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REPORTS OF CASES

DECIDED BETWEEN

AUGUST 22, 1970 and MAY 14, 1971

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM 1970 AND
JANUARY TERM 1971

VOLUME CLXXXVI

H. EMERSON KOKJER

OFFICIAL REPORTER

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By H. Emerson Kokjer, 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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[2] Appointed February 11, 1971
[3] Retired March 22, 1971
[4] Appointed March 23, 1971

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Number of District	Counties in District	Judges in District	Residence of Judge
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Fifth	Hamilton, Polk, York, Butler, Seward, and Saunders.	Howard W. Kanouff John D. Zeilinger	Wahoo York
Sixth	Dodge and Washington.	Robert L. Flory	Fremont
Seventh	Fillmore, Saline, Thayer, and Nuckolls.	Orville L. Coady	Hebron
Eighth	Thurston, Dakota, Dixon, and Cedar.	Joseph E. Marsh	South Sioux City
Ninth	Knox, Antelope, Cuming, Pierce, Madison, Stanton, Wayne, and Burt.	George W. Dittrick Merritt C. Warren	Norfolk Creighton
Tenth	Adams, Clay, Phelps, Kearney, Harlan, Franklin, and Webster.	Fredric R. Irons Norris Chadderdon	Hastings Holdrege
Eleventh	Hall.	Donald H. Weaver	Grand Island
Twelfth	Sherman and Buffalo.	S. S. Sidner	Kearney
Thirteenth	McPherson, Logan, Lincoln, and Dawson.	Hugh Stuart	North Platte
Fourteenth	Chase, Hayes, Frontier, Furnas, Red Willow, Hitchcock, Perkins, Gosper, and Dundy.	Jack Hendrix	Trenton
Fifteenth	Brown, Keya Paha, Boyd, Rock, Holt, and Wheeler.	William C. Smith, Jr.	Ainsworth
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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1970

CENTRAL CONSTRUCTION COMPANY, A CORPORATION, APPELLANT, V. DONALD LEROY OSBAHR ET AL., APPELLEES.
180 N. W. 2d 1

Filed October 9, 1970. No. 37447.

1. **Trial: Evidence.** Parol evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties.
2. **Trial: Evidence: Fraud.** Parol evidence is always admissible to show, for the purpose of invalidating a written instrument, that its execution was procured by fraud, or that, by reason of fraud, it does not express the true intentions of the parties.
3. **Fraud.** Fraud must relate to a present or preexisting fact and may not generally be predicated on an inference concerning any event in the future or acts to be done in the future unless such representations as to future acts are falsely and fraudulently made with an intent to deceive.

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

Kerrigan, Line & Martin, for appellant.

Homer E. Hurt, Jr., and William J. Tighe, for appellees.

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

McCOWN, J.

This was an action to foreclose a mechanic's lien. It was based on a contract involving the installation of

plastic siding and aluminum windows and doors on defendants' residence. The district court found that the written contract was procured by the plaintiff by fraud and misrepresentation, ordered that the written contract be reformed to conform to the oral agreement of the parties, and dismissed plaintiff's petition.

In July 1967, the defendants, Donald and Ardyce Osbahr, were the owners of a house in Hooper, Dodge County, Nebraska. Two representatives of the plaintiff called on defendants at their home. After several hours, the salesmen departed with a printed form contract which had been signed by the defendants. The cash price for the work to be done by plaintiff on defendants' residence was $2,720. Some of the blanks dealing with a time price were not filled in on the copy left with defendants. One paragraph of the printed agreement provided: "There are no representations, guarantees or warranties except such as may herein be incorporated, if any, nor any agreement collateral hereto, nor is this contract dependent upon or subject to any conditions not herein stated. Any subsequent agreement in reference hereto shall be binding only if in writing and if signed by all parties. Owner(s) understand and agree that Contractor does not make, and no agent of Contractor is authorized to make, any agreement with Owner(s) either concerning the use of the Owner(s)' premises as a 'model home' or concerning any payments, credits or commissions to be received by Owner(s) for referrals of prospective customers. Owner(s) further understand and agree that, in the event Owner(s) make any such agreements with any person whomsoever, Contractor has no responsibility whatsoever for the performance of such agreements. Contractor does hereby expressly disaffirm any such agreements purportedly made on its behalf."

The defendants testified that the initial contacts with them to arrange a meeting were represented to be for the purpose of discussing the use of their residence as a

"model home." The defendants were permitted to testify, over objection, that at the meeting they advised plaintiff's representatives that they could not pay any cost or expense for home improvements because of a Farmers Home Administration loan and mortgage on their residence. Defendants testified that plaintiff's salesmen represented to them that defendants' residence would be used by the plaintiff as a "model home," and that certain payments resulting from the sale of plaintiff's products arising out of such use of defendants' home would be credited to and discharge defendants' obligations under the contract. The entire installation would, in effect, be at no cost to defendants. Their testimony was that an oral agreement to that effect was made. There was also evidence that a similar pattern of representation had previously been followed by plaintiff with other persons.

There was also evidence that plaintiff's representatives told the defendants there was no need to read the contract. Whenever they attempted to read it, or inquired about or objected to portions of the contract they read, the representatives would explain to them that it did not apply to them because theirs was to be a model home and the printed form was the form for standard contracts.

The plaintiff's representative, in effect, conceded that he made an agreement with defendants about payments to be made to the defendants for the use of their residence as a "model home," but testified that such payments were to be made only "for every job that would be sold through recommendation of their home."

The plaintiff asserts on appeal that the trial court erred in admitting parol evidence to vary the terms of the written contract, and in finding that the written contract was procured by plaintiff through fraud and misrepresentation.

The term "parol evidence rule" is inaccurate. The rule is misleading, and its interpretation often con-

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

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

As this court said in Ely Construction Co. v. S & S Corp., 184 Neb. 59, 165 N. W. 2d 562: "Parol evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties." For a full discussion of the parol evidence rule and its multiple exceptions see 3 Corbin on Contracts, Chapter 26, "The Parol Evidence Rule," p. 356.

Even if the many other exceptions to the parol evidence rule were unavailable, parol evidence has always been admissible to show that the execution of a written instrument was procured by fraud. In 1929, this court said: " 'It is well established that, as fraud vitiates everything which it touches, parol evidence is always admissible to show, for the purpose of invalidating a written instrument, that its execution was procured by fraud, or that, by reason of fraud, it does not express the true intentions of the parties.' * * * the rule is not

rendered inapplicable, even though there is an agreement between the parties or a provision in the contract 'that no verbal agreements affecting its validity will be recognized.'" Chapin v. Noll, 118 Neb. 318, 224 N. W. 687. See, also, Nathan v. McKernan, 170 Neb. 1, 101 N. W. 2d 756.

The plaintiff contends that fraud must relate to a present or preexisting fact and that any misrepresentations here dealt only with events in the future or acts to be done in the future. That rule has a well-recognized exception. "Fraud must relate to a present or preexisting fact and may not generally be predicated on an inference concerning any event in the future or acts to be done in the future unless such representations as to future acts are falsely and fraudulently made with an intent to deceive." Transportation Equipment Rentals, Inc. v. Mauk, 184 Neb. 309, 167 N. W. 2d 183. See, also, Sterner v. Lehmanowsky, 173 Neb. 401, 113 N. W. 2d 588.

While the evidence in this case is conflicting and disputed, it was sufficient to establish an intent to deceive. The finding that the written contract was procured by the plaintiff by fraud and misrepresentation is supported by the evidence. Fraud in a transaction may be proved by inferences which may reasonably be drawn from intrinsic evidence respecting the transaction itself, such as inadequacy of consideration, or extrinsic circumstances surrounding the transaction. See Trebelhorn v. Bartlett, 154 Neb. 113, 47 N. W. 2d 374.

The trial court saw and heard the witnesses and the evidence fully supports its findings and decree.

The judgment is affirmed.

AFFIRMED.

OMAHA NATIONAL BANK, EXECUTOR OF THE ESTATE OF LEWIS E. NICHOLS, DECEASED, APPELLANT, V. OMAHA PUBLIC POWER DISTRICT, A CORPORATION, ET AL., APPELLEES.

180 N. W. 2d 229

Filed October 9, 1970. No. 37470.

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, and if there is any evidence which will sustain a finding for the plaintiff, it may not be disregarded and the case decided as a matter of law.
2. **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 activities expose them to the risk of inadvertent contact with the electric lines but they are not insurers and not liable for damages in the absence of negligence.
3. **Negligence.** One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.
4. ———. To constitute want of due care it is not required that a person should have anticipated the exact risk which occurred, or that the peril was a deadly one; it is sufficient that he has placed himself in a position of known danger where there was no need for him to be or that he knew or should have known that substantial injury was likely to result from his act.
5. **Negligence: Evidence.** The presumption of due care arising out of the natural instinct of self-preservation is not evidence but a mere rule of law and obtains only in the absence of direct or circumstantial evidence one way or the other on the subject. When such evidence is produced, the presumption disappears and may no longer be considered.

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

Gaines, Spittler, Neely, Otis & Moore, for appellant.

Fraser, Stryker, Marshall & Veach, for appellees.

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

SPENCER, J.

This is an action for damages for the death of plaintiff's decedent, Lewis E. Nichols, who was electrocuted on the farm of his employer. The action is brought by plaintiff as executor of decedent's estate against Omaha Public Power District, the owner of an electrical distribution line supplying electrical power to the farm. At the close of plaintiff's evidence OPPD moved to dismiss the petition. This motion was sustained.

Decedent was the farm director for Roberts Dairy Co., which owned and operated a dairy farm ½ mile south of Elkhorn, Nebraska. He was electrocuted on June 15, 1967, while moving an aluminum ladder which came in contact with the OPPD power line. The line consisted of three wires, two phase wires carrying 7,600 volts to the ground, and one neutral wire. It was strung between two power poles 320 feet apart, and had been in the same location for several years.

Roberts' employees, under the direction of the farm manager, decedent's brother-in-law, were constructing hay sheds underneath and in close proximity to the power lines. One of them had been constructed 1 foot below and 1 foot east of the west wire of the power line without incident. The second hay shed, the one involved herein, was 60 feet south and 15 feet west of the previous one. It was being constructed approximately 7 feet 4 inches east of the west wire of the power line. The work was being done by Roberts' employees when they were not busy with their regular duties.

Decedent and the farm manager visited about the proximity of the power lines to the new construction, and decedent called the power company requesting that the lines be relocated because they interfered with the construction and use of the hay sheds. In response to the call, two of OPPD's employees came on the farm 1 week before the fatal accident, recommended that the lines be moved, and tentatively staked out the relocation for them. They were then to prepare a diagram

and a material estimate as a step in the procedure of processing the work through the OPPD construction office. Before the lines were moved, the fatal accident occurred.

The shed involved in the accident was to be 136 feet long and 16 feet wide. The support for its sides consisted of used power poles 35 feet long, spaced 15 feet apart and standing approximately 22 feet high. These poles were strung together at the top, with 2 by 8 rafters which were to form a support for an aluminum roof. At the time of the accident, the farm manager, decedent's son, and one other person were working on the construction. They were on a scaffolding erected on a truck, which truck was moved between the poles as the roof construction proceeded. It had been moved to a new location between the two rows of poles by the decedent immediately preceding the accident. After the truck and scaffolding was in place, decedent was heard to remark, " 'I'll move the ladder for you guys before I leave.' "

The ladder was a 22 foot extension ladder and was being used between the power line and the west line of poles. It had been leaning against one of the shed poles, and decedent was to move it to the next pole 15 feet away. While in the process of doing so, he was electrocuted. No one saw exactly what happened. The three persons working on the construction heard a shout or yell after the contact of the ladder and the wire; saw the ladder falling; saw sparks around decedent's feet; and saw the decedent either falling or on the ground. Decedent was unconscious when they reached him, and never regained consciousness.

It is the contention of the plaintiff that OPPD was negligent in not exercising reasonable engineering safety in the maintenance of the power line after the construction was called to their attention. Plaintiff attempted to prove that after the representative of OPPD saw the situation, OPPD was obligated to take steps to protect

the Roberts' employees by insulating the line or raising it by jacking up the poles involved or by disconnecting the electrical current.

This case must be considered under the rule that 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, and if there is any evidence which will sustain a finding for the plaintiff, it may not be disregarded and the case decided as a matter of law. Reed v. Reed, 182 Neb. 136, 153 N. W. 2d 356.

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 activities expose them to the risk of inadvertent contact with the electric lines but they are not insurers and not liable for damages in the absence of negligence. Gillotte v. Omaha Public Power Dist., 185 Neb. 296, 176 N. W. 2d 24.

One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent. Disney v. Butler County Rural P. P. Dist., 183 Neb. 420, 160 N. W. 2d 757.

"To constitute want of due care it is not required that a person should have anticipated the exact risk which occurred, or that the peril was a deadly one; it is sufficient that he has placed himself in a position of a known danger where there was no need for him to be or that he knew or should have known that substantial injury was likely to result from his act." Disney v. Butler County Rural P. P. Dist., *supra*.

As we view the evidence, there is no merit to plaintiff's contentions. The plaintiff's expert conceded that the OPPD power line exceeded the minimum requirement of the National Electric Safety Code. There was no

appreciable sag; there was only a slight breeze on the day in question; and the line at its lowest point was 22 feet 3 inches from the ground, which is 7 feet 3 inches above the minimum vertical height requirement of the code. We cannot ignore the fact that the power line was not built in proximity to the hay sheds, but rather the sheds were built alongside the power line. Both the decedent and the farm manager realized the danger, and the decedent called OPPD about relocating the line. We realize that a week elapsed between the appearance of OPPD representatives on the premises and the accident, but also appreciate, with a weekend intervening, under the facts of this case this delay was not sufficient to charge OPPD with negligence. Decedent was cognizant of the danger or he would not have requested the relocation of the line. Still, he permitted construction before its relocation. Actually, the north hay shed had been entirely constructed within 1 foot, both vertical and horizontal, of the power line. The shed in question was 7 feet 4 inches from the power line. On this record, if there were negligence on the part of OPPD, which we do not need to decide, the contributory negligence of the decedent barred recovery as a matter of law.

Plaintiff argues that before decedent can be found guilty of such contributory negligence to bar recovery as a matter of law, it is necessary to rebut the presumption that he was using due care at the time of his death. Where there is no witness to an accident causing death, the presumption is, in the absence of evidence to the contrary, that decedent exercised due care; but this presumption is rebutted when circumstances show that decedent was negligent. The presumption of due care arising out of the natural instinct of self-preservation is not evidence but a mere rule of law and obtains only in the absence of direct or circumstantial evidence one way or the other on the subject. When such evidence is produced, the presumption disappears and may no longer

be considered. Anderson v. Nincehelser, 153 Neb. 329, 44 N. W. 2d 518.

For the reasons given, we find that the motion to dismiss was properly sustained, and the judgment is affirmed.

AFFIRMED.

CHRISTIAN RETIREMENT HOMES, INC., APPELLANT, V. BOARD OF EQUALIZATION OF THE COUNTY OF LANCASTER ET AL., APPELLEES.

180 N. W. 2d 136

Filed October 9, 1970. No. 37480.

1. **Property: Revenue and Taxation.** Property which is owned and used exclusively for religious or charitable purposes and is not owned or used for financial gain or profit is exempt from taxation.
2. ———: ———. The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation.
3. ———: ———. Property which is owned and used primarily for the purpose of furnishing low-rent housing is not entitled to exemption from taxation as property which is owned and used exclusively for charitable purposes.

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

Mattson, Ricketts & Gourlay, for appellant.

Paul L. Douglas, William D. Blue, Ronald D. Lahners, Floyd A. Sterns, Janice L. Gradwohl, Robert R. Gibson, and Bernard J. McGinn, for appellees.

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

BOSLAUGH, J.

The plaintiff, Christian Retirement Homes, Inc., appeals from a judgment of the district court for Lancaster County, Nebraska, determining that only a part

of Eastmont Manor is exempt from taxation. The property in question is a retirement home owned by the plaintiff and located in Lincoln, Nebraska.

The plaintiff is a nonprofit corporation organized by members of the Lincoln Evangelical Ministerial Fellowship, a fellowship composed of ministers of the Evangelical faith. These ministers, being concerned with the welfare of the older members of the community, developed Eastmont Manor as a project for ministering to needs of senior citizens.

Eastmont Manor is a modern masonry-type structure consisting of 5 floors and a ground floor. As constructed, the building contains 64 apartments, dining room, kitchen, lounge, recreation area, medicenter, and other facilities. The medicenter is located on the top floor of the building and is equipped to furnish extended hospital care. The district court found that the chapel and medicenter were exempt, but that the rest of the property was subject to taxation. There is no cross-appeal. The question presented is whether the property other than the chapel and medicenter is subject to taxation.

Property which is owned and used exclusively for religious or charitable purposes and is not owned or used for financial gain or profit is exempt from taxation. Art. VIII, § 2, Constitution of Nebraska; § 77-202, R. R. S. 1943; Evangelical Lutheran Good Samaritan Soc. v. County of Gage, 181 Neb. 831, 151 N. W. 2d 446. It is the primary or dominant use, and not an incidental use, that is controlling in determining whether property is exempt from taxation.

There is some evidence of religious use of the property. A chaplain-administrator is in charge of the home. Vesper services are conducted on Sundays and Bible classes are held on Thursday mornings in the lounge or dining area. The chaplain counsels with the residents in their apartments. The religious use of the property, other than the chapel, is an incidental rather

than a primary or dominant use. The record will not sustain an exemption of the entire property upon the basis of religious use.

The record shows that the primary or dominant use of the property, other than the chapel and medicenter, is to provide housing for elderly persons. The average age of the residents of the home is about 74 years. At the time of admission they must be physically able to maintain themselves in their own apartment. They are required to sign an occupancy agreement, pay an entrance endowment, and pay a monthly food and service charge. Applicants are required to furnish a financial statement and show that they will be able to pay the monthly fees. The occupancy agreement provides that an occupant's residency shall not be terminated solely by reason of the inability of an occupant to pay the monthly fees, if such a dispensation can be granted without impairing the ability of the home to operate on a sound financial basis.

The entrance endowment is a lump sum payment of from $7,950 to $15,950 and is in the nature of a life-lease payment. Clergymen and missionaries are allowed a 25 percent discount. It is estimated that the entrance endowments will retire the debt against the home in a period of 8 to 10 years and may be discontinued at that time.

The monthly food and service charge is intended to cover the actual operating costs of the home. The residents are required to eat one meal a day in the dining room, but are entitled to eat all of their meals there if they desire. Food service in the apartments is available when necessary, and emergency nursing service is available at all times.

The occupancy agreement provides that the occupant shall have the right to live in the home for the rest of his life and receive unlimited infirmary care in the home. Although the residents of the home residing in the apartments have the benefit of nursing and hospital

services when needed, the record shows that most of these residents require such services only occasionally. In this respect the home is best described as a retirement home rather than a nursing home furnishing daily care similar to hospital care to the occupants.

We are committed to the rule that property which is owned and used primarily for the purpose of furnishing low-rent housing is not entitled to exemption from taxation as property which is owned and used exclusively for charitable purposes. County of Douglas v. OEA Senior Citizens, Inc., 172 Neb. 696, 111 N. W. 2d 719.

The services furnished to the residents of Eastmont Manor are somewhat different in quantity and quality from those described in the OEA Senior Citizens, Inc., case, but the fact remains that the primary use of the property is to provide housing for elderly persons. The plan is to operate the home at cost, with the residents providing the funds necessary to operate the home and retire its debt. Although the operation of the home includes many worthy charitable aspects, the ownership and use of the property, at this time, is not exclusively charitable.

The judgment of the district court is affirmed.

AFFIRMED.

JAMES C. PRESTON, APPELLANT, V. L. C. JOHNS, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEE.

180 N. W. 2d 135

Filed October 9, 1970. No. 37513.

1. **Intoxicating Liquors: Motor Vehicles: Arrest.** Where the evidence shows facts existing at the time of an arrest for driving a motor vehicle while intoxicated which show a reasonable basis for making the arrest, it is not necessary that the arresting officer summarize the facts and give his opinion that defendant was intoxicated in the absence of evidence requiring expert knowledge.

2. **Intoxicating Liquors: Motor Vehicles.** A conditional or qualified refusal to take a test to determine the alcoholic content of body fluids under the implied consent law is not sanctioned by the act and such refusal is a refusal to submit to the test within the meaning of the act.

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

Paul E. Galter, 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.

This is an appeal from the district court for Lancaster County affirming an order of the Director of the Department of Motor Vehicles revoking the driver's license and operating privileges of James C. Preston pursuant to the implied consent law of this state.

On July 26, 1969, about 11:40 p.m., Preston was driving his pickup truck east on M Street in Lincoln. He made a right turn onto 16th Street and struck the right rear of a parked vehicle on the east side of the street in so doing. Upon arrival of the police, he advised them that he had been drinking but stated that the collision was the result of a defective steering mechanism on his truck. Preston was arrested for driving a motor vehicle on a public street while intoxicated.

A police officer testified that Preston's speech was slurred and that he engaged in an "over-pronunciation of his words." His eyes were bloodshot and watered badly. His walk was slightly staggered and he appeared unsure of his balance. There was a strong odor of alcohol on his person. He was given some of the usual tests to determine if he was intoxicated. He passed some and failed others. Preston contended that he had drunk but three beers, that he passed all tests, and that he was not intoxicated.

The police gave Preston the Miranda warnings and read him the implied consent law. They requested him to submit to one of the tests provided for in the implied consent law. He agreed to take one of the tests if, and only if, he would be permitted to go home after taking it. The police refused to agree to this.

But two issues are raised in the instant case: (1) The evidence is insufficient to show that the police had reasonable grounds for arresting Preston for operating a motor vehicle while under the influence of intoxicating liquor, and (2) the evidence at the hearing failed to show that Preston refused to submit to a test to determine the alcoholic content of his body fluids.

The evidence of the State's witness as to the condition and appearance of Preston at the time of his arrest was sufficient to warrant his arrest for driving a motor vehicle while under the influence of intoxicating liquor. Preston seems to contend that the witness must summarize the evidence and give his opinion that Preston was driving a motor vehicle while intoxicated. Where the facts are simple and not subject to explanation by expert opinion, such a conclusionary statement is not required; the trier of facts may draw the conclusion from the facts stated. Reasonable grounds clearly existed for the making of the arrest.

On the second issue, it is plain from the record that Preston agreed to take the alcoholic test under the implied consent statute only if he was permitted to go home immediately thereafter. The implied consent law does not sanction a qualified or conditional consent. Such a consent is in fact a refusal to take the test provided by the implied consent law. Finocchairo v. Kelly, 11 N. Y. 2d 58, 226 N. Y. Supp. 2d 403, 181 N. E. 2d 427, cert. denied 370 U. S. 912, 82 S. Ct. 1259, 8 L. Ed. 2d 405; Ent v. State of California, 265 Cal. App. 2d 936, 71 Cal. Rptr. 726; Blow v. Commissioner of Motor Vehicles, 83 S. D. 628, 164 N. W. 2d 351; Beare v. Smith, 82 S. D. 20, 140 N. W. 2d 603.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MAURICE J. STANOSHECK, APPELLANT.
180 N. W. 2d 226

Filed October 9, 1970. No. 37528.

1. **Intoxicating Liquors: Motor Vehicles: Juries.** It is for the jury to determine, in the case of conflicting evidence, whether a defendant was operating a motor vehicle while under the influence of intoxicating liquor or whether he was operating such motor vehicle in an abnormal manner as a result of an epileptic seizure.
2. **Appeal and Error: New Trial.** In order to obtain a review of alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon.
3. **Appeal and Error: Sentences.** On an appeal from a lower court to the district court in a criminal case, the district court affords the defendant a complete new trial and, in case a verdict of guilty is found, the trial court may impose its sentence within the limits of the statutory penalty without regard to the sentence imposed in the lower court.
4. **Appeal and Error: Costs.** The taxation of the costs of a jury under the provisions of section 29-2703, R. S. Supp., 1969, requires a finding by the district court supported by the evidence that the appeal was frivolous or capricious.

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

C. E. Danley, for appellant.

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

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

CARTER, J.

The defendant Maurice J. Stanosheck was charged in

the district court for Hall County with operating a motor vehicle on the public highways of this state while under the influence of intoxicating liquor. The defendant entered a plea of not guilty and the jury returned a verdict of guilty as charged. Defendant was sentenced to serve 60 days in the county jail, pay a fine of $100 and costs, and that his driver's license be suspended for 6 months after his release from jail and the payment of the fine and costs. The defendant has appealed.

The evidence shows that defendant was found at 1:45 a.m., on a public highway standing near his damaged automobile in close proximity to a highway bridge. The surrounding circumstances show rather conclusively, especially from the location of debris, that the serious damage to defendant's car was the result of its collision with the highway bridge. It is not urged that defendant was not the operator of the car, in fact, the evidence shows he was its sole occupant. Six police officers testified that they smelled the odor of alcohol on his breath and that he staggered when he walked. Some of the officers testified that his eyes were bloodshot and his talk slurred. All gave their opinions that defendant was intoxicated. Defendant refused to submit to a test to determine the alcoholic content of his blood.

The defendant testified that he had been afflicted with epilepsy, that he had suffered grand mal seizures in the past, and that he had been under treatment for the disease since 1953 and was under treatment at the time of his arrest on March 22, 1969. He testified that he wore a medallion on a chain around his neck indicating that he had a serious medical condition and informing an observer that an instructional card would be found on his person. These were found by the law enforcement officers, but they were not convincing to them that defendant was not intoxicated.

Defendant testified that he went to Grand Island to attend a race meet on March 21st, checked into a motel, and went to the races in the afternoon. He returned to

his motel about 7 p.m. where he began drinking which he continued until the early hours of the next morning. He admitted that he drank five drinks of hard liquor before he started for home shortly before the incident resulting in his arrest.

The defendant called Dr. Nat J. Wilson as a witness, the only medical doctor who testified. He was the chief of neurology and psychiatry at the Veterans Administration Hospital in Lincoln for the previous 28 years. Dr. Wilson had treated the defendant for several years prior to the incident here involved. In his history of the case, he testified to defendant's condition and its nature, the fact that defendant has had two lobotomies, has been subjected to shock treatments, and has experienced grand mal seizures, one of which was in the doctor's presence. In an effort to control the disease, he and others have prescribed barbiturate medication to the time of defendant's arrest. He explained the loss of memory before and after a grand mal seizure, and the fact that such seizures occurred without warning. He stated further that the use of alcohol can increase the susceptibility to grand mal seizures and could be the cause of such a seizure. He testified that he advised the defendant concerning the relationship of drinking as an inducing factor to a grand mal seizure. Dr. Wilson stated that he could not say that the defendant was intoxicated at the time of the incident, nor did he say that in his opinion defendant suffered a grand mal seizure at that time.

It seems clear to us that it was for the jury to determine from the evidence if the State has proved beyond a reasonable doubt that defendant was operating his car while under the influence of intoxicating liquor. We think the evidence was sufficient to sustain the finding of the jury. The amount of liquor that he admittedly drank and the strong odor of liquor on his breath, coupled with the other evidence indicating intoxication is proper for the jury's consideration in determining the

issue. We cannot say as a matter of law that a defendant having a history of epilepsy and consequent seizures, by refusing to submit to an alcohol test, thereby immunizes himself from prosecution for driving while intoxicated.

Defendant complains that the trial court failed to instruct the jury on the nature of his defense. This error, if it be such, was not asserted in defendant's motion for a new trial. The failure to assert an alleged error in the motion for a new trial will not be considered on appeal. Such failure will be deemed to be a waiver of the claimed error. Kennedy v. State, 170 Neb. 193, 101 N. W. 2d 853.

Defendant contends that the trial court was in error in imposing a harsher sentence than that imposed in the lower court. The record shows that on a trial in the county court, that court imposed a sentence of 5 days in jail and a fine of $100 and costs. Defendant's privilege to operate a motor vehicle on the highways of the state was also suspended for a period of 6 months. After conviction in the district court on appeal, the trial court imposed a sentence of 60 days in jail, a fine of $100 and costs, and specifically included in the costs the actual cost of the jury in the amount of $310. Defendant's license to drive on the public highways also was suspended for 6 months following his release from jail.

Several reasons exist why a sentence on appeal to the district court may properly exceed that in the county court. In the instant case, for example, the defendant offered no evidence in the county court and, for ought we know, the State may have limited its proof in establishing the offense. It has never been the rule in this state that a sentence imposed by a county court or justice of the peace has the effect of limiting the sentence on appeal. The defendant relies primarily on North Carolina v. Pearce, 395 U. S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656. In the latter case the defendants' convictions were reversed on appeal and on subsequent convictions

the trial court imposed sentences which, added to the time served pending appeal and retrial, exceeded the first sentences imposed. The court held that an appeal was a matter of right without retaliatory motivation or vindictiveness on the part of the trial court against the defendants for having prosecuted the appeals. In the instant case there is nothing in the record to indicate any such motivating factor in the imposition of the sentence in the district court. In any event, a sentence after reversal and retrial is quite different from a sentence imposed after an appeal from an inferior court. Defendant's contention is not well taken.

Defendant further contends that the trial court erred in taxing the actual cost of the jury against the defendant. It is asserted that the action taken in this respect by the trial court is based on the latter's holding that the appeal was frivolous and capricious as provided by section 29-2703, R. S. Supp., 1969. In sentencing the defendant, the trial court found that the appeal was frivolous and defendant was ordered to pay as part of the costs the actual costs of the jury in the amount of $310. We find nothing in this record to indicate that the appeal was frivolous. The defendant contended that the evidence of his intoxication stemmed from an epileptic seizure and not self-induced intoxication. Some of the visual results of intoxication were common to those of an epileptic grand mal seizure. While the jury believed the State's witnesses rather than those of the defendant, it was an issue for the jury and cannot be said to constitute a frivolous or capricious defense within the meaning of the statute. The conclusion of the trial court that the appeal was frivolous is not sustained by the evidence. A finding unsupported by the record will not sustain the taxing of the actual cost of the jury to the defendant under section 29-2703, R. S. Supp., 1969. See State v. Jungclaus, 176 Neb. 641, 126 N. W. 2d 858.

Other claimed errors have been examined and found to be without merit. The judgment of the district court

is affirmed, except for the taxing of costs as hereinbefore noted.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. GARY WILLIAM JACKSON, APPELLANT.
180 N. W. 2d 134

Filed October 9, 1970. No. 37550.

Criminal Law: Instructions. All instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.

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

A. Q. Wolf and William D. Staley, for appellant.

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

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

NEWTON, J.

Defendant was convicted of burglary. His defense was that he was an innocent bystander and an unintentional participant in the crime. We affirm the judgment of the trial court.

An instruction on aiding and abetting was given. Defendant's sole contention on appeal is that the court failed to include in this instruction the element of "knowing" participation and wrongful intent.

The court did instruct that each instruction should be considered in the light of all the others; that the words willfully and maliciously as used in the information mean intentionally or deliberately with a wicked or ill-willed purpose; that evidence of "mere presence, acquiescence, or silence" does not constitute aiding and

abetting; that the acts of defendant had to be committed willfully and maliciously; and that intent to steal was a necessary element of the crime charged. It would appear that the trial court adequately and correctly covered the disputed issue. "All instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error." State v. Jones, 183 Neb. 133, 158 N. W. 2d 278.

The judgment of the district court is affirmed.

AFFIRMED.

DONALD HALBERT, APPELLANT, V. UNITED STATES FIDELITY & GUARANTY COMPANY ET AL., APPELLEES.

180 N. W. 2d 879

Filed October 30, 1970. No. 37476.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. On motion for rehearing. See 185 Neb. 775, 178 N. W. 2d 781, for original opinion. Affirmed as amplified and modified.

Munro, Parker, Munro & Grossart, for appellant.

H. L. Blackledge, for appellees.

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

WHITE, C. J.

Our opinion in this case is reported in 185 Neb. 775, 178 N. W. 2d 781. Plaintiff, the successful litigant in this court, files a motion for rehearing asking, in substance, an amplification and clarification of the judgment that we are required to enter de novo in this court. The substance of this complaint is that this court failed to specifically allow temporary disability and travel expense in connnection with the surgery on the left foot,

which this court specifically found to be compensable. The judgment of the district court is therefore modified to: (a) Allow $993.25 for surgical, medical, and travel expenses in respect to Dr. Getscher's operation on the left foot; (b) allow $42 a week temporary disability from and including July 15, 1966, to June 7, 1968, the date when the extent of permanent disability was first ascertainable. See, former § 48-121 (3), R. R. S. 1943; Uzendoski v. City of Fullerton, 177 Neb. 779, 131 N. W. 2d 193. The award of $42 a week for 43 weeks for the permanent partial disability of the left leg is affirmed. The judgment as amplified and modified is affirmed.

AFFIRMED AS AMPLIFIED AND MODIFIED.

CONSTANCE R. HUTCHINSON, APPELLEE, V. JAMES R. HUTCHINSON, APPELLANT.
180 N. W. 2d 874

Filed October 30, 1970. No. 37481.

Divorce: Trial: Evidence. When the evidence on material questions of fact is in irreconcilable conflict, in determining the weight of the evidence, this court will 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.

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

Mattson, Ricketts & Gourlay, for appellant.

Pierson & Pierson, for appellee.

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

MCCOWN, J.

The plaintiff, Constance Hutchinson, was granted a divorce from the defendant, James Hutchinson, on the grounds of extreme cruelty. Defendant has appealed.

The parties were married in 1946. Their ages are not disclosed in the record. They were the parents of a son who was 21 years old at the time of trial. He was living with the plaintiff and attending Milford Vocational School. The schooling was expected to continue for another year and a half.

The basis for plaintiff's charges of cruelty against the defendant stemmed from defendant's alcoholism. It has extended over a period of some 10 years and the defendant had been hospitalized for some months prior to the filing of plaintiff's petition in the fall of 1968.

The defendant had had a succession of employers and had been intermittently unemployed over a period of 8 to 10 years. The plaintiff had been employed as a department manager of a retail store continuously since 1960.

The record does not establish the total value of the personal property divided by agreement of the parties, nor how the division was made. Inferences are that the value was a few thousand dollars at most. The residence was purchased in 1954 or 1955 for $14,500. The cost of additional improvements made shortly thereafter is in dispute. Total cost of the house was between $15,000 and $17,000. There is no testimony as to its current value except that it probably exceeds $15,000. The balance due on the mortgage was between $5,000 and $6,000. The defendant testified that he paid the downpayment and all payments on the mortgage, at least until 1967 or 1968. The plaintiff testified that they both contributed to the downpayment, and the subsequent mortgage payments until 1967 or 1968. Since that time she had paid them individually.

The district court found the defendant guilty of extreme cruelty and granted the plaintiff a divorce. The defendant's cross-petition was dismissed. The decree approved a division of personal property made by the parties and awarded the only real estate, the residence, to the plaintiff. Each party was ordered to pay the

costs and attorneys' fees incurred by him or her.

The only real issue on appeal is whether the court erred in awarding the residence property to the plaintiff. The factors to be considered in a division of property in a divorce case have been set forth by this court innumerable times. See, Trimble v. Trimble, 180 Neb. 647, 144 N. W. 2d 171; Gartside v. Gartside, 181 Neb. 46, 146 N. W. 2d 777; Neeman v. Neeman, 183 Neb. 105, 158 N. W. 2d 236.

In many cases this court has approved an award of residential property to the wife under similar or analagous circumstances. Gadway v. Gadway, 141 Neb. 695, 4 N. W. 2d 765; Trimble v. Trimble, *supra;* Neeman v. Neeman, *supra.*

When the evidence on material questions of fact is in irreconcilable conflict, in determining the weight of the evidence, this court will 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. Parkhurst v. Parkhurst, 184 Neb. 687, 171 N. W. 2d 243.

Under the circumstances reflected by this record, the property division made by the district court was proper. The decree is affirmed.

AFFIRMED.

ROBERT G. SIMMONS, SR., ET AL., APPELLEES, REVIVED IN NAMES OF ROBERT G. SIMMONS, JR., ET AL., APPELLEES, V. MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, A CORPORATION, APPELLANT.

180 N. W. 2d 672

Filed October 30, 1970. No. 37495.

1. **Judgments: Res Judicata.** Any right, fact, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by

the judgment therein and cannot again be litigated between the parties and privies, whether the claim or demand, purpose, or subject matter of the two suits is the same or not.

2. ———: ———. A judgment will not operate as res judicata unless it appears on the face of the record, or is shown by extrinsic evidence, that the precise question was raised and determined in the former suit between the parties or their privies.

3. ———: ———. An adjudication as to the construction or validity of an instrument is res judicata when it comes in issue and is determined in another action between the same parties, although the immediate subject matter of the two actions is different.

4. ———: ———. The doctrine of res judicata is applicable to defenses, setoffs, and counterclaims, and such an issue so adjudicated as a defense in a prior action between the parties may not be interposed in a subsequent action as a cause of action or defense.

5. **Judgments.** To justify the entry of a summary judgment, the record must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

6. **Pleadings: Parties: Estoppel.** Where defendant demurs to a petition for misjoinder of parties plaintiff and stipulates that it be sustained on condition that a necessary party plaintiff be added, which was done, the defendant is estopped to object on the ground of misjoinder of parties plaintiff.

7. **Pleadings.** The filing of an amended petition after a demurrer to the original petition has been filed, but before a ruling on the demurrer by the court, is not prejudicial to the defendant and affords no valid basis for asserting error.

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

Fraizer & Fraizer, for appellant.

Ray C. Simmons, for appellees.

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

CARTER, J.

Plaintiffs brought this action against the defendant insurance company to recover under a policy of insurance for hospital benefits resulting from injuries sus-

tained by Gladyce W. Simmons in an automobile accident. The trial court sustained a motion by plaintiffs for a summary judgment and the defendant has appealed.

On April 15, 1959, the defendant issued the policy to Gladyce W. Simmons as beneficiary. All premiums due under the policy were paid and the policy was at all times here involved in effect in accordance with its terms. On May 10, 1964, the insured was injured in an automobile accident. As a result of the accident, the insured was confined continuously to hospitals and convalescent or nursing homes from May 10, 1964, to July 8, 1968, the period involved in this litigation. The issue involves the extent and amount of the liability of the defendant under its policy.

The policy contained the following pertinent provisions: " 'Hospital confinement' means necessary confinement as a resident bed patient in a place which is licensed as a hospital and which has accommodations for resident bed patients * * *. 'Convalescent or nursing home confinement' means confinement * * * beginning immediately subsequent to required hospital confinement for a period of at least 5 days, and * * * for the purpose of receiving medical care necessary for convalescence from the conditions causing or contributing to the precedent hospital confinement."

The difference of opinion arises from the following paragraphs of the policy: "The Association will pay the expense incurred by the Insured for customary hospital room charges during the Insured's hospital confinement because of injuries or sickness, but not to exceed $10.00 per day nor 60 days for any one period of confinement. * * * 'One period of confinement' means one or more periods of hospital confinement and/or convalescent or nursing home confinement resulting from the same or related causes unless not less than 6 months elapses between the termination of one confinement and the beginning of the succeeeding confinement."

Plaintiffs construe these provisions to mean that the 60-day limitation fixes the termination date of one period of confinement and that the elapse of 6 months thereafter fixes the time for a new period of confinement covered by the policy. Defendant, on the other hand, contends that for more than one period of confinement to result from the same accident, there must be a release or discharge from the hospital or convalescent home and the expiration of 6 months before reconfinement.

Under plaintiffs' theory of the case there are three 60-day periods for which defendant was liable under the policy at the time this action was brought, a 6-month period having elapsed prior to each 60-day period for which claim is made.

The defendant appears to have made payments of $600 each in 1964 and 1965. In September 1966, plaintiffs brought an action to recover $600 on each of two periods of 60 days commencing January 11, 1965, and May 12, 1966. Final judgment was obtained in the municipal court of Lincoln for these amounts. Plaintiffs plead this judgment as being res judicata of defendant's claimed defense.

The claim of res judicata as a defense grows out of a case tried in the municipal court of Lincoln. In that case the plaintiffs brought an action for two 60-day periods of hospitalization, one commencing on January 11, 1965, and the other on May 12, 1966. It cannot be disputed that 6 months intervened between the two claimed periods. The municipal court interpreted the policy as the plaintiffs contended and as they contend in the present case, and entered judgment for $1,200 and costs, including an attorney's fee. Notice of appeal was given and the district court assumed jurisdiction of the case. On appeal to this court it was determined that the appeal from the municipal court to the district court was not properly perfected and that the district court did not obtain jurisdiction of the appeal from the municipal court. Simmons v. Mutual Benefit Health &

Acc. Assn., 183 Neb. 175, 159 N. W. 2d 197. The judgment for plaintiffs in the municipal court thereupon became final and was subsequently satisfied by the defendant. It is this judgment which the plaintiffs plead as res judicata of defendant's claim of nonliability under the terms of the policy.

As respects the question of res judicata, the record shows that the parties in the municipal court case were the same as in the case before us. The cause of action was not the same, but the issue as to the meaning of the policy was the same. "An adjudication as to the construction or validity of an instrument is res judicata when it comes in issue in another action between the same parties, although the immediate subject matter of the two actions is different." 46 Am. Jur. 2d, Judgments, § 429, p. 599. "Any right, fact, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies, whether the claim or demand, purpose, or subject matter of the two suits is the same or not." State ex rel. Weasmer v. Manpower of Omaha, Inc., 163 Neb. 529, 80 N. W. 2d 580. See, also, Wischmann v. Raikes, 168 Neb. 728, 97 N. W. 2d 551. There are cases not applicable here which limit the scope of res judicata. American Province Real Estate Corp. v. Metropolitan Utilities Dist., 178 Neb. 348, 133 N. W. 2d 466.

Plaintiffs' claim in the present case is based on the same interpretation of the insurance policy as was given it in the municipal court case. It is true that plaintiffs' claim was based on different periods of hospitalization and, consequently, different causes of action. But the action was based on the same provisions of the insurance policy as interpreted in the municipal court. In Ripley v. Storer, 309 N. Y. 506, 132 N. E. 2d 87, it is stated: "It is familiar law that where a contract has been ad-

judged to be valid and enforcible, it is thereby rendered binding between the same parties as res judicata, even though the subsequent proceedings are on a different cause of action arising out of the same agreement. * * * 'Another statement of the rule is that any right, fact or matter in issue, and directly adjudicated on, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered on the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether or not the claim or demand, purpose, or subject matter of the two suits is the same.' This rule has been applied to successive actions arising from different aspects of the same contract in numerous cases. * * * Here both causes of action manifestly arise out of the same contract, which is not severable insofar as this issue is concerned." See, also, Epstein v. Chatham Park, Inc., 52 Del. 56, 153 A. 2d 180; Faust v. Carson, 158 Kan. 479, 148 P. 2d 504; Wight v. Montana-Dakota Utilities Co., 299 F. 2d 470.

Defendant asserts that the plea of res judicata is an affirmative defense and not available as a bar to defendant's answer. The doctrine of res judicata is applicable to defenses, setoffs, and counterclaims, and such an issue so adjudicated as a defense in a prior action may not be interposed in a subsequent action as a cause of action or defense. 46 Am. Jur. 2d, Judgments, § 430, p. 600. "In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." Cromwell v. County of Sac., 94 U. S. 351, 24 L. Ed. 195. See, also, Summers v. Summers, 177 Neb. 365, 128 N. W. 2d 829; Muff v. Mahloch

Farms Co., Inc., 184 Neb. 286, 167 N. W. 2d 73. The present action comes within the rule.

Defendant contends that the trial court erred in granting a summary judgment in that the basis for such a judgment did not exist. The rule is that to justify the entry of a summary judgment, the record must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wilson Grain Co., Inc. v. Resso, 179 Neb. 676, 140 N. W. 2d 18.

Plaintiffs assert that there is no disputed question of fact as shown by the pleadings and admissions contained therein, a written stipulation, the response to a request for admissions, the response to written interrogatories, the pleadings and judgment in the municipal court case, and the affidavit of one of the plaintiffs. From the foregoing the following facts are admitted or conclusively determined: The insurance policy was issued and premiums paid. It was valid and enforcible. On May 10, 1964, the insured was injured in an automobile accident and was confined in a licensed hospital and convalescent hospital continuously thereafter during the time involved in this litigation. A previous case between the same parties was filed in the municipal court upon which a final judgment was entered. The same issue was there decided which interpreted the same provisions of the same policy necessary to a decision there as are necessarily involved here, giving rise to the defense of res judicata.

The defendant contends that there were fact questions raised in the present case which are disputed that make a summary judgment an improper remedy. It is asserted that the trial court erroneously overruled a demurrer to the petition for the misjoinder of parties plaintiff. The record shows that the first action in municipal court was brought by Robert G. Simmons, Sr. A demurrer was filed by the defendant for the reason that the petition failed to state a cause of action in that

there was a defect in parties plaintiff. A written stipulation was thereupon entered into by the parties that the demurrer should be sustained and that the plaintiff would file an amended petition in which Gladyce W. Simmons, the beneficiary of the policy, would be added as a party plaintiff. This was done. The defendant at that time did not object to Robert G. Simmons, Sr., as a party plaintiff; in fact, it was stipulated in effect that Robert G. Simmons, Sr., remain a party plaintiff. Defendant is now in no position to raise the issue. In any event the defendant is not prejudiced by the court's ruling, even if erroneous, since the beneficiary of the policy was made a party plaintiff.

Defendant also contends that there was an issue of fact as to whether or not the periods for which liability was claimed were for hospitalization or convalescent care for which the policy provided different benefits both as to time and daily rate. The trial court determined this issue in favor of the defendant and, consequently, the defendant has not been prejudiced. In its showing in resistance to summary judgment, defendant asserted the contention. Plaintiffs filed nothing in opposition to this showing. We do not think the trial court erred in holding that the contention of the defendant was admitted on this point.

Defendant further contends that plaintiffs were permitted to file an amended petition after defendant had demurred to the original petition but before the court had ruled thereon. Obviously there is no merit to this contention. The filing of an amended petition after a demurrer to the original petition has been filed and not ruled on is nothing more than a confession of the validity of the demurrer. Such action in no way prejudices the rights of the defendant and affords no valid basis for asserting error.

Defendant contends that the action should fail because proofs of loss were not filed. Proof of loss was filed following the accident. Subsequent proofs of loss

for installments subsequently to become due resulting from the same accident are not required, at least, unless demanded by the insurance company.

We think, for the reasons stated, that there was no issue of fact remaining to be tried and that the district court acted within its province in granting summary judgment. We find no error in the record prejudicial to the rights of the defendant and the judgment of the district court is affirmed.

AFFIRMED.

J. CLIFF RAHEL AND COMPANY, INC., A DELAWARE CORPORATION, APPELLEE, V. REDGE K. ROPER, APPELLANT.
180 N. W. 2d 682

Filed October 30, 1970. No. 37499.

Contracts: Securities. Contracts made in violation of the Securities Exchange Act of 1934, or of any rule or regulation thereunder are not void but merely voidable at the option of the innocent party. 15 U. S. C. A. § 78cc.

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

John R. Doyle, for appellant.

Cline, Williams, Wright, Johnson & Oldfather and Stephen E. Gehring, for appellee.

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

BOSLAUGH, J.

This is an action upon a promissory note and collateral agreement executed by the defendant. The trial court found generally for the plaintiff and the defendant appeals.

The controversy arises out of the sale of 500 shares of Raychem Corporation stock and 700 shares of Memorex Corporation stock on October 11, 1966. The stock

was sold by the defendant through the plaintiff, a licensed security broker. Although the defendant did not own the stock at the time of the sale, he represented to the plaintiff that he did own the stock. When the defendant failed to deliver the securities to the plaintiff upon demand, the plaintiff discovered that the defendant did not own the securities he had sold and that the sales were, in fact, "short sales."

The securities increased in value and as of December 14, 1966, the defendant had sustained a nonrealized loss on the transactions in the amount of $32,661.06. The promissory note and collateral agreement were executed on December 24, 1966. The agreement provided that in consideration of the plaintiff assuming the defendant's short position in the securities, the defendant had agreed to execute the note in the amount of $32,661.06 which would become due not later than June 20, 1967. The agreement further provided that if the value of the securities should increase by more than $9,386.25, the plaintiff on notice to the defendant had the right to cover the short position and add all additional loss and expenses to the principal amount of the indebtedness.

The value of the securities continued to increase and on January 26, 1967, the plaintiff covered the short position in accordance with the terms of the agreement. The defendant's loss, less the proceeds of collateral that had been delivered to the plaintiff, amounted to $37,564.41 which with interest and costs is the amount of the judgment recovered by the plaintiff.

The defendant contends that the transaction was void because the plaintiff extended credit to him in violation of the federal statutes and regulations applicable to such transactions. The defendant relies upon section 29 of the Securities Exchange Act of 1934, 15 U. S. C. A. § 78 cc, and Regulation T of the Board of Governors of the Federal Reserve System, 12 CFR § 220.1 et seq.

The statute provides generally that every contract made in violation of it, or of any rule or regulation

thereunder, shall be void. The record shows that there was a failure to comply with the regulations pertaining to the handling of short sales in regard to the transactions involved in this case. The question is whether that automatically voids the contract arising out of the transactions.

Section 29 of the Securities Exchange Act of 1934 has been interpreted to mean that a contract made in violation of the act is not void but voidable at the option of the innocent party. In Mills v. Electric Auto-Lite Co., 396 U. S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970), the United States Supreme Court said: "We do not read § 29(b) of the Act, which declares contracts made in violation of the Act or a rule thereunder 'void . . . as regards the rights of' the violator and knowing successors in interest, as requiring that the merger be set aside simply because the merger agreement is a 'void' contract. This language establishes that the guilty party is precluded from enforcing the contract against an unwilling innocent party, but it does not compel the conclusion that the contract is a nullity, creating no enforceable rights even in a party innocent of the violation. The lower federal courts have read § 29(b), which has counterparts in the Holding Company Act, the Investment Act, and the Investment Advisers Act, as rendering the contract merely voidable at the option of the innocent party." See, also, VI Loss, Securities Regulation, p. 3866.

The plaintiff in this case did not handle the transactions as short sales because of the representation by the defendant that he owned the stock which was sold. The plaintiff had handled a large number of transactions for the defendant on prior occasions and the defendant had never had a margin account with the plaintiff. The plaintiff thought that the transactions were "straight" sales and handled the transactions in a cash account. When the plaintiff discovered that the transactions were in fact short sales, the plaintiff demanded collateraliza-

tion as required by the federal regulations. This finally resulted in the execution of the promissory note and collateral agreement in which the plaintiff assumed the defendant's short position.

Under the facts in this case, the plaintiff and not the defendant is the innocent party. The contract is not voidable at the option of the defendant, and the plaintiff has not elected to rescind.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HENRY WADSWORTH WAGNER, ALSO KNOWN AS HARRY WAGNER, APPELLANT.
180 N. W. 2d 695

Filed October 30, 1970. No. 37503.

Criminal Law: Rape: Evidence. Corroboration of the prosecutrix in a rape case is sufficient if there are material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.

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

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

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

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

SMITH, J.

Defendant appeals from his conviction of forcible rape. In issue is the sufficiency of evidence to sustain the finding of guilt.

The complaining witness testified as follows: Age 17 and the unwed mother of a 16-month-old baby, she lived in an apartment of a housing project four blocks

from Kellom School, Omaha. On July 8, 1969, at 1:40 a.m., she and the baby entered a taxicab to return to her apartment. She stopped the taxicab at 2 a.m., a block from the apartment and stepped out, paying no fare. Prior to stepping out, she had seen defendant, a stranger, staggering in the vicinity.

When the complaining witness and the baby arrived at the apartment, defendant suddenly approached. Wrapping a wire around her head and warning her to remain silent, he followed her in. There he said: "We are going to Kellom," and he forced her to depart with him. Enroute she screamed until he beat her. He dragged her part of the way to a grassy part of Kellom School grounds.

At the school grounds, defendant wrapped a wire around her neck, forced her to the ground, warned her not to resist, and proceeded to have sexual intercourse with her. Meanwhile, he struck her in the stomach, across the eyes, and on her hands so that she lost her keys.

The complaining witness and defendant returned to the apartment at 4 a.m., entering a window and replacing the screen. She then ran upstairs with the baby. Subsequently she heard someone clumping and pounding on her upstairs door, but no one entered. Although she still heard someone in the apartment about 6 a.m., she escaped through a downstairs window. She saw the screen on the apartment floor and a broken vase. She proceeded to a neighbor's house where a police officer visited her after 7 a.m. She appeared sleepy.

John S. Felinski, an Omaha police sergeant and the only other witness for the State, testified as follows: The complaining witness at 6 a.m. had described her assailant as a male, 5'9" to 5'10" tall, weight 155 pounds. Defendant turned out to be 5'7½" tall, weight 185 pounds.

During a subsequent investigation of the school grounds, Felinski saw bent, trampled grass and a house

key that fit the lock on the apartment door. At the apartment he saw two front windows open, and a screen and broken drinking glass on the living room floor.

A physical examination of the complaining witness at 6:40 a.m. revealed scratch marks in the mid-lumbar area, but neither abrasions nor spermatazoa on vaginal examination.

Defendant denied commission of the alleged offense.

Corroboration of the complaining witness in a rape case is sufficient if there are material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn. It is not essential that other witnesses corroborate her testimony to the particular act constituting the offense. Texter v. State, 170 Neb. 426, 102 N. W. 2d 655 (1960).

The evidence of the alleged offense was sufficient for a jury to find defendant guilty beyond a reasonable doubt.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TERRY B. DUITSMAN, APPELLANT.
180 N. W. 2d 685

Filed October 30, 1970. No. 37505.

1. **Criminal Law: Probation and Parole.** When any court suspends sentence and places a defendant on probation it shall determine the conditions and period of probation, and that the conditions of probation shall be such as the court shall in its discretion prescribe.
2. **Criminal Law: Sentences.** This court will not interfere with a sentence imposed by a lower court unless it appears to be the result of an abuse of discretion.
3. **Statutes.** Section 49-301, R. R. S. 1943, provides: Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Affirmed.

A. James McArthur, for appellant.

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

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

WHITE, C. J.

The district court revoked an order of probation and sentenced the defendant to 25 days in jail on the charge of being a minor in possession of alcoholic liquor. The defendant contends, in this appeal, that the original judgment of the county court constituted a sentence and not an order of probation and that the sentence has been satisfied and therefore further proceedings are void. He also contends that the sentence of 25 days in jail on the order revoking probation is excessive and should be reduced.

The order of probation in contention here provided as follows: "* * * the defendant is hereby placed on probation * * *, under the following terms and conditions * * *. 8. That said Terry B. Duitsman shall pay $60.00 in lieu of fine and $5.00 court costs on or before the 20th day of September, 1968." The defendant contends although the language of the order is probationary in form, actually the imposition of the $60 "in lieu of fine" which the defendant has paid, constituted a sentence and that the case therefore became terminated. His argument becomes an exercise on sematics which it is not necessary to decide. Section 29-2219, R. R. S. 1943, provides that a judge in entering an order of probation may impose a fine as one of the permissible conditions. There are other conditions in the probationary order beside the one recited above. If the language "in lieu of fine" was in substance a fine, which it would appear to be, then it is a legitimate and permissible con-

dition of probation and the argument of the defendant that it constitutes a sentence fails. § 29-2219, R. R. S. 1943. If, on the other hand, it did not constitute, in a technical sense, a fine, then it is permissible as one of the general conditions of probation that may be imposed by the court. Section 29-2219, R. R. S. 1943, provides that when any court suspends sentence and places a defendant on probation it shall determine the conditions and period of probation, and that the conditions of probation shall be such as the court shall in its discretion prescribe. Obviously the intent of the Legislature is to give the sentencing judge, when he suspends sentence, appropriate latitude to tailor individualized conditions of probation with the objective of accomplishing the rehabilitative purposes of the probationary act. This is particularly indicated when the sentencing judge is faced with a situation where incarceration or confinement of a young person of the age of the defendant herein involved, and the attempt in a probationary order is to achieve the reformation of the defendant by the imposition of appropriate disciplinary sanctions short of confinement. To interpret section 29-2219, R. R. S. 1943, otherwise would be to emasculate the purposes of a probation act and return it to the limbo of the archaic notion that probation constituted merely an act of clemency or mercy. There is no merit to the defendant's contention in this respect.

It is now contended that the sentence of the district court of 25 days in jail is excessive. This court will not interfere with a sentence imposed by a lower court unless it appears to be the result of an abuse of discretion. State v. Lenz, 183 Neb. 496, 161 N. W. 2d 710. The defendant was placed on probation for a period of 8 months from August 30, 1968. In May 1969, resulting from an incident occurring in February 1969, the defendant violated ordinances of the City of Beatrice in driving an automobile in a negligent manner, leaving the scene of a property accident, hindering and obstruct-

ing officers in the performance of their duties, and becoming intoxicated. There is no contention as to his guilt of these offenses and this conduct, or that they constituted a violation of the conditions of his probation. The evidence shows that he hindered and obstructed officers in the performance of their duties, that he was in a motor vehicle containing alcoholic beverages, and, at the same time, he was intoxicated. On revocation, and sentencing of the original offense, the court was authorized to impose a fine of not less than $100 or more than $250 or imprisonment in the county jail not to exceed 60 days or both such fine and imprisonment. § 53-180.05, R. R. S. 1943. The record also shows that the defendant was convicted and sentenced in 1966 on a joy-riding charge. Under these circumstances this court cannot say that there was an abuse of discretion in imposing the sentence of 25 days in jail.

Perhaps the most strenuous contention of the defendant is that he was 20 years of age at the time of the commission of the offense, that the Legislature has amended section 53-103 (L.B. 167, effective March 13, 1969), and that at the time he was sentenced, after his probation was revoked, the offense for which he was charged did not constitute a crime. This contention is effectively answered by the express provisions of section 49-301, R. R. S. 1943. In a criminal action this court has specifically held contrary to the defendant's contention in Lower v. State, 109 Neb. 590, 191 N. W. 674. This court stated: "It will, of course, be presumed that the legislature knew that section 3097 was and had been a part of the substantive law of the state almost 50 years when the 1921 act was adopted. It goes without saying that, if it had not been for the general saving clause statute, the legislature would in all probability have incorporated such a clause in the new act when the section in question was repealed.

"It is unthinkable that the lawmakers should have intended, either directly or indirectly, to cause the dis-

missal of prosecutions against persons charged with the commission of a crime, but who had not yet been brought to trial. Nor is it conceivable that it was the legislative intention to bestow a legislative pardon upon persons found guilty of a criminal offense, but who, perhaps by some error in the proceedings or other mishap, had not yet been lawfully sentenced. We are convinced, upon reason and authority, that the saving clause act in question continued the act in force under which the information was drawn and that the court was clothed with power to impose the sentence upon defendant of which he complains."

The judgment and sentence of the district court revoking the probation and sentencing the defendant are correct and are affirmed.

AFFIRMED.

GEORGE C. HORN ET AL., APPELLANTS, V. COMMUNITY REFUSE DISPOSAL, INC., ET AL., APPELLEES, CITY OF NORFOLK, A MUNICIPAL CORPORATION, INTERVENER-APPELLEE.
180 N. W. 2d 691

Filed October 30, 1970. No. 37515.

1. **Injunctions: Nuisances.** To enjoin an anticipated nuisance, it must be shown: (1) That the proposed construction or the use to be made of the property is a nuisance per se; or (2) that, while it may not amount to a nuisance per se, under the circumstances of the case, a nuisance must necessarily result from the contemplated act.
2. **Nuisances.** A refuse disposal operation is not a nuisance per se but it may become a nuisance in fact as a result of the manner in which it is operated.
3. **Trial: Nuisances.** The burden rests on the one complaining to establish that the use to be made of the property must necessarily create a nuisance.

Appeal from the district court for Madison County: GEORGE W. DITTRICK, Judge. Affirmed.

Grady & Casky, for appellants.

Hutton, Hutton & Garden, for appellees.

Robert E. Otte, for intervener-appellee.

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

McCOWN, J.

This is a suit by a number of individual plaintiffs to enjoin the establishment and operation of a dump yard on rural real estate in Madison County, Nebraska. The district court denied the application of the plaintiffs for an injunction and dismissed plaintiffs' petition.

The defendant, Milton Retzlaff, was the owner of the southeast quarter of Section 13, Township 23 North, Range 1 West of the 6th P.M., in Madison County, Nebraska. The defendant, Community Refuse Disposal, Inc., entered into a contract with Retzlaff to purchase that 160-acre tract of land. The intended use was to establish, operate, and maintain a dump yard for disposal of garbage and other refuse by a sanitary landfill solid waste disposal operation. The intervener, City of Norfolk, had entered into a franchise contract with Community Refuse Disposal, Inc., for the construction, maintenance, and operation of a garbage disposal facility. The city had no approved garbage disposal facility. The former facility had been disapproved and condemned by the State Department of Health. The State Department of Health had approved an application for a license for a sanitary landfill solid waste disposal area on the real estate involved in this suit. No operations had begun at time of trial.

The distance and direction of the proposed site from the City of Norfolk is not shown in the record. The record does establish that the area within a mile and a half of the site in all directions is rural farmland. No zoning statutes or ordinances of any kind are involved.

One residence is located 160 feet north of the north boundary line of the disposal site. The residence build-

ings on another farm are approximately one-eighth of a mile south of the south boundary of the disposal site. All residence buildings of other plaintiffs are located approximately one-half mile or more from the nearest boundary of the disposal site.

The soil on the disposal site was sandy. The level of the ground was generally higher on the eastern two-thirds of the quarter-section and lower on the western one-third. The water table under the westerly 950 feet of the disposal site varied from 3.6 to 5 feet below the surface of the ground. On the eastern two-thirds, the water table was from 10 to 19 feet below the surface.

The plaintiffs' testimony was to the effect that operation of a dump would produce smoke, strong and offensive odors, attract rodents, and might pollute the ground water and the wells of some of the plaintiffs and depreciate the value of their property.

The defendants' evidence was that if the sanitary landfill solid waste disposal operation on this site was conducted in accordance with the rules and regulations of the State Department of Health, there would be no problem of offensive odors, rodents, nor pollution of ground or surface water.

The evidence is persuasive that it is possible to operate a sanitary landfill so that it will not emit offensive odors, pollute ground water, or be attractive to rodents. The rules and regulations adopted in 1969 enforcible by the State Department of Health under statutory authority are reasonably designed to produce that result.

The plaintiffs here have invoked injunctive relief against an anticipated nuisance. To enjoin an anticipated nuisance, it must be shown: (1) That the proposed construction or the use to be made of the property is a nuisance per se; or (2) that, while it may not amount to a nuisance per se, under the circumstances of the case, a nuisance must necessarily result from the contemplated act. See, Annotation, 55 A. L. R. 880; Demont v. Abbas, 149 Neb. 765, 32 N. W. 2d 737.

It is generally accepted that a refuse disposal operation is not a nuisance per se but it may become a nuisance in fact as a result of the manner in which it is operated. See, Annotation, 52 A. L. R. 2d 1134; Wood v. Town of Wilton, 156 Conn. 304, 240 A. 2d 904.

The burden rests on the one complaining to establish that the use to be made of the property must necessarily create a nuisance. Prauner v. Battle Creek Coop. Creamery, 173 Neb. 412, 113 N. W. 2d 518. The plaintiffs here failed to meet that burden.

The judgment of the trial court is affirmed.

AFFIRMED.

KURT L. LUTJEMEYER, THROUGH AND BY HIS FATHER AND NEXT FRIEND, ALBERT LUTJEMEYER, APPELLANT, V. EMMET J. DENNIS, JR., DIRECTOR OF DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

180 N. W. 2d 679

Filed October 30, 1970. No. 37519.

1. **Administrative Law: Motor Vehicles.** The revocation of a license to operate a motor vehicle under the point system is a ministerial act.
2. ———: ———. When his records disclose that any person has accumulated a total of 12 or more points within 2 years, the Director of Motor Vehicles is required by section 39-7,129, R. R. S. 1943, to summarily revoke the license and privileges of such person to operate a motor vehicle in this state.
3. ———: ———. Administrative authority vested in the Director of Motor Vehicles by the statute may be exercised in the name of the Director by properly designated subordinates.
4. **Motor Vehicles.** The abstract for reports of violations of the motor vehicles act is sufficient if it complies with the requirements of section 39-796, R. R. S. 1943.
5. **Appeal and Error.** In an appeal from an order of revocation by the Director of Motor Vehicles, the burden of proof is on the appellant.

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

Ryan & Snyder, 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.

This appeal is from the action of the trial court in dismissing appellant's appeal from an order of the Department of Motor Vehicles revoking his motor vehicle operator's license.

Appellant raises three issues in this court:

1. Must the Director of the Department of Motor Vehicles personally sign the order of revocation and the notice of revocation, or can one of his designated employees perform this act in his name as a ministerial function?

2. Must an abstract forwarded to the Department of Motor Vehicles, pursuant to sections 39-794 and 39-795, R. R. S. 1943, state in unequivocal terms that the offense involved the use of an automobile?

3. Who has the burden of proof when a revocation is appealed to the district court, pursuant to sections 39-7,130 and 60-420, R. R. S. 1943?

Section 39-796, R. R. S. 1943, so far as material herein, provides: "To enable * * * the Director of the Department of Motor Vehicles punctually and economically to perform *his ministerial duties* in revoking or suspending operator's licenses * * *. In the administration of sections 39-794 to 39-796 or of any section of the Motor Vehicle Operators' License Act, the powers and duties conferred upon * * * the Director of the Department of Motor Vehicles, *his subordinates,* or his successors, with respect to the revocation or suspension of any operator's license or driving privileges *are ministerial in character.*" (Italics supplied.)

As can be seen from the above provision, the revoca-

tion of a license to operate a motor vehicle under the point system is a ministerial act. See Bradford v. Ress, 167 Neb. 338, 93 N. W. 2d 17.

Section 39-7,129, R. R. S. 1943, provides, so far as material herein: "Whenever it shall come to the attention of the Director of Motor Vehicles that any person has, as disclosed by the records of such director, accumulated a total of twelve or more points within a period of two years, as set out in section 39-7,128, the director shall summarily revoke (1) the license and privilege of such person to operate a motor vehicle in this state * * *."

From the above statute, it is apparent that the accumulation of 12 or more points within a 2-year period makes mandatory the suspension of the operator's license. See, Martindale v. State, 181 Neb. 64, 147 N. W. 2d 6; Durfee v. Ress, 163 Neb. 768, 81 N. W. 2d 148.

The order of revocation and the notice to appellant of the revocation were signed in the name of the Director of the Department of Motor Vehicles by the assistant division chief of the financial responsibility division, as follows:

"DEPARTMENT OF MOTOR VEHICLES
"EMMETT J. DENNIS, JR., Director
"By Anne M. Hanks (Signed)
"Financial Responsibility
"Anne M. Hanks, Assistant Division Chief."

We have italicized the words "his subordinates" in the extract above from section 39-796, R. R. S. 1943, to point up the fact that the Legislature contemplated that the Director of the Department of Motor Vehicles would act through subordinates in the performance of ministerial duties. The undisputed testimony is that on a daily average the department receives approximately 1,000 abstracts on violations involving the loss of points for operators of motor vehicles. It is axiomatic that the director must function through the assignment of ministerial duties to subordinates if he is to effectively

administer the law, which has for its purpose not the punishment of the licensee but the protection of the public. Durfee v. Ress, 163 Neb. 768, 81 N. W. 2d 148.

An examination of the motor vehicle law indicates that while it was the intention of the Legislature to clothe the Director of Motor Vehicles with specific administrative authority, properly designated subordinates may exercise that administrative authority in the name of the director.

