessary delay. Hanley v. Union Stock Yards Co., 100 Neb. 232, 158 N. W. 939.

This was a minimal claim, the payment of which defendant sought to avoid by ignoring it. Obviously, section 48-125, R. R. S. 1943, is particularly pertinent to the facts herein. The allowance of the penalty and an attorney's fee were proper.

For the reasons given, the judgment is reversed and the cause is remanded to the district court for the entry of a judgment in conformity with this opinion. Plaintiff is allowed $350 for attorney's fees in this court.

REVERSED AND REMANDED.

CARTER, J., dissenting.

This case originated in the Nebraska Workmen's Com-

pensation Court which, after a hearing before a single judge, entered an award for disability in the amount of $42, with a penalty for delay of 50 percent, and an attorney's fee of $100. An appeal was taken to the district court. On a trial de novo, the district court, after a hearing, entered an award for 1 week's disability without penalty or an attorney's fee. The plaintiff appealed to this court.

On September 18, 1968, a trial of the case was had. The court's journal for said date shows: "Now, on this day, this matter came on for trial, the parties hereto appearing by their respective counsel. Plaintiff produced evidence. Defendant produced evidence. Parties rested. Summations made. Matter taken under advisement." On October 18, 1968, the decree heretofore mentioned was entered.

I am in complete agreement with the trial court's holding that plaintiff was disabled for 2 weeks as the result of an accident arising out of and in the course of the employment. The employer admits this fact in his pleadings. The only issue is whether or not there was a delay in the payment of compensation that warranted the assessment of a penalty under the provisions of section 48-125, R. R. S. 1943. This in turn requires a determination of whether or not the delay was the result of a reasonable controversy. If it was, and this is the sole and only issue, the employer is not subject to penalty. The trial court determined after a trial that a penalty could not properly be assessed. Wheeler v. Northwestern Metal Co., 175 Neb. 841, 124 N. W. 2d 377; Hiestand v. Ristau, 135 Neb. 881, 284 N. W. 756.

A purported bill of exceptions was filed in this court. It consists solely of eight exhibits. The certificate of the court shows that the presence of a court reporter was mutually waived and that there was no stenographic report of the trial. There is no certificate by the judge or court reporter that the bill of exceptions contains all the evidence introduced and considered by the court.

It is a partial bill of exceptions not in accordance with Rule 7c, of the Revised Rules of the Supreme Court, 1967. We are required to take notice of the fact that there was no proper bill of exceptions filed in a case before us. Bryant v. Greene, 163 Neb. 497, 80 N. W. 2d 137.

"It was many years ago determined, has since been frequently repeated, and quite recently reiterated that a bill of exceptions in a case tried in the district court must be authenticated by the certificate of the clerk of such court to entitle it to be considered in the Supreme Court. If a purported bill of exceptions has not been so authenticated, its contents will not be examined or considered by this court for any purpose. * * * The practice is firmly established and has been consistently adhered to that this court will on its own motion refuse to consider a document appearing in the record and purporting to be a bill of exceptions when not authenticated as such by the certificate of the clerk of the district court. * * * In the absence of a bill of exceptions, no question will be considered, a determination of which requires an examination of the evidence produced in the trial court. It follows that any assignment of error that requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions." Wabel v. Ross, 153 Neb. 236, 44 N. W. 2d 312.

In In re Estate of Jurgensmeier, 142 Neb. 188, 5 N. W. 2d 233, we said: "Two sufficient reasons require us to sustain the action of the district court: First, the district court journal recording the action on this special appearance recites that 'hearing is had, evidence taken.' This evidence not being perpetuated and incorporated in the bill of exceptions allowed in this case, we are compelled to assume that the judgment entered by the district court was in accord with the proof."

In Hilligas v. Farr, 171 Neb. 105, 105 N. W. 2d 578, we said: "The exaction of the law that the record of the evidence must be presented when questions of fact

are to be determined on appeal means that the entire record of the evidence shall be presented."

I submit that under the foregoing holdings a judgment of the district court is presumptively correct in this court when there is no bill of exceptions containing all the evidence, except when a partial bill is agreed upon in accordance with Rule 7c, of the Revised Rules of the Supreme Court, 1967.

Even if the exhibits contained in the purported bill of exceptions could be considered by this court, there is nothing in them that sustains a reversal in this case. The defendant below admitted disability for 2 weeks and liability for the payment of compensation for 1 week. Defendant below denied that he was subject to a penalty for delay under the compensation act. This was the issue before the court. The presumption is that the evidence adduced sustains the findings of the trial court. While the briefs indicate a delay of more than 30 days in the payment of compensation, the exhibits do not show that there was no reasonable controversy which is a condition precedent to the assessment of a delay penalty.

The exhibits consist of the report of the employer, the reports of the attending physician, and correspondence between counsel. That the claim was not paid within 30 days is not disputed. But this is not the issue. The issue is whether or not there was a reasonable controversy as to the liability or the amount due.

I submit that there was a basis for controversy over this claim. Plaintiff's physician in a letter to plaintiff's attorney under date of September 16, 1968, stated: "Because of the nature of Mrs. Gill's work, that is a fry cook, it would seem reasonable to me that a total disability of two weeks on this injury would be anticipated. I routinely advise patients with similar injuries to keep the affected part dry until it is well healed, and in Mrs. Gill's case this would have been necessary for approximately one week after I dismissed her from

treatment." Since the first week of disability of short duration is not compensable for time lost, a difference of opinion could well arise as to the amount, if any, the employer was required to pay. The demand of plaintiff's attorney for the $42 was accompanied by a further demand for a $50 attorney's fee which was not due and owing under the compensation law at that time. There simply is no evidence in this record establishing that the delay was allowable under the compensation act. It is by surmise and conjecture that we penalize the employer. It is fundamental that where the record contains no authentic bill of exceptions, or the bill of exceptions has been quashed, no question will be considered on appeal the determination of which necessarily involves examination of evidence adduced in trial court, and in such a situation, if the pleadings are sufficient to support the judgment, it will be affirmed. Blanco v. General Motors Acceptance Corp., 180 Neb. 365, 143 N. W. 2d 257. The same rule applies to an improperly authenticated partial bill of exceptions. But what is more important still, we are reversing the judgment of a trial judge without the evidence before us that he had before him and on which his judgment was based. I would affirm the judgment.

WHITE, C. J., dissenting.

I concur in Judge Carter's dissent and also add the following observations in support of the conclusions made therein. The statute since 1961 provides that this court promulgates the rules for the preparation, filing, and delivery of a bill of exceptions in all cases.

