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REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 13, 1969 and AUGUST 21, 1970

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM 1969 AND
JANUARY TERM 1970

VOLUME CLXXXV

WILLIAM E. PETERS

OFFICIAL REPORTER

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By William E. Peters, Reporter of the Supreme Court

For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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HARRY A. SPENCER, Associate Justice
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Fourth	Douglas.	Patrick W. Lynch Lawrence C. Krell James P. O'Brien Donald Brodkey John C. Burke Paul J. Garrotto John E. Murphy Rudolph Tesar Donald Hamilton James A. Buckley Theodore L. Richling	Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha
Fifth	Hamilton, Polk, York, Butler, Seward, and Saunders.	H. Emerson Kokjer John D. Zeilinger	Wahoo York
Sixth	Dodge and Washington.	Robert L. Flory	Fremont
Seventh	Fillmore, Saline, Thayer, and Nuckolls.	Joseph Ach	Friend
Eighth	Thurston, Dakota, Dixon, and Cedar.	Joseph E. Marsh	South Sioux City
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Tenth	Adams, Clay, Phelps, Kearney, Harlan, Franklin, and Webster.	Edmund Nuss Norris Chadderdon	Hastings Holdrege
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Thirteenth	McPherson, Logan, Lincoln, and Dawson.	Hugh Stuart	North Platte
Fourteenth	Chase, Hayes, Frontier, Furnas, Red Willow, Hitchcock, Perkins, Gosper, and Dundy.	Jack Hendrix	Trenton
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Nineteenth	Banner, Kimball, Morrill, Cheyenne, Garden, Deuel, Arthur, and Keith.	John H. Kuns	Kimball
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TABLE OF CASES REPORTED

IN MEMORIAM

FREDERICK W. MESSMORE

And now, at the hour of nine o'clock a.m., on this sixth day of April, A.D., 1970, the same being the date fixed by the Court for hearing the report of the Committee appointed to draft resolutions in memory of Frederick W. Messmore, the Court being in session and members of the bar in attendance, the Committee makes the following report:

HONORABLE M. S. HEVELONE.

MAY IT PLEASE THE COURT:

The Chief Justice and the Associate Justices of the Supreme Court of Nebraska:

The committee, by this honorable court, heretofore appointed to present a memorial service in recollection of the late Honorable Frederick W. Messmore, for many years a justice of this court, respectfully tenders this tribute to his person, his character, and his long and distinguished public career.

Frederick Wilbur Messmore was born at Boone, Iowa, on July 11, 1890, the son of Hiram Allison Messmore and Clarinda Jane (Davidson) Messmore. His boyhood was spent almost entirely in the state of his birth, and his primary education was largely received therein. He graduated from the Bedford, Iowa, High School in 1907; then studied for a year in the Northwestern Business and Normal College at Council Bluffs, Iowa.

On April 30, 1913, he was united in marriage with Jennie Frances Saxe. To that union were born three sons, Hiram Allison Messmore, Frederick Boughn Messmore, and John Colby Messmore. Of those children, Frederick Boughn Messmore, familiarly known as "Ted," graduated from the College of Liberal Arts of Creighton

University with the Bachelor of Arts degree, in June, 1942. The second World War being then in progress, he entered at once into the military force of the United States, and was assigned to duty in the aviation service. On September 9, 1943, while on duty in the European Sector, he was killed in an airplane accident in Sicily during the battle of Salerno, Italy. The other two sons survive.

The second Hiram Allison Messmore (now Hiram Allison Messmore, Sr.), after a worthy career in the military air service during World War II, pursued the study of law in the School of Law of Creighton University, from which he graduated with the degree, LL.B. on February 9, 1948. On February 18, 1948, he was admitted successively to the bar of this court, of which he remains an active member, and to the bar of the United States District Court for the District of Nebraska, wherein, too, he retains his membership. He was admitted to practice in the Supreme Court of the United States on March 3, 1964, and is a member of the American Bar Association. Also, an active member of the bar of Texas, he has resided in Houston, Texas, since 1948. There he is the manager of litigation in the legal department of the Tennessee Gas Pipeline Company, and in that position, is in charge of all of its eminent domain actions, damage suits, and other litigation. His wife, Estelle T. Messmore, during the second World War, was a Lieutenant in the United States Army Nurse Corps, and as such was in active foreign duty. They are the parents of two adult children, a daughter, Mary Jane Messmore, an employee at Houston, Texas, of Dun and Bradstreet, Inc., and a son, Frederick B. Messmore, presently nearing the completion of his collegiate education.

John Colby Messmore, already mentioned, received his education in the dental profession in the College of Dentistry of the University of Nebraska, from which he graduated in June 1951, with the degree, D.D.S. He is engaged in the practice of dentistry in Pocatello, Idaho, where he and his wife, Betty O. Messmore, reside. His

children are a son, Frederick B. Messmore (Ted), a senior student in Idaho State University; a daughter, Susan Elizabeth Messmore, a first year student in the University of Minnesota; and a son, Eric John Messmore, aged ten, a grammar school pupil in Pocatello, Idaho.

Toward the family of Justice and Mrs. Messmore, thus identified, they, as parents, and as grandparents, exhibited an unfailing affection and devotion.

In September 1909, Frederick Wilbur Messmore entered upon the study of law in the School of Law of Creighton University; and he completed his course and received the degree LL.B., with that school's class of 1912. He was, throughout, a consistent, faithful, and competent student. He was admitted to the bar of this court on May 2, 1912, and to the bar of the United States District Court for the District of Nebraska, on May 11, 1931.

He promptly entered upon the practice of his profession at Beatrice, Nebraska, as an associate in the office of Leonard Wright Colby, commonly known, in consequence of a military career originating in the Civil War, and upon its termination continuing through the Indian conflicts, as "General Colby" a title to which he was probably entitled, in consequence of his Civil War and post Civil War military career. Locating in Beatrice after the conclusion of the Civil War, General Colby had achieved more than local prominence as a trial lawyer, especially in the defense of persons charged with the commission of criminal offenses.

In the general election of 1914, Frederick Wilbur Messmore was chosen as the County Attorney of Gage County, Nebraska, in which position he remained qualified and effective until late in 1918, when he resigned that office to enlist for service in World War I, and particularly to enter the Infantry Officers Training Corps at Camp Pike, near Little Rock, Arkansas. During that service he contracted the then prevailing malady of Spanish Influenza; but eventually, and in 1919, he was discharged from the military service. From such dis-

charge through 1920, he resumed, and continued in, the practice of law in Beatrice, Nebraska.

From 1920 through 1928, pursuant to successive elections, he served as County Judge of Gage County, Nebraska. In the election of 1928, he was chosen as Judge of the District Court for the Eighteenth Judicial District of Nebraska, comprising the two counties of Gage and Jefferson, with their respective county seats of Beatrice and Fairbury. And, assuming the duties of that office, by virtue of an election covering the unexpired portion of a vacancy, he served continuously thereafter as such District Judge until the late summer or early autumn of 1937.

On August 9, 1937, in consequence of the then recent death of the Honorable Edward E. Good, he was, by the Honorable R. L. Cochran, Governor of Nebraska, appointed as a Justice of the Supreme Court of Nebraska. He entered on September 18, 1937, upon the active performance of the duties of that high office, and he continued therein until January 6, 1965, when he arrived at the statutory age for his retirement. Thereafter, he remained in retirement status until his death on June 24, 1969. We here reflect, therefore, upon one man's relatively continuous tenure in public service through approximately fifty-five years, and actively through a half century. And let it be remembered that the opening labor of that long interval was in the notably vulnerable position of a public prosecutor, and, by far, its greater duration was devoted to the never easy task of presiding over the trial of an almost infinite variety of litigation, both civil and criminal. Yet, there is warrant, in considering his long career, for the conclusion that, even in its inception, he so discharged his official duties that his long persistence in high public office was thus early foreshadowed.

With the opening of 1915, despite his then unfamiliarity with trial procedure and practice, he entered upon his service as the county's counsel and prosecutor, with considered, yet modest, assurance. He early be-

came recognized among the profession in consequence of the thoroughness of his factual preparation for his prosecutions. He was tireless in his quiet and orderly pursuit of dependable evidence. And he was cautious in his inquiry into the applicable law. That diligence was not fruitless. His years of service were widely commended for the relative frequency wherewith persons, by him accused of the commission of crimes, and confronted with the persuasive evidence against them, voluntarily entered pleas of guilty. And as the county's legal adviser, he early found himself possessed of a high measure of public confidence in his legal conclusions and in his discretion in the tender of advice, and in the pursuit of the negotiatory process. Thus, County Attorney Messmore early merited and received a generous and widely accepted appraisal of his capacity as the public lawyer.

And County Judge Messmore's stature as the occupant of that office, through his approximately nine years in such position, was not less highly commended. He quickly recognized the necessity that a Nebraska County Judge possess an informed familiarity with both the legal and the practical requirements whereby the delicate problems rooted in the management and settlement of the estates of deceased or incompetent persons must be accomplished. In that notably important office, he was known both as a prudent and well advised legal guide, and as a practical adviser, of those who relied implicitly upon his reasoned judgment. And doubt may well be entertained whether, in our Nebraska state government, there is any public office clothed with a responsibility greater than—or even equal to—that which is reposed in our county courts.

During the approximately eight years from 1929, through the greater part of 1937, Judge Messmore of the District Court for the eighteenth judicial district of Nebraska, presided over that court with the uniform approval of its bar and of the court's constituents.

He was highly esteemed for his punctual and orderly

administration of his calendar, for his patience with, and courtesy towards, all who were concerned with his court, including its official personnel, the members of its bar, its jurors, the witnesses appearing before him, and the spectators who licitly observed the proceedings over which he presided. He was unobtrusively industrious and diligent in his preparation and study, yet never domineering or autocratic. On the contrary, he invariably listened attentively, not only to the evidence adduced, but, as well, to the arguments presented, before him. He was, in fine, an industrious and informed, but a gracious and conscientious, jurist. And his district exhibited towards him its invariable and virtually unanimous, respect and affection. Indeed, not a few of his constituents quite frankly expressed, over his eventual promotion to the Supreme Court, their sincere regret, but on the score alone of his imperative withdrawal from their immediate association and presence to the capital of the state. Without diminution of their respect for his official excellence, they desired to retain him as their convenient and cherished friend and neighbor.

And what of Justice Messmore of the Supreme Court of Nebraska? For it was in that high office that he completed his public career. It may be declared briefly but adequately that in the highest court of his state he was a justice of the character and capacity foreshadowed in and by his many years of service, first at the bar as County Attorney, and successively thereafter and consecutively as County Judge, and as Judge of the District Court. He vindicated his apprenticeship.

As a Justice of the Supreme Court, he remained his sincere, conscientious, courageous, and morally and intellectually qualified self. He approached his daily tasks as a reviewing jurist with becoming modesty, humility, dedication and industry. He resolved his honest doubts by close attention and unremitting personal labor, which are fairly reflected in his opinions. And of those opinions, let it be mentioned that he invariably and appropriately oriented them, not to the production of legal liter-

ature, but rather to the correct resolution and determination of the respective cases that were before him. He arrived at that which most becomes an appellate judge. And for that he is entitled to the enduring esteem of his fellow jurists and of the members of the legal profession.

In that spirit, your Honors, your committee presents this token recollection of a sincerely respected brother at the bar and judge of the courts of the State of Nebraska.

Respectfully submitted,
John W. Delehant
Ernest A. Hubka
Fred Vette
Leslie H. Noble
M. S. Hevelone

HONORABLE LESLIE H. NOBLE.

MAY IT PLEASE THE COURT:

We all share a deep personal loss in the death of our friend, Fred W. Messmore.

I first met Fred in 1924, some 46 years ago when he was serving as County Judge of Gage County. He had previously served two terms as County Attorney of our County.

In 1928 he was elected District Judge of the 18th Judicial District, comprising Gage and Jefferson Counties, by a large and imposing majority and he assumed the bench in January 1929. He continued to serve as Trial Judge of this District until his appointment to the Nebraska Supreme Court in 1937. He served as a member of this Court with distinction and honor until his retirement in 1965.

Fred Messmore was a man who loved people. He deeply enjoyed mingling with groups of his friends and visiting with them whenever the opportunity offered. He had a good sense of humor and wit and had the reputation in Gage County of being an exceptionally good story teller.

On the trial bench where he served so capably he was well known for the evenness of his temper and disposition. He did not believe in harsh judgments and penalties. He was kind and courteous to lawyers and litigants alike, and was particularly kind to and patient with the younger members of the Bar. Of all the fine qualities Fred possessed, I was always impressed by his sympathy and compassion for the unfortunate, those of modest means, those in trouble and the individual who needed help.

Fred was fond of the out-of-doors and the woods and he liked very much to fish. He and I went fishing together on occasion, where we could be found sitting on the bank of some creek or farmer's pond enjoying the beauties of nature.

Fred Messmore was a loyal and patriotic American. He firmly believed in the democratic process of our country. He was devoted to the great principles of our Constitution, and the rights, privileges and freedoms of our American heritage which we so deeply cherish and enjoy.

Fred was a family man and a devoted husband and father. He was proud of his wife, Jane, and his three sons, Hiram, Ted and John. Like Fred, who served in the military forces of his Country all three of his sons were members of the Armed Forces, and his son Ted made the supreme sacrifice while serving in the United States Air Force.

Judge Messmore's record of fine service on the Supreme Court speaks for itself and is well known to the lawyers of this State. We owe him and his memory our deep and sincere gratitude for his diligence, perseverance and outstanding public service in the Judicial processes of the Courts of Nebraska in which he served so ably.

The State of Nebraska has lost a leader, a loyal and patriotic citizen, a fine gentleman and an outstanding member of the Nebraska Judiciary.

His memory will long dwell in the minds and hearts of his many friends and members of the Bench and Bar.

HONORABLE ERNEST A. HUBKA.

MAY IT PLEASE THE COURT:

In the year 1928, the Honorable Frederick W. Messmore was elected District Judge of the Eighteenth Judicial District which comprised Jefferson and Gage Counties. Justice Messmore's terms as District Judge extended through several years of the great depression. For nearly seven of those distressing years, I served as Gage County Attorney.

It was my good fortune to become closely acquainted with Justice Messmore and to observe his work as a District Judge.

I well remember his outstanding qualities as a District Judge, particularly his courtesy, kindness and encouragement to young lawyers.

He loved to stop and visit with people and ascertain their views no matter what their station in life. The welfare of his fellowmen was a matter of genuine interest to him. He was just. He respected the oath that he took as a Judge.

Justice Messmore's integrity was recognized by all the lawyers of the Eighteenth Judicial District. All of us respected the wisdom of the decisions he pronounced from the District Court bench. All just men would agree that Justice Messmore succeeded well as a citizen, lawyer and Judge. Strong, capable and warm in his friendship, Justice Messmore was a good citizen, an outstanding Judge, truly a man of high character.

HONORABLE FRED VETTE.

MAY IT PLEASE THE COURT:

I feel that the history of Judge Messmore's public life, his capabilities in connection therewith, and the excellence of his personality and friendship have been fully dealt with in the committee's statement as read this day by the Chairman. Personally, I have had a rewarding experience in being able to practice under Judge

Messmore during part of his tenure as a County Judge and all of the time in which he was a District Judge and Supreme Court Justice. The work that I had before him was made less difficult and more rewarding by reason of his fair and impartial handling of the matters in which I was involved. I fullheartedly subscribe to all of the remarks set forth in the committee's report which I feel well covers Judge Messmore's life as a public servant.

In addition to the hobbies of Judge Messmore, and he had many, that were set forth by other members of the committee, I believe his two most important hobbies were first his family, and second, friends and people, people being in his opinion all people and not just a chosen few. It seemed that he always found time to visit with and listent to people's troubles and sorrows as well as to share their joys and their company. It was this unselfish consideration of others that endeared him to the citizenry of the communities he served.

While I know that others have shared the same benefits, I personally feel that my life has been fuller and more rewarding because of my acquaintance with, contact with, and association with Judge Fred W. Messmore.

HONORABLE JOHN W. DELEHANT.

MAY IT PLEASE THE COURT:

Upon the gracious invitation of Chief Justice White, may I accept the privilege and honor of uniting with my brothers of the Committee, and of the Gage County bar, in this, to us, unwelcome, yet eagerly tendered, ceremony. In it we offer an abundantly merited tribute to one "we have loved long since and lost awhile", the Honorable Frederick W. Messmore, through many years a Justice of this Court, and, since 1912 an esteemed member of the Gage County, Nebraska bar. May it be taken as a mark of our affection for him that, in this solemn hour, we who speak here identify him familiarly

and simply as "Fred". We are persuaded that he would not have it otherwise.

First, and without repetition, I concur in the recollection of his career, and in the testimony touching his character and personality, professional, individual and public, which are reflected in the resolution presented by the committee, and in the considered statements of its several members who have already appeared before the Court. Reiteration by me of those testimonials would be presumptuous and ineffective. I am moved rather to mention very briefly some features of a comparatively long personal friendship with the honored and esteemed subject of this session.

My acquaintance with Frederick W. Messmore arose somewhat more than sixty years ago. In the early Autumn of 1909, he entered upon the initial year of his legal studies at the School of Law of Creighton University, in whose College of Liberal Arts I was opening my senior year. We shortly became acquainted, and encountered each other from time to time during that scholastic year. In the Fall of 1910, I became a freshman in the law school wherein he was then at the threshhold of his second year. Through the ensuing two school years our association was normally frequent and we became good friends. Fred completed his formal law course in the Spring of 1912 and was at once admitted to the bar of this state.

Early in 1913, I was admitted to the bar of Nebraska, and in July of that year, I entered upon the practice of law as an employee of the firm of Rinaker and Kidd at Beatrice, in Gage County. There, I shortly renewed my contact with Fred, who had entered into a professional association with General Leonard Wright Colby at Beatrice. Our meetings became reasonably frequent, and arose variously from the practice of law to a congenial fellowship in Democratic political affairs, in a community wherein Democrats were in an obvious minority. In the latter field, Fred's familiarly recalled career prompted numerous pleasant encounters between

us. And, I need not add, I followed his public service with sincere esteem and pride.

It has already been noted that Fred entered the United States Army during the First World War and was assigned to study and duty in the Infantry Officers Training School at Camp Pike, Arkansas, in 1918. There, again, our paths joined, for we found ourselves in the same training unit, though in different companies.

The Spanish Influenza epidemic of 1918 is a subject of common recollection. Fred was overtaken by, and was desperately ill from, it. His father came to Little Rock and Camp Pike in apprehension of his son's probable, and imminent, death. In consequence, I had several solemn meetings with the father, Hiram Messmore. One of those may be briefly recalled. On the Sunday before Thanksgiving Day in 1918, he and I sat together for some two hours on a boardwalk outside the most critical ward of the camp's base hospital, where Fred was lying. And in our discussion, I disclosed to the elder Mr. Messmore the requirements of military usage which he and Mrs. Fred Messmore would have to pursue in order to secure Fred's personal effects, if and when he should die, for his recovery was that precarious.

Fortunately, Fred recovered, but tardily enough, that, as I recall, his military discharge was not forthcoming until the year 1919 was well advanced. His career thereafter is history of recognized interest to Gage County, to Nebraska, and to this Honorable Court, and has been adverted to proudly in this ceremony. I venture to close with this final allusion. He was a valued friend, a devoted son, husband and father, a competent and worthy lawyer, and a jurist, through long service, of acknowledged eminence.

ASSOCIATE JUSTICE EDWARD F. CARTER.

For almost 28 years, Judge Messmore and I were contemporary members of this court. Our association was necessarily personal and close even though, from the

very nature of our work, disagreement from time to time arose. His sincerity of purpose was never questioned. His impartiality and fairness was ever evident and his integrity always beyond question. These are not trite words on my part, but constitute a conclusion drawn from a personal observation of his actions and conduct in dealing with the intricate problems of the law and the complexities of the factual situations with which an appellate judge is compelled to deal.

His traits as a citizen, his habits as an individual, and the successes he enjoyed, I leave largely to others. But as to his qualities as a judge, his energy, his courage, and his rugged individualism in the support of rule by law stand out as a guiding star in his judicial life.

I have heard it said that Judge Messmore was gruff and distant. Nothing could be further from the truth. He was, in fact, good natured and affable. He enjoyed a good story and loved to discuss interesting experiences from the past. He was a most enjoyable person, never restricted by serious demeanor or evidences of stuffiness. He did not claim to know all the law, nor would any other lawyer in his right mind. But to his great credit, he was willing to gain enlightenment wherever he could and come to a completely independent conclusion.

In the passing of Judge Messmore, we pay our respects to a good judge, impartial and honest, an unassuming public servant, and a man of the people. His subtle humor and good sense will not soon be forgotten.

In addition to my professional relationship with him as a member of this court, I considered him a close personal friend. It is fitting, indeed, to pause here in tribute to his memory. We who knew him well, sorrow at his passing, but we rejoice in the life that he lived and the influence that this conscientious and simple man had upon us. I shall always treasure his memory for the man that he was.

CHIEF JUSTICE PAUL W. WHITE.

There is little that I can add to what has already been said. There are many others besides the distinguished gathering here this morning who are of the same attitude and disposition. Continuously for over fifty years through county, district and the Supreme Court, Judge Fred Messmore symbolized the ideals and the traditions of a judge in the State of Nebraska. 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 receives the 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 meeting to honor him this morning, all of this image is personified in Judge Messmore. In personal appearance, in the dignity of his conduct and demeanor, and in his speaking of the law, he exemplified a sanctified dedication to the law and the moral and cultural principles it implements.

In Judge Messmore, society had a judge who carefully, meticuously and conscientiously worked at the law and had the wisdom to know, as an appellate judge, that knowledge and grasp of the facts were fundamental to an appellate court's function. A lawyer may disagree with an appellate court's opinion on the law, but he becomes hostile when you take his facts away from him. Fred Messmore never did that.

But beyond this, Fred Messmore knew that the majesty of the law lies equally between principle and the necessity of certainty that furnishes a guide to social adjustment and our basic concept of ordered liberty. He placed his faith in the American principle that only the majesty of the law could transcend the dictator, the monarch or the whims of a transient innovating oligarchy.

Fred Messmore knew well that there was no glory, either temporary or permanent, in manning the light house while the storms of destruction raged around it. In Judge Messmore, we find the personification of the traditions of humble judge who adds his small increment to the great traditions of the law and the judiciary.

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. Messmore and the members of the family will be advised of the high regard of the Bench and the Bar for Justice Messmore, and of the expressions of sympathy made this day. Copies of the resolutions and statements of counsel will be sent to them in brochure form and the record of this memorial will be published in the official Nebraska Reports.

The Court stands recessed.

IN MEMORIAM

ROBERT GLENMORE SIMMONS

And now, at the hour of nine o'clock a.m., on this fourth day of May, A.D., 1970, the same being the date fixed by the Court for hearing the report of the Committee appointed to draft resolutions in memory of Robert Glenmore Simmons, the Court being in session and members of the bar in attendance, the Committee makes the following report:

HONORABLE ROBERT VAN PELT.

MAY IT PLEASE THE COURT:

Death this year has taken men
Whose kind we shall not see again.
Pride and skill and friendliness
Wrath and wisdom and delight,
Are shining still, but shining less,
And clouded to the common sight.
Time will show them clear again.
Time will give us other men
With names to write in burning gold
When they are great and we are old,
But these were loyal-hearted, rare.
Memory keeps with loving care
Deeds they did and tales they told.
But living men are hard to spare.

ROBERT GLENMORE SIMMONS was born in a sod house on his father's farm in Scotts Bluff County, on December 25, 1891.

His early years were spent on the farm. The family later moved to Gering and in 1900 moved to Scottsbluff when Bob's father was appointed its Postmaster. There in 1909 Bob graduated from high school. He attended Hastings College for two years, was out of school

one year, and entered the College of Law at the University of Nebraska in September 1912, graduating in 1915 with the honor of the Order of the Coif. He immediately entered the practice of law at Gering where he served as County Attorney in 1916 and 1917. He enlisted in the U. S. Army Balloon Corps in October 1917. He was commissioned a Second Lieutenant March 12, 1918, and was honorably discharged in January of 1919. He returned to the practice of law at Scottsbluff, continuing until he was elected to the Congress of the United States from the Sixth Nebraska District in 1922. He served as a member of the 68th, 69th, 70th, 71st and 72nd Congresses. In 1933 he returned to Lincoln, where he maintained his residence until his death, which occurred on December 27, 1969, at Lincoln General Hospital following a heart attack a few hours earlier.

In 1920 he was elected Department Commander of the American Legion and in 1921 was elected President of the Alumni Association of the University of Nebraska. In 1934 and again in 1936 he was nominated by the Republican Party for the U. S. Senate. No Republican was elected on the state-wide ticket in 1934 and only one Republican to a minor office in 1936.

In November 1938, he was elected Chief Justice of this Court and on November 12, 1938, was appointed by Governor Cochran to fill the vacancy which had existed because of the death of Chief Justice Goss. He served as a member of this Court from that date until January 2, 1963. His period of service exceeds that of any other Chief Justice. His first opinion is found in Volume 135 of the Nebraska Reports at page 654 and his last opinion in Volume 174 at page 584.

He received honorary degrees from Hastings College and Creighton University and jointly with Mrs. Simmons in 1963 was recipient of the Distinguished Service Award of the University of Nebraska.

His career as a judge will be mentioned by others but certain aspects should be mentioned in this statement.

While carrying his load as a member of this Court, he

also served by Presidential appointment as a member of several Emergency Boards, he was an arbitrator for the National Mediation Board, and a neutral member of the National Railroad Adjustment Board, acting on that Board as a referee.

In 1952 the Department of State during the Truman Administration, sent him to the Orient and later he went to the Middle East and to the Gold Coast. In 1956 he was appointed by President Eisenhower as chairman of the legal group on the People-to-People Program. He carried on its work in Indonesia, India and the Phillipines and was the recipent of the Order of Kalantiao from Central Phillipine University in 1955. He was awarded the Certificate of Merit by the U. S. Information Agency in 1956.

Observing the destruction of law books in some of the Asian countries which he visited, he authored and carried through a project to procure law books for distribution in these countries, securing the cooperation of the bar, the bench and the law book publishing companies. These books were shipped by or through the State Department and the United States Information Offices to law colleges and to courts in countries where law libraries had been burned by enemy invaders.

He served as a member of the House of Delegates of the American Bar Association, served as a member of the Editorial Advisory Board of the American Bar Association Journal, and was chairman of the Association's special committee on improving the administration of justice. He authorized articles which were published in various law journals. He received the Freedom Foundation's award in 1960.

An event of 1946 should not be overlooked. That year Mrs. Simmons was selected Nebraska State Mother, which brought him great satisfaction. The Distingushed Service Award previously mentioned was declined by him until Mrs. Simmons, whom he felt equally qualified for it, was included. His devotion to his wife will be the subject of one of the presentations this morning.

He was one of the founders of Boys State in Nebraska, was active in Girls State, and originated the Boys and Girls County Government activities. He helped in the writing of the original text book on county government in Nebraska used by Boys and Girls County.

In 1939 he became an Inspector General Honorary 33° of the Sottish Rite of Free Masonry.

This account is not complete without mentioning his close personal friendship with Herbert Hoover, the 31st President of the United States, who was frequently an unpublicized guest in the Simmons home.

It is difficult to review the life of a man who was active in so many fields without either unduly prolonging an account such as this or omitting service which some friend will recall as equally important with the things mentioned. He was indeed an unusual public servant as will be pointed out by other speakers.

He will be remembered by those here today as a friend. Long after we have departed this life, Robert Glenmore Simmons will still be recorded in Nebraska history as a distinguished soldier, statesman and jurist who for fifty years of the 20th century was a stable yet constructive influence for good government in Nebraska and the Nation.

I close as I began—
Death this year has taken men
Whose kind we shall not see again.
* * *
Memory keeps with loving care
Deeds they did and tales they told.
But living men are hard to spare.

Judge Simmons was survived by his wife, Gladyce, who died 44 days after his death, and sons Robert G. Simmons, Jr., of Scottsbluff, Ray C. Simmons of Fremont, and daughter, Jean (Mrs. Lyman Wear) of Menlo Park, California.

HONORABLE FLOYD E. WRIGHT.

MAY IT PLEASE THE COURT:

I am honored to be privileged to speak at this Memorial Service for Judge Robert G. Simmons.

As a native of Scotts Bluff County and a member of the Scotts Bluff County Bar Association since 1922, I wish to speak briefly of Judge Simmons' early life in Scotts Bluff County and of the respect and admiration in which he was held by the people of Western Nebraska.

Judge Simmons' parents were pioneers in Scotts Bluff County, settling on a homestead near Scottsbluff in 1886. With the coming of the railroad and the founding of the City of Scottsbluff, the Simmons family moved to Scottsbluff and the father became the first postmaster and also engaged in the mercantile business.

Bob Simmons grew up in Scottsbluff and was educated in the city's schools, graduating from the high school in 1909. By reason of his ambition and his willingness to work, he was able to continue his education, first, at Hastings College, and then, at the University of Nebraska, where he earned his way and graduated from the Law College, cum laude, in 1915.

He then returned to Scottsbluff to take up the practice of law. He was soon, thereafter, elected County Attorney of Scotts Bluff County and served as such until resigning to enlist in the Army during World War I. After his discharge from the Army in 1919, he returned to Scottsbluff and resumed the practice of law. During the next few years, he was elected State Commander of the American Legion and the President of the newly formed Nebraska Alumni Association. In 1922, he was elected to Congress from the 6th District and served with distinction in Congress for ten years and accomplished much for the people of his District. A notable accomplishment was the settlement of a conflict between the Reclamation Department and the water users, whereby delinquent charges were postponed and the water payments extended over a longer period of time, a great ad-

vantage to the land owners. While in Congress, he had the respect and friendship of both President Coolidge and President Hoover.

At the end of his service in Congress, he returned to Lincoln. Others will speak of his many accomplishments and of his service to this court.

Judge Simmons was survived by three children—a daughter, who resides in California, and two sons, both of whom are active in the practice of law in Nebraska. All of the children were graduates of the University of Nebraska with Phi Beta Kappa honors.

Judge Simmons was a devoted husband and father and was extremely proud of his family, as he well might have been, and the family was equally devoted to and proud of him.

Judge Simmons retained his interest in Western Nebraska and his many friends here. He was a frequent visitor and often attended the annual meetings of the Western Nebraska Bar Association. He will be missed by his friends in Western Nebraska. They were proud to have him as their Congressman and as the Chief Justice of this court.

HONORABLE LOWELL W. WALKER.

MAY IT PLEASE THE COURT:

It was my privilege to know Robert G. Simmons and his wife, Gladyce, for half a century. I knew him as a World War I veteran, a Nebraska University alumnus, a member of the American Legion, a lawyer, a Congressman, a candidate for United States Senator, Chief Justice of the Supreme Court of Nebraska and as a devoted husband and father and grandfather of a fine family, and as a valued friend.

Early in his career, Bob, as he liked to be called, revealed his life-long dedication to education and public service. In 1920, he was elected the second State Commander of the American Legion, Department of Nebraska, and continued a leader in developing and pro-

moting the organization's pledge of service to community, state and nation. He was especially devoted to the Legion Americanism programs for youth. He was one of the leaders in developing the Legion Boys State, Girls State, Boys County and Girls County programs in Nebraska which became models for similar programs throughout the country. He was a co-author of "County Government in Nebraska", the official text book for the latter programs.

He also was devoted to education and in 1921 was elected president of the Alumni Association of the University of Nebraska, where he and Gladyce received their degrees and their children and grandchildren were to continue the family scholastic honors record, with a total of six PBKs in the family to date. His devotion not only to his Alma Mater but also to continuing education everywhere, even half way around the world, continued throughout his life.

I believe any tribute to Robert G. Simmons would be incomplete without reference to the dedicated help and inspiration throughout his career of his wife, Gladyce, the devoted mother of their children, who in her own right was honored as Nebraska's Mother of the Year. Her devotion was fully reciprocated and demonstrated by his constant loving care during her last years in the hospital as an invalid.

I salute Judge Robert G. Simmons as a great American and a great Jurist.

HONORABLE S. E. TORGESON.

MAY IT PLEASE THE COURT:

As a member of this Memorial Committee, I am honored and grateful for the opportunity to express my admiration for a man I knew as a lawyer, Congressman, a Judge and one of the most outstanding citizens of Nebraska.

I became acquainted with Bob Simmons in 1917. It was not until he returned from military duty that our

friendship developed. We had several things in common. We were, first af all, from Western Nebraska, we had served our respective counties as prosecuting attorneys, we were Republicans and we shared the philosophy that politics was the highest and noblest of peacetime pursuits.

In 1922 we campaigned together. He was elected to Congress when Moses P. Kincaid chose to retire. During the next ten years he served the Big Sixth District of Nebraska with distinction and earned the respect and admiration of his colleagues in the House. I recollect that through his influence we were successful in bringing to Kimball the opening national debate between Barkley of Kentucky and Tincher of Kansas relative to the then controversial "McNary-Haugen" Bill before the Congress.

In the New Deal landslide of 1932, Bob Simmons was retired. He was as crushed by the defeat of his friend, Hoover, as he was his own. But there was no rancor. He realized that both were victims of circumstances beyond their control. A lesser character would have quit—but not Bob—he carried on. When his party called on him to seek the Senate seat, he willingly and enthusiastically campaigned, not once, but twice. For a man who had dedicated his life to public service, it was no surprise that in 1938 he was elected Chief Justice of this State. While the office was non-political, you can rest assured that his partisan friends were there in his behalf.

To aid the helpless, the poor and the downtrodden was his constant aim and the record is voluminous with the many acts of kindness and service performed above and beyond his official duties.

While he was a confidant and advisor of President Coolidge, he emulated the virtue and integrity of McArthur, Churchill and Hoover. His was a well rounded life, with the essence of prudence, fortitude, temperance and justice.

He was the gentlest man I ever knew. He had faith, courage, and all the attributes we demand of greatness,

but he also had compassion, patience and those distinguishing qualities which denote the common man. His life was dedicated to his fellowman exemplified in the spirit of St. Francis of Assisi when he prayed:

Lord, make me an instrument of Thy peace.
Where there is hatred, let me sow love;
Where there is injury, pardon;
Where there is doubt, faith;
Where there is despair, hope;
Where there is darkness, light;
Where there is sadness, joy.

I count it a privilege and an honor to have been his friend.

HONORABLE VARRO H. RHODES.

MAY IT PLEASE THE COURT:

It was in 1933 that I met Robert G. Simmons for the first time, although his name had long been no stranger to me. Within a short time the intellect, the sincerity, the integrity and the loyalty and dedication of the man captivated me and made of me just one among the thousands who wanted to be his friend.

Those qualities, which so endeared him to his family, to this Court, to all in this room and to countless others, were magnificently exemplified in his long and faithful service in Masonry. This service carried him through all the bodies, marked by tireless effort, and culminated in 1939 in his being coroneted an Honorary 33°, the highest honor attainable by a Scottish Rite Mason. More significant than the work and the honor, however, was the fact that his life was built upon and lived by the tenets and virtues taught by God and glorified by Masonry.

He was a man possessed of a mind devoid of bigotry and prejudice. Less than three weeks ago a revered former president of Creighton University, which bestowed an Honorary L.L.D. degree upon him in 1963, said "Judge Simmons was one of God's finest children.

He was a great friend of Creighton University and of all education." That fact was also recognized by Hastings College when it honored him with an L.L.D. degree in 1942.

The principles of this man were manifest in his concise and meaningful opinions as a member of this Court; in his steadfast adherence to his keen discernment for right and wrong and his unadjustable sense of what was constitutional or unconstitutional.

Throughout the mature life of Bob Simmons, in his several capacities, it fell his lot to make decisions. Never is it possible to please all people in such activity. Let it be said, however, that no one, not even one of the displeased, was ever heard to say that he had been motivated by other than honest conviction.

Though for so long cast in a role where his seriousness was the predominant trait, recognizing that specifics would be inappropriate here, we should remember that Bob Simmons was a man possessed of a great wit and a spontaneously wholesome and hearty humor.

To all of us who were privileged to know him, the memory of this man we honor today will stand always as an inspiration and for generations to come this will be a better place because he passed this way.

HONORABLE RAYMOND G. YOUNG.

MAY IT PLEASE THE COURT:

Robert Glenmore Simmons, whose memory we honor, was Chief Justice of this Supreme Court of Nebraska from November 12, 1938, until January 2, 1963. During that period of more than 24 years, which exceeded by 6 years the term of any of his predecessors in the office of Chief Justice, there were heard by him more than 3,500 appeal cases. He was the author of Supreme Court decisions in more than 500 cases and participated in decisions on briefs in more than 100 others. They are contained in 40 volumes of Nebraska Reports beginning

with Volume 135, page 654, and running through 174 Nebraska 584.

In these printed records and his other writings are to be found the best expressions of Judge Simmons' legal reasoning and, set forth in a faultless literary style, the results of his uniformly diligent and thorough research.

Bespeaking his nation wide recognition by the legal profession, he was Chairman of the American Bar Association Section on Judicial Administration, and of its Special Committee on Improving the Administration of Justice. By request of the Board of Editors he wrote many learned articles which were published in the American Bar Association Journal. They show profound scholarship and have been widely recognized as a part of our legal literature.

In the life of Robert Simmons were manifest a power and a talent for leadership that derived naturally from his unyielding adherence to principles which to him were enduring and excellent and which he believed should actuate his personal effort and underlie his professional career.

In all of its relationships his life was marked by the highest standards of moral rectitude and of intellectual and ethical integrity.

He deemed it the most gratifying accomplishment to contribute of his great talents to the improvement of the Law and its processes and procedures, thereby repaying to the greatest extent possible the privileges which had come to him from his country and its institutions.

Some of us were associated with him in the high service rendered by this Supreme Court to our great Commonwealth. Others of us were co-workers with him in the efforts of our organized profession to accomplish the improvement of the administration of justice, particularly by means of the "Nebraska Plan" which has been widely acclaimed as a program of the cooperation of the Bench and Bar in the area of Bar Integration.

All of us, whatever the nature of our association with him, have been and are the beneficiaries of his sound wisdom, his idealism, his steadfact devotion to our American system and to the principle of the supremacy of the Law, his broadmindedness and understanding and all the virtues which made him beloved of all of us.

LET US RESOLVE,—

> that we of the Bench and Bar of Nebraska, conscious of the many years of dedicated service which Robert G. Simmons, great lawyer and great Judge that he was, rendered in many capacities to the people of this state and country and mindful of the manifold benefits which resulted to them from his exalted qualities of mind and heart, will in the years to come honor and revere his memory and emulate his example.

HONORABLE CLARENCE A. DAVIS.

MAY IT PLEASE THE COURT:

Bob Simmons was my friend—long before he became Chief Justice of this Court.

So if I depart from the formalities this occasion would seem to require, in this courtroom in which for so long he occupied the center chair, it is only because there are some personal things that should be said to give a true picture of his life.

What is the measure of a man's life? Is it material gain? Is it political popularity? Is it professional competency? But, under all these questions lies the basic question "But what was he really like?"

His legal views and record are written indelibly in his decisions and the opinions of this Court. His views on government and its policies are on the record in a hundred speeches.

But what was he really like?

He was a solid rock of principles from which he never departed and upon which his family, his friends and this state might build with confidence. And he had the

courage to defend these principles at whatever personal cost. Never was it necessary to ask where he stood—today.

What are the words that come naturally to our lips as we think of him? To me they are loyalty, constancy and devotion.

Loyalty to God and country, family and friends. But it is constancy and devotion that set him aside from too many of us. His constancy and devotion to his wife in their last few years is almost worthy of the romantic poets and almost unbelievable to those who did not witness it.

In May 1964, while he and Mrs. Simmons (Gladyce) were driving between Lincoln and Fremont, he suffered what he called a "blackout"—possibly a very tiny stroke. The car went off the road, against a pole and Gladyce was totally paralyzed. She never spoke again. She was in hospitals and nursing homes for six years until she passed away just 44 days after him. It was during these long six years that his constant solicitude and devotion to her knew no bounds. He blamed himself for her misfortune, although the cause was an act of nature beyond his control—an act of God if you will—but he never was able to put out of his mind that for which he blamed himself. Thereafter, his life was her life, dedicated entirely to her care and comfort, always sustained by a faint hope. They represent six years of the greatest example of devotion of man and wife that we have ever known. His care and tenderness of her pulled at the heartstrings of all who knew, and especially because by nature he was plain spoken, direct and almost blunt.

Mrs. Davis and I saw them many, many times. Day after day, evening after evening, never missing, although he quit driving, he was at the hospital trying to make her comfortable, taking "our evening ride", as he called it, in a wheel chair through endless miles of hospital corridors and sometimes on summer evenings out on the steps of the hospital, always solicitous for her comfort, always outwardly bearing a cheerful demeanor, talking

to everyone, wheeling her in to visit friends where she could sometimes smile a greeting that she could not speak. Determined, in spite of his own illness, to take care of her as long as she lived. These were the last years of his life. Against these years of loyality and devotion all of the honors of Congress, of intimate friendships with Presidents, of foreign missions for the State Department, and the long Chief Justiceship of this State, perhaps seem less important than does this picture of a strong and positive character showing the homely virtues of love and tenderness in ways we all might emulate.

That is what he was really like, and that is the measure of a man.

ASSOCIATE JUSTICE EDWARD F. CARTER.

It was my privilege to serve on this court with Bob Simmons for more than twenty-four years. While my close association with him predates by many years his service on this court, I shall limit my remarks to that period of time, knowing that our memorial committee will adequately present the other high points of his eventful life.

After his election as Chief Justice in November of 1938, he was appointed on November 12th of that year by Governor R. L. Cochran to complete the term of Chief Justice Charles A. Goss, deceased. Although he had not previously served in a judicial capacity, he stepped into the breach and quickly adjusted himself to the work of the court. He came without fanfare and without any disposition to remake the court or to change the law because of preconceived notions originating in his practice of the law. He always was ready to support the improvement of our practice and procedure; to simplify and make certain that which was cumbersome and ambiguous; to expedite and make less costly to litigants the rights of parties in seeking redress in the courts to settle their controversies.

Judge Simmons was a stalwart in the advocacy of rule by law and not of men. He was a firm believer in the stability of courts and the consistency of court opinions. He fully realized that a want of consistency in court opinions was the bane of the practicing lawyer. He knew full well that inconsistency of decision and the shifting of position by an appellate court left the practicing lawyer in a shadowy uncertainty in advising a client on matters of importance. He knew well from his long experience that an appellate court that did not speak clearly and consistently on the principles of the law did a disservice to the lawyer and his client. These things he had learned and learned them well.

Judge Simmons was an energetic man. No case was too small to deserve his careful and complete attention. He may have had faults, as we all do, but laziness or indifference were not among them. I can best describe him by quoting a short paragraph from Piero Calamandrie's "Eulogy of Judges" wherein it is said: "The good judge takes equal pains with every case no matter how humble; he knows that important cases and unimportant cases do not exist, for injustice is not one of those poisons which, though harmful when taken in large doses, yet when taken in small doses may produce a salutory effect. Injustice is a dangerous poison even in doses of homeopathic proportions." He knew so well, and I have heard him express it many times, that although a case may appear unimportant to us, it is usually of utmost importance to the litigant.

Without integrity, a judge, no matter how energetic and wise, lacks much in qualifications for the bench. I merely desire to point out here that Judge Simmons' integrity was beyond reproach. One might disagree with him, but one always felt his sincerity and a feeling that his position was objective and honest. He may have made mistakes, but I have no hesitancy in saying that they were of the head and not the heart.

I can say without fear of contradiction that he was a man of principle. He believed in our system of govern-

ment and its principles. He had the courage to express his views in public in its support and to resist all attempts to subvert the American system. He was uncompromising on fundamental concepts and expediency was foreign to his thinking where governmental principle was concerned.

I had known him for fifty years and have had the greatest admiration and respect for the attributes that he possessed. I know of no yardstick to measure his influence, but I can honestly say that we can use more men of his breed in these troublesome times. His unquestioned integrity, his complete honesty, his unimpeachable character, his loyalty to his friends, his dedication to this court, and, above all, his incomparable devotion to his family, marked him as a man entitled to the admiration of all who knew him.

As I have previously said, I had been closely associated with Robert G. Simmons for many, many years. The firmness of his ideals and the integrity with which he acted during his eventful life makes me feel proud to acknowledge him as a valued friend. He evidenced many signs of greatness as a citizen in a constitutional republic. Neither expediency, selfishness, nor greed could dent the armor of honest conviction that he wore. While we express our sincere regrets at his passing, we can be thankful that he lived among us for the many years that he did. His life was an example that others could safely emulate. I shall always revere the memory of Bob Simmons.

CHIEF JUSTICE PAUL W. WHITE.

There is little that I can add to what has already been said. It must be said that there is a multitude of other citizens across the breadth and length of this great state besides the distinguished gathering here this morning, who are of the same attitude and disposition. Continuously, for over 24 years, serving over twice the period of time of any other Chief Justice of this state, Chief

Justice Simmons symbolized the ideals and the traditions of a Judge in the State of Nebraska. We idealize a government of law rather than men, but revelation must come from the lips and the character and the ability 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 invites the respect of the people in the integrity and character of the individual Judge.

Judge Robert G. Simmons was intensely human and intensely considerate. He had the wisdom to know that the independence of judges, so cherished a part of the American tradition, does not mean that a judge should dwell like a soul apart. The poet bespoke the spirit of Bob Simmons when he said that there are hermit souls who live withdrawn in the place of their self content, but as for me, let me live in a house by the side of the road and be a friend to man. He knew, dispassionate and as detached as a Judge's job requires him to be, that in the end our government under law, our respect for the judiciary, and our very existence as free people, depend upon communication with and respect by the people and public opinion for all of our institutions and particularly the judiciary.

The strength and quality of Judge Simmons' character and belief as succinctly illustrated in the remarks that he made less than one year ago before this court in the memorial services for another Judge. He said: "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."

Judge Simmons' scholarship, his industry, and his

contributions to the law of the State of Nebraska are written immortally in the pages of the printed records and the decisions of this court. But even more important, his character as a man, his character as a Judge, and his communication to the people in this state of the great principles of Americanism and of our independent judicial system have carried forth a tradition that we hope will last forever in this state and in this nation.

Every new Judge in America received at the outset of his career a book entitled "Handbook for Judges," which contains all of the classical statements of the qualities of a Judge, the importance of the courts, and the basic principles of our American judicial system. One of the speeches Judge Simmons made is contained in this book. In it, he said: "The maintenance of free government in America is dependent upon the maintenance of an independent and strong fully functioning system of courts. Whatever we do to strengthen the courts strengthens America. Whatever we fail to do to that end weakens our system and strengthens the hands of those who would change or destroy it. By the very nature of our profession as lawyers we must meet the challenge to free government that is made by those who would abolish the courts or supplant their functions by transferring them to dependent agencies of the Executive or Legislative departments." This statement is exemplary of Bob Simmons' life-long devotion to the law and to the principles of our American judicial system.

Bob Simmons, as a Judge and as a man, 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 people in the security of 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 Simmons we find the personification of the traditions of the law that in some way we must transmit to each generation if ordered liberty is to survive.

Judge Simmons was a real physician of applied lib-

erty. With intellect, dispassionate temperament, and a courageous resolution, he spelled out in his record a clear concept of the law and of the judicial power. His hallmark was the same as Cokes, "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. The members of his family will be advised of the high regard of the Bench and the Bar for Chief Justice Simmons, and of the expressions of sympathy made this day. Copies of the resolutions and statements of counsel will be sent to them. The court stands adjourned.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1969

JACK L. BUSH, APPELLEE, V. MARY ANNE WHITTAKER KRAMER, APPELLANT.

173 N. W. 2d 367

Filed December 19, 1969. No. 37253.

1. **Contracts: Payment.** Where services are furnished by one party to another, and knowingly accepted by him, the law implies a promise on his part to pay the reasonable value of the services.
2. **Contracts.** A quasi contract is a contract implied in law and usually has its origin in the principle that a person shall not be allowed to enrich himself unjustly at the expense of another.
3. **Contracts: Payment.** Where benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving the benefits to avoid payment therefor, the law requires the party receiving and retaining the benefits to pay the reasonable value of them.

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

Spittler & O'Kief, for appellant.

Michael V. Smith and John C. Coupland, for appellee.

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

BOSLAUGH, J.

This is an action to recover the fair and reasonable value of pasturage which the plaintiff claims was furnished to the defendant and William H. Whittaker, her late husband. A jury was waived and the action tried

to the court. The trial court found that the plaintiff should recover judgment in the amount of $2,984.40 together with interest and costs. The defendant's motion for new trial was overruled and she has appealed.

The evidence shows that the plaintiff and Whittaker entered into a written agreement on October 18, 1965, for the pasturing of cattle upon the plaintiff's land. Whittaker agreed to deliver between 400 and 600 yearling steers to the plaintiff between March 15 and May 1, 1966. The plaintiff agreed to keep the cattle until called for and furnish all labor except trucking labor, salt, water, and fly rubs necessary for the sum of $3 per month per animal.

The plaintiff testified that the defendant was present during one or two of the conversations between the plaintiff and Whittaker that led up to the execution of the written contract and that she took an active part in the conversations.

On March 11, 1966, the defendant negotiated a loan from the First National Bank of Valentine, Nebraska, for the purchase of cattle. The cattle which were pastured on the plaintiff's land were purchased by Whittaker in Wyoming on March 31, 1966. The cattle were paid for with a check drawn on a joint bank account in the First National Bank of Valentine, Nebraska, owned by the defendant and Whittaker. On the same day the defendant signed a financing statement and security agreement to the Valentine bank.

The cattle which were delivered to the plaintiff for pasturing were branded with a brand owned by the defendant and her husband. Ownership of the brand is prima facie evidence of ownership of the animal. § 54-109, R. R. S. 1943.

On the day the cattle were delivered to the plaintiff's pasture, Whittaker delivered a check to the plaintiff in the amount of $1,800 drawn on the Valentine bank and signed by the defendant. In October Whittaker delivered a similar check in the amount of $2,772.

The cattle were sold during October 1966, and the bank loan was paid off.

Whittaker died on March 11, 1967. This action was filed November 17, 1967.

The plaintiff's theory of the case is that the defendant and her husband were engaged in a joint venture. The defendant testified that she had no agreement with her husband concerning the purchase or ownership of the cattle; that she and her husband did not at any time agree to be partners with regard to the cattle; and that she had loaned some of her separate funds to her husband which were to be repaid when the cattle were sold.

We find it unnecessary to determine whether the evidence is sufficient to support the judgment upon the theory of a joint venture because it is sufficient to support the judgment on the theory of quasi contract.

Where services are furnished by one party to another, and knowingly accepted by him, the law implies a promise on his part to pay the reasonable value of the services. Comstock v. Evans, 159 Neb. 739, 68 N. W. 2d 351. A quasi contract is a contract implied in law and usually has its origin in the principle that a person shall not be allowed to enrich himself unjustly at the expense of another. 17 C. J. S., Contracts, § 6, p. 566. Where benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving the benefits to avoid payment therefor, the law requires the party receiving and retaining the benefits to pay the reasonable value of them.

Under the defendant's theory of the case, the plaintiff was entitled to a lien for the feed and care furnished to the cattle. § 54-201, R. R. S. 1943. As between the plaintiff and the defendant, the plaintiff should have a better right to the proceeds from the sale of the cattle for the payment of the balance due for pasturage.

The evidence in this case shows substantial participa-

tion by the defendant in the cattle transaction. The bank loan for the purchase and maintenance of the cattle was negotiated by the defendant and secured by a security agreement executed by her. The cattle were paid for with funds from the joint bank account and were branded with a brand which was jointly owned. When the cattle were sold, the proceeds of the sale were used to pay off the bank loan, resulting in a direct benefit to her. Under these circumstances, the defendant should be required to pay the balance due the plaintiff for the reasonable value of the pasturage furnished.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, C. J., dissenting.

FARMERS ELEVATOR MUTUAL INSURANCE COMPANY, A CORPORATION, ET AL., APPELLANTS, V. AMERICAN MUTUAL LIABILITY INSURANCE CO., A CORPORATION, ET AL., APPELLEES.

173 N. W. 2d 378

Filed December 19, 1969. No. 37254.

1. **Insurance.** Where an insurance company issues a comprehensive liability policy to a contractor insuring against injury by accident, a contract for construction work is incidental to the business and within the insuring clause although not specifically mentioned in the policy.
2. ———. The insuring clause in an insurance policy issued to a building contractor covers a nondescribed contract incidental to the business entered into subsequent to the issuance of the policy without the payment of a premium where classifications of work and premium rates are fixed by the policy and payment of premiums are determined at the close of the policy year by audit of the insured's records.
3. ———. An exclusionary provision in a general liability policy which provides for no coverage for bodily injury to any employee of the insured arising out of and in the course of his employment by the insured provides no coverage to an employee

of the insured injured by a fall from a defective ladder furnished by the employer.

4. **Judgments: Damages: Indemnity.** Where a party obtains judgment against another for damages for tort on specified grounds of negligence and such judgment debtor then seeks indemnity against another on specified and different grounds of negligence, which are sustained, such parties are joint tort-feasors and each is liable as such.
5. **Indemnity.** Generally joint tort-feasors have no right of contribution or indemnity, one against the other.
6. **Negligence: Indemnity.** The rule that one of two negligent persons in causing injury to a third where the negligence of one is active and primary and the other passive and secondary, and permitting contribution or indemnity against the one guilty of active negligence, has no application where the negligence of each is founded on separate and distinct acts of negligence and no way exists to determine the relative degrees of negligence of each. Such joint tort-feasors have no right to contribution or indemnity, the one against the other.
7. **Indemnity: Contracts.** Joint tort-feasors have no right of contribution or indemnity among themselves except by contract or some other legal relation giving rise to it.
8. **Insurance.** Where two insurance companies have issued general liability insurance policies to the same insured, each obligated to defend the insured for the same injury, if one affords a defense, no damage ordinarily results to the insured from the failure of the other to defend.
9. ———. The duty to defend an insured is for the purpose of protecting the insured's interests and from the costs and expenses of litigation. Its purpose operates as a shield for the protection of the insured and not as a sword to impose liability where none otherwise exists.

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

William B. Craig of Craig, Woodruff & Hanley, Jack E. Horsley and Fred Kelly of Craig & Craig, and Jess C. Nielsen of Crosby & Nielsen, for appellants.

Walsh, Walentine, Miles & Katskee and Knapp, Tarrell & State, for appellees.

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

CARTER, J.

This is a declaratory judgment action brought by the Farmers Elevator Mutual Insurance Company and the Farmers Cooperative Association of Big Springs, Nebraska, against the American Mutual Liability Insurance Company, the Empire Fire and Marine Insurance Company, and the Wilmac Construction Company to determine the insurance coverage of Empire Fire and Marine Insurance Company and to recover from the latter the full amount of a judgment in the federal district court of Nebraska against Wilmac Construction Company, including the amount of the judgment in excess of policy limits. The trial court found that there was a contract of insurance between the Wilmac Construction Company and the Empire Fire and Marine Insurance Company, that adequate notice of the accident and injury giving rise to the litigation was given to the Empire Fire and Marine Insurance Company, and that, under exclusionary provisions of the policy, there was no coverage. Judgment was entered for the defendants and the plaintiffs have appealed.

For convenience we shall hereafter refer to the Farmers Elevator Mutual Insurance Company as Farmers Elevator Mutual; to Farmers Cooperative Association as Farmers Co-op; to American Mutual Liability Insurance Company as American Mutual; to Empire Fire and Marine Insurance Company as Empire; and to the Wilmac Construction Company as Wilmac.

Farmers Co-op was the owner of a grain elevator facility at Big Springs, Nebraska. In the fore part of 1960, it entered into a written contract with Wilmac for the remodeling of the existing elevator and for the renovation of other portions of the facility. After the contract was entered into and on October 19, 1960, one Arthur C. Strand, an employee of Wilmac, was seriously injured by a fall from a defective ladder. American Mutual had in force a workmen's compensation and liability policy of insurance with Wilmac. Workmen's com-

pensation was adjusted and paid by a lump sum settlement. Wilmac contended that it had a comprehensive general liability policy with Empire which the latter denied. However, in the course of the trial, Empire admitted in open court, and later by an amended pleading, that it had a policy of insurance in force, but denied there was any coverage under the terms of the policy.

The litigation in this case originated as the result of a fall from a defective rung in a ladder furnished by Farmers Co-op to Wilmac. Wilmac contributed to the accident by removing the defective rung and permitting its use by Strand with the missing rung. American Mutual paid its liability as the compensation carrier. On January 14, 1964, Strand filed an action in the federal district court against Farmers Co-op and American Mutual in which action a third party complaint was filed against Wilmac by Farmers Co-op. The original action and the third party complaint were separately tried. On October 28, 1965, Wilmac filed an answer to the Strand complaint setting up the right of subrogation to the amounts paid under the workmen's compensation law. In the original action, the jury returned a verdict for $200,000 and a judgment was entered thereon on May 16, 1966, which was affirmed on appeal. In the suit of Strand v. Farmers Co-op in the federal district court, neither Wilmac nor Empire was a party. In the third party complaint, Wilmac, but not Empire, was a party.

The third party complaint was filed by Farmers Co-op, the third party plaintiff, against Wilmac, the third party defendant. An answer to the third party complaint was filed on behalf of Wilmac on August 21, 1964. On May 8, 1968, a settlement was made between Farmers Co-op and American Mutual in which American Mutual paid Farmers Co-op $5,000 for an agreement that Farmers Co-op would not prosecute any claims against it on any judgment rendered on the third party claim, American Mutual having included a general liability provision in

the workmen's compensation policy. On May 27, 1968, Wilmac, by its president, consented to the entry of a judgment against it in the amount of $272,955.74. On May 28, 1968, Empire upon discovery of the entry of the consent judgment moved to intervene asserting an understanding with counsel that the case would not be called up prior to the trial of the instant case in the district court for Douglas County without notice. On June 5, 1968, the consent judgment was vacated. On June 14, 1968, the consent judgment was again entered in the federal district court which was after the trial of the present case in the state district court.

On October 15, 1965, this action for a declaratory judgment was filed in the district court for Douglas County which, after hearing, found that Empire's policy of general liability insurance contained no coverage for the accident to Strand.

No policy of insurance issued by Empire to Wilmac was in existence at the time of the trial of this case. The evidence shows that Empire suffered a fire which destroyed its old storage file area, including any insurance policies or records pertaining to Wilmac. The soliciting agent for Empire testified that he destroyed his files after 4 years in accordance with his custom. Wilmac filed a petition in bankruptcy in 1962 and appears to have been unable to produce an insurance policy. It was established, however, that a policy issued in 1961 contained the same coverage, conditions, and exclusions as the 1960 policy.

The insuring clause of the policy applicable here provided: "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident." The exclusionary provisions relied upon state: "This policy does not apply: (a) to liability assumed by the insured under any contract or agreement except under coverages

B and D, (1) a contract as defined herein or (2) as respects the insurance which is afforded for the Products Hazard as defined, a warranty of goods or products; * * * (h) under coverage B, except with respect to liability assumed by the insured under a contract as defined herein, to bodily injury to or sickness, disease or death of any employee of the insured arising out of and in the course of his employment by the insured; * * *." It is the contention of Empire that the foregoing provisions exclude liability in the instant case. It is the contention of Farmers Co-op and Wilmac that the provisions provide coverage but, in any event, liability attaches as a matter of law and that the exclusions are wholly immaterial to the resolution of the instant case.

Attached to the policy of insurance is a rider which defines a contract within the meaning of the contract of insurance as follows: "The word 'contract' means, if in writing (1) any easement agreement, except in connection with a railroad grade crossing, (2) any agreement required by municipal ordinance, except in connection with work for the municipality, (3) any elevator or escalator maintenance agreement or (4) any lease of premises agreement." With reference to the coverage of independent contractors and contracts as defined in condition 3, the policy in each instance stated: "None At Inception—Premium—If Any—To Be Determined by Audit." As to products hazards, the policy stated: "Excluded—L6355a Attached."

We point out that Wilmac was in the construction business in which it contracted to construct, repair, and maintain business facilities. Ofttimes contracts for such work were not in existence when the insurance policy was issued and consequently no basis existed for determining the premium rate on the issuance of the policy. In such cases the classification of work and the premium rate therefor were shown. Such work is covered by the policy and the premium rate for such work determined at the end of the policy year. Hence the signifi-

cance of the description of the hazards covered and the rating classification therefor, although they do not have the effect of modifying the exclusions in the policy. The definition of "contract" contained in the policy does not purport to exclude such work from the coverage of the policy. It did not state that it was excluded as it did in the case of products and completed operations which was admittedly intended to be excluded. Instead of excluding such coverage, it stated there was none at the inception of the policy by clearly indicating if contracts or independent contractors came into being after the issuance of the policy, they would be covered and the additional premium would be paid after audit at the close of the policy year. The president of Wilmac and the soliciting agent for Empire each testified that this is what they intended the insurance policy to mean and we find that this is what it does mean.

The evidence is that the coverage was audited and premium paid. Since coverage is found to exist, no reason exists for any discussion of the right to reform the policy. The meaning of the policy is to afford coverage under the insuring clause of the policy for all damages because of accident chargeable to the insured. The construction of the policy is consistent with the intention of the parties and it should be so construed in establishing its meaning where the language used is subject to such interpretation. Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N. W. 2d 133; Koehn v. Union Fire Ins. Co., 152 Neb. 254, 40 N. W. 2d 874; Rathbun v. Globe Indemnity Co., 107 Neb. 18, 184 N. W. 903, 24 A. L. R. 191.

It is contended by Empire that the employee exclusion contained in paragraph (h) heretofore quoted excludes any liability for injury, sickness, disease, or death of any employee of Wilmac, the pertinent exclusionary language being: "except with respect to liability * * * to bodily injury to or sickness, disease or death of any

employee of the insured arising out of and in the course of his employment by the insured."

In 12 Couch on Insurance (2d Ed.), § 44:477, p. 47, it is said: "Where a contractor executed an agreement with his customer which provided that the contractor should maintain such accident and liability insurance as would protect the contractor and the customer from claims for damage for personal injuries arising from the operations under the agreement, and subsequently two of the contractor's employees were injured on the job and recovered judgments against the customer on the basis of negligence, there was no coverage afforded the contractor when the customer sought recovery of such judgments under the contractor's general liability policy, which excluded coverage as to liability assumed by the insured under any contract or agreement and for injuries to employees of the insured." In 1 Long, The Law of Liability Insurance, § 10.17, pp. 10-26 and 10-27, it is said on the same question: "The exclusion in the first paragraph is intended to relieve the insurer of any liability under the laws mentioned therein; while the second exclusion is broader in scope and is calculated to preclude any claim against the insurer for damages for bodily injuries sustained by an employee of the insured arising out of and in the course of employment, except with respect to the assumption of liability by the insured under a contract as defined in the policy."

In Davis v. Liberty Mutual Ins. Co., 308 F. 2d 709 (8th Cir., 1962), Van Pelt, J., speaking for the court in a similar case said: "Reading the entire policy we conclude that it is clear that the policy did not include within its protection either injury to or death of appellant's husband when injured in the course of his employment with the insured employer." See, also, Maryland Cas. Co. v. Waumbec Mills, 102 N. H. 200, 152 A. 2d 619.

It is contended by Empire that the Nebraska Workmen's Compensation Law is an exclusive remedy for the

injuries sustained by an employee and that such exclusiveness of remedy insulates the employer from liability from contribution or indemnity in favor of a third person against whom the employee has recovered a judgment for injuries sustained while in the course of his employment. Wilmac carried compensation insurance with American Mutual and it paid the compensation liability due Strand in the amount of $36,480. This liability was not based on the negligence of Wilmac, it is one imposed by law with or without fault. In addition to carrying compensation insurance with American Mutual and a general comprehensive liability provision as well, Wilmac had a general comprehensive liability policy with Empire. The policy contained no express provision for indemnity covering Farmers Co-op or its liability insurance carrier. The basis of the tort liability of Farmers Co-op seems important here in view of the claim of Farmers Co-op for indemnity for the judgment obtained against it by Strand in the federal district court. The evidence on which the judgment against Farmers Co-op was obtained supported findings that it was dark in the headhouse at the time of the accident; that Farmers Co-op failed to provide adequate light; that the elevator was being used on the day of the accident resulting in the accumulation of dust making the ladder slippery; that the dust was inadequately controlled; and that Farmers Co-op had control of the premises, failed to provide a place of safety, and made no effort to correct the defective condition of the ladder. The evidence supported the allegations of Farmers Co-op's negligence and dissipates the claim that the negligence of Farmers Co-op was technical, constructive, vicarious, or passive and not active and primary.

The contract for the construction and repair work entered into between Farmers Co-op and Wilmac provided: "Contractor shall further save and hold harmless the owner from any claim, liability, action, or cause of action arising out of the performance of this contract

based upon the negligence of the contractor, his agent or employees. Said contractor shall save and hold harmless the owner from payment of any and all taxes, workmen's compensation, and any other amount due workmen or other persons employed by the contractor either as employees or sub-contractors." The hold harmless provision appears to impose liability on Wilmac to indemnify Farmers Co-op for any damages accruing to it caused by Wilmac's negligence. But Empire refused to assume this obligation assumed by Wilmac by specifically excluding any such coverage in the insurance policy issued to Wilmac irrespective of Wilmac's agreement with Farmers Co-op.

Considering first the above-quoted provision of the contract between the contractor and the owner, assuming the inapplicability of the exclusionary clause in Wilmac's policy, the proper interpretation of this provision places Wilmac in one of two categories: Either Wilmac is free from negligence, or it is a joint tort-feasor with Farmers Co-op as regards the accident. If Wilmac is free from negligence, there is, of course, no liability under the contractual provision. If Wilmac is a joint tort-feasor, the law governing joint tort-feasors controls the disposition of the case. The consent judgment in the federal district court, which has become final, and the evidence which supports it shows that Wilmac and Farmers Co-op are joint tort-feasors and joint wrongdoers. In any event, the assumed liability of Wilmac is excluded by the exclusionary provision excepting from its coverage any liability assumed by any contract not specified in the policy, as provided by exclusion (a) thereof.

It is the contention of Empire that there can be no contribution or indemnity among joint tort-feasors. Empire cites Slattery v. Marra Bros., Inc., 186 F. 2d 134, wherein it is said: "Therefore, the right of Marra Bros., Inc., to indemnity from the Spencer Company cannot rest upon any liability of that company to Slat-

tery; and, if it exists at all, it is hard to see how it can arise in the absence of some legal transaction between the two corporations, other than that of joint tortfeasors: * * * . Yet it is true, at least when the putative indemnitor is not protected by a compensation act, that courts have at times based indemnity merely upon a difference between the kinds of negligence of the two tortfeasors; as for instance, if that of the indemnitee is only 'passive,' while that of the indemnitor is 'active.' Such cases may perhaps be accounted for as lenient exceptions to the doctrine that there can be no contribution between joint tortfeasors, for indemnity is only an extreme form of contribution. When both are liable to the same person for a single joint wrong, and contribution, stricti juris, is impossible, the temptation is strong if the faults differ greatly in gravity, to throw the whole loss upon the more guilty of the two. * * * We cannot, however, agree that that result is rationally possible except upon the assumption that both parties are liable to the same person for the joint wrong. If so, when one of the two is not so liable, the right of the other to indemnity must be found in rights and liabilities arising out of some other legal transaction between the two. However, in the case at bar, not only was the Spencer Company not liable to Slattery, but it had no contract with Marra Bros., Inc., or any other legal relation with it except that of joint tortfeasor. Unless therefore there be some controlling authority to the contrary, the amended complaint was rightly dismissed."

Whether or not a technical, constructive, or passive joint tort-feasor is entitled to contribution or indemnity from an active and primary joint tort-feasor is not of importance here in view of our holding that both tort-feasors were active wrongdoers. This court does not appear to have passed on the question of indemnity to a passive joint tort-feasor against an active one and we find no reason to decide that question here. Both joint tort-feasors being active wrongdoers, contribution or in-

demnity cannot be maintained by one against the other. See, United States Fidelity & Guar. Co. v. Virginia Eng. Co., 213 F. 2d 109; Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp., 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 133; Shell Oil Co. v. Hercules Const. Co., 74 Ill. App. 2d 166, 219 N. E. 2d 392. This conclusion makes it unnecessary to determine the effect of the workmen's compensation act as it applies to the present situation.

It is contended by Wilmac that Empire refused to defend the third party complaint brought in the federal court by Farmers Co-op. It will be observed that Strand was not a party to the third party complaint. The third party complaint was filed on June 24, 1964. Demand was subsequently made by the president of Wilmac on Empire to defend the action for Wilmac. On January 14, 1965, Empire informed the trustee in bankruptcy of Wilmac that it would defend the action if the trustee would execute a reservation of rights agreement protecting Empire against a waiver of its defense of non-coverage under its comprehensive liability policy with Wilmac. The trustee refused to execute a reservation of rights agreement. The record shows that an answer was filed in the case for Wilmac by an attorney procured by American Mutual. The record shows that immediately following the taking of the first consent judgment, Empire sought to intervene in the case. This was evidently permitted as is indicated by the vacation of the consent judgment of May 27, 1968. On June 14, 1968, the consent judgment was reentered, Wilmac consenting thereto by its president although it was a dissolved and bankrupt corporation.

It should be noted here that Wilmac offered to settle the third party claim with Farmers Co-op for $272,955.74, evidently the amount then due on the $200,000 judgment in the federal district court and indicating a willingness to confess judgment for this amount. Farmers Co-op accepted the offer. This resulted in the consent judg-

ment heretofore mentioned. The authority of the president of Wilmac to confess judgment in the amount of $272,955.74 against the dissolved and bankrupt Wilmac corporation is not an issue in the case.

Two agreements between Farmers Co-op and American Mutual appear in this record in which it is stated that Empire and American Mutual each had a liability policy with Wilmac in which each had an obligation to defend Wilmac. It was stated that each had a liability to pay any amount recovered against Wilmac on the third party complaint. For a consideration of $5,000, Farmers Co-op agreed in effect to relieve American Mutual from liability in the case at bar. Farmers Co-op's contract was not to release or satisfy its claim, but to not pursue or make claims against American Mutual on account of any judgment on the third party complaint filed and then pending in the federal district court.

It is on the foregoing facts that counsel for Empire contends that the transactions enumerated constitute an attempt to cast the burden of the $272,955.74 judgment on Empire because of the alleged breach of the contract to defend contained in Empire's general comprehensive liability policy.

The policy issued by Empire to Wilmac contained the following provision: "With respect to such insurance as is afforded by this policy, the company shall: (a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient; * * *."

The duty to defend under such a provision has been recently stated by this court as follows: "An insurer's duty to defend an action against the insured is measured in the first instance by the allegations of the pleadings in the action against the insured, and if such pleadings state facts bringing the injury within the coverage

of the policy, insurer must defend irrespective of the insured's ultimate liability to the plaintiff." National Union Fire Ins. Co. v. Bruecks, 179 Neb. 642, 139 N. W. 2d 821. See, also, Lee v. Aetna Casualty & Surety Co., 178 F. 2d 750; Danek v. Hommer, 28 N. J. Super. 68, 100 A. 2d 198, affirmed in 15 N. J. 573, 105 A. 2d 677.

There is evidence in the record that demand was made upon Empire by Wilmac to defend Farmers Co-op in the action brought against it by Strand. But we fail to see how Empire had any duty to defend Farmers Co-op since the latter was not an insured under Empire's policy. The demand by Wilmac that Empire defend Wilmac in the third party complaint in which Farmers Co-op was the third party plaintiff and Wilmac the third party defendant is an altogether different question. While we have found that Farmers Co-op is not entitled to be indemnified by Wilmac's insurer, Empire, the demand of Wilmac to be defended by Empire rests on the policy agreement to defend Wilmac, "even if such suit is groundless, false or fraudulent."

The general liability policy issued to Wilmac by American Mutual contained the following provision relating to its duty to defend: "As respects the insurance afforded by the other terms of this policy the company shall: (a) defend any proceeding against the insured seeking such benefits and any suit against the insured alleging such injury and seeking damages on account thereof, even if such proceeding or suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient; * * *."

It is apparent that both American Mutual and Empire had a mutual obligation to defend Wilmac on the third party complaint on each of the general liability provisions in their respective policies. Empire did offer to defend Wilmac if Wilmac's trustee in bankruptcy would sign a reservation of rights protecting Empire against any waiver of its claim that there was no coverage

under its policy. The trustee in bankruptcy refused to sign such proposed reservation agreement. The evidence shows, however, that American Mutual did defend Wilmac as shown by the following: American Mutual's legal counsel employed an otherwise disinterested attorney to file an answer for Wilmac to the third party complaint. Counsel for American Mutual approved the form of the consent judgment which was signed by Wilmac and its president, Wilson. The consent judgment was entered the day that the trial in the declaratory judgment action was commenced in the district court for Douglas County. This judgment was vacated and reentered on June 14, 1968, as hereinbefore recited. This gives substance to the contention of Empire's counsel that Wilmac was defended by American Mutual as its policy required and that Wilmac suffered no damage because of its failure to defend. It gives substance, also, that the manner of defending Wilmac by American Mutual was nothing more than an attempt to provide a fund from which Farmers Co-op and American Mutual could recover by subrogation the amounts of compensation paid and any loss under its general liability provisions by indemnity from Empire.

The duty of an insurance company to defend pursuant to its policy contract requires the utmost good faith on its part. Likewise, a demand that an insured be defended under such a contract provision requires that the demand be in good faith. Its purpose is to protect the insured from the expenses and costs of the litigation as well as other liabilities for which it could be held. It operates as a shield for the protection of the insured and not as a sword to impose liability where none otherwise exists. The failure of Empire to defend caused no damage because Wilmac was defended by American Mutual which was obligated to so do. It is plain that Empire had no duty to defend when a defense was supplied by another having the same obligation. If Wilmac suffered any loss, it was due to the failure of American

Mutual to fulfill its duty to defend in good faith. Under the situation here, it would be unconscionable to impose liability on Empire to the advantage of American Mutual for a claimed damage which it was obligated, if possible, to avoid. We find no merit in the contention that any damage resulted from Empire's failure to defend the third party complaint.

We have examined other claimed errors and find that they have no merit. The judgment of the district court is correct and it is affirmed.

AFFIRMED.

COUNTY OF LINCOLN, APPELLEE, V. ELOISE H. EVANS ET AL., APPELLANTS.
173 N. W. 2d 365

Filed December 19, 1969. No. 37311.

1. **Taxation: Foreclosure.** Resolution of County Board of Commissioners directing foreclosure of tax sale certificates need not identify each tax sale certificate individually.
2. ———: ———. The affixing of a county treasurer's official seal to a tax sale certificate is not essential to its validity.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed.

Jess C. Nielsen of Crosby & Nielsen, for appellants.

W. R. Mullikin and Donald V. Lowe, for appellee.

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

NEWTON, J.

This is an action to foreclose tax sale certificates purchased by plaintiff county at a private tax sale on March 4, 1964. Subsequent to the sale, tax sale certificates were executed and issued by the county treasurer. The property sold was that of defendants. After retention of the certificates for 2 years from the date of sale, an

action of foreclosure was commenced. On discovery of the fact that the county treasurer had not affixed his official seal to the certificates, the action was dismissed without prejudice. The county treasurer's official seal was thereafter affixed to the certificates and this action was commenced on November 22, 1966. Decree of foreclosure was entered on March 6, 1969, in the district court. The judgment of the district court is affirmed.

In their appeal, defendants urge two grounds of error. Their first contention is that the county attorney of plaintiff county was not authorized to bring the foreclosure action. The record discloses that on September 8, 1964, and again on May 9, 1966, a resolution was adopted by the county board of commissioners of plaintiff county authorizing and directing the county attorney "* * * to foreclose, in the name of said county, all Certificates of Tax Sale, the real estate for which and the subsequent taxes for which were heretofore purchased in the name of said county at private sale * * *." It is apparent that the certificate upon which the present action is based was one of those referred to in these resolutions and that the resolutions conferred sufficient authority upon the county attorney to bring this action.

The second ground upon which defendants challenge the judgment of the trial court is that the county treasurer's seal not having been affixed to the tax sale certificates at the time of issuance, the certificates are void and unenforceable. In this regard, defendants call attention to section 77-1857, R. R. S. 1943, which provides in part: "Each county treasurer shall attach an impression of such seal to every certificate of tax sale and tax deed made by him." On its face, this provision of the statute appears to be clear. Yet, statutes in pari materia must be considered together. Section 77-1838, R. R. S. 1943, provides that a tax deed shall be given under the official seal of the county treasurer and acknowledged by the treasurer, that when so executed and acknowledged, it shall be recorded and when re-

corded, such deed shall vest title in the grantee. Section 77-1839, R. R. S. 1943, sets out the form of the tax deed and concludes with a statement that it is given under the "hand and *official seal*" of the county treasurer. (Emphasis supplied.) It is apparent that in the case of a tax deed, the affixing of the county treasurer's official seal is necessary to the validity of the tax deed.

A different situation and a different legislative intent are evidenced by the provisions dealing with tax sale certificates. Section 77-1818, R. R. S. 1943, provides that a tax sale certificate: "* * * shall be signed by the treasurer, in his official capacity, and shall be presumptive evidence of the regularity of all prior proceedings. The purchaser acquires a perpetual lien of the tax on the land, and if, after the taxes become delinquent, he subsequently pays any taxes levied on the same, whether levied for any year or years previous or subsequent to such sale, he shall have the same lien for them, and may add them to the amount paid by him in the purchase." Section 77-1819, R. R. S. 1943, sets out the form of the tax sale certificate to be issued and concludes with the following language: "In witness whereof, I have hereunto set my hand this _____ day of _____, A.D. 19____." There is no requirement in these statutes that the treasurer's official seal be affixed to the certificate. Indeed, there is not even a reference in these statutes to such official seal, but it does state that after it has been signed by the treasurer in his official capacity, it is presumptive evidence of the regularity of all prior proceedings and the purchaser has acquired the tax lien on the land sold. It appears that this statute is somewhat contradictory of section 77-1857, R. R. S. 1943. However, the direction by the Legislature that a county official shall perform a certain act and the effect of his failure to perform such act are two different things. The Legislature has directed the affixing of a county treasurer's official seal on tax sale certificates, but it is evident that unlike tax deeds, the Legislature has not made

the validity of a tax sale certificate dependent upon the affixing of the county treasurer's official seal. We find that the omission from a tax sale certificate of such seal is simply an irregularity and does not render the tax sale certificate void or unenforceable.

The judgment of the district court is affirmed.

AFFIRMED.

THE FLAMINGO, INCORPORATED, A CORPORATION, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.
173 N. W. 2d 369

Filed December 19, 1969. No. 37318.

1. **Words and Phrases: Statutes: Licenses and Permits.** The words "suspension" and "revocation" are not synonymous. Suspension normally means a temporary cessation but with an expectation or purpose of resumption. Revocation implies a permanent termination and when used within a statute it imports finality.
2. ———: ———: ———. Since it is not a revocation, a suspension is not governed by section 53-1,116, R. R. S. 1943.
3. **Administrative Law: Statutes: Licenses and Permits.** The Nebraska Liquor Control Commission is an administrative agency within the meaning of the term as defined in section 84-901, R. R. S. 1943, and it is therefore governed by the rules of administrative agencies.
4. **Appeal and Error: Statutes: Licenses and Permits.** The right to appeal is statutory and the requirements of the statute are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action.

Appeal from the district court for Dakota County: JOSEPH E. MARSH, Judge. Affirmed.

Leamer & Galvin, for appellant.

Clarence A. H. Meyer, Attorney General, and Robert R. Camp, for appellee.

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

WHITE, C. J.

The question involved in this case is the proper venue of an appeal from a license suspension order of the Nebraska Liquor Control Commission. On July 19, 1968, as a result of the hearing at the Commission's office in Lincoln, Nebraska, the appellant's liquor license was suspended for a period of 10 days. This action was taken and the order entered at the Commission's office in Lincoln, Nebraska. Appellant filed a petition on appeal in the district court for Dakota County, Nebraska. The Commission filed a special appearance, objecting to the Dakota County district court's jurisdiction, which was sustained by the district court. This ruling is before us on this appeal. We affirm the judgment of the district court sustaining the special appearance and dismissing the purported appeal.

The appellant contends that an appeal from the suspension of a liquor license may and must be brought in the district court for the county where the licensee resides. It relies upon section 53-1,116, R. R. S. 1943, which provides: "* * * (3) Within twenty days after the service of any * * * decision of the commission upon any party to the proceeding, * * * such party may apply for a rehearing in respect to any matters determined by the commission. * * * No appeal shall be allowed from any decision of the commission, except as is provided for in subsection (5) of this section. * * * (5) Any decision of the commission * * * *revoking* * * * a license or permit for the sale of alcoholic liquors, * * * may be reversed, vacated, or modified by the district court of the county where * * * the licensee resides * * *." (Emphasis supplied.) Appellant contends that "revoking" is synonymous with "suspension" under the statute. We disagree.

The words "suspension" and "revocation" are not synonymous. United Air Lines v. Civil Aeronautics Board, 198 F. 2d 100, 108 (7th Cir., 1952); Martinka v. Hoffmann, 214 Minn. 346, 9 N. W. 2d 13 (1943). "Sus-

pension" normally means a temporary cessation. Gaston v. Pittman, 285 F. Supp. 645, 649 (N. D., Fla., 1968); Hild v. Polk County, 242 Iowa 1354, 49 N. W. 2d 206 (1951); Orme v. Atlas Gas & Oil Co., 217 Minn. 27, 13 N. W. 2d 757 (1944). It infers an expectation or purpose of resumption. State ex rel. Currie v. McCready, 238 Wis. 142, 297 N. W. 771 (1941). On the other hand, "revocation" implies a permanent termination. Vogulkin v. State Board of Education, 194 Cal. App. 2d 424, 427, 15 Cal. Rptr. 335, 337 (1961). When used within a statute it imports finality. Winokur v. Michigan State Board of Dentistry, 366 Mich. 261, 114 N. W. 2d 233 (1962).

The semantical distinction, although sufficient alone to decide this case, reveals a balanced legislative policy designed to expedite the day-to-day necessities of discipline and control by the Commission. Clearly temporary suspensions are an effective weapon to discipline licensees and insure compliance with the law. The swiftness and certainty of the execution of the disciplinary orders are vital to any law enforcing mechanism. A routine appeal by a licensee to district courts in outlying counties in the state might easily emasculate the effective enforcement by the Commission of its temporary suspension and disciplinary order. On the other hand, it is clear the statute contemplates that when a revocation is ordered, and the life of the licensee's business is at stake, together with his investment, equipment, etc., then he is entitled to a hearing in the jurisdiction where the witnesses may be summoned and the evidence more conveniently produced.

Since it is not a revocation, a suspension is not governed by section 53-1,116, R. R. S. 1943. The Commission is an administrative agency within the meaning of the term as defined in section 84-901, R. R. S. 1943. Terry Carpenter, Inc. v. Nebraska Liquor Control Commission, 175 Neb. 26, 28, 120 N. W. 2d 374, 376 (1963). It is therefore governed by the rules of administrative agencies. Section 84-917, R. R. S. 1943, is controlling in

this case. It provides: "(1) Any person aggrieved by a final decision in a contested case, * * * is entitled to judicial review under sections 84-917 to 84-919. * * * (2) Proceedings for review shall be instituted by filing a petition *in the district court of the county where the action is taken* * * *." (Emphasis supplied.) Since the petition was filed in Dakota County it is clear that appellant has not complied with the requirements of this section. The "action (was) taken" in Lancaster County, and thus the petition should have been filed in the district court for Lancaster County. "The right to appeal is statutory and the requirements of the statute are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action." Radil v. State, 182 Neb. 291, 293, 154 N. W. 2d 466, 468 (1967), citing Brown v. City of Omaha, 179 Neb. 224, 137 N. W. 2d 814 (1965).