The second issue raised by the appellant is whether the abstract forwarded to the Department of Motor Vehicles should state in unequivocal terms that the offense involved the use of an automobile. Section 39-796, R. R. S. 1943, clearly states what the abstract of conviction must contain. The five abstracts in the instant case fully complied with said section. The appellant entered a plea of guilty to each of the five offenses. Two of them, involving two points each, list the offense as follows: "Violating auto signal." Appellant's point seems to be that this does not specify that he violated an automatic signal while driving a car, suggesting that he could have done so as a pedestrian. The difficulty with appellant's argument is that section 39-7,128, R. R. S. 1943, provides points only for violations involving the use of a motor vehicle, and there can be no question but that the points assessed herein were for the violation of an automatic signal while driving a motor vehicle. Appellant did not attempt to dispute the record, but merely complains that the abstract was incomplete or misleading because it did not specifically specify that the violation was in connection with the operation of a motor vehicle. There is no merit to this contention. If there had been any question about it, appellant was not without remedy.

The last issue raised by the appellant is that the court erred in placing the burden of proof on him in the district court. This is an appeal to the district court from the order of revocation entered pursuant to the statute.

Section 39-7,130, R. R. S. 1943, provides that a party aggrieved by an order of revocation may appeal in the manner prescribed by section 60-420, R. R. S. 1943, but that the appeal shall not suspend the order of revocation unless a stay is allowed by the judge of the district court. Section 60-420, R. R. S. 1943, provides for the filing of a bond in the office of the director, and makes it the duty of the director on payment of the costs to prepare a complete transcript of the proceedings concerning the revocation of the license. The party aggrieved must file his petition in the district court within 30 days of the filing of the director's order. He is also required to file the transcript of the proceedings before the director before answer day. The statute then provides that the district court shall hear the appeal as in equity without a jury, and determine anew all questions raised before the director.

The question raised by the appellant is as to who has the burden of proof. The appellant is designated as the plaintiff in the district court, and is contesting the revocation which is effective unless and until it is set aside on appeal in the district court. The appellant files the transcript of the proceedings before the director in the district court. We conclude that while the district judge determines anew all questions raised before the director, the burden of proof is on plaintiff-appellant, as determined by the district court.

For the reasons given, the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TERRENCE OWEN COLLINS, APPELLANT.
180 N. W. 2d 687

Filed October 30, 1970. No. 37548.

1. **Criminal Law: Searches and Seizures.** A package shipped by air mail parcel post is subject to inspection by the postal au-

thorities. An inspection of such a package in the presence of the postal authorities and while the package is in their custody is not an illegal search.

2. ———: ———. Objects which are in plain view are subject to seizure by an officer who has a right to be in the position to have that view.

3. **Criminal Law: Evidence.** Guilty knowledge may be proved by circumstantial evidence.

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

E. Dean Hascall of Hascall, Campbell & Reagan, 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 appeals from a conviction for unlawful possession of methamphetamine hydrochloride, a stimulant drug, in violation of section 28-499, R. S. Supp., 1969.

The defendant was arrested as he was leaving the post office at Bellevue, Nebraska, after he had accepted delivery of a package containing approximately 4,000 tablets. The package which had been shipped by air mail parcel post had been sealed with tape, but the tape had been broken in transit. When the package arrived at the post office, the contents of the package were visible.

After the package arrived at the post office, the assistant postmaster, who was the officer in charge, notified the postal inspector. Shortly thereafter, a state patrolman and a federal narcotics agent arrived at the post office. In the presence of the assistant postmaster and while the package was in his custody, one tablet was removed and a test performed which indicated that

the tablet contained amphetamine. The contents of the package were then replaced.

About 1 hour later the defendant appeared at the post office and asked if there was a parcel for him. The package was delivered to the defendant, and he was apprehended as he was carrying the package out of the post office.

The defendant's principal contention is that there was an illegal search of the package and that his later arrest and search was illegal because it was based upon information disclosed by the illegal search of the package. The record does not sustain this contention.

The package was subject to inspection because it was sent by parcel post. See, 39 U. S. C. A. §§ 4057, 4301; 39 CFR § 117.1; Santana v. United States, 392 F. 2d 854. However, the package had become unsealed in transit so that it was unnecessary to open the package to see what it contained. Objects which are in plain view are subject to seizure by an officer who has a right to be in the position to have that view. State v. Dillwood, 183 Neb. 360, 160 N. W. 2d 195. The assistant postmaster had been instructed by the former postmaster to watch for a package addressed to the defendant. When the package arrived he notified the postal inspector who, in turn, notified the federal narcotics agent. The inspection and examination of the contents of the package were made at the post office in the presence of the assistant postmaster. The record does not show an illegal search of the package.

The package was addressed to the defendant and carried the notation: "WILL CALL." It contained a note addressed to the defendant from "Glen" which indicated that code words should be used in future conversations. The defendant's billfold contained a card with the name and address of Glen E. Todd, the shipper, written on it. The evidence was sufficient for the court to conclude that the defendant knew what the package contained at

the time he accepted delivery of it at the post office. State v. Faircloth, 181 Neb. 333, 148 N. W. 2d 187.

The judgment of the district court is affirmed.

AFFIRMED.

LOIS THELEN, APPELLANT, V. J. C. PENNEY CO., APPELLEE.
180 N. W. 2d 693

Filed October 30, 1970. No. 37554.

Workmen's Compensation. The burden is on a plaintiff in a workmen's compensation case to prove a right of recovery.

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

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

Edwin Cassem of Cassem, Tierney, Adams & Henatsch, for appellee.

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

NEWTON, J.

This is an action under the Workmen's Compensation Act to recover for an alleged injury said to have been sustained on January 25, 1968. Hearing was had before one judge of the Workmen's Compensation Court and rehearing before the court sitting en banc. Recovery was denied in both instances and the judgment affirmed on appeal to the district court. We affirm the judgment of dismissal.

Plaintiff was a stockroom employee of defendant J. C. Penney Company. On January 25, 1968, a chair collapsed under her while in defendant's employ. She maintains she sustained a back injury as a result of this incident. She first consulted a doctor in June 1968, and steadily continued in her employment until August when she entered a hospital. The doctor's record shows she

was complaining of severe back pain. X-rays were taken and a myelogram given which were found to be normal with the exception of a congenital defect in that she had two sacral segments instead of the normal one. She was released without the source of her trouble being located. Her doctor reported that she "was not hospitalized in August 1968 as a result of accident on January 25, 1968"; and that: "We were not aware of any disability due to this accident." She was again hospitalized in October 1968, at which time orthopedic specialists and specialists in internal medicine and surgery were called in. She was then operated upon, a cyst removed from an ovary, her appendix removed, and a loosened and twisted bowel condition corrected. The medical record shows "pain subsided following surgery." She subsequently consulted another orthopedic specialist who referred her to a neurologist. The neurologist was the only medical expert who testified. He indicates he examined plaintiff in December 1968, and examined the myelogram and X-rays previously taken. He found no pathological symptoms of a back injury with the exception that she complained of pain in the lower back, displayed tenderness in that area, and had a slight limitation of movement of the leg. On examination of the myelogram and X-rays previously taken, the neurologist disagreed with plaintiff's other physicians and maintained that they showed a herniated disc between the first and second sacral vertebrae which resulted from her January 25, 1968, fall. He states that the narrow space between these vertebrae indicates a damaged disc, but concedes that in a normal back, there is no space between them as they have grown together. He then qualified his statement that plaintiff had a herniated disc by saying: "I said that there is a narrowing of the disc space and that we see narrowing with herniation of a disc." He treated her in a hospital for several days and never saw her again. His report states: "Fortunately she responded adequately to conservative ther-

apy." He also concedes that it is possible a bowel condition such as plaintiff had could cause back pain which would disappear when the condition was corrected. Plaintiff's history, as given to the neurologist, indicates she first had back pains 2 months after the accident.

"The burden is on a plaintiff in a workmen's compensation case to prove a right of recovery." Hula v. Soennichsen, 178 Neb. 484, 134 N. W. 2d 47. All of the doctors whose reports appear in this record were employed by the plaintiff herself. None of these doctors, with the exception of the neurologist, give the slightest intimation that plaintiff is suffering from a condition caused by her fall while in defendant's employ. On the contrary, their reports tend to conflict with such a conclusion and one specifically denies that the condition is related to her fall. The testimony of the neurologist that she sustained a herniated disc as a result of the fall was seriously impeached and is not convincing.

We conclude that the Workmen's Compensation Court was correct in concluding that plaintiff had failed to sustain her burden of proof and affirm the judgment for defendant entered in the district court.

AFFIRMED.

LILLY JOHNS, APPELLANT, V. ERVIN W. HAASE, INDIVIDUALLY AND DOING BUSINESS AS NORTHEAST LANES, APPELLEE.

VERNON JOHNS, APPELLANT, V. ERVIN W. HAASE, INDIVIDUALLY AND DOING BUSINESS AS NORTHEAST LANES, APPELLEE.

180 N. W. 2d 689

Filed October 30, 1970. Nos. 37578, 37579.

Judgments. Entry of a summary judgment is proper when only a question of law is presented.

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

Krause & Howland, for appellants.

Cline, Williams, Wright, Johnson & Oldfather and Alan E. Peterson, for appellee.

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

NEWTON, J.

Two actions are before us. In one, Lilly Johns sues to recover for injuries sustained by reason of a fall while bowling on an alley at Northeast Lanes. In the second, Vernon Johns seeks to recover for damages sustained by him as the husband of Lilly Johns which resulted from her injury. Defendant's motion for summary judgment was sustained in each of the consolidated cases. We affirm the judgments entered in the district court.

Plaintiffs sought to hold defendant liable on the ground that he was conducting the bowling alley business at the scene of the accident and was negligent in its operation. In support of his motion for summary judgment, defendant introduced his affidavit stating that he was not, and never had been, the owner, operator, proprietor, or manager of Northeast Lanes; that it was owned and operated by Lincoln Enterprises, Inc., a corporation of which he had been secretary-treasurer and which was now dissolved; that the alley manager, chief mechanic, and maintenance supervisor at the time of the accident was one Ray Phipps, an employee of Lincoln Enterprises, Inc.; and that he had nothing to do with the maintenance or surfacing of the alleys and was not present when the accident occurred. Plaintiffs' countershowing consisted only of an affidavit indicating an amusement license for Northeast Lanes was applied for under the name of "Northeast Lanes by Ervin Haase." In response, defendant filed his affidavit to the effect that he applied for the license in his capacity as secretary-treasurer of Lincoln Enterprises, Inc.

The undisputed facts so established clearly show a lack of liability on the part of defendant unless the matter of the amusement license is sufficient to raise a question of fact on the issue. The statutory requirements that one operating a bowling alley must obtain a license and that trade names be registered is referred to. There is no showing that Lincoln Enterprises, Inc., failed to register its trade name "Northeast Lanes" nor that it was registered as a trade name of defendant. The application for a bowling alley license for "Northeast Lanes by Ervin Haase" does not raise an inference that he was the owner or operator of the establishment, but only that he was acting as its agent in obtaining the license. The nature or basis of the agency is not disclosed. As pointed out by the trial court, this is insufficient to support a reasonable inference or conclusion that defendant owned or operated the bowling alley and no question of fact is presented.

Plaintiffs' assertion that defendant's affidavits are conclusionary rather than factual in nature is without merit.

Entry of a summary judgment is proper when only a question of law is presented. See State v. Kidder, 173 Neb. 130, 112 N. W. 2d 759.

The judgments entered by the district court are affirmed.

AFFIRMED.

SHIRLEY PIGNOTTI, APPELLANT, V. COFFEE TIME, INC., ET AL., APPELLEES.
180 N. W. 2d 677

Filed October 30, 1970. No. 37581.

1. **Trial: Witnesses: Evidence.** Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though uncontroverted by direct testimony.

2. **Workmen's Compensation: Trial.** Workmen's compensation cases are triable de novo in this court. However, where all of plaintiff's complaints are subjective, we cannot ignore the fact that the compensation court in assessing the extent of injuries had an opportunity to observe the demeanor of the plaintiff.

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

Larry E. Welch, for appellant.

Edwin Cassem of Cassem, Tierney, Adams & Henatsch, for appellees.

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

SPENCER, J.

This is an appeal from the affirmance of an award of the compensation court en banc. Plaintiff was awarded her medical expenses, total temporary disability for 20 2/7ths weeks; and 10 percent permanent partial disability to the body as a whole. This appeal by the plaintiff is concerned solely with the extent of temporary disability, and percentage of permanent partial disability.

Plaintiff, a married woman, 39 years of age at the time of injury on Thursday, January 23, 1969, had been employed the past 3 years as a catering driver by Coffee Time, Inc., hereinafter referred to as defendant. She drove a catering truck, selling lunches and beverages to customers on her route. Part of her duties required her to load the truck for the day's run with crushed ice, milk, pop, coffee, and sandwich trays. The ice was scooped by the plaintiff into 10 gallon buckets, and loaded into the truck. In addition, plaintiff loaded about three cases of milk each day, and about eight gallons of coffee. The coffee was in large metal milk cans, which plaintiff placed on the truck.

Plaintiff's truck slid through a stop light and collided with another car. As a result of the impact she hit her chest on the steering wheel. She was taken to the

Douglas County Hospital where she was examined and released. Plaintiff did not return to work until the following Monday. She went to a doctor on Tuesday because of the pain in her arms. He referred her to an orthopedist. Plaintiff continued to work while attempting to get an appointment with the orthopedist. She was able to do so the following Friday. The orthopedist prescribed certain drugs and medication, recommended physical therapy, and advised plaintiff to rest for a week. She remained off work for a week, and when she returned the employer told her she could work if she could get someone to load the truck for her. She did not do so, and her testimony is that on later occasions the employer failed and refused to take her back so she never resumed her former employment.

Neither plaintiff's nor defendant's orthopedists appeared at the hearing. Narrative medical reports were filed for both. Three reports of plaintiff's orthopedist are in evidence. On April 17, 1969, he gave his diagnosis as a sprain of the cervical spine, and stated the treatment consisted primarily of therapy, and that plaintiff could probably return to work about May 1, 1969. His report of June 19, 1969, stated: "Physical examination on June 18th revealed tenderness in the left trapezius. Motion of the neck is normal in all directions. The upper extremity reflexes are normal and there is no objective evidence of muscular weakness or atrophy in either upper extremity. X-rays were repeated and these films did not show any evidence of bony injury.

"* * * I think that Mrs. Pignotti should be permitted to return to work and make an effort to do so in spite of the fact that I believe this would aggravate her symptoms but I think that this would be temporary."

The report of plaintiff's orthopedist of October 15, 1969, contained the following: "She was last seen October 14, 1969 still complaining of pain across the shoulders with tenderness in the middle trapezius on the right and the upper trapezius on the left. Extension and flex-

ion of the cervical spine lateral were good. Lateral bending did produce some pain but range was good. * * *

"My final diagnosis is extension sprain of the neck with residual fibromyositis of the trapezius muscles bilaterally.

"DISABILITY: Total temporary disability lasted until August 8, 1969 when she was advised to return to work but to avoid heavy lifting. Residual disability of 20% of the body as a whole is estimated based primarily on efforts to return to work and inability to lift and the persistence of pain across the shoulders."

Defendant's orthopedist, in his report dated April 8, 1969, stated: "She is still symptomatic and it is my opinion that this is due to a cervical strain. I do not feel that this injury will result in permanent disability and I feel that she should be able to return to work by the 1 May 1969." In his report of May 27, 1969, defendant's orthopedist stated: "Examination revealed a full range of cervical motion. The patient complained of tenderness to any pressure in the right cervical area and in the posterior shoulder muscles to both sides of the mid line and also along the dorsal para-spinal muscles.

"In spite of active treatment by Doctor Stanley Bach, and the fact that it has been four months since her injury, she still has the same complaints referable to the neck and shoulders.

"I would expect further improvement in this individual and I would not anticipate the permanent partial disability to exceed 5 percent."

Plaintiff had a prior cervical disability in 1965, although her orthopedist doubted if the present trouble could be traced to that source, but that absolute proof was not possible.

"To entitle a claimant under the Workmen's Compensation Act to recover, he must establish by a preponderance of the evidence that he suffered an accident arising out of and in the course of his employment.

"Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though uncontroverted by direct testimony." Dike v. Betz, 181 Neb. 580, 149 N. W. 2d 750.

Compensation cases are triable de novo in this court. Yost v. City of Lincoln, 184 Neb. 263, 166 N. W. 2d 595. However, where, as here, all of plaintiff's complaints are subjective, we cannot ignore the fact that the compensation court in assessing the extent of her injuries on two occasions had an opportunity to observe the demeanor of the plaintiff. This is particularly important where the medical witnesses did not appear but filed medical reports.

Plaintiff, except for the few days after the accident, never resumed her former employment. She testified she attempted to secure other employment at numerous businesses on her catering route, but was unable to do so. Although plaintiff's orthopedist bases his opinion as to her residual disability on her efforts to return to work and her inability to lift, she did not return to any type of employment after the accident. Her inability to lift, on this record, is in the realm of conjecture.

When we consider the fact that the trial court observed the demeanor of the witness in the consideration of the testimony of the medical witnesses, we cannot say that the conclusion reached is not a just one, and affirm the judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EDWARD J. NYDEGGER, APPELLANT.
180 N. W. 2d 892

Filed November 6, 1970. No. 37446.

1. **Criminal Law: Evidence.** In a prosecution for larceny, the corpus delicti may be established by circumstantial evidence, and it

is sufficient if the circumstances are consistent with the crime, even though they also may be consistent with innocence.

2. ———: ———. A larceny corpus delicti may be proved by evidence that property has been taken and removed without the owner's knowledge or consent.

3. ———: ———. The possession of recently stolen property when coupled with a lack of a satisfactory explanation, or a false explanation or other incriminating circumstances or conduct, is sufficient to support a verdict of guilty.

4. ———: ———. It ordinarily is sufficient if the property found in the possession of the accused or shown to have been disposed of by him is of the same character and appearance as that stolen, and circumstantial evidence with respect thereto is admissible.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Affirmed.

C. E. Danley, 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.

WHITE, C. J.

The defendant appeals from a jury verdict, judgment, and sentence for larceny. He contends that the evidence is insufficient to sustain a verdict and that there was error in the admissibility of evidence. We affirm the judgment and sentence of the district court.

The main thrust of the defendant's argument as to the insufficiency of the evidence is directed towards the failure to prove the corpus delicti of the crime and is interwoven with the argument that the evidence is entirely circumstantial and fails to meet the judicial test of sufficiency. We will treat these interwoven contentions together as they are argued in the defendant's brief.

The defendant was employed by R. L. Harris Associates in Beatrice, Nebraska. Sometime between the semiannual inventories of the Harris warehouse of No-

vember 1967 and April 1968, it was discovered by the manager that one of two Dayton 1-horse power electric motors, model 4K996, was missing from a caged-in area in which the warehouse inventory was kept in storage. The manager testified that it could not be taken out of the inventory in the caged-in area unless there would have been a record made of such use and the removal of the motor from inventory. Furthermore, this could not be done without the authority from the manager or someone superior to him. There was no record of removal of the motor for any such purpose, and the testimony was that there was no authority ever given for such removal. The defendant was employed by the warehouse and had free access to the caged-in area during this period of time. The company keeps complete records of all movements of merchandise from inventory, together with an explanation for each item leaving it. There was no indication in the company records of the removal of the motor on a customer-purchase order, which was the ordinary method of removing it from inventory. A Dayton 1-horse power electric motor, model 4K996, with a bent base was delivered to the Hawkins Auction Company in Beatrice, Nebraska, on or about January 19, 1968, by the defendant for sale. The purchaser, one Truman Garber, testified that he purchased exhibit 7 from the auction company which exhibit is the motor testified to which has a bent base.

The defendant testified in his own behalf that he purchased the motor from one Donald Radford and thereafter he had Radford take it to the Hawkins Auction Company in Beatrice. The defendant did not proffer Radford as a witness, notwithstanding the fact that he had testified that he had numerous contacts with Radford. His testimony supports the conclusion that he could not identify Radford or in any other way explain the transaction. He did not testify as to having made any effort to secure the attendance of Radford as a witness at the trial and his only explanation was that.

he did not happen to know where Radford was "today" on the day of the trial. In a prosecution for larceny, the corpus delicti may be established by circumstantial evidence, and it is sufficient if the circumstances are consistent with the crime, even though they also may be consistent with innocence. 52A C. J. S., Larceny, § 129 (5), p. 656. In Andersen v. State, 141 Neb. 306, 3 N. W. 2d 447, this court held that larceny corpus delicti may be proved by evidence that property has been taken and removed without the owner's knowledge or consent. Here, of course, identification of the allegedly stolen property and the tracing thereof to the defendant aids in the proof of the corpus delicti, even though on the issue of the sufficiency of the evidence it is generally held that it is not required that the stolen property be recovered or, if recovered, that it be positively identified as the stolen property. See 52A C. J. S., Larceny, § 129 (5), p. 656.

Here in addition to the proof that the motor was stolen from the Harris warehouse, there is further unimpeached evidence that during the period in which the theft occurred the defendant had free access to the caged enclosure where the missing motor had been housed, and there is further evidence that, on the date alleged in the complaint, the defendant sold a motor of the exact description of the missing Harris motor. We do not hesitate in coming to the conclusion that the circumstantial evidence supporting the verdict of guilty and the establishment of the corpus delicti were sufficient.

As we have pointed out the evidence is sufficient to warrant the jury finding that the defendant was in possession of the motor and delivered it to the auction house. The defendant's explanation of his possession of the property was an unsatisfactory one and was a proper circumstance for the jury to take into consideration in connection with all of the other circumstances in the determination of guilt. We have recently said in a burglary conviction that the possession of recently stolen

property when coupled with a lack of a satisfactory explanation, or a false explanation, or other incriminating circumstances or conduct, is sufficient to support a verdict of guilty. State v. Solano, 181 Neb. 716, 150 N. W. 2d 585. See, also, State v. Thomas, 121 Utah 639, 244 P. 2d 653; State v. Ebel, 92 Mont. 413, 15 P. 2d 233; 12 C. J. S., Burglary, § 59, p. 736.

The next contention of the defendant is that the motor sold by the defendant was improperly admitted into evidence. The evidence positively establishes that a Dayton 1-horse power electric motor, model 4K996, disappeared from the warehouse between November 1967 and April 1968 during the period of time that the defendant was an employee of Harris and had free access to the enclosure where the missing motor was last known to be. The witness, Armstrong, a clerk for the auction house testified that the defendant on the date alleged in the complaint, consigned a motor to the auction house for sale and that such motor was thereafter purchased by Truman Garber. We think the proper rule under these circumstances is that in order to make evidence of possession admissible the identity of the property need not be *absolutely established.* It ordinarily is sufficient if the property found in the possession of the accused or shown to have been disposed of by him is of the same character and appearance as that stolen, and such circumstantial evidence with respect thereto is admissible. 52A Larceny, § 126(a), p. 630. In State v. Allen, 183 Neb. 831, 164 N. W. 2d 662, the victim of a robbery testified that there was taken from him a cigarette lighter, a partial roll of mints, and approximately $5 in cash consisting of currency and coins. He could not positively identify certain of the State's exhibits as being his lighter, mints, and money, except that they were of the same type or description. This court found that these exhibits were admissible in evidence and that the argument of the defendant only went to the credibility and weight of this testimony and not to its admis-

sibility. Here, we note that the motor was identified as a Dayton 1-horse power electric motor, that it was model 4K996, and that the motor that Truman Garber purchased had a bent base on it, the same as appeared in visual inspection of exhibit 7. We come to the conclusion that exhibit 7, being the motor consigned for sale to the auction house, was properly admissible in evidence and sufficient for the jury to consider in the determination of the guilt or the innocence of the defendant.

Other errors are assigned but not argued in the brief. We have examined them and found them to be without merit.

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

AFFIRMED.

BOSLAUGH, SPENCER, and MCCOWN, JJ., dissenting.

The corpus delicti may be proved by circumstantial evidence, but it must be established by evidence beyond a reasonable doubt to sustain a conviction. MacAvoy v. State, 144 Neb. 827, 15 N. W. 2d 45. To justify a conviction on circumstantial evidence it is necessary that the facts and circumstances essential to the conclusion sought be proved beyond a reasonable doubt and, when taken together, be inconsistent with any reasonable hypothesis of innocence. State v. Williams, 183 Neb. 257, 159 N. W. 2d 549. If the facts and circumstances proved are consistent with innocence, the evidence is not sufficient to sustain a conviction.

CARTER, J., concurring.

The dissent filed in this case purports to incorrectly apply a rule of law that is too often misunderstood. It should not be permitted to stand unchallenged.

It is true, of course, that a crime may be proved by circumstantial evidence. It is the rule that in instructing a jury in such a case, the jury must be informed that in order to convict it must find that the circumstantial evidence is of such character that the facts when taken together must be consistent with each other

and with the conclusion sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence. NJI 14.50, p. 318. The rule is one for the guidance of the jury only in considering circumstantial evidence in a criminal case.

But on review after conviction, in a circumstantial evidence case, the only question on appeal in determining the sufficiency of the evidence is whether there is evidence in the record which, if believed by the jury, is sufficient to sustain a finding of guilt beyond a reasonable doubt. Such rule is usually stated as follows: After a jury has considered the evidence in the light of this rule and returned a verdict of guilty the verdict on review may not, as a matter of law for insufficiency of evidence, be set aside if the evidence sustains some rational theory of guilt. Hoffman v. State, 162 Neb. 806, 77 N. W. 2d 592; State v. Ohler, 178 Neb. 596, 134 N. W. 2d 265; State v. Williams, 183 Neb. 257, 159 N. W. W. 2d 549; State v. Reeder, 183 Neb. 425, 160 N. W. 2d 753.

If this were not the rule, this court would be reviewing the evidentiary test given to the jury in a circumstantial evidence case by weighing the evidence and determining the credibility of the witnesses. This is a jury function and not that of this court. I submit that the dissenting opinion is completely in error and in no way detracts from the correctness of the court's opinion.

WHITE, C. J., SMITH, and NEWTON, JJ., join in this concurrence.

IN RE INTEREST OF STEPHEN JEFFREY MOORE, A CHILD UNDER EIGHTEEN YEARS OF AGE.

180 N. W. 2d 917

Filed November 6, 1970. No. 37453.

1. **Damages: Evidence.** Knowledge that an accident has occurred

and that personal injuries have been inflicted may be established by circumstantial evidence.

2. **Juvenile Courts: Actions.** An action in a juvenile court may be dismissed by the county attorney at any time prior to trial without leave of court.

Appeal from the separate juvenile court of Douglas County: SEWARD L. HART, Judge. Reversed and remanded with directions to dismiss.

Kneifl, Kneifl & Byrne and Terrence J. Ferguson, for Moore.

Donald L. Knowles and Colleen R. Buckley, for Gordon E. Doeschot.

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

NEWTON, J.

Stephen Jeffrey Moore, a minor 13 years of age, was charged in separate juvenile court with being a delinquent or a child in need of special supervision. He was found by the court to be a child in need of special supervision and was placed on probation. The basis of the charge was an alleged violation of section 39-762, R. R. S. 1943. We reverse the judgment of the separate juvenile court.

The evidence indicates that on March 31, 1969, 7-year old Vicki Mulligan was attending Mary Our Queen School in Omaha, Nebraska, and was playing in the parking lot on the school grounds when she was struck by, or ran into, a mini motor-bike operated by Stephen Jeffrey Moore. A passenger on the bike fell off when the accident occurred and as soon as he got back on, Stephen drove off. Vicki was knocked 4 or 5 feet from the point of contact, fell down, lost one shoe, and sustained a compound fracture of one leg.

Error is assigned on the ground that the state failed to show Stephen had knowledge of the accident and injury to Vicki. Stephen admits he knew he struck

Vicki and knocked her down. It is apparent he had knowledge of the accident and the circumstantial evidence is sufficient to require a finding that he had knowledge an injury had been inflicted. In cases of this nature, knowledge may be proved by circumstantial evidence. See State v. Snell, 177 Neb. 396, 128 N. W. 2d 823.

Section 43-201, R. R. S. 1943, defines a delinquent child as one who has violated a municipal ordinance or state law. It is contended that the petition is defective in failing to include an essential element of the offense of unlawfully leaving the scene of an accident. This contention is rendered immaterial as the separate juvenile court did not find Stephen to be a delinquent child. It did find he was a child in need of special supervision on the basis set out in subsection (5) (c) of the statute. He had deported himself in such a manner as to injure and seriously endanger the health of others.

The petition contained two counts. Count I was dismissed by the court. It is asserted that the motion of the county attorney to dismiss Count II, made prior to trial, must be honored and that the separate juvenile court was without authority to overrule the motion. Such proceedings in a juvenile court have been denominated quasi-criminal in character but are generally considered to be civil actions and were unknown at common law. Statutes regulating the juvenile courts do not encompass the question presented. At common law, a criminal action could be dismissed by the prosecuting attorney, without leave of court, at any time before a jury was impaneled. See 22A C. J. S., Criminal Law, § 457c, p. 5. This rule has not been altered by statute in Nebraska. By statute, civil actions may be dismissed without leave of court at any time before final submission of the cause. See, § 25-601, R. R. S. 1943; Giesler v. City of Omaha, 175 Neb. 706, 123 N. W. 2d 650. At common law, a plaintiff had a similar right to dismiss without leave of court at any time prior to trial. See

27 C. J. S., Dismissal & Nonsuit, § 18a, p. 338. Whether a juvenile court action be regarded as quasi-criminal or civil in nature in the absence of a special statute to the contrary, it appears that the county attorney, when not disqualified, may dismiss the action without leave of court. This being true, it follows that the dismissal of Count II by the county attorney was final and Count I, having been dismissed by the court, the case has been finally concluded.

The judgment of the separate juvenile court is reversed and the cause dismissed.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

SPENCER and BOSLAUGH, JJ., dissenting.

We have here the anomalous situation of the county attorney urging the affirmance of the separate juvenile court order finding the appellant a child in need of special supervision, and also in his brief asserting herein the refusal of the separate juvenile court to sustain his motion to dismiss at the time of the trial.

We concede that in all other cases the county attorney ordinarily has the right to dismiss a petition at any time before final submission, but that is not true in the juvenile court. Under our law a county attorney in the first instance has the choice of processing a juvenile through the juvenile court or through the criminal courts. Fugate v. Ronin, 167 Neb. 70, 91 N. W. 2d 240. When he files a petition in the juvenile court, he has made that choice, because the juvenile court acquires jurisdiction upon the filing of a petition and the service of process, and this jurisdiction is continued until the court voluntarily relinquishes it. The child becomes a ward of the court as soon as the court takes jurisdiction, and it is the court which will determine what is for the best interests and welfare of the child. Stewart v. McCauley, 178 Neb. 412, 133 N. W. 2d 921.

We should remember that the juvenile court is a product of the solicitude of the law for the welfare of

infants. Its powers and duties are prescribed more or less in detail in our statutes, and because of their humanitarian and beneficient purpose they should be liberally construed to the end that their manifest purpose may be effectuated to the fullest extent compatible with their terms. To sustain the position of the majority in this case would mean that the county attorney, after he has filed a juvenile proceeding, could dismiss the proceeding at any time before final submission, and refile the proceeding in the criminal court. This to us violates the intent and purpose of the Juvenile Court Act and should never be permitted. After the county attorney has once made his choice, that choice should be final.

STATE OF NEBRASKA, APPELLEE, V. WARDELL MOORE, APPELLANT.
180 N. W. 2d 888

Filed November 6, 1970. No. 37486.

1. **Criminal Law: Appeal and Error.** Section 29-2306, R. R. S. 1943, provides specifically in criminal cases that the Supreme Court shall have jurisdiction of the case when a notice of appeal is filed with the clerk of the district court.
2. **Criminal Law: Sentences: Judgments.** A motion in arrest of judgment must be made and disposed of after verdict and before the court pronounces final judgment and sentence, and where the motion is made after judgment and sentence, it is void in the absence of an order vacating the judgment and sentence.

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

Herbert J. Friedman, 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 criminal action the defendant entered a plea of guilty to the crime charged in the information, assaulting and resisting a law enforcement officer in violation of section 28-729.01, R. S. Supp., 1967. He was sentenced by the district court for Lancaster County, Nebraska, to be confined in the Nebraska Penal and Correctional Complex for a period of 1 year. The defendant filed a notice of appeal and an affidavit of poverty in the district court for Lancaster County on November 6, 1969, and on November 10, 1969, his poverty affidavit was filed in this court. During the period of the pendency of the appeal in this court, and precisely during the period of time in which this court had extended the defendant's brief date to May 5, 1970, the defendant filed a motion for the arrest of the judgment and sentence in the district court for Lancaster County, Nebraska. The district court overruled this motion in arrest of judgment. His complaint made in his brief filed in this court now is that there was error in the overruling of the motion for arrest of judgment filed in the district court on April 21, 1970.

Jurisdiction of this case was vested in the Supreme Court of the State of Nebraska on November 6, 1969, under the precise terms of section 29-2306, R. R. S. 1943. Consequently, the district court for Lancaster County, Nebraska, had no jurisdiction while this appeal was pending in this court to entertain or enter any order with reference to the defendant's motion in arrest of judgment and sentence which he filed on April 21, 1970. The defendant's motion in arrest of judgment and the order thereon was void ab initio and was a nullity because the total jurisdiction of the case was vested in the Supreme Court of the State of Nebraska.

It further appears that a motion in arrest of judgment must be made and disposed of after verdict and before the court pronounces final judgment and sentence, and that where the motion is made after judgment and

sentence, it is void in the absence of an order vacating the judgment and sentence. See, Smith v. State, 68 Neb. 204, 94 N. W. 106; 24 C. J. S., Criminal Law, § 1547, p. 373.

The bill of exceptions in this case contains only the proceedings occurring on the defendant's plea of guilty in the district court for Lancaster County, Nebraska. No complaint is made as to error or the deprivation of constitutional rights in the reception of the plea of guilty or the legality of the judgment and sentence thereon. The matters complained of are extrinsic to this record and appear to be asserted in connection with filing of the motion in arrest of judgment.

An examination of the information filed herein reveals that the information charged all of the facts and the elements to constitute the offense described in the statute. The information is sufficient. Leisenberg v. State, 60 Neb. 628, 84 N. W. 6; Hans v. State, 147 Neb. 67, 22 N. W. 2d 385.

The judgment of the district court for Lancaster County is correct and is affirmed.

AFFIRMED.

HAVELOCK MEATS, INC., A CORPORATION, APPELLANT, V. C. MARVIN ROBERTS, APPELLEE.

180 N. W. 2d 875

Filed November 6, 1970. No. 37494.

1. **Pleadings: Courts.** The provisions of section 26-1,104.01, R. S. Supp., 1969, dealing with the certificate or proof of service of a notice of appeal from the municipal court to the district court are not mandatory and jurisdictional, but directory only. Defective proof of service may be corrected or amended with the permission of the court.
2. **Partnerships: Estoppel.** Under the doctrine of partnership by estoppel, it is essential to the cause of action that the party asserting liability against a nonpartner must have been induced

by misleading appearances to change his position to his detriment.

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

Krause & Howland, for appellant.

Herbert M. Brugh and Barney & Carter, for appellee.

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

McCOWN, J.

This was an action to recover the value of meat products sold and delivered. At the conclusion of the plaintiff's evidence, a motion to dismiss was sustained.

In the fall of 1964, this action was originally filed in the municipal court of Lincoln against Marvin Roberts and Alfred Hanna, defendants. It involved meat delivered to the Town and Country Restaurant in Lincoln, Nebraska, from May 20, 1964, through August 15, 1964.

No service was ever obtained upon the defendant Hanna. On February 20, 1968, judgment was entered in favor of the plaintiff and against the defendant Marvin Roberts. Roberts appealed to the district court. The plaintiff filed a special appearance objecting to the jurisdiction of the district court on appeal. That was overruled. Pleadings on appeal were then filed and the matter proceeded to trial in the district court.

The petition on appeal alleged that the defendant, Marvin Roberts, was the owner of the Town and Country Restaurant. It also alleged that the defendant, Alfred Hanna, was the manager of the restaurant at the relevant times and "was the employee and/or agent or partner of the said Marvin Roberts at all times herein relevant."

The evidence established that C. Marvin Roberts was the owner of a restaurant building located at 3045 Adams Street in Lincoln, Nebraska, which was designated as the Town and Country Restaurant. Roberts had ope-

rated a restaurant on the premises in partnership with his wife from 1958 to December 31, 1963. It was then closed, and remained closed until reopened by Hanna. At no time during the operation of the restaurant by Roberts and his wife, or thereafter, had they ever done any business with the plaintiff. Plaintiff's president testified that the first time he had ever talked to Roberts was in the summer of 1963. At that time he solicited Roberts' business, but Roberts refused to deal with him.

In early February 1964, the defendant Hanna came to Roberts and represented himself as being a chef and restaurant operator. Roberts had never met or known Hanna before. They made an oral agreement under which Roberts rented the building and equipment to Hanna as Hanna's sole operation. The rental was on a percentage basis of the gross receipts. Roberts went with Hanna to the bank and withdrew Roberts' Town and Country Restaurant checking account. Hanna opened an account in his name with the same bank. Roberts also went with Hanna to the electric company, the telephone company, the gas company, and major supply services to have the services changed to Hanna's name and taken out of Roberts' name. Thereafter Hanna reopened the restaurant sometime in February 1964.

The sign "Town and Country Restaurant," with the word "Roberts" on the sign, remained. The sign was and had always been owned by Nebraska Neon Company and leased by Roberts Dairy. That company furnished the sign to the defendant C. Marvin Roberts. He never bought the sign, but had purchased dairy products from Roberts Dairy when he was operating the restaurant business. C. Marvin Roberts obtained a bottle club license for the premises in 1963, which was used during the time of his operation. The license was not in use in 1964, although it had been renewed for one year in April 1964. It was surrendered to the State Liquor Commission sometime in August 1964.

The president of the plaintiff corporation called on

Hanna at the restaurant for the first time in May 1964. At that time, he made the agreement to sell meat. Thereafter orders were made by telephone and there was no identification of persons. Billing was to "Town and Country." On August 12, 1964, Hanna apparently absconded. A day or two later, Roberts reentered the property to close down the operation.

At the conclusion of plaintiff's evidence, the district court sustained a motion to dismiss. The basis for the motion was that plaintiff had failed to prove a cause of action against the defendant, C. Marvin Roberts, and there was no evidence from which his liability could be established.

We are met at the threshold by a preliminary procedural issue. The plaintiff asserts that the original appeal from the municipal court to the district court was defective, and that the district court obtained no jurisdiction of this cause. The basis for this contention is that the certificate of service of the notice of appeal was not verified under oath.

The notice of appeal was filed and served on the plaintiff within the statutory time. Certificate of that service was also filed in time. Thereafter, leave was granted to file an amended certificate of service. The timely filing and service of a notice of appeal are mandatory requirements under similar statutes. See Radil v. State, 182 Neb. 291, 154 N. W. 2d 466.

Where an appellant has complied with those requirements, the filing of a defective affidavit of service does not defeat the appeal. With respect to the specific appeal statute involved here, this court said: "The purpose of the legislation has been accomplished by the giving of such notice as the statute requires. The proof of the service of such notice is incidental only to the accomplishment of the purpose of the statute, is directory only, and may be relied on only when the failure to file results in prejudice to the adverse party." Sim-

mons v. Mutual Benefit Health & Acc. Assn., 183 Neb. 175, 159 N. W. 2d 197.

All jurisdictional requirements here were fully complied with within the time specified. The provisions of section 26-1,104.01, R. S. Supp., 1969, dealing with the certificate or proof of service of a notice of appeal, are not mandatory and jurisdictional, but directory only. Defective proof of service may be corrected or amended with the permission of the court.

The allegations in plaintiff's petition set out the basis of liability against the defendant Roberts. The petition alleges that Roberts is the owner of the Town and Country Restaurant. It alleges that at all relevant times, the defendant Hanna was the manager of the restaurant and was the employee or agent or partner of defendant Roberts.

The evidence establishes without contradiction that the defendant Roberts was the owner and lessor of the restaurant premises and defendant Hanna was the lessee. It also establishes that, in actuality, the defendant Hanna was not the employee or agent or partner of the defendant Roberts. The evidence wholly failed to show that the defendant Roberts participated in any way in the operation of the restaurant or in the making or performance of the contract during any of the time involved. His role was that of landlord, and occasional customer.

There is no allegation of any ostensible agency or partnership or reliance thereon. Even if it be assumed that some theory of ostensible partnership and agency had been pleaded, there is still a failure of proof. Section 67-307, R. R. S. 1943, subsection (1) provides: "Except as provided by section 67-316, persons who are not partners as to each other are not partners as to third persons."

Section 67-316, R. R. S. 1943, is essentially section 16 of the Uniform Partnership Act. It incorporates the principle of partnership by estoppel. That section pro-

vides in part: "(1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, *on the faith of such representation,* given credit to the actual or apparent partnership, * * *

"(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation." (Emphasis ours.)

There is no evidence in this record that either Roberts or Hanna ever represented to the plaintiff that Hanna was an employee, agent, or partner of Roberts, much less any evidence that plaintiff relied upon any representation of any kind implying any such relationship.

Under the doctrine of partnership by estoppel, it is essential to the cause of action that the party asserting liability against a nonpartner must have been induced by misleading appearances to change his position to his detriment. See, Wisconsin Telephone Co. v. Lehmann, 274 Wis. 331, 80 N. W. 2d 267; 40 Am. Jur., Partnership, § 76, p. 182.

There is no evidence in the record here that the plaintiff did anything it would not have done, or refrained from doing anything that it otherwise would have done, had it known the true facts relative to the relationship between Roberts and Hanna. If the plaintiff was seeking to hold defendant Roberts liable by estoppel, it had the burden of proving the elements of estoppel.

The action of the trial court in dismissing plaintiff's petition was correct and is affirmed.

AFFIRMED.

CENTRAL MARKETS WEST, INC., A CORPORATION, ET AL., APPELLEES, V. STATE OF NEBRASKA ET AL., APPELLANTS.

180 N. W. 2d 880

Filed November 6, 1970. No. 37524.

1. **Constitutional Law.** The balance between due process and the police power is more or less unstable, as it must necessarily keep pace with the economic and social orders. As the exercise of the police power increases to meet new conditions, the protection of the due process clauses must necessarily recede to a corresponding degree.
2. **Constitutional Law: Statutes.** The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals, and generally for the public welfare.
3. ———: ———. Statutes which are reasonably designed to protect the health, morals, and general welfare do not violate the Constitution where the statute operates uniformly on all within a class which is reasonable.
4. ———: ———. It is not the province of this court to annul a legislative act unless the act clearly contravenes the Constitution and no other resort remains.
5. ———: ———. It is the duty of the Legislature to use its judgment in exercising police powers of the state. The presumption is that any such law enacted by it is constitutional and it is only when the courts determine that an enacted law invades personal and property rights protected by the Constitution that it will not be sustained.
6. ———: ———. The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences in situations and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated.
7. **Constitutional Law: Statutes: Intoxicating Liquors.** Section 53-168, R. S. Supp., 1969, is not in violation of either section 3 or section 25, Article I, of the Constitution of Nebraska, but on the contrary is a reasonable and valid exercise of the police power.

Appeal from the district court for Lancaster County:

ELMER M. SCHEELE, Judge. Reversed and remanded with directions.

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

Healey, Healey, Brown & Burchard, for appellees.

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

NEWTON, J.

This action has been brought by two retailers of alcoholic liquors to enjoin the enforcement of section 53-168, R. S. Supp., 1969, and to have declared unconstitutional provisions prohibiting wholesalers from giving discounts for quantity purchases to retailers. The district court granted the relief prayed. We reverse the judgment of that court.

Plaintiffs assert the statute violates Article I, sections 3 and 25, Constitution of Nebraska. Section 3 provides that: "No person shall be deprived of * * * property, without due process of law." Section 25 provides in part: "There shall be no discrimination between citizens of the United States in respect to the acquisition, ownership, possession, enjoyment or descent of property."

The conflict between the police power and constitutional provisions is pointed out in Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729, wherein it is stated: "The balance between due process and the police power is * * * more or less unstable, as it must necessarily keep pace with the economic and social orders. As the exercise of the police power increases to meet new conditions, the protection of the due process clauses must necessarily recede to a corresponding degree."

"The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals, and gen-

erally for the public welfare." State v. Geest, 118 Neb. 562, 225 N. W. 709. The extent to which the Legislature may go in the exercise of the police power is primarily a matter of legislative judgment, but the purpose of the regulatory measure must be legitimate and the means employed to effect it must be reasonable. See State ex rel. Baldwin v. Strain, 152 Neb. 763, 42 N. W. 2d 796. "Statutes which are reasonably designed to protect the health, morals, and general welfare do not violate the Constitution where the statute operates uniformly on all within a class which is reasonable." State ex rel. Meyer v. Knutson, 178 Neb. 375, 133 N. W. 2d 577.

It is conceded that the liquor industry is one in which the public has a sufficient interest to warrant regulation under the police power. This leaves but one question: Is the statutory regulation a reasonable one in view of its purposes and effect? As noted, the statute simply forbids wholesalers to give, and retailers to accept, rebates or discounts. It is not a price-fixing statute. Both the wholesaler and the retailer remain free to set their own prices and may even sell below cost if they so desire. The statute simply prevents the wholesaler from preferring one retailer over another. Competition between wholesalers and between retailers is retained, but one retailer cannot secure an advantage over another.

The degree to which a particular industry or occupation may be subject to regulation is determined by its nature and the extent to which the public is interested in it due to the necessity of protecting the public safety, health, morals, and welfare. Throughout our history, the liquor industry has been regarded as one warranting what may well be regarded as stringent regulation. In this country it was completely barred for a time by the adoption of the Eighteenth Amendment to the Constitution of the United States. Prohibition proving impractical, it was repealed and ever since, the liquor industry has been closely supervised. Some states retained

prohibition, some installed state-operated liquor stores, and some, as in Nebraska, threw it open to private operation under extensive regulation. It is evident that this industry is regarded as more susceptible to regulation, and to regulation in a greater degree, under the police power than almost any other.

There are two states which have rendered decisions cited as sustaining plaintiffs' contention that the statute is void as an unreasonable and, consequently, unconstitutional exercise of the police power. See, Scarborough v. Webb's Cut Rate Drug Co., Inc., on rehearing, 150 Fla. 772, 8 So. 2d 920; Schwegmann Bros. v. Louisiana Board of Alcoholic Beverage Control, 216 La. 148, 43 So. 2d 248. These cases are not here in point as they dealt with statutes requiring minimum markups over cost and were to that extent price-fixing statutes. The Nebraska statute still permits sales at, above, or below cost, at prices to be set by dealers under competitive conditions. The validity of price fixing is not before us and we do not pass on that question, but it may be well to point out that it has been sustained in several states. See, Pompei Winery, Inc. v. Board of Liquor Control, 167 Ohio St. 61, 146 N. E. 2d 430; Supreme Malt Products Co., Inc. v. Alcoholic Beverages Control Commission, 334 Mass. 59, 133 N. E. 2d 775; Duff v. Trenton Beverage Co., 4 N. J. 595, 73 A. 2d 578; Schwartz v. Kelly, 140 Conn. 176, 99 A. 2d 89; Gipson v. Morley, 217 Ark. 560, 233 S. W. 2d 79; Reeves v. Simons, 289 Ky. 793, 160 S. W. 2d 149.

This court has repeatedly stated that it is not its province to annul a legislative act unless the act clearly contravenes the Constitution and no other resort remains. See Wilson v. Marsh, 162 Neb. 237, 75 N. W. 2d 723. "It is the duty of the legislature to use its judgment in exercising police powers of the state. The presumption is that any such law enacted by it is constitutional and it is only when the courts determine that an enacted law invades personal and property rights protected by the constitution that it will not be sus-

tained." Thorin v. Burke, 146 Neb. 94, 18 N. W. 2d 664.

"The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences in situations and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated." Creigh v. Larsen, 171 Neb. 317, 106 N. W. 2d 187. Since the law applies equally to all wholesalers and retailers of alcoholic liquors, it is evident that it is not discriminatory. As we have heretofore observed, the liquor industry is of sufficient public interest to justify the exercise of the police power and consequent regulation. The fact that traffic in other items of commerce is not of great public interest and consequently remains unregulated is not indicatory of an unreasonable classification.

Plaintiffs insist that the statute restricts bargaining between retailer and wholesaler by denying discounts for volume purchases. The factual basis for this statement is doubtful. In ordinary commercial transactions, prices are quoted on a volume basis and it is not a matter of bargaining but of simply ordering in volume. It is also contended that the law is invalid because it places the small retailer on an equal footing with the large retailers. This is not necessarily true as a retailer doing a large volume of business is frequently able to profitably deal on a smaller margin.

In Ralphs Grocery Co. v. Reimel, 70 Cal. Rptr. 407, 444 P. 2d 79, the court dealt with a similar regulation proscribing quantity discounts and stated: "We see nothing arbitrary or capricious in the department's conclusion that rule 105 (a) promotes the sale of fresh beer and aids in preserving small retailers and manufacturers and, in the long run, fosters competition." In the case of Oklahoma Alcoholic Bev. Con. Bd. v. Central Liquor

Co. (Okla.), 421 P. 2d 244, the Oklahoma court dealt with a statute similar to the one before us. The court, in upholding the validity of the statute, stated: " 'The control of liquor traffic is a complicated and difficult task. The Legislature should be accorded considerable discretion as to the method employed in providing the necessary control and supervision required.' "

The Nebraska liquor laws provide for the licensing of all liquor dealers. All retail liquor dealers are assessed license fees at identical rates regardless of the size or volume of their business. The income derived from the license fees constitutes a material increment to public funds. It is apparent that if the practice of granting volume discounts were permitted unchecked, the dealers able to buy in large volumes could consistently and materially undersell smaller competitors and, in the course of time, completely destroy or render unprofitable their businesses. This would tend to establish monopolies in the hands of a relatively few large dealers and would have a material effect on licensing income. It would also, when small dealers were being forced out of business, tend toward sales in more unwholesome surroundings and to bring about law violations occasioned by their desperate attempts to stay in business. Distributors are commonly forbidden to acquire interests in, make gifts or loans to, or extend credit to retail establishments. This is for the purpose of preventing the so-called "tied house." The granting of discounts to preferred customers tends to circumvent these precautions.

Plaintiffs rely strongly on the case of Terry Carpenter, Inc. v. Nebraska Liquor Control Com., 175 Neb. 26, 120 N. W. 2d 374. The case dealt with a rule promulgated by the Commission. It was held that the rule was promulgated without legislative authority and if authorized, would have constituted an unlawful delegation of legislative authority to the Commission. The rule required distributors to file their prices with the Commission, fixed the amount of permissible discounts, and

froze prices until changed on application to and with the consent of the Commission. It was held to be a price-fixing rule and an invalid exercise of the police power. It is neither in point nor controlling under the circumstances here presented.

We conclude that plaintiffs have not successfully overcome the presumption of constitutionality. They have not shown that the statute clearly contravenes a constitutional principle. On the contrary, it appears that the Legislature has not acted arbitrarily, capriciously, or in an unreasonable manner. There are sound reasons for prohibiting discounts and we are not at liberty to substitute our judgment as to the advisability of such action for that of the Legislature. It would indeed be ironical if a legislative body with authority to completely do away with a certain type of business were found to be lacking in authority to promulgate reasonable regulations for its control. We conclude that the passage of section 53-168, R. S. Supp., 1969, constitutes a reasonable exercise of the police power and is not a violation of the due process clause of the Constitution of Nebraska.

The judgment of the district court is reversed and the cause remanded with directions to set aside the injunction granted and to enter judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

McCOWN, SPENCER, and BOSLAUGH, JJ., dissenting.

The real issue here is whether a statute prohibiting the giving or receiving of any discount of any kind between a liquor wholesaler and a retailer is reasonable or arbitrary.

The state could completely prohibit the sale of alcoholic liquors if it wished. It is also true that the liquor business, if permitted, is constitutionally subject to regulation more strict than an ordinary lawful business. This certainly does not mean that if a law "applies equally to all wholesalers and retailers of alcoholic

liquors, it is evident that it is not discriminatory." If that be true, there is no constitutional protection for anyone engaged in the legal liquor business.

When the liquor business is lawful, as it now is, the regulations provided therefor must be pursuant to a legitimate exercise of the state's police power, which precludes regulation that is arbitrary and discriminatory. See, Shoot v. Illinois Liquor Control Commission, 30 Ill. 2d 570, 198 N. E. 2d 497; 1 Davis, Administrative Law Treatise, § 7.12, p. 456 (1958).

The basic determination which must be made is whether the statute or regulation "'* * * is really designed to accomplish a purpose properly falling within the scope of the police power. * * * In every case it must appear that the means adopted are reasonably necessary and appropriate for the accomplishment of a legitimate object within the domain of the police power. A statute to be within this power must also be reasonable in its operation upon the persons whom it affects, must not be for the annoyance of a particular class, and must not be unduly oppressive. * * * In order to sustain legislative interference by virtue of the police power, either by a statute or a municipal ordinance, it is necessary that the act should have some reasonable relation to such objects, or, for more specific examples, to the public welfare or public health. Moreover, the law must tend toward the accomplishment or promotion of such purposes in a degree that is perceptible and clear, either in preventing some offense or manifest evil or in furthering some such object.'" Reynolds v. Louisiana Board of Alcoholic Bev. Con., on rehearing, 249 La. 170, 185 So. 2d 810.

Statutes or regulations dealing with liquor pricing, including quantity discounts, ordinarily are supported only on grounds that higher prices tend to promote temperance or tend to eliminate price wars and ruinous competition. The statute involved here clearly cannot be justified under either ground. There is nothing

which regulates the setting or the amount of wholesale prices, and the statute does not even purport to deal with retail prices. It simply prohibits any discounts, rebates, and inducements of any kind by a wholesaler to a retailer. Neither is the statutory regulation directed at the elimination of discriminatory discounts or rebates, but, instead, it is directed at all discounts, whether justified or not and regardless of whether the discounts are offered to all dealers under the same terms and conditions.

The legislative history of this act, as well as the language, make it glaringly apparent that the purpose of the statute was "to protect the little retailer from the volume dealer * * * by nullifying the natural competitive advantage of volume sales." See Terry Carpenter, Inc. v. Nebraska Liquor Control Com., 175 Neb. 26, 120 N. W. 2d 374. That protection is at the expense of the consuming public. The record establishes that fact without contradiction.

The statute concededly will redistribute sales to retail dealers, by destroying the natural competitive advantage of volume purchasing. The majority opinion speculates as to the economic problems of small dealers which might possibly result from the absence of the no-discount statute. If those fears had any validity, it would have become apparent long ago. There is already a 35-year history of the operation of the legal liquor industry in Nebraska under quantity discounts without any evidence of economic disaster. In fact, the Chairman of the Liquor Commission acknowledged that the number of liquor retailers has not decreased.

Article XV, section 9, Constitution of Nebraska, specifically gives the Legislature the power to enact laws "for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare." Chapter 59, R. R. S. 1943, currently condemns price fixing, price control, and price discrimination in general. Neither the Legislature nor the Liquor Control Commission needed any other authority

to outlaw discriminatory discounts not allowed to all retail liquor dealers on the same terms and conditions. That constitutional provision and those statutory provisions did not authorize the legislative declaration that anyone offering or receiving a discount of any kind for any reason is conclusively presumed to do so for an illegal but undefined purpose. This is true even though the business be the liquor business.

The trial court specifically found: "The law includes all forms of price variations among customers without regard to whether or not those variations reflect a legitimate differential in cost to the seller * * *. The law is so broad that it legislates into the statute what should be reserved as an issue of fact for the courts to determine in appropriate cases. The act in effect sets up a conclusive presumption that whoever offers a price differential does so without cost or other justification and with intent to destroy competition in the liquor industry. * * *

"There is no requirement in L.B. 151 that the effect of any discrimination in price must be to tend to lessen competition, to create a monopoly or to injure, destroy or prevent competition. Instead, L.B. 151 creates a conclusive presumption that anyone offering a discount does so for some illegal although undefined purpose."

Those findings are fully supported by the evidence. This court has previously indicated its approval of the principles of constitutional protection of fair competition in business generally, and specifically as to the liquor business. See Terry Carpenter, Inc. v. Nebraska Liquor Control Com., *supra*.

A statute designed for the private welfare of one class of licensed liquor retailers, which bears no real or substantial relationship to the general health, morals, or welfare of the public is unconstitutional. At best, it arbitrarily disregards the realities of fair competition in a free enterprise system.

The judgment of the district court was correct and should have been affirmed.

BETTY BUCHANAN, APPELLANT, V. JAMES L. BUCHANAN, APPELLEE.
180 N. W. 2d 886

Filed November 6, 1970. No. 37573.

1. **Judgments.** A district court has inherent power to vacate or modify its own judgment at any time during the term at which it is rendered. Such action rests in the sound discretion of the court and, in the absence of an abuse of discretion, will not be interfered with.
2. **Divorce: Appeal and Error.** In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict and the determination of the issues depends to a reasonable extent upon the reliability of the respective witnesses, the conclusions of the trial court as to such reliability will be carefully regarded by the Supreme Court on review.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Affirmed.

John McArthur, for appellant.

Gerald J. Hallstead, for appellee.

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

NEWTON, J.

This is a divorce action. Decree of divorce was awarded to defendant, with an award of child support and alimony to plaintiff. Decree was entered on December 15, 1969, motions for new trial entered by both parties, and on January 5, 1970, the court entered an order stating consideration would be given to modification of the decree on the motion of the court and setting a time for rehearing. Hearing was had and thereafter on February 10, 1970, a modified decree was entered reducing somewhat the amount of child support and ali-

mony granted. Both the original and the modified decree were entered at the September 1969, term of court.

Plaintiff's only assignment of error challenges the authority of the court to modify the decree on its own motion. No additional evidence was taken. It appears that the court simply came to the conclusion that the original determination of the case was in some respects erroneous and, in the interests of justice, should be modified. The prevailing rules governing such a situation appear in Morgan v. Weiner, 173 Neb. 715, 114 N. W. 2d 720, and Beliveau v. Goodrich, 185 Neb. 98, 173 N. W. 2d 877. A district court has inherent power to vacate or modify its own judgment at any time during the term at which it is rendered. Such action rests in the sound discretion of the court and, in the absence of an abuse of discretion, will not be interfered with.

When, in a case tried to the court and determined on its merits, the court after entry of decree, upon due reflection, arrives at the conclusion that an erroneous or unjust decree has been entered and modifies or sets it aside, no question of an abuse of discretion can arise. The only question presented is whether the final determination is right or wrong, just or unjust, on the merits. Strictly speaking, the assignment of error does not succeed in raising the question of the correctness of the court's final determination. Yet, this appears to be the primary basis of plaintiff's argument and this being a divorce case and entitled to de novo consideration in this court, we will consider it from that standpoint. The only complaint which appears to be seriously urged is the reduction in alimony from the $16,000 allowed in the original decree to the $13,000 allowed in the final decree.

Both parties are 45 years of age. Plaintiff is a registered nurse and defendant a pharmacist. Plaintiff works 2 days a week and earns about $250 per month. Defendant's net income amounts to approximately $22,000 annually. His business valued at $35,000 to $45,000 was subject to an encumbrance of $4,950 which he was

paying at the rate of $400 per month. The home was valued at $20,000 to $21,000 and was subject to a mortgage of $11,851, with monthly payments of $83.43 exclusive of insurance and taxes in the annual sums of $62 and of $525 respectively. Other debts amounted to about $1,000. Net assets of the parties were valued by plaintiff at $60,347.57 and by defendant at $51,347.57. The final decree entered by the court awarded to plaintiff property and alimony amounting to $23,249 according to plaintiff's values and $24,249 according to defendant's values. This means that plaintiff will receive 38.5 percent or 47.2 percent of the estate, depending on whether plaintiff's or defendant's figures are adopted. The mean would be 42.8 percent.

In view of this record, the assets of the parties, their ages and earning abilities, and the respective contribution of the parties toward the breaking up of the marriage relationship, we are unable to find any abuse of discretion on the part of the trial court and on trial de novo have concluded that a fair and just division of assets was made by the trial court. In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict and the determination of the issues depends to a reasonable extent upon the reliability of the respective witnesses, the conclusions of the trial court as to such reliability will be carefully regarded by the Supreme Court on review. See Kuta v. Kuta, 180 Neb. 443, 143 N. W. 2d 751.

No error appearing in this record, the judgment of the district court is affirmed. Plaintiff's attorney is allowed $300 for his services in this court, and costs, including attorney's fee allowed, are taxed to the defendant.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DALE DEARDURFF, APPELLANT.
180 N. W. 2d 890

Filed November 6, 1970. No. 37580.

1. **Trial.** The latitude of cross-examination which is within the discretion of the court is wide.
2. **Criminal Law: Witnesses.** One to whom the complaining witness has complained may testify to the fact and nature of the complaint if the complaint was made voluntarily and without inconsistent delay.
3. **Criminal Law: Right to Counsel.** A defendant may effectively waive his right to counsel at a custodial interrogation, provided he does so voluntarily, knowingly, and intelligently.

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

Davis, Thone, Bailey, Polsky & Hansen and Keith A. McIntyre, for appellant.

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

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

SMITH, J.

Defendant appeals from his conviction for statutory rape. He contends: (1) The trial court unduly restricted cross-examination of the complaining witness; (2) testimony to her complaints was hearsay; and (3) reception of his confession in evidence after the custodial interrogating officers had ignored his demand for an attorney was erroneous.

The complaining witness, born July 17, 1955, testified to sexual intercourse with defendant, age 34, on July 5, 1969, the date of the alleged offense, and on previous occasions. Prior to July 5, she had reported his actions to her mother. The mother paid no attention. The little girl feared defendant who, in her presence, had hurt other children.

On July 11, 1969, about 3:30 p.m., a Mrs. Fisher, a close friend who employed the girl as a babysitter, asked her whether defendant had molested her. The girl answered: "Yes."

Defendant was arrested at work on July 11, 1969, at 9 p.m. Enroute to the police station, Detective Valentine of the Lincoln police department fully informed defendant of the latter's constitutional rights, including the right to counsel. Valentine then asked whether defendant would willingly do without services of a lawyer. Defendant replied that he first desired to speak to the girl's mother. Valentine informed him that the mother was also in custody and that defendant could not then see her. Defendant repeated his desire to see the mother. Valentine repeated the question concerning waiver. Defendant indicated that he did not want to talk to Valentine at that time.

Upon arrival at the station, Valentine informed defendant the latter had permission to make a phone call to a lawyer. Defendant said: ". . . he did not know a lawyer; he could not afford one; and did not want to talk with one at that time." The next conversation occurred about 5 p.m., July 12. Valentine again fully advised defendant of the latter's constitutional rights. He then asked whether defendant was willing to talk or make a statement. Defendant replied: "Yes." The written confession was given between 7:30 and 8 p.m.

The latitude of cross-examination which is within the discretion of the court is wide. See, State v. Martinez, 181 Neb. 392, 148 N. W. 2d 841 (1967); Sherrick v. State, 157 Neb. 623, 61 N. W. 2d 358 (1953). The questions to which the court sustained objections on cross-examination of the girl were unduly repetitive or argumentative. The court did not abuse its discretion.

One to whom the complaining witness has complained may testify to the fact and nature of the complaint if the complaint was made voluntarily and without inconsistent delay. Sherrick v. State, *supra*. We

reject any hard and fast rule that a complaint in form of an answer to a question is involuntary. In the circumstances of this case, especially the mother's callosity, the girl's fear of defendant, and the setting of Mrs. Fisher's question, the girl's answer was admissible in evidence.

A defendant may effectively waive his right to counsel at a custodial interrogation, provided he does so voluntarily, knowingly, and intelligently. State v. Johns, 185 Neb. 590, 177 N. W. 2d 580 (1970). We cannot catalog all situations in which waivers are effective. Substantial evidence in this case supports the trial court's finding that defendant effectively waived his right to counsel at the custodial interrogation.

The judgment is affirmed.

AFFIRMED.

IN RE CONDEMNATION BY THE STATE FIRE MARSHAL OF BUILDING LOCATED ON LOTS 985, 986, 987 AND PART OF LOT 988, ORIGINAL TOWN OF DORCHESTER, SALINE COUNTY, NEBRASKA.

STATE FIRE MARSHAL OF THE STATE OF NEBRASKA, APPELLEE, V. VILLAGE OF DORCHESTER ET AL., APPELLEES, J. FRANK LONGNECKER ET AL., INTERVENERS-APPELLANTS.

180 N. W. 2d 919

Filed November 13, 1970. No. 37497.

1. **Administrative Law: Buildings.** An order of the State Fire Marshal for the repair or demolition of a building under section 81-513, R. R. S. 1943, is an exercise of the police power of the state and must be supported by facts established by a preponderance of the evidence upon a trial in the district court.
2. ———: ———. Where the evidence does not affirmatively show that a building is beyond reasonable repair, the order of the State Fire Marshal should be in the alternative, to wit, to make needed specified repairs within a fixed period of time, or, upon failure to so do, to direct the demolition of the building.
3. ———: ———. In an appeal from a judgment enforcing an

alternative order of the State Fire Marshal to repair or demolish a building under section 81-513, R. R. S. 1943, the courts have authority to modify the repair specifications to obtain a reasonable compliance with the purpose of the act.

Appeal from the district court for Saline County: ERNEST A. HUBKA, Judge. Affirmed as modified.

Clarence C. Kunc, for interveners-appellants.

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

Bernard J. Ach, for appellees Village of Dorchester et al.

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

CARTER, J.

This is an action by the State Fire Marshal for the condemnation of a building located on Lots 985, 986, 987, and a part of 988 in Dorchester, Nebraska, which because of its dilapidated condition, has become a fire hazard and otherwise unsafe for life and property in its immediate vicinity. After a trial, the district court sustained the order of the State Fire Marshal and the owner of the building, the Village of Dorchester, was given 30 days to demolish the building or, in the alternative, to make the corrections and repairs required by the order of the State Fire Marshal, otherwise the latter was to proceed immediately thereafter to enforce his aforementioned order. An appeal was taken from the order of the district court by interveners claiming an interest in the property.

The evidence shows that the lots and buildings here involved were owned, according to the record title, by the Village of Dorchester, the village having purchased them at tax sale in 1963. Frank and Alice Longnecker were occupants of an apartment on the second floor of the building and claimed an interest in the property under an option agreement which had expired. They

intervened in this action and are the appellants on this appeal.

The proceeding was commenced by the issuance of an order by the State Fire Marshal, pursuant to section 81-513, R. R. S. 1943, to demolish the building or make the following corrections or repairs: "(1) Provide a foundation of sufficient size and strength to support the building, foundation shall be constructed of either poured concrete or solid brick masonry laid in Portland Cement Mortar. The foundation shall be placed in good firm soil. (2) Replace all rotted and deteriorated materials in the building such as rotted sills, rotted floor joists, rotted floors, rotted studdings, rotted doors and window frames, rotted ceiling rafters, rotted roof and replace all broken window glass. (3) Rewire the building to meet the Nebraska and the National Electrical Code. (4) Check and repair all loose bricks and repair the cracks that are showing in the outside walls and chimneys. (5) This building shall be cleaned of all combustible materials. (6) Lots shall be cleared of all debris and weeds." The building was neither demolished nor repaired and enforcement was sought in the district court.

The building involved is described as two 2-story store buildings and a newer and smaller building. One of the 2-story buildings was erected in 1882, the other in 1883. The 1-story building was erected within the last 4 or 5 years. The 2-story buildings stood side by side and appear to have been used as a single building. The outside walls were of brick with frame construction on the interior. The 1-story building was built on as an addition, was 10 feet high, and constructed of cement blocks. The latter building was never completed; it had no permanent roof other than rafters, at least one of which had become seriously damaged. For all practical purposes there was but a single building with a common use.

The evidence shows that the basements of the 2-story

buildings had suffered some damage from water. There was no evidence indicating that new foundations were necessary although some repairs were needed. The brick walls contained large cracks and the mortar between the bricks had sloughed away. Most of the windows were broken out and the large store windows had been sealed up with concrete blocks. Great deterioration had occurred in the floor joists, rafters, and window sills. Window casings had rotted out in many instances. The roof leaked badly and contributed greatly to the interior deterioration. The electric wiring was inadequate and a fire hazard.