Our rules require: "* * * a praecipe requires that *all* of the evidence offered at the trial and all of the evidence offered at any hearing on any matter and the rulings thereon be included in the bill of exceptions." (Emphasis supplied.) Rule 7c, Revised Rules of the Supreme Court, 1967.

And there could be no partial bill of exceptions because our rules require that a partial bill of exceptions

must be prepared only if the written consent of all other parties be endorsed on or attached to such praecipe. Rule 7c, Revised Rules of the Supreme Court, 1967. No such consent or stipulation appears in this case. Our rule provides: "The bill of exceptions shall be certified by the court reporter as being correct and *complete* in accordance with the praecipe." (Emphasis supplied.) Rule 7d1, Revised Rules of the Supreme Court, 1967. Our Rule 7d2, Revised Rules of the Supreme Court, 1967, provides as follows: "If the court reporter is unable to prepare and certify a bill of exceptions, a bill of exceptions shall be prepared under the direction and supervision of the trial judge and *shall be certified by the judge* and delivered to the clerk of the district court." (Emphasis supplied.) The trial judge in his certificate stated as follows: "That at said trial, Counsel for Plaintiff offered what are herewith marked as Exhibits 1 through 8, inclusive, and that said Exhibits were received in evidence by the Court." Elsewhere the certificate of the court reporter states that counsel for both parties waived the reporting of the cause and tried same to the court and "that said record was not prepared in the usual and customary manner, of preparing Bills of Exceptions, * * *."

The praecipe requires that *all* of the evidence be included in the bill of exceptions. It requires a certificate by the court reporter or the judge, "as being correct and complete in accordance with the praecipe." Rule 7d1, Revised Rules of the Supreme Court, 1967.

It seems clear to me that we have no bill of exceptions in this case. What we have, and by express recital by the trial judge, is nothing more than a certificate that eight exhibits were entered and received in evidence.

The rules involved here are not mere technical rules. I know of no procedural rule in our court's history that has been more rigidly enforced than the one that protects the integrity of this court's jurisdiction by requir-

ing, in the interests of justice, that there be guaranteed to this court a complete record of all the evidence for judicial review. In the absence of such a bill of exceptions or such a certificate guaranteeing the authenticity of the transcript containing all the evidence, the only question that this court can decide is whether the pleadings support the judgment entered by the lower court. The cases reveal that this is not a rule created for the purpose of disposing of an adversary procedural controversy by counsel, but rather rests basically on the necessity of the court's preserving the integrity of its jurisdiction and not deciding cases only on an apparent incomplete record of the evidence or on conjectural speculation. And it has long since been determined that it is the responsibility of the appellant to procure a proper bill of exceptions if he wishes to have reviewed any issue presenting a question of the sufficiency of the evidence or the trial of a fact issue. See Crafts v. Sawtelle, 132 Neb. 592, 272 N. W. 567.

Turning to an examination of the exhibits, I can find very little, if any, basis for a determination that no reasonable controversy existed with reference to the second week of disability prior to the time the litigation and the suit in compensation court was initiated. There is a statement (exhibit 1) by the plaintiff's doctor that he had billed the employer for an $18 charge and had not received payment. No inference can be drawn from this exhibit as to the extent of disability. On February 22, 1968, the plaintiff, through her attorney, made claim against the defendant for the $18 doctor bill and for the second week of workmen's compensation wages to his client. I am unable to come to the conclusion that a naked statement for a doctor bill by the attending physician without a recital of the extent of disability or a letter asserting a claim for this amount from a lawyer constitutes a showing that no reasonable controversy existed as to whether the disability actually existed and whether it was unjustly refused by the defendant.

On the contrary, a statement by the plaintiff's doctor, dated July 23, 1968, states that the date of the injury was August 20, 1967, and the patient was discharged as cured on August 28, 1967. This, of course, would permit only an inference of a week of disability, which is noncompensable under the compensation law. Significant is the fact that in this report the day on which the patient was able to return to work is left blank in the spaces provided for an answer. In the medical report by claimant's doctor, W. E. Engdahl, M.D., on July 23, 1968, the questions 20, 21, and 22 requiring answers as to when the patient was able to resume regular work or when she would be able to resume work were left blank. The first medical report by the plaintiff's doctor sustaining her claim for 2 weeks of disability appears in the record in exhibit 2, a letter to the plaintiff's attorney from the doctor reciting in effect that she was entitled to a week of compensable disability, or a total of 2 weeks altogether.

The first appearance of any evidence that could be considered to show liability of the defendant was his report to the Workmen's Compensation Court dated June 7, 1968. In this report it is recited: "Probable length of disability - 2 weeks." This is a report filed in the Workmen's Compensation Court after the initiation of litigation to recover the claim. The plaintiff was injured on August 20, 1967. She was discharged as cured by the doctor on August 28, 1967. The medical reports sustaining the claim for the 2 weeks of disability were all filed and first appear in the picture after the initiation of litigation. The admission on June 7, 1968, responsive to the demands of litigation that the plaintiff suffered a probable disability of 2 weeks, is not, in my opinion, any evidence that the defendant knowingly or unjustly and unreasonably refused pay of the extra week of disability now sustained by the doctor's subsequently filed medical reports. We do not know that we have all of the evidence. But if we do, there is no

evidence that at the time or immediately subsequent to the suffering of the second week of disability that the defendant knew of it or was notified of it by the plaintiff. Nor is there any evidence that in the intervening period of time, either by her doctor or by plaintiff, that she made the claim against the defendant or demanded the payment of the compensation disability. The first appearance of even a claim for the second week of disability is in the letter from the lawyer to the defendant threatening litigation to collect it. In the light of her own doctor's reports and in the light of the somewhat equivocal statement in this respect made as late as September 1968, and in the absence of any evidence from the plaintiff herself, it seems to me that the district court was correct in not finding that a reasonable controversy existed with reference to the plaintiff's additional disability. Or to put it another way, it seems to me that there was insufficient evidence to sustain the plaintiff's burden of proof to show that the defendant unjustifiably refused to pay for the claimed compensable disability. Surely it must be conceded that defendant cannot be penalized in the district court for the time delay involved in litigating the issue of whether the plaintiff had met her burden of proof to show that the defendant unjustifiably refused to pay her claim for the additional week's compensation.

BOSLAUGH, J., concurring.

The praecipe which was filed in this case requested preparation of the "Bill of Exceptions." The bill of exceptions was then prepared and filed pursuant to Rule 7, Revised Rules of the Supreme Court, 1967. It was prepared under the direction and supervision of the trial judge and certified by him because both parties waived a stenographic record of the proceedings.