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

AFFIRMED.

SMITH, J., dissenting.

DONALD F. ALBERS ET AL., APPELLEES AND CROSS-APPELLANTS, V. RAYMOND KOCH ET AL., APPELLANTS AND CROSS-APPELLEES, IMPLEADED WITH MIDWEST LAND COMPANY, APPELLEE AND CROSS-APPELLEE.
173 N. W. 2d 293

Filed December 19, 1969. No. 37327.

1. **Contracts: Specific Performance.** The remedy of restitution for breach of contract is available to plaintiff only in case defendant's breach is total. A slight breach does not terminate the duty of the injured person unless nonperformance of an express condition requires that result.
2. ———: ———. Specific performance may properly be decreed in spite of a minor breach by plaintiff, the breach involving no substantial failure of the exchange for the performance to be compelled.

3. **Contracts: Specific Performance: Payment.** The fact that a contract provides for payment of liquidated damages for breach of promise is not a bar to specific enforcement of the promise. Where a contract provides for such payment as a true alternative performance, the promisor's election to pay this price will prevent specific enforcement of the alternative against him.

Appeal from the district court for Cedar County: JOSEPH E. MARSH, Judge. Affirmed in part, and in part reversed and remanded.

Olds & Reed, for appellants.

Ryan & Scoville, for appellees Albers.

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

SMITH, J.

Donald F. Albers and wife sued for $4,500, which they had paid down on the purchase price of farmland. They contended that sellers, Raymond Koch and wife, had breached contractual provisions for possession. Kochs cross-petitioned for specific performance and for $160, which they had paid for fall plowing. After trial the district court rendered judgment against Kochs for $2,841 as partial restitution. The cross-petition was dismissed. Kochs have appealed. Alberses have cross-appealed.

Alberses had paid Kochs the $4,500 upon making the agreement in May 1968, promising to pay $4,500 on December 1, $14,000 on March 1, 1969, and the balance of the $87,000 purchase price in 20 annual installments. Actual possession was to be delivered on March 1, 1969. Time was to be of the essence. The agreement also provided: ". . . in case . . . defects in the title, . . . cannot be cured . . . (the $4,500 down payment) is to be refunded, and in the event of the refusal or failure of the Buyer to consummate the purchase, to be retained by the Seller as liquidated damages . . . . Buyers shall have the privilege, . . . to fix fences, remove trees and to fall plow after the 1968 crop is harvested. The Buyers shall

not disturb the Tenants growing crops or fall grazing privileges."

Grazing on part of the tract, 240 acres which included 47 acres of trees and roads, were cattle of Raymond Koch's brother Herman, a subtenant. Another brother, Donald, was in possession of the tract under a year-to-year tenancy from March 1. Raymond had orally notified brother Donald in April 1968 that Raymond was listing the tract for sale with possession on March 1, 1969.

On September 4, 1968, Raymond, a California resident, in a letter with copy to Alberses, who lived 17 miles from the tract, informed Donald Koch of the sale: "I agreed . . . that he can fall plow after the 1968 crop is harvested. I don't know how many acres you had into small grain or soil bank but I understood that Mr. Albers would like to fall plow close to 60 acres . . . I also said that Mr. Albers can fix fence or remove trees if it doesn't disturb your fall grazing."

Donald Albers visited Raymond's brothers after September 4, 1968, about entering on the land that fall. The gate was padlocked, and "no trespassing" signs were posted. Donald Koch left the entry decision to Herman, whose language was unequivocal: Albers had no right there; should he trespass, Herman would shoot him.

The situation brought Raymond to Nebraska, where Alberses on October 21, 1968, notified him that the tenant's refusal constituted a breach of the contract. Restitution was demanded. On October 23 an order in a suit by Raymond restrained his brothers from interference with performance of the purchase agreement. On the same day Donald Koch signed this consent: ". . . Raymond Koch, his agents or assigns will have immediate right to fall plow the 40 acres from which the crop has been harvested or which has been summer fallowed . . . , the undersigned also agrees to permit . . . (them) to remove trees, to repair fences, as long as they do not disturb his crops or grazing privileges on

the balance of the land . . . not fall plowed. The . . . lease terminates February 28, 1969."

Shortly after October 23, 1968, Donald Miller, Raymond's agent, engaged Valgene Stratman, a custom farmer, to plow 40 acres of the tract. Raymond's attorney promptly notified Alberses in a letter enclosing copies of the restraining order and Donald Koch's consent. The plowing was completed that month, and the $160 charge was paid by Donald Koch. There is testimony of Miller to authority from Alberses in August to engage Stratman. Testimony of Donald Albers to a meeting with Stratman that month is that "we didn't ask him to . . . plow for sure." Testimony of Donald Albers' father to an August meeting with Miller is: "Q . . . did either you or your son agree to pay the cost of fall plowing? A No. . . . Q Did your son agree to have Valgene Stratman plow the ground? A Well, he said if anybody would plow it he thought Valgene would be the best."

Until the trial Alberses did not complain that the number of acres plowed was only 40. After October 23, 1968, no one denied them entry. On November 29, 1968, they again demanded restitution for refusal of entry and for sellers' "failure to . . . obtain or be assured of obtaining possession . . . on March 1, 1969." Holding over as tenant after February 28, 1969, had been the subject of three separate conversations between Donald Koch and Donald Albers. The latter had requested a written statement of intention to hold over. Donald Koch refused. He and Herman were still occupying the land at the time of trial in April 1969.

The remedy of restitution for breach of contract is available to a plaintiff only in case defendant's breach is total. A slight breach does not terminate the duty of the injured person unless nonperformance of an express condition requires that result. Restatement, Contracts, § 347, Comment e, p. 587. See Klapka v. Shrauger, 135 Neb. 354, 281 N. W. 612 (1938).

Specific performance may properly be decreed in spite of a minor breach by plaintiff, the breach involving no substantial failure of the exchange for the performance to be compelled. Restatement, Contracts, § 375 (2), p. 691.

The fact that a contract provides for payment of liquidated damages for breach of promise is not a bar to specific enforcement of the promise. Where a contract provides for such payment as a true alternative performance, the promisor's election to pay this price will prevent specific enforcement of the alternative against him. Restatement, Contracts, § 378, p. 700. See, Adams v. Adams, 156 Neb. 778, 58 N. W. 2d 172 (1953); Ruzicka v. Saylor, 107 Neb. 631, 186 N. W. 968 (1922); Edmiston v. Hupp, 98 Neb. 84, 152 N. W. 296 (1915); Hickey v. Brinkley, 88 Neb. 356, 129 N. W. 553 (1911). To the extent of conflict Boehmer v. Wellensiek, 107 Neb. 478, 186 N. W. 326 (1922), is disapproved.

We find neither total breach of contract by defendants Koch nor nonperformance of a condition that terminated Alberses' duty of performance. Existence of the tenancy to March 1, 1969, under the circumstances afforded Alberses no excuse for refusing to proceed with the contract. See 6 Williston on Contracts (3d Ed., 1962), §§ 878 and 879, pp. 357 and 366. Liquidated damages were not to be a true alternative performance. Alberses did not contract to pay the $160 charge for fall plowing. They were not entitled to restitution. Defendants Koch were entitled to a decree of specific performance.

That part of the judgment dismissing the cross-claim for fall plowing is affirmed. The other parts are reversed and the cause remanded for proceedings consistent with this opinion. Costs on appeal are taxed to Alberses.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

NICKERSON TOWNSHIP, THE COUNTY OF DODGE ET AL., APPELLEES, V. WALTER ADAMS, APPELLANT.

173 N. W. 2d 387

Filed January 6, 1970. No. 37270.

Waters. Diffused surface waters may be used in such manner as the owner of the land sees fit, provided 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.

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

Lyle B. Gill, for appellant.

Sidner, Svoboda & Schilke, for appellees.

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

McCOWN, J.

This is an action for an injunction involving the course of drainage of surface waters. The district court enjoined the defendant from allowing any water that formerly drained easterly on defendant's land from draining westerly through an excavation made by the defendant, and required the defendant to restore the excavation

to its former level. The defendant has appealed.

The defendant, Walter Adams, is the owner of a farm located principally on the Southwest Quarter of Section 17, Township 18, Range 8, Dodge County, Nebraska. A township road runs north and south along the west side of defendant's land. Plaintiff, Nickerson Township, is responsible for the construction and maintenance of the road; and plaintiff, Dodge County, is responsible for the maintenance of bridges on township roads. The plaintiff, Stena Lueken, owns the quarter section of land immediately across the road west of defendant Adams' land.

There is a drainage basin of approximately 147 acres located largely on defendant's land, and all in the south half of Section 17. The perimeter of the drainage basin is irregular. The contour of the land in the basin roughly resembles a saucer, slightly tipped to the southeast. The western rim of the drainage basin at the point involved here is roughly parallel to and some 300 or 400 feet east of the township road. Before the work done by the defendant, the elevation in this area of the perimeter was 1051.2 to 1053 feet. The lowest elevation on the perimeter of the basin was 1047.5 feet. That point was on the southeast portion of the rim and in the southeast quarter of Section 17. The natural drainage inside the basin is to the east and south. There is an area outside the basin on the west side of defendant's land. Approximately five acres of this area immediately west of the point involved here drains to the west to a ditch along the east side of the township road. Water then drains south in the road ditch near a 15-inch culvert to the southwest corner of defendant's land; under the township road; and over the plaintiff Lueken's land to reach a small creek to the west.

The lowest part of the 147 acres within the drainage basin was an area of approximately 30 acres somewhere roughly in the center of the basin. The whole area of the drainage basin drained into this inner basin both before and after the construction done by the defendant.

The exact location of this inner basin was not shown, nor is there any evidence as to the quantity of water it could or did contain. In general, it ran approximately 2700 feet east and west and was approximately 200 to 500 feet wide. In prior years, rain falling into the 147-acre drainage basin drained and collected in the inner 30-acre basin in what are referred to as lakes, potholes, or low spots in the basin. The size of the water area remaining for more than brief periods of time varied from two lakes of 3 or 4 acres each, to a single area of 15 acres. The depth of the water, presumably at the deepest point, was estimated by various witnesses as being from 2½ feet to 4 feet. The water in the low areas ultimately disappeared and the land there was replanted each year except for one year when one lake remained all summer. Replanted crops were harvested on the low areas in some years.

In times of excessive rainfall, witnesses testified that water in the drainage basin flowed east and south onto adjoining land, presumably over the low elevation in the southeast portion of the perimeter rim of the basin. There is no evidence as to how often this occurred, nor as to the amount of water which drained from the basin when it did occur. There is no evidence that any such water ever reached a natural watercourse. No water ever drained out of the basin to the west.

In the spring of 1968, the defendant hired an earth-moving contractor. He removed earth from the western perimeter of the drainage basin for a width of 70 to 100 feet and lowered the elevation at that point to 1046.3 feet. The defendant also made a ditch from that point on to the east, a distance of approximately 2900 feet. The ditch was approximately 18 feet wide, 1 foot deep at the center, and sloped up at the sides. The earth removed from the excavation on the west edge was used to fill some of the low spots or potholes in the inner basin. The elevation in the bottom of the ditch from the excavation in the perimeter on eastward fol-

lowed the general slope of the drainage basin, dropping to an elevation of 1045.5 feet at a point 900 feet east of the perimeter cut and on down to the low point of 1045 feet 1600 feet east of the cut. Elevations then rose again, reaching 1045.5 feet at a point 2400 feet east of the cut and again reached 1046.3 feet, the level of the perimeter cut, at a point 2600 feet east of the excavation. The elevation at the end of the ditch, 2900 feet east of the cut, was 1047.2 feet.

The fundamental differences here arise from the parties' differing interpretation of the evidence as to future damage. There is no evidence of any present damage. In fact, the evidence is that after a 2½-inch rain on August 9, 1968, the water in the drainage basin did not even come close to going through the excavation to the west. The plaintiffs' engineer did not know what the run-off in the drainage basin would be; how much water the 30-acre inner basin would hold; nor how much of a rain would be required before the inner basin would overflow to the west through the excavated rim of the 147-acre outer basin. The evidence was clear that no water could drain to the west until the level of the water in the 30-acre inner basin reached the level of the excavation. The evidence of the highway superintendent and the township clerk was that if the entire drainage from the 147-acre drainage basin was diverted to the west, the 15-inch culvert under the township road would be inadequate and that it would require a 42 or 48-inch culvert to carry the water, or that the water might wash out the road. There was no evidence of damage to the Lueken's land other than the fact that any water draining to the west would drain across it.

The defendant's engineer testified that the average rainfall in the area was 23 inches a year; that the normal run-off coefficient would be .25 or .35 depending upon soil and vegetation; and that the 30-acre inner basin would hold the run-off from 4 inches of rain in one hour without spilling over the excavation in the west

rim of the outer basin. He conceded, however, that if the water got high enough, it would go out the ditch in the west rim before it went to the east.

The evidence is clear that in the past water flowed out of the basin to the southeast in times of excessive rainfall. It is undisputed that if the water gets high enough in the basin it will now drain out to the west before it goes to the east because the excavation made by the defendant in the west rim of the basin is about 1 foot lower than the southeast rim. We conclude that the evidence established that damage will probably occur in the future, even though the evidence as to the frequency or extent of the anticipated damage may be speculative.

The water involved here is surface water. Diffused surface waters may be used in such manner as the owner of the land sees fit, provided 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. See, Nichol v. Yocum, 173 Neb. 298, 113 N. W. 2d 195; Muff v. Mahloch Farms Co., Inc., 184 Neb. 286, 167 N. W. 2d 73. It should be noted that the element of injury or damage has been an essential part of the rule at least since Clare v. County of Lancaster, 160 Neb. 622, 71 N. W. 2d 190. There is also statutory authority for landowners to drain land by constructing open ditches under specified conditions without liability for damages. See § 31-201, R. R. S. 1943.

The decree here made no finding as to any damage, present or future. The first numbered paragraph of the decree enjoins and restrains the defendant from allowing any water from the drainage basin, which formerly drained easterly, from draining westerly through the low place in the westerly rim of the drainage basin. The decree is not limited to drainage which results in

damage or injury, nor does it make any exception for drainage lawful by statute without liability for damage.

The second numbered paragraph of the decree requires the defendant to restore the low point on the westerly rim of the basin "to its former level as it existed prior to the excavation conducted by the defendant." That elevation was 1051.2 to 1053 feet. The evidence is clear that if the elevation on the west rim were even slightly higher than the 1047.5 elevation on the east rim, no water would drain from the basin to the west nor any damage occur. The decree, therefore, went further than was required and unduly interfered with the defendant's use of his own land.

The decree should be modified to provide that the defendant be enjoined and restrained from allowing any water from the basin or low areas on the southwest quarter of Section 17, Township 18, Range 8, that formerly drained easterly, from draining westerly through the low place in the westerly rim of the basin, to the damage or injury of the land owned or controlled by plaintiffs; except in a lawful manner as authorized by statute. The decree should be further modified to require the defendant to restore the low point on the westerly rim of the basin, in the full area excavated, to a firm, settled elevation of not less than 1048 feet.

In this case also, the defendant testified that he intended to irrigate his farm and that if there should ever be a flow of water to the west out of the drainage basin, he intended to dig a pit which would catch it. There was also testimony that the work done by the defendant here was in accordance with good conservation practices, but there was no finding by the trial court with respect to the effectiveness of any such proposed plan in protecting plaintiffs from injury or damage. Jurisdiction of the trial court should be retained to permit the defendant to apply for a modification of the decree conditional upon the completion of required and specified work by the defendant which will effectively

protect plaintiffs from injury and damage. See Muff v. Mahloch Farms Co., Inc., *supra*.

The cause is remanded to the district court for entry of a decree modified in accordance with this opinion. Costs in this court are taxed to the appellee.

AFFIRMED AS MODIFIED AND REMANDED WITH DIRECTIONS.

ANN PLANTZ, A MINOR, BY CLAIRE PLANTZ, MOTHER, NATURAL GUARDIAN, AND NEXT FRIEND, APPELLANT, V. HERBERT J. ARMBRUST ET AL., APPELLEES.
173 N. W. 2d 377

Filed January 6, 1970. No. 37319.

1. **Actions: Venue.** Where an action is dismissed as to the resident defendant before trial, jurisdiction over nonresident defendants is lost.
2. **Actions: Pleadings: Venue.** An objection to the jurisdiction of the court over the person of nonresident defendants is timely made if asserted after the dismissal of the action as to the resident defendant and before any further appearance has been made.

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

Monen, Seidler & Ryan, for appellant.

Joseph H. McGroarty, Bernard F. Schafersman, and Larry E. Welch, for appellees.

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

BOSLAUGH, J.

The plaintiff, Ann Plantz, was injured on February 15, 1967, when her clothing caught fire while she was standing next to a wall heater in an apartment in Fremont, Nebraska. The property was owned by the defendant Herbert J. Armbrust. The wall heater had been

serviced by the defendant Lambert Coufal, an employee of the defendant Ray O. Buckridge.

This action was brought in Douglas County, Nebraska, to recover damages for the injuries the plaintiff sustained in the accident in Dodge County, Nebraska. The defendant Armbrust is a resident of Douglas County and was served in that county. The defendants Coufal and Buckridge are residents of Dodge County and were served in that county.

After the defendants had answered but before trial the plaintiff and the defendant Armbrust entered into a settlement agreement which resulted in a payment of $95,000 to the plaintiff and a dismissal of the action as to the defendant Armbrust only. The defendants Coufal and Buckridge then moved to dismiss the action on the ground that the court had lost jurisdiction over them. The trial court sustained the motion and dismissed the action without prejudice as to the defendants Coufal and Buckridge. The plaintiff has appealed.

The case turns on the interpretation to be placed on section 25-504, R. R. S. 1943, which provides: "When the action is rightly brought in any county, according to the provisions of this code, a summons shall be issued to any other county, against any one or more of the defendants at the plaintiff's request." The plaintiff contends that the action was "rightly brought" in Douglas County because the resident defendant Armbrust was a bona fide defendant. The plaintiff argues that the settlement with Armbrust demonstrates that the plaintiff could have recovered against that defendant. The plaintiff cites decisions from Ohio and Oklahoma under similar statutes holding that a pre-trial settlement with the resident defendant does not establish that the action was not "rightly brought."

We believe that the following decisions of this court are controlling. In Cobbey v. Wright, 23 Neb. 250, 36 N. W. 505, the plaintiff dismissed the action as to the

resident defendant and took a default judgment against the nonresident defendant. This court held that jurisdiction over the nonresident defendant depended upon the continued presence of the resident defendant as a party, and that the court lost jurisdiction over the nonresident defendant when the resident defendant ceased to be a party to the record.

In Lippincott v. Wolski, 147 Neb. 930, 25 N. W. 2d 747, 169 A. L. R. 1236, in discussing section 25-504, R. R. S. 1943, this court said: "In other words, plaintiff's right, under this statute, to have service upon a defendant in a foreign county, is entirely dependent upon his alleging, and finally proving, a cause of action against the defendant served in the county of the forum."

The plaintiff further contends that the defendants cannot now object to the jurisdiction of the court over their persons because they did not preserve such an objection in their answer. The objection did not exist until the action had been dismissed as to the defendant Armbrust. The objection was timely made and the plaintiff's contention is without merit.

The judgment of the district court is affirmed.

AFFIRMED.

LOIS GAYLE RUBOTTOM, APPELLEE, V. MAX ORIN RUBOTTOM, APPELLANT.
173 N. W. 2d 447

Filed January 6, 1970. No. 37322.

1. **Divorce: Parent and Child.** In determining the provisions to be made for the support of minor children in a divorce proceeding, their status and situation, and all other attendant circumstances, should be considered, and an amount determined in accordance with the best judgment and sound discretion of the court.
2. ———: ———. Where there has been a change of circumstances, the same rule applies in determining whether child support payments should be increased or decreased.

3. ———: ———. A decree of the district court in a divorce action, insofar as minor children are concerned, is never final in the sense that it cannot be changed. Such decree is at all times subject to review and adjustment in the light of changed conditions regardless of the particular language of the award.
4. ———: ———. The allowance made for the support and maintenance of a minor child in a divorce proceeding should be fair and reasonable under the circumstances of each particular case.

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

Holtorf, Hansen, Kortum & Kovarik and David C. Nuttleman, for appellant.

Lyman & Meister, for appellee.

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

CARTER, J.

This is an appeal from a judgment of the district court finding that changed conditions warranted a modification of a divorce decree increasing the amount of child support payable by the husband to the wife.

The parties were divorced on November 5, 1954. At that time the parties had four children, Richard and Delmer, twins age 7 years; Lee, age 4 years; and Ray, age 8 months. On the date of the hearing of this case, Richard and Delmer were 21 years of age, Lee was 19, and Ray was 15. Under the divorce decree, Richard and Delmer were no longer entitled to support by their father, Lee had passed his nineteenth birthday and was no longer entitled to support by his father under the terms of the original divorce decree, and Ray was entitled to support until his nineteenth birthday. Richard and Delmer were attending Chadron State College, Lee was attending Nebraska Western, and Ray was in junior high school. The application for increased child support on the ground of changed conditions was for increased and extended support for Lee until he reached

his majority at 20 years of age and for Ray until he also reached the age of 20 years.

The original decree provided that after Richard and Delmer reached the age of 19 years, defendant should pay child support for Lee and Ray in the sum of $75 per month until Lee reached the age of 19 years after which defendant was to pay $40 per month for the support of Ray. In the order appealed from, dated April 2, 1969, defendant was ordered to pay $75 per month for the support of Lee until he reached the age of 20 years on December 11, 1969, and $100 per month for Ray until he reached the age of 20 years on March 8, 1974.

The asserted changes of conditions relied on to sustain a modification of the decree of divorce are as follows: Each of the parties has remarried and each has a child resulting from the second marriage. Each has a moderately valued home and each appears to enjoy about the same standard of living. The cost of supporting the children is alleged by the wife to have materially increased, which is undoubtedly true, although the evidence as to the extent of the increase is in conflict. The wife has been employed the last 2 years, her income in 1968 being approximately $4,000. Plaintiff and her husband have an automobile and some stock in a local family corporation of questionable value. She makes a contribution of $70 per month to each of the two older boys to aid them while attending Chadron State College. The four boys have been claimed as exemptions for income tax purposes by plaintiff and her husband. During 1968, Lee earned $1,200 and used the money to buy an automobile and for personal expenses with little or no contribution towards his living expenses.

In 1954, defendant received $3,900 for the year from his employment and in the year following, it increased to $4,200. In 1968, his income was $10,850 which included a bonus of $3,500. In 1969, his base income is $7,800 with little chance of any substantial bonus. He

has paid promptly all child-support payments due under the divorce decree, including insurance premiums to protect his four sons amounting over the years to an alleged total cost of more than $3,557.25, all of which has been paid as shown by a sworn answer to a previous application for modification of the decree. The record shows that defendant has voluntarily paid $25 per month to each of the two oldest boys to help with their education. It also shows that he paid Lee $25 in December, January, and February following his reaching age 19 to aid in his schooling which was evidently terminated after the filing of the present application to modify the decree.

The subsequent marriages of the parties, the rising costs of supporting minor children over the past 15 years, and the corresponding increase in the husband's annual income constitute changed conditions authorizing a modification of the child-support order. This conclusion is supported by the following authorities: Phillips v. Phillips, 162 Neb. 649, 77 N. W. 2d 152; Walters v. Walters, 177 Neb. 731, 131 N. W. 2d 166.

It is contended here that there are no changed conditions and that the findings as to the allowance of child support in the original decree are res judicata. This is a correct statement of the law where changed circumstances are not found to exist. But where changed circumstances are found to exist, a child-support decree or order is at all times subject to review and adjustment in the light of such changed conditions regardless of the language of the allowance previously made. Caporale v. Hale, 169 Neb. 751, 100 N. W. 2d 847; Gibson v. Gibson, 147 Neb. 991, 26 N. W. 2d 6.

Under the decree of divorce, defendant was required to pay $75 per month for the support of Lee and Ray after the support for the two older boys was terminated. After the support for Lee terminated, he was required to pay $40 per month for Ray's support until he reached the age of 19. The order from which this appeal is

taken provides that defendant shall pay support for Lee in the amount of $75 per month until he reaches age 20 and the amount of $100 per month for Ray until he likewise reaches age 20. In determining the reasonableness of the trial court's last award, all the circumstances must be considered and placed in proper perspective.

The evidence shows that the cost of supporting Lee and Ray is greater now than it was when the decree of divorce was entered in 1954. The defendant's income in 1954 was $3,900. In 1969, his basic pay is $7,800 per year. In 1968, it was approximately $10,850 which included a bonus of $3,500, the basis for which does not appear to exist in 1969. The plaintiff had an income of $4,000, although not a controlling factor, it is a circumstance to be considered. The defendant has made every payment required for the support of his children, including the cost of insurance for the children and a life policy on himself with the children as beneficiaries. In addition thereto, he has voluntarily contributed to the cost of educating the children both before and after termination of child support under the court's order. As to Lee, the evidence shows that he is able to contribute to his own support, a benefit that is legally available to the plaintiff if she chooses to exercise it. Under the circumstances set forth in this opinion, we think the modification of the child support decree exceeded the bounds of reasonableness.

We hereby modify the court's order under the date of April 2, 1969, for child support in the following respects: Defendant shall pay for the support and maintenance of Lee the sum of $60 per month commencing April 1, 1969, until he reaches his majority on December 11, 1969. Defendant shall pay for the support and maintenance of Ray the sum of $60 per month commencing April 1, 1969, until Lee reaches his majority on December 11, 1969, and thereafter defendant shall pay for the support and maintenance of Ray the sum of $75 per

month until he reaches his majority on March 8, 1974. See Trautman v. Trautman, 184 Neb. 202, 166 N. W. 2d 415.

The costs of this appeal, including an attorney's fee of $250, are taxed to the defendant.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. EDWARD D. WALLEN, APPELLANT.
173 N. W. 2d 372

Filed January 6, 1970. No. 37352.

1. **Automobiles: Public Officers and Employees.** A police officer, when there is just cause, must not only impound a vehicle from a public highway for its own protection, but should inventory the contents to safeguard the owner and protect against false claims of loss.
2. **Automobiles: Evidence: Criminal Law.** When the evidence shows a lawful arrest followed by an inventory of the contents of defendant's automobile following its impoundment, and there is reasonable justification for such impoundment, the taking of an inventory for the purpose of protecting defendant's property during defendant's detention and of protecting law enforcement officers from false claims of loss, such inventory is reasonable and lawful, and evidence of crime found while making such inventory will not be suppressed.
3. ———: ———: ———. If during the proper inventory of the contents of an impounded vehicle, evidence of crime is discovered, such evidence may be used to support a charge for the crime indicated.
4. **Automobiles: Searches and Seizures: Arrest: Criminal Law.** If the arrest of an automobile owner or impoundment of his vehicle was resorted to as a device and pretext for making a general exploratory search of the automobile without a required search warrant, evidence of crime found during the taking of the inventory will be suppressed.
5. **Constitutional Law: Searches and Seizures.** Whether or not an inventory of the contents of an impounded automobile of a person in custody was a reasonable and lawful inventory procedure or an unauthorized exploratory search is a factual question to be determined by the court on a motion to suppress.

6. **Gambling Devices: Evidence.** Only unreasonable searches are prohibited by the Fourth Amendment to the Constitution of the United States.
7. ———: ———. In a prosecution for keeping gaming devices adapted, devised, and designed for the purpose of playing a game of chance for money under section 28-945, R. R. S. 1943, the evidence must sustain a finding that the gambling devices in evidence were adapted, designed, and kept for the purpose of playing games of chance for money. Possession alone is not enough.

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

Kerrigan, Line & Martin, 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 charged with the offense of keeping gaming devices for the purpose of playing a game of chance for money. A jury was waived and defendant was found guilty by the court and sentenced to pay a fine of $400 and costs. Defendant has appealed.

The evidence shows that on August 14, 1968, guards at the Scribner Air Base reported to the Nebraska State Patrol that an intoxicated motorist with a stalled automobile was found outside the entrance to the air base. A state patrolman arrived at the scene at 11:10 p.m., and the stalled automobile was found in a highway intersection with the intoxicated defendant standing near the car. The car could not be moved by its own power. Defendant was arrested and lodged in jail. The patrolman called the Fremont Gas Market and directed it to remove the automobile to its lot in Fremont. There was clothing hanging in the back of the car and suitcases also on the floor in the rear section, all of which were plainly visible.

The automobile was towed to the fenced lot of the Fremont Gas Market. After placing the defendant in jail, the patrolman went to the Gas Market and proceeded to inventory the contents of the automobile for the purpose of protecting the defendant against loss of the personal property in the automobile and to protect himself against false claims of loss upon their return to the defendant. It was during the course of making the inventory that the trunk of the car was opened with the key found in the switch. Upon opening the trunk and the checking of the contents of a vanity box five pairs of dice were found as well as other recognized gambling paraphernalia. Other dice were found in the glove compartment, some of which were observable through the plastic bag in which they were contained. About the time the inventory was completed, another patrolman appeared on the scene with a search warrant. It is on this evidence that defendant contends that the search and seizure of the gambling devices and paraphernalia was unlawful and that they should have been rejected as evidence against the defendant.

In this case, the defendant was arrested for intoxication. He was standing beside his stalled automobile in a highway intersection. On the defendant being lodged in jail, the duty devolved upon the patrolman to clear the highway by removing the automobile. This he did. The fact that the removal of the automobile was not done pursuant to some state law is not a material factor. His duty to cause the automobile to be removed because of the inability of the defendant to do so is in itself reason enough to support the action taken. Also, in removing the automobile necessary steps are required to be taken to protect the contents of the car for the benefit of the defendant. Taking an inventory of the contents of the automobile to insure the return of all the personal property to the defendant and to protect the patrol against false claim of loss while in the custody of law enforcement officers is a salutary practice whether

required by rule or common practice. There is no evidence in this record that the taking of the inventory was a subterfuge for an unlawful search for evidence to convict for crime. The evidence shows that the inventory was taken for the reasons heretofore stated and not to obtain evidence to convict the defendant of any crime. In fact, the evidence shows that defendant was not suspected of any offense, other than intoxication, until the dice and other gaming paraphernalia were discovered during the course of making the inventory. Such a situation does not support any claim of unlawful search or seizure. The taking of the inventory, even if it could properly be defined as a search, is not an unreasonable search and seizure within the constitutional prohibition against "unreasonable searches and seizures."

In Heffley v. State, 83 Nev. 100, 423 P. 2d 666 (1967), the court in a similar case said: "The police officer, when there is just cause, has a duty not only to impound a car from the public highway for its own protection, but also to inventory the contents so that they may be safeguarded for the owner. Such practice is deemed necessary to defeat dishonest claims of theft of the car's contents and to protect the temporary storage bailee against false charges. * * * If, however, the policing conduct indicates that the intention is exploratory rather than inventory the fruits of that search are forbidden. * * * Unfortunately, distinguishing inventory from exploration may prove to be ambitious and unprecise. We can only say that each case must be determined upon its own facts and circumstances."

In a similar case the Supreme Court of Washington stated: "When, however, the facts indicate a lawful arrest, followed by an inventory of the contents of the automobile preparatory to or following the impoundment of the car, and there is found to be reasonable and proper justification for such impoundment, and where the search is not made as a general exploratory

search for the purpose of finding evidence of crime but is made for the justifiable purpose of finding, listing, and securing from loss, during the arrested person's detention, property belonging to him, then we have no hesitancy in declaring such inventory reasonable and lawful, and evidence of crime found will not be suppressed." State v. Montague, 73 Wash. 2d 381, 438 P. 2d 571 (1968). Other cases to the same effect are: St. Clair v. State, 1 Md. App. 605, 232 A. 2d 565 (1967); Cooper v. California, 386 U. S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967).

The defendant relies on Preston v. United States, 376 U. S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964). In that case three suspicious men were arrested for vagrancy while in a parked car. They were taken to jail and their automobile was taken to the police station and then towed to a garage. The police then went to the garage and searched the car for evidence of crime which they found. The search was made because of the failure of any of the three men to have a title to the car and the evasive answers given to questions propounded by the police at the time of their arrest. The court held that the search without a warrant at a remote time and place under the circumstances was unreasonable. In the case before us, the search of the car was not to procure evidence of crime. The patrol had no suspicion of crime by the defendant other than the offense of intoxication. The evidence of crime was discovered incidental to the inventory of the contents of the car. The taking of the inventory, a reasonable precaution, did not constitute an unreasonable search any more than in any other case where the police stumble on to evidence of crime in the pursuance of duty. The facts in the instant case are distinguishable from Preston and require a contrary result.

The broad statements in Preston that a search and seizure in connection with an arrest must be at the time and place of the arrest is subject to some limitations. In State v. Omo, 199 Kan. 167, 428 P. 2d 768 (1967), the

court said: "The 'place of arrest' in cases involving a search of an automobile over which an accused has immediate control at the time of arrest has reference to the vehicle itself rather than its geographical location. An automible, because of its mobility, requires application of rules in the search thereof different from those governing the search of a house. * * * In Arwine v. Bannan, 346 F. 2d 458 (6th Cir. 1965), where the automobile in which the defendant had been arrested was moved to the police station before it was searched, the court stated: '* * * The place of arrest, in this case, must be considered the automobile in which Arwine was sitting when he was arrested; it was the automobile over which he had control, or in which he was legitimately present, that was the place of search. The place where the arrest was made was not the geographical area in which the car was parked; * * *.' * * * The question of reasonableness of a search must be resolved from the facts and circumstances of each particular case. Our view of the evidence in the instant case is that the arrest of the defendant, the removal of the automobile and its search were a series of events constituting one continuous happening. Under such circumstances, the search occurred substantially contemporaneous with and incidental to the arrest. The fact defendant was not present did not prevent the search from being incidental to his arrest." See, also, Fuqua v. State, 246 Miss. 191, 145 So. 2d 152 (1962), certiorari denied 372 U. S. 709, 83 S. Ct. 1018, 10 L. Ed. 2d 125 (1963); DiMarco v. Greene, 385 F. 2d 556 (1967); Boyden v. United States, 363 F. 2d 551 (1966); United States v. Blackburn, 389 F. 2d 93 (1968).

In the instant case, the evidence shows that the patrolman was not making a search at all. There was no reason to search; the sole reason for entering the car was to inventory its contents. There was not even a suspicion that defendant had committed any offense other than intoxication. As we see it, there was not

even a basis existing for obtaining a search warrant. There is no basis for a contention that the patrolman made any search of the car and it cannot therefore be said that there was an unreasonable search and seizure within the prohibition of the Constitution of the United States or the Constitution of this state.

Defendant assigns as error the failure of the trial court to acquit the defendant for the reason that the evidence shows only the possession of gaming devices and fails to show the keeping of gaming devices adapted, devised, and designed for the purpose of playing any game of chance for money or property as provided by section 28-945, R. R. S. 1943. In Glasgow v. State, 147 Neb. 279, 22 N. W. 2d 842, it was said: "From an examination of section 28-945, R. R. S. 1943, it appears that one of the essential elements is that gambling devices set up and kept be adapted, devised, and designed for the purpose of playing games of chance for money or property and the information so charges. In the submission of the defendant's guilt or innocence of the crime charged this essential element was left out of the instructions submitting that issue." In the instant case, a jury was waived and the only question is whether or not the evidence sustains a finding of guilt.

In the instant case, the dice found in the possession of the defendant were crooked. Some of the dice were rigged. There is evidence also that among the paraphernalia found was an "emergency ace supplier" by which a playing card could be passed down the sleeve for a fraudulent use in winning at cards. Such gambling devices have no lawful use and afford indisputable evidence that they were designed for use as a gambling device.

We think this case is controlled by the reasoning in People v. Hall, 56 Ill. App. 2d 7, 204 N. E. 2d 824 (1965), wherein it is said: "It is no evidence of erudition on our part to observe that these dice vary considerably in structure, design and numbering from the

normal dice utilized for either lawful or unlawful purpose. It is patent that we here deal with abnormal rather than normal dice. We think it abundantly clear that normal dice are not iniquitous per se nor within the legislative condemnation although they may become contraband if used with, a necessary part of or indubitably connected or associated with other gambling paraphernalia when seized. In short, normal dice may lose their virginity through immediate and present association. * * * Our Supreme Court supplies the principle that devices which are made or kept for gambling purposes and have no potential for lawful use are gambling devices per se and are not lawful subjects of property which the law protects. * * * We therefore conclude that they were 'designed primarily for use in a gambling place' and have no discernable potential for lawful use. As such, they are contraband and subject to seizure on sight as an incident to an otherwise lawful search."

The purpose or the intent for which an article is to be used is normally hidden within the recesses of the mind and can rarely be proved by direct evidence, but such purpose or intent may be gathered or inferred from the circumstances surrounding the case. The evidence here is sufficient for the trier of fact to find that the gaming devices were kept for illegal gambling purposes within the purview of section 28-945, R. R. S. 1943.

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

AFFIRMED.

E. M. BURNEY, APPELLEE, V. LINDA EHLERS, APPELLANT.
173 N. W. 2d 398

Filed January 9, 1970. No. 37305.

1. **Automobiles: Damages.** When a damaged automobile can be repaired and restored substantially to its original condition, the

reasonable cost of the repair is a proper measure of damage.
2. **Evidence.** Opinion evidence as to value is generally not binding on the trier of fact, even when it is not met by opposing proof.

Appeal from the district court for Seward County: JOHN D. ZEILINGER, Judge. Affirmed.

Blevens and Bartu, for appellant.

Healey & Healey and Kenneth A. Legg, for appellee.

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

BOSLAUGH, J.

The plaintiff's 1960 Dodge automobile was damaged when it collided with a truck operated by the defendant, Linda Ehlers. This action was brought to recover the damages resulting from the accident.

A jury was waived and the trial court found that the plaintiff should recover $206.91. The defendant's motion for new trial was overruled and she has appealed.

The accident happened on U. S. Highway No. 34 just west of Utica, Nebraska, at about 4 p.m., on October 21, 1967. The weather was clear and the sun was shining. The plaintiff was traveling west and driving about 35 or 40 miles per hour. When the plaintiff was 2 or 3 blocks east of the main entrance to Utica he saw the truck operated by the defendant drive onto the highway and turn west. The truck was traveling about 10 miles per hour.

About 1 block west of the main entrance to Utica, as the plaintiff started to pass the truck, the defendant turned left into a private driveway. The plaintiff turned onto the shoulder and applied his brakes but was unable to stop. The right front of the plaintiff's automobile collided with the left front of the truck.

The plaintiff testified that he saw no turn signal of any kind. The defendant testified that she turned the signal lights on "almost immediately" after she entered

the highway. She also testified that she had seen the plaintiff's automobile behind her but did not look to the left or to the rear as she started to turn.

The trial court found "that plaintiff was contributorily negligent but that his negligence was slight in comparison with gross negligence of defendant under the circumstances."

The plaintiff alleged that his damages were $275.88 and introduced a written estimate or statement of repairs in that amount which was received without objection. In offering the exhibit, plaintiff's counsel stated that if the repairman were called "he would testify this was the amount of the damage."

The defendant contends that the trial court found that the plaintiff's contributory negligence was 25 percent in a comparative degree and that this should bar the plaintiff's recovery as a matter of law. The argument assumes that the amount of the plaintiff's recovery was reduced 25 percent because of contributory negligence.

When a damaged automobile can be repaired and restored substantially to its original condition, the reasonable cost of the repair is a proper measure of damage. Wylie v. Czapla, 168 Neb. 646, 97 N. W. 2d 255. The estimate or statement of repairs introduced by the plaintiff in this case was some evidence of the cost of repairs. The parties did not stipulate as to the fair and reasonable value of the labor and material necessary to repair the damaged automobile or as to the amount of the plaintiff's damages. The record shows only no objection to the offer of the exhibit.

Opinion evidence as to value is generally not binding on the trier of fact, even when it is not met by opposing proof. Grimminger v. Cummings, 176 Neb. 142, 125 N. W. 2d 613. The trial court in this case was not bound to accept the plaintiff's evidence as conclusive of the value of the repairs to the plaintiff's 1960 Dodge automobile.

Under the comparative negligence statute, section 25-

1151, R. R. S. 1943, the negligence of the parties is to be compared, and the plaintiff cannot recover unless the contributory negligence of the plaintiff is slight and the negligence of the defendant is gross in comparison therewith. Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N. W. 158. Any contributory negligence of the plaintiff is to be considered in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff. § 25-1151, R. R. S. 1943.

A comparison of the negligence of the two parties involved in an accident cannot be easily translated into a mathematical ratio. This court has never adopted a rule that contributory negligence of more than a certain percent will bar recovery as a matter of law. The statute does not contemplate such a rule and we do not believe that the adoption of such a rule would further the administration of justice.

The evidence sustains the judgment of the district court and it is affirmed.

AFFIRMED.

PHILIP G. SCHMER, APPELLANT, V. RILEY C. GILLELAND, APPELLEE.

173 N. W. 2d 391

Filed January 9, 1970. No. 37308.

1. **Limitations of Actions: Time.** A demurrer on the ground of the statute of limitations opens the record pertaining to the time the action was commenced.
2. **New Trial: Appeal and Error.** A motion for new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court. A ruling on the motion will not be disturbed unless an abuse of discretion is shown.

Appeal from the district court for Madison County: MERRITT C. WARREN, Judge. Affirmed.

Moyer & Moyer and James F. Brogan, for appellant.

Jewell, Otte & Pollock, for appellee.

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

SMITH, J.

Defendant demurred on the ground that the statute of limitations barred the common law remedy of plaintiff for negligence. Plaintiff's petition not disclosing the date of commencement of the action, the district court concluded that the demurrer searched the record for the date. The demurrer was accordingly sustained and the petition dismissed. Plaintiff moved for new trial on the ground of newly discovered evidence—an affidavit like a return of service. The court overruled the motion. On appeal, plaintiff assigns for error both the reach given the demurrer and the denial of new trial.

The clerk of the district court at plaintiff's request issued 4 summonses respectively dated February 19, 1966, four years after the accident; October 13, 1966; February 3, 1967; and March 14, 1968. The summonses were duly served on the Secretary of State pursuant to the nonresident motorist statute, section 25-530, R. R. S. 1943. No affidavit of notification to defendant in compliance with the statute was filed until March 25, 1968. The one then filed related only to the fourth summons.

In April 1968, defendant filed a special appearance to each summons. One ground was failure of plaintiff to file the statutory affidavit. In June the court sustained the special appearances to all except the fourth summons.

Defendant's demurrer was filed June 21, 1968, argued August 22, and sustained October 3. The court on February 7, 1969, ordered dismissal of the petition unless plaintiff should file a good amended petition within 10 days. Plaintiff having taken no action, the court dismissed the petition February 20. On March 25, for the

first time, plaintiff filed a notification affidavit of his former counsel. The affidavit, made in Madison County on March 24, related to the original summons. It was the basis for plaintiff's motion for new trial. No excuse for delay appears.

A criterion of commencement of action for limitation purposes is the date of the summons served on defendant. § 25-217, R. R. S. 1943. Where the record discloses that an action was not commenced within the time required by statute, the petition is subject to demurrer. Gorgen v. County of Nemaha, 174 Neb. 588, 118 N. W. 2d 758 (1962). The rule that a demurrer searches the record has been limited to pleadings. See In re Estate of McCleneghan, 145 Neb. 707, 17 N. W. 2d 923 (1945).

Plaintiff's objection to the demurrer is technical. Although considerable support for it may exist elsewhere, it is in our opinion unacceptable. See, Smith v. Day, 39 Ore. 531, 64 P. 812, 65 P. 1055 (1901); Dolan v. Baldridge, 165 Wash. 69, 4 P. 2d 871 (1931); Atkinson, "Pleading the Statute of Limitations," 36 Yale L. J. 914 (1927); Clark on Code Pleading (2d Ed., 1947) 522; Annotation, 61 A. L. R. 2d 300 (1958). A demurrer on the ground of the statute of limitations opens the record pertaining to the time the action was commenced.

A motion for new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court. A ruling on the motion will not be disturbed unless an abuse of discretion is shown. Markey v. Hunter, 170 Neb. 472, 103 N. W. 2d 221 (1960). There was no abuse here.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STANLEY ANTONIO WHITAKER, APPELLANT.

173 N. W. 2d 397

Filed January 9, 1970. No. 37312.

Criminal Law: Sentences. Where a sentence has been imposed by the district court within statutory limits it will not be disturbed in the absence of an abuse of discretion.

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

Dennis B. Smouse, for appellant.

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

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

SPENCER, J.

Defendant had been sentenced by the municipal court of the city of Omaha to 6 months in the county jail and fined $500 for indecent exposure. After a short period in the county jail, defendant, who was 26 years of age and married, was assigned by the Douglas County sheriff's office to the Clearview Rehabilitation Center, a minimum security institution. Defendant walked away from that institution and left the state. He was apprehended at Des Moines, Iowa.

Defendant pled guilty to an information drawn under section 28-736, R. R. S. 1943, charging unlawfully breaking custody and escape. After a presentence investigation, he was sentenced to imprisonment in the Nebraska Penal and Correctional Complex for a period of not less than 2 years nor more than 4 years. The penalty provided by section 28-736, R. R. S. 1943, is confinement in said complex for a period of not less than 1 year nor more than 10 years. Defendant in this appeal is attacking only the propriety of the sentence levied, contending that it is excessive under the circumstances.

This court has often said that where the punishment of an offense created by statute is left to the discretion of the district court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed where there is no abuse of such discretion. See Nicholson v. Sigler, 183 Neb. 24, 157 N. W. 2d 872.

Defendant's record, going back to 1963, involves disturbing the peace and disorderly conduct; violation of auto laws; open and gross lewdness; and lewd and lascivious behavior.

Under the circumstances, we cannot say that the trial court abused its discretion in the imposition of the sentence herein. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIE NEVELLS, JR., APPELLANT.
173 N. W. 2d 395

Filed January 9, 1970. No. 37326.

Criminal Law: Probation and Parole: Evidence. Where the violation of a probation order is established or admitted, in determining whether or not to set aside the probationary order and to impose the penalty which it might have imposed before placing the defendant on probation, the trial court is not limited to a consideration of probative evidence of matters arising subsequent to the order of probation.

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

William Stillmock and Bennett G. Hornstein, 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.

WHITE, C. J.

The district court, on a plea of guilty to the violation of conditions of probation, revoked its previous order of probation, and on the original charge of grand larceny, sentenced the defendant to imprisonment in the Nebraska Penal and Correctional Complex for a period of 5 years. On appeal we affirm the judgment of the district court.

It appears indisputably in the record that the defendant pleaded nolo contendere to the original charge of grand larceny. At all stages of the proceedings recited herein the defendant was represented by counsel. Prior to pleading nolo contendere to the original charge of grand larceny, he was advised of the consequences of such a plea. At that time he was also advised of the various pleas he could make and what would be the effect of each. The defendant with counsel entered his plea of nolo contendere and the district court found him guilty of the charge of grand larceny based thereon and deferred sentencing. This occurred on May 17, 1967. On June 29, 1967, the district court entered an order, without pronouncing sentence, suspending further proceedings, and placing defendant on probation for 2 years. At this time the record reveals that he was given repeated warnings and admonitions by the trial court and was told that if he did not live up to the conditions of probation, he would be brought back to court. The court advised him, "* * * and at that time (the court) can enter any sentence for this offense which he could on this date, regardless how long you have been on probation, and you may not get any credit for efforts made at all. I told you before that the penalty for the offense you are charged with, and pled guilty to, is from one to seven years in the Nebraska Penal and Correctional Complex." On March 21, 1969, an information was filed charging the defendant with probation violation in that he violated the laws of the State of Nebraska on November 4, 1968. This is a specific charge of a violation of para-

graph No. 7 of the written order of probation. Subsequently, on March 28, 1969, prior to taking the defendant's plea on the charge of violation of probation, the district court refreshed the defendant's memory relative to the effect of the consequences of a violation of probation which had previously been given him. The defendant then entered a plea of guilty to violating the terms of his probation. The record reveals that he reaffirmed his guilt after admonitions by the court. The record also reveals that he talked the matter over with his attorney and thereafter again entered his voluntary plea of guilty to violation of the conditions of probation. The court thereupon sentenced him to a term of 5 years in the Nebraska Penal and Correctional Complex.

It is somewhat difficult to understand the defendant's contention. The gist of his argument seems to be that he was denied a hearing on the charge of violation of probation and that therefore it should be set aside. To support this contention he cites only cases which involve a plea of not guilty to the charge of violation of probation. That he would be entitled to a hearing in this situation we are in full agreement, but that is not the issue involved in this case. The record reveals that he was represented by counsel at every stage of the proceedings and that the district court, in an exhaustive and repetitive manner, did everything it could to advise him of all of his rights, the nature of the charge, and the consequences that could follow a plea of guilty or nolo contendere and a violation of the terms of his probation. The defendant seems to contend that the information did not contain enough details or a specific charge against him. The defendant is confusing the requirements of the original information, to which he pleaded guilty, with the requirements of his order of probation and the complaint of that order. His complaint for violation of probation contained a specific charge of a violation of paragraph No. 7 of that order which required him to be law abiding and not to violate any

laws of the State of Nebraska. The issue before the court was whether he violated his probation and not whether he had committed the original offense of grand larceny.

Bearing on the question here is the case of Young v. State, 155 Neb. 261, 51 N. W. 2d 326, where this court had before it a case of violation of probation. The defendant, Young, stood mute and a plea denying the charge was entered for him. The court held a hearing and he was found guilty of violation of his probation. This court said as follows: "Accordingly we hold that where the violation of a probation order is established *or admitted,* in determining whether or not to set aside the probationary order and to impose the penalty which it might have imposed before placing the defendant on probation, the trial court is not limited to a consideration of probative evidence of matters arising subsequent to the order of probation." (Emphasis supplied.) A case almost directly in point is the case of People ex rel. Ambrose v. Combs, 33 Misc. 2d 360, 224 N. Y. S. 2d 874. In that case on being arraigned for violating his probation, the accused pleaded guilty. He was then sentenced. Afterwards on habeas corpus proceedings, he alleged that the information charging him with a probation violation was insufficient and that he was therefore denied a hearing or right to be heard. The court dismissed the writ substantially on the grounds and rationale that we have discussed herein.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEONARD LEO FRANKLIN, APPELLANT.
173 N. W. 2d 393

Filed January 9, 1970. No. 37342.

1. **Criminal Law: Trial.** An in-court identification by a witness to whom the accused was exhibited before trial in the absence of defense counsel may be admissible if an independent origin of the identification is established.
2. **Witnesses: Trial.** The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld unless an abuse of discretion is shown.

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 Bernard L. Packett, for appellee.

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

BOSLAUGH, J.

The defendant was convicted of robbery and sentenced to 4 to 6 years imprisonment. His motion for new trial was overruled and he has appealed.

The complaining witness, Dallas Petersen, testified that he met Josephine Parker at Fifteenth and Cass Streets in Omaha, Nebraska, at about 10 p.m., on January 3, 1969, and invited her to go riding with him in his automobile. Petersen drove around for awhile and then stopped and bought two six-packs of beer.

At the request of Parker, Petersen drove to Twenty-fifth and Patrick Streets. Petersen, Parker, and an Indian male identified as William Phillips, then entered an apartment house at 2434 Patrick Street and went to the second floor. The defendant followed them into the building and the robbery took place in the hallway on the second floor of the apartment house.

Petersen had left part of his money in the automobile,

so Phillips and the defendant took Petersen out to the automobile to get the rest of his money. After they had located the rest of the money, the defendant struck Petersen in the face and he and Phillips left.

After Petersen had reported the robbery he was taken to the police station and shown about 200 photographs. He also appeared at two lineups at the police station and identified the parties who had robbed him.

At the trial Petersen positively identified the defendant as the man who had robbed him. The defendant contends that this identification of the defendant by Petersen should have been excluded because the defendant did not have the assistance of counsel at the lineups. See United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149.

Petersen testified that his identification of the defendant at the trial was based upon his independent recollection of seeing the defendant at the time of the robbery. The identification had an origin independent of the lineups and was admissible. See, State v. Cannito, 183 Neb. 575, 162 N. W. 2d 260; State v. Beasley, 183 Neb. 681, 163 N. W. 2d 783. Although the hallway in the apartment house was dimly lighted, Petersen had a good view of the defendant while the defendant and Phillips were locating the money that Petersen had left in his automobile.

During the cross-examination of Phillips, who testified for the defendant, the State was allowed to inquire as to whether the defendant and Phillips had been in jail at the same time and whether Phillips had seen and talked to the defendant in jail. Phillips volunteered that he had been in jail during the summer of 1968. The defendant contends that the evidence as to the defendant having been in jail should have been excluded because it tended to show that the defendant had committed another crime before the robbery.

The State cross-examined Phillips in regard to the extent of his acquaintance with the defendant before the

robbery. The evidence in question had some relevance to that issue. The scope of the cross-examination of a witness rests largely in the discretion of the trial court. State v. Sukovaty, 178 Neb. 779, 135 N. W. 2d 467. We find no abuse of discretion here.

At the request of his counsel, we have considered a statement filed by the defendant personally in this court and find it to be without merit.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ENOCH ROBINSON, APPELLANT.
173 N. W. 2d 443

Filed January 9, 1970. No. 37348.

1. **Criminal Law: Evidence.** The question of the admissibility of photographs of a gruesome nature rests largely in the discretion of the trial court.
2. ———: ———. The test is whether the evidence is relevant and in determining relevancy, the court is to weigh and balance the probative value of the picture as against its possible prejudicial effect.
3. ———: ———. A photograph proved to be a true representation of the person, place, or thing which it purports to represent is ordinarily proper evidence of anything of which it is competent and relevant for a witness to give a verbal description.
4. **Criminal Law: Homicide: Evidence.** In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of wounds or injuries, and to establish malice or intent.
5. **Criminal Law: Constitutional Law.** Safeguards prescribed by the United States Supreme Court decision of Miranda v. State of Arizona are applicable only in instances of "custodial interrogation" which is 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.

Appeal from the district court for Thurston County: JOSEPH E. MARSH, Judge. Affirmed.

Mark J. Ryan, for appellant.

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

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

NEWTON, J.

The defendant Enoch Robinson appeals from his conviction of murder in the first degree in the district court for Thurston County, Nebraska. In accordance with the finding of the jury, he was sentenced to imprisonment for life. We affirm the judgment and sentence of the trial court.

The defendant, the deceased, and several of the witnesses are Omaha Indians. All of the Indians involved were residents of or staying temporarily in the vicinity of Macy, Thurston County, Nebraska. They were drinking, primarily beer, throughout the afternoon and evening of Sunday, January 12, 1969. The deceased Norman Grant was a physically strong man, about 5 feet 9 inches in height, weighing in excess of 200 pounds, and 32 years of age, but his left arm had been amputated above the elbow. His party ran out of beer and several of them drove to Homer, Nebraska, to replenish their supply. As Norman Grant entered a Homer tavern about 4 or 4:30 p.m., he was accosted by the defendant who had a knife in his sleeve and placed it against Norman's neck informing Norman that: "* * * he had a knife to his neck." Norman knocked the defendant's arm up and then knocked him down. Defendant was ejected. A short time later Norman Grant's brother Donald was assaulted by defendant outside the tavern. In the struggle, defendant dropped the knife which was picked up by another member of the party and left with the bartender.

Later that night, at approximately 1 a.m. on January 13, 1969, Norman Grant and another brother Mathew

Grant left the home of friends in Macy and walked toward their own home in that village. They were overtaken by the defendant and a sister of the defendant. Defendant asked them: "* * * if we wanted to settle it now." He had an object in his hand and swung at Mathew Grant who backed away. He then went after Norman who kept backing away for a considerable distance but was steadily pursued by defendant. In the meantime, defendant's sister struck Mathew with a club of some nature, inflicting a cut on his scalp. Mathew ran away but returned when defendant and his sister left the scene. He found Norman injured and bleeding; and helped him walk to the house of an acquaintance who was aroused and conveyed them to the hospital at Winnebago, Nebraska. There a nurse examined Norman, found he was dead, and called a doctor who verified that fact. The doctor also sutured Mathew's scalp wound.

The county sheriff was called. After viewing the body and talking with the doctor and Mathew Grant, he met an investigating officer of the Nebraska State Patrol at the hospital and they proceeded to Macy. On arriving at Macy about 4 a.m., they checked the scene of the crime and found numerous blood stains in the snow and a bloodstained knife blade broken in three parts.

On the afternoon of January 13, 1969, defendant went to the home of a teacher in a local churchschool and asked to use the phone saying: "My name is Enoch Robinson and I want to turn myself in, I want to call the police." The teacher then called for the sheriff. Defendant remained there until the arrival of the sheriff. While waiting, defendant was asked by the teacher what had happened. Defendant said: "* * * he had been in a fight, he guessed he had used a knife * * *."

Defendant testified in his own behalf. He indicated he was drunk and his memory very hazy about events occurring on January 12 and 13, 1969, but denied having injured Norman Grant.

An autopsy was performed on the body of Norman Grant. The examining physician found lacerations on the right ear and cheekbone, the chin, and below the left eye. He also found stab wounds below the sternal notch, below the breastbone, and on the left side of the neck above the clavicle. The neck wound which was 3 inches in depth appears in photographs to have been at least 1 inch in length. He indicated the wounds were made with a pointed, narrow instrument such as a screwdriver or sharp paring knife. He also found that the left carotid artery and the left jugular vein had been severed as a result of the wound in the neck. Death was caused by bleeding from the neck wound.

Two colored photographs of the blood covered face, head, and torso of deceased and one full length photograph were received without objection. One full length colored picture taken after the body had been washed was also admitted without objection. Defendant objected strenuously to the admission of a colored photograph taken during the course of the autopsy. Part of the flesh over the left chest, shoulder, and neck had been folded back and a forceps inserted through the wound in the neck to show its size and location. The picture was admitted as exhibit 13.

Defendant assigns the admission of exhibit 13 as prejudicial error. The question of the admissibility of photographs in evidence rests largely in the discretion of the trial court. See 23 C. J. S., Criminal Law, § 852 (1), p. 345. A photograph proved to be a true representation of the person, place, or thing which it purports to represent is ordinarily 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. For many years the courts of this country have held that evidence of a gruesome nature and which may tend to inflame the passions of jurors should be excluded unless it has some probative value which outweighs its possible prejudicial effect. See State v. Morris,

245 La. 175, 157 So. 2d 728. Such evidence is generally admitted for purposes of identification to show the condition of a body and to indicate the nature and extent of wounds or injuries. See Reizenstein v. State, 165 Neb. 865, 87 N. W. 2d 560. It is also admitted to establish malice and intent. See State v. Blackwell, 184 Neb. 121, 165 N. W. 2d 730.

In the present instance, the photograph was offered to show the size and location of the neck wound which was in the nature of a slit, about 1 inch in length. In view of the doctor's testimony that the wounds were made by "a pointed narrow instrument such as maybe a screwdriver, maybe a sharp paring knife," this evidence appears to be pertinent and particularly so when the broken and bloodstained knife found at the scene of the crime has a blade at least 1 inch wide and about 7 inches long. It is definitely not a screwdriver or what is commonly referred to as a paring knife, but it obviously is the weapon used and of a type which could inflict a wound such as the one that resulted in death. The picture served to indicate the nature and extent of the wound.

In People v. Harrison, 59 Cal. 2d 622, 30 Cal. Rptr. 841, 381 P. 2d 665, the court stated: "The test is whether the evidence is relevant, and in determining the relevancy the trial court is to weigh and balance the probative value of the pictures as against their possible prejudicial effect." In another case, People v. Brommel, 56 Cal. 2d 629, 15 Cal. Rptr. 909, 364 P. 2d 845, involving photographs taken during an autopsy, the photographs were found to be relevant and admissible. Photographs of this nature were also found acceptable in People v. Arguello, 65 Cal. 2d 768, 56 Cal. Rptr. 274, 423 P. 2d 202. See, also, State v. Hanna, 150 Conn. 457, 191 A. 2d 124; State v. Bucanis, 26 N. J. 45, 138 A. 2d 739, 73 A. L. R. 2d 760.

The State has the burden of going forward with the evidence. It cannot anticipate the nature of the defense

which will be subsequently advanced by the defendant and which it will be required to meet. It must prove all elements of the crime charged beyond a reasonable doubt and also combat all possible defenses. Under such circumstances, evidence is frequently advanced which appears unnecessary after the trial has been concluded. Nevertheless, if such evidence were to be omitted, it could well leave an opening for a successful defense on the part of a defendant. This is true in most criminal prosecutions and this case was not an exception.

There is reason to doubt the inflammatory effect of such a picture. It is understandable that a picture of a body horribly mutilated or dismembered might well influence a jury against a person accused of such mutilation. Yet, such pictures are often properly received in evidence. In the present age when crime is rampant, when we are at war, and when the news media often describes and supplies pictorial evidence of the violent results, those members of the public who serve as jurors are not likely to be greatly influenced by such evidence. In the present instance, it was clearly understood by the jury that the violence done to the body during the autopsy was the work of the physician and not of the defendant.

The evidence adduced in this case clearly establishes murder in the first degree resulting from the persistently aggressive acts of defendant. The only extenuating circumstance was the possible drunken condition of defendant at the time. The jury, rather than recommending a death sentence, found defendant should be imprisoned for life. This was not the act of jurors whose passions and prejudices had been aroused. On the contrary, the jury treated the defendant as leniently as the law permits.

We do not find that there was an abuse of discretion requiring a reversal of the judgment in this case. Nevertheless, it is, under prevailing rules, a borderline case, and our trial courts should be ever vigilant and guarded

in dealing with such evidence. Except in cases of absolute necessity, prosecuting attorneys should avoid the use of doubtful evidence of this character.

Exception is taken to the admission in evidence of the knife with which defendant earlier in the day threatened Norman Grant. The knife and the incidents occurring at the time mentioned were pertinent. They demonstrated the malice and ill will of the defendant toward Norman Grant and the motive for the final assault. Defendant also excepts to the reception in evidence of the bloodstained clothes worn by the deceased. They perhaps had little evidentiary value, but it is difficult to see how defendant could have been prejudiced by their reception, especially so in view of the pictures of the body coated with blood which were introduced without objection. These contentions are without merit.

Defendant challenges the sufficiency of the evidence. The outline of the evidence given above belies the validity of this complaint.

Defendant asserts that the admission alleged to have been made by defendant to the schoolteacher when "turning himself in" was not admissible because defendant had not been warned of his constitutional rights. The teacher had no connection with law enforcement officers but was acting solely as a private citizen. Furthermore, defendant was not then in custody. Under the circumstances, such warning was not required. See, State v. O'Kelly, 181 Neb. 618, 150 N. W. 2d 117. See, also, Evans v. United States, 377 F. 2d 535 (5th Cir., 1967), wherein it is stated: "The Miranda safeguards are applicable only in instances of 'custodial interrogation' which the Court defines as: '* * * 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.' "

Several other assignments of error are set out in defendant's brief. Although not argued, they have been

considered and are found to be without merit.

The judgment of the district court is affirmed.

AFFIRMED.

EVELYN LOCK, APPELLANT, V. PACKARD FLYING SERVICE, INC., A CORPORATION, APPELLEE.
173 N. W. 2d 516

Filed January 16, 1970. No. 37218.

1. **Negligence.** Foresight, not retrospect, is the standard of negligence. An act which prudent men, exercising reasonable care under the circumstances, would not foresee or anticipate might endanger or injure another is not negligent.
2. ———. The causal connection is broken if between the defendant's negligent act and the plaintiff's injury there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff.
3. ———. An injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and would not have resulted from it, but for the interposition of some new, independent cause that could not have been anticipated.

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

Cobb, Swartz & Wieland, for appellant.

Luebs, Tracy & Huebner, Vincent L. Dowding, and James A. Beltzer, for appellee.

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

NEWTON, J.

Plaintiff seeks to recover for personal injuries received in an airplane accident. Defendant operated a repair

service at the city of Imperial, Nebraska, municipal airport. Plaintiff's husband, with three other persons, constituted the Chase County Flying Club which owned the airplane involved in the accident. One member of the club damaged the rudder of the plane and arranged for defendant to repair the rudder. Defendant's employees removed the rudder for the purpose of repairing it. The plane was left in its hangar with the ignition key left in the plane and no warning given of the removal of the rudder. Plaintiff's husband failed to note the absence of the rudder, took off with plaintiff as a guest passenger, crashed, and plaintiff was injured. The case was submitted to a jury which found for defendant and judgment was entered accordingly. We affirm the judgment of the trial court.

The rudder is essential as a vertical stabilizer and a plane without a rudder is not airworthy. The rudder, together with the elevator, the flaps, and the ailerons, constituted the control surfaces on the airplane. All are connected by cables to controls in the pilot's compartment and are fastened to the plane by means of hinges, bolts, nuts, and cotter pins. In the present instance, the rudder varied in width from 1 foot 8 inches to 2 feet and was 4½ feet high. The control cables were loosely hooked together when disconnected from the rudder and were open to inspection. The rudder controls were also attached to the front wheel to facilitate turning when taxiing on the ground and the fact the plane could be turned while taxiing did not indicate the rudder was present or functioning.

Applicable Federal Aviation Regulations forbid the operation of aircraft not in an airworthy condition and hold the pilot responsible for determining if a plane was safe to fly. The regulations also make the pilot primarily responsible for maintaining the aircraft in an airworthy condition. In complying with these regulations, it is necessary and customary for a pilot to make a preflight inspection of the plane. This includes check-

ing the engine oil, draining accumulated moisture from the gas tanks, and checking all control surfaces together with their connecting cables, hinges, and fastenings to ascertain that they are in safe operating condition.

Plaintiff has assigned several grounds of alleged error. We find it unnecessary to consider these assignments. Her right to recover is dependent upon two fundamental propositions. First, was the defendant guilty of negligence in failing to give warning of the removal of the rudder? Second, was the removal of the rudder and the failure to give warning of its removal a proximate cause of the accident and of plaintiff's injury? We resolve both questions in favor of the defendant. Under such circumstances, any error assigned by plaintiff is necessarily harmless and not prejudicial.

The aircraft in which the plaintiff was injured was the property of her husband and three other persons. Under existing regulations, no one except a licensed pilot is authorized to fly a plane. Licensed pilots, such as plaintiff's husband, are charged with making preflight inspections and ascertaining that the plane is airworthy before they take off. All experienced airmen, including mechanics and repairmen, are familiar with these requirements. Defendant could not reasonably be expected to anticipate that the plane would be flown by other than experienced and licensed pilots. Neither could defendant, or any prudent person under similar circumstances, be reasonably expected to anticipate that a duly qualified pilot would neglect to make a reasonable preflight inspection or fail to notice such an open and obvious defect as a missing rudder. If there was no reasonable apprehension of danger, there was no duty to warn of the removal of the rudder. In Kolar v. Divis, 179 Neb. 756, 140 N. W. 2d 658, it is stated: "Foresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is

always a question of what reasonably prudent men under the same circumstances would or should, in the exercise of reasonable care, have anticipated." In Schild v. Schild, 176 Neb. 282, 125 N. W. 2d 900, it is stated: " 'There is negligence only where no care is exercised to avert a risk to others which reasonably should be apprehended.' " See, also, Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710; Anderson v. Mosher, 169 Neb. 134, 98 N. W. 2d 703, 81 A. L. R. 2d 956; Clouse v. County of Dawson, 161 Neb. 544, 74 N. W. 2d 67, 55 A. L. R. 2d 991.

The evidence discloses that the pilot of the plane was clearly negligent in failing to ascertain that it was airworthy and in flying a craft that was obviously disabled. This is not a case of a concealed or hidden defect or of one which the pilot might reasonably have been expected not to discover. The negligence of the pilot occurred subsequent to the removal of the rudder by defendant. Defendant's removal of the rudder and failure to give warning of the consequent disabling of the aircraft was not the proximate cause of the accident. "Two acts of independent source are not concurrent in causing an injury if one of them merely furnishes a condition by which such injury is made possible, and later such injury occurs through the efficient, self-acting, and independent operation of the other." Johnson v. Metropolitan Utilities Dist., 176 Neb. 276, 125 N. W. 2d 708. "Ordinarily, where the negligence of one party is merely passive and potential causing only a condition while that of the other is the moving and effective cause of the accident, the latter is the proximate cause." Jarosh v. Van Meter, 171 Neb. 61, 105 N. W. 2d 531, 82 A. L. R. 2d 714. "Where a second actor has or should have become aware of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor is relieved of liability, because the condition created by him was

merely a circumstance of the accident and not its proximate cause." 65 C. J. S., Negligence, § 111 (2), p. 1210. See, also, Jarosh v. Van Meter, *supra*. " 'The causal connection is broken if between the defendant's negligent act and the plaintiff's injury there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff.' " Shupe v. County of Antelope, *supra*. " 'An injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and would not have resulted from it, but for the interposition of some new, independent cause that could not have been anticipated.' " Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831.

Defendant did nothing that in and by itself could have resulted in plaintiff's injuries. The plane could only be used by licensed, experienced pilots familiar with the plane and the dangers of flying a plane that was not airworthy. Such a pilot is aware of the necessity of a rudder on the aircraft and that without it it would not be airworthy or manageable. He is charged at all times with making a preflight inspection of the aircraft with a view to determining its safety and airworthiness. The absence of the rudder was an obvious, not a concealed, defect which any reasonable examination by the pilot would have disclosed. Under such circumstances, defendant could not be required to anticipate injury from the absence of the rudder. It had no reason to anticipate the grossly negligent acts of the pilot. In accordance with the foregoing rules, it is apparent that the intervening acts of negligence on the part of the pilot were of such nature as to relieve defendant of any possible liability and constituted the sole proximate cause of the accident.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD JAMES LEARY, APPELLANT.
173 N. W. 2d 520

Filed January 16, 1970. No. 37271.

1. **Criminal Law: Evidence: Trial.** The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case, and the verdict of the jury may not be disturbed by this court unless it is clearly wrong.
2. ———: ———: ———. Evidence is sufficient to sustain a verdict of guilty in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt.

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

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

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

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

SPENCER, J.

Defendant was convicted under an information charging robbery, and was sentenced to the Nebraska Penal and Correctional Complex. He has perfected an appeal to this court, attacking the sufficiency of the evidence to sustain a conviction.

At approximately 6 p.m., October 16, 1968, Simon Green and his wife were at their place of business, a grocery store, when two unmasked men walked in and one of them announced, "This is a stickup." One of the two men carried a sawed-off shotgun, the other a chrome-plated revolver. They ordered the Greens to lie down in the aisle. Mr. Green lay down on his stomach, but

Mrs. Green, who had arthritis, could not bend her knees. She was helped to a chair by the man with the sawed-off shotgun, who was identified as the defendant. Defendant tied her legs to the chair and also tied her hands. The two men rifled the cash register, and later searched Mr. Green. His hands were then tied with tape.

Jerry Manzer, a 17-year-old youth, was also in the store at the time and was made to lie down in the aisle. During the course of the robbery, Robert Combs, a 15-year-old youth, entered the store and was also directed to lie down in the aisle.

All of the witnesses identified the defendant and one Mathis as the participants. Separate informations had been filed against them, but the two cases were consolidated for trial. They were represented by different attorneys. The defendant herein was convicted, and Mathis was acquitted.

The sole complaint of the defendant is that Mathis was found innocent and he was convicted on substantially identical evidence. He argues that if the identification of Mathis is corroded by his alibi, how can the same witnesses be reliable against him?

The identification of the defendant by all four witnesses was positive as the man who carried the sawed-off shotgun. The identification of Mathis was equally positive by three of the witnesses, but rather uncertain on the part of Mrs. Green who was tied in the chair and should have had the best opportunity to observe the participants. Mathis produced strong alibi evidence, consisting of the testimony of his employer supported by a timecard indicating that at the time of the robbery he was employed several miles from the site of the robbery. If the jury believed this evidence it could find Mathis was not a participant, or that the evidence was not sufficient to find him guilty beyond a reasonable doubt.

The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal

case, and the verdict of the jury may not be disturbed by this court unless it is clearly wrong. State v. Knecht, 181 Neb. 149, 147 N. W. 2d 167.

Evidence is sufficient to sustain a verdict of guilty in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt. State v. Houp, 184 Neb. 206, 166 N. W. 2d 117.

The defendant was unable to establish his whereabouts at the time of the robbery. The evidence against him was sufficient if believed by the jury to find him guilty of the crime charged beyond a reasonable doubt. The only point urged by the defendant is that his alleged accomplice was found innocent, but even defendant admits that Mathis had a very strong alibi, whereas he could not produce evidence of his presence elsewhere. The fact that Mathis was found innocent has no bearing herein. The judgment and sentence of the trial court are affirmed.

AFFIRMED.

JEAN JOHNSON, BY HER NEXT FRIEND AND FATHER, WILLIAM JOHNSON, APPELLANT, V. BERNARD J. RIECKEN, ADMINISTRATOR OF THE ESTATE OF HAROLD A. RIECKEN, DECEASED, APPELLEE.

173 N. W. 2d 511

Filed January 16, 1970. No. 37274.

1. **Automobiles: Words and Phrases: Statutes.** The phrase "without giving compensation therefor" (§ 39-740, R. R. S. 1943) indicates an intention not to limit compensation to persons specifically paying for transportation in cash or equivalent, or to require that it pass exclusively from the passenger to the driver.
2. **Automobiles.** A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity.

3. **Automobiles: Evidence.** If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question of whether or not a person riding in a motor vehicle is a guest is one for decision by the court as a matter of law.
4. **Negligence: Evidence: Juries.** When evidence with relation to negligence is such that minds may reasonably reach different conclusions therefrom with regard to its existence, the issue should be submitted to the jury for its determination.
5. ———: ———: ———. When the evidence is in conflict as to what negligence, if any, constituted the proximate cause of the injury, the determination of the proximate cause is for the jury.
6. **Pleadings: Evidence.** As a general rule, pleadings containing an admission are admissible against the pleader in another action on behalf of a stranger to the former action.
7. **Pleadings: Evidence: Infants.** Admissions made by a next friend or guardian ad litem in pleadings filed for an infant are not ordinarily admissible against the infant.
8. **Evidence: Trial.** If a party desires to limit the purpose and application of evidence properly admitted, he must request such specific instruction.

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

Sidner, Svoboda & Schilke, for appellant.

Ray C. Simmons, for appellee.

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

NEWTON, J.

Plaintiff seeks to recover for personal injuries sustained in an automobile accident. The accident occurred on paved U. S. Highway No. 275, between Beemer and West Point, Nebraska, at about 8:30 a.m. on July 18, 1967. It was a clear morning, with good visibility. Plaintiff was an occupant of an automobile operated in a westerly direction by defendant's decedent, Harold Riecken. They intended to attend a horse show at Beemer, Nebraska, and were pulling a trailer containing two horses. It was preceded by two vehicles also going west. Defendant's decedent attempted to pass

the nearer vehicle and collided head-on with an automobile operated in an easterly direction by Duane R. Beckman. At the time Harold Riecken pulled into the south lane to pass, the Beckman automobile was visible approximately ½ to ¾ mile to the west. The collision occurred on the south edge of the paving. Duane R. Beckman, Harold Riecken, and one other were killed and plaintiff was very seriously injured. On trial to a jury, verdict and judgment were rendered for defendant. We affirm the judgment of the district court.

The case was submitted on the theory that plaintiff was a guest in the Wiechman automobile. The jury was charged that it must find Harold Riecken guilty of gross negligence before it could return a verdict for plaintiff. In her petition, plaintiff alleged that: "Jean Johnson paid for the transportation of her horse and herself." The court determined that the evidence on this point was insufficient to justify its submission to the jury. This action of the court is assigned as error.

The primary evidence bearing upon this point is undisputed. Harold Riecken, 18 years of age, was a younger brother of Herb Riecken who operated a horse stable and made a business of caring for horses owned by other people. The Wiechmans were customers of his and he kept and cared for the horses of Debra Wiechman. Debra's parents usually provided transportation for Debra when attending horse shows. On the occasion of the Beemer show, Debra's father could not attend. Her mother agreed to take Debra to the show and pull a trailer belonging to Herb Riecken as a means of transporting Debra's horse. Mrs. Wiechman had never driven with a trailer and was reluctant to do so. As a result, Debra prevailed upon Harold Riecken to drive the Wiechman car with the trailer. Herb Riecken had nothing to do with this arrangement, it being a voluntary decision on the part of Harold Riecken who had intended to attend the Beemer show in any event.

Plaintiff and her parents were not patrons of the Rieck-

en stable. Jean Johnson's horse was kept on the Johnson farm and her parents habitually transported both Jean and her horse to horse shows in the Johnson truck. On this occasion, the Johnsons were not sure that they could follow this custom. Mr. Johnson asked Herb Riecken "* * * if he knew somebody else was going that would have an empty stall in their trailer * * *" and was told that Debra Wiechman was going and would probably have room for another horse in the trailer. The evening before the show, Jean made arrangements with Debra for transportation. In this regard Mr. Johnson stated: "Well, I think that she visited with Debbie about both she and the horse probably the night before or morning of the show. The night before, probably." There is no evidence of either Harold or Herb Riecken participating in this arrangement. Plaintiff made a direct approach to Debra Wiechman to secure transportation for herself and her horse.

Debra Wiechman testified that the evening before the show, she prevailed upon Harold Riecken to drive. She stated: "Well, it was kind of late, because my mom couldn't take us so he gave in and said he would take us." She did not talk to Herb Riecken about it and there was no understanding that Harold Riecken was to be paid. She never had paid for transportation except sometimes paying for gasoline and, in this instance, her parents were providing the automobile.

It is intimated that Harold Riecken was an employee of his brother Herb. This is not supported by the evidence. The undisputed evidence indicates that Harold liked to work with horses and when not otherwise occupied often helped out around the Riecken stable. There was no understanding that he was to be paid for such services, but when he needed money, his brother Herb occasionally gave him some. Assuming that Harold did get paid for such services, the most that can be said is that he was a part-time employee. On this occasion,

as pointed out above, he was acting on his own account and clearly not as an employee.

Jean Johnson's father, after the departure of the Wiechman automobile, asked Herb Riecken what he owed and paid Herb $4. The evidence on this is conflicting. Herb Riecken maintains the payment was for the use of the trailer and said he had told the girls there would be a charge for its use. Mr. Johnson understood that the payment was for the use of the trailer, the Wiechman automobile, and the services of the driver. Since the automobile did not belong to Herb Riecken, but was provided by Debra Wiechman's parents, a fact known to Mr. Johnson, it would appear that his conclusion was unfounded. In any event, assuming that Herb Riecken did accept pay for Harold Riecken's services as a driver, he could not bind Harold by such action. As heretofore pointed out, Harold was a free agent in this transaction, not an employee, but a volunteer and gratuitous operator of the Wiechman vehicle. Any action of Herb Riecken would be ineffective to change the established relationship existing between his brother and the occupants of the Wiechman automobile.

It is not contended that any agreement between the Johnsons and Harold Riecken was ever arrived at directly. The existing relationship is dependent entirely on the understanding arrived at between Harold Riecken and the Wiechmans.

The rules governing a situation of this kind arising under the motor vehicle guest statute, section 39-740, R. R. S. 1943, are found in Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N. W. 2d 451. "The phrase 'without giving compensation therefor' indicates an intention not to limit compensation to persons specifically paying for transportation in cash or equivalent, or to require that it pass exclusively from the passenger to the driver.

"A person riding in a motor vehicle is a guest if his

carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity. However, if his carriage contributes such tangible and substantial benefits as to promote the mutual interests of both the passenger and the owner or operator, or is primarily for the attainment of some tangible and substantial objective or business purpose of the owner or operator, he is not a guest." See, also, Hansen v. Lawrence, 149 Neb. 26, 30 N. W. 2d 63; Snelling v. Pieper, 178 Neb. 818, 135 N. W. 2d 707. In what manner can it be inferred that the presence of Jean Johnson in the Wiechman automobile conferred any benefit upon Harold Riecken? His position would have been unchanged had she elected not to ride along. If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question of whether or not a person riding in a motor vehicle is a guest is one for decision by the court as a matter of law. See Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184.

In his answer, defendant alleged that the sole proximate cause of the accident was the negligence of Duane R. Beckman in driving at an excessive rate of speed; failing to keep a proper lookout; failing to keep proper control of his automobile; and failing to stop, slow down, or turn onto the shoulder of the highway in time to avoid the collision. In view of this contention, the court charged that plaintiff must prove not only that Harold Riecken's gross negligence was a proximate cause of the accident and that if it found that the proximate cause of the accident was the concurrent negligence of defendant's decedent and Beckman, the verdict should be for plaintiff, but also that if it was found that the sole proximate cause was the negligence of Beckman, plaintiff could not recover. Plaintiff takes exception to the latter instruction. The instructions mentioned are standard instructions set forth in Nebraska Jury Instruc-

tions. It is plaintiff's contention that under the evidence in this case, the negligence, if any, of Beckman could not have been the sole proximate cause and was prejudicial. Without recapitulating the evidence, suffice it to say it is clear that the situation warranted a submission to the jury of the question of negligence on the part of both Beckman and defendant's decedent.

We have consistently held that: "When evidence with relation to negligence is * * * such that minds may reasonably reach different conclusions therefrom with regard to its existence, the issue should be submitted to the jury for its determination." Welstead v. Ryan Construction Co., 160 Neb. 87, 69 N. W. 2d 308. "When the evidence is in conflict as to what negligence, if any, constituted the proximate cause of the injury, the determination of the proximate cause is for the jury." Warren v. Bostock, 170 Neb. 203, 102 N. W. 2d 55. In any event, the plaintiff necessarily had the burden of proving that *a* proximate cause of the accident was the gross negligence of defendant's decedent. Such an instruction was required and properly negates a finding that *the sole* cause of the accident was the negligence of the third party. The instruction complained of did not increase plaintiff's burden of proof and it is difficult to ascertain how it could have prejudiced plaintiff. We find no error in the submission of this instruction.

Defendant offered in evidence excerpts from the original claim executed and filed by William Johnson as next friend of Jean Johnson against the estate of Duane R. Beckman, deceased. The portions offered contained charges of negligence against Beckman, allegations of fact pertaining to circumstances attendant upon the accident, and an allegation that Beckman's negligence was the sole proximate cause of the accident. They were admitted over objection. Plaintiff maintains this was prejudicial error. As a general rule, pleadings containing an admission are admissible against the pleader in another action on behalf of a stranger to the former ac-

tion. See, Zimmerman v. Lindblad, 154 Neb. 453, 48 N. W. 2d 415; Annotation, 63 A. L. R. 2d 417. An exception to the rule is made in the case of infants. Admissions made by a next friend or guardian ad litem in pleadings filed for an infant are not ordinarily admissible. See, Annotation, 14 A. L. R. 87; 42 Am. Jur. 2d, Infants, § 184, p. 169, § 210, p. 187. It is therefore clear that admissions contained in pleadings filed in the Beckman case should not ordinarily have been admitted.

In the present case, the father and next friend of Jean Johnson assigned to her his claim against defendant for medical and other expenses incurred in her behalf. This constituted the second cause of action in plaintiff's petition. The assignee of such a claim stands in the shoes of the assignor and accepts it subject to all available defenses. See Hansen v. E. L. Bruce Co., 162 Neb. 759, 77 N. W. 2d 458. The pleading would have been admissible as against the father had he brought action on his claim. It can be no less admissible for this purpose when he assigns his claim to his minor daughter and she seeks to collect on it. Plaintiff would have been entitled to an instruction limiting the consideration of such evidence to the assigned claim, but no such instruction was requested. If a party desires to limit the purpose and application of evidence properly admitted, he must request such specific instruction. See, Berggren v. Hannan, O'Dell & Van Brunt, 116 Neb. 18, 215 N. W. 556; Gable v. State, 176 Neb. 789, 127 N. W. 2d 475.