The building was used primarily for storage of old printing equipment. The intervener testified that he constructed the 1-story portion under the belief that the heavy printing equipment would be moved there when he thought he had a part of the 2-story building sold during his previous period of ownership. In addition to its storage use, the 2-story portion contained much combustible waste materials which were conducive to fire.

The interveners lived in an apartment on the second floor of the old building. Frank Longnecker was 80 years of age and his wife was 77 years old and an invalid. One means of entrance existed. A second stairway had collapsed and was nonusable. The only other means of exit was through windows to the roof, then to the ground. Two coal or cob-burning stoves were used in this apartment. The evidence indicates that the apartment was a fire hazard although Frank Longnecker indicated that they were willing to assume this risk.

There was much debris around the building, including slabs of cement formerly used as steps into the building, loose brick, etc. Two sides of the building were barricaded to guard against falling debris such as bricks, glass, and window frames. Weeds and other debris have accumulated on the lots about the building.

Several photographs were offered in evidence that

were taken on the day of the trial. They are rather convincing of the dilapidated condition of this building as viewed from the outside. The testimony of the intervener, Frank Longnecker, indicates that the building is unsafe and a fire hazard. His father had been the owner of the building many years previously and his testimony appears to be based on sentiment and nostalgia rather than about the precise issues of this case.

The evidence shows that the building was in a dilapidated condition, was unsafe, and a fire hazard within the meaning of section 81-513, R. R. S. 1943. Through the passage of time and the failure to repair the building has become so dilapidated that it is no longer usable for the purpose intended. Although the evidence indicates that it would be too costly to make the necessary repairs, it is the province of the owner to do so if the owner chooses. The record title to the premises is in the Village of Dorchester which has not appealed from the order of the district court. The interveners are occupants of the building claiming an interest in the property. By intervening in the action they have submitted themselves to the jurisdiction of the court and are in no position to claim want of notice. The claimed interest of interveners in the building is not made clear but, in any event, such issues are not material under the issues of this case.

The order issued by the State Fire Marshal is in writing, states the findings of that officer, and directs the repair of the building or its demolition. It is in conformity with section 81-515, R. R. S. 1943. Iverson v. Keith County, 152 Neb. 565, 41 N. W. 2d 858. We think the evidence is sufficient to sustain the order of the State Fire Marshal with one exception. Provision (1) of the list of repairs required by the State Fire Marshal's order, hereinbefore quoted, appears to require the construction of a new foundation for the building. The evidence does not support this portion of the order. We think this portion of the trial court's decree

should be modified to require that the foundation to the building be placed in such state of repair as to afford adequate strength and support for the building in accord with the commonly accepted practices of the building construction trade. Iverson v. Keedick, 151 Neb. 802, 39 N. W. 2d 797. With this modification of the order of the trial court, the judgment is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. FREDERICK WALKER BUSSE, APPELLANT.
181 N. W. 2d 124

Filed November 13, 1970. No. 37502.

Criminal Law: Sentences. The mere fact that an accused upon a plea of guilty receives a sentence greater than the sentence he anticipated is insufficient to render his plea involuntary or the assistance of his counsel ineffective.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Donald R. Prinz, 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.

SMITH, J.

Defendant pleaded guilty on October 7, 1969, to the offense of shooting with intent to kill, wound, or maim. On October 24, the court sentenced him to 5 to 15 years imprisonment. The victim was a police officer. Defendant had a record of four prior felony convictions. He subsequently and unsuccessfully moved for leave to withdraw his plea on grounds of involuntariness of the plea and ineffective assistance of counsel. On appeal he asserts error in denial of his motion.

Affidavits by defendant and another state that counsel "represented" or "led them to believe" that defendant would receive a 5-year sentence. The verbatim record of proceedings at arraignments of defendant for plea and sentence is filled with searching inquiry and clear statements by court and defense counsel. Defendant's acknowledgment in context leaves no room for doubt respecting voluntariness of the plea and effective assistance of counsel.

The mere fact that an accused upon a plea of guilty receives a sentence greater than the sentence he anticipated is insufficient to render his plea involuntary or the assistance of his counsel ineffective. See State v. Alvarez, 185 Neb. 557, 177 N. W. 2d 591 (1970).

The ruling on the motion was correct.

AFFIRMED.

NORLANCO, INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS, V. COUNTY OF MADISON, NEBRASKA, ET AL., APPELLEES.

181 N. W. 2d 119

Filed November 13, 1970. No. 37541.

1. **Statutes: Constitutional Law.** A court will not hold a statute unconstitutional unless it is necessary to the proper disposition of the case.
2. **Res Judicata.** The rule of res judicata is grounded, first, on a public policy and the necessity to terminate litigation and, second, the hardship on a person by being vexed more than once for the same cause.
3. ———. The conclusiveness of a prior judgment precluding subsequent litigation of the same cause of action between the same parties is much broader in its application than a determination of the questions actually involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined but also to other matters which properly could have been raised and determined and those which were necessarily adjudicated or necessarily implied in the final judgment, whether formally raised or not.

4. **Judgments.** A judgment is an adjudication of all the matters that are essential to support it and every proposition assumed or decided by the court leading up to the final conclusion and on which such conclusion is based is as effectually passed upon as the ultimate question which is finally resolved.
5. **Constitutional Law.** A constitutional question must be raised at the earliest practical opportunity to raise it in a court of competent jurisdiction.
6. **Statutes: Constitutional Law.** A statute is presumed to be constitutional and a judgment entered on an unconstitutional statute is not void, but is voidable only.
7. **Judgments: Constitutional Law.** A judgment based on an unconstitutional statute is not for that reason subject to collateral attack.
8. ———: ———. A judgment in a court of competent jurisdiction which has become final, based on a statute, is as binding on the parties as any other judgment even though such statute was subsequently declared unconstitutional.

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

Hutton, Hutton & Garden, for appellants.

Jewell, Otte & Pollock, Milton D. Ellwood, Robert E. Otte, and Thomas E. Brogan, for appellees.

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

CARTER, J.

Plaintiffs brought this action in the district court for Madison County praying for an injunction enjoining the defendants from assessing and levying municipal taxes on personalty and real estate allegedly annexed to the city of Norfolk and enjoining the collection of taxes already levied on the property of the plaintiffs on and after May 1, 1967. The trial court found that the annexation of plaintiffs' lands was valid and the taxes assessed and levied on plaintiffs' property were valid and enforceible, and dismissed the action. The plaintiffs have appealed.

On July 6, 1959, the city of Norfolk passed an ordinance annexing the property of the plaintiffs to the city

which was duly published on July 10, 1959, in a local newspaper as provided by law. On July 20, 1960, the city filed an action in the district court praying for the annexation of the property to the city of Norfolk. On February 1, 1963, the case was tried and taken under advisement by the court. On July 17, 1963, the decree of the court was filed by which the property was decreed to be annexed to the city.

On April 28, 1967, the petition in the instant case was filed. It is alleged therein that the ordinance enacted by the city of Norfolk and the decree of July 17, 1963, are null and void for the reason that the statute purporting to authorize the ordinance and decree are unconstitutional and void.

In the annexation proceeding, the statute then in effect provided that the city council may by ordinance include therein all the property contiguous or adjacent containing not more than 5 acres which has been subdivided into parcels on authority of the owners and any tract in excess of 5 acres which is entirely surrounded by land already embraced within the corporate limits of the city and such council shall have power by ordinance to compel the laying out of streets and alleys. When the city desires to annex any territory it is entitled to annex, and shall have adopted an ordinance to that effect, it may thereupon present to the district court a petition praying for the annexation of such territory together with an accurate plat of the same as prescribed in the act. Upon a finding of the existence of the facts required by the statute, a decree shall be entered accordingly and a certified copy of the decree together with a plat of the territory shall be filed and recorded in the office of the county clerk or register of deeds and from the time of filing such decree and plat the territory therein described shall be included in and become a part of the city. § 16-106, Comp. St. 1929; Laws 1929, c. 44, p. 189.

In an early case that reached this court, it was contended that the presentation of the petition for annexa-

tion to the district court as the statute provided was an attempt to transfer the legislative powers of the city council to the district court. This contention was not sustained under the statute then in existence. City of Wahoo v. Dickinson, 23 Neb. 426, 36 N. W. 813. The plaintiffs rely primarily upon Williams v. County of Buffalo, 181 Neb. 233, 147 N. W. 2d 776, where the Wahoo case was discussed but not overruled.

In 1963, the Legislature amended the 1929 act, subsequently designated as sections 16-106, 16-107, 16-109, and 16-110, R. R. S. 1943, to provide in part that an annexation ordinance duly enacted effectuating the extension of the corporate limits of the city shall be presumed legal as to territory where no appeal is taken and that any legal owner of territory annexed could appeal from the annexation ordinance to the district court, and provided the procedure for so doing. If the court found for the petitioner, a decree was to be entered accordingly and a certified copy of the decree filed in the office of the clerk of the city affected thereby. Laws 1963, c. 59, p. 249.

In Williams v. County of Buffalo, *supra*, this court held Laws 1963, c. 59, p. 249, to be unconstitutional. The basic reason for the holding of unconstitutionality is set out in the following paragraph of that opinion: "In the instant case, the appeal in effect authorizes the district court to consider 'the grounds for sustaining the ordinance and why the territory should not be eliminated from such annexation ordinance.' The statute further provides that the appeal shall be tried as a suit in equity de novo. This imposes upon the court the duty of serving as a superior legislative body when it requires the city to carry the burden of proof of showing valid reasons for annexing the property to the city. The sum and substance of the statute are that the property will be annexed if the court thinks best. The question as to whether or not the annexing of the property is a question of public policy is not in any sense

a judicial question. In attempting to submit that question to the district court by an appeal from the passage of the ordinance, the Legislature has attempted to make it the means of transferring the legislative power to the district court. As the statute now stands, the court is required to determine what facts shall exist as a basis for the annexation of the property, a purely legislative function, and must be held invalid as an attempt to impose upon the courts the performance of nonjudicial duties, and an unauthorized delegation of legislative power. We hold that L.B. 338 is unconstitutional in that it is inhibited by Article II, section 1, of the Constitution of Nebraska."

It is the contention of the plaintiffs that the statute under consideration in the Williams case is so similar that a holding of unconstitutionality is required as to the statute applicable to the annexation case here involved. But the statutes are not the same, and the one here applicable has been held constitutional in the Wahoo case while the subsequent act was held constitutionally invalid in the Williams case. We find no need to distinguish Wahoo and Williams for the reason that the case before us can be determined on nonconstitutional grounds.

At the time the annexation proceeding was commenced in 1959, the territory to be annexed included the lands involved in the injunction proceeding presently before the court belonging to Norlanco, Inc. Wheeler Lumber Bridge and Supply Company is the owner of personal property located on the lands of Norlanco, Inc. Its liability for municipal taxes assessed and levied by the city of Norfolk is dependent on the validity of the annexation of the lands of Norlanco, Inc., on which its personal property here involved is kept. The plaintiffs voluntarily paid the taxes on the annexed land in 1963, 1964, and 1965. Subsequent taxes have not been paid and an injunction is sought to bar their collection and the assessment and levy of municipal taxes thereafter.

On July 20, 1960, the city of Norfolk filed its petition in the district court alleging the adoption and publication of the annexation ordinance and praying for a decree annexing the real estate to the city. Notice was served as the statute requires. Norlanco, Inc., was served with notice and it filed its answer praying that the petition be denied. Neither Norlanco, Inc., nor any other defendant in that case, objected to the jurisdiction of the court or asserted any claim of unconstitutionality of the act under which the proceeding was commenced.

In its answer to the petition of the plaintiffs for injunctive relief in the pending litigation, the city of Norfolk alleges that there is an existing final judgment of the district court, a court of competent jurisdiction, rendered on the merits, determining the same cause of action between the parties hereto and that plaintiffs for many years last past have enjoyed the benefits of the judgment and paid taxes and assessments thereunder and are estopped to challenge the constitutionality of the annexation ordinance or the jurisdiction of the court. No reply was filed and the case will be treated as if the reply was a general denial.

It is a fundamental rule of law that a statute is presumed to be constitutional and that its constitutionality will not be considered by the court if the issue may be disposed of on other grounds. In the instant case, it is established that the city of Norfolk filed a previous suit praying for the annexation of the same territory involved in the present action. The plaintiffs in this action were made parties defendant in the former action. They filed an answer but did not question the constitutionality of the act nor the jurisdiction of the court. The judgment of the district court in the former action is final as to every issue there decided and every other issue which could have been decided in the case. This rule of res judicata is grounded on public policy and necessity to end litigation and the hardship imposed on a person by being vexed twice for the same cause.

American Province Real Estate Corp. v. Metropolitan Utilities Dist., 178 Neb. 348, 133 N. W. 2d 466.

It is plain that plaintiff, Norlanco, Inc., could have raised the constitutionality of the act in its answer to the petition in the district court praying for a decree of annexation. It did not do so and in effect waived any claimed defense subsequently on that ground. In Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N. W. 2d 626, this court said: "As to the time in which questions of constitutionality may be raised, it was said in Owen v. Mutual Benefit Health & Accident Assn., 171 Kan. 457, 233 P. 2d 706: 'A similar statement of the rule is found in 12 C. J. 785 and 11 Am. Jur. 772. Each of these general authorities cites a number of federal and state decisions. And in Yakus v. United States, 321 U. S. 414, 64 S. Ct. 660, 88 Law Ed. 834, the court had occasion to say (page 444): "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."' In Cotton v. Iowa Mut. Liability Ins. Co., 363 Mo. 400, 251 S. W. 2d 246, the court said: 'A constitutional question should be raised at the earliest practical opportunity.' (Citing authorities.) See, also, Wendlandt v. Industrial Commission, supra."

"The phase of the doctrine of res judicata precluding subsequent litigation of the same cause of action is much broader in its application than a determination of the questions involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined, but also to other matters which could properly have been raised and determined therein. The rule applies to every question relevant to and falling within the purview of the original action, in respect to matters of both claim or grounds of recovery, and defense, which could have been presented by the exercise of diligence." 46 Am. Jur., Judgments, § 417;

p. 585. See, also, American Province Real Estate Corp. v. Metropolitan Utilities Dist., *supra*.

"This application of the general rule extends to questions necessarily involved in an issue, and necessarily adjudicated, or necessarily implied in the final judgment, although no specific finding may have been made in reference thereto, and although such matters were not directly referred to in the pleadings and were not actually or formally presented. Under this rule, if the record of the former trial shows that the judgment could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties, and if a judgment necessarily presupposes certain premises, they are as conclusive as the judgment itself. Reasons for the rule are that a judgment is an adjudication on all the matters which are essential to support it, and that every proposition assumed or decided by the court leading up to the final conclusion and upon which such conclusion is based is as effectually passed upon as the ultimate question which is finally solved." 46 Am. Jur. 2d, Judgments, § 422, p. 591.

The former judgment of the district court annexing the property was necessarily based on the constitutionality of the statute authorizing such annexation and was necessary to the judgment rendered. As such, it is subject to the rule of res judicata and may not be raised again in a second action between the same parties.

A statute is presumed to be constitutional and a judgment entered on an unconstitutional statute is not absolutely void but is voidable only. "But even though an unconstitutional statute furnished the only basis for the judgment of the court, the judgment did not constitute the subject of collateral attack." Beck v. State, 196 Wis. 242, 219 N. W. 197. See, also, 49 C. J. S., Judgments, § 416, p. 820. In the case of In re Application of Newkirk, 114 Fla. 552, 154 So. 323, it is said: "Where a chancery court's jurisdiction to hear and determine an

equity cause has been once duly acquired by it through proper filing of the suit and service of process upon the parties, the fact that the relief granted by a final decree in such suit is predicated upon an unconstitutional statute that the court necessarily had the right and power to decide was constitutional in order to grant the relief prayed for and awarded, does not make the resultant final decree void, nor is such decree rendered subject to collateral attack, merely because a court of superior appellate jurisdiction has, subsequent to the rendition of such final decree, declared unconstitutional the underlying statute upon which the final decree was awarded." See, also, Local 333B, United Marine Div. v. Commonwealth, 193 Va. 773, 71 S. E. 2d 159; City of Hickman v. First Nat. Bank, 307 Ky. 702, 211 S. W. 2d 801. "The general rule is said to be that a statute declared unconstitutional is void ab initio. However, this is subject to the exception that the finality of a judgment cannot be affected thereby. We are concerned here with a judgment from which no appeal was taken, rendered before the Act was declared unconstitutional —not the mere acts of de facto officers. A fortiori, such a judgment is a final adjudication of all issues which could have been adjudicated, and is as binding on the parties thereto as any other judgment." Martin v. Ben Davis Conservancy Dist., 238 Ind. 502, 153 N. E. 2d 125.

Assuming the unconstitutionality of section 16-106, Comp. St. 1929, Laws 1929, chapter 44, page 189, the defense of res judicata is established and defeats the contentions of the plaintiffs for the reasons herein stated. In view of the conclusion which we have reached, it is not necessary to consider other assignments of error asserted by the plaintiffs. The judgment of the trial court is correct and its judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ODELL FORD, APPELLANT.
180 N. W. 2d 922

Filed November 13, 1970. No. 37557.

1. **Criminal Law: Constitutional Law: Trial.** The passage of 5 months time between arrest and trial, standing alone, does not demonstrate a violation of the constitutional guarantee of speedy trial.
2. **Criminal Law: Instructions: Trial.** If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issue from consideration of the jury, error cannot be predicated on failure to charge on some particular phase of the case unless proper instruction has been requested by the party complaining.

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

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

McCOWN, J.

Odell Ford was convicted of manslaughter in the district court for Douglas County and sentenced to 5 to 10 years in the Nebraska Penal and Correctional Complex.

The defendant raises two issues on appeal: (1) The constitutional right to a speedy trial, and (2) the instructions to the jury as to self defense.

The offense with which the defendant was charged took place on July 8, 1969. Information was filed on July 9, 1969, in the municipal court. The defendant was arraigned on July 25, 1969. Information was filed in the district court on July 30, 1969. On August 4, 1969, the public defender was appointed to represent the defendant. Trial to the jury commenced December 10, 1969, and the jury verdict was returned December 12, 1969.

The defendant contends that approximately 5 months time between arrest and trial denied him a speedy trial, where an eyewitness, endorsed by the State, died before trial. There is no showing as to what testimony the State's witness could have given if available, nor is there any showing as to when he died. There is no showing of any action by the prosecution or the defense either to expedite or delay proceedings. Neither is there any showing as to the condition of the trial docket, nor whether any exceptional circumstances necessitating any delay existed.

Under section 29-1202, R. R. S. 1943, two terms of court are fixed as the maximum period after which a prisoner held in custody is entitled to be discharged for want of a speedy trial. That time is a maximum time, and this court has the power to determine a fair and reasonable time in each particular case, even though less than that maximum. See State v. Bruns, 181 Neb. 67, 146 N. W. 2d 786.

The 5-month period involved here is within the range of time limitations in those states which currently fix specific time limits in days or months. It is close to the optimum recommendations of the President's Commission on Law Enforcement and Administration of Justice. See, also, ABA Standards Relating to Speedy Trial, § 2.1.

The United States Supreme Court has consistently held that: "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." United States v. Ewell, 383 U. S. 116, 86 S. Ct. 773, 15 L. Ed. 2d 627. The delay must not be purposeful or oppressive. The essential ingredient is orderly expedition and not mere speed. See State v. Ellis, 184 Neb. 523, 169 N. W. 2d 267. Here the total time involved was approximately 5 months from the time of arrest to the time of trial. There is no showing whatever as to any factors which affected that time span. Neither is there any showing that any

delay was purposeful or oppressive. The passage of 5 months time between arrest and trial, standing alone, does not demonstrate a violation of the constitutional guarantee of speedy trial.

The defendant also contends that the district court committed reversible error in not properly instructing the jury concerning the Nebraska law of self defense. The Court fully and thoroughly instructed the jury as to the law of self defense. Although an instruction conference was held, there was no objection to the instruction on self defense at the time of trial, nor was any other or different instruction requested. The issue is raised for the first time in this court.

The theory is that section 29-114, R. S. Supp., 1969, which became law approximately 1 month before the offense committed here, substantially changed Nebraska law as to self defense, and in some unexplained particulars made the instruction given here erroneous. It is quite apparent that the instructions given were correct under the common law prior to the passage of section 29-114, R. S. Supp., 1969. If that section should be unconstitutional, the instructions given were also concededly correct. No issue of constitutionality of section 29-114, R. S. Supp., 1969, has been raised by the defendant nor by the State. That issue is not before the court. Even at this stage of the proceedings, the defendant does not point out in what respects the instruction given was erroneous. If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issue from consideration of the jury, error cannot be predicated on failure to charge on some particular phase of the case unless proper instruction has been requested by the party complaining. See State v. Caldwell, 183 Neb. 712, 164 N. W. 2d 213.

The judgment of the district court is affirmed.

AFFIRMED.

CENTRAL SAVINGS BANK IN THE CITY OF NEW YORK, A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. FIRST CADCO CORPORATION, A CORPORATION, APPELLANT AND CROSS-APPELLEE.
181 N. W. 2d 261

Filed November 13, 1970. No. 37574.

1. **Time: Statutes.** The original maturity of indebtedness, referred to in section 25-1506, R. R. S. 1943, is the date on which the final payment is due without acceleration.
2. **Judicial Sales: Appeal and Error.** An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale.
3. **Mortgages: Foreclosure.** A provision in a mortgage assigning the possession and rents to the mortgagee, effective upon default, is valid and enforceable. Such a provision may be enforced in the foreclosure action upon the application of the mortgagee.
4. **Courts: Equity.** Where a court of equity has obtained jurisdiction of a case for any purpose, it will retain it for all and will proceed to final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation.

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

Herman Ginsburg and Paul L. Douglas, for appellant.

Clarence E. Heaney, Jr., and Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

BOSLAUGH, J.

This action was brought to foreclose a real estate mortgage. The property involved is an apartment building known as the Cadco Apartments located at Twenty-fifth and N Streets in Lincoln, Nebraska. A decree of foreclosure was entered on July 17, 1969. On the same

day the court dismissed the plaintiff's application for the appointment of a receiver.

On August 4, 1969, the defendant requested a stay of the order of sale. An order of sale was issued on October 21, 1969, and the property was sold to the plaintiff on December 2, 1969. The objections of the defendant to confirmation were overruled and the sale was confirmed on December 31, 1969.

On August 11, 1969, the plaintiff had filed an application for an assignment of the rents and possession of the property in accordance with the terms of the mortgage. This application was overruled on December 31, 1969.

The defendant appeals from the judgment confirming the sale. The plaintiff cross-appeals from the order overruling its application for the rents and possession.

The defendant's principal contention is that it was entitled to a 9-months stay of the order of sale. Section 25-1506, R. R. S. 1943, provides that as to certain mortgages executed after September 28, 1959, the stay period shall be 3 months "if the original maturity of indebtedness secured by the mortgage is more than twenty years from and after the date of the filing of the petition to foreclose said mortgage."

The mortgage here was executed on April 1, 1963, and provided for the payment of principal in monthly installments commencing January 1, 1965, with the final payment of interest and principal to be made on December 1, 2003. A modification agreement later extended the time for payment of the first installment of principal to January 1, 1969. The defendant contends that the "original maturity of indebtedness" was the date on which the first installment of principal became due.

The statute refers to the original maturity of indebtedness, not to installments of the indebtedness. The evident purpose of the statute is to grant longer stays to mortgagors with greater equities in the property. We think that the controlling date is the day on which

the final payment was due without acceleration. Under the facts in this case, the defendant was entitled to only a 3-months stay of the order of sale.

The defendant also contends that the sale should not have been confirmed because the property did not sell for its fair value. The defendant produced affidavits from two appraisers who valued the property at $1,300,000. The plaintiff's evidence placed the value of the property at less than $1,100,000.

The amount due under the decree was $1,167,419.26 with interest and costs, and there were real estate taxes in the amount of $31,537.70 due or delinquent against the property. Approximately 25 persons attended the sale but the plaintiff's bid of $1,100,000 was the only bid received.

An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale. Federal Land Bank v. Miller, 139 Neb. 161, 296 N. W. 748; Lincoln Nat. Life Ins. Co. v. Curry, 138 Neb. 741, 295 N. W. 282. The record fully sustains the finding of the trial court that the property sold for its fair value under the circumstances and conditions of the sale, and that a subsequent sale would not realize a greater amount.

The mortgage in this case provided that in the event of default the mortgagee should have the right to enter into possession of the property and "collect the rents, issues, and profits thereof." Such a provision is valid and enforceable. Penn Mutual Life Ins. Co. v. Katz, 139 Neb. 501, 297 N. W. 899. In the Penn Mutual Life Ins. Co. case this court said: "When an assignment of the possession and rents is lawfully executed by the mortgagor and, upon default, demand for its observance is timely made but refused, parties plaintiff or

defendant may file application for its adjudication in the foreclosure action still pending and, upon issues joined thereon, the court may retain the same for trial and award that relief to which the parties are entitled."

Where a court of equity has obtained jurisdiction of a case for any purpose, it will retain it for all and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation. Corn Belt Products Co. v. Mullins, 172 Neb. 561, 110 N. W. 2d 845. The plaintiff is entitled to an accounting for the rents from the property from the date of the decree of foreclosure to the date of the confirmation of sale.

The judgment confirming the sale of the property to the plaintiff is affirmed. The order overruling the plaintiff's application for assignment of the rents and profits is reversed and cause remanded for further proceedings in accordance with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED.

LIBERTY MUTUAL INSURANCE COMPANY, A CORPORATION, ET AL., APPELLANTS, V. IOWA NATIONAL MUTUAL INSURANCE COMPANY, A CORPORATION, ET AL., APPELLEES.

181 N. W. 2d 247

Filed November 20, 1970. No. 37504.

Insurance: Motor Vehicles: Workmen's Compensation. Where an automobile liability policy issued to a truck owner, also a consignor, contains a "severability of interests" clause and a clause that excludes application of the policy to employees of insured or to injuries for which insured may be held liable under the workmen's compensation law, the clauses do not exclude injury claims of the truck owner's employee against the consignee and employees of the consignee who are omnibus insureds.

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

Tye, Worlock, Tye, Jacobsen & Orr and Gary Loseke, for appellants.

Kenneth H. Elson, Spittler & O'Kief, and John F. McCarthy, for appellees.

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

SMITH, J.

An employee of a consignor, owner of a truck-trailer, sustained bodily injury in the unloading of the semi-trailer by an employee of the consignee. The consignee asserted that it was an omnibus additional insured under an automobile liability policy that named the consignor as insured and applied to the truck. The policy contained standard "exclusion of employees" and "severability of interests" clauses.

The district court concluded that the consignee, plaintiff Bushman Construction Company, was not an insured under the policy which defendant Iowa National Mutual Insurance Company had issued. The petition of Bushman and its comprehensive general liability insurer, Liberty Mutual Insurance Company, was therefore dismissed. Plaintiffs appeal. The only question is the meaning of the two insurance clauses in Iowa National's policy.

The parties, except defendant Alva C. Adams, stipulated these facts. On July 11, 1961, Jack Varcados, employee of the consignor, defendant Wilson Concrete Company, operated the truck-trailer with a flat bed. The consignment to Bushman was five concrete beams for construction of a bridge. Wire hooks were fastened to both ends of each beam for unloading by a crane and attached boom of Bushman. At the construction site Varcados, standing on the truck after fastening clamps on the crane lift cable to the wire hooks, saw Adams, Bushman's employee, lift the first beam from the semi-trailer to the ground. Varcados asserted (1) upon being

lifted the second beam swung toward him, (2) he started to jump off the trailer when the beam struck him in the back, and (3) he fell to the ground, his knee striking a beam. Adams denied he operated the crane in a manner to cause the beam to strike Varcados.

Varcados sued Bushman for damages, joining Wilson as subrogee under the workmen's compensation law. The petition alleged vicarious liability but no independent negligence of Bushman. After an unsuccessful demand upon Iowa National to defend Bushman, Liberty undertook the defense.

The action was settled by Varcados and Liberty for Bushman. Varcados recovered a consent judgment against Bushman for $23,500 and costs of $161.60. Wilson's subrogation claim of $4,737.71 was settled for $3,500 payable out of the judgment against Bushman. Liberty paid $23,661.60 into court. It also paid expenses and an attorney's fee totaling $2,930. The petition in the present case sought reimbursement of those sums.

Iowa National's policy provided: "INSURING AGREEMENTS. . . . III. Definition of Insured . . . The unqualified word 'insured' includes the named insured and also includes . . . (2) under coverages A and B any person while using an owned automobile . . . and any . . . organization legally responsible for the use thereof. . . . EXCLUSIONS . . . This policy does not apply: . . . (f) under Coverage A, to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation . . . law; (g) under Coverage A . . ., to bodily injury to . . . any employee of the insured arising out of and in the course of his employment by the insured. . . . CONDITIONS . . . 3. Definitions. . . . (f) Purposes of Use. . . . Use of an automobile includes the loading and unloading thereof. . . . 8. Severability of Interests. The term 'the insured' is used severally and not collectively, but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability."

National representatives of insurance trade associations consistently interpreted the word "insured" in the employee exclusion clause without the severability of interests clause. In situations like the one in the present case "insured" meant the particular person who claimed coverage. It simply operated to deny coverage of loss to an employee of the claimant. Some courts, however, decided otherwise. In 1955 the national representatives recommended that insurers add the severability of interests clauses to clarify the matter. See, Risjord, "Recent Decisions with Respect to the Omnibus Clause, Loading and Unloading, and the Overlap of Coverages Between the Automobile and General Liability Policies," Neg. & Comp. Law, 108 at 116 (A.B.A., Sec. Ins., 1963); Brown and Risjord, "Loading and Unloading: The Conflict Between Fortuitous Adversaries," 29 Ins. Counsel J. 197 (1962); Comment, 31 Fordham L. Rev. 178 at 198 (1962).

Notwithstanding addition of the severability of interests clause, some courts continued to reject the interpretation intended by the national representatives. See, Kelly v. State Auto. Ins. Assn., 288 F. 2d 734 (6th Cir., 1961); Liberty Mut. Ins. Co. v. Imperial Cas. & Ind. Co., 168 So. 2d 688 (3d Dist., Fla. App., 1964); Nationwide Mut. Ins. Co. v. Peek, 115 Ga. App. 678, 155 S. E. 2d 661 (1967); Transport Ins. Co. v. Standard Oil Co. of Texas, 161 Tex. 93, 337 S. W. 2d 284 (1960).

The representatives' interpretation was adopted in Shelby Mut. Ins. Co. v. Schuitema, 183 So. 2d 571 (4th Dist., Fla. App., 1966) (Smith, C. J.). On review, 193 So. 2d 435 (Fla., 1967), the court said: "The rule of the District Court of Appeal, Third District . . ., collides directly with the decision here reviewed and poses our problem of resolving the conflict. . . . Judge Smith, in his penetrating analysis of the policy and persuasive authorities, has reached the preferable conclusion. The writ is discharged." See, also, Marwell Const., Inc. v.

Underwriters at Lloyds, Lon., 465 P. 2d 298 (Alaska, 1970).

The Supreme Court of Texas reexamined the Transport case in Commercial Standard Ins. Co. v. American Gen. Ins. Co., 455 S. W. 2d 714 (Tex., 1970), saying: "Our decision in Transport . . . failed to give proper emphasis to the 'severability of interests' clause. This fact, accompanied by many subsequent decisions specifically interpreting this clause, lead us to a different result. . . . Transport is overruled."

Where an automobile liability policy issued to a truck owner, also a consignor, contains a severability of interests clause and a clause that excludes application of the policy to employees of insured or to injuries for which insured may be held liable under the workmen's compensation law, the clauses do not exclude injury claims of the truck owner's employee against the consignee and employees of the consignee who are omnibus insureds.

The judgment is reversed and the case remanded for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

WAYNE LUTHER, APPELLANT, V. KENNETH SOHL, APPELLEE.
181 N. W. 2d 268

Filed November 20, 1970. No. 37561.

1. **Estoppel: Statute of Limitations.** In a proper case, estoppel may be applied to prevent a fraudulent or inequitable resort to a statute of limitations. A defendant may, by his representations, promises, or conduct, be estopped where the other elements of estoppel are present.
2. ———: ———. Where a plaintiff has ample time to institute his action after the inducement for delay has ceased its operation, he cannot excuse his failure to act within the statutory time on the ground of estoppel.

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

Michael T. Levy and Harry B. Otis of Gaines, Spittler, Neely, Otis & Moore, for appellant.

Harold W. Kauffman and A. G. Schatz of Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellee.

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

MCCOWN, J.

This was a trial upon the sole issue of whether the defendant was estopped from raising the statute of limitations as a defense to plaintiff's action for personal injuries. At the close of plaintiff's evidence, the district court sustained defendant's motion to dismiss.

On December 14, 1964, the plaintiff sustained injuries to his back and leg while he was assisting the defendant in repairing a roof on defendant's farm. Farm Bureau Insurance Company of Nebraska was the liability insurer of defendant at the time of the accident. The plaintiff was also an insured of Farm Bureau Insurance Company. In the spring of 1965, Farm Bureau paid plaintiff the full amount of medical payments provided for in both insurance policies.

The plaintiff and his wife were the only witnesses who testified. The plaintiff on December 14, 1964, and thereafter knew that there was a 4-year statute of limitations on personal injuries in Nebraska, and that it would run on December 14, 1968. In January 1967, plaintiff visited the office of Farm Bureau Insurance Company in Lincoln, Nebraska, in an attempt to settle his claim. He thought that he then gave a statement regarding the accident. Plaintiff's next contact with the insurance company was a visit by a Mr. Morrison at plaintiff's home on November 1, 1967. The plaintiff gave Mr. Morrison written authority to obtain medical information and also requested a change in a portion of his original statement. Mr. Morrison next visited the plaintiff on June 13, 1968. At that time, plaintiff expressed to Mr. Morri-

son his concern about the statute of limitations. Morrison told him at that time that as long as they were still negotiating he need not worry about the statute of limitations. Morrison made a specific settlement offer which was refused. On July 10, 1968, Morrison again called at the plaintiff's home, reiterated the same settlement offer of June 13, and advised plaintiff and his wife that it was the final amount the company would offer. It was on a take it or leave it basis. After refusal, Morrison stated that he would still make an attempt to get more. On July 18, 1968, Morrison called the plaintiff by telephone and reported that the company would not add anything to the figure. The plaintiff conceded that he might have told Morrison that he would get an attorney to process his claim. Plaintiff also admitted that he knew from the outset that the insurance company had considerable doubts about the liability.

The plaintiff had no further negotiations with Morrison or with any agent of the insurance company after July 18, 1968. Plaintiff's wife testified that she knew the settlement offer of the insurance company on July 10, 1968, was all it would offer. The plaintiff testified that he supposed the insurance company had ceased negotiating in July 1968, but he was still "hoping." The plaintiff called Morrison in February of 1969. Morrison then informed him that the statute of limitations had run. Plaintiff's action was filed on March 13, 1969.

In a proper case, estoppel may be applied to prevent a fraudulent or inequitable resort to a statute of limitations. A defendant may, by his representations, promises, or conduct, be so estopped where the other elements of estoppel are present. State Farm Mut. Auto. Ins. Co. v. Budd, 185 Neb. 343, 175 N. W. 2d 621.

Equitable estoppels cannot be subjected to fixed and settled rules of universal application but rest largely on the facts and circumstances of the particular case. National Fire Ins. Co. v. Bruecks, 179 Neb. 642, 139 N. W. 2d 821.

In this case, the evidence is clear that the only possible inducement for delay was a representation that as long as they were negotiating the plaintiff need not worry about the statute of limitations. That representation was made June 13, 1968. It is also clear that the last negotiations were on July 18, 1968, and plaintiff at that time "supposed" the insurance company had ceased negotiating. Almost 5 months went by after that before the bar of the statute finally fell.

Judicial decisions almost uniformly support the proposition that if a plaintiff has ample time to institute his action, after the inducement for delay has ceased to operate, he cannot excuse his failure to act within the statutory time on the ground of estoppel. See Annotation, 24 A. L. R. 2d 1413. Time periods ranging from 6 weeks to 6 months have been held to be ample opportunity under that rule. See, Reat v. Illinois Central R.R. Co., 47 Ill. App. 2d 267, 197 N. E. 2d 860; Krupa v. Kelley, 5 Conn. Cir. 127, 245 A. 2d 886; Bryant v. Bryant (Ky. App.), 246 S. W. 2d 457. Under the circumstances here, a period of approximately 5 months after the inducement for delay ceased to operate and before the statute of limitations expired constituted ample opportunity to sue.

The evidence here fully supports the action of the trial court. The judgment was correct and is affirmed.

AFFIRMED.

SYLVIA R. HANNON, WIDOW OF THOMAS E. HANNON, DECEASED, APPELLEE, V. J. L. BRANDEIS & SONS, INC., APPELLANT.

181 N. W. 2d 253

Filed November 20, 1970. No. 37572.

1. **Workmen's Compensation.** In an action to obtain an award of benefits under the Nebraska workmen's compensation law, the burden of proof is on the plaintiff to establish by a preponder-

ance of the evidence that the injury or death was sustained by an accident arising out of and in the course of the employment.

2. ———. Where a violent death is shown under circumstances indicating that death took place within the time and place limits of the employment without evidence as to the cause of death, there is no presumption that the death arose out of and in the course of the employment by virtue of section 48-151, R. R. S. 1943.
3. **Trial: Evidence.** A presumption is not evidence and only relates to a rule of law as to which party shall first go forward and produce evidence sustaining a matter in issue. A presumption will serve as and in the place of evidence in favor of one party or the other until prima facie evidence has been adduced by the opposite party, but the presumption should never be placed in the scale to be weighed as evidence.
4. **Workmen's Compensation: Appeal and Error.** An appeal from the grant or denial of an award under the workmen's compensation law is triable de novo in this court and it is for this court to consider the evidence and draw the natural and logical inferences from the established facts.
5. **Workmen's Compensation.** Where a plaintiff fails to sustain the burden of proving that the death or injury was due to an accident arising out of and in the course of the employment within the meaning of the workmen's compensation law, the claim fails and plaintiff cannot recover.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Reversed and dismissed.

Walsh, Walentine, Wolfe, Miles & Katskee, for appellant.

Thomas A. Walsh of Boland, Mullin & Walsh and Sam Klaver, for appellee.

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

CARTER, J.

This is an action by the widow of Thomas E. Hannon to recover benefits under the workmen's compensation law resulting from his death on December 6, 1968, while in the employ of the defendant. The trial court found for the plaintiff and defendant has appealed to this court.

On December 6, 1968, the deceased was employed by

J. L. Brandeis & Sons, Inc., at its steam plant as a maintenance engineer. He had been so employed for approximately 20 years and on the date of his death he was receiving approximately $130 per week as compensation. He worked 8 hours each day. His duties generally required 6 hours at the steam plant and approximately 2 hours at the store building where he performed maintenance work. He was at the store building on the day in question for the sole purpose of talking with the director of personnel at the direction of the defendant. He had received no call for maintenance assistance nor had he been directed to perform any such service. The evidence is that Hannon's physical condition had deteriorated to such an extent that he had been relieved of many of his former duties. He was afflicted with a disease which about 2 years before his death had been diagnosed as Huntington's chorea which is generally described as a chronic, convulsive nervous disease with involuntary and irregular jerking movements usually accompanied with irritability and depression. The disease had progressively worsened until Hannon's supervisory officers had concluded that he was to be retired for his own safety and the safety of others about him. His immediate supervisor, Elmer Guy, was directed to bring Hannon to the office of the personnel director, Graydon A. Landahl, who was to inform him that he was to be retired and the conditions of such retirement.

At about 1:30 p.m., on December 6, 1968, Guy accompanied Hannon to the 8th floor of defendant's downtown department store where the personnel office was located. He introduced Hannon to Landahl and returned to his work.

Landahl testified that he visited with Hannon, informed him that he was to be retired, and told him that his social security was to be augmented by the defendant so that he would get the equivalent of his present pay until he was eligible for full social security benefits. He testified also that Hannon became emotionally dis-

traught and and asked to sit in the office for awhile which he did. He said to Landahl many times: " 'I don't know what I am going to do.'," and " 'There has been trouble, trouble, trouble. Now, what am I going to do?' "

The assistant to the personnel officer testified she left when Guy and Hannon came in. She came up in the elevator later from the 1st floor. It stopped at the 7th floor and Hannon entered and got off on the 8th floor. A few minutes later it was reported to the personnel office that Hannon had fallen to his death.

The evidence shows that the 8th floor, other than the personnel office, was constructed for the parking of automobiles. The car-park was enclosed with a 3-foot wall which one must clear to fall to the ground. It cannot be questioned that Hannon fell from the upper part of the building. A witness who stopped at a stop light in the street saw Hannon falling past the upper floors and sustains the contention that he fell from the parking area of the building.

The workmen's compensation law provides that to recover benefits under the act, a plaintiff must establish by a preponderance of the evidence that the injury or death was sustained by the employee by an accident arising out of and in the course of his employment. In other words, a claimant must establish that the injury occurred within the time and place limits of the employment and that the injury was incidental to or caused by the employment. Oline v. Nebraska Nat. Gas Co., 177 Neb. 851, 131 N. W. 2d 410.

This case may properly be described as an unexplained death case. There was no witness as to the manner of Hannon's fall from the car ramp. The plaintiff relies on the rule that where a violent death is shown under circumstances indicating that death took place within the time and place limits of the employment, in the absence of any evidence as to cause of death, there is a presumption that the death arose out of the employ-

ment. Such a rule, in effect, holds that in such a case the presumption against suicide is sufficient to sustain an award of benefits under the workmen's compensation law. This rule is stated in 1 Larson, Workmen's Compensation Law, § 10.32, p. 108. Many cases from many jurisdictions supporting this view are collected in note 49 to the cited rule in the text. No cases are cited therein from this jurisdiction. It will be observed that section 48-151, R. R. S. 1943, states in part: "(2) * * * The claimant shall have a burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment. There shall be no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment. * * * (7) For the purpose of this act, willful negligence shall consist of (a) deliberate act, (b) such conduct as evidences reckless indifference to safety, * * *."

An employee who is willfully negligent cannot recover under the workmen's compensation law. § 48-101, R. R. S. 1943. An employee who commits suicide is willfully negligent within the meaning of the act. Under the Nebraska workmens' compensation law, the burden of proof is on the plaintiff to establish that the injury or death arose out of and in the course of the employment and there is no presumption from the mere occurrence of an unexpected or unforeseen injury or death that it was in fact caused by the employment.

Plaintiff asserts that where a violent death is shown, it will be presumed that such death was due to accident and that the injuries were not self-inflicted. The crux of this case is whether or not the defendant has produced sufficient proof to indicate suicide to overcome the presumption that the injuries suffered by Hannon were not self-inflicted, or, in other words, has plaintiff carried the burden of proof.

It is a general rule that where a cause of death is in issue and there is nothing to show how death was

caused, there is a negative presumption against suicide. The presumption against suicide is one of law and not of fact. It is based upon the natural characteristic of persons for love of life and fear of death. The presumption does not continue or possess probative force after the introduction of evidence tending to show how death occurred. The presumption should never be weighed as evidence and it disappears when circumstances are adduced showing how the death occurred and the trier of fact passes upon the issues in the usual way. In such case, the issue is to be decided, not by a presumption of law, but by inferences reasonably drawn from established facts. 29 Am. Jur. 2d, Evidence, §§ 217, 219, pp. 268, 269.

In Hawkins v. Kronick Cleaning & Laundry Co., 157 Minn. 33, 195 N. W. 766, 36 A. L. R. 394, it is said: "It is clear, therefore, that, in the presence of proof contra, there is nothing conclusive or even dominating about the presumption against self-destruction. All authorities agree that it is one of fact and therefore disputable. Being that, and nothing more, a mere inference or deduction adopted by the law of evidence, 'as a self-evident result of human reason and experience,' it controls decision only in the absence of opposing proof. It is persuasive; it is a cogent inference, strong argument, and nothing more. It does not take the place of facts proven nor does it remove from the field of judicial consideration any such facts. It is simply a deduction from experience and the knowledge we possess concerning ourselves and our tendency to cling to life rather than to destroy it. Such a deduction does not, we repeat, take the place of facts. On the contrary, it is applied to facts. Given only the fact of death, the presumption against suicide is controlling. But, given in addition to the death, circumstances indicating suicide, it is for the trier of the facts to weigh such circumstances, not only as against contrary proof, but also as against

the presumption or inference or deduction, whatever it may be termed, against suicide."

In Bohmont v. Moore, 138 Neb. 784, 295 N. W. 419, 133 A. L. R. 270, in dealing with the question of presumptions, this court said: "The better reasoned authorities hold that a presumption is not evidence of a fact, but purely a conclusion, having no probative force, and designed only to sustain the burden of proof until evidence is introduced tending to overcome it. '* * * When evidence is introduced rebutting the presumption, the presumption disappears, leaving in evidence the basic facts which are to be weighed.'" See, also, In re Estate of Goist, 146 Neb. 1, 18 N. W. 2d 513; In re Estate of Kajewski, 134 Neb. 485, 279 N. W. 185.

There being some proof tending to show that death was the result of suicide, the case stood for decision by the trier of facts upon the evidence adduced unaffected by the presumption against suicide since it is not evidence and could not be given weight as such. Since this is a trial de novo in this court, it is for this court to consider the evidence and draw the natural and logical inferences from the facts. New York Life Ins. Co. v. Gamer, 303 U. S. 161, 58 S. Ct. 500, 82 L. Ed. 726, 114 A. L. R. 1218.

No one saw how Hannon fell to his death, but this fact is not fatal to a finding of how it occurred. It is true, as heretofore stated, that if there is no evidence other than death itself, the presumption against self-destruction is sufficient to sustain a prima facie case. But where there is other evidence, the presumption disappears and the case proceeds as in other cases.

There is no material evidence in this case pointing toward death resulting from an accident arising out of and in the course of the employment. With the disappearance of the presumption against self-inflicted injury, we must determine if the inferences from the facts established reasonably point toward accidental injury or suicide.

The facts testified to in this case are as follows: The deceased was afflicted with Huntington's chorea, a serious disease which had become progressively worse. The defendant determined that his condition had become such that retirement was necessary and directed deceased's supervisory officer to take him to the personnel director to make his retirement effective. There was no other reason for the deceased going from the steam plant to the Brandeis store on that day. He had not been called to perform maintenance in the Brandeis store, had not been directed to do so, and, in fact, there was no equipment in the parking area of the 8th floor that required maintenance within the scope of deceased's employment. After being informed of his retirement by the personnel director, deceased became very distraught as evidenced by the testimony of the personnel director and became very distressed and depressed by his retirement. He left the office and descended from the 8th floor. Shortly thereafter he returned to the 8th floor where he had no duty to perform for the defendant. Very shortly thereafter his fall and death occurred. In order to fall he had to clear a 3-foot rail or wall. His return to the 8th floor and his closeness to the rail or wall can be accounted for only as a place to bring about his self-destruction.

We think the only inference that can reasonably be deduced from these facts is that his fall was due to suicide. De Bruler v. City of Bayard, 124 Neb. 566, 247 N. W. 347, a case very similar in principle, supports the conclusion we have reached. There a night policeman was found dead within the hours of his employment and at a place where his duties took him. No one saw the accident. Deceased had a gun in his hand and its hammer rested on a discharged cartridge. A witness testified that he talked to deceased in the early morning before the body was found and deceased appeared nervous and restless. Another witness testified that he talked with deceased about money matters some 4 months pre-

viously and deceased said: " 'Well, there ain't much use of trying. I just as well end it all.' " We held this sufficient evidence to find that the deceased committed suicide.

We think that the only logical inference that can be drawn from the established facts is that Hannon met his death by suicide. The plaintiff therefore failed to sustain the burden of proof on the contention that Hannon's death was due to an accident arising out of and in the course of his employment. The judgment of the district court is therefore reversed and the cause of action dismissed.

REVERSED AND DISMISSED.

McCOWN, SPENCER, and SMITH, JJ., dissenting.

The thrust of the majority opinion here places the burden on the plaintiff in a workmen's compensation case to prove that a deceased employee did not commit suicide rather than placing the burden on the employer to establish the affirmative defense of willful negligence.

Section 48-102, R. R. S. 1943, provides that willful negligence (which includes suicide) is an affirmative defense available to the employer in a workmen's compensation case. Under such circumstances, the burden of proof rests on the employer to prove suicide rather than on the employee to prove the negative of that issue.

We cannot agree with the rejection of the rule followed by the great majority of states: "When an employee is found dead under circumstances indicating that death took place within the time and space limits of the employment, in the absence of any evidence of what caused the death, most courts will indulge a presumption or inference that the death arose out of the employment." See 1 Larson, Workmen's Compensation Law, § 10.32, p. 108.

The underlying justification for that rule is stated by Larson at page 111: "The theoretical justification is similar to that for *unexplained falls* and other neutral

harms: The occurrence of the death within the course of employment at least indicates that the employment brought deceased within range of the harm, and the cause of harm, being unknown, is neutral and not personal. The practical justification lies in the realization that, when the death itself has removed the only possible witness who could prove causal connection, fairness to the defendants suggest some softening of the rule requiring claimant to provide affirmative proof of each requisite element of compensability." (Emphasis supplied.) Section 48-151, R. R. S. 1943, does not prevent the adoption of the rule.

In this case, no one saw how Hannon's fall occurred, and no one knows how it occurred. Any conclusion as to whether it was intentional or accidental must rest on inference and speculation. The presumptions are all against suicide. When an employee is killed within the time and space limits of his employment by a fall which could only be accidental or suicidal, evidence that he might have had some plausible reason to commit suicide is not sufficient to overcome the presumption against suicide, much less carry the burden of proof that suicide was committed.

Three courts have previously reached that conclusion on the facts here. Their action should be affirmed.

DENNIS RUSHO, APPELLANT, V. LAWRENCE C. JOHNS, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.
181 N. W. 2d 448

Filed November 20, 1970. No. 37583.

1. **Intoxicating Liquors: Motor Vehicles.** A conditional or qualified refusal to take a test to determine the alcoholic content of body fluids under the implied consent law is not sanctioned by the act and such refusal is a refusal to submit to the test within the meaning of the act.

2. ———: ———. A refusal of a request of an arrested person to contact an attorney before consenting to an alcoholic test under the implied consent law affords no reasonable ground for refusing to submit to the test.

3. **Intoxicating Liquors: Motor Vehicles: Right to Counsel: Constitutional Law.** The revocation of a motorist's license to operate a motor vehicle for his refusal to take a test of body fluids for alcoholic content as required by the implied consent law on the ground that he had been denied the services of legal counsel is not a deprivation of constitutional rights.

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

Richard L. Goos, 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.

This is an appeal from the district court for Lancaster County affirming an order of the Director of the Department of Motor Vehicles revoking the driver's license and operating privileges of Dennis Rusho pursuant to the implied consent law of this state.

On February 24, 1969, about 2:50 a.m., Rusho was driving his automobile east on O Street in Lincoln. He was stopped by officer Miller of the Lincoln police force. Officer Miller testified he smelled the odor of liquor on the plaintiff, that his speech was slurred, and that he staggered when he walked. In the opinion of the officer, plaintiff was intoxicated. The issue on this appeal is whether or not Rusho's refusal to consent to a test of alcoholic content of body fluids under the implied consent law was reasonable.

The record shows that the arresting officer took Rusho to the police station and there requested that he submit to a urine or blood test which was refused. Plaintiff admitted that he refused to submit to a test until he

could first consult with a lawyer. The officer having plaintiff in custody refused plaintiff's request for a lawyer prior to his submitting to the requested test.

On the foregoing issue, it is plain from the record that Rusho refused to take the alcoholic test under the implied consent law until he had talked to his lawyer. This is not a reasonable ground for refusing to take the test. A conditional or qualified refusal to take a test to determine the alcoholic content of body fluids under the implied consent law is not sanctioned by the act and such refusal is a refusal to submit to the test within the meaning of the act. Preston v. Johns, *ante* p. 14, 180 N. W. 2d 135.

A licensed driver's request for counsel when requested to submit to a chemical analysis to determine intoxication cannot be considered a basis for a holding that the driver did not in fact refuse to submit to the test. Blow v. Commissioner of Motor Vehicles, 83 S. D. 628, 164 N. W. 2d 351; Westmoreland v. Chapman, 268 Cal. App. 2d 1, 74 Cal. Rptr. 363; Ent v. State, 265 Cal. App. 2d 936, 71 Cal. Rptr. 726. The revocation of a motorist's license to operate a motor vehicle for his refusal to take a blood test after being arrested for driving while intoxicated, when officers refused to allow motorist to telephone his attorney, did not deprive the motorist of any constitutional rights. Finocchairo v. Kelly, 11 N. Y. 2d 58, 226 N. Y. Supp. 2d 403, 181 N. E. 2d 427, cert. den, 370 U. S. 912, 82 S. Ct. 1259, 8 L. Ed. 2d 405; Schmerber v. California, 384 U. S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908.

Under the record and the authorities cited the refusal of the plaintiff to consent to the taking of an alcoholic test under the implied consent law until he consulted his lawyer was not reasonable, the revocation of plaintiff's license to operate a motor vehicle for failure to take the test was supported by the evidence and the law, and no constitutional right of the plaintiff was violated

in revoking plaintiff's license to operate a motor vehicle. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEONARD ECKERT, APPELLANT.

181 N. W. 2d 264

Filed November 20, 1970. No. 37584.

1. **Intoxicating Liquors: Motor Vehicles.** The conviction of a defendant upon the charge of intoxication does not bar a subsequent prosecution for the offense of operating a motor vehicle while under the influence of alcoholic liquor.
2. **Intoxicating Liquors: Motor Vehicles: Evidence.** In a prosecution for operating a motor vehicle while under the influence of intoxicating liquor, the operation of the motor vehicle is an element of the offense and may be established by circumstantial evidence.

Appeal from the district court for Perkins County: JACK HENDRIX, Judge. Affirmed.

Frederick E. Wanek, for appellant.

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

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

CARTER, J.

On June 12, 1969, the defendant was charged with a violation of the liquor laws in two counts, first, with intoxication and, second, with unlawfully operating a motor vehicle upon a public highway while under the influence of intoxicating liquor. Defendant was found guilty in county court on both counts. He was assessed a fine of $10 and costs on the charge of intoxication which he paid. On the charge of operating a motor vehicle while under the influence of intoxicating liquor,

he was fined $100 and costs and his operator's license suspended for 6 months. From the latter sentence, defendant appealed to the district court and was again found guilty in that court. The identical sentence was imposed as in the county court. From this judgment and sentence, the defendant has appealed to this court.

The primary issue on appeal is the correctness of the trial court's ruling on a plea in bar filed by the defendant in the district court. The plea in bar alleged that defendant had previously been convicted of intoxication and that such charge and conviction thereof is a bar to a further charge of intoxication or of a charge for drunk driving. It is shown that both charges grew out of the same incident. The question is one of law that does not appear to have been previously decided by this court.

It is fundamental under our Constitution that no person shall be compelled in any criminal case to be twice put in jeopardy for the same offense. Art. I, § 12, Constitution of Nebraska. Cases decided by this court have held that a defendant who has been found not guilty of a higher crime may not be again prosecuted for a lesser offense included within the former. The question here, however, is whether or not the offense of intoxication is a lesser offense than operating a motor vehicle on a public highway while under the influence of intoxicating liquor within the meaning of the double jeopardy rule.

In Warren v. State, 79 Neb. 526, 113 N. W. 143, the defendant was first tried and acquitted of murder during an attempt to perpetrate a robbery. Defendant was subsequently charged with robbery of the person formerly alleged to have been murdered growing out of the same incident. A demurrer to the plea in bar was sustained. This court affirmed, holding that double jeopardy was not involved. In the case of In re Resler, 115 Neb. 335, 212 N. W. 765, defendant was acquitted of murder by poisoning. Defendant was subsequently charged under a different statute with poisoning with in-

tent to take life. This court held that the second charge was included in the first and that the acquittal on the first charge was a bar to the prosecution of the second. These two cases appear to point up the differences as to when former jeopardy does or does not apply.

In Stevison v. State (Okla. Cr. App.), 449 P. 2d 916, the same situation arose as we have here. In holding public drunkenness and operating a motor vehicle while under the influence of intoxicating liquor to be separate and distinct offenses and that the conviction for one is no bar to a conviction for the other, the court said: "This logically leads us to the consideration of whether Public Drunkenness is a necessary included offense of the offense of Operating a Motor Vehicle While Under the Influence of Intoxicating Liquor, or whether it constitutes an attempt to commit the same. We believe the answer to this proposition can only be in the negative, for the elements necessary to prove the offense of Public Drunkenness are not elements necessary to be proven for the offense of Operating a Motor Vehicle While Under the Influence of Intoxicating Liquor, * * *."

In Reese v. State, 89 Ind. App. 378, 165 N. E. 780, the court said: "We cannot concur in appellant's contention. The offense for which he paid his fine was complete when he appeared in a public place in a state of intoxication; the other offense was not complete until, being in such condition, he drove his automobile on the public highway, an act which from its very nature could but endanger the lives of others traveling upon such highway. These offenses, under our statute, are separate and distinct, and a conviction of one is no bar to a conviction for the other." See, also, Tibbs v. State, 89 Ga. App. 716, 80 S. E. 2d 834.

The instant case appears to fall under the rule announced in Warren v. State, *supra*, and not under the rule applied in the case of In re Resler, *supra*. The applicable rule appears more similar to a case where a defendant was first charged and acquitted of murder

and subsequently charged with a robbery growing out of the same incident than with a case of an acquittal of murder by poisoning and a subsequent charge of poisoning with intent to take the life of another. In Warren v. State, *supra,* we said: "The essential elements necessary to constitute the crime of murder and those necessary to the crime of robbery are entirely different. In proving the commission of murder, under some circumstances it may be necessary to show an attempt to rob or an actual robbery, but, in proving a robbery, it can never be important or necessary to show the murder of the person assaulted. The same proof is not required in both cases, and the crimes are dissimilar, except that in both an assault is an essential element. Tested by every accepted rule, there is no identity between the former charge upon which the defendant was tried and the charge upon which he was convicted. The evidence is clear that he was a participant in the design to rob, even though he was not present in the saloon at the time the money was taken."

It is true, of course, that the intoxication of the defendant is a common element of the two offenses. But otherwise they are entirely different as are the purposes of the legislation. The primary purpose of section 53-196, R. R. S. 1943, is to prohibit intoxication and the evils that such a condition imposes on the public. On the other hand, the primary purpose of section 39-727, R. R. S. 1943, is to protect the users of public highways from the dangers of motor vehicles operated by drivers under the influence of intoxicating liquors. "It seems to be settled by the weight of authority, however, that where the second transaction is for a crime which is but another degree of the crime for which the first prosecution was had, the previous jeopardy will constitute a bar. A man cannot be tried for manslaughter when he has previously been tried for murder of the same person, nor vice versa, for the gist of the charge is the same in both cases, namely, the unlawful killing.

The degree of the crime, or, in other words, the gravity of the punishment which may be inflicted, depends upon the circumstances surrounding the transaction, which may aggravate or mitigate the punishment according to its heinousness or the degree of moral turpitude of the guilty party in its commission. Since in such a case the defendant might have been convicted of manslaughter under the charge of murder in the first degree, the identity of the crime is clear, and as to such a state of facts there is no conflict in the authorities. Where, however, the same transaction or criminal acts may constitute more than one crime, the question becomes more difficult. If a man breaks into a building and steals from the person of an inmate by force and violence or by putting him in fear, he is guilty of burglary on account of the breaking, of robbery because of the larceny perpetrated by the assault and putting in fear, and of simple larceny on account of the taking and asportation of the goods or money. In such a case a man may be indicted for the burglary, for breaking and entering with intent to steal, or he may be indicted for the robbery, or for the simple larceny. Since these are crimes which differ in their essential elements, the authorities are almost uniform that the former jeopardy of one is no bar to a prosecution for the other (1 Bishop, New Criminal Law, sec. 1062), although a few courts, notably North Carolina and Georgia, hold to the contrary." Warren v. State, *supra*.

Under the authorities cited, we hold that a conviction for intoxication is not a bar to a subsequent prosecution for operating a motor vehicle while under the influence of intoxicating liquor. Admittedly, the question presented is not entirely free from doubt, there being a few cases holding to the contrary. See, State v. Brennan, 13 Utah 2d 195, 371 P. 2d 27; State v. McLaughlin, 121 Kan. 693, 249 P. 612.

We think the better reasoning is contained in Warren v. State, *supra*, and the authorities cited to the same

effect. The gist of the two offenses is not the same and the purposes of the two statutes are entirely different. The identity of the crimes as separate offenses is clear. Defendant was undoubtedly guilty of intoxication before he entered his car, but he was not guilty of operating a motor vehicle while under the influence of intoxicating liquor until he thereafter entered and operated the motor vehicle. In the one, the purpose is to prohibit the excessive use of alcoholic liquors to the extent of intoxication. In the other, the purpose is to prohibit the driving of motor vehicles on the public highways in a manner dangerous to the public, a danger resulting from the notorious driving conduct of intoxicated operators.

The defendant further contends that the evidence will not sustain a finding that he was operating a motor vehicle on a public highway at the time charged. In this respect the evidence shows that defendant's motor vehicle was found parked in the right-hand lane of a public highway approximately 8 miles north of Grant, Nebraska. Defendant was slumped over the steering wheel in a drunken stupor. He was alone in the motor vehicle and no other person was in proximity to the motor vehicle. No liquor, nor liquor containers, were found in or about the motor vehicle. The motor vehicle was not moving and the engine was not running. Defendant stated that he had no recollection of what happened from the time he left Madrid until he was aroused by law enforcment officers at the time of his arrest. These facts are not disputed. The evidence is sufficient, although circumstantial, to sustain the finding that defendant operated his motor vehicle on a public highway while under the influence of intoxicating liquor. A person charged with crime may be convicted on circumstantial evidence. State v. Ohler, 178 Neb. 596, 134 N. W. 2d 265.

We find the record to be free from prejudicial error and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TERRY LEE GASTON, APPELLANT.
181 N. W. 2d 247

Filed November 20, 1970. No. 37589.

Criminal Law: Sentences: Appeal and Error. Where there is no evidence to show what information was considered by the judge in passing sentence, and the record on its face reflects nothing to indicate that the sentence was excessive, a sentence imposed within statutory limits will not be disturbed.

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

Eugene M. Alexander, 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.

McCOWN, J.

Defendant, represented by counsel, pleaded guilty to auto theft. The court sentenced him to an indeterminate term of 4 to 7 years in the Nebraska Penal and Correctional Complex. The only issue raised by this appeal is whether the sentence was excessive.

There is no bill of exceptions. A copy of the presentence report is not a part of the record. Nothing in the transcript reflects any facts indicating an appropriate sentence.

Where there is no evidence to show what information was considered by the judge in passing sentence, and the record on its face reflects nothing to indicate that the sentence was excessive, a sentence imposed within statutory limits will not be disturbed.

The judgment is affirmed.

AFFIRMED.

IN RE ESTATE OF JOSEPH F. GALLAGHER, DECEASED. LEO F. HARTE ET AL., APPELLANTS, V. JAMES P. GALLAGHER, ADMINISTRATOR OF THE ESTATE OF JOSEPH F. GALLAGHER, DECEASED, APPELLEE.

181 N. W. 2d 251

Filed November 20, 1970. No. 37595.

1. **Estates: Appeal and Error.** In an appeal from the county court in a probate proceeding under a statute providing that it shall be the duty of the probate judge, upon payment of his fee therefor, to transmit to the clerk of the district court a certified transcript of the proceedings, the probate judge may waive the right to demand his fee in advance for the making of such transcript.
2. ———: ———. Where, on appeal in a probate proceeding, notice of appeal is given and bond filed as required by statute, it is the mandatory duty of the county judge to prepare and transmit the transcript to the district court and his failure to do so will not defeat the appeal.
3. **Appeal and Error: Public Officers and Employees.** Where a duty is placed upon a public officer to perform acts necessary to perfect an appeal, his failure to perform cannot be charged to the litigant nor operate to defeat the appeal.

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

McFadden & Kirby, for appellants.

Julius D. Cronin and Edward E. Hannon, for appellee.

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

NEWTON, J.

The estate of Joseph F. Gallagher, deceased, was administered in the county court of Holt County, Nebraska. Objections were filed to the final report and account of the administrator. The objections were overruled and a final decree entered. Notice of appeal was duly given and appeal bond timely filed and approved. No praecipe for transcript was filed but the transcript was ordered or requested and, in line with his customary

practice, the county judge waived the advance payment of fees. The transcript was not filed in the district court until after the time allotted by statute had expired and the appeal was dismissed. We reverse the judgment of dismissal.

It is conceded that the county judge wrote a letter to appellants' attorneys requesting instructions regarding the desired contents of the transcript. The judge excuses his delay in filing the transcript on the ground that he failed to receive a response to his letter. Appellants claim they immediately contacted the judge by telephone and gave him the requested information.

Although the filing of a praecipe for a transcript is the better practice, it is not required by statute. Sections 30-1602, R. R. S. 1943, and 30-1603, R. S. Supp., 1969, allow 30 days to file the appeal bond and take the appeal. Section 30-1605, R. R. S. 1943, provides: "When such appeal is taken, the county court shall, * * * transmit to the clerk of the district court, within ten days after perfecting such appeal, a certified transcript * * *."

"In an appeal from the county court in a probate proceeding under a statute providing that it shall be the duty of the probate judge, upon payment of his fee therefor, to transmit to the clerk of the district court a certified transcript of the proceedings, said probate judge may waive the right to demand his fee in advance for the making of such transcript." In re Estate of Tagart, 119 Neb. 647, 230 N. W. 492. See, also, Drexel v. Reed, 69 Neb. 468, 95 N. W. 873.

Where, on appeal in a probate proceeding, notice of appeal is given and bond filed as required by statute, it is the mandatory duty of the county judge to prepare and transmit the transcript to the district court and his failure to do so will not defeat the appeal. See, Drexel v. Reed, *supra;* In re Estate of Tagart, *supra.* Where a duty is placed upon a public officer to perform acts necessary to perfect an appeal, his failure to perform cannot be charged to the litigant nor operate to defeat

the appeal. See, Prucka v. Eastern Sarpy Drainage Dist., 157 Neb. 284, 59 N. W. 2d 761; Miller v. Peterson, 165 Neb. 344, 85 N. W. 2d 700.

In the present case a misunderstanding appears to have occurred and an inadvertent failure to file the transcript on time resulted. It is understandable that the officer upon whom the duty to prepare the transcript devolved would wish to make inquiry relative to the desired contents. This cannot, however, excuse the failure to perform a mandatory duty. When the necessary preliminary steps have been complied with, the officer *must* prepare and forward the transcript. His failure to do so will not defeat the appeal.

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

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. HARRY DIXON, APPELLANT.

181 N. W. 2d 250

Filed November 20, 1970. No. 37615.

Criminal Law: Sentences: Appeal and Error. This court may reduce the sentence when in its opinion the sentence is excessive.

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

Charles M. Pallesen, Jr., for appellant.

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

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

SMITH, J.

Defendant pleaded guilty to burglary. The court sentenced him to 5 years imprisonment to run consecu-

tively to an 18-month sentence imposed 2 days earlier in another district for burglary. The court ordered incorporation of the presentence report into the record. On appeal, defendant, age 70, requests reduction of the sentence to run concurrently with the 18-month sentence.

This court may reduce the sentence when in its opinion the sentence is excessive. § 29-2308, R. R. S. 1943. We grant defendant's request. The sentence is modified to provide that the 5-year sentence shall run concurrently with the 18-month sentence.

AFFIRMED AS MODIFIED.

CARTER, J., dissents.

BETTY B. DODENDORF, APPELLEE, V. RAYMOND LEE DODENDORF, JR., APPELLANT.
181 N. W. 2d 438

Filed November 27, 1970. No. 37582.