When the bill of exceptions was filed in the office of the clerk of the district court it became the official bill of exceptions. It was, of course, subject to amendment if incomplete. That is the remedy available to a party

who claims that material evidence has been omitted from the bill of exceptions.

The accident in this case occurred on August 20, 1967. The First Report of Accident, signed by the employer and dated June 7, 1968, stated the probable length of total disability to be 2 weeks. The hearing before the compensation court was on July 8, 1968. The medical report which is somehow relied upon as a justification for the defendant's delay is dated July 23, 1968. If, as the dissenting Judges say, the defendant admitted in his pleadings that the plaintiff was disabled for 2 weeks, it is difficult to see how there could be a reasonable controversy over this fact.

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IN RE APPLICATION OF ACE GAS, INC. ACE GAS, INC., SUPERIOR, NEBRASKA, APPELLANT, IMPLEADED WITH ERNEST G. WROUGHTON, APPELLEE, V. PEAKE., INC., ET AL., APPELLEES.

168 N. W. 2d 373

Filed June 2, 1969. No. 37132.

1. **Public Service Commissions.** On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.
2. ———. The issue of public convenience and necessity is ordinarily one of fact and where there is evidence in the record to sustain the Nebraska State Railway Commission's order, this court cannot say that it is unreasonable and arbitrary.
3. ———. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska State Railway Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene.

Appeal from the Nebraska State Railway Commission: Affirmed.

C. E. Danley, for appellant.

Richard A. Knudsen, James E. Ryan, and Robert E. Powell, for appellees Peake, Inc., et al.

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

McCOWN, J.

Ace Gas, Inc., of Superior, Nebraska, filed an application with the Nebraska State Railway Commission for authority to acquire a certain portion of the intrastate motor carrier operating rights previously issued to one Ernest G. Wroughton. The application was protested by several motor carriers and railroads. The application was denied, and Ace Gas, Inc., has appealed.

Ernest G. Wroughton held operating authority under Application No. M-1794 and its supplements. Under M-1794, and Supplement No. 2, Wroughton held authority for commodities generally except those requiring special equipment over irregular routes from within a 10-mile radius of Wroughton's home to and from Nelson, Nebraska, and occasionally to and from Omaha and intermediate points; and sand and gravel and road and dam construction materials requiring the use of dump trucks between points in Nebraska over irregular routes. This authority was retained by Wroughton.

The authority sought to be transferred to Ace Gas, Inc., was that under Supplement No. 3 only. It was issued to Wroughton in 1948. That supplement authorizes the transportation of commodities generally including sand and gravel, over irregular routes from Fairfield, Nebraska, and within a 30-mile radius therefrom, to and from various points in the State of Nebraska at large; all shipments either originate or terminate within the 30-mile radius of Fairfield, Nebraska. Wroughton's home is located approximately 8 miles south of Fairfield, Nebraska, and 7 miles northwest of Nelson, Nebraska,

and both Fairfield and Nelson are within the 10-mile radial authority being retained by Wroughton.

Wroughton was 77 years old, and had been in the trucking business since 1928. At the time of the hearing here, he owned one 2-ton 1967 Chevrolet tandem truck. He testified that he had not had any tank equipment since 1954, when he discontinued the petroleum business. Petroleum and its products or commodities requiring the use of special equipment had not been transported under Wroughton's authority thereafter, until approximately 2 years before the hearing on this application.

Approximately 2 years before the hearing, Wroughton entered into certain arrangements with or through Everett Lillich. Lillich is the president and a substantial stockholder in Ace Gas, Inc., and several other corporations which are engaged in the buying and selling of various forms of petroleum products. Ace Gas, Inc., the applicant and appellant here, buys and sells propane gas and anhydrous ammonia at wholesale and also operates as a private carrier. Under one of the agreements, Ace Gas, Inc., leased certain described equipment to Wroughton. It was a written lease and the rental was 35 cents per mile. Wroughton also made an oral agreement to sell the authority involved here, Supplement No. 3, to Ace Gas, Inc., for the sum of $3,000. He also had an oral agreement to employ Everett Lillich, the president of Ace Gas, Inc., as manager for Wroughton. For approximately 2 years prior to the hearing, the equipment leased by Ace Gas, Inc., was operated under Wroughton's authority carrying propane gas, anhydrous ammonia, and fertilizers. The equipment was used sometimes for Ace Gas, Inc., as a private carrier and sometimes under Wroughton's authority as a common carrier.

After the arrangements with Lillich, the offices of the Wroughton trucking business were moved to the office of Ace Gas, Inc., in Superior, although Wroughton paid

no rent. A separate bank account was established by Lillich in which the revenues from the Wroughton trucking business were deposited. All checks on that account were signed by Lillich. Wroughton did not hire, pay, or direct any drivers, nor solicit the business. All directions and instructions to drivers and the dispatching of trucking equipment was done by Lillich. At the time of the hearing, Wroughton had already been paid the agreed purchase price of $3,000 for the authority, and the evidence shows no other payments to him, either from the separate bank account or otherwise. Lillich had not received any salary or compensation from Wroughton for services as "manager" of the operation. The financial statement of Ace Gas, Inc., for June 30, 1967, shows a common carrier permit as an asset of $3,000, although Ace Gas, Inc., had no common carrier authority on that date. Wroughton testified that he was consulted now and then about the business in some vague fashion. He testified that the shipments made during the period of the operation were transported in equipment owned by Ace Gas, Inc., and operated under his authority, and that he actually did not transport the commodities, but Ace Gas, Inc., did.

The Nebraska State Railway Commission found that the operations being conducted under the leasing arrangement were actually those of Lillich and Ace Gas, Inc., and resulted in a lease of Wroughton's Supplement No. 3 operating authority without the approval of the commission required by statute. It also found that the operating authority contained in Application M-1794, Supplement No. 3, duplicates the operating authority issued to Wroughton in Application M-1794, and to transfer the Supplement No. 3 operating authority to Ace Gas, Inc., would place two carriers in the field where only one carrier existed before, and the result would not be consistent with the public interest. The application was, therefore, denied.

The appellant's assignments of error are primarily

grounded on the contention that the action of the commission in denying the application was arbitrary and unreasonable.

The approval of the railway commission is required for any purchase, lease, operating control, or acquisition of control of the properties, certificates, permits, or any part thereof, held by motor carriers. After hearing, the commission must find that the transaction proposed will be consistent with the public interest and does not unduly restrict competition, and that the applicant is fit, willing, and able to properly perform the proposed service. If any of the certificates or permits, or any part thereof, to be transferred or leased are dormant, or if the transfer or lease will permit or result in a new or different service or operation as to territorial scope than that which is or may be rendered or engaged in by the respective parties, then the application can be granted only upon proof and finding that the transfer or lease is or will be required by the present and future public convenience and necessity. See § 75-318, R. S. Supp., 1967.