No error appearing, the judgment of the district court is affirmed.

AFFIRMED.

McCOWN and SPENCER, JJ., dissenting.

LARRY URWIN, APPELLANT, V. JAMES R. DICKERSON, APPELLEE.
173 N. W. 2d 874

Filed January 16, 1970. No. 37370.

1. **Courts: Judgments.** A district court has inherent power to vacate or modify its own judgment at any time during the term at which it was rendered.
2. **Courts: Judgments: Trial.** Ordinarily, where a judgment has been entered by default and a prompt application is made at the same term to set it aside, with a tender of an answer disclosing a meritorious defense, the court should, on reasonable terms, sustain the motion and permit the cause to be heard upon the merits.
3. **Courts: Judgments.** An application to vacate a default judgment is a matter of discretion for the trial court. The burden of showing an abuse of discretion is upon the party adversely affected by the court's order.
4. ———: ———. The facts and circumstances in each case, as shown by the record, determine whether there has been an abuse of discretion.
5. **Judgments.** Ordinarily, opposing counsel should be notified before a default is taken.

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

Charles Ledwith, for appellant.

No appearance for appellee.

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

BOSLAUGH, J.

This action was commenced in the municipal court to recover the cost of repairs to the plaintiff's automobile which was damaged in an accident with the automobile of the defendant on January 3, 1969. The municipal court found for the defendant and the plaintiff appealed.

The petition on appeal was filed in the district court on April 7, 1969. The defendant made no appearance in the district court and a default judgment in the amount of $117.40 was entered on May 13, 1969.

On May 22, 1969, the defendant moved to set aside the default judgment. On May 27, 1969, the district court set aside the judgment of May 13, 1969. The plaintiff's motion for new trial was overruled and he has appealed.

The default judgment was entered and set aside during the January 1969 term of the district court. A district court has inherent power to vacate or modify its own judgment at any time during the term at which it is rendered. Jones v. Nebraska Blue Cross Hospital Service Assn., 175 Neb. 101, 120 N. W. 2d 557; Barney v. Platte Valley Public Power & Irr. Dist., 147 Neb. 375, 23 N. W. 2d 335.

Ordinarily, where a judgment has been entered by default and a prompt application is made at the same term to set it aside, with a tender of an answer disclosing a meritorious defense, the court should, on reasonable terms, sustain the motion and permit the cause to be heard upon the merits. Lacey v. Citizens Lumber & Supply Co., 124 Neb. 813, 248 N. W. 378. There was no answer tendered with the defendant's motion in this case. The plaintiff contends that it was error for the district court to set aside the default judgment since no answer was tendered with the motion.

The tender of an answer is required so that the district court may judge the sufficiency of the defense upon which the defendant is expected to rely in the event that the judgment is vacated. Anthony & Co. v. Karbach, 64 Neb. 509, 90 N. W. 243, 97 Am. S. R. 662. It is not an absolute requirement. See, Bigler v. Baker, 40 Neb. 325, 58 N. W. 1026, 24 L. R. A. 255; Barney v. Platte Valley Public Power & Irr. Dist., *supra*. In this case the transcript of the proceedings in the municipal court was some indication that there was a meritorious defense to the action.

On June 5, 1969, while the action was still pending in the district court upon the plaintiff's motion for new trial, the defendant filed an answer which denied, gen-

erally, the allegations of negligence. This supplied the missing requirement so that after June 5, 1969, the plaintiff could not claim that the defendant had not alleged a meritorious defense.

The burden is upon the plaintiff to establish an abuse of discretion by the trial court. Commercial Sav. & Loan Assn. v. Holly Development, Inc., 182 Neb. 335, 154 N. W. 2d 510. It has been said that the order of the district court must be "oppressive" or a "clear abuse of discretion" before this court will interfere, and that a stronger showing is required where the default has been set aside. Bigler v. Baker, *supra;* Orr v. Seaton, 1 Neb. 105.

The facts and circumstances in each case, as shown by the record, determine whether there has been an abuse of discretion. Morgan v. Weiner, 173 Neb. 715, 114 N. W. 2d 720. Unfortunately, there is no bill of exceptions in this case so we are not advised as to what took place at the time the defendant's motion was heard. For the same reason the affidavit of the plaintiff's attorney, filed in resistance to the motion, is not before us.

It is the policy of our practice to afford a full opportunity for making a defense, and for this purpose to give full relief against slight and technical omissions. On the other hand, it is the duty of the courts to prevent unnecessary delays in the prosecution of actions and to guard against dilatory and frivolous proceedings. In the absence of a showing to the contrary, it is presumed that the trial court acted with due regard to both of these principles. Lichtenberger v. Worm, 41 Neb. 856, 60 N. W. 93.

The default judgment in this case was entered on the day after answer day. The record does not show excessive delay or dilatory proceedings.

The plaintiff argues that a party, such as the defendant who is not a lawyer and who represents himself, is subject to the same rules of procedure as a litigant who is represented by a lawyer. On the same basis, such a

party is entitled to the notice of an intention to take a default which is ordinarily required to be given to opposing counsel. Lacey v. Citizens Lumber & Supply Co., *supra*. There is no suggestion in the record in this case that such notice was given to the defendant.

We find no abuse of discretion. The order of the district court is affirmed.

AFFIRMED.

WILLIAM M. FOLEY, JR., SPECIAL ADMINISTRATOR OF THE ESTATE OF JANE FOLEY, DECEASED, APPELLANT, V. BISHOP CLARKSON MEMORIAL HOSPITAL, APPELLEE.

173 N. W. 2d 881

Filed January 23, 1970. No. 37284.

1. **Hospitals: Torts: Negligence.** The proper measure of the duty of a hospital to a patient is the exercise of that degree of care, skill, and diligence used by hospitals generally in the community where the hospital is located or in similar communities.
2. ———: ———: ———. Proof of a violation of hospital standards or regulations is not conclusive on the question of negligence, but is simply evidence of negligence.
3. ———: ———: ———. A hospital must guard, not only against *known* physical and mental conditions of patients, but also against such conditions as it should have discovered by the exercise of reasonable care.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Reversed and remanded for a new trial.

Daniel G. Dolan and Dennis T. Chapman of Lathrop & Albracht, for appellant.

Charles F. Gotch of Cassem, Tierney, Adams & Henatsch, for appellee.

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

NEWTON, J.

This action is brought by William M. Foley, Jr., special administrator of the estate of Jane Foley, deceased, to recover for her death. Jane Foley was delivered of a child in the defendant hospital and thereafter developed a severe beta hemolytic streptococcus infection which caused her death approximately 31 hours after the birth of her child. At the conclusion of plaintiff's evidence, the trial court sustained defendant's motion for a directed verdict and entered judgment for defendant. We reverse the judgment of the district court.

Viewing the evidence from a standpoint most favorable to plaintiff, the following facts appear.

During her pregnancy, Jane Foley had consulted with and was under the care of a private physician. She entered the hospital at 5:20 a.m. on August 20, 1964, gave birth at 2:30 p.m. on that day, and died at 9:15 p.m. the following day. She had been treated by her physician for a sore throat during July and August 1964, and several days after her death, one of her children was treated in the hospital for a "strep throat." There is no evidence in the record that Mrs. Foley made complaint of a sore throat while in the hospital. One nurse testified that an intern was called who checked her chest, throat, and abdomen at about 7:30 p.m. on August 20. At that time she had told the nurse she had had a cold throughout her pregnancy and a severe sore throat 2 weeks before. There were two interns in the hospital. The one thought by the nurse to have been called denied examining Mrs. Foley, but admitted he was called and the other said he had no recollection of Mrs. Foley or her case.

The hospital rules require that a history and physical examination shall be written promptly on admission of a patient, with 24 hours considered as the limit of promptness. One rule states: "All necessary admission information is collected with particular attention to possibility of infection. Suspicion of infection is reported to the

physician immediately." No history was taken although Mrs. Foley was examined several times in regard to the progress of child labor. After delivery she complained of pain and discomfort and said she had had severe cramping after the birth of a previous child. Such symptoms are not unusual in postpartum patients.

Mrs. Foley's normal blood pressure on admission was 112 over 80. Normal pulse is 64, normal temperature, 98.6 degrees, and normal respiration, 16 to 18 per minute. These elements are regarded as vital signs. Five hours after delivery, Mrs. Foley's blood pressure was 110 over 70, her pulse 126, her temperature 102.2, and her respiration 28. At this time the intern was sent for to check Mrs. Foley. The evidence of the nurse and the intern is conflicting as to whether he actually saw her and made such check. Aspirin was given to reduce the temperature which then dropped to normal, 12 hours after delivery. Codeine was given, and ice applied to the lower abdomen, to control pain. The codeine and ice were administered contrary to the orders of the attending physician. The physician also ordered that a blood count be taken within 24 hours of admission. This was not taken until 32 hours after admission and after her condition had become critical.

One of the hospital rules provides: "The patient must be observed closely by an experienced nurse, interne, or physician for uterine relaxation, hemorrhage, elevation or drop in blood pressure or pulse, and other symptoms of complications." Another rule provides in part as follows: "The interne shall immediately examine a patient when he is notified of any unusual occurrence or change in the patient's condition. He shall notify the attending physician of any significant change. This applies to all antepartum, intrapartum, and postpartum patients. In the event that the attending physician is not immediately available to receive a report of a change in condition of a patient, the interne shall follow orders at present existing in the department. He shall notify

the attending physician, as soon as possible, of the occurrence and what treatment the interne ordered for the patient." The intern stated in his subsequent report that apparently Mrs. Foley "did quite well until approximately seven-thirty p.m." on her first day in the hospital. He apparently recognized that there was a change in her condition at that time yet he failed to call her attending physician. In this regard, one of the attending nurses testified that at that time, following postpartum, a temperature of 102 and a pulse of 126 constituted an unusual occurrence, one not out of the ordinary, but one which good nursing practice would require notifying the attending physician.

Plaintiff's medical expert attributes her death to the failure to obtain a history indicating she had a cold, the failure to do anything more than administer aspirin at 7:30 p.m. on August 20, 1964, wher her temperature, pulse, and respiration increased, failure to notify the attending physician, and the administering of codeine and ice. Had she received proper care at that time (7:30 p.m.), the infection could have been overcome with antibiotics. He concedes that antibiotics should not be administered until a diagnosis is made and that the several doctors present on the morning of August 21 could not be criticized for failure to diagnose her condition until an exploratory operation was performed that afternoon.

Evidence of the degree of care, skill, and diligence common to hospitals in the Omaha community consisted of the introduction of the rules of the defendant hospital and a statement by its administrator that they represented the standard of care to be expected in the defendant hospital. Also, that such standard of care was "as good as the other standards of care" in Omaha hospitals.

A jury might reasonably infer that had Mrs. Foley's condition been properly treated at 7:30 p.m. on August 20, 1964, her infection could have been successfully com-

bated and her life saved. It might also reasonably infer that had a history been promptly taken on her admission to the hospital for the purposes contemplated by its rules, her cold and throat condition would have been discovered and the hospital personnel alerted to watch for possible complications of the nature she later developed. Quite possibly this would also have helped in diagnosing her condition, especially had it been apparent that she was subject to a "strep" throat condition.

Plaintiff and defendant agree that the proper measure of the duty of a hospital to a patient is the exercise of that degree of care, skill, and diligence used by hospitals generally in the community where the hospital is located or in similar communities. Although there are some exceptional situations in which the rule has been held not to be applicable, it is the general rule followed in the great majority of jurisdictions. See, Garfield Memorial Hospital v. Marshall, 204 F. 2d 721, 37 A. L. R. 2d 1270; 40 Am. Jur. 2d, Hospitals and Asylums, § 26, p. 869; Restatement, Torts 2d, § 299A, p. 73. Standards and regulations fixed by the state Department of Health and by such organizations as the American Hospital Association may well be pertinent on this issue, also, the standards, rules, and regulations of the defendant hospital and of other hospitals in the same or similar communities. Proof of a violation of such standards or regulations is not conclusive on the question of negligence, but is simply evidence of negligence. See Darling v. Charleston Community Memorial Hospital, 33 Ill. 2d 326, 211 N. E. 2d 253, 14 A. L. R. 3d 860.

In this case the evidence regarding standards of care prevailing in Omaha or similar communities consists primarily of the rules and regulations of the defendant hospital. This does not establish community standards which may be either more liberal or stricter than the standards set up by defendant. Although pertinent, such evidence standing alone is insufficient. In addition, plaintiff's medical expert testified that the practice of

obtaining histories was followed in all hospitals and one of defendant's nurses testified that the condition of Mrs. Foley at 7:30 p.m. on her first day in the hospital was such that good nursing practice required notification of the attending physician. Although this evidence is of a minimal nature, we believe it is sufficient to require the question of standards to be submitted to the jury.

In view of the failure to take a medical history of Mrs. Foley and of the failure to discover the infection until too late to combat it, other questions are presented. Had the history been taken and knowledge of the sore throat condition obtained, would the infection have been diagnosed in time to save her life? Plaintiff's expert answers this in the affirmative. Is it the responsibility of the hospital to guard against only known conditions or also against conditions which it should reasonably be expected to discover? The general rule is that a patient is entitled to such reasonable care and attention as her *known* mental and physical condition may require. See 40 Am. Jur. 2d, Hospitals and Asylums, § 26, p. 869. Nebraska has heretofore subscribed to this rule. See Wetzel v. Omaha Maternity & General Hospital Assn., 96 Neb. 636, 148 N. W. 582. Under such a rule, a simple denial of knowledge of a patient's condition will frequently provide a good defense. It also promotes carelessness as the less a hospital knows about a patient's condition, the safer it is against charges of negligence.

There is a minority rule which holds that a hospital must guard, not only against *known* physical and mental conditions of patients, but also against such conditions as it should have discovered by the exercise of reasonable care. See, Maki v. Murray Hospital, 91 Mont. 251, 7 P. 2d 228; Vick v. Methodist Evangelical Hospital, Inc. (Ky. App.), 408 S. W. 2d 428; Quick v. Benedictine Sisters Hospital Assn., 257 Minn. 470, 102 N. W. 2d 36. The minority rule is the rule generally followed in the law of negligence. The majority rule applied in hospital cases is an exception to the general law of negligence. In

Darling v. Charleston Community Memorial Hospital, *supra,* it is stated: "'* * * in negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in the light of the apparent risk. What the defendant must do, or must not do, is a question of the standard of conduct required to satisfy the duty.'" See, also, Prosser on Torts (3d Ed.), § 53, p. 331. Hospitals now employ medical students, interns, and resident physicians and surgeons. The evidence discloses that it is customary for these employees to take a medical history of patients on admission for the purpose of protecting the patient and guarding against complications. This means taking the history before surgery, delivery, or treatment, not afterwards when it may be too late. We adopt the minority rule and overrule any prior conflicting Nebraska decisions. A jury question was presented.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

MARTHA C. MARTIN, APPELLANT, V. RICHMAN GORDMAN NO. 2, INC., APPELLEE.
173 N. W. 2d 885

Filed January 23, 1970. No. 37307.

1. **Trial: Instructions.** A misstatement of issues tending to mislead the jury is erroneous.
2. ———: ———. Errors in instructions not prejudicial to the complaining party are not a ground for reversal of a judgment otherwise correct.

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

Eisenstatt, Morrison, Higgins, Miller, Kinnamon & Morrison, for appellant.

John R. Douglas of Cassem, Tierney, Adams & Henatsch, for appellee.

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

SMITH, J.

Martha C. Martin, a shopper at the store of Richman Gordman No. 2, Inc., slipped and fell on a patch of ice in the parking lot. Jury verdict in her personal injury action went for Richman, and Martha has appealed. She contends that the jury instructions were erroneous in these respects: They omitted an issue raised by a negligence specification in Martha's petition, and they included a false issue over Richman's knowledge of the icy condition.

Some years prior to the accident which happened at 6:30 p.m., January 12, 1968, Richman had engaged a contractor to attach a rainspout to the store building. The rainspout, as at least the assistant manager knew, emptied onto the parking lot. The patch of ice at the time of the accident lay in or near the course of the discharge while slush covered the parking lot.

Jury instruction No. 1 stated: "Plaintiff further alleges that . . . defendant maintained a drain pipe . . ., thereby creating an icy condition. . . . Plaintiff further alleges that the defendant was negligent—(A) In that the icy condition involved an unreasonable risk of harm to . . . plaintiff which the defendant knew of or in the exercise of reasonable care could have discovered."

Instruction No. 12 attached conditions to the duty of Richman. One condition was as follows: "A. There was a condition . . . involving an unreasonable risk of harm to Martha . . ., which Richman . . . knew of, or in the exercise of reasonable care could have discovered; . . .." If the jury found all conditions true, the instruction continued, ". . . then Richman . . . was under a duty to use reasonable care 1. To make its premises

safe for Martha . . .; or 2. To give her adequate warning to enable her to avoid harm."

Instruction No. 13 pursued the subject of Richman's knowledge: "The liability . . . is predicated on proof . . . of its superior knowledge, actual or constructive, of dangers to which an invitee is subjected . . .. Proof of knowledge, either actual or constructive, may not be predicated upon conjecture, surmise, or speculation."

Martha specifically alleged negligent failure of Richman to warn her. She contends that the trial court did not submit the issue.

A misstatement of issues tending to mislead the jury is erroneous. Zimmerman v. Continental Cas. Co., 181 Neb. 654, 150 N. W. 2d 268 (1967). The phrase "unreasonable risk of harm" in instruction No. 1 was broad enough to include the specification, and instruction No. 12 treated duty to warn. There was no error.

Martha's argument concerning Richman's knowledge of the icy condition runs along these lines: She had to persuade the jury on a false issue, instructions Nos. 12 and 13 implying existence of evidence the other way.

Errors in instructions not prejudicial to the complaining party are not a ground for reversal of a judgment otherwise correct. Hansen v. First Westside Bank, 182 Neb. 664, 156 N. W. 2d 790 (1968). Should the jury have found that Martha fell on ice formed by water from the rainspout, possibilities of nonpersuasion concerning Richman's knowledge of the condition would have been remote. The error was not prejudicial.

The judgment is affirmed.

AFFIRMED.

KATHLEEN M. BELIVEAU, APPELLEE, V. GUY WILLIAM GOODRICH ET AL., APPELLANTS.

173 N. W. 2d 877

Filed January 23, 1970. No. 37339.

1. **Judgments: Courts.** A district court has inherent power to vacate or modify its own judgment any time during the term in which it is rendered.
2. **Judgments: Pleading: Courts.** Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard upon the merits.
3. **Judgments: Courts.** In deciding whether or not there was an abuse of discretion in setting aside a default judgment, a much stronger showing is required to substantiate an abuse of discretion when the judgment is vacated, than when it is not.
4. **Judgments: Mistake: Courts.** Mere mistake or miscalculation of a party or his attorneys is not sufficient, in itself, to warrant the refusal to set aside a default judgment, when there is a good defense pleaded or proved and no change of position or substantial prejudice will result from permitting a trial on the merits.
5. **Pleading: Courts.** The tender of an answer is not an absolute requirement and independent proof may, in the discretion of the court, be permitted to resolve the question of the possible dilatory or frivolous nature of the defense.
6. **Trial: Evidence.** Where the state of mind of a person at a particular time is relevant to a material issue in a case, his declarations made at that time are admissible as proof on that issue, notwithstanding they were not made in the presence of the adverse party.

Appeal from the district court for Douglas County: JAMES P. O'BRIEN, Judge. Reversed and remanded with directions.

Pilcher, Howard & Dustin, for appellants.

Eisenstatt, Morrison, Higgins, Miller, Kinnamon & Morrison, for appellee.

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

WHITE, C. J.

The district court, during the same term that it was entered, refused to set aside a default judgment in the sum of $25,000, this amount being the prayer of plaintiff's petition in a personal injury automobile accident suit. We reverse the judgment of the district court and remand the cause with directions that the default judgment be set aside and that the case be opened for further proceedings on the merits.

The accident occurred on September 13, 1968. On December 9, 1968, plaintiff filed a petition in this action praying for $25,000 in damages as a result of the accident. Summons, the answer day of which was January 13, 1969, was served. On that date defendants had filed no answer to the plaintiff's petition. The insurance carrier first contacted the plaintiff's attorney on March 5, 1969. Much of the factual dispute in this case centers around what took place in this conversation on March 5, 1969, and the second conversation between plaintiff's attorney and the insurance carrier on March 19, 1969, the day before the default judgment was entered. On March 20, 1969, plaintiff took a default judgment in the amount of the prayer of the plaintiff's petition in the sum of $25,000. A motion to vacate this default judgment was filed by the defendants on April 8, 1969, alleging meritorious defenses. The defendants tendered an answer with their motion, setting up meritorious defenses to the action and a hearing was held before the court on May 8, 1969. The court refused to set aside the default judgment.

There is voluminous testimony as to the nature and extent of the two conversations between the insurance company's claim agent and the plaintiff's attorney on March 5 and March 19, 1969. It is unnecessary to encumber this record with a recital of this detailed conflicting testimony. We summarize. The alleged mistake in permitting the default judgment in this case to

be entered focuses upon three distinct points in the testimony:

(1) Whether the plaintiff's attorney told the insurance carrier he would not take a default judgment until he provided medical bills to the insurance carrier. This refers to the conversation of March 5, 1969;

(2) Whether the plaintiff's attorney was told to take a default judgment by the insurance company's representative on March 19, 1969, allegedly because the agent told the plaintiff's attorney that the carrier denied coverage; and

(3) Whether the insurance carrier was told that the plaintiff's attorney would file a new petition in order to increase his prayer for damages because, apparently, of the discovery of a herniated disc as a part of the plaintiff's injuries.

As the term "default" itself implies, the problem of granting relief in the situation before us is not simply one of determining whether mistake or neglect has occurred. It is the policy of the law to give a litigant full opportunity to present his contention in court and for this purpose to give full relief against slight and technical omissions. On the other hand, it is the duty of the courts to prevent an abuse of process, unnecessary delays, and dilatory and frivolous proceedings in the administration of justice. Consequently this court has long held that a district court has inherent power to vacate or modify its own judgment any time during the term in which it is rendered. Jones v. Nebraska Blue Cross Hospital Service Assn., 175 Neb. 101, 120 N. W. 2d 557; Barney v. Platte Valley Public Power & Irr. Dist., 147 Neb. 375, 23 N. W. 2d 335; and most recently in Urwin v. Dickerson, *ante* p. 86, 173 N. W. 2d 874.

Our cases hold that this is a matter that rests in the sound discretion of the court. But this discretion is not an arbitrary one. It must be exercised reasonably and depends upon the facts and circumstances in each case as shown by the record. Morgan v. Weiner, 173

Neb. 715, 114 N. W. 2d 720; Urwin v. Dickerson, *supra.* As a further guideline for the exercise of this discretion by the district court our cases have universally held that where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard upon the merits. Jones v. Nebraska Blue Cross Hospital Service Assn., *supra;* Lacey v. Citizens Lumber & Supply Co., 124 Neb. 813, 248 N. W. 378; Barney v. Platte Valley Public Power & Irr. Dist., *supra;* Ak-Sar-Ben Exposition Co. v. Sorensen, 119 Neb. 358, 229 N. W. 13. Pertinent here, this court has held in deciding this question that a much stronger showing is required to substantiate an abuse of discretion when the judgment is vacated than when it is not. Bigler v. Baker, 40 Neb. 325, 58 N. W. 1026; Coates v. O'Connor, 102 Neb. 602, 168 N. W. 102. Mere mistake or miscalculation of a party or his attorneys is not sufficient, in itself, to warrant the refusal to set aside a default judgment, when there is a good defense pleaded or proved and no change of position or substantial misjustice will result from permitting a trial on the merits. Coates v. O'Connor, *supra;* Ak-Sar-Ben Exposition Co. v. Sorensen, *supra;* Barney v. Platte Valley Public Power & Irr. Dist. *supra.*

In this case the default judgment was entered on March 20, 1969. The motion to set aside the default was promptly filed on April 8, 1969. It tendered a meritorious defense. The district court erroneously excluded additional evidence to the effect that there was a defense on the merits, especially with respect to the nature and the amount of the injuries and disabilities of the plaintiff. The tender of an answer is not an absolute requirement and independent proof may, in the discretion of the court, be permitted to resolve the question of the possible frivolous nature of the defense.

Bigler v. Baker, *supra;* Barney v. Platte Valley Public Power & Irr. Dist., *supra.* We now observe that the judgment was in the full amount of the prayer of the petition. It strains credulity to believe that a default judgment in the full amount of the prayer of the petition in a personal injury case would be justified in the absence of some proof or indication in the record that would at least prima facie sustain it. There is also proffered evidence in the record, excluded by the trial court, demonstrating that the agent of the insurance company informed the company in writing, immediately following the conversation of March 19, 1969 (one day before the default judgment), to the effect that a new suit or petition would be filed by the plaintiff's attorney and that no default judgment would be taken. This testimony was relevant for the purpose of reviewing the broad issue of the bona fides of the defense. It is true that this witness had already testified as to the contents of the report he had made to the company, but it corroborates his oral testimony. Generally where the state of mind of a person at a particular time is relevant to a material issue in a case, his declarations made at that time are admissible as proof on that issue, notwithstanding they were not made in the presence of the adverse party. 29 Am. Jur. 2d, Evidence, § 650, p. 700. See, also, Sutter v. State, 102 Neb. 321, 167 N. W. 66.

We can find no evidence in this record to support the conclusion that the actions of the defendants and the insurance company, under these circumstances, were calculated for the purpose of delay or that the tendered defense was frivolous in nature. The application to set aside the default was during the term and promptly made. We can find no evidence of prejudice or a change in plaintiff's position that would require the sustaining of this judgment in the full amount of the prayer of the plaintiff's petition in the sum of $25,000. We can find no reason why a full opportunity should not be given the parties to fully explore the issues on their merits.

It is, however, apparent that the defendants were neglectful in filing their answer, and that the plaintiff's pursuit and defense of the default judgment have colorable merit. By what we have said herein we do not condone their action. In the interest of justice they should pay the cost of this appeal and a reasonable attorney's fee in the sum of $500.

On condition that the defendants pay the cost of this appeal and an attorney's fee in the sum of $500 the judgment of the district court is reversed and the cause remanded with directions to set aside the default judgment and permit the filing of an answer and a trial on the merits.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLANT, V. RICHARD BRENT CHERRY, APPELLEE.

173 N. W. 2d 887

Filed January 23, 1970. No. 37360.

Disorderly Conduct: Words and Phrases. The term "disorderly conduct" is one of general or indefinite meaning, but generally signifies any conduct which tends to breach the peace or to disturb those who see or hear it; to endanger the morals, safety, or health of the community; or to shock the public sense of morality.

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

George A. Sommer, for appellant.

Robert M. Harris, for appellee.

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

SPENCER, J.

Richard Brent Cherry, hereinafter referred to as defendant, was convicted in police court at Scottsbluff,

Nebraska, on a complaint charging that he unlawfully engaged in disorderly conduct by urinating in public. On appeal the district court sustained a motion to quash, refused to grant leave to file an amended complaint, and dismissed the complaint. The State perfected an appeal to this court.

Essentially, defendant's contention is that the complaint does not state facts sufficient to constitute an offense under the ordinances of Scottsbluff, and that the complaint does not state facts sufficient to constitute an offense which the city has power to define as disorderly conduct under the statutes of the State of Nebraska.

The complaint is as follows: "The complaint and information of George A. Sommer who, being duly sworn on oath says that Richard B. Cherry defendant, on or about the 25th day of Jan. 1969, within the corporate limits of the City of Scottsbluff, Scotts Bluff County, Nebraska then and there being, did unlawfully engage in disorderly conduct by urinating in Public contrary to the ordinance in that behalf provided."

Section 1 of ordinance No. 1566 of the city of Scottsbluff is as follows: " '14-301. It shall be unlawful for any person or persons within the city to indulge or engage in any riotous, tumultuous or disorderly conduct; to take part in any disorderly assembly; to be an inmate of a disorderly house or attend or visit any such house; to fight by agreement or otherwise; to quarrel; to engage in lewd, indecent or lascivious behavior; or to do or engage in any other disorderly act or conduct tending to disturb the peace and quiet of the city.' "

Scottsbluff is a city of the first class. Section 16-228, R. R. S. 1943, provides as follows: "A city of the first class by ordinance may provide for the punishment of persons disturbing the peace and good order of the city by clamor and noise, by intoxication, drunkenness, fighting, or using obscene or profane language in the streets or other public places, or otherwise violating the public

peace by indecent and disorderly conduct, or by lewd or lascivious behavior."

It should be obvious that each and every act which may constitute disorderly conduct cannot be particularized in an ordinance. It is sufficient to categorize generally those groups of offenses to be prohibited. The motion to quash should have been overruled.

Defendant's conduct, depending upon the circumstances, would be embraced within the general term "indecent behavior" and could, by shocking the public sense of morality, be a disorderly act which in our society might tend to disturb the peace and quiet of the city.

The term "disorderly conduct" is one of general or indefinite meaning, but generally signifies any conduct which tends to breach the peace or to disturb those who see or hear it; to endanger the morals, safety, or health of the community; or to shock the public sense of morality. See State v. Sukovaty, 178 Neb. 779, 135 N. W. 2d 467.

This action, although criminal in form, is a civil one for the collection of a penalty. In such cases the general rule is that unless there is a complete failure to state a cause of action, the complaint will be sufficient on appeal. See State v. Novak, 153 Neb. 596, 45 N. W. 2d 625. The offense was described with sufficient particularity to inform the defendant as to the nature of the specific disorderly conduct with which he was charged. In any event, if the district court believed the complaint to be insufficient, which we do not, it should have permitted the filing of an amended complaint. See Rolfsmeier v. State, 163 Neb. 659, 80 N. W. 2d 885.

The judgment of dismissal is set aside, the motion to quash overruled, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

DELORES SANDROCK, ADMINISTRATRIX OF THE ESTATE OF GEORGE B. SANDROCK, DECEASED, APPELLEE, V. ROBERT L. TAYLOR ER AL., APPELLANTS.
174 N. W. 2d 186

Filed January 30, 1970. No. 37275.

1. **Automobiles: Evidence: Trial.** Ordinarily the question of the admissibility of evidence as to the speed of a vehicle shortly prior to the time of an accident rests largely in the discretion of the court.
2. **Master and Servant.** In determining whether an individual is a servant as distinguished from an independent contractor, under the doctrine of respondeat superior, the basic test is whether or not his physical conduct in the performance of the service is controlled or is subject to the right of control.
3. ———. An employer cannot insulate himself against the burdens of the employer-employee relationship by a contract that leaves him with the control benefits of that relationship. Nor can he escape his liability under the doctrine of respondeat superior by a contract that expressly provides that the workman is an independent contractor, if in fact, under the entire contract, the workman only possesses the same independence that employees in general enjoy.
4. **Automobiles: Negligence.** Where there is no evidence of a relationship between the driver of an automobile and a passenger other than that of a gratuitous social host and guest, the mere fact that the trip is for the passenger's benefit and that he happens to have a business purpose, does not make the driver a controlled agent and the passenger a controlling principal; and the negligence of the driver is not ordinarily imputable to the passenger.

Appeal from the district court for Cedar County: JOSEPH E. MARSH, Judge. Affirmed in part, and in part reversed and dismissed.

Gleystein, Nelson, Harper, Kunze & Eidsmoe, Jewell, Otte & Pollock, Deutsch & Hagen, David W. Curtiss, Baylor, Evnen, Baylor, Urbom & Curtiss, Robert T. Grimit, Ryan & Scoville, and Frank Brady, for appellants.

Warren C. Schrempp and O. William Von Seggern of

Schrempp, Rosenthal & Bruckner, and Philip H. Robinson, Jr., for appellee.

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

MCCOWN, J.

This is an action for damages for the death of the plaintiff's decedent in a motor vehicle accident at a country road intersection.

The accident occurred between 1 and 1:30 p.m. on August 2, 1963, at a country road intersection located south and east of Hartington, Cedar County, Nebraska. The weather was clear and the roads were dry. There were no stop signs at the intersection. There was a cornfield southeast of the intersection. The corn was 7 to 8 feet high and there were high weeds growing in the road ditches and along the fence lines. The ground level in the cornfield was somewhat higher than the roads in the area approaching the intersection.

The decedent, George B. Sandrock, was a guest passenger in an automobile driven by the defendant Casper B. Meirose. The Meirose car was proceeding north. The defendant Robert L. Taylor was driving a partially loaded milk tank truck in a westerly direction. The empty weight of the milk truck was 10,000 pounds. The tank capacity was 15,000 pounds and it was carrying 8,000 to 10,000 pounds of milk. The two vehicles collided approximately in the center of the intersection and George B. Sandrock was killed.

The defendant Osceola County Cooperative Creamery Association operated the Cooperative Marketing Association of Laurel, Nebraska, under that trade name, and will be hereafter referred to as Co-op. Co-op was joined as a defendant on allegations that the defendant Taylor was the agent, servant, or employee of Co-op and operating the milk truck in the course of its business.

The jury brought in a verdict of $46,712 against all defendants, and all defendants have appealed.

The first problems involve the negligence of the defendant Taylor. Taylor's position is that he had the directional right-of-way as a matter of law; that the accident was due solely to Meirose' negligence; and that there was insufficient evidence of negligence on Taylor's part to submit the issue of his negligence to the jury. The plaintiff relies on the rule in effect at the time of the accident, that when approaching an intersection a driver traveling at an unlawful speed forfeited any right-of-way which he would ordinarily have in being the vehicle approaching on the right. The general limitation to a reasonable and proper speed was, of course, applicable, and the specific maximum speed on the roads involved here was 50 miles per hour. See § 39-723, R. R. S. 1943.

Taylor testified that a partial load of milk in the milk tank produces a shifting motion when the truck is stopped or turned. He also testified that he had had trouble on the day of the accident because of the shifting of the milk load and that it made it harder to stop. He testified that his speed as he approached the intersection was 35 to 40 miles an hour, the same speed at which he testified the Meirose car was going. He admitted that he had previously asserted that Meirose was driving 55 miles per hour. When Taylor was 125 feet away from the intersection he knew that the Meirose car was proceeding toward the intersection. He saw the Meirose car, started to slow up, and when he saw the Meirose car was not going to stop, he slammed on his brakes 50 or 60 feet from the intersection.

The only witness other than Taylor who testified as to the speed of the milk truck was Mrs. Mary Smith. The driveway to her farm home was 3/10's of a mile east of the intersection. Mrs. Smith was in her yard hanging up clothes. She was about 1½ city blocks south of the east-west road on which the milk truck was traveling. There was a hill to the west of her, the crest of which was 575 feet east of the intersection. Mrs. Smith saw

the truck as it approached her driveway from the east and until it passed over the crest of the hill to the west. She estimated the speed of the truck to be 60 miles per hour and testified that it maintained the same speed and did not slow up during the time she observed it. She could not see the intersection itself from her yard, nor did she know the accident had happened until later.

Taylor and Co-op assign as error the overruling of objections to the testimony of Mrs. Smith as to the speed of the milk truck. It is their position that the testimony of Mrs. Smith as to speed relates to a place too remote from the point of the accident to be admissible.

The critical issue as to the admission of such evidence involves the relative proximity in distance and time and the inferences that can reasonably be drawn from the facts testified to. Where a reasonable inference can be drawn that the speed testified to was continued at approximately the same rate to the crucial point of determination, the evidence is ordinarily admissible. See Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701.

Here the witness observed the speed of the truck while it traveled a distance of more than a quarter of a mile and during that time, the same speed was maintained. Although the witness' point of observation was some 3/10's of a mile away from the intersection, she observed the truck and its speed until the truck was within 575 feet of the intersection and from that point it passed downgrade and out of sight of the witness. The defendant Taylor testified that he first slowed his speed when he was 125 feet from the intersection and at the time he saw the Meirose car.

Ordinarily the question of the admissibility of evidence as to the speed of a vehicle shortly prior to the time of an accident rests largely in the discretion of the court. Buhrman v. Smollen, 164 Neb. 655, 83 N. W. 2d 386. Under the circumstances here, the trial court did not

abuse its discretion in admitting the testimony of Mrs. Smith.

At the time of this accident, section 39-751 (2), R. R. S. 1943, dealing with right-of-way at intersections, provided as follows: "The driver of any vehicle traveling at an unlawful speed shall forfeit any right-of-way which he might otherwise have hereunder." There was also evidence from which a jury might have found that in view of the weight and condition of the load, and the obstructions to view, Taylor was traveling at a speed greater than reasonable and proper, and failed to slow down for the intersection. Possible inferences might also be drawn that he failed to apply his brakes immediately when he observed the Meirose car. The evidence here was sufficient to go to the jury on the issue of Taylor's negligence, and he was not entitled to a directed verdict against the plaintiff as a matter of law.

The next issues involve Co-op's assertions that Taylor was an independent contractor, and was not acting as a servant or agent of Co-op. Co-op contends that it is therefore absolved from liability because there was no master-servant relationship.

Prior to September 19, 1961, Co-op owned all of the milk trucks used in the business and the drivers, including the defendant Taylor, were employees. At about that time, at the instigation of the drivers during a strike, arrangements were changed and a form of "carrier's contract" was executed with the individual drivers, including the defendant Taylor. Taylor was designated the "carrier" and the contract provided that he was to render daily fresh sweet milk delivery, including Sundays and holidays, between Co-op's creamery and the respective farms on its bulk routes. The transportation service was to be furnished by suitable insulated equipment supplied, maintained, and operated by Taylor at his own expense and required him to deliver whatever milk was tendered to him from each and every place situated on Co-op's milk route. It also required him to

deliver butter, calf feeds, and products used in sanitation for the production of milk as directed by Co-op. Co-op reserved the right to revise bulk routes at 3-month intervals.

Taylor was required to notify Co-op by telephone or otherwise as soon as possible if any emergency prevented furnishing transportation service on any certain day or days. He was also required to take reasonable care of any of Co-op's equipment loaned to him.

Transportation service was to be satisfactory to Co-op and all shippers on the route and Co-op agreed to collect from each shipper and pay to Taylor the amounts each shipper authorized Co-op to deduct for that purpose from any payments due the shipper on milk delivered to Co-op. These payments were originally monthly, but by addendum they were made semi-monthly. The hauling rate was 25 cents per 100 pounds of fresh sweet milk delivered to Co-op, which was to be charged to producers and deducted from the producers' check by Co-op. In addition, Co-op agreed, "in the interest of providing Carrier with enough income to avoid hardship," to subsidize the hauling rate when the daily average weight of milk transported was less than 20,000 pounds. The direct subsidy ranged from 3 cents per 100 pounds to 1 cent per 100 pounds.

Taylor was required to perform his obligations under the contract personally except for use of a relief man paid by Taylor. Taylor could not employ any person objectionable to Co-op and was forbidden to continue employment of any employee beyond 2-weeks notice who was objectionable to Co-op. The contract was not assignable by Taylor.

The contract provided that Taylor should have complete liberty to use his own discretion and judgment as to the method and manner of performance without any right on the part of Co-op to direct or control his performance. It also required him to furnish and maintain in effect workmen's compensation insurance on his own

employees if required by law, and public liability, property damage, and cargo insurance on the equipment. Taylor was to pay all taxes and license fees. The parties expressly disclaimed possession by either of any rights with respect to the other except those conferred by law applicable to an independent contractor.

The contract also provided that Co-op would furnish Taylor with suitable facilities for daily cleaning of the bulk tank and the materials necessary for use, at Co-op's plant. Taylor was also required to provide Co-op with accurate samples for whatever tests might be required by Co-op regarding butterfat content, sediment content, and bacteria activity, and accurate readings of producer's dip-sticks and weight charts.

The contract also provided for purchase of the tank truck from Co-op by Taylor and for the method of payment. "As a deterrent toward violation of this contract," Co-op reserved the right to consider all payments made by Taylor forfeited if he "solicits business for a competitor or . . . breaks contract by working for a competitor."

The contract was for a period of 1 year. It was automatically renewable from year to year in the absence of written notice by either party not later than 30 days prior to the end of the year. Co-op, however, reserved the right to terminate the contract by 30-days written notice to Taylor at any time.

In addition to the written contract, the evidence established that Taylor's first tank and chassis were purchased and financed through Co-op, but the tank truck involved in this accident was bought by Taylor from an independent dealer. Taylor testified that Co-op had to approve his truck sale at the time he purchased the new equipment.

Taylor was also required to measure quantities of milk at the farms, Co-op relied on his milk readings, and relied on him to take samples and supply them. Co-op gives a new driver training in picking up milk, and

making accurate tests for Co-op. Co-op's name was on each ticket furnished to the producers and Taylor signed the receipt for Co-op. Taylor also delivered butter and feed for Co-op to the various producers on his route. For this he was paid 1 cent per pound for butter and received approximately 1 cent per pound for feed. Solicitation of new customers was sometimes by Taylor and sometimes by Co-op.

In determining whether an individual is a servant as distinguished from an independent contractor, under the doctrine of respondeat superior, the basic test is whether or not his physical conduct in the performance of the service is controlled or is subject to the right of control. See Restatement 2d, Agency, § 2, p. 12. See, also, Restatement 2d, Agency, § 220, p. 485. The latter section also sets out particular matters of fact which are to be considered in determining whether one acting for another is a servant or an independent contractor.

In a workmen's compensation case, this court stated: "The primary test in determining whether the relationship of employer-employee exists is whether the alleged employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be done as well as the result which is to be accomplished." Gardner v. Kothe, 172 Neb. 364, 109 N. W. 2d 405.

The facts of each particular case must be considered in determining whether a master and servant relationship existed. If it did, the master is subject to liability for the torts of his servants committed while acting in the scope of their employment. Restatement 2d, Agency, § 219, p. 481. The case of Sanford v. Goodridge, 234 Iowa 1036, 13 N. W. 2d 40, is similar to the one at bar in many respects, including the general nature of the contract as well as the type of business and vehicle involved. The language of the court in that case is appropriate here. "An employer cannot insulate himself against the burdens of the employer-employee rela-

tionship by a contract that leaves him with the control benefits of that relationship. Nor can he escape his liability under the doctrine respondeat superior by a contract that expressly provides that the workman is an independent contractor, if in fact, under the entire contract, the workman only possesses the same independence that employees in general enjoy."

Here the evidence could have justified a finding by the jury that the written contract did not constitute the entire agreement between the parties and that Co-op maintained control over the methods of carrying out the contract. The facts justified a finding that Taylor had no more independence than employees in general enjoy. The effect upon control involved in Co-op's right to terminate the contract on short notice without liability to Taylor was clearly material. The issue of whether the defendant Taylor was an independent contractor, or a servant, or employee of Co-op was properly submitted to the jury.

The next group of assignments of error rest on the premise that the negligence of the defendant Meirose should have been imputed to the plaintiff's decedent, and that the negligence of Meirose barred any recovery by the plaintiff.

The defendant Meirose resided in the buildings on his farm but leased the farm land to his son, who lived on a nearby farm. The decedent Sandrock also lived on a nearby farm and exchanged work with Meirose' son. On the date of the accident, the decedent Sandrock was helping the younger Meirose mow hay when a part on Sandrock's mower broke. After the noon meal, Sandrock asked the defendant Meirose to take him to town. Meirose agreed to take Sandrock to town so that Sandrock could get the broken part repaired. There was no other purpose for the trip.

On the basis of these facts, Taylor and Co-op contend that the defendant Meirose was acting as an agent on behalf of Sandrock and subject to Sandrock's direction

and control and solely for Sandrock's purposes and benefit. Therefore, they assert that Meirose' negligence is imputed to Sandrock and bars any recovery as against them.

This case was tried and the instructions were given on the basis of a host-guest relationship rather than that of agent and principal. "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement 2d, Agency, § 1, p. 7.

There is no evidence here that the transportation was anything but gratuitous, resulting from a friendly and neighborly favor. There is no evidence of any mutual understanding that Sandrock had any right or power to control Meirose' operation of the car, nor that Meirose consented to act subject to Sandrock's control. There is no evidence whatever that Sandrock exercised or attempted to exercise any direction or control over the operation of the car. The fact that Sandrock requested the ride is not controlling. See, Renich v. Klein, 230 Wis. 123, 283 N. W. 288; Hynek v. Milwaukee Automobile Ins. Co., L., Mutual, 243 Wis. 591, 11 N. W. 2d 352.

This state, for many years, has followed the rule that the negligence of a driver is not imputable to a passenger except where the driver is the servant or agent of the passenger, or where the driver and passenger are engaged in a joint enterprise or where the passenger assumes to direct operation of the automobile and to exercise control over it. See Petersen v. Schneider, 154 Neb. 303, 47 N. W. 2d 863. Such cases probably reflect the view that ordinarily an agency does not arise out of purely social relationships. See Hynek v. Milwaukee Automobile Ins. Co., L., Mutual, *supra*. The rule of nonimputation of negligence has been extended to cases where an owner is a passenger in his own automobile. See Petersen v. Schneider, *supra*. Unless some relationship existed between the passenger and the driver which

gave a passenger authority to direct or assist in the operation of the automobile, a passenger has ordinarily been classified as a guest, and the negligence of a driver has not been imputed to the passenger. Where there is no evidence of a relationship between the driver of an automobile and a passenger other than that of a gratuitous social host and guest, the mere fact that the trip is for the passenger's benefit and that he happens to have a business purpose, does not make the driver a controlled agent and the passenger a controlling principal; and the negligence of the driver is not ordinarily imputable to the passenger.

The district court was correct in concluding that the defendant Meirose was a host driver and the decedent Sandrock a guest passenger.

The final issue is whether the negligence of defendant Meirose, the host driver, was ordinary negligence or gross negligence.

Defendant Meirose was a retired farmer and was familiar with the intersection and the roads. His testimony was that he was driving at 20 to 25 miles per hour, although the defendant Taylor placed his speed at 35 to 40 miles per hour. Meirose testified that he looked to both right and left as he approached the intersection; that he did not see any dust; nor did he ever see the milk truck. His car had a manual shift and he shifted to second gear at about 100 feet from the corner. He last looked to the right at a point close to the intersection where he could see 100 to 150 feet to the east of the intersection and did not see the truck.

This case might be said to be a classic example of the effect of our guest statute. While Meirose was guilty of negligence as a matter of law, the issue here is whether there was sufficient evidence of *gross* negligence on his part. In the present state of our cases, it seems clear that on the evidence here, his negligence was momentary in nature rather than extending over a period of time and that as a matter of law Meirose' conduct did not

amount to gross negligence. See, Pavlicek v. Cacak,155 Neb. 454, 52 N. W. 2d 310; Callen v. Knopp, 180 Neb. 421, 143 N. W. 2d 266; Brugh v. Peterson, 183 Neb. 190, 159 N. W. 2d 321; Douglass v. Douglass, 183 Neb. 837, 164 N. W. 2d 661.

The judgment is affirmed as against Robert L. Taylor and against Osceola County Cooperative Creamery Association, a corporation. The judgment as to the defendant Casper B. Meirose is reversed and dismissed.

AFFIRMED IN PART, AND IN PART REVERSED AND DISMISSED.

MAY SOUTHERN, APPELLANT, V. WILLIS SHAW FROZEN EXPRESS, INC., A CORPORATION, APPELLEE.

174 N. W. 2d 90

Filed January 30, 1970. No. 37296.

1. **Trial: Evidence: Juries.** Before evidence is submitted to the jury, the question is not whether there is literally no evidence at all but whether there is evidence so reasonably convincing that the jury can properly proceed to find a verdict for the plaintiff producing it, upon whom the burden of proof was imposed.
2. ———: ———. ———. In determining whether evidence is sufficient to sustain a jury verdict, conjecture, speculation, or mere choice of quantitative possibilities are not proof. The trier of fact must come to the conclusion that there is something more than quantitative possibilities which would lead a reasoning mind to come to one conclusion rather than another.
3. **Trial: Evidence.** Competent, relevant testimony of unimpeached witnesses should not be held to be contradicted by inferences from circumstantial evidence, unless the circumstances and the natural inferences to be deduced therefrom cannot in reason be reconciled with the conclusion that the direct evidence is true.

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

Padley & Dudden, for appellant.

Holtorf, Hansen, Kortum & Kovarik, David C. Nuttleman, and Thomas M. Shanahan, for appellee.

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

WHITE, C. J.

The district court directed a verdict for the defendant in this action for damages arising out of a collision between a truck trailer and a passenger car on a bridge on U.S. Highway No. 30 near Brule, Nebraska, on June 21, 1964. On appeal we affirm the judgment of the district court dismissing the action.

On the issue presented we review the evidence bearing in mind the traditional rule that all conflicts in the evidence must be resolved in favor of the party against whom the verdict was directed and that such party is also entitled to all reasonable inferences to be drawn from such evidence. At the same time we must bear in mind that the question is not whether there is literally no evidence at all but whether there is evidence so reasonably convincing that the jury can properly proceed to find a verdict for the plaintiff producing it, upon whom the burden of proof was imposed. Raff v. Farm Bureau Ins. Co., 181 Neb. 444, 149 N. W. 2d 52.

On June 21, 1964, the defendant's truck was traveling eastward a short distance to the east of Brule, Nebraska. Behind it at some distance was another truck. Plaintiff, driving a 1963 Mercury 4-door passenger sedan, was traveling east at the same time with her husband in the front seat and her daughter and another pasenger in the rear seat. Plaintiff passed the first truck, came back to the south or right side of the road and then engaged in a passing operation of the defendant's truck. Both plaintiff's car and the truck were approaching a bridge 56 feet long and 24 feet wide, and it can be stated with accuracy that the collision occurred between the front end of the truck and the left side and left front of the plaintiff's automobile about 7 feet west of the east end

of the bridge. Except for this basic information all of the evidence consists of the direct evidence and testimony of the defendant's witnesses and the circumstantial evidence supplied by the patrolman testifying as to the skid marks and the other physical facts surrounding the accident. The plaintiff herself testified that she was going 50 to 55 miles per hour when she passed the truck, and she remembers passing the truck and coming over to her right or south side of the road and further than that she remembers nothing. Plaintiff's husband was reading a map in the front seat and adds nothing further to the plaintiff's testimony. The same was true of the two witnesses in the rear seat.

James Pepper was the defendant's driver. The highway was level, paved and dry, and the weather was clear. Pepper testified that the plaintiff, coming from the west after passing his truck, turned to the south to return to the eastbound lane of traffic and in doing so lost control of the automobile; skid marks appeared on the pavement; the right rear side of her automobile hit the southwest corner of the bridge abutment or the warning post; and it then careened over into the north or westbound lane of traffic. Seeing an imminent accident he turned his truck to the left into the north or westbound lane of traffic but was unable to avoid hitting the plaintiff's automobile about 7 feet from the east end of the bridge. The brake or skid marks of plaintiff's automobile continued on to the point where the automobile came to rest about 60 feet east of the bridge in the right ditch of the highway. Defendant's truck after the collision continued on to the east, was thrown out of control, and also wound up in the right ditch of the highway about 110 feet from the east edge of the bridge, where it was on fire. The truck driver immediately to the rear of defendant's truck testified that as defendant's truck moved to the left into the westbound lane of traffic, he observed the plaintiff's automobile careening and the right rear hitting the southwest edge

of the bridge abutment and the vehicle being thrown over or turning into the westbound lane of U.S. Highway No. 30.

The above testimony is undisputed and uncontradicted. The patrolman's testimony is also undisputed and uncontradicted. He testified as to the identification of the various skid and brake marks. Because of the width and the narrowness of the tracks, the skid marks of the plaintiff's vehicle were rather easily identified. They began 88 feet west of the bridge abutment and continued on to where there were "jagged" marks and a pile of debris about 7 feet from the east edge of the bridge, and then continued on to the point where the plaintiff's car came to rest. Another set of skid marks of the plaintiff's car began at a point about 37 feet west of the west end of the bridge and continued on to the place where the "jagged" marks were made, indicating an abrupt movement on the pavement close to the point where the debris was located. Pictures in evidence show extensive damage, with both doors on the *left* side of the plaintiff's vehicle being wrenched off. On the other hand, the rear bumper, tail lights, and trunk compartment show little if any damage, with the license fixture remaining untouched. A portion on the extreme right side of the bumper is pulled or bent upwards. The right rear fender shows very extensive damage on the side but does not appear to be pushed or bent in from the back. Heavy *scrape* marks appear a foot or two forward from the rear of the right rear bumper. The patrolman testified as to paint and scrape marks on the right rear corner panel of the plaintiff's car and this paint matched that found on the wooden reflector post at the southwest corner of the bridge abutment. The brake marks of the truck showing the application of the brakes just before the entrance to the bridge, and their veering to the left, corroborate accurately the version of the accident of defendant's driver. One further important fact testified to by the plaintiff herself should be men-

tioned. Plaintiff testified that she successfully completed the passing operation prior to the time of the entry to the bridge and returned to the right or south lane of traffic and at that time the defendant's truck was about four car lengths behind her.

Plaintiff's theory of the accident, in order to support the conclusion that she was entitled to go to the jury, is that the jury could reasonably find from all of this evidence the plaintiff passed the defendant's truck, got back into her right lane, and then in approaching the bridge the defendant's driver, in an attempt to pass the plaintiff, struck the left rear corner of her car, forcing the right rear fender to the guard rail post, and the car then careened and spun across the bridge to be struck broadside about 7 feet from the east end of the bridge, which in turn forced it into the ditch on the right side of the road.

We come to the conclusion that this theory of the accident is mere speculation and by maximum reach could only be considered as a mere possibility. In evaluating evidence for the purposes of a directed verdict this court has recently stated that conjecture, speculation, or a choice of quantitative possibilities are not proof. There must be something to be *reasonably* adduced from all of the evidence which would lead a reasoning mind to one conclusion rather than another. Popken v. Farmers Mutual Home Ins. Co., 180 Neb. 250, 142 N. W. 2d 309. We have held that the competent, relevant testimony of unimpeached witnesses should not be held to be contradicted by inferences from circumstantial evidence, unless the circumstances and the natural inferences to be deduced therefrom cannot in reason be reconciled with the conclusion that the direct evidence is true. Bixby v. Ayers, 139 Neb. 652, 298 N. W. 533.

The undisputed, uncontradicted direct testimony is that the plaintiff lost control of her automobile at some distance ahead of the defendant's truck and struck the reflector post or the southwest corner of the bridge.

Considering a minimum of reaction time, the plaintiff must have started to apply her brakes some place between 100 and 150 feet to the west of the west entrance to the bridge. This not only corroborates the testimony of defendant's driver and his supporting witness but we feel that it is almost conclusive as a physical fact that the plaintiff had lost or was losing control of her automobile from that point to the west end of the bridge. There are no marks on the left rear bumper of the plaintiff's vehicle that would corroborate the theory or possibility advanced by the plaintiff's counsel. Plaintiff has the burden of proof in this action, and it is her duty to affirmatively demonstrate a reasonable inference that would support this theory as to how the accident happened. Without analyzing this theory further we come to the conclusion that this is proof of mere speculative possibility and is far short of physical facts and evidence which lead to a reasonable inference that the accident must have happened in the manner proposed by the plaintiff herein.

Approaching the problem from the standpoint of an affirmative analysis of the evidence with relation to the specific allegations of negligence in the plaintiff's petition, we have no doubt as to the conclusion to be reached in this case. We find no evidence which was produced, either direct or circumstantial, that would indicate that the defendant's truck was not being kept under proper control at any time prior to the accident.

Plaintiff's second allegation of negligence is that the defendant's driver operated his truck too close behind the plaintiff's vehicle. But the plaintiff herself testified that she turned in front of the defendant's truck and at that point was about four car lengths ahead of it. It is obvious under the undisputed and uncontradicted evidence that the nearness of the defendant's truck to the plaintiff's vehicle was solely the result of plaintiff having passed it just prior to reaching the bridge. There is no evidence of any nature whatsoever

that defendant's driver speeded up after the plaintiff passed him. Again there is no evidence that the defendant's driver failed to keep a proper lookout for traffic in front of him. On the contrary as far as the actions of defendant's driver are concerned the evidence and the brake marks demonstrate that upon seeing the plaintiff losing control of her vehicle he attempted to take evasive action to avoid striking the vehicle by turning to the left, but he was unable to avoid the vehicle when it careened across the bridge into his lane of traffic.

Plaintiff alleges negligence in the failure of defendant's driver to stop before colliding with plaintiff's vehicle. Failing to stop, of course, is not negligence per se, especially in light of the undisputed evidence that this accident occurred either during or immediately after a passing operation by the plaintiff's vehicle. Again the allegation of the failure of the defendant's driver to turn left to avoid the accident fails because this, in itself, fails to raise an inference of negligence. Furthermore the evidence conclusively shows that the defendant's driver did turn to the left in order to avoid the accident. There is no evidence as to an unlawful or an excessive rate of speed by the defendant's driver. The only evidence is the speed the plaintiff testified she was traveling—about 50 or 55 miles per hour when she passed the truck.

Summarizing, an analysis of the evidence in this case reveals no evidence from which a reasonable inference could be affirmatively drawn that the plaintiff had met her burden of proof of establishing any act of negligence on the part of the defendant's driver, James Pepper. On the other hand, all of the reasonable inferences to be drawn from the physical facts and the undisputed and uncontradicted testimony of the witnesses is that the proximate cause of this accident was the loss of control by the plaintiff driver after or during the completion of the passing operation of the defendant's truck.

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

AFFIRMED.

IN RE BABY GIRL BATT.
BABY GIRL BATT, BY CANDACE BATT, HER NATURAL MOTHER AND NEXT FRIEND, APPELLANT, V. NEBRASKA CHILDREN'S HOME SOCIETY, APPELLEE.
174 N. W. 2d 88

Filed January 30, 1970. No. 37357.

1. **Adoption: Acknowledgments: Infants.** A valid consent or relinquishment for adoption may be executed by a minor.
2. ———: ———: ———. No particular form of acknowledgment is required for a relinquishment for adoption. It is sufficient if the evidence shows an intention to voluntarily execute a valid relinquishment in the presence of the notary public.

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

Richard J. Bruckner of Schrempp, Rosenthal, McLane & Bruckner, for appellant.

Lane, Baird, Pedersen & Haggart, for appellee.

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

BOSLAUGH, J.

This was an action to determine the validity of a relinquishment for adoption executed by the appellant, Candace Batt Schaffer. The trial court found that the relinquishment was valid and dismissed the action. The plaintiff has appealed.

The relinquishment was signed by the appellant when she was 17 years of age. Her first contention is that the relinquishment is invalid because she was not of age at the time it was executed.

The adoption statute requires the written consent of

the mother of a child born out of wedlock unless the child has been relinquished for adoption by a written instrument. § 43-104, R. S. Supp., 1967. The statute contains no provision regarding the age of the mother at the time the consent or relinquishment is executed. It is generally held that a consent or relinquishment executed by a mother who is not of age is valid unless the statute contains a specific requirement concerning the age of the mother. Nelson v. Gibson, 235 Minn. 192, 50 N. W. 2d 278; Kozak v. Lutheran Children's Aid Society, 164 Ohio St. 335, 130 N. E. 2d 796. See, also, Gills v. Burdette, 83 Ohio App. 368, 83 N. E. 2d 813; In re Brock, 157 Fla. 291, 25 So. 2d 659. We conclude that a consent or relinquishment executed by a minor is valid in this state.

The appellant next contends that the relinquishment was invalid because it was not properly acknowledged. Section 43-106, R. S. Supp., 1967, provides that consents must be acknowledged before an officer authorized to acknowledge deeds in this state. No particular form of acknowledgment is specified.

The relinquishment involved in this case is regular on its face and recites that it is a voluntary relinquishment. The certificate of the notary public recites that the appellant acknowledged the execution of the relinquishment to be her voluntary act and deed.

The evidence shows that the relinquishment was signed by the appellant in the presence of three persons, one of whom was a notary public employed by the appellee. The notary public testified that she handed the copies of the relinquishment to the appellant so that she could read them. When the appellant was ready to sign them, the notary public said to the appellant: " 'Now, you realize that these relinquishments are—that you are giving the baby, when you sign these you are giving the baby to the Nebraska Childrens Home and when you sign these papers this is final and you can't change your mind and you cannot have your baby

back.' " The notary public further testified that the appellant said that she understood and that appellant signed the relinquishment without any reluctance.

The appellant argues that the acknowledgment was defective because she did not read the instrument and the notary public did not ask her if it was her voluntary act and deed. The fact that the appellant may not have read the instrument is not important in view of the testimony that it was explained to her before she signed it. The evidence shows an intention to voluntarily execute a valid relinquishment. Under such circumstances, the failure to inquire as to whether the execution was the voluntary act and deed of the appellant is an irregularity. Bode v. Jussen, 93 Neb. 482, 140 N. W. 768. The appellant's second contention is without merit.

The appellant's third contention is that the relinquishment was obtained through fraud, duress, or coercion. The appellant testified that she discovered that she was pregnant in September 1967. She was kept at home for 2 weeks and then taken to Omaha. Her mother insisted that she could not keep the baby, that she could not come home if she had the baby, and that the baby would be deformed or retarded. She entered the Booth Hospital and remained there until she was taken to University Hospital where the child was born on December 27, 1967. She was then returned to the Booth Hospital and was discharged early in January 1968. The child was placed with adoptive parents by the appellee when it was 1 month old.

The relinquishment was executed at the Booth Hospital on December 29, 1967, 2 days after the child was born. According to the appellant, a social worker employed by the appellee, Katharine Goeser, showed the appellant the relinquishment and then said: " 'We have talked to your mother and we have talked to your grandma and grandpa and it is all settled, this is the final paper and after you sign it, you can go back home and back to school.' " Appellant claims that she was re-

fused permission to call her mother, grandfather, and boyfriend and told: " 'There is no need for any phone calls. It is settled and signed.' " Appellant states that she signed the relinquishment "Because of my mother and everyone told me I had to. I couldn't get out of the room. The door was shut and I could not leave."

Mrs. Goeser testified that it was her understanding that the appellant wanted to relinquish the baby; that it was "just an accepted fact. She did not want this baby"; and that the appellant never mentioned not wanting to relinquish the child. Mrs. Goeser was at the University Hospital when the appellant saw her baby, and she did not at that time express a desire to keep the baby. Mrs. Goeser corroborated the testimony of the notary public as to the execution of the relinquishment. Mrs. Goeser said that appellant expressed no reluctance at signing the relinquishment and expressed no emotion but "relief of having it over with." Mrs. Goeser testified that the appellant did not ask to call her mother, grandfather, or boyfriend and "There was never any indication of her wanting to get her baby back."

Margaret Fisher, an employee of the Booth Hospital, the third person present at the execution of the relinquishment, corroborated the testimony of Mrs. Goeser and the notary public. According to Mrs. Fisher, it was the least emotional relinquishment that she had ever seen.

The appellant admits that she did nothing toward getting the baby back until in May of 1968. This action was commenced in July. The record as a whole indicates a change of attitude long after the execution of the relinquishment rather than fraud, duress, and coercion at the time of its execution. The record fully sustains the finding of the district court that no fraud, duress, or undue influence affected the execution of the relinquishment.

The judgment of the district court is affirmed.

AFFIRMED.

ROY BAKER, APPELLANT, LORENE SMITH, EXECUTRIX OF THE ESTATE OF ROY BAKER, DECEASED, SUBSTITUTE-APPELLANT, V. A. C. NELSON CO., ET AL., APPELLEES, ELLA BAKER, INTERVENER-APPELLEE.
174 N. W. 2d 197

Filed February 6, 1970. No. 37244.

1. **Judgments: Parties.** It is essential in an action for a declaratory judgment that there be a justiciable issue and that all interested persons be before the court before a declaratory judgment may be granted. When these conditions are met, the court is authorized to enter such a judgment.
2. **Usury: Contracts: Interest.** Where the defense of usury is established under a motor vehicle installment contract, the contract is not void but the usurer may recover the principal of the contract without interest, less interest paid.
3. **Statutes: Contracts: Usury.** The statute purporting to authorize the installment contract that is the subject of this action was declared unconstitutional by this court in Elder v. Doerr, 175 Neb. 483, 122 N. W. 2d 528, and thereby makes applicable the provisions of section 25-205, R. R. S. 1943.
4. **Statutes: Limitations of Actions: Usury.** Under the provisions of section 25-205, R. R. S. 1943, after a holding of unconstitutionality by this court, no action attacking the enforcement of an installment contract authorized by the invalid statute may be brought or maintained unless it be raised within 1 year from the effective date of such decision or within 1 year from November 22, 1963, whichever is the latest in time.
5. **Limitations of Actions: Parties.** Where a community of interest or a privity of estate exists between an intervener and other plaintiffs, a suit commenced before the expiration of the statutory period inures to the benefit of a person who intervenes therein after the time when an action would be barred.
6. ———: ———. On the other hand, where no community of interest or privity of estate exists between the intervener and another party or parties to the original action, the commencement of the action before the statute of limitations has run does not inure to the benefit of a person who intervenes after the time when an action would be barred.

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

Lyman & Meister, for appellant.

Wright, Simmons & Hancock, 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 sustaining a motion for summary judgment by which the court found that defendants were entitled as a matter of law to recover the sum of $1,320 from the plaintiff as the amount remaining due on a motor vehicle installment contract. The plaintiff appealed.

Plaintiff's petition alleges that on August 1, 1960, plaintiff purchased a house trailer; made a downpayment of $850 in cash or its equivalent; and executed a motor vehicle installment contract in the amount of $5,040, payable in 60 monthly installments of $84 each. The amount of the installment contract is shown by its terms to consist of the following items: The cash sale price, $4,350; a downpayment of $850; the unpaid balance of cash price, $3,500; cost of insurance, $220; the basic time price, $3,720; the time price differential, $1,320; the time balance due, $5,040; and the time sale price, $5,890. When the present action was commenced, plaintiff had paid 44 monthly installments of $84 each on the contract for a total of $3,696, leaving a balance due of $1,344. By a stipulation of the parties, plaintiff paid the $1,344 into court as the installments became due and the plaintiff retained possession of the house trailer. Under the stipulation, the $1,344 was paid into court to abide the decision of the court in the present case and that such payments paid into court were not to be treated as an admission of liability or lack of it by any party to the action.

The defendant, Central Credit Corporation, filed its answer denying that it had any interest in the litigation; asserting that it acted solely as a collection agent for the defendant, A. C. Nelson Co., and that Ella Baker is a necessary party in that she was signatory to the con-

tract; and praying for a dismissal of the action.

The defendant, A. C. Nelson Co., filed its answer and cross-petition admitting that it entered into the installment contract with plaintiff and his wife, Ella Baker; asserting that Ella Baker has an interest in the installment contract and house trailer and is a necessary party; contending that the contract is valid; and praying in its cross-petition for a dismissal of plaintiff's petition and for a judgment in the amount of $1,344 to be paid from the funds held in the registry of the court pursuant to the stipulation of the parties. It denies all other allegations of plaintiff's petition. In reply to the cross-petition of Nelson Company, plaintiff alleges that Nelson Company has waived, by failure to demur, the contention that Ella Baker is a necessary party and is estopped to assert that Ella Baker is a necessary party by praying for a judgment in the amount of the fund held in the registry of the court.

The Nelson Company filed a motion in the instant case to permit a demurrer after answering on the ground that the failure of the plaintiff to file a copy of the contract pursuant to the rules of court had misled the Nelson Company and resulted in its failure to demur on the ground of failure to bring a necessary party into the suit. The demurrers were filed and, after a hearing, the demurrers were overruled. Thereafter on July 18, 1967, Ella Baker filed her petition in intervention, claiming a one-half interest in the house trailer and asserting that the amount due on the contract was $24 and not $1,344 because of usury; tendered $12 into court as her share of the amount due; and demanded that she receive indicia of title to one-half of the house trailer. In answer thereto, the Nelson Company asserted that the statute of limitations had run against Ella Baker and otherwise denied generally the allegations of her petition in intervention. By an amended answer and cross-petition, the Nelson Company prayed for judgment

against the plaintiff for the $1,344 in the hands of the court.

The Nelson Company thereafter moved for a summary judgment, asserting that there was no issue of fact and as a matter of law it was entitled to judgment for $1,344 and interest. No evidence was produced at the hearing on the motion for summary judgment. The proceeding as presented was in fact a hearing on a motion for judgment on the pleadings. The motion was sustained and plaintiff has appealed.

The issue in this case involves the meaning and application of section 25-205, R. R. S. 1943, which, so far as applicable here, provides: "An action upon a specialty, or any agreement, contract or promise in writing, or foreign judgment, can only be brought within five years; Provided, that no action at law or equity may be brought or maintained attacking the validity or enforceability of or to rescind or declare void and uncollectible any written contract entered into pursuant to, in compliance with, or in reliance on, a statute of the State of Nebraska which has been or hereafter is held to be unconstitutional by the Supreme Court of Nebraska where such holding is the basis for such action, unless such action be brought or maintained within one year from the effective date of such decision or within one year from November 22, 1963, whichever is the latest in time; * * *." The action in the present case was commenced on August 3, 1964. The statute purporting to authorize the contract sued on was declared unconstitutional in Elder v. Doerr, 175 Neb. 483, 122 N. W. 2d 528, decided on June 28, 1963, and the mandate of this court was issued on October 18, 1963. It is clear that the petition of the plaintiff was filed within the 1-year period provided for in the statute and that the petition in intervention of Ella Baker was not filed within such period.

It is the contention of the defendants that plaintiff's petition does not state a cause of action for a declaratory judgment and that the relief prayed for in the petition in

intervention of Ella Baker is barred by the 1-year statute of limitations contained in section 25-205, R. R. S. 1943.

It is not contended that there was no justiciable issue in the case that is subject to determination by declaratory judgment. What is contended is that there is a want of necessary parties to invoke the benefit of the Declaratory Judgments Act. The applicable statute provides in part: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." § 25-21,159, R. R. S. 1943. It is fundamental that the rights of the parties must be determined as of the time of the commencement of the action.

This court has passed upon the necessity for making all interested persons parties to an action for a declaratory judgment. Redick v. Peony Park, 151 Neb. 442, 37 N. W. 2d 801. It has been generally held by this court that all necessary parties must be made parties to a declaratory judgment action to give the court jurisdiction to determine the questions presented. Hall v. United States Nat. Bank, 128 Neb. 254, 258 N. W. 403; Dobson v. Ocean Accident & Guarantee Corp., 124 Neb. 652, 247 N. W. 789; Southern Nebraska Power Co. v. Village of Deshler, 130 Neb. 133, 264 N. W. 462; 22 Am. Jur. 2d, Declaratory Judgments, § 80, p. 943.

The motor vehicle installment contract here involved was signed by Roy Baker and Ella Baker. Roy Baker is the plaintiff and therefore a party to the action. Ella Baker is a signer of the contract but not made a party except by intervention almost 3 years after the declaratory judgment action was commenced. The allegations of the petition in intervention are that Ella Baker owned an undivided one-half interest in the house trailer.

The record discloses that all necessary persons were parties to the action at the time the court entered its

declaratory judgment. This is all that is required to authorize the entry of such a judgment on a justiciable issue notwithstanding the evidences of procrastination that appear to have delayed the trial of the case.

A consideration of the pleadings in the case, including the petition to which a copy of the motor vehicle installment contract is attached, demonstrates that the contract is usurious under many holdings of this court including Elder v. Doerr, *supra;* and Central Constr. Co. v. Blanchard, 180 Neb. 62, 141 N. W. 2d 416. Under the foregoing holdings and a finding that a contract is usurious, the contract is not void but a recovery thereon is limited to the amount of the principal without interest, less any interest paid. § 45-105, R. R. S. 1943. There can be no doubt after an examination of all the pleadings that at the time plaintiff filed his petition for a declaratory judgment the contract was usurious and that he was entitled to such a declaration when and if all necessary persons had been made parties to the suit. The case was never dismissed for want of necessary parties but, instead, the case was permitted to drag along until all necessary persons had become parties to the action. Upon the filing of the petition in intervention by Ella Baker all necessary persons were parties to the action and the right to declaratory relief was within the power of the court to grant.

A further question for our consideration is the application of the statute of limitations as it applies to the defense of usury in the instant case as set out in section 25-205, R. R. S. 1943. Plaintiff's petition asserting the usurious nature of the installment contract was brought within the 1-year limitation contained in the act. The co-signer of the contract, Ella Baker, did not raise the question of usury for almost 3 years after the case was commenced and clearly more than the 1 year provided by section 25-205, R. R. S. 1943.

The pleadings show that plaintiff and Ella Baker were the signers of the installment contract. Each is jointly

and severally liable and each has the same community of interest. When this situation exists the general rule is: "The general rule seems to be that where a community of interest or a privity of estate exists between an intervener and other plaintiffs, a suit commenced before the expiration of the statutory period inures to the benefit of the person who intervenes therein after the time when an action would be barred. The reason for this holding is that an intervention does not constitute a new cause of action. * * * Where no community of interest or privity of estate exists between the intervener and another party or parties to the original action, the commencement of the action before the statute of limitations has run does not inure to the benefit of a person who intervenes after the time when an action would be barred." Annotation, 8 A. L. R. 2d, Bringing in Party—Limitations, § 42, p. 90. These principles have been applied in two cases by this court that we deem controlling here.

In Hickman v. Loup River Public Power Dist., 173 Neb. 428, 113 N. W. 2d 617, we said: "Where a community of interest or a privity of estate exists between an intervener and other plaintiffs, a suit commenced before the expiration of the statutory period inures to the benefit of a person who intervenes therein after the time when an action would be barred." See, also, cases collected in Annotation, 8 A. L. R. 2d, § 42, p. 90.

In Hoffman v. Geiger, 135 Neb. 349, 281 N. W. 625, the converse of the foregoing holdings is demonstrated by the following: "The petitions of the Hoffmans who alleged they sued for all other creditors similarly situated did not inure to the benefit of cross-appellants to prevent the bar of the statute, because the two classes of creditors in litigation were not similarly situated. * * * As already stated, the cross-appellants, the nine intervening creditors, were in a class different from that of the Hoffmans. * * * By intervening and demanding independent relief, they disavowed the pleas of the Hoff-

mans in their behalf. They did not borrow from the pleas of other litigants immunity from the statute of limitations." See, also, Annotation, 8 A. L. R. 2d, § 43, p. 92, and § 49, p. 107, and cases there collected.

For the reasons stated, we hold that the commencement of the action by the plaintiff inures to the benefit of the intervener.

The judgment of the district court is reversed and the cause remanded with directions to enter a declaratory judgment for plaintiff and intervener for the funds in the registry of the court in excess of the principal amount of the contract as provided by section 45-105, R. R. S. 1943.

REVERSED AND REMANDED WITH DIRECTIONS.

JOHN DEERE COMPANY, A CORPORATION, APPELLEE, V. MARTIN VAN CONET, APPELLANT.
174 N. W. 2d 85

Filed February 6, 1970. No. 37334.

1. **Estoppel: Fraud.** The proper function of equitable estoppel is the prevention of fraud, actual or constructive, and the doctrine should always be so applied as to promote the ends of justice and accomplish that which ought to be done between man and man.
2. ———: ———. The essential elements of an equitable estoppel are the existence of a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice.
3. ———: ———. Where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of facts, and induces him to act on that belief or to alter his previous condition, the former is concluded from averring against the latter a different state of things as existing at the same time.

4. **Judgments: Trial.** Summary judgment is authorized when the moving party is entitled to judgment as a matter of law, it is clear what the truth is, and no genuine issue remains for trial.

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

William G. Whitford, for appellant.

Fitzgerald, Brown, Leahy, McGill & Strom, C. L. Robinson, and William J. Brennan, Jr., for appellee.

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

NEWTON, J.

Defendant purchased of Mason Company two scrapers. A retail installment contract vesting a security interest in Mason Company was executed and delivered by defendant. Subsequently, as additional security, Mason Company obtained a security interest in a Hobbs lowbed trailer under a chattel mortgage executed and delivered by defendant. Both security contracts were assigned to plaintiff. This action is brought to replevin the scrapers and trailer. Defendant answered, alleging that plaintiff had taken possession, under an order of replevin, of the two scrapers and a Fruehauf trailer and that plaintiff did not have a security interest in the trailer taken. He also alleged that at the time of filing this action, plaintiff was not the owner of a security interest in the scrapers. In reply, plaintiff generally denied the allegations contained in the answer and alleged the chattel mortgage was given in consideration of an extension of time granted defendant when he was in default under the retail installment contract. It further alleged that it was the intention of the parties that the chattel mortgage should cover the trailer replevined and specifically denied that the trailer was a Fruehauf trailer. Plaintiff's motion for summary judgment was sustained. We affirm the judgment of the district court.

In answer to interrogatories, defendant admitted the execution of the retail installment contract, that a true copy of the contract was attached to the petition, and the assignment of the contract by Mason Company to plaintiff. Defendant also admitted the execution of the chattel mortgage and that a true copy of it was attached to the petition. It was further admitted that defendant did not come into possession of the property under any execution, order, or judgment against plaintiff, or for the payment of any fine, tax, or amercement against plaintiff, or by virtue of any order of delivery in replevin, or any other mesne or final process issued against plaintiff.

Admitted in evidence were defendant's check to plaintiff for $809.91, returned for want of sufficient funds, the retail installment contract, and the chattel mortgage. Also received were affidavits of Gordon Mason, president of Mason Company, a corporation, and D. C. Henderson, division retail credit manager for plaintiff, identifying both security contracts and stating they were assigned by Mason Company to plaintiff, were never redeemed by Mason Company, and were never reassigned. Henderson stated he wrote a letter to defendant saying the agreements had been reassigned and returned to Mason Company but that no assignment was actually made because Mason Company failed to pay the amount due plaintiff.

In answer to further interrogatories, defendant said the trailer described in the mortgage had burned up except for the tires and the wheels; and that he was in default on the retail installment contract when this action was filed on October 18, 1968. In his deposition, defendant stated the Hobbs trailer had been burned and destroyed prior to the date he gave the chattel mortgage on it.

Defendant introduced in evidence a certificate dated March 12, 1965, showing he had title to a 1945 Fruehauf semitrailer. By way of affidavit, he said it was a 1954 trailer, the certificate of title being erroneous in this respect, and that this is the trailer taken by plaintiff.

"The proper function of equitable estoppel is the prevention of fraud, actual or constructive, and the doctrine should always be so applied as to promote the ends of justice and accomplish that which ought to be done between man and man." 28 Am. Jur. 2d, Estoppel and Waiver, § 28, p. 630. The essential elements of an equitable estoppel are the existence of: " '* * * a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice.' " Scottsbluff Nat. Bank v. Blue J Feeds, Inc., 156 Neb. 65, 54 N. W. 2d 392.

All the elements of estoppel are present in this case. The defendant executed and delivered to plaintiff a chattel mortgage on a Hobbs trailer and warranted that he then owned a trailer of that make. He made this representation for the purpose of obtaining an extention of time on indebtedness owed by him to plaintiff. He thereby induced plaintiff to grant such extension and permit him to retain possession and use of the two scrapers. Defendant now says that he did not have a Hobbs trailer at the time of executing the chattel mortgage and that the trailer he owned was a Fruehauf trailer. He now insists that he knowingly made a false representation regarding the trailer for the purpose of inducing plaintiff to grant him an extension of time, and concedes that plaintiff relied upon his false representation and changed its position to its detriment. Under such circumstances, he is estopped to maintain that the trailer replevied is not the mortgaged trailer. " 'Where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of facts, and induces him to act on that belief or to alter his previous condition, the former is concluded from averring against

the latter a different state of things as existing at the same time.' " Bleicher v. Heeter, 141 Neb. 787, 4 N. W. 2d 897. No issue of fact is presented in this regard.

Defendant contends that a summary judgment was erroneously entered because an issue of fact is presented on the question of ownership of the security agreements at the time this suit was commenced. He relies on a letter written by a representative of plaintiff to defendant stating that the agreements had been reassigned to Mason Company. The undisputed evidence clearly reveals that this was an erroneous statement and that the security agreements never were reassigned because Mason Company failed to pay plaintiff the sum due on the agreements. There is no genuine issue of fact regarding ownership. Summary judgment is authorized when the moving party is entitled to judgment as a matter of law, it is clear what the truth is, and no genuine issue remains for trial. See County of Douglas v. OEA Senior Citizens, Inc., 172 Neb. 696, 111 N. W. 2d 719.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF DANNY BLUNK ET AL., CHILDREN UNDER EIGHTEEN YEARS OF AGE.

JOHN S. MINGUS, APPELLEE, V. ADRINA BLUNK STUCHLICK, APPELLANT, NEBRASKA CHILDREN'S HOME SOCIETY, APPELLEE.

174 N. W. 2d 194

Filed February 6, 1970. No. 37351.

1. **Parent and Child: Courts.** A court may terminate parental rights when it finds such action to be in the best interests of the child, and it appears from the evidence that the parent has substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection, or a parent is unfit by reason of debauchery or repeated lewd and lascivious behavior, which conduct is found by the

court to be seriously detrimental to the health, morals, or well-being of the child.

2. ———: ———. The fact that the trial judge heard and observed the parties and the witnesses is an important consideration in determining the weight and significance of the testimony in a custody proceeding.

3. ———: ———. Where parental unfitness is established, the court's sole concern is the welfare of the children.

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

John McArthur and A. James McArthur, for appellant.

Robert A. Munro, for appellee Mingus.

Lane, Baird, Pedersen & Haggart, Charles P. Fike, and Gary F. Anderson, for appellee Nebraska Children's Home Society.

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

WHITE, C. J.

This is a juvenile action brought under the Juvenile Court Act, Chapter 43, article 2, R. R. S. 1943, alleging that appellant's seven children were neglected and dependent and in need of special supervision. This action was commenced by a supplemental petition filed in the Buffalo County district court on March 14, 1969. In the original proceeding initiated on October 30, 1967, the district court for Buffalo County, Nebraska, took jurisdiction of the children, found that they were neglected and dependent, and placed them in the custody, supervision, and control of the appellee, Nebraska Children's Home Society. The three youngest children have been placed for adoption by the Society, and it appears that they have been living in their adoptive homes since about January 26, 1968. The County of Buffalo and the Nebraska Children's Home Society were joined in this action and are the appellees in this case. The district court, on May 15, 1969, entered an order finding the appellant

unfit to have the custody of her children and terminated her parental rights. We affirm the judgment and order of the district court.

A court may terminate parental rights when it finds such action to be in the best interests of the child, and it appears from the evidence that the parent has substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection, or a parent is unfit by reason of debauchery or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the child. § 43-209 (2) and (4), R. R. S. 1943. See, also, Hubbard v. Loewenstein, 181 Neb. 96, 147 N. W. 2d 164.

In our review of the facts, tried de novo here on appeal, the fact that the trial judge saw, heard, and observed the parties and the witnesses is an important consideration in determining the weight and significance of the testimony in a custody proceeding. Hubbard v. Loewenstein, *supra*. A review of the evidence in this case leads us to the conclusion that the record supports the following findings of fact by a preponderance of the evidence: Appellant is the natural mother of the seven children and was divorced from their father, now deceased, in the summer of 1967. Appellant was granted custody of the seven children and lived with them in Kearney, Nebraska. Subsequent to the divorce the appellant was the recipient of support payments for the children and was under the supervision of the county welfare department.

A welfare worker of 13 years' experience testified as to lack of cleanliness in the home and failure of appellant to properly supervise the children. She had informed appellant that complaints had been received about her conduct with various men in the home. We are unable to determine from the evidence whether one Gene Jordan (separated but not divorced) or one Grant Phifer was the first liaison of appellant.

About September 14, 1967, appellant was again advised that there had been a complaint about men living in her home, and she admitted that one Charles Gay had a bedroom on the front porch and was living there. In any event the relationship with Grant Phifer, beginning in the summer of 1967, resulted in his moving into her home with the children on or about October 17, 1967. Despite objections by the welfare worker, appellant persisted in this conduct and in living with Phifer. Phifer was a heavy drinking, dissolute, completely irresponsible, and perhaps dangerous person, and at various times the appellant was afraid of her life from beatings.