1. **Divorce.** A divorce action is for trial de novo in this court. However, we cannot ignore the fact that the trial court had an opportunity to observe the parties and accepted one version of the evidence rather than another.
2. ———. It is not possible to delineate a general rule as to the degree of corroboration in a divorce action. Each case must be decided on its own facts and circumstances.

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

Marks, Clare, Hopkins & Rauth, for appellant.

Richard J. Bruckner of 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 divorce brought by Betty B. Dodendorf, hereinafter referred to as plaintiff, against

Raymond Lee Dodendorf, Jr., hereinafter referred to as defendant, on the grounds of extreme cruelty. The trial court granted plaintiff an absolute divorce. Defendant appealed, attacking the division of the property and the granting of the divorce to plaintiff rather than to him on his cross-petition.

While the defendant questions the sufficiency of the evidence to support a decree for plaintiff, we see no useful purpose in reviewing the evidence in detail. A divorce action is for trial de novo in this court. Parkhurst v. Parkhurst, 184 Neb. 687, 171 N. W. 2d 243. However, we cannot ignore the fact that the trial court had an opportunity to observe the parties and accepted one version of the evidence rather than another. This case is not too different from many others where no physical violence is involved. Suffice it to say that we agree with the trial judge that it is sufficient to sustain a decree for the plaintiff. From the record it is evident that the marriage became intolerable for the parties and reconciliation is not possible. While the corroboration is not as strong as it is in many cases, it is sufficient to sustain the decree. It is not possible to delineate a general rule as to the degree of corroboration in a divorce action. Each case must be decided on its own facts and circumstances. Applegate v. Applegate, 182 Neb. 342, 155 N. W. 2d 337.

The principal argument herein involves the allowance of alimony and the division of property. Over the years plaintiff's parents had given her cash and securities, the value of which at the time of trial was $150,020. During the course of the marriage, the plaintiff on occasions had been employed. Her earnings, the cash given her by her parents, and the proceeds from the sale of some of the securities as well as the income from securities, were used to supplement the income of the parties. An exhibit in evidence would indicate that these contributions totalled $44,761.70.

Defendant suggests that this case is one in which an

award of alimony should be made to him out of the plaintiff's separate property. While he has had the benefit of the income therefrom during the latter years of the marriage, there is no basis by which he should have any claim to it. Although the plaintiff testified that she was in good health, the record would suggest a question. She had undergone heart surgery, was on daily medication, and had been instructed not to live under tension or strain. Plaintiff has placed her separate property in a revocable trust for the benefit of the children of the parties.

The value of the accumulations of the parties at the time of the divorce was $27,322. This included a home valued at $19,000, subject to a mortgage of $6,000, but did not include the value of a gun collection, a coin collection, or a stamp and camera collection, which were in the possession of the defendant. The values of these collections are not shown, although the evidence indicates that the gun collection was insured for either $1,200 or $1,500. The joint property of the parties was divided as follows: The equity in the home was awarded equally to the parties. Plaintiff was awarded furniture and fixtures of the value of $1,500; a one-half interest in a $5,000 certificate of deposit; and alimony at the rate of $200 a month for 121 months. Defendant was awarded a 1965 Ford valued at $1,000; 74 shares of A. T. & T. stock, valued at $4,422; the other one-half interest in the $5,000 certificate of deposit; furniture, furnishings, and household goods, valued at $1,500; and a recently purchased lakeshore lot at Columbus, Nebraska, valued at $900.

We agree with the defendant that under the peculiar facts of this case, no alimony award should be made to the plaintiff, but we also believe that a more equitable distribution should be made of the joint property. We modify the award of the trial court in the following particulars: Plaintiff shall receive no alimony, but should receive the other property granted, and in addition the

other one-half interest in the certificate of deposit, which was granted to the defendant. The defendant is given the right to occupy the home of the parties until the youngest child attains her 20th birthday, during which time the property shall not be subject to partition, but defendant is required to pay all taxes, interest, and mortgage payments during that period. Under this revised division the plaintiff will receive $13,000 of the joint accumulations, and the defendant will receive $14,322, plus the gun, coin, stamp, and camera collections. In all other respects the decree is affirmed. Costs of appeal are taxed to the defendant, including a fee of $350 for the services of plaintiff's attorney.

AFFIRMED AS MODIFIED.

CARTER, J., dissenting.

Plaintiff sued for a divorce from the defendant which was granted. Defendant appealed and asserted as error the granting of the divorce without corroborating evidence.

Our opinion disposes of this issue by saying: "While the corroboration is not as strong as it is in many cases, it is sufficient to sustain the decree." I submit that where the error assigned is the sufficiency of the evidence to corroborate plaintiff's grounds for divorce, the evidence should be reviewed and its corroborative nature shown.

An examination of the evidence fails to disclose any corroboration of plaintiff's grounds for a divorce. The dissolution of the marriage relation involves matters of public policy solely within the scope of the legislative power. The Legislature has said that a divorce will not be granted unless the evidence of marital wrong is corroborated by evidence other than that of the parties. I submit that the decision of this court permits the doing of that which the controlling statute expressly prohibits.

While the affirmance of the divorce decree may not appear too important in view of defendant's cross-peti-

tion for a divorce, there are considerations other than the public policy involved which are of extreme importance to the defendant. If the divorce is sustained in disregard of the applicable law, the defendant is subjected to a division of the joint property and a possible jeopardizing of his business and other sources of income. The custody and care of the minor children of the marriage becomes a litigable issue when two homes instead of one are to be permanently necessary. Such detrimental results ought not to be cast upon a party because of petty grievances and fancied wrongs without corroborating evidence of statutory grounds for divorce. Robinson v. Robinson, 164 Neb. 413, 82 N. W. 2d 550.

Where the record, as here, fails to show necessary evidence to bring the case within the applicable divorce statutes, it is error to sustain the grant of a divorce. I would reverse the judgment on this issue.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL EDWARD CARROLL, APPELLANT.
181 N. W. 2d 436

Filed November 27, 1970. No. 37586.

1. **Witnesses: Trial.** One who is shown to be acquainted with property and its fair and reasonable value in the market is competent to testify as to such value.
2. ———: ———. The qualifications of a witness to give testimony as to the value of personal property is a matter committed to the sound discretion of the trial court, and its ruling thereon will only be disturbed when clearly erroneous.
3. **Witnesses: Criminal Law: Larceny.** Where items of personal property are bought and sold by dealers in the regular course of business, evidence of the dealers' wholesale price is evidence of the fair and reasonable market value for the purpose of distinguishing between grand and petit larceny.

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

Lathrop & Albracht, 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.

MCCOWN, J.

The defendant was found guilty of grand larceny and sentenced to a term of 2 to 5 years in the Nebraska Penal and Correctional Complex.

The assignments of error relate to the testimony of Orlan Smith as to the value of the stolen merchandise, and whether the State failed to prove the statutory value.

Orlan Smith was the shop foreman and new car manager of Stan Olsen Pontiac, Incorporated, the owner of the property stolen. The property consisted of new tires, wheels, and rims removed from new Pontiac automobiles stored on a fence-enclosed parking lot of Olsen Pontiac. Smith testified that he had been associated with Pontiac dealers for 20 years, and during that time, he had purchased and sold tires and rims. He had also checked the invoices and records of Olsen Pontiac as to the price of tires, wheels, and rims. In answer to separate questions as to the fair and reasonable value or market price of tires, wheels, and rims of the specific kind involved, his answers were that the cost of the tires to the dealer was $30 each; dealer cost of the rally-type wheels was $21 each; and the dealer cost of the plain black rims was $10.95 each. The total cost to the dealer for all items stolen was $439. The jury found and declared the value of the stolen property to be $430. To constitute grand larceny, the statute specifies a value of $100 or upwards. § 28-506, R. R. S. 1943.

The defendant asserts that there was not sufficient foundation to admit the testimony of Orlan Smith as to value. One who is shown to be acquainted with prop-

erty and its fair and reasonable value in the market is competent to testify as to such value. The qualifications of a witness to give testimony as to the value of personal property is a matter committed to the sound discretion of the trial court, and its ruling thereon will only be disturbed when clearly erroneous. Borden v. General Insurance Co., 157 Neb. 98, 59 N. W. 2d 141.

Rules for establishing value in civil cases are ordinarily applicable in distinguishing between grand and petit larceny. In the sound discretion of the court, the price actually paid for articles of personal property is generally admitted as some evidence of its value at a subsequent period. See, 29 Am. Jur. 2d, Evidence, § 388, p. 440; 50 Am. Jur. 2d, Larceny, § 45, p. 209.

Fair and reasonable market value may be established by evidence of wholesale or retail values or both. Where wholesale and retail prices are both sufficient to establish grand larceny, it is immaterial whether the computation of market value is by reference to one or the other. See State v. Sorrell, 95 Ariz. 220, 388 P. 2d 429.

The basic issue is whether there was sufficient evidence to show that the fair and reasonable market value of the stolen property was in excess of the statutory amount of $100. Evidence of other values is admissible to enable the trier of fact to determine the fair market value. See State v. Randle, 2 Ariz. App. 569, 410 P. 2d 687.

Where items of personal property are bought and sold by dealers in the regular course of business, evidence of the dealers' wholesale price is evidence of the fair and reasonable market value for the purpose of distinguishing between grand and petit larceny. Under the circumstances here, the evidence was clearly sufficient to establish grand larceny.

The trial court properly admitted the testimony of Orlan Smith as to the value of the stolen property. The credibility and the significance to be given to his testimony was for the consideration of the jury.

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

AFFIRMED.

HUBERT G. MUFF, APPELLEE, V. MAHLOCH FARMS CO., INC., ET AL., APPELLANTS.
181 N. W. 2d 258

Filed November 27, 1970. No. 37604.

1. **Costs: Appeal and Error.** A determination that all costs are taxed to a party means only the costs of the appeal to this court. The direction does not include costs in the trial court save in those situations where, by appropriate language, the trial court costs as well as the appeal costs are taxed in the order of this court.
2. **Costs.** The cost or expense of a bill of exceptions is to be taxed in the district court.
3. **Costs: Judgments.** An award of costs in a judgment is a part of the judgment, and the power of the court to change such an award is coextensive with its power to vacate or modify the judgment.
4. ———: ———. Costs may be retaxed at a subsequent term when the court has failed to follow a mandatory statutory duty to tax costs, in the event of a clerical error or the failure to perform a ministerial act, and in instances authorized by section 25-2001, R. R. S. 1943, for the vacation or modification of judgments at a subsequent term.
5. ———: ———. An award of costs cannot ordinarily be changed by the court after the term at which it was made except in instances where the statutes permit a vacation or modification of a judgment at a subsequent term.

Appeal from the district court for Saline County: ERNEST A. HUBKA, Judge. Reversed and remanded.

Steinacher & Vosoba, for appellants.

Jack L. Craven and Herman Ginsburg, for appellee.

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

NEWTON, J.

The present appeal results from an order retaxing

costs in the case of Muff v. Mahloch Farms Co., Inc., previously determined by this court and found in 184 Neb. 286, 167 N. W. 2d 73. This court, on the previous appeal, affirmed a judgment for the defendants with a slight modification and directed that each party should pay his or its own costs. An application was filed in the district court requesting that court to retax district court costs which had been previously taxed to the plaintiff. At a term subsequent to that at which the court had entered a decree for the defendants and a judgment for costs against the plaintiff, the court retaxed district court costs and ordered the defendants to pay one-half of the cost of the bill of exceptions. From this order defendants appeal. We reverse the judgment of the district court retaxing costs.

"A determination that 'all costs are taxed' to a party means only the costs of the appeal to this court. The direction does not include costs in the trial court save in those situations where, by appropriate language, the trial court costs as well as the appeal costs are taxed in our order." Cover v. Platte Valley Public Power & Irr. Dist., 167 Neb. 788, 95 N. W. 2d 117. It is well established that the cost or expense of a bill of exceptions is to be taxed in the district court. See, Pettis v. Green River Asphalt Co., on motion to retax costs, 71 Neb. 519, 101 N. W. 333; Elliott v. Gooch Feed Mill Co., 147 Neb. 309, 23 N. W. 2d 262.

The defendants contend that costs taxed in the district court are a part of the judgment of that court and cannot, after the term at which the judgment was entered, be vacated or modified except in the manner authorized by statute for the vacation or modification of judgments after the term at which they were entered. The Nebraska decisions relating to costs are to a certain extent confusing and upon their face appear to be somewhat contradictory; yet, these decisions can be readily reconciled.

The cases of Allen v. Tallon, 120 Neb. 611, 234 N. W.

411, and Wirtele v. Grand Lodge, A.O.U.W., 111 Neb. 302, 196 N. W. 510, both deal with the recovery of sums due on policies of insurance from insurance companies. In such cases the Nebraska statutes make it mandatory to allow the plaintiff an attorney's fee when he is successful in recovering judgment. Under the statute, the failure to allow attorney's fees is an illegal and unauthorized act and these cases hold that under such circumstances, the attorney's fees may be recovered by a supplemental proceeding instituted at a subsequent term. It is true that these cases also state that attorney's fees taxed as costs are no part of the judgment. This statement is obiter dictum, has no bearing on the determination of these cases, and is erroneous.

In the case of Stake v. Western Assurance Co., 136 Neb. 735, 287 N. W. 222, a similar statement is made in a case requiring a determination of whether or not a judgment exceeded the $200 jurisdiction of a justice of the peace. Here again the statement that costs are not to be considered a part of the judgment is obiter dictum and incorrect. Section 27-102, R. R. S. 1943, fixes the jurisdiction of a justice of the peace not on the basis of the amount of the judgment ultimately entered but on the basis of "the sum in question." In other words, the determination of the justice of the peace jurisdiction is made on the basis of the amount claimed by the plaintiff and denied by the defendant and obviously was not intended to include costs.

In Barkley v. Pool, 105 Neb. 203, 180 N. W. 77, it was held where judgment has been rendered for costs, the clerk of the district court acts in a ministerial capacity in taxing such costs and may do so at a subsequent term.

It therefore appears that costs may be retaxed at a subsequent term when the court has failed to follow a mandatory statutory duty to tax costs, in the event of a clerical error or the failure to perform a ministerial act, and in instances authorized by section 25-2001, R. R. S. 1943, for the vacation or modification of judgments at

a subsequent term. None of these situations exist in the present case.

In the case of Rehn v. Bingaman, 152 Neb. 171, 40 N. W. 2d 673, it was held: "The award of costs is as much a part of the judgment as the dismissal of the action, and the power of the court to change an award of costs is coextensive with the power of the court to modify the judgment of dismissal." In its opinion, this court cited the case of Smith v. Bartlett, 78 Neb. 359, 110 N. W. 991, wherein it was stated: "An award of costs to the successful party is as much a part of the judgment entered as the damages allowed, and the court cannot, after the term, change this award except for some statutory cause allowing the court to set aside or modify its judgments at a subsequent term." It is stated in 20 Am. Jur. 2d, Costs, § 88, p. 73, that: "If a court has power and discretion to award costs to the successful litigant against his defeated adversary or to withhold them at will as it may consider just, the allowance or denial of costs is a judicial act and, after the term ends, cannot, even when the court makes a mistake, be reversed or modified by a nunc pro tunc amendment. If, however, a litigant by law is entitled to costs as a matter of right, and they are not awarded to him or are allowed to his adversary by mistake in the judgment or the entry thereof, the error in that regard is a clerical one which is open to correction on motion by nunc pro tunc amendment at any time."

The case of Rehn v. Bingaman, *supra,* was cited with approval in Summerville v. North Platte Valley Weather Control Dist., 171 Neb. 695, 107 N. W. 2d 425, but was distinguished. The case was one involving class litigation. This court held that where one goes into a court of equity to preserve or protect a fund in which others are entitled to share, such others will be required to contribute to and share the reasonable cost and expenses of litigation including attorney's fees; and that an allowance for attorney's fees and expenses in such cases may

be petitioned for and obtained at a subsequent term after the successful determination of the litigation when it is possible for the court to assess the actual benefit accruing to interested parties benefiting. In such case the proceeding is held to be supplemental to the original suit and not a request for a modification of the original judgment.

In view of the foregoing, we find that the judgment of the district court retaxing the cost of the bill of exceptions was made without authority and that the judgment must be and is reversed and the cause remanded.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT DEWAINE SARGENT, APPELLANT.
181 N. W. 2d 449

Filed November 27, 1970. No. 37610.

Criminal Law: Post Conviction: Guilty Plea. When following a plea of guilty in a criminal action and the institution of a post conviction action the court finds from the record of an in-court examination of the defendant that his plea was voluntary, was free from coercion, was fairly advised by his counsel, and that his counsel was effective, a subsequent contention that his plea was coerced and his counsel ineffective will not be entertained.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Robert Dewaine Sargent, pro se.

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

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

NEWTON, J.

This is an action brought under the Post Conviction Act. Defendant was charged with murder in the first

degree as a result of the death of his former wife. After pleading guilty to the charge, he was sentenced to life imprisonment. His present contention is that his counsel was ineffective and his plea of guilty coerced. Defendant was denied relief in the trial court and we affirm the judgment there entered.

The record discloses that defendant was at all times represented by the public defender. As a result of plea bargaining, the county attorney agreed to recommend that the defendant, in the event of a guilty plea, be given a sentence of life imprisonment rather than death. The agreement was adhered to. Defendant withdrew his plea of not guilty, was rearraigned, and entered a plea of guilty. The court, in a very painstaking manner, fully explained to defendant the nature of his constitutional rights, the effect of a guilty plea, the nature of the punishment provided by law for the offense charged, and then ascertained that defendant was in fact guilty. Defendant assured the court that his plea was voluntary, did not result from any coercive influence, that he had fully apprised his counsel of the facts of the case, had been fairly, soundly, and adequately advised, and was satisfied with the effectiveness of his counsel.

The record clearly demonstrates that defendant's present complaints are without foundation. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TRUMAN WILLIS WALKER, APPELLANT.
181 N. W. 2d 435

Filed November 27, 1970. No. 37612.

Criminal Law: Sentences: Appeal and Error. Defendant may request that the presentence report be made a part of the record and included in the bill of exceptions.

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

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

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

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

SPENCER, J.

Defendant entered a guilty plea to a charge of burglary. After a presentence investigation, he was sentenced to an indeterminate term of 2 to 8 years in the Nebraska Penal and Correctional Complex. The only question raised by this appeal is whether or not the sentence was excessive.

Defendant, who was represented by counsel, in order to place before this court the information before the trial court at the time of sentencing, requested that the presentence report of the probation officer be made a part of the record and had it included in the bill of exceptions herein.

The thrust of defendant's argument is directed to the maximum limit of the sentence. This being an indeterminate sentence of from 2 to 8 years, the defendant is eligible for parole after he has served the minimum period less credit for good time. This would mean that if defendant made a serious effort to rehabilitate himself he could be paroled in less than 2 years.

We have reviewed the defendant's presentence report. It is very illuminating. Defendant had eight appearances in juvenile court before being sent to the Boys' Training School at Kearney. He had seven appearances in police court before he was sentenced to the Nebraska Penal and Correctional Complex for 1 to 3 years. He was paroled after serving 1 year. After his parole, he had several police court appearances prior to the present conviction.

On the record herein, we feel that the trial judge was more than fair in giving an indeterminate sentence and in fixing the minimum at 2 years. The judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF STEPHEN JEFFREY MOORE, A CHILD UNDER EIGHTEEN YEARS OF AGE.
180 N. W. 2d 919

Filed December 4, 1970. No. 37453.

SUPPLEMENTAL OPINION

Appeal from the separate juvenile court of Douglas County: SEWARD L. HART, Judge. See *ante* p. 67, 180 N. W. 2d 917, for original opinion.

Kneifl, Kneifl & Byrne and Terrence J. Ferguson, for Moore.

Donald L. Knowles and Colleen R. Buckley, for Gordon E. Doeschot.

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

NEWTON, J.

The original opinion in this case will be found *ante* p. 67, 180 N. W. 2d 917. The opinion states that: "At common law, a criminal action could be dismissed by the prosecuting attorney, without leave of court, at any time before a jury was impaneled." This was followed by the statement that: "This rule has not been altered by statute in Nebraska." This last sentence is deleted from the opinion. It is in the nature of obiter dictum and may possibly be construed as in conflict with section 29-1606, R. R. S. 1943, construction of which is neither necessary nor pertinent in the present instance.

IN RE ESTATE OF RICHARD M. CAIN, DECEASED.
LLOYD R. HOLMAN, JR., APPELLANT, V. LOLA MORRISON, APPELLEE.
181 N. W. 2d 441

Filed December 4, 1970. No. 37569.

1. **Estates: Wills.** The elements of testamentary capacity are that the testator understood the nature of his act in making the will; knew the extent and character of his property; knew and understood the proposed disposition of his property; and knew the natural objects of his bounty.
2. ———: ———. The mere exclusion of the relatives of a testator is not sufficient to establish undue influence, but when it appears from an examination of the terms of the purported will itself that there is an inequality in distribution, unreasonableness, and unnaturalness, such factors may be taken into account in deciding the effect of undue influence.

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

Ronald E. Reagan and Francis M. Casey, for appellant.

Lathrop, Albracht & Dolan and Atkinson & Kelly, for appellee.

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

WHITE, C. J.

This is an appeal from a jury verdict and district court judgment denying probate of a will. The issues raised in the case were testamentary capacity and undue influence. We affirm the judgment of the district court, based on the jury verdict, denying probate of the will.

Richard M. Cain, the testator, was a resident of Sarpy County, Nebraska. He died on March 24, 1968, at the age of 66, leaving an instrument, dated November 5, 1965, purporting to be his last will and testament. Lloyd R. Holman, Jr., a nephew, was named as sole beneficiary in the instrument. Holman, the appellant here, was proponent of the will. The county court of Sarpy County, Nebraska, denied probate of the will and Holman ap-

pealed to the district court. Lola Morrison, sister of the testator, was the contestant and is the appellee here.

The precise issues presented on appeal are whether or not there was sufficient evidence to raise a jury question, both as to testamentary capacity and undue influence. In resolving this question, the appellee is entitled to have all controverted facts resolved in her favor together with any reasonable inferences that may be drawn therefrom. In re Estate of Hunter, 151 Neb. 704, 39 N. W. 2d 418. It is clear, and indeed it is not denied by the contestant here, that the proponent made a prima facie case on both issues. Under familiar rules, the burden of going forward with the evidence then shifted to the contestant, and the issue raised in this case is whether the contestant introduced sufficient evidence to carry the case to the jury. In re Estate of Bayer, 119 Neb. 191, 227 N. W. 928.

The elements of testamentary capacity are well established under our case law. They are that the testator (1) understood the nature of his act in making the will; (2) knew the extent and character of his property; (3) knew and understood the proposed disposition of his property; and (4) knew the objects of his bounty, that is, usually those who would take deceased's estate in the absence of a will. See Skochdopole v. Bays, 179 Neb. 307, 137 N. W. 2d 875.

On the issue of testamentary capacity, one James M. Schott, having lived with the testator for over 2 years, testified that it was his opinion that the testator was not capable of conducting his own business and that he was childish in character, "Kind of in a wonder world." There is testimony that the testator did not understand his mail, and often would bring advertisements to his neighbor, Steyskal, thinking that they were something official. There is testimony from which an inference can be drawn that he did not know how much cash money he had on hand; that he did not know how much rent he had coming; and that generally from the

time of his hospitalization until the time of his death he was not able to take care of his own business. The evidence on this issue and that of undue influence overlaps and is recited in some detail later in this opinion. The medical testimony and lay testimony relating to the testator suffering from a degenerating chronic brain syndrome, hardening of the arteries, and a personality and judgment impairment are particularly pertinent to the different elements of testamentary capacity. Considered as a whole, we come to the conclusion, as the district court did, that there was ample evidence to warrant the jury to draw a reasonable inference that one or all of the elements of testamentary capacity was lacking at the time the instrument purporting to be the testator's last will and testament was drawn.

A more elaborate question is presented with reference to the issue of undue influence. We have held that the tests to be applied to the issue of the sufficiency of the evidence to sustain a finding of undue influence are that the testator (1) was susceptible to such undue influence; (2) that the opportunity to exercise existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. The contestant produced evidence from which a reasonable inference could be drawn that the testator was subject to the influence of others, mainly because of his extremely dependent relationship and his physical and mental condition. There was medical and lay testimony that the testator had been hospitalized twice for mental and physical ailments within an 18-month period prior to execution of the will. The testator was an elderly man, living a lonely life, and suffering from a mental disorder based upon a physical disability, which his own psychiatrist testified made him susceptible to the influence of others. Particularly significant here is the undisputed testimony that in addition to the personality change, substantial impairment of judgment and confusion associated therewith, the testator was on medi-

cation after his release from the hospital until the time of his death.

As to the question of the opportunity to exercise undue influence the evidence strongly supports the jury verdict. The testator had been placed under a guardianship in early 1964 which lasted until September 23, 1965, and was changed to a conservatorship. The proponent was the testator's guardian and conservator during this period. It was only approximately 6 weeks after the guardianship was terminated that the purported will was made.

The testator lived alone for many years after the death of his brother. He developed a very close relationship with a neighbor, one Stanley Steyskal, who testified for the contestant, who had a farm home approximately 300 yards from the home of the testator. Testator made daily visits to the Steyskal residence, helped some around the Steyskal farm, and would almost daily stay for lunch. This had gone on for quite a few years. The relationship, the evidence shows, developed gradually and Mr. Steyskal had been farming the testator's farm for approximately 9 or 10 years. Mr. Steyskal testified that, in the first part of 1964, he noticed a marked change in the mental attitude and personality of the testator. Steyskal, after a few months, felt that something had to be done about it. The testator's problems grew progressively worse and Mrs. Steyskal finally called the testator's sister, Lola Morrison, the contestant here. She was not able to help and so Mrs. Steyskal called the testator's nephew, Max Holman. As a result, the testator was hospitalized. He spent about 80 days in the hospital under the care of a psychiatrist. He was later transferred to another hospital where he was under the care of another psychiatrist, Dr. James R. Dunlap, who was a witness for the contestant in this case. This doctor testified that the testator was withdrawn, depressed, confused, unable to cope with his own personal needs, and unable to care for himself. His

diagnosis was "involutional depression" or "chronic brain syndrome" with paranoid depressive symptoms. There was hardening of the arteries that had affected the brain and in turn had a serious effect upon the personality of the testator and the impairment of his judgment. He testified that the testator had suspicions and fears that were irrational and that he was confused. This undisputed medical testimony is obviously pertinent to both the issue of testamentary capacity and undue influence. The inferences to be drawn therefrom are accentuated by the fact that the testator's condition was becoming progressively worse. He was again hospitalized from June 11, 1965, until July 2, 1965. After release from the hospital this last time he was continuously on medication until the time of his death, and, of course, was in that condition at the time of making the instrument purporting to be the will in this case. The evidence also shows that a guardianship was established in early 1964, and later changed into a conservatorship. It was during the conservatorship on November 5, 1965, 6 weeks after the dissolution of the guardianship, that the testator made the purported will at issue in this case.

It appears clear from this evidence that a reasonable inference could be drawn that the testator was subject to and susceptible to undue influence in the execution of his will and an opportunity to exercise such influence existed.

We also believe that a disposition to exercise influence for an improper purpose was demonstrated in the evidence. The neighbor, Stanley Steyskal, a completely disinterested witness, and probably more familiar with the testator in a lay sense than anybody else, testified that the proponent freely admitted to Steyskal that it was the proponent who should receive all of the testator's property. The testator had told Steyskal that the proponent was trying to talk him into willing his property to him but that was not what he wanted to do. The testator later told Steyskal that he was relieved because

the proponent had promised to tear up the will in question. It is true that the proponent and Steyskal were not on friendly terms, but this is a matter of credibility for the jury under all of the circumstances.

The result clearly shows the effect of the undue influence. From an examination of the terms of the will itself, it appears that there was an inequality in distribution, unreasonableness, and unnaturalness of the will which may be taken into account in deciding the issue of the effect of undue influence. In re Estate of Bowman, 143 Neb. 440, 9 N. W. 2d 801. The proponent, only one of several nephews and nieces, was the sole beneficiary under the will. Not only were the other nephews and nieces excluded, but the surviving brothers and sisters of the testator were shut out as well. It is true that in the absence of other factors indicating undue influence, the mere exclusion of other relatives would not be given great weight, but as the evidence was presented we believe the jury could, as it did, draw a reasonable inference that the purported will does show the effect of undue influence by the proponent.

For the reasons stated, the jury verdict was based on sufficient evidence and the judgment of the district court is affirmed.

AFFIRMED.

SMITH, J., not participating.

CLIFFORD E. CONNER, APPELLANT, V. DONOVAN E. SOUTHERN ET AL., APPELLEES.
181 N. W. 2d 446

Filed December 4, 1970. No. 37577.

1. **Process.** Where the record fails to show that the defendant has transacted any business in this state, service of a summons outside the state under subsection (2) of section 25-536, R. S. Supp., 1969, is invalid.

2. ———. Personal service outside the state, as a substitute for service by publication, is invalid unless the affidavit required by section 25-518, R. R. S. 1943, has been filed.
3. ———. Personal service outside the state, as a substitute for service by publication, made by some person other than the sheriff or some person appointed by the sheriff is invalid. § 25-521, R. R. S. 1943.
4. **Pleadings: Garnishment.** Allegations which are proper in a motion to dissolve an attachment or garnishment may be included in a special appearance without making a general appearance.
5. **Appeal and Error: Pleadings.** A motion to dismiss an appeal to this court, where there has been no final order in the district court, is not a general appearance in the action pending in the district court.

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

Dan J. Whiteside, for appellant.

Cronin & Shamberg, for appellees.

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

BOSLAUGH, J.

The plaintiff appeals from an order dismissing the action after the special appearance of Donovan E. Southern, the defendant, had been sustained. No summons was ever served upon W. J. Smith. A prior appeal from the order sustaining the special appearance was dismissed upon the motion of the defendant.

The petition filed in the district court for Hall County, Nebraska, alleged that the plaintiff was a resident of Nebraska; that the defendants were residents of Ohio; that on February 22, 1967, the plaintiff prepared and executed a contract whereby the plaintiff agreed to erect a steel building for the defendants at Monaca, Pennsylvania; and that the defendants are indebted to the plaintiff on the contract in the amount of $11,250.

A summons was served upon the defendant in Ohio. An affidavit for garnishment was filed and a summons in

garnishment was served upon the Mid-States Grain Company in Hall County, Nebraska. The affidavit alleged that the defendant owned shares of capital stock of the Mid-States Grain Company.

The plaintiff contends that the service upon the defendant in Ohio was valid because service outside the state is now authorized as to a cause of action arising from "transacting any business in this state." §§ 25-536 and 25-537, R. S. Supp., 1969. The record, however, fails to show that the defendant transacted any business in this state. The petition alleges only that the plaintiff prepared and executed the contract in Nebraska. The contract itself called for the work to be done in Pennsylvania. There is no allegation or any proof of any business transacted in Nebraska by the defendant.

The plaintiff acquired no jurisdiction over any property of the defendant because there was a failure to comply with the requirements of section 25-518 and 25-521, R. R. S. 1943. See Nelson v. Robinson, 154 Neb. 64, 46 N. W. 2d 892.

The plaintiff further contends that the defendant has made a general appearance in the action because the special appearance filed in the district court alleged that the petition failed to state a cause of action and because the prior appeal was dismissed upon the motion of the defendant made in this court.

The contract involved in this action was executed by "National Constr., Inc. by W. J. Smith, Vice Pres. & Treas." The petition alleged that there was no such corporation; that the defendant and Smith were partners doing business under the corporate name; that the partnership had been dissolved; and that it owned no property.

The special appearance contained allegations which were directed at the truth of these matters and which would have been proper in a motion to dissolve the garnishment. Allegations which are proper in a motion to dissolve an attachment or garnishment may be

included in a special appearance without making a general appearance. See Insurance Co. of North America v. Kunin, 175 Neb. 260, 121 N. W. 2d 372.

The motion to dismiss the prior appeal was an objection to the jurisdiction of this court. There had been no final order in the district court and there was no basis upon which this court could obtain jurisdiction. The motion was a proper procedural step toward obtaining the final order in the district court to which the defendant was entitled. See Busboom v. Gregory, 179 Neb. 254, 137 N. W. 2d 825. The motion in this court to dismiss the prior appeal was not a general appearance in the action pending in the district court.

The judgment of the district court is affirmed.

AFFIRMED.

ERNEST G. ENDORF ET AL., APPELLEES, V. SCHOOL DISTRICT NO. 303 OF THAYER COUNTY, NEBRASKA, ET AL., APPELLANTS.
181 N. W. 2d 445

Filed December 4, 1970. No. 37600.

Schools and School Districts: Statutes. Section 79-403, R. S. Supp., 1967, required the giving of notice by publication and also by posting notice in certain places, and where the proof of such notices does not appear in the bill of exceptions, the action of the board in granting the request for change of school district boundaries will be held void for want of jurisdiction.

Appeal from the district court for Jefferson County: ERNEST A. HUBKA, Judge. Reversed and remanded with directions.

Davies, Cheuvront & Sutter, for appellants.

Merrell L. Andersen and Harlan D. Hubka, for appellees.

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

BOSLAUGH, J.

The defendants appeal from a judgment of the district court approving the transfer of plaintiff's land from School District No. 303 of Thayer County, Nebraska, to School District No. 8 of Jefferson County, Nebraska. The defendants Uher, Mussman, and Jezl are resident taxpayers in District No. 303. District No. 303 was non-accredited at the time the transfer was approved by the freeholders' board under subsection (2) of section 79-403, R. S. Supp., 1967.

The defendants contend that the judgment must be reversed because the plaintiffs failed to prove in the district court that the notice required by statute was given prior to the hearing before the freeholders' board. Copies of the notice and of the proof of publication appear in the transcript filed in the district court but were not offered or received in evidence in the district court.

In Everts v. School Dist. No. 16, 175 Neb. 310, 121 N. W. 2d 487, this court held that where proof of the notice required by section 79-403, R. S. Supp., 1961, does not appear in the bill of exceptions, the action of the board granting the transfer requested will be held void for want of jurisdiction.

It is unnecessary to consider the other assignments of error. The judgment of the district court is reversed and the cause remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., A CORPORATION, APPELLANT, V. CITY OF SIDNEY, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
181 N. W. 2d 682

Filed December 4, 1970. No. 37602.

1. **Municipal Corporations: Public Utilities.** A municipal corpo-

ration in fixing rates to be charged by a public utility acts in a legislative rather than a judicial capacity.

2. **Public Utilities.** A public utility is entitled to rates for its service that may normally be expected to yield a fair return upon the reasonable value of the property that is being used for the public convenience.
3. ———. Utility rates fixed by a city are presumed to be correct and reasonable, and the burden is on the party attacking them to show they are arbitrary, unreasonable, and confiscatory.
4. **Trial: Appeal and Error.** Where, on appeal from an action in equity, credible evidence on material questions of fact is in irreconcilable conflict, the Supreme 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.
5. **Pleadings: Statutes.** A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it and at the same time question its constitutionality.

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

J. Robert Wilson, Duane L. Stromer, James D. Conway, Martin, Mattoon & Matzke, and Wright, Simmons & Hancock, for appellant.

Clinton & McNish, for appellees.

Sidner, Svoboda & Schilke and Loren G. Olsson, for amici curiae.

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

NEWTON, J.

This is an injunction action. Plaintiff sought to increase rates for the sale of natural gas at retail in 108 of 141 Nebraska municipalities. Defendant city refused to grant the proposed raise in rates in its entirety and plaintiff seeks to enjoin the city from preventing plaintiff from putting its proposed increased rates into effect.

Plaintiff produces, purchases, transports, and distributes natural gas in Kansas, Nebraska, Wyoming, and Colorado. In the vicinity of Sidney, there are several

gas wells, a large storage system, and pipelines from Wyoming and Colorado connecting with plaintiff's pipeline system. Owing to these natural advantages, defendants have enjoyed the lowest retail gas rates in Nebraska. Plaintiff seeks to raise defendants' rates to place them on a comparable basis with other Nebraska municipalities. In conformity with the provisions of section 16-679, R. R. S. 1943, plaintiff applied to defendants for an increased rate of approximately 25 percent and received an increase calculated by defendants to be 6.7 percent or equivalent to the desired Nebraska increases if spread equally over all of the 141 Nebraska municipalities served by plaintiff. Plaintiff did not submit to the Sidney city council, nor to the district court, figures establishing a rate base for defendant city, but limited such figures to its Nebraska statewide system.

Evidence of the expert witnesses called to testify in regard to the proper rate base and rate of return is exceedingly conflicting. Plaintiff requested a return of 7.6 percent on a rate base figured at $27,387,028 and defendants granted a 7.45 percent return on $24,765,485.

A municipal corporation in fixing rates to be charged by a public utility acts in a legislative rather than a judicial capacity. See, Kansas-Nebraska Natural Gas Co. v. City of St. Edward, 167 Neb. 15, 91 N. W. 2d 69; City of Scottsbluff v. United Tel. Co. of the West, 171 Neb. 229, 106 N. W. 2d 12. By statute, the Legislature has delegated to municipalities the authority to regulate, determine, and fix rates. This power being legislative in nature, it cannot be assumed by the courts and this court cannot usurp the functions of a rate-making body. Plaintiff contends that if the rate fixed by a rate-making authority is arbitrary, unreasonable, and confiscatory, relief may be had in the courts. With this we agree. A public utility is entitled to rates for its service that may normally be expected to yield a fair return upon the reasonable value of the property that is being used for the public convenience. See Skeedee Independent Tel.

Co. v. Farm Bureau, 166 Neb. 49, 87 N. W. 2d 715. It will be noted that in the present instance, plaintiff has avoided establishing a rate base for the defendant city notwithstanding that the statute confers rate-fixing authority upon each individual municipality. See § 16-679, R. R. S. 1943. Obviously the Legislature did not anticipate that rates should be substantially equal in all Nebraska municipalities as plaintiff now insists they should be. It is entirely possible that a proper rate base may vary from city to city depending upon the extent of plaintiff's investment in its system attributable to such individual cities. So also may its costs of supplying service vary from city to city as where one city is adjacent to a cheap supply of gas and another requires that its supply be transported over a great distance. These factors have been willfully ignored by plaintiff with the result that the record in this case completely fails to demonstrate that the rate fixed by the city of Sidney and approved by the trial court is arbitrary, unreasonable, or confiscatory.

Even when considered on a statewide rate basis such as plaintiff pursued, the evidence fails to convince us that defendants have acted unlawfully. Electric and gas rates fixed by a city for a utility company are presumed to be correct and reasonable and the burden is on the utility company to show that they are clearly, palpably, and grossly unreasonable. See, Iowa-Illinois Gas & Elec. Co. v. City of Iowa City, 255 Iowa 1341, 124 N. W. 2d 840; City of Wink v. Wink Gas Co. (Tex. Civ. App.), 115 S. W. 2d 973. In Pell v. City of Marshalltown, 241 Iowa 106, 40 N. W. 2d 53, the court, calling attention to the legislative nature of the rate-fixing power, stated: "As a general rule, the acts of a municipal corporation which are within its power are not subject to judicial review unless there is a manifest and palpable abuse of power, and it is well-established that the motives of the council acting in its legislative capacity cannot be inquired into. * * * In the present case,

in exercising a power expressly authorized by statute the council has a discretion, and so far as it does not act oppressively or unreasonably under that power courts are powerless to interfere with that discretion." City of Wink v. Wink Gas Co., *supra,* in dealing with city-fixed gas regulations, states: "The ordinance is presumed to be reasonable. One attacking it has the burden of proving that it is unreasonable. * * * If there is a reasonable doubt as to its reasonableness, the ordinance must be sustained. If the question of reasonableness is seriously debatable, the opinion of the City Commission, not that of the courts, must prevail." Where, on appeal from an action in equity, credible evidence on material questions of fact is in irreconcilable conflict, the Supreme 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. See State v. Merritt Brothers Sand & Gravel Co., 180 Neb. 660, 144 N. W. 2d 180.

Plaintiff urges that section 16-679, R. R. S. 1943, is unconstitutional. This question we do not determine. Plaintiff sought a raise in gas rates from the defendant city pursuant to the provisions of this statute. Being unsatisfied with the result obtained, it brought this action to enforce the rates it desired and alleged in its petition that defendants had jurisdiction over the rates by virtue of the statute. It cannot now be heard to question the constitutionality of the statute. "A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it and at the same time question its constitutionality." Shields v. City of Kearney, 179 Neb. 49, 136 N. W. 2d 174.

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

AFFIRMED.

BOSLAUGH and MCCOWN, JJ., dissenting.

The plaintiff attempted to raise the issue of the ap-

plicability and constitutionality of section 16-679, R. R. S. 1943, in both the district court and in this court. The opinion of the majority holds that section 16-679, R. R. S. 1943, is applicable and that the plaintiff is estopped from questioning the validity of the statute in this action.

The plaintiff is an integrated public utility providing natural gas service to wholesale and retail customers in four states. In Nebraska the plaintiff serves 52,926 retail customers within the boundaries of 141 separate municipalities, and 11,513 rural retail customers.

Section 16-679, R. R. S. 1943, enacted in 1901, authorizes the mayor and council in cities of the first class to regulate and fix the rates for gas supplied by an individual or private corporation "operating such works or plants." The reference is to manufactured gas produced from oil or coal or both in a gas works located in the city.

Natural gas is produced from underground sources and transmitted by pipeline to distribution centers. Manufactured gas is produced by local plants or works at the distribution center and is not transmitted through long-distance pipelines. Natural gas was not used in Nebraska before 1930.

In considering a similar statute, the Supreme Court of Colorado, in Citizens Utilities Co. v. City of Rocky Ford, 132 Colo. 427, 289 P. 2d 165, said: "The meaning of this statute when construed in the light of subsequent events, must be discovered by giving consideration to the language of the statute as it was understood at the time of its enactment. No new meaning can be given thereto because of changed conditions. This statute cannot be construed as broad enough to include a natural gas distribution system. The very wording of the statute when applied to conditions existing at the time of its passage, if defendants' contention be considered at all, certainly provokes a doubt, to say the least, as to the meaning of 'gasworks,' and invoking the well-settled rule, if a doubt exists as to the power of a

municipality to create or acquire a natural gas distribution system under this statute, then such doubt is resolved against the municipality. Since municipal corporations are creatures of statute, they are confined to the powers specifically granted thereby. Notice is to be given to the fact that in 1899 distribution of natural gas was unknown. Such gas as was available for use at that time was artificial gas, manufactured in what may be termed a 'gasworks,' and distributed by its particular system, and it follows that a word used in the statute of that date does not include everything to which that word may be applied at the present time. At that time the legislature could not have contemplated that municipalities in the state of Colorado would, at the present time, be using natural gas, and therefore the word it employed at that time could have referred only to artificial or manufactured gas." See, also, Application of Village of Walthill, 125 F. Supp. 859, holding that a gas plant or gas works is an establishment where gas is manufactured.

We think that the proper interpretation of section 16-679, R. R. S. 1943, is that it has no application to an integrated natural gas distribution system such as that operated by the plaintiff, and that the Legislature has not delegated the power to regulate this type of utility.

This action was brought by the plaintiff to enjoin the defendant city from preventing the plaintiff from putting its proposed rates into effect. It was not a continuation of the proceeding before the city council of the defendant city or a form of direct review of the action of the city council. The rule upon which the majority relies refers to an attempt to challenge the validity of a statute in the same action in which the benefit of the statute is claimed.

In Shields v. City of Kearney, 179 Neb. 49, 136 N. W. 2d 174, the plaintiffs "appealed" to the district court "from the enactment of the ordinance" and then attempted to challenge the validity of the statute which

purported to authorize the "appeal." They had invoked the benefit of the statute to obtain a determination that the action of the city was not authorized. We think the better rule is that the plaintiff is not estopped in this action from questioning the applicability or constitutionality of section 16-679, R. R. S. 1943.

In Abie State Bank v. Weaver, 119 Neb. 153, 227 N. W. 922, this court held that since the plaintiff had accepted benefits arising from the Bank Depositors' Guaranty Law, it was estopped to question the validity of an assessment made under the law. In holding that the plaintiff was not estopped, the United States Supreme Court, in Abie State Bank v. Bryan, 282 U. S. 765, 51 S. Ct. 252, 75 L. Ed. 690, said: "The banks were not bound for all time, regardless of consequences."

We think it is clear that the regulation of the rates of an integrated utility, such as the plaintiff, is not a matter of local concern, but is a matter of statewide concern. It is a power which was not delegated by the Legislature under the statute passed in 1901.

UNITED BENEFIT FIRE INSURANCE COMPANY IN LIQUIDATION BY AND UNDER THE DIRECTION OF NEBRASKA DEPARTMENT OF INSURANCE, APPELLANT, V. MAX A. EARL, DOING BUSINESS AS EARL INSURANCE AGENCY, APPELLEE.

181 N. W. 2d 841

Filed December 11, 1970. No. 37440.

Insurance: Agency. Unearned premiums and unearned commissions held by an insurance agent are held in a fiduciary capacity for the company and are recoverable for the company in involuntary liquidation.

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

Craig F. Swoboda, for appellant.

Lyle E. Strom and C. L. Robinson, for appellee.

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

SMITH, J.

United Benefit Fire Insurance Company in involuntary liquidation sued Max A. Earl, its soliciting agent, on an account. The court instructed the jury to limit any recovery by United to earned premiums collected by Earl but not transmitted to United. Verdict went for Earl and United appeals. It contends that other items, especially financed premiums and unearned commissions, were held by Earl as its fiduciary.

On November 24, 1965, the district court decreed the involuntary liquidation which canceled all United policies and authorized suit in United's name. See § 44-127, R. R. S. 1943. United's claim against Earl amounted to $9,530.12, based on testimony of an insurance accountant who had examined United's records. The accountant divided the claim into four categories, the first two concerning policies canceled by the liquidation and the last two concerning preliquidation cancellations, as follows: (1) Unpaid financed premiums and unearned commissions on them, $7,427.24; (2) unearned commissions where premiums had not been financed, $419.73; (3) financed premiums, $99.95; and (4) unearned commissions and unearned finance, less unearned premiums, $173.49.

The agency agreement, dated December 30, 1964, imposed duties on Earl (1) to refund to United unearned commissions on return premiums; (2) to collect all premiums and hold them as trust funds belonging to United; and (3) to account monthly for business conducted. United authorized Earl to deduct net commissions. It also gave him a rate schedule which stated: "Premium Budget Available with North American . . .. Agent has no liability on the contract except to return unearned commissions in the event of cancellation. . . . Agent

may deduct his commission from the downpayment and remit the balance to North American. . . ." United supplied Earl with forms of the North American financing agreement which read: "AGENTS AGREEMENT. . . . in the event of cancellation . . . I agree . . . to direct the Company to reimburse North American . . . (for) unearned premiums . . .."

Practice departed from the writings. By oral agreement between United and Earl an application that was accompanied with a North American financing agreement was transmitted directly by Earl to United. The latter rendered the monthly statements of account. Earl paid most of the statements that charged him for financed premiums and unearned commissions. He did not, however, pay the balance due as shown on the statements for September and October 1965. There was no other important agreement relating to North American.

The insurance accountant found no records of North American and no financing agreement among United's records. The inter-company relationship was a mystery.

On September 28, 1965, United notified Earl that it would accept no more applications, and its financial weakness was common talk among insurance men. Earl then either returned money received from customers or rewrote the insurance with another company. He had been following a trade usage of paying return premiums to his customers.

The status of premiums held by an agent in ordinary insurance transactions is governed by section 44-328, R. R. S. 1943, which provides: "Any person . . . who shall with authority receive . . . money on account of . . . any contract of insurance . . . from other persons to be transmitted to any such (insurance) company . . . for a policy . . ., shall be deemed to all intents and purposes an agent . . . of such company." We doubt that the framers of the quoted section contemplated involuntary liquidation of the insurance company.

Some courts have said that the agent holds unearned premiums and commissions for his customers and not in a fiduciary capacity for the insurance company in receivership or involuntary liquidation. See, Bushnell v. Krafft, 133 Ind. App. 474, 183 N. E. 2d 340 (1962); Bohlinger v. Zanger, 306 N. Y. 228, 117 N. E. 2d 338 (1954), noted 54 Colum. L. Rev. 638 (1954). Other courts have asserted the contrary. See, Garrison v. Edward Brown & Sons, 25 Cal. 2d 473, 154 P. 2d 377 (1944); Clay v. Eagle Reciprocal Exchange, 368 S. W. 2d 344 (Mo., 1963); Shoup v. Mayerson, 454 P. 2d 666 (Okla., 1969); Korlann v. E-Z Pay Plan, Inc., 247 Ore. 170, 428 P. 2d 172 (1967) (O'Connell, J., dissenting).

We consider (1) the agent's need to maintain good business relations with his customers, (2) statutory and decisional law governing ordinary insurance transactions, (3) the vital interest of the state in the field of insurance, and (4) the purpose of involuntary liquidation to achieve equality of treatment among policyholders and other creditors, the equality of course being subject to equitable preferences.

On balance the following rule is approved: Unearned premiums and unearned commissions held by an insurance agent are held in a fiduciary capacity for the company and are recoverable for the company in involuntary liquidation.

There were too many gaps in the evidence of North American financing for the district court to submit categories (1), (3), and (4) of United's claim to the jury. Withdrawal of category (2), however, was prejudicial error.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

SCHOOL DISTRICT OF OMAHA, COUNTY OF DOUGLAS, STATE OF NEBRASKA, ET AL., APPELLEES, V. STATE BOARD OF EDUCATION ET AL., APPELLANTS.

181 N. W. 2d 861

Filed December 11, 1970. No. 37458.

1. **Administrative Law: Statutes.** A state agency may be subject to suit by statutory implication.
2. **Trial.** The court in every stage of an action must disregard any error in the proceeding which does not affect substantial rights of the adverse party.
3. **Injunction: Statutes.** Section 25-1071, R. R. S. 1943, in providing that no injunction shall be granted by a judge after a motion therefor has been overruled on the merits of the application by his court, simply establishes a rule of practice.

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

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

Leo Eisenstatt and J. Patrick Green of Eisenstatt, Higgins, Miller & Kinnamon, and William Ross King, for appellees.

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

SMITH, J.

The State Board of Education limited state aid to the School District of Omaha for the school year 1968-69. In doing so, it assumed that Omaha was subject to the first clause of section 12, L.B. 448, Laws 1967, c. 514, p. 1723. The board denied Omaha's claim for relief from undue hardship under a subsequent provision of that section. On review the district court decided that the board had misinterpreted the first clause and that section 12 did not apply. The court ordered the board to submit a recalculation of the amount of aid to Omaha and to stay further action. The board appeals. Chief contentions relate to judicial jurisdiction, allowance of

a temporary injunction on Omaha's second application and after denial of the first application, and statutory interpretation.

L.B. 448 substantially increased state aid to local school districts. It established a rough norm for financial support and provided for districts that might be spending more than the norm. Section 12 read: "For a district in which actual per pupil cost, in any particular year, exceeds the total financial support prescribed by sections 7, 8, and 11 . . . the following limitation shall apply . . . Provided, . . . the . . . Board . . . may grant whatever relief (from undue hardship caused by the section) . . . it deems appropriate . . . ."

In November 1968, Omaha submitted its application for state aid and for relief from undue hardship under section 12 for 1968-69. These data are undisputed: (1) Net current expense for 1967-68, $26,301,849.10; (2) average daily membership for 1967-68, 60,480.2; (3) resultant per pupil cost, $434.88; (4) estimated total financial support prescribed by sections 7, 8, and 11 for 1968-69, $28,837,638; and (5) estimated average daily membership for 1968-69, 61,974.

The board held a hearing. It and Omaha both assumed the first clause of section 12 governed—evidence and arguments going to the issue of hardship. On November 6, 1968, the board denied Omaha's application for relief from hardship. Applying the limitations of section 12 of the act, the board decreased the allocation to Omaha from $5,661,199 to $4,165,114.

Omaha raised the issue concerning the first clause on November 29, 1968, when it filed a petition in district court. The petition, headed "Petition in Review" and "Petition in Error," requested appropriate relief. Omaha also then filed a certified transcript pertaining to the board action and a praecipe for summons in error against the board, the Commissioner of Education, and the State Treasurer, who was in charge of the disputed funds.

On December 13, 1968, Judge Boyles of the district

court "on consideration of arguments and briefs" denied Omaha's application for a temporary injunction. On March 26, 1969, Judge Hastings of the district court allowed a temporary injunction on Omaha's second application. The injunction remained in effect until August 19, 1969, when the court entered the order from which this appeal resulted.

The board contends that Omaha attempted to sue the State without legislative authority. It is true that explicit authority was not granted. The Legislature provided, however, that the board shall constitute a body corporate with authority to adopt a common seal. § 79-325, R. S. Supp., 1969. Furthermore, a statutory section prescribing broad duties concluded: "None of the duties . . . shall prevent the board from exercising such other duties as in its judgment may be necessary for the proper . . . exercise of its obligations." § 79-328, R. S. Supp., 1969.

A state agency may be subject to suit by statutory implication. Johnson v. Municipal University of Omaha, 184 Neb. 512, 169 N. W. 2d 286 (1969). The board's objection to jurisdiction of the district court here is without merit.

The board contends that its actions were not quasi-judicial and that therefore neither an error proceeding nor an administrative appeal would lie. See §§ 25-1901, R. R. S. 1943, and 84-917, R. S. Supp., 1969. Conceding the points arguendo only, we think Omaha met the requirements of an independent suit in district court for equitable relief. Cf. Campbell v. City of Ogallala, 178 Neb. 663, 134 N. W. 2d 597 (1965); From v. Sutton, 156 Neb. 411, 56 N. W. 2d 441 (1953); State ex rel. Nebraska Beer Wholesalers Assn. v. Young, 153 Neb. 395, 44 N. W. 2d 806 (1950). See generally 3 Davis, Administrative Law Treatise, 388 to 425 (1958). The court in every stage of an action must disregard any error in the proceedings which does not affect substantial rights of the adverse party, and no judgment shall be reversed or

affected by reason of such error. § 25-853, R. R. S. 1943. Omaha's claim, if good on the merits, will not fail for any such errors of form.

The board contends that it was prejudicial error for Judge Hastings to allow a temporary injunction after Judge Boyles had denied the first application. Section 25-1071, R. R. S. 1943, provides that no injunction shall be granted by a judge after a motion therefor has been overruled on the merits of the application by his court. The board's contention fails for at least two reasons: First, the board failed to establish that Judge Boyles' denial was on the merits. Second, section 25-1071, R. R. S. 1943, simply establishes a rule of practice. In this case the final order of the court is analogous to a permanent injunction. In such circumstances a violation of the statutory provision would be harmless error.

The board contends that the first clause of section 12 of L.B. 448 concerning per pupil costs did not refer to 1967-68. Section 2 of the act provided: ". . . unless the context otherwise requires: . . . (3) Per pupil cost shall mean a district's current operating expense for the preceding year . . . divided by the average daily membership . . . for the preceding school year." § 79-1331, R. S. Supp., 1969. The phrase "in any particular year" in section 12 means 1968-69 in this case. The per pupil cost for 1967-68, $434.88, did not exceed total support prescribed for 1968-69, $28,837,638 which, divided by 60,480.2, was $476.81 per pupil, or $465.31 per pupil with use of the estimated average daily membership, 61,974, for 1968-69. Section 12 did not apply to Omaha.

The judgment is affirmed.

AFFIRMED.

ENTERPRISE COMPANY, INC., A CORPORATION, APPELLANT, V. NETTLETON BUSINESS COLLEGE OF LINCOLN, INC., A CORPORATION, APPELLEE.
181 N. W. 2d 846

Filed December 11, 1970. No. 37523.

1. **Contracts.** The interpretation given a contract by the parties themselves while engaged in performance of the contract is one of the best indications of their true intent.
2. **Landlord and Tenant.** Where a landlord notifies his tenant for a fixed term that in case the latter holds over he must pay a specified increased rental, the tenant will become liable for such rental if he in fact holds over, and either remains silent with reference to the notification, or fails to express his nonassent to the increase.
3. **Equity: Estoppel.** The principle prohibiting a party from mending his hold after commencement of litigation is ordinarily applicable only if some previous conduct on his part would render present assertion of the right unjust.
4. **Landlord and Tenant: Evidence.** In the absence of a change of conditions, monthly rental is competent evidence of the reasonable value of the occupation and use of premises that the tenant held over his term.

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

Ginsburg, Rosenberg, Ginsburg & Krivosha and R. P. Cathcart, for appellant.

Nelson, Harding, Marchetti, Leonard & Tate and Richard H. Williams, for appellee.

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

SMITH, J.

Enterprise Company, Inc., sought an accounting and damages from Nettleton Business College of Lincoln, Inc. The suit related to Nettleton's renting its students living quarters in two apartment buildings of Enterprise. We limit our opinion to three of the main claims against Nettleton. (1) As manager of the buildings, it failed to account for all rentals received; (2) it wrong-

fully refused to surrender possession of one building; and (3) it breached its duties to maintain the buildings and to collect from tenants or to pay Enterprise for tenant damage beyond ordinary wear and tear.

The district court allowed Enterprise (1) $550 for rents paid Nettleton by occupants of overcrowded units in the fall of 1967 and (2) $399.50 for items missing from apartment appliances. Enterprise appeals.

The buildings, known as 601 and 1801, were constructed in 1963. A unit of the 43 units in each building accommodated 4 tenants without overcrowding. The manager, H. A. Wolf Company, prior to August 1965, leased units in 1801 to Nettleton for occupancy by girls enrolled in the business college. Nettleton paid rent based on the number of girls occupying apartments and not on the number of apartments occupied by the girls.

In July 1965, the parties were negotiating a management agreement and an option to Nettleton to purchase both buildings. Meanwhile they orally agreed upon Nettleton assuming management on August 1 subject to full review of rental rates. Orville Kingery, president of Enterprise, which we treat as owners at all times for present purposes, authorized Nettleton to contact possible students and to set up occupancy schedules for the upcoming school year.

The parties agreed in a writing dated September 1, 1965, as follows. During the purchase option period of 2 years, Nettleton, as exclusive manager, was to try to "maintain an average occupancy . . . of at least 75%." It promised to submit monthly a "running computation" of total rentals received. Enterprise reserved an option to terminate the contract, should gross rentals received at any time be less than 75 percent of the gross receivable upon full occupancy. The reservation was subject to the "right" of Nettleton within 10 days to pay the difference in cash.

The agreement contained this provision: "2. During the term of the option period . . . (b) The schedule of

rentals shall be fixed by . . . (Enterprise); that is the amount to be received for each apartment unit for monthly occupancy, shall be . . . fixed by . . . (Enterprise) and . . . (Nettleton) shall adhere to said schedule of rentals." Under the paragraph Enterprise increased the monthly rental rate a unit from $134 to $146, effective May 31, 1966.

The agreement required Nettleton to collect rentals monthly in advance and to remit same less deductions for certain expenses of management. It then continued: ". . . expenses incurred in the employment of a house mother and alternative, and for telephone and for such furniture as . . . (Nettleton) may be willing to provide, shall not be . . . an expense of management and no deduction for such items shall be made by . . . (Nettleton) from the rental proceeds."

The application form for enrollment at Nettleton prior to June 1, 1966, stated: "Student rate at Nettleton Manor is $37.50 per 4 week month." A revised form set the rate at "$140.00 per quarter (12 weeks) (Effective June 1, 1966)." A student deposit of $50, a "reservation fee," was to be applied to the last rent due. Another student deposit of $5 to $7 was to secure Nettleton against key and breakage damage.

An illustration of the monthly account submitted by Nettleton to Enterprise related to transactions at 1801 during June 1966. Part one, headed "Collections . . ." was as follows:

Apt. No.	Rent Due This Month	Loss by Vacancy	Amount Paid This Month	Unpaid Balance
B1	146.00	$ 52.12	$ 93.88	0.00
. . .	. . .	. . .	. . .	. . .
103	146.00	146.00	0.00	0.00
104	146.00	63.88	82.12	0.00
. . .	. . .	. . .	. . .	. . .
(Totals)				
43 apartments	$6,278	$3,556.14	$2,721.86	0.00

Part two, headed "RECAP OF RENTAL INCOME AND EXPENSES . . ." was as follows:

"Rental Income . . .	$2,721.86
Expenses:	
. . .	
Total Expenses	230.00
Total to be remitted . . .	2,491.86"

The account statements included the $50 deposit but not the key and breakage deposit which Nettleton returned to the student in almost every case. The statements set out a monthly rental charge of $134 until June 1966, and the increase to $146 effective that month. During the latter period the statements did not account for the quarterly collection of $140, or approximately $46.67 a month, a student, but only for $36.50 a month. The difference went to pay charges for a housemother, a proctor for each floor, telephone, and building furnishings. All apartment units were furnished by Nettleton.

Wayne Kingery, vice president and secretary of Enterprise, recognized in the Nettleton statements calculations on a per capita basis. He vaguely testified to one or possibly two verbal protests, explaining: "But I did not believe that we would not be compensated further at a later date due to the wording of that contract." On November 22, 1967, Wayne Wiegert, president of Nettleton, wrote Enterprise that the rate had been $36.50 a girl, or $146 a unit occupied by four girls. Enterprise continued to accept statements on that basis without written protest, except reiteration of $146 per apartment unit, prior to commencement of this suit on December 6, 1967.

In July and August 1966, Nettleton had remitted not only the balances shown on the monthly statements but also $6,735.11 in order to preserve its option. On April 12, 1967, Enterprise notified Nettleton of a deficiency under the 75 percent occupancy clause: ". . . Should . . . (Nettleton) fail to make such payment ($5,009.34)

within 10 days, then . . . (Enterprise) shall have the option to declare this contract forthwith terminated." The payment was not made. On June 1, 1967, Enterprise accepted a surrender of 601 by Nettleton with the statement that the acceptance terminated all contracts relating to 601.

On October 17, 1967, Enterprise wrote Nettleton in regard to 1801: ". . . there is no written contract between your organization and our's covering the rental of these apartments. Therefore, . . . 30 day notice will suffice for either of us to terminate this arrangement." Enterprise, in a letter dated October 31, purported to terminate the month-to-month tenancy, effective November 30.

Nettleton's lawyers on November 8, 1967, wrote Enterprise: ". . . there is no written agreement governing the tenancy. . . . We have reviewed the Nebraska law . . . and find ample authority . . . which would categorize the occupancy . . . as a year-to-year lease. . . . our client . . . will not quit the premises until August 31, 1968, assuming proper notice is given . . . to terminate the year-to-year tenancy."

Enterprise replied on November 20, 1967: ". . . expressly denying that any such claim . . . is . . . valid, we do recognize that some time necessarily will be involved before this issue can be resolved completely. Therefore, you are advised that during the . . . time . . . you continue to exercise . . . management of . . . (1801), the rent per apartment . . . is hereby . . . fixed as $159.00 per apartment. During such time . . . you should remit to the undersigned on the basis of $159.00 per month per apartment."

Nettleton on November 22, 1967, in writing stated its claim to the year-to-year tenancy and to a rental basis of $36.50 a student. It retained possession until June 1, 1968, paying rentals accordingly. The parties tried this suit intermittently from April 18 to October 17, 1968. On the latter date Wiegert testified to meeting Enter-

prise representatives subsequent to the surrender of 601. The subject was 1801. ". . . it was just a verbal agreement that we would continue to occupy 1801 and . . . to pay rental the way we had paid it before. . . . except not deduct any expenses, and they would . . . take back . . . paying the bills . . .. Q- . . . you mean . . . on a per girl basis? A- Yes. . . . we would have it until August of 1968."

The written agreement of September 1965 was ambiguous. The interpretation given a contract by the parties themselves while engaged in performance of the contract is one of the best indications of their true intent. Baxter & Sons v. Sofio, 182 Neb. 599, 156 N. W. 2d 141 (1968). In view of the conduct of the parties the rental rate was based on the number of girls in the units and not on the number of units occupied.

Enterprise contends that Nettleton was accountable for the difference of $10.17 between the $46.67 collected and the $36.50 remitted. Enterprise ought to have anticipated that Nettleton would pass on to students the expenses for dormitory services and furnishings. The contract between the parties interposed no obstacle. Respecting the key and breakage deposit, Nettleton did not account other than by general testimony and offer of its records for inspection. Under the particular circumstances the accounting for that item was sufficient.

The purported increase of "rent" to $159 a month was not effective. Correspondence between the parties establishes that the provisions of the 1965 contract were no longer in force. No other reason could justify the $159 amount in view of Nettleton's protest. Where a landlord notifies his tenant for a fixed term that in case the latter holds over he must pay a specified increased rental, the tenant will become liable for such rental if he in fact holds over, and either remains silent with reference to the notification, or fails to express his nonassent to the increase. Heckman v. Walker, 167 Neb. 216, 92 N. W. 2d 548 (1958).

Enterprise argues that our conclusion violates this rule: Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted thus to mend his hold. Ballou v. Sherwood, 32 Neb. 666, 49 N. W. 790, 50 N. W. 1131 (1891).

It is true that Nettleton's protest against the $159 amount lay side-by-side with its claim to a year-to-year tenancy. That position was also somewhat inconsistent with Wiegert's testimony to an agreement.

The principle prohibiting a party from mending his hold is ordinarily applicable only if some previous conduct on his part would render present assertion of the right unjust. See State ex rel. Traux v. Burrows, 136 Neb. 691, 287 N. W. 178 (1939). See, also, Bigelow on Estoppel (Carter, 6th Ed., Rev. 1913), p. 604; Bisphams Principles of Equity (8th Ed., 1909), p. 434. Nettleton's letter expressed no more than an opinion, and the limit of its effect would be to charge it with the reasonable value of occupation and use after November 1967. Cf. Hays v. Christiansen, 114 Neb. 764, 209 N. W. 609 (1926).

Wayne Kingery testified that the fair and reasonable value of occupation and use of an apartment unit after November 20, 1967, was $159. His testimony was not directly contradicted. In the absence of a change of conditions, however, the monthly rental is competent evidence of the reasonable value of the occupation and use of premises that the tenant held over his term. See Kendall v. Uland, 83 Neb. 527, 120 N. W. 152 (1909). In addition the district court heard evidence that the units needed redecoration. The amounts remitted by Nettleton were fair and reasonable.

The evidence pertaining to Enterprise's claims of improper maintenance and tenant damage beyond reasonable wear and tear was in sharp conflict. We approve

the district court's resolution of those issues because of its opportunity to observe the witnesses.

The judgment is affirmed.

AFFIRMED.

RICH S. PECKHAM ET AL., APPELLEES AND CROSS-APPELLANTS, V. KENNEY F. DEANS ET AL., APPELLANTS AND CROSS-APPELLEES.
181 N. W. 2d 851

Filed December 11, 1970. No. 37559.

1. **Contracts: Default.** Ordinarily, the acceptance of performance after a default in performance waives the right to rely upon the default.
2. **Contracts.** The general rule is that a demand for performance is not necessary unless required by the terms of the contract or its peculiar nature.
3. ———. The law favors and encourages settlements, and in the absence of fraud or mutual mistake they should not be set aside.

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

Wright, Simmons & Hancock, for appellants.

Atkins, Ferguson & Nichols, L. M. Hahn, and Hugh H. Atkins, for appellees.

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

BOSLAUGH, J.

This case arises out of a contract between Valley Developers, Inc., and Kenney F. Deans for the sale of 36 lots in McKinley's Fourth Addition to the city of Scottsbluff, Nebraska. The property involved was sold by Rich S. Peckham to Valley Developers, Inc., on contract. Valley Developers, Inc., then entered into the agreement with Deans who was a builder.

The contract provided generally for the payment of

$5,000 to Valley Developers, Inc., plus $3,800 for each lot. Deans agreed to purchase and pay for 7 lots within 1 year after November 5, 1965, the date that water, sewer, and pavement were completed in the first addition. The $5,000 payment was to be applied to the purchase price of the last two lots, but in the event of default by Deans, the contract was to terminate and no part of the $5,000 was to be repaid to Deans.