The principal issue raised throughout the hearings was whether the trucking business carried on under the agreements referred to was under the control of Ace Gas, Inc., and its president Lillich, or whether it was under the control of Ernest G. Wroughton, the certificate holder. We believe the evidence was more than sufficient to support the commission's finding that the operations conducted under the leasing arrangement were actually those of Lillich and Ace Gas, Inc.

The witnesses who testified in support of the application all based their testimony on the shipments and services performed during the 2-year period of operations described. Six of these seven witnesses for the applicant were employed either by the Superior-Deshler Propane Company, which has the same stockholders, officers, and directors as Ace Gas, Inc., or by Consumers Propane Service in which Everett Lillich has a one-

third stock ownership. The transcript of shipments relied on by Ace Gas, Inc., shows that 125 of the 162 shipments shown were to the Superior-Deshler Propane Company as consignee.

The evidence of the protestants was that they had not experienced any competition from Wroughton prior to the operations referred to. They believed Wroughton's authority, to the extent that it authorized transportation of bulk commodities and commodities requiring special equipment, was dormant. Protestants' evidence also indicated that the present and future public convenience and necessity did not require the transfer of the operating rights involved.

Here there is no question but that the Nebraska State Railway Commission was acting within the scope of its authority. On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865.

The issue of public convenience and necessity is ordinarily one of fact and where there is evidence in the record to sustain the Nebraska State Railway Commission's order, this court cannot say that it is unreasonable and arbitrary. Canada v. Peake, Inc., *ante* p. 52, 165 N. W. 2d 587.

The determination of what is consistent with the public interest or public convenience and necessity, 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. See Neylon v. Petersen & Petersen, Inc., 183 Neb. 813, 164 N. W. 2d 452.

The evidence here is amply sufficient to sustain the findings of the commission. The order of the commission

is not arbitrary or capricious, and it is therefore affirmed.

AFFIRMED.

SPENCER, J., participating on briefs.

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WILLIAM A. GOOD, APPELLANT, V. DELLA A. JONES, APPELLEE.

168 N. W. 2d 520

Filed June 2, 1969. No. 37145.

1. **Negligence.** Negligence is ordinarily defined as the doing of some act, under the circumstances surrounding the accident involved, which a man of ordinary prudence would not have done, or the failure to do some act or to take some precaution that a man of ordinary prudence would have done or taken.
2. ———. Negligence and a duty to use due care do not exist in the abstract but must be considered against a particular set of facts and circumstances.
3. ———. A person has no duty to anticipate negligence on the part of others, and, in the absence of knowledge or notice to the contrary, is entitled to assume, and to act on the assumption, that others will exercise ordinary care.
4. ———. "Ordinary care" is that amount or degree of care which common prudence and a proper regard for one's own safety and the safety of others would require under the circumstances.

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

Eisenstatt, Morrison, Higgins, Miller, Kinnamon & Morrison and Nanfito & Nanfito, for appellant.

Fraser, Stryker, Marshall & Veach, for appellee.

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

NEWTON, J.

This is an action to recover for personal injuries alleged to have been occasioned by a defective sidewalk.

On trial to a jury, a verdict was found for plaintiff; subsequently, defendant's motion for judgment notwithstanding the verdict was sustained and judgment entered for defendant. We affirm that judgment.

Defendant was the owner of a 4-unit apartment house purchased by her in 1961. She occupied one of the units and rented another to plaintiff and his family. Plaintiff had occupied the apartment since January of 1963. The accident occurred on April 30, 1965. A concrete sidewalk ran from the street into the apartment house entrance. In one portion of the sidewalk, one of the slabs had sunk somewhat so that it was ½ inch or 1½ inches, depending on varying versions, lower than the adjoining slabs. This condition had existed at the time defendant purchased the apartment house and had remained the same all through the period of approximately 27 months that plaintiff had been a tenant. Plaintiff acknowledged that he was aware of this condition; that on one or two occasions someone had stumbled there; and that he had mentioned it to his wife but had never complained about it to defendant. On the day of the accident, which occurred during daylight hours, plaintiff had left the apartment house, met his brother-in-law coming to visit him, and started to return to his apartment. Plaintiff testified that in returning, he was walking with his brother-in-law, was looking straight ahead, stepped on the offset portion of the sidewalk, turned his ankle and fell, injuring his leg. The sidewalk was a common walk, used by all of the tenants in the apartment house and maintained by the defendant.

Questions presented deal with the existence of negligence and contributory negligence. There is a wide variation displayed in the determination of cases of this type. See Annotation, 37 A. L. R. 2d 1187. Nebraska has dealt with cases of this type on a case-by-case basis and generally speaking, has required, as a preliminary to recovery, the showing of the existence of a clearly dangerous situation. The ordinary rules of neg-

ligence are applicable to a case of this nature. Negligence is ordinarily defined as the doing of some act, under the circumstances surrounding the accident involved, which a man of ordinary prudence would not have done, or the failure to do some act or to take some precaution that a man of ordinary prudence would have done or taken. See Kozloski v. Modern Litho, Inc., 182 Neb. 270, 154 N. W. 2d 460. Negligence and a duty to use due care do not exist in the abstract but must be considered against a particular set of facts and circumstances. See Presho v. J. M. McDonald Co., 181 Neb. 840, 151 N. W. 2d 451. "A person has no duty to anticipate negligence on the part of others, and, in the absence of knowledge or notice to the contrary, is entitled to assume, and to act on the assumption, that others will exercise ordinary care." 65 C. J. S., Negligence, § 15, p. 592. See, also, Missouri Pacific R. R. Co. v. Corpus Christi Hardware Co. (Tex. Civ. App.), 414 S. W. 2d 185.

"Ordinary care" is that amount or degree of care which common prudence and a proper regard for one's own safety and the safety of others would require under the circumstances. See Niemeyer v. Forburger, 172 Neb. 876, 112 N. W. 2d 276.

This case must be determined in the light of the foregoing rules and the circumstances attendant upon the accident. It is common knowledge that depressions, holes, and inequalities in the elevations of sidewalks are not unusual, but on the contrary, are frequently found. One cannot safely ignore this fact in walking over sidewalks and completely disregard the nature of the walk as one might safely do when walking across a ballroom floor. One who maintains a sidewalk, in determining whether or not the condition of the sidewalk meets the requirements of ordinary care, is entitled to take this factor into consideration and is not required to assume that the condition of the walk will be ignored by those traveling over it nor is such person required to antici-

pate negligence on the part of such travelers, but on the contrary, may assume they will use ordinary care for their own safety. In the present instance, the defect in the sidewalk was not a major defect. It was one that was readily apparent to anyone approaching on the sidewalk and was not of such a nature as would necessarily give concern to the owner of the premises for fear that it might result in serious injuries to a user of the sidewalk. It had been safely used by many people over a considerable period of time. The plaintiff had traversed this walk for many months and was thoroughly familiar with it. The accident occurred during daylight hours when the slight difference in elevation was readily apparent even to one not familiar with the walk. Had plaintiff himself considered it to be of a dangerous nature, there would appear to be no excuse for his not having used due care for his own safety.