On the evening of October 24, 1967, a deputy from the Buffalo County sheriff's office appeared at the appellant's home with a warrant for the arrest of Grant Phifer. On the next day, October 25, 1967, the appellant went to the Buffalo County welfare office and represented that she was going alone to Des Moines, Iowa, to visit her ex-husband who, she said, had called her to come and see him and that Grant Phifer was no longer in her home. Her assistance check, which had been withheld from her, was given to her and later in the day, appellant left for Colorado with Phifer. The evidence is undisputed that upon reaching Colorado appellant posed as Phifer's wife and lived with him in several places for a period of time of approximately 2 months.

Prior to leaving for Colorado appellant had made no provision for the care of her seven children. The story of her life in Colorado with Phifer is one of drinking and fighting as a result of which she finally left Phifer. She had notified neither the welfare department nor her own mother, Mrs. Ackerman, prior to leaving, and on October 29, 1967, 4 days after leaving with Phifer, Mrs. Ackerman discovered this situation as a result of a visit from a family friend and one of the children who advised that his mother was not at home. The children were removed to Mrs. Ackerman's home and as a result

the original petition in this case was filed.

During the time appellant was in Colorado she did correspond with her mother. Between November 15, 1967, and December 13, 1967, the date set for the hearing on the custody of her children, the appellant received from her mother two copies of the published legal notice in the Kearney daily paper, was advised by her mother that proceedings were pending to permanently remove her children from her custody, and the district court itself in two letters which were delivered to the appellant prior to the hearing advised her of the hearing and suggested that she make an appearance and retain an attorney to represent her. Appellant not only failed to appear at the hearing or take any steps with relation to the care and custody of her children, but continually advised her mother to not disclose her whereabouts. Although the appellant was working and, of course, entitled to charity relief to assist her, the only attempt to provide adequate food, shelter, and supervision for her children was her request by letter to her mother to take care of the children. Her written correspondence to her mother during this period reveals the appellant was at a minimum, indecisive as to what, when, or how she could ever discharge her parental responsibility toward her children.

The record shows a careful consideration by the court of the rights of the parties, and it is clear that there was ample opportunity for appellant to reform her conduct, and to return to her children within a reasonable time. Finally, on January 26, 1968, a further hearing was held before the district court for Buffalo County, Nebraska, and the children were ordered to be placed in the Nebraska Children's Home Society in Omaha, Nebraska, where they have been since that day except for the placement of three smaller children in adoptive homes about that date. In the meantime the appellant had become acquainted with another man and shortly after leaving Grant Phifer appellant married Paul

Stuchlick, a divorced man with three minor children.

Stuchlick, appellant's present husband, is only 29 years of age. He has been employed in four different jobs in the past year before these proceedings were initiated. He was divorced October 22, 1965, by a former wife, has three children and has paid nothing on a child support decree in the sum of $60 per month for support of the three children. He has not seen his children since June 1965 although they have been within a distance of approximately 250 miles from his residence.

The record herein abundantly, if not conclusively, supports the findings of the district court that these children were abandoned; that they lacked proper parental care by reason of the fault and habits of their mother; that the appellant, although able to do so, neglected and refused to provide the necessary and proper subsistence and care for the health, morals, and well-being of the children; and that, therefore, they were neglected and dependent within the meaning of sections 43-201 and 43-209, R. R. S. 1943.

Turning to the question of the present disposition by the court of the children, appellant now contends that she loves her children and is presently willing to provide a home with adequate supervision and care for them. The proper rule in this situation is that where parental unfitness is established, the court's sole concern is the welfare of the children. Mullikin v. Lutkehuse, 182 Neb. 132, 153 N. W. 2d 361.

We are mindful of the compelling considerations present to avoid separating the seven children of this family from each other and from their natural mother. It appears from the record that these children are living in and have adapted to a clean and wholesome environment, are properly fed and taken care of, and are receiving treatment and care far superior to that they received in the custody of the appellant. A further and overriding consideration, also, is that three of the children have already been placed in adoptive homes for a

period of now approximately 2 years and have developed the attachment, love, and adjustments of a normal home and parental relationship. We agree with the trial court that it would be unconscionable to wrench these three children away from their adoptive parents and the other four from the Nebraska Children's Home Society during their impressionable years and restore them to their mother upon the mere representation that she has reformed. As we have mentioned the trial court's judgment in this situation, having seen, heard, and observed the parties involved, is entitled to great weight under the circumstances. Moreover we are persuaded in this situation by the fact that the purported reformation of the appellant's home and environmental situation is primarily to be accomplished by a man 29 years of age who has not maintained or paid his child support payments to his previous wife, maintains an erratic employment record, and does not show sufficient interest in his own children to visit them for the past 4 years.

We feel, as the trial court must have felt, that the appellant has not sufficiently demonstrated a character, capacity, and a creation of proper circumstances in which these children may be safely returned to her unsupervised custody and control. The primary concern is for the best interests of the children. Considering all of the circumstances we feel that the actions of the proper authorities concerning the welfare and the care of these children and the judgment of the district court concerning them should be affirmed.

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

AFFIRMED.

DONALD C. CONNOR ET AL., APPELLANTS, V. CITY OF OMAHA, NEBRASKA, APPELLEE.
174 N. W. 2d 205

Filed February 6, 1970. No. 37353.

Statutes. Where a legislative act is complete in itself but is repugnant to or in conflict with a prior statute which is not referred to nor repealed by the latter, the earlier statute is repealed or modified by implication by the later act, but only to the extent of the repugnancy or conflict.

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

Dan J. Whiteside, for appellants.

Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, James E. Fellows, Allen L. Morrow, Jon B. Abbott, George S. Selders, Jr., Verne W. Vance, and Kent N. Whinnery, for appellee.

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

NEWTON, J.

In this action plaintiffs seek to restrain the defendant city from acquiring their property by eminent domain. Plaintiffs allege the appropriation ordinances are invalid, a failure to negotiate in good faith, and condemnation for a private purpose. These issues were resolved against plaintiffs in the district court. We affirm the judgment of the district court.

The city of Omaha enacted three ordinances declaring the necessity of acquiring property of plaintiffs for park purposes and for a sewer easement. The ordinances authorized the acquiring of the property by negotiation or, if this was not possible, by eminent domain. No action in eminent domain had been commenced at the time this action was brought.

The act encompassing sections 14-366 to 14-371, R. R. S. 1943, was adopted at the 1921 Session of the Legislature.

Section 14-366, R. R. S. 1943, authorizes cities of the metropolitan class to exercise the power of eminent domain to acquire private property for various purposes, including parks and sewers.

Section 14-367, R. R. S. 1943, as originally adopted, required the purpose and necessity for the appropriation to be declared by ordinance and provided for the appointment by the city council of three disinterested freeholders as appraisers to appraise and assess damages and make awards of damages. Also, that if the award was confirmed, it should be paid "as in this act provided."

Section 14-368, R. R. S. 1943, provides that if the amount of the appraisal does not exceed $100,000, the council may proceed and shall levy special taxes or assessments on property especially benefited to the extent of the benefits conferred, and if the levy is insufficient, bonds shall be issued for the excess.

Section 14-369, R. R. S. 1943, provides that if the appraisal exceeds $100,000, the city has 120 days to proceed and the council shall appoint a committee of three of its members to determine the amount of special benefits which would result from the improvement.

Section 14-370, R. R. S. 1943, provides that if the special benefits do not amount to 90 percent of the amount of the appraisal, the proceeding shall be abandoned until bonds have been voted to pay such excess cost.

Section 14-371, R. R. S. 1943, makes provision for a bond election.

Section 14-367, R. R. S. 1943, was amended in 1951. As amended, it requires that the purpose and necessity for the appropriation be declared by ordinance and that the procedure for condemnation set forth in sections 76-704 to 76-724, R. R. S. 1943, be followed. These sections provide a uniform method of procedure to be followed in eminent domain actions.

Plaintiffs assert that the ordinances mentioned are invalid for failure to comply with sections 14-368 to 14-371, R. R. S. 1943. Defendant maintains these sections

were repealed by implication with the adoption of the amendment to section 14-367, R. R. S. 1943, because they are repugnant to this section and sections 76-704 to 76-724, R. R. S. 1943.

Section 14-367, R. R. S. 1943, as originally adopted, provided for the appointment of three disinterested freeholders as appraisers of damages and laid down rules governing the making of appraisals and how they should be reported. Actions prescribed in sections 14-368 to 14-371, R. R. S. 1943, all refer to and are based upon the appraisal so provided for. With the amendment to section 14-367, R. R. S. 1943, as originally adopted, all provisions for the appointment of appraisers and directions for the making of appraisals were deleted. Under such circumstances, sections 14-368 to 14-371, R. R. S. 1943, were rendered inoperable and section 14-367, R. R. S. 1943, as amended, was clearly repugnant to and inconsistent with these sections. That this situation existed and was finally recognized by the Legislature is demonstrated by the repeal of these sections. See L.B. 871, 80th Session of Nebraska Legislature. "Where a legislative act is complete in itself but is repugnant to or in conflict with a prior statute which is not referred to nor repealed by the latter, the earlier statute is repealed or modified by implication by the later act, but only to the extent of the repugnancy or conflict." City of Auburn v. Eastern Nebraska Public Power Dist., 179 Neb. 439, 138 N. W. 2d 629. We are constrained to agree with defendant that sections 14-368 to 14-371, R. R. S. 1943, have been repealed by implication.

Residents of the general area where plaintiffs' property is located had importuned the council of defendant city by petitions and otherwise to establish a park in the vicinity. In response to this public demand, the defendant proceeded to take steps to acquire plaintiffs' property for park purposes and an election was held at which the electorate of the city voted bonds for this purpose. The proposed acquiring of an easement across the same

property for sewer purposes is incidental and becomes irrelevant if the entire property is to be acquired by defendant. In view of the public demand for the establishment of the park and the defendant city's response, it is apparent plaintiffs' contention that the proposed appropriation was for a private purpose is without merit.

In regard to the alleged failure of the defendant to negotiate in good faith for the purchase of plaintiffs' property, it would appear that this action was prematurely brought. There is always time, prior to the filing and determination of an eminent domain action, to negotiate for purchase at private sale. No eminent domain action had been commenced when this suit was brought. In any event, defendant had had plaintiffs' property appraised, apprised plaintiffs of the result of the appraisal, was informed the appraised price was unsatisfactory, and at plaintiffs' request, had a reappraisal which was also unacceptable to plaintiffs. Subsequently, offers exceeding the appraised price were made to plaintiffs and rejected. The evidence fails to sustain the proposition that defendant failed to negotiate in good faith.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRED CANNON, APPELLANT.
174 N. W. 2d 181

Filed February 6, 1970. No. 37354.

1. **Criminal Law: Evidence.** When evidence of an in-court identification alleged to be tainted by a prior illegal line-up is first challenged on appeal, such challenge, in the absence of a clear showing of prejudicial error, will not be considered. Failure to object will be attributed to defense counsel's choice of trial tactics.
2. ———: ———. In-court identification evidence is admissible where such identification is made on a basis independent of a tainted line-up.

3. ———: ———. A primary factor in determining whether an independent basis for an in-court identification exists is the opportunity afforded the witness to observe the defendant under circumstances free from taint.
4. ———: ———. 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.
5. **Criminal Law: Evidence: Appeal and Error.** This court will not interfere with a verdict of guilty which is based on conflicting evidence unless the evidence is so lacking in probative force that it is insufficient as a matter of law to support a finding of guilt beyond a reasonable doubt.
6. **Criminal Law: Evidence: Juries.** Evidence of an unexplained breaking and entering by the defendant is sufficient to require submission to the jury of the question whether the breaking and entering was with an intent to steal.

Appeal from the district court for Adams County: EDMUND NUSS, Judge. Affirmed.

Joseph R. Helmann, 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.

Fred Cannon was charged with breaking and entering the Phelps Liquor Store in Hastings, Nebraska, at approximately 11:20 p.m. on December 6, 1968. Trial to a jury was had and a verdict of guilty rendered pursuant to which judgment and sentence were pronounced against defendant. We affirm the judgment of the trial court.

The Phelps Liquor Store is located approximately 575 feet north and west of the Hitching Post Bar. The Phelps Liquor Store closed at about 10 p.m., but the manager and one other employee remained in the store to bring additional merchandise up from the basement and replenish the stock. The manager was on the first floor when he heard glass breaking. He walked toward

the area from which the sound came and observed that a large window about 6 feet high and 3 feet wide had been broken. A man was entering through the window. At this time the manager was about 20 feet from the broken window with a clear view of the intruder. Fifteen feet in from the window was a 160 watt fluorescent overhead light. He shouted at the intruder who was then standing sidewise in the window. The intruder turned his head and looked directly at the store manager. He then retreated from the window and ran away. The other store employee looked out through the window and saw the trespasser running down the street in the direction of the Hitching Post Bar. He did not see the individual enter the Hitching Post Bar as it was around the corner and out of view. A call was immediately made to the police. That call was received at 11:24 p.m. When the police arrived at the Phelps Liquor Store, the manager described the person attempting to gain entrance as being a medium-sized colored man with a bushy mustache, long sideburns, dark colored trousers and shirt, and a ¾-length light brown leather-like coat or jacket. Within the hour defendant was located and arrested at the Hitching Post Bar. At the time of his arrest, defendant had a shallow cut approximately 1 inch long under his left eye which was still bleeding. A bartender at the Hitching Post Bar saw the defendant in the bar and stated that when the police entered, the defendant got up and went into the back part of the room where his brother was playing pool. Another witness stated that he arrived at the Hitching Post Bar about 11:15 p.m. at which time the defendant was leaving the bar and that defendant returned sometime later, but the witness did not know at what time. At the time of his arrest, defendant was wearing a dark shirt, blue jeans, and a fawn-colored leather jacket. He had a mustache and was about 5 feet 10 inches in height.

The manager of the Phelps Liquor Store made an in-court identification of the defendant. No motion to

suppress this evidence was made either before or during the trial. It was not objected to and there was no motion to strike it. On cross-examination defendant brought out the fact that a short time after his arrest the defendant had been identified by this witness in the absence of counsel or a waiver thereof. Prior to the illegal line-up, he had viewed a picture of the defendant and four other colored men. The four other colored men were known to the witness. This was, therefore, in effect, a one-man line-up made the morning following the commission of the offense. The State introduced no evidence regarding prior identification.

Defendant's evidence sought to establish an alibi. Several relatives and acquaintances of defendant testified to his movements between 11 p.m. and 12 midnight on the night of December 6, indicating that he did not arrive at the Hitching Post Bar until after the commission of the offense and was at the time of the offense in the company of others. The various times attributed to defendant's movements during this period seemed to be somewhat indefinite or conflicting. The defendant himself took the stand and attempted to verify this defense, but on cross-examination admitted that in an earlier statement which he had given to the county attorney, he said that he had arrived there at a little after 10 p.m. Some of these witnesses also attempted to impeach identification of the defendant by stating that his mustache was not bushy and that his sideburns were not long. The evidence also disclosed that defendant was suffering from paralysis of one side of his face due to Bell's Palsy and indicated that when he attempted to talk, smile, or otherwise endeavor to use his facial muscles, his face would be pulled to one side in a noticeable manner. In rebuttal, the State called a physician who testified that defendant's facial condition would not be noticeable when his face was in repose.

In his brief and his oral argument, defendant challenges the validity of the State's evidence of identifica-

tion. This proposition was not raised either in his motion for new trial or in his assignments of error in this court and would not ordinarily be considered by this court under such circumstances. However, in view of the fact that a constitutional question has been raised, this defense will be considered. Defendant cites the case of United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149. See, also, Gilbert v. California, 388 U. S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178; Stovall v. Denno, 388 U. S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199. These cases lay down the rule that when a pre-trial line-up is had and defendant's counsel is not present, evidence of the line-up is inadmissible. In the present instance, no evidence of the line-up was introduced by the State, the only evidence pertaining thereto being brought out by defendant on cross-examination. These cases further hold that an in-court or subsequent identification will be barred if it is tainted by the preceding illegal identification. The Wade case further holds that evidence of an in-court identification will not be excluded "* * * without first giving the Government the opportunity to establish * * * that the in-court identifications were based upon observations of the suspect other than the lineup identification." In the present instance, no objection having been made to this evidence at or before the trial, the court had no opportunity to ascertain all the facts pertaining to the situation presented or to hear other evidence on the question of whether or not there was an independent basis for the in-court identification. Under such circumstances, several jurisdictions have held that the defendant waives any objection he may have to the admissibility of the identification evidence. See, Robbins v. State (Ind., 1969), 242 N. E. 2d 925; Thompson v. State, 6 Md. App. 50, 250 A. 2d 304; People v. Armstrong (Cal. App.), 74 Cal. Rptr. 37. In the case of Solomon v. United States, 408 F. 2d 1306 (D. C. Cir., 1969), the court failed to go quite so far and, indeed, failed to pass upon this question but

indicated that it was reluctant to consider such claims when first raised on appeal. In the case of People v. Cruz, 415 F. 2d 336 (9th Cir., 1969), it was held that: Where an evidentiary hearing is necessary for decision of a motion to suppress in-court identification, allegedly the tainted fruit of an illegal line-up, the district court may refuse to entertain such motion made after trial is underway if it is not satisfied that accused could not at an earlier stage have had adequate knowledge to make his claim.

It was further held that: Where defense counsel made no objection to witness' in-court identification despite fact that counsel himself elicited from previous witness statement that witness had identified defendant in a line-up and counsel presented no convincing reason why he could not have known of line-up, prior to trial, refusal to hold hearing, outside presence of jury and on motions during trial, on issue of whether in-court identification was tainted fruit of illegal line-up was not prejudicial.

It is apparent that in the present case, defendant and his counsel were aware at all times of the prior line-up. This is made evident by the cross-examination of the State's identification witness in regard to the line-up yet no motion for the suppression of the evidence was made before trial. This case is even more extreme than the cited case in that such motion or objection was not made during the trial and the question was not raised by assignment of error in defendant's motion for new trial or in his brief. While we believe this rule to be a proper one, especially in a case such as this, nevertheless, this case is not dependent upon the adoption of such a rule.

As previously noted, the Wade case indicates that evidence of an in-court identification may be properly received if it appears that it has a basis independent of the illegal line-up. This is supported by the case of Russell v. United States, 408 F. 2d 1280 (D. C. Cir., 1969).

In that case the court held that: Considerations bearing on actual reliability of an identification are relevant only to a determination of whether there was an "independent source" for an identification made at or after unnecessarily suggestive confrontation; even then, the question is not whether the identification was accurate in fact, but whether the witness was likely to make an accurate identification. In the case of United States v. Broadhead, 413 F. 2d 1351 (7th Cir., 1969), the court held that in-court identification evidence was admissible where such identification was made on a basis independent of a tainted line-up. This case also sets out the general procedure for determination of such questions by the trial court in the following words: "Where the prosecution intends to offer only an in-court identification, the defense may challenge its admissibility. The court should then, on facts elicited outside the presence of the jury, rule upon whether a pre-trial identification by the same eyewitness is violative of due process or the right to counsel. If a violation is found, the court should then decide whether the in-court identification is still admissible because it has an idependant (sic) source; indeed, it would appear in the interest of expeditious judicial administration for such a ruling to be made in any event. If the judge regards only the in-court identification as admissible, in the trial to the jury thereafter, the defense may, as a matter of trial tactics, decide to bring out the pre-trial confrontation itself, hoping that it can thus detract from the weight the jury might otherwise accord the in-court identification." It appears that the Wade and similar decisions are aimed at preventing the use of obviously unreliable identifications. Thus, where the facts make it evident that the witness has had a reasonable opportunity, at the time of the commission of the crime, to view the defendant whom he later identifies as the culprit, the evidence is generally considered to be sufficiently reliable to permit it to go to the jury on the basis that such

view constitutes an independent basis for identification. Such was the case here. The defendant was observed full face under a bright light from a distance of only 20 feet. The fact that the identifying witness did have an excellent opportunity to examine the defendant is made evident by the fact that he was able to give the police a sufficiently accurate description of the person he had observed so that the police were able to locate and identify him a short time later.

Defendant also challenges the sufficiency of the evidence of guilt. The evidence discloses that defendant was positively identified as a person caught in the commission of the offense charged. He was placed in the vicinity at the time by another witness and when arrested, within an hour after the offense, he had a fresh cut on his face which remains unexplained. There was sufficient evidence to justify submission of this case to the jury.

"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.

"This court will not interfere with a verdict of guilty which is based on conflicting evidence unless the evidence is so lacking in probative force that it is insufficient as a matter of law to support a finding of guilt beyond a reasonable doubt." State v. Sheldon, 179 Neb. 377, 138 N. W. 2d 428.

Another point raised by defendant is the sufficiency of the evidence on the question of intent to steal. It is true that the defendant was interrupted and frightened away before he had an opportunity to make any move directly indicating his intent. It has long been the rule in Nebraska that intent being ordinarily hidden within the mind must be determined from all the facts and circumstances in evidence. In People v. Stewart, 113 Cal. App. 2d 687, 248 P. 2d 768, the court held that a burglari-

ous intent could be reasonably and justifiably inferred from the unlawful and forcible entry alone. In Ex Parte Seyfried, 74 Idaho 467, 264 P. 2d 685, it was held that: "Where a dwelling house is broken and entered in the nighttime and no lawful motive or purpose is shown or appears, or any satisfactory or reasonable explanation given for such breaking and entering, the presumption arises that the breaking and entering were accomplished with the intent to commit larceny." In State v. Whitaker (Mo., 1955), 275 S. W. 2d 316, the court stated: "The intent with which certain acts are done may be found, and frequently can only be found, from the attendant circumstances and must ordinarily be inferred from the facts. * * * If a person breaks and enters a house intending to steal, he is not exonerated from the commission of burglary merely because he did not steal anything or because he was frightened away before he carried out his intent." In State v. Woodruff, 208 Iowa 236, 225 N. W. 254, it was held that evidence showing an unexplained breaking and entering of a dwelling in the nighttime by the defendant was sufficient to require submission to the jury of the question whether such breaking and entering was with intent to commit larceny. It appears in the present case that the evidence regarding intent was also sufficient to present a jury question.

Defendant also asserts that the court's instructions on intent and on the purpose for which evidence of defendant's prior conviction of a felony can be considered were erroneous and prejudicial. Suffice it to say that both instructions set out rules which are well established in this jurisdiction.

The judgment of the district court is affirmed.

AFFIRMED.

LLOYD CHAPPELL, APPELLEE, V. JOHN D. CARR, COUNTY SUPERINTENDENT OF SCHOOLS OF CHERRY COUNTY, NEBRASKA, APPELLANT.
174 N. W. 2d 208

Filed February 6, 1970. No. 37372.

1. **Schools and School Districts: Statutes.** It is the mandatory duty of the county superintendent where the conditions precedent in section 79-420, R. R. S. 1943, exist, unless a valid waiver has been given, to take action to dissolve the school district involved and to attach its territory to another district or districts.
2. ———: ———. Unless a county school district reorganization committee acts promptly on petitions presented to it under the provisions of section 79-402, R. R. S. 1943, or unless on its failure to act interested parties within a reasonable time institute proceedings to force action, the reorganization committee will lose jurisdiction to act on those petitions.

Appeal from the district court for Cherry County: ROBERT R. MORAN, Judge. Reversed and remanded with directions.

Michael V. Smith, for appellant.

Beatty, Morgan & Vyhnalek and John C. Coupland, for appellee.

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

SPENCER, J.

This is an appeal from the entry of a summary judgment setting aside an order of the county superintendent dissolving a Class I school district and attaching all its territory to a Class II school district.

On June 13, 1966, petitions signed by more than 60 percent of the legal voters of school district No. 34 and school district No. 55, both Class I districts in Cherry County, were filed with the Cherry County Committee for School District Reorganization. These petitions sought the dissolution of school district No. 34 and the attachment of its territory to school district No. 55. The

members of the county committee received notice of a meeting of the committee for 9 o'clock a.m. on July 16, 1966, at the office of Marie G. Perrett, county superintendent of Cherry County, to consider the petitions. Only one member of the reorganization committee appeared at the time and place stated. The hearing was then continued until August 23, 1966, at 2 p. m., for lack of a quorum. When the county committee failed to meet on that day, the county superintendent announced that she was dissolving school district No. 34 and attaching a part of the territory to school district No. 55, and other portions to school district No. 70. A written order was made to that effect. Appellee herein, a legal voter, taxpayer, and owner of property in school district No. 34, appealed that order to the district court. The county superintendent filed a demurrer to his petition. This was overruled February 20, 1967. The county superintendent elected to stand on her demurrer, and the district court entered judgment for the plaintiff, appellee herein, holding the order of the county superintendent dated September 10, 1966, null and void. No appeal was taken in that action.

No action of any nature other than recited above was ever taken on the petitions filed with the county reorganization committee. On May 30, 1968, the appellant, John D. Carr, who succeeded Marie G. Perrett as county superintendent of schools of Cherry County, caused a notice to be published in the Valentine Newspaper, a legal newspaper published weekly at Valentine, Nebraska, of a hearing on the dissolution of school district No. 34. On August 12, 1968, appellant determined that there had been no school in school district No. 34 for 6 years, and that the district for more than 155 days had not provided school for children by contract with other districts, and entered an order dissolving school district No. 34 and attaching all of the territory of said school district to school district No. 70, a Class II school district of Cherry County. Appellee then filed the pres-

ent action to set aside the order of the county superintendent. He alleged that the county superintendent was without power to dissolve the district because petitions were still pending before the county committee for school district reorganization, and for the further reason that the prior judgment was res judicata on the parties and the issues involved therein. After the filing of an answer and reply, appellee filed a motion for a summary judgment. The trial court sustained this motion and determined that the doctrine of res judicata applied.

Section 79-402, R. R. S. 1943, under which the petitions were filed in 1966, provides, so far as material herein, as follows: "Petitions proposing to create a new school district or to change the boundary lines of existing school districts shall, when signed by at least sixty per cent of the legal voters in each district affected, be submitted to the county committee for school district reorganization, established under sections 79-426.01 and 79-426.05. The county committee shall, within forty days, review and approve or disapprove such proposal and submit it to the state committee for school district reorganization. The state committee shall, within forty days, review and approve or disapprove the proposal and return said proposal, with any recommendations deemed advisable, to the county committee. The county committee shall, within fifteen days of receipt of the returned proposal, consider the action of the state committee, and determine whether to give final approval or disapproval to the proposal. The county committee shall also, within fifteen days of receipt of the returned proposal, advertise and hold a public hearing at which the recommendations and action of the state and county committees shall be presented to the legal voters in attendance. The county committee shall hold the petitions for ten days following the hearing, at the end of which time the committee shall file the petitions with the county superintendent. The county superintendent shall, within fifteen days, advertise and hold a hearing to de-

termine the validity and sufficiency of the petitions. Upon determination, as a result of the hearing, that valid signatures of at least sixty per cent of the qualified legal voters of each district are contained in the respective petitions, or at least sixty-five per cent if the proposal has been disapproved by both the state and county committees, the county superintendent shall proceed to effect the changes in district boundary lines as set forth in the petitions; * * *."

The county superintendent proceeded herein under section 79-420, R. R. S. 1943, which, so far as material herein, is as follows: "When, for a period of one school term, a district (1) shall have less than three legal voters residing therein, or (2) shall either fail to maintain a public elementary school within the district, in which are enrolled and in regular attendance for at least one hundred fifty-five days one or more pupils of school age residing in the district or does not contract for the tuition and transportation of pupils of such district with another district or districts and have pupils attending school regularly for at least one hundred fifty-five days under such contract or contracts, it shall be the duty of the county superintendent of the county in which such district lies to dissolve such district and attach the territory of such district to one or more neighboring school districts; Provided, that before dissolving a district under the provisions of this section, the county superintendent shall fix a time for a hearing and shall notify each legal resident of the district at least fifteen days before such hearing; * * *."

At the time the appellant entered his order, no school had been maintained for more than 6 years in school district No. 34, nor had any contract for instruction been made with any other district for more than 2 years, so that both of the provisions of subsection (2) of section 79-420, R. R. S. 1943, were applicable. The statute provides for a waiver of requirements in certain instances by the State Board of Education. They are

not pertinent herein. The statute reads: "* * * it shall be the duty of the county superintendent of the county in which such district lies to dissolve such district and attach the territory of such district to one or more neighboring school districts; * * *." This court has interpreted this language to be mandatory unless a valid waiver has been given. See Bierman v. Campbell, 175 Neb. 877, 124 N. W. 2d 918. Appellee does not seriously dispute this point but argues that inasmuch as petitions were filed under section 79-402, R. R. S. 1943, the county superintendent is precluded from acting. There is no merit to this contention.

There is no conflict between the two statutes. Section 79-402, R. R. S. 1943, is a general statute providing a method by which new school districts may be created or the boundaries of all existing school districts may be changed. Section 79-420, R. R. S. 1943, is limited to depopulated or inactive districts. The former requires petitions signed by a certain percentage of the legal voters of the affected districts, whereas for the latter, there is a much more expeditious procedure. If the conditions precedent enumerated in the statute exist, it is the mandatory duty of the county superintendent to take action unless such action has been specifically waived by the State Board of Education.

In the instant case, petitions were filed with the Cherry County School District Reorganization Committee in 1966. Although the committee was required to act within 40 days, it failed to do so. While it would have been possible for any interested party to have forced action through legal proceedings, no one attempted to do so. The failure of the county committee to act cannot be attributed to any dereliction on the part of the county superintendent, and no such allegation has been made herein. The Cherry County School Reorganization Committee, for reasons not apparent in this record, chose to ignore its duty and no one saw fit to force the issue even after the judgment decreeing the nullity of the

1966 order of the county superintendent. It is readily understandable why property owners who did not have children of school age would not be interested in forcing the reorganization committee to act. So long as the situation remained as it was, no school taxes were being levied on property in school district No. 34. If dissolution of the district had been proceeding expeditiously under the petition procedure, there would have been no need for action by the county superintendent. However, that was not the situation, and it became the duty of the county suprintendent to take the action outlined in section 79-420, R. R. S. 1943, to provide regular school facilities for children of school age in school district No. 34. The conditions precedent existed, and the county superintendent had no alternative but to proceed with the action of dissolution and attachment.

Even if the county committee retained jurisdiction under the petitions beyond the time specified for its mandatory action, and it would in certain instances where it was attempting to follow the statute, its failure to act, as well as the failure of any interested person to force action for more than 2 years, certainly divested it of any such jurisdiction. Unless a county school district reorganization committee acts promptly on petitions presented to it under the provisions of section 79-402, R. R. S. 1943, or unless on its failure to act interested parties within a reasonable time institute proceedings to force action, the reorganization committee will lose jurisdiction to act on those petitions. Assuming, which we do not, that the judgment sustaining the demurrer in the first action was correct, it clearly cannot be res judicata under the facts in this case.

For the reasons given, the judgment herein is reversed and the cause remanded with directions to dismiss appellee's petition on appeal.

REVERSED AND REMANDED WITH DIRECTIONS.

WILLIAM S. LAWSON, APPELLANT, V. VIRGINIA LAWSON, APPELLEE.

174 N. W. 2d 202

Filed February 6, 1970. No. 37460.

1. **Divorce: Statutes.** Section 42-340, R. R. S. 1943, provides that a divorce decree shall not become final or operative until 6 months after trial and decision except for purposes of appeal.
2. **Divorce: Pleadings.** Either party to a divorce action may within 6 months of the date of the entry of the decree make application to have the decree set aside or modified.
3. ———: ———. The automatic finality of a divorce decree at the end of 6 months is stayed where proceedings for vacation or modification are then pending.
4. **Divorce: Judgments.** Where parties resume marital relations within the 6-month period, the decree may be set aside.
5. ———: ———. One of the important purposes of the law requiring 6 months to elapse between the entry of a decree of divorce, which in this state is in the nature of an interlocutory order, and before the same becomes final, is to give the parties a chance to effect a reconciliation which the law favors.
6. ———: ———. A consent decree is usually treated as an agreement between the parties. It is accorded greater force than ordinary judgments and ordinarily will not be modified over objection of one of the parties.

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

George O. Kanouff, for appellant.

Shrout, Lindquist, Caporale, Brodkey & Nestle, for appellee.

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

SPENCER, J.

This is an appeal from the denial of an application to set aside and vacate a "modified" divorce decree.

Plaintiff secured a decree of divorce herein October 19, 1960. Defendant's cross-petition was dismissed because defendant had failed to introduce evidence in support thereof. Plaintiff, in addition to child support

of $25 per week, was ordered to pay defendant the sum of $6,100 alimony. This alimony was payable at the rate of $50 per month, with the proviso that the monthly payments should cease upon the date of the remarriage of the defendant. The decree provided that except for purposes of appeal it would not be final or operative until 6 months from the date thereof.

On April 11, 1961, within the 6-month period, the defendant filed a motion to set aside the decree because the parties had lived together as man and wife since the granting of the decree as well as after the filing of the petition and prior to the granting of the decree.

On the 14th day of September 1961, the plaintiff's attorney had a new decree, which was designated as a "modified" decree, entered in the case. This decree had been approved as to form by defendant's attorney. The "modified" decree was identical in every respect with the previous decree except that the proviso terminating alimony payments upon the date of the remarriage of the defendant was eliminated. Both parties have remarried. Defendant remarried January 18, 1965, considerably before the alimony payments at $50 per month would total $6,100.

Plaintiff, whose attorney had the "modified" decree entered, filed this action by other counsel February 20, 1969, when defendant sought to collect the balance due by garnishment process. He seeks to set aside and vacate that decree and to declare the decree of October 19, 1960, to be in full force and effect.

Plaintiff raises two issues herein: "1. Whether the Court had a legal right to modify the original Decree as to alimony provisions after said original decree became final. 2. Whether the Court when the only legal instrument before it was a motion to set aside a decree on the grounds the parties had lived together as husband and wife after the filing of the original Petition and after the entry of the decree can modify said decree by

changing the alimony provisions after the original decree became final."

The difficulty with both plaintiff's issues is that the original decree never became final. Plaintiff ignores section 42-340, R. R. S. 1943, which provides that a divorce decree shall not become final or operative until 6 months after trial and decision, except for purposes of appeal. By this section, either party to a divorce action may within 6 months of the date of the entry of the decree make application to have the decree set aside or modified. Hubbard v. Hubbard, 176 Neb. 768, 127 N. W. 2d 503.

The automatic finality of a divorce decree at the end of 6 months is stayed where proceedings for vacation or modification are then pending. Dudgeon v. Dudgeon, 142 Neb. 82, 5 N. W. 2d 133.

Defendant in her application alleged that the parties cohabited after the filing of the petition and also after the entry of the decree. Where parties resume marital relations within the 6-month period, the decree may be set aside. Shinn v. Shinn, 148 Neb. 832, 29 N. W. 2d 629, 174 A. L. R. 510. In that case, the parties had resumed marital relations within the 6-month period, but no action was taken to set aside the decree, and it became final. This court set aside the decree on the grounds of extrinsic fraud. That case quoted with approval from Cary v. Cary, 144 App. Div. 846, 129 N. Y. S. 444, as follows: " 'If the fact of the voluntary cohabitation had been known to the court at the time of the entry of the final judgment, the final judgment would undoubtedly have been denied.' "

One of the important purposes of the law requiring 6 months to elapse between the entry of a decree of divorce, which in this state is in the nature of an interlocutory order, and before the same becomes final, is to give the parties a chance to effect a reconciliation which the law favors. Shinn v. Shinn, 148 Neb. 832, 29 N. W. 2d 629, 174 A. L. R. 510.

At the time plaintiff's counsel appeared before the district court on September 14, 1961, and procured the entry of what is described as a "modified decree," the divorce was not final because of the pending motion. Plaintiff argues the motion has never been heard. If that were true, the divorce would not be final. The new decree was presented to the court with the representation that both parties, through their respective counsel, had approved and consented to its entry. The only change it made was to modify the original decree so as to delete the provision that alimony payments should cease upon defendant's remarriage. The court had the power to modify the previous decree. The presentation of this new decree to the court by plaintiff's attorney, approved by defendant's attorney, was a representation that the parties had agreed on a new property settlement and by consent the decree was being submitted for approval. The court was justified in presuming the full agreement of the parties, and approved the settlement by signing the tendered decree. This decree became final 6 months thereafter. See Royal Trust Co. v. Exchange Bank of Cortland, 55 Neb. 663, 76 N. W. 425. It was to every intent and purpose a consent decree.

In Detter v. Erpelding, 176 Neb. 600, 126 N. W. 2d 827, we held: "A consent decree is usually treated as an agreement between the parties. It is accorded greater force than ordinary judgments and ordinarily will not be modified over objection of one of the parties." See, also, Kanouff v. Norton, 160 Neb. 593, 71 N. W. 2d 89.

Plaintiff argues that the original decree provides for an unqualified allowance of alimony in gross. As originally drawn it did not so provide. Even if it had, that fact in the proper case would not divest the district court of the power to modify or vacate its decree, as provided by section 42-340, R. R. S. 1943.

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

AFFIRMED.

PLATTE VALLEY BANK OF NORTH BEND, A CORPORATION, APPELLEE, V. NORMAN P. KRACL, APPELLANT.
174 N. W. 2d 724

Filed February 17, 1970. No. 37266.

1. **Marshaling Assets: Mortgages.** The equitable doctrine of marshaling assets rests upon the basic principle that a senior creditor who has two funds from which he may satisfy his debt may not defeat another junior creditor who may resort to only one of these assets.
2. **Mortgages.** Upon default a secured party may enforce his security interest by any available judicial procedure.
3. **Statutes: Automobiles: Liens.** Section 60-110, R. R. S. 1943, of the Nebraska motor vehicle code, establishes a procedure by which a lienor can secure his interest in a motor vehicle, and if such procedure is followed, then the lienor's interest shall take priority, and on default, the secured creditor is given an absolute right to the immediate possession of the motor vehicle.
4. **Mortgages: Automobiles.** Under article 9 of the Nebraska Uniform Commercial Code, a secured creditor under a mortgage of a motor vehicle is given, on default, a statutory right to the immediate possession of the motor vehicle.
5. **Marshaling Assets: Equity.** The doctrine of marshaling assets is not founded upon the law of contract or liens but rather the doctrine is based in equity and is designed to promote fair dealing and justice.
6. **Marshaling Assets: Liens.** The rule as to marshaling assets has its proper exceptions and limitations, and where, by reason of the circumstances in a particular case, it would be inequitable and work an injustice to require one of two creditors having a lien on two securities to first resort to the one on which the other creditor has no lien, a court of equity will not enforce the doctrine of marshaling assets.
7. ———: ———. Generally the doctrine of marshaling assets will not be applied if it will hinder or impose hardships on the paramount creditor, or inconvenience him in the collection of his debt, or deprive him of his rights under his contract.
8. **Marshaling Assets.** The doctrine of marshaling assets is not an absolute right of a litigant and generally may not be invoked or applied so as to defeat statutory rights.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed in part, and in part reversed and remanded with directions.

John L. Cutright, for appellant.

Kerrigan, Line & Martin, for appellee.

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

WHITE, C. J.

This is an action in replevin filed by the plaintiff bank to recover a pick-up truck upon which it held first and second liens. The question presented is whether, on default, the plaintiff as a security grantor is entitled to possession of the motor vehicle as against a subsequent levying creditor, without first proceeding against other property covered by the plaintiff bank's original security agreements. The district court in its judgment held that plaintiff was entitled to possession of the vehicle, but that before plaintiff could dispose of the vehicle it should proceed against other property covered in another security agreement. We reverse the judgment and remand this portion of the cause to the district court.

The facts have been stipulated as follows: On August 2, 1966, and August 3, 1966, one Pedro Leal executed and delivered to plaintiff, a Nebraska corporation, for valuable consideration separate financing statements and security agreements which were filed for record on August 3 and 8, 1966. These documents constituted first and second liens on a Chevrolet pick-up truck. On or about February 15, 1968, defendant, in this case, recovered a judgment on a promissory note against the bank's debtor, and in this action had an execution issued and levied on the pick-up truck. At the execution sale on March 19, 1968, plaintiff's cashier announced to all persons present that plaintiff had two liens filed and shown on the face of the certificate of title to the vehicle being sold in excess of plaintiff's believed value of that vehicle. This announcement was made twice, defendant's attorney hearing the announcement both times. Plaintiff made no demand for possession and no court

action was commenced prior to the filing of this action for replevin.

Plaintiff's debtor defaulted, and on May 1, 1968, plaintiff notified defendant in writing of its intention to exercise its right, under the security agreements and financing statements, specifically to take possession of the motor vehicle in question. Plaintiff has other security in addition to the truck involved in this proceeding, and defendant refused to surrender possession of the vehicle.

It would appear there is no question but that the plaintiff bank has an enforceable lien and that it is superior to that of the defendant judgment creditor. However, it is defendant's contention that the equitable doctrine of marshaling assets may or can be applied in a replevin action when the senior lien holder has additional security available to which a junior lien holder has no access. To this contention there are three related answers: (1) The sole issue ordinarily litigated in a replevin action is the right to the immediate possession of the property. Ordinarily questions of title, or the total adjustment of the rights of the parties with relation to the whole transaction, abide disposition in other jurisdictional forums; (2) the motor vehicle lien statute, section 60-110, R. R. S. 1943, establishes the plaintiff's right to priority in this case, giving him an absolute statutory right to the immediate possession of the property in question; and (3) under article 9 of the Nebraska Uniform Commercial Code, the plaintiff has an absolute right to priority, again giving him a statutory right to the immediate possession of the property.

The right to possession here is founded upon a specific motor vehicle chattel mortgage covering one vehicle only, a 1966 Chevrolet, secured by an installment loan in the amount of $2,485.44 dated August 3, 1966. This mortgage was signed and executed on August 3, 1966. This instrument provides, inter alia, "and upon default Secured Party shall have the *immediate right to the possession* of the Collateral." Our Nebraska motor vehicle

law, Chapter 60, R. R. S. 1943, establishes a special law governing title, the priority of liens, and the right to possession of motor vehicles. Section 60-110, R. R. S. 1943, provides in part that: "Any mortgage, conveyance intended to operate as a mortgage, trust receipt, conditional sales contract, or other similar instrument covering a *motor vehicle* * * * if a notation * * * (of such instrument) has been made by the county clerk on the face * * * (of the certificate of title), shall be valid as against the creditors of the mortgagor, whether armed with process or not, and subsequent purchasers, mortgagees and other lienholders or claimants *but otherwise shall not be valid against them.* All liens, mortgages and encumbrances, noted upon a certificate of title, *shall* take priority according to the order of time in which the same are noted thereon by the county clerk." (Emphasis supplied.)

The statutory history reveals a legislative desire to separately classify and establish a procedure for the enforcement of liens on motor vehicles. It is clear in the modern context that problems of increased mobility, accelerated depreciation, difficulty of identification, simplicity, celerity, and certainty in credit policy, and other considerations have resulted in a legislative determination to clear up the previous uncertainties and confusion in the law by the enactment of a comprehensive statute. The statutory scheme creates a simple method that will accomplish a general public interest in maintaining simplicity and celerity in the determination of the right to the uninterrupted possession and use of motor vehicles and the facilitation of the operation of the credit structure supporting motor vehicle financing. The statute clearly establishes a procedure by which a lienor can secure his interest in the vehicle, and unless he does so, his lien shall not be enforceable against subsequent creditors of the mortgagor. But if such procedure is followed, however, then the lienor's interest shall take priority. It would appear without question that the

plaintiff, under the clear provisions of the statute, has a valid and enforceable prior lien with the immediate right to possession. It appears further that the declared statutory policy of this state is to enforce the clear, unambiguous, and specifically recited agreement between the parties present in this transaction.

There is another basis upon which defendant's argument must be rejected. Article 9 of the Nebraska Uniform Commercial Code explicitly governs secured transactions. The debtor in this case has defaulted, and upon default a secured party may enforce his security interest by any available judicial procedure. § 9-501, U. C. C. On default a secured party has the right to take possession of the collateral. § 9-503, U. C. C. These sections clearly show that an action in replevin when the debtor has defaulted is proper, and allow such a procedure if plaintiff is in fact a "secured party."

Under section 9-105 (1) (i), U. C. C., a secured party is "a lender * * * in whose favor there is a security interest, * * *." Security interest as defined in section 1-201 (37), U. C. C., is an interest in property "which secures payment or performance of an obligation." Clearly, the bank qualifies as a secured party with a security interest in the property here in question. The bank's interest is perfected under section 9-303 (1), U. C. C., since financing statements were filed pursuant to section 9-302 (1), U. C. C., and the interest has attached under section 9-204 (1), U. C. C. Since the bank filed first, and perfected first, then clearly it has priority under section 9-312, U. C. C. Priority under this section, and the right to take possession of the collateral under section 9-503, U. C. C., establishes a *statutory* right which would be defeated if plaintiff were forced to marshal assets.

We examine the doctrine of marshaling assets as it applies to the particular facts in this case. The district court's order did not require a resort to other security in the *same* agreement, but rather required a resort by

the plaintiff to security covered in an independently executed instrument on other personal property and signed and executed on a different date. This mortgage, in the sum of $1,100, covered two 1956 and 1957 vehicles together with some trailer equipment and 16 pigs. This petition was filed on May 8, 1968, at which time the equipment would be 11 and 12 years old, respectively, and the pigs about 2 years of age.

The signed and executed agreement between the parties concerning which there is no dispute, reads in part as follows: "The taking of this security agreement shall not waive or impair any other security said Secured Party may have or hereafter acquire for the payment of the above indebtedness, nor shall the taking of any such additional security waive or impair this security agreement; but said Secured Party may resort to any security it may have *in the order it may deem proper,* and notwithstanding any collateral security, Secured Party shall retain the rights of setoff against Debtor." (Emphasis supplied.) Also the agreement contains the heretofore-recited provision for immediate possession upon default. The equitable doctrine of marshaling assets rests upon the basic principle that a senior creditor who has two funds from which he may satisfy his debt may not defeat another junior creditor who may resort only to one of these assets. Anthes v. Schroeder, 68 Neb. 370, 94 N. W. 611; Meyer v. United States, 375 U. S. 233, 84 S. Ct. 318, 11 L. Ed. 2d 293. It is not founded upon the law of contract or liens but rather the doctrine is based in equity and is designed to promote fair dealing and justice.

But the rule is well settled in equity that the doctrine of marshaling assets is not an absolute right, and cannot be invoked or applied so as to defeat *statutory rights.* 55 C. J. S., Marshaling Assets and Securities, § 1b, p. 958. Following the principle announced in this general rule our court has held that the rule as to marshaling assets has its proper exceptions and limitations, and

where, by reason of the circumstances in a particular case, it would be inequitable and work an injustice to require one of two creditors having a lien on two securities to first resort to the one on which the other creditor has no lien, a court of equity will not enforce the doctrine of marshaling assets. Anthes v. Schroeder, *supra*. See, also, 55 C. J. S., Marshaling Assets and Securities, §§ 1 to 4, pp. 956 to 965.

Securities will not be marshaled to the injury of one over whom the party asking the marshaling has no superior equity. 55 C. J. S., Marshaling Assets and Securities, § 1b, p. 961. We further note that the court's order in this case requiring resort to the property alienated in the other security agreement is, in effect, an order for a foreclosure of the security agreements in order of their alienation. This result cannot be reached under the doctrine of marshaling assets because it must be based upon a contractual agreement, whereas the agreement of the parties in the present case is directly to the contrary. Nor is there any allegation, proof, or finding by the court that the value of the chattels secured in the other mortgage sought to be marshaled is substantially or wholly sufficient to satisfy the paramount lien of the mortgage and issue in this action. This is fatal. 55 C. J. S., Marshaling Assets and Securities, § 1b, p. 961; Becker Roofing Co. v. Farmers' & Merchants' Bank of Piedmont, 223 Ala. 132, 134 So. 635; Bradford Realty Corporation v. Beetz, 108 Conn. 26, 142 A. 395; Bewley Mills v. First Nat. Bank (Tex. Civ. App.), 110 S. W. 2d 201; Meyer v. United States, *supra*. It should not be applied where the parties themselves have by contract fully defined their rights with reference to the priority of the marshaling of their assets. 55 C. J. S., Marshaling Assets and Securities, § 1b, p. 961; Boykin v. First State Bank of Comanche (Tex. Civ. App.), 61 S. W. 2d 126.

The exceptions to the application of the doctrine of marshaling assets, from a review of all of the cases, has been comprehensively stated in 55 C. J. S., Marshaling

Assets and Securities, § 4, p. 963, as follows: "Such relief will not be given if it will hinder or impose hardships on the paramount creditor, or *inconvenience him in the collection of his debt, or deprive him of his rights under his contract,* by displacing or impairing a prior acquired lien or contract right; nor will it be given on any other terms than giving him complete satisfaction. The doctrine is never enforced where it will operate to suspend or put in peril the claim of the paramount creditor, or cause him risk of loss, or where the fund to be resorted to is one which may involve such creditor in litigation, *especially if final satisfaction is somewhat uncertain,* or where the effect of applying the doctrine would be to *compel him to proceed by an independent action,* such as one for the foreclosure of a mortgage, since that would place an additional burden on him." (Emphasis supplied.)

The application of the above principles to the facts in this case is obvious. There is no proof of the value of the chattels in the other mortgage sought to be marshaled. It would appear reasonable that it was far short of satisfying the obligations of either mortgage conferring an aggregate total indebtedness with interest of something over $4,000. It would be contrary to the express agreement of the parties. It would clearly delay the paramount creditor and require him to resort to conjectural and speculative independent legal action. The identification and impounding of the pigs involved in the first mortgage is speculative. Plaintiff would have the additional burden of advancing the costs, examining and evaluating the burden of an independent legal action, and the possible appeals and delay involved. Such a result if applied generally would adversely affect the extension of credit on motor vehicles and perhaps materially impair the extension of credit by a bank or loan company on property other than motor vehicles to the debtor. It would extend the period of litigation and possible controversy. The statute on governing the extension of

credit on motor vehicles was enacted to simplify and clarify situations of this type. Here the parties themselves have done all they can, by an explicit provision in the contract, to enforce the policy of the statute and to forbid the delay and uncertainty of a double and delayed foreclosure procedure and the right to possession. Such a result flies in the face of the express provisions of the contract and flies in the face of the fundamental rule that a judgment creditor cannot become invested with a right that his judgment debtor himself did not have. Finally, it is apparent that the defendant in this action has not even remotely met the burden of proof in order to affirmatively demonstrate that he is entitled to the equitable benefits of the doctrine of marshaling assets.

For these reasons it is clear that the plaintiff has a priority interest in the property in question and is entitled to the immediate right to possession; and that it is not required to marshal assets in the other security interest in this replevin action. This is particularly true in this case because the defendant judgment creditor prays only for dismissal of this replevin action in his answer.

For the reasons given the cross-appeal of the plaintiff is sustained herein, and that part of the judgment decreeing that the plaintiff was entitled to the possession of the vehicle is affirmed, and the portion of the judgment decreeing that the plaintiff before disposing of the vehicle should proceed against the other property of the judgment debtor is reversed. The judgment of the district court is affirmed in part and reversed in part and the cause remanded with directions to enter a judgment consistent with this opinion.

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

SPENCER, J., concurs in the result.

ARTHUR J. ABBOTT, APPELLANT, V. ETHEL S. ABBOTT, APPELLEE.

174 N. W. 2d 335

Filed February 17, 1970. No. 37321.

1. **Pleadings: Limitations of Actions.** A cause of action pleaded by amendment ordinarily relates back to the original pleading for limitation purposes, provided that claimant seeks recovery on the same general set of facts.
2. **Fraud.** The maker of a fraudulent misrepresentation is not liable to one who does not rely upon its truth but upon the expectation that the maker will be held liable in damages for its falsity.
3. **Fraud: Evidence.** The parol evidence rule does not prevent reception or consideration of evidence to prove promissory fraud.
4. **Wills.** Settlement of a will contest, unlike a composition among creditors, does not rest upon the assumption of equality among various claimants and heirs.

Appeal from the district court for Grant County: ROBERT R. MORAN, Judge. Reversed and remanded.

Wright, Simmons & Hancock, for appellant.

Finlayson, McKie & Fisk and Lester A. Danielson, for appellee.

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

SMITH, J.

Arthur Abbott sued his stepmother, Ethel, to recover damages for promissory fraud and undue influence. He alleged that she thus had caused him to settle objections by his sisters to probate of their father's will. The district court rendered summary judgment for Ethel, and Arthur has appealed. Questions concern (1) relation back of amended pleadings for limitation purposes, (2) justifiable reliance on a promise made with intent not to perform it, (3) applicability of the parol evidence rule to promissory fraud, and (4) legality of bargain.

In the posture of the case parts of the record favorable to Ethel are excluded from the following summary.

Besides Ethel and Arthur, survivors of Christopher J. Abbott, deceased, were Le Roy Abbott, brother, and Glaideth Frank and Phyllis Drummond, daughters. Christopher's will gave one-half of his estate to Ethel. Le Roy, Arthur, and Glaideth were named specific legatees. Arthur, Glaideth, and Phyllis were named beneficiaries of the remainder in equal shares. The will was subscribed by four witnesses: Le Roy, Ethel, Arthur, and Miles Lee, a lawyer and not a beneficiary.

Glaideth and Phyllis were threatening to contest probate of the will on grounds of defective attestation. Arthur's counsel argues that the threat was telling: ". . . a serious problem presented itself to Mrs. Abbott. If there was a will contest, she would have to testify. If she testified (regardless of the result of the will contest) she would receive one-fourth instead of one-half of the estate (a difference of $1,250,000.00). If, however, there was no contest, then Mrs. Abbott need not testify and the will could be proved by Miles Lee, alone, and Mrs. Abbott would receive one-half of the estate."

On March 29, 1954, Arthur without an attorney attended a conference of family members and attorneys in Omaha. There he volunteered to share equally with Glaideth and Phyllis. Ethel reacted by orally promising to pay him an amount out of her share upon distribution of the estate. The amount was fixed at the difference in value between the property covered in the will provisions for Arthur and the property distributed to him from the estate. Ethel attached conditions that he agree to share equally with his sisters and that the sisters agree not to contest probate of the will. On May 6 and 10 Ethel again orally promised payment. Conditions were that Arthur sign the proposed written settlement, that he appear as a subscribing witness to the will in county court, and that he obtain written approval of the written settlement from his attorney, Miles Lee.

The will was admitted to probate in accordance with the settlement, dated May 6, 1954, but signed by Arthur

on May 10. The settlement in the main saved the testamentary gift of one-half the estate to Ethel. By its terms the property specifically bequeathed to Arthur and Glaideth, and $128,816.70 which Ethel paid because of a ranch that Phyllis for convenience had conveyed to Christopher, went equally to Arthur, Glaideth, and Phyllis.

Arthur received $303,415.25 less than he would have received under the will without settlement. There is a suggestion that he would have received less under the will than under the statutes of descent and distribution.

As counsel for Arthur, Miles in writing approved the family settlement. Arthur had retained him after the Omaha conference and after a suggestion by Ethel to Miles respecting the retainer. Miles had prepared a letter addressed to himself. The letter, signed by Arthur on May 10, date of the probate hearing, reads:

"I have signed the agreement . . . without your consent. I fully understand that it is a large financial sacrifice . . . I know that you have strenuously advised me against signing such a contract. However, after talking with Ethel and Le Roy Abbott, I felt determined not to go back on the voluntary offer I made at the Omaha conference . . . Against your counsel . . ., I have directed you as my attorney to approve the stipulation settling the estate controversies and admitting my father's will to probate."

Miles explained why he had insisted upon the letter from Arthur: ". . . Arthur was rather changeable and also inexperienced in business matters and he was in close relationship with Ethel . . . I knew of the influence Ethel Abbott may have over him and I wanted that (letter) for my own protection . . . Ethel . . . very largely dominated all business matters that affected Arthur and . . . the estate."

Prior to the end of May 1954, Miles was discharged

as attorney for Arthur and for Le Roy, Ethel, and Arthur as personal representatives of the estate.

Warren Johnson, attorney for Glaideth and Phyllis, had conferred on April 6, 1954, with Barton Kuhns, attorney for Ethel. Warren expressed doubt whether his clients would agree to settle at the expense of Arthur but not of Ethel unless Arthur should receive additional property. Barton stated that such an agreement must never be in writing. Warren departed with the impression from Barton that the settlement would not cause Arthur substantial loss. Glaideth, Phyllis, and their attorneys on May 10, 1954, did not otherwise know of oral promises by Ethel to Arthur.

Warren, Glaideth, and Phyllis made affidavits that the alleged oral promises had not resulted in misrepresentations to affiants. The settlement had been fair to the sisters. They did not consider themselves entitled to any part of what Ethel may have promised Arthur.

Arthur commenced action on his original petition on December 26, 1963. The petition and the first amended petition alleged the will, the family settlement, the oral promises by Ethel, acceptance and performance by Arthur, and nonperformance by Ethel. There was no allegation of fraud or undue influence. On January 4, 1965, more than 4 years after distribution of the estate on February 9, 1960, Arthur filed a second amended petition. It introduced promissory fraud and undue influence.

Prior opinions concerning the statute of limitations contain these rules: Commencement of action on the original petition may stop the running of the statute, although the petition fails to state a cause of action. Merrill v. Wright, 54 Neb. 517, 74 N. W. 955 (1898). One test is whether identity of the cause of actions is preserved. May Plumbing Co. v. Shaver, 182 Neb. 251, 153 N. W. 2d 911 (1967); J. R. Watkins Co. v. Wiley, 182 Neb. 242, 153 N. W. 2d 871 (1967). If the cause of action in the amendment is entirely independent, the

statute runs against it until filing of the amendment. Independence does not exist when the amendment depends entirely upon different reasons for holding defendant responsible, although the alleged injury is the same. Blair v. Klein, 176 Neb. 245, 125 N. W. 2d 669 (1964).

Our rules are objectionable in the best modern view of desirability of adjudications on the merits. We therefore reformulate the general rule: A cause of action pleaded by amendment ordinarily relates back to the original pleading provided that claimant seeks recovery on the same general set of facts. See, Wilson v. Bittick, 63 Cal. 2d 30, 45 Cal. Rptr. 31, 403 P. 2d 159 (1965); 1A Barron & Holtzoff, Federal Practice and Procedure, § 448, p. 753 (1960); Clark on Code Pleading, § 118, p. 729 (2d Ed., 1947); 3 Moore's Federal Practice, §§ 15.05 and 15.15 (3), pp. 833 and 1025 (2d Ed., 1968). Commencement of the action on Arthur's original petition stopped the running of the statute against the cause of action in the second amended petition.

The maker of a fraudulent misrepresentation is not liable to one who does not rely upon its truth but upon the expectation that the maker will be held liable in damages for its falsity. Restatement, Torts, § 548, p. 108. The record fails to establish that Ethel is entitled to judgment as a matter of law on this issue.

The parol evidence rule does not prevent reception or consideration of evidence to prove promissory fraud. See, Transportation Equipment Rentals, Inc. v. Mauk, 184 Neb. 309, 167 N. W. 2d 183 (1969); Chapin v. Noll, 118 Neb. 318, 224 N. W. 687 (1929); McCready v. Phillips, 56 Neb. 446, 76 N. W. 885 (1898). See, also, Sweet, "Promissory Fraud and the Parol Evidence Rule," 49 Cal. L. Rev. 877 (1961). A contrary indication in Security Savings Bank v. Rhodes, 107 Neb. 223, 185 N. W. 421, 20 A. L. R. 412 (1921), is disapproved.

Ethel argues illegality on the single ground that such a bargain would have defrauded Glaideth and Phyllis.

The argument is not persuasive. Glaideth and Phyllis on this record have not suffered wrongs that entitle Ethel to reap a benefit by insisting upon illegality. Settlement of a will contest, unlike a composition among creditors, does not rest upon the assumption of equality among various claimants and heirs. Callaghan v. Corbin, 255 N. Y. 401, 175 N. E. 109, 81 A. L. R. 1184 (1931).

The summary judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

WHITE, C. J., and CARTER and NEWTON, JJ., concurring in the result but dissenting in part.

We concur in the result reached in this case but dissent from that part of the majority opinion that purports to change and adopt a new rule in this state with reference to the running of the statute of limitations on an amended cause of action.

The general rule is that an amendment introducing a new cause of action does not relate back to the commencement of the action with respect to limitations but is the equivalent of a new suit, so that the statute of limitations continues to run until the time of the filing of the amendment. In all of the jurisdictions in this country passing upon the subject we can find no deviation from this statement of the general rule. The statement of the law above made is taken from 54 C. J. S., Limitations of Actions, § 281, p. 335. Several hundred cases are cited in support of this rule from almost all jurisdictions and the 1969 cumulative annual pocket part cites two full fine-printed columns of recent cases from 26 jurisdictions in support of this rule. In either the original text statement or in the recent cases no decisions are cited as being contrary to this general rule.

Our rule has always been the same. See, 54 C. J. S., Limitations of Actions, § 281, p. 336; Streight v. First Trust Co. of Omaha, 133 Neb. 340, 275 N. W. 278 (1937); Emel v. Standard Oil Co., 117 Neb. 418, 220 N. W. 685 (1928). More recently we have specifically affirmed

the rule. Tennyson v. Werthman, 167 Neb. 208, 92 N. W. 2d 559 (1958); Blair v. Klein, 176 Neb. 245, 125 N. W. 2d 669 (1964); Horn's Crane Service v. Prior, 182 Neb. 94, 152 N. W. 2d 421 (1967); May Plumbing Co. v. Shaver, 182 Neb. 251, 153 N. W. 2d 911 (1967); J. R. Watkins Co. v. Wiley, 182 Neb. 242, 153 N. W. 2d 871 (1967).

It is true that the authorities and the cases are diverse and vary in the application of this rule to a particular set of facts or a particular pleading situation. Nevertheless, the rule that we have and the undisputed general rule have furnished a specific guideline for the determination of cases.

We cannot accept the statement in the majority opinion that our time-honored rule, supported by the conclusive weight of authority, is objectionable "in the best modern view." Further, the overruling of all of our previous cases in this matter and the adoption of a new rule is accomplished without discussion or analysis. It is a flat and arbitrary statement of a new rule. Only one California case is cited in support thereof. In the interest of brevity we will not discuss or attempt to analyze this one case except to state that it does lend some support to the rule stated. This case cites only previous California decisions and a close reading of this case and its supporting California decisions leaves us in doubt that such rule is the law in California. We note that the annotator in Corpus Juris Secundum cited *supra* cites the same case as supporting the general rule.

We further point out that the purported new statement of the rule depending upon a "general set of facts" is so vague in nature that it would furnish virtually no guideline at all for use in application to particular cases. In a matter which is essentially procedure and where certainty and definiteness are desired, we feel that this is a step backward. It is so general that the pressure of equities in a particular case could easily lead this court and the lower courts to a vicarious and irrecon-

cilable determination of individual cases. Above all, in practice we feel that it would leave the practicing lawyer without a suitable guide.

The Legislature has established, by statute, our law on the statute of limitations. The accrual of a "cause of action" is the statutory and universal guideline. Our past interpretations of this specific statutory language have met no legislative changes or resistance, much less any overruling of our prior decisions.

For these reasons we dissent from that portion of the majority opinion which purports to change the part of the established law of the State of Nebraska without discussion and with only chimera of authority to support it. The result in this case should and could be reached under the established law and the application of the general rule.

STATE OF NEBRASKA, APPELLEE, V. EDWIN LEE, APPELLANT.
174 N. W. 2d 344

Filed February 17, 1970. No. 37345.

1. **Criminal Law: Trial.** The failure to bring a person charged with a criminal offense to trial, who has been held in jail pending trial, before the close of the second term of court following the filing of the charge is entitled to be discharged as a matter of right, pursuant to section 29-1202, R. R. S. 1943, except where the delay is caused by the defendant.
2. ———: ———. Whether or not delay within the maximum limits fixed by the Legislature entitles the defendant to a discharge, where the defendant has not contributed to the delay, is dependent on whether or not the time was fair and reasonable in the particular case.
3. ———: ———. What is a fair and reasonable time in each particular case is always in the discretion of the court. Except for an abuse of discretion, the order of the trial court denying a motion to discharge the defendant for unreasonable delay will not be disturbed on appeal.
4. ———: ———. The right of accused to discharge for failure to receive a speedy trial is a personal right which may be waived and it ordinarily is waived if accused fails to assert

his right by making a demand for trial, or by failing to make some effort to secure a speedy trial.

5. ———: ———. Where there is no evidence of prejudice, or that the delay was caused by the prosecution, or that it was willful by court officials, or that a request or demand was made for a speedier trial by the defendant, the trial court does not abuse its discretion in denying a discharge.

Appeal from the district court for Thayer County: WILLIAM F. COLWELL, Judge. Affirmed as modified.

Orville L. Coady of Baldwin & Coady, 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 charged in the district court for Thayer County with breaking and entering an automobile with intent to commit larceny and with breaking and entering a gasoline service station building on July 7, 1968, with intent to steal property of value, in separate counts of the same information. Defendant was found guilty by a jury on count two of the information on May 15, 1969. On May 29, 1969, defendant was sentenced to the Nebraska Penal and Correctional Complex for a period of 1 year at hard labor. The defendant has appealed, claiming that he was denied a speedy trial and that his motion for a discharge from custody made before and at the commencement of the trial should have been sustained. The foregoing presents the principal issue orally presented to this court.

The chronology of events from the date of defendant's arrest until the commencement of his trial in the district court is material to the issue raised. Defendant was arrested on July 7, 1968, and lodged in the Thayer County jail on July 8, 1968. On July 10, 1968, defendant appeared in county court and waived a preliminary hearing. His appearance bond was fixed at $1,500. On

July 26, 1968, an information charging the offenses was filed in the district court. On August 2, 1968, defendant appeared in district court and requested court-appointed counsel. The county attorney objected to an appointment of counsel and the matter was continued to August 13, 1968, to permit the county attorney to reduce his objections to writing. On August 13, 1968, it was shown that defendant's parents were able to provide counsel but they declined to do so. The trial court thereupon refused to appoint counsel for defendant at state expense but did reduce his appearance bond to $1,000. On August 28, 1968, defendant was arraigned and he entered a plea of not guilty. Some indication was given that the trial would be had at the next jury term following the Bonebrake case as soon as the court could get to it, but not sooner than 3 weeks. Defendant for the first time filed a written application for the appointment of counsel and an affidavit in support thereof on February 6, 1969, in which he stated he had been held in jail continuously since July 7, 1968. At the regular call of the docket on February 19, 1969, the matter of the appointment of counsel for defendant was continued to March 7, 1969, at which time defendant's written application for the appointment of counsel was overruled but no trial date fixed. On April 2, 1969, counsel was appointed for defendant who promptly filed a motion to dismiss because of a denial of defendant's right to a speedy trial. The motion was set for hearing on May 2, 1969, and the trial set to begin on May 15, 1969. The motion to dismiss was heard on May 6, 1969, and taken under advisement. Defendant's appearance bond was reduced to $500 and trial advanced to May 14, 1969. On May 13, 1969, the motion to dismiss was overruled. A motion to discharge defendant because of a denial of due process and the failure to appoint counsel prior to April 2, 1969, was filed the morning of the trial and it was overruled. Defendant again moved for a discharge for the failure of the State to afford due process and a

speedy trial at the close of the State's evidence. The motion was overruled, the case submitted to the jury, and a verdict of guilty returned. An appearance bond was furnished on May 16, 1969. After the conviction and sentence of the defendant, cash in the sum of $500 in lieu of an appearance bond pending appeal was furnished.

The defendant was confined in the county jail from July 8, 1968, to May 16, 1969, a total of 313 days from the date of his arrest until an appearance bond was furnished. From his arrest until his arraignment in the district court on August 28, 1968, a period of 52 days, the case proceeded expeditiously and in the usual course. It is the period from his arraignment until his trial, a matter of 259 days, that affords the basis of the claim that defendant was not afforded a speedy trial as required by the Constitution.

This case was tried within the statutory limitation of two terms of court provided by statute in cases where the defendant is held in jail pending a trial on the offense charged. § 29-1202, R. R. S. 1943. No contention is made otherwise. Whether or not the defendant is entitled to be discharged for want of a speedy trial is therefore dependent upon all the facts and circumstances of the case. The prosecution at no time asked for any delay or contributed to any delay other than for time to file written objections to defendant's application for the appointment of an attorney at the state's expense on the ground that he was indigent which was granted and disposed of within 2 weeks. There is no evidence in this record that defendant requested a more speedy trial although the defendant inquired of the court on August 28, 1968, when his case would come up for trial, to which inquiry the court replied that it could not be heard in less than 3 weeks but it would probably be in 4 or 5 weeks. The evidence is clear that the delay was not contributed to by either the prosecution or the defense.

On August 2, 1968, the defendant orally requested the

appointment of counsel on the basis of indigency. No written motion was made nor was an affidavit of indigency filed. The county attorney made no objection to the form of the request, but objected solely on the ground that defendant was not indigent. We deem the form of the request to have been waived when the county attorney directed his objections to the question of indigency only. On the taking of evidence on August 13, 1968, the court evidently determined that defendant was not indigent for the reason that his parents were able to provide counsel for defendant's defense. Defendant testified on August 2, 1968, that he talked with his father who told him in effect that he got himself into the mess and that it was up to him to get himself out of it. The court, in denying the request, evidently concluded that indigency meant that defendant not alone was indigent but that any person to whom he is entitled to look for support must also be indigent. See, State v. Eberhardt, 179 Neb. 843, 140 N. W. 2d 802; Storrs Agricultural School v. Whitney, 54 Conn. 342, 8 A. 141; Ex Parte Mays, 152 Tex. Cr. 172, 212 S. W. 2d 164.

On February 6, 1969, a written motion for the appointment of counsel at state expense was on file, accompanied by an affidavit of indigency. This was evidently done to comply with the conditions precedent to the appointment of counsel. There being no change of conditions, the motion was overruled on March 7, 1969. On April 2, 1969, the court in the interest of justice, as it stated, appointed counsel for the defendant. The matter of defendant's right to counsel involved the taking of evidence and a determination of the legal right thereto. Whether the court's conclusions were correct or erroneous, a matter which is unnecessary to decide, is not material here except as they contributed to the delaying of the trial. Certainly time consumed in their determination is excluded time in determining the limitations of a speedy trial.

We take note of the fact that the trial judge in the in-

stant case was a nonresident judge assigned by this court to hear the case because of the temporary disability of the local judge to hear the case. The record shows that from November 13, 1968, to April 14, 1969, nonresident district judges appeared and sat in the district court for Thayer County on 10 occasions. This is nothing more than an indication of the extent that the temporary disability of the local judge may have contributed to the delay of the trial in the instant case.

A defendant confined in jail pending his trial on criminal charges is entitled to be discharged solely because of lapse of time only when he is not tried before the end of the second term of court following the filing of the charge, pursuant to section 29-1202, R. R. S. 1943. The foregoing statute supplements the constitutional guaranty of a speedy trial and fixes the maximum limits of time for trial where a defendant has not contributed to the delay. Whether or not delay within the maximum limits of the statute requires a discharge of a defendant is dependent on whether or not the time was fair and reasonable in the particular case, a matter which is in the discretion of the court. Maher v. State, 144 Neb 463, 13 N. W. 2d 641. "* * * no general principle fixes the exact time within which a trial must be had to satisfy the requirement of a speedy trial. The right to a speedy trial is necessarily relative; * * *." 22A C. J. S., Criminal Law, § 467 (4), p. 24. In Critser v. State, 87 Neb. 727, 127 N. W. 1073, we said: "There is room for the exercise of sound discretion on the part of the trial court, always bearing in mind that the right to a speedy trial is the constitutional right of any citizen who is accused of crime." In Svehla v. State, 168 Neb. 553, 96 N. W. 2d 649, we said: "* * * But the legislature has not undertaken to fix any minimum time in such matters. What is a fair and reasonable time in each particular case is always in the discretion of the court. No hard and fast rule can be applied in all cases."

"In Shepherd v. United States, 163 F. 2d 974, it is said: 'The constitutional guarantee of a "speedy trial" is intended to prevent the oppression of a citizen by delaying criminal prosecution for an indefinite time and to prevent delays in administration of justice by requiring judicial tribunals to proceed with reasonable dispatch in trial of criminal prosecutions. * * * A "speedy trial", generally, is one conducted according to prevailing rules and proceedings of law, free from arbitrary, vexatious and oppressive delays. * * * The right of accused to discharge for failure to receive a speedy trial is a personal right which may be waived, and it ordinarily is waived if accused fails to assert his right by making a demand for trial, by resisting a continuance, by going to trial without objection that time limit has passed, or by failing to make some effort to secure a speedy trial.' * * * We fail to find in the record any protest or objection made on the part of the defendant until he filed his plea in abatement on September 19, 1958. This plea in abatement refers to a 'speedy trial.' We fail to find in the record any request by the defendant for an immediate trial." State v. Fromkin, 174 Neb. 849, 120 N. W. 2d 25. See, also, Annotation, 57 A. L. R. 2d, Speedy Trial—Loss of Right, § 10, p. 326.

"We do not approve a delay of two years in trying any defendant's case. * * * The combination of circumstances here * * * negate any wilful failure on the part of court officials to give defendant a speedy trial. Considering the reasons for the delay, the lack of prejudice to defendant from it, and his failure to demand a trial earlier, his Honor's ruling that defendant's right to a speedy trial had not been transgressed will not be disturbed." State v. Hollars, 266 N. C. 45, 145 S. E. 2d 309. See, also, State v. Bruns, 181 Neb. 67, 146 N. W. 2d 786; State v. Ellis, 184 Neb. 523, 169 N. W. 2d 267; State v. Gau, 182 Neb. 114, 153 N. W. 2d 298.

There is no evidence in this record that the delay was arbitrary or oppressive. There is no evidence that

either the prosecution or the defense contributed to the delay. There is no evidence that defendant demanded or requested a speedy trial or made any effort to obtain a speedier trial. There is no evidence of a willful failure by court or counsel to afford defendant a speedy trial. We find a want of prejudice to the defendant since the trial court made it clear that the time spent in jail awaiting trial was given full consideration at the time sentence was passed. Under the foregoing authorities and the discretion lodged with the trial court in such matters, we fail to find any abuse of discretion by the trial court and defendant's denial of a discharge because of delay is affirmed.

Defendant complains that the sentence of 1 year in the Nebraska Penal and Correctional Complex is excessive. The guilt of the defendant was established beyond question. No contention is made to the contrary. Before imposing sentence, the trial court held a hearing to explore the possibility of probation for the defendant. It was discovered that defendant had been in juvenile court on several occasions and that he had been fined in county court several times and that none of the fines had been paid. The sheriff testified that he held a warrant or detainer for the arrest of defendant for a breaking and entering charge in York County. The trial court announced that probation was not possible under such circumstances. The sentence was then imposed.

We point out that the sentence was the minimum for the offense of breaking and entering, and was imposed after giving full consideration of the time served in the county jail while awaiting trial. The sentence is not excessive.

AFFIRMED.

BOSLAUGH, J., concurring.

I concur in the decision in this case solely upon the ground of a lack of prejudice to the defendant. However, in view of the fact that the defendant has already been in jail for 311 days, the sentence of 1 year's im-

prisonment in the Nebraska Penal and Correctional Complex is excessive and I would reduce the sentence to 2 months' imprisonment in the county jail of Thayer County, Nebraska. See §§ 28-532 and 29-2308, R. R. S. 1943; Haney v. State, 119 Neb. 862, 228 N. W. 939.

McCOWN, SPENCER, and SMITH, JJ.

An indigent 18-year-old youth, never convicted of a felony, who had never served any time in jail before, was charged with breaking and entering. He was confined in the county jail for 311 days without trial. He was confined in jail 268 days before counsel was appointed for him. During that period of time his requests for appointment of counsel were resisted by the county attorney, and denied by the court on the ground that his parents were not indigent. He remained in jail for 259 days after arraignment before trial. These events took place in Thayer County, Nebraska, where the docket is not crowded and the State offers no excuse for the delay.

The statutory minimum sentence to the Penal and Correctional Complex for this offense was one year. The defendant was sentenced to one year in the Penal and Correctional Complex, which was in addition to the 311 days he had already spent in jail. There was, at that time, no statutory authority for the sentencing court or the Director of Corrections to credit the time already spent in jail on a sentence to the Penal and Correctional Complex. That situation has now been corrected insofar as the Director of Corrections is concerned. See L.B. 1307, § 37(1), 1969 Legislative Session, effective August 25, 1969. We find no authorization as yet for the sentencing court to give credit for jail time where a minimum sentence to the Penal and Correctional Complex is required and imposed.

In Klopfer v. North Carolina, 386 U. S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967), the Supreme Court said: "We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amend-

ment. That right has its roots at the very foundation of our English law heritage." Admittedly, the dimensions of the right to a speedy trial must be largely determined by the facts and circumstances of each individual case. It should be pointed out also that the impact of the constitutional requirement is vitally affected where the defendant is in jail rather than free on bail.

The opinion supporting the conviction and sentence here relies heavily on section 29-1202, R. R. S. 1943, which fixes two terms of court as the maximum period after which the defendant is entitled to be discharged for want of a speedy trial. That section has remained completely unchanged at least since 1873. See G. S. 1873, p. 813. In 1873, however, terms of court were set by statute. Terms of court within the first Judicial District in 1873 varied from one year, as in Thayer County, to three a year in Otoe County. See G. S. 1873, p. 258. In 1873, a defendant arraigned on August 28, in Thayer County would not have been entitled to statutory discharge until June 1876, while in Otoe County, he would have been entitled to discharge in March 1874. Such inequity and lack of uniformity continue today.

In 1875, the new Constitution provided that times of holding court should be fixed by the judges of the district courts until otherwise provided by law. Constitution of 1875, Article XVI, § 26. The current statute requires judges of the district court in the last two months of each year to fix the time of holding terms of court during the ensuing year. § 24-303, R. R. S. 1943. There is no limitation as to the number or frequency of terms. Section 24-505, R. R. S. 1943, requires county courts to hold a regular term of court each calendar month for the trial of civil cases. We have held that this statute does not fix terms of court for criminal cases on the issue of a speedy trial. See State v. Bruns, 181 Neb. 67, 146 N. W. 2d 786.

We are advised that in 1968, the terms of the district court in Thayer County were February 21 and Sep-

tember 11; and in 1969, were February 19 and September 17. We are also advised that there are some district courts holding only one term of court per year. Information is not readily available as to courts holding more than two terms a year. In Thayer County itself, depending upon the date of the arrest and charge, the time for statutory discharge for lack of a speedy trial would vary from 12 to 19 months. In a one term a year district, it might vary from 2 to almost 3 years. When county court and district court terms may and do vary over the entire state, the utter lack of uniformity is apparent. This is surely no way to measure time limits dealing with the constitutional requirements of a speedy trial! The artificial distinctions based on terms of court constitute an anachronism urgently requiring legislative attention. ABA Standards Relating to Speedy Trial, § 2.1, provides: "A defendant's right to speedy trial should be expressed by rule or statute in terms of days or months running from a specified event. Certain periods of necessary delay should be excluded in computing the time for trial, and these should be specifically identified by rule or statute insofar as is practicable."

The terms of court approach to expressing the time limitations is still used in most states. This approach is obviously a residual appendage carried over from circuit riding days. See commentary to ABA Standards Relating to Speedy Trial, § 2.1. It should be noted also that ABA Standard 2.1, in referring to time limits uses the words "days or months." The commentary also points out that in the seven jurisdictions which in 1967 expressed the time in days or months rather than in terms of court, the times range from 75 days to 6 months. The President's Crime Commission has proposed that the period from arrest to trial of felony cases be not more than 4 months. The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, 155 (1967).

In any event, the time limits set in section 29-1202, R. R. S. 1943, are *maximum* time limits within which a defendant must be tried. This court has authority to determine whether the constitutional right to a speedy trial has been denied where the delay involved was less than the maximum fixed by statute. As we said in State v. Bruns, *supra:* "But the legislature has not undertaken to fix any minimum time in such matters. What is a fair and reasonable time in each particular case is always in the discretion of the court. No hard and fast rule can be applied in all cases."

We recognize that under present constitutional, statutory, and judicial standards, each individual case must be determined on its own facts. Not only the time involved in the delay, but the reasons for the delay, prejudice to the defendant, and a waiver of the constitutional right by the defendant may all be involved.

On the issue of reasons for the delay, the appropriate test is whether a purposeful or oppressive violation of Sixth Amendment rights occurred. Where the delay was by accident or oversight, and not purposeful and oppressive, courts should and have, in many instances, refused to find the delay constitutionally objectionable. See United States ex rel. Solomon v. Mancusi, 412 F. 2d 88 (1969). In the case before us, however, there can be little reasonable question but that the delay resulted not by mere accident or oversight, but from affirmative objections on the part of the county attorney to the appointment of counsel for an 18-year-old indigent defendant, and the trial court's refusal to appoint counsel from August 13, 1968, until April 2, 1969. The defendant first requested counsel on August 2, 1968, less than 30 days after his arrest and confinement. That request was denied. The defendant even filed a written application for appointment of counsel and an affidavit in support thereof on February 6, 1969, in which he specifically stated that he had been held in jail continuously since July 7, 1968. At the regular call of the docket on Feb-

ruary 19, 1969, that matter was continued to March 7, 1969, at which time the application for appointment of counsel was again overruled. Counsel was finally appointed on April 2, 1969, 8 months to the day after the defendant's first request for counsel.

Counsel promptly filed a motion to dismiss for denial of due process and a speedy trial. That motion was heard one month later and denied, and the trial was held 43 days after counsel was finally appointed. Under such circumstances, the record is powerfully persuasive that the delay here cannot be classified as accidental or an oversight, but was, instead, purposeful and oppressive.

The opinion supporting the conviction and sentence here also finds no evidence that there was any prejudice to the defendant. The possibility of prejudice from the delay is an important factor in close cases, but the very assumption of the Sixth Amendment is that unreasonable delays are, by their nature, prejudicial. It is not generally necessary for the defendant to demonstrate affirmatively how he has been prejudiced by an unreasonable delay. Hedgepeth v. United States, 364 F. 2d 684 (1966).

We think it clear that the prejudice referred to in most speedy trial cases refers to prejudice at trial, but there are other types of prejudice as well. In United States v. Ewell, 383 U. S. 116, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966), the court said: "This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation, and to limit possibilities that long delay will impair the ability of an accused to defend himself." It can hardly be doubted that the defendant here was subjected to "undue and oppressive incarceration." If the defendant had been found not guilty, there could have been no prejudice "at trial." Yet we think no one would disagree that in that event the undue and oppressive incarceration would have been "prejudicial."

The opinion supporting affirmance of the conviction and sentence here concludes that the undue incarceration did not result in any prejudice to the defendant because "the trial court made it clear that the time spent in jail awaiting trial was given full consideration at the time sentence was passed." The problem here, however, is that if a sentence to the Penal and Correctional Complex was to be given, a minimum sentence of one year was required, and the trial court had no statutory authorization for reducing a required minimum sentence to the Penal and Correctional Complex by the amount of time the prisoner had been confined in jail pending trial. See, Volker v. McDonald, 120 Neb. 508, 233 N. W. 890, 72 A. L. R. 1267; Opinions of the Attorney General 1955-56, p. 127.