The contract further provided that Deans would purchase at least another 7 lots in each of the second, third, and fourth years after completion of the improvements in the first addition, and would purchase the balance of the lots in the following year. Valley Developers, Inc., agreed to convey the lots free of all encumbrances except special assessments. The amount of the special assessments was to be deducted from the balance due Valley Developers, Inc., upon payment for each lot. Deans purchased 5 lots during the first year; 7 lots during the second year; 2 lots during the third year; and 3 lots during the fourth year.

At the time the contract was made, W. F. McKinley and Herbert Ziegler each owned one-half of the stock in Valley Developers, Inc. In 1967 Ziegler acquired the stock owned by McKinley and became the sole stockholder in the corporation.

Deans purchased 2 lots on March 17, 1969. At about this time Ziegler became dissatisfied with the contract and the performance by Deans. Ziegler asked Deans to release 2 lots so that they could be sold to another builder, but Deans refused. There was also a dispute concerning taxes, interest on special assessments, and an alleged oral modification of the contract as to the price for each lot.

Ziegler had his lawyer prepare a revised form of agreement which was submitted to Deans on March 27, 1969. Difficulties developed concerning a time for a conference to resolve the differences. This action was filed on April 1, 1969, for strict foreclosure of the contract.

By cross-petition the defendants sought an accounting and a construction of the contract.

On April 2, 1969, the day after the action was filed, Deans offered to purchase 4 lots. This offer, if it had been accepted, would have eliminated the default which existed at the time the action was commenced.

The trial court found that Deans was in default; that the plaintiff was entitled to strict foreclosure; that the defendants were entitled to no relief on their cross-petition; that Deans was indebted to Valley Developers, Inc., in the amount of $215.50; and that the defendants should have 60 days in which to redeem by purchasing the remaining 19 lots. The defendants appeal and the plaintiffs have cross-appealed.

The defendants' principal contention is that the plaintiffs had no right to foreclosure at the time the action was commenced. The defendants' theory is that the plaintiffs had waived all prior defaults and that the defendants were entitled to a demand for performance with a reasonable time in which to comply before an action could be commenced.

Ordinarily, the acceptance of performance after a default in performance waives the right to rely upon the default. See Wegner v. West, 169 Neb. 546, 100 N. W. 2d 542. Under the facts in this case, the acceptance by Valley Developers, Inc., of the performance by Deans during the second year was a waiver of his default during the first year.

Although we find that Valley Developers, Inc., waived the default of Deans which occurred during the first year, Deans was clearly in default at the end of the third year. If the 3 lots purchased after November 5, 1968, are credited to the third year, Deans' total purchases for that year were 5 lots instead of 7. Thus, Deans was in default at the time the action was started.

The general rule is that a demand for performance is not necessary unless required by the terms of the contract or its peculiar nature. See, 17A C. J. S., Contracts,

§ 478, p. 674; 17 Am. Jur. 2d, Contracts, § 356, p. 794. The contract in this case provided for the purchase of 7 lots per year for the first 4 years after November 5, 1965. Valley Developers, Inc., was not required to demand that Deans perform the contract.

The contract provided that Deans would pay an additional $50 for each lot in Blocks 6, 7, and 8 because Valley Developers, Inc., had agreed to enclose the irrigation lateral in tile where it crossed the property east of Twelfth Avenue. The plaintiffs contend that there was an oral modification of the contract in that Deans would pay an additional $50 for each lot in Blocks 3, 4, and 5 for enclosing the irrigation lateral in tile where it crossed the property north of Thirty-eighth Street. The trial court found against the plaintiffs on this issue and we believe the finding was correct.

The plaintiffs also contend that Valley Developers, Inc., had no obligation to pay any interest on special assessments. The contract provided that upon payment for each lot, the balance due Valley Developers, Inc., "will be reduced by the amount of the special assessments and the special assessments will be paid at that time." The trial court found that Valley Developers, Inc., was required to pay the interest on the special assessments up until the time when the lots should have been conveyed to Deans. We think this finding was correct except that Valley Developers, Inc., waived the default which occurred during the first year.

The trial court computed the indebtedness of Deans to Valley Developers, Inc., by charging a portion of the interest on special assessments, general taxes, and interest to Deans and crediting him with a $300 overpayment for 6 lots.

While we agree generally with the trial court's interpretation of the contract, we find that neither party is entitled to an accounting with respect to the purchase of the first 17 lots.

The record in its present state is inadequate to permit

a satisfactory accounting as to these transactions. More important, each purchase was handled as a separate transaction and, in effect, there was a settlement between the parties as to that transaction. The law favors and encourages settlements, and in the absence of fraud or mutual mistake they should not be set aside. See Lortscher v. Winchell, 178 Neb. 302, 133 N. W. 2d 448. Under the circumstances in this case, these transactions should not be set aside or recomputed.

The contract originally provided that Deans would purchase all 36 lots within 5 years after November 5, 1965. We think that the defendant Deans should be given an additional 60 days from and after the entry of judgment on the mandate in this case in which to perform the contract by purchasing the remaining 19 lots.

The judgment of the district court is modified to provide that the defendant Deans shall have 60 days from and after the entry of judgment on the mandate in this case in which to perform the contract by purchasing the remaining 19 lots. The judgment is further modified by deleting the judgment against Deans in the amount of $215.50. The judgment as modified is affirmed.

AFFIRMED AS MODIFIED.

SKY HARBOR AIR SERVICE, A CORPORATION, APPELLANT, V. NORTH AMERICAN VAN LINES, A CORPORATION, APPELLEE.

181 N. W. 2d 859

Filed December 11, 1970. No. 37597.

1. **Motor Carriers: Damages.** A carrier in interstate commerce may contract to limit its liability to an agreed value made to adjust rates of carriage.
2. ———: ———. The validity of such a limitation is not ordinarily impaired by these circumstances: The shipper, with reasonable notice that he might increase liability of the carrier for loss by payment of a correspondingly greater charge, failed to do so.

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

Clayton H. Shrout of Shrout, Lindquist, Caporale, Brodkey & Nestle, for appellant.

Michael L. Lazer of Marer & Lazer, for appellee.

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

SMITH, J.

This action arose out of fire damage to an interstate shipment of goods owned by plaintiff for present purposes and transported by defendant. A jury awarded plaintiff $6,345, but the court on motion of defendant rendered judgment of $750 for plaintiff. Plaintiff appeals. It contends a jury question existed whether it might recover more than $750, the released value of the shipment.

Plaintiff's agent and inventory controller, Chester Peters, engaged defendant to transport 2 kardex machines and 16 other items, net weight 2,500 pounds, from Cheyenne, Wyoming, to Omaha, Nebraska. Fire damaged the shipment in transit near Grand Island, Nebraska, on February 22, 1962.

Defendant's subagent Earl Harper testified as follows. On Saturday morning, February 17, 1962, after a call from Peters, Harper telephoned plaintiff's office. Informed that Peters was absent and that the speaker was the supervisor, Harper fully explained defendant's tariff. The supervisor replied that the released value was adequate protection for the short haul. Copies of the tariff were of course carried by the salesmen.

Peters testified as follows. On February 20, 1962, in a discussion with a subagent of defendant at Peters' home, Peters said that each machine was worth $5,000 and that he desired insurance against loss by fire. Upon assurance of the subagent that he would obtain insurance protection and at his request, Peters as plaintiff's

agent signed the freight bill. The amount of protection was not otherwise discussed, and cost was not mentioned.

Peters read and understood the freight bill. It exhibited mostly black type, some red type, and typewriting. Near the center of the form in black boldface was the phrase "FULL VALUE PROTECTION" followed by a typewritten ".30." Approximately an inch above Peters' signature, language in red type appeared as follows: "Unless a different value is declared, the shipper hereby releases the value to 30¢ per pound for each article. Shipper does declare that the entire shipment is valued at $——." The blank was filled with a typewritten ".30."

Between the red type and Peters' signature the freight bill in small black type stated: "Shipper hereby agrees to the foregoing contract terms and conditions, makes the declaration of value, if any, as set forth above, and acknowledges receipt of Interstate Commerce Commission General Information Circular No. 176.12."

Plaintiff did not receive the circular, and, according to Peters, the typewritten ".30" in the two places was not there at that time.

The released value order of the Interstate Commerce Commission then in force authorized $.30 a pound. Defendant's tariff on file with the commission also provided two methods for a shipper to increase defendant's liability: The shipper might pay double the normal rate for the weight and mileage, or he might pay a predetermined charge per hundred dollar value declared by him.

Federal law governs. A carrier in interstate commerce may contract to limit its liability to an agreed value made to adjust rates of carriage. The validity of such a limitation is not ordinarily impaired by these circumstances: The shipper, with reasonable notice that he might increase liability of the carrier for loss by payment of a correspondingly greater charge, failed

to do so. See, 49 U. S. C. A. § 20(11); Adams Express Co. v. Croninger, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314 (1913); Chandler v. Aero Mayflower Transit Co., 374 F. 2d 129 (4th Cir., 1967).

Defendant's tariff was available. Peters read and understood the freight bill. If he relied on the subagent to obtain full protection without agreement on amount or cost, his reliance was wholly unjustified. On any theory of the case, the evidence presented no jury issue.

AFFIRMED.

VIRGIL H. METSCHKE, APPELLEE, V. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA ET AL., APPELLANTS.

181 N. W. 2d 843

Filed December 11, 1970. No. 37603.

1. **Intoxicating Liquors: Motor Vehicles.** In an appeal from an order of the Director of the Department of Motor Vehicles revoking the driver's license for 1 year for refusing a body fluid test after his arrest for operating a motor vehicle while under the influence of alcoholic liquor, it is necessary, when put in issue, for the State to show that the arresting officer had reasonable grounds to believe that the arrested person was driving a motor vehicle while under the influence of intoxicating liquor.
2. **Intoxicating Liquors: Motor Vehicles: Right to Counsel.** A refusal of a request of an arrested person until he could contact an attorney before consenting to an alcoholic test under the implied consent law affords no reasonable ground for refusing to submit to the test.
3. **Trial: Continuances: Witnesses.** It is not error for a trial court to deny a motion for a continuance because of the absence of a witness where no showing is made as to the evidence he will give, its materiality, the diligence employed to have the witness present, and the unavailability of other evidence to eliminate the need for such witness.
4. **Appeal and Error: New Trial: Affidavits.** This court will not review testimony in the form of affidavits used in the trial court on the hearing of a motion for a new trial unless such affidavits have been included in and presented by a bill of exceptions.

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

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

Lyle B. Gill, for appellee.

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

CARTER, J.

This is an appeal from the district court for Dodge County reversing an order of the Director of the Department of Motor Vehicles revoking the driver's license and operating privileges of Virgil H. Metschke pursuant to the implied consent law of this state.

On October 9, 1966, Metschke drove to his home in Fremont where he found two police cars parked in front of his residence. One police officer asked if he had been drinking and he replied that he had a few beers. He drove his car into his driveway. He was asked to go down to the police station to which he replied, " 'no, because my home is my castle and I am going to bed.' " A handcuff was attached to one wrist after which a scuffle ensued. He was brought under control and taken to the police station. He was requested to take a blood test which he refused until he could consult his lawyer. His lawyer appeared some 10 or 15 minutes later but the blood test was not again mentioned.

The record of Metschke's refusal to take one of the tests required by the implied consent law was certified to the Director of the Department of Motor Vehicles. Notice was given and a hearing held before the Director in the Capitol Building in Lincoln, Nebraska. After hearing the evidence, the driver's license of Metschke was suspended for 1 year as the law requires after finding that he refused to take the test after his arrest under the provisions of the implied consent law. Metschke appealed to the district court.

On the trial in the district court, Metschke testified in his own behalf and rested his case. The State moved to dismiss the appeal on the ground that Metschke had not shown that his refusal to take the test was reasonable. The motion was overruled and the State thereupon rested its case. The court then entered judgment for Metschke.

The evidence shows that Metschke was arrested for driving his automobile while under the influence of intoxicating liquor and taken to the police station. It is undisputed that Metschke refused to take the test until he could talk to his lawyer. This is a refusal to take the test within the meaning of the implied consent law. Preston v. Johns, *ante* p. 14, 180 N. W. 2d 135; Rusho v. Johns, *ante* p. 131, 181 N. W. 2d 448.

The only remaining issue is whether or not there was a reasonable cause for the arrest which is necessary for a valid request for a test and the consequences that follow in case of a refusal. It is provided in part by section 39-727.03, R. R. S. 1943, as follows: "The test shall be administered at the direction of a law enforcement officer whenever the person has been arrested for any offense (1) involving operating a motor vehicle under the influence of alcoholic liquor in violation of a statute or a city or village ordinance when the arresting officer has reasonable grounds to believe that before his arrest the person was driving while under the influence of alcoholic liquor, * * *." Unless it be shown that such reasonable grounds existed, the request for a test is not authorized and the refusal to take the test is reasonable. In this case, there is no evidence that reasonable grounds for the arrest existed for driving a motor vehicle while under the influence of alcoholic liquor. The establishment of such reasonable grounds for the arrest is a condition precedent to a valid request for a body fluid test under the implied consent law. If the validity of the request for a test is not established, a refusal to give the test is reasonable, and fatal to the revo-

cation of a driver's license by the Director of the Department of Motor Vehicles as provided by section 39-727.09, R. R. S. 1943.

The State assigns as error the failure of the trial court to grant its oral motion for a continuance at the close of plaintiff's evidence. The motion was: "I would like to request a continuance in order to secure the attendance of the officers." No showing was made as to the evidence to be given by the absent witnesses, its materiality, the diligence employed in producing the witnesses, the availability of other witnesses to supply the necessary evidence, or other matters pertinent in support of the motion. In the absence of a showing in conformance with section 25-1148, R. R. S. 1943, it is not error for the trial court to refuse to grant a continuance. The grant of a continuance is within the sound discretion of the trial court and its order granting or denying a continuance will not ordinarily be disturbed in the absence of an abuse of such discretion. O'Rourke v. State, 166 Neb. 866, 90 N. W. 2d 820.

The State contends that the trial court was in error in overruling its motion for a new trial. An affidavit of the trial attorney for the State was attached to the motion for a new trial in which the circumstances leading up to the motion for a continuance were set forth. Such circumstances were set out substantially as follows: The arresting officer was contacted by telephone prior to the hearing of the appeal and he agreed to be present and testify for the State. At the hour set for the trial, the officer had not appeared. The trial attorney for the State, assuming that the officer would be present before the trial was concluded, offered to proceed with the trial on such assumption, but stated that if the officer did not appear, he would move for a continuance until the officer could be obtained as a witness. The affidavit states that the officer mistakenly assumed that the trial would be in the Capitol Building in Lincoln rather than the Dodge County courthouse in Fremont.

The officer drove to Lincoln and on discovery of his error immediately telephoned the courthouse in Fremont to find that the trial had been concluded. On the discovery of these facts, the State filed its motion for a new trial, attaching thereto the affidavit setting out the mistake resulting in the officer's nonappearance. No counter-showing was made by Metschke. The State contends that it was error for the trial court to overrule the motion for a new trial under these circumstances.

The affidavit in support of the motion for a new trial in this case was not offered in evidence in the hearing on the motion. It has long been the law of this state that affidavits in support of a motion for a new trial must be offered in evidence and preserved in and made a part of a bill of exceptions to be considered by this court. "This court will not review testimony in the form of affidavits used in the trial court on the hearing of a motion for a new trial unless such affidavits have been included in and presented by a bill of exceptions." Gray v. Godfrey, 43 Neb. 672, 62 N. W. 41. See, also, Peterson v. George, 168 Neb. 571, 96 N. W. 2d 627; Everts v. School Dist. No. 16, 175 Neb. 310, 121 N. W. 2d 487; Blanco v. General Motors Acceptance Corp., 180 Neb. 365, 143 N. W. 2d 257.

We find nothing properly brought to the attention of this court on appeal that warrants a reversal of the judgment in this case. The evidence sustains the judgment and it is affirmed.

AFFIRMED.

THEODORE KELLER, APPELLANT AND CROSS-APPELLEE, V. LEE WELLENSIEK ET AL., APPELLEES AND CROSS-APPELLANTS.
181 N. W. 2d 854

Filed December 11, 1970. No. 37607.

1. **Motor Vehicles: Highways.** A left-hand turn across a public highway between intersections is inherently dangerous and one

making such a movement is required to exercise a degree of care commensurate with the danger.

2. **Motor Vehicles: Words and Phrases.** A farm tractor is a motor vehicle within the meaning of the statutes governing the operation of motor vehicles on public highways of the state.
3. **Motor Vehicles: Negligence.** When the driver of a motor vehicle turning across a highway between intersections fails to look to the front and rear for oncoming traffic at a time and place when to look would be effective, or looks and negligently fails to see that which is in plain sight, or is in a position where he cannot see, a question of law for the court is usually presented.
4. **Motor Vehicles: Infants: Negligence.** An owner of a motor vehicle who lends his vehicle to a minor who is forbidden by statute to operate a motor vehicle because of his age is guilty of negligence and liable for injuries caused by such minor in the use of the vehicle.
5. **Appeal and Error: New Trial: Evidence.** In an appeal from an order of the district court granting a new trial where the plaintiff prays for the reversal of the order and a reinstatement of the verdict, the contention of plaintiff that the evidence was insufficient to submit the issue of contributory negligence to the jury will be deemed to have been waived upon a holding that the new trial was improvidently granted.

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

John McArthur and A. James McArthur, for appellant.

Baylor, Evnen, Baylor, Curtiss & Grimit, for appellees.

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

CARTER, J.

This is an action for personal injuries and property damage suffered by the plaintiff as the result of a collision between plaintiff's automobile and a farm tractor owned by the defendant, Henry F. Wellensiek, and operated by his 12-year-old son, Lee, on a public highway near Syracuse, Nebraska, on July 12, 1968. The jury returned a verdict for the plaintiff against both defend-

ants in the amount of $49,793.98. The defendants filed motions for a new trial which were sustained by the trial court. The plaintiff has appealed from the trial court's order granting a new trial. The defendants have cross-appealed alleging errors prejudicial to them.

On July 12, 1968, the plaintiff and a fellow employee, James T. Wagner, were returning home from their employment, each driving his own automobile. As they approached Syracuse from the south on State Highway No. 50, they observed a farm tractor on the highway moving north. Wagner was several hundred yards in front of the plaintiff. He turned to the left and passed the tractor without incident at a speed that he estimated at about 65 miles per hour. Wagner observed the plaintiff in his rear vision mirror as plaintiff turned into his left lane to pass the tractor and saw the tractor turn to the left across the highway to enter a private driveway. He saw the resulting collision and immediately returned to the scene of the accident.

Lee Wellensiek was the driver of the tractor. He was the son of the defendant, Henry F. Wellensiek, and at the time of the accident was 12 years of age. He testified that he lived with his parents on a farm a mile south of the accident scene. He testified that a neighbor had requested assistance in starting a stalled tractor and, at the direction of his father, he was going to the farm on which the private lane was located to render the requested assistance. Lee testified that three pickups and the Wagner car passed him before the accident occurred. He stated that he looked back when he was 1/16 of a mile from the lane, and saw plaintiff's car 3 blocks back. When 60 feet from the lane he looked back and Keller was 2 blocks back. When he was 30 feet from the lane he again looked and Keller was 1 block back. He said he thought it safe to turn and did so without looking and the accident resulted. Lee gave no signal of his intention to turn into the lane. The tractor was not equipped with turn signals. A farm

tractor is a motor vehicle within the meaning of the statutes regulating the use of motor vehicles on public highways. § 39-741, R. R. S. 1943.

The tractor and car were seriously damaged. Both drivers were injured. The Keller car laid down tire marks for 149 feet. The front wheels of the tractor were at the west edge of the pavement when the collision occurred. Plaintiff attempted to swerve back to his right-hand lane to avoid a collision without success. Visibility was good and the pavement dry. The road was level for more than 3 blocks each way from the scene of the accident.

The plaintiff contends that the trial court erred in granting a new trial for the reason that the case was fairly tried and that there is no error in the record prejudicial to the defendants. Defendants assert that the court erred in imputing the negligence of Lee to his father, in failing to direct a verdict for the father, and in giving instructions Nos. 2 and 6 to the jury. Plaintiff contends that the court erred in not directing a verdict for the plaintiff on the issue of liability, in submitting the issue of contributory negligence, in giving instructions Nos. 5, 8, and 9, and in allowing the opinion evidence of defendant's expert witness, W. F. Weiland.

The plaintiff moved at the close of the evidence for a directed verdict against Lee Wellensiek on the issue of negligence as a matter of law. This motion should have been sustained. The undisputed facts show that the tractor was proceeding north on its right-hand side of the highway. Plaintiff came up behind the tractor and turned into the left-hand lane for the purpose of passing the tractor. The driver of the tractor, without indicating any intention to turn, turned left across the highway between intersections to enter a private lane. The tractor was not equipped with a signaling device and its operator gave no signal of his intention to turn. The result was he drove the tractor into plaintiff's on-

coming car and the accident occurred. This is negligence on the part of the driver of the tractor as a matter of law.

The defendant Lee Wellensiek attempts to avoid the charge of negligence on the theory that he looked back before turning left across the highway and thought he could safely do so. He testified that when he was 1/16 of a mile south of the lane he looked back and saw plaintiff's car 3 blocks back. When he was 60 feet from the lane he looked back again and saw the car 2 blocks back. When he was 30 feet from the lane he again looked back and the car was 1 block back. Under his own estimates of the respective speeds of the vehicles, he should have known that when he traveled 30 more feet the car would have been upon him. But the fact is that he did not look at a time when the danger was apparent. After looking 30 feet from the lane, he did not look again, but drove his tractor the last 30 feet and turned across the highway without looking or signaling his intention to turn. In Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355, we said: "The most dangerous movement on public streets or highways is the left-hand turn. While the left-hand turn at intersections is within the purview of this statement, the left-hand turn across a favored public highway between intersections is a particularly dangerous one. * * * He must take reasonable precautions for his own safety and the safety of others before he undertakes a left turn between intersections where such movements are not anticipated."

With reference to the failure of Lee to look for oncoming traffic before making the left turn, this court said in Petersen v. Schneider, *supra:* "In the case before us the defendant, when some 500 feet from the private drive, saw the plaintiff's car through the rear vision mirror, coming about one-half mile behind him. He therefore knew that plaintiff's automobile was coming along behind him. He did not look to the rear within 200 feet before turning, according to his own testimony,

either through his rear vision mirror or otherwise. He drove to the point of the accident and, without looking at all for plaintiff's car or other traffic, turned his car onto the north side of the highway and into the car of the plaintiff. This is negligence as a matter of law and indicates a reckless disregard for his own safety and for that of others lawfully using the highway." See, also, Kruger v. Ervin Clark Constr. Co., 166 Neb. 252, 88 N. W. 2d 778.

The defendants contend that instruction No. 6, given by the trial court, was prejudicially erroneous. The instruction stated that the negligence of the defendant, Lee Wellensiek, "if any you so find, is to be treated and considered by you as the negligence of the defendant, Henry F. Wellensiek." The pertinent evidence on this question is: Lee Wellensiek was the 12-year-old son of Henry F. Wellensiek. At the time of the accident, he was driving the farm tractor on Highway No. 50 at the express direction of his father. Lee testified that he had been operating this or other tractors belonging to his father for about 3 years. He had used it in doing farm work in the field and on public highways. It is asserted by defendants that no relationship between the father and son was pleaded sufficient to impute the negligence of the son to the father. It is on this ground that Henry F. Wellensiek asserts that his motion for a dismissal of the action as to him should have been sustained.

It is provided by section 39-726, R. R. S. 1943, so far as pertinent here, as follows: "It shall be unlawful for any person under sixteen years of age * * * to operate a motor vehicle; and any owner, dealer or manufacturer of motor vehicles who permits a person under sixteen years of age, * * * to operate a motor vehicle shall be deemed guilty of a misdemeanor and shall be punished as provided in section 39-7,127; * * *."

It is the general rule that an owner of a motor vehicle who lends his vehicle to a minor who is forbidden by

statute to operate a motor vehicle because of his age is guilty of negligence and liable for injuries caused by such minor in the use of the vehicle. 8 Am. Jur. 2d, Automobiles and Highway Traffic, § 575, p. 128. The foregoing rule is discussed at length and adopted by this court in Walker v. Klopp, 99 Neb. 794, 157 N. W. 962. In Stevens v. Luther, 105 Neb. 184, 180 N. W. 87, this court disapproved certain language in Walker v. Klopp, *supra,* insofar as it was in conflict with Omaha Street Ry. Co. v. Duvall, 40 Neb. 29, 58 N. W. 531. But the rule for which Walker v. Klopp, *supra,* was cited in this case was not disturbed as it applies to the facts before us. See, also, Annotation, Automobiles—Unlicensed Operator, 69 A. L. R. 2d, § 4, p. 983.

We conclude that instruction No. 6 was free from error and that the trial court properly instructed that any negligence of Lee Wellensiek was imputable to his father under the facts of this case.

In view of our holdings that Lee Wellensiek was guilty of negligence as a matter of law and that any negligence of Lee was imputable to Henry F. Wellensiek under the facts of this case, it is unnecessary to determine other assignments of error contained in the briefs on these issues. There was no prejudicial error in submitting plaintiff's case to the jury that in any way prejudiced defendants' rights. The plaintiff has asserted that the defense of contributory negligence was improperly submitted to the jury for the reason that the evidence was insufficient to sustain its submission. In view of the fact that plaintiff seeks the reversal of the order granting a new trial and the reinstatement of the verdict of the jury, we see no reason to discuss the evidence of contributory negligence or the correctness of the submission of that issue to the jury after the holding that a new trial was improvidently granted.

The defendants have cross-appealed, alleging that it was error on the part of the trial court in submitting to the jury the issue of negligence on the part of Henry

F. Wellensiek by directing the jury that the negligence of Lee Wellensiek was imputable to Henry F. Wellensiek. Defendants further assign as error the refusal of the trial court to dismiss the action as to Henry F. Wellensiek or in the alternative to direct a verdict in his favor. These questions have been determined adversely to the defendant Henry F. Wellensiek by this opinion and consequently there is no merit in the cross-appeal. The defendants cannot complain of the submission of the issue of contributory negligence which they tendered, although some objection is made to the manner of its submission. But the instructions taken together leave little doubt that the jury was not misled. The instructions on contributory negligence, comparative negligence, and their treatment in relation to a finding for the plaintiff, are proof enough that the jury knew the duty imposed on it in arriving at a proper verdict. Under such circumstances, we cannot say that an instruction to the effect that if plaintiff proves his case the jury will find for the plaintiff eliminates from its consideration questions of contributory and comparative negligence instructed upon at length by the trial court. It is hard to conceive that a jury, particularly after summations of the evidence by counsel, could be misled to the extent here contended. We think the instructions as a whole fairly submitted the case and that the errors complained of were not prejudicial to the rights of the defendants.

For the reasons stated, we think the trial court was in error in granting defendants a new trial. The judgment of the district court is reversed and the cause remanded with directions to reinstate the judgment for the plaintiff and against both defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

HERMAN BOSE ET AL., APPELLEES, V. AMERICAN FAMILY MUTUAL INSURANCE COMPANY, A CORPORATION, APPELLANT.
181 N. W. 2d 839

Filed December 11, 1970. No. 37617.

Insurance: Motor Vehicles: Damages. A clause embodied in an uninsured motorist insurance policy prorating liability is not enforceable in these circumstances: The adjudicated damages to the named insured and his dependent son equal or exceed the aggregate liability of two policies naming the same insured and issued by the same insurer for a separate premium on the coverage in each policy.

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

Chambers, Holland, Dudgeon & Beam, for appellant.

Ginsburg, Rosenberg, Ginsburg & Krivosha, R. P. Cathcart, and Bernard Wishnow, for appellees.

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

SMITH, J.

The question is whether under Nebraska law certain "other insurance" clauses in uninsured motorist provisions of automobile policies are enforceable under the circumstances. The district court found in the negative, entering judgment of $20,000 for plaintiffs. Defendant appeals.

Defendant named plaintiff Herman Bose insured in two automobile policies with uninsured motorist liability coverage of $10,000 a policy. Each policy applied to a different one of the two family automobiles owned by Herman. The policies defined the insured to include the named insured and any relative. Defendant charged and collected a separate premium for the coverage in each policy.

Plaintiff Lynn Bose resided with his father, Herman, who had a legal duty to pay Lynn's costs of maintenance and medical care. While both insurance policies were

in force and Lynn was operating one of Herman's family automobiles with permission on November 25, 1966, he collided with an "uninsured automobile" operated by an uninsured motorist. As the result of bodily injury to Lynn in the collision, he and Herman were entitled to recover from the uninsured motorist damages of $20,000. The court found that Herman was damaged in the sum of $11,140.82, and Lynn, $8,859.18.

Defendant contends that its maximum liability is $10,000 because of clauses in both policies as follows:

". . . if the insured has other similar insurance available to him, and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this Uninsured Motorists Coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.

"Subject to the foregoing . . ., if the insured has other similar insurance available to him against a loss caused by the Uninsured Motorists Coverage of this policy, the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability herein bears to the total applicable limits of liability of all valid and collectible insurance against such loss."

In determining enforceability, we consider public policy declared by the Legislature and reasonable expectations of the named insured. Shipley v. American Standard Ins. Co. of Wis., 183 Neb. 109, 158 N. W. 2d 238 (1968); Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N. W. 2d 133 (1968).

Section 60-509.01, R. R. S. 1943, provides: "No policy insuring against loss resulting from liability imposed by law for bodily injury . . . suffered by any person arising out of . . . use of a motor vehicle shall be . . . issued . . . unless coverage is provided . . . in limits for bodily

injury . . . set forth in section 60-509 . . . for the protection of persons insured thereunder who are legally entitled to recover damages from . . . operators of uninsured motor vehicles . . . because of bodily injury . . . resulting therefrom; Provided, that the named insured shall have the right to reject such coverage . . .."

"Policy" in the sense of an insurance policy is a word of art with a definite meaning in the law. The letter of the statute prohibits issuance of a policy without uninsured motorist coverage subject to exceptions of no consequence here. Although a literal interpretation does not support defendant's position, we consider the spirit of the statute—a consideration which somewhat blends with reasonable expectations of Herman.

Judicial views of "other insurance" clauses in uninsured motorist provisions are divided. See Laufer, "Insurance Against Lack of Insurance? A Dissent From the Uninsured Motorist Endorsement," 1969 Duke L. J. 227 at pp. 249, 250 (1969).

One argument for defendant is that the Legislature intended to require the insurer's offer only to equal the minimum limits under financial responsibility laws. Donaldson, "Uninsured Motorist Coverage," 36 Ins. Counsel J. 397 (1969); Allen, "Several Outstanding Problems Involving Uninsured Motorist Coverage," 31 Ala. L. 368 at 381 (1970); Melton, "Uninsured Motorist Insurance in Alabama—Recent Developments," 31 Ala. L. 314 (1970).

Plaintiffs argue that Herman paid a separate premium charge on the uninsured motorist coverage embodied in each policy issued by the same insurer. Herman reasonably expected coverage of loss to "any relative," and especially his son. Plaintiffs urge that for us to decrease policy limits by enforcing the proration clauses under these circumstances would defeat the spirit of the statute and Herman's reasonable expectations. We concur.

A clause embodied in an uninsured motorist insurance policy prorating liability is not enforceable in these

circumstances: The adjudicated damages to the named insured and his dependent son equal or exceed the aggregate liability of two policies naming the same insured and issued by the same insurer for a separate premium on the coverage in each policy. See Protective Fire & Casualty Co. v. Woten, *post* p. 212, 181 N. W. 2d 835. Cf. Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N. W. 2d 133 (1968). See, also, Widiss, A Guide to Uninsured Motorist Coverage, 115 (1969).

AFFIRMED.

PROTECTIVE FIRE & CASUALTY COMPANY, APPELLANT, V. HAROLD E. WOTEN ET AL., APPELLEES.
181 N. W. 2d 835

Filed December 11, 1970. No. 37664.

1. **Insurance: Motor Vehicles: Statutes.** Our uninsured motorist law was enacted for the benefit of the innocent victim of the financially irresponsible motorist, and is to be liberally construed to fully accomplish that purpose.
2. ———: ———: ———. Policy provisions which conflict with requirements of the uninsured motorist statute will not be effective to reduce an insured's recovery below the amount necessary to fully indemnify him for his loss within the limits of all applicable policies.

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

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

Thomas J. Guifoyle of Swenson & Guifoyle, for appellees.

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

SPENCER, J.

This is a declaratory judgment action seeking to

sustain an excess-escape clause as applied to an uninsured motorist provision in a policy issued by plaintiff. The district court held the provision to be contrary to the requirements of our statute, and of no effect. We affirm.

Deceased was a guest passenger in a car owned and operated by one Turner, which was involved in a collision with a car owned by an uninsured motorist. Turner had uninsured motorist's coverage with the State Farm Mutual Automobile Insurance Company for the statutory minimum. His insurer paid defendants $10,000, the limit of the uninsured motorist coverage under the Turner policy. The Woten family car was insured by the plaintiff for the statutory minimum uninsured motorist coverage. This action seeks a declaration that the plaintiff is absolved from liability under the policy it issued to the Wotens because the defendants have received the statutory uninsured motorist coverage from the State Farm Mutual Automobile Insurance Company. Defendants' damages are in excess of $20,000, which would be the amount of coverage for both policies. Plaintiff's position is essentially that its policy assures payment up to the statutory minimum uninsured motorist coverage from some source, and payment by the State Farm Mutual Automobile Insurance Company met that obligation. Plaintiff argues this construction carries out the intent of the statute because defendants are in the same position as if the uninsured motorist had owned an insurance policy with the minimum coverage provided by the statute.

The following provisions of plaintiff's policy are pertinent to this issue: "To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' sustained by the insured, caused by accident and arising out of the owner-

ship, maintenance or use of such uninsured automobile; * * *.

"Other Insurance: With respect to bodily injury to an insured while occupying an automobile not owned by the named insured the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant, and this insurance shall then apply only in the amount by which the applicable limit of liability of this Part exceeds the sum of the applicable limits of liability of all such other insurance.

"With respect to bodily injury to an insured while occupying or through being struck by an uninsured automobile, if such insured is a named insured under other similar insurance available to him, then the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and this company shall not be liable under this Part for a greater proportion of the applicable limit of liability of this Part than such limit bears to the sum of the applicable limits of liability of this insurance and such other insurance.

"Subject to the foregoing paragraphs, if the insured has other similar insurance available to him against a loss covered by this Part, the company shall not be liable under this Part for a greater proportion of such loss than the applicable limit of liability hereunder bears to the total applicable limits of liability of all valid and collectible insurance against such loss."

Plaintiff relies on the "other insurance" provision set out above, involving what is commonly known as an excess-escape clause, to avoid liability. There are cases from other jurisdictions which support plaintiff's position. There are also several jurisdictions which reject that position as a violation of the intendment of the uninsured motorist law. It is not possible to reconcile the deep conflict in these cases or to distinguish them on any rational basis, although in a few of those supporting

plaintiff's position there is no uninsured motorist statute requiring uninsured motorist coverage.

Some of the cases supporting the rejection of the excess-escape clause are: Bryant v. State Farm Mut. Auto. Ins. Co., 205 Va. 897, 140 S. E. 2d 817; Sellers v. United States Fidelity & Guaranty Co. (Fla.), 185 So. 2d 689; Vernon v. Harleysville Mut. Cas. Co., 244 S. C. 152, 135 S. E. 2d 841; Travelers Indemnity Co. v. Williams, 119 Ga. App. 414, 167 S. E. 2d 174; Aldcroft v. Fidelity & Cas. Co. of New York (R. I.), 259 A. 2d 408; Meridian Mut. Ins. Co. v. Siddons (Ky. App.), 451 S. W. 2d 831; Harleysville Mut. Cas. Co. v. Blumling, 429 Pa. 389, 241 A. 2d 112.

The following extract from Sellers v. United States Fidelity & Guaranty Co., *supra,* is pertinent herein: "It appears to us that the statute expresses the statutory requirements both as to coverage to be provided by the insurer, and as to its sources of recovery of insurance protection it paid from other persons, including other insurers legally responsible for the bodily injury to insureds, to the exclusion of inconsistent language inserted in an automobile liability policy. There appears no latitude in the statute for an insurer limiting its liability through 'other insurance'; 'excess-escape' or 'pro rata' clauses, as attempted in Condition 5. If the statute is to be meaningful and controlling in respect to the nature and extent of the coverage and to the sources of recovery and subrogation of the insurer, all inconsistent clauses in the policy to the controlling statutory language such as are contained in Condition 5 must be judicially rejected."

The following from Bryant v. State Farm Mut. Auto. Ins. Co., 205 Va. 897, 140 S. E. 2d 817, is also pertinent herein: "Section 38.1-381 (b) of the Code, quoted above, commands that *no policy* of bodily injury liability insurance shall be issued or delivered unless it undertakes to pay the insured 'all sums' he is legally entitled to recover as damages from the owner or operator of an un-

insured motor vehicle within the limits of the policy. That is plain language. It means that every such policy shall so undertake. There is no limitation or qualification of this language anywhere in the statute, nothing at all to indicate that it does not mean what it says.

"But Part 4, Section Six, of the insurance policy issued by State Farm to Bryant, Jr., undertakes to limit and qualify the provision of the statute. It undertakes to pay the insured not 'all the sums which he shall be legally entitled to recover as damages,' as the statute commands, but only such sum as exceeds 'any other similar insurance available' to him; i.e., the amount by which the applicable limit of the policy 'exceeds the sum of the applicable limits of all such other insurance.' Clearly this provision places a limitation upon the requirement of the statute and conflicts with the plain terms of the statute. It is therefore illegal and of no effect."

Our uninsured motorist law was enacted for the benefit of the innocent victim of the financially irresponsible motorist, and is to be liberally construed to fully accomplish that purpose. Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N. W. 2d 133. In the light of our previous construction of facets of our law, we are most persuaded by those cases which reject the plaintiff's position and more nearly accomplish the beneficient purpose of the law.

Plaintiff argues that the Stephens case, *supra*, is authority for its position, because we there said: "The purpose of a statute or provision is to give the same protection to the person injured by an uninsured motorist as he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy." This has been the premise on which some of the cases supporting plaintiff's view have been predicated. In Stephens we had only one policy and were concerned with deductions which would reduce the recovery below the statutory minimum. The question present here was not involved nor discussed.

Plaintiff further argues that defendants have already received the amount they would have received if the uninsured motorist had been covered by a standard liability policy, and to permit recovery under plaintiff's policy is to provide a windfall not intended by our law. By the same token, to allow the plaintiff to reduce its liability is a windfall to it. Defendants have paid the plaintiff for coverage, and should have the benefit of it if necessary.

Plaintiff, on the authority of those cases which uphold its position, further argues that the "other insurance" limit on recovery is a part of its contract with its insured. Obviously it is. The question, however, is whether it may be properly incorporated in its present form. The limiting provisions incorporated into the contract are no part of the statutory requirement for uninsured motorist coverage. To permit such provisions other than as they may be interpreted to prevent overcompensation is to dilute the statute. It is obvious to us that it is undesirable to permit an insurance carrier to satisfy a statutory requirement by a policy provision that reduces or eliminates liability in those instances where its insured is not fully indemnified. We have no quarrel with provisions to prevent overcompensation, but where, as here, defendants' damages exceed the possible liability, to allow the insurer to escape or limit liability is to pervert the intent of the statute. Defendants paid a premium to cover their loss under the uninsured motorist provision of plaintiff's policy. The provision therein as to excess insurance is not applicable because their loss exceeds the limits of both policies. Policy provisions which conflict with requirements of the uninsured motorist statute will not be effective to reduce an insured's recovery below the amount necessary to fully indemnify him for his loss within the limits of all applicable policies.

Judgment is affirmed. Defendants' counsel is allowed $750 for his services in this court.

AFFIRMED.

NEWTON, J., dissenting.

The opinion in this case hinges on an interpretation of the statutes of Nebraska dealing with uninsured motorists and consequent insurers liability. It holds, in substance, that section 60-509.01, R. R. S. 1943, clearly evidences a legislative intention to leave unlimited the amount that may be recovered under uninsured motorist provisions despite restrictions in affected insurance policies limiting recovery.

As indicated in the opinion of Spencer, J., there is a wide divergence of opinion on this subject among the various courts. See Annotation, 28 A. L. R. 3d 551. In the present instance, where two different insurance policies, issued by different companies, are involved, it is sought to justify the result on the theory that separate premiums were paid for uninsured motorist coverage in each policy. The argument is unsound. The insured paid in each instance, not for an unlimited coverage, but for coverage subject to the "other insurance" provisions contained in the policies.

The *only* justification for permitting recovery in the present instance is that the statute requires it. I submit that it does not. Section 60-509.01, R. R. S. 1943, was adopted in 1963. It places a minimum on the amount of uninsured motorist coverage to be made available by insurers, but is silent as to a maximum. Similar statutes have resulted in the divergent opinions referred to above. This is not, however, the only Nebraska statute dealing with the subject. In 1967, sections 60-509.02 and 60-509.03, R. R. S. 1943, were adopted. The first section provides that when a tort-feasor's insurance company becomes insolvent such tort-feasor shall be deemed an uninsured motorist. The second section provides that if the injured party recovers from a second insurer under uninsured motorist provisions of the

statute and the insurance contract, such second insurer shall be subrogated to the claim of the insured against the insolvent insurer. In other words, if the policy issued by the second insurer was for the statutorily required amount of $10,000, that is all the insured can recover. He cannot also recover a portion of his claim against the insolvent company *regardless of the amount of damage he has sustained.*

The 1967 statutes are part of the uninsured motorist act. They give a clear indication of the legislative intent on the point at issue. Had it been intended to permit recovery from two or more insurers in excess of the statutorily required $10,000 sum and in disregard of "other insurance" provisions contained in the policy, section 60-509.03, R. R. S. 1943, would never have been adopted. Under the interpretation placed on our statutes in the majority opinion, an insured dealing with an insolvent insurer can recover from only one insurer, but all others can recover from two insurers. The result is illogical and definitely not a correct interpretation of legislative intent. It promotes discrimination and represents an interpretation specifically prohibited by legislative act in California and some other states.

RAYMOND E. STAHLA, APPELLANT, V. BOARD OF ZONING ADJUSTMENT IN AND FOR HALL COUNTY, STATE OF NEBRASKA, APPELLEE.
182 N. W. 2d 209

Filed December 23, 1970. No. 37510.

1. **Zoning: Property.** The right to full and free use and enjoyment of one's property in a manner and for such purpose as the owner may choose, so long as it is not for the maintenance of a nuisance or injurious to others, is a privilege protected by law, and one of which a property owner may not be deprived without due process of law. The owner's right to use his property is subject, however, to reasonable regulation, restriction,

and control by the state in the legitimate exercise of its police powers.

2. **Zoning: Property: Municipal Corporations.** The test of legitimacy is the existence of a real and substantial relationship between the exercise of those powers in a particular manner, and the peace, public health, public morality, public safety, or the general welfare of the city.
3. ———: ———: ———. What is for the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function is committed, and, unless an abuse of discretion has been clearly shown, it is not the province of the courts to interfere.
4. **Zoning: Municipal Corporations.** Where the validity of legislative classification for zoning purposes is fairly debatable, the legislative judgment is controlling.
5. **Zoning: Trial.** The burden is on one who attacks the validity of a zoning ordinance valid on its face and enacted under lawful authority, to prove facts which establish its invalidity.

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

Wagoner & Grimminger, for appellant.

Robert E. Paulick & Gary G. Thompson, for appellee.

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

SPENCER, J.

This is an appeal from the affirmance by the district court of the denial by the county board of supervisors, sitting as a board of zoning adjustment, of plaintiff's request to operate a mobile home park on certain propery within an area where such operation is conditionally permitted. We affirm.

Hall County, pursuant to section 23-114, R. R. S. 1943, adopted a comprehensive zoning plan in 1968. Plaintiff does not challenge any of the procedural steps taken in the enactment of the zoning plan or any of the procedures resulting in the denial of his application. He does, however, urge that his constitutional rights were violated and that the ordinance is invalid as applied to

him, first, because nowhere in the ordinance are mobile home parks unconditionally allowed, and second, because of discrimination in the granting of permits and the requirement of more stringent conditions for mobile home parks than for other businesses of a similar nature.

Plaintiff is the owner of 15 acres, 2 miles west of the edge of Grand Island, which he bought for a mobile home park. Before buying the property he ascertained from the county building inspector that the area was zoned TA-2, and while permitted in that zoning area, a special permit was necessary for a mobile home park. The building inspector suggested that before actually buying the property plaintiff should attempt to get a conditional use permit, but he purchased the property before applying for the permit. Plaintiff's property is located on a graveled county road approximately three-fourths of a mile north of U. S. Highway No. 30, with which it intersects. West Park Plaza, hereinafter referred to as Park Plaza, a mobile home park established in 1968, abuts U. S. Highway No. 30 on the south and the graveled county road on the east. It is located three-fourths of a mile south of plaintiff's property.

The right to full and free use and enjoyment of one's property in a manner and for such purposes as the owner may choose, so long as it is not for the maintenance of a nuisance or injurious to others, is a privilege protected by law, and one of which a property owner may not be deprived without due process of law. The owner's right to use his property is subject, however, to reasonable regulation, restriction, and control by the state in the legitimate exercise of its police powers. The test of legitimacy is the existence of a real and substantial relationship between the exercise of those powers in a particular manner, and the peace, public health, public morality, public safety, or the general welfare of the city. See City of Milford v. Schmidt, 175 Neb. 12, 120 N. W. 2d 262.

The pertinent provision of section TA-2 of the zoning ordinance, so far as material herein, is as follows: "4. TA-2 Transition Agricultural.—Intent of this district to provide for a transition from primarily agricultural uses to medium density residential and other urban development in keeping with the growth of the county. This district permits both farm and non-farm dwellings and those agricultural uses which do not tend to be nuisances for this residential population.

"(a) Permitted Principal Uses:
"Raising of field crops and horticulture.
"Ranch and farm dwellings.
"Single family dwellings.
"Two family dwellings.
"Multiple family dwellings.
"Mobile home dwellings.
"On-site signs.
"Parks, playgrounds, golf courses, country clubs and tennis courts.

"(b) Permitted Accessory Uses:
"Home occupations.
"Other uses normally appurtenant to the permitted uses when established in conformance with the space limits of this district.

"(c) Permitted Conditional Uses:
"Mobile home park development.
"Cemeteries, crematories, mausoleums and columbarium.
"Educational services.
"Utility substations."

Plaintiff's first contention would merit serious consideration if there was nothing further in the zoning ordinance than the language of TA-2, but that is not the case for the term is amplified in other sections and as used in the ordinance is within the ambit of permissible zoning practice. "Conditional use," as used in TA-2, is defined by the ordinance in section 4, as follows: "A conditional use is a use that would not be appropriate

generally or without restriction throughout the zoning district but which, if controlled as to number, area, location, or relation to the neighborhood, would promote the public health, safety, welfare, morals, order, comfort, convenience, appearance, prosperity, or general welfare. Such uses may be permitted in such zoning district as a conditional use, if specific provision for such conditional use is made in this zoning resolution."

The conditions governing applications for "conditional use," such as ingress and egress, safety and convenience, off-street parking, refuse and utilities, etc., and general compatibility with adjacent properties, are set out in subsection 2 of section 12 of said ordinance, and, contrary to plaintiff's contentions, are not vague and indefinite.

Plaintiff's main contention is that a mobile home park is a medium density residential use, the same as the permitted principal uses in TA-2, and by making mobile home parks a conditional rather than a principal use, the ordinance discriminates between medium density uses. He argues the conditions set forth in section 12 of the ordinance would be as fully applicable in determining the desirability of a large multiple family complex, which is a principal medium density use, as they would to a mobile home park. We do not accept plaintiff's premise. While the two have many considerations in common, there are other considerations which would justify the difference in classification. Mobile home parks are not prohibited. They are permitted if they meet certain conditions. So long as those conditions are reasonable and are not arbitrarily applied, there is no cause for complaint.

What is for the public good as it relates to zoning ordinances affecting the use of property is primarily a matter lying within the discretion and determination of a municipal body to which the power and function is committed, and, unless an abuse of discretion has been clearly shown, it is not the province of the courts to

interfere. Wolf v. City of Omaha, 177 Neb. 545, 129 N. W. 2d 501. Where the validity of legislative classification for zoning purposes is fairly debatable, the legislative judgment is controlling. See Bucholz v. City of Omaha, 174 Neb. 862, 120 N. W. 2d 270.

There are three mobile home parks in the area, including Park Plaza which has been in operation since August 25, 1968. Park Plaza started with 109 spaces, but now has 187 spaces available for mobile homes. As of the time of this hearing only 66 of those spaces were rented, and these were all within the first 109 authorized. Park Plaza has two points of ingress and egress, one on U. S. Highway No. 30, and the other on the graveled county road on which plaintiff's property is located three-quarters of a mile north. Plaintiff's proposed mobile home park for 80 spaces would have but one such point, and that onto the graveled county road. While the denial of the permit by the zoning board of adjustment does not set out the specific reasons for the denial, there are several considerations apparent which would distinguish plaintiff's application from that of Park Plaza. It is not necessary, however, to detail these considerations because plaintiff's attack is on the ordinance itself and not specifically on any factors which may have resulted in the denial of his application, except as they may affect the legality of the ordinance. In any event, we would not consider the denial of the permit arbitrary, unreasonable, or capricious on the record before us.

Plaintiff purchased his property May 8, 1969. The hearing on his application for a permit was held by the zoning board of adjustment on May 19, 1969. There were several objectors at the hearing. These included owners of residences in the immediate area of plaintiff's property who contested the compatability of plaintiff's proposed use of the property with its immediate area. The school board of district No. 38, the district embracing this area, also filed objections to the granting of

the application on the basis that the school facilities in the district were already overextended by the three mobile home courts in the district, and to grant the permit would constitute an undue hardship on the district. These factors, while not alone controlling, are circumstances the zoning board of adjustment could consider.

While plaintiff bases his assignments of error herein on the unconstitutionality of the ordinance as it is applied to him, the thrust of his argument seems to be that as the area is zoned for medium density use and a mobile home park is a medium density use, he is entitled as a matter of right to the issuance of a permit. In this respect, plaintiff's inferences are fully answered by Crane v. Board of County Commissioners, 175 Neb. 568, 122 N. W. 2d 520. In that case we said: "Under zoning regulations, an applicant is not entitled to a special permit to operate a trailer court as a matter of right upon a showing of compliance with applicable health and sanitation regulations."

The burden is on one who attacks the validity of a zoning ordinance valid on its face and enacted under lawful authority to prove facts which establish its invalidity. Bucholz v. City of Omaha, 174 Neb. 862, 120 N. W. 2d 270. We find plaintiff has failed to meet this burden. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GENE PINKERTON, JR., APPELLANT.
182 N. W. 2d 198

Filed December 23, 1970. No. 37525.

Infants: Criminal Law. A boy of sane mind under the age of 18 years, upon conviction of any crime, except murder or manslaughter, in any court of record, may be committed to the Boys' Training School. § 83-465, R. S. Supp., 1969.

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

Padley & Dudden, for appellant.

Walter R. Mullikin, for appellee.

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

BOSLAUGH, J.

The defendant, Gene Pinkerton, Jr., a boy 15 years of age, was convicted of petit larceny and committed to the custody of the Department of Public Institutions. His appeal questions only the right of the trial court to commit him to the custody of the Department of Public Institutions instead of imposing the penalty prescribed by section 28-512, R. R. S. 1943.

The prosecution was commenced by a complaint filed in the police court of the city of North Platte, Nebraska. The defendant was found guilty and appealed to the district court. There the complaint was amended with the consent of the defendant to charge a violation of section 28-512, R. R. S. 1943. The jury found the defendant guilty. At the time of sentencing the record shows the trial court found the defendant to be a delinquent child as defined in section 43-201, R. R. S. 1943, which finding was to be an adjudication as provided in section 43-206.03, R. R. S. 1943; and that the defendant should be committed to the custody of the Department of Public Institutions and delivered by the sheriff to the Boys' Training School near Kearney, Nebraska.

The defendant contends that the trial court had no right to impose any penalty other than that prescribed by section 28-512, R. R. S. 1943, the statute under which he was prosecuted. That statute authorizes imprisonment in the county jail for not more than 6 months or a fine of not more than $500, or both, for first-offense petit larceny. The defendant argues that the sentence is excessive because he might be held at the Boys' Train-

ing School for a matter of years whereas an adult person could not be imprisoned in the county jail for more than 6 months for the same offense.

The procedure which was followed in this case is not specifically authorized by any statute of this state. However, it is unnecessary to determine in this case whether the commitment was valid under the Juvenile Court Act because commitment of the defendant to the Boys' Training School is specifically authorized under section 83-465, R. S. Supp., 1969.

It has been the policy in this state, at least since 1879, to authorize special treatment for juvenile offenders. Although prosecuting officers have a discretion as to whether to proceed against juvenile offenders directly under the criminal statutes or under the Juvenile Court Act, the Legislature has provided that in either case a child under the age of 18 may be committed to the Boys' Training School. See Lingo v. Hann, 161 Neb. 67, 71 N. W. 2d 716. Section 83-465, R. S. Supp., 1969, provides that when a boy of sane mind under the age of 18 years, has been found guilty of any crime, except murder or manslaughter, in any court of record, the court may order that the boy be committed to the Boys' Training School. It was within the discretion of the district court to commit the defendant in this case to the Boys' Training School.

A commitment to the Boys' Training School is not for a definite period. § 83-472, R. S. Supp., 1969; Cohen v. Clark, 107 Neb. 849, 187 N. W. 120. See, also, 43 C. J. S., Infants, § 100b, p. 261; 47 Am. Jur. 2d, Juvenile Courts, etc., § 33, p. 1011. The theory of the law is that commitment to the Boys' Training School is not punishment but is the furnishing of protection, care, and training by the State as a substitution for parental authority. The object is reformation, not incarceration for a fixed period. The defendant has cited no authority which supports his contention that the commitment is illegal, and we find the contention is without merit.

The judgment of the district court is affirmed.

AFFIRMED.

GWEN BAHE, APPELLANT, V. SAFEWAY STORES, INC., A CORPORATION, ET AL., APPELLEES.

182 N. W. 2d 202

Filed December 23, 1970. No. 37530.

1. **Negligence.** A storekeeper has a duty to use due care to keep his premises reasonably safe for the use of an invitee, but he is not an insurer of the safety of customers who patronize his place of business.
2. ———. It is a storekeeper's responsibility to exercise due care to see that merchandise is stacked in a reasonably safe manner on his shelves, and where he or his employees know of a dangerous condition, or if it has existed for such a period of time that they should know of it, then liability attaches.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Cobb, Swartz & Wieland, for appellant.

Marti, O'Gara, Dalton & Bruckner, for appellee Safeway Stores, Inc.

Crosby, Pansing, Guenzel & Binning, for appellee Coca-Cola Bottling Co.

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

SPENCER, J.

This is an action for damages for injuries sustained when a 16-ounce bottle of Coca-Cola fell from a pop gondola in a Safeway store and struck plaintiff's foot. At the close of plaintiff's case the trial court directed a verdict in favor of the defendants, Safeway Stores, Inc., hereinafter referred to as Safeway, and Cola-Cola Bottling Company, Inc., and dismissed plaintiff's peti-

tion. Plaintiff perfected an appeal only as to the defendant Safeway. We affirm.

Plaintiff was an invitee in the Safeway store located on East Court Street in Beatrice, Nebraska. While shopping for pop, she was standing in an aisle before the pop gondola. She placed a 6-pack of Fresca in her shopping cart and then a carton containing five bottles of assorted pop. She wanted a bottle of orange pop to fill out that carton and reached over another carton containing two bottles of unnamed pop to secure the bottle of orange. She pulled the bottle of orange from its carton and was in the act of conveying it to her cart when something hard hit the top of her right foot. She completed putting the bottle in her cart and then reached down to pick up an empty carton from the floor, when she saw blood oozing profusely from the top of her right foot. She was alone in the aisle at the time, but almost immediately the assistant manager, who had heard something fall, arrived on the scene.

Plaintiff testified the pop was stacked on a gondola in the usual manner, and she observed nothing unusual about the pop stand. She does not know whether the bottle which struck her was from the carton she reached over or not. She has no idea where the bottle came from, how it fell, or how the broken glass got on the floor. There is no dispute the broken bottle was a 16-ounce Coca-Cola bottle. The Coca-Cola cartons are stacked on the gondola by a representative of the Coca-Cola company. The pop was kept in normal 6-pack cartons stacked one on top of the other, with a plastic flap as a divider between each tier of cartons. They are stacked three or four cartons high. Pop had been stacked in substantially the same manner in this store for at least 7 years. No regular inspection is made of the pop shelves, but every time an employee passes it if necessary he straightens it up, although most of the time the pop remains where the deliveryman puts it.

Defendant's manager testified that bottles do not fall

off the shelves, but they do occasionally get knocked off. Plaintiff's son, who had worked in a Safeway store in O'Neill, Nebraska, testified that pop was stacked in the same manner there, and it was his observation that it could become wobbly and unstable. This at best is a far cry from evidence that a condition existed which involved an unusual risk for the plaintiff sufficient to impose liability on Safeway.

Plaintiff contends that the proprietor of a self-serve store owes a very high degree of care to protect customers from injury due to falling merchandise, and cites several cases from other jurisdictions to sustain her contention. There are no Nebraska cases specifically involving this situation, but the duty of a business establishment to an invitee is well defined in this jurisdiction.

In Jeffries v. Safeway Stores, Inc., 176 Neb. 347, 125 N. W. 2d 914, we held that a storekeeper has a duty to use due care to keep his premises reasonably safe for the use of an invitee, but that he is not an insurer of the safety of the customers who patronize his place of business.

Plaintiff agrees that this is not a res ipsa loquitur situation, and we are directed to no specific evidence from which we can infer negligence on the part of Safeway. The burden is upon the plaintiff to prove that the condition which resulted in the falling object involved an unreasonable risk of harm to her as an invitee. She was alone in the aisle at the time of the occurrence. She did not observe anything unusual about the pop gondola. She had taken two cartons from the gondola without incident. She was not struck until after she had reached over another carton and removed a bottle of orange pop from the carton behind it. She has no idea as to what happened except that a falling bottle struck her foot. If there had been anything unusual about the pop stand, or if there had been loose bottles or cartons which appeared like they were going to fall, it would seem reasonable that the plaintiff would have noticed this fact,

but she testified that she observed nothing unusual. It is not possible to infer from this evidence the existence of an unreasonable risk of harm to the plaintiff, and if we could assume one existed, that Safeway knew of or in the exercise of reasonable care could have discovered it.

Further, there is no competent evidence to show what condition, if any, caused the accident. Plaintiff did produce a witness who a year before had been struck by a falling bottle, but this witness did not know why the bottle fell although she did not think she knocked it off with her hand. Safeway's manager testified that occasionally customers do knock bottles from the shelves with coat sleeves or otherwise, but no one would contend that a storekeeper must follow all customers around the store to be certain they do not knock merchandise from the shelves. It is the storekeeper's responsibility to exercise due care to see that the merchandise is stacked in a reasonably safe manner on his shelves, and where a storekeeper or his employees know of a dangerous condition, or if it has existed for such a period of time that they should know of it, then liability attaches.

The testimony of plaintiff's son is obviously intended to suggest that pop gondolas can become unstable; that this situation must have been present in the instant case because plaintiff does not know what happened; and that Safeway, having a duty to exercise reasonable care, failed to discover the instability. The difficulty with this line of reasoning is that there is absolutely no evidence that the pop gondola was unstable, unless we infer that fact from the falling of the bottle of Coca-Cola. To do so would require the highest degree of speculation. It is certainly more logical to believe that some act of the plaintiff, who was alone at the pop gondola on the occasion in question, was the cause of the accident. In any event, this not being a res ipsa loquitur situation, it was the responsibility of the plaintiff to prove by a preponderance of the evidence that

some negligence on the part of Safeway was the proximate cause of her injury. This she has not done. Giving the plaintiff the benefit of every reasonable inference under the familiar rule on a directed verdict, this court determines that reasonable minds could not differ. The motion to direct a verdict was properly sustained, and the judgment is affirmed.

AFFIRMED.

EMIL J. VOSS ET AL., APPELLANTS, V. CITY OF GRAND ISLAND, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
182 N. W. 2d 427

Filed December 23, 1970. No. 37532.

1. **Annexation: Actions.** Annexation is a legislative matter and the proper remedy to test whether the conditions required by an annexation statute have been complied with is by collateral attack in the nature of an injunction action.
2. **Annexation: Municipal Corporations.** Section 16-117, R. R. S. 1943, provides that the mayor and council may by ordinance, at any time include within the corporate limits of such city any contiguous or adjacent lands, lots, tracts, streets, or highways as are urban or suburban in character, and in such direction as may be deemed proper. Such grant of power shall not be construed as conferring power to extend the limits of a city of the first class over any agricultural lands which are rural in character.
3. **Annexation: Words and Phrases.** The use of land for agricultural purposes does not necessarily mean it is rural in character. It is the nature of its location as well as its use which determines whether it is rural or urban in character.
4. ———: ———. Rural means of or pertaining to the country as distinguished from a city or town, whereas urban means of or belonging to a city or town.

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

John A. Wagoner and Baylor, Evnen, Baylor, Urbom & Curtiss, for appellants.

Richard L. DeBacker and Duane A. Burns, for appellees.

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

WHITE, C. J.

This is an action for an injunction against the City of Grand Island from assessing, levying, or collecting any taxes from the owners of several tracts of land annexed by ordinances Nos. 4521 and 4593.

The district court for Hall County found that the land sought to be annexed was not agricultural and rural in character and that the annexation was valid. The case is here on appeal of the finding that the land sought to be annexed was not agricultural and rural in character. We affirm the judgment of the district court.

The land involved is immediately contiguous to the City of Grand Island on the east and the principal north boundary line is U. S. Highway No. 30. The area stretches generally in a northeasterly direction and is bounded on the south by an area identified as an industrial addition. It is bounded on the east by a tract owned by the Union Pacific Railroad which is zoned for industrial uses. On exhibit 10, an aerial photograph, there are superimposed tract numbers that facilitate an analysis of this case. Tract Nos. 1 to 13 extend from the extreme western point contiguous with the City of Grand Island to the eastern boundary of the annexation. Tract No. 1 appears to be almost wholly developed into residences and other structures nonagricultural in character. Generally, the same is true of Tract Nos. 3, 4, 5, 6, 7, 10, 11, 12, and 13. Also, Tract Nos. 14, 15, and 16, immediately to the south of the developed tracts, are platted, subdivided, and partially occupied by residences and other structures of a nonagricultural nature. Tract No. 17 is to the *west* of these tracts.

This situation reveals, especially when compared with a 1966 aerial photograph, continuous and progressive

urban and residential development in which there remain isolated tracts or spots that are still vacant and thus actually used for the growing of crops and for agricultural purposes.

The annexed area contains 12 different named subdivisions, an elementary school, and a multitude of commercial and residential uses that are allocated generally in the area, some of them being on the *east* side of the area.

On March 25, 1968, the City of Grand Island adopted ordinance No. 4521 annexing these tracts of land. On July 1, 1968, ordinance No. 4593 confirming the annexation was adopted.

The area contains 302.02 acres, consisting of 12 subdivisions or resubdivisions and 6 unplatted tracts. The largest of the unplatted tracts is 9.77 acres and the smallest is 4.72 acres. Other tracts are made up of public streets and roads traversing the area.

A portion of the area is zoned B-2 General Business Zone and the balance is zoned TA-Transitional Agriculture Zone as of the time of trial. At the time of the annexation, the zoning was divided between Residence A and Business B. Transitional Agriculture Zoning permits residential development and allied uses but excludes some farming uses, such as commercial feed lots. The older classification of Residence A was "a typical residential zoning" which also permitted agricultural operations, schools, parks, etc.

Nearby areas to the north, south, and west of the land in question are zoned for light manufacturing and heavy manufacturing. The area annexed contains approximately 120 residences, 10 commercial or business uses, 2 industrial uses, an 8-unit trailer court, and an elementary school.

Robert C. Windolph owns approximately 20 acres of Tract No. 17. All of Tract Nos. 15, 16, and 17 were previously owned by his family and were platted as Windolph Subdivision over 35 years ago. Since that time

3 of those lots have been further subdivided into residential lots. The balance of Windolph Subdivision is not remarkably different from those portions which have been more intensively developed, and there is no reason as far as physical characteristics and location are concerned why they could not be developed in the same way as the others.

Emil J. Voss, one of the appellants, owns 11.5 acres in Tract No. 2. The Voss Subdivision, of which his property is a part, bears his family name. In addition to his own home, he has built 2 rental properties on the tract and transferred title to a smaller piece to his son for a home site. He has made further efforts to subdivide his property for residential purposes. In 1965 Mr. Voss and his wife submitted to city officials a proposed subdivision plat acknowledging complete dedication of streets, all necessary easements, and demonstrating an intention to convert and make available the property for urban use.

Grand Island commenced furnishing police and fire protection to the area immediately after passage of the first ordinance. The city has installed a collector sewer to serve the area. Two sanitary sewer districts have been created to connect to this collector. These districts are the result of petitions by property owners to be served. Municipal water service is also being extended into the area. The city previous to July 1968, had provided electrical service to that portion along U. S. Highway No. 30, and since that date to the entire area.

Exhibits 11 to 14 in evidence in this case show clearly that Tract No. 14 has been subdivided and now consists of 2 subdivisions containing about 56 lots and 3 streets. The record does not bear out the contention of the appellants that this area has not already been subdivided, thus inviting the inference that it is rural in character.

In addition to the above factual analysis, the trial court's judgment was supported by the expert testimony that the area annexed was urban or suburban in char-

acter and not agricultural or rural in character.

Annexation is a legislative matter and not subject to judicial control. Consequently, we have held that the proper remedy to test whether the conditions required by an annexation statute have been complied with is by collateral attack in the nature of an injunction action. Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490; Williams v. County of Buffalo, 181 Neb. 233, 147 N. W. 2d 776.

The pertinent statutory authority under which we test the issue presented in this case is section 16-117, R. R. S. 1943, which provides: "* * * the mayor and council may by ordinance * * * at any time include within the corporate limits of such city any contiguous or adjacent lands, lots, tracts, streets, or highways as are urban or suburban in character, and in such direction as may be deemed proper. Such grant of power shall not be construed as conferring power * * * to extend the limits of a city of the first class over any agricultural lands which are rural in character."

We feel that the last sentence of this statute is particularly significant. The term "agricultural lands which are rural in character" clearly lends the inference that lands may be currently utilized in an agricultural fashion and still not be rural in character and meet the test of urban or suburban in character. We have recently said in Sullivan v. City of Omaha, 183 Neb. 511, 162 N. W. 2d 227, as follows: "This brings us to the crux of the problem. Does the annexation involve agricultural land rural in character? The use of land for agricultural purposes does not necessarily mean it is rural in character. It is the nature of its location as well as its use which determines whether it is rural or urban in character. In Wagner v. City of Omaha, supra, we said: ' "Rural" means of or pertaining to the country as distinguished from a city or town, whereas "urban" means of or belonging to a city or town. In many of the cities and villages throughout the state there are tracts which

are only partially developed as residential areas wherein substantial parts of the land are used for agricultural purposes but which tracts are, in fact, urban in character. It was clearly not the intention of the Legislature, if such an area develops outside the boundaries of a metropolitan city, to prevent such city from annexing it. It was, however, the purpose of the act to prevent annexation by such city of agricultural areas which are rural in character.' "

The record in this case, and the different exhibits demonstrating the undisputed location, character, and degree of development of the land involved herein, overwhelmingly support the district court's conclusion that the property was properly annexed as being urban or suburban in character. It is contiguous to the corporate limits of the city. The recent extensive and continuous development of the land, particularly since 1966, is significant. The change of the conditions of the surrounding areas, platting and subdivision development, and the erection of homes and businesses within the area, many of them contiguous to the *eastern* boundary, are clearly indicative and persuasive that the land is urban and suburban in character and not rural in character. The statute does not prescribe, nor does reason dictate. that annexation must be blindly confined to land and areas that have already been zoned and developed into nonagricultural uses. Any such construction of the statute would seriously impair intelligent planning and coordination of the change-over in the use of land for urban purposes. It would result in the increasing and duplication of costs in the extension of the city services such as water, electricity, and fire and police protection and result in an inequitable distribution of the costs of such services to the people actually being served. The statute sets up suitable standards for testing whether a city has arbitrarily and irrationally used the power granted therein to include lands entirely disconnected, agricultural in char-

acter, and bearing no rational relation to the legitimate purposes of annexation.