Under the existing circumstances, we are obliged to arrive at the conclusion that the judgment of the district court is correct and should be affirmed.

AFFIRMED.

SPENCER, J., participating on briefs.

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STATE OF NEBRASKA, APPELLEE, V. ROBERT NEWELL PILGRIM, APPELLANT.

168 N. W. 2d 368

Filed June 2, 1969. No. 37155.

1. **Post Conviction: Criminal Law.** The Post Conviction Act specifically authorizes the trial court to examine the files and records to see if the prisoner is entitled to relief.
2. ———: ———. If the files and records show to the satisfaction of the district court that the prisoner is entitled to no relief under the Post Conviction Act, the court may overrule a motion to vacate a sentence without a hearing.
3. **Criminal Law: Right to Counsel.** Where a justiciable issue of law or fact is presented, an indigent defendant is entitled to the appointment of counsel.

Appeal from the district court for Dakota County: WILLIAM F. COLWELL, Judge. Affirmed with directions.

Leamer & Galvin, for appellant.

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

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

SPENCER, J.

Robert Newell Pilgrim, hereinafter referred to as defendant, appeals from a denial of relief in a post conviction proceeding.

Defendant was convicted of second-degree murder in the district court for Dakota County. On direct appeal the conviction was affirmed. See State v. Pilgrim, 182 Neb. 594, 156 N. W. 2d 171.

Defendant filed a motion to vacate and set aside the sentence, alleging he was unlawfully confined in the Nebraska Penal and Correctional Complex because his constitutional rights had been violated in the following respects: The State identified 46 exhibits which were exposed where they could be seen by the jury but only 12 were offered and received in evidence; and that one Charles Reed, purported to be a fingerprint expert, was produced as a witness without showing his qualifications and without following up his testimony on the result of any fingerprint investigation.

The district court ordered the county attorney to show cause why a full evidentiary hearing should not be held. Pursuant to that order, the county attorney offered the bill of exceptions, the original instructions, and a certified copy of the opinion and mandate in the previous case. From the file in the previous case the judge who had presided at the previous trial determined that no new constitutional issues were raised by the motion, and dismissed it. The Post Conviction Act specifically au-

thorizes the trial court to examine the files and records to see if the prisoner is entitled to relief. State v. Hizel, 181 Neb. 680, 150 N. W. 2d 217. The district court sustained the defendant's motion to proceed in forma pauperis, but denied his motion for the appointment of counsel. Defendant assigns as error the refusal of the trial court to grant him an evidentiary hearing on his motion and the failure to appoint counsel for him at any stage of the proceedings.

The issues raised by defendant in his motion were fully considered in the previous case and no purpose would have been served by an evidentiary hearing. If the files and records show to the satisfaction of the district court that the prisoner is entitled to no relief under the Post Conviction Act, the court may overrule the motion to vacate a sentence without a hearing. State v. Ronzzo, 181 Neb. 16, 146 N. W. 2d 576. An examination of defendant's brief indicates that the only questions presented herein are ones of law: Is Bruton v. United States, 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476, applicable herein; and should an attorney have been appointed for defendant?

The exhibits in question were identified by the court reporter, but because they were not received in evidence they were not examined by the jurors. It is possible the jurors may have been able to have seen some of the exhibits at a distance on the table of counsel or the reporter, but they did not have an opportunity to examine them. The State attempted to authenticate the exhibits and offered a few in evidence, but after the defendant's objections were sustained the State abandoned any attempt to secure their admission. Defendant requested a cautionary instruction relative to evidence offered and excluded, which was identical to the court's instruction No. 18, set out in our previous opinion.

Ignoring any question of retroactivity, Bruton v. United States, *supra,* has no applicability herein. That case involved the confession of a joint defendant which

was admitted in evidence and which the jury was instructed to disregard as to Bruton. Here, the jurors were not asked to exorcise a statement admitted in evidence which incriminated the defendant. Here, they were charged to consider only the evidence actually received in evidence. If there could possibly have been any doubt on this point, it has clearly been removed by Frazier v. Cupp, 394 U. S. 731, 89 S. Ct. 1420, 22 L. Ed. 2d 684.

Defendant complains his constitutional rights were violated because one Charles Reed was produced as a fingerprint expert without showing his qualifications and without following through on fingerprinting evidence. There is no merit to this allegation. Reed was qualified as a photographer and testified as to several photographs taken by him. He was also permitted to testify without objection to 2½ years experience in working with fingerprints. However, when the county attorney sought to question him about fingerprints he had taken pursuant to a search of the premises involved, defendant's objections as to foundation were sustained and the testimony was not produced.

After defendant's motion for counsel was denied, he communicated with the counsel who had been appointed to represent him in the previous case. This counsel filed a motion for a new trial in the district court and after the motion was overruled, perfected an appeal herein. Defendant had a legal question which he was entitled to have determined. Where a justiciable issue of law or fact is presented, an indigent defendant is entitled to the appointment of counsel. Counsel should have been appointed to represent defendant herein, but the failure to do so cannot be considered prejudicial because defendant was represented by able counsel when this question was presented to the trial court and on appeal herein.

We affirm the judgment of dismissal, but direct the

district judge to allow a claim of defendant's counsel for his services in these proceedings.

AFFIRMED WITH DIRECTIONS.

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STATE OF NEBRASKA, APPELLEE, V. JESSE HOWARD, APPELLANT.
168 N. W. 2d 370

Filed June 2, 1969. No. 37183.

1. **Criminal Law: Appeal and Error.** In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.
2. **Criminal Law: Trial: Evidence.** It is within the discretion of the trial court to permit the introduction of evidence in rebuttal that is not strictly rebutting.
3. **Criminal Law: Trial: Witnesses.** A defendant in a criminal case who becomes a witness subjects himself to the rules of law applicable to other witnesses.
4. ———: ———: ———. A defendant in a criminal proceeding who has waived his privilege against self-incrimination by testifying in his own behalf may be required to repeat certain statements, put on a jacket, or perform other similar acts as a part of cross-examination.
5. ———: ———: ———. The testimony of a witness at a previous trial is admissible if the witness is unavailable.
6. ———: ———: ———. It is within the discretion of the trial court to determine whether the unavailability of the witness has been shown.
7. ———: ———: ———. The unavailability of a witness due to illness may be shown by affidavit in a criminal proceeding.