Here an 18-year-old defendant, never before in jail and never previously convicted of a felony, received the minimum one-year sentence required by law if he was to be sentenced to the Penal and Correctional Complex. The court had no statutory authorization to credit jail time on that minimum penitentiary sentence. Under such circumstances, the fact that the trial court fully considered the jail time in passing sentence ought not to be construed as proof that the sentence would otherwise have been two years or longer. The fact that the court stated that he could not consider the defendant for probation is inconclusive. It is noteworthy that although the defendant received the minimum penitentiary sentence, his sentence might have been a fine, or imprisonment in the county jail for not exceeding six months. See § 28-532, R. R. S. 1943. The facts here emphatically do not remove a reasonable possibility of prejudice, much less affirmatively establish a complete lack of prejudice. If the defendant were to serve the one-year sentence here with full credit for good time while serving it, he would be released in less than the time he spent in jail before trial. Even assuming that the Director of Corrections exercises his new statutory

authority to credit jail time, the mere processing procedure will mean additional incarceration. We think the record before us vividly demonstrates not only the reasonable possibility of prejudice, but the probability of prejudice.

With respect to waiver, the opinion for affirming the conviction and sentence discusses cases in which this court and others have held that the right to speedy trial is waived if an accused failed to make some effort to secure a speedy trial. That opinion states: "There is no evidence that defendant demanded or requested a speedy trial or made any effort to obtain a speedier trial." We think it only necessary to point out that an indigent defendant who has been denied counsel for 8 months and who inquired at the time of arraignment as to when his trial might be, can hardly be said to have waived his constitutional right to a speedy trial. It is the prosecution and not the defense that is charged with bringing a case to trial. See Hedgepeth v. United States, *supra*.

Under the circumstances of this case, the defendant was denied his constitutional right to a speedy trial, and that denial was purposeful, oppressive, and prejudicial. The judgment should be reversed and the defendant discharged.

Three judges of this court have concurred in affirming the conviction and sentence. One judge has concurred in the conviction and the decision to affirm it, but has found the sentence excessive, and that it should be reduced to 2 months imprisonment in the county jail. Under the facts and circumstances here, and without retreating in any respect from the views expressed in this opinion, we also find the sentence excessive. See §§ 28-532 and 29-2308, R. R. S. 1943. We therefore join in reducing the sentence here to 2 months imprisonment in the county jail in Thayer County, Nebraska.

PER CURIAM.

Four Judges of this court concur in sustaining the jury verdict and the finding of guilty in this case. Four

Judges of this court concur in finding that the sentence is excessive.

The judgment of the district court is affirmed and the sentence is modified. The sentence is reduced to a period of 2 months in the county jail.

AFFIRMED AS MODIFIED.

NEWTON, J., concurring in finding of guilt and dissenting from reduction of sentence.

I concur with the opinion of Carter, J., that, under the circumstances attendant upon this case, the failure to try defendant more promptly was not prejudicial and is not indicative of an abuse of discretion nor was the sentence excessive.

The opinion of McCown, Spencer, and Smith, JJ., holds forth at considerable length on a critique of present Nebraska law. It complains that our law does not specifically provide that the sentencing court may give credit for time spent in jail where a minimum sentence is required. The criticism is not pertinent and is completely unwarranted. Defendant received a sentence of 1 year in the Nebraska Penal and Correctional Complex on a charge of breaking and entering. The statute, section 28-532, R. R. S. 1943, provides that in such cases the defendant may be either fined or imprisoned in the county jail for not to exceed 6 months, in lieu of being sentenced to the Nebraska Penal and Correctional Complex. This certainly allows sufficient latitude to give credit for "jailtime."

Further complaint is made regarding section 29-1202, R. R. S. 1943, which fixes 2 terms of court as the maximum period over which a defendant may be held prior to trial. Again, the criticism is not pertinent. It is conceded in the opinion that this court is free to determine *minimum* time limits on a factual case-by-case basis. These criticisms are patent efforts to solicit legislative action. They constitute a direct and calculated invasion of the legislative field and, as such, a willful violation of the tripartite division of governmental powers pro-

vided in the Constitution of Nebraska. This court may well exercise restraint upon the executive and legislative branches of government, but the only practical restraint upon the judiciary is that imposed by a sense of propriety and good conscience and a faithful adherence to constitutional principles. Abuse of judicial powers can only promote a lack of confidence in the courts and the eventual destruction of our constitutional system of government.

The proponents of the opinion are in an anomalous and contradictory position. After adopting the position that the defendant should be *discharged* on the theory that his right to a speedy trial was unlawfully denied, they join in the opinion of Boslaugh, J., requiring the imposition of a 2-month jail sentence. One position or the other is necessarily incorrect.

To sustain their position, the proponents of the opinion cite United States v. Ewell, 383 U. S. 116, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966), wherein the court said: "This guarantee (of speedy trial) is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation, and to limit possibilities that long delay will impair the ability of an accused to defend himself." None of these considerations are here applicable. Undue incarceration before trial and concern over public accusation would be very material to an innocent person wrongfully accused, but scarcely so to one who is guilty when the court takes the period of incarceration into consideration in fixing sentence. There is not the slighest hint or contention that defendant's ability to defend himself was impaired. Indeed, he offered no evidence whatever in his own behalf.

The contention that the sentence was excessive is likewise without merit. It has long been the rule of this court that the punishment of a statutory offense is left to the discretion of the trial court, to be exercised within prescribed limits, and a sentence imposed within such

limits will not be disturbed unless there appears to be an abuse of discretion. See Thompson v. State, 159 Neb. 685, 68 N. W. 2d 267. The sentence imposed was well within the limits prescribed by statute. The four members of this court who have insisted upon modifying the sentence imposed of 1 year in the Penal and Correctional Complex do not even contend that there has been an abuse of discretion. They simply say, in effect, we would have imposed a lighter sentence and since we have the power to do so, we herewith modify the sentence with or without legal justification.

At the time of imposing sentence, the trial court was well aware that he had four alternatives: Probation, a fine, a jail sentence, or a sentence to the Penal and Correctional Complex. It was dealing with a young man who had not before been convicted of a felony, but who was not exactly a first offender. Defendant owed a number of fines imposed for various misdemeanors. Still more serious, he was wanted in two other counties on breaking and entering charges. Under such circumstances, can it reasonably be contended that he should have been placed on probation or punishment limited to a fine or a short sentence to the county jail? Instead, the court sentenced him to the minimum of 1 year in the Nebraska Penal and Correctional Complex and in so doing, stated: "It now becomes my function and duty to impose sentence upon you. In imposing sentence I've given full consideration to the record, to the offense charged against you, your age, your background, your prior criminal record, which, I know, shows no prior felony convictions; I've given consideration, full consideration, to the record showing the date of your arrest, your incarceration and the time of your incarceration in the County Jail of this county, up until the time of your release on bail on May 16th of this year; I've given full consideration to the amount of bail that has been set for you, whether or not it might be con-

sidered excessive, or, whatever it might be; I've given consideration to all these things."

It is apparent that the court felt this young man merited a heavier sentence but reduced it to 1 year to allow for the time spent in jail prior to trial. This was the only manner in which the court could give credit for "jailtime" and the court having availed itself of the opportunity there was no prejudice sustained by reason of defendant's stay in jail prior to trial and no abuse of discretion. For this court to now reduce the sentence further amounts to giving "double time" or a double allowance for the time in jail. It amounts to a subversion of the law without regard to the record before the court and to an encroachment upon the powers and prerogatives of the Board of Pardons and Paroles. I reiterate that the reduction of this sentence is an unjustified assertion of naked judicial power and a violation of the legal principles applicable in such situations.

WHITE, C. J., and CARTER, J., join with NEWTON, J., in the above.

DERYLE SEEFUS, APPELLEE, V. WILLARD BRILEY ET AL., APPELLANTS.
174 N. W. 2d 339

Filed February 20, 1970. No. 37344.

1. **Highways: Municipal Corporations: Property.** Where an alley is vacated by the city council of a city of the first class, the alley reverts to the owner of the adjacent real estate one-half on each side thereof.
2. **Deeds: Property.** Where a plat of the lands conveyed is adequately referred to in a deed, usually it is to be considered as a part of the latter instrument and construed in connection therewith; and the courses, distances, and other particulars which appear on such plat are, as a general rule, to be construed as the true description of the land conveyed.
3. **Highways: Deeds: Property.** A conveyance of a tract of land by a description shown on a plat which has been vacated in-

cludes the interest in one-half of an adjacent alley which has been vacated, in the absence of express intention to the contrary shown in the conveyance.

4. ———: ———: ———. Where the owner of a lot abutting on an alley which was vacated during his ownership conveyed the lot by a conveyance which describes the lot by block and number, and contained no reservation of rights in the alley, the conveyance transfers the fee to the centerline of the abutting portion of the vacated alley, even though the conveyance also described the lot by metes and bounds description which did not include any part of the alley and used the edge of the alley as a boundary.

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

Baylor, Evnen, Baylor, Urbom & Curtiss and Vantine A. James, for appellants.

Wellensiek, Morrissey and Davis, for appellee.

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

CARTER, J.

This is an appeal from a judgment of the district court for Otoe County quieting title to a vacated alley in Nebraska City in the plaintiff, enjoining the defendants from encroaching thereon, and awarding damages to the plaintiff. The defendants have appealed.

The record discloses that the real estate involved in this action is within an area that was platted and accepted by the city in 1859. At all times herein mentioned, the platted area was described as Elmwood Addition to Nebraska City, Nebraska. On November 22, 1960, defendants became the owners of Lots 1, 2, 3, 4, 5, and 6, Block 29, Elmwood Addition. On February 15, 1966, plaintiff became the owner of Lots 9, 10, 11, and 12, Block 29, Elmwood Addition. Between the two tiers of lots purchased by these parties was an east-west alley, 16.5 feet in width. On June 6, 1955, the alley

was vacated by ordinance of the city council of Nebraska City which vacation ordinance was never filed in the office of the register of deeds. In early 1966, plaintiff made inquiry of the city council about improving the alley and was informed that it was vacated. He then obtained deeds to the north and south halves of the vacated alley from those owning the abutting lots at the time the alley was vacated. It is the contention of plaintiff that the sale of lots by lot and block numbers alone does not convey title to half of the abutting vacated alley unless specifically included. The defendants contend that a conveyance by block and lot numbers includes the abutting half of a vacated alley unless it is specifically reserved. This is the primary issue in the case.

Nebraska City is a city of the first class and is controlled by the laws governing cities of such class. The applicable statute states: "Upon the vacation of any street, avenue or part of either, the same so vacated shall be and remain the property of the city, but may be sold and conveyed by the city for any price that shall be agreed upon by the mayor and three-fourths of the city council. When an alley is vacated the same shall revert to the owner of the adjacent real estate one half on each side thereof except that when any alley is taken wholly from one or more lots, upon the vacation thereof, it shall revert to the owner or owners of the lot or lots from which it was originally taken." § 16-611, R. R. S. 1943. It will be noted that the first part of the statute deals exclusively with streets and avenues while the second part deals only with the vacation of alleys. According to this statute, when an alley is vacated, it reverts, under the facts before us, one-half to the abutting lots on each side of the alley.

The parties to the litigation appear to be in agreement that the second part of section 16-611, R. R. S. 1943, is the controlling statute in the instant case. The dispute arises as to whether or not a conveyance by lot

and block number, as shown by the dedication and plat, conveys the one-half of the abutting alley, or whether or not the reversion of the abutting one-half of the vacated alley creates a separate and distinct tract that must be transferred by separate words of conveyance.

In Hoke v. Welsh, 162 Neb. 831, 77 N. W. 2d 659, this court said: "The general rule has been stated as follows: 'Where a map, plat, plan, or survey of the premises conveyed is adequately referred to in a deed, usually it is to be considered as a part of the latter instrument and construed in connection therewith; and the courses, distances, or other particulars which appear on such map, plat, plan, or survey, are, as a general rule, to be considered as the true, or part of the true, description of the land conveyed.' * * * Applying the foregoing rule, it is clear that the purport of the deed was to convey the title to the lots and one-half of the vacated streets and alleys to the purchaser as they are shown on the plat of the Original Town of Ogallala." In the Hoke case, the deed specifically followed the lot and block description with the additional words "now vacated." This case holds that such words carry with it the legal inference only that streets and alleys have reverted to the owners of the adjacent real estate, one-half on each side thereof, and brings into play the legal effects that attach to the description used by virtue of the vacation of the plat. The holding of the court is in effect a holding that the conveyance by block and lot number includes the adjacent one-half of a vacated alley.

In Hillerege v. City of Scottsbluff, 164 Neb. 560, 83 N. W. 2d 76, it was said: "It is true, as appellant asserts, that it has been sometimes stated that the fee of the street is in the municipality. This form of statement was sufficient for the facts the court was then considering and it was not necessary for it to determine or precisely declare in those cases the exact nature of the ownership a city has of a street or the condition and qualification of its title. It is generally recognized that

under legislation such as prevails in this state the title of a street vested in a municipality is not a fee simple title absolute but a qualified base or determinable fee and that the title which the municipality has is held in trust for the purposes for which the street is dedicated." The reasoning of this case is as applicable to an alley as to a public street.

This principle is sustained in Dell v. City of Lincoln, 170 Neb. 176, 102 N. W. 2d 62, wherein it is stated: "Plaintiffs now argue that the greatest possible interest which defendant city could possess after it annexed the village of Havelock, including Sixty-ninth Street, was a fee simple determinable title, subject to being determined or diverted upon vacation of the street by defendant, which has occurred, and that plaintiffs are owners in fee simple absolute of one-half such street adjacent to their real property. We agree." See, also, Belgum v. City of Kimball, 163 Neb. 774, 81 N. W. 2d 205, 62 A. L. R. 2d 1295.

It is asserted by the defendants that the conveyance by block and lot number of real estate in accordance with a plat includes not only the generally recognized lot as described but also one-half of an alley abutting such property as shown on such plat. With this we agree. The city does not own the alley in fee absolute, its interest being defined as a qualified base or determinable fee. Such city has such a title until the happening of the event which terminates its interest, in this case the vacation of the alley. While the vacation of the alley increased the interest of the owner in the estate from that which he had prior to the vacation, in common language, it was nothing more than the acceleration of a lesser interest that he already had. The plaintiff contends that the vacation of the alley created a new estate unaffected by conveyances subsequent to the vacation of the alley on the theory that land cannot be appurtenant to land. It appears to be a general rule that the title to land additional to that described in a conveyance

cannot pass as a conveyance. But general rules do not always decide specific cases. Land may be conveyed without description when it is incidental or appurtenant to the grant when an intention to do so is established. Meier v. Maguire, 172 Neb. 52, 108 N. W. 2d 397.

"The inchoate right of the grantor to land, on vacation of a street, has been held to pass by a deed although not mentioned therein. The general rule is that when the owner of land abutting upon a street or highway or upon a body of water or watercourse conveys the land, the conveyance will carry title to and fix the boundaries of the grantor's land by the center of the street or highway or the thread of the body of water or watercourse if the grantor's title extends thereto, notwithstanding the land is described as being bounded by the road, highway, or watercourse." 23 Am. Jur. 2d, Deeds, § 258, p. 295. In Greenberg v. L. I. Snodgrass Co., 161 Ohio St. 351, 119 N. E. 2d 292, 49 A. L. R. 2d 974, the court said in the syllabus thereto: "Where the owner of a lot abutting on a street, which street is vacated during his ownership, conveys such lot by number and without reservation of any rights in the street, such conveyance transfers, in addition to the lot, all rights which the grantor may have acquired by reason of such vacation, even though the metes and bounds description in the conveyance extends only to the side of the street." See, also, Bradley v. Spokane & I. E. R. Co., 79 Wash. 455, 140 P. 688; Spence v. Frantz, 195 Wis. 69, 217 N. W. 700.

At the time the alley was vacated on June 6, 1955, Earl and May E. Faler were the owners of Lots 8, 9, 10, 11, and 12. On October 6, 1956, the Falers conveyed the lots to Eloise A. Coatney, who, on February 15, 1966, conveyed lots 9, 10, 11, and 12 to the plaintiff. At the time of the vacation of the alley, Albert H. and Olive Pearl Schneider were the owners of Lots 1, 2, 3, 4, 5, and 6. On November 22, 1960, the Schneiders conveyed these lots to the defendants without reserving

ownership to the north one-half of the alley. After trouble arose over the ownership of the vacated alley, plaintiff obtained a warranty deed from the Schneiders to the north one-half of the alley and a quitclaim deed from Coatney on February 21, 1966, to the south one-half of the alley. Plaintiff bases his claim to the whole of the alley on the warranty and quitclaim deeds last mentioned. These two deeds were ineffective for any purpose since title to the vacated alley had already been conveyed, the south one-half to plaintiff and the north one-half to defendants by the lot and block descriptions contained in the plat and without a reservation of title in the vacated alley.

We hold that the trial court was in error in quieting title to the whole of the alley in plaintiff and in enjoining the defendants from encroaching upon the north one-half of the alley. The basis for an award of damages to the plaintiff is likewise based on a misinterpretation of the law and will require a reconsideration in the light of this opinion.

We reverse the judgment of the trial court and remand the cause with directions to quiet title to the vacated alley in accordance with this opinion, to modify the award of injunctive relief accordingly, and to reconsider the question of damages in the light of the foregoing holdings.

REVERSED AND REMANDED WITH DIRECTIONS.

GEORGE W. SHADBOLT, APPELLANT, V. COUNTY OF CHERRY ET AL., APPELLEES.
174 N. W. 2d 733

Filed February 20, 1970. No. 37363.

1. **Public Administrative Bodies: Elections.** Lack of notification to the public concerning a special meeting of a county board to call an election upon initiative petition under section 23-343,

R. S. Supp., 1967, is insufficient to invalidate the resulting election.

2. **Public Administrative Bodies: Hospitals: Bonds.** Whether a county board shall issue bonds for the purpose of paying the cost of acquiring the existing facilities for a county community hospital or purchasing a site and constructing thereon a county community hospital and purchasing suitable equipment for the same is a single proposition.
3. **Hospitals: Constitutional Law.** An independent hospital district by statute may fractionate territories of counties. Harm from such district levies is insufficient to establish that levies by one of the counties for a county hospital violate Article I, section 25, or Article VIII, section 1, Constitution of Nebraska, which prohibit discrimination and require uniformity in taxation.

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

Michael V. Smith, for appellant.

Richard L. Spittler, for appellees.

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

SMITH, J.

Land owned by George W. Shadbolt formed part of Gordon Memorial Hospital District in Cherry County, part of the district lying in an adjoining county. Voters of Cherry County on initiative petition authorized a county hospital. Shadbolt subsequently sued to invalidate the election. Motion of the county and its commissioners, defendants, for summary judgment was sustained, and this appeal has been taken.

Shadbolt asserts: (1) Failure of the county clerk to notify the public of a special meeting of the board to call the election nullified the proceeding; (2) the ballot did not respond to the petition; (3) the proposition was dual; and (4) the election effected violations of Article I, section 25, and Article VIII, section 1, Constitution of Nebraska, which prohibit discrimination and require uniformity in taxation.

The county clerk on January 20, 1969, undertook to

notify the public of a special session of the board on January 22 to consider the initiative petition. He simply posted a typewritten notice on the bulletin board outside the meeting room but away from daily courthouse traffic.

The county board at the special session responded to the initiative petition which proposed an election on a bond issue to acquire or construct a county hospital. The proposition at the election, called for March 4, 1969, in the board resolution was to be whether the board should issue general obligation bonds to purchase, acquire, or construct a county hospital. The ballot stated the proposition as follows: "Shall the Board . . . issue . . . bonds . . . for the purpose of paying the cost of acquiring the existing facilities for a county community hospital or purchasing a site and constructing thereon a county community hospital and purchasing suitable equipment for the same . . . ."

County clerks have power to call special sessions upon 5 days' notification by publication in three public places. § 23-154, R. R. S. 1943. In Morris v. Merrell, 44 Neb. 423, 62 N. W. 865 (1895), notification of a special session to the three commissioners or to the public was not given. The court held that an order by two of the commissioners for location and construction of a drainage ditch was void. Lack of jurisdiction was properly emphasized under the circumstances.

The applicable statutes provide: "The public policy of the State of Nebraska is that all public meetings should be preceded by some publicized notice . . . in order that the citizens of the state can intelligently exercise their democratic privilege of appearing at public sessions of governmental bodies . . . ." § 84-1402, R. S. Supp., 1967. "Any formal action of any type, including expenditure of funds, . . . taken at any meeting other than while open to the attendance of the public, shall be void." § 84-1405, R. S. Supp., 1967.

The initiative petition concededly was good. The

board's calling the election in response to it was ministerial and nonreviewable by appeal or error. See, § 23-343, R. S. Supp., 1967; Chaloupka v. Area Vocational Tech. School No. 2, 184 Neb. 196, 165 N. W. 2d 719 (1969). Public notification of meetings has not outranked the initiative on the scale of values for subsidiarity. The Legislature in encouraging the citizen to participate in local government has not set its policy at cross-purposes. Lack of notification to the public concerning a special meeting of a county board to call an election upon initiative petition under section 23-343, R. S. Supp., 1967, is insufficient to invalidate the resulting election. Cf. Inslee v. City of Bridgeport, 153 Neb. 559, 45 N. W. 2d 590 (1951).

On the ballot the words "acquiring the existing facilities" were an immaterial departure from the petition. The proposition was single. See Inslee v. City of Bridgeport, *supra*.

Gordon Memorial Hospital District, an independent district organized February 25, 1969, extends over parts of Cherry and Sheridan Counties. It possesses authority over annexation, land withdrawal, and dissolution upon approval of the voters. See §§ 23-343.30, 23-343.31, and 23-343.35, R. R. S. 1943. Although two or more adjoining counties may issue joint bonds for hospital purposes under section 23-343.15, R. R. S. 1943, the county in relation to the hospital district remains the basic unit.

An independent hospital district by section 23-343.21, R. S. Supp., 1967, may fractionate territories of counties. Harm from such district levies is insufficient to establish that levies by one of the counties for a county hospital violate Article I, section 25, or Article VIII, section 1, Constitution of Nebraska. Cf. City of Bellevue v. Eastern Sarpy County S. F. P. Dist., 180 Neb. 340, 143 N. W. 2d 62 (1966); City of Grand Island v. Ehlers, 180 Neb. 331, 142 N. W. 2d 770 (1966); Pleuler v. State, 11 Neb. 547, 10 N. W. 481 (1881). See, also, Simms

v. County of Los Angeles, 35 Cal. 2d 303, 217 P. 2d 936 (1950).

Defendants were entitled to summary judgment.

AFFIRMED.

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

I am unable to agree with one of the legal conclusions arrived at in the majority opinion. Section 23-154, R. R. S. 1943, sets out requirements for the calling of a valid special meeting of county commissioners. Adopted in 1879, it has stood the test of time and has never been amended. It was literally construed to mean exactly what it says as early as 1895 in the case of Morris v. Merrell, 44 Neb. 423, 62 N. W. 865. Down through the years it has, as a matter of practice, been steadfastly understood that no act of a county board, be it legislative, administrative, judicial, or ministerial in nature, was valid unless taken at a regular meeting or a special meeting called as required by statute.

The reasoning adopted is also applicable to section 23-153, R. R. S. 1943, which fixes the place where board meetings shall be held. If so applied, the county board could then meet anywhere, at any time, to deal with acts deemed "ministerial." Actually, in a case like the one before us, such irresponsible action deprives the people of the county of an opportunity to question or challenge the sufficiency of the initiative petition. Whether or not they would have done so is immaterial. The statute guarantees them the opportunity.

That the majority opinion runs counter to public policy is clearly enunciated by the Legislature in sections 84-1401 and 84-1402, R. S. Supp., 1967, adopted as recently as 1967. It is therein stated that: "The public policy of the State of Nebraska is that all public meetings should be preceded by some publicized notice specifying the time and place of all such meetings in order that the citizens of the state can intelligently exercise their democratic privilege of appearing at public sessions of governmental bodies." § 84-1402, R. S. Supp., 1967. Min-

isterial acts are not exempted from the announced policy. On the contrary, it refers to "all public meetings" of governing bodies.

In my judgment, the opinion adopted in this case is a partial nullification of all the legislative acts mentioned above and represents a direct and inexcusable encroachment by this court on the functions of the Legislature. It judicially approves what the Legislature expressly forbids.

Although, as indicated, I cannot agree that the action of the county board in calling an election at an unauthorized meeting was proper, I, nevertheless, concur in the result arrived at in the majority opinion. The error was not a fatal one, but this does not mean that other actions of a county board taken at irregular meetings, be they ministerial or otherwise, are to be sustained.

Section 23-343, R. S. Supp., 1967, provides for the establishment of county hospitals and the issuance of bonds for this purpose. Bonds may be issued only when authorized by a majority vote cast at an election called for such purpose. The election may be called by resolution of the county board or may be brought about by petition signed by 10 percent of the electors. If a proper petition is filed, the county board must call the election. The law distinguishes between challenges to election proceedings made before and after an election is actually held. Ordinarily compliance with statutory provisions is mandatory if enforcement is sought before an election, but after an election has been held, they are construed in support of the result of the election and are deemed to be directory only unless prejudice to a fair election appears. See, 29 C. J. S., Elections, § 67, p. 158; Haggard v. Misko, 164 Neb. 778, 83 N. W. 2d 483. No showing has been made that the error of the county board resulted in an unfair election and under such circumstances the election must be approved.

WHITE, C. J., and CARTER, J., join in dissenting in part and concurring in part.

DONALD O. LYONS, APPELLANT, V. JULIUS WAGNER, APPELLEE.
174 N. W. 2d 730

Filed February 20, 1970. No. 37367.

1. **Trial: Evidence.** A party against whom a motion to dismiss is made is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence.
2. **Master and Servant: Negligence.** An employer is not an insurer of the safety of the appliances which he furnishes. If he exercises the reasonable care which a prudent man would ordinarily take for his own safety, under like circumstances, in furnishing his employees with instruments reasonably safe for the particular purpose for which they are used, he has fulfilled his whole duty in that respect.
3. ———: ———. A mere expression of an opinion by the employer is not an assurance of safety that will absolve an employee from the assumption of risk.

Appeal from the district court for Antelope County: MERRITT C. WARREN, Judge. Affirmed.

Monen, Seidler & Ryan, Thomas E. Whitmore, Thomas E. Brogan, and Elmer C. Rakow, for appellant.

Jewell, Otte & Pollock, for appellee.

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

BOSLAUGH, J.

The plaintiff, Donald O. Lyons, was employed as a farm hand or laborer by the defendant, Julius Wagner. On September 19, 1968, the plaintiff was injured when a farm tractor which he was operating overturned. This action was brought to recover damages for the injuries which the plaintiff sustained in the accident.

At the close of the plaintiff's evidence, the trial court dismissed the action on the motion of the defendant. The plaintiff's motion for new trial was overruled and he has appealed.

At the time of the accident the plaintiff was 66 years of

age. His principal occupation had been field manager for a grass seed company. He had also done some farming and had worked around farms. He had operated tractors since he was 21 years of age and was familiar with their operation in general.

The plaintiff had worked for the defendant during part of 1966, 1967, and 1968. He did carpentry and general repair work and also farm work. In 1968 he had helped plant corn. In a prior year he had helped put up silage. On the 2 days before the accident the plaintiff had been working at the farm of defendant's brother helping to pack silage.

On the day of the accident the defendant was cutting hybrid sudan for silage. The silage was dumped on the ground to make a rectangular pile four loads wide. The loose silage was then packed down by driving a tractor over the pile. The tractor which was used to pack the silage was a 1953 Ford tractor with dual rear wheels.

The defendant had operated the tractor during the morning and the early part of the afternoon. At about 3 p.m. the defendant asked the plaintiff to get on the tractor and ride with the defendant so that the plaintiff would " 'get the feel of this thing.' " The plaintiff then climbed on the tractor and rode on the left fender. The plaintiff testified that he "paid pretty good attention" to what the defendant was doing and noticed that occasionally the front wheels of the tractor would raise up. He asked the defendant what kept the tractor from going over backwards and the defendant replied that the drawbar would probably keep the tractor from going over backwards. After the plaintiff had watched the defendant operate the tractor for about a half hour the plaintiff took over the operation of the tractor and drove it for a half hour or an hour. During this time the front of the tractor raised up 8 or 10 times.

The defendant testified the front end of the tractor would raise up when silage would be caught or wedged

under the transmission or pan of the tractor. When that happened the remedy was to disengage the clutch so that the tractor would back off and the front end would be lowered.

At the time the accident happened the plaintiff was driving along the north edge of the silage pile in a westerly direction. The pile was then one load high and 2½ to 3 feet high at the highest point. The plaintiff had the left wheels on the pile and was attempting to pack the silage along the edge of the pile. The tractor was tilted slightly to the north.

Just before the accident happened the front end of the tractor raised up. The plaintiff disengaged the clutch, the tractor rolled back, and the front end came down. The plaintiff then started forward again. The front end of the tractor raised up again and got up far enough that the plaintiff could not get his foot on the clutch pedal. The plaintiff could see that the tractor was going to tip over backwards and tried to jump off, but was pinned underneath when the tractor fell on him.

The defendant's motion to dismiss alleged that the evidence failed to establish that the accident was caused by any negligence of the defendant; that the accident was caused by the negligence of the plaintiff which was more than slight; and that the plaintiff assumed the risk inherent in the operation of the tractor. In determining whether the motion was properly sustained the plaintiff is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence.

An employer is not an insurer of the safety of the appliances which he furnishes. If he exercises the reasonable care which a prudent man would ordinarily take for his own safety, under like circumstances, in furnishing his employees with instruments reasonably safe for the particular purpose for which they are used, he has fulfilled his whole duty in that respect. Lownes v. Furman, 161 Neb. 57, 71 N. W. 2d 661. This rule

is applicable to the use of farm tractors and it is not enough for the plaintiff to show that there is danger in the operation of a tractor. All machinery is more or less dangerous and the liability of the employer must be based upon negligence. Ring v. Kruse, 158 Neb. 1, 62 N. W. 2d 279.

The plaintiff's specifications of negligence involved three main contentions: That the tractor was improper or defective for use in packing silage; that the defendant failed to warn or instruct the plaintiff as to the dangers incident to the operation of the tractor; and that the defendant assured the plaintiff that there was no danger of the tractor overturning.

There was no evidence that the tractor furnished by the defendant was defective or improper for use in packing silage. There was evidence that on other occasions other tractors were used for packing silage. The defendant testified that it was a common practice to use a tractor with a loader to push silage into a pile, but at the time the accident happened the pile was too low to require the use of a loader. As the pile increases in height, a tractor with a loader may be used to push the silage into a gradual slope but a wheeled tractor is still used to pack the silage.

The evidence did not show a failure to warn or instruct the plaintiff as to the dangers incident to the operation of the tractor. The plaintiff rode on the tractor for about a half hour while the defendant operated it. While the plaintiff was riding on the tractor with the defendant the front wheels of the tractor would raise up occasionally. After the plaintiff took over the operation of the tractor the front end raised up 8 or 10 times. Just before the accident happened the front end raised up, the plaintiff disengaged the clutch, and the tractor rolled back. The evidence shows that the plaintiff knew of the danger of the front end raising up and knew what to do to keep it from going over backwards.

With respect to the plaintiff's claim that the defendant

assured him that there was no danger of the tractor overturning, the plaintiff's testimony was that the defendant said, "'I don't believe it could go over backwards.'" The plaintiff asked, "'Why?'", and the defendant replied, "'This drawbar down there.'" The defendant's statement was an expression of opinion as distinguished from a positive assurance of safety. See, 56 C. J. S., Master and Servant, § 405, p. 1236; 35 Am. Jur., Master and Servant, § 321, p. 748. The theory of the rule regarding an assurance of safety is that if the employer has superior knowledge, and the employee is entitled to rely on the assurance of safety, and does rely on the employer's assurance of safety, the employee will not be held to have assumed the risk. In this case the evidence shows that the plaintiff was familiar with the operation of tractors, the existence and condition of the drawbar was open and obvious, and the plaintiff did not rely on the claimed assurance of safety.

The evidence in this case further shows that the accident was caused by the plaintiff's operation of the tractor in failing to disengage the clutch in time to prevent the tractor from overturning. Just before the accident the front end of the tractor had raised up, the plaintiff had disengaged the clutch, and the tractor had rolled back. The plaintiff then attempted to go forward again in the same place. The front end raised again and the plaintiff allowed the tractor to raise up so high that he was unable to get his foot on the pedal and disengage the clutch to prevent the tractor from going over backwards. This was negligence as a matter of law which was more than slight and a bar to any recovery by the plaintiff.

The judgment of the district court is affirmed.

AFFIRMED.

THERESA K. NIELSEN ET AL., APPELLANTS, V. TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., A CORPORATION, APPELLEE.

174 N. W. 2d 722

Filed February 20, 1970. No. 37382.

Eminent Domain: Evidence: Trial. The verdict of a jury on conflicting evidence in an eminent domain action will be set aside when it is clearly excessive.

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

Firmin Q. Feltz, for appellants.

Frederick E. Wanek, for appellee.

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

SMITH, J.

In this eminent domain proceeding a jury awarded plaintiffs $10,500 for a perpetual easement appropriated by defendant for a power line. The district court granted a new trial on the ground that the verdict was excessive. Plaintiffs have appealed.

Plaintiffs owned a ranch and farm unit bordering the City of Ogallala on the east and north. The unit comprised 2,562 acres of grazing land, 495 acres of accretion, 422 acres of dry crop land, 94 acres of irrigated land, and 14 acres of building site. Fences divided the grazing land into 5 pastures. Pasture I bordered the city on the north. Pastures IV and V, lying northeast of the city, contained 1,640 acres.

On March 21, 1968, defendant petitioned for the easement over plaintiffs' land in order to construct a 115-kilovolt line. The line was constructed prior to trial. On plaintiffs' land were 22 structures - 3 3-pole structures and 19 H-frames that measured approximately 12 feet between the outer edges of the poles. The easement area, 100 feet wide and 15,161 feet long, was com-

posed of 28.09 acres of pastures IV and V; 4.59 acres of accretion; 1.6 acres of meadow; and the remaining fractional acre of doubtful classification.

Witnesses testified to the preappropriative value an acre as follows: $110 to $150 for the meadow, $60 to $100 for the accretion, and $60 to $75 for the pastures. Plaintiff manager testified to an average of $70 for the five pastures in view of different distances from Ogallala. Opinions of damage from the appropriation were: $10 an acre for all accretion and pasture, 10 per cent of the value of the whole unit, $5 an acre for the whole unit, $30 an acre for 6 quarter sections, and $20 an acre for 8 quarter sections. Plaintiff manager admitted that the appropriation would not decrease the number of sustainable animal units and that the accretion had not produced a crop. Among items of damage were erosion around the poles, destruction of vegetation within the easement, and defendant's right of access. The jury viewed the premises.

Instruction No. 2 informed the jury in part as follows: "The plaintiffs will retain . . . possession . . . but may use said property only . . . (without) interference with . . . defendant . . . . The defendant has . . . perpetual rights: 1. To enter upon . . . the easement at any time . . . . 3. To construct and maintain gates through fences crossing the easement. 4. To remove trees, brush and shrubbery within the easement which may interfere with . . . safe operation and maintenance . . . ."

Instruction No. 3 to the jury limited the issues to "The amount by which the value of plaintiffs' property in pastures IV and V, meadow land and accretion lands has been reduced in value as of March 21, 1968."

The verdict of a jury on conflicting evidence in an eminent domain action will be set aside when it is clearly excessive. Moyer v. Nebraska E. G. & T. Coop., 171 Neb. 879, 108 N. W. 2d 89 (1961). The district court in

granting a new trial in the present case exercised sound judicial discretion. The judgment is affirmed.

AFFIRMED.

JOHN W. SINNETT, APPELLEE AND CROSS-APPELLANT, V. HIE FOOD PRODUCTS, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE.
174 N. W. 2d 720

Filed February 20, 1970. No. 37396.

1. **Evidence: Appeal and Error.** In reviewing equity cases, where there is an irreconcilable conflict on a material issue, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other.
2. **Master and Servant: Contracts.** Where an agreement provides for a bonus for continuous service which is terminated by the employer through no fault of the employee the latter is entitled to a proportionate share of the bonus according to the time served. Where, however, the employee voluntarily quits or is discharged for a reason attributable to his own fault, there is no right to recover any part of the bonus.

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

William H. Mecham and Carl I. Klekers, for appellant.

Charles Ledwith, for appellee.

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

NEWTON, J.

This is an action for the recovery of an employee's bonus and for wages alleged to be due. Trial was had to the court. Judgment was rendered for plaintiff for the bonus claimed in his first cause of action and for defendant on the claim for wages in the second cause of action. We affirm the judgment of the trial court.

The following facts are alleged in plaintiff's petition. Defendant was engaged in the manufacture and sale of food products. It employed plaintiff under an oral contract providing for an $80 weekly wage and for a bonus of $20 per week in stock of the defendant company. The written stock bonus agreement contained the following provision: "This stock will be issued at the end of each consecutive year from that date, the end of each fulfilled year. However, if at during any year Bill Sinnett's employment is terminated by him or Hie Foods that years accumulation will be nulled and void. Any stock earned during a previous year will always be good." Plaintiff commenced work on October 1, 1967, and was discharged on September 30, 1968. The stock bonus was denied to plaintiff.

In his second cause of action, plaintiff alleges he was underpaid $61.70 during the first 5 weeks he was employed.

The answer contains a general denial and states plaintiff's employment was terminated for good cause prior to the lapse of 1 full year. Defendant also maintains the stock bonus agreement had been mutually rescinded.

The evidence regarding the terms of plaintiff's employment, the execution of the stock agreement, and the period of employment is not disputed and is as alleged. It is also conceded that after plaintiff had been employed in the plant for about 2 months, he was transferred to a route and made sales and deliveries of defendant's products. At this time he went on a commission basis, with a guaranteed weekly wage in an increased amount.

The fact that plaintiff was discharged is admitted in defendant's answer and the testimony of its executive officer. There is a serious conflict in the testimony of the parties on the question of whether or not defendant had good cause for plaintiff's dismissal. Defendant

charges irregularities in plaintiff's report of sales and in gasoline purchases. This plaintiff denies.

Regarding the theory that the stock agreement was rescinded at the time plaintiff went on a route on a commission basis, there is no evidence of any discussion regarding rescission. It is conceded that defendant's second route man received the stock bonus.

There is some indication in the record that plaintiff may have been underpaid $61.70 during the first weeks he was employed, but the record does not disclose that he ever made any complaint or demand for additional wages until this action was contemplated after his dismissal from defendant's employment.

The parties have treated this action as one in equity. Although the fact of its being an equitable action is questionable, we will abide by the theory on which it was tried. "In reviewing equity cases, where there is an irreconcilable conflict on a material issue, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the other." Lunzmann v. Yost, 182 Neb. 101, 153 N. W. 2d 294. It is apparent from the decision of the trial court that it found the stock agreement had not been rescinded, that plaintiff had received all cash payments due him, and that he had been discharged without good cause. We accept these findings.

Plaintiff's employment commenced on October 1, 1967, and terminated September 30, 1968. Had he completed a full day's work on September 30, 1968, he would have completed a full year's employment as contemplated by the stock bonus agreement. The contract of employment, not being for a definite term, was terminable at will by either party, but this does not deprive plaintiff of the right to recover when discharged without good cause: "There is much authority that where an agreement provides for a bonus for continuous service which

is terminated by the employer through no fault of the employee the latter is entitled to a proportionate share of the bonus according to the time served. Where, however, the employee voluntarily quits or is discharged for a reason attributable to his own fault, there is no right to recover any part of the bonus." Kollman v. McGregor, 240 Iowa 1331, 39 N. W. 2d 302. See, also, American Security Life Ins. Co. v. Moore, 37 Ala. App. 552, 72 So. 2d 132; Coats v. General Motors Corp., 11 Cal. 2d 601, 81 P. 2d 906; 56 C. J. S., Master and Servant, § 98, p. 528; 35 Am. Jur., Master and Servant, § 80, p. 511; Annotation, 28 A. L. R. 346.

In his cross-appeal, plaintiff complains of the failure of the trial court to allow an adequate attorney's fee. The court allowed an attorney's fee of $98 in compliance with the requirements of section 25-1801, R. S. Supp., 1967. The statute does not authorize a larger fee but does allow a similar fee to be taxed in this court. An additional attorney's fee of $98 is allowed plaintiff for services of his attorney in this court.

The judgment of the trial court is affirmed.

AFFIRMED.

GAIL LEONHARDT, APPELLANT, V. ARNOLD D. HARIMON ET AL., APPELLEES.
174 N. W. 2d 926

Filed February 20, 1970. No. 37466.

1. **Trial: Instructions.** The meaning of an instruction and not its phraseology is the important consideration. Where the meaning of an instruction is reasonably clear, it is not prejudicially erroneous.
2. ———: ———. An inadvertent substitution of one word for another in an instruction is harmless error if it is clear from the instruction itself and the other instructions given that the jury was not confused or misled by the error.

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

Van Steenberg, Winner & Wood, for appellant.

Holtorf, Hansen, Kortum & Kovarik and David C. Nuttleman, for appellees.

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

BOSLAUGH, J.

This was an action for damages arising out of an automobile accident. The jury returned a verdict for the defendants. The plaintiff's motion for new trial was overruled and he has appealed.

There is no bill of exceptions. The plaintiff's sole assignment of error relates to instruction No. 3.

The trial court gave 28 numbered instructions to the jury. Instruction No. 1 was a general instruction relating to the duty of the jury. Instruction No. 2 related to the plaintiff's claims and was divided into three parts as follows: A. Issues; B. Burden of Proof; and C. Effect of Findings. Instruction No. 3 related to the defendants' defenses and was divided into four parts as follows, each part appearing on a separate page: A. Issues; B. Burden of Proof; C. Effect of Findings; and D. Comparative Negligence. The remaining instructions related to the rules of the road, the assessment of damages, and other applicable rules of law.

The plaintiff's complaint is directed to the first paragraph of Part C of instruction No. 3 in which the jury was advised as to what the verdict should be if the defendants had failed to prove their allegations of contributory negligence and proximate cause and the plaintiff had proved his allegations of negligence and proximate cause.

In that paragraph the jury was instructed in part as follows: "If the defendants have failed to establish either of these propositions No's. 1 or 2 in the *immediately preceding instruction* by a preponderance of the evidence, * * *." (Emphasis supplied.)

The plaintiff contends that by referring to "the immediately preceding instruction" the jury was referred to instruction No. 2 relating to the plaintiff's claims instead of Part B of instruction No. 3 relating to the defendants' burden of proof and the two propositions on which the defendants had the burden of proof. The plaintiff contends that the instructions were conflicting and misleading because of the internal reference.

In Part C of instruction No. 3 the trial court also referred to "Instruction No. 2, A," and "Instruction No. 3, A." This would indicate that the term "instruction" was used in Part C of instruction No. 3 to refer to the lettered parts of instructions Nos. 2 and 3.

An erroneous instruction is not necessarily prejudicial error. The meaning of an instruction and not its phraseology is the important consideration. Where the meaning of an instruction is reasonably clear, it is not prejudicially erroneous. Zager v. Johnson, 175 Neb. 866, 124 N. W. 2d 390. An inadvertent substitution of one word for another in an instruction is harmless error if it is clear from the instruction itself and the other instructions given that the jury was not confused or misled by the error. Pierson v. Jensen, 150 Neb. 86, 33 N. W. 2d 462.

In Zager v. Johnson, *supra*, an instruction referring to the "numbered parts" of another instruction was held to be not prejudicial where the second instruction contained no numbered parts but did contain subparagraphs identified by letters.

In this case the inadvertence was clearly apparent and the jury would have had to disregard the captions appearing on the instructions and their parts as well as the wording of the instructions themselves to be misled by the internal reference. We conclude that any error in instruction No. 3 was not prejudicial.

The judgment of the district court is affirmed.

AFFIRMED.

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

175 N. W. 2d 3

Filed February 27, 1970. No. 37349.

Criminal Law: Sentences: Appeal and Error. Where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless there appears to be an abuse of discretion.

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

Charles A. Fisher and Charles F. Fisher, for appellant.

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

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

CARTER, J.

On November 22, 1968, the defendant, James Duncan, was charged with operating a motor vehicle on a public highway in a speed contest as defined in section 39-745.01, R. R. S. 1943. The defendant entered a plea of guilty to the charge and the district court sentenced the defendant to serve 30 days in the county jail and to pay a fine of $100, and suspended his motor vehicle operator's license for a period of 60 days. Defendant has appealed.

The bill of exceptions consists solely of the arguments made to the district court before sentence was pronounced. There appears to be little dispute as to the facts in the case as presented in the arguments of counsel. Such facts are substantially as follows: On October 31, 1968, the defendant and Roger Mazanec, accompanied by two other boys, Davis and Walker, went out into the country from Hemingford, Nebraska, where they engaged in drag racing. Walker was the starter

and remained on the side of the road at the starting point of the race. Davis rode with one of the participants in the race as a passenger. After the start of the race, the two cars took off to the north, running side-by-side, turned around about ¼ mile north, and raced back to the starting point. Defendant crossed the starting line first and Mazanec turned in behind him. During the time the race was finishing, Walker stepped out on the road to see the finish and was struck and killed by a pickup truck coming from the opposite direction. It was established that the driver of the pickup had no opportunity to avoid the accident and that its proximate cause was the negligence of Walker in suddenly stepping in front of the pickup truck. Thereafter defendant and Mazanec were charged as previously stated.

The misdemeanor complaint was filed in county court. Defendant appeared with legal counsel and entered a plea of guilty. Defendant was found guilty and granted probation. Defendant appealed to the district court where he, again accompanied by counsel, entered a plea of guilty. The district court found defendant guilty and granted probation. Defendant refused probation and filed a motion so stating and requesting that he be sentenced under the statute. Probation appears to have been refused because one of its conditions provided that he should not operate any motor vehicle for any purpose for a period of 2 years. The defendant was fully advised by the court of the consequences that could follow in moving for sentence under the statute. No contention is made that he did not know the maximum penalty that could be imposed.

The arguments of defendant's counsel and the county attorney hinged largely on whether or not a jail sentence was justified. The age of the defendant, his previous good conduct, the fact that his father farmed six tracts of land some miles apart necessitating the use of a motor vehicle, the need to operate a car to and from school, and the relationship of the drag race to the death of

Walker were thoroughly gone into with the court. It is clear that the trial court was advised of all the mitigating circumstances before sentence was pronounced.

We point out, however, that the statute prohibiting speed contests or drag racing is for the protection of the public in using public roads and minimizing the inherent dangers of vehicular traffic. While it could be said that the death of Walker was not directly caused by the drag race, it did create the condition that indirectly brought it about. If the death of Walker had resulted directly from the drag race, it could well have been a motor vehicle homicide case covered by a different statute containing a much more serious penalty. The purpose of this misdemeanor statute prohibiting drag racing on the public highways is to eliminate the dangers in them and make the public highways safer for their users. The very purpose of the statute was to prohibit the creation of dangerous conditions such as existed in this case. The fact that no one was killed directly by the drag race does not lessen the purpose of the statute nor mitigate the reasons for its enforcement. How the situation in this case could be a more serious offense under section 39-745.01, R. R. S. 1943, and still be within its scope is difficult to fathom.

The chief complaint appears to be that the sentence imposed interferes unduly with defendant's need for the use of motor vehicles, primarily because his father for whom he works has six tracts of land as far as 6 miles from home. But the enforcement of the law usually produces inconvenience and expense which compliance with the law would completely eliminate. It is true, of course, that the serving of a 30-day jail sentence could seriously interfere with the defendant's progress in school, but the trial court was not insensitive to that situation as is demonstrated by its grant of a 30-day suspension of the jail sentence when sentence was imposed on May 5, 1969.

The trial judge was fully advised of the facts and circumstances in this case by the county attorney and

defendant's counsel in the presence of the defendant. The court saw the defendant, was familiar with his age and previous good conduct, was fully informed as to his status in school, and was fully informed of all the facts out of which the complaint grew. From all of this, the trial court concluded that the sentence imposed was required. The sentence was within the limits prescribed by the statute and we can find no evidence of an abuse of discretion on the part of the trial court. State v. Agostine, 184 Neb. 158, 165 N. W. 2d 353; State v. Blackwell, 184 Neb. 121, 165 N. W. 2d 730.

Several other assignments of error were made in defendant's brief. We find no prejudicial error in them. We conclude that the case was fully and fairly considered by the trial court and its judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. ERNEST B. SAMPSON ET AL., APPELLANTS, V. JAMES A. KENNY, COUNTY TREASURER, APPELLEE, CITY OF BELLEVUE, INTERVENER-APPELLEE.
175 N. W. 2d 5

Filed February 27, 1970. No. 37355.

1. **Actions: Parties: Taxation.** Generally a suit cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover back taxes alleged to have been illegally assessed, but each taxpayer must bring action on his own behalf.
2. **Actions: Parties.** Generally an action may not be maintained as a class action by a plaintiff on behalf of himself and others unless he has the power as a member of the class to satisfy a judgment on behalf of all members of the class.

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

Eugene T. Atkinson of Atkinson & Kelly, for appellants.

John E. Rice and Dixon G. Adams, for appellees.

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

WHITE, C. J.

The question presented in this case is whether the relators have the legal capacity to join all of the taxpayers similarly situated in a class action for mandamus against the county treasurer. On failure to further plead, the district court sustained a demurrer and dismissed the action. We affirm the judgment of the district court.

The petition in this case purports to be a class action for mandamus. The relators herein seek a district court order requiring the county treasurer to refund taxes to all taxpayers having the right to file claim for refund of taxes illegally collected and disbursed. The county treasurer's duties are defined in the provisions of our tax refund statutes. § 77-1734, R. R. S. 1943, et seq. The petition alleges that relators are owners of property which was annexed to the City of Bellevue in 1965. Subsequently, on June 30, 1967, this annexation was declared invalid by the decree of the district court for Sarpy County, Nebraska, and the tax levied by the City of Bellevue under the invalid annexation was declared illegal and void. The relators filed their claim under the refund statutes with the county treasurer and the county treasurer refused to act upon their application. In this petition the relators seek to join all other taxpayers having the right to file a claim for refund of the illegal taxes collected and disbursed. The relators ask in their petition that the court make provisions for paying the claims for refund to all persons situated in the areas described in their petition, and for such other different relief as justice and equity may require. No issue is presented here as to the right to maintain an individual mandamus action against the county treasurer. The petition itself and relators, by precise statement in their brief, narrow the issue to the determination of whether they may maintain this class action on the be-

half of all other taxpayers for the recovery of the refunds due to each one individually.

This precise question has been decided by our court. We have held that a taxpayer cannot maintain a class action to recover back void taxes. In the case of Monteith v. Alpha High School Dist., 125 Neb. 665, 251 N. W. 661, this court aptly stated the holding and the reasons for it in the following language: "'A suit to recover back is quite different in the grounds upon which a recovery can be had from a suit to enjoin a tax. In the latter case, each is not only interested in the question involved, but a judgment may be rendered in favor of all as a class, upon substantially the same case, and terminate the litigation. Not so in an action to recover back money paid under duress. In such case the judgment must not only be for each according to the amount due him, but must depend upon whether each as an individual paid voluntarily or involuntarily.'"

The reasoning in the above opinion can be well illustrated in the procedural difficulties in maintaining a class action involved in this case. Without attempting to describe all of the procedural difficulties and confusion that would be accomplished by attempting to judicially control in a class action the ministerial actions of a county treasurer in this situation, we shall point out a few of the difficulties involved. The refund statute provides for the refund to be paid to the person paying such tax. This petition joins all taxpayers. Can a person who has purchased real property subsequent to the illegal levy and who did not pay the tax recover such refund? The statute requires that the claim for refund be filed by the person or his agent or authorized representative with the county treasurer. It is clearly the policy of the Legislature in setting up a refund statute to require individual action. Taxes ordinarly paid under a mistake of law are not recoverable, and the refund statute gives special relief in this situation. The county treasurer's duty arises only on a taxpayer's individual

application. The Legislature is authorized and may properly, on considerations of public policy, require individual applications and it is not mere speculation to suggest that this requirement is related to the security of the public treasury. The law (§ 77-1736.04, R. S. Supp., 1967) also provides for a determination and certification by the county board individually of the legality and validity of a refund. This is an individual determination and we feel it could not be properly maintained within the jurisdictional limits and effective judicial capacity of a court in a class action. While in form the action purports to be directed at the enforcement of the ministerial function by the county treasurer, the enforcement of a judgment in such a case would or might involve judicial control, interference with, and usurpation of the ministerial functions of a statutory officer.

We further observe that because of the peculiarly individual requirements of the refund statute that relators' petition and the relief they ask therein runs counter to the principle announced in Archer v. Musick, 147 Neb. 344, 23 N. W. 2d 323, reversed on other grounds, 147 Neb. 1018, 25 N. W. 2d 908. In that case it was stated as follows: "An action may not be maintained as a class action by a plaintiff in behalf of himself and others unless he has the power as a member of the class to satisfy a judgment in behalf of all members of the class. Vashon Fruit Union v. J. W. Godwin & Co., 87 Wash. 384, 151 P. 797 * * *."

It is true, as the cases hold generally, that a court has considerable discretion in permitting the filing of a class action in order to finally determine issues that present a common question and to prevent a multiplicity of suits. This question in the last analysis involves a balancing of conflicting considerations involved. We do not depart from the holdings of Monteith v. Alpha High School Dist., *supra,* and Archer v. Musick, *supra.*

The judgment of the district court sustaining the demurrer dismissing the action is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MERLE W. BURNSIDE, APPELLANT.
175 N. W. 2d 1

Filed February 27, 1970. No. 37429.

1. **Criminal Law: Guilty Plea: Evidence.** A plea of guilty, voluntarily entered, is conclusive and eliminates all questions of admissibility of evidence.
2. **Criminal Law: Guilty Plea.** A plea of guilty waives all defenses except that the information fails to charge an offense.
3. **Criminal Law: Sentences: Appeal and Error.** 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 Hall County: DONALD H. WEAVER, Judge. Affirmed.

Merle W. Burnside, pro se.

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

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

NEWTON, J.

This is a prosecution for burglary. The defendant Merle Burnside was charged in Hall County, Nebraska, with burglary and with being an habitual criminal. On pleading guilty to the burglary charge, the habitual criminal charge was dismissed and defendant was sentenced to 3 to 10 years in the Nebraska Penal and Correctional Complex. Defendant has appealed, without first moving for a new trial, to vacate sentence, or to withdraw his plea of guilty.

Defendant, appearing pro se, has assigned numerous errors. He complains of the overruling of a plea in abatement, a motion for change of venue, and a motion to suppress evidence. These complaints have been waived by the plea of guilty. A plea of guilty, voluntarily entered, is conclusive and eliminates all questions of admissibility of evidence. See State v. Decker, 181 Neb. 859, 152 N. W. 2d 5. A plea of guilty waives all defenses except that the information fails to charge an offense. See Wolff v. State, 172 Neb. 65, 108 N. W. 2d 410.

The defendant, prior to entering his plea of guilty, moved to disqualify the presiding judge. In support of his motion, he testified that 16 years before, the judge, then county attorney, had prosecuted him on a criminal charge; that in 1966 he had an unsatisfactory post conviction matter before the judge; and that while in jail he had been prevented from visiting with an accomplice. The judge stated he had no recollection of either the defendant or his past record and that he had not, by order or otherwise, interfered with defendant's visiting privileges while in the county jail. The charge of disqualification due to bias or prejudice is without foundation and was properly overruled.

It is asserted that defendant's plea of guilty was induced by coercion, incompetency of counsel, and a misleading statement as to the right to counsel on appeal. In regard to appellate counsel, the record clearly reflects that defendant had insisted on pleading guilty prior to his being misinformed on the subject and this could not have induced the plea. The record is entirely devoid of anything that indicates, in the slightest degree, coercion or incompetency of counsel.

In the present instance, the defendant has failed to call alleged errors occurring prior to sentence to the attention of the trial court. Ordinarily, preliminary to an appeal, assigned errors must be presented to and ruled upon by the trial court. This serves a twofold purpose. It affords opportunity for the trial court to correct its own

errors and often enables a litigant to make a record upon which to found an appeal. The defendant failed to avail himself of this opportunity.

Finally, it is said that the sentence pronounced against defendant is at once illegal and excessive. Both charges are without merit. The indeterminate sentence of not less than 3 nor more than 10 years is specifically authorized by statute. See § 28-532, R. R. S. 1943. "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." Taylor v. State, 159 Neb. 210, 66 N. W. 2d 514.

No error appearing, the judgment of the district court is affirmed.

AFFIRMED.

WHITE, C. J., not participating.

CARLYSLE O. DAVISON ET AL., APPELLEES, V. ROBIN CHARLENE INSELMAN ET AL., APPELLANTS.
175 N. W. 2d 85

Filed March 6, 1970. No. 37192.

1. **Deeds: Mortgages.** Whether a deed absolute in form is a mortgage depends upon the intention of the parties. Their intention may be evidenced not only by the document in question but also by their declarations and conduct.
2. **Mortgages: Evidence.** Evidence to prove a mortgage in such a case must be clear and convincing.

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

Thomas J. Gorham, for appellant.

Walter, Albert, Leininger & Grant, for appellee.

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

SMITH, J.

The question is whether the parties to a deed absolute in form intended a mortgage. The district court found a mortgage, quieting title in plaintiffs. Defendants appeal.

Plaintiff Carlysle "Lyle" O. Davison is an uncle of the principal defendants, Robin and Mary, children of Robert and Doris Davison, whose marriage ended in divorce. Robert died intestate in December 1965.

The dispute concerns a quarter section of farmland with buildings located in Nance County and valued as of December 1965 at $25,600. Robert owned the farm in 1952, but a partnership of the two brothers cultivated and improved it from 1952 through 1965. Robert contributed little service to the partnership, but in addition to his contribution of half the capital he lent money to Lyle. The initial loan was evidenced by Lyle's promissory note of September 1, 1952, for $3,742.18, payable to Robert 6 months after date. On October 13, 1958, Lyle gave his promissory note for $7,950, payable to Robert 6 months after date and secured by a chattel mortgage. The amount which was composed of the original indebtedness and additional advancements has not been paid except perhaps $500. The loans enabled Lyle to contribute his share of partnership capital.

The partnership over the years expended approximately $11,000 on the farm for taxes and materials that went into permanent improvements including a cabin. Building the improvements and farming the land were largely the work of Lyle, who with his wife had moved there in 1952.

The partnership paid no rent as such, receiving all income from the farm. Profits and losses were to be shared equally, but the account balance was almost always too small for a distribution.

On October 4, 1956, Robert conveyed to Lyle complete property in the farm subject to encumbrances of record. Robert received $1 for the deed which stated:

"ONE and no/100 ($1.00) and other valuable consideration." The deed was filed of record October 5. In the transaction Robert received from Lyle and wife the disputed deed which stated a consideration of $1. The deed was preserved but not recorded in Robert's lifetime. Lyle, according to his testimony, had delivered it as a mortgage notwithstanding his knowledge of the chief difference between the instruments. Delivering the chattel mortgage on October 13, 1958, he intended to substitute security.

Evidence of some transactions tends to imply that Robert retained complete property in the farm. In 1962 he negotiated with a telephone company for service to the brothers. Lyle's application included a performance guaranty signed by Robert. It was company practice to solicit a guaranty from the owner in case of an application by the tenant. Accompanying the brothers' applications was a grant of easement signed by Robert as the landowner. Through the year 1964 at the "A. S. C. Office" Lyle signed up as operator, and Robert as owner, of the farm.

Testimony of Doris and several witnesses akin to her by blood or marriage is to this effect: Robert made statements inconsistent with ownership of the farm in Lyle, and after Robert's death Lyle repeatedly admitted he was not the owner. Lyle denied making the statements.

From 1957 to 1964 Robert, according to two close friends and an acquaintance, had declared ownership of the farm in Lyle: "I would ask him how he was going to pay Lyle for what he had done . . ., that farm was run down. . . . And he said 'well, it was Lyle's farm'." "I was kidding him about . . . how much money he had made and how he was accumulating land and . . . he said, 'Well, you can't accuse me of owning any land because I put the land that I did have in my brother's name.'" "He had, I said, a nice set up here (at the

cabin) and he said, 'No, that is Lyle's. . . . I just come down here to . . . relax.' "

A stranger who, in March 1963, had heard that Robert might sell the farm testified: "I went to see . . . Robert Davison, and he told me that the farm wasn't his to sell, that it belonged to his brother. . . . He referred me to Lyle and I went out and talked to him and he said it wasn't for sale. . . . Well, he wondered if I had seen Robert and I said yes and that Robert said that it wasn't his farm."

A life insurance agent who was not acquainted with Lyle conferred with Robert in 1965. The agent's deposition reads: "We talked about his brother, . . . there was something about a cottage. . . . And I got the impression that . . . this brother had some interest in this farm as a long-range program. I don't know what the thing was."

The district court for Lancaster County had allowed Doris the divorce, alimony, and support for Robin and Mary, ages 12 and 7, on October 4, 1956. On October 25 Doris commenced suit in the district court for Nance County to set aside the deed to Lyle for fraud on creditors, alleging recordation of the divorce decree in Nance County on October 19. The answer verified on belief by Robert and filed June 4, 1957, admitted execution, delivery, and recordation of the deed to Lyle. Without disclosing the deed back, the answer alleged that Lyle owned the farm. A formal order of dismissal without prejudice was entered February 8, 1966.

Whether a deed absolute in form is a mortgage depends upon the intention of the parties. Their intention may be evidenced not only by the document in question but also by their declarations and conduct. Evidence to prove a mortgage in such a case must be clear and convincing. The requirement is based on presumptions: Express terms of a written instrument, or relation of the parties, may raise such presumptions that proof of more than ordinary cogency is required to create a pre-

ponderance of evidence. Until overcome by clear and convincing proof, the terms of the instrument stand as evidence of the intention of the parties. Norton v. Dosek, 161 Neb. 554, 74 N. W. 2d 56 (1955); Topping v. Jeanette, 64 Neb. 834, 90 N. W. 911 (1902); Stall v. Jones, 47 Neb. 706, 66 N. W. 653 (1896).

Reviewing the case de novo but considering the opportunity of the trial judge for observation of the witnesses, we affirm the judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD EUGENE KIRBY, APPELLANT.
175 N. W. 2d 87

Filed March 6, 1970. No. 37232.

1. **Trial: Juries.** A party in the selection of a jury ordinarily has no right to examine a juror out of the presence of all other jurors.
2. **Criminal Law: Trial: Juries.** Whether, during the trial of a criminal case, the jury shall be allowed to separate, after being duly cautioned, is a matter for the discretion of the trial court, and the exercise of such discretion, unless abuse or prejudice is shown, furnishes no ground for error.
3. **Trial: Juries.** One who cannot subordinate his personal views to what he perceives to be his duty to abide by his oath as a juror and to obey the law of the state must be excused for cause.
4. **Criminal Law: Trial: Witnesses.** The asking of improper questions of a witness to which objections are sustained by the court does not constitute prejudicial error in the absence of a showing that defendant was thereby deprived of a fair and impartial trial.
5. **Criminal Law: Trial.** A defendant is entitled to a fair trial but not a perfect one.
6. **Criminal Law: Evidence.** As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution.
7. ———: ———. In crimes involving motive, criminal intent, or guilty knowledge, evidence of independent crimes wholly dis-

connected with the one charged may be received.

8. ———: ———. A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof.
9. **Criminal Law: Trial: Witnesses.** A defendant in a criminal case who becomes a witness subjects himself to the rules applicable to other witnesses.

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

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

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

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

SPENCER, J.

Defendant was convicted of the murder of Gilbert Arthur Batten, Jr. He was sentenced to life imprisonment and has perfected an appeal to this court.

The murder occurred shortly after 3 a.m., on September 20, 1968, at 3724 Ohio Street, in Omaha, Douglas County, Nebraska. Defendant had been to the premises on two other occasions the previous evening, looking for a Judy Dunbar. The premises in question were occupied by James Lynch with his four minor children. Defendant appeared at the premises about 7 p.m., on September 19, in the company of a tall Indian later identified as Robert Walker, and a Donna Marshall. He was carrying a .22 caliber survival rifle. On this occasion he did not enter the house but asked Lynch if he had been dating Judy Dunbar, and when Lynch told him he had defendant told Lynch to stay away from her and Lynch said he would. Defendant shot two or three times at a brush pile and Walker shot at a rabbit. They were at the premises for approximately 15 or 20 minutes. On that occasion Donna Husky, her child, and Eugene Phillips, all of whom were also living

on the premises, were present, as well as the deceased who lived in the neighborhood, and Judy Warner who lived elsewhere.

Defendant returned to the premises at 11:30 p.m., on September 19, 1968, this time with a girl named Pam or Patty. He was admitted to the premises by the deceased. He was still carrying the gun he had on his previous visit. Lynch was not home. Judy Warner, Eugene Phillips, Donna Husky, deceased, and Harriet Taylor, a neighbor, were the only ones present other than the children, who were asleep. Deceased asked Judy Warner to get defendant a beer, and when she did not respond quickly enough defendant said, "* * * when he tells them to do something they do it," and ordered the girl with him to get down on her knees, which she did. Defendant was dissatisfied with the brand of beer offered, and left within 15 minutes. When he left he said he was going to see if he could find Judy Dunbar at her home. If not, he would be back.

Subsequently, Lynch returned home about 12 midnight and went downstairs to bed. Defendant returned to the premises about 3 a.m., on September 20, 1968. Deceased and Judy Warner were sitting on a couch in the parlor. Defendant asked for James Lynch, and when he was told Lynch was asleep in the basement he asked how to get to the basement, and forced the deceased, who opened the door, to show him the way. Defendant still had the gun in his hand. He was accompanied on this occasion by Walker and a man with long hair, wearing a "Hell's Angels cut-away jacket," who was later identified as Orval Hinz.

According to defendant's testimony, he told Walker to go around a screen in the basement and to get Lynch. Lynch testified that he was dragged out of bed by Walker; that when he was pulled around the screen, the deceased was on his knees; that someone hit him with a gun; and that's all he remembers. Lynch heard a shot, and when he came to, the deceased was lying

there in a pool of blood. Lynch got to his feet and pushed his three boys, who were also sleeping in the basement, out of the basement window, followed them, and they went next door until the police arrived.

Defendant testified that he told deceased to get down on the floor; that Walker put Lynch beside him; and roughed him up with the gun stock which had been detached from the gun. Defendant held the rest of the gun in his hand, with the trigger cocked. Deceased was 3 or 4 feet directly in front of defendant, on his knees. Defendant, who was left-handed, had the gun in his left hand, with his finger on the trigger which had to be squeezed or pulled to fire the gun. Defendant admitted his finger squeezed or pulled the trigger. Defendant's explanation of what happened is as follows: "What happened? Well, Robert was slapping on the guy or whatever he was doing. He turned around and got a little close. He said, 'Watch me. Don't point that thing,' and he pushed both hands on the barrel and the gun goes off. He said, 'What happened?' He said, 'What did you do?' I said, 'Do nothing.' I said, 'The thing went off and Batten fell over.'" Defendant testified that things then got hectic. They looked at the guy that got shot and blood was gushing, and they broke for the stairs. Defendant thought that Hinz was several feet behind him, back by the stairs, when all the activity was going on. He doesn't recall what happened afterwards, but they left the premises.

Judy Warner testified that when defendant's party arrived at 3 a.m., she was sitting upstairs on the couch with deceased. When defendant ordered deceased to go to the basement, she awakened Eugene Phillips and Donna Husky who were sleeping in a bedroom off the parlor, and went to the basement. Defendant turned toward her, pointing the gun. Lynch was on his knees alongside deceased. Defendant had the barrel and the trigger to the gun pointed at deceased. The stock was not on it. Walker had the stock, and hit Lynch on the

face with it. She then went to the three Lynch boys who were sleeping in beds behind the plastic curtain. The fourth Lynch child was asleep upstairs in the back bedroom. At this time Hinz stood over by the steps, holding a piece of iron pipe. She could only see shadows after she went behind the curtain. After she had comforted the children she started to go upstairs, and Hinz said he would kill her if she moved, so she went back to the children. She then heard a shot and started screaming. When she came out from behind the curtain, defendant still had the gun and deceased was lying on the floor. Lynch was leaning back, half stunned. She stood there, and the defendant and the other two men ran upstairs. She went to the deceased. He was bleeding severely from his head. She ran up the steps to the kitchen and defendant, who was coming out of the front bedroom, turned on her and hit her with the gun on her left cheek. She fell backwards and returned to the basement. Lynch was then pushing the children out the window. She ran back upstairs to call the rescue squad for deceased.

Phillips testified that Judy Warner awakened him at about 3 a.m., and when he heard the shot he started looking for a shotgun he knew was upstairs and started to load it, when someone swung at him with a rifle. Someone grabbed the person who swung at him, and said, "'Let's get out of here.'"

Donna Husky testified that defendant had the barrel of the gun in his hand when he came into her bedroom upstairs. She had heard the gunshot before she saw the defendant with the barrel. Walker had the stock of the gun at this time.

A pathologist testified that the bullet wound was to the right, just below the bridge of the nose, and that he removed a number of particles of lead slug, primarily in the right cerebral hemisphere of the brain. He testified it was the bullet which caused the death, and

from the absence of powder burns the muzzle of the gun must have been at least 2 feet away.

Judy Dunbar testified that she had been going with defendant, but had not seen him for over a month. He had beat her up in August with his fists, and had struck her with a gun. Subsequently she had been out with deceased, and had dated Lynch a couple of times. She had been at the Lynch home twice September 19, 1968. On the first occasion Lynch had taken her to driving school, where he left her. She returned to the Lynch home after driving school, and Lynch then took her to a friend's and later to her home. Her brother-in-law then took her to her brother's home in South Omaha, where she spent the night.

About 11 o'clock in the evening of September 19, 1968, defendant was at the home of Judy Dunbar's parents, inquiring for her. The testimony is that he broke the lock on the outer door and entered the house. He was holding a gun. He was there for 6 or 7 minutes.

Defendant was permitted to file a supplemental brief herein. The nature of it is such that we would ordinarily strike it as scandalous and profane. In it defendant attempts to discredit his counsel and the trial court, both of whom did everything possible to protect his rights. Those allegations will be answered herein.

Defendant complains that his counsel was ineffective, and that court-appointed counsel must render effective assistance at every stage of the proceedings. There is no merit to defendant's contention. Defendant was guilty of a brutal murder under circumstances which in the hands of less able counsel could have resulted in the death penalty. He was represented by a very competent member of the public defender's staff. The record demonstrates a conscientious effort on the part of counsel to protect defendant's rights at every stage. Counsel presented an adequate defense, worthy of a most conscientious defense attorney. It is of more than passing interest that after 4 days of trial, when the trial

judge, out of an abundance of caution, turned to the defendant to explain what his attorney was doing in agreeing to a stipulation, defendant cut him short and said, "Whatever he decides is good enough."

The first assignment of error in the original brief is as follows: "The District Court abused its discretion and committed reversible error in denying defendant's pretrial motions for a continuance of his trial, to sequester prospective jurors during their voir dire examination, and regular jurors during trial." Defendant and his counsel were not in agreement on the matter of a continuance. Defendant's counsel sought to postpone the trial until he felt the effects of the publicity of the brutal slaying had sufficiently diminished in the public mind that a fair and impartial jury could be obtained. Defendant was demanding a speedy trial and a letter to the presiding judge resulted in a special hearing on the question on December 27, 1968. On that occasion defendant requested the removal of his counsel and demanded the right to try his own case. The court granted defendant's request for a speedy trial and scheduled the trial for January 6, 1969. Defendant's conduct on this occasion amply demonstrated his need for competent counsel. The trial court directed counsel to remain in the case.

The question of sequestering prospective jurors during their voir dire examination was presented to this court in State v. Fiegl, 184 Neb. 704, 171 N. W. 2d 643. In that case we held: "A party in the selection of a jury ordinarily has no right to examine a juror out of the presence of all other jurors."

On the question of the court permitting the jury to separate during the course of the trial, we observe that nowhere in the brief nor in this record has there been any showing of prejudice because the trial judge allowed it to separate during the trial. In Smith v. State, 111 Neb. 432, 196 N. W. 633, we held: "Whether, during the trial of a criminal case, the jury shall be allowed to

separate, after being duly cautioned, is a matter for the discretion of the trial court, and the exercise of such discretion, unless abuse or prejudice is shown, furnishes no ground for error."

In Wesley v. State, 112 Neb. 360, 199 N. W. 719, we held: "On the trial of one charged with murder, the court may in its discretion, during the progress of the trial and before its final submission, permit the jury to separate during the several recesses of the court and go to their respective homes at the close of a day's service in the court, when the jury are properly admonished as provided in section 10150, Comp. St. 1922."

In the present case the jury was adequately admonished on every occasion of separation, and there is nothing in this record to indicate that the defendant was prejudiced in any manner because the jurors were permitted to separate and go to their respective homes at the close of a day's service in the courtroom.

The complete voir dire examination was transcribed and is a part of the record herein. There were no restrictions of any nature on the examination of the prospective jurors. Every challenge for cause was sustained, so every juror selected had specifically been passed for cause. It is also to be noted that defendant did not object in any instance to the excusing of any juror who was challenged for cause by the State. In fact, he specifically consented to their exclusion. Defendant's counsel, upon questioning, did not find one juror who ultimately was chosen as a juror who could remember any specific facts of the case that he had read or heard, or who had formed any opinion of the guilt or innocence of the defendant or who did not feel that he could be fair and impartial to both sides. Two alternate jurors were chosen. The defense waived its last peremptory challenge in this instance. One of the alternate jurors ultimately replaced a juror who was excused because of the illness of his mother in an-

other state. Both the defendant and the State agreed to the replacement.

Defendant, in his supplemental brief, under an assignment of error titled "Conduct of the Trial Judge." states: "In the Appellants Brief filed by the court Appointed Attorney, it is felt that the Attorney did fairly well presenting the issue of adverse publicity, however the Appellant feels that more should be added and the case Appellant feels that should have been further and more concisely presented is Sheppard v. Maxwell, 384 U. S. 333, Where in the Supreme Court of the United States in reversing the Conviction of Sheppard stated. 'The Carnival atmosphere at trial could easily have been avoided since the Courtroom and Courthouse premises are subject to the control of the Court.'"

Defendant quotes extensively from Sheppard v. Maxwell, 384 U. S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600, but that case has absolutely no relevance herein. The record indicates that the trial judge made every attempt to protect the rights of the defendant. If there was any carnival atmosphere at the trial, it certainly is not apparent from anything in this record. Defendant's counsel makes no such claim, and to a direct question on argument before this court stated that he could not make that complaint.

While the nature of the case was such that it would result in considerable publicity, the pretrial exhibit describing the incident and giving information on the defendant cannot be said to have prejudiced the defendant on his trial herein. The record is clear that none of the jurors who were ultimately chosen to serve on the jury to try defendant were influenced by the publicity or had formed any opinion therefrom. There is no merit to defendant's contention.

Defendant in his supplemental brief further urges that the court erred in failing to reduce the charge against him from murder in the first degree to a charge of manslaughter. The obvious answer to this allegation is that

it is hard to visualize a more cold-blooded murder than the one of which defendant was convicted. The gun he was carrying had a faulty safety. He testified he kept the gun loaded. He had the trigger cocked when he pushed the deceased to his knees; had the gun pointed at the head of the deceased; and admits that it was his finger which squeezed or pulled the trigger. In any event, the jury was instructed on manslaughter as well as on first- and second-degree murder.

Defendant in his supplemental brief also complains that he was denied a fair and impartial trial by excluding prospective jurors who were opposed to the death penalty. The death penalty was not imposed herein. The jury recommended that defendant be sentenced to life imprisonment. Sixteen of the prospective jurors were excused for cause, because they were opposed to the death penalty. However, these prospective jurors were not excluded until the trial court and the examining attorneys had established that they were irrevocably opposed to capital punishment and that they could not subordinate their personal views to what they perceived to be their duty to abide by their oaths as jurors and to obey the law of the state. One who cannot subordinate his personal views to what he perceives to be his duty to abide by his oath as a juror and to obey the law of the state must be excused for cause. On the record made, the jurors were properly excluded. As suggested heretofore, defendant's counsel consented to their exclusion.

The second assignment of error in the original brief is as follows: "The District Court committed reversible error in first overruling a defense objection to testimony before the jury by a police officer that the defendant had invoked his rights to counsel and silence after first being advised of them by police, and the Court compounded this error by denying a defense motion for mistrial when the same officer again testified to a subse-

quent repeated refusal of the defendant to respond to police interrogation."

The factual situation is important to understand the reason the prosecution thought it necessary to adduce this testimony. It was foundational to a subsequent statement by the defendant regarding the murder weapon. The officer in question gave the appellant the Miranda warnings at the federal building when he was released by the federal authorities to the State. When defendant was asked if he was willing to make a statement, he answered "no," and indicated that he wanted an attorney. Thereupon he was immediately taken to the Douglas County courthouse before the Honorable John C. Burke, who again explained his rights to him and allowed him to call an attorney. From Judge Burke's court, appellant was taken to the police station. On the way to the police station the officer in question told defendant that he would like to have the gun. At that time defendant stated that the gun was broken down into three pieces. The officer asked what type of gun it was. Defendant replied that it was an army survival type gun that breaks down into three pieces. The officer asked where the gun could be located, and defendant related that it was in the Carter Lake area. The officer was then asked if he pursued the conversation as to where the gun was, and his answer was as follows: "We tried to. Then he refused to answer any more questions." At this point, defendant's counsel made an objection and asked that the answer be stricken. The last part of the answer was stricken and the jury was admonished to disregard it. Defendant's counsel then moved for a mistrial, which was overruled.

Complaint is made about the testimony relative to the silence, but not particularly as to the admission of defendant's statements regarding the murder weapon. As a matter of fact, the defendant himself testified as to the weapon and that he had thrown it in the lake.

We fail to see, on the present record, how the defendant could possibly have been prejudiced by this testimony. The foundational testimony was necessary for the admission of the defendant's statement about the gun used in the murder.

In State v. Country, 184 Neb. 493, 168 N. W. 2d 918, we held: "The asking of improper questions of a witness to which objections are sustained by the court do not constitute prejudicial error in the absence of a showing that defendant was thereby deprived of a fair and impartial trial." There was absolutely no question about defendant's participation in the events which culminated in the murder, or in the fact that it was his finger which pulled the trigger.

The United States Supreme Court, in Lutwak v. United States, 344 U. S. 604, 73 S. Ct. 481, 97 L. Ed. 593, said in regard to an item of evidence that came in the record: "In view of the fact that this record fairly shrieks the guilt of the parties, we cannot conceive how this one admission could have possibly influenced this jury to reach an improper verdict. A defendant is entitled to a fair trial but not a perfect one."

We find there was no error prejudicial to the defendant in this instance. However, if there was, it certainly would be within the ambit of the above rule.

The original brief's third and fourth assignments of error concern the admission over objection of the testimony of Judy Dunbar to a beating inflicted upon her by the defendant with a gun, and to the court's instruction to the jury that it could consider the evidence of the beating to show intent, purpose, and motive. Judy Dunbar, the girl defendant was seeking the night of the murder, was permitted to testify to a severe beating she received at the hands of the defendant on the occasion of their last meeting in August 1968. As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. Fricke v. State, 112 Neb. 767, 201 N. W. 667.

However, in crimes involving motive, criminal intent, or guilty knowledge, evidence of independent crimes wholly disconnected with the one charged may be received. Swogger v. State, 116 Neb. 563, 218 N. W. 416. See, also, Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632; Erving v. State, 174 Neb. 90, 116 N. W. 2d 7.

On the occasion in question, defendant beat Judy Dunbar with his fists, kicked her, and also used a gun. On the night of the murder, the defendant went to the home of Judy's parents and on three different occasions to the Lynch home, looking for her. Each time he was carrying the gun. When defendant told Lynch to stay away from Judy Dunbar he had the gun in his hands, with the clip inserted, and subsequently he shot at a brush pile, which emphasized the fact that the gun was loaded. Defendant testified the gun was always loaded. The court, by instruction No. 19, specifically limited this testimony, as follows: "The State has introduced testimony of an alleged attack made upon one Judy Dunbar by the defendant in August 1968 with the use of a weapon.

"Evidence of a separate and different crime, previously committed by the defendant, in a manner similar to that charged herein, is admissible in a prosecution that has an element of a motive, purpose or criminal intent.

"This evidence of another crime previously committed, which tends to show the inclination or disposition of the defendant to commit such crimes and fix the pattern of previous conduct on his part, are relevant and admissible when it tends to prove motive, purpose, or a particular criminal intent which is necessary to constitute the crime charged. Such evidence was received solely for the limited purpose of showing intent, purpose, or motive of the accused in the particular acts charged. You must not, therefore, consider such evidence for any other purpose."

The original brief's fifth assignment of error concerns the trial court's permitting the prosecution to ask the

defendant if he had ever been convicted of a felony. Section 25-1214, R. R. S. 1943, provides: "A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof." This same question was raised in State v. Jones, 183 Neb. 133, 158 N. W. 2d 278. In that case we held: "A defendant in a criminal case who becomes a witness subjects himself to the rules applicable to other witnesses." See, also, State v. Clingerman, 180 Neb. 344, 142 N. W. 2d 765.

The last assignment of error in the original brief concerns the overruling of defendant's motion for a mistrial during the examination of Jens Christensen, the brother-in-law of Judy Dunbar. His testimony is as follows: "Q. How long have you known Ronald Kirby? A. I have met him a couple times. When he is—before he went to prison—MR. HORNSTEIN: Move for mistrial. THE COURT: Ladies and gentlemen, you will disregard any statement that has been made; completely disregard the statement. It shall be considered by you in no, any fashion whatsoever. Motion overruled. You may continue."

What we said relative to the testimony on the second assignment of error is pertinent on this point. The answer was unexpected, and the court immediately instructed the jury to disregard it. It is a rule in this jurisdiction that if an objection or motion to strike is made and the jury is admonished to disregard it, the alleged tainted evidence is not error. State v. Country, 184 Neb. 493, 168 N. W. 2d 918. Unless we are willing to rule that a defendant is entitled to a perfect or a flawless trial, this assignment of error cannot be sustained. Here the trial court, without a motion to strike or to admonish the jury, immedately directed the jury to completely disregard the statement. In its instructions to the jury the trial court specifically admonished the jury that it was not to consider any evidence stricken by the court. As stated in Lutwak v. United States,

344 U. S. 604, 73 S. Ct. 481, 97 L. Ed. 593, the defendant is entitled to a fair trial but not a perfect one.

We find no prejudicial error in this record. The judgment herein is affirmed.

AFFIRMED.

JOE RANNEY, JR., APPELLEE, V. FRANK GARTNER, APPELLANT, LILLIAN GARTNER, ADMINISTRATRIX OF THE ESTATE OF FRANK GARTNER, DECEASED, SUBSTITUTE-APPELLANT.
175 N. W. 2d 83

Filed March 6, 1970. No. 37381.

Trial. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination.

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

William H. Mecham, for appellant.

Garvey, Nye, Crawford, Kirchner & Moylan, for appellee.

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

NEWTON, J.

This is an action to recover from the cosigner of a promissory note. A verdict was directed for plaintiff and judgment entered accordingly. We affirm the judgment of the district court.

Bernard Etherington, who died subsequent to May 1965, borrowed money from plaintiff. Etherington was an employee of defendant. Defendant signed the note at Etherington's request. The note was for $1,597.20, with monthly payments of $66.55 accruing over a 2-year period. Plaintiff, who was in both the loan and insurance business, wrote a life and disability policy for

Etherington. It was a decreasing term policy providing that the amount of insurance would decrease each month by the amount of the installment due on the note. It contained a further proviso that during the 2-year term, "* * * the amount payable shall not be less than the amount necessary to discharge the indebtedness of the Insured Debtor." The policy expired April 19, 1965, 2 years from the date of the note.

Evidence regarding consummation of the transaction is conflicting. Defendant says Etherington brought the note to him, told him it would be insured, and he signed it. On the following day, defendant called plaintiff, inquired if the note was insured, and was told that it was. He made no inquiry as to the nature of the insurance.