It follows that the annexation ordinances enacted by the City of Grand Island were valid, come clearly within the power granted to the city under the applicable statute, and that the judgment of the district court so finding should be and is hereby affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIE BROOKS HAYNES, APPELLANT.
182 N. W. 2d 199

Filed December 23, 1970. No. 37563.

1. **Criminal Law: Trial.** Failure to object promptly to an offer of evidence ordinarily waives the objection.
2. **Criminal Law: Constitutional Law.** Trial strategy adopted by counsel without prior consultation with the accused will preclude the accused from asserting constitutional claims in the absence of exceptional circumstances.
3. **Criminal Law: New Trial: Evidence.** The right to a new trial for newly discovered evidence depends upon the facts and circumstances of each case.
4. **Criminal Law: New Trial.** A motion for a new trial is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown, its determination will not be disturbed.
5. **Criminal Law: New Trial: Evidence.** New cumulative evidence tendered in support of a motion for a new trial must be so potent that a new trial would probably result in a different verdict.
6. ———: ———: ———. A new trial will not ordinarily be granted for newly discovered evidence which would simply impeach a witness.

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

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

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

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

SMITH, J.

A jury found defendant guilty of robbery and of using a firearm in commission of a felony. He asserts through counsel appointed on appeal that (1) testimony identifying him in a police lineup violated his right to counsel, and (2) newly discovered evidence entitled him to a new trial.

The New Tower Motel in Omaha was robbed shortly after 2:30 a.m., September 4, 1969, by four Negro males. The motel desk clerk, Carl Lundberg, testified as follows: Defendant had produced a pistol which he had pointed at Lundberg's head 2 feet away. He and a companion next removed $385 from the cash register, a watch, and other property. The assailants then bound together Lundberg and another motel employee, J. Edward Fitzsimmons, also present from the beginning. The elapsed time of the robbery was 3 or 4 minutes.

Between 2:30 a.m. and 3 a.m., police officers observed a Lincoln automobile parked some distance from the motel. Defendant and four other Negro males were standing outside. Defendant, clad in a shirt and green trousers, was carrying loose 23 $5 bills. A companion, Shaw, was wearing a hat and carrying 2 $50 bundles of $1 bills banded with bank wrappings. Another one, Cass, produced $130.03 which included rolled coins. A hat lay in the car.

At the police station Shaw dropped a watch between his legs. He also handed over the pistol. No pistol or allegedly stolen property other than money was found on defendant.

At the trial Lundberg and Fitzsimmons identified defendant as the gunman. Lundberg recalled a jump suit worn by one assailant and a blue hat worn by defendant, but he could not further describe the men. Fitzsimmons on cross-examination described defendant's

physical features, such as relative weight, and dress—a hat and two-tone sweat shirt.

Defendant testified to having been wearing a gray sweater and green trousers but no hat. Shaw had been wearing a two-tone green sweater and a gray hat. Defendant and Shaw were similar in build and features, often having been mistaken for brothers. Without knowledge of his companions' nefarious plan, defendant slept in the Lincoln automobile. Awaking, he learned of the robbery while the automobile was speeding away. The money in his possession represented the balance of proceeds of his 2-week pay check.

Lundberg testified on cross-examination by retained counsel who represented defendant throughout the district court proceedings: "Q. Do you remember how you described them . . .? A. Their approximate height and their faces and so on. Q. And what kind of description did you give on them? A. We picked them out of the lineup. THE COURT: Just a moment, I think we better have a little conference over here for a second. (A conference was held between counsel and the Court outside the hearing of the jury.)" Unrelated questioning ensued.

In the presence of the jury the only other inference to lineup occurred in subsequent direct examination of Fitzsimmons by the prosecution: "Q. Did you later . . . see your wrist watch again? A. Yes, sir, in the police station. Q. When was that? A. We went down to identify the suspects. THE COURT: Just a moment now. (THE PROSECUTOR): I will withdraw that. THE COURT: The jury will disregard this last statement." Defense counsel did not move for a mistrial or otherwise object.

Rules excluding testimony evolved at common law partly to prevent incompetent testimony from misleading jurors and partly to keep jurors to the pleaded issues. 9 Holdsworth's History of English Law, 127 (1926). In 1938 a bar committee reported the objec-

tion to be indispensable to preserve rules of admissibility. The objection tends to prevent waste and delay from mistrials. Counsel is not wholly free to remain silent and gamble on a favorable verdict without waiving objection. 1 Wigmore on Evidence (3d Ed., 1940), 270, 322 to 330. In words that have explained the ancient doctrine of estoppel by record, there must be a "decent finality to litigation." 9 Holdsworth's History of English Law, 149, 157, 162 (1926).

Failure to object promptly to an offer of evidence waives the objection. State v. Cook, 182 Neb. 684, 157 N. W. 2d 151 (1968). A similar rule governs the after-objection or motion to strike where the basis first appears subsequently in the trial. Timmons v. School Dist., 173 Neb. 574, 114 N. W. 2d 386 (1962); McCormick on Evidence, 116 (1954). The rules are subject to exceptions. See generally 1 Wigmore on Evidence (3d Ed., 1940), 1964 Supp., 78 to 81.

Trial strategy adopted by counsel without prior consultation with the accused will preclude the accused from asserting constitutional claims in the absence of exceptional circumstances. See Henry v. Mississippi, 379 U. S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965). In the present case on a cold record we cannot put a finger on specific strategy of retained counsel. Yet the record bespeaks a conclusion of trial judge and counsel that the proceedings failed to tinge the aura of fairness to defendant. There was no prejudicial error.

Affidavits of Shaw and retained counsel were attached to defendant's motion for a new trial. Shaw in corroborating defendant simply stated that he had refused to testify at defendant's trial because he had been confident of acquittal. Retained counsel stated that Eddie Johnson, one of the robbers, had refused to testify or inform counsel of the true facts that would have proved defendant's innocence. After trial, counsel learned the reason. Johnson had feared that his testimony would have increased the severity of his own sentence.

The right to a new trial for newly discovered evidence depends upon the particular facts and circumstances of each case. Severin v. State, 148 Neb. 617, 28 N. W. 2d 326 (1947). A motion for a new trial is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown, its determination will not be disturbed. New cumulative evidence tendered in support of a motion for a new trial must be so potent that a new trial would probably result in a different verdict. A new trial will not ordinarily be granted for newly discovered evidence which would simply impeach a witness. State v. Wycoff, 180 Neb. 799, 146 N. W. 2d 69 (1966).

The denial of defendant's motion for a new trial was correct.

AFFIRMED.

FRANCIS J. KIRBY ET AL., APPELLEES, V. CLIFFORD W. BERGFIELD ET AL., APPELLANTS.
182 N. W. 2d 205

Filed December 23, 1970. No. 37592.

1. **Banks and Banking: Payment.** Section 3-504, U. C. C., does not contemplate that the presentment of a personal check drawn on a bank be made by telephone. Payment of a personal check or refusal of payment and dishonor by the drawee bank necessitate exhibition or delivery of the instrument under current banking practices.
2. ———: ———. Where a personal check is taken for an underlying obligation, the obligation is suspended pro tanto until the presentment of the check. If the check is not paid on due presentment, the right to sue on, or otherwise enforce, the obligation is "revived."
3. **Equity: Forfeitures.** A court of equity is always reluctant to make a decree which will effect a forfeiture.

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

Mason, Knudsen, Berkheimer & Endacott and Reddish, Fiebig & Curtiss, for appellants.

Albert W. Crites of Crites & Shaffer, for appellees.

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

MCCOWN, J.

This is an action for specific performance of a contract for the purchase and sale of real estate. The trial court entered a decree ordering the specific performance of the contract and the defendant sellers have appealed.

Following negotiations initiated by two representatives of the sellers several weeks before, the parties reached an oral agreement for the purchase and sale of a 9,040-acre ranch located in Dawes County, Nebraska. The following day, August 8, 1967, the written contract was prepared by the sellers' attorney, and signed by all of the parties.

The total purchase price was $352,560, "payable in manner following: $10,000.00 down payment, receipt of which is hereby acknowledged, and the balance of $342,560.00 by assuming and paying promptly when due a first mortgage of the (sellers) to the John Hancock Insurance Co. in the sum of $172,000.00; $20,000.00 cash on or before the 1st day of November, 1967, and the balance of $150,560.00 payable in ten years." This balance carried interest of 5½ percent from November 1, 1967, and was payable in semiannual installments with the balance due at the end of 10 years. The $150,560 balance was to be represented by a promissory note of the purchasers secured by a second mortgage on the premises.

The 1967 taxes were to be prorated as of November 1, 1967, but possession of the premises was to be delivered to the buyers on December 1, 1967.

The contract provided that contemporaneously with the execution of the agreement, a warranty deed to the premises would be prepared and placed in escrow with the Bank of Chadron, together with a copy of the con-

tract. The escrow conditions incorporated into the contract provided that the deed would be delivered to the buyers upon the sellers acknowledging receipt of the $20,000 payable November 1, 1967, and the execution of the note and second mortgage for $150,560 by the purchasers.

The escrow terms and conditions also provided that in the event of a default by the purchasers in making the $20,000 payment due on November 1, 1967, and delivering their note and mortgage, all items in escrow were to be returned to the sellers on their demand after notice to the purchasers by certified mail. Terms of the escrow could be changed only by written agreement of all parties.

The contract also provided: "It is mutually understood and agreed that time is of the essence of this agreement and that in the event of any payment, either of principal or interest, remaining unpaid for a space of thirty (30) days after the same shall become due, or in case of failure of the second parties to make due payment of all sums due the John Hancock Insurance Company, or any breach of any other covenant herein contained, this Contract shall, at the option of the first parties, be forfeited and determined and the second parties shall forfeit all payments whatsoever made hereunder to the first parties, and the first parties shall have immediate right to re-entry and take possession of the lands and premises aforesaid."

Kirby's $10,000 check for the down payment drawn on the First National Bank of Omaha, dated August 8, 1967, was returned for insufficient funds. A cashier's check in that sum was deposited with the defendants' bank about August 12, 1967, and was accepted by the defendants as the down payment. The deed and a copy of the contract were never placed in escrow.

On November 1, 1967, the agreed closing date, the parties met in Chadron and drove together to Crawford. Mrs. Bergfield wanted to be positively assured that

Kirbys had the money for the $20,000 payment. The testimony is conflicting as to what the Bergfields were told. Kirbys maintain that Bergfields were specifically told to call Kirby's banker, Mr. Hugh Campbell, at the Bank of Bellevue, Nebraska, if they had any doubts about the check. Bergfields testified that Mr. Kirby told them to call "his bank," "the Bank of Bellevue," or "his banker." The Bergfields and their attorney all deny that the banker's name was mentioned.

The final closing was completed in the office of the defendants' attorney in the early evening of November 1, 1967. All necessary documents were executed by both parties. All of the documents except the $20,000 check were retained by the defendants' attorney until Bergfields could ascertain whether or not the check was good.

The following morning, Bergfields went to the Bank of Chadron and requested that Mr. Bare, the cashier, call the Bank of Bellevue to ascertain if there were sufficient funds in the Kirby account to cover the $20,000 check. Mr. Bare called the Bank of Bellevue and asked for the bookkeeping department. He gave the name of the account, the account number, and the amount of the check to a lady there and asked her if there were sufficient funds on hand to cover it. After a time, she returned to the telephone and indicated that there was not money in the account to cover the check. The Bergfields then continued to hold the check. It was never presented at the Bellevue Bank for payment. At the Bergfields' order, their attorney tore their signatures off the deed which was in his possession.

Sometime between November 7 and 10, 1967, Mrs. Bergfield received a call from Mr. Kirby telling her to "send the check through." She refused to do so and told him they were not going to deal with him at all. On November 24, 1967, a cashier's check for $20,000 was issued by the Bank of Bellevue. On November 26, 1967, Mr. Kirby again called Mrs. Bergfield and told her he had the cashier's check available. She again refused to deal

with him. On November 30, 1967, Kirby delivered the cashier's check to an attorney in Chadron and instructed him to write to the Bergfields and advise them that the money was available and he was prepared to settle the matter. His attorney did so by registered letter dated November 30, 1967. The Bergfields refused to accept delivery of the letter and it was returned unclaimed. On about December 26, 1967, Mr. Kirby's attorney delivered a copy of the contract and the $20,000 cashier's check to the Bank of Chadron, the escrow agent named in the contract. The Chadron Bank returned the cashier's check on January 2, 1968.

It was stipulated that there were insufficient funds in the Kirby account at the Bank of Bellevue from November 1, 1967, through December 31, 1967, to cover the $20,000 check. It is also undisputed that before November 1, 1967, Mr. Kirby had made arrangements with Hugh Campbell, president of the Bank of Bellevue, to finance the $20,000 payment. Campbell testified that he individually made a verbal agreement with Mr. Kirby and told him that he would arrange to take care of the check when and if it was presented to the Bank of Bellevue for payment. Campbell alerted the people in the bookkeeping department as to the arrangement he had with Mr. Kirby.

After some unsuccessful attempts at settlement, all of which were refused by the defendants, this action for specific performance was filed on February 29, 1968.

The appellants' position is that the telephone call to the bookkeeper of the Bellevue bank was a presentment and demand for payment of the check, or that presentment was excused under the terms of the Uniform Commercial Code. Both parties rely upon interpretations based upon the technical provisions of the Code relating to presentment. Presentment is primarily necessary to charge secondary parties, none of whom are involved in this case. See § 3-501, U. C. C.

Section 3-504, U. C. C., defines presentment as: "A

demand for acceptance or payment made upon the maker, acceptor, drawee or other payor by or on behalf of the holder." That section authorizes presentment "by mail"; "through a clearing house"; or "at the place of * * * payment specified in the instrument"; or "* * * at the place of business * * * of the party to * * * pay." This section does not contemplate that the presentment of a personal check drawn on a bank may be made by telephone. It seems obvious that payment of a personal check or refusal of payment and dishonor by the drawee bank necessitate exhibition or delivery of the instrument under current banking practices. The telephone call in this case constituted an inquiry as to circumstances which might indicate whether the check would or would not be paid upon future presentment in due course. It was not a presentment and demand for payment envisioned by section 3-504, U. C. C. The situation here did not excuse presentment under section 3-511, U. C. C. Neither did it constitute refusal of payment and dishonor.

The basic issue here is what effect the delivery and acceptance of the $20,000 check had upon the rights of the parties under the contract. Section 3-802, U. C. C., covers this situation. That section provides in part: "(1) Unless otherwise agreed where an instrument is taken for an underlying obligation * * * the obligation is suspended pro tanto until the instrument is due or if it is payable on demand until its presentment. If the instrument is dishonored action may be maintained on either the instrument or the obligation; * * *." The draftsmen's comment No. 3 under this section states: "It is commonly said that a check or other negotiable instrument is 'conditional payment.' By this it is normally meant that taking the instrument is a surrender of the right to sue on the obligation until the instrument is due, but if the instrument is not paid on due presentment the right to sue on the obligation is 'revived.' * * *."

Here the sellers' right to terminate the contract and impose a forfeiture upon the purchasers was suspended

until the check was presented for payment and dishonored.

Both parties rely upon the case of Willan v. Farrar, 174 Neb. 826, 119 N. W. 2d 686, on rehearing, 176 Neb. 1, 124 N. W. 2d 699. Even aside from the fact that that case arose prior to the effective date of the Uniform Commercial Code, this court also pointed out that equitable rules as to relieving against forfeitures did not apply to an extension of an "unless" oil and gas lease. In the Willan case, this court cited with approval State ex rel. Davis v. Farmers State Bank, 112 Neb. 597, 200 N. W. 173. In that case, we said: "A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture." That principle clearly applies here.

Even aside from issues involving the check, the contract itself, reasonably construed, permits termination and forfeiture only in the event that any payment remained unpaid for 30 days after it was due. In addition, equitable rules against forfeiture apply. The rule of construction also applies, which directs that uncertain or ambiguous provisions in a contract be construed against the party who prepared it.

In connection with the escrow terms and conditions, the contract provided specifically that in the event of a default in making the $20,000 payment due on November 1, 1967, and delivering the note and mortgage for the balance of the purchase price: "* * * after notice to the second parties by Certified Mail * * *, all items in escrow shall be returned to the first parties on their demand."

The provisions dealing with default in any payments appear on the last page of the contract. There it is stated: "* * * that in the event of any payment, either of principal or interest, remaining unpaid for a space of thirty (30) days after the same shall become due, * * *," the contract at the option of the sellers shall be forfeited and determined and all payments made by

the purchasers shall be forfeited to the sellers. Under the applicable rules of construction and the structure of the contract provisions for payment of the purchase price, "any payment" would include the $20,000 payment due November 1, 1967. At least twice within the 30-day period, the purchasers made a valid tender and offer of performance. At least twice during the same 30-day time, sellers refused to carry out the contract and advised the purchasers they would not deal with them at all. Under such circumstances, subsequent offers to perform would have been superfluous and futile.

The trial court found that the purchasers were entitled to a decree of specific performance of the contract. The judgment of the trial court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT GAMRON, APPELLANT.
182 N. W. 2d 425

Filed December 23, 1970. No. 37613.

1. **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.
2. **Criminal Law: Intoxicating Liquors: Sentences.** The voluntary drunkenness of one accused of crime does not mitigate the offense, although it may have a bearing on his turpitude and the quality of his crime, and be considered on the question of punishment.

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

John Story, for appellant.

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

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

CARTER, J.

Defendant appeals from his conviction and sentence for the crime of burglary. He was charged with burglarizing the Whitehorse Tavern in Grand Island on January 25, 1970. Legal counsel was appointed for him at the expense of the State. He entered a plea of guilty to the charge after being fully advised by his counsel and the court as to the nature of the charge and the result that could follow such a plea. Sentence was delayed to permit a presentence investigation. A few days later defendant appeared for sentence. It was there developed that he had served two previous sentences in the state penitentiary; one for assault, the other for breaking and entering. He had been arrested more than 20 times in Grand Island alone for intoxication. He had twice been committed to a hospital for treatment as an alcoholic without success.

The defendant is 31 years of age, divorced, and could have been prosecuted under the Habitual Criminal Law. The trial court imposed a sentence of 5 to 10 years in the Nebraska Penal and Correctional Complex. The defendant asserts solely that the sentence is excessive.

The general rule is that where a sentence has been imposed by the district court within statutory limits it will not be disturbed in the absence of an abuse of discretion. State v. Whitaker, 185 Neb. 57, 173 N. W. 2d 397. The law places the primary responsibility for imposing sentences after conviction for crime in the judges of the district court within limits fixed by statute. The presumption is that the judgment of the district court is correct and will not be disturbed except where that court's legal discretion has been improperly exercised.

The defendant is an alcoholic. He has been arrested 20 times for various forms of intoxication in Grand Island. He admitted on interrogation in open court that he had been arrested a "few times" in Wilmington and Dover, Delaware, for drunkenness. He admitted he

had been arrested in Colorado and Wyoming, and in Lincoln, York, and Hastings, Nebraska. He has served two penitentiary sentences, one for breaking and entering, the other for abusing his little daughter by burning her with lighted cigarettes. It is clear that defendant was within the scope of the habitual criminal statute although he was not so charged. Defendant stated that he has a drinking problem which has been associated with all his crimes and offenses. But knowing of his propensity to commit violations of the law while drinking, he stated to the trial court that he started drinking about noon of the day the present crime was committed with the intention of drinking the rest of the afternoon. It is fundamental that voluntary intoxication does not justify the commission of crime. It is clear that his intent to drink intoxicating liquors all afternoon is an indication of an intent to become drunk and assuming the known risks of his violating the law when he was in that condition. With a knowledge of these facts, the trial court imposed a sentence of 5 to 10 years for the burglary. We cannot say that the trial court abused its discretion in so doing. The lives and property of the public are entitled to protection against the criminal conduct of those who become voluntarily intoxicated. Where one deliberately pursues a course to voluntarily become intoxicated, as here, particularly where defendant was fully aware of his propensity to violate the law when drunk, there is little that can be said in his behalf in mitigation of the crime or the punishment.

AFFIRMED.

HAROLD PARRISH, APPELLANT, V. KARL KEHM & SONS CONTRACTORS, APPELLEE.
182 N. W. 2d 422

Filed December 23, 1970. No. 37629.

1. **Workmen's Compensation: Evidence.** The rule of liberal construction of the Workmen's Compensation Act applies to the law but it is not applicable to the evidence offered in support of a claim made for benefits under the act.
2. ———: ———. The burden of proof is upon a claimant to establish by a preponderance of the evidence a claim for benefits under the Workmen's Compensation Act.
3. ———: ———. Where evidence in a workmen's compensation case is in irreconcilable conflict, this court on appeal will consider the fact that the trial court observed the demeanor of the witnesses and gave credence to the testimony of some rather than the contrary testimony of the others.

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

Robert C. Vondrasek of Lathrop & Albracht, for appellant.

Kennedy, Holland, DeLacy & Svoboda, William J. Riedmann, and William M. Lamson, Jr., 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 Douglas County denying benefits to the claimant under the Workmen's Compensation Act from and after November 22, 1968.

There is no dispute that the claimant was injured on September 30, 1968, while in the employ of the defendant. While working in a hole 18 to 20 feet deep, claimant was injured when a heavy tile fell from a banam bucket and struck his neck and left shoulder. He suffered lacerations requiring 78 stitches to close and some bruises and contusions in the surrounding area. The lacerations were cleansed and sutured, pain pills pre-

scribed, and claimant permitted to return to his home. The issue here is the extent of the injury and the period of time that the claimant was or is disabled as a result of the injury.

The accident occurred on September 30, 1968. On December 13, 1968, claimant filed his petition with the Workmen's Compensation Court. On February 13, 1969, the Workmen's Compensation Court entered its award finding that claimant was totally disabled as a result of the accident and awarded compensation and medical expenses in accordance with the finding and the statute, and for such time as the disability continued. An appeal to the compensation court en banc was waived and an appeal taken to the district court from the award of the one judge compensation court that heard the case.

After a trial de novo, the district court entered its judgment on February 17, 1970, reversing the award of the compensation court entered on February 13, 1969, and dismissed the action. The defendant paid compensation and medical expenses to and including November 22, 1968. The issue here is, therefore, whether or not the claimant is entitled to benefits under the Workmen's Compensation Act after November 22, 1968. The district court, in effect, found that claimant's disability had ceased on the latter date and from this finding and the judgment based thereon, the claimant has appealed to this court.

Claimant testified that after the injury, the lacerations on the neck were sutured and he remained at home for a week thereafter. On October 2, 1968, he went to Dr. John Coe. He saw Dr. Coe five times in the fore part of October. He was examined, X-rays taken, and no abnormalities found. A report of Dr. Coe, dated November 15, 1968, states that claimant was able to do the same work as before the accident and that his injuries resulted in no permanent disability.

Dr. Coe referred claimant to Dr. Richard D. Smith, an orthopedist. Dr Smith examined claimant on No-

vember 8, 1968, and observed the scar on claimant's neck, a small hematoma on the shoulder, and soreness in the area. Dr. Smith stated that these indicated nothing that would prevent claimant from carrying on his usual employment. Claimant was again examined by Dr. Smith on November 15, 1968, and his findings and conclusions were the same as before. On the latter date, Dr. Smith told the claimant that no medical reason existed for claimant not returning to work and that he was fully capable of doing the same work as before the accident. Subsequently claimant informed Dr. Smith by telephone that he was unable to work and thought he would have to lay off work for the winter.

Almost a month later, on December 10, 1968, claimant went to Dr. R. P. Clemens, a general practitioner. On December 20 and 23, 1968, claimant again saw Dr. Clemens who, on the last-stated date, put him on a series of diathermy treatments lasting until May 9, 1969. Claimant also was given therapy treatments by a physical therapist on 26 occasions between January 9 and February 25, 1969. Dr. Clemens stated that an electromyelograph examination was performed, but the results are not testified to. On June 20, 1969, it is stated in the last report made by Dr. Clemens that his diagnosis remained unchanged, that is, that claimant had moderately severe injuries to the left shoulder muscle group and the necessity for an electromyelographic evaluation was required which revealed nerve injury in the left trapezius muscle. Dr. Clemens' report of January 27, 1969, stated that claimant was completely disabled which would persist at least until his next examination in early February.

The claimant testified that he was unable to raise his left arm above the shoulder level for a considerable period of time following the accident, but admits that by proper rotating exercises the arm has become normal in this respect. He complained of injuries to his back that made it impossible for him to work. He used a back

brace which prevented his bending over. He took diathermy and physical therapy treatments which Dr. Clemens said in one of his reports improved his condition. He worked at several different jobs, each of which, for one reason or another, he left. He contended that he could not lift with his left arm and that any kind of hard work was so painful to his back that he was forced to discontinue. Between May 29 and June 5, 1969, an investigator for a detective agency placed the claimant under surveillance and took pictures of the claimant with a movie camera without claimant's knowledge. These pictures show claimant driving a truck for a metal products company without any evidence of a disability to perform this kind of work. He was shown pulling himself into the cab of a crane and operating the levers and brakes, some above his head, without indicating any disability to perform the work. He was shown engaging in changing a tire on his automobile with the help of another in which he picked up a wheel, rim, and tire in his left hand and placed it in the luggage compartment of an automobile without any indication of disability.

In considering the evidence in the case, the credibility of the witnesses and the weight to be given their testimony is of controlling importance. The trial court who saw and heard the testimony could properly consider the following factors: The claim of disability rests solely on the evidence of the claimant. No employer or fellow employee supports his claim. Dr. Smith, to whom he was referred by his own doctor, testified that there is nothing revealed by his examinations to sustain a finding of disability. Dr. Smith further stated that no reason exists why claimant could not have worked at his former job since November 15, 1968, and "that I felt he simply lacked motivation and that once his litigation was settled to his satisfaction I felt sure he would return to the same type of employment that he had done previously." The evidence of the investigator for the detective agency bears out this statement from and after May 29, 1969.

Dr. Coe did not testify nor submit any reports. Nor did Dr. Clemens testify, but he did make several reports. He made but one statement purporting to support the claimant from a medical viewpoint. He said: "I considered the injuries severe enough to obtain an electro-myelo-graphic evaluation, which examination revealed nerve injury in the left trapezius muscle." The electromyelograph was not offered in evidence nor was the basis for Dr. Clemens' conclusion shown. He did not testify and consequently did not subject himself to cross-examination.

The only medical witness in the case was Dr. Smith. He specialized in orthopedic medicine and his qualifications were not questioned. He appeared to be free from bias and personal interest. His testimony was consistent and positive, and he responded directly and precisely within the area of his special knowledge. On the other hand, the reports of Dr. Clemens appeared to be based on the complaints made by the claimant and the assumption that they were entirely credible.

Other medical doctors whose names came into the record did not purport to evaluate the injury as it relates to permanent and partial disability, and for that reason, no doubt, did not testify. It is evident that the trial court considered the evidence of Dr. Smith to be credible and entitled to more weight than that of other medical doctors which came into the record in the form of reports. After a consideration of the foregoing evidence and circumstances, the trial court found, in effect, that the disability of the claimant ended on November 22, 1968. We can find no valid reason for disagreeing with that conclusion.

"A workmen's compensation cause on an appeal to this court is considered de novo upon the record, but where the evidence is conflicting and cannot be reconciled, this court will consider the fact that the trial court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory

testimony of the others." Dike v. Betz, 181 Neb. 580, 149 N. W. 2d 750.

The burden of proof is upon the plaintiff to sustain his claim by a preponderance of the evidence. The rule of liberal construction applies to the Workmen's Compensation Act, but it is not applicable to the evidence offered in support of a claim made for benefits under the act. After a consideration of all the evidence under the foregoing rules, we conclude that claimant failed to establish his claim by a preponderance of the evidence.

Other errors assigned have been examined and are found to be without merit. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EUGENE A. WATERS, APPELLANT.
182 N. W. 2d 214

Filed December 23, 1970. No. 37635.

1. **Criminal Law: Appeal and Error.** It is a general rule that plain evidentiary errors not presented to the trial court will not be reviewed.
2. **Criminal Law: Appeal and Error: New Trial.** This court may grant a new trial for plain evidentiary errors under exceptional circumstances that deprived defendant of a fair and impartial trial, although no one presented the matter to the trial court.

Appeal from the district court for Pawnee County: WILLIAM F. COLWELL, Judge. Reversed and remanded for new trial.

David E. Gregory and Peter Burrill Beekman, 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.

A jury found defendant guilty on Count 1 of burglarizing a gas station and not guilty on Count 2 of burglarizing a fertilizer company. He appeals. One complaint is that waiver of objections to evidence resulted in a miscarriage of justice.

The information alleged that both offenses occurred at or near Table Rock on November 22, 1969. Property taken from the gas station was $158 in paper money, checks, and coins, and 7 or 8 salted nut roll candy bars. When the burglary was discovered about 7 a.m., coins and loose checks were scattered at the station. Later that morning defendant was found in possession of these items: $60 in a trouser pocket, $16.25 in coins in a sport coat, $2.96 in a topcoat, $71 in bills hidden in a corn shock, and 6 salted nut roll candy bars.

Defendant testified to possession of the money upon his arrival in Table Rock on November 21 and to purchase of the candy bars in Omaha enroute to Table Rock. Other witnesses testified to statements by defendant, who had at times named a bus stop near Humboldt and at other times, Omaha, as the place of the purchase.

Appointed counsel, who is not counsel on appeal, represented defendant at the trial. Certain testimony of the sheriff was admitted without objection, motion to strike, or instruction to the jury to disregard the testimony. Defendant's motion for new trial set out the general ground—errors of law occurring at the trial.

The sheriff testified to having inquired of Robert Sitzman whether he had seen defendant in Table Rock the night before the burglaries. Sitzman answered affirmatively. Testimony of the sheriff continued: "And, I said, 'Where?' And, he said: 'Hiding in the weeds in lower town.' . . . So, since I knew him as a known burglar and I knew something about him, we proceeded to go look for him in lower town as he used to be a resident there. I thought he might be hiding in the area. . . ."

The sheriff also testified on direct examination to a

conversation in which defendant had said: " 'The reason I came to Table Rock is . . . to get a gun that I had loaned to a fellow several years ago, and I want to go over to' . . . Logan, Iowa, 'and get the Sheriff.' " The sheriff subsequently returned to the subject on direct examination: "And, he, again tells me: '. . . The only reason that he came over here was to get this gun to go get this Sheriff at Logan, Iowa. 50 years wouldn't be too bad a time for getting rid of a sheriff.' "

The sheriff testified on direct examination that he had lifted no fingerprints at the gas station. He concluded with this observation: "I, personally, think that the Defendant might have been wearing his socks for gloves."

Defendant testified on cross-examination to having hidden $71. The prosecutor continued: "Q. What were you going to do with the rest of it? A. I was going to buy a gun over at Table Rock. A friend of mine has one, and I was going to buy that. Q. What were you going to do with that? THE WITNESS: I will have to take the Fifth Amendment on that, your Honor. THE COURT: Sustained. Go ahead."

It is a general rule that plain evidentiary errors not presented to the trial court will not be reviewed. See Clough v. State, rehearing denied, 7 Neb. 351 (1878). We may, however, grant a new trial for plain evidentiary errors under exceptional circumstances that deprive defendant of a fair and impartial trial, although no one presented the matter to the trial court. Cf. Wamsley v. State, 171 Neb. 197, 106 N. W. 2d 22 (1960). See, also, People v. Murray, 72 Mich. 10, 40 N. W. 29 (1888); Vestal, "Sua Sponte Consideration in Appellate Review," 27 Fordham L. Rev. 477 (1959).

The rule calls for a new trial on Count 1. The judgment is reversed and the cause remanded accordingly.

REVERSED AND REMANDED FOR NEW TRIAL.

IN RE APPLICATION OF WELLS FARGO ARMORED SERVICE CORP., OF NEBRASKA, INC., OMAHA, NEBRASKA. WELLS FARGO ARMORED SERVICE CORP., OF NEBRASKA, INC., APPELLEE, V. BANKERS DISPATCH CORPORATION, CHICAGO, ILLINOIS, APPELLANT.

182 N. W. 2d 648

Filed January 8, 1971. No. 37518.

1. **Administrative Law.** On appeal from the Nebraska State Railway Commission, judicial review is limited to a determination whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made.
2. **Motor Carriers: Words and Phrases.** A contract carrier is one who furnishes transportation service to meet the special needs of the individual shipper or shippers.
3. **Administrative Law: Motor Carriers.** Generally, under the law, the Nebraska State Railway Commission is required to weigh the special needs of shippers desiring the new contract carrier service against the adequacy of the existing common carrier service.
4. ———: ———. Section 75-311, R. S. Supp., 1969, requires a finding by the Nebraska State Railway Commission that the proposed operation of a contract carrier to the extent authorized by the permit would be consistent with the public interest.
5. **Motor Carriers: Words and Phrases.** The term "consistent with the public interest," as used in section 75-311, R. S. Supp., 1969, means that the proposed contract carrier service does not conflict with the legislative policy of the state in dealing with transportation by motor vehicles.

6. **Motor Carriers.** When an application is made for a common carrier certificate, a heavier burden is cast upon the applicant than in the case of a contract carrier.
7. ———. An applicant for a common carrier certificate must meet the test that the proposed service is or will be required by the present or future public convenience and necessity, otherwise such application shall be denied.
8. ———. In determining such public convenience and necessity, the deciding factors are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by the applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest.

Appeal from the Nebraska State Railway Commission. Reversed.

W. W. Wallin and Acklie & Peterson, for appellant.

Joseph J. Vinardi, Harold W. Kauffman, and William A. Day, Jr., of Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellee.

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

WHITE, C. J.

This is an appeal by Bankers Dispatch Corporation, hereinafter referred to as B.D.C., from a Nebraska State Railway Commission order granting a contract carrier permit to Wells Fargo Armored Service.

Samardick of Grand Island-Hastings, Inc., filed an application with the Nebraska State Railway Commission on September 23, 1968, seeking authority to operate in Nebraska instrastate commerce as a contract carrier by motor vehicle, over irregular routes, transporting cash, letters, checks, and other commercial papers, data processing materials, and other documents and records related thereto. B.D.C. filed a protest to the granting of the application.

Subsequent to the filing of the application, Wells Fargo acquired the operating authority of Samardick.

By stipulation of the parties, Wells Fargo was the applicant in the commission proceedings and is the appellee here. The commission granted the contract carrier permit to Wells Fargo and this appeal by B.D.C. followed.

On appeal from the Nebraska State Railway Commission, this court is usually only called upon to decide if the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made. Poulson v. Hargleroad Van & Storage Co., 183 Neb. 201, 159 N. W. 2d 302 (1968). It is this latter issue that is involved here.

The commission consistently treated Wells Fargo's application as one for a contract carrier permit. The application, as filed, sought such a permit. However, the commission need not be bound by the applicant's own definition of the proposed service. If it is in fact an application in the nature of a common carrier, the commission should treat it as such. Midwest Mail Service, Inc. v. Bankers Dispatch Corp., 174 Neb. 809, 119 N. W. 2d 692 (1963).

A contract carrier has been generally defined by this court as "one who furnishes transportation service to meet the special needs of the individual shipper or shippers. In other words the commission is required to weigh the special needs of shippers desiring the new contract carrier service against the adequacy of the existing common carrier service." Hagen Truck Lines, Inc. v. Ross, 174 Neb. 646, 119 N. W. 2d 76 (1963). If the service can be performed as well by common carrier, a need for a contract carrier has not been established.

A contract carrier permit application is governed by section 75-311, R. S. Supp., 1969: "A permit shall be issued to any qualified applicant therefor, authorizing in whole or in part the operations covered by the application, if it appears after notice and hearing from the application or from any hearing held thereon that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to

conform to the provisions of sections 75-301 to 75-322.01 and the lawful requirements, rules and regulations of the commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest; otherwise, such application shall be denied."

"Consistent with the public interest," as used by the quoted section, means that the proposed contract carrier service does not conflict with the legislative policy of the state in dealing with transportation by motor vehicles. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp., 183 Neb. 229, 159 N. W. 2d 310 (1968). To be contrasted with this is the heavier burden put upon an applicant for a common carrier certificate. In that case, the applicant must meet the test of "public convenience and necessity," also set out in section 75-311, R. S. Supp., 1969: "A certificate shall be issued to any qualified applicant therefor * * * if it is found * * * that the proposed service * * * is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."

In determining such public convenience and necessity, the deciding factors are "whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest." Moritz v. Transcontinental Bus Lines, Inc., 153 Neb. 206, 43 N. W. 2d 603 (1950).

The original application in this case stated that only the Omaha National Bank would be served in the operation. Wells Fargo revealed at the hearing that there were at least four more proposed contracting parties. In addition, Wells Fargo proposes to add as many contracts as it can by actively soliciting business. The vice president of Wells Fargo of Nebraska testified that his company intends to make contacts with "all the poten-

tial clients" in order to provide service for them.

Wells Fargo had authority prior to the application in question to transport coin and currency in armored vehicles between all points in Nebraska. By the present application, Wells Fargo hopes to also carry shipments of letters, checks, and data processing material. B.D.C. presently serves all of the various correspondent banks used by Wells Fargo as supporting witnesses. B.D.C. already transports all the requested commodities for these banks, with the exception of coin and currency.

Thus, given Wells Fargo's admitted intention of active solicitation, the only real distinguishing factor between the service now rendered by B.D.C. and that which is to be performed under the contract carrier permit is that Wells Fargo could provide such service on a contract basis. The evidence does not support this as being sufficient to constitute a "service to meet the special needs of the individual shipper or shippers." Hagen Truck Lines, Inc. v. Ross, 174 Neb. 646, 119 N. W. 2d 76 (1963).

The language in Midwest Mail Service, Inc. v Bankers Dispatch Corp., 174 Neb. 809, 119 N. W. 2d 692 (1963) is in point: "The fact that the proposed service will be used by a limited class of persons or businesses is not a controlling factor. Many services rendered by common carriers are limited or specialized, depending upon the nature of the industry being served. It seems clear to us that applicant desires authority to transport the designated articles for the general needs of all shippers. These are factors indicating a common carrier service and not that of a contract carrier. Even though applicant purports to transport only a limited number of articles for a limited number of businesses who alone have occasion to transport them, the evidence indicates that applicant intends to hold itself out to perform transportation service for all shippers of articles named in the permit."

We conclude, therefore, that the proposed service is

that of a common carrier and, if such authority is to be granted, it must be shown that it is required by public convenience and necessity.

As mentioned earlier, one deciding factor in determining public convenience and necessity is whether the proposed service can or will be served as well by existing carriers. Appellee contends that its witnesses showed they supported its application in order to provide competition as to service as well as rates. It is true that some of the witnesses said that service competition was part of the basis for their opinion. However, it was shown that the service which the witnesses were commenting on, i.e., the authority to transport letters, checks, and other commercial papers, data processing material, and other documents and records related thereto, was a service which was already furnished by B.D.C. The singular exception to this was the transportation of coins and currency, which is of such minor significance in this instance that it does not distinguish the two operations. In fact, Wells Fargo's predecessor in interest, Samardick, never transported combined shipments of coin and currency and data processing materials on any regularly scheduled basis, even though it had authorization to do so.

In addition, many of those same witnesses stated they had not even discussed the proposed services with the appellee. Many stated that if the application were granted they would then find out what Wells Fargo might be able to provide that was advantageous to them. Contrary to appellee's contentions, all but one of the witnesses stated that B.D.C.'s services had been satisfactory. There was testimony showing that B.D.C. had been able to adjust its existing schedules and implement new ones in order to satisfactorily accommodate various banks' needs.

Inasmuch as B.D.C. can provide the service in question, we believe that the granting of such a permit in this instance would endanger or impair the operations of

the existing common carrier, B.D.C., contrary to the public interest. B.D.C. derives over one-fourth of its revenue from the service it provides for banks which supported Wells Fargo's application. In addition, it must be remembered that Wells Fargo has no intention of limiting itself to the specified customers. This will not mean "limited competition of a nonfatal nature," as was found by the Railway Commission. On the contrary, all of the bank business now enjoyed by the common carrier will be subject to applicant's competition. Wells Fargo's diversion of B.D.C.'s business would deprive B.D.C. of revenue that is needed in order to give satisfactory service to its present customers, the shipping public.

Fair and reasonable competition is not undesirable. However, the competition here cannot be termed either fair or reasonable. It is competition that at best would merely permit one carrier to gain a competitive advantage over another in performing what are substantially the same services. In this instance, such competition is not in the public interest. We believe that the granting of such a permit does not promote adequate, economical, and efficient motor carrier service such as is required by the legislative policy set out in section 75-301, R. R. S. 1943. On the contrary, it would only lead to unfair or destructive competitive practices such as are expressly condemned by that section.

We conclude, therefore, that the granting of the contract carrier permit was without support of the evidence. A need for a more specialized service than that now provided by B.D.C. was not shown. The granting of the permit was shown to have an effect on B.D.C. which would be contrary to the public interest. It was not shown that a denial of the application would have an adverse effect upon the shippers. As a result we reverse the order of the Railway Commission as unreasonable, arbitrary, and of no force and effect.

REVERSED.

McCOWN, BOSLAUGH, and SMITH, JJ., dissenting.

The majority opinion states: "We conclude, therefore, that the proposed service is that of a common carrier and, if such authority is to be granted, it must be shown that it is required by public convenience and necessity." That conclusion is contrary to the specific factual finding of the railway commission, which was supported by evidence. The conclusion is also directly opposite in result from that reached by this court more than two years ago. The former case was Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp., 183 Neb. 229, 159 N. W. 2d 310, decided by this court on June 7, 1968. In that case we affirmed an order of the railway commission authorizing "operations as a *contract carrier* by motor vehicle to transport cash, letters, checks and other commercial papers, data processing materials, and other documents and records thereto related." The parties were the predecessor of the present applicant and the identical protestant involved here. The case involved the same type of commodities, the same type of service, the same type of certificate, and the same economic and policy issues. The applicant here is presently operating as a contract carrier of the commodities involved under the regular route certificate granted in that case.

The only real distinction between the prior case and this one is that the applicant here seeks to extend its contract carrier authority from a specific regular route authority to an irregular route authority extending over the entire state.

The majority opinion here apparently takes the unique position that because the applicant stated that it desired to contract for its services with five banks rather than one and to solicit other banks where it was possible to furnish necessary services, the operations are somehow converted from a contract carrier type of operation to a common carrier type of operation.

The evidence is almost undisputed that the needs

of banks for transportation services for data processing materials are specialized within a rigid time and place framework. The record is abundantly clear that neither the rules of the railway commission nor any law or previous decision of this court limit the holder of a contract carrier permit to contracting for the authorized carriage with a single specific shipper or even a series of named shippers. Not even the protestant takes that position.

The majority here has substituted its own definition of a "contract carrier" for that prescribed by statute, by previous opinions of this court, and by the regulatory body charged with the responsibility of carrying out legislative policy.

In the original Samardick case in 1968, this court said: "The term 'consistent with the public interest' is quite different in its meaning than the term 'public convenience and necessity.' The former means only that the proposed contract carrier service does not conflict with the legislative policy of the state in dealing with transportation by motor carriers, while the latter requires a consideration of the present service being rendered in the territory, the need of additional service, and the facilities which the applicant can provide. Consistent with the public interest simply means that it is not contrary to the public policy of the state as expressed in the Motor Carrier Act."

The evidence here is replete with testimony indicating the requirements of specialized service to meet the needs of the banking industry in connection with prompt and efficient data processing. We refer again to the original Samardick case in 1968. We also said there: "The evidence as to where the public interest lies in the present case is in conflict. The determination of the public interest in such a case is one that is peculiarly for the determination of the commission. If there is evidence to sustain the findings of the commission, this court cannot intervene. It is only where the findings of

the commission are against all the evidence that this court may hold that the commission's findings on the evidence are unreasonable and arbitrary. Where the evidence is in conflict, as here, the weight of the evidence is for the determination of the commission and not for this court."

It is glaringly apparent that the majority opinion here is grounded upon the principle that a single, somewhat specialized, common carrier ought to be protected from all competition. In effect, the majority opinion says that the type of specialized service rendered by that common carrier, at least if it is offered to more than one contract shipper by any other carrier, can only be that of a common carrier and cannot be contract carriage. These are policy issues into which this court ought not to inquire. The entire statutory and regulatory pattern for motor carriers in this state clearly demonstrates that such policy decisions were specifically committed to the railway commission. Whatever expertise and experience it may have is and should be applied to making such policy determinations in the public interest. An attempt by this court to determine how much competition is in the public interest and where the competition ought to be or ought not to be is a clear usurpation of the authority and jurisdiction specifically committed to the railway commission.

The basic principles undergirding the regulation of motor carriers was stated very effectively in Black Hills Stage Lines, Inc. v. Greyhound Corp., 174 Neb. 425, 118 N. W. 2d 498: "The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Its purpose was not to create monopolies in the transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Legitimate competition is a normal attribute of our free enterprise system.

It must be permitted to exist and the law contemplates that it shall."

The extent and level of regulation of motor carriers is a matter of legislative policy. It has been committed to the jurisdiction of the railway commission. When the evidence on policy issues is in conflict, but there is evidence to sustain the findings and orders of the commission, this court cannot and should not act in the role of a superimposed regulatory body. See, Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp., *supra;* Neylon v. Petersen & Petersen, Inc., 181 Neb. 143, 147 N. W. 2d 488.

There was evidence here to sustain the findings and the order of the railway commission. It was within the jurisdiction of the commission to act and the action was neither arbitrary nor unreasonable. Its order should be affirmed.

IN RE ESTATE OF JAMES P. WALLACE.
UNITED STATES OF AMERICA, APPELLANT, V. RENNE EDMUNDS, ADMINISTRATOR OF THE ESTATE OF JAMES P. WALLACE, DECEASED, APPELLEE.
182 N. W. 2d 829

Filed January 8, 1971. No. 37599.

1. **Statutes.** In interpreting statutes, the function of the courts is to construe the language so as to give effect to the intent of Congress.
2. ———. The basic rule in the interpretation of the statute is to ascertain the legislative intent from the whole act and to give effect to it if it is a lawful one.
3. ———. A statute should be given a reasonable construction in order to accomplish its purpose.

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

William D. Ruckelshaus, Richard A. Dier, Robert J.

Becker, Alan S. Rosenthal, Robert M. Feinson, and Morsman, Fike, Sawtell & Davis, for appellant.

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

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

WHITE, C. J.

This appeal concerns the interpretation of a federal statute governing the federal government's right to a deceased veteran's intestate estate.

The deceased, an 89-year-old Spanish-American War veteran, was admitted to the Veterans' Hospital in Omaha, Nebraska, on June 2, 1967. After a dismissal, and subsequent readmittance, Wallace was transferred from the hospital to a private nursing home, the Bellevue Leisure Manor, for nursing and home care at United States' government and the Veterans' Administration expense. The Veterans' Administration paid for the service pursuant to a contract between the government and the home. He died intestate and without heirs at Bellevue Leisure Manor on September 9, 1967, leaving an estate of around $3,500. The district court held that the estate escheated to the State of Nebraska and the federal government has filed this appeal. We reverse the judgment of the district court.

The applicable federal statute, 38 U.S.C.A., section 5220(a), page 251, provides as follows: "Whenever any veteran * * * shall die while a member or patient in any facility, or any hospital while being furnished care or treatment therein by the Veterans' Administration, and shall not leave surviving him any spouse, * * * or heirs entitled, under the laws of his domicile, * * * as to which he dies intestate, all such property, * * * not disposed of by will or otherwise, shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund * * *."

It seems clear from the plain language of this statute, undisputedly applicable here, that the deceased did die intestate and without heirs while a member or patient in a facility, while being furnished care or treatment therein by the Veterans' Administration. The provisions of this statute take precedence over the escheat laws of the various states. United States v. Oregon, 366 U. S. 643, 81 S. Ct. 1278, 6 L. Ed. 2d 575. The deceased was receiving institutional care, within the terms of the statute, being furnished (at the expense of) by the Veterans' Administration in the nursing home. He was initially admitted to the Veterans' Hospital in Omaha, transferred to Bellevue Leisure Manor, pursuant to 38 U.S.C.A., section 620, page 63 (Cum. Supp., 1970), when the Veterans' Administration decided that he had received the maximum benefit from hospital care but still would require an extended period of nursing home care.

The State's contention is that the applicable section only applies when the deceased was receiving care from a facility which is under the direct and exclusive administrative jurisdiction of the Veterans' Administration. In interpreting statutes, the function of the courts is to construe the language so as to give effect to the intent of Congress. The basic rule in the interpretation of the statute is to ascertain the legislative intent from the whole act and to give effect to it if it is a lawful one. United States v. American Trucking Assn., Inc., 310 U. S. 534, 60 S. Ct. 1059, 84 L. Ed. 1345; State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N. W. 2d 63. Turning to 38 U.S.C.A., section 5223, page 256, it provides: "Disbursements from the Fund shall be made by the Division of Disbursements, Treasury Department, upon the order and within the discretion of the Administrator for the benefit of members and patients *while being supplied care or treatment by the Veterans' Administration in any facility or hospital. The authority contained in the preceding sentence is not limited to facilities or hospitals under direct administra-*

tive control of the Veterans' Administration." (Emphasis supplied.)

Construing the whole act it seems to us that Congress intended to disclaim expressly any possible suggestion that by use of the words "any facility or hospital" in the act that it referred to only institutions under the direct administrative control of the Veterans' Administration. It would also appear that a statute should be given a reasonable construction in order to accomplish its purpose, and it seems plain that the operation of the section should not be controlled or defeated by the fortuitous circumstance that the veteran's condition has reached the point where care in a nursing home was determined to be preferable to continued hospital care or that he was transferred there because of overflow in regular Veterans' Administration facilities, under the terms of the statute above referred to (38 U.S.C.A., § 620, p. 63 (Cum. Supp., 1970)).

The congressional purpose of the act is that where a veteran dies intestate and without heirs while being furnished with institutional treatment or care by the Veterans' Administration, his personal property should be employed, through the vehicle of the General Post Fund, for the benefit of other veterans who are institutionalized. United States v. Oregon, *supra*. We feel that it would be irrational to conclude that the effectuation of this purpose permits a distinction to be made between, on one hand, a veteran who is being treated or cared for by the Veterans' Administration in its own and directly controlled facilities to the day of his death, and, the veteran on the other hand who, like the deceased here, shortly before his death, is transferred from a Veterans' Administration hospital to a private facility for continued care at Veterans' Administration expense. We feel that the determinative factor, under the statute, is simply that at the time of his death, he was receiving institutional treatment or care being furnished by the Veterans' Administration either in one of its own facil-

ities or in some other facility better adapted to meet his particular needs. It is reasonable to assume that there was congressional recognition of this fact when it used the phrase "*any* facility or *any* hospital" in 38 U.S.C.A., section 5220(a), page 251.

We have examined the other contentions of the State and they are without merit. The contention that 38 U.S.C.A., section 5209, page 250, is applicable cannot be supported. By its terms the definition of facility or Veterans' Administration facility as used in such subchapter is specifically limited to subchapter 1 of the act. The section we are called upon to construe, section 5220, appears in subchapter 2, and the limitation to subchapter 1 invites the suggestion that a different and broader interpretation is proper in section 5220. Again the contention that the heading or title to the section or subchapter is controlling cannot be sustained. See Brotherhood of Railroad Trainmen v. Baltimore & O. R.R. Co., 331 U. S. 519, 67 S. Ct. 1387, 91 L. Ed. 1646. It further appears that the administrative interpretation and the regulations enacted by the Veterans' Administration pursuant to the date section 5220(a) was enacted into law in 1941 sustains the government's contention as to the meaning, the purpose, and the application of the act to the case here.

The State here has invited this court to give 38 U.S.C.A., section 5220(a), page 251, a reading which is at odds with the plain terms of the section, its consistent administrative interpretation, and also attributes to Congress an irrational purpose. The State has furnished us no rational basis upon which we could conclude that Congress might have intended that veterans such as the deceased herein, Wallace, should be treated differently for vesting purposes of his estate.

For the foregoing reasons, the judgment and decree of the district court herein are reversed and the cause remanded.

REVERSED AND REMANDED.

CENTRAL MARKETS WEST, INC., A CORPORATION, ET AL., APPELLEES, V. STATE OF NEBRASKA ET AL., APPELLANTS.
182 N. W. 2d 898

Filed January 22, 1971. No. 37524

SUPPLEMENTAL OPINION

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge On motion for rehearing. See *ante* p. 79, 180 N. W. 2d 880, for original opinion. Motion for rehearing overruled.

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

Healey, Healey, Brown & Burchard, for appellees.

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

CARTER, J.

This case involves the validity of a statute, section 53-168, R. S. Supp., 1969, which prohibits wholesalers of intoxicating liquors from giving discounts for quantity sales to retail distributors. The motion for a rehearing cites no new cases and is, in fact, a second discussion of the same issues that were before the court when the case was argued on its merits. Central Markets West, Inc. v. State, *ante* p. 79, 180 N. W. 2d 880.

It is contended here that our original opinion in the present case is a departure from the previous holdings of this court from Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729, to Terry Carpenter, Inc. v. Nebraska Liquor Control Com., 175 Neb. 26, 120 N. W. 2d 374. With this we cannot agree. The Tilley case relates to an attempt to regulate the automobile business, a competitive private business subject to the ordinary rules of the market place under a private enterprise system. The instant case deals with a licensed business having a great public interest and subject to almost complete regulation by the Legislature because of the

very nature of the business. The law applicable to a licensed business such as the manufacture, distribution, and sale of intoxicating liquors is altogether different, and well it should be.

We concede that if a statute dealing with intoxicating liquors is purely arbitrary without relation to the public interest, it would be unconstitutional. Here there is a public interest which the Legislature may properly protect. All retailers of intoxicating liquors are required to obtain a license. To obtain a license certain standards must be met, not only as to personal qualifications, but as to the location of the retail point, policing conveniences, and the like. The license is the same for each outlet and becomes of real value especially where the number of licenses in a given locality are limited. The very purpose of limiting the number of licenses is in some degree to insure that each licensee can operate at a profit and eliminate the evils that usually are inherent in a failing liquor outlet. The permitting of rebates on large sales permits large sellers to undersell the small ones with the same resulting evils. The public interest is as great in one case as in the other.

Admittedly there is a question of judicial policy involved. This court over the years has adhered to the policy of strict regulation of the liquor traffic. This court has been a consistent adherent of this principle and we are very fearful of the result if we abandon that policy in favor of applying the ordinary rules of the market place. Such a result can only compound the difficulties inherent in the administration of our liquor control laws. If our Legislature has the power to remove the sale of intoxicating liquors from private enterprise, as it did in Iowa by putting all sales in the hands of the state, it surely has the power to do anything less than that.

The original dissenting opinion makes the point that the liquor industry has been carried on in this state for 35 years without apparent need for outlawing rebates on volume sales. But this is a legislative policy ques-

tion. Cases cited in the original majority opinion support the holdings of that opinion. Rebates on volume sales are ordinarily beyond constitutional criticism. But when applied to the sale and distribution of alcoholic liquors, they can and do become important in regulating the business. In Terry Carpenter, Inc. v. Nebraska Liquor Control Com., *supra,* several cases are cited on the constitutional question as applied to the general rules of the market place, but they are not controlling as to a licensed business such as the sale and distribution of alcoholic liquors. Surely, if the Legislature can prohibit the sale and distribution of alcoholic liquors by private industry, it can prevent the giving of rebates having the effect of aiding one licensee and destroying the other.

In our judgment, our original opinion is not only correct, but it is a proper regulation of the sale of intoxicating liquors, a licensed business involving the health, morals, and safety of the using public.

MOTION FOR REHEARING OVERRULED.

McCOWN, SPENCER, and BOSLAUGH, JJ., dissenting.

The fundamental assumption upon which the majority builds its conclusion here is apparent in the following language of the supplemental opinion: "If our Legislature has the power to remove the sale of intoxicating liquors from private enterprise, as it did in Iowa by putting all sales in the hands of the state, it surely has the power to do anything less than that." That assumption is legally unsupportable.

It is fundamental that even though the Legislature can wholly prohibit the sale of intoxicating liquors; and even though the business, if legally permitted, may be strictly regulated; the Legislature still cannot resort to classifications for licensing regulations which are arbitrary, capricious, and unreasonable. Neither does the state's right to regulate the legal liquor business wipe out all constitutional rights of licensed liquor dealers. The Supreme Court of Minnesota, as far back as 1948, phrased it well. It said: "Equal protection of the laws

applies to regulation of occupations which may be entirely prohibited as well as to those which are inherently lawful. As between the selling of intoxicating liquor and other less harmful callings, there may be discrimination against the former, but there can be none as between persons engaged in the business." Anderson v. City of St. Paul, 226 Minn. 186, 32 N. W. 2d 538. See, also, 45 Am. Jur. 2d., Intoxicating Liquors, §§ 30 and 31, pp. 507 and 508.

The critical issue in this case is not whether there should or should not be a policy of strict regulation of the legal liquor industry. Instead, the issue is whether the statute here was a reasonable exercise of the police power for the benefit of the public, or was an arbitrary attempt to discriminate economically between liquor retailers. More than 35 years of experience in the legal liquor industry in this state without prohibition of quantity discounts by wholesalers has not resulted in the devastating evils referred to so graphically in the original majority opinion. The factual evidence is quite clear on that point. Yet such illusory evils furnish the only basis upon which the legislative action here can be called a reasonable exercise of the police power. The answer of the supplemental opinion to this evidence now is that: "* * * this is a legislative policy question." By the same token, every legislative decision involving the regulation of the legal liquor industry is also a policy question. That fact should not preclude this court from determining whether the exercise of legislative discretion was for the benefit of the public under the police power or was instead an arbitrary effort to discriminate between licensed retailers by destroying the normal economic advantages of quantity purchases in a free economy. It is quite clear that the statute here was intended to benefit the retail liquor dealer who cannot or will not buy in sufficient quantities to obtain the economic saving resulting from quantity purchases. The majority of this court now approve legislative action the

purpose of which admittedly is "to insure that each licensee can operate at a profit and eliminate the evils that usually are inherent in a failing liquor outlet." The incompetent, the inefficient, or the marginal liquor retailer is apparently to be covered by the economic blanket of the state's police power.

The Legislature was not at all concerned about the supposed evils of quantity discounts at the retail level. The evidence is clear, however, that the retail purchaser will bear the financial burden of the legislative ban on quantity discounts at the wholesale level. The real beneficiaries of the legislative attempt to interfere with "the ordinary rules of the market place" will actually be the extremely small group of licensed wholesalers in the State of Nebraska. The statute here ought not to be supported as a reasonable exercise of the police power for the benefit of the public, when the evidence establishes that its real purpose is to discriminate economically between licensed liquor licensees at the expense of the purchasing public.

We remain convinced that the statute here was designed for the private welfare of one class of licensed liquor dealers. It bears no real or substantial relationship to the general health, morals, or welfare of the public. The statute constitutes an arbitrary and unreasonable discrimination which disregards the realities of fair competition in a free enterprise system.

STATE OF NEBRASKA, APPELLEE, V. WELDON ROSS, APPELLANT.
183 N. W. 2d 229

Filed January 22, 1971. No. 37533.

Criminal Law: Constitutional Law: Evidence. In a criminal prosecution, the State may not make use of evidence unconstitutionally obtained to make a case for the jury. But a case having been so made, the State may use evidence unconstitutionally

obtained to impeach the credibility of the defendant on collateral matters not ultimately involved in the issue of guilt.

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

A. Q. Wolf, Bennett G. Hornstein, and James R. Welsh, 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 question involved in this case is whether a defendant, who voluntarily takes the witness stand in his own behalf, may be impeached on cross-examination or rebuttal testimony by previous statements taken from the defendant unless all of the Miranda warnings have been given. The sole ground of this appeal is the admission of such testimony by the district court. We affirm the judgment and sentence of the district court.

The defendant was prosecuted for burglary. Two police officers arrived at a grocery store at 2008 North Twenty-fourth Street in Omaha, Nebraska, about 3 a.m. on July 15, 1969, in response to an electronic A.D.T. alarm. Upon opening the door of a large incinerator in the northwest corner of the grocery building the officers discovered the defendant inside. An examination of the door at the rear of the building revealed several pry marks. Several pieces of scrap metal resembling crow or pry bars were lying near the door of the store and could have been used to make the pry marks which the officers found. Other evidence pointing to and establishing the guilt of the accused will not be repeated here as it is not pertinent to the issue involved in this case. No issue is raised as to the sufficiency of the evidence.

The defendant took the stand voluntarily and related that on July 15, 1969, he was unemployed and on parole from the Kearney (Boys' Training School). One of his parole restrictions was a midnight curfew. He testified that at about 2:30 a.m. on the night in question while at his girl friend's home, Miss Washington, he realized that he had violated his parole curfew and decided to leave. After leaving, he proceeded to the Twenty-fourth Street area to search for pop bottles which could be redeemed for cigarette money at a nearby service station. He testified that while looking for pop bottles he climbed inside the grocery store's incinerator to determine whether any pop bottles could be found there, and during this time a policeman came to the incinerator and told him to get out. He denied any attempt to break into the store. His statement was entirely exculpatory in nature.

In rebuttal, the State called an Omaha police officer. The officer related that the defendant had been questioned by him in the detective bureau at police headquarters. In recalling the constitutional rights admonitions given defendant before the interrogation, the officer failed to mention the warning that anything the defendant might say could be used as evidence against him in court. This officer then related, over objection, the substance of the defendant's statement, which was similar to the exculpatory testimony he had previously given, with the significant variation that just prior to searching for the pop bottles he had been at his *own home* where he was unable to sleep because of the hot weather.

The precise question presented in this case is whether this earlier exculpatory statement could be used to impeach his testimony on the witness stand as to a matter collateral to the issue of guilt. In all statements he denied participation in or commission of the crime charged. In both his testimony and previous statements he admitted being in the incinerator and searching for pop bottles at 3 o'clock in the morning.

It should be pointed out that nowhere in the record

or in the defendant's argument in this court does he allege or suggest that the exculpatory statements he made were not voluntary or that coercion, force, or fear were involved in the giving of the statements. Where the defendant was prior to the aborted burglary attempt was irrelevant to the issue of his guilt or innocence. The defendant did bring the explanatory statement of his prior conduct into the trial on direct testimony. He now complains when his truthfulness is legally attacked by the interdiction of an inconsistent statement as to where he was prior to the time of the incident in question.

Illegally obtained evidence is admissible for impeachment purposes as to a collateral matter. Walder v. United States, 347 U. S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954); State v. Howard, 182 Neb. 411, 155 N. W. 2d 399 (1967); Tate v. United States, 283 F. 2d 377 (1960); People v. Kulis, 18 N. Y. 2d 318, 221 N. E. 2d 541 (1966); People v. Harris, 25 N. Y. 2d 175, 250 N. E. 2d 349 (1969); People v. Boodie, 26 N. Y. 2d 779, 257 N. E. 2d 657 (1970); State v. Catrett, 5 N. C. App. 722, 169 S. E. 2d 248 (1969); State v Butler, 19 Ohio St. 2d 55, 249 N. E. 2d 818 (1969); People v. Marsh, 14 Mich. App. 518, 165 N. W. 2d 853 (1968). The controlling authority for the admissibility of this evidence is Walder v. United States, *supra*. It will be observed that the facts in the Walder case were much stronger in support of the defendant's position than in the case at bar. In Walder the defendant was charged in 1950 with purchasing and possessing heroin. He moved to suppress the seized heroin because the government came by it as a result of an unlawful search and seizure. The motion was sustained and thereafter the government dismissed the charges. Approximately 1½ years later Walder was arrested on other narcotics charges, none of which were related to the 1950 charge. During the trial Walder took the stand and testified in effect that he had never possessed any narcotics at any time in his life. On cross-examination and over his objection, he was asked about the 1950 heroin capsule that had been

suppressed in the former proceeding and was illegally obtained. Walder denied any narcotics were taken from him in 1950. The government rebutted this with the testimony of one of the officers who unlawfully seized heroin from Walder in 1950. The sole purpose of this evidence, under the court's instruction and as a basis for admissibility, was to impeach Walder's credibility. The Supreme Court of the United States in Walder (speaking through Justice Frankfurter) approved the admission of this testimony: "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment.

"Take the present situation. Of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics. Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." Directly in point is the case of Tate v. United States, *supra*. There the Circuit Court of Appeals for the District of Columbia sustained the admissibility of an impeaching statement of the same nature similar to the one presented in this case. The court said, speaking through Judge Burger, now Chief Justice of the United States Supreme Court:

"In the instant case, it is plain that the court did not admit any statement which was per se inculpatory. None of the acts described in the challenged statements, in and of themselves, constituted 'elements of the case against him.' The statements, even if true and believed by the jury, described lawful proper acts in which appellant as well as his companions were free to engage.

"* * * The statement on rebuttal was not inherently more incriminatory than the statement on direct; it was simply a different story but significantly different so far as his credibility was concerned. Appellant had a right to explain, as he did on direct examination, why and how he happened to be where he was found and arrested with stolen property in his possession. But when he gave one story to the police and another in court, and neither story covered any act which was per se inculpatory, the jury was entitled to hear both versions.

"The weight to be given to this impeaching testimony was for the jury; if the jury accepted the officer's testimony as true, that would tend to cast some doubt on appellant's veracity. In this sense the impeaching testimony had an adverse impact on the defense. But the Supreme Court in Walder did not suggest that impeaching evidence is to be excluded because it is damaging; there is little point for prosecutors to offer, or courts to allow, impeaching evidence unless it has some relevance to credibility. We note however that the evidence allowed in Walder was vastly more damaging than the impeachment evidence here. * * *

"We have considered whether the use of such admissions exerts undesirable influence on an accused to refrain from testifying in his own defense. We think it does not. The accused is still free to take the stand and truthfully deny all elements of the crime. Once he goes beyond denial of the crime itself and testifies as to collateral matters he is under an added compulsion to tell the truth. He may also have an added burden to provide a convincing explanation for any substantial inconsist-

encies which may be shown between his statement on the stand and contrary statements previously made; of course this is by no means confined to statements made to police or while in custody. Various statements made prior to his direct testimony might be available to impeach what he says in court, whether made before or after arrest and whether to police, friends or strangers. If impeached on a pheripheral non-inculpatory matter, he is of course free to explain the inconsistency, if indeed there is a rational 'human error' explanation for the inconsistency. What is proscribed by Walder is the freedom to 'resort to perjurious testimony' on the assumption that prior inconsistent statements would be kept from the jury. Neither sound public policy nor the ends of justice in the particular case would be served by a different rule. Whatever inhibition arises out of our view of the law it is not against testifying, but against testifying falsely."