Appeal from the district court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Leo M. Bayer, for appellant.

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

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

BOSLAUGH, J.

The defendant was convicted of robbery and sentenced to imprisonment. His motion for new trial was overruled and he has appealed. The assignments of error relate to the sufficiency of the evidence and the admissibility of certain evidence produced by the State.

The record shows that the McCarthy Liquor Store in Alliance, Nebraska, was robbed at about 9 p. m., on December 7, 1967. The robber was armed and had a handkerchief tied over his face during the robbery. He was followed from the liquor store to an area near the defendant's home. The defendant was apprehended later at his home.

Laura McCarthy, the proprietor of the liquor store, and three other persons were in the store at the time of the robbery. The defendant was identified as being the robber by his hair, skin, clothing, voice, and build. Laura McCarthy made a positive identification of the defendant after hearing his voice in the courtroom.

There are minor discrepancies and conflicts in the testimony of the State's witnesses. The defendant testified in his own behalf and contradicted much of the State's evidence. The defendant's mother testified that he was at home at the time the robbery took place.

In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Sheldon, 179 Neb. 377, 138 N. W. 2d 428. The evidence presented a question for the jury and is sufficient to sustain the conviction. See Small v. State, 165 Neb. 381, 85 N. W. 2d 712, 70 A. L. R. 2d 984.

The positive identification of the defendant by Laura McCarthy was made during rebuttal over the objection of the defendant that the testimony was not proper rebuttal evidence. The defendant contends that the ruling was erroneous.

It is within the discretion of the trial court to permit the introduction of evidence in rebuttal that is not strictly rebutting. Drewes v. State, 156 Neb. 319, 56 N. W. 2d 113. The trial court may permit the State to offer further evidence-in-chief for good reason and in furtherance of justice. § 29-2016 (4), R. R. S. 1943. In this case, the voice identification was made after the witness had heard the defendant testify in open court. Under the circumstances it was within the discretion of the trial court to receive this testimony.

During the cross-examination of the defendant, he was required over objection to put on a jacket which the State claimed he was wearing at the time of the robbery, and to repeat statements which were made by the robber at the time of the robbery. The defendant contends that this was a violation of his right against self-incrimination.

A defendant in a criminal case who becomes a witness subjects himself to the rules of law applicable to other witnesses. Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701. Although there is authority to the contrary, we believe the better rule is that the defendant can be required to repeat certain statements, put on a jacket, and perform other similar acts after he has waived his privilege against self-incrimination by testifying in his own behalf. See, State v. Taylor, 99 Ariz. 85, 407 P. 2d 59; Schmerber v. California, 384 U. S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908. The defendant's contention is without merit.

The State, over objection, was permitted to prove the testimony of a witness at a previous trial. The defendant contends that the testimony was not admissible and that the foundation evidence to show that the witness was unavailable was improper.

The absent witness, Teresa Eagleman, had testified in person for the State at a previous trial of the case. The State produced the affidavit of a medical officer at the Public Health Service Indian Hospital at Rapid City,

South Dakota, which stated that the witness was afflicted with positive contagious tuberculosis; that her physical condition would be greatly impaired by travel; and that she could infect those with whom she might come in contact.

The testimony of a witness at a previous trial is admissible if the witness is unavailable. It is within the discretion of the trial court to determine whether the unavailability of the witness has been shown. Jackson v. State, 133 Neb. 786, 277 N. W. 92.

The record here does not show an abuse of discretion by the trial court in admitting the testimony from the previous trial. The affidavit of the medical officer established, prima facie, that the witness was unavailable and such a showing may be made by affidavit. The issue as to the availability of the witness was collateral and did not relate to the general issue of the guilt or innocence of the defendant. Although affidavits may not ordinarily be used as primary evidence against the defendant, they may be used in connection with preliminary, collateral, and interlocutory matters. Banks v. Metropolitan Life Ins. Co., 142 Neb. 823, 8 N. W. 2d 185. It is customary in civil proceedings to show the unavailability of the witness by affidavit. 26A C. J. S., Depositions, § 92 (2) (d), p. 441.

The defendant further contends that the testimony was not admissible because the witness referred only to "Jesse" and did not identify the defendant by his last name. This is a matter relating to weight and credibility which could have been developed fully at the previous trial.

The judgment of the district court is affirmed.

AFFIRMED.

SPENCER, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. MAX Q. SNYDER, APPELLANT.

168 N. W. 2d 530

Filed June 6, 1969. No. 37015.

**Automobiles: Evidence.** Evidence that radar equipment was tested within a few hours of its use, by means of a calibrated tuning fork, or by a comparison with the speedometer of a motor vehicle driven through the radar field, and was functioning properly, is sufficient evidence of the accuracy of the radar equipment.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Affirmed.

Russell R. Strom, 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.

MCCOWN, J.

The defendant, Max Q. Snyder, was convicted by a jury of exceeding the speed limit. The sole issue on appeal is the sufficiency of the evidence as to the operating efficiency and accuracy of radar equipment on the particular occasion.

Several troopers of the Nebraska State Patrol set up the radar equipment approximately 3 miles south of Beatrice, Nebraska, on U. S. Highway No. 77 on July 28, 1967, at about 4:30 p.m. The radar unit was tested at that time by use of a calibrated tuning fork and by a speedometer check with a patrol car as it passed through the radar field. On both comparative tests, the radar equipment was found accurate. On termination of the radar operation that night, another speedometer check in a different cruiser brought identical results.

At approximately 8:40 p.m., the defendant's 1964 Chevy II white panel van was observed passing through

the radar field by the trooper operating the radar equipment. The radar meter reading was 73 miles per hour. The radar operator radioed one of the pursuit cars. The defendant's vehicle was stopped and a summons was issued to the defendant for speeding. The speed limit at the time and place was 65 miles per hour.

The defendant's testimony was that when he saw the patrol cars ahead, he checked his speedometer and it showed his speed to be 63 or 64 miles per hour. He also testified that he did not believe his 3-ton van would go more than 65 miles per hour loaded as it was. The defendant admitted that he had never had his own speedometer calibrated.

There was also testimony that the speedometer on one of the "run by" patrol cars had been calibrated on April 12, 1967, some 3 months before the occurrence, and that speedometer had also been checked with radar approximately every other week since that time.