Plaintiff's evidence is that defendant signed the note in plaintiff's office and was then given a full explanation of the insurance coverage.

Defendant asserts he was misled by plaintiff regarding the nature of the insurance coverage and that it was the duty of plaintiff to protect him by renewing the insurance.

We cannot accept either premise. The insurance was issued to Etherington, a transaction in which, according to defendant, he took no part. Defendant says he signed the note on being assured by Etherington that it would be insured. He did so without making inquiry either before or after he signed the note as to the nature of the insurance. According to his own testimony, no misrepresentations were made to him by plaintiff and he was not relying upon any specific factor other than Etherington's assurance that it would be insured.

If we accept plaintiff's version of the facts, it appears that defendant, at the time of signing the note, had full knowledge of the nature of the insurance policy issued and its limitations. In neither instance was he deceived nor can he place the additional burden of renewing the policy on plaintiff. In fact, the uncontradicted evidence

shows that on the expiration date of the policy, the loan was delinquent and the policy could not have been renewed. In any event, defendant took no steps for his own protection. Either he did not know and did not attempt to ascertain the nature of the insurance issued, or, if he did know about it, he did not attempt to secure a renewal or otherwise protect himself. We do not see, and defendant has failed to point out, wherein plaintiff was remiss in any obligation or duty owed to defendant.

No issue for the jury was presented. Indeed, no defense to plaintiff's cause of action is reflected in this record. "Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination." Thomas v. Owens, 169 Neb. 369, 99 N. W. 2d 605.

The judgment of the district court is affirmed.

AFFIRMED.

CITY OF SCOTTSBLUFF, NEBRASKA, A MUNICIPAL CORPORATION, PLAINTIFF, V. NORBERT T. TIEMANN, GOVERNOR OF THE STATE OF NEBRASKA, DEFENDANT.

175 N. W. 2d 74

Filed March 6, 1970. No. 37463.

1. **Statutes.** A statute is not to be read as if open to construction as a matter of course.
2. ———. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning.
3. ———. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
4. **Statutes: Constitutional Law.** A statute classifying cities for legislative purposes in such a way that no other city may ever

be added to the class violates the constitutional provision forbidding special laws where general laws can be applicable.

5. ———: ———. Generally, a classification which limits the application of the law to present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development, is special, and a violation of Article III, section 18, of the Constitution of Nebraska.

6. ———: ———. When invalid portions of a statute are so interwoven with the rest of the act so that the act may not be operative with the void portions eliminated or where it is obvious from an inspection of the act that the invalid portion formed the inducement for the passage of the act, the whole act fails.

7. ———: ———. It is competent for the Legislature to classify objects of legislation and if the classification is reasonable and not arbitrary, it is a legitimate exercise of legislative power.

8. ———: ———. A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.

9. ———: ———. Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.

Original action. Judgment for plaintiff.

Loren G. Olsson, for plaintiff.

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

Heard before WHITE, C. J., CARTER, SPENCER, SMITH, and MCCOWN, JJ., and SCHEELE and BOYLES, District Judges.

WHITE, C. J.

This is an original action instituted in this court and brought by the City of Scottsbluff alleging the unconstitutionality of an act of the 1969 Legislature which directs certain cities of the first class, falling within certain prescribed population limits, to establish, maintain, and financially support a municipal court. In addition, the petition asks that this court enjoin the Governor from appointing a judge to fill a vacancy on the purported municipal court in Scottsbluff, Nebraska.

The issues presented by the pleadings are solely issues of law. Proper analysis of the constitutional issues involved necessitates the thorough understanding of the pertinent provisions of the legislative bill as originally adopted and an analysis of its subsequent amendments. Legislative Bill 1293, which is the act in question in this case, as originally enacted on May 5, 1969, provided in part: (Italics indicate new language.)

"Sec. 3. There is hereby established and created in each city of the metropolitan * * *, primary, *and first * * * class cities having more than thirteen thousand population located in a county having a population of more than thirty-three thousand inhabitants according to the 1960 federal census,* a municipal court, which shall be held in such place as may be provided for that purpose within such city. *Any other city of the first class may establish a municipal court to be subject to the provisions of Chapter 26, article 1, upon a vote of the qualified electors of such city. Any proposition to establish such a municipal court shall be submitted by action of the city council at any regular municipal election.*

"Sec. 4. *In each city of the first class having more than thirteen thousand population located in a county having a population of more than thirty-three thousand inhabitants according to the 1960 federal census there shall be one judge of the municipal court, and when authorized by the governing body there shall be two judges of the municipal court, who shall be selected and retained in office in accordance with the provisions of Article V, section 21 (the merit system of judicial selection), of the Constitution of Nebraska.*

"Sec. 5. Each judge of the municipal court in a city of the metropolitan * * * primary, *or first class having more than thirteen thousand population located in a county having a population of more than thirty-three thousand inhabitants according to the 1960 federal census* shall be paid a salary of fifteen thousand dollars per annum, except as provided in section 26-103.01. * * *

The employees and assistants of the clerk of the municipal court in a city of the * * * *first class having more than thirteen thousand population located in a county having a population of more than thirty-three thousand inhabitants according to the 1960 federal census* shall receive such salary as may be fixed by the city commission or council. All salaries shall be paid out of the general fund of such cities.

"Sec. 6. In cities of the metropolitan * * * primary, *and first* class *having more than thirteen thousand population located in a county having a population of more than thirty-three thousand inhabitants according to the 1960 federal census* the municipal court shall in all cases, unless otherwise provided by law, have jurisdiction over territory coextensive with the boundaries of the justice of the peace districts in which such courts are located, as such boundaries are now or hereafter established; * * *.

"Sec. 7. The party appealing from a decree, judgment, or order of a municipal court in metropolitan * * * primary, *or first* class city *having more than thirteen thousand population located in a county having a population of more than thirty-three thousand inhabitants according to the 1960 federal census,* or any part thereof, shall, within ten days * * *.

"Sec. 8. *Any city attorney of a city having a municipal court may sign and prosecute complaints in the municipal court for misdemeanors, which are violations of state law, and which were committed within the jurisdiction of such court.*"

From May 27, 1969, until the adjournment of the Legislature on September 24, 1969, this act was subjected to detailed and piecemeal amendments which is significant with relation to the constitutional issues raised herein.

Section 3 of L.B. 1293, which creates the court and sets its population classification, was subsequently amended by L.B. 787 on May 27, 1969, changing the controlling federal census standard from "1960" to "most

recent." This section of the statute was subsequently amended on another subject but leaving the "most recent" language intact. See L.B. 1089, on June 11, 1969.

Section 4 of L. B. 1293 provides for a judge of the municipal court created under section 3, the creation of which is based upon the population figures according to the 1960 federal census. On September 24, 1969, section 4 was amended by L.B. 1070. However, the amendment pertained only to the designation of commencement of the full term of office for such judge, and left untouched the reference to the "1960 federal census" as originally enacted.

Section 5 of L. B. 1293, with relation to salary, was amended by L.B. 853 on July 17, 1969, changing the amount of the salary and the reference to the federal census from "1960" to "most recent."

Section 6 of L.B. 1293, which was not amended, deals with the jurisdiction of the newly created municipal courts in certain first class cities *based upon the 1960 federal census.*

Section 7 of L.B. 1293, which was not amended, provides for a method of appeal from the newly created courts, and again makes reference to those cities of the first class, *based upon the 1960 federal census.*

The history of this legislation in chronological summary is as follows:

Section	Subject	Final Passage	Approved by Governor
Sec. 6 of L.B. 1293	Jurisdiction of court	May 7, 1969	May 12, 1969
Sec. 7 of L.B. 1293	Appeals from court	May 7, 1969	May 12, 1969
Section 3 of L.B. 1293 as amended by Sec. 1 of LB787 and reamended by Sec. 1 of LB 1089	Creation of court	May 27, 1969 June 11, 1969	May 28, 1969 June 13, 1969

Sec. 5 of L.B. 1293 as amended by Sec. 1 of LB 853	Salary of judges	July 17, 1969	July 24, 1969
Sec. 4 of L.B. 1293 as amended by Sec. 6 of LB 1070	Number of judges, terms, vacancies	Sept. 24, 1969	Sept. 26, 1969

In this declaratory judgment action we hold that L.B. 1293 as amended is invalid on the grounds that it constitutes special legislation, in violation of Article III, section 18, of the Constitution of Nebraska, because (1) it creates a permanently closed class, and (2) it is totally arbitrary and unreasonable in its method of classification.

According to the 1960 federal census only 2 of the 22 first class cities in Nebraska, Grand Island and Scottsbluff, meet the population requirements set forth in the bill, of more than 13,000 inhabitants in a city situated in counties of more than 33,000 inhabitants. The class is thus permanently closed with respect to the provision for judges (section 4), the provision for jurisdiction (section 6), and the method of appeal from the municipal courts thus created (section 7). The law is unmistakably clear that a statute classifying cities for legislative purposes in such a way that no other city may ever be added to the class violates the constitutional provision forbidding special laws where general laws can be applicable. Axberg v. City of Lincoln, 141 Neb. 55, 2 N. W. 2d 613, 141 A. L. R. 894 (1942). The court in the Axberg case further held: "Under its terms the city of Lincoln is not obliged to pay firemen's pensions while the city of Grand Island is required to do so, even though they are both cities of the first class. The *freezing of the class in this manner* has *repeatedly* been held to violate the uniformity provisions of section 18, art. III of the Constitution." (Emphasis supplied.) The Axberg case concerned a statute which provided

in part that all first class cities "having a paid fire department, except any city of the first class that has *heretofore* adopted a charter for its own government, shall pension all firemen * * *." This court held that the statute on its face was not uniform in its operation upon the designated class, since only those cities of the first class who had adopted a home rule charter prior to the statute's enactment in 1923 were not obliged to pension firemen. Thus, the City of Lincoln would have been relieved of this obligation, since home rule was adopted in Lincoln in 1918, while the City of Grand Island would not have been relieved of this obligation as home rule was adopted in that city in 1928.

In State v. Scott, on rehearing, 70 Neb. 685, 100 N. W. 812 (1904), this court held: "An act of the Legislature which regulates a county office, and which by its terms limits its operation to counties having a population of 50,000 'according to the census of 1900,' is local and special in its application, since it can never apply to any other counties than the two which were in the class at the time of the passage of the act."

In State ex rel. Conkling v. Kelso, 92 Neb. 628, 139 N. W. 226 (1912), a case analogous in principle to our present case, this court said: "The rule appears to be settled by an almost unbroken line of decisions that a classification which limits the application of the law to present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development, is special, and a violation of the clause of the constitution above quoted. It follows that the limitation in the act to all county seats which had existed for ten successive years at the time of the passage of the act, and not permitting the rule to be applied to other counties, is *equivalent to the naming of the county seats* of that class, and is therefore void." (Emphasis supplied.)

We therefore hold that sections 4, 6, and 7 of L.B. 1293 constitute special legislation under Article III, sec-

tion 18, of the Constitution of Nebraska, because they classify cities for legislative purposes in such a way that no other city of the first class may be ever added to the class designated. Section 4, relating to an integral part of the act, providing for the judge of the municipal court, restricts the population standard to the 1960 federal census alone. Section 3, as amended, requires the creation of a municipal court in cities of the first class having a population of more than 13,000, situated in a county of more than 33,000 according to the "most recent" federal census. The language of these statutes is clear and unambiguous. It requires no interpretation. Reading section 4 together with section 3, they clearly provide that a municipal court judge shall be provided for those courts which are created based upon the 1960 federal census yet no judge is provided in the case of cities creating municipal courts on the basis of the "most recent" federal census. In this way the legislation assured that in practical operation the act would be restricted to the cities of Scottsbluff and Grand Island.

Section 6 of L.B. 1293 sets the jurisdictional limits of the municipal courts created in accordance with the population standard based upon the *1960 federal census.* It would therefore appear that if and when new courts *were mandatorily* created according to the *most recent federal census* under section 3, or *optionally created by a city under the other provisions of the statute,* that the court then would have no such jurisdiction.

Again section 7 of L.B. 1293 establishes the appeal procedure from municipal courts created according to the *1960 federal census.* Again, it clearly appears that the appeal sections would be restricted to the cities of Scottsbluff and Grand Island. The general section, section 3, purports to allow other cities of the first class to come into the subdivided class. Although the population classification was subject to intense scrutiny by the Legislature, as is evidenced by repeated specific amendments over a 4-month period, the failure to amend

or change sections 6 and 7 indicate an intention to keep and restrict the act to the limits of its original operating design, and at a minimum, to eliminate all possible inducement for cities of the first class to come under the provisions of the act.

The State contends that these problems can be cured in the act by merely reading "1960 federal census" to mean "most current federal census." It is urged that the legislative intent is clear and that this inadvertence should be cured by the court rewriting the act and its different sections to be consistent. It is not even contended by the State that the words are ambiguous or susceptible of any other but one interpretation. The words "most recent federal census" and "the 1960 federal census" are words of ordinary meaning, plain, direct, and they mean what they say and say what they mean. In a similar situation we recently restated the law in this area in Bachus v. Swanson, 179 Neb. 1, 136 N. W. 2d 189 (1965), as follows: "The position seems to be that any statute passed by the Legislature should be open to construction as a matter of course, and that we should not only judicially construe it, but judicially rewrite it. *A statute is not to be read as if open to construction as a matter of course.* Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. *Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.* Franzen v. Blakley, 155 Neb. 621, 52 N. W. 2d 833; Todd v. County of Box Butte, 169 Neb. 311, 99 N. W. 2d 245." (Emphasis supplied.)

But even accepting the standard the State asks us to apply, was this unambiguous provision inadvertent or was it intentional? We have already noted the history

of the act and the passage of the successive amendments. It appears the Legislature's attention was redirected repeatedly to the use of the federal census in the consideration of the amendments of these vital portions of the act. It is quite unreasonable, if not incredible, to indulge in such an assumption of inadvertence. Moreover, as we have intimated, the restriction to the 1960 federal census in the operative sections as to the judge, jurisdiction, and appeal guarantees against the mandatory creation of a municipal court except in the cities of Scottsbluff and Grand Island. We find no merit in this contention of the State.

It requires little argument that the sections involved are not severable, and that the whole act must fall. The State does not contend that they are severable. The rule is that when invalid portions of a statute are so interwoven with the rest of the act so that the act may not be operative with the void portions eliminated or where it is obvious from an inspection of the act that the invalid portion formed the inducement for the passage of the act, the whole act fails. Terry Carpenter, Inc. v. Wood, 177 Neb. 515, 129 N. W. 2d 475 (1964). See, also, Peterson v. Hancock, 155 Neb. 801, 54 N. W. 2d 85 (1952); Thorin v. Burke, 146 Neb. 94, 18 N. W. 2d 664 (1945); State ex rel. O'Connor v. Tusa, 130 Neb. 528, 265 N. W. 524 (1936); State ex rel. Polk v. Galusha, 74 Neb. 188, 104 N. W. 197 (1905); Crawford Co. v. Hathaway, 60 Neb. 754, 84 N. W. 271 (1900), rehearing denied, 61 Neb. 317, 85 N. W. 303 (1901); State ex rel. Cornell v. Poynter, 59 Neb. 417, 81 N. W. 431 (1899); State ex rel. Scott v. Bowen, 54 Neb. 211, 74 N. W. 615 (1898); State ex rel. Smyth v. Magney, 52 Neb. 508, 72 N. W. 1006 (1897); State ex rel. Comstock v. Stewart, 52 Neb. 243, 71 N. W. 998 (1897).

We turn now to another reason for holding the act unconstitutional. A closely related ground is that the subdivisional classification of first class cities made here

is an unreasonable and arbitrary one, regardless of whether it sets up a "closed class." It is competent for the Legislature to classify objects of legislation and if the classification is reasonable and not arbitrary, it is a legitimate exercise of legislative power. Baker v. Gillan, 68 Neb. 368, 94 N. W. 615 (1903). The classification must rest upon real differences in situation and circumstances surrounding members of the class relative to the subject of the legislation which renders appropriate its enactment. Stanton v. Mattson, 175 Neb. 767, 123 N. W. 2d 844 (1963); May v City of Kearney, 145 Neb. 475, 17 N. W. 2d 448 (1945); Steinacher v. Swanson, 131 Neb. 439, 268 N. W. 317 (1936); State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N. W. 835 (1935). The power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation. United Community Services v. Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576 (1956). A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. *Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.* Wittler v. Baumgartner, 180 Neb. 446, 144 N. W. 2d 62 (1966); Terry Carpenter, Inc. v. Wood, *supra;* State Securities Co. v. Ley, 177 Neb. 251, 128 N. W. 2d 766 (1964).

The population, according to the most recent (1960) federal census of the pertinent cities excluded from the act and of the two cities included within it, and of the counties in which such cities are situated, is as follows:

City (excluded)		County	
Beatrice	12,132	Gage	26,818
Columbus	12,476	Platte	23,992
Fremont	19,698	Dodge	32,471
Hastings	21,412	Adams	28,944
Kearney	14,210	Buffalo	26,236
Norfolk	13,640	Madison	25,674
North Platte	17,184	Lincoln	28,491
City (included)		County	
Grand Island	25,742	Hall	35,757
Scottsbluff	13,377	Scotts Bluff	33,809

First we observe that the act is an attempt to create a subclass within the already existing specific governmental population classification of first class cities. We further observe that in the subclass created by the statute, a municipal court is *mandatory,* while in all of the other cities, of greater or lesser population than Scottsbluff, the choice is made by the electors. And that this quite apparently unusual classification is accomplished by tieing it in with a county population of over 33,000.

It is elementary that it must appear in a legislative act that there is some reasonable difference of situation with relation to the objects of the legislation that would justify the discrimination inherent in any legislative classification. As the name indicates, municipal courts created on a population classification basis, are primarily for the benefit of the cities involved. This act leaves no doubt in this area because the quarters, salaries of the judges, the clerk, and the municipal court employees are mandatorily required to be paid out of the general fund of the cities involved. Five cities of the first class, Fremont (19,698), Hastings (21,412), Kearney (14,210), Norfolk (13,640), and North Platte (17,184) exceed the population of the City of Scottsbluff. Considering population as a standard, and the primary object of the legislation, it not only does not appear that there is any reasonable relation in the population classification, but it appears affirmatively that there is no uniformity of

operation within the classification standards set up by the Legislature itself with relation to the cities. We cannot discover any reasonableness in arbitrarily imposing by mandatory act a municipal court on a city of 13,377 and permitting five cities of greater population to make such determination upon the choice of the electors. Why should there be choice in the higher populated cities and the creation of a mandatory court in the seventh-ranked city? Moreover, Beatrice and Columbus, two cities within a range of about 1,000 population of Scottsbluff, are excluded.

Since the newly created courts in the act are primarily for the benefit of the city, there would appear to be no sound reason for tieing their mandatory creation to county population. But, if we were to assume that such a tied-in correlation is permissible, it does not appear a reasonable one in the present case. We can detect no scheme or apparent legal relationship to the purposes of the act in the proportions present between the city and the county populations. They appear to be vicarious, irrational, and totally unrelated. The attempt to explain it perhaps even defies speculation. There is not even an attempt to set up proportional city and county populations. Nor does any peculiar factor appear which would tie in the need as a class for a municipal court in a city of 13,377 with a county population of over 33,000 with the need for a municipal court in a city of 25,742 in a county of similar population. Nor can we discover any reconcilable geographical factor that would give an appearance of reasonableness to a classification, so irrationally disproportionate on its face.

What does appear is, once the population standards were arbitrarily established, that the act was expressly designed to compel the creation of a municipal court in the City of Scottsbluff. It would appear that the inclusion of the City of Grand Island within this subclassification is either fortuitous or designed to avoid a sub-

classification which on its face would have one city only. The lack of correlation of any tie-in with the county population can be further illustrated by pointing out that all five of the excluded cities of the first class which exceed Scottsbluff in population also have a county population ranging from 25,674 to 32,471 according to the 1960 census. And yet, Fremont located in Dodge County, exceeds the minimum city population by 6,698 and fails to attain the county population by only 529, yet it is excluded from the subclassification. A further analysis of the population figures or an attempt to rationalize the proportions between city populations or their relation to county populations is unnecessary. Pertinent here is the pronouncement of our court in Axberg v. City of Lincoln, *supra,* which held: "We think that section 35-201, Comp. St. 1929, is not only void as local and special legislation in its application, but it is violative of section 18, art. III of the Constitution, in that it is not uniform as to class. *There is no sufficient reason advanced why one city of the first class should be exempted from the special obligations and burdens of the firemen's pension law, while others in the same class are required to submit to such obligations and burdens.* The attempt of the legislature, by the enactment of section 35-201, Comp. St. 1929, to divide the class constitutes arbitrary action, and the contentions of appellees to the contrary are without merit. It therefore violates section 18, art. III of the Constitution." (Emphasis supplied.)

In light of the conclusions we have reached herein it is unnecessary to discuss the further contentions that have been raised in the briefs herein. We hold that L.B. 1293, 1969 Legislative Session, constitutes special legislation and is unconstitutional and void as violative of Article III, section 18, of the Constitution of Nebraska.

In this original action, therefore, judgment shall be entered for the plaintiff and the injunction restraining

the enforcement of the act will be issued as prayed for in the plaintiff's petition.

JUDGMENT FOR PLAINTIFF.

STATE OF NEBRASKA EX REL. LOREN B. BELKER, APPELLANT, V. BOARD OF EDUCATIONAL LANDS AND FUNDS OF THE STATE OF NEBRASKA ET AL., APPELLEES.

175 N. W. 2d 63

Filed March 10, 1970. No. 37004.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. On motion for rehearing and reargument. See 184 Neb. 621, 171 N. W. 2d 156, for original opinion. Original opinion adhered to.

Ginsburg, Rosenberg, Ginsburg & Krivosha and Rodney P. Cathcart, for appellant.

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

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

On reargument, previous opinion adhered to.

BOSLAUGH, MCCOWN, and SMITH, JJ.

The central issue in this case, and the only real issue, is whether the Legislature is authorized to direct the sale of all school lands. It is our opinion that the constitutional provision which vests the general management of all school lands and funds in the Board of Educational Lands and Funds "under the direction of the Legislature" authorizes the Legislature to direct the sale of school lands. Art. VII, § 1, Constitution of Nebraska.

The legislative history of the act does not appear in the record in this case. Whatever it may have been, there is nothing in the act, nor in any legislative history

alluded to, which in any way limits or attempts to limit the jurisdiction or power of the courts to determine, in a proper proceeding, whether the sale of any school lands was conducted in the manner required by law.

Whether the sale of the lands should prove to be a wise decision or not, it is a decision which the people empowered the Legislature to make. This court has no authority to exercise a power which the people have constitutionally vested in the Legislature.

We adhere to the opinion originally filed in this case.

CARTER, J., dissenting.

This matter arises after a reargument of the issues raised by the appeal. The three members of the court upholding the constitutionality of the act under Article V, section 2, Constitution of Nebraska, have concluded to adhere to the former opinion. I disagree with this disposition of the case.

Due to a temporary disability, I was not able to participate in the disposition of the case originally and Colwell, District Judge, sat in my stead. Having participated in the motion for a rehearing and the reargument of the case, I deem it necessary to state my views regarding the constitutionality of the legislation authorizing the sale of the school lands held in trust for the benefit of the common schools of the state.

The statutes primarily questioned here provide in part: "All lands, now owned or hereafter acquired by the state for educational purposes, shall be sold at the expiration of the present leases. * * * Prior to such sale, the land shall be appraised for sale purposes in the same manner as privately-owned land by a representative appointed by the Board of Educational Lands and Funds, and thereafter shall be sold at public sale at not less than the appraised value; Provided, * * *." § 72-257, R. S. Supp., 1967. "Such land shall be sold, at public auction, by a representative of the Board of Educational Lands and Funds or by the county treasurer of the county in which the land is located, to the highest

bidder. The appraised value for sales purposes as provided in section 72-257 shall be the starting bid price. * * * Settlement shall be made by paying cash of not less than twenty percent of the purchase price at the time of sale and the balance shall be payable in cash within ninety days of the date of sale. If the person submitting the high bid for the land fails to pay the balance of the purchase price and complete the sale within ninety days his rights under the sale, including the twenty per cent down payment, shall be forfeited by the board and a new sale shall be authorized." § 72-258, R. S. Supp., 1967. It is clear to me that if the foregoing provisions are complied with, the sale is to be final and complete and the purchaser entitled to a deed.

The original concurring opinion of Boslaugh, Smith, and McCown, JJ., State ex rel. Belker v. Board of Educational Lands & Funds, 184 Neb. 621, 171 N. W. 2d 156, in sustaining the constitutionality of the foregoing provisions of the law holds that irrespective of the shortcomings of the statutes, the trustee, or persons dealing with the trust assets, have the courts available to them to determine whether or not the rules governing trusts have been properly applied and that such fact is sufficient to sustain a holding of constitutionality. This opinion states: "The fact that the sale statute is silent as to the procedures for such a determination does not alter the law of trusts, nor relieve the trustee of its trust obligations, nor make the statute unconstitutional." Under this theory, the Legislature can merely direct a sale and the courts will supply the missing language, compel compliance with such directions of the court, and hold the act constitutional. This has been tried many times in this state with fatal results in each and every instance. Cases in this court consistently and unanimously support such results. They are cited in the dissenting opinion by Spencer, J., in State ex rel. Belker v. Board of Educational Lands & Funds, 184 Neb. 621, 171 N. W. 2d 156, and will not be repeated

here. In 82 C. J. S., Statutes, § 328, p. 635, it is said in part: "It has been held to make no difference that the omission resulted from inadvertence, or because the case in question was not foreseen or contemplated, or that as a result of the omission the statute is a nullity."

The controlling opinon in this case concedes that the school lands of this state are held in trust for the benefit of the common schools. The relationship of trustee and beneficiary is a fiduciary one imposing the utmost good faith in the handling of the trust property. Among the duties of a trustee is to require in the case of the sale of trust property that he shall obtain the highest price possible and refuse to make a sale if the sale was fraudulent, or the result of chilled bidding, or any other conduct or circumstance that resulted in an inadequate sale price. The statute under consideration provides for an appraisal and a public sale, after which, if the bid price equals or exceeds the appraisal price, the sale is completed upon payment of the bid price within 90 days. The statute therefore deprives the trustee, the Board of Educational Lands and Funds, from exercising the powers and duties of a trustee imposed by the creation of the trust relationship by the Constitution.

It is asserted in the controlling opinion that the failure to provide for the sale of school lands consistent with its trust status may be read into the statute by implication and enforced as if written into the statute. This is simply not true. See 82 C. J. S., Statutes, § 328, p. 635. An implication to be drawn from the absence of language in a statute is a mere guess and the guess, if made, is judicial legislation. But assuming, solely for the purpose of argument, that there is language in the statute from which an intent can be implied, the position of the controlling members of the court remains wholly untenable under the facts in this case.

The history of the act shows conclusively that the Legislature intended that the appraisal, sale, and payment were to constitute the sole basis for the passing of

ownership. The right of the trustee to perform its duty was intended to be cut off. Its duty to protect, conserve, and safeguard the assets of the trust for the benefit of all its beneficiaries and its liability for loss thereof resulting from its failure to exercise reasonable care, prudence, and diligence were cast aside in favor of a summary binding sale for the very purpose of subverting the duty of the trustee and the rights of beneficiaries.

The history of the statutes under consideration is set forth in the dissent of Spencer, J., in State ex rel. Belker v. Board of Educational Lands & Funds, *supra*, and will be only briefly set forth here. The statutes here involved were before the Legislature in their present form. An amendment was offered that would give the Board of Educational Lands and Funds the right to reject bids. The amendment was rejected, plainly indicating that the Legislature did not intend that such board as trustee could see to it that the land did sell for its highest market price. This legislative action demonstrated that the Legislature intended to obstruct the trustee in the performance of its duty and to provide for a completed sale if the bid equalled or exceeded the appraised value whether or not the best interests of the beneficiaries were served. That this was the intent of the Legislature is further shown by the provision that the county treasurer of the county in which the land was located could sell school lands, a person not even a trustee. With this situation existing, a court cannot possibly justify finding or creating a legislative intent contrary thereto by implication or otherwise.

In Love v. Wilcox, 119 Tex. 256, 28 S. W. 2d 515, 70 A. L. R. 1484, it is said: "No court could justify putting into a statute by implication what both houses of the Legislature had expressly rejected by decisive votes. The House and Senate Journals leave no room for doubt of the legislative intent to deny the power exercised by the State Committee in seeking to debar names from the primary ballots under the resolutions of February 1,

1930. Once the legislative intent is ascertained the duty of the court is plain. To refuse to enforce statutes in accordance with the true intent of the Legislature is an inexcusable breach of judicial duty, because an unwarranted interference with the exercise of lawful, legislative authority." See, also, Blome Co. v. Ames, 365 Ill. 456, 6 N. E. 2d 841, 111 A. L. R. 940; 50 Am. Jur., Statutes, § 330, p. 322.

In Long v. Poulos, 234 Ala. 149, 174 So. 230, the court said: "If the intention of the Legislature can be ascertained from the language used and the history of the enactment, it is not necessary to apply any presumptions of law which will aid in the interpretation when its meaning does not otherwise appear. * * * We do not think it is necessary to draw upon such presumptions in this case because we think that without them we are able to ascertain the legislative intent."

In State, Department of Highways v. Busch (La. App.), 220 So. 2d 513, it was said: "We cannot supply by interpretation what our lawmakers have failed or refused to do by legislation."

"If legislative intent has meaning for the interpretative process it means not a collection of subjective wishes, hopes, and prejudices of individuals, but rather the objective footprints left on the trail of legislative enactment. Legislative intent can't be 'dreamed-up.' It can be *speculated about*; but it can be *discovered* only by factual inquiry into the history of the enactment of the statute, the background circumstances which brought the problem before the legislature, the legislative committee reports, the statements of the committee chairman, and the course of enactment. To pursue this course means work and hard work, but if it is pursued it is seldom that the pursuit is fruitless. An honestly conducted inquiry into these considerations will fail but infrequently to disclose to the inquirer the purpose and intent of the legislature and will clarify the applicability of the statute to the question in litigation." 2 Suther-

land, Statutory Construction (3d Ed.), § 4506, p. 321.

"Be this as it may, judicial interpretation should never be judicial legislation. We may not, therefore, under the guise of interpretation, read into a statute matters which have been omitted by the legislature particularly where it appears that the omission might have been intentional." In re Estate of Barnett, 97 Cal. App. 138, 275 P. 453.

"There are two well established rules by which we must be governed in construing a statute. On the one hand, we must give effect to each and every part of it; on the other, we are not permitted to read into a statute anything which we may conceive the legislature may have unintentionally left out. Rather than violate the latter rule, the court will leave ambiguous phrases of statutes ineffctive and refer their correction to the legislature. And that is what must be done with respect to the phrase we are considering. * * * To render the phrase effective would require much supplementation by the court. * * * To supply these deficiencies in the act in order to give effect to the ambiguous phrase, would amount to judicial legislation. From the phrase itself, we think it would be a violent assumption to say that the legislature intended in any manner to change or modify our long established practice and procedure with respect to the appointment of trustees for insolvent corporations. That such an assumption would be repugnant to the legislative intent, is apparent from the title of the act, * * *." Seattle Assn. of Credit Men v. General Motors Acceptance Corp., 188 Wash. 635, 63 P. 2d 359.

"In the same case it was also held that 'the court cannot, under its powers of construction, supply omissions in a statute, especially where it appears that the matter may have been intentionally omitted.'" Appeal of Infants Welfare League Camp, 169 Pa. Super. 81, 82 A. 2d 296.

"If the omission was intentional, no court can supply it. If the omission was due to inadvertence, an attempt

to supply it by including the omitted case would be tantamount to adding to a statute a meaning not intended by the Legislature." Mitchell v. Mitchell, 312 Mass. 154, 43 N. E. 2d 783.

The foregoing authorities when applied to the facts in this case show the plain intent of the Legislature to circumvent the duties and liabilities of the trustee and the right of the beneficiaries of the trust to have the trust property sold for the highest market price obtainable in accordance with the fiduciary relationship of the parties. The holding of the controlling opinion that the court may supply the missing legislative intent by interpretation or implementation, even though it is directly contrary to the real purpose and intent of the Legislature, is nothing more than judicial legislation and an encroachment upon the powers of the Legislature forbidden by the separation of powers provision of our state Constitution. The very idea that this court may rewrite a statute and give it effect, even though in conflict with the ascertained and real intent of the Legislature, is abhorrent to every student of constitutional government.

"In Armstrong v. Board of Supervisors, 153 Neb. 858, 46 N. W. 2d 602, it is said: 'If the language of a statute is clear and unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature.' See, also, Federal Farm Mortgage Corp. v. Adams, 142 Neb. 202, 5 N. W. 2d 384; 50 Am. Jur., Statutes, § 225, p. 204. A statute is not to be considered as appropriate for construction as a matter of course. It is only ambiguous statutes of uncertain meaning to which the rules of construction have application. In Cross v. Theobald, 135 Neb. 199, 280 N. W. 841, this court said: 'Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the

statute itself.'" Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409.

"We are not warranted in supplying words which appear to have been designedly omitted, or in accomplishing the same result indirectly by giving to the words used the broad import and meaning for which the state contends." State v. Pence, 173 Ind. 99, 89 N. E. 488.

"This being true, must we not accept the statute as we find it and concede that the General Assembly in its wisdom omitted the word 'newspapers' from the second sentence for some reason which appeared to that august body to be sufficient? Whatever may have influenced the General Assembly to omit the word 'newspapers' from the second sentence in the statute, if it did purposely do so, is sufficient, and courts are not authorized to interpolate words into a statute which the lawmaking body has purposely omitted. * * * The learned trial judge delivered a written opinion from which we take the following pertinent observation: 'The argument of the Commonwealth is that the word "newspapers" was inadvertently omitted by the legislature in the second sentence adverted to, and having been inadvertently omitted by the legislature, it should be included by the court. This seems to me clearly to confound the functions of these two agencies of the government. Under the Constitution it is the province of the legislature to enact and the province of the judiciary to interpret, and it is of vital importance to the maintenance of our institutions that the functions of the two departments shall be kept separate and distinct as provided in the Constitution. However beneficent a law might be, it is for the legislature to pronounce it. However much public policy may demand the enactment of a law, the court cannot enact it.'" Commonwealth v. Lipginski, 212 Ky. 366, 279 S. W. 339.

"In the construction of statutes, words should never be supplied except to effectuate a meaning clearly shown by the other parts of the statute and to undertake to

augment the substance of a statute as here desired would be an abortive act of legislation rather than a proper exercise of the power of judicial construction." Saslow v. Previti, 17 N. J. Misc. 29, 3 A. 2d 811.

The controlling opinion, however, purports to sweep these fundamental concepts under the rug by stating that they have no application because equity courts are open to enforce the duties, liabilities, and fiduciary relationship of the parties. Let us examine the validity of this holding, a holding supported by no legal authority, court decision, or authoritative text, in the controlling decision of this case.

I am in full agreement with the controlling opinion that our equity courts have general supervisory powers over the administration of trusts. According to available records, the value of unsold school lands was at least $70,100,000. The number of tracts to be sold is not known to me but there are at least 544 since there are that many tracts under lease. Under the theory of the controlling opinion, it is possible that a minimum of 544 suits would be required to insure that the trustee procured the highest possible market value of the land for the benefit of the beneficiaries of the trust. It is not at all likely that the Board of Educational Lands and Funds would bring such suits, a board whose duties are prescribed by the Legislature and whose salaries are fixed by it. If a beneficiary brought suit to determine the adequacy of the sale price, the cost of attorneys' fees and court expense would probably far exceed the benefit accruing to a single beneficiary even if the litigation proved successful. But more important still, the statute deprives the trustee of its duty to act in the capacity of a fiduciary and the duties and responsibilities of the trustee acting in its fiduciary capacity. It deprives the beneficiaries of the benefit of the trustee in seeing to it that the highest market price is obtained for the common schools of the state. It would subject the state to the payment of losses from sales not made in

accordance with the law governing the sale of trust property as provided in Article VII, section 9, of the Constitution. I submit that the theory announced in the controlling opinion is not only not in accordance with law but, for all practical purposes, provides no adequate remedy for a breach of the fiduciary relationship. I submit that the power of the courts to control the administration of trust property can best be exercised by insisting that the statute providing for the sale of school lands be consistent with the sale of trust property and the duties, liabilities, and benefits accruing to trustees and beneficiaries growing out of the fiduciary relationship of trustee and beneficiary created by the Constitution. I submit that the theory of the court's opinion is unworkable, defeats the purposes of the law of trusts, and in practice provides no effective protection to the beneficiaries of the trust. I submit that the general power of equity courts to supervise trusts through collateral attack does not afford an adequate remedy, nor does it comply with the necessary attributes of due process. In addition thereto, a multiplicity of suits would be required to insure compliance with the law of trusts and the protection of the beneficiaries of the trust.

This case has been twice argued. In each argument four judges were of the opinion that the statutes were unconstitutional. In the first argument, Colwell, District Judge, sat as a member of the court. In the second, I resumed my place on the court and Colwell, District Judge, did not participate. The result is that five judges sat on the two arguments who firmly believe that the act before us is unconstitutional. On the other hand, the same three members of the court have stood in the shadow of Article V, section 2, of the Constitution, and insisted that the act is constitutional. I do not intend to infer any irregularily in constituting the court in either instance. There was none. My only comment is that three members of the court under the provisions of

Article V, section 2, of the Constitution, are authorized to sustain the constitutionality of a legislative act without citing a single case or text authority. On the other hand, the five dissenting members of the court have cited ample authority to sustain their position that the act is unconstitutional. I submit in all fairness that if the position of the three members of the court can sustain their holding of constitutionality, and I am confident they cannot, it is encumbent upon them to do so. In my opinion, the controlling opinion is legally unsound and the failure to cite supporting authority affords some evidence to confirm that opinion.

The purpose of the statute is shown by the language of the act and the history of its enactment. It is clearly demonstrated that the legislative intent is to make the sale therein provided the final completion of the sale to the highest bidder. The object of the controlling opinion is to avoid questions of unconstitutionality by a construction contrary to the intent of the Legislature. This is judicial legislation under all of the authorities and is violative of the division of powers provision of the state Constitution. Such a construction is not only void as judicial legislation, but it has the effect of eliminating the protection afforded the resulting trust fund and its beneficiaries by virtue of its status as trust property. The purported remedy of the controlling opinion is not only inadequate, but it will require a multiplicity of suits to enforce the protections required by the Constitution in designating the school lands of the state as trust property. I submit that our adopted opinion is contrary to the Constitution and the applicable law, is an arbitrary assumption of legislative powers by rewriting the act contrary to the intent of the Legislature, and has the effect of circumventing the rights of the beneficiaries of the resulting trust fund by a disregard of the manner provided for the sale of trust property. The act is unconstitutional and void, and contrary to the best interests of the state, the beneficiaries of

the trust fund, and the good conscience of a court of equity.

Simple justice and the applicable law require that its beneficiaries should be protected with the utmost fidelity without the necessity of engaging in costly collateral litigation. I submit that the controversial statute is wholly void and arbitrary and that the only legal and adequate remedy is a declaration of unconstitutionality by this court. Having these views, I emphatically dissent from the unsupported holdings announced in the opinion of the controlling members. I would reverse the judgment of the district court and enter a declaration of unconstitutionality.

WHITE, C. J., and SPENCER and NEWTON, JJ., join in this dissent.

Separate Opinion by SMITH, J.

From original submission of this case on January 14, 1969, almost 14 months have elapsed. The interval, highly abnormal for this court, is an example of predilection for delay that we ought to prevent.

SPENCER, J., dissenting.

I reaffirm my dissent to the three-judge opinion upholding the constitutionality of sections 72-257 and 72-258, R. S. Supp., 1967, and 72-258.01, R. R. S. 1943 (as amended by Laws 1965, c. 435, §§ 2, 3, and 4, pp. 1386 and 1387, and Laws 1967, c. 466, §§ 10 and 11, p. 1450), found at 184 Neb. 621, 171 N. W. 2d 156. I am authorized to state that White, C. J. and Carter and Newton, JJ., adhere to that previously declared position.

The controlling opinion in this case states that the only real issue is whether the Legislature is authorized to direct the sale of all school lands. This is not the issue at all. No contention is advanced by anyone that the power to sell school lands is not lodged in the Legislature. The issue is whether the statute implementing the constitutional authorization to sell meets the requirements for the sale of trust property where, as here, the Constitution declares it to be such. The dissenting

opinion of Judge Carter points out not only that the statute does not comply, but that it was the intention of the Legislature not to comply.

Additionally, I attack the right of three members of this court to override a majority opinion, and state that the following sentence from Article V, section 2, Constitution of Nebraska, "No legislative act shall be held unconstitutional except by the concurrence of five judges," is itself unconstitutional.

The Enabling Act of Congress, permitting the people of Nebraska to adopt a Constitution and form a state government, required a republican form of government not repugnant to the Constitution of the United States and the principles of the Declaration of Independence. As the Supreme Court of Colorado said in People v. Western Union Telegraph Co., 70 Colo. 90, 198 P. 146, 15 A. L. R. 326: "The original Constitution of Colorado was a solemn compact between the State and the Federal government, a compact which stipulated that it should never be altered save in the manner therein provided, and that all amendments and all revisions thereof would conform to the supreme law. The whole people of the state have no power to alter it save according to their contract. They cannot do so, even by unanimous consent, if such alteration violates the Constitution of the United States. Should they make the attempt their courts are bound by the mandate of the Federal Constitution, and by the oath they have taken in conformity therewith and with their own Constitution, to declare such attempt futile, to disregard such violation of the supreme compact, and decline to enforce it. There is no sovereignty in a state to set at naught the Constitution of the Union, and no power in its people to command their courts to do so. That issue was finally settled at Appomattox."

This provision does not limit the authority of this court to declare an act unconstitutional if it is in violation of the state Constitution only, but prohibits such

declaration without five votes, whether it is unconstitutional under the state *or* the federal Constitution. This is violative of the federal Constitution. Any dilution of the judicial power shatters the fundamental principle that government is divided into three coordinate branches —legislative, executive, and judicial. Any limitation upon what is rightfully a part of the judicial power destroys the republican form of government. If it is possible to require more than a majority vote, is it not also possible to require a unanimous vote? To so hold is foreign and hostile to our republican form of government.

There are certain acts which even the state Constitution cannot abrogate. One of these is to limit the authority of this court to exercise its sovereign and inherent power as the judicial branch of government, free from the dictates of the Legislature.

This constitutional provision as applied in the instant case permits the Legislature to dilute the inherent power of this court, as well as depriving the beneficiaries of the public school lands' trust of property without due process of law. In other jurisdictions a simple majority may hold a legislative act unconstitutional. Because of this provision, Nebraska requires five of seven judges to so hold. Citizens of Nebraska are not therefore entitled to all of the privileges of citizens in the several states.

The Supreme Court of the United States in Reitman v. Mulkey, 387 U. S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830, struck down an act of the State of California which sought to prohibit open housing laws unless first approved by a majority vote of the people of California. The court held that even a majority could not promulgate legislation inherently contrary to rights afforded an individual under the Constitution of the United States. I maintain that our constitutional provision permitting a minority of the citizens of Nebraska, as represented by three judges upon this court, to thwart the will of

the majority is in violation of the equal protection clause of the Constitution of the United States.

WHITE, C. J., dissenting.

As early as 1894 and as recently as 1962 this court has stated and reaffirmed the principle that the constitutional authority and power to sell, lease, and manage the educational lands of the state is conferred upon a distinct board and that the authority thus conferred, the Legislature is powerless to take away. At the present time the Board of Educational Lands and Funds has sole power under the Constitution to manage and control school lands. State ex rel. Crounse v. Bartley, 40 Neb. 298, 58 N. W. 966; State v. Kidder, 173 Neb. 130, 112 N. W. 2d 759.

This constitutional function conferred upon the board "under the direction of the legislature" has been present since 1875. Nebraska Constitution of 1875, Article VIII, section 1; Nebraska Constitution of 1920, Article VII, section 1. In light of the above language it is clear that the responsibility, duty, and discretion to sell, lease, and manage the school lands is in the board and not the Legislature. Thus the word "direction" in the phrase "under the direction of the Legislature," cannot be construed to mean command. Rather, the word "direction" must be defined as meaning care and superintendence; a guidance or supervision of action, conduct, or operation. Town of Palatine v. Canajoharie Water Supply Co., 90 App. Div. 548, 86 N. Y. S. 412; Webster's Third New International Dictionary, p. 640 (1968). The prevailing minority states that "under the direction of the Legislature" authorizes the Legislature to direct the sale of school lands and also that whether the sale of the lands should prove to be a wise decision or not, it is a decision which the people have constitutionally vested in the Legislature.

One instance is sufficient to emphasize the fallacy in this reasoning. As pointed out by Carter, J., in the present case, and Spencer, J., in his previous opinion, the

statute does not provide for, and the legislative intent was to prohibit, giving the board any right to reject or confirm bids. State ex rel. Belker v. Board of Educational Lands & Funds, 184 Neb. 621, 171 N. W. 2d 156. It cannot be denied that the right to confirm or reject bids at a sale of land is the very essence of discretion. Thus, without any consideration of applicable trust law, it is clear under our previous decisions that the Legislature has usurped the constitutional duty of the board. Such usurpation is itself unconstitutional. The prevailing minority blithely permits this by stating that it is the will of the people with total disregard, or possibly disdain, for the previous interpretations this court has placed upon the stated will of the people. The direction to sell, while reserving no discretion in the board to confirm or reject bids, is more than a guidance or supervision of action, conduct, or operation. It is the arbitrary assumption of duties constitutionally placed upon the board by the will of the people and thus must fail as being unconstitutional.

This reasoning is also supported by the fact that Article VII, section 8, of the Constitution, pursuant to a 1920 amendment, states that school lands shall not be sold except at public auction under such conditions as the Legislature shall provide. This power to set the conditions of sale is a function of guidance or supervision and cannot be looked at as giving the Legislature the power to command sale of the school lands. The language used here clearly infers that the Legislature is not vested with the power to command sale of the school lands.

The prevailing minority states that there has been no present abuse of the trustee's discretion and that if an abuse is present when the land is sold an action on behalf of the beneficiaries may then be brought. As pointed out by Carter, J., this is in effect, no remedy at all as individual benefits would be grossly dispropor-

tionate to the costs of such an action by a trust beneficiary.

Aside from the ability of the Legislature to make such a command, the command itself is clearly a blatant violation of the trustee's discretion. The Legislative command in 1965 to sell all of the school lands as the leases expire, with over half of the land going on the market in 1975, shows total disregard for what future market conditions in a volatile economy may be. The lands are required to be sold without regard to the possibility of a depressed economy, a glutted market, or the availability and cost of money to purchase the land. Such a policy is clearly not prudent and is an abuse of the trustee's discretion. As such, it should be stopped in its gestation rather than aborted on a piecemeal basis as the expiration of each lease gives birth to a sale. As pointed out by Carter, J., the latter alternative is a totally inadequate remedy. I submit that the 1965 command is a present violation of the trustee's discretion as it governs sale of all the land, not just the sale of an isolated tract which may or may not be wise at the time sold.

An additional consideration is the fact that the available investments for proceeds of the sales are limited. In considering the wiseness of a sale it cannot be isolated from what will become of the proceeds. Land has been on a general rise in value for some time, the same is not true of legally permitted investments. The investments permitted by statute, section 72-202, R. R. S. 1943, are generally of the type considered as income investments rather than capital appreciation investments. To some extent the opposite is true of land. The possibility of increased income for the use of common schools is attractive, but it should not be used to close our eyes to the fact that in this age of inflation most investment analysts would advise a balanced portfolio which would also provide for capital appreciation. This might well be impossible if all of the school lands were sold and the

proceeds invested pursuant to section 72-202, R. R. S. 1943. A trustee is required to dispose of trust property upon the most advantageous terms which it is possible for him to secure for the benefit of the cestui que trust whom he represents. State ex rel. Ebke v. Board of Educational Land & Funds, 154 Neb. 244, 47 N. W. 2d 520. To be prudent embraces foresight to the extent that reinvestment of the proceeds is predetermined, as it is under section 72-202, R. R. S. 1943. This, among other things, is indicative of the trustee's violation of discretion and the consequent invalidity of the act.

Article IV, section 3, of the Constitution of 1866, gave exclusive chancery and common law jurisdiction to the district courts and Supreme Court. This theme has continually been carried forward and is presently stated in Article V, section 9. The Legislature is powerless to take away the equity jurisdiction conferred by the Constitution. Lacey v. Zeigler, 98 Neb. 380, 152 N. W. 792. Jurisdiction over the administration of trusts and supervisory jurisdiction over charitable trusts are inherent in equity courts of this state and in this court, and the Legislature has no power to limit or control this jurisdiction. John A. Creighton Home v. Waltman, 140 Neb. 3, 299 N. W. 261.

The framers of the original Constitution placed the school lands in trust with the fund to remain inviolate and undiminished. The creation of a trust and provision that the funds remain inviolate clearly shows the intent of the framers that the courts, through their equity jurisdiction, should retain control and supervision over the fund to prevent or remedy any and all violations of the trustee's duty.

The gift of this land under the Enabling Act and the acceptance and constitutional provisions for it are in the nature of a trust deed forming a solemn compact with the federal government. The state, in its generic sense, is the trustee with all branches of government participating in the administration of the trust. The Board

of Educational Lands and Funds, executive branch, has the power to sell, lease, and manage under the direction of the Legislature and subject to the supervisory powers of the equity courts. It cannot be argued but that the creation of this trust under such a system of checks and balances was to guard against any violation of the trustee's discretion. Should the fact that a 1920 constitutional amendment will allow a legislative act to be overturned only by five votes of this court be permitted to disrupt this system of checks and balances? The answer must be an unequivocal no. A review of the history of the 1920 Constitutional Convention reveals not the slightest intent to invade or impede this court's jurisdiction to control and administer, in a proper case, the provisions of this trust and to protect the school children of the State of Nebraska against any type of state action whether by the people directly or by legislative action.

It is the duty of the courts to reconcile and harmonize, if reasonably possible, conflicting statutory or constitutional provisions. State ex rel. Johnson v. Marsh, 149 Neb. 1, 29 N. W. 2d 799; Swanson v. State, 132 Neb. 82, 271 N. W. 264; Elmen v. State Board of Equalization & Assessment, 120 Neb. 141, 231 N. W. 772; 16 C. J. S., Constitutional Law, §§ 16, 23, 25, 26, and 38, pp. 72, 91, 98, 99, and 117. In a literal context the 5-2 provision would seem to apply to any act of the Legislature. However, when we examine the context of the school lands trust, its origin, its formulation in the constitutional provisions, and the duties of this court in enforcing the administration of this trust, it seems to me that "an act of the Legislature" can never mean administrative actions by the Legislature in behalf of the state in the exercise of its power as a trustee of the school lands. To otherwise hold would give the Legislature a power superior to that of the judicial or executive branch and clearly defeat the careful system of checks and balances formulated by the drafters of the Constitution to protect this trust. The compact establishing this trust was

in form a constitutional provision, but in substance a trust deed. If the fundamental nature of the administrative power over the school land trust is to be circumscribed by independent judicial control, it cannot be transcended by such state action taking the form of an exercise of the general law-making power.

Under the original compact and its acceptance by the people of the State of Nebraska, no state action whether in the guise or form of legislative action or constitutional amendment of any nature whatsoever can assume to the Legislature the arbitrary and unreviewable power to manage the corpus of this trust as it sees fit.

The problem here is fundamental and it is also unique in trust law. It is unique because the trustee itself (the State) has embodied and integrated within itself the general law-making power through which the legislative will of the people must be expressed. Can this power be used to transcend its limitations? Is a declaration by the trustee state in the form of a legislative enactment necessarily an exercise of legislative power in any respect? Can the same power that administers the trust determine its extent? Can the original limitations incorporated by solemn compact be extended by the ordinarily overriding sovereignty of the state? Can the trustee pull itself up by its own boot straps?

Research reveals one case parallel, though not exactly in point, with the situation presented here. In Bridgeport Public Library & Reading Room v. Burroughs Home, 85 Conn. 309, 82 A. 582, the court was faced with the problem of a legislative act or resolution for the sale of real property held by a charitable public trust under the direction and control of the state Legislature. The parallelism to our case here was aptly stated by the Supreme Court of Connecticut as follows: "The decision of the Supreme Court of the United States in Stanley v. Colt, 5 Wall. (U. S.) 119, supported by others prior and subsequent, removes from the field of discussion any question as to the existence of a power in the sovereignty

of the State fully adequate to bestow upon trustees administering a public charitable trust authority as to its administration such as the General Assembly attempted to confer in the present instance. Perin v. Carey, 24 How. (U. S.) 465, 501; Ould v. Washington Hospital, 95 U. S. 303, 312; Jones v. Habersham, 107 U. S. 174, 183, 2 Sup. Ct. Rep. 336."

That court disposed of the issue in that case without examining any question as to "constitutionality." In its opinion the court held, in language self-explanatory as to its application here, as follows: "* * * there has remained no doubt that our Constitution is to be construed as a grant and not as a limitation of power, and that the *exercise of judicial power is forbidden to the legislative branch of the government, as the legislative is to the judicial.* * * * The legislative power must be found somewhere outside of the judicial domain, and within the legislative, or *it is nonexistent.* * * * It concerns a trust, which is emphatically a matter of conscience, and a charitable trust, which is peculiarly the subject of a court of equity's care and solicitude. Bispham's Principles of Equity (8th Ed.) § 8; Stanley v. Colt, 5 Wall. (U. S.) 119, 169. The power is one which has come into our American jurisprudence in conformity with the English original, and is an adjunct of the judicial power. Its exercise involves an appeal to the conscience of the chancellor through an application duly made, an inquiry, and a determination embodying the exercise of discretion. These are peculiarly judicial functions. The judicial power includes such power as the courts, under the English and American systems of jurisprudence, have always exercised in legal and equitable actions."

That court continued: "We have no occasion to attempt to define the exact limits of either the judicial or the legislative power, *or to draw the dividing line between the two. It is certain, wherever that dividing line may be* or however indefinite it may be at points,

that jurisdiction over this charitable trust, to see that it is properly and beneficially administered, that the purpose of the donor does not fail, and that the interests of the beneficiaries be subserved, under changing conditions and with the lapse of time, belongs to the judicial department of the government, *and is in no respect an incident of the legislative.*

"The resolution of the General Assembly in question, in so far as its purports to confer authority upon these trustees, must therefore fail of its purpose. The courts, in the exercise of their chancery powers, are alone competent to confer such authority. That authority not having been obtained, any attempt on the part of the trustees to sell the property would be in excess of their powers." (Emphasis supplied.)

This court has consistently held that a violation of the trustee's duty is a violation of the Constitution itself. In this case, we are compelled to go one step further and hold that the Constitution itself and any agency purporting to act under its delegated powers may not violate this trust in the guise of a constitutionally exercised power. A majority of this court has determined that the legislative act is a violation of the trustee's fiduciary duty. A majority now holds that the power sought to be exercised is subject to the supervisory control of the courts in their exclusive constitutional jurisdiction over the supervision of charitable trusts. A majority now holds that this supervisory control and jurisdiction may not be limited or changed by the trustee state (even though sovereign) by casting the extension of their powers or the violation of their trust duties in the form or the guise of a "constitutionally" exercised "legislative" power.

In conclusion it has been said that the protections of procedure are of the essence of due process. No better illustration could be made of that principle than in the context of this case. Our original Constitution and all subsequent Constitutions and amendments have created

the procedural power necessary for the district and Supreme Courts to supervise and administer the school lands trust and to guard against invasions of the beneficiary's rights by state action of any nature whatsoever. To hold that these basic powers enumerated and declared in the Constitution may be eroded, no matter in how infinitely small degree, is, in my opinion a violation of our constitutional mandate to protect and guard this sacred trust against invasion by either the Legislature or by the people themselves.

CARTER, SPENCER, and NEWTON, JJ., join in this dissent.

IN RE INTEREST OF SCOTT RALPH BROWN.
SCOTT RALPH BROWN, APPELLANT, V. GORDON M. DOESCHOT, APPELLEE.
175 N. W. 2d 280

Filed March 13, 1970. No. 37206.

Infants: Courts. The juvenile court has a broad discretion as to the disposition of a child found to be delinquent.

Appeal from the separate juvenile court of Douglas County: SEWARD L. HART, Judge. Affirmed.

David J. Cullan and Foulks, Wall & Wintroub, for appellant.

Donald L. Knowles, Colleen R. Buckley, and Paul F. Peters, for appellee.

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

MCCOWN, J.

Scott Ralph Brown, born January 7, 1954, has appealed from an order of the separate juvenile court of Douglas County, Nebraska, committing him to the Department of Public Institutions, State of Nebraska, at the Boys'

Training School, Kearney, Nebraska. We affirm the judgment.

On October 23, 1967, the State filed a petition alleging Scott to be a delinquent child, or in need of special supervision. The petition contained five separate counts of law violations from June through September 1967. The separate juvenile court, after hearing, found that four counts of the petition were true, including two admitted counts of burglary, and one of larceny. On October 31, 1967, he was found to be delinquent and placed on probation for a period of 2 years. In Decembr 1967, a supplemental petition was filed charging him with a burglary on November 22, 1967. On January 3, 1968, the supplemental burglary count was found to be true and he was again adjudged a delinquent. The court then entered its order committing him to the care and custody of the Department of Public Institutions, State of Nebraska, at the Boys' Training School, Kearney, Nebraska.

Subsequently, the court was advised that the Omaha Home for Boys would accept placement of Scott. The court then suspended the prior commitment to the Boys' Training School, and placed him in the temporary custody of the Omaha Home for Boys. That order was entered January 15, 1968.

On August 7, 1968, a motion to modify placement by returning him to his parents was filed on behalf of Scott. On September 4, 1968, a motion to review placement was filed on behalf of the State by the assistant chief probation officer of the separate juvenile court. The grounds specified were that Scott had absented himself from the Omaha Home for Boys without authorization on three different occasions through late May 1968, for a total of 14 days. On September 9, 1968, after notice and hearing, the court entered its order determining that the placement of Scott in the Omaha Home for Boys should not be disturbed.

On October 24, 1968, a motion to review the place-

ment of Scott was again filed on behalf of the State by the assistant chief probation officer of the separate juvenile court. It alleged that Scott had absented himself from the Omaha Home for Boys overnight in late September, and also left on October 4, and was still absent without leave on October 24. The matter was heard on November 8, 1968. After hearing, the court sustained the motion, terminated the responsibility of the Omaha Home for Boys, and committed Scott to the Department of Public Institutions, State of Nebraska, at the Boys' Training School at Kearney. Motion for new trial was filed and overruled. A $1,000 appearance bond was filed and Scott was released to the custody of his father pending final disposition of the matter.

An appeal from the juvenile court is disposed of in this court by trial de novo on the record. Krell v. Sanders, 168 Neb. 458, 96 N. W. 2d 218.

The juvenile court has a broad discretion as to the disposition of a child found to be delinquent. See State ex rel. Weiner v. Hans, 174 Neb. 612, 119 N. W. 2d 72.

Under section 43-210, R. R. S. 1943, the disposition of a child found to be delinquent may include commitment to the care and custody of the Department of Public Institutions. There is no statutory limitation on the court's power to make such commitment after an adjudication of delinquency. Under section 43-210.01, R. R. S. 1943, dealing with the disposition of a child found to be in need of special supervision, the court may enter any order it is empowered to make in the case of a delinquent child, except that the child in need of special supervision may not be committed to the Department of Public Institutions until the court shall find: "(1) That said child has failed to make a satisfactory adjustment after a reasonable period of time under its original order; or (2) Such commitment is necessary in the first instance for the protection of the health and welfare of said child or of society."

The original order on the supplemental petition in

January of 1968, committed Scott to the Department of Public Institutions at the Boys' Training School. Even if the later order placing Scott in the temporary custody of the Omaha Home for Boys be regarded as the original order, the evidence indicated a failure to make a satisfactory adjustment after a reasonable period of time.

Section 43-209, R. R. S. 1943, gives the juvenile court continuing jurisdiction over any child brought before the court or committed under the provisions of the Juvenile Court Act. Scott contends that under that statute, the juvenile court has no power to change the custody or care of a delinquent child except where the change is for the best interests of the individual child. We think it clear that the interests of society, as well as those of the child, must be considered. The Juvenile Court Act, as well as the reasonable requirements of a lawful organized society, require that conclusion.

The separate juvenile court did not abuse its discretion, and the judgment is affirmed.

AFFIRMED.

JOHN GILLOTTE, APPELLEE, V. OMAHA PUBLIC POWER DISTRICT, A CORPORATION, APPELLANT, IMPLEADED WITH LARSON CEMENT STONE CO., A CORPORATION, APPELLEE.
176 N. W. 2d 24

Filed March 13, 1970. No. 37282.

1. **Electricity: Negligence.** Power companies engaged in the transmission of electricity are charged with the duty of exercising a very high degree of care to safeguard those whose lawful activity exposes them to the risk of inadvertent contact with the electric lines.
2. ———: ———. Electric companies are not insurers and are not liable for injuries in the absence of negligence.
3. ———: ———. Where the circumstances are such that the probability of danger to persons having a right to be near an electric line is reasonably foreseeable, a power company may

be liable for its negligence even though the specific injury might not be foreseeable.

4. **Trial: Negligence.** If the facts are such that reasonable men may draw different inferences from them, the question of the existence of actionable negligence is ordinarily for the jury.
5. **Evidence: Appeal and Error.** In determining the sufficiency of evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to every inference that can be reasonably deduced from the evidence.

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

Fraser, Stryker, Marshall & Veach, for appellant.

Matthews, Kelley, Cannon & Carpenter, for appellee Gillotte.

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

MCCOWN, J.

This is an action for damages for bodily injuries resulting from electrical shock and burns. The injuries occurred while plaintiff, John Gillotte, was unloading a boom truck alongside an electric power line constructed and maintained by the defendant, Omaha Public Power District. The verdict of the jury was for the plaintiff in the sum of $79,263. The defendant has appealed from the overruling of a motion for judgment notwithstanding the verdict.

On August 25, 1967, at around 9 a.m., the plaintiff, John Gillotte, an employee of Larson Cement Stone Company was delivering concrete blocks and building supplies to a house under construction at 13215 Cedar Street, Omaha, Nebraska. The house was on a triangular shaped lot. The south and rear lot line was the base of the triangle and ran east and west. The south side of the house ran parallel to and approximately 34 feet north of the rear lot line.

The defendant's single-pole power line also ran east and west, substantially on the rear lot line. The specifications for the power line called for 35 foot poles set 5½ feet in the ground. The span between the poles at the construction site was 172 feet. The center of this span was almost directly south of the southeast corner of the house under construction.

The single primary 8,000 volt line was aluminum, approximately ¼ inch in diameter. It was carried on insulators extending some 6 to 8 inches above the top of the poles. Approximately 5 feet below the 8,000 volt line on the east pole, and 9 feet below the primary line on the west pole, a ground or neutral wire was mounted. Immediately below this ground wire were two secondary lines carrying 120 and 240 volts respectively. The two lower wires were insulated. The ground wire and the primary 8,000 volt line on top were uninsulated.

The day was clear and the wind was from the south. It was fairly strong and gusty according to plaintiff's witnesses. The weather bureau record showed the average velocity of the wind that day was 9.2 miles per hour, with the fastest mile 13 miles per hour.

Due to trucks and other obstructions, plaintiff was unable to drive his truck in from the street to the north. He drove around and backed his boom truck across a vacant lot to the south of the house under construction, under the defendant's power line, and up near the house. He parked his truck facing at an angle to the southwest, and slightly downhill. The right rear of plaintiff's boom truck was close to the southeast corner of the house. The left front corner of the boom truck was closest to the power line. Before unloading, the plaintiff testified that he checked to make sure that the front of his truck completely cleared any of the power lines and testified that he had about 4 to 5 feet clearance. He did not see any motion in the wires when he looked.

The boom truck itself had an overall length of 27 feet and a width of 7 feet 11 inches. The boom was

a nontelescoping boom mounted on a pivot post or tower located in the center and 4 feet 10 inches forward from the rear of the truck bed. The boom was 21 feet 4 inches long. When stored horizontally in its cradle centered over the cab of the truck, the top edge of the boom was 7 feet above the truck bed, and the truck bed was 4 feet 4 inches above the ground. The boom was operated by a control box attached to a 12 foot cable at the rear of the truck.

After positioning his truck, the plaintiff set his brakes, removed the control box from the rear of the truck, raised the boom, and observed that he had 5 feet clearance between the boom and the closest point of the wires. The plaintiff then proceeded to unload three pallets or cubes of construction materials using the boom for each one. Two loads were unloaded from the west side of the truck with the boom, and a third load was unloaded from the east side of the truck to the rear. The plaintiff then brought the boom back to approximately the same position it had been in, in preparing to unload the third load. The boom was extended over the left rear corner of the cab of the truck. The plaintiff was holding the control box and was standing on the ground toward the rear of the truck and on the east side. In the process of preparing to unload the fourth load, the plaintiff was knocked down by an electric shock that came through the control cable and the control box in his hands. Plaintiff fell unconscious with the control box on his chest. The first shock also stopped the truck engine which operated the hydraulic system and the boom. After a second shock, the mason who was assisting the plaintiff in unloading, grabbed the control cable, pulled the control box off plaintiff's chest, and threw the box to the ground. The mason received no electric shock. The truck began to roll to the southwest and moved approximately 2 feet forward before the mason and his helper could place concrete blocks in front of the wheels and stop it. Plaintiff's witnesses testified that the 8,000

volt electric line was swinging back and forth at least 2 or 3 feet to each side and contacting the end of the boom each time it swung north. After contacting the end of the boom some 10 or 12 times, the wire broke and fell to the ground. The evidence is undisputed that electric current of 8,000 volts will arc or jump approximately a 1-inch gap.

Shortly after the accident, a burn mark on the end of the boom was measured and found to be 20 feet above the ground. A new line of the same aluminum conductor was installed in this span the same day. The initial stringing sag placed in the new line was 22 inches, which was the proper initial sag for this 172 foot span. With that 22 inch sag in it, the new line was 23 feet 6 inches above the ground at the point of the accident. At the same temperature, final sag would be approximately 6 inches lower. There was no testimony as to the height or the amount of sag or clearance for any of the three wires below the 8,000 volt line on the poles. None of these three wires were damaged or disturbed. The evidence is convincing that the actual sag in the 8,000 volt line immediately before the accident was at least 5 feet. There was also evidence from which the jury might infer that this span was initially constructed with a general elevation 4½ feet lower than the engineering specifications indicated.

The National Electrical Safety Code specified a minimum clearance of 15 feet above ground for all supply wires carrying from 0 to 15,000 volts, where the ground spaces crossed were accessible only to pedestrians.

The electric line involved here was installed in November 1964. It had been inspected once since that date on June 1, 1966, and no defects were reported. There was evidence that one of the reasons for inspection is to guard against excessive sag and that excessive sag was not in conformity with engineering design nor common good practice. There was also evidence that excessive sag permits excessive swing and lateral motion,

and that it is dangerous to have any excess lateral moveability of uninsulated electric transmission wires.

The conduct of the defendant in three particular respects was alleged to be negligent: (1) In maintaining an uninsulated power line closer to the ground than suggested by safety regulations and requirements of due care; (2) in maintaining a power line with a sag in excess of that suggested by safety regulations and the exercise of due care; and (3) in failing to make reasonable inspections of its electric wires. These specifications of negligence were submitted to the jury and the jury was instructed that the plaintiff must prove the defendant negligent in one or more of those particulars, and that such negligence was the proximate cause of the accident and injuries. The defendant raises no issue as to the instructions.

Electricity is a dangerous thing and power companies engaged in the transmission of electricity, particularly electricity of high voltage, are charged with the duty of exercising a very high degree of care to safeguard those whose lawful activity exposes them to the risk of inadvertent contact with the electric lines. Electric companies are not insurers and are not liable for injuries in the absence of negligence. See Roos v. Consumers Public Power Dist., 171 Neb. 563, 106 N. W. 2d 871. See, also, Manaia v. Potomac Electric Power Co., 268 F. 2d 793.

The principal basis for determining liability of a power company for injuries resulting from contact between its wires and a moveable machine is the foreseeability of a situation arising which might lead to such injuries. Where the circumstances are such that the probability of danger to persons having a right to be near an electric line is reasonably foreseeable, power companies have often been held liable for injury or death resulting from contact between the power line and a moveable machine, such as the one involved here. See Annotation, "Liability of electric power company for injury or death resulting from contact of crane, der-

rick, or other movable machine with electric line." 69 A. L. R. 2d 93, §§ 4 and 5, p. 104.

As this court stated in Roos v. Consumers Public Power Dist., *supra:* "Such companies, being engaged in the transmission of a dangerous commodity, must anticipate and guard against events which may reasonably be expected to occur, and a failure to do so is negligence." In this case, the defendant's power line was constructed and maintained for almost 3 years in a developing residential neighborhood in which houses were under construction and the use of equipment such as the plaintiff was operating in the area adjacent to the electric line might reasonably be expected.

It suffices to charge a person with liability for a negligent act if some injury to another ought reasonably to have been foreseen as the probable result thereof by the ordinarily intelligent and prudent person under the same circumstances, even though the specific injury might not be foreseeable. McClelland v. Interstate Transit Lines, 142 Neb. 439, 6 N. W. 2d 384.

If the facts are such that reasonable men may draw different inferences from them, the question of the existence of actionable negligence is ordinarily for the jury. This principle of the law of negligence has frequently been applied in cases presenting factual situations similar to this one. See, 69 A. L. R. 2d 99, and cases there cited; 38 Am. Jur., Negligence, § 344, p. 1041.

Here differing conclusions might be drawn from the evidence. The jury could have found that excessive sag was present in this line from the time of its construction, and that such excessive sag was dangerous to persons having a right to be near the line because the breeze blown swing of the wires was widened beyond normal expectations. The factor of excessive sag was indirectly recognized as being relevant evidence of negligence in Disney v. Butler County Rural Public Power Dist., 183 Neb. 420, 160 N. W. 2d 757.

The jury might also have found from the evidence

that the line was constructed and maintained at an elevation lower than defendant's own specifications called for, and that the defects in the line were open and obvious at all times after its construction but were not discovered nor corrected by the defendant.

The major conflict in the evidence here goes directly to the issue of proximate cause. The testimony of plaintiff's witnesses was that the 8,000 volt electric line swung 2 to 3 feet laterally in the wind and contacted the motionless boom intermittently until the line broke. The testimony of defendant's witnesses indicated either that the line did not swing at all or that the plaintiff placed the boom in contact with the wire.

In determining the sufficiency of evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to every inference that can be reasonably deduced from the evidence. Lucht v. American Propane Gas Co., 183 Neb. 583, 162 N. W. 2d 891.

On that principle, it is apparent that if the conduct of the defendant was negligent, the defendant's negligence proximately caused the injuries to the plaintiff. Cases in which there was no negligence in maintenance of an electric line or cases involving the independent or intervening negligence of third parties are not in point.

The issue of plaintiff's contributory negligence likewise involved issues of fact and was duly submitted to the jury with instructions which are unchallenged.

The motion for judgment notwithstanding the verdict was properly overruled. The judgment of the trial court was correct and is affirmed.

AFFIRMED.

ERVIN F. BARTELS, APPELLEE, V. RETAIL CREDIT COMPANY, A CORPORATION, APPELLANT.

175 N. W. 2d 292

Filed March 13, 1970. No. 37338.

1. **Privileged Communications: Defamation of Character.** Reports of mercantile agencies, published in good faith and based upon probable cause, are subject to a qualified or conditional privilege, and ordinarily are not subject to an action for defamation.
2. ———: ———. A publication loses its character as privileged and is actionable if it is motivated by express or actual malice or if there is such a gross disregard of the rights of the person injured as is equivalent to malice in fact.
3. ———: ———. To be privileged, a mercantile agency's representatives must act impartially and in good faith, carefully evaluating all information before disseminating any defamatory statements to its subscribers.
4. ———: ———. This requires them to make a thorough and complete investigation and to fully and accurately report information only from reliable sources.
5. **Trial: Instructions.** Conflicting instructions are erroneous and prejudicial unless it appears that the jury was not misled.
6. **Trial: Evidence.** It is a general rule that the burden of proving the affirmative of an issue is on the party alleging it.
7. **Trial: Instructions.** An instruction which misstates the issues or defenses and has a tendency to confuse or mislead the jury is erroneous.

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

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

Abrahams, Kaslow & Cassman and Schrempp, Rosenthal, McLane & Bruckner, for appellee.

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

SPENCER, J.

This is an action for libel as a result of reports made by the defendant to certain of its customers concerning the plaintiff. The jury returned a verdict for plaintiff

in the sum of $60,000, and defendant perfected an appeal to this court.

Plaintiff, who was 59 years of age, was born and raised on a farm near Millard, Nebraska, and had owned and operated a farm near Elkhorn, Nebraska, for the past 13 years. Plaintiff was married and had two children, a son 22 and a daughter 19 years of age. He had never had a traffic violation or ever been arrested for any cause.

For many years plaintiff had been insured under four policies issued by the Northwestern Mutual Life Insurance Company for a total amount of $10,000. In December 1965, he made application with an agent of that company for additional coverage. Thereafter Northwestern Mutual requested the defendant to furnish an information report concerning the character and personal habits of the plaintiff.

On December 27, 1965, defendant issued a written report stating in part that plaintiff was a self-employed farmer farming some 200 acres of land, and had a favorable business reputation. He was a steady, frequent drinker. His personal reputation suffered due to his drinking habits. He would drink to excess often and would then drive his car home; he has not been in any trouble due to drinking; but had been drinking to the extent noted for the time he has been known in the area.

Upon receipt of this report, the Northwestern Mutual requested the defendant to recheck its information, and by letter dated January 11, 1966, the defendant replied in part that it had verified the original information submitted concerning defendant's drinking habits. The report stated it was usually on the weekends that plaintiff was known to overindulge, and at these times he becomes obviously intoxicated. Defendant stated this information had been duly confirmed by sources contacted within the community, and also from file information obtained for other purposes. The Northwestern Mutual did not issue the new insurance.

In the spring of 1966, plaintiff made application for insurance with the Surety Life Insurance Company. On May 16, 1966, the defendant furnished Surety Life a report, together with a letter from defendant's manager concerning plaintiff's character and reputation, stating that his personal reputation in the area was favorable but that he was a steady, frequent drinker and would drink to the point of obvious intoxication. In the past he had to be helped out of the bar and could not walk under his own power. The Surety Life company did not issue a policy.

For several years plaintiff had carried his automobile insurance with the Farmers Insurance Group without incident. The family owned three automobiles which were operated by the plaintiff, his wife, and his two children. In August 1965, the Farmers Insurance Group transferred the insurance on an automobile driven by plaintiff's son to one of its other companies at a higher premium, due to two accidents involving the son. On April 8, 1966, defendant furnished the Farmers Insurance Group with an automobile insurance report which stated in part, "* * * prior to 10-12 months ago, Mr. Bartels was known to drink to some excess. * * * he would become loud and obviously intoxicated * * *." Subsequently, plaintiff received three notices of cancellation from the Farmers Insurance Group for the insurance coverage on the automobiles, effective at the expiration of the policies. Plaintiff thereafter attempted to obtain automobile insurance coverage from the Hartford Insurance Company. On August 22, 1966, the defendant reported to the Hartford in part as follows, that prior to about 1 year ago subject was known to drink to excess. He was not regarded as a steady, regular drinker, but would drink to excess on occasions. Hartford did not issue the coverage.

Plaintiff was finally able to obtain insurance coverage on two of his automobiles on October 27, 1966. The automobiles were without insurance coverage from the

time of the expiration of the Farmers Insurance Group policies until that date.

Plaintiff testified that he had been intoxicated only once in his lifetime, and that was in 1940 when his brother left for the service. He did not drink hard liquor but confined his drinking to beer in limited amounts. Plaintiff produced several witnesses as to his character and drinking habits, both personal friends and businessmen in the Elkhorn community. The substance of their testimony is that they had never known the plaintiff to be intoxicated; that he was a very moderate drinker, confining himself to beer; and that his record for sobriety was good.

Plaintiff by interrogatories secured the names of those persons allegedly contacted by defendant's representatives in making the various reports. Several of these were called as witnesses by the plaintiff. In each instance they denied making the statements contained in the reports.

Defendant's representative at Fremont, F. D. Nevius, who made the initial report branding the plaintiff as an excessive drinker, testified that because of the press of other business he interviewed only two persons for the purpose of making the initial report. One of these was in Hawaii at the time of the trial. The other was called as a witness by the plaintiff. The one who testified positively denied she had ever made the statements contained in the report. Nevius could not remember specifically what either person told him. On cross-examination Nevius admitted that the witness who was in Hawaii told him that she had never seen the plaintiff in an intoxicated condition. Nevius also admitted that he was the one who made the decision not to recommend plaintiff for insurance. In May of 1966, Nevius prepared a report to the Surety Life, again characterizing plaintiff as an excessive drinker, without making any additional investigation whatsoever except, as he testified, talking again to the two previous informants.

The subsequent reports indicated that the owner of the Play Pen Bar was one of the informants. A recheck of the report was made by one of defendant's supervisors, Ronald K. Erskins. Mr. Erskins on cross-examination admitted that the owner of the Play Pen Bar, who was not otherwise identified, had told him that he had never seen Mr. Bartels intoxicated. Erskins' report also indicated that Mr. Bartels had not been in a bar in Elkhorn for 10 or 12 months. However, without making any further investigation, the report contains this statement: "We find that he may be going to other towns, either Elk City, Nebr. or possibly Bennington, Nebr. or even Waterloo, all are fairly close to his farm as is Elkhorn * * *." This same report also contained the information that other sources reported that plaintiff had not been drinking to any excess for the past 10 or 12 months, and that they felt that he has actually been spending pretty much of his time at home taking care of his farming activities.

Defendant alleges 17 assignments of error. In view of the result we reach, it is only necessary to discuss those which can be grouped into two main categories: First, the reports were privileged and not subject to an action for defamation; and second, the trial court erred in giving certain instructions.

This is a case of first impression in this jurisdiction. The weight of authority in other jurisdictions would indicate that reports of mercantile agencies, published in good faith and based upon probable cause, are subject to a qualified or conditional privilege, and ordinarily are not subject to an action for defamation. See Annotation "Defamation—Credit Reports" 30 A. L. R. 2d 776. We are of the opinion that reports made by a mercantile agency to an interested subscriber should be conditionally privileged. A publication loses its character as privileged and is actionable if it is motivated by express or actual malice or if there is such a gross disregard of the rights of the person injured as is equiva-

lent to malice in fact. 33 Am. Jur., Libel and Slander, § 113, p. 115.

The defendant argues: "The reason for the privilege granted in connection with a retail credit report is obvious. It is the necessity of the service of merchantile agencies to the business world and the fact that without the qualified privilege, such agencies would be unable to function properly and business and industry would ultimately suffer the consequences because reports on their proposed customers would either not be obtainable or would be long delayed."

We recognize the need for the services of mercantile agencies, but we must not lose sight also of the need to protect an individual from the secret destruction of his good name and reputation. Users of reports of mercantile agencies usually have utmost confidence in the accuracy of such reports and act accordingly. Consequently, the privilege granted to such agencies must be a qualified one. The privilege must be predicated upon the premise that the reporting agency will exercise all reasonable care to ascertain the facts. Such reports must be compiled with regard to the effect the report will have upon the rights of the subject of the report. To be privileged, a mercantile agency's representatives must act impartially and in good faith, carefully evaluating all information before disseminating any defamatory statements to its subscribers. This requires them to make a thorough and complete investigation and to fully and accurately report information only from reliable sources. An erroneous or careless report serves no purpose except to substantially damage the subject of the report, and when once the report is published, the damage has been done and very little can be done to correct it.

We have set out sufficient of the evidence to indicate that a jury question was presented. The evidence is sufficient to permit the jury to find that the preparation of the reports indicated a lack of reasonable care

and diligence to ascertain the truth, and that they were circulated in reckless disregard of the rights of the plaintiff.

The trial court determined malice as a matter of law and held the publication of the reports to be libelous per se. By instruction No. 7 the jury was instructed that the reports were qualifiedly privileged, and that plaintiff could not recover unless he proved that they were published with actual malice on the part of the defendant. However, in instruction No. 14, the jury was told that the reports, being libelous per se, the plaintiff was entitled to receive nominal damages even in the absence of proof of actual or special damages. The court, in requiring at least nominal damages, undoubtedly overlooked the fact that this case involved a qualified privilege. Unless malice was present, there could be no recovery. The instructions were conflicting. Conflicting instructions are erroneous and prejudicial unless it appears that the jury was not misled. Zimmerman v. Continental Cas. Co., 181 Neb. 654, 150 N. W. 2d 268. The verdict herein, on the present record, is highly excessive, and is subject to reversal on that ground. We can only conclude that the jury was misled by the instructions.

Plaintiff in his pleadings alleged that the defendant falsely and maliciously stated that he was addicted to the excessive use of alcoholic beverages. In his proof he attempted to carry the burden of the falsity of the statements and under proper instructions the jury could have found he had done so. It is a general rule that the burden of proving the affirmative of an issue is on the party alleging it. The trial court in its burden of proof instruction required the plaintiff only to prove malice and the damages proximately caused. Nowhere in the instructions is the plaintiff required to prove the falsity of the reports which in instruction No. 2 the jury is informed he had made an issue.

The defendant in its answer did not plead truth as a

defense. It alleged that any reports it may have furnished concerning the plaintiff to any insurance companies were furnished in good faith and at the request of said companies, which had a legitimate interest in the information contained in said reports and were privileged and not subject to an action for defamation.

The trial court's instructions Nos. 8 and 10 required the defendant to prove the truth of the statements made concerning plaintiff. By statute, truth in and of itself is made a complete defense unless the plaintiff proves the statements were made with actual malice. It is obvious that a defendant who relies upon the truth of the defamatory matter published by him has the burden of proving it. Here, however, the defendant was not relying for its defense on the truth of the statements made by it but on the fact that they were made in good faith under a qualified privilege. These instructions therefore placed an undue burden on the defendant and were erroneous. An instruction which misstates the issues or defenses and has a tendency to confuse or mislead the jury is erroneous. Chard v. New York Life Ins. Co., 145 Neb. 429, 16 N. W. 2d 858.

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

REVERSED AND REMANDED.

LAWRENCE WILSON, A MINOR, BY HIS FATHER AND NEXT FRIEND, JAMES R. WILSON, APPELLANT, V. MARTIN GUTSCHENRITTER ET AL., APPELLEES, CONSOLIDATED WITH JAMES R. WILSON ET AL., APPELLANTS, V. MARTIN GUTSCHENRITTER ET AL., APPELLEES.

175 N. W. 2d 282

Filed March 13, 1970. No. 37347.

1. **Arrest: Probable Cause.** A law enforcement officer may arrest, without process, a person who he has reasonable cause to believe is guilty of a felony and may detain him for a reasonable

time until a warrant can be procured. Such officer is justified in so doing even though he has no personal knowledge of the guilt of the accused if the officer in good faith acted upon information received from others upon whom he had reason to rely although it should be subsequently discovered that the one so arrested was not guilty.

2. ———: ———. When the evidence is conflicting, the question whether the officer had reasonable ground for believing that the person arrested had committed a felony is for the jury under proper instructions. But when the facts are admitted or undisputed, probable cause is a question of law for the court.
3. **Probable Cause.** Probable cause is a reasonable cause of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing that the accused was guilty.
4. **False Imprisonment: Evidence.** In an action for false imprisonment against an officer for arresting without a warrant, the reasonableness of plaintiff's detention is a question for the court where there is no conflict in the evidence as to the length of time and the circumstances under which the plaintiff was held.
5. **False Imprisonment: Arrest.** Where one is properly arrested by lawful authority, even though without a warrant, an action for false imprisonment cannot be maintained.
6. **Public Officers and Employees: Assault and Battery.** A police officer may use such force as is reasonably necessary to perform his official duties in the enforcement of the law. The exercise of force in excess of that which is reasonably necessary under the circumstances may give rise to a charge of assault and battery.