The entire argument of the defendant is based upon dicta in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974 (1966). The Walder case has never been overruled by the United States Supreme Court and remains the applicable law to the case here within the constitutional context. Miranda, of course, involved the use of an inculpatory statement and the admissibility of evidence to affirmatively establish guilt by an inculpatory statement. It did not pass on the question we have in this case or which was present in Walder. A close examination of the cases cited by the defendant reveals that they are based upon an anticipatory analysis of what the Supreme Court of the United States would hold in the event that the precise question was presented to it. The opposite conclusion has been reached in the following cases: State v. Howard, *supra;* Tate v. United States, *supra;* People v. Kulis, *supra;* People v. Harris, *supra;* People v. Boodie, *supra;* State v. Catrett, *supra;* State v. Butler, *supra;* People v. Marsh, *supra.* In State v. Howard, *supra,* this court quoted with

approval part of the quotation from the Walder case that we have herein quoted. In People v. Harris, *supra*, the court of last resort in New York said as follows: "The first concerns a statement obtained from him after his arrest and under circumstances which concededly violated the requirements prescribed by the Supreme Court in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694. In its direct case, the People did not offer the statement in evidence. On cross-examination, however, and over the defendant's objection, the statement was employed extensively by the prosecutor in cross-examining the defendant who had taken the witness stand in his own defense. The statement was at complete variance with the account given by the defendant on direct examination although *it was no more inculpatory than his direct testimony.* Such use of the statement for purposes of impeachment is authorized by our decision in People v. Kulis, 18 N. Y. 2d 318, 274 N. Y. S. 2d 873, 221 N. E. 2d 541, to which we adhere." (Emphasis supplied.) The Kulis and Boodie cases cited *supra* have since followed and applied the Walder rule, again subsequent to Miranda. We think the conclusion of the North Carolina court in State v. Catrett, 5 N. C. App. 722, 169 S. E. 2d 248 (1969), is applicable here. The North Carolina court said as follows: "We do not think the challenged evidence falls within the condemnation of Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, where a signed confession was introduced as substantive evidence against the defendant. On the contrary, we think the principle declared in Walder v. United States, 347 U. S. 62, 74 S. Ct. 354, 98 L. Ed. 503, is applicable."

We agree with the reasoning of the Supreme Court of Ohio in State v. Butler, 19 Ohio St. 2d 55, 249 N. E. 2d 818 (1969), which held that the dictum of Miranda did not overrule the controlling opinion of Walder but that Walder in fact controlled. After discussion of dictum by Chief Justice Marshall in Cohens v. Virginia,

19 U. S. (6 Wheat.) 264, 399, 5 L. Ed. 257 (1821), the Ohio court concluded: "The court, in Miranda, was not faced with the facts of this case. Thus, we do not consider ourselves bound by the dictum of Miranda." In conclusion we feel that the rule of Miranda dealt with the affirmative use of confessions for the purpose of providing probative facts to establish the essential elements of the crime of which the defendant is charged. We have so held in several cases.

As controversial as the scope of the Miranda holding may be, it cannot be disputed that the reasoning of the Miranda case is grounded upon the proposition set forth in the Fifth Amendment to the Constitution of the United States—that no man shall be *compelled* to give incriminating evidence against himself. A barring of the affirmative use of a statement to establish guilt in violation of the Miranda requirements, but otherwise voluntary, is a prophylactic rule of exclusion designed to prevent the introduction of statements by the defendant which tend to establish his confession of guilt or his guilty acts as a matter of fact. It seems to us that the introduction of statements made by a defendant collateral to the issue of guilt and by way of impeachment to test the credibility of his story of his innocence serves no such purpose.

There is nothing in the Fifth Amendment, as we see it, that gives a defendant in a criminal case the right to lie with impunity. He cannot be forced to take the stand but once he does he ought to be subjected to cross-examination as any other witness. As to contradictory exculpatory statements on collateral matters, why should the jury not know this in evaluating the important issue of credibility? As we have noted there is no issue in this case as to the voluntariness of the exculpatory statement given to the police officer and sought to be used for impeachment purposes.

Ignoring the controversial contention that Miranda flays the blundering constable by freeing the felon (Jus-

tice Cardozo's famous dictum in People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926)), we feel that a striking of the balance between the interest of society and the rights of a defendant in our adversary trial system require a holding that testimony of the nature in issue here be admissible. The function of criminal court proceedings in our history has been a search for the truth and an honest endeavor to find out if the accused is guilty or innocent. A rigid formula developed by an anticipatory and enthusiastic expansion of the Miranda holding which would provide a defendant the means by which he could use the government's illegally obtained evidence as a shield against his own untruths and false testimony is not permissible.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HOWARD EDWARD REICH, APPELLANT.
183 N. W. 2d 223

Filed January 22, 1971. No. 37538.

1. **Criminal Law: Statutes.** While penal statutes must be construed strictly, it is not proper to give them a strained or an unnatural construction.
2. ———: ———. Penal statutes should be construed so as to give effect to the plain meaning of the words employed, and where of doubtful meaning, or application, the court should adopt the sense that best harmonizes with the context and the apparent policy and objects of the Legislature.
3. **Criminal Law: Statutes: Rape.** In a prosecution under section 28-929(2), R. R. S. 1943, the touching, fondling, rubbing, or feeling of the body, members or private parts of a minor under the age of 16 years, with the intent of arousing, appealing to, and gratifying the lusts, passions, and sexual desires of either the minor or the accused, constitutes the offense charged, even though such touching, fondling, rubbing, or feeling was through the clothing of the minor.

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

Craig F. Swoboda, for appellant.

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

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

WHITE, C. J.

After conviction for violation of section 28-929(2), R. R. S. 1943, for the indecent fondling or massaging of the sexual organs of a girl of the age of 10 years, the defendant was sentenced to an indeterminate period of 3 to 5 years in the Nebraska Penal and Correctional Complex. He appeals. We affirm the judgment and sentence of the district court.

No purpose would be served by a detailed recital of the facts and circumstances or the names of the witnesses involved in this unfortunate incident concerning a 10-year-old girl. Except for the defendant's complaint that the sentence is excessive, his appeal boils down to the contention that because the little girl, who was the victim in this case, had on shorts and there is no evidence that the defendant got his hand under the shorts she was wearing at the time; and that therefore there was no fondling or massaging of the sexual organs within the meaning of the statute. The statute simply says, "whoever shall fondle or massage in an indecent manner the sexual organs of any * * * girl under the age of sixteen years * * *." § 28-929(2), R. R. S. 1943. The statute requires that the fondling or massaging be in an "indecent" manner. The defendant concedes, and indeed it could not be argued, that the court's instruction on this essential element was correct. The court instructed the jury that: "By 'indecent' is meant unbecoming, immodest or obscene. 'Fondle' means to caress or stroke tenderly. 'Massage' means to rub or knead."

The defendant asks us to read into the statute a meaning and a requirement that the massaging and the fondling referred to in the statute requires that it be on the naked body of the victim of the offense. While penal statutes must be construed strictly, it is not proper to give them a strained or an unnatural construction. They should be construed so as to give effect to the plain meaning of the words employed, and where of doubtful meaning, or application, the court should adopt the sense that best harmonizes with the context and the apparent policy and objects of the Legislature. State v. Stapel, 103 Neb. 135, 170 N. W. 665. It is apparent that the statute was not intended to protect only unclothed small girls or permit the accomplishment of the act sought to be prohibited by the statute as long as they were performed on a clothed girl victim. A like contention was made in People v. Elliott, 158 Cal. App. 2d 623, 322 P. 2d 1029, where the defendant was charged with committing a lewd and lascivious act upon and with the body of a 7-year-old boy and also with committing a similar act upon and with the body of an 8-year-old girl. At request of the People, the trial court instructed: " 'It is not necessary in committing the crime charged against the defendant in the information that the bare skin of the minor be touched. The touching, fondling, rubbing or feeling of the body, members or private parts of a minor under the age of 14 years, with the intent of arousing, appealing to and gratifying the lusts, passions and sexual desires of either the minor or the accused, constitutes the offense charged, even though such touching, fondling, rubbing or feeling was through the clothing of the minor.' "

An examination of the record reveals a carefully conducted trial. The instructions to the jury, except in the areas mentioned, are not questioned. We find no merit in the defendant's contention.

The indeterminate sentence of the defendant of 3 to 5 years is challenged. A sufficient answer to this con-

tention is this quotation from the record of the trial judge's statement on sentencing the defendant: "* * * that was a very fine argument and I am sure I am sympathetic with the defendant, probably even more so were it not for the fact that I have now seen his record and I cannot in good conscience condone the present offense in any way. Even though it may appear no harm has been done, his record is just replete with previous cases such as contributing to the delinquency of a minor, not to mention that life sentence where he was sentenced for life in Minnesota for having carnal knowledge of a female. I think this man is too dangerous to be set free and go his own way." In the absence of abuse of discretion a sentence within statutory limits will not be disturbed. State v. Barker, 185 Neb. 659, 178 N. W. 2d 270; State v. Cunningham, 185 Neb. 488, 176 N. W. 2d 732.

We feel it is apparent, under these circumstances, that not only did the trial court not abuse its discretion but actually used restraint in sentencing the defendant under the circumstances of this case.

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

AFFIRMED.

LAWRENCE V. BOWLEY, APPELLANT, V. AIRPORT AUTHORITY OF THE CITY OF OMAHA, APPELLEE.

182 N. W. 2d 911

Filed January 22, 1971. No. 37539.

1. **Eminent Domain: Damages.** The amount of damages sustained by a landowner in a proceeding in eminent domain is peculiarly of a local nature and is ordinarily to be determined by the jury. Such a verdict will not be set aside unless it is clearly wrong.
2. **Trial: Depositions and Discovery.** A report prepared by an expert appraiser is generally not subject to discovery by the adverse party in the absence of a strong showing of good cause.
3. **Trial: Instructions.** The trial court is not required to give a

proffered instruction upon a subordinate issue, or which unduly emphasizes a part of the evidence in the case.

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

Martin A. Cannon of Matthews, Kelley, Cannon & Carpenter, and J. Michael Fitzgerald, for appellant.

John W. Delehant and Frederick A. Brown, for appellee.

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

BOSLAUGH, J.

This is a proceeding in eminent domain. The plaintiff, Lawrence V. Bowley, appeals from a verdict and judgment in the amount of $720,000 for land condemned by the defendant, Airport Authority of the City of Omaha, Nebraska.

The land in question is an irregular tract lying directly east of Eppley Field between the levee of the East Omaha Drainage District and the west bank of the Missouri River. It is bounded on the south by Pinkney Street extended and on the north by a tract owned by the defendant.

The land immediately adjacent to the river is accretion land which is subject to flooding during the year. The balance of the tract is higher ground with an area of 450 acres. The high ground is substantially level but slopes down somewhat from the east toward the levee to the west. The land itself is mostly river sand.

The plaintiff has used the land for agricultural purposes and for sand mining. It is zoned suburban which is described as a holding or transitional classification.

Much of the controversy in this case centers around the fact that the plaintiff's land lies outside the levee and in the flood channel of the river. The elevation of the high ground is generally at the level of flooding at 10-year frequencies. The evidence is in conflict as to

the cost and type of a levee required to protect the land against all floods except those of 100-year frequencies.

The plaintiff's evidence suggested that the land was suitable for industrial use, and valued the land at from $2,500,000 to $4,500,000. The defendant's witnesses were of the opinion that the land was not suitable for industrial use primarily because of its poor access, lack of utilities, its vulnerability to flooding, and the low demand for industrial land in the general area of the plaintiff's land. The channel is on the opposite side of the river so there is no direct access to river traffic. The defendant's witnesses considered the best and highest use of the land to be for sand mining and recreational use, and valued the land at $1,500 to $1,600 per acre for the high ground.

The verdict of the jury was equivalent to $1,600 per acre for 450 acres. The plaintiff contends that the verdict was too low and is not sustained by the evidence.

The amount of damages sustained by a landowner in a proceeding in eminent domain is peculiarly of a local nature and is ordinarily to be determined by the jury. Such a verdict will not be set aside unless it is clearly wrong. Jensen v. State, 184 Neb. 802, 172 N. W. 2d 607. The record in this case sustains the verdict of the jury and it is not clearly wrong.

The remaining assignments of error relate to the overruling of the plaintiff's discovery motion, rulings on evidence, and the instructions to the jury.

The trial court refused to compel the defendant to produce a report prepared by an expert appraiser employed by the defendant. Such reports are generally not available to the adverse party in the absence of a strong showing of good cause. See, 23 Am. Jur. 2d, Depositions and Discovery, § 199, p. 556; Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp., 23 F. R. D. 257; Annotation, 86 A. L. R. 2d 138. The ruling was within the discretion of the trial court.

The plaintiff produced an engineer who testified concerning the construction and cost of a levee to protect the high ground against all floods except those of 100-year frequencies. The defendant produced the testimony of engineers employed by the U. S. Army Corps of Engineers. These witnesses testified, over objection, as to the construction and cost of such a levee built to Corps of Engineers' standards. This evidence tended to prove that the levee proposed by the plaintiff's witness would be inadequate and would not satisfactorily protect the land from flooding and that an adequate levee would be much more costly. The evidence was admissible and plaintiff's objections to the testimony were properly overruled.

The plaintiff attempted to show that a levee could be constructed along the east edge of the high ground and continuing on to the north across the tract owned by the defendant which would eliminate some of the objections raised to the levee he had originally proposed. Objections to this testimony were sustained on the basis that it assumed facts not in evidence, was irrelevant, and was not proper cross-examination.

The record does not support the plaintiff's theory that he could force the creation of a levee district to construct such a levee. It appears that many landowners might be affected by such a levee; and in addition to the approval of the county board, it would be necessary to obtain a permit under the flood plain act. The objections were properly sustained.

We have examined the other rulings complained of and find no prejudicial error in any of them.

The trial court refused the plaintiff's request to instruct the jury in regard to statutes pertaining to levee districts and improvement districts generally. The requested instructions were properly refused. The statutes in question relate to collateral issues upon which the trial court was not required to instruct. See Reller v. City of Lincoln, 174 Neb. 638, 119 N. W. 2d 59.

In regard to the creation of a levee district, as stated above, the record is not clear that the plaintiff could force the creation of a levee district for the construction of a levee in accordance with his alternate plan.

By instruction No. 10 the trial court advised the jury that a statute, effective October 23, 1967, had been enacted which could restrict or prevent construction upon land subject to floods of 100-year frequencies until such land was properly protected against such floods. The plaintiff complains that the instruction misstated the law and that no instruction regarding the flood plain act should have been given.

The statute in question regulates the use of lands lying within the 100-year flood plain. A purchaser of the plaintiff's land would have considered the effect of this law upon the future use of the land. It was proper for the trial court to instruct in reference to the law even though the law had not become effective at the date of taking.

A primary purpose of the law appears to be the regulation of construction and the erection of artificial obstructions within the flood plain. There is, however, reference within the statute to the protection of obstructions erected within the flood plain. See § 2-1506.06, R. S. Supp., 1969. We find no prejudicial error in instruction No. 10.

We have considered the other assignments of error and find them to be without merit.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM RANDOLPH, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. ROBERT COLEMAN, APPELLANT.
183 N. W. 2d 225

Filed January 22, 1971. Nos. 37551, 37552.

1. **Criminal Law: Witnesses: Evidence.** Each case must be considered on its own facts, and a conviction based on eyewitness identification at trial following pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
2. **Criminal Law: Statutes: Sentences.** Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.

Appeals from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed in part, and in part remanded with directions.

Paul E. Watts and Michael N. Schirber, for appellants.

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

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

McCOWN, J.

Defendants, William Randolph and Robert Coleman, were charged with assault with intent to rob; and imprisoning a person for the purpose of compelling the performance of an act by another. The cases were consolidated for trial. A jury found the defendants guilty on both counts. They were each sentenced to 2 to 7 years on the assault count, and to life imprisonment on the kidnapping count.

On the evening of July 9, 1969, Valdis Lusins and his wife, Nancy, were entertaining their neighbors, William

and Celia Woodward at the Lusins' home in Omaha, Nebraska. Sometime around 11 p.m., two men entered the Lusins' residence, both armed with guns. They were not masked or disguised, although the larger man wore a hat, sun glasses, and rubber gloves. The larger of the two gunmen forced Mr. Lusins to change his clothes. For purposes of robbery, he then forced Lusins to drive to a supermarket near 72nd and Dodge Streets. Lusins was the manager of the supermarket. The smaller of the two gunmen stayed in the Lusins' home guarding Mrs. Lusins and the Woodwards. After extended investigation at and around the supermarket, the robbery attempt was abandoned when it appeared that a security guard and police cars were on and near the premises. After some 30 to 45 minutes, Mr. Lusins and the larger gunman returned to the Lusins' home. The gunmen remained in the Lusins' home for an additional 5 or 10 minutes, warned and threatened the witnesses about calling the police and about later identification, and left. The entire episode took approximately 1 hour.

During that time, all four of the witnesses had an opportunity to observe both gunmen for some 5 minutes at the beginning of the incident and 5 to 10 minutes at the conclusion while in the well-lighted Lusins' home. For 30 to 45 minutes Mr. Lusins had had an extended and thorough opportunity to observe the larger gunman inside and outside the car and in varying lighting conditions. The other three witnesses, during the same period of time, had observed the smaller gunman in the Lusins' home.

Some 15 minutes after the departure of the gunmen, the police were called. Upon their arrival, descriptions of the two gunmen were given to the police. On the following day, Mr. Lusins went to the police station and was shown several hundred pictures in an effort to identify the gunmen. He did not identify anyone. On at least one other occasion, a police officer brought a single photograph to the store which Mr. Lusins was

unable to identify. On July 25, 1969, a police officer brought six photographs, three each of two different men, to Lusins' store. Lusins promptly and positively identified the two men pictured as the gunmen. The pictures were later shown to Mrs. Lusins at her residence. Thereafter they were shown to the Woodwards separately. All four witnesses made a positive identification of the gunmen. At the time of the identification by the four witnesses on July 25th, the two defendants were not in police custody in Nebraska but apparently were in custody in Sacramento, California. One of the three pictures of each defendant which was shown to each of the four witnesses bore an identification from the sheriff's department of Sacramento, California.

Mr. and Mrs. Lusins testified at the preliminary hearing and at the trial. Mr. and Mrs. Woodward testified at the trial. All four witnesses testified that their identifications were based upon seeing the men at the time of the crime and nothing else. Immediately following the impaneling of the jury, a hearing was held outside the presence of the jury on defendants' motions to exclude the testimony of pretrial identifications and in-court identifications. The court determined the identification testimony to be admissible. The motions were overruled and the trial proceeded.

The defendants' assignments of error rest primarily on the contention that the photographic identifications were impermissibly suggestive and tainted the in-court identification sufficiently to violate due process of law. Defendants also contend that they were entitled to counsel under the rules established by United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

We think it clear that this case does not fall within the post-indictment lineup area circumscribed by Wade. Neither is it reasonable to term the photographic identification here a critical stage in a prosecution which has not yet focused on anyone. Even where the defendant was under arrest, Judge Friendly said in United States

v. Bennett, 409 F. 2d 888 (2d Cir., 1969): "* * * to require that defense counsel be allowed or appointed to attend out-of-court proceedings where the defendant himself is not present would press the Sixth Amendment beyond any previous boundary. None of the classical analyses of the assistance to be given by counsel * * * suggests that counsel must be present when the prosecution is interrogating witnesses in the defendant's absence even when, as here, the defendant is under arrest; * * *."

The defendants' claim to a right to counsel at the pretrial, preindictment, prearrest photographic identification by witnesses involved here is completely untenable.

The case of Simmons v. United States, 390 U. S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968), is determinative of the issue here. While there was no issue as to the right to counsel in that case, there was the assertion that the photographic identification procedure was so unduly prejudicial as to taint the conviction. Mr. Justice Harlan, speaking for the court about the use and hazards of the technique of initial identification by photograph, said: "We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

The circumstances affecting visual observance here can be characterized as similar to those in Simmons except that here the four witnesses involved had far greater and longer opportunity for observation than did any of the witnesses in Simmons. As the court said there: "Notwithstanding cross-examination, none of the witnesses displayed any doubt about their respective identifications of Simmons. Taken together, these circumstances leave

little room for doubt that the identification of Simmons was correct, even though the identification procedure employed may have in some respects fallen short of the ideal."

In the factual context presented, the identification procedure used in this case clearly did not deny the defendants due process of law. See, also, United States v. Bennett, *supra;* United States v. Ballard, 423 F. 2d 127 (5th Cir., 1970); Davida v. United States, 422 F. 2d 528 (10th Cir., 1970).

The defendants also contend that the sentences of life imprisonment imposed under Count II were improper and not authorized. At the time of the commission of the crime here, July 9, 1969, section 28-417, R. R. S. 1943, provided a mandatory sentence of life imprisonment upon conviction under the charge contained in Count II. The 1969 Legislature amended section 28-417, R. R. S. 1943, by reclassifying degrees of the crime of kidnapping and reduced the penalty under Count II to imprisonment for not less than 3 nor more than 50 years. That amendment, with the emergency clause, became effective September 19, 1969. The informations against the defendants in district court were filed September 30, 1969. The defendants were convicted November 28, 1969, and sentenced December 26, 1969.

There was no specific provision in the amending statute indicating legislative intent as to its prospective or retroactive operation. Section 49-301, R. R. S. 1943, provides that repeal of a statute shall not in any manner affect pending actions nor causes of action accrued prior to any such repeal except as may be provided in the repealing statute. This "saving clause" on repeal applies to both civil and criminal statutes.

While there is still some divergence of opinion among the states, we believe the better rule to be and we therefore hold that where a criminal statute is amended by mitigating the punishment, after the commission of a

prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.

The basic issue is, of course, the intention of the Legislature. As the Supreme Court of California said in In re Estrada, 63 Cal. 2d 740, 48 Cal. Rptr. 172, 408 P. 2d 948 (1965): "It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology."

In People v. Oliver, 1 N. Y. 2d 152, 151 N. Y. S. 2d 367, 134 N. E. 2d 197 (1956), the court said: "As to a mitigation of penalties, then, it is safe to assume, as the modern rule does, that it was the legislative design that the lighter penalty should be imposed in all cases that subsequently reach the courts." The North Carolina court phrased it thus: "When, however, the law under which a defendant was convicted is amended pending appeal so as to mitigate the punishment, it is logical to assume that the legislature intended the new punishment, which it now feels fits the crime, to apply whenever possible." State v. Pardon, 272 N. C. 72, 157 S. E. 2d 698 (1967). See, also, 21 Am. Jur. 2d, Criminal Law, § 578, p. 542; In re Fink, 67 Cal. 2d 692, 63 Cal. Rptr. 369, 433 P. 2d 161 (1967).

The convictions of both defendants on all counts and the sentences of both defendants under Count I are affirmed. The sentences under Count II are vacated and the causes remanded to the district court for resentencing

on Count II, under the provisions of section 28-417, R. S. Supp., 1969.

AFFIRMED IN PART, AND IN PART REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. THOMAS ROWE JONES, APPELLANT.
183 N. W. 2d 235

Filed January 22, 1971. No. 37560.

1. **Criminal Law.** A lesser included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged.
2. **Criminal Law: Instructions.** Where the court has instructed generally as to the elements of the offense charged, a failure to charge on some particular phase of the case is not error in the absence of a request for a more specific instruction.
3. **Criminal Law: Trial.** An argument which is based on evidence and inferences drawn therefrom is ordinarily not misconduct.

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

Edward F. Carter, Jr., for appellant.

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

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

BOSLAUGH, J.

The defendant, Thomas Rowe Jones, appeals from a conviction for leaving the scene of a personal injury accident in violation of section 39-762, R. R. S. 1943. The assignments of error relate to the instructions to the jury and the refusal to grant a mistrial at the close of the argument to the jury.

The accident occurred at about 8:30 p.m., on June 12, 1969. Dan Curran, a boy 15 years of age, and two

other boys were walking south on Memorial Drive in Lincoln, Nebraska. There is no sidewalk along Memorial Drive where the accident happened. The boys were walking abreast with Dan on the right side walking in the street near the east curb.

When Dan was about 300 feet north of South Street, an automobile operated by the defendant, which was proceeding south on Memorial Drive at approximately 30 miles per hour, struck Dan injuring him seriously. The defendant did not stop at the scene of the accident or comply with any of the requirements of section 39-762, R. R. S. 1943, which provides as follows: "The driver of any vehicle involved in an accident upon either a public highway, private road, or private drive, resulting in injury or death to any person, shall (1) immediately stop such vehicle at the scene of such accident, (2) give his name, address, and the registration number of his vehicle and exhibit his operator's or chauffeur's license to the person struck or the driver or occupants of any vehicle collided with, and (3) render to any person injured in such accident reasonable assistance, including the carrying of such person to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary or is requested by the injured person. Any person violating any of the provisions of this section shall upon conviction thereof be punished as provided in section 39-763."

The defendant was subsequently identified as the driver of the automobile through police investigation.

The defendant contends that the trial court should have instructed as to the offense of leaving the scene of a property damage accident on the theory that it was a lesser included offense. The contention is without merit.

A lesser included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. State v. McClarity, 180 Neb. 246, 142 N. W. 2d 152. The offense of leaving the scene of a property damage acci-

dent, which is defined in section 39-762.01, R. R. S. 1943, includes some of the elements of the offense of leaving the scene of a personal injury accident but also includes "damage to property" which is irrelevant to a charge under section 39-762, R. R. S. 1943. Thus, the trial court correctly refused the requested instruction.

The defendant admitted that he knew there had been an accident but claimed that he did not know there had been a personal injury. The evidence, however, was clearly sufficient to sustain the finding by the jury that the defendant knew there had been a personal injury in the accident.

In instruction No. 6 the trial court advised the jury that a material element of the offense charged was that "the defendant had knowledge of such personal injury accident." The defendant contends that the court should have divided the element of knowledge so that knowledge of an accident and knowledge of an injury would have been submitted as separate elements. The defendant, however, did not request that such an instruction be given.

The instruction given was adequate to submit the element of knowledge to the jury and was not erroneous in the absence of a request for a more specific instruction. See State v. Lewis, 184 Neb. 111, 165 N. W. 2d 569.

In his closing argument the deputy county attorney referred to the fact that a party some 200 feet from the scene of the accident heard something which he attributed to the accident. At the close of the argument the defendant moved, unsuccessfully, for a mistrial on the ground that there was no evidentiary basis for the argument.

Pierre Beau, one of the boys who had been walking with Dan when the accident occurred, testified that after the impact he ran to a house that was "back north several yards" and "pretty far from the street" to call for an ambulance. Pierre also stated that the man in the house said, after he had been told that there was an

accident: "'I thought I heard something'" or words to that effect.

Myron Carkoski, a police officer who investigated the accident, testified that he located the point of impact by measuring from the drive to the residence located at 1840 Memorial Drive, and that the residence was approximately 200 feet from where the accident occurred.

The record shows a factual basis for the argument of the deputy county attorney. An argument which is based on evidence and inferences drawn therefrom is ordinarily not misconduct. Cramer v. State, 145 Neb. 88, 15 N. W. 2d 323. The motion for mistrial was properly overruled.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY LEROY WILBUR, APPELLANT.
182 N. W. 2d 906

Filed January 22, 1971. No. 37585.

1. **Criminal Law: Trial: Confessions.** A statement obtained from a defendant in a criminal prosecution who had received the Miranda warnings is not inadmissible because the defendant was not advised as to what charges might be brought against him.
2. **Criminal Law: Trial: Evidence.** Photographs, although of a gruesome nature, are admissible in evidence if they are relevant and a true representation of what they purport to represent.
3. **Criminal Law: Trial: Right to Counsel.** An autopsy is not a critical stage of the prosecution. There is no right to representation by counsel at an autopsy.

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

Charles J. Knight, Ginsburg, Rosenberg, Ginsburg & Krivosha, R. P. Cathcart, Bernard Wishnow, and Ronald Rosenberg, for appellant.

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

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

BOSLAUGH, J.

The defendant, Gary LeRoy Wilbur, appeals from a conviction for manslaughter in the death of his wife, Judith Ann Wilbur. The assignments of error relate to the admission in evidence of his confession and certain photographs, and whether the defendant had a right to be represented by counsel at the autopsy of the deceased.

The record shows that Judith Ann Wilbur, the deceased, died on August 19, 1969, as the result of an injury to her liver from a sudden, violent compression or blow on the right side of her abdomen. The blow to the abdomen caused a laceration and shattering of the liver and a disruption of its capsule which could not be repaired surgically. Her death resulted eventually from loss of blood. The evidence is clearly sufficient to sustain a finding by the jury that the defendant struck the deceased with his fist during an argument at their home on August 15, 1969, and then came down on her abdomen with his knee causing the injury that resulted in her death.

The defendant was at the hospital when the deceased died at about 7 a.m., on August 19, 1969. He was arrested by Detective Barker at the hospital at approximately 7:45 a.m. The defendant was then allowed to return to the chapel at the hospital for about 30 minutes.

The defendant had a conversation with Barker and Inspector Sawdon at the hospital at about 8:15 a.m. The Miranda warnings were read to the defendant before the conversation took place and the defendant replied that he was willing to make a statement to the officers in the absence of counsel. The defendant admitted that he had struck his wife during the argument on August 15, 1969. The officers then advised the defendant that

he would have to go with them to police headquarters which he agreed to do.

A further conversation took place in Sawdon's office at police headquarters at about 9 a.m. in the presence of the county attorney. In this conversation the defendant related the events that led to the argument and assault in which he fatally injured his wife. At about 10 a.m., a statement was taken in the presence of a court reporter. The written statement was presented to the defendant at about 2:45 p.m. The defendant read over the statement, made several changes in it, and then signed it at about 3:30 p.m.

The defendant appeared in county court where a complaint had been filed at about 4 p.m. A date for a preliminary hearing was set and the defendant was released on bond.

The defendant contends that his waiver of counsel at the time the statement was taken by Sawdon and the county attorney was invalid because he had not been advised what charges might be brought against him. The defendant cites no authority which directly supports this contention.

During the conversation with the defendant at the hospital, after he had been advised of his rights, Barker and Sawdon told the defendant that they wanted to talk to him about the death of his wife. The defendant admits that this is true. There can be no doubt but that the defendant knew that he was being questioned by the police about his wife's death and, as a result of the police investigation, he might be charged with an offense arising out of her death.

The police could not advise the defendant as to what charge would be filed because the investigation was still in progress. To hold otherwise would be an unwarranted extension of the Miranda doctrine. The statement made by the defendant was not inadmissible because he was not advised as to what charge might be filed against him.

The defendant further contends that his statement was involuntary because it was obtained by use of inducements and promises at a time when he was under extreme emotional stress. The defendant testified that after he had been told that his wife had died, he "didn't care about anything but my children, what was going to happen to my wife." The defendant further testified that he asked about his children numerous times while the statement was being taken and that he was told that he had to give a statement before he would be allowed to see his children.

So far as emotional stress is concerned, Barker did testify that the defendant appeared despondent and cried once in his presence when they were at the hospital. This, of course, was just after the defendant's wife had died. Sawdon testified that the defendant appeared to be normal and not emotional when they arrived at police headquarters.

The defendant's claim that he was told he had to sign the statement was contradicted directly by Sawdon, and on cross-examination the defendant admitted that the county attorney told him he did not have to sign the statement. Sawdon further testified that the defendant did not inquire about his children while the statement was being taken, and this is corroborated by the testimony of the court reporter. The defendant's testimony, at most, was a matter for the consideration of the jury. The statement was properly received in evidence.

The photographs about which the defendant complains were taken during the autopsy. They show the body of the deceased and the liver after it had been removed from the body. The defendant contends that the photographs should not have been received in evidence because they were not relevant to any issue and served to inflame the jury.

Photographs, although of a gruesome nature, are admissible in evidence if they are relevant and a true

representation of what they purport to represent. State v. Robinson, 185 Neb. 64, 173 N. W. 2d 443.

The defendant in this case was charged with killing his wife while unlawfully striking her. The photographs of the body of the deceased were relevant because they showed the bruises inflicted by the defendant and demonstrated the violent nature of the assault. The extraneous marks on the body were explained in the testimony and could not have misled the jury.

The photographs of the liver were relevant because they supplemented and corroborated the testimony of the surgeon and the pathologist and helped to explain the mechanism of death. This was of importance in this case because of the time interval between the assault and the resulting death. The photographs were properly received in evidence.

The defendant contends that he was entitled to be represented by counsel at the autopsy performed on the body of the deceased. The defendant argues that this was a critical stage of the prosecution because the autopsy established the cause of death. The defendant cites no authority which directly supports his contention.

An autopsy is a medical procedure not unlike laboratory analysis of blood samples, hair, clothing, fingerprints, and similar matters. As stated in United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149: "Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial."

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN C. VICARS, APPELLANT.

183 N. W. 2d 241

Filed January 22, 1971. No. 37588.

1. **Criminal Law: Rape.** Where the prosecutrix is 15 or over, her previous chastity is an essential element of the offense of statutory rape.
2. ———: ———. While a general criminal intent is involved in the crime of statutory rape, no intent is requisite other than that evidenced by the doing of the act constituting the offense.
3. **Criminal Law: Statutes: Due Process.** It is not violative of due process for the Legislature in framing its criminal laws to cast upon the public the duty of care or extreme caution.
4. **Criminal Law: Rape: Instructions.** The question of the previous chastity of a prosecutrix is one for the jury to determine under proper instructions.
5. **Criminal Law: Rape.** A mistake or lack of information as to the victim's chastity is no defense to the crime of statutory rape.
6. **Criminal Law: Rape: Words and Phrases.** A chaste female within the meaning of section 28-408, R. R. S. 1943, is one who has never had unlawful sexual intercourse with a male prior to the intercourse with which the prisoner stands indicted.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Affirmed.

A. James McArthur and Douglas McArthur, 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 of the crime of statutory rape of a previously chaste 15-year-old female. Defendant's appeal is predicated upon the alleged unconstitu-

tionality of section 28-408, R. R. S. 1943; errors in the reception and exclusion of the evidence; and the giving or refusing of instructions. We affirm.

The incident resulting in the prosecution occurred on the evening of June 7, 1969. At that time the prosecuting witness was 15 and the defendant 21 years of age. Defendant admits the act and for the purposes of this opinion we assume that the prosecutrix consented to the act and that defendant believed her to be previously unchaste and to be older than 15.

Section 28-408, R. R. S. 1943, so far as material herein, is as follows: "* * * if any male person, of the age of eighteen years or upwards, shall carnally know or abuse any female child under the age of eighteen years, with her consent, unless such female child so known and abused is over fifteen years of age and previously unchaste, shall be deemed guilty of rape, and shall be imprisoned in the Nebraska Penal and Correctional Complex not more than twenty nor less than three years."

Defendant argues that: "* * * the statute permits an accused to raise consent as a defense where the complainant is over 15 years, if she is previously unchaste. This defense is not available if the complainant is previously chaste. It is the defendant's position that this distinction constitutes a denial of equal protection and deprives the defendant of due process of law." Where the prosecutrix is 15 or over, her previous chastity is an essential element of the offense of statutory rape. Truman v. State, 153 Neb. 247, 44 N. W. 2d 317. Defendant's argument is premised on his contention that the criminal act is made dependent upon the physical condition of the prosecutrix rather than the nature of the act. He argues that in a situation where two individuals perform the same act, one with a chaste female, the other with one who is not, criminal liability is imposed on the one and not on the other, even though both committed the same act. Defendant argues that the statute is Mid-Victorian and totally unfair, and that constitutionally the

State cannot punish one defendant yet impose no penalty on another when both have committed the same act. That, however, is not the crux of the matter. There is an important distinction between the two acts. The object of the statute is to protect the virtuous maidens and the undefiled virgins of the State and not the unchaste female. Christiancy v. State, 106 Neb. 822, 184 N. W. 948. The act which constitutes the crime of statutory rape is depriving a female within the age limits of her virginal chastity. This is a proper and not an unreasonable classification. In fact, most jurisdictions have substantially similar statutes. While in defendant's view the morals of society may be changing, Mid-Victorian or not, section 28-408, R. R. S. 1943, is constitutionally valid and must be enforced.

Defendant further argues that the statute is invalid because it does not include intent or knowledge as an element of the crime and because the act which it makes criminal is one that cannot be discovered and avoided even through the utmost care.

There is no question the Legislature may enact criminal statutes which do not include criminal intent or guilty knowledge as an element of the crime. Markham v. Brainard, 178 Neb. 544, 134 N. W. 2d 84. To sustain a conviction under the statute, a defendant must have carnal knowledge of a chaste female. The intent is evidenced by the doing of the act. While a general criminal intent is involved in the crime of statutory rape, no intent is requisite other than that evidenced by the doing of the act constituting the offense. 75 C. J. S., Rape, § 9, p. 471.

It is not violative of due process for the Legislature, in framing its criminal laws, to cast upon the public the duty of care or extreme caution. Nor is it unfair to require one who gets perilously close to an area of proscribed conduct to take the risk that he may cross over the line. As was said in Nash v. United States, 229 U. S. 373, 33 S. Ct. 780, 57 L. Ed. 1232: " 'The very mean-

ing of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor forsaw.' * * * 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.' "

The previous chaste character of the prosecutrix is a material element of the offense to be alleged and proved. The evidence herein is substantial that prosecutrix was previously chaste but, in any event, even if there were a substantial conflict, that question is one for the jury to determine under proper instructions. Marchand v. State, 113 Neb. 87, 201 N. W. 890.

A mistake or lack of information as to the victim's chastity is no defense to the crime of statutory rape. This specific question is one of first impression in Nebraska. Defendant, arguing by analogy, places great reliance on People v. Hernandez, 61 Cal. 2d 529, 39 Cal Rptr. 36, 393 P. 2d 373, 8 A. L. R. 3d 1092, which rejected the traditional view that mistake as to age was not a defense to statutory rape. In that case the California court adopted the old common law rule that an honest and reasonable belief in an existence of circumstances which, if true, would make the act for which the person is indicted an innocent act, is a good defense.

Defendant tendered a request for an instruction that a reasonable belief as to the previous unchastity of the prosecutrix would constitute a complete defense to the charge of statutory rape. This instruction was properly refused. To give it would, in effect, nullify the statute. While a few jurisdictions have adopted statutes making reasonable mistake a defense, the California rule is an isolated one. Most American jurisdictions support the view that mistake or a reasonable belief in this situation is no defense. We recognize that view rather than the California rule as a proper one to be applied in this jurisdiction.

Defendant complains of instruction No. 7 given by the

trial court. The instruction, so far as material, reads: "You are instructed that a woman who is 'chaste' within the meaning of the law, is one who has never had unlawful sexual intercourse with a male person prior to the intercourse with which the defendant stands charged in the information. No other conduct, even though loose, indiscreet or even immoral, amounts to unchastity. You are allowed, however, to consider any and all of the acts and conduct of the prosecutrix shown by the evidence, as circumstances bearing upon the question whether the prosecutrix was chaste on or before June 7, 1969." Defendant's objection is to the words, "unlawful sexual intercourse." This wording was specifically approved in Christiancy v. State, 106 Neb. 822, 184 N. W. 948. See, also, Marchand v. State, 113 Neb. 87, 201 N. W. 890, in which we held: "In Bailey v. State, 57 Neb. 706, a chaste female, within the meaning of section 9551, Comp. St. 1922 (now section 28-408, R. R. S. 1943), is defined as 'one who has never had unlawful sexual intercourse with a male prior to the intercourse with which the prisoner stands indicted.'" "Chaste" is defined in Black's Law Dictionary (4th Ed.), p. 299, as: "Never voluntarily having had unlawful sexual intercourse." Webster's New International Dictionary (2d Ed.), Unabridged, p. 455, gives as its primary definition: "Innocent of unlawful sexual intercourse." There is no merit to defendant's assignment.

Defendant complains of the exclusion of certain testimony of a girl friend of the prosecutrix which he asserts was offered for the purpose of impeaching the credibility of the prosecutrix. Defendant fails to point out in his brief where the prosecutrix testified about the areas covered to form the basis for impeachment. At most, the alleged impeaching testimony could only go to the question of consent, which is immaterial herein.

Finally, defendant complains because the examining doctor was permitted to express an opinion on the previous chastity of the prosecutrix, claiming such testi-

mony was to the ultimate fact and invaded the province of the jury. The testimony in question is as follows: "Q Assuming and supposing that the girl's hymen membrane was ruptured or fractured on June 7, 1969, do you have any opinion that she had any sexual intercourse before this night? A Yes, sir." After other questions and objections, the following appears: "Q Yes. In your opinion when was the first time that she had such intercourse with a man on the basis of your examination? A At my original examination, I mean, the present situation, was the thing that indicated it was the first time she ever had intercourse with anybody to my knowledge." The doctor was giving an opinion based solely upon and limited to his examination. He had found a freshly ruptured hymen, and was merely testifying that it indicated to him it was the first time prosecutrix had had intercourse. He was not testifying to the ultimate issue, but to the inference he drew from his examination. There was other testimony on the cross-examination on this point which would seem to establish the chastity of the prosecutrix, which was the ultimate issue.

For the reasons given, there is no merit to any of defendant's assignments of error, and the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT O. MCDONNELL, APPELLANT.
182 N. W. 2d 903

Filed January 22, 1971. No. 37606.

1. **Criminal Law: Trial.** 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.
2. **Criminal Law: Sentences.** A sentence imposed within statutory limits ordinarily will not be disturbed in the absence of an abuse of judicial discretion.

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

Charles M. Pallesen, Jr., of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

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

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

SPENCER, J.

This appeal is from an indeterminate sentence of 6 to 8 years on a conviction of burglary. Defendant assigns as error the failure to grant a speedy trial; failure to insure adequate counsel; the severity of the sentence; errors in the admission of evidence; and the failure to supply the defendant with a complete record of the proceedings. There is no merit in any of the assignments, and we affirm.

Defendant, with two codefendants, was apprehended late the evening of May 21, 1969, inside a store in Merriman, Nebraska. A complaint charging two counts of burglary was filed the next day. Count I involved the store in which defendant was found. Count II involved a machine and welding shop in Valentine, Nebraska. On May 22 defendant was taken to the county court for preliminary examination. He asked for a preliminary hearing and an opportunity to consult with his attorney to determine the date for it. The hearing was set for June 17. At that time defendant, represented by counsel, waived a preliminary hearing and was bound over to the district court. The two persons who were apprehended with the defendant, who were represented by the same counsel as defendant, posted $5,000 bonds, and were released. Defendant was unable to make bond. On September 15, 1969, the district court on its own motion called up the case and was informed that defendant's attorney was ill in a hospital in San An-

tonio, Texas. The court then set an arraignment in district court for October 20, 1969. Defendant's two codefendants failed to appear on October 20 and their bonds were forfeited. The record indicates that they are now serving sentences in a federal prison.

On October 19 defendant talked to his counsel by phone and entered a plea of not guilty to both counts of the information. Trial was set for November 18. On November 17, defendant appeared in court and was advised that his attorney no longer represented him. Defendant requested counsel and the court appointed one for him. Appointed counsel moved for immediate trial and requested a psychiatric evaluation of the defendant. This motion was sustained. Trial was set for December 16, 1969, and the defendant was ordered taken to the Lincoln State Hospital for such evaluation. The evaluation was not ready by December 16, and the trial was continued to January 20, 1970. The psychiatric evaluation was received January 16, 1970. Defendant went to trial 4 days thereafter—January 20, 1970.

Admittedly, 8 months is a long time to wait for trial for a defendant who is not free on bail. The dimensions of the right to speedy trial, however, must be determined largely by the facts and circumstances of each individual case. 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. State v. Lee, 185 Neb. 184, 174 N. W. 2d 344. The facts of this case do not support the claim of a denial of a speedy trial. Defendant's problem stems from the fact that he was represented by out-of-state counsel who was attempting to negotiate a plea bargain. The delay herein must be charged to the defendant and his counsel and not to the prosecution. It was the district judge who brought this matter to a head in September 1969. When defendant's attorney withdrew, the judge immediately appointed local counsel for the defendant. When counsel was appointed he re-

quested a psychiatric evaluation. The court granted the request and ordered the defendant taken to the Lincoln State Hospital for such evaluation. Within 4 days of the receipt of the evaluation report, the case proceeded to trial. The defendant did not assert this defense in the trial court. What we said in State v. Pilgrim, 182 Neb. 594, 156 N. W. 2d 171, is pertinent herein.

Defendant's second assignment of error alleges the failure of the court to insure that defendant had adequate counsel. Defendant was represented by counsel of his own choice until this counsel withdrew and defendant requested the appointment of counsel. The court immediately appointed counsel upon his request. Defendant admitted before sentencing that he was satisfied with the services of his trial counsel. During the appellate process, defendant discharged his trial counsel, and he is represented herein by other counsel. If defendant was represented by inadequate counsel in the first instance, it was of his own choosing.

Defendant's third assignment of error attacks the severity of the sentence. Defendant admitted that he had three previous felony convictions and two escapes. He also stated he was out on bond on a federal offense on which the other defendants had received sentences of 15 years. At the time of sentencing there were two federal detainers on file. The presentence investigation, which was a part of the proceedings requested by the defendant, would indicate that defendant, who was 41 years of age, had been closely associated with crime from his early incarceration in the Minnesota Boys' Industrial School. The maximum penalty involved herein would be 10 years unless a habitual criminal charge had been filed, in which event the minimum would be 10 years. Defendant was given a maximum sentence of 8 years, and a minimum sentence of 6 years, with the recommendation that he be allowed credit by the Director of the Division of Corrections for the 245 days he

was held in custody previous to his conviction and commitment. If he obeys the rules of the institution he can be released in less than 4 years. We consider this to be a very reasonable sentence in view of the circumstances and defendant's record. In any event, a sentence imposed within the statutory limits will ordinarily not be disturbed in the absence of an abuse of judicial discretion. State v. Arguello, 185 Neb. 351, 175 N. W. 2d 614.

Defendant alleges errors in the admission of certain evidence. Three revolvers were introduced into evidence. One of them was found in a cookie rack near where the defendant was apprehended; one was found behind the counter where the defendants were placed in the store; and one was found where one of the defendants was seen to throw it before he ran back into the store when ordered to stop. All of them were loaded when found. Defendant argues that only an indirect connection can be made with him in case of the revolver found in the cookie rack, and that the introduction of the other two into evidence was prejudicial to him. Defendant also objects to testimony to the effect that the two codefendants were wearing jackets taken from the store. There was testimony that another jacket was found in one of the aisles. Defendant complains that this testimony had no relevancy to his guilt or innocence, and was prejudicial to him. Defendant further complains that the effect of the introduction of evidence pertaining to the burglary of the Valentine Machine Shop for which he was acquitted, as well as other evidence, was an attempt to assassinate his character and was prejudicial to him. There is no merit to this assignment. The evidence pertaining to the burglary for which defendant was convicted was clearly admissible to show that the defendant was present in the store by design with the intent to commit a crime with which he was charged. By virtue of section 28-201, R. R. S. 1943, all persons present aiding and abet-

ting were guilty as principals. The evidence relating to the codefendants was admissible against the defendant. With reference to the evidence pertaining to the Valentine Machine Shop, while defendant was acquitted on that charge the evidence was pertinent to it. However, it could not possibly have been prejudicial to the defendant's case because the jury acquitted him on the count charging that burglary.

Defendant's last assignment of error alleges the failure to supply him with a complete record of his proceedings. He was furnished with a complete transcript of all of the recorded proceedings, at state expense. These proceedings did not include the voir dire examinations nor the opening and closing arguments to the jury, one of which closing arguments was made by the defendant himself, because no request was made that they be recorded. If defendant's counsel had made the request for the record of these proceedings, it would have been granted as a matter of course. Poverty was not the basis for the omissions because they are never included unless specifically requested.

The judgment is affirmed.

AFFIRMED.

LARRY E. DORAN, APPELLANT, V. LAWRENCE C. JOHNS, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

182 N. W. 2d 900

Filed January 22, 1971. No. 37622.

1. **Intoxicating Liquors: Motor Vehicles.** The implied consent law does not sanction a qualified or conditional consent. Neither does it sanction a dissent on the ground that plaintiff has taken medicine which he feels could affect the results of the tests.
2. **Intoxicating Lilquors: Motor Vehicles: Right to Counsel.** A licensed driver's request for counsel when requested to submit to a chemical analysis to determine intoxication cannot be con-

sidered a basis for a holding that the driver did not in fact refuse to submit to the test.

3. **Administrative Law: Motor Vehicles.** Receipt in evidence of the remainder of an incomplete transcript on appeal from an order of the Director of Motor Vehicles revoking an operator's license does not constitute prejudicial error.
4. ———: ———. Findings of fact in an order entered by the Director of Motor Vehicles are sufficient if they consist of a concise statement of the conclusions upon each contested issue of fact.

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

Leonard Dunker and Joseph H. Badami, for appellant.

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

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

NEWTON, J.

Plaintiff was arrested on a charge of driving a motor vehicle while under the influence of alcoholic liquor. His license to operate a motor vehicle was revoked when defendant found that plaintiff had unlawfully refused to submit to a urine or blood test. On appeal to the district court, the petition of plaintiff was dismissed. We affirm the judgment of the district court.

The evidence of the arresting officer indicates that plaintiff was driving on the left side of the street centerline forcing the arresting officer driving in the opposite direction over to the curb, and stopping about 2 feet in front of the police cruiser. Plaintiff's speech was slurred; he had difficulty maintaining his balance; his eyes were droopy, bloodshot, and watery; and he had the odor of alcoholic liquor on his breath. He was informed that he was under arrest for driving while intoxicated. At the police station the implied consent law was read to him; and he was twice requested to submit to a urine test and, on refusal, was twice re-

quested to submit to a blood test. This was likewise refused and when stopped from leaving the room, plaintiff struck the officer.

Plaintiff admits he was informed at the police station of the grounds for his arrest; that he was informed regarding the implied consent law; that he was requested to submit to urine and blood tests; and that he refused. He states he refused because he was taking medication for infected teeth and did not know what effect it would have on the requested tests; and that he requested permission to call a lawyer which was denied.

The arresting officer denied that plaintiff at any time mentioned taking medication or asked to call a lawyer.

It is undisputed that at the police station plaintiff talked to a lieutenant of police and stated "that he needed a break, that he was drunk but not that bad, and that he really needed a break." He was informed that the officer had no authority to give him a break.

The evidence is sufficient to sustain the judgment. Assuming the correctness of plaintiff's statements, they cannot help him. We said in Preston v. Johns, *ante* p. 14, 180 N. W. 2d 135, that: "The implied consent law does not sanction a qualified or conditional consent." Neither does it sanction a dissent on the ground that plaintiff has taken medicine which he feels could affect the results of the tests. In Rusho v. Johns, *ante* p. 131, 181 N. W. 2d 448, it is stated that: "A licensed driver's request for counsel when requested to submit to a chemical analysis to determine intoxication cannot be considered a basis for a holding that the driver did not in fact refuse to submit to the test." It was also stated that such action is not a deprivation of any constitutional right.

Section 60-420, R. R. S. 1943, provides that on appeal from the order of the Director of Motor Vehicles, the director shall furnish a transcript of the proceedings had before him and the appellant shall file it in the district court. In the present case, a transcript was fur-

nished and duly filed. It did not contain a transcript of the evidence but this was later placed in evidence by the State at the trial in the district court. The State did not seek to question the adequacy of plaintiff's transcript on appeal, but rather sought to amend what both parties appear to consider an incomplete transcript. Plaintiff has failed to point out how he was prejudiced by this procedure and we are unable to ascertain wherein he could have suffered prejudice.

The case of Prigge v. Johns, 184 Neb. 103, 165 N. W. 2d 559, is cited in support of the contention that the order of the director fails to contain a sufficient statement of his conclusions upon contested issues of fact. In the case before us, the director specifically found that the arresting officer had reasonable grounds to believe plaintiff was guilty of driving a motor vehicle while under the influence of intoxicating liquors, was arrested on that charge, was thereafter informed of the implied consent law, was requested to submit to a urine or blood test, and refused to do so. It was further found that no justification for such refusal appearing, such refusal was unreasonable. The findings of fact appear to cover all essential elements of the case. It is not required that the findings be so specifically made as to set out the items of evidence upon which they are based, only that they "consist of a concise statement of the conclusions upon each contested issue of fact." See § 84-915, R. R. S. 1943.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BOBBY JOE WEILAND, APPELLANT.
183 N. W. 2d 244

Filed January 22, 1971. No. 37627.

1. **Criminal Law: Appeal and Error: Evidence.** A party may not predicate error on the admission of evidence to which no objection is made at the time it is offered or adduced.
2. ———: ———: ———. The fact that a responsive answer elicited by the defense in cross-examining a prosecution witness is damaging to the defense is not ordinarily a proper ground for granting a mistrial.

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 James J. Duggan, for appellee.

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

SPENCER, J.

This appeal involves the single issue as to whether defendant should have been granted a mistrial because of a reference to a polygraph test taken by a witness against the defendant. We affirm.

The issue may be narrowed to the question, can a defendant on cross-examination secure a mistrial because he elicits a response which, while correct, may be prejudicial to him?

The testimony involved is as follows: "Q- Did you handle that with the County Attorney's Office, discuss with the county attorney the filing of charges against Phyllis Croghan? A- Yes. Q- You recommended that, didnt (sic) you? A- Yes. Q- Have the charges been dismissed? A- I have talked to the county attorney about it. I don't have any knowledge of it being dismissed. Q- As far as you know they are still pending? A- As far as I know. Q- Did you recommend to the

county attorney that they be dismissed? A- Yes. Q- When? A- Right after I had questioned Mr. Leffel and taken him on a polygraph. Q- That was when, in November? A- That was in December. Q- And did you follow up to see that the charges had been dismissed? A- I checked with the county attorney continuously." A second witness testified. "Q- Now you were sure enough about Phyllis Croghan so that charges were filed against her, weren't you? A- Yes sir. Q- When did you first say that you weren't sure about that? A- After the further examination or investigation pointed out that I was in error. Q- Who called that to your attention? A- I—Sergeant Petersen advised me of statements he had received and I also read some of the statements. Q- And when was that? A- Oh, approximately the early part of January or the later part of December. Q- And those statements of the man Leffel? A- Yes sir. Q- So the statements of this forger and burglar convinced you that you didn't see what you thought you saw at a prior period? A- The statements along with the polygraph tests he took convinced me."

No objections or motion to strike were made to the first reference above, and we find any objection thereto to have been waived. Defendant may not predicate error on the admission of evidence to which no objection is made at the time it is offered or adduced. State v. Snell, 177 Neb. 396, 128 N. W. 2d 823; State v. Homan, 180 Neb. 7, 141 N. W. 2d 30.

We have said many times that a party may not complain when he does not ask promptly for a mistrial but consents instead to proceed with the trial. Davis v. State, 171 Neb. 333, 106 N. W. 2d 490.

After the second reference defendant promptly moved for a mistrial, so the question posed above is pertinent. We would answer in the negative. It was elicited on cross-examination of a prosecution witness and is definitely responsive. It refers to a polygraph test of an accomplice and not the defendant. There is no sugges-

tion defendant did or did not take such test. Defense counsel was pushing the second witness to state exactly why he had changed his mind on testimony given on another occasion. In doing so, counsel was suggesting the lack of credibility of the witness and of the statement which induced the witness to change his mind. He must have known that the polygraph statement was an element which the witness considered in reaching the conclusion he did. The fact that a responsive answer elicited by the defense in cross-examining a prosecution witness is damaging to the defense is not ordinarily a proper ground for granting a mistrial. United States v. Apuzzo, 245 F. 2d 416.

We affirm the judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT STARR, APPELLANT.
182 N. W. 2d 910

Filed January 22, 1971. No. 37630.

1. **Criminal Law: Guilty Plea.** It is essential to the validity of a plea of guilty that it be entered intelligently and voluntarily, and that the record disclose this fact.
2. **Criminal Law: Constitutional Law: Guilty Plea.** It is not required that there be a direct waiver of each and every constitutional right involved but only that the plea waiving such rights be voluntarily and intelligently entered.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

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

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

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

NEWTON, J.

Defendant, following a plea of guilty, was convicted of burglary. On appeal, the only assignment of error presented is that the record fails to show the plea of guilty was entered "voluntarily, understandingly, intelligently, and with full knowledge of the rights he was waiving." We affirm the judgment of the district court.

Defendant, a man 42 years of age, with 4 previous felony convictions, was represented by competent counsel, apparently of his own choosing. The information was read to him and the offense of burglary explained. He stated he understood. He was informed that in pleading guilty he was waiving his right to trial, both by jury and by the court, and the requirement that he be found guilty beyond a reasonable doubt. He stated he understood. The right to be represented at a trial by counsel, to cross-examine witnesses, to have the advantage of a presumption of innocence, and the nature and extent of the penalties provided by law for burglary were explained. Again he stated he understood. He affirmed he had discussed the matter with his attorney and that they arrived at the mutual conclusion it was advisable to plead guilty. He further affirmed that no promises or threats had been made to induce a plea of guilty. He specifically admitted he had committed the offense with which he was charged and that his plea was voluntary. In defendant's presence, the deputy county attorney stated defendant had been extremely cooperative and shown a willingness to help secure a return of the property taken. Sentence was deferred for 21 days pending a presentence report at which time defendant again appeared with counsel. No desire to withdraw the plea previously entered was evidenced and sentence was pronounced.

Defendant relies upon the case of Boykin v. Alabama, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274. Previous decisions of the United States Supreme Court had established that to be valid, a plea of guilty must be

made intelligently and voluntarily. This case simply adds the requirement that the *record disclose* the plea was so made. It is pointed out that a plea of guilty is a waiver of many constitutional rights and that such a waiver will not be presumed from a silent record. The court stated: "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. * * * Second, is the right to trial by jury. * * * Third, is the right to confront one's accusers. * * * We cannot presume a waiver of these three important federal rights from a silent record." The United States Supreme Court does not require a direct waiver of each and every constitutional right involved but only requires that the plea of guilty waiving such rights be shown by the record to have been voluntarily and intelligently entered. See Brady v. United States, 397 U. S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747.

The record before us discloses compliance with the rule laid down in Boykin and earlier cases. It also discloses compliance with the standards relating to pleas of guilty adopted by the American Bar Association. The trial court ascertained there had been no plea bargaining, that defendant's plea was entered voluntarily, that he actually committed the offense, that he understood the charge, and that he was aware he was waiving his right to trial by jury. The trial court informed him of the maximum and minimum sentence provided by law. Regarding a voluntary and intelligent entry of plea by defendant, it may be pointed out that he was a mature man with four previous convictions and was not a stranger to the sentencing process or unaware of his fundamental rights. In addition, his waiver of a right to a jury trial and to confront witnesses was called to his attention, as was also the nature of the offense charged and the penalty. He expressly admitted com-

mission of the burglary and conceded that he entered his plea of guilty free of promises or threats, on advice of counsel, and of his own volition.

Our attention has been called to the fact that defendant's appeal may be subject to dismissal for failure to file a motion for a new trial in the district court. In view of the foregoing, we find it unnecessary to consider this phase of the case.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLARENCE W. BYRD ET AL., APPELLEES, IMPLEADED WITH MARYLAND NATIONAL INSURANCE COMPANY, APPELLANT.

183 N. W. 2d 234

Filed January 22, 1971. No. 37636.

1. **Judgments.** The power to modify or set aside a judgment ends with the adjournment of the term at which it was rendered, except as provided in section 25-2001, R. R. S. 1943.
2. ———. In an action to vacate a judgment after the adjournment of the term, the applicant must allege and prove that he exercised due diligence and that his failure to secure a proper decision was not due to his fault or negligence.

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

Quigley & Quigley and William S. Dill, for appellant.

Richard L. Spittler and Michael V. Smith, for appellee State.

Darrell F. Holmes, Jr., for appellees Byrd et al.

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

SPENCER, J.

This is an appeal from the denial of a motion to set aside a judgment entered against Maryland National Insurance Company on the forfeiture of the two $5,000

bail bonds made for Clarence W. Byrd and Daniel J. Ward. We affirm.

The bonds were written on behalf of Maryland by its agent, Hollis Jennings. Notice of an order of forfeiture, dated October 20, 1969, was served on Jennings, and he admits that on or about November 11, 1969, he received a copy of a motion for default judgment with a notice that it would be called up November 17, 1969. No appearance was made for Maryland, and on November 17, 1969, judgment was entered against it in the amount of $10,000. No appeal or other proceedings were taken within the time limited, and said judgment became final. On January 26, 1970, after the term at which the judgment was entered had expired, Maryland filed a motion to set aside the judgment. This appeal is prosecuted from the denial of that motion.

Section 25-2001, R. R. S. 1943, provides the grounds on which a district court shall have the power to vacate or modify its judgments or orders after the term at which they were entered has expired. The power to modify or set aside a judgment ends with the adjournment of the term at which it was rendered except as provided in section 25-2001, R. R. S. 1943. Meier v. Nelsen, 156 Neb. 666, 57 N. W. 2d 273. The only ground alleged by Maryland to set aside the judgment was that "* * * justice does not require the forfeiture herein." This does not come within any of the enumerated grounds for setting aside a judgment after term. In any event, we have reviewed all of the proceedings and find nothing therein to justify the setting aside of the judgment after term time. In an action to vacate judgment after the adjournment of the term, the applicant must allege and prove that he exercised due diligence and that his failure to secure a proper decision was not due to his fault or negligence. Citizens Ins. Co. v. Herpolsheimer Implement Co., 78 Neb. 707, 111 N. W. 606.

The judgment is affirmed.

AFFIRMED.

BETTY SATTERFIELD, APPELLANT, V. ED NAGEL, DOING BUSINESS AS FAIRACRES REST HOME ET AL., APPELLEES.
183 N. W. 2d 237

Filed January 22, 1971. No. 37712.

1. **Workmen's Compensation: Proof.** The burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that his disability was caused by an accident arising out of and in the course of his employment.
2. ———: ———. Where the claimant fails to show with reasonable certainty that the disability of which he complains arose out of and in the course of his employment the proceeding will be dismissed.

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

Atkins, Ferguson & Nichols, LeRoy M. Hahn, and Hugh S. Atkins, for appellant.

Holtorf, Hansen, Kortum & Kovarik and David C. Nettleman, for appellees.

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

BOSLAUGH, J.

This is a proceeding under the Workmen's Compensation Act. The plaintiff, Betty Satterfield, claims that she was injured while employed by the defendant Ed Nagel, as a nurse's aide at the Fairacres Rest Home in Scottsbluff, Nebraska.

After a hearing before one judge of the compensation court, the court found that the evidence did not show that the plaintiff's disability was the result of an accident arising out of and in the course of her employment, but was the result of a natural progression of a preexisting condition. Both parties filed applications for a rehearing before the full compensation court.

After a hearing before the full compensation court, the court again found that the evidence did not show

that the plaintiff's disability was the result of an accident arising out of and in the course of her employment, but was the natural progression of a preeexisting condition, and affirmed the previous order of dismissal. The plaintiff then appealed to the district court.

The district court found that the evidence did not show that the plaintiff's disability was the result of an accident arising out of and in the course of her employment, but was the result of a natural progression of a preexisting condition, and dismissed the action. The plaintiff has now appealed to this court.

The burden was upon the plaintiff to prove by a preponderance of the evidence that her disability was caused by an accident arising out of and in the course of her employment by the defendant. Todd v. Mer-Del Enterprises, Inc., 184 Neb. 258, 166 N. W. 2d 598. The principal issue in this case is whether the plaintiff's disability is a result of the following incident.

On or about April 24, 1968, the plaintiff was assisting several other persons move a patient at the rest home from a regular bed into a hospital bed. A draw sheet was being used to move the patient. The plaintiff was holding one side and another nurse was holding the opposite side. As the patient was being moved onto the hospital bed, the nurse opposite the plaintiff dropped her side of the draw sheet and the plaintiff fell forward onto the patient. The plaintiff testified that as she fell, "I felt my back snap."

The plaintiff further testified that at the time it happened she said that she had "snapped" her back. The nurse who was helping the plaintiff with the draw sheet testified that she could not recall the plaintiff complaining about her back. The daughter of defendant's wife, who was in charge of the rest home that day, was helping move the patient. She testified that the plaintiff said nothing about her back.

The plaintiff finished her work that day, which was a Wednesday. On Thursday, the plaintiff consulted Dr.

Hanna about her back. She did not work again until the following Monday which was her next regular workday. She worked on Monday and saw Dr. Holmes about her back that day. She also worked Tuesday and Wednesday. On Saturday she tried to rake some leaves in her yard. This seemed to aggravate her back situation and she was hospitalized the next day, She has not worked since that time.

The plaintiff has a long medical history and has had surgery for various conditions 14 times. Her history of back trouble extends back to before January 1966.

The record shows that the plaintiff was hospitalized for 24 days in January 1966 for low back pain. She was treated with traction and a lumbosacral garment for what was considered a recurrent low back syndrome. The hospitol report at that time states that: "* * * she has had recurrent back trouble over the past several years. She has been treated by a orthopedic surgeon for this in the past and was evaluated and told that it was felt that surgery was not indicated at the present time. She was fitted with a back brace and treated conservatively and apparently got along quite well until while moving she lost her back brace and has been without it now for several weeks. She states that during this time her back has become progressively worse."

A consultation report at that time states the plaintiff related: "* * * she has had backache for good many years. In about 1948, she was involved in an automobile accident when she was a passenger in an automobile, and she was treated on an out patient basis for low back syndrome. Periodically, she has had aching in her back. She did quite well until 1958 or 1959 when she was working for Armours Meat Packing Company, and was moving tubs of meat or sliding it, and one time she pulled on this 150# tub and noted pain in her back. Subsequently, she has had increased difficulty with her back. She was treated for acute back with a corset."

On April 2, 1968, more than 3 weeks before the inci-

dent at the rest home, the plaintiff consulted Dr. Holmes for "low back pain that she had had for several years." She saw Dr. Holmes again on April 9, 16, and 23, 1968. Thus, the plaintiff had been under treatment for her back condition before she saw Dr. Hanna on April 25, 1968, the day following the incident at the rest home.

After the leaf-raking incident on May 4, 1968, the plaintiff was hospitalized from May 5 to June 2, 1968. On June 7, 1968, Dr. Holmes prescribed additional physiotherapy care. She was hospitalized again on August 20, 1968, for the same complaint, following a 2-week car trip. She consulted Dr. Freelander, a neurologist, on August 28, 1968. She was hospitalized in Scottsbluff from September 1 to September 17, 1968, and then in Omaha for an additional 2 weeks. She was hospitalized again for 13 days in November 1968.

She was hospitalized in May 1969 for 2 weeks and developed a "paralysis" of her right arm in November 1969. She saw Dr. Holmes on October 14 and 29, 1969. She was examined by Dr. Freed, a neuro-surgeon, in Denver on May 21 and December 4, 1969, and by Dr. Herrold, a psychiatrist, in Cheyenne in July and October 1969.

The plaintiff made no claim for compensation until October 1968 after she had learned that her medical and hospital expense would not be paid by Blue Cross. Her explanation for the delay is that she did not want to harm or prejudice the defendant in any way. Her medical and hospital expense since April 24, 1968, is now in excess of $5,000.

None of the physicians who have examined the plaintiff have been able to find a logical medical explanation for her difficulties. It has been suspected that a disc injury was the cause of her complaints but the X-rays, neurological tests, and other diagnostic procedures have not demonstrated this to be true. The plaintiff now contends that the incident at the rest home on April 24, 1968, aggravated a preexisting condition causing

hysteria neurosis and disability. This is based upon an opinion by Dr. Herrold that the plaintiff is suffering from a hysteria neurosis, conversion type.

The problem in this case is that there is no satisfactory evidence to establish that the incident at the rest home on April 24, 1968, is the cause of her disability. The opinion of Dr. Herrold is based largely on the history given by the plaintiff.

The fact that the plaintiff was suffering from back pain before 1966; that she had consulted Dr. Holmes for her back condition more than 3 weeks before the incident at the rest home; that she worked the rest of the day on April 24, 1968, and worked her full time the following week; and that she was not hospitalized until after the leaf-raking incident on the following Saturday all suggest that her disability was not caused by the incident at the rest home on April 24, 1968.

As we view the record, it fails to show by a preponderance of the evidence that the plaintiff is disabled as the result of an accident arising out of and in the course of her employment by the defendant. Where the claimant fails to show with reasonable certainty that the disability of which he complains arose out of and in the course of his employment the proceeding will be dismissed. Hart v. American Community Stores Corp., 138 Neb. 149, 292 N. W. 387.