By statute in this state, the speed of any motor vehicle may be determined by the use of radiomicrowaves or other electronic devices. The results of such determinations shall be accepted as prima facie evidence of the speed of such motor vehicle in any court or legal proceeding where the speed of the motor vehicle is at issue. See § 39-7,108.02, R. R. S. 1943. This statute has been in effect since 1955.

The defendant's position is that unless there is proof that the speedometers of the patrol cars were accurate and proof that the calibrated tuning fork was also accurate, there is insufficient proof that the radar equipment was accurate and functioning properly. In effect, the defendant's argument is that any comparative testing devices used to determine whether the particular radar equipment was accurate and functioning properly must themselves be proved accurate and functioning properly. We cannot agree. Such a chain of evidence might have to proceed ad infinitum.

In a case arising before the effective date of the radar

statute, this court held that radar evidence was admissible if a sufficient foundation was laid as to the accuracy of the equipment in operation. Testimony of an officer as to the speedometer reading of a car driven by him at a given time was held competent prima facie evidence of the speed of the car without requiring evidence as to the accuracy of the speedometer. See Peterson v. State, 163 Neb. 669, 80 N. W. 2d 688. A conviction on radar evidence where the accuracy test was based only on a drive through speedometer check was affirmed in Kucera v. State, 170 Neb. 368, 102 N. W. 2d 635. Some courts have held that the tuning fork test alone may be sufficient, at least in the absence of evidence of inaccuracy. See State v. Tomanelli, 153 Conn. 365, 216 A. 2d 625.

Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required. Evidence that radar equipment was tested within a few hours of its use, by means of a calibrated tuning fork, or by a comparison with the speedometer of a motor vehicle driven through the radar field, and was functioning properly, is sufficient evidence of the accuracy of the radar equipment.

The judgment is affirmed.

AFFIRMED.

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DALE D. ANDERSON ET AL., APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.
168 N. W. 2d 522

Filed June 6, 1969. No. 37090.

1. **Eminent Domain: Evidence.** In an eminent domain action, evidence of comparable sales is not inadmissible merely because it is secondary or hearsay evidence.
2. ———: ———. In an eminent domain proceeding, a wide discretion must be granted the trial judge in determining the

admissibility of evidence of other sales, and the evidence should not be admitted where there is a marked difference in the situation of the properties or unless the judge is satisfied that the price paid was sufficiently voluntary to be a reasonable index of value.

3. **Eminent Domain: Witnesses: Fees.** A witness who testifies as an expert on a subject requiring special knowledge and skill is, in the absence of special contract, entitled only to the statutory fee.
4. **Eminent Domain: Witnesses: Brokers.** One who appraises real estate for another, for a fee, commission, or other valuable consideration, is by statutory definition a real estate broker.
5. **Eminent Domain: Brokers.** It is unlawful for any person to act as a real estate broker unless he is properly licensed.
6. **Eminent Domain: Witnesses: Brokers: Fees.** One not licensed as a real estate broker may not be allowed an expert witness' fee for testifying in regard to real estate values.
7. **Eminent Domain: Attorneys at Law: Fees.** Attorney's fees allowed in an eminent domain action should not be fixed on the basis of an unnecessary multiplicity of counsel.

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

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Betsy G. Berger, John P. Regan, Warren D. Lichty, Jr., and Ted L. Schafer, for appellant.

McGinley, Lane, Mueller, Shanahan & McQuillan, for appellees.

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

NEWTON, J.

This is an action in eminent domain. In its appeal, defendant State of Nebraska, Department of Roads, alleges error in the exclusion of evidence of comparable sales of land and in the taxation of attorney's and expert witness' fees. We reverse the judgment of the district court.

The record discloses that defendant called an expert on real estate values to give his opinion of the value of plaintiffs' land before and after the taking. As a basis

for his opinion, he sought to compare the lands of plaintiffs with other lands in the area which had been sold. One such sale is referred to as the Walz-Phelps sale consummated about 2 months prior to the appropriation of plaintiffs' land. It was investigated by the witness in the usual manner. He inspected the premises, found the sale to have been an open-market transaction and the land to have numerous points of similarity to plaintiffs' property. Both places adjoined the south bank of the South Platte River; were in the same general area; had accretion land, similar type soils, high water tables, hay and pasture land in native grass; and were used as wintering areas for cattle. There were some dissimilarities. The Walz-Phelps tract was larger, had a small set of improvements, and had 125 acres irrigated. The plaintiffs' land was irrigable but not presently irrigated. The Walz-Phelps place sold for $189.18 per acre whereas the jury awarded plaintiffs for land taken on the basis of $290 per acre. The court sustained an objection to evidence that the sale was an open-market transaction on the ground it was hearsay. Evidence of this sale was barred entirely. The court stated: "There are certain features of it that are based on hearsay on the witness's part, and other phases that depend on matters as to which an expert's opinion is not available." In view of the fact that it was a duly qualified expert witness testifying, there would not appear to be any basis for the latter portion of the ruling made. The question of admissibility of hearsay evidence under such circumstances is one not heretofore specifically determined in this jurisdiction.

The authorities are not agreed on whether or not the testimony of an expert witness, as to comparable sales, is admissible over a claim of hearsay based on his lack of personal knowledge relating to sales of comparable property. See Annotation, 95 A. L. R. 2d 1217. The majority rule, and we believe the better reasoned, admits such testimony. In International Paper Co. v. United

States (5th Cir.), 227 F. 2d 201, it is stated: " 'If the expert has made careful inquiry into the facts, he should be allowed to give them as the basis of the opinion he has expressed. If he had not made careful inquiry, this will be developed on cross examination and will weaken or destroy the value of the opinion. Ordinarily evidence as to facts of this sort given by an expert as the basis of his opinion as to value comes with a sufficient guaranty of trustworthiness to justify the relaxation of the hearsay and best evidence rules.' "

In State v. Oakley, 163 Tex. 463, 356 S. W. 2d 909, 95 A. L. R. 2d 1207, the court held that such evidence by an expert witness, although partially based on hearsay, was admissible to show a basis for his opinion of value. In State Highway Com. v. Parker, 225 Ore. 143, 357 P. 2d 548, the court quoted, with approval, the following excerpt from Stewart v. Commonwealth (Ky.), 337 S. W. 2d 880: " 'It is quite often true that the most thorough, comprehensive and accurate professional appraisals are based almost entirely on "hearsay" in the legal sense of the word. Persons who appraise or deal in real estate professionally make it their business to keep abreast of current transactions. The value of an appraisal depends very largely on the manner in which it is developed. It is of importance to the court and jury to know how it was made and on what information it was based. If some or all of that information was acquired by hearsay, but through the customary channels of the trade, or by methods recognized as standard in the making of appraisals, we see no useful purpose in a rule of absolute exclusion. Therefore, confining the effect of this opinion to witnesses whose qualifications include experience in appraising or dealing in real estate *as a business,* we hold that testimony as to the prices paid in comparable sales is not inadmissible merely because it is secondary or hearsay evidence. * * *' " This evidence was admissible and was erroneously refused. See, O'Neill v. State, 174 Neb. 540, 118 N. W. 2d 616; City of Lincoln v.