Appeal from the district court for Dawson County: HUGH STUART, Judge. Affirmed.

Padley & Dudden, for appellants.

Smith Brothers, for appellees.

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

CARTER, J.

This is an appeal from judgments entered in two actions for false arrest and related issues growing out of the same transaction which were consolidated for purposes of trial. The trial court withdrew from the con-

sideration of the jury all issues except the issue of assault and battery in the case brought by James R. Wilson as father and next friend of Lawrence Wilson, a minor. On the latter issue, the jury returned a verdict for the defendants. The plaintiff or plaintiffs in each action have appealed to this court.

On October 9, 1967, one Larry Wilson, shortly before 3 p.m., robbed the Elm Creek State Bank at Elm Creek, Nebraska, at gun point. The robber was recognized by an employee of the bank who gave his name and description immediately to law enforcement officers. The information given as to the identity of the robber was substantially as follows: Larry Wilson, 25 years of age, 5 feet 10 inches in height, 165 pounds in weight, dark complexion, dark eyes, black hair, wearing a black hat, tan jacket, black gloves, and believed to be living in Lexington or Cozad, Nebraska. This information was immediately relayed to the Nebraska State Patrol radio station at Holdrege which immediately alerted other stations, state patrolmen, and other law enforcement officers in the area. The bank robber was later apprehended at Arapahoe, Nebraska.

The plaintiff, Lawrence Wilson, commonly known as Larry Wilson and whom we shall hereafter refer to as Larry, resided with his parents, James R. Wilson and Rose Wilson, in Lexington, Nebraska. At 3:22 p.m., the patrol station at Holdrege requested the Lexington police department to obtain information as to any vehicle registration for Larry Wilson. The defendant, John Wiley, a member of the Lexington police force, called the county treasurer's office and found that a Larry Wilson residing in Lexington was the registered owner of a 1965 red Pontiac hardtop coupé, bearing Nebraska license number 18-A766, which information was immediately given to the patrol station at Holdrege. About 3:30 p.m., the Lexington police were requested to call the defendant Martin Gutschenritter back on duty as state patrolman which was immediately done. Gutschenritter called Sergeant

Morrissey at the Holdrege patrol station and informed him that he was proceeding to the home of Larry Wilson in Lexington and asked for confirmation as to whether Larry Wilson was the person who robbed the bank. The description of the robber was given to him and he was told that Larry Wilson was the man. On the way to the Larry Wilson home, he was joined by Wiley and the two proceeded to the Wilson residence in Gutschenritter's patrol car.

On arriving at the Wilson residence, the patrol car was parked partly in the driveway and partly in the street. Gutschenritter, followed by Wiley, went to the entrance to the home. The door was open but the storm door was closed. Gutschenritter could see Larry through the glass portion of the door. Gutschenritter opened the door and asked him if he was Larry Wilson. Larry answered that he was. He asked Larry where he had been the last hour and Larry replied that he had just returned from Elm Creek. Gutschenritter thereupon drew his gun and, without a warrant, placed Larry under arrest for the robbery of the Elm Creek bank. Larry was handcuffed, was cooperative, made no resistance, and went with the officers to the patrol car.

There are conflicts in the evidence as to what occurred during the arrest. Larry and his mother testified that both officers came into the house without invitation, drew guns which they pointed at Larry, handcuffed him, and dragged him out of the house, across the front yard, and into the patrol car. Gutschenritter testified that he opened the door, stood in the doorway, asked the questions hereinbefore recited, had his gun out of its holster, and that Larry came out on the porch where he was arrested and handcuffed and taken to the patrol car. His testimony is that Larry was cooperative, made no resistance, and walked between the officers to the patrol car. He testified that Larry was in his stocking feet, that he got sandburrs in his feet, and that they helped him out of the sandburrs in crossing the yard. Wiley testified

that he did not enter the house and that he did not draw his gun although the flap on his holster was open. He generally corroborated the evidence of Gutschenritter. The evidence indicates that one of the officers, probably Gutschenritter, returned to the house. Rose Wilson testified that he came in and demanded of her where the money was hidden. There is evidence that one of the officers came back into the house to get Larry's shoes, although there was confusion as to which one did so. The jurors evidently believed the evidence of the officers as it was their province to do.

After the two officers and Larry entered the patrol car, Larry stated that he was 20 years of age and that he had gone to Elm Creek about 1 o'clock to collect a bill for his father and had returned shortly after 2 p.m. While in the car, Gutschenritter informed Sergeant Morrissey by radio that they had Larry in custody. Morrissey informed them to stay where they were and that he would be there shortly. He also told them to turn down their radio. Morrissey arrived within a few minutes, informed the officers that they had the wrong man, removed the handcuffs, and released Larry. Morrissey remained and discussed the episode with Larry and his father. Larry admitted that the description of the bank robber recited by Morrissey fitted his description closely except as to the matter of age, he being 20 instead of 25. The evidence is not disputed that Larry was held by the officers for 15 minutes before Morrissey arrived to release him. Morrissey testified that he received information from another patrolman at Overton on his way to Lexington that led him to the belief that Larry was probably the wrong man.

The pertinent facts were not in dispute. The evidence shows that Larry and the bank robber had the same name. Larry lived in Lexington and the bank robber had formerly lived there but was living in Gothenburg at the time the robbery was committed. Both fitted the description given of the bank robber by the bank em-

ployee who recognized him except for the 5-year age differential. Each had a red automobile. Larry had been in Elm Creek between 1 p.m. and 2 p.m., and the robbery had occurred at 2:55 p.m. With these undisputed facts existing, the existence of probable cause for making the arrest is for the court. The court determined that probable cause existed for the arrest and withdrew the issues of false arrest and false imprisonment as a matter of law. In this the court was correct.

The applicable law is stated in Diers v. Mallon, 46 Neb. 121, 64 N. W. 722, where in the syllabi, supported by authority in the body of the opinion, it is stated: "In the absence of any statutory power or authority a sheriff, constable, or other peace officer may arrest, without process, a person whom he has reasonble cause to believe guilty of a felony, and detain him a reasonable time until a warrant can be procured. Such officer is justified in arresting without a warrant for a felony, even though he has no personal knowledge of the guilt of the accused, if the officer in good faith acted upon information received from others upon whom he had reason to, and did, rely, although it should subsequently turn out that the one so arrested was not guilty. * * * When the testimony is conflicting, the question whether the officer had reasonable ground for believing that the person arrested had committed a felony is for the jury under proper instructions. But where the facts are conceded or undisputed, probable cause is a question of law for the court to determine. * * * Probable cause is a reasonable ground of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing that the accused was guilty. * * * In an action for false imprisonment against an officer for arresting without a warrant, the reasonableness of plaintiff's detention is a question for the court, where there is no conflict in the evidence as to the length of time and the circumstances under which the plaintiff

was held." See, also, State v. O'Kelly, 175 Neb. 798, 124 N. W. 2d 211.

In State v. Harding, 184 Neb. 159, 165 N. W. 2d 723, we said: "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."

"Where one is properly arrested by lawful authority, even though without a warrant, an action for false imprisonment cannot be maintained." 32 Am. Jur. 2d, False Imprisonment, § 76, p. 137.

The trial court submitted the issue as to whether or not the defendants committed an assault and battery in making the arrest of the plaintiff, Larry Wilson. By instruction No. 4, the court told the jury that it was for the jury to determine if Gutschenritter and Wiley, in taking Larry into custody, used more force and violence than was reasonably necessary to safely arrest and detain him in custody; in other words, were the defendants guilty of an assault and battery upon the person of Larry. There is evidence, although disputed, that one or both pointed their guns at Larry in making the arrest. The jury could find, as it evidently did, that an officer, acting prudently and reasonably in arresting a person thought to have robbed a bank at gun point, was justified, in the interest of his own safety, in having a gun ready for use in anticipating every possible eventuality. The use of handcuffs in such cases to protect the arresting officers and to prevent the escape of one arrested for a felony is a recognized procedure. The evidence that Larry was dragged to the patrol car appears rather flimsy in view

of Larry's own evidence that the officers did not abuse him in any way. The evidence, although somewhat conflicting, sustains the finding of the jury that Larry did not sustain an assault and battery at the hands of these officers. The instructions correctly stated the law and the evidence is ample to support the finding for the defendants.

The trial court correctly directed a verdict for the defendants in the case brought by James and Rose Wilson. The court also properly withdrew the issues as to false arrest and false imprisonment in the action brought by Larry Wilson by his father as next friend. The verdict of the jury for the defendants on the issue of assault and battery is sustained by the evidence. Other errors assigned are found to be without merit and the judgments for the defendants are affirmed.

AFFIRMED.

RANSOME J. BROWN ET AL., APPELLEES, V. NILE VALLEY BUILDING AND LOAN ASSOCIATION, A CORPORATION, ET AL., APPELLANTS.
175 N. W. 2d 297

Filed March 13, 1970. No. 37369.

Evidence. A regular business record not mentioning a matter that would ordinarily appear on it is admissible evidence of nonexistence of the matter.

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

Van Steenberg, Winner & Wood and Herman & Herman, for appellants.

Wright, Simmons & Hancock, for appellees.

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

SMITH, J.

Defendant savings and loan associations, which we treat as one, held withdrawable savings deposited by plaintiff Ransome J. Brown on January 2, 1953. A jury, in effect, found the total deposit to be $15,000. On appeal, defendant assigns for error a jury instruction that business records cannot prove absence of an entry. Plaintiffs, without cenceding error, argue that under correct instructions no reasonable jury could fail to find for them.

Our summary of Ransome's testimony begins with January 2, 1953, when he visited defendant's office twice. In the morning he opened a joint tenancy account in plaintiffs' names by depositing $8,500—a $2,000 certificate of a Colorado association and $6,500 cash accumulated at home over many years. A passbook, exhibit 2, was delivered to him. In the afternoon he acquired a second passbook when he opened an individual account by depositing $6,500 in checks. During 1954, prior to October 8, he made three withdrawals which totaled $4,900. When he returned on October 8 to withdraw $1,000, defendant substituted a passbook, exhibit 1, for the passbook issued the afternoon of January 2, 1953. Defendant informed Ransome that the original passbook omitted an entry of deposit of $2,000 on January 7, 1953. The item represented proceeds of the Colorado certificate, Ransome's deposits during the period totaling $15,000.

A former employee of defendant testified to issuance of the duplicate passbook October 8, 1954, on Ransome's signed statement of loss of the original. The written statement could not be found, although copies of deposit slips and the transmittal letter to the Colorado association were preserved.

The duplicate passbook specifies Ransome's name alone, account No. "36-B" on the cover, and account No. 36 on the inside certificate. It lists two deposits and the three withdrawals prior to October 8, 1954; deposits of $6,500 on January 2, 1953, and $2,000 on January 7, 1953;

and withdrawals on January 21, August 11, and September 2, all in 1954. In contrast, original passbook, exhibit 2, designates account No. 36 in joint tenancy of plaintiffs. It discloses a deposit of $8,500 on January 2, 1953, an $8,500 balance, and no other entry. Entries then were made manually and not mechanically. The practice of making machine entries in defendant's records and passbooks simultaneously was not yet in effect.

Search of defendant's records turned up the loose-leaf journal for January 2-10, 1953, and the loose-leaf ledger with only one account carrying Ransome's name. The ledger sets out plaintiffs' joint tenancy and account No. 36 followed by a pencilled "B." Journal and ledger entries of deposits and withdrawals to October 8, 1954, correspond with the duplicate passbook.

Defendant, whose accounts on January 1, 1953, numbered 86, ordinarily made a maximum of one deposit a banking day. Its deposit slip containing a printed "30" and the date January 2, a Friday, lists $6,500 in checks pertaining to Ransome, and $100 in currency. Another deposit slip containing a printed "33" and the date, January 8, lists the Colorado association's check for $2,000.

Instruction No. 9 told the jury that certain exhibits were in evidence and for jury consideration only in respect to affirmative entries: "These exhibits were not admitted, and cannot be considered by you, as evidence that something which is not shown upon them did not occur."

Courts differ on admissibility of business records to prove absence of an entry. We adopt this rule: A regular business record not mentioning a matter that would ordinarily appear on it is admissible evidence of nonexistence of the matter. See, Proposed Rules of Evidence for United States District Courts and Magistrates, § 8-03 (7) and Advisory Committee note, p. 174 (Prel. Dr., 1969); McCormick on Evidence, § 289, p. 609 (1954); V Wigmore on Evidence, § 1531, p. 392 (3d. Ed., 1940). Instruction No. 9 was erroneous.

Plaintiffs point out that defendant's position seems irreconcilable with the single entry of $8,500 on January 2, 1953, in original passbook exhibit 2. They ask why the three withdrawals prior to October 8, 1954, do not appear in that exhibit. The record gives no ready answer. On the other hand, the two passbooks in evidence set out deposits in January 1953, totaling $17,000, an undisputed inaccuracy. We conclude that plaintiff's contention concerning harmless error in the jury instruction is not well taken.

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

REVERSED AND REMANDED.

RAY RIDENOUR AND FAYE RIDENOUR, APPELLEES, V. ADOLPH KUKER, APPELLANT, CONSOLIDATED WITH FAYE RIDENOUR, APPELLEE, V. KUKER INDUSTRIES, INC., A CORPORATION, APPELLANT, CONSOLIDATED WITH RAY RIDENOUR, APPELLEE, V. ADOLPH KUKER AND KUKER INDUSTRIES, INC., A CORPORATION, APPELLANTS.
175 N. W. 2d 287

Filed March 13, 1970. No. 37377.

1. **Evidence: Appeal and Error.** In determining the sufficiency of the evidence to sustain a judgment, every controverted fact must be resolved in favor of the successful party, and he must have the benefit of every inference that can reasonably be drawn from the evidence.
2. **Corporations.** The corporate fiction may be disregarded when its retention would produce injustices and inequitable consequences.
3. **Contracts: Frauds, Statute of.** Generally, the statute of frauds does not apply to a contract which has been performed by one party.
4. **Contracts: Damages.** Damages are recoverable for losses caused by breach of contract only to the extent that the evidence affords a sufficient basis of ascertaining their amount in money with reasonable certainty.
5. **Contracts: Damages: Master and Servant.** The measure of

damages in a suit for breach of contract for personal services is the amount of the salary agreed upon for the period involved less the amount which the servant earned or, with reasonable diligence, might have earned from other employment during that period.

6. ———: ———: ———. Where the contract of employment is for an indefinite term, but is not a hiring at will, in the event of wrongful discharge the employee is entitled to a reasonable time in which to find other employment or go into business for himself.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Case No. 1 reversed and remanded with directions to dismiss the action. Cases Nos. 2 and 3 reversed and remanded for new trials on the issue of damages.

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

Nelson, Harding, Marchetti, Leonard & Tate, for appellees.

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

BOSLAUGH, J.

These cases arise out of oral contracts which the plaintiffs allege were made with the defendants in 1964. The cases were originally commenced as one action but were separately docketed after a demurrer for misjoinder was sustained. They were consolidated for trial in the district court and were briefed and argued together in this court. Since the cases arise out of one transaction, the three appeals will be disposed of in this opinion.

The record shows that Kuker Industries, Inc., is a corporation engaged in the manufacture of agricultural sprayers. Faye E. Ridenour was employed by the corporation as a bookkeeper commencing January 2, 1964. Prior to April 6, 1964, the outstanding stock of the corporation was owned equally by Adolph Kuker and Paul

Kuker, his brother. Paul Kuker had charge of the factory and its management and Adolph was the sales manager.

On April 6, 1964, Adolph purchased Paul's stock for $38,000 and Paul withdrew from the business. At closing time Adolph asked Faye if she or her husband, Ray Ridenour, would like to meet with Adolph and his wife at the plant that evening. Faye told Adolph that she and Ray would be there.

The plaintiffs met with Adolph and his wife at the plant at about 8 p.m. Adolph showed them around the plant and then discussed the matter of the plaintiffs buying into the corporation and Ray taking charge of the plant. According to the plaintiffs, Adolph offered to sell the plaintiffs 25 percent of the stock in the corporation for $19,000. The plaintiffs explained that they only had $3,500 they could invest. Adolph then offered to "cover" their note for the balance. There was also discussion of job security and salaries. Adolph was to be president of the corporation and receive a salary of $1,000 per month. Ray was to be vice president in charge of purchasing and plant management at a salary of $800 per month plus $50 car allowance. Faye was to be secretary-treasurer and her salary was to be increased to $450 per month. It was also agreed that the plaintiffs would have their jobs as long as they had the stock in the corporation.

Adolph denies that he agreed to "cover" the plaintiffs' note for the balance due on the stock purchase. He testified that they were to secure the money by their own means.

Ray had been employed as parts manager and purchasing agent at the Omaha branch of the Fruehauf Trailer Company for 10 years and was earning approximately $1,000 per month. He explained that he would need to give Fruehauf 2 weeks' notice and could not start at Kuker Industries immediately.

On April 9, 1964, Ray went to the plant at the re-

quest of Adolph and placed a steel order. At that time Adolph asked Ray to come to work immediately. Ray then told Fruehauf that he could not stay the full 2 weeks and commenced work at Kuker Industries.

On or about April 10, 1964, Norman Kuker, a nephew of Adolph, came to Omaha and was at the plant on the following day. There was a conversation in which Adolph told the plaintiffs that Norman might buy 25 percent of the stock of the corporation, and Norman complained about the $50 per month car allowance that Ray was receiving. Apparently Norman was placed on the payroll at that time at $800 per month plus $50 car allowance.

On April 20, 1964, Adolph called a vice president of the North Side Bank and arranged for the plaintiffs to go to the bank to discuss a loan. The plaintiffs were not able to obtain the loan because of a lack of proper security. The plaintiffs then went to the First West Side Bank, where they maintained an account, and attempted to obtain a loan to purchase the stock from Adolph. In their presence an officer of the bank called Adolph and asked him if he would sign the plaintiffs' note. Adolph refused to sign the note.

The executive salaries at Kuker Industries were paid monthly on the last Friday of the month. On June 26, 1964, Faye made out the checks for Adolph, Norman, Ray, and herself. Adolph refused to sign the checks for the plaintiffs and ordered Faye to reduce Ray's check to $400 and her check to $300. Faye refused to change the checks. There was further conversation in regard to the checks on Saturday and the following Monday.

On Tuesday, June 30, 1964, Adolph called Ray into his office shortly after 5 p.m. and handed him a letter stating that he was discharged because he had failed to attend a meeting at the plant on the preceding Wednesday evening. Ray testified that he had talked with Norman Kuker by telephone after 5:30 p.m. on June 24, 1964, and that Norman had said that Adolph wanted to know if the plaintiffs could attend a meeting that eve-

ning. Ray said that they could not because they were having guests that evening. There is some conflict in the record as to whether Faye was discharged on June 30, 1964, but the plaintiffs' evidence is that both of them were discharged at that time.

In 1964 the plaintiffs commenced an action to recover damages resulting from the breach of the contract. A second action was filed in 1968 which resulted in these cases. The parties have referred to the suit for damages growing out of the stock purchase as case No. 1; the suit for wrongful discharge of Faye as case No. 2; and the suit for wrongful discharge of Ray as case No. 3.

The jury returned verdicts for the plaintiffs in all three cases and fixed the damages at $4,000 in case No. 1; $16,549.44 in case No. 2; and $35,919.75 in case no 3. The defendants' motions for new trials were overruled and they have appealed.

The evidence is in conflict, but the plaintiffs' evidence was clear, satisfactory, unequivocal, and sufficient, if believed, to sustain a finding that oral contracts were made between the plaintiffs and defendants as the plaintiffs contend.

There can be no question about the authority of Adolph to bind Kuker Industries, Inc., since on April 6, 1964, after the purchase of Paul Kuker's stock he was the sole stockholder and the only executive officer of the corporation. The three contracts resulted from one transaction in which Adolph participated in two capacities. In agreeing to sell a part of his stock to the plaintiffs he acted in his own capacity. In making the employment contracts he acted on behalf of the corporation.

The defendants argue that the corporation cannot be held liable in cases Nos. 2 and 3 because the plaintiffs never owned any stock in the corporation. Under the circumstances in these cases, the corporation cannot urge the result of Adolph's breach of contract in case No. 1 as a defense in the other cases. Adolph was the sole stockholder of the corporation at the time the con-

tracts were made and the corporate fiction may be disregarded when its retention would produce injustices and inequitable consequences. See Massachusetts Bonding & Ins. Co. v. Master Laboratories, Inc., 143 Neb. 617, 10 N. W. 2d 501.

The defendants urge that the contracts are not enforcible because of the statute of frauds. Generally, the statute does not apply where the contract has been performed by one party. Platte County Independent Telephone Co. v. Leigh Independent Telephone Co., 80 Neb. 41, 113 N. W. 799. The contracts involved in these cases all arose out of one transaction and were, in reality, but one contract so that the performance of each was referable solely to the others. In this case, the contract was fully performed by the plaintiffs to the extent possible, and full performance on their part was prevented by the refusal of Adolph to "cover their note" for the purchase of the stock.

There is another consideration, however, which prevents the judgments in these cases from being affirmed. Damages are recoverable for losses caused by breach of contract only to the extent that the evidence affords a sufficient basis of ascertaining their amount in money with reasonable certainty. Bitler v. Terri Lee, Inc., 163 Neb. 833, 81 N. W. 2d 318.

In case No. 1 the plaintiffs alleged that the stock for which they agreed to pay $19,000 had a value of $25,000. The verdict of the jury, in the amount of $4,000, had the effect of fixing its value at $23,000.

The plaintiffs introduced audit reports for the calendar years 1963 and 1964. These reports show that the corporation had a loss, before tax refunds, of $11,878.76 in 1963 and $30,504.44 in 1964. The par value of the stock is $50 per share. The book value per share at the end of 1963 was $60.97, and at the end of 1964, $44.31. The plaintiffs agreed to pay $54.39 per share which was the price Adolph paid when he purchased his brother's stock that same day. The evidence will not

sustain a finding that 25 percent of the stock of Kuker Industries had a value of $23,000, or $65.71 per share, on April 6, 1964, as fixed by the jury.

In case No. 2 the jury returned a verdict of $16,549.44. The measure of damages in a suit for breach of contract for personal services is the amount of the salary agreed upon for the period involved less the amount which the servant earned or, with reasonable diligence, might have earned from other employment during that period. Lee v. Ralston School Dist., 180 Neb. 784, 145 N. W. 2d 919.

The evidence shows that the plaintiffs received unemployment compensation and reported to the Nebraska Employment Service until November 1964 when they purchased a motel in Ponca City, Oklahoma. They operated the motel until October 1967 and then returned to Omaha. Faye accepted employment in Omaha in January 1968 at $475 per month.

During 35 of the 42 months from July 1964 to January 1968, the plaintiffs were in the motel business. The authorities are in conflict as to how self-employment should be treated with regard to mitigation of damages in an action for breach of an employment contract. We believe that the better rule is that the value of the employee's services while engaged in self-employment must be considered in determining the loss resulting from the breach of contract. See 56 C. J. S., Master and Servant, § 59, p. 472.

Here the contracts of employment were for an indefinite term, as long as the plaintiffs owned the stock. It was not a hiring at will because the plaintiffs had agreed to purchase stock in the corporation which was a consideration additional to the services to be performed. Where the contract of employment is for an indefinite term, but is not a hiring at will, an employee is entitled to a reasonable time, to be determined from all of the facts and circumstances, in which to find other employment or go into business for himself. See Ransome

Concrete Machinery Co. v. Moody, 282 F. 29. Under the circumstances in this case we conclude that an award of salary for more than 36 months in case No. 2 is not sustained by the evidence.

In case No. 3 the jury returned a verdict for $35,919.75. The evidence shows that Ray, the plaintiff in case No. 3, obtained no employment, other than the operation of the motel in Ponca City, Oklahoma, until March 1968.

The verdict of the jury in case No. 3 is equivalent to Ray's full salary for more than 44 months. Under the circumstances of this case, and for the reasons previously stated, we conclude that this award is not sustained by the evidence.

The judgment in case No. 1 is reversed and the cause remanded with directions to dismiss the action. The judgments in cases Nos. 2 and 3 are reversed and the causes remanded to the district court for a new trial in each case on the issue of damages.

CASE NO. 1 REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS THE ACTION. CASES NOS. 2 AND 3 REVERSED AND REMANDED FOR NEW TRIALS ON THE ISSUE OF DAMAGES.

RANCH & FARM LINES, INC., A NONSTOCK CO-OP MARKETING ASSOCIATION, APPELLANT, V. ERWIN DRESSMAN, APPELLEE.
175 N. W. 2d 299

Filed March 13, 1970. No. 37536.

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

Robert E. Paulick, for appellant.

John A. Wolf and Cronin & Shamberg, for appellee.

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

McCOWN, J.

We dismiss this appeal for lack of an appealable order. The district court sustained a special appearance by defendant, an individual resident of Kansas. Objections to personal jurisdiction were directed at the invalidity of issuance, service, and return of summons.

An order sustaining an objection to personal jurisdiction is not final within the meaning of section 25-1902, R. R. S. 1943. See, Erdman v. National Indemnity Co., 178 Neb. 312, 133 N. W. 2d 472; Busboom v. Gregory, 179 Neb. 254, 137 N. W. 2d 825. This action has not terminated. Plaintiff has the procedural choices pointed out in Busboom v. Gregory, *supra*.

Plaintiff's appeal from the order sustaining defendant's special appearance should be, and hereby is, dismissed at plaintiff's costs.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM WASHINGTON, APPELLANT.

175 N. W. 2d 620

Filed March 20, 1970. No. 37286.

Criminal Law: Self Defense. A defendant may lawfully do in another's defense what such other might lawfully do in his own defense, but no more.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Reversed and remanded.

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, McCOWN, and NEWTON, JJ.

WHITE, C. J.

A manslaughter conviction is sought to be reversed

because of a failure to instruct the jury as to the right of the defendant to use force in the defense of another. We reverse the judgment and remand the cause for a new trial.

In a State accepted version of the facts, the defendant's testimony, supported by the chief prosecution witness, is that in the early morning hours of September 20, 1968, at Twenty-fourth and Lake Streets, Omaha, Nebraska, decedent was running rapidly pursuing a young woman, an acquaintance of defendant. Just before this the decedent, in a camper truck, was observed pursuing the same woman in her automobile. The defendant stepped into the line of pursuit and hit the decedent one blow with his fist in the chest-stomach region. Combined with blows struck by others, decedent's death resulted.

No Nebraska precedent is available, but the prevailing rule, almost without contradiction, says that a defendant may lawfully do in another's defense what such other might lawfully do in his own defense, but no more. See 40 C. J. S., Homicide, § 108 a, p. 968. See, also, Griffin v. State, 229 Ala. 482, 158 So. 316; People v. Will, 79 Cal. App. 101, 248 P. 1078; People v. Spranger, 314 Ill. 602, 145 N. E. 706; State v. Borwick, 193 Iowa 639, 187 N. W. 460; Hendrick v. State, 63 Okla. Cr. 100, 73 P. 2d 184; Martinez v. State, 142 Tex. Cr. 313, 152 S. W. 2d 369; People v. Roe, 189 Cal. 548, 209 P. 560; People v. Sullivan, 345 Ill. 87, 177 N. E. 733.

Our standard instruction on self-defense is well established. See NJI 14.33, p. 315. See, also, Housh v. State, 43 Neb. 163, 61 N. W. 571 (1895); State v. Kimbrough, 173 Neb. 873, 115 N. W. 2d 422 (1962); State v. Archbold, 178 Neb. 433, 133 N. W. 2d 601 (1965). It is readily adaptable to fit a proper submission of the issue of defense in this case.

The theory of the defense was clearly presented in the evidence. In fact it was the only one, and it was specifically called to the attention of the trial court. A

jury could reasonably infer, if the defense testimony was believed, that the elements required by our law of self-defense were present. It was error not to give an instruction on this issue.

Other contentions of the defendant have been examined and are without merit.

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

REVERSED AND REMANDED.

EDITH CROSSWHITE, APPELLEE, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.
175 N. W. 2d 908

Filed March 20, 1970. No. 37346.

1. **Streets and Sidewalks: Negligence.** In the absence of notice of knowledge to the contrary, a pedestrian making normal use of the public sidewalk, night or day, has a right to assume that it is in reasonably safe condition, and while he must use ordinary care for his personal safety and make reasonable use of his faculties to avoid injury to himself, he is not required to keep his eyes fixed on the ground or to be on a constant lookout for danger.
2. **Public Utilities: Negligence.** In operating a water system a city acts in its proprietary capacity and is liable for negligence to the same extent as a private corporation engaged in the same business.
3. ———: ———. A supply or service line from a water main to the property of a consumer, including a stop box constructed and maintained in a public sidewalk, is a part of the water system of a city which it must construct and maintain in a reasonably safe condition for the protection of the public.
4. **Streets and Sidewalks: Negligence.** An abutting landowner may be subject to liability for the dangerous condition of portions of the public sidewalk which have been altered or constructed for the benefit of his property and which serve a use independent of and apart from the ordinary and customary use for which sidewalks are designed.
5. ———: ———. Where persons are injured by a dangerous sidewalk condition created and maintained subject to the joint control of the city and an abutting landowner, and where the

condition is maintained for the benefit of a proprietary business operated by the city, and is also for the benefit of the property of the abutting landowner, the city and the abutting landowner are joint or concurrent tort-feasors and each is directly liable for his own wrong.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Norman Krivosha, Richard R. Wood, and Mattson, Ricketts & Gourlay, for appellants.

Healey & Healey and Dennis D. Burchard, for appellee.

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

MCCOWN, J.

This is an action for damages for personal injuries sustained by the plaintiff, Edith Crosswhite, when she tripped and fell on a city sidewalk. The defendants were the City of Lincoln, Nebraska, and the individual owners of the property adjoining the street and sidewalk. The jury verdict was for the plaintiff and against all the defendants, in the amount of $14,500. The defendants have appealed.

At approximately 6 a.m. on the morning of December 6, 1967, the plaintiff, Edith Crosswhite, was on her way to work. She was employed at the spot labor office of the State of Nebraska, which was then located at 317 South 11th Street, in downtown Lincoln. It was dark at the time. There were two street lights in the block, but the lighting was poor. She parked her car at the curb on the west side of 11th Street, a short distance south of her place of employment. She got out of her car, stepped up on the curb, and started toward her office. She tripped and fell over an obstruction in the sidewalk. The obstruction was a pipe, a few inches in diameter, which protruded about 3½ inches above the concrete surface of the sidewalk. It was variously

referred to in the record as a stop box, water pipe, or service valve.

The stop box was part of the water system and was located in the sidewalk 2 feet 8 inches from the curb. The stop box was installed in 1888 under a permit issued by the City of Lincoln to predecessor owners of the individual defendants' property. The present sidewalk was constructed about 1921. The stop box had protruded from the sidewalk at least since 1950, and, presumably, since the sidewalk had been constructed.

The purpose of a stop box is to shut off the flow of water from the city water main to the property of the water consumer. The pipe which protruded from the sidewalk was a means of access to the valve in the water lines, which were some 42 inches below the ground at that point. A water meter and another shut-off valve were inside the building on the property of the individual defendants.

The City of Lincoln, in its proprietary capacity, owns and operates the municipal water system. Ordinances require the installation of a stop box in every pipe attached to a city water main. The ordinances also provide where the stop box shall be placed and require that it have a tight fitting lid with the word "City" or "City Water" cast on it, and that it be of a make or pattern approved by the water department. Stop boxes may be and are used by both the property owner and the city. There was no evidence here that either the city or the individual defendants had ever used this particular stop box.

Ordinances also provide that only the city may tap the water main and a property owner is required to obtain a permit from the city to connect to the water tap. The stop box and supply and service lines are installed by a plumber for the property owner and at the property owner's expense. The water department must inspect and approve such installations and no plumbing work is to be covered or backfilled until examined by the

water department. Ordinances require water consumers to keep their own service pipes, supply pipes, stop cocks and boxes in good repair and protect them from frost at their own expense. Other ordinances of the city provide that sidewalks shall be kept free of all obstructions, and make it unlawful to obstruct a sidewalk in any manner.

All defendants contend that the plaintiff was guilty of contributory negligence as a matter of law. We cannot agree. In the absence of notice or knowledge to the contrary, a pedestrian making normal use of the public sidewalk, night or day, has a right to assume that it is in reasonably safe condition, and while he must use ordinary care for his personal safety and make reasonable use of his faculties to avoid injury to himself, he is not required to keep his eyes fixed on the ground or to be on a constant lookout for danger. 19 McQuillan, Municipal Corporations (1967 Rev. Ed.), § 54.122, 54.122a, pp. 355 to 361, and cases there cited.

On the basis of the evidence here, it is apparent that different minds might reasonably draw different conclusions from the evidence. Under such circumstances, the matter was properly submitted to the jury. See Hickman v. Parks Construction Co., 162 Neb. 461, 76 N. W. 2d 403, 62 A. L. R. 2d 1040.

A major issue is whether the city or the adjoining property owners, or both of them, had control over the stop box and a duty to maintain it and the sidewalk in a safe condition. As to the City of Lincoln, we believe the issue is settled by the case of Harms v. City of Beatrice, 142 Neb. 219, 5 N. W. 2d 287, 142 A. L. R. 239. Under quite similar factual circumstances, this court held that a water installation located within inches of a sidewalk was a part of the water works system of the city which it must construct and maintain in a reasonably safe condition. This court held that in operating a water system a city acts in its proprietary capacity and is liable for negligence to the same extent as a private cor-

poration engaged in the same business. That case also made it clear that the duty of the city existed irrespective of any contract or agreement with the adjoining property owner as to the payment of the cost of installation, and also that the duty could not be delegated. In the case at bar, the city required and exercised the right of supervision and inspection. It even embodied its former water department rules into ordinances. No prospective consumer is in any position to argue with the city. All the facts here make it clear that the city should not be permitted to delegate the duty it owes to the public to maintain the water works system in a safe condition. A supply or service line from a water main to the property of a consumer, including a stop box constructed and maintained in a public sidewalk, is a part of the water system of a city which it must construct and maintain in a reasonably safe condition for the protection of the public.

With respect to the liability and duty of the adjoining property owners, we believe the better rule is that an abutting landowner may be subject to liability for the dangerous condition of portions of the public sidewalk which have been altered or constructed for the benefit of his property and which serve a use independent of and apart from the ordinary and customary use for which sidewalks are designed. See, Peters v. City & County of San Francisco, 41 Cal. 2d 419, 260 P. 2d 55; Restatement 2d, Torts, § 350, p. 231. Such a duty runs with the land and a property owner cannot avoid liability on the grounds that the condition was created by or at the request of his predecessors in title. See, City of Omaha v. Philadelphia Mortgage & Trust Co., 88 Neb. 519, 129 N. W. 996; Peters v. City & County of San Francisco, *supra*.

We believe the jury was entitled to find from the evidence that the stop box here was subject to the control of either the city or the adjacent property owners or both. The stop box and water facilities were for the benefit

of the proprietary business of the city, and for the benefit of the property owned by the individual defendants. The use of the sidewalk for the purpose of installing and maintaining a water facility was a use independent and apart from the ordinary and customary use for which sidewalks are designed. Both the city and the abutting landowners owed a duty to the traveling public to maintain the stop box in a reasonably safe condition. The duty of each is sufficiently independent that we find neither to be derivative from the other.

We hold that where persons are injured by a dangerous sidewalk condition created and maintained subject to the joint control of the city and an abutting landowner, and where the condition is maintained for the benefit of a proprietary business operated by the city, and is also for the benefit of the property of the abutting landowner, the city and the abutting landowner are joint or concurrent tort-feasors and each is directly liable for his own wrong. See, Peters v. City & County of San Francisco, *supra;* Osborn v. City of Nashville, 182 Tenn. 197, 185 S. W. 2d 510.

The action of the district court was correct in all respects and the judgment is affirmed.

AFFIRMED.

NELSE ZACHRY, APPELLEE, V. NAOMI T. ZACHRY, APPELLANT.
175 N. W. 2d 616

Filed March 20, 1970. No. 37362.

1. **Divorce: Courts.** The control of a divorce decree during the 6-month period pending finality is within the sound judicial discretion of the trial court.
2. **Evidence: Affidavits.** A properly certified transcript of the evidence and the record of the proceedings in the district court is conclusive and ordinarily may not be impeached by recitals in ex parte affidavits to show the falsity in such transcript.
3. **Divorce: Appeal and Error.** On appeal to this court a refusal of a trial court to set aside a decree of divorce within the 6-

month period may not be set aside in the absence of an affirmative showing of an abuse of discretion.

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

Mingus & Mingus, for appellant.

Kenneth S. Gotobed, for appellee.

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

WHITE, C. J.

Defendant, on her cross-petition, secured a decree of absolute divorce including a court-approved stipulation for a settlement of property rights between the parties, as a result of a trial and hearing before the district court for Buffalo County, Nebraska, on April 29, 1969. By a motion and affidavit attached thereto, appellant now seeks to set aside the property settlement agreement, asserting that she did not enter into it, or approve the stipulation for a property settlement between the parties; that she is not satisfied with the property settlement; and that the plaintiff had other and further property that was not disposed of by the decree and property settlement agreement. The district court, after granting a hearing on the motion to set aside the decree and to grant a new trial, refused to set it aside. We affirm the judgment of the district court.

There is only one assignment of error in this case which relates solely to the property settlement agreement. The parties herein are mature people. Plaintiff is a conductor on the Union Pacific Railroad and the defendant an experienced school teacher. Both had been previously married, and the plaintiff at the time of their marriage was the father of six children by a previous marriage, four of whom are still residing with him. The parties were married in 1959 and both were the owners of property acquired separately from the period of the mar-

riage relationship. There is no allegation or evidence of poor health or disability of either of the parties. The court, in its decree of April 29, 1969, awarded the defendant two lots in the City of Grand Island, Nebraska, and several lots in the Village of Boelus, Nebraska, besides two cemetery lots owned by the plaintiff, together with a sum of $100 cash for credit on one tombstone. Defendant was awarded her personal property and extensive household goods and effects, including a sewing machine, vacuum sweeper, camera and projecting equipment, a corn stalk shredder, bedroom set, two deep freezers, bedding and linen, kitchen equipment, dishes, and silverware. She was also awarded the sum of $2,500 in alimony payable in installments of $100 per month, court costs, and attorney's fee. The plaintiff was awarded a parcel of real estate in the Village of St. Michael, Nebraska, and two town lots in the City of Grand Island, Nebraska. All of these awards were subject to then existing indebtedness. All other personal property of the parties "such as automobiles, household goods, trailer house, and other personal property or assets of every nature" were awarded to the plaintiff. In this approved stipulation, recited by the decree of April 29, 1969, the parties could not agree on the disposition of a large mirror mounted on the wall of the residence in St. Michael, or a small garden tractor. Trial was had on April 29, 1969, and by separate order on May 1, 1969, the court completed the disposition of the property by deciding that the mirror should go to the defendant and the garden tractor to the plaintiff.

It is clear that the control of a divorce decree during the 6-month period pending finality (section 42-340, R. R. S. 1943), is within the sound judicial discretion of the trial court. Colick v. Colick, 148 Neb. 201, 26 N. W. 2d 820; Pittman v. Pittman, 148 Neb. 864, 29 N. W. 2d 790; Roberts v. Roberts, 157 Neb. 163, 59 N. W. 2d 175. If such decree is vacated or modified, under section 42-340, R. R. S. 1943, the exercise of a sound judicial dis-

cretion requires the showing of a good reason therefor and the absence of a unconscionable result. Roberts v. Roberts, *supra;* Collick v. Colick, *supra;* Pittman v. Pittman, *supra.*

The defendant's motion for a new trial and the affidavit in support thereof were filed on May 9, 1969, and apparently without a transcript of the evidence being available to the defendant's newly employed attorney. It appeared that the defendant, after the orally announced decision in open court on April 29, 1969, then discharged her then attorney within a week, and employed her present counsel. In her motion and affidavit she alleges various conclusions and dissatisfactions. Giving maximum effect to her allegations and affidavit she asserts that she did not know of the property settlement agreement; that she did not approve of a stipulation for property settlement; and that the court did not ask her if she approved the settlement agreement incorporated in the decree of April 29, 1969, filed May 29, 1969. She also states, in effect, that the plaintiff had personal property and had sold or transferred some of it prior to the time of the decree and that she did not know the disposition of the proceeds.

The decree in this case, filed May 29, 1969, recites: "Defendant and her attorney, Lloyd W. Kelly present. Conference was had between the attorneys for the parties and the Court relative to a property settlement agreement or division of property stipulation. After having conferred with the Court, the said attorneys counseled with their respective clients, the parties to this action, and said attorneys having been advised by their respective clients, the parties of this action, the following stipulation property settlement agreement or division of property was presented to the Court for its approval, to wit: * * *."

In the hearing on the motion for new trial on May 26, 1969, the sole evidence introduced was the motion and affidavit of the defendant. The plaintiff did not testi-

fy nor is there anything in this record to controvert the evidence in the record, the recitals and findings in the decree as set out above. It therefore remains conclusive as to what transpired. Segebart v. Gregory, 160 Neb. 64, 69 N. W. 2d 315; Woodard v. Baird, 43 Neb. 310, 61 N. W. 612; Hansen v. Village of Ralston, 147 Neb. 251, 22 N. W. 2d 719. Further, matters certified as part of a record cannot be controlled by statements in an ex parte affidavit. Evans v. Stettnisch, 149 U. S. 605, 13 S. Ct. 931, 37 L. Ed. 866; Woodard v. Baird, *supra;* Security Nat. Bank of Grand Island v. Latimer, 51 Neb. 498, 71 N. W. 38. The bill of exceptions contains the following colloquy between her then counsel, Mr. Kelly, and the court at the beginning of the trial as shown by the transcript of evidence: "THE COURT: Mr. Kelly, you want to—MR. KELLY: At this time, Your Honor, we would ask leave to amend our answer and cross-petition, the prayer thereof, which prayed for separate maintenance, to a request for divorce absolute. THE COURT: And I believe you asked for a change in name, too, did you not? MR. KELLY: Yes, and she be restored to her former name of McPhillips. THE COURT: I will show here then today is 4-29, Defendant given leave to amend cross-petition to ask for divorce and restoration of name of—what was the name? MR. KELLY: McPhillips. THE COURT: Permission granted. Matter came on for trial. *Parties stipulate into record agreement as to property rights and settlement and also facts as to property not agreed upon.* All right. I think we should—the Plaintiff offers no evidence on request for divorce. Evidence received on cross-petition. Mr. Kelly, I believe we are ready for your client to proceed." (Emphasis supplied.)

Defendant and her corroborating witness gave the only evidence at the trial. The record reveals that she is 59 years of age and her husband 53 years of age and that they both had previously been married and both had families by their previous marriages. After con-

siderable examination concerning the background of the stipulation and the agreement for property settlement, the defendant testified as follows: "Q And during the course of this morning and up until now, have you variously discussed with me the purported stipulation and settlement of the personal and real property? A Yes, sir. Q And is that generally agreeable with you? A You mean— Q Those things? A Yes, the way I gave it to you last. Q You agreed to accept things and things that were to stay with him? A Um-hm."

It developed then, and it is not now disputed, that the only matters left for determination were the disposition of a mirror and a small garden tractor. After an examination of the facts and circumstances surrounding these two items, the following undisputed testimony is in the record: "Q And at this time you are requesting the Court to grant you a divorce? A Yes, sir. Q And further to approve the stipulation that has been discussed between the attorneys and the Court and yourself and your husband? A Yes, sir. Q With the exception of those two items, the mirror and the small tractor? A Yes, sir." And in open court, present with her counsel the court concluded the matter with the following statement: "THE COURT: So the Court will take under advisement those three matters as to property. The Court grants the decree of divorce as prayed and within the next three or four days, I will make my decision on those three matters." The decree that was drawn herein was drawn by the defendant's counsel, Mr. Kelly, on express direction of the court, in the defendant's presence, in open court. And it further appeared that the court reporter had made notes of the stipulation and property settlement and that defendant's counsel at that time in open court requested a copy so that he could use them in submitting the decree to the court (signed on May 29, 1969). There is no testimony in the record, either in the original proceeding of April 29, 1969, or in the hearing on motion for new trial that denies or con-

troverts the proposition that the decree that was drawn was in strict conformity with the court's order and understanding of the matter at the time of the trial.

Summarizing, it appears: (1) Both parties were present and represented by counsel, that the property settlement agreement was fairly entered into and fully explored by the parties, their counsel, and the court; (2) there is no evidence of overreaching, fraud, or other unconscionable conduct which could lead the trial court or this court to a conclusion of abuse of discretion; and (3) that the parties to this stipulation and agreement are mature, educated, and intelligent adults, and fully aware of the nature and the extent of their property and the significance of the stipulation.

It appears to us as it must have to the district court that the defendant herein was merely dissatisfied with her fairly entered into, court-approved property settlement and stipulation, and now desires, with new counsel, to use the agreement entered into as a starting point for an additional award. It is apparent that mere dissatisfaction, and a desire to retry the issues after having had her day in court, are considerations which would not appeal to the sound discretion of the court. As we have seen, the matter of setting aside a divorce decree and property settlement agreement previously approved by the court, rests within the sound discretion of the trial court and will not be reversed on appeal in the absence of a showing of an abuse of discretion. An examination of this record reveals a trial and hearing at which the defendant was present in open court, adequately represented by counsel, and a continuing disclosure to her of all of the proceedings and negotiations for the property settlement. It also conclusively shows a careful and conscientious guarding of the rights of the defendant by the court, and no substantial evidence to support her allegations of fact and conclusions alleged in her motion for new trial and affidavit. It further reveals that she was granted the relief she prayed for, and

an entire absence of any legal grounds to set aside the decree.

There being no abuse of discretion in the refusal to set aside the previous decree of divorce and property settlement herein, the judgment of the district court is affirmed. All costs herein are taxed to the defendant.

AFFIRMED.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION, APPELLANT, V. WILLIAM J. BUDD, APPELLEE.

175 N. W. 2d 621

Filed March 20, 1970. No. 37364.

1. **Evidence: Appeal and Error.** If the evidence is entirely written and relates to matters as to which the trial court is in no better position to reach a correct solution than the appellate court, this court will be governed by its own conclusions as to the weight of the evidence.
2. ———: ———. The appellate court will consider the finding of a trial court based on an agreed statement of ultimate facts as if trying the case originally in order to determine whether the facts warranted the judgment.
3. **Estoppel: Statute of Limitations.** The equitable doctrine of estoppel in pais may, in a proper case, be applied to prevent a fraudulent or inequitable resort to a statute of limitations and a defendant may, by his representations, promises, or conduct be so estopped where the other elements of estoppel are present.
4. **Estoppel.** Equitable estoppel rests largely on the facts and circumstances of the particular case and will be applied where the wisdom and justice of the principle are founded upon equity, morality, and justice in accordance with good conscience, honesty, and reason.
5. ———. Equitable estoppels cannot in the nature of things be subjected to fixed and settled rules of universal application like legal estoppels, nor be hampered by the narrow confines of a technical formula.
6. ———. A person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith, relied thereon.

7. **Estoppel: Statute of Limitations.** One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause him to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his conduct as a defense to the action when brought.

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

Stephen G. Olson and Daniel J. Cole, Jr., of Fraser, Stryker, Marshall & Veach, for appellant.

Stephen A. Davis of Cassem, Tierney, Adams & Henatsch, for appellee.

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

NEWTON, J.

The issue in this case is the right of defendant to invoke the statute of limitations as a defense. Plaintiff maintains that defendant is estopped to use this defense. The trial court entered judgment for defendant. We reverse the judgment of the trial court.

On December 26, 1961, plaintiff's insured, Sam F. Garafalo, was involved in an automobile accident with defendant William J. Budd. Defendant was insured by the Aetna Casualty & Surety Company. Garafalo sustained personal injuries and damage to his automobile. The accident resulted from the negligence of defendant. Plaintiff paid its insured the fair and reasonable value of damage to his automobile and was subrogated to his claim against defendant in the sum of $1,650.

Correspondence discloses that plaintiff notified Aetna of its subrogation claim and on March 31, 1962, was notified by letter that the claim would be considered upon conclusion of the personal injury claim arising out of the accident. Similar responses were made by Aetna to plaintiff's inquiries on April 16, 1962, October 15, 1962, March 20, 1963, October 7, 1963, November 7, 1963, and February 25, 1964. On May 18, 1964, Aetna stated: "We

are still not in a position to honor your subrogation claim, as the bodily injury portion of the file is still open. When we are able to close the BI portion, we will then be in a position to honor your subrogation claim." Again on July 7, 1964, Aetna stated it was not yet in a position to honor the subrogation claim. On September 29, 1964, Aetna reiterated it was not yet in a position to consider plaintiff's claim as the bodily injury claim had not been settled. On January 13, 1965, Aetna stated: "Suggest you diary the matter to April 1, 1965 and at that time we might have the bodily injury claims closed and will be in a position to honor your subrogation claim." On March 8, 1965, Aetna reiterated that the bodily injury claim was not closed and suggested plaintiff diary its file to June 1, 1965. On July 2, 1965, plaintiff was again informed the bodily injury claim remained open and would be advised when it was settled. The same information was forthcoming on July 19, 1965, and on October 21, 1965, when Aetna suggested plaintiff diary its file 90 days. On February 8, 1966, Aetna notified plaintiff that the statute of limitations having run, the claim was rejected by Aetna. Subsequently plaintiff notified Aetna it had requested the delay and had misled plaintiff. Aetna refused to reconsider and this action was brought.

The facts are undisputed and were all submitted by stipulation. Aetna, as defendant's representative, pleaded the statute of limitations and plaintiff's petition was dismissed. The evidence, consisting entirely of the correspondence and stipulation of the parties, presents a question of law and not of fact. If the evidence is entirely written and relates to matters as to which the trial court is in no better position to reach a correct solution than the appellate court, this court will be governed by its own conclusions as to the weight of the evidence. See, Faulkner v. Simms, on rehearing, 68 Neb. 299, 94 N. W. 113; Colby v. Foxworthy, 80 Neb. 239, 114 N. W. 174. "The appellate court will consider the finding of a trial court based on an agreed statement of ultimate

facts as if trying the case originally in order to determine whether the facts warranted the judgment." 5A C. J. S., Appeal & Error, § 1661, p. 580. See, also, General Asb. & Sup. Co. v. Aetna Cas. & Sur. Co., 101 Ind. App. 207, 198 N. E. 813; Davis v. Vermillion, 173 Kan. 508, 249 P. 2d 625.

By the great weight of authority, the equitable doctrine of estoppel in pais may, in a proper case, be applied to prevent a fraudulent or inequitable resort to a statute of limitations and a defendant may, by his representations, promises, or conduct be so estopped where the other elements of estoppel are present. See Annotation, 24 A. L. R. 2d 1417. "Equitable estoppel rests largely on the facts and circumstances of the particular case and will be applied where the wisdom and justice of the principle are founded upon equity, morality, and justice in accordance with good conscience, honesty, and reason. Under such circumstances, the doctrine subserves its true purpose as a practical, fair, and necessary rule of law." Koop v. City of Omaha, 173 Neb. 633, 114 N. W. 2d 380.

"Equitable estoppels cannot in the nature of things be subjected to fixed and settled rules of universal application like legal estoppels, nor be hampered by the narrow confines of a technical formula.

"Equitable estoppel rests largely on the facts and circumstances of the particular case. * * *

" '* * * a person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith, relied thereon.' " National Union Fire Ins. Co. v. Bruecks, 179 Neb. 642, 139 N. W. 2d 821.

The case of Rupley v. Huntsman, 159 Cal. App. 2d 307, 324 P. 2d 19, is somewhat analogous to the case before us. Plaintiffs' tractor was negligently damaged by defendants. Agents of defendants' insurance company notified plaintiffs' attorney it could not discuss their

claim until personal injury features of the case had been disposed of and later reiterated its position. After the personal injury features had been settled, plaintiffs threatened to bring suit but were assured that the insurance company was ready to take up their claim when invoices desired preliminary to settlement were supplied. The invoices were given to the insurance company's representative who forwarded them to the company and said he should have a reply by the time he returned from his vacation. In the meantime, the statute of limitations ran against the claim and it was rejected. The court held that: "When the act or promise of one causes another to do or forbear to do something which he otherwise would have done, the other is estopped from taking advantage of the act or omission caused by his own act or promise. One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause him to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his conduct as a defense to the action when brought." See, also, Safeway Stores, Inc. v. Wilson, 190 Kan. 7, 372 P. 2d 551; Industrial Indem. Co. v. Industrial Acc. Comm., 115 Cal. App. 2d 684, 252 P. 2d 649; Kinsey v. Thompson, 44 Ill. App. 2d 304, 194 N. E. 2d 565; LaBonte v. New York, New Haven & Hartford R.R. Co., 341 Mass. 127, 167 N. E. 2d 629.

In the present case, defendant's insurer on three occasions assured plaintiff it would "honor" plaintiff's claim and concedes it was liable for the full amount of the claim. Having convinced plaintiff that its claim would be honored or paid, it was not difficult to secure multiple extensions of time until the statute of limitations had run against the claim. In reliance on Aetna's assurances, plaintiff forbore suit. Now defendant seeks to take advantage of his insurer's trickery and dishonesty to defeat plaintiff's just claim. To permit him to do so would be contrary to equity, morality, justice, and good con-

science. We find that defendant should be held to the position previously assumed by his insurer and should be required to "honor" plaintiff's claim.

The judgment of the district court is reversed and this cause is remanded with directions to enter judgment for plaintiff for the conceded amount of its claim.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. DALLAS DENBO, APPELLANT.
175 N. W. 2d 613

Filed March 20, 1970. No. 37473.

Criminal Law: Sentences: Appeal and Error. Where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless there appears to be an abuse of judicial discretion.

Appeal from the district court for Chase County: HUGH STUART, Judge. Affirmed.

Frederick E. Wanek, 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.

CARTER, J.

Defendant was charged with the crime of breaking and entering a store building with intent to steal property of value. He entered a plea of guilty thereto. The trial court granted probation. The defendant was subsequently charged with violating the terms of his probation and found guilty. The defendant was sentenced to serve from 2 to 4 years in the Nebraska Penal and Correctional Complex. Defendant has appealed.

There is no bill of exceptions. The facts found in the

transcript indicate the following: The original information charged that defendant on November 7, 1968, feloniously broke and entered a store building with intent to steal property contained therein. On March 10, 1969, defendant, accompanied by court-appointed counsel, appeared in district court and entered a plea of guilty to the first count of the information. The trial court granted probation for a period of 2 years on terms and conditions which the defendant accepted. On August 19, 1969, an information was filed charging the defendant with violating the terms of his probation. He was charged with using intoxicating liquor and operating a motor vehicle when his driver's license was suspended. After a hearing with defendant and his counsel present, defendant was found guilty of violating the terms of his probation and sentenced as aforesaid.

The only error assigned is the excessiveness of the sentence. The defendant was 19 years of age and married. He pleaded guilty to robbing a hardware store and causing a loss to the owner in the amount of $344.85 as determined by the trial court in fixing the amount of restitution in the probationary order. The violation of the terms of probation in the manner shown is not denied on this appeal.

The trial court in granting probation undoubtedly considered the age of the defendant, the fact of his marriage, and his previous conduct. The defendant, however, chose to disregard the terms of his probation and continued in unlawful pursuits. He has imposed upon the leniency of the court and flaunted his opportunity to become a law-abiding citizen. He has, of course, forfeited any claim to further leniency.

Defendant contends that the indeterminate sentence of 2 to 4 years is legally a sentence for 4 years. This is, of course, true. Draper v. Sigler, 177 Neb. 726, 131 N. W. 2d 131; Studley v. Studley, 129 Neb. 784, 263 N. W. 139. An indeterminate sentence of 2 to 4 years is, however, more advantageous to the defendant than a

determinate sentence of 4 years. It is more advantageous only if defendant by his good conduct makes it so. In the instant case, the trial court granted probation in the belief that defendant would correct his errant ways and eliminate the necessity for punishment by confinement. The defendant having failed to respond to the court's attempt at rehabilitation, the court by imposing an indeterminate sentence has placed on the defendant the burden of release at the minimum term by showing the want of need for further confinement.

The sentence of 2 to 4 years is well within the maximum penalty provided by statute. The trial court heard the case and saw the defendant, and was in a better position than this court to evaluate the situation. In State v. Agostine, 184 Neb. 158, 165 N. W. 2d 353, the defendant, 19 years of age and never previously convicted of a felony, entered a plea of guilty to a charge of breaking and entering, and was sentenced to a term of 2 to 10 years in the Nebraska Penal and Correctional Complex. In affirming the sentence this court said: "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.'" Other cases to the same effect are: State v. Lenz, 183 Neb. 496, 161 N. W. 2d 710; State v. Stroh, 181 Neb. 24, 146 N. W. 2d 756; State v. Burnside, 181 Neb. 20, 146 N. W. 2d 754.

The record does not indicate an abuse of discretion on the part of the trial court. The judgment of the trial court is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD F. ARGUELLO, APPELLANT.
175 N. W. 2d 614

Filed March 20, 1970. No. 37478.

Criminal Law: Sentences: Appeal and Error. Where a sentence has been imposed by the district court within statutory limits it will not be disturbed in the absence of an abuse of judicial discretion.

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

Nelson, Harding, Marchetti, Leonard & Tate and Richard H. Williams, for appellant.

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

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

CARTER, J.

The defendant was charged with the crime of murder in two counts; in the first count with feloniously, purposely, intentionally, and maliciously, but without deliberation and premeditation, killing Joyce Frieda Arguello and, in the second count, with feloniously, purposely, intentionally, and maliciously, but without deliberation and premeditation, killing Shawn Marie Arguello. Defendant entered a plea of guilty to each count and was sentenced by the court to life imprisonment in the Nebraska Penal and Correctional Complex on each count, the sentences to run concurrently. The defendant has appealed.

The only assignment of error is that the sentences are excessive. The defendant having entered a plea of guilty, there is no evidence pertaining to the circumstances leading to and surrounding the commission of the crime. Before sentence was pronounced, the defendant was examined by one psychologist and two psychia-

trists and his mental condition ascertained. The medical reports were in the hands of the court and defendant's court-appointed attorney. Before the pleas of guilty to second degree murder were accepted, the court meticulously inquired into the voluntariness of the plea and if the effect of such a plea was understood by the defendant. Defendant entered the plea after conference with his attorney. Defendant answered all questions and stated that he understood his rights and the effect of a guilty plea. He also stated that his court-appointed attorney had gone over these matters with him at length and that he was completely satisfied with the services rendered by his attorney.

The record indicates that the victims of the murder were the wife and daughter of the defendant. No mitigating circumstances surrounding the crime were advanced by the defendant or his counsel. We find nothing in the record to support a finding that the sentence imposed was the result of an abuse of discretion on the part of the trial court. Under such circumstances this court will not interfere with the sentence imposed. The applicable rule is: Where a sentence has been imposed by the district court within statutory limits it will not be disturbed in the absence of an abuse of judicial discretion. State v. Whitaker, *ante* p. 57, 173 N. W. 2d 397.

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

AFFIRMED.

WHITE, C. J., not participating.

CLARENCE J. DEBACKER, APPELLANT V, MAURICE SIGLER, APPELLEE.

175 N. W. 2d 912

Filed March 20, 1970. No. 37531.

Infants: Trial. A defendant is not entitled to a jury trial upon

a complaint filed in the juvenile court alleging that the defendant is a delinquent child.

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

Kerrigan, Line & Martin, for appellant.

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

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

BOSLAUGH, J.

This is a second proceeding for a writ of habeas corpus by Clarence J. DeBacker. The petitioner alleges that he is in the custody of the Warden of the Nebraska Penal and Correctional Complex by reason of a transfer from the Boys' Training School under section 83-455, R. R. S. 1943. The validity of section 83-455, R. R. S. 1943, is not an issue in this proceeding.

The petitioner alleges that he is unlawfully deprived of his liberty because the Juvenile Court Act of Nebraska, under which he was committed, is unconstitutional. Specifically, the petitioner complains that section 43-206.03, R. R. S. 1943, does not provide for a trial by jury and that section 43-205.04, R. R. S. 1943, permits the county attorney to decide whether juveniles shall be charged in the juvenile court or in the criminal court.

The issues here are essentially the same as those presented in DeBacker v. Brainard, 183 Neb. 461, 161 N. W. 2d 508. In that case, four members of this court, including the writer, were of the opinion that the Juvenile Court Act violated the Constitution of the United States because of the decisions of the United States Supreme Court in In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527, and Duncan v. Louisiana, 391 U. S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491. However, the judgment of the district court dismissing the proceeding was af-

firmed because of the five-judge concurrence requirement of Article V, section 2, Constitution of Nebraska.

The petitioner then appealed to the United States Supreme Court where, after argument, the appeal was dismissed. DeBacker v. Brainard, 396 U. S. 28, 90 S. Ct. 163, 24 L. Ed. 2d 148. In DeStafano v. Woods, 392 U. S. 631, 88 S. Ct. 2093, 20 L. Ed. 2d 1308, that court had decided that Duncan v. Louisiana would not apply to trials prior to May 20, 1968. The court concluded that petitioner's case was "not an appropriate one" in which to decide whether the Nebraska statute was valid.

It has been the rule in this state that a defendant is not entitled to a jury trial upon a complaint filed in the juvenile court alleging that the defendant is a delinquent child. State ex rel. Weiner v. Hans, 174 Neb. 612, 119 N. W. 2d 72. It now appears that this is still the rule, at least as to proceedings in which the trial commenced prior to May 20, 1968.

The petitioner presents a new contention based upon the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. In substance, the argument is that the classification of juveniles separately from adults for correctional purposes is unreasonable; that there is no reasonable basis for such a classification; and that the act is, therefore, invalid.

The respondent points out the many places in the law where minors have always been classified separately from adults. The existence of the juvenile court system itself is a recognition of the validity of the separate classification of juveniles for correctional purposes. We think that the right of a juvenile to a jury trial in juvenile court, if one exists, does not have its origin in the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The petitioner's contention that section 43-205.04, R. R. S. 1943, is invalid because it permits the county attorney to decide whether juveniles shall be charged in the

juvenile court or in the criminal court is not well founded. As pointed out by the United States Supreme Court in DeBacker v. Brainard, *supra,* the discretion vested in the county attorney is not conferred by the Juvenile Court Act.

In his brief the petitioner suggests that there should be a procedure available to a juvenile so that he could obtain a judicial determination as to whether he should be charged in the juvenile court or the criminal court. Although we find no constitutional objection to the procedure in this state, the question is not presented in this case. The petitioner was charged in juvenile court and his only objection to proceeding in that court was in regard to his demand for a jury trial.

It is unnecessary to consider the petitioner's assignment of error relating to Article V, section 2, of the Constitution of Nebraska.

The judgment of the district court is affirmed.

AFFIRMED.

SMITH, J., concurs in the result because DeBacker complains of proceedings that antedate May 20, 1968, the probable cutoff.

SPENCER, J., dissenting.

I expressly reaffirm my position which is set out in the dissents in DeBacker v. Brainard, 183 Neb. 461, 161 N. W. 2d 508. It is possible, however, that the issues there raised may be moot because the proceedings attacked occurred before May 20, 1968.

Petitioner has raised three new issues. Two of them are mentioned in the present opinion. The third issue, which is not discussed therein, raises the invalidity of a part of Article V, section 2, Constitution of Nebraska, which provides: "No legislative act shall be held unconstitutional except by the concurrence of five judges." Petitioner alleges that this sentence is itself unconstitutional, in that it hampers the assertion of a federal right and unreasonably discriminates against litigants asserting the constitutional invalidity of legislation. If this

is true, as I believe it is, the previous opinion of the majority should be controlling herein.

The Enabling Act of Congress, permitting the people of Nebraska to adopt a Constitution and form a state government, required a republican form of government not repugnant to the Constitution of the United States and the principles of the Declaration of Independence. As the Supreme Court of Colorado said in People v. Western Union Telegraph Co., 70 Colo. 90, 198 P. 146, 15 A. L. R. 326: "The original Constitution of Colorado was a solemn compact between the State and the Federal government, a compact which stipulated that it should never be altered save in the manner therein provided, and that all amendments and all revisions thereof would conform to the supreme law. The whole people of the state have no power to alter it save according to their contract. They cannot do so, even by unanimous consent, if such alteration violates the Constitution of the United States. Should they make the attempt their courts are bound by the mandate of the Federal Constitution, and by the oath they have taken in conformity therewith and with their own Constitution, to declare such attempt futile, to disregard such violation of the supreme compact, and decline to enforce it. There is no sovereignty in a state to set at naught the Constitution of the Union, and no power in its people to command their courts to do so. That issue was finally settled at Appomattox."

It is to be noted that the provision in question limits not only the authority of this court to declare an act unconstitutional if it is in violation of the state Constitution, but also prohibits such declaration without five votes if it is unconstitutional under the federal Constitution. Any dilution of the judicial power destroys the equality among the three coordinate branches of government: Executive, legislative, and judicial, and shatters the fundamental principle of a republican form of government.

It goes without saying that if it is possible to require more than a majority vote, it is also possible to require a unanimous vote. There are certain acts which even the state Constitution cannot abrogate. One of these is the exercise of the sovereign and inherent power of the judicial branch of government within the framework required by a republican form of government.

In other jurisdictions, a simple majority may hold a legislative act unconstitutional. Because Nebraska requires five of seven judges to so hold, a citizen of Nebraska therefore is not entitled to all of the privileges of citizens in the several states. By this provision, a minority of the citizens of Nebraska, as represented by three judges upon this court, are permitted to thwart the will of the majority.

McCOWN, J., dissenting.

My opinion as set out in DeBacker v. Brainard, 183 Neb. 461, 161 N. W. 2d 508, is expressly reaffirmed.

The Constitution of Nebraska contains provisions dealing with criminal prosecutions similar to those of the federal Constitution. See Article I, section 11, Constitution of Nebraska. The state Constitution also contains a separate specific requirement that: "The right of trial by jury shall remain inviolate, but the Legislature may authorize trial by a jury of a less number than twelve in courts inferior to the District Court, and may by general law authorize a verdict in civil cases in any court by not less than five-sixths of the jury." Article I, section 6, Constitution of Nebraska.

If an adjudication of juvenile delinquency is still regarded as civil rather than criminal, these provisions may well bolster an equal protection argument, as well as the due process argument.

The position of the majority here is that since juveniles may properly be classified separately from adults for certain purposes, they may also be classified separately from adults in granting or withholding specifically guaranteed constitutional rights. That position simply

means that a juvenile is not a "person" or a "citizen" protected by either the state or the federal Constitution. That position I cannot accept.

RICHARD F. CAST, APPELLEE, V. NATIONAL BANK OF COMMERCE TRUST AND SAVINGS ASSOCIATION OF LINCOLN, NEBRASKA, EXECUTOR, TRUSTEE, AND RESIDUARY LEGATEE AND DEVISEE OF THE LAST WILL AND TESTAMENT AND ESTATE OF WILLIAM J. WEBERMEIER, DECEASED, APPELLANT.
176 N. W. 2d 29

Filed March 27, 1970. No. 37212.

1. Wills. A testator has a right to dispose of his property in any manner he sees fit and to attach any conditions to its possession and enjoyment, provided no positive rule of law or public policy is infringed, and it is the duty of the courts to enforce the will of the testator under this limitation in accordance with his intention, as expressed by the words used.
2. ———. The condition that a devise or bequest be dependent upon a change of name is reasonable and enforceable and one that a testator can reasonably impose.
3. ———. The validity of a requirement that a beneficiary must reside on certain premises is well established.
4. Tenancy in Common. A tenant in common has an interest in the possession of every part of the common property and has the right to occupy the whole of the property and every part thereof, but he is not entitled to exclusive possession of the whole or of any particular part, as against the other cotenants, except by agreement with them.
5. Wills. The provisions and conditions of a will are to be construed by the courts with a view of carrying out the intention of the testator. The basic object of will construction is to ascertain the intent and purpose of the testator as shown by the will, and then to give that intention effect if not contrary to law.
6. ———. The intention which must be given effect is the intention which the testator expressed by the language employed in his will.
7. ———. The intention of the testator is not to be ascertained by subtle rules of construction or obscure legal principles and

technicalities, but by the ordinary meaning of the language employed by the testator in his will.

8. **Wills: Estates.** A devise which conveys property in fee simple to which conditions are attached for the violation of which forfeiture may be declared by contingent devisees, creates an estate in fee simple subject to conditions subsequent.

9. ———: ———. Conditions precedent are those which must take place before an estate can vest or be enlarged; and if land is conveyed or devised on a condition precedent the title will not pass until the condition is performed. Conditions subsequent are those which in terms operate on the estate conveyed or devised and render it liable to be defeated for breach of condition.

10. ———: ———. If an estate is defeated by a contingent event before its natural expiration, it goes to the devisee in the nature of a remainder, technically constituting a conditional limitation.

11. ———: ———. The devise over to a residuary devisee is an executory interest, or an estate created in a third person upon the defeasance of the prior estate in the same property. It lies within the general class of future estates which may be created in some person other than the transferor.

12. **Property: Forfeitures.** We interpret section 76-299, R. R. S. 1943, to mean that after the possibilities of reverter or right of entry or reentry for breach of condition subsequent are created, they cannot be thereafter conveyed or devised and must terminate within 30 years.

13. ———: ———. Where there has been an honest effort to comply, conditions subsequent should be liberally construed to avoid forfeiture.

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

Samuel Van Pelt, for appellant.

Robert T. Cattle, Jr., for appellee.

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

SPENCER, J.

This is an action brought by Richard F. Cast against the executor and residuary trustee to construe the last will and testament of William J. Webermeier. The case was heard on the pleadings and a stipulation of facts.

The trial court found for the plaintiff and the defendant perfected an appeal to this court.

The pertinent provisions of the will, which was executed August 4, 1966, are as follows: "II. I give, devise and bequeath to Richard Cast, if he survives me, The Northwest Quarter (NW¼), and the Northwest Quarter of the Northeast Quarter (NW¼, NE¼), of Section Fourteen (14), Township Eleven (11), North, Range Two (2) East, Seward County, Nebraska, together with all tangible personal property located thereon. If the said Richard Cast does not survive me, then I give, devise and bequeath the property described in this paragraph to such issue of Richard Cast as survive me.

"III. I give, devise and bequeath to Richard Cast, should he survive me, all right, title and interest which I shall die seized in and to the South Half (S½) of Section One (1), Township Nine (9) North, Range Two (2) East, Seward County, Nebraska, together with all tangible personal property located thereon, including, but not limited to all livestock, equipment, household goods and furnishings, all of which is subject to the following terms and conditions:

"A. The said Richard Cast or one of his children shall, *within a period of one year after my death, move to and occupy said farm as his or her residence and domicile,* and continuously maintain the same thereon for a period of twenty-five (25) years.

"B. The member of the Richard Cast family so occupying said real estate shall, within a period of one year after my death, by appropriate legal action, add the name 'Webermeier' to his or her legal name.

"C. *If any of the above conditions shall not be met during the period described in Paragraph IIIA, or should there be a subsequent violation of any of the said conditions during said period of time, title to said real estate shall revert to the residuary legatee specified in Paragraph VI of this will.*" (Italics supplied.)

At the date of his death on January 12, 1968, William

J. Webermeier was the sole owner of the northwest quarter and the northwest quarter of the northeast quarter of Section 14, Township 11 North, Range 2 East, Seward County, Nebraska, but owned only an undivided one-half interest in the south half of Section 1, Township 9 North, Range 2 East, Seward County, Nebraska. He also died possessed of tangible personal property of a value in excess of $500,000. The other undivided one-half interest in the south half of Section 1 was owned by an incompetent sister of deceased, Ida Marie Cast, the mother of plaintiff. Plaintiff is the only child and the sole and only heir of said Ida Marie Cast, who at the time of the hearing herein was 74 years of age. At all times from and subsequent to October 15, 1930, Ida Marie Cast has been an incompetent person, and until his death was under the care and custody of William J. Webermeier, her brother and court-appointed guardian.

Plaintiff, who has been a resident of Amarillo, Texas, for the past 10 years, was 47 years of age at the time of the hearing, and the father of four children ranging in age from 8 to 21 years. He is a graduate geologist and for the past 7 years has been employed by a petroleum company in Amarillo in the capacity of district geologist. Because of his activities in his profession and in the Amarillo community, he has established himself professionally and socially under the name of Richard F. Cast.

In his petition plaintiff informs the court that he accepts the devise and bequest of real estate and personalty under paragraph III, but that the terms and provisions of subparagraphs A, B, and C of said paragraph III are equivocal, ambiguous, vague, indefinite, uncertain, and inherently questionable as to legality under the laws of Nebraska, and that plaintiff will, upon construction thereof, accept and comply with such conditions and provisions as may be determined valid and controlling by the court.

Plaintiff contends that subparagraphs A, B, and C are

void for one or more of the following reasons: (a) Testator was not the owner of the entire interest and title in the real estate, and could not impose requirements as to occupancy and use of said real estate contrary to the ownership and title of the other undivided one-half interest; (b) the exceptions are an attempted restraint as to alienation and use of the real estate, and are inconsistent and repugnant with the grant of a clear and unequivocal fee simple title in paragraph III; (c) said property is under the control of testator's personal representatives who prevent compliance with subparagraph A; (d) the requirement as to the addition of the name "Webermeier," if strictly construed as requiring its addition and use as a surname, applies equally to male and female children, and with respect to female children would be in restraint on third parties who are strangers to the gift and devise, and therefore against public policy; (e) the requirements are an attempt to condition the title upon the performance of third parties, the children of plaintiff, and are therefore unreasonable and unlawful restraints; (f) the purported reversion in subparagraph C is void as the alleged testamentary trust is void for want of a beneficiary; and (g) all of said restrictions are void as being unnatural, unreasonable, impossible of performance, contrary to public policy, and illegal restraints against alienation.

Plaintiff devotes 20 pages of his brief to an attack on the right of the defendant to prosecute an appeal herein. There is no merit in plaintiff's position and we do not deem it necessary to encumber this opinion with a discussion of those issues. Suffice it to say that plaintiff brought this action against the defendant not only as Executor but also as Trustee and Residuary Legatee and Devisee of the Last Will and Testament and Estate of William J. Webermeier, deceased. Before attempting to determine the exact nature of the estate created by the devise, we consider the legality of the conditions imposed.

A testator has a right to dispose of his property in any manner he sees fit and to attach any conditions to its possession and enjoyment, provided no positive rule of law or public policy is infringed, and it is the duty of the courts to enforce the will of the testator under this limitation in accordance with his intention, as expressed by the words used. See In re Estate of Smith, 117 Neb. 776, 223 N. W. 17.

The will herein uses words and language which clearly indicate the intent of the testator to condition the devise and bequest upon the conditions expressed. Do these conditions violate any positive rule of law or any public policy?

We consider first the condition that the member of plaintiff's family occupying the real estate in question add the name "Webermeier" to his or her own real name. The legality of a condition that a devise or bequest be dependent upon a change of name has previously been passed on by this court. Smith v. Smith, 64 Neb. 563, 90 N. W. 560, involved a condition that a devisee should be christened and baptized by a certain name and no other, and that he should maintain and be known by that name during his natural life. The evidence disclosed that he violated the condition. This court held the condition to be reasonable and enforceable and one that the testator could reasonably impose. It divested the devisee of the estate which it determined had vested conditionally.

The validity of a requirement that the beneficiary must reside on certain premises is well established. See collection of citations at 35 A. L. R. 2d, II, § 3, p. 391. A more serious contention is that testator was the owner of only an undivided one-half interest in the south half of Section 1, and consequently could not impose conditions involving the entire farm. The other one-half interest was owned by testator's incompetent sister who is the plaintiff's mother. The farm was the home place and was known as the "Webermeier" farm. Tes-

tator had controlled it for 37 years as a part owner and as the guardian for his incompetent sister.

Subparagraph A provides that plaintiff or one of his children occupy the farm as his or her residence for a period of 25 years. The trial court held this provision was an attempted condition subsequent which failed because it is an impossible condition, and that plaintiff received the title to the farm in fee simple absolute. There is no question it was beyond the testator's power to give exclusive occupancy to the entire farm for 25 years after his death. This could only be done with the cooperation and consent of the guardian of the incompetent and her heirs after her death. However, the will does not say this. What it says is that the plaintiff or a member of the plaintiff's family shall move on and occupy the farm as his or her residence and domicile continuously for a period of 25 years. Testator was a tenant in common, holding by the " 'moiety or half and by the whole.' " 20 Am. Jur. 2d, Cotenancy and Joint Ownership, § 7, p. 98.

"A tenant in common has an interest in the possession of every part of the common property and has the right to occupy the whole of the property and every part thereof, but he is not entitled to exclusive possession of the whole or of any particular part, as against the other cotenants, except by agreement with them." 86 C. J. S., Tenancy in Common, § 25, p. 383.

Here, the devise is to the only child and the sole and only heir of the incompetent cotenant. Obviously, the testator knew the situation. He knew that the devisee and his family were nonresidents of the State of Nebraska. He knew that he owned only an undivided one-half interest, and that the devisee was the sole and only heir of the incompetent cotenant. Whatever his motive, and there could have been several, his intent is not ambiguous or obscure. It is apparent that he was attempting to perpetuate the Webermeier name and to keep the occupation and possession of the property in the Weber-

meier line for a period of 25 years subsequent to his death. It is also apparent that if the conditions were not met, he wanted the property to vest in the residuary devisee for the benefit of the "William Webermeier Scholarship Fund Trust."

The provisions and conditions of a will are to be construed by the courts with a view of carrying out the intention of the testator. The basic object of will construction is to ascertain the intent and purpose of the testator as shown by the will, and then to give that intention effect if not contrary to law. National Bank of Commerce Trust & Savings Assn. v. Crowell Memorial Home, 181 Neb. 341, 148 N. W. 2d 304. The intention which must be given effect is the intention which the testator expressed by the language employed in his will. In re Estate of Zents, 148 Neb. 104, 26 N. W. 2d 793.

The trial court held that testator's dominant intent was to give his interest in the farm to his closest competent relative, his nephew. With this we cannot agree. The intention of the testator is not to be ascertained by subtle rules of construction or obscure legal principles and technicalities, but by the ordinary meaning of the language employed by the testator in his will. When we compare the outright bequest made to the nephew in paragraph II with the explicitly conditioned bequest in paragraph III, can we say testator intended that a fee simple title would ever vest in the nephew without restriction? It is of interest to note that in paragraph II there is a provision for his issue in event of the death of the plaintiff. There is none in paragraph III. It is much more reasonable to conclude that testator's dominant intent was to force compliance with the conditions if the nephew was to have his interest in the land. The dominant intent was to bring a member of the family back to the farm and to perpetuate the family name, and that if either condition failed, the devise over was to be effective. This is the intent inherent in the words, "* * * all of which is subject to the following terms and

conditions: * * *." To hold otherwise is to defeat the intent of the testator.

The size of testator's estate and the list of his securities in the record indicate that he was a man of at least average intelligence. He had been the guardian of his sister, the plaintiff's mother, for 37 years and would be thoroughly familiar with her finances as well as with the problems inherent in the divided title. The fact that no provision was made in the will for the incompetent would indicate she had no financial problems. The conditional devise was made to the only person who might be in a position to influence the new guardian relative to the occupancy and possession of the farm. It is no strained construction to find that among other reasons testator was attempting to avoid a partition and sale by returning at least one member of the plaintiff's family to the farm for a period of 25 years.

The devise in paragraph III, as a part thereof, includes the words: "* * * all of which is subject to the following terms and conditions." We have said that a devise which conveys property in fee simple to which conditions are attached and in violation of which forfeiture may be declared by contingent devisees, creates an estate in fee simple subject to conditions subsequent. See, Ohm v. Clear Creek Drainage Dist., 153 Neb. 428, 45 N. W. 2d 117; Watson v. Dalton, 146 Neb. 78, 18 N. W. 2d 658.

There is a suggestion that we are dealing here with conditions precedent as well as subsequent. Conditions precedent are those which must take place before an estate can vest or be enlarged; and if land is conveyed or devised on a condition precedent the title will not pass until the condition is performed. Conditions subsequent are those which in terms operate on the estate conveyed or devised and render it liable to be defeated for breach of condition. 28 Am. Jur. 2d, Estates, § 132, p. 246.

The devise is more in the nature of a conditional limitation than a condition subsequent. 2 Washburn on

Real Property (6th Ed.), § 1640, p. 582, speaking of the rules applicable to conditional limitations and the distinction between them and contingent remainders in one class of cases and conditions of common law in another, says this distinction: "* * * is often exceedingly nice, and yet very important in its consequences. As an illustration, if an estate is limited to A *until* B return from Rome, and *after* B return to C, the limitation is a contingent remainder, and good as such. But if the estate had been limited to A, which would be for life if no words of inheritance were annexed, provided that if B return from Rome the estate should go to C, the limitation, though precisely the same in effect as the first, would be, not a remainder, but a conditional limitation. In the one case, if C's estate comes into effect at all, it is after the prior estate had determined by the natural expiration of the time for which it was limited; whereas, in the other, C's estate, if it took effect, came in and displaced the prior estate before its natural termination, and took its place as a substitute therefor. Then, again, though the estate of A is a conditional one, liable to be defeated by the happening of a contingent event, it is not a case of condition at the common law, where to determine an estate for a breach of it required an entry by the grantor or his heirs, who thereby regained the estate originally parted with; but it is a case where the estate is wholly parted with by the grantor, no interest being left in him, and passes at once, upon the happening of the event, to him to whom it is limited. That contingent event, when it happens, is the limitation of the first estate granted; and the estate, instead of going back to the original grantor, goes over, eo instanti, and without any act but that of the law, to the party named in the very gift itself of the estate, as the one to take it in that event. In case of a condition at common law, if the estate granted is defeated by the happening of the event, and the re-entry by the grantor, it is restored to or revests in the grantor as of his original

estate. If it determines by its original limitation, or the natural expiration of the estate as first granted, it reverts at once, and without any act on his part, to the grantor. If it determines by being defeated by the contingent event before its natural expiration, it goes in the case above supposed to the second party, or grantee, in the nature of a remainder, technically constituting, as above stated, a conditional limitation."

We have here what is referred to as a determinable, qualified, or base fee, because the property passes over to a third party upon defeasance rather than reverting to the grantor and his heirs, as is the situation with a true condition subsequent. See 28 Am. Jur. 2d, Estates, § 22, p. 99, and note 4, § 139, p. 253. The devise over to the residuary devisee is an executory interest, or an estate created in a third person upon the defeasance of the prior estate in the same property. It lies within the general class of future estates which may be created in some person other than the transferor. 28 Am. Jur. 2d, Estates, § 333, p. 538.

Plaintiff is required to take affirmative action—move on the land and change name—and unless that action is taken within the time limited, there is a devise over. It is obvious, therefore, that the testator intended to create an estate upon a special or conditional limitation, and did not intend the estate to permanently vest unless the plaintiff took the affirmative action. Time for compliance was necessary and the time limited, 1 year, was well within the time necessary to probate the will and to administer an estate of this size. The words used are words of limitation rather than condition because they circumscribe the continuance of the estate and mark the period which is to determine it.