Marshall, 161 Neb. 680, 74 N. W. 2d 470.

Defendant also objects to the ruling of the court barring evidence of another sale. The objection made was, among others, on the ground that the sale was not of comparable land. There were many dissimilarities and bearing in mind that the court is vested with a reasonable discretion in determining the admissibility of evidence of this nature, we conclude that, in this instance, there was not an abuse of discretion. See Swanson v. State, 178 Neb. 671, 134 N. W. 2d 810.

Plaintiffs called as an expert witness a man with a wide knowledge of local real estate values in the vicinity of plaintiffs' land. Arrangements had been made with this individual to appraise plaintiffs' land, testify in regard to such appraisal and to damages sustained, and for compensation for his services. He was not a licensed real estate salesman or broker. The court allowed an expert witness' fee for the services of this witness to which defendant excepts. A witness who testifies as an expert on a subject requiring special knowledge and skill is, in the absence of special contract, entitled only to the statutory fee. See, Hefti v. Hefti, 166 Neb. 181, 88 N. W. 2d 231; Peek v. Ayres Auto Supply, 155 Neb. 233, 51 N. W. 2d 387. The record discloses that a special contract had been entered into with this witness; yet, the law forbids the payment of compensation for his services. Section 81-867, R. S. Supp., 1967, defines a real estate broker as a person who, "for another and for a fee, commission, or other valuable consideration, * * *, sells, exchanges, * * * or appraises, or offers or attempts or agrees to appraise, * * *, any real estate, * * *." Section 81-869, R. R. S. 1943, provides: "It shall be unlawful for any person to act as a real estate broker or real estate salesman without first having procured a license to be issued by the State Real Estate Commission, as hereinafter provided for." It appears that one who is not a real estate broker cannot charge or collect a fee for his services in appraising real estate and the court was

without power to allow an expert witness' fee for services rendered by this witness. Since he cannot lawfully contract for such compensation, he falls within the rule announced in Hefti v. Hefti, *supra*, and Peek v. Ayres Auto Supply, *supra*.

Defendant also challenges the award of attorney's fees allowed in this case. Plaintiffs retained as counsel the firm of McGinley, Lane, Mueller & Shanahan. The case is one in which the allowance of an attorney's fee is proper under the provisions of section 76-720, R. R. S. 1943. That section provides that under certain circumstances "* * * the court *may* in its discretion award to the condemnee a reasonable sum for the *fees of his attorney* * * *." (Emphasis supplied.) The statute is not mandatory but enables the court, in instances where it may be deemed proper and statutory requirements are present, to make such allowance. The purpose of the statute is to protect condemnees against harassment by the institution of groundless appeals on the part of condemners and its use should be limited to the purposes for which it was intended. In the present instance, we find there was no abuse of discretion in allowing an attorney's fee, but a question arises as to the amount allowed. The fee allowed is somewhat in excess of that requested by plaintiffs. The evidence further shows that two members of the firm employed by plaintiffs participated in the trial and perhaps the preparation therefor. A claim was made for the fees of both attorneys notwithstanding that at least, insofar as the trial was concerned, these fees were in a measure for the work of one attorney duplicating that of the other. The statute contemplates but one fee and the amount allowed should be fixed as though the services were performed by one attorney unless the circumstances are such as to require the services of two or more attorneys. See, Hamilton v. Nunn, 247 Ky. 715, 57 S. W. 2d 655; In re Epstein's Estate, 176 Misc. 494, 27 N. Y. S. 2d 872; Maryland Casualty Co. v. Maloney, 119 Ark. 434, 178

S. W. 387, L. R. A. 1916A 519; Southland Life Ins. Co. v. Norton (Tex. Civ. App.), 5 S. W. 2d 767. Fees should not be allowed on the basis of an unnecessary multiplicity of counsel. It does not appear that this case was one requiring a multiplicity of counsel.

The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

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DALE D. ANDERSON ET AL., APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.
168 N. W. 2d 383

Filed June 6, 1969. No. 37091.

**New Trial: Attorneys at Law. Misconduct of an attorney to require a new trial must be such as prejudices the substantial rights of a party.**

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., John P. Regan, and Gary R. Welch, for appellant.

McGinley, Lane, Mueller, Shanahan & McQuillan, for appellees.

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

NEWTON, J.

This is an action in eminent domain. Defendant asserts prejudice by reason of remarks of plaintiffs' attorney to the jury during argument. We do not find error of a prejudicial nature and affirm the judgment of the district court.

The alleged erroneous remarks were as follows:

"Now, the good, gracious Mr. Pilmer, he did come in

with one thing. He said, 'Yes, that they should have a loading pen on the north, a chute'. He didn't give any cost for it; he didn't give any cost for the fences; he didn't give any money value for any of the improvements. * * *

"I want to refer here for a moment to this testimony, and I mentioned it to you here before, that Mr. Pilmer —if you give credit to the improvements that have to go in there, that he recognizes have to go in there, you are at a $5,200.00 figure, as best I can reach."

Objections to these remarks were overruled.

The witness Pilmer did not state that there should be a loading pen or chute on the land lying north of the highway nor did he intimate that any improvements had to be constructed in that area. He had testified that damages for land taken and to the remainder amounted to $4,000. Other evidence introduced by plaintiffs was to the effect that fences, a corral, and a barn or shed would have to be constructed on this land at a cost of about $1,300 if it were to continue in use in cattle operations. There was evidence in the record to sustain the statements of counsel, but he erroneously attributed the statements to Pilmer, a witness for defendant. The jury returned a verdict for almost double the figure of $5,200 attributed to Pilmer and in so doing, necessarily relied on other evidence adduced. Defendant does not assign as error excessiveness of the verdict. Furthermore, the court instructed the jury: "* * * you should not be influenced by statements of counsel not supported by evidence."

Under the circumstances, the error appears to be harmless and nonprejudicial. Misconduct of an attorney to require a new trial must be such as prejudices the substantial rights of a party. See, Rankin v. Northern Assurance Co., 98 Neb. 172, 152 N. W. 324; 5A C. J. S., Appeal & Error, § 1713, p. 856.

The judgment of the district court is affirmed.

AFFIRMED.