It is not material here whether we are dealing with a conditional limitation or a condition subsequent. The result would be the same. Plaintiff calls attention to section 76-299, R. R. S. 1943, which provides that the possibilities of a reverter or right of entry for breach

of condition subsequent are not alienable or devisable. Plaintiff misconstrues the statute as it may apply to this case. To adopt his construction would contravene the plain language of the statute. This particular section must be construed in conjunction with the sections immediately following it. To accept plaintiff's construction would require a holding that it is now impossible to provide for reverter or rights of entry or reentry, on breach of a condition subsequent. This patently is not the case. To so hold would require us to nullify the intent of sction 76-2,100, R. R. S. 1943, which provides: "At the termination of a trust, however effected, any right of entry or reentry for breach of condition subsequent and any possibility of reverter heretofore or *hereafter reserved* by or to the trustee and affecting land in this state ceases and determines as to the trustee, but shall, at such termination pass to the person or persons who receive the assets of the trust." (Italics supplied.)

It is also to be noted that the words "hereafter reserved" appear in section 76-2,101, R. R. S. 1943, and the words "hereafter created" appear in section 76-2,102, R. R. S. 1943. It is further to be noted that section 76-2,102, R. R. S. 1943, also provides that the possibility of reverter or rights of entry or reentry for breach of conditions subsequent shall be valid for a period of 30 years from the date of the creation of the condition or possibility of reverter. We interpret section 76-299, R. R. S. 1943, to mean that after the possibilities of reverter or right of entry or reentry for breach of condition subsequent are created, they cannot be thereafter conveyed or devised and must terminate within 30 years. In the instant case, if we construe the devise as a condition subsequent, the possibility of reverter terminated by its own terms within the 30-year period.

Plaintiff in his petition stated that he would accept and comply with such conditions and provisions as were determined valid and controlling by this court. To re-

ceive the benefit of paragraph III, the plaintiff must make an honest effort to comply with the conditions. The year is now past, and no attempt was made to comply because of the litigation. However, plaintiff's offer was of record within the time limited and he was within his rights in seeking a construction of the will, so plaintiff should be permitted a reasonable period to comply with said conditions. Where there has been an honest effort to comply, conditions subsequent should be liberally construed to avoid forfeiture. See Erskine v. Board of Regents, 170 Neb. 660, 104 N. W. 2d 285. We determine that plaintiff should be allowed 6 months from the entry of the mandate herein to comply with the conditions subsequent. In the event of noncompliance, the property passes under subparagraph C of paragraph III to the residuary legatee and devisee for the benefit of the "William Webermeier Scholarship Fund Trust."

For the reasons given, the judgment of the trial court is reversed and the cause is remanded for the entry of a judgment in conformity with this opinion.

REVERSED AND REMANDED.

WHITE, C. J., dissenting.

The majority opinion does not consider nor discuss what I consider to be the fundamental issue involved in the disposition of this case. I am in agreement with the detailed and rather fine-spun analysis reaching the conclusion that the devise here constitutes an executory or conditional limitation. However, the conditional or executory limitation is clearly void and of no effect whatsoever because it constitutes an *illegal restraint* on alienation.

The strength of the intent statute is urged in the majority opinion. But for centuries the dead hand of a testator has been carefully restrained by rules of positive law prohibiting an intent that interferes unduly with the absolute necessity of the freedom of alienation and use of land in a political and economic system fundamentally based on the private ownership and use of land.

For many years in the early history of our law in Nebraska our court wavered in this general area. Then, in one of the leading cases in this country this court firmly committed itself to the doctrine of freedom of alienation of property when opposed to the unrestrained intent of a testator in Andrews v. Hall, 156 Neb. 817, 58 N. W. 2d 201, 42 A. L. R. 2d 1239 (1953). There the rule is stated as follows: "The general rule that restrictions against alienation of real estate vested in fee simple are against public policy and void is a rule of substantive law which remains *unaffected by the intent statute. It is a rule to be applied in all cases falling within it.*" (Emphasis supplied.)

In the instant case Richard Cast was devised a fee simple estate subject to the requirement that he or a member of his family live on the land for 25 years and with a limitation over to the residuary legatee upon breach of condition. This devise was in form a condition subsequent but due to the limitation over there can be no question, as the majority opinion states, that what the estate created was a fee simple subject to an executory limitation. The language of the principle enunciated by Andrews v. Hall, *supra,* needs no paraphrasing or further explanation. It is directly applicable here. That case stated: "A restraint on alienation *in the form* of a condition subsequent, forfeiting or terminating the fee simple estate, or providing for a *limitation over upon breach of the condition,* is void." (Emphasis supplied.)

While this would appear clear from a simple reading of the conditional limitation imposed here I will indulge in a further analysis of the nature of this devise.

The dominant purpose of the testator is succinctly stated by the majority as being to force compliance with the conditions of living on the land for 25 years if the nephew was to keep his interest and if he was unwilling the limitation over would be effective. It also appears clear that this condition was tied in with a companion purpose, if not a dominant one, to perpetuate the family

name of Webermeier. In any event it cannot be doubted that the testator intended to prohibit in any practical sense any alienation of the land for a 25-year period.

Could Richard Cast make any effective alienation when clear title in a third party would be subject to such a condition? What kind of a market would exist for such a title? What of the whims of the devisee Richard Cast during the 25-year period? Would the death of Richard Cast in the 25-year period make operative the conditional limitation? Is there any practical or effective alienability at all for a period of 25 years? The only possible answer is "no." How could the land be used as collateral in obtaining credit? And even on a color-matching basis, how could this case be distinguished from Andrews v. Hall, *supra,* where the prohibitive restriction was against a remainderman selling, mortgaging, or disposing of his interest prior to the death of the life tenant? The practical effect upon Richard Cast's power of alienation is exactly the same. One of the primary incidents of ownership in fee simple is the right to possession, the right to convey it, sell it, or encumber it. We have a complete gap for 25 years in any practical alienability of this property. The purpose of the condition was to perpetuate the Webermeier name. The language of the devise conclusively shows that the limitation over was designed to enforce the 25-year possessory or "living" period upon Richard Cast. Cast must earn his title by a 25-year living on the property and in the meantime it is removed from the merchantable stream of alienable real estate. It cannot be plotted, developed, improved, or used by a purchaser as a part of the normal incidents of fee title.

In Peters v. Northwestern Mutual Life Ins. Co., 119 Neb. 161, 227 N. W. 917, 67 A. L. R. 1311 (1929), a restraint against sale or encumbrance which ran for a 10-year period from the date of execution of the will was upheld as valid. In *overruling* this case the court in Andrews v. Hall, *supra,* stated: "The validity or ex-

tent of one's title to real estate ought not to rest upon *consideration of reasonableness in the imposing of restrictions.* Such a relaxation by judicial interpretation can only bring confusion where certainty ought to exist." (Emphasis supplied.) The restrictions in the instant case run for a period of 25 years *from the date of the testator's death.* The majority is without mention flouting the command of Andrews v. Hall, *supra,* and resurrecting a case long since dead. The evil in restraints on alienation as clearly demonstrated by case law is not restrictions on *how* the property is to be used but rather restrictions on *who* can use the property.

At this point it may be well for us to understand the importance and the vitality of the principle stated in Andrews v. Hall, *supra.* In that case this court wisely turned away from its previous course. A reading of the authorities in this area, while abstruse in nature, leads one to the inevitable conclusion that this conditional limitation is void as a restraint against alienation. I generalize the applicable principles in this area. The conceptual argument to begin with is that the law defines the exact nature of every estate in land and that each has certain incidents which are *provided by law,* and that one of the principal incidents of a fee is alienability. See, Manning, The Development of Restraints on Alienation Since Gray, 48 Harv. L. Rev. 373 (1935). There are many reasons for restraining the intent of a testator. The first of two reasons most often given for holding restraints void is that a restraint is repugnant to the nature of the *fee.* Murray v. Green, 64 Cal. 363, 28 P. 118 (1883); Eastman Marble Co. v. Vermont Marble Co., 236 Mass. 138, 128 N. E. 177 (1920); Andrews v. Hall, *supra*; 5 Tiffany, Real Property, § 1343, p. 161 (3d Ed., 1939); Manning, Harv. L. Rev., at p. 401. The danger of the type of restraint involved in this case was realized as far back as Coke. He stated that restraints were void not only because they were repugnant to the fee, but because "it is absurd and repugnant to reason,

that a tenant in fee simple should be restrained, of his power to alien." See, Coke upon Littleton, 223a.

The second, and probably the more important and more practically oriented reason for holding restraints of this nature void, is that a restraint by taking land out of the flow of commerce is detrimental to the economy and the basic principles of a free competitive society. See, Gray, Restraints on Alienation, § 21 (2d Ed., 1895); 6 Powell on Real Property, 1 (1969); 5 Tiffany, Real Property, § 1343, p. 161 (3d Ed., 1939). One of the best statements is contained in Simes and Smith, The Law of Future Interests, § 1115, p. 8 (2d Ed., 1956), where it is stated: "In brief, *the law is concerned primarily with practical alienability, not with a theoretical power of alienation.* All these rules tend primarily to further practical alienability. Whether a given provision will be held valid or not depends on a number of considerations, but, reduced to their lowest terms, these considerations amount to no more than this: One must consider, first, *the extent to which the sort of provision in question tends to decrease practical alienability; and, second, the purpose of the restraint in question.*" (Emphasis supplied.)

The primary considerations underlying the prohibition against restraints on alienation is that they are economically undesirable and that the dead hand should not be allowed to control the living. Restraints on alienation are economically undesirable in that they tend to produce frozen assets and, without prohibitory rules, productive property would be rendered useless whenever one in whom ownership is inalienably vested could not use it himself. The dead hand rule is, simply stated, that society is better off if property is controlled by its living members who are cognizant of every changing economic condition than if controlled by the dead.

As stated generally by the authorities, an analysis or exploration as to the latitude of a permissible restraint on alienation must be governed by a balancing of the

beneficial character of the purposes of the restraint as against the extent to which alienability would be hindered, if the provision in question is held to be valid. In the light of the nature of this devise could there be any question as to what the conclusion of the court should be in this case? There is no purpose here to accomplish a gift over to the scholarship fund. It is clear, and is in effect conceded by the majority opinion, that the "limitation over" had as its design the imposition of compulsory possession or "living" by Richard Cast for a period of 25 years and this in turn for a purpose related to the perpetuation of the family Webermeier name.

Another example of the repugnancy of this restraint to the base fee is pertinent. As a result of the devise Richard Cast became a tenant in common with his incompetent mother and thus was not entitled to exclusive possession. The majority feels it is quite relevant that the cotenant is Richard Cast's incompetent mother and that he is her sole and only heir. I submit that the fact is immaterial as the decisions of this court in cases of this type should never hinge on the sole issue of *who* the cotenant may be, the cotenant's competency, or who the cotenant's heirs are.

Would the majority result be different if the cotenant was not Richard Cast's mother? If she was not incompetent? If he was not her sole and only heir? If so, what would the majority position be if the cotenant regained her competency and made a will disinheriting Richard Cast?

This leads us to a final conclusion that this condition imposed by the testator is in derogation of one of the basic rights of joint property owners in the right of partition. § 25-2170.01, R. R. S. 1943. We must realize that partition in kind in this situation as a practical matter is almost impossible. The right to partition is absolute and fulfills a fundamental public policy in settling conflicting rights to possession, eliminating confusion

as to title, and restoring to a unity of use and title enhancing the economic productivity of land. It would seem that Richard Cast would clearly be foreclosed of the right to partition without violating the restrictions imposed upon him. How could a sale be held that would be effective to give a purchaser clear title when Cast is required to remain in possession? What would be the effect upon Richard Cast's title and right to the proceeds if his mother regained her competency and forced a partition sale? We are aware of the doctrine of Peterson v. Damoude, 98 Neb. 370, 152 N. W. 786, 14 A. L. R. 1238, holding that a prohibition against partition is not a restraint on alienation when the undivided share is assignable. But here there is and cannot be for a period of 25 years an assignable interest in any practical sense of Cast's interest, under the condition imposed. The title itself is prohibited from having the basic element necessary in a partition action, that the purchaser shall acquire a fee title with the exclusive right to possession.

Although the majority opinion does not discuss these issues we anticipate, as the result of our research, that cases could be cited holding that "use" restrictions in deeds and testamentary dispositions are valid and that they do not interfere with the legal right of alienation. These cases cannot be equated with the restriction in the instant case. In the first place such cases as I have been able to discover are not close in either the nature of the conveyance or restriction attempted to be imposed. In the second place in all of these cases a restriction upon the kind of use (e.g., against the use of alcoholic liquor), does not restrain alienation because the property may be conveyed to *anyone* subject to the restriction. The restriction here is not upon *how* the land may be used or a prohibition of some individual particular use. The prohibition here is upon *who* shall have *all* of the uses of the property, thus effectively forbidding alienation.

Nor may it be argued in this case that a distinction between a direct and an indirect restraint will sustain this condition. There is a statement in Simes and Smith, The Law of Future Interests, 2d ed., c. 37, § 1111, et seq., that could be construed to infer that any "indirect" restraint, short of the violation of the rule of perpetuities, is valid. It is very clear that when this statement is read in context the writer's classification is purely for the purpose of clarification in analyzing whether the restraint is a disabling, promissory, or forfeiture restraint. The reason for this is obvious because a drafter of a deed or a will could easily avoid an illegal restraint on alienation by simply clothing it in the form of an indirect restraint. Fortunately, as Simes himself recognizes, neither the Restatement of Property nor the classic writers on restraints of alienation, Gray or Kales, recognizes such a distinction. See, Simes and Smith, The Law of Future Interests, c. 37, § 1111, p. 4, n. 3.

It is what the condition *does* with reference to practical alienability that is the test. This is made abundantly clear by Simes and Smith, The Law of Future Interest, 2d ed., §§ 1111 and 1112, pp. 4 and 5, wherein is stated: "As used in this treatise, the expression 'restraint on alienation' refers not merely to the restriction of the legal power of alienation, but also to the restriction of alienability as a practical matter. * * * These provisions may assume a variety of forms. Thus, the conveyance or devise may contain a direction to the effect that the grantee or devisee shall not alienate, *or a condition to the effect that if he attempts to alienate, his estate shall be subject to forfeiture,* or there may be a contract binding on the grantee to refrain from alienation. A further classification of direct restraints is set out later." (Emphasis supplied.)

Such a superficial distinction is avoided by the Restatement of Property, and by Gray and Kales, the classic writers in this area. We are dealing here with what we all recognize as a "forfeiture restraint," that is, a

violation of the condition forfeits the estate. Such a restriction is valid only if the "restraint" is reasonable under the circumstances and if it does not violate the rule against perpetuities. See Restatement of Property, c. 30, §§ 406 and 407. The comment on these sections states: "Even though a restraint on alienation is a forfeiture or promissory restraint and is qualified so as to permit alienation to some though not all possible alienees, the restraint must still be found to be reasonable under all the circumstances. * * * Each case must be thoroughly examined in the light of all the circumstances to determine whether the objective sought to be accomplished by the restraint is worth attaining at the cost of interfering with the freedom of alienation or to determine whether the particular interference with alienability is so slight as not to be material."

There is no problem here of contention that the creation of a contingent remainder or some other future interest in property constitutes an illegal restraint on alienation. That is a problem that belongs to the application of the rule against perpetuities. *What we are dealing with here is the creation of an absolute estate in fee simple, with no attempt to create a future interest but only the imposition of a forfeiture restraint to enforce a condition repugnant to alienation.*

How far we are departing from the sound doctrine of Andrews v. Hall is demonstrated in the latest annotation to Simes and Smith, The Law of Future Interests, 2d ed., at § 1150.5, p. 13 (1969), wherein it is stated: "Until recently, only Kentucky and Nebraska had given support to any doctrine that 'reasonable' restraints on the alienation of a legal estate in fee would be sustained. Moreover, as indicated in the preceding section, Nebraska has recently overruled the doctrine." (Andrews v. Hall, *supra.)*

Richard Cast is now 48 years of age. At the age of 73, and only then, he will receive a fee simple title in

any realistic sense. In the meantime, he has a choice of forfeiting the estate or living on the property in serfdom. The practical alienability or partition of this property is nil during that period of time. The restrictions imposed are clearly repugnant to the fee created as Richard Cast during the 25-year period has none of the most basic rights of a fee owner. Furthermore, it appears abundantly clear that this condition will serve only the capricious and unreasonable purpose of perpetuating the Webermeier name. I submit that the doctrine and principles of Andrews v. Hall, *supra,* should be followed.

The undoubted intent to give Richard Cast the fee simple should be enforced, and the restriction requiring personal possession declared void.

McCOWN, J., joins in this dissent.

CARTER, J., concurring.

The dissent in this case relies heavily on Andrews v. Hall, 156 Neb. 817, 58 N. W. 2d 201, 42 A. L. R. 2d 1239. That case holds that a direct restraint on alienation of an estate in fee simple absolute is void. With this holding I am in full accord. In the case before us, however, the restraints against alienation are incidental to the conditions subsequent provided for by the will. Such conditions subsequent are void only when they violate the rule against perpetuities, and this rule is not violated in the instant case.

The difference between a direct restraint which is void and an indirect restraint which is valid if not violative of the rule against perpetuities, is generalized as follows: "This difference leads to a further generalization which seems warranted by the specific rules discussed in the following chapters: If the restraint is direct, it may be bad regardless of the length of time it is to last. On the other hand, if the restraint is indirect, it will invariably be valid if it is to terminate within a life or lives in being and twenty-one years beyond; but, if it is to last longer than that period, the indirect re-

straint may be bad." Simes and Smith, The Law of Future Interests (2d Ed.), § 1116, p. 10.

Courts generally, including the ancient common law courts of England, have developed a judicial predilection for minimizing the permissible fetterings of property. Direct restrictions on the alienability of property conveyed by a fee simple title were rather easily disposed of by holding them to be void because of their complete repugnancy with a fee simple title. Hence restrictions upon a grantee of a fee simple title to sell, mortgage, or otherwise encumber are void as we held in Andrews v. Hall, *supra*. But the right of a grantor to convey a fee simple title subject to conditions that do not directly restrict alienability, although they tend incidentally to do so, is not so simple a problem. Such restrictions have not been held to be void, but to preserve property from undue fettering of the title by conditions indirectly affecting alienation, the courts have subjected such conditions to the rule against perpetuities. By such a method conditions not directly restricting alienation are not void, but are limited in time. See Restatement, Property, Part I, p. 2123. This appears to be the state of the law at present and it is for these reasons that I concur with the majority opinion.

NEWTON, J., concurring.

STATE OF NEBRASKA, APPELLEE, V. LARRY LEDENT, APPELLANT.
176 N. W. 2d 21

Filed March 27, 1970. No. 37310.

1. **Criminal Law: Searches and Seizures.** In passing on validity of a search warrant, the court may consider only information brought to the attention of the magistrate.
2. **Criminal Law: Affidavits: Drugs and Narcotics.** For the affidavit of a tip from an informant to be sufficient, the magistrate must be informed of (1) some of the underlying cir-

cumstances from which the informant concluded that the narcotics were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible.

3. **Criminal Law: Affidavits: Searches and Seizures.** Affidavits for search warrants must be tested in a common sense, realistic fashion.

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

Paul E. Watts, 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.

SMITH, J.

Larry LeDent was convicted of unlawful possession on November 4, 1968, of narcotic marijuana. On appeal he asserts (1) right to discharge because of entrapment and estoppel of the State to prosecute, and (2) insufficiency of a search warrant affidavit of a tip from an informer.

Larry was arrested in Omaha for a state drug violation in August 1968. At his request, he soon met Lieutenant Joseph Friend, Omaha police officer in charge of the vice detail, to whom he offered to inform. Friend promised to drop charges upon cooperation by Larry, and he inquired whether Larry needed money to buy marijuana. No money was supplied, but some information was received in the following 2 weeks.

At a meeting with Larry and counsel in September 1968, Eugene Leahy, deputy county attorney, promised to drop the charges in exchange for information. Larry understood, according to his testimony, that he was to "buy, sell and carry on like I had done before." Leahy then knew that Larry was a pusher in possession of narcotics. He testified to having instructed Larry: "To

carry on as he had . . . to give us information . . . when a . . . transaction would take place . . . that this would be received by me, by you (Larry's counsel), by the police . . . but there was never any indication . . . that he was ever to deal in it . . . or to do anything without our knowing about it."

Larry's version of events is as follows. Prior to August 1968, he was a pusher. On November 1, Louis Schiern delivered 47 lids and one kilo of marijuana which, in Schiern's presence, Larry hid. The hiding place was a crawl area underneath the living room of the residence occupied by Larry and his parents at 13450 Frederick Street, Omaha. After Schiern's departure, Larry threw away the kilo or brick which was valueless. He took no step, direct or indirect, to notify authorities, his inaction resulting from Schiern's arrest on November 2: "That was the night I was supposed to pick up a large quantity (from Schiern) . . . where they arrested all of those kids . . . ."

Schiern's version is as follows. On October 20, 1968, Larry proposed delivering marijuana to Schiern for chemical treatment, disclosing marijuana hidden in the crawl area. He described 80 lids and a kilo. Schiern took delivery but he retained possession only 3 days to a week when he returned the marijuana. His arrest on November 2 fanned his suspicions that he was dealing with an informer. On November 4, he contacted a stranger, Carl Grossoehme of the Nebraska State Patrol, Drug Control Division, to inform upon Larry.

On November 4, 1968, Grossoehme obtained a search warrant on his affidavit of an informer's tip. In executing the warrant, he found 47 lids of narcotic marijuana in the crawl area. The State at trial time named Schiern as the informer.

Grossoehme's affidavit reads in part: ". . . that a reliable informant related to investigative authorities that . . . Larry . . . offered . . . informant certain narcotic drugs for resale; that on Friday, November 1, 1968 . . .

Larry . . . told the . . . informant that he had fifty . . . lids of marijuana . . . and also a homemade brick of grass available for resale, and that he knows that . . . informant knows that the narcotics are kept at . . . 13450 Frederick Street . . . . The reliable informant has given your affiant other information that coincides with information received from other reliable sources. Said . . . informant's information has been verified and that information received has been the truth . . . . Larry . . . is now charged . . . with possession of depressant or stimulant drugs in a separate incident."

Our law of entrapment and estoppel is not crystallized. An advisory opinion stated that entrapment under the evidence was no defense to charges of prostitution. See State v. Ransburg, 181 Neb. 352, 148 N. W. 2d 324 (1967). We have said that estoppel is no defense to a criminal action. See State ex rel. Meyer v. Knutson, 178 Neb. 375, 133 N. W. 2d 577 (1965). Universality of the latter principle is not free from doubt. See, Cox v. Louisiana, 379 U. S. 559, 85 S. Ct. 466, 13 L. Ed. 2d 487 (1965); Comment, 78 Yale L. J. 1046 (1969); Note, 81 Harv. L. Rev. 895 (1968).

Section 28-462, R. R. S. 1943, which incorporates section 12, Uniform Narcotic Drug Act, reads: "The provisions . . . restricting the possession . . . of narcotic drugs shall not apply . . . to temporary incidental possession . . . by persons whose possession is for the purpose of aiding public officers in performing their official duties."

It is not necessary for us in this case to attempt an exposition of entrapment, estoppel, or section 28-462, R. R. S. 1943. A trier of fact might reasonably find from the evidence that (1) no law enforcement official encouraged Larry to possess the 47 lids of marijuana on November 4, 1968, and (2) the possession was not for the purpose of aiding public officers in performing their official duties.

In passing on validity of a search warrant the court

may consider only information brought to the attention of the magistrate. For the affidavit of a tip from an informant to be sufficient the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible. Affidavits for search warrants must be tested in a common sense, realistic fashion. See, Spinelli v. United States, 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); United States v. Ventresca, 380 U. S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965); Aguilar v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

Grossoehme's affidavit complied with constitutional requirements marginally. Other contentions, including excessiveness of the sentence of 4 to 5 years, are not well taken.

The judgment is affirmed.

AFFIRMED.

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

176 N. W. 2d 18

Filed March 27, 1970. No. 37350.

1. **Criminal Law: Appeal and Error.** Error may not ordinarily be claimed because of the nature of cross-examination if it was not on the trial challenged by timely and proper objection thereto.
2. **Criminal Law: Intoxicating Liquors.** Where voluntary intoxication is interposed as a defense in a criminal case involving the question of the intent with which an act is done, it is for the jury to determine if such intoxication is so excessive as to wholly deprive the defendant of reason and his ability to form a criminal intent.

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

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

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

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

CARTER, J.

The defendant in this case was charged with robbing one Stephen Vern Carlson of property of value by force and violence, and by putting him in fear, with intent to rob and steal. The jury returned a verdict of guilty and defendant was sentenced to serve a term of 5 years in the Nebraska Penal and Correctional Complex. The defendant has appealed.

The evidence shows that defendant went to the home of Joseph L. Williams at about 10 p.m., on February 4, 1969, accompanied by Williams and Eleanor Moore. The evidence of all three is that defendant and Williams commenced drinking intoxicating liquor. Defendant testified that he drank many drinks and many kinds of drinks, including whiskey and 2 or 3 ounces of Romilar RCF, a nonprescription cough syrup. Williams testified that he called a cab about 2:30 a.m., and that he helped or carried defendant to the cab at about 3 a.m. because he was so drunk that he could not stand or walk by himself.

Carlson, the cab driver, testified that he answered the call for a cab, that defendant entered the cab, and the other man seen at the door went back into the house. Carlson said he opened the door from the inside and defendant sat down in the back seat. Defendant asked him to write down the address where he entered the cab and Carlson wrote it down and gave it to him. It was later found on his person by the police. Carlson asked where he wanted to go and defendant gave him two or three different addresses. After some driving, defendant asked to be let out at 2407 Brown Street.

The cab stopped at that address. Defendant asked if Carlson knew what he had in his pocket. Carlson said he imagined it was a gun. Defendant said, "Yes. You know what I want now, don't you?" Carlson said, "I suppose you want my money." Defendant said, "Yes. * * * Lots of it." He had told Carlson that he had a .38 caliber pistol. Carlson gave him his money. He handed it back over his shoulder, dropping some of the bills on the floor. While defendant was picking up the money, Carlson took the keys from the cab, jumped out, ran to his home close by, and reported the robbery. On his return to the cab the police were there. Carlson testified that defendant appeared to be drunk but he smelled no odor of liquor.

Defendant testified that he had no recollection of anything that happened from the time the cab was called until after he was in the police station.

Defendant called Williams as his first witness. Williams testified on cross-examination that he was 20 years of age and resided at 2522 Saratoga, the place where the drinking occurred just prior to defendant's arrest. He stated that he was presently living temporarily with his mother at 2865 Bristol. He was then asked: "Q. Where are you living now? A. At 2522 Saratoga. Q. Where did you sleep last night, Joe? A Last night? Q. Yes. A. Upstairs in the County Jail. Q. How long have you been in County Jail? MR. MONTAG: Outside of direct examination. THE COURT: I am going to allow it for the purpose of showing interest. You may proceed. THE WITNESS: Over 84 days. BY MR. CORRIGAN: Q. Can you tell me what day you started living there? THE COURT: I think I will stop it right now. I will sustain the objection. BY MR. CORRIGAN: Q. How long has Jethro Barnes been in the County Jail? MR. MONTAG: I object. THE COURT: He may answer. THE WITNESS: I don't know. * * * Q. How long have you known Jethro? * * * where did you know him from? A. I was in the Boys

Training School with him. Q. Are you fairly close friends? A. Not fairly close." It is the contention of the defendant that the foregoing evidence constituted prejudicial error.

It is the contention of defendant that evidence of defendant's previous incarceration in jail or a juvenile detention center is inadmissible unless the defendant has first placed his character in issue, is incident to the establishment of a prior felony conviction or some other fact relevant to the issues, and then only if its relevancy outweighs its prejudicial effect. The case is unusual in that the claimed error arose out of the cross-examination of a defendant's witness and not the cross-examination of the defendant himself. The State, in cross-examining the witness Williams, attempted to show Williams' close relationship with the defendant. The cross-examination developed that Williams was in the county jail during the time that defendant was being held for trial in the instant case. Williams testified that there was no discussion of the instant case while he and defendant were in the county jail.

When Williams was asked how long he had been in the county jail, defendant objected that the question was outside the direct examination. No other objection was ever made and, particularly, no objection was ever made on the ground here assigned as error. Defendant cites Latham v. State, 152 Neb. 113, 40 N. W. 2d 522, in support of his contention. In that case defendant admitted on cross-examination that he had been convicted of felonies on four previous occasions which was proper. The State pursued the matter further by inquiring into the nature of the crimes and the duration of the sentences which was improper and to which no objections were made. The court said: "Defendant failed to properly or sufficiently challenge by objection the cross-examination. His claim of error because of the cross-examination is without substance." In Rimpley v. State, 169 Neb. 171, 98 N. W. 2d 868, a similar case,

this court said: "Error may not be claimed because of the nature of cross-examination if it was not on the trial challenged by timely and proper objection thereto." We fail to see, in any event, how the evidence of Williams that he, Williams, had been in jail for 84 days was prejudicial to the defendant. The fact that a defendant in a criminal case spent time in jail awaiting the trial is a matter of common knowledge to the jury and creates no inference of other crimes within the meaning of the rule. The statement by Williams that he had first met the defendant in the Boys' Training School, without objection to the question or a motion to strike the answer, is so wanting in prejudice to defendant's right to a fair trial, as to furnish no basis for a reversal. The defendant is entitled to a fair and impartial trial, but not a perfect one.

The primary issue here is whether the evidence is sufficient to sustain a verdict of guilty. The defendant contends that he was so intoxicated that he was wholly deprived of reason and the intent necessary to commit the crime charged as a matter of law. The evidence shows that defendant had been drinking intoxicating liquors for a considerable period of time before the robbery. Witnesses for the State and defendant are in agreement that defendant appeared to be intoxicated. Voluntary intoxication is ordinarily no excuse or justification for the commission of crime. Excessive intoxication may prevent deliberation or the formation of a criminal intent. Whether excessive intoxication is such as to prevent a defendant from formulating criminal intent is a question of fact to be determined from the evidence and surrounding circumstances and therefore for the jury. The jury was properly instructed on the effect of excessive intoxication and the jury determined the question adversely to the defendant. Even though the evidence established without doubt that defendant was intoxicated, it is for the jury to determine if defendant was capable of deliberation or of forming the intent

to commit the crime charged. State v. Brown, 174 Neb. 393, 118 N. W. 2d 332; Tvrz v. State, 154 Neb. 641, 48 N. W. 2d 761.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM BROWN, APPELLANT.
176 N. W. 2d 16

Filed March 27, 1970. No. 37432.

Criminal Law: Confessions. Where voluntary statements or confessions are not offered or received in evidence, the foundational requirements for such are not material and, on objection or motion, should be excluded or stricken if they are not otherwise relevant to the issues.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Reversed and remanded.

Margaret A. Lawse, for appellant.

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

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

WHITE, C. J.

In this post conviction proceeding subsequent to a jury conviction for robbery, the record of the original trial shows the following testimony of a police officer, elicited by the State on direct examination, reciting a post arrest conversation with the defendant:

"Q. What did you do, if anything, while you were interviewing him? A. After getting the name and address, et cetera, I advised him of his constitutional rights. *He refused to answer any question in regards to the incident without benefit of counsel.* Q. What

did you do then? MR. DAY: (defendant's attorney) At this time I ask that this answer be stricken and a mistrial be declared. * * * THE COURT: *The motion is overruled.*" (Emphasis supplied.)

The question presented is whether the admission of this statement over objection, is prejudicial error. We hold that it is, and reverse the judgment and remand the cause for a new trial on the original charge.

No statements or confessions of the defendant were offered or received in evidence. He did testify on his own behalf. In State v. Whited, 182 Neb. 282, 154 N. W. 2d 508 (1967). we said: "(W)here no statements or confessions are offered or received in evidence, the foundational requirements for such are not material and should be excluded or stricken from the evidence * * * (as) such evidence may be prejudicial to the defendant by developing an inference of guilt by the mere silence of the defendant. * * * (T)he foundational requirements for the use of voluntary statements and confessions are not material where no such statement or confession is offered or received and, *on objection or motion, they should be excluded or stricken if they are not otherwise relevant.*" (Emphasis supplied.) And subsequently in State v. Young, 183 Neb. 458, 161 N. W. 2d 503 (1968), we reaffirmed this holding. Court syllabus 2 states: "Where voluntary statements or confessions are not offered or received in evidence, the foundational requirements for such are not material and, on objection or motion, should be excluded or stricken if they are not otherwise relevant to the issues."

No statements or confessions were sought to be offered by the State. The testimony had no foundational purpose. It was properly objected to and sought to be stricken. The overruling of the motion to strike was error because of the inference of guilt from silence in violation of the Fifth Amendment as stated in State v. Whited, *supra,* and State v. Young, *supra.*

It is quite clear that the defendant cannot be penalized

for the exercise of his Fifth Amendment privilege when he is under police custodial interrogation, and the State may not use the fact that he stood mute or claimed his privilege. Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974 (1966); Johnson v. New Jersey, 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966); Bruntz v. State, 137 Neb. 565, 290 N. W. 420 (1940).

In Hardesty v. State, 95 Neb. 839, 146 N. W. 1007 (1914), and Bruntz v. State, *supra,* the error was comment on failure to testify rather than evidence that he refused to make a statement. Nevertheless, in the Bruntz case we reversed the judgment because of prejudicial error. In both cases, either by objections or on the court's own motion, the objective statements *were stricken,* and the jury admonished to disregard them. Here the error was aggravated by the overruling of the objection and the refusal to strike, with no admonition to the jury. The error was complete and prejudicial at the time. It is argued that defendant testified in his own behalf. But in an error of constitutional dimension, we cannot be permitted to speculate that this was not done to remedy the prejudicial error already created by the court's ruling. The State, in its argument, cites People v. Norman, 252 Cal. App. 2d 381, 60 Cal. Rptr. 609, to support its position. But in that case there was *no objection* to the testimony and the testimony could have been offered as foundation for "the purpose of showing that he understood his rights when he subsequently made the statement attributed to him."

There is no showing by the State that the evidence is so conclusive and beyond a reasonable doubt to bring it within the rule of Chapman v. California, 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, 24 A. L. R. 3d 1065 (1967).

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

REVERSED AND REMANDED.

SCHOOL DISTRICT OF BELLEVUE, SARPY COUNTY, NEBRASKA, ET AL., APPELLANTS, V. JOSEPH G. STRAWN ET AL., APPELLEES.
176 N. W. 2d 42

Filed March 27, 1970. No. 37443.

1. **Schools and School Districts: Statutes: Time.** Ordinarily, when a statute specifies a time or date when a proceeding creating or altering school districts shall become effective, the status of districts affected remains unchanged until such time or date.
2. **Schools and School Districts.** On the completion of a merger of one school district, or a portion of one, with another, the merging district, or part of a district, loses its former identity. It is dissolved, abolished, and ceases to have any separate existence.
3. **Statutes.** A fundamental principle of statutory construction is to ascertain the legislative intent and give effect to it, if it is a lawful one.

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

Crosby, Pansing, Guenzel & Binning, for appellants.

W. Ross King, Seymour L. Smith, and Dixon G. Adams, for appellees.

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

NEWTON, J.

The School District of Omaha, a Class V district, and other parties defendant are challenging the annexation by the plaintiff, School District of Bellevue, a Class III district, of a portion of the School District of Omaha lying south of the Douglas-Sarpy County line in Sarpy County and recently annexed by the city of Bellevue, a city of more than 1,000 and not more than 50,000 inhabitants. The trial court ruled that the lands in question remained a part of the School District of Omaha. We affirm the judgment.

The disputed territory, which formerly had comprised the major portion of School District No. 5 of Sarpy County, merged with the School District of Omaha on

October 1, 1958, pursuant to a duly executed petition of the electors of School District No. 5. Since that date the area has remained a part of the School District of Omaha which assumed and paid off its bonded indebtedness and made substantial improvements in school facilities.

Ordinances of the city of Bellevue annexing the disputed area became effective in April and May 1967. Their validity is not challenged and the area now lies within the corporate limits of the city of Bellevue. Plaintiffs contend that under section 79-801, R. R. S. 1943, the disputed area was merged in the Bellevue School District at the time of its annexation by the city of Bellevue. The section provided: "The territory embraced within the corporate limits of each incorporated city * * *, together with such additional territory and additions to such city * * * as may be added thereto, as declared by ordinances to be boundaries of such city * * *, having a population of more than one thousand and not more than fifty thousand inhabitants, * * * shall constitute a school district of the third class * * *. * * * The title to all school buildings or other property, real or personal, owned by any school district within the corporate limits of any city * * *, shall, upon the organization of the district, vest immediately in the new district; and the board of education of the new district shall have exclusive control of the same for all purposes herein contemplated."

Section 79-801.02, R. R. S. 1943, provides that: "* * * such merger shall be effective on June 15 of the year following the first full school year after such merger."

Section 79-801, R. R. S. 1943, has been amended (see R. S. Supp., 1967) by adding thereto the following: "Provided, that where the territory annexed by a change of boundaries of such city has been part of a Class III, IV, or V school district for more than one year prior thereto, having been annexed by petition, a merger of the area annexed with the Class III school district shall

not become effective unless a majority of the board of education of such Class III, IV, or V district within ninety days after the effective date of the city annexation ordinance shall vote in favor of the merger."

Approval of the merger by the board of education of the School District of Omaha has not been obtained.

Plaintiffs maintain that the merger was completed at the time the area was annexed by the city of Bellevue but simply did not become "operative" until June 15, 1968, in order to permit adjustment of school and taxation problems. Plaintiffs also contend that the 1967 amendment is not applicable to mergers completed before its effective date of July 13, 1967, in the absence of a clear legislative intent that it should act retrospectively. That the annexation of the area by the city of Bellevue was completed prior to the effective date of section 79-801, R. S. Supp., 1967, is clear and undisputed. It does not necessarily follow that the area was simultaneously merged into the School District of Bellevue. The statute provides that title to school property in the area to be merged with the Class III district shall vest immediately in the *new* district upon its organization and that the new district shall then have exclusive control over such property. Obviously the new district could not be organized and control taken of such property while school was still being held in the area to be merged and the school property necessarily remained in charge of the board of education of the merging district as required by the provision that the merger should not be effective until June 15 of the year following the first full school year after such merger. The words "after such merger" are somewhat ambiguous in that they refer not to a completed merger but to the preliminary steps taken to bring about a future merger. This intimation of a completed merger cannot prevail in the face of the clear and specific provision that the merger shall not be effective until June 15 of the year following the first full school year thereafter.

The word "effective" has many connotations. It may be used to mean operative, taking effect, or being in force. Ordinarily, when a statute specifies a time or date when a proceeding creating or altering school districts shall become effective, the status of districts affected remains unchanged until such time or date. See, Independent School Dist. No. J1-69 v. Independent School Dist. No. D-45 (Okla.), 363 P. 2d 835; 78 C. J. S., Schools and School Districts, § 47, p. 741. On the completion of a merger of one school district, or a portion of one, with another, the merging district, or part of a district, loses its former identity. It is dissolved, abolished, and ceases to have any separate existence. See, Garrett v. Folsom, 88 Ariz. 380, 357 P. 2d 130; 78 C. J. S., Schools and School Districts, § 70, p. 797.

In the present instance, our statute provides that the disputed area shall retain its identity as a part of the School District of Omaha until June 15 following one full school year after the annexation by the city of Bellevue. During this period it continued to be a part of the School District of Omaha for purposes of taxation and the conduct of its school system. It is apparent that its former identity was not then dissolved or abolished and no final merger or reorganization had been effected or taken place. Such we believe to have been the legislative intent. This is borne out by the use of the term "effective" in that portion of the statute added by the 1967 amendment. It is there provided that the merger "shall not become effective" until the board of education of the merging district has approved the merger. In other words, the "merger" is not considered to be consummated but temporarily "inoperative." On the contrary, it is not even in existence until the required approval is forthcoming.

A fundamental principle of statutory construction is to ascertain the legislative intent and give effect to it, if it is a lawful one. See Wilson v. Marsh, 162 Neb. 237, 75 N. W. 2d 723. A final merger not having occurred,

a question of retrospective application of the statutes is not presented.

We affirm the judgment of the district court.

AFFIRMED.

BARBARA JOYCE COSTELLO, APPELLANT, V. MAURICE COSTELLO, APPELLEE.

176 N. W. 2d 10

Filed April 3, 1970. No. 37272.

1. **Divorce: Appeal and Error.** It is the duty of this court on appeal of proceedings to modify a decree of divorce to try the action de novo on the record and to reach a conclusion uninfluenced by what was done by the trial court, except if there is irreconcilable conflict in the evidence the court may consider that the trial court saw the witnesses and accepted one version of the facts.
2. **Divorce: Parent and Child.** If the circumstances of the parties change or if it is in the best interests of the child, the court may from time to time either on the motion of the parties or on its own motion revise or alter the custody provisions of a divorce decree.
3. ———: ———. A court should change custody when it finds such action to be in the best interests of the child and it appears from the evidence that the parent having custody has subjected the child to such disturbing and unsettling conditions as could be seriously detrimental to the health, morals, and well-being of the child.

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

David J. Cullan and Foulks, Wall & Wintroub, for appellant.

Morsman, Fike, Sawtell & Davis and Nelson, Harding, Marchetti, Leonard & Tate, for appellee.

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

SPENCER, J.

This is an action for the modification of a divorce decree, instituted by Maurice Costello, defendant-appellee. The action seeks a change in the care and custody of the minor child of the parties, hereinafter referred to as Morgin. The trial court modified the decree changing the custody, and plaintiff-appellant perfected an appeal to this court.

The parties were divorced on July 19, 1963. Appellant was granted the custody of Morgin. In 1966, the decree was modified by agreement to permit the appellant to move Morgin to Colorado. On November 23, 1968, appellee, with whom Morgin was visiting, secured an ex parte order permitting him to retain temporary custody of Morgin pending a hearing on an application for change of custody. On November 26, 1968, appellant filed an application, praying for an order vacating the ex parte order of November 23, and for an order permitting her to remove Morgin from Denver, Colorado, to Hayden Lake, Idaho. Appellant subsequently dismissed the portion of her application to remove the child to Idaho for the reason that she had secured employment in Omaha and returned to the State of Nebraska. There were several other subsequent legal maneuvers, including an application to this court. No purpose will be served by detailing those proceedings herein. Trial was had on the application for change of custody on February 4, 5, and 6, 1969.

Appellant sets out seven assignments of error, only three of which we consider herein. The first assignment of error involves the question as to whether a sufficient change of circumstances was shown to warrant a change in custody. The second assignment of error concerns the participation of appellant's former counsel, and the third assignment of error concerns the inference of prejudice on the part of the trial court in failing to disqualify himself herein. We consider the assignments in inverse order.

There is nothing in this record which would in the slightest measure impugn the integrity of the trial court. His procedure on the ex parte order is common procedure in this state when prompt action is necessary to protect the interests of a minor child. We are further convinced that the trial court handled himself properly at all stages of this proceeding, and specifically find that any inference of bias or prejudice is unwarranted.

At the preliminary stages of the proceedings herein appellee was represented by appellant's former counsel, who had by agreement represented both parties in the original action. Due regard for Canon 6 of the Canons of Professional Ethics should have prompted counsel to withdraw from the proceedings. Original counsel did not participate in the trial. The trial was handled by other counsel who entered an appearance as co-counsel. This impropriety, which cannot be condoned, has no bearing on the merits of the controversy herein, and is not in any way determinative of the issue of custody.

It is the duty of this court on appeal of proceedings to modify a decree of divorce to try the action de novo on the record and to reach a conclusion uninfluenced by what was done by the trial court, except if there is irreconcilable conflict in the evidence the court may consider that the trial court saw the witnesses and accepted one version of the facts. Dennis v. Dennis, 179 Neb. 200, 137 N. W. 2d 694.

Considering the evidence de novo, as we are required to do, we conclude that a sufficient change in circumstances was shown to warrant a change in custody. It will serve no useful purpose to review the evidence in detail herein. Appellant's evidence would indicate that her indiscretions were the result of deception practiced by one Kenneth Stroupe. She testified she was deceived into entering into a meretricious relationship involving an illegal marriage and a purported divorce. In passing, we observe that in November of 1968, subsequent to the purported divorce, appellant's interest in

Stroupe was still such that she was planning to move to Idaho to be with him, and on his representation that he had finally been divorced, was expecting to marry him. He accompanied appellant when she returned to Omaha to contest the temporary custody order. Appellant, who is again a legal resident of Nebraska, testified that she now has no intention of marrying Stroupe although his wife has filed a divorce action against him. This may be her intention at the present time but conditions exist which indicate he will be visiting her home in the future, and his influence has been such over the past 6 years that we cannot say that the district court abused its discretion in changing custody herein.

If the circumstances of the parties change or if it is in the best interest of the child, the court may from time to time either on the motion of the parties or on its own motion revise or alter the custody provisions of a divorce decree. § 42-312, R. R. S. 1943.

The testimony reflects disturbing and unsettling conditions which were detrimental to the welfare of Morgin. In our view of the evidence, there had been a sufficient change in circumstances to warrant a change in custody. At the time of the order on temporary custody, there is no question the best interests of the child were served by placing her in the temporary custody of her father. She has been in her father's home since November 1968. There is no reason at this time why that arrangement should be disturbed. Our concern is solely the welfare of the minor child. A court should change custody when it finds such action to be in the best interests of the child and it appears from the evidence that the parent having custody has subjected the child to such disturbing and unsettling conditions as could be seriously detrimental to the health, morals, and well-being of the child.

The judgment changing custody to the appellee was not an abuse of discretion and it is affirmed.

AFFIRMED.

DUNMAR INVESTMENT COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLANTS, V. NORTHERN NATURAL GAS COMPANY, A CORPORATION, ET AL., APPELLEES.

176 N. W. 2d 4

Filed April 3, 1970. No. 37359.

1. **Utilities: Sales.** The supplying of heat and cold by means of circulated steam and refrigerated water does not constitute a sale of gas or water.
2. **Municipal Corporations: Streets and Sidewalks: Franchises.** The subsurface use of a public thoroughfare, which does not interfere with its public use, which is subject to termination by the city, and which is of such a limited nature as not to be of general public interest, is not a proper subject for a franchise.
3. **Municipal Corporations: Streets and Sidewalks: Licenses and Permits.** By legislative authority a city of the metropolitan class operating under a home rule charter may properly provide for such use of its streets for private purposes under a proper permit issued as provided by ordinance.

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

Foulks, Wall & Wintroub, for appellants.

Robert D. Mullin of Boland, Mullin & Walsh, Thomas N. Wright, F. Vinson Roach, William Strong, and James E. Fellows, for appellees.

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

NEWTON, J.

This action tests the right of defendant Northern Natural Gas Company to use the subsurface of the streets of the city of Omaha for pipes conveying steam and refrigerated water without first securing a franchise. Judgment for defendants was entered in the trial court. We affirm the judgment of the trial court.

For convenience, defendants Northern Natural Gas Company, Metropolitan Utilities District of Omaha, and the City of Omaha will be hereinafter respectively referred to as Northern, M.U.D., and City.

Northern constructed and operates a plant in downtown Omaha which supplies steam and chilled water to several buildings in the area for purposes of heating and air conditioning. The steam and chilled water are distributed by means of pipes or conduits lying under the surface of the streets and are returned to Northern's plant in the same manner. The plant is steam powered and natural gas is used to heat the boilers. All gas and water used in the system are purchased from M.U.D. All water used in the system, either as water or steam, after circulating through the system and through the buildings supplied, is returned and reused, the only exception being small unavoidable losses of steam and a minor loss due to the use of steam as a humidifier. Customers are charged for steam losses occurring on the customer's premises. Northern does not purport to be a public utility but reserves the privilege of accepting or rejecting customers and contracts with each on an individual basis. Its pipes or conduits were installed and are maintained under a permit issued by the City for which a charge is made annually.

Plaintiffs contend: (1) That Northern is engaged in the sale of steam and water in competition with M.U.D.; (2) that the operation is one requiring a franchise; and (3) that the permit is void as one permitting a purely private use of the streets.

The City is included in the Metropolitan Utilities District. Plaintiffs call attention to section 14-1011, R. R. S. 1943, which provides that if any portion of the district is supplied with water by any other entity, the M.U.D. board shall have power to fix water rates, regulate conditions of water service, and the conduct of the *water plant affording such supply.* Also cited is section 14-1009, R. R. S. 1943, which provides that no franchise or permit for the use of the streets for the laying of pipes in connection with a water plant designed for public or private service shall be granted except by the board of directors of M.U.D., and such

franchise or permit shall not be valid until approved by the electors of the district. The inapplicability of these statutes to the existing situation is apparent. Section 14-1008, R. R. S. 1943, gives M.U.D. general supervision and control of all matters pertaining to the water *supply* of the district. These statutes are clearly designed to give M.U.D. exclusive control of the water *supply* within the district. The term "water plant" refers to a "water plant affording such supply," in other words, to the production and supplying of water for consumption within the district. Northern obtains its water from M.U.D. It does not operate an independent plant producing water. Neither does it supply water for consumption by others. Any loss of water through escaping steam is negligible and not an inherent part of its operation which is aimed solely at the production of heat and cold by means of steam and chilled water. Plaintiffs' contention that Northern is engaged in the distribution and sale of gas and water is untenable.

It is urged that Northern's operation is one requiring a franchise which under the terms of section 14-811, R. R. S. 1943, cannot be issued without approval of the electors of the City. Such a franchise has not been obtained. As previously mentioned, Northern is operating under a permit issued in conformity with sections 28.20.010 to 28.20.140 of the Omaha municipal code. The pertinent portions of the ordinance provide:

"It shall be unlawful for any person, firm or corporation to use any space underneath, upon or above the surface of any street, alley, public way or other public grounds belonging to the city of Omaha, or to construct any structure thereunder or thereover, * * * without first obtaining a permit so to do from the Permits and Inspection Division of the Public Safety Department of the City of Omaha; * * *." § 28.20.010.

Section 28.20.070 requires the payment of annual compensation for the privilege of maintaining such structures.

Section 28.20.120 forbids interference with public works

and utilities except on consent of the city and lays down rules governing such action designed to prevent undue disruption of services rendered by public utilities.

Section 28.20.140 provides for the revocation of such permits on failure to comply with all requirements of the ordinance or if the space described in the permit shall be required for public use.

When is a franchise, as distinguished from a license or permit, required to authorize the use of a city's streets and alleys? A franchise is generally defined as a special privilege conferred by government upon an individual or corporation to do that which does not belong to the citizens of the country generally by common right. See, 36 Am. Jur. 2d, Franchises, § 1, p. 722; Omaha & C. B. St. Ry. Co. v. City of Omaha, 114 Neb. 483, 208 N. W. 123. The definition is sufficiently broad to include licenses and permits; yet, it is generally conceded that there is a distinction between a franchise and a permit or license. See, 36 Am. Jur. 2d, Franchises, § 2, p. 724; 37 C. J. S., Franchises, § 7, p. 149. The authorities concede that the distinction is of a somewhat nebulous and uncertain character without an exact line of demarcation. " 'A franchise is property, * * * a vested right, protected by the Constitution—while a license is a mere personal privilege, and, except in rare instances and under peculiar conditions, revocable.' " Shaw v. City of Asheville, 269 N. C. 90, 152 S. E. 2d 139. "It is true that a mere license is defined to be a permit or privilege to do what otherwise would be unlawful, and is not a contract between the authority granting it and the person to whom it is granted, * * * but the grant of a franchise, when accepted and acted upon, does create a contract, * * * since it creates obligations binding upon both the grantor and the grantee." Denny v. Brady, 201 Ind. 59, 163 N. E. 489. In Finney v. Estes, 130 Colo. 115, 273 P. 2d 638, it was held that a grant by a city council of a nonexclusive right to collect and dispose of garbage in the city, which was revocable by the

city at any time without payment of penalty, constituted a revocable "permit" and not a "franchise" which under the city charter could be granted only upon a vote of the tax-paying electors.

"What is the proper subject of a franchise depends largely upon existing conditions and the extent to which the public welfare is affected by the conduct of the business or enterprise in question. Rights exercised by a citizen may, when the public interest requires, be withdrawn by the state, so as in effect to make them franchises to all practical intents and purposes. Whenever any occupation or business is conducted in such a manner that the welfare of the people generally requires it to be regulated, modified, or restrained altogether, the legislature may affix to its exercise any conditions that legitimately tend to correct the evil; and thus, what was at one time a common right may be made the subject of a franchise." 36 Am. Jur. 2d, Franchises, § 3, p. 725. See, also, 37 C. J. S., Franchises, § 1d, p. 146.

The laying of pipes or conduits in the streets by Northern does not in any manner interfere with the public use of the streets and is in no sense a public nuisance. No contract has been entered into which gives or guarantees to Northern a property or contract right in the streets or the use of the streets. There is no attempt or necessity to regulate Northern's business or its rates in ways common to a franchise. Rather, it enjoys a mere personal privilege which must be exercised without detriment either to the public or to public utilities and which is revocable if it comes in conflict with the public interest. Northern's project serves only a very small segment of the people of Omaha and the public welfare is not affected by the conduct of its business. It is of far less interest to the people of Omaha than the conduct of other business enterprises patronized by the public generally. Under such circumstances, we cannot conceive of the public interest being sufficient to warrant an expensive and time-consuming election to pass

upon its desirability and propriety nor do we believe that this situation is one contemplated by the statutes cited by plaintiffs as requiring a franchise.

Finally, we believe that plaintiffs' contention that the permit issued to Northern is void as authorizing a private use of the public ways is without merit. We are not unmindful of the general rule that such private use cannot be granted without legislative authority, but it can be granted when such authority has been given, for example, in the case of privately owned and operated public utilities. Section 14-106, R. R. S. 1943, gives the city council authority to regulate the "laying down gas *and other pipes.*" (Emphasis supplied.) Section 14-107, R. R. S. 1943, provides that the council "may determine, fix and charge rentals for subways and conduits." The City has adopted and operates under a home rule charter. In Mollner v. City of Omaha, 169 Neb. 44, 98 N. W. 2d 33, this court said: " 'We hold that the city may by its charter under the Constitution provide for the exercise by the council of every power connected with the proper and efficient government of the municipality, including those powers so connected, which might lawfully be delegated to it by the legislature, without waiting for such delegation. It may provide for the exercise of power on subjects, connected with municipal concerns, which are also proper for state legislation, but upon which the state has not spoken, until it speaks.' " The authority of the City to act in the manner it has appears to be clear.

The judgment of the district court is affirmed.

AFFIRMED.

BOSLAUGH, J., not participating.

DOMINICK L. GIANGRASSO, APPELLANT, V. EAGLE DISTRIBUTING COMPANY, APPELLEE.

176 N. W. 2d 16

Filed April 3, 1970. No. 37366.

Judgments: Appeal and Error: Time. Where a notice of appeal is not filed within 1 month from the entry of the judgment or final order appealed from, this court obtains no jurisdiction to hear the appeal and it must be dismissed.

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

Thomas P. Kelley of Kelley, Grant, Costello & Dugan, for appellant.

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

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

MCCOWN, J.

Where a notice of appeal is not filed within 1 month from the entry of the judgment or final order appealed from, this court obtains no jurisdiction to hear the appeal and it must be dismissed. See, § 25-1912, R. R. S. 1943; Ruan Transport Corp. v. Peake, Inc., 163 Neb. 319, 79 N. W. 2d 575; Morimoto v. Nebraska Children's Home Society, 176 Neb. 403, 126 N. W. 2d 184.

The notice of appeal in this workmen's compensation case having been filed out of time, the appeal is dismissed.

APPEAL DISMISSED.

DWAINE BOHN, APPELLANT, V. DARRELL KRUGER, APPELLEE.
176 N. W. 2d 14

Filed April 3, 1970. No. 37386.

Damages: Trial: Evidence. When the amount of the damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict.

Appeal from the district court for Pierce County: GEORGE W. DITTRICK, Judge. Reversed and remanded.

Deutsch & Hagen, for appellant.

McFadden & Kirby and Jewell, Otte & Pollock, for appellee.

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

MCCOWN, J.

This is an action for damages resulting from a farm accident in which the defendant backed a tractor over the plaintiff. The jury verdict for the plaintiff was $3,194.99, and plaintiff has appealed. The sole issue on appeal is the inadequacy of the verdict and judgment.

It was stipulated that the plaintiff had paid certain bills for items of special damages in the total sum of $3,424.62, and that the amounts paid were fair and reasonable. The jury verdict of $3,194.99 was the exact amount of the stipulated medical expenses paid by the plaintiff. The remaining items of special damages totaling $229.63 represented farm labor hired by the plaintiff while incapacitated.

Plaintiff's original injuries were undisputed. He sustained three fractures of the pelvic ring. His bladder was ruptured and his urethra completely severed. These injuries required surgery. The plaintiff spent 30 days in the hospital immediately following the accident. He was returned to the hospital for an additional 4 days approximately 2 weeks after his first release. The acci-

dent occurred on April 30, 1966, and at the time of trial in May 1969, he was still under medical care.

The surgeon and also the treating urologist testified that the plaintiff had a stricture of the membranous urethra where it had been severed; a residual defect in the bladder; and an elongated and fixation of the prostatic urethra. In the opinion of the treating urologist, the plaintiff had a 25 percent permanent partial disability.

The only other doctor who testified was a urologist who examined the plaintiff on one occasion more than 2 years after the accident. He had never seen any X-rays of the plaintiff. His examination was manual and cystoscopic. He testified that the plaintiff's lower urinary tract at the time of his examination was normal except for the stricture of the membranous urethra. He did not know what percentage of disability would result because he felt there was nothing incapacitating. He testified that if internal surgery were required to repair the stricture, there might be a disability of "5 per cent at the most."

All of the doctors agreed that there is a stricture or narrowing of the membranous urethra, and that it will require periodic dilations in the future. There is no dispute but that the plaintiff had extensive pain and suffering. While there was some evidence of damage to plaintiff's sexual capabilities, this evidence was disputed and largely speculative or conjectural.

Contributory negligence of the plaintiff was pleaded and submitted to the jury. The evidence was more than ample to sustain a verdict for the plaintiff. The plaintiff's stipulated special damages exceeded the amount of the jury's verdict. It is apparent that the jury disregarded the instructions of the court and the uncontradicted evidence of special damages. It is also obvious that plaintiff received no damages for pain and suffering, nor for any permanent injury. Under the facts here, the amount of the verdict was grossly inadequate.

When the amount of the damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict. Dolen v. Beatrice Restaurant Co., 137 Neb. 247, 289 N. W. 336; Gross v. Johnson, 174 Neb. 273, 117 N. W. 2d 534; Schumacher v. Lang, 160 Neb. 43, 68 N. W. 2d 892.

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

REVERSED AND REMANDED.

DANIEL N. WEBSTER, APPELLEE, V. BRUCE L. HALBRIDGE, APPELLANT.

176 N. W. 2d 8

Filed April 3, 1970. No. 37394.

1. **New Trial.** The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion.
2. **New Trial: Appeal and Error.** This court will not ordinarily disturb a trial court's order granting a new trial, and not at all unless it clearly appears that no tenable ground existed therefor.
3. **Trial: Evidence: Appeal and Error.** Ordinarily, where testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated on it.
4. **Damages: Trial: Evidence.** Where the amount of damages allowed by the jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict.

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

Stephen A. Davis of Cassem, Tierney, Adams & Henatsch, for appellant.

George O. Kanouff, for appellee.

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

SPENCER, J.

This is an action for damages for personal injuries and property damage in which the trial court directed against the defendant on liability. The jury returned a verdict for the plaintiff in the amount of $1,600. The trial court sustained plaintiff's motion for a new trial because in his opinion the jury was influenced by matters not relevant to the case and the verdict was inadequate. Defendant perfected an appeal to this court.

Under our law a motion for a new trial is ordinarily addressed to the sound discretion of the trial court and is not subject to review absent an abuse of discretion. The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion. As used in this connection, judicial discretion means the application of statutes and legal principles to all of the facts of the case. State v. Wixson, 175 Neb. 431, 122 N. W. 2d 72.

We held in Wagner v. State, 176 Neb. 589, 126 N. W. 2d 853, that this court will not ordinarily disturb a trial court's order granting a new trial, and not at all unless it clearly appears that no tenable ground existed therefor.

This accident occurred when the plaintiff's eastbound vehicle entered the intersection of Forty-second and Harney Streets in Omaha, Nebraska, on a green light, and the defendant's vehicle forcefully collided with it. Plaintiff's car damage was $676.33, and his special damages would slightly exceed the amount of the verdict. Plaintiff sustained some injuries as the result of the accident. He spent 2 hours at the hospital after the accident and made several visits to his doctor's office. A wound on his head required four stitches. The medical testimony indicated that the scar on his forehead would be to some extent permanent. The amount of plaintiff's special damages totaled $2,015.61. The only con-

troverted item is whether or not the plaintiff could have gone back to work on October 18 rather than on October 31. Even if we deduct the difference his out-of-pocket expenses would be more than $1,600.

The incident referred to by the trial court between the defendant and the plaintiff's son came into the record on the direct testimony of the defendant without objection. Ordinarily, where testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated on it. State v. Dillon, 175 Neb. 444, 122 N. W. 2d 223.

A direction of liability for a collision does not thereby constitute an admission that all damages claimed by a plaintiff were the proximate result of the accident. Cooper v. Hastert, 175 Neb. 836, 124 N. W. 2d 387. However, where the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict. Gross v. Johnson, 174 Neb. 273, 117 N. W. 2d 534.

It was the opinion of the trial court in setting aside the verdict on the grounds of inadequacy that the demeanor of the witnesses and the incident between the defendant and the plaintiff's son after the accident must have influenced the jury to the detriment of the plaintiff. On this record we find that the trial court did not abuse its discretion in sustaining the motion for a new trial. Absent such abuse, the judgment should be and hereby is affirmed.

AFFIRMED.

ALFRED E. BERIGAN, APPELLEE, V. MARY L. BERIGAN, NOW MARY L. LECHMAN, APPELLANT.
176 N. W. 2d 1

Filed April 3, 1970. No. 37439.

1. **Divorce: Parent and Child.** If the circumstances of the parties change or if it is in the best interests of the children the court

may from "time to time," on the application of either party or on its own motion, revise or alter the custody provisions of a divorce decree.

2. ———: ———. A proper regard for the welfare of children requires the parent to refrain from conduct which would reflect on him and produce harmful effects upon his children.
3. ———: ———. The proper rule in a divorce case, where the custody of minor children is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents.
4. ———: ———. The natural rights of a parent to the custody of his child are not absolute. They must yield to the best interests of the child where the preferential rights have been forfeited.
5. ———: ———. The court's discretion is broad and not limited to a choice between parents.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Reversed and remanded.

Mitchell & Beatty, for appellant.

Leo Eisenstatt and J. Patrick Green of Eisenstatt, Higgins, Miller & Kinnamon, for appellee.

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

WHITE, C. J.

A 1964 divorce decree granted the defendant mother Mary Berigan a divorce but, due to her serious illness, placed custody of their two boys in the plaintiff father. On August 7, 1968, defendant filed this petition for modification and custody of the boys. At the close of her evidence, the district court sustained the plaintiff's motion to dismiss for insufficiency of evidence. We reverse the judgment of the district court and remand the cause for a new trial.

If the circumstances of the parties change or if it is in the best interests of the children the court may from "time to time," on the application of either party or

on it own motion, revise or alter the custody provision of a divorce decree. § 42-312, R. R. S. 1943.

A previous petition filed in 1964 was discontinued, and a 1966 petition was dismissed for insufficiency of evidence on November 3, 1966. We avoid questions of res judicata by considering evidence as to fitness since November 3, 1966. See Goodman v. Goodman, 180 Neb. 83, 141 N. W. 2d 445.

We summarize our findings from the evidence. The defendant, seriously ill, depressed, and sometimes disoriented, was incapable of the children's care at the time of her securing the 1964 divorce. Consequently, the custody of the two boys was granted to the plaintiff. No finding of defendant mother's "unfitness" was made by the court at that time or at any time since in this litigation.

Defendant's evidence conclusively shows a long, continued, complete, and remarkable recovery from her incapacitating illness present at the time of the divorce. She has been employed, is now remarried, and maintains a good home with an ample income to support and maintain the boys.

The evidence sustains a finding that the plaintiff takes the boys (ages 8 and 10 at the time of trial) to taverns and bars, and that he becomes intoxicated in their presence. The youngest boy, on examination, stated that when plaintiff was drinking he does "stupid stuff, * * * like drive crazy." He takes them with him when visiting women, they are often kicked by their father, he comes home after the boys have eaten, they know he has been drinking because he walks funny, his hands go all over, he looks straight at the floor, and then goes to bed. This happens several times a week. The boys have found whiskey bottles under the car seats and are locked out of the house so the housekeeper can watch television; they have been to the police station with their father to get one of his lady friends out of jail; and the police took the father to

jail once when he was asleep on the interstate with the *eldest boy in the back seat.*

The evidence in this case is not confined to isolated incidents. It reveals a continuous and habitual pattern of drinking and drunkenness, erratic automobile driving, bar hopping, being thrown out of bars, immoral and dissolute conduct with women, and general irresponsibility. The defendant's evidence warrants an inference of aggravation of improper conduct both in quality and degree since November 1966. Some of the evidence is from paid investigators but it is amply corroborated by independent witnesses. The invasion of this conduct into the lives of the two boys is clear, either by direct evidence or inescapable inference. The evidence, quite overwhelming in nature, is inconsistent with any rational finding of *present* fitness in the plaintiff.

The state and the court's concern is not merely adequate food and clothing for children but the proper moral and educational background, including the environment of the home, the stability and love of the parental relationship, and the effect which the actions of a parent may create in the impressionable mind of a child of tender years. A proper regard for the welfare of children requires the parent to refrain from conduct which would reflect on him and produce harmful effects upon his children. Speck v. Speck, 164 Neb. 506, 82 N. W. 2d 540.

In modification cases, we have recently applied the following rule: "The proper rule in a divorce case, where the custody of minor children is involved, is that the custody of the child is to *be determined by the best interests of the child,* with due regard for the superior rights of fit, proper, and suitable parents. * * * The natural rights of a parent to the custody of his child are not absolute. They must yield to the best interests of the child where the preferential right has been forfeited." (Emphasis supplied.) Jones v. Jones, 183 Neb. 223, 159 N. W. 2d 544; Goodman v. Goodman, *supra.*

It is clear from a review of the record and the applicable authorities, that there is ample evidence to sustain a finding of the present unfitness of the plaintiff. The district court was in error in not hearing all of the evidence and then determining the case in the best interests of the two children on the merits. The court's discretion in the determination of custody is broad and not limited to a choice between parents. §§ 42-311 and 42-312, R. R. S. 1943.

The judgment of the district court dismissing defendant's petition is reversed and the cause remanded for a new trial. The costs of this appeal including an attorney's fee to the defendant in the sum of $500 are taxed to plaintiff.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. EDWARD D. KENNEDY, APPELLANT.

176 N. W. 2d 12

Filed April 3, 1970. No. 37448.

Criminal Law: Right to Counsel: Guilty Plea. Appointment of counsel and the arraignment of the defendant on the same day do not show lack of effective assistance by counsel where the facts and circumstances of the offense were such that investigation by counsel was not required and a plea of guilty was appropriate.

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

William D. Staley, for appellant.

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

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

BOSLAUGH, J.

In 1959 the defendant was convicted of possession of burglary tools and carrying concealed weapons. He was sentenced to 15 years' imprisonment on each count as an habitual criminal. The conviction was affirmed by this court in Kennedy v. State, 171 Neb. 160, 105 N. W. 2d 710.

The defendant has now moved to vacate these sentences. The defendant contends that his conviction for burglary in 1946 upon a plea of guilty was void because he was denied effective assistance of counsel. The defendant testified, by deposition, that he did not have counsel except at the time of sentencing.

The defendant was charged with breaking and entering an ice cream store in Omaha, Nebraska, on August 8, 1946. The defendant admits that he was apprehended by the police inside the building. An information was filed the following day and the defendant brought before the district court. The record then recites:

"Whereupon, it appearing that said defendant is in indigent circumstances and unable to employ counsel, it is ordered by the Court that the Public Defender be and hereby is appointed to represent defendant.

"Thereupon said defendant waives the filing of a complaint, preliminary examination, service of a copy of the information heretofore filed herein and the time provided by law before being required to answer thereto, and is, with his assent, arraigned for plea. The information being read to him for plea thereto, said defendant says he is guilty of Burglary as charged therein.

"Whereupon sentence is deferred and said defendant is remanded to custody of the Sheriff to await sentence."

The records of the office of the public defender show that the defendant was interviewed on August 9, 1946, and that the defendant was then on parole from the Industrial School for breaking and entering.

Edward T. Hayes, a former assistant public defender, testified that it was always the practice to interview

the prisoner prior to the time that a plea was entered. Mr. Hayes stated that he recognized the handwriting on the defendant's interview card as that of Mr. Lovely who was the public defender at that time but is now deceased.

The record will sustain a finding that the public defender was appointed as counsel for the defendant and conferred with him prior to arraignment. Although the appointment of counsel and the arraignment of the defendant occurred the same day, this does not establish that the defendant was deprived of the effective assistance of counsel. Commonwealth ex rel. Washington v. Maroney, 427 Pa. 599, 235 A. 2d 349.

The facts and circumstances of the offense were not such as to require investigation by counsel, and a plea of guilty was appropriate. The record sustains the judgment of the district court denying the motion to vacate.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HAROLD HUFFMAN, APPELLANT.

176 N. W. 2d 506

Filed April 10, 1970. No. 37332.

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.** Error in the admission of evidence may be harmless if the fact is established by other evidence.
3. **Criminal Law: Trial.** Participation in a hearing on an habitual criminal charge without objection is a waiver of the notice required by section 29-2221, R. S. Supp., 1967.

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, McCOWN, and NEWTON, JJ.

BOSLAUGH, J.

The defendant was convicted on four counts of forgery and uttering forged instruments. He was sentenced to 20 years' imprisonment on three counts, and to 22 years' imprisonment on Count IV. His motion for new trial was overruled and he has appealed.

The assignments of error relate to the sufficiency of the evidence; the admission of evidence; and the failure to give the statutory notice required by section 29-2221, R. S. Supp., 1967.

The record shows that the defendant was employed as an attendant at the Conoco Courts service station in Grand Island, Nebraska. He was living at Giltner, Nebraska, with Faye Boersen. On March 2, 1969, at about 3 p.m., when Faye was at the service station, the defendant asked her to get some check blanks from Ham Jungclaus. She obtained the check blanks and returned to the station.

At the defendant's request, Faye wrote out a check for $15 and gave it to the defendant. She did not place any signature on the check, but the defendant later told Faye that he cashed it. The check was received in evidence as exhibit 1 and purports to have been signed by "W. R. Schatz." W. R. Schatz testified that he did not sign exhibit 1 and did not authorize anyone to place his signature on the check. He identified a duplicate invoice which he had signed at the Conoco Court service station in Grand Island on March 2, 1969, for the purchase of gasoline on a credit card.

Ron Cook, who was also employed at the Conoco Courts service station, identified exhibit 3 as a check which was in the cash register at the station on the afternoon of March 2, 1969. Exhibit 3 is a check for $43 which purports to have been signed by "D. W. Ryder." Cook testified that the defendant said that he had cashed exhibit 3.

Del Ryder testified that he did not sign exhibit 3 and that he did not authorize anyone to place his signature on the check. Ryder identified a duplicate invoice which he had signed at the Conoco Courts service station on March 2, 1969, using "D. W. Ryder" as his signature, for the purchase of gasoline on a credit card. An officer of the bank testified that the authorized signature for the Ryder account was "Del W. Ryder."

There was other evidence from which the jury could infer that the defendant had forged the checks by tracing the signatures from the duplicate invoices which Schatz and Ryder had signed at the service station on March 2, 1969.

The evidence was sufficient, if believed, to sustain a finding of guilty on all four counts. 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. Adams, 181 Neb. 75, 147 N. W. 2d 144.

The defendant's second assignment of error relates to exhibits 1 and 3 which were received in evidence with slips attached by the bank showing why the checks were returned unpaid. The slip attached to exhibit 1 bears a notation: "no acct." The slip attached to exhibit 3 bears a notation: "forgery" and "not like signature on file." The defendant contends that the return slips with the notations were hearsay and should not have been admitted.

The defendant objected to the admission of exhibits 1 and 3 for lack of foundation but made no objection specifically directed at the return slips. There was no

prejudice in admitting the checks with the return slips attached because the other evidence clearly established that both exhibits were forgeries. Lamb v. State, 40 Neb. 312, 58 N. W. 963. State v. Morgan, 182 Neb. 639, 156 N. W. 2d 799, is not applicable here.

The defendant's third assignment of error relates to the hearing upon Count XI of the information which alleged that the defendant was an habitual criminal. Section 29-2221, R. S. Supp., 1967, provides in part: "The court shall fix a time for the hearing and notice thereof shall be given to the accused at least three days prior thereto." The defendant contends that a sentence imposed under the habitual criminal law is void if the statutory notice of the hearing was not given.

The defendant was convicted on April 17, 1969, and sentenced on April 28, 1969. There is nothing in the record to show that the defendant or his counsel were notified 3 days in advance that a hearing on the habitual criminal charge would be held on April 28, 1969. However, the defendant was present in court with his counsel on April 28, 1969, and participated in the hearing on the habitual criminal charge without objection. The defendant did move for a continuance for the purpose of filing an application for probation, but there was no objection made to the hearing on the habitual criminal charge. Participation in the hearing without objection was a waiver of the statutory notice of the hearing. See, Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124, 165 A. L. R. 932; Foster v. State, 83 Neb. 264, 119 N. W. 475.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RUBY C. HAILE, APPELLANT.
176 N. W. 2d 232

Filed April 10, 1970. No. 37341.

1. **Criminal Law: Automobiles: Evidence.** In the absence of objection in the trial court, a defendant may not be heard to complain of a lack of sufficient foundation for admission into evidence of the results of breathalizer tests.
2. **Criminal Law: Statutes: Appeal and Error.** A complaint charging a statutory misdemeanor substantially in the language of the statute, will be liberally rather than technically construed, and if a defect is amendable, it will be held sufficient on appeal in the absence of objection in the trial court.

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

Kelly & Kelly, 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.

MCCOWN, J.

The defendant, Ruby C. Haile, was found guilty by a jury of operating a motor vehicle while under the influence of alcoholic liquor, and on a second count of abusing an officer while in the execution of his office. On Count I, the defendant was sentenced to pay a fine of $100 and her driver's license was suspended for 6 months. On Count II, the defendant was sentenced to 5 days in the Hall County jail.

The defendant's first assignment of error is that the evidence as to breathalizer tests was incompetent because the record did not show that the method or equipment had been approved by the Department of Health as provided by statute. Testimony by the State established that Captain Bacon, the officer administering the breathalizer tests, had a license issued by the State as

a breathalizer operator, and also identified the type and make of the test machine. The evidence does not affirmatively and directly show that the breathalizer method was approved by the Department of Health.

On direct testimony, Captain Bacon testified that an attempt to give a breathalizer test after the defendant's arrival at the police station was unsuccessful because the defendant did not blow sufficient breath into the equipment to permit any test analysis. The defendant's counsel, on cross-examination, elicited the fact that a second breathalizer test, taken more than an hour and a half after defendant's arrest showed .14 percent of alcohol. There was no objection to the introduction of any of the testimony with respect to the breathalizer tests, nor was the point raised in the motion for new trial.

It is obvious that the defendant cannot properly object to testimony as to test results when the defendant elicited the testimony. It is also apparent that if defendant was not satisfied with the foundation laid for the State's evidence and testimony as to breathalizer tests, objections should have been made at the time and on that ground. In the absence of objection in the trial court, a defendant may not be heard to complain of a lack of sufficient foundation for admission into evidence of the results of breathalizer tests. See Dietze v. State, 162 Neb. 80, 75 N. W. 2d 95, as to radar speed evidence. In addition, the issue was not raised in a motion for new trial and will not be considered now. See Kennedy v. State, 170 Neb. 193, 101 N. W. 2d 853. It should also be pointed out that there was ample evidence, entirely aside from any breathalizer test results, upon which the jury could and did find the defendant guilty on Count I.

There was also ample evidence to establish that the defendant verbally and physically abused the arresting officer, kicked him, and scratched his face. The defendant, however, now contends for the first time, that

the complaint as to Count II was fatally defective because it failed to specifically allege that the offense charged was committed within the limits of the City of Grand Island. It must be noted also that the count involves a statutory misdemeanor and that if the complaint is found insufficient or defective at any stage of the proceedings on appeal in the district court, the court shall order a new complaint to be filed. See, § 29-613, R. R. S. 1943; State v. Ruggiere, 180 Neb. 869, 146 N. W. 2d 373. Even in the case of a felony where an alleged defect in the information was not called to the attention of the trial court in the motion for new trial, this court has held that an information first questioned on appeal must be held sufficient unless it is so defective that by no construction can it be said to charge the offense for which the accused was convicted. Anderson v. State, 150 Neb. 116, 33 N. W. 2d 362.

The defendant relies on Gaweka v. State, 94 Neb. 53, 142 N. W. 287, decided in 1913. That case held that an information was insufficient if it did not allege that the offense of resisting a municipal officer was committed within the limits of the municipality of the officer. The complaint in the case now before us charged the statutory offense in the specific language of the statute, and that the offense occurred in Hall County, Nebraska. It also alleged that the named officer was abused "while in the execution of his office, of the Grand Island Police Department." The evidence established that the offense occurred in the City of Grand Island, and the jury was instructed that it was necessary for the State to prove that the crime occurred in the City of Grand Island. Any reasonable intendment would make it clear that Count II of the complaint alleged that the offense was committed in Grand Island, Nebraska. The defendant was fully apprised of the offense charged, and failed to challenge the complaint until this appeal. Even if the complaint be regarded as insufficient or defective, it was amendable at any stage of the proceedings in the

district court, but would not support a challenge for the first time on appeal.

A complaint charging a statutory misdemeanor substantially in the language of the statute, will be liberally rather than technically construed, and if a defect is amendable, it will be held sufficient on appeal in the absence of objection in the trial court. See, Buckley v. State, 131 Neb. 752, 269 N. W. 892; State v. Neimer, 147 Neb. 284, 23 N. W. 2d 81. To the extent that Gaweka v. State, 94 Neb. 53, 142 N. W. 287, is in conflict, it is overruled.

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

AFFIRMED.

WATKINS PRODUCTS, INC., A CORPORATION, APPELLANT, V. JAMES H. KEANE, APPELLEE.
176 N. W. 2d 230

Filed April 10, 1970. No. 37441.

Trial: Evidence. Clear, uncontradicted, self-consistent, and unimpeached business records of a party having initial production and persuasion burdens may suffice for a directed verdict in his favor.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Reversed and remanded for a new trial.

Witte & Donahue, for appellant.

Everson, Wullschleger & Sutter, for appellee.

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

SMITH, J.

Watkins Products, Inc., alleged indebtedness of James H. Keane for goods wholesaled him and for freight

charges. After jury verdict for Keane the district court overruled Watkins' alternative motion for judgment or new trial. Watkins appeals. Assigned for error are exclusion of freight charges from evidence and the rulings after verdict.

Under a requirement agreement Keane promised to pay Watkins wholesale prices and prepaid transportation charges, and to deposit in a bank $1,500 as security. Watkins promised delivery f.o.b. one of its regular shipment points. The agreement provided that either party could terminate it by postal notification.

Watkins, numbering Keane's account 3264, headed some records, "James H. Keane, 612 Spring, Friend, Nebraska," and others, "Harling Agt, Glen Keane Prin, James H. R#1, Box 76 Geneva, Nebr." A summary for 1965 is as follows:

Date			No. of Entries	Dr.	Cr.
3-1		Balance		$1,179.22	
3-5		Merchandise	3	606.51	
3-24	to 5-18	Freight	3	56.20	
4-19	to 8-24	Merchandise	10	715.16	
		Glen Harling			$ 101.34
12-2		Keane's security deposit			1,537.50
		Total		$2,557.09	$1,638.84
12-2		Balance		$ 918.25	

Account entries were explained. Keane on March 13, 1965, signed a statement that the balance on March 1 was correct, and at the trial he so stipulated. The latest orders personally signed by him were dated in February and represented by the entries on March 5. The 10 entries totaling $715.16 from April 19 to August 24 resulted from orders signed by Glen Harling without indication of agency.

Watkins filled 4 of the 10 orders from Glen Harling

by transporting the merchandise to Geneva in its trucks. It received delivery receipts signed by John or Betty Harling as agent for Glen Harling. No other evidence tends to disclose the relationship. Exhibits 13, 16, and 22, excluded from evidence, were memoranda setting out charges of $56.20 for transportation of merchandise in Watkins' trucks.

Keane's testimony is short. He quit retailing Watkins' products February 16, 1965, when he moved to Beatrice. Watkins' fieldman induced him to deliver the inventory to Glen and to sign an authorization form. Keane was advised it was a formality.

The authorization, undated and addressed to Watkins, was signed by Keane as principal and by Glen under the words "Authorized Agent's Signature." It provided: "I . . . authorize Glen Harling to order . . . all goods under my contract with you . . . and to conduct any correspondence in his name, or in my name . . .; and request that you fill . . . all orders he may send you, and . . . act upon . . . communications in relation thereto which you may receive from him, the same as you might . . . do with orders sent you by me, or . . . (with) communications which I might write you personally."

On March 16, 1965, Watkins wrote Keane at Friend as follows: "We have received your properly signed Authorization Blank from which we note that Mr. Glen Harling has been authorized to order goods and conduct correspondence under your Agreement."

On March 25, 1965, Watkins wrote Keane at Friend concerning his February orders as follows: "Attached are copies of . . . invoices . . . dated March '3' (5), 1965, which merchandise was delivered to you via Company-operated truck. As our files do not contain your personally signed acknowledgment of receipt of this merchandise, please sign the bottom of this letter in the space indicated. . . . 'I have received the merchandise listed on the above . . . invoices.' ———————— Dealer's Signature." The letter was returned with Glen's signa-

ture. By letter dated October 11 Watkins notified Keane it was terminating the agreement.

Only Keane and the custodian of Watkins' records testified. Availability of Glen was a guess.

The words "prepaid transportation charges" in the requirement agreement referred to carrier charges prepaid by Watkins, but not to charges for transportation in Watkins' trucks. No datum tended to prove reasonableness of the amounts in exhibits 13, 16, or 22. The exclusionary rulings were correct.

Clear, uncontradicted, self-consistent, and unimpeached business records of a party having initial production and persuasion burdens may suffice for a directed verdict in his favor. A similar rule governs testimony of an interested witness. See, City Nat. Bank v. Jones, 109 Neb. 724, 192 N. W. 509 (1923); Farmers Grain & General Shipping Assn. v. Jordan, 107 Neb. 537, 186 N. W. 528 (1922). See, also, Ferdinand v. Agricultural Ins. Co., 22 N. J. 482, 126 A. 2d 323, 62 A. L. R. 2d 1179 (1956); James, "Sufficiency of the Evidence and Jury—Control Devices Available Before Verdict," 47 Va. L. Rev. 218 at 226 (1961); generally, Note, 107 U. Pa. L. Rev. 217 (1958). Contrary intimations in Shawnee State Bank v. Vansyckle, 109 Neb. 86, 189 N. W. 607 (1922), and Shawnee State Bank v. Lydick, 109 Neb. 76, 189 N. W. 603 (1922), are disapproved. See Bobbé, "The Uncontradicted Testimony of an Interested Witness," 20 Cornell L. Q., 33 at 34, n. 7 (1934).

The stipulated balance and the debits of March 5 exceeded credits. The evidence brought those items, but not others, within the foregoing rule. Evidence of the transactions reflected in the 10 merchandise items after March 5 raised questions for the jury. The order denying the motion for judgment notwithstanding the verdict was correct. The order denying the motion for new trial was erroneous.

REVERSED AND REMANDED FOR A NEW TRIAL.