The judgment of the district court is affirmed.

AFFIRMED.

OMAHA COUNTRY CLUB, A CORPORATION, APPELLEE, V. MARIE A. DWORAK ET AL., APPELLANTS.
183 N. W. 2d 264

Filed January 29, 1971. No. 37558.

1. **Contracts. A lease is to be construed as any other contract.**
2. **———. The intent of the parties is to be determined from the whole instrument and is controlling if consistent with the rules of law.**

3. ———. A written contract which is couched in clear and unambiguous language is not subject to a construction other and different from that which flows from the language used.

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

Cassem, Tierney, Adams & Henatsch, Daniel J. Duffy, Abrahams, Kaslow & Cassman, Gross, Welch, Vinardi, Kauffman, Schatz & Day, and Frost & Meyers, for appellants.

John W. Delehant and Robert J. Huck, for appellee.

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

BOSLAUGH, J.

This is an action for declaratory relief brought by the Omaha Country Club, a corporation. The defendants are the owners of land which was leased to the plaintiff by four separate leases executed in 1923. This action was brought to determine the rights of the parties under the leases.

Each lease is denominated "NINETY-NINE YEAR LEASE" and contains the following provisions:

"WITNESSETH: The lessors, in consideration of the rents herein reserved, and of the covenants and agreements herein contained on the part of the lessee to be kept and performed, do by these presents demise and lease unto the said lessee, real estate in the County of Douglas and State of Nebraska, known and described as follows, to-wit: * * *." (Legal description of property omitted.)

"TERM

"TO HAVE AND TO HOLD THE above described real estate * * * unto the said lessee for and during the term of ninety-nine years (99), commencing on the first day of May, A.D., 1923, and ending on the thirtieth day (30) of April, A.D., 2022, unless said term be sooner terminated as hereinafter provided.

"The parties hereunto, each in consideration of the covenants of the other herein expressed (and the lessee in consideration, further, of the above demise) do hereby covenant unto and with each other as follows, to-wit:

"RENEWAL

"FIRST: The Lessee, at its option, at the expiration of fifty years, shall have the right to renew the term hereof for an additional forty-nine years, upon reappraisal of said premises by three appraisers (one appointed by lessor and one by lessee and a third to be selected by the two so selected) who shall appraise the land on a just and equitable basis and upon that basis a rental shall be paid by lessee of four per centum per annum net to lessors and upon the same conditions herein. Said option shall be exercised by notifying the lessors in writing six months before the expiration of the fifty year period. * * *

"RENT

"THIRD: The lessee covenants that it will pay to the lessors as rent for the demised premises for and during the said term of ninety-nine (99) years as follows: A sum of money equivalent to Fifteen Dollars ($15.00) per acre per year for each and every year of the term herein provided for, which rental * * * shall be payable in ninety-nine equal installments, the first installment to be paid upon the execution and delivery of this lease, and thereafter one of said equal installments shall be payable on the first day of May of each year during the term. * * *

"TAXES, ETC.

"FOURTH: The lessee further covenants and agrees to and with the lessors to pay, as additional rent for the demised premises, promptly when due, and in the name of the lessors, all water rates and all taxes, charges, liens, penalties, assessments, and all other impositions, general and special, ordinary and extraordinary, of every kind and nature whatsoever, (except inheritance and income taxes) which may hereafter during the life of

this lease be levied, imposed or assessed, upon the land hereby demised * * *; it being understood that the first general annual taxes to be paid by the lessee shall be the 1923 State and County taxes, and the last general taxes to be paid by the lessee shall be the taxes levied for the year A.D., Two Thousand and Twenty-one (2021)."

The plaintiff contends that the leases provide for initial terms of 99 years at a rental of $15 per acre with an option to renew for an additional 49 years commencing May 1, 2022, at a rental of 4 percent of the appraised value to be determined in 1973. The defendants contend that the leases provide for initial terms of 50 years at a rental of $15 per acre, with an option to renew for an additional 49 years commencing May 1, 1973, at a rental of 4 percent of the appraised value to be determined in 1973. The trial court found generally for the plaintiff, and the defendants appeal.

A lease is to be construed as any other contract. Wattles v. South Omaha Ice & Coal Co., 50 Neb. 251, 69 N. W. 785. The intent of the parties is to be determined from the whole instrument and is controlling if consistent with the rules of law. § 76-205, R. R. S. 1943; Towle v. Morrell, 129 Neb. 398, 261 N. W. 827. A written contract which is couched in clear and unambiguous language is not subject to a construction other and different from that which flows from the language used. Bishop Cafeteria Co. v. Ford, 177 Neb. 600, 129 N. W. 2d 581.

The controversy in this case results from an apparent conflict between the renewal provision and the other provisions in the leases. Except for the language in the paragraph designated "RENEWAL FIRST," the leases clearly provide for an initial term of 99 years. There is no conflict if the renewal clause is understood to relate only to the lessee's option to renew and not to the duration of the initial term of the leases. Under this interpretation the renewal clause fixes the time when the lessee's option to renew must be exercised, but the re-

newal term does not commence until the end of the initial 99-year term.

The defendants argue that the construction adopted by the trial court is unusual and extraordinary, largely because of the 49-year interval between the appraisal of the property and the time when the rental based upon the appraisal becomes effective. The defendants argue that an appraisal made in 1973 will be outdated and have no significance in 2022.

The parties could have incorporated a formula in the leases whereby the rental would have been adjusted periodically to take into account some of the changes in values which would occur during the terms of the leases. The parties determined otherwise and (except for taxes) adopted a plan whereby the rentals are fixed amounts for the initial terms and the renewal terms of the leases.

The rental to be paid during the last 49 years of a 99-year lease with a fixed rental is determined 50 years before it will be paid. The parties may have considered that a rental based on a 1973 appraisal is a reasonable compromise between a fixed rental for both terms, determined in 1923, and an appraisal at the end of 99 years to determine the rental for the renewal term. The construction adopted by the trial court is not unusual or unreasonable when the plan of the leases is considered.

The leases contained provisions indemnifying the lessors from all liens or charges against the premises as a consequence "of any act or omission of the lessee," or of "the existence of the lessee's interest under this lease," and any "liability, loss, cost, damage, or expense (including attorney fees)," on account of use of the premises for illegal purposes, failure of the lessee to satisfy obligations under the leases, accidents, liability of the lessors on the premises without fault, or arising out of law or governmental regulation. The provisions referred to have no application to a dispute between the parties as to the interpretation or construction of the

leases. The contention of the defendant Marie A. Dworak to the contrary is without merit.

It is unnecessary to consider the other assignments of error.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DENNIS RYS, APPELLANT.
183 N. W. 2d 253

Filed January 29, 1971. No. 37587.

1. **Criminal Law: Motor Vehicles: Searches and Seizures.** When materials in an automobile which are indicative of a criminal offense are in plain sight of an officer looking into the automobile from the outside, a search is justified and legal.
2. ———: ———: ———. It is generally held that when a motorist is stopped or arrested for a violation of the traffic or motor vehicle laws, an exploratory search of the vehicle for the purpose of obtaining evidence of other offenses is unwarranted.
3. ———: ———: ———. A search of an automobile made in connection with the violation for which it is stopped is ordinarily held to be a lawful search although it results in a discovery of evidence of some other offense.
4. **Criminal Law: Motor Vehicles: Searches and Seizures: Intoxicating Liquors.** Ordinarily, when liquor, narcotics, or contraband materials are found on a defendant's premises or in an automobile owned and operated by him, the evidence of unlawful possession is deemed sufficient to sustain a conviction in the absence of any other reasonable explanation for its presence.

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

O'Hanlon & Martin, for appellant.

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

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

NEWTON, J.

Defendant, stopped for a violation of the motor vehicle laws, was subsequently charged with being a minor in possession of alcoholic liquor and convicted. He contends the evidence against him was obtained as the result of an unlawful search and seizure and is insufficient to sustain his conviction. We affirm the judgment of the district court.

At approximately 3 a.m. on June 15, 1969, defendant, accompanied by six other young men, was driving through the village of Fort Calhoun on U. S. Highway No. 73. The village marshal observed that the automobile operated by defendant was without number plates and stopped it. Defendant immediately approached the marshal and offered for his inspection a title to the automobile. On request he also displayed his driver's license. The marshal, desiring verification of ownership, ordered the passengers out of the automobile and proceeded to look for a registration certificate, in-transit plates, or other indicia of ownership. On opening a front door and shining his flashlight in the automobile, he observed a bottle of whiskey lying in plain sight on the right-hand side of the floor in the front seat area. No other indicia of ownership was found. Defendant and five of his six passengers were minors. No arrest was made until after discovery of the liquor and then only in connection with its possession. There was no odor of liquor in the automobile or about its inmates. No search warrant had been obtained.

The automobile, being without license or number plates, was apparently being operated in violation of law and the officer was acting properly and within due bounds when he stopped it. This would also be true of his search for a registration certificate or other verification of the title presented. The officer's concern, and justification for his inspection of the inside of the automobile, necessarily relates solely to the possible violation of the motor vehicle laws. Probable cause to believe

some other violation was occurring did not exist until discovery of the liquor, and no arrest having been made, a search cannot be justified as attendant upon arrest.

There are numerous cases holding that when materials in an automobile which are indicative of a criminal offense are in plain sight of an officer looking into the automobile from the outside, a search is justified and legal. See, State v. Mallory (Mo.), 336 S. W. 2d 383, Cert. Den. 364 U. S. 852, 81 S. Ct. 99, 5 L. Ed. 2d 75, Reh. Den. 364 U. S. 925, 81 S. Ct. 287, 5 L. Ed. 2d 264; Goodwin v. United States (D. C. Cir., 1965), 347 F. 2d 793, Cert. Den. 382 U. S. 920, 86 S. Ct. 298, 15 L. Ed. 2d 234.

The distinction between the present case and those above-mentioned is that although the liquor was in plain sight and could have been seen had the officer shone his flashlight in through the window, he did not actually see it until after he had opened the automobile door and was technically engaged in a search of the automobile for another purpose. It is generally held that when a motorist is stopped or arrested for a violation of the traffic or motor vehicle laws, an exploratory search of the vehicle for the purpose of obtaining evidence of other offenses is unwarranted. See, United States v. Tate (3d Cir., 1962), 209 F. Supp. 762; People v. Lee, 371 Mich. 563, 124 N. W. 2d 736. On the other hand, a search of such an automobile made in connection with the violation for which it is stopped is ordinarily held to be a lawful search although it results in a discovery of evidence of some other offense.

In People v. Galceran, 178 Cal. App. 2d 312, 2 Cal. Rptr. 901, an automobile was stopped because it had no front license plate and inquiry disclosed it was registered to someone not present. A search of the automobile made to uncover documents or other evidence of ownership was upheld notwithstanding it disclosed evidence of another offense.

In People v. Guerrero, 247 Cal. App. 2d 687, 56 Cal.

Rptr. 7, Cert. Den. 390 U. S. 959, an officer stopped the defendant and checked his driver's license. The officer then learned by radio of an outstanding traffic warrant against defendant, arrested him, and noted that the registration slip was not visible as required by California law. He opened the door to look for it and on observing stolen property in the car, he searched it. The court stated: "The officer sought to locate the registration slip within the car. This was proper. He was not required to ignore the suspicious circumstances created by the plainly visible galvanized pipe protruding from under the seat, and several purses under the uneven front floor mat which was two to three inches above the floor."

In State v. Brooks, 57 Wash. 2d 422, 357 P. 2d 735, the defendant had illegally parked the automobile in which he was sitting. An officer opened a door to talk to him and while checking the registration certificate, noticed some stolen goods in the automobile. The court stated: "In the instant case, one of the officers opened the automobile door in order to question the appellant regarding the ownership of the automobile. This was not a part of an illegal search. On the contrary, it was a reasonable course for a police officer to take in handling a case of an illegally parked car when someone was sitting in it. Once lawfully in that position, the officer could observe what was there to be seen. As we stated in State v. Llewellyn, supra (119 Wash. 306, 205 P. 394): '* * * Once in the place, the officers were justified in taking cognizance of the fact that a crime was being committed by the defendant. The evidence thereof was before their very eyes; it took no search to find it. * * *.'

"The officer saw paper bags with clothing consisting of uncuffed pants protruding from them while he was in the process of questioning the appellant concerning ownership of the automobile. As we have above decided, upon this observation, a lawful arrest could have been made. Therefore, the search into the paper bags and

seizure of the contents prior to the arrest of the appellant was lawful, and the trial court properly denied the motion to suppress this evidence."

In the case of United States v. Owens (7th Cir., 1965), 346 F. 2d 329, Cert. Den. 382 U. S. 878, 86 S. Ct. 163, 15 L. Ed. 2d 119, Howell was driving a new Cadillac automobile accompanied by Owens and Hightower. Howell was arrested for speeding and the arresting officer, finding the automobile to be registered to someone not present, suspected it had been stolen. He had Owens open the trunk and then examined the contents of the trunk and of a suitcase therein. Evidence of the use of narcotics was found. In upholding the search and seizure, the court stated: "It is clear from the facts in the record that the arrest for speeding was not 'a mere excuse to search' for narcotics as in Taglavore v. United States, 291 F. 2d 262, 265 (9th Cir. 1961), and that the arrest was valid under Pennsylvania law, which controls that question. * * * The surrounding circumstances justified the arresting officer in suspecting that he was dealing with a situation more serious than routine speeding and he had reasonable grounds for believing that the car might be stolen. There is nothing to indicate that the officer suspected the presence of any narcotics or other violation until the suitcase was opened, disclosing the needle. Considering the situation which faced the officer, his attempts to determine whether the car was stolen were not unreasonable or violative of the Fourth Amendment, and the evidence which was turned up was not the fruit of any 'poisonous tree.'"

It appears that the foregoing decisions present situations quite similar to the case before us. The officer stopped defendant's automobile at an early morning hour, not for the purpose of making an exploratory search, but because of what appeared to be an obvious infraction of the law, namely, operating an unregistered motor vehicle. Before the officer could get out of his automobile, defendant leaped out of his own auto-

mobile, walked back to the officer, and presented a certificate of title. The certificate is not in evidence and it cannot be determined whether or not defendant was actually guilty of violating the motor vehicle laws. The circumstances were sufficiently unusual to reasonably raise questions in the mind of the officer and he desired corroboration of the title presented. No in-transit tags were visible but the officer thought it appropriate to check inside the automobile for in-transit tags, a registration certificate, or other evidence of ownership. For this purpose, and not for the purpose of making a general exploratory search for evidence of other offenses, the door was opened. Evidence of the offense with which defendant is charged was then observed in plain sight. Under the circumstances we do not believe the officer acted unreasonably or was guilty of an unreasonable search and seizure. He had already examined the driver's license of defendant, ascertained that defendant was a minor, and he was not required to ignore the evidence before him.

Defendant has offered no explanation of the presence of the bottle of whiskey in his automobile. The evidence simply indicates the presence of the bottle on the floor of the front seat area in plain sight of the defendant while he was driving. Defendant was the operator and claimed rightful custody or possession of the automobile. Under such circumstances, the question of conscious possession of the liquor is one to be determined by the trier of fact. Ordinarily, when liquor, narcotics, or contraband materials are found on a defendant's premises or in an automobile possessed and operated by him, the evidence of unlawful possession is deemed sufficient to sustain a conviction in the absence of any other reasonable explanation for its presence. See, Grosh v. State, 118 Neb. 517, 225 N. W. 479; Bilz v. State, 103 Neb. 15, 170 N. W. 167; State v. Schuck, 51 N. D. 875, 201 N. W. 342; State v. Salte, 54 S. D. 536, 223 N. W. 733; People v. Magdaleno, 158 Cal. App. 2d 48, 322 P. 2d 89; Horne v.

State, 93 Ga. App. 345, 91 S. E. 2d 824; State v. Nelson (Mo. App., 1929), 21 S. W. 2d 190.

The judgment of the district court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

While there are problems with the search and seizure issues here, the problems in the area of proof of possession of liquor by a minor are more glaring.

Critical additional facts need to be set out. The automobile which the defendant was presumptively driving was not owned by him, nor was there any evidence as to the circumstances under which he was driving it. The evidence shows that "Donald R. Rys was the notarized owner of the vehicle." There is no evidence of the relationship of Donald R. Rys to the defendant, Dennis Rys. The six other occupants of the vehicle were never identified in the evidence either by name or description, nor were their positions in the automobile shown. "Five of the other parties in the vehicle were found to be less than 20 years old. One party was 21 years old or older." The bottle of whiskey on the right-hand side of the floor in the front seat was "partially covered with a jacket or coat." The village marshal went around to the right side of the vehicle after the passengers were all out of the car "and opened this door and pulled the jacket away from the bottle to be certain it was a whiskey bottle * * *."

The majority opinion makes the statement that the bottle was "in plain sight of the defendant while he was driving." There is no evidence to support that statement. It was at night. The village marshal used a flashlight to see the bottle. There were seven people in the car.

The marshal at no time smelled alcohol on any person in the car, nor in the car itself, nor in the soft drink bottles which were also in the car. There is simply no evidence of knowledge or consciousness of possession by defendant except whatever inference might arise

from the fact that he was apparently driving the vehicle at the time it was stopped. There is no evidence that the owner of the car was not a passenger in the car. There is not even any evidence that the owner was not the individual over 21 years old.

Under these factual circumstances, the majority opinion holds: "Ordinarily, when liquor, narcotics, or contraband materials are found on a defendant's premises or in an automobile possessed and operated by him, the evidence of unlawful possession is deemed sufficient to sustain a conviction in the absence of any other reasonable explanation for its presence." None of our cases have ever gone that far and the cases cited in support of the proposition do not support it. Most of the cases cited by the majority opinion involve premises, not vehicles. In the three cited cases which involve vehicles, the crucial words are "ownership, domination, and control."

State v. Salte, 54 S. D. 536, 223 N. W. 733, comes closest to supporting the majority opinion. It states: "The finding of the liquor in a vehicle owned, dominated, and controlled by the accused is sufficient prima facie to establish a conscious and substantial possession."

In State v. Nelson (Mo. App.), 21 S. W. 2d 190, the court stated: "The car belonged to another who was present and in control thereof, and the presumption would prevail that possession of the liquor went with ownership and possession of the car."

In Horne v. State, 93 Ga. App. 345, 91 S. E. 2d 824, the last of the vehicle trio cited, and the only vehicle case of recent vintage, the court said: "Presumptively the whiskey found in the automobile belonged to the owner of the automobile who was driving the car."

If the majority opinion here be correct, a minor may be convicted of unlawful possession of liquor by the mere fact that he was driving an automobile, which he did not own, in which liquor was found, without any additional proof of conscious and substantial possession. This would

be so whether or not the owner of the automobile was present in the car and whether or not there were other minor passengers also. While the court may wish to overrule State v. Eberhardt, 176 Neb. 18, 125 N. W. 2d 1, by ignoring it, this is not the case in which to do it. In fact, the rule that knowledge and consciousness of possession of alcoholic liquor are essential elements of proof was reaffirmed in State v. Reeder, 183 Neb. 425, 160 N. W. 2d 753. In any event, this court has not yet disagreed with the rule quoted in Eberhardt, from Reyes v. State, 151 Neb. 636, 38 N. W. 2d 539: "Where circumstantial evidence is relied upon, the circumstances proven must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion."

The evidence here was clearly insufficient and the conviction should be reversed.

BOSLAUGH, J., joins in this dissent.

DURAND ASSOCIATES, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. GUARDIAN INVESTMENT COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLANT, M. L. STRONG ET AL., APPELLEES AND CROSS-APPELLEES.
183 N. W. 2d 246

Filed January 29, 1971. No. 37598.

1. **Contracts.** The proper construction of a written contract is a question of law to be determined by the courts.
2. **Architects: Contracts: Costs.** An architect is bound to make full disclosures of all matters of which he had or should have had knowledge which it was important that his clients should know.
3. ———: ———: ———. An architect or engineer may breach his contract for architectural services by underestimating the construction costs of a proposed structure.
4. ———: ———: ———. The rule to be applied is that the cost of construction must reasonably approach that stated in the estimate unless the owner orders changes which increase the cost of construction.

5. ———: ———: ———. It is ordinarily for a jury to say whether the actual cost is within a reasonable range of the estimated cost unless the excess is so great that the court can deal with it as a matter of law.
6. **Contracts.** Recovery cannot be had on a quantum meruit by a party who breaches a contract against one receiving no benefit from the performance of the services for which recovery is sought.
7. **Pleadings.** The rule requiring the defense that plaintiff is not the real party in interest to be specially pleaded is not applicable where the case is one in which the facts showing interest must be established as an essential of the cause of action, or where the circumstances of the case are such that the objection raised goes to the existence of the cause of action.

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

Lyle E. Strom, C. L. Robinson, and Fitzgerald, Brown, Leahy, McGill & Strom, for appellant.

Pilcher, Howard & Dustin, for appellees.

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

SPENCER, J.

This is a law action to recover fees for professional engineering services, pursuant to a contract for the erection of an apartment building which was never constructed because the construction bids were substantially in excess of an alleged estimate. Defendant Guardian Investment Company, hereinafter referred to as Guardian, cross-petitioned for alleged damages because of an inadequate estimate. At the close of the evidence, the trial court directed a verdict for the defendants on plaintiff's petition, and for the plaintiff on the Guardian cross-petition. Plaintiff perfected an appeal and defendant, Guardian, a cross-appeal.

William H. Durand is the president and sole stockholder of the plaintiff corporation. Durand is a licensed professional engineer and in the practice of his profession designs buildings and other structures. The defend-

ants, M. L. Strong and Theodore H. Lundt, are the sole stockholders of Guardian Investment Company, a corporation. Strong and Lundt, through another corporation, Elshire Investment Company, owned property at Forty-Second and Emile Streets in Omaha, Nebraska.

Sometime during the early part of 1962, Strong and Lundt visited with Durand about the construction of a medical clinic on their property For reasons not material here, the erection of a medical clinic was abandoned and the parties discussed the erection of an apartment building. Durand prepared preliminary plans for the apartment building. He was informed by the defendants that Guardian had no money and would have to borrow most of the cost of the building except for the cost of the site and certain costs which were to be borne by them. After preliminary plans and negotiations, Durand submitted a standard form of agreement between owner and architect to Strong and Lundt. Certain objections were made by them to the submitted contract, and Durand took it back to his office for revision. It was subsequently returned to them for signature by an associate of Durand. At this time, it had a construction cost estimate of $629,000 to which the defendants objected. The undisputed evidence on this figure is the testimony of Strong, as follows: "Well, I seen the 629,000, I said, 'Well, Jack, this isn't right, where did you get the 629,000?' I says, 'This building is to be built for the $420,000 we had previously discussed.' So he gets on the phone and calls Mr. Durand, and he tells me after, he says, 'Well, Mr. Durand says go ahead and change it to 420,' that his girl evidently took that off of an estimate and put it in there. Q. Was it changed right then and there? A. It was changed right there, and both of us initialed it."

Before insertions, the contract, so far as material herein, read as follows: "5 PAYMENTS Payments to the Architect on account of his fee shall be made as follows, subject to the provisions of Article 4:

"Upon completion of the preliminary studies, a sum equal to 25% of the basic rate *computed upon a reasonable estimated cost.* (Italics supplied.)

"During the period of preparation of specifications and general working drawings, monthly payments aggregating at the completion thereof, a sum sufficient to increase payments to 75% of the rate or rates of commission arising from this Agreement, computed upon a reasonable cost estimated on such completed specifications and drawings, or if bids have been received, then computed upon the lowest bona fide bid or bids.

"From time to time during the execution of work and in proportion to the amount of service rendered by the Architect, payments shall be made until the aggregate of all payments made on account of the Architect's compensation under this Article, but not including any covered by the provisions of Article 4, shall be a sum equal to the rate or rates of commission arising from this Agreement, computed upon the final cost of the Project.

"Payments to the Architect, other than those on his compensation, fall due from time to time as his work is done or as costs are incurred.

"No deductions shall be made from the Architect's compensation on account of penalty, liquidated damages, or other sums withheld from payments to contractors."

The material insertion in the contract is as follows: "Payments to the architect will be made on a monthly basis, payments to be prorated equally over a twelve month period beginning with this contract date. Payments will be based on estimated construction costs until actual costs are determined at which time the amount of the payments will be revised accordingly. (Construction cost estimate $420,000.) WHD & Ass J.C.J. 1/7/62 MLS

"Painting and decorating; Ground and preparation; & All apartment furnishings excluded from project costs. WHD & Assoc J.C.J. 1/7/69 MLS." Four payments

of $1,750 were made on the contract, obviously based upon the estimate of $420,000.

The big dispute in this action involves the interpretation of the contract. The proper construction of a written contract is a question of law to be determined by the courts. Bishop Cafeteria Co. v. Ford, 177 Neb. 600, 129 N. W. 2d 581. Plaintiff insists that the $420,000 figure was intended only as a figure for preliminary payment of fees to the architect. Defendants insist that the construction cost of the project was not to exceed $420,000, exclusive of painting and decorating, ground and preparation, and all apartment furnishings. The contract is the standard form used by the American Institute of Architects and was prepared by the plaintiff. Therefore, it must be strictly construed against the plaintiff and in favor of the defendants.

We agree with the construction of the contract by the trial court that the inserted paragraph is in conflict with article 5 and is controlling over it. Plaintiff's argument on the meaning of the contract does not embrace the realities of such situations. We interpret the insertion in parentheses of the words "Construction cost estimate $420,000" to mean exactly what it says. The estimated cost of construction was $420,000, exclusive of the mentioned exclusions. It strains credulity to believe any businessman or private corporation would enter into a substantial building project without insisting on some estimate of cost. Plaintiff's expert witness testified that a cost estimate is valuable information to give a client before entering into a contract, and that it would be very unusual for an architect not to discuss costs, for estimating costs are a part of the design of a project.

After plaintiff prepared the plans and specifications it took bids in conformity with the specifications. The low bids received totaled $724,535. While this figure may have embraced some of the exclusions, even then it is at least 72 percent above the construction estimate. These bids were submitted to Strong and Lundt, who

told Durand the cost was too high to permit them to proceed, and asked what could be done to lower it. Durand visited with some of the bidders, suggested the elimination of certain items, and came up with a modified bid of $652,728. This figure was still too high for the defendants and the project was abandoned.

Plaintiff relies for recovery on two provisions of the contract. First, the following language from article 4: "If any work designed or specified by the Architect is abandoned or suspended, in whole or in part, the Architect is to be paid for the service rendered on account of it"; and, second, article 8: "When requested to do so, the Architect will furnish preliminary estimates on the cost of the Project, but he does not guarantee such estimates."

With reference to the first provision, if, as we shall discuss later, an architect or engineer who excessively overestimates the probable cost at which a building can be erected is not entitled to fees, then this provision could have no application.

We interpret article 8 to mean that the architect does not guarantee the exact figure but only represents that the estimate furnished is a reasonable approximation of the cost of the project. If, as the plaintiff seems to infer, it means that an architect will under no circumstances be bound by his estimate, we would consider it contrary to public policy because it would mean that no matter how large the bid for doing the work, defendants would be obligated to pay an architectural fee based on that amount. Reading the contract as submitted, we conclude the intent of it to be that any estimate furnished is a reasonable cost estimate.

Durand's profession required him to keep informed on building costs and in case of any question he could readily ascertain the approximate cost on any project. His knowledge in this respect was superior to that of the defendants. Durand held himself out as an expert in his field. He was supposed to be skilled in estimat-

ing costs of construction. Those employing him or his firm had a right to expect that he would exercise that skill and judgment. It was his affirmative duty to give the defendants some definite idea of the reasonable cost of the project. It is immaterial whether or not the defendants told him, as they contend, that the cost could not exceed $420,000 above the exclusions. When that figure was included in the contract, he was bound by it. If it was not a realistic estimate, he should have disclosed to the defendants that the plans proposed by him could not possibly be carried out for that figure. He was duty bound to make full disclosures of all matters of which he had or should have had knowledge which it was important that his clients should know.

There are many cases discussing the effect of underestimating the cost of construction on the compensation of architects and engineers. Some of them are collected in an annotation at 20 A. L. R. 3d 778. There are many courts which deny compensation where the actual or probable cost of construction exceeds the estimated cost. We believe some of these cases apply too stringent a rule. We prefer to hold that an architect or engineer may breach his contract for architectural services by underestimating the construction costs of a proposed structure. The rule to be applied is that the cost of construction must reasonably approach that stated in the estimate unless the owner orders changes which increase the cost of construction. It is ordinarily for a jury to say whether the actual cost is within a reasonable range of the estimated cost unless, as here, the excess is so great that the court can deal with it as a matter of law.

There is further reason why plaintiff cannot recover herein. The contract as modified does not provide for any allocation of the fees to particular stages of the execution of the work. It provides for monthly payments until the $21,000 based upon the $420,000 estimate is paid. On this construction, ignoring plaintiff's breach

as set out above, the proper measure of damages would be the reasonable value of the service rendered by the plaintiff plus any loss of profit, assuming a wrongful breach on the part of the defendants. As the trial court found, there was insufficient evidence of the reasonable value of the services rendered to submit that issue to the jury. In any event, in this case only the preliminary work or that previous to the execution of the contract could be covered by this rule. Recovery cannot be had on a quantum meruit by a party who breaches a contract against one receiving no benefit from the performance of the services for which recovery is sought.

The trial court sustained plaintiff's motion for dismissal of the cross-petition on three grounds: (a) Guardian is not the real party in interest; (b) there is no sufficient evidence of an appropriate measure of damages; and (c) granting the right of Guardian to recover the $7,000 in progress payments, the measure of recovery could not ignore the reasonable value of plaintiff's services prior to the time of the execution of the written contract.

Guardian argues that the plaintiff did not specifically plead it was not the real party in interest, and therefore was barred from raising that defense at the close of the evidence. Ordinarily the defense of not being the real party in interest must be specially pleaded and cannot be raised by a general denial, which was the plea herein. However, that is not true in this situation. Guardian alleged it had expended certain sums of money. Plaintiff denied that fact, and the burden was on Guardian to prove it. We hold that the rule requiring the defense that plaintiff is not the real party in interest to be specially pleaded is not applicable where the case is one in which the facts showing interest must be established as an essential of the cause of action, or where the circumstances of the case are such that the objection raised goes to the existence of the cause of action.

Involved in the Guradian cross-petition are excavating

costs of $1,167; a loan fee of $4,900 for a $490,000 loan commitment; a loss of $6,814 on steel prepurchased to avoid a price increase; and four progress payments of $1,750 each on plaintiff's fees pursuant to the contract, or $7,000.

The contract was signed January 7, 1963. The working drawings were completed May 23, 1963. Bids were opened on June 7, 1963, and the final bids were received by June 28, 1963. All of the payments included in the cross-petition were made prior to the receipt of the bids from the contractors. There is no sufficient showing that Guardian incurred the obligations. None of them were billed to or paid by Guardian.

The excavating was billed to T. H. Lundt and paid by Elshire. There is no specific showing of any loss on this item to Guardian or anyone else. Strong's testimony would indicate that the land was sold by Elshire previous to the trial, with no evidence as to how the value of the property may have been affected.

The loan commitment was made to Melvin Strong and Theodore Lundt, who are listed therein as the borrowers. Nowhere in the commitment is there any reference to Guardian nor does it appear to be a party to the commitment. Exhibit 19 acknowledges receipt of $4,900 from Elshire Investment Company, and the funds are to be returned to it with interest unless forfeited as liquidated damages if "Elshire Investment Company does not close out the mortgage loan * * *."

Strong and Lundt believed that steel prices were rising and ordered the necessary steel before the bids were opened. Exhibit 16 would indicate this was done in the name of Harney Realty Company which is operated by Strong. None of the steel had been delivered by the steel company although some of it had been cut in certain lengths. When the project was abandoned, Strong settled this item for $6,814, and the bill was paid by Elshire. Most of the damage involved resulted from the

fabrication of the steel. There is no evidence to show any need of this before the bid letting.

What we have said as to the other items of alleged damages applies with equal force to the four payments made on the plaintiff's fee by Elshire.

It is undisputed Guardian had no funds and that all of these payments were made by Elshire Investment Company, another corporation owned by Strong and Lundt. It is of interest that the land on which the apartment building was to be constructed was owned by Elshire and was subsequently sold by it. There is no evidence in this record that it was ever transferred to Guardian. Also, the plans and specifications in evidence refer to the project as "Elshire Apartments." The only evidence in the record pertinent to these payments, other than the fact that they were made by Elshire, is the following from the testimony of Strong: "Q. And the payment that was made to Mr. Kleager for the excavation on this site was made by Elshire Investment Company? A. Yes, it must have been, because Guardian didn't have any funds at that time. Q. Do you have any records here in the courtroom that indicate that Guardian Investment Company ever made any payments to Elshire Investment Company regarding any of these items? A. I recollect in the minutes of the corporation it showed that Guardian had borrowed a certain amount of funds, or owed Elshire a certain amount of funds for this project. This was just recited in the minutes of the meeting. Other than that I don't have— Q. But to your knowledge there has never been any made by Guardian Investment to Elshire on this project; is that right? A. No, I don't believe so, sir."

Guardian had the burden of proving that in reliance upon the contract it expended the funds for which it now seeks recovery. That burden is not met by proving that the items were billed to other parties, and that Elshire made the expenditures. Elshire is not a party to the contract and is not involved in this litigation. While

Strong and Lundt were the sole owners of both corporations, the payments were made by one corporation and the cross-petition was filed by the other. Strong and Lundt deny personal liability herein and did not join Guardian in its cross-petition. It is their position that they signed for the corporation in a representative capacity. The contract itself would seem to indicate otherwise, but in view of our holding on the plaintiff's action and the position of Strong and Lundt, it is not necessary to discuss or meet that issue.

We affirm the judgment of the trial court dismissing both the petition and the cross-petition.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JUDITH WAYNE GOODSEAL, APPELLANT.
183 N. W. 2d 258

Filed January 29, 1971. No. 37605.

1. **Criminal Law: Constitutional Law: Statutes.** The definition of crimes and the penalties for their violation are statutory in this state, and a statute which has the effect of delegating to a private person the punishment to be assessed for a crime is subject to constitutional objection.
2. **Criminal Law: Constitutional Law: Self-Defense.** The Nebraska Self-Defense Act, section 29-114, R. S. Supp., 1969, is unconstitutional and void in that it delegates to a person asserting self-defense the determination of the amount and extent of the force to be used in defending his person as a legal justification for crime.
3. **Constitutional Law: Statutes: Appeal and Error.** Where an unconstitutional statute is relied on to sustain the position of one or more of the parties, this court will, in a proper case, notice the plain error in the premise on which the case was tried and declare the unconstitutionality of the act even though that issue was not raised by the parties.
4. **Criminal Law: Self-Defense.** Killing in self-defense is grounded upon necessity. It exists only in extremity where no other practical means exists to avoid death or great bodily harm apparent to the person resorting to it.
5. ———: ———. In order to excuse or justify a killing in self-

defense, the accused must not only have entertained the belief that his life was in danger or that he was in danger of suffering great bodily harm, but the belief must have been reasonable and in good faith.

6. ———: ———. Whether or not an accused killed in fear of death or great bodily harm, or whether or not the killing was motivated by anger, punishment, or vengeance is an issue of fact to be determined by the jury.
7. ———: ———. The bad character of the accused and the fact that she was an acknowledged prostitute does not deprive her of the right of self-defense, but such facts are circumstances to be considered in determining the necessity for and the extent and reasonableness of the force used in connection with the other evidence in the case.
8. **Criminal Law: Trial.** It is the province of the jury to determine the circumstances surrounding the crime charged; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.
9. **Criminal Law: Trial: Appeal and Error.** After a jury has considered the evidence in the light of the rule regarding circumstantial evidence and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt.
10. **Trial: Instructions.** It is not error to refuse a tendered instruction where its content is covered by other instructions given by the court.
11. ———: ———. A party may not properly complain of an instruction given by the court when such instruction is more favorable to him than that to which he was entitled.

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

Paul E. Watts and Michael N. Schirber, 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.

CARTER, J.

The defendant, Judith Wayne Goodseal, was charged

in the district court for Douglas County with murder in the second degree for the killing of Dick Edgar Williams on July 8, 1969. The jury returned a verdict of guilty and the trial court imposed a sentence of 10 to 15 years imprisonment at hard labor in the Nebraska Reformatory for Women. The defendant has appealed.

On July 8, 1969, the body of Williams was found on the street edge of the sidewalk in front of a vacant building at 5208 South 28th Street in Omaha. It was later determined that he had been shot five or six times with .32 caliber bullets. That Williams was the victim of a homicide seemed apparent. The defendant admitted shooting the deceased and asserted that it was done in self-defense.

The deceased and Lee Dunbar were employed at a service station in Omaha. After closing the station in the evening of July 7, 1969, deceased suggested that they go out on the town. They went to several bars, purchased and drank some beer, and finally drove to the Eldorado Club at about 1 a.m. Deceased had previously inquired of a taxi driver as to where they might find some women. They parked Dunbar's car near the Eldorado Club where deceased accosted the defendant who was driving a car leased to Larry W. Pullian and after some negotiation offered $20 for her intimate association. Deceased purported to give defendant two $10 bills which she soon discovered to be two $1 bills and returned them to him. She told him to get out of the car and, according to her testimony, he proceeded to force his desires upon her.

The defendant was 24 years of age, was married, and separated from her husband. She had her two small children in her custody. She had been living with Larry W. Pullian, a single man, for about a year. She admitted that she had engaged in prostitution and admitted further that she had negotiated with deceased for such an act with him. Pullian testified that he had a .32 caliber pistol that he had taken as security for a loan. He stated

that he had placed the pistol on the floor of his car under the driver's seat, but had no knowledge as to whether or not it was loaded. Defendant testified that she did not know there was a gun in the car until immediately before the shooting.

Dunbar testified that after deceased entered defendant's car, defendant and deceased drove around the block and Dunbar followed in his car. Defendant parked her car and Dunbar parked his car about 5 to 10 feet behind it. After some delay he approached the car driven by defendant and made some inquires during the course of which deceased asked him if he had his gun. On signal from the deceased, he answered in the affirmative although he had no gun. Some time later, Dunbar heard five or six pops somewhat similar to exploding firecrackers. He saw defendant drive away and attempted to follow. He saw a man in the back seat but was unable to follow the car. He made an anonymous call to the police and informed them that there had been a shooting in the area. He gave the police the color and license number of the car. The call was verified and answered by the police, but evidence of a shooting was not discovered until the body was later found on the sidewalk in front of 5208 South 28th Street.

Defendant testified that deceased said he did not have $20. She said he tried to force her to remove her clothing which she resisted. She did not testify to making an outcry or to any attempt to open the car door or to leave the car. He finally spun her around with her legs toward him and was threatening to strike her which he did not do. He partially removed his own clothing. She said that she was afraid of deceased and fearful because she knew the man following them had a gun. As he turned her around in the seat, she said her left hand dropped down and came in contact with a gun. She got the gun in her left hand, pointed it at deceased, and squeezed it until all the bullets in the automatic pistol were fired. Deceased slumped back against the door of

the car. She drove the car back in front of the Eldorado Club, honking the horn to attract the attention of Pullian. As she came in front of the Eldorado Club, Pullian came out and, seeing the deceased in the car and the blood on defendant, signaled her to pull over to the curb. She went on, turned the corner, and stopped. He followed and when he reached the car he opened the front door on the right-hand side and the body fell out on the edge of the sidewalk where it was later found by the police. He then got in the back seat because, as he testified, the front seat was covered with blood.

Defendant and Pullian drove away and went home without reporting the incident to anyone. On arrival at their home, Pullian put the gun away and produced it in court at the trial. He washed the floor mats and upholstering to remove the blood stains. The floor mats and upholstering were still damp and the odor of vinegar was noticeable when the car was searched that afternoon by the police.

We point out that defendant admits shooting the deceased with a .32 caliber automatic pistol which she found under the seat of the car. She claims that she squeezed the trigger of the gun until all its shells were fired into the body of the deceased. She contends that she did the shooting while in fear of the deceased and Dunbar who admittedly had followed the Pullian car and had told the deceased in defendant's presence that he had a gun. The evidence is clear that defendant and Pullian had left the body of deceased on the sidewalk in front of a vacant building at 5208 South 28th Street. They left the scene immediately and did not report the killing of the deceased to anyone. On arriving home, the gun was put away and the floor mats and upholstering washed to remove the blood stains and thereby remove evidence of the killing. There is evidence that would sustain a finding of self-defense. On the other hand, there is evidence that defendant attempted to conceal her participation in the killing, an indication of guilt. It was for

the jury to determine under all the facts and circumstances whether or not defendant purposely and maliciously killed Williams without deliberation and premeditation or whether or not she killed him in self-defense as that defense is defined by the law of this state. The jury resolved these issues against the defendant and thereby found beyond a reasonable doubt that defendant did not kill Williams in self-defense and found also that the evidence shows beyond a reasonable doubt the defendant did kill Williams purposely and maliciously but without deliberation and premeditation.

The defendant contends the rule as to the weight to be given to circumstantial evidence supports the assignment of error that the evidence was insufficient to sustain the conviction. The jury was properly instructed on the circumstantial evidence rule by instruction No. 15 and its giving is not assigned as error. The jury considered the circumstantial evidence in the light of this instruction and concluded that the facts and circumstances tend to connect the accused with the crime charged and were of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. After a verdict of guilty in part on circumstantial evidence and on appeal therefrom for insufficiency of the evidence, the verdict may not be set aside as a matter of law for insufficiency of the evidence if the evidence sustains some rational theory of guilt. State v. Reeder, 183 Neb. 425, 160 N. W. 2d 753; State v. Williams, 183 Neb. 257, 159 N. W. 2d 549; State v. Ohler, 178 Neb. 596, 134 N. W. 2d 265. The evidence is sufficient to sustain the finding of the jury.

Defendant assigns as error the trial court's refusal to give her requested instruction applicable to the law of self-defense. The requested instruction is: "Defendant contends that she acted in self-defense. Self-defense is defined as the use of such force by any means necessary to repel an attack as at the time appeared to defendant to be necessary, although she may have been

mistaken as to the extent of the actual danger, if a reasonable person would also have been so mistaken. The defendant was justified in acting upon the facts as they appeared to him and is not to be judged by the facts as they actually were.

"When a person is threatened or attacked in such a manner that it causes him to believe he is in danger of receiving bodily injury, he may use self-defense to defend himself.

"It is necessary for conviction that the state prove beyond a reasonable doubt that the defendant was not acting in self-defense, and there is no burden on the defendant to prove that she was acting in self-defense."

The foregoing requested instruction was given verbatim by the trial court as instruction No. 9, except that the court inserted a paragraph between the second and third paragraphs of the tendered instruction. The inserted paragraph stated: "However, when the person threatened or attacked uses more force than permitted by the above definition of self-defense, she is guilty of unlawful conduct and is criminally responsible therefor." It is the contention of the defendant that it was error for the trial court to give an instruction which requires the jury to weigh the type and degree of force and means used.

The defendant relies upon the defense of self-defense as defined by section 29-114, R. S. Supp., 1969, referred to herein as the Nebraska Self-Defense Act. The requested instruction tendered by the defendant is based upon the Nebraska Self-Defense Act which became effective on June 5, 1969. The State relies solely upon an interpretation of the act. It is readily apparent that the constitutionality of the act is not raised by either the State or the defendant.

The pertinent part of the act provides: "No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting, by any means necessary, himself, his family, or his real or personal property, or

when coming to the aid of another who is in imminent danger of or the victim of aggravated assault, armed robbery, holdup, rape, murder, or any other heinous crime." § 29-114, R. S. Supp., 1969. The State argues that the language of the statute preserves the concept of the use of reasonable force only in defending one's person or property. On the other hand, the defendant argues that the act provides that a person may use unlimited force in repelling an aggressor and that the common law rule that one may use only reasonable force has been abrogated by the act. It is shown that amendments by the Legislature were twice offered and defeated to change the words "any means necessary" to "any reasonable means necessary." It was clearly the intention of the Legislature to eliminate the word "reasonable" from the common law rule and it would be an act of legislation for this court under such circumstances to place it back in the act by judicial pronouncement. On the other hand, we do not subscribe to defendant's view that the words "by any means necessary" were an opening of the door for the use of extreme and brutal force by an aggressor in every case to protect against minor infringements of personal and property rights. Necessary force does not mean unnecessary force. Nor does "any means necessary" mean "any reasonable means necessary" under the legislative history here shown.

Killing in self-defense is grounded upon necessity. The right exists only in extremity where no other practicable means to avoid the threatened harm is apparent to the person resorting to it. If there is no real or apparent necessity for the killing, the defense fails. In order to be entitled to assert self-defense as an excuse or justification for the killing, the defendant must have been in imminent danger of death or great bodily harm at the time of the commission of the act. In order to justify or excuse a killing in self-defense, the accused must not only have entertained the belief that his life was

in danger or that he was in danger of suffering great bodily harm, but the belief must have been reasonable and in good faith. 40 Am. Jur. 2d, Homicide, §§ 151 to 159, pp. 439 to 447. Ordinarily a woman is justified in taking human life in protecting her chastity where she has been placed in fear for her life or great bodily harm. Here the defendant was admittedly engaged in prostitution and had negotiated with the deceased to engage in an act of prostitution with him for the sum of $20. It was for the jury to determine whether or not she killed in fear of death or of suffering great bodily harm, or on the other hand, whether or not the killing was motivated by anger, punishment, or vengeance. The character of the defendant and the fact of her engaging in prostitution did not deprive her of the right of self-defense, but they were circumstances to be considered by the jury, along with all other facts and circumstances shown by the evidence in determining the necessity for and the extent of the force used. The jury and not this court was charged with the duty of deciding these issues of fact.

Common law crimes are unknown to the law of this state. The definition of crimes and the punishment to be assessed for their violation are fixed by statute. If section 29-114, R. S. Supp., 1969, means, as the defendant contends, that any person who finds it necessary in his own judgment to protect his person or property from another, no matter how great or trivial the invasion of his rights may be, to use force to the fullest extent, even beyond all reason, the punishment of the aggressor is placed with the person claiming self-defense and not with the state. Without fixing the amount of force that may properly be exercised in resorting to justifiable self-defense, over and above which is criminal, the Legislature has delegated the fixing of the punishment to the person asserting self-defense which it cannot do. The criminal laws under which we live in our social order are prescribed by the state through the Legislature and the

penalties for their violation are likewise prescribed by legislative enactment. Any attempt to delegate either of such powers to private persons with the excesses that naturally follow when crime or punishment are placed elsewhere than with the state, is violative of the powers placed exclusively with the Legislature by our state Constitution.

The argument has been advanced that section 29-114, R. S. Supp., 1969, when properly interpreted, has not changed the preexisting rule which has long been upheld in this state and elsewhere. We cannot accept the basis of this argument for two reasons, first, because unless the amendment here put in issue was intended to change the existing law there would have been no reason for enacting section 29-114, R. S. Supp., 1969, and second, amendments were twice offered and rejected in the Legislature to properly limit the defense of self-defense. The intent of the Legislature, which we are required to determine and follow, is clear and not constitutionally acceptable.

We cannot in effect rewrite the statute to meet constitutional requirements. On the other hand, the constitutionality of the act is not raised which ordinarily precludes us from a consideration of that question. But where the invalidity of the act is plain, and such a determination is necessary to a reasonable and sensible disposition of the issues presented, we are required by necessity to notice the plain error in the premise on which the case was tried. Consequently we hold that section 29-114, R. S. Supp., 1969, is unconstitutional and void.

Instruction No. 9 contains no error prejudicial to the rights of the defendant, in fact, the instruction was more favorable to the defendant than she was entitled to. Defendant's requested instruction herein discussed was in effect given by inclusion in instruction No. 9 and it was properly denied by the trial court. The evidence is sufficient to sustain the verdict of the jury and the

judgment of the trial court ought to be and is affirmed.

AFFIRMED.

SPENCER and BOSLAUGH, JJ., dissenting.

The majority opinion herein violates a fundamental principle of constitutional construction. Neither the State nor the defendant raise an issue as to the constitutionality of the Self-Defense Act, section 29-114, R. S. Supp., 1969. Yet the majority opinion declares the statute invalid without the benefit of briefs or arguments upon the issue of constitutionality.

The following from Stanton v. Mattson, 175 Neb. 767, 123 N. W. 2d 844, indicates the extent of this abrupt departure from well-defined precedent: "All acts of the Legislature are presumed to be constitutional. The courts will not declare an act of the Legislature unconstitutional except as a last resort on the facts before the court. Courts will not decide questions of constitutionality unless they have been raised by a litigant whose interests are adversely affected. A court has no power to summarily pass upon the constitutionality of an act of the Legislature."

It is unnecessary to reach any question of the constitutionality of section 29-114, R. S. Supp., 1969, in this case. The instruction relating to self-defense, which was given in this case, advised the jury that self-defense was "the use of such force *by any means necessary* to repel an attack as at the time appeared to defendant to be necessary." (Emphasis supplied.) The instruction conformed to the statute in that the only limitation placed upon the force that might be used was that it be "necessary."

The instruction as given also conformed to the instruction requested by the defendant except that the trial court included a paragraph, taken from NJI 14.33, stating that a person who uses more force than that permitted by the definition contained in the instruction is criminally responsible therefor. The defendant contends that this part of the instruction was erroneous.

The Self-Defense Act does not authorize the use of unlimited force nor does it provide that persons who use more force than necessary should be immune from prosecution. The defendant's criticism of the instruction given is without merit.

IRENE NEEMAN, APPELLEE, V. OTOE COUNTY ET AL., APPELLEES, IMPLEADED WITH AETNA INSURANCE COMPANY, APPELLANT.

MAURICE V. KARSPECK, APPELLEE, V. OTOE COUNTY ET AL., APPELLEES, IMPLEADED WITH AETNA INSURANCE COMPANY, APPELLANT.

RUTH M. WILLIAMS, APPELLEE, V. OTOE COUNTY ET AL., APPELLEES, IMPLEADED WITH AETNA INSURANCE COMPANY, APPELLANT.

LORETTA H. BASSINGER, APPELLEE, V. OTOE COUNTY ET AL., APPELLEES, IMPLEADED WITH AETNA INSURANCE COMPANY, APPELLANT.

183 N. W. 2d 269

Filed January 29, 1971. Nos. 37631, 37632, 37633, 37634.

1. **Workmen's Compensation: Insurance.** Rule XI of the Rules of Procedure of the Nebraska Workmen's Compensation Court requiring that notice of cancellation of compensation insurance be filed within 10 days after cancellation of the policy is primarily for the protection of claimants entitled to compensation.
2. ———: ———. Where a workmen's compensation insurance policy is canceled and is replaced by a new policy issued and certified by another insurance company and effective on the date of cancellation of the old policy, a failure to file notice of cancellation with the Nebraska Workmen's Compensation Court within the time specified by Rule XI does not in and of itself invalidate the cancellation.
3. ———: ———. A new compensation insurance carrier has no standing to complain of a delay by the former carrier in complying with Rule XI. The new carrier should be held solely responsible for payment of workmen's compensation liability arising on or after the effective date of its policy and after the date of cancellation of the replaced policy.
4. **Workmen's Compensation: Words and Phrases.** A workmen's

compensation insurance carrier for an employer should be deemed to be an "employer" within the meaning of section 48-125, R. R. S. 1943.

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

Haney, Wintroub & Haney, for appellant.

Vantine A. James, for appellees Neeman, Williams, and Bassinger.

Maurice V. Karspeck pro se.

Bernard M. Spencer, and Joseph J. Vinardi and Harold W. Kauffman of Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellees Otoe County et al.

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

MCCOWN, J.

These are workmen's compensation cases. Aetna Insurance Company has appealed from judgments of the district court holding Aetna solely liable for payment of four separate workmen's compensation awards arising out of an accident which occurred April 24, 1968. Aetna contends that Hawkeye Security Insurance Company also covered the risk, and that Aetna and Hawkeye should each be responsible for one-half of the awards.

There is no dispute as to the plaintiffs' right to compensation benefits nor as to the amount of benefits. Prior to 1968, Otoe County had carried its workmen's compensation insurance with Hawkeye. It was written through Rowe Insurance Agency, an independent insurance agent. The certificate of compensation insurance filed by Hawkeye with the workmen's compensation court on March 14, 1967, covered the one-year policy period from April 30, 1967, to April 30, 1968.

In the spring of 1968, the manager of Rowe Insurance Agency negotiated with the county commissioners for a package insurance policy combining and replacing some

40 to 50 separate coverages, including the workmen's compensation coverage. The new package policy was to be placed with Aetna. The county commissioners accepted the proposal on March 29, 1968, to be effective on April 15, 1968. The agent (who was the agent for both Hawkeye and Aetna) and the county commissioners agreed that April 15, 1968, would be the effective date of cancellation of all other policies.

On March 29, 1968, Aetna was informed that its insurance policy was in effect as of April 15, 1968. On April 5, 1968, Aetna filed its certificate of compensation insurance with the Nebraska Workmen's Compensation Court certifying that Aetna insured Otoe County for workmen's compensation liability under a policy effective April 15, 1968, and expiring April 15, 1969. On or before April 10, 1968, Hawkeye was notified that its workmen's compensation policy was canceled as of April 15, 1968. The independent agent specifically testified that there was no agreement as to any dual coverage.

Sometime between April 15 and April 20, 1968, the payroll auditor for Hawkeye was requested by his superiors to audit the Otoe County payroll for the period from April 30, 1967, to April 15, 1968. That audit was done in the usual course of business early in May and the workmen's compensation insurance premium to Hawkeye was predicated and paid on the period ending April 15, 1968.

A notice of cancellation of the Hawkeye insurance policy was received and filed by the workmen's compensation court on April 29, 1968. That notice showed the policy had been canceled effective April 15, 1968. Rule XI of the Nebraska Workmen's Compensation Court required the notice of cancellation to be filed "within ten days after cancellation of the policy." The accident out of which plaintiffs' claims arose occurred April 24, 1968.

It was stipulated that Aetna had paid 50 percent of the benefits due under the Nebraska Workmen's Com-

pensation Act to each of the plaintiffs and that Hawkeye had paid no compensation benefits. Both insurance companies were joined with Otoe County, the employer, as defendants in the workmen's compensation court and in the district court. The one-judge Nebraska Workmen's Compensation Court found that Hawkeye had failed to prove that its policy was canceled prior to the accident of April 24, 1968, and entered judgment against both insurance companies jointly and severally. Hawkeye appealed directly to the district court for Otoe County. The district court affirmed all awards as against Aetna Insurance Company and adjudged Hawkeye to have no liability. It also ordered the addition of the statutory 50 percent penalty for delinquent payments as provided by section 48-125, R. R. S. 1943, and also assessed against Aetna an attorney's fee of $300 for each individual plaintiff represented by counsel.

Aetna concedes that it was the workmen's compensation carrier for Otoe County on the date of the accident, April 24, 1968, but contends that because Hawkeye's notice of cancellation to the workmen's compensation court was not filed within the 10-day period required by Rule XI, Hawkeye's policy was also in effect and there was dual coverage and joint liability.

The issue is one of first impression in Nebraska. It has been considered in various aspects and in varying contexts by many courts. In some states, compensation statutes provide that cancellation of a workmen's compensation insurance policy does not become effective in absence of notice to the compensation commission. Sometimes statutes require either the approval of the commission or the lapse of a specified interval of time in which provision may be made for replacement of the insurance. Some states deal with the issue by regulation or rule. Such rules also vary. Occasionally, statutes, rules, or regulations make exceptions where the employer has procured other insurance within the time limit or provide that the effective date of the new policy

shall be the cancellation date of the old policy. It is, therefore, difficult to compare cases dealing with so many variables.

In Nebraska, by statute, any workmen's compensation policy is required to cover all of the employer's liability, and all compensation awarded under the act. §§ 48-146 and 48-145, R. R. S. 1943. The form of policy approved by the insurance department provides that it may be canceled by the insured by surrender thereof to the company or any of its authorized agents, or by mailing written notice to the company stating when thereafter the cancellation is to be effective. No statute requires the filing of any notice of cancellation of the workmen's compensation insurance policy.

Rule XI does not provide that cancellation of a policy shall not be effective until notice, nor does it require the approval of the compensation court or the lapse of a specified interval of time after notice before the cancellation may be effective. It does not contain any exceptions where new or duplicate coverage has been certified. Rule XI of the Rules of Procedure of the Nebraska Workmen's Compensation Court is titled "Orange Cancellation Card Form 13." Form 13 is entitled "Cancellation of Compensation Insurance." That printed form is to notify the compensation court that a designated policy "*was* cancelled on" a specified date. (Emphasis ours.) Here the notice of cancellation was filed 14 days after the cancellation, 4 days after the expiration of the specified time, and 5 days after the accident. On the date of the accident, the 10 days allowed by Rule XI had not yet expired.

It is established by the evidence here that neither the employer, nor the insurance agent, nor either insurance company, intended any dual coverage. It is also uncontradicted that the premium on the Hawkeye policy was predicated and paid only for the period ending April 15, 1968, and that the Hawkeye policy was canceled and the Aetna policy made effective as of that date.

An analysis of the cases in this area of workmen's compensation law indicates that the basic purpose of the type of rule with which we deal here is to protect the claimant entitled to compensation. In instances where the controversy has been between two insurance companies on a dual coverage theory and one has received and collected premiums and the other has not, the entire liability has often been imposed on the company which received the premiums. See, Musgrave v. Liberty Mut. Ins. Co., 73 Idaho 261, 250 P. 2d 909 (1952); Pucci v. Novel Lithographers, Inc., 29 App. Div. 2d 590, 285 N. Y. S. 2d 362 (1967).

Closely in point on the critical issues in this case is Chevron Oil Co. v. Industrial Commission, —— Colo. ——, 456 P. 2d 735 (1969). The court there held that the failure to notify the compensation commission within 10 days of the cancellation of a workmen's compensation policy in violation of a rule of the commission did not give another compensation insurance carrier standing to complain of noncompliance.

Rule XI of the Rules of Procedure of the Nebraska Workmen's Compensation Court is primarily for the protection of claimants entitled to compensation. Where a workmen's compensation insurance policy is canceled and is replaced by a new policy, issued and certified by another insurance company and effective on the date of cancellation of the old policy, a failure to file notice of cancellation with the workmen's compensation court within the time specified by Rule XI does not in and of itself invalidate the cancellation. A new compensation insurance carrier has no standing to complain of a delay by the former carrier in complying with Rule XI. The new carrier should be held solely responsible for payment of workmen's compensation liability arising on or after the effective date of its policy, and after the date of cancellation of the replaced policy.

Aetna also challenges the judgment of the district court in assessing against Aetna the statutory penalty

for delinquent payments, together with a reasonable attorney's fee. Aetna paid to the claimants only half of the amounts of compensation due. It took the position that Hawkeye was responsible for the remaining half.

Section 48-146, R. R. S. 1943, provides in part: "No policy of insurance against liability arising under this act shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to the same *all* benefits conferred by this act, * * *." (Emphasis ours.) If Aetna wished to assert its claim against Hawkeye, there were ample remedies available without delaying or denying plaintiffs the benefits due them. Aetna was chargeable with the statutory penalty for all delinquent payments.

Aetna asserts that the plaintiffs are not entitled to an attorney's fee in the district court because the employer, Otoe County, was not designated as an appellant from the workmen's compensation court. Hawkeye alone was the appellant there. Aetna alone is the appellant here. The language of the relevant portion of section 48-125, R. R. S. 1943, is: "In the event the employer appeals to the district court from the award of the compensation court, or any judge thereof, and fails to obtain any reduction in the amount of such award, the district court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court." It is quite clear that this section is for the benefit of the claimant employee and becomes effective in the event no reduction in the amount of an award is obtained by the employer on an appeal. Aetna's position is that if the appeal is taken only in the name of a workmen's compensation carrier for the employer, but the employer itself is not designated as an appellant, or is designated an appellee, no attorney's fees may be allowed. We cannot agree. The obligation of the compensation insurance carrier or carriers is to pay the

benefits due because of the compensation liability of the insured employer. The extent of that obligation and the limits of it are measured by the employer's liability. Section 48-146, R. R. S. 1943, regarding compensation insurance policies specifically provides: "* * * that jurisdiction of the insured for the purpose of this act shall be jurisdiction of the insurer, and * * * that the insurer shall in all things be bound by the awards, judgments, or decrees rendered against such insured."

Within the context and framework of the Nebraska Workmen's Compensation Act, a workmen's compensation insurance carrier for an employer should be deemed to be an "employer" within the meaning of section 48-125, R. R. S. 1943. In Gill v. Hrupek, 184 Neb. 436, 168 N. W. 2d 377, this court said: "The Workmen's Compensation Act is remedial in nature and its purpose is to do justice to workmen without expensive litigation and unnecessary delay." An employer's compensation insurance carrier should not be permitted to avoid possible liability for an attorney's fee on appeal simply by its failure to join the insured employer as a named appellant. Cases such as Franzen v. Blakley, 155 Neb. 621, 52 N. W. 2d 833, and Fidelity & Casualty Co. v. Kennard, 162 Neb. 220, 75 N. W. 2d 553, are distinguishable. On the facts before us, the district court was correct in allowing a reasonable attorney's fee when the award of the compensation court was not reduced in amount on appeal to the district court.

The judgment of the district court was correct in all respects and is affirmed. Each plaintiff represented by counsel in this court is allowed an attorney's fee of $300 for services in this court.

AFFIRMED.

MAJOR VON BOKELMAN, APPELLANT, V. MAURICE H. SIGLER, WARDEN, NEBRASKA PENAL COMPLEX, APPELLEE.
183 N. W. 2d 267

Filed January 29, 1971. No. 37667.

Criminal Law: Pardons and Paroles. Section 83-1,107, R. S. Supp., 1969, applies toward eligibility for parole or release under supervision, rather than for absolute discharge as under previous statutes.

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

Major Von Bokelman pro se.

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

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

SPENCER, J.

This is an appeal from the dismissal of a petition for habeas corpus, specifically attacking the administrative application of section 83-1,111(5), R. S. Supp., 1969. (Laws 1969, c. 817, § 42(5), p. 3094.)

Section 83-1,111(5), R. S. Supp., 1969, is as follows: "If the board fixes no earlier release date, a committed offender's release under supervision shall become mandatory at the expiration of his maximum term of imprisonment, less good time reductions allowed in accordance with the provisions of this act, or three months prior to discharge, whichever is earlier. Nothing herein shall require the mandatory release under supervision of an offender who has violated his parole within three months of the date when his release would otherwise be mandatory."

It is the construction of the last sentence quoted above to which appellant takes exception. The questioned sentence is not ambiguous and is intended to permit exclusion of the specified offender from the benefits of the section.

From his argument, it appears appellant's problem is his construction of section 38 of the act, now section 83-1,107, R. S. Supp., 1969. (Laws 1969, c. 817, § 38, p. 3092.) He construes this act as applicable toward discharge rather than to determine eligibility for release on parole or mandatory release under supervision, as now applied by the chief executive officer of the facility.

The following language of section 83-1,107, R. S. Supp., 1969, is conclusive on the intent of the act: "The total of all such reductions shall be deducted: (a) From his minimum term, *to determine the date of his eligibility for release on parole;* and (b) From his maximum term, *to determine the date when his release under supervision becomes mandatory* under the provisions of section 83-1,111." (Italics supplied.) We interpret section 83-1,107, R. S. Supp., 1969, to apply toward eligibility for parole or release under supervision, rather than for absolute discharge as under previous statutes.

There is no merit to appellant's contention, and the judgment of dismissal is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAUL WAYNE GERO, APPELLANT.
183 N. W. 2d 274

Filed January 29, 1971. No. 37671.

Criminal Law: Post Conviction. An evidentiary hearing in a post conviction proceeding is not required where the files and records in the case show that the prisoner is entitled to no relief.

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

Paul Wayne Gero pro se.

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

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

BOSLAUGH, J.

The defendant was convicted of forcible rape and sentenced to 20 years' imprisonment. The conviction was affirmed in State v. Gero. 184 Neb. 107, 165 N. W. 2d 371.

On January 9, 1970, the defendant filed a lengthy motion to vacate and set aside his conviction and sentence under the Post Conviction Act. The trial court then appointed counsel to represent the defendant. After hearing argument by counsel the trial court found that the defendant was entitled to no relief and overruled the motion. The defendant has appealed.

The defendant's principal assignment of error, and the only one which requires mention, alleges that he was denied effective assistance of counsel.

The record shows that the defendant was represented by able counsel throughout the proceedings in the district court and in this court on the prior appeal. The finding of the trial court that the defendant is entitled to no post conviction relief is fully supported by the record.

Under the circumstances in this case the defendant's request for the appointment of counsel for appeal to this court was properly denied.

The judgment of the district court is affirmed.

AFFIRMED.

SPENCER, J., participating on briefs.

CHARLES HENNING, APPELLEE, V. CITY OF HEBRON, A MUNICIPAL CORPORATION, ET AL., APPELLANTS, IMPLEADED WITH COUNTY OF THAYER, A BODY CORPORATE AND POLITIC, ET AL., APPELLEES.
183 N. W. 2d 756

Filed January 29, 1971. No. 37706.

1. **Municipal Corporations: Sheriffs, Police, and Constables.** Under the provisions of section 17-118, R. R. S. 1943, a police officer of a city of the second class has the same powers and duties as a sheriff or constable and has the duty to apprehend and arrest felons and disturbers of the peace and to keep and preserve the peace within the whole area of his respective county.
2. ———: ———. Under the provisions of section 23-1704, R. R. S. 1943, a sheriff has the power to summon to his assistance, in the arrest of felons, police officers of cities of the second class.
3. **Sheriffs, Police, and Constables.** A police officer exercising the the powers and performing the duties required by law is acting within the scope of his employment.
4. **Workmen's Compensation: Master and Servant.** Joint employment and pro rata liability for compensation payments under section 48-129, R. R. S. 1943, exists only where there is an agreement between employers as to salary, wages, hours of employment, and terms of service.

Appeal from the district court for Thayer County: JOSEPH ACH, Judge. Affirmed.

John A. Wagoner of Wagoner & Grimminger, for appellants.

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellee Henning.

Baylor, Evnen, Baylor, Curtiss & Grimit, for appellees County of Thayer et al.

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

WHITE, C. J.

This is a workmen's compensation case. The plaintiff, city police chief of Hebron, Nebraska, was injured

while assisting the county sheriff in the arrest and incarceration of two fleeing robbers. The compensation carrier for the city asserts that the police chief was acting under the sheriff's control and direction and was, therefore, an employee of the county and that the county compensation carrier is liable for the judgment herein. The Workmen's Compensation Court and the district court held that the plaintiff was an employee of the City of Hebron and awarded judgment accordingly. We affirm.

Only the facts necessary for a determination of the issue involved herein will be recited. Two armed robbers were fugitives from justice. The sheriff of Thayer County, Nebraska, first gave chase to the robbers about ½ mile north of the City of Hebron. The chase proceeded through Hebron on U. S. Highway No. 81 at a speed of 100 to 110 miles per hour. The sheriff caught them about 1 mile south of Hebron. When the sheriff apprehended the two robbers he immediately called his wife to put in a call for help in taking them into custody. The plaintiff is the police chief of the City of Hebron and at the time of the call from the sheriff answered him directly. The plaintiff took the city police car, went immediately to the scene of the arrest, was in a city police uniform at the time, and, during the process of taking the two robbers into custody, was shot and injured. The sheriff testified that his purpose in calling the chief of police was to secure assistance in taking the prisoners to jail and to make an effective arrest and confinement of the two apprehended fugitive robbers. At the time of the chase and the arrest, law enforcement officers, including the sheriff of Clay County, the sheriff of Nuckolls County, the Jefferson County deputy sheriff, the Fillmore County deputy sheriff, the chief of police of the City of Geneva, and three state troopers were converging on the scene of the chase and the arrest.

Using analogies to private employment situations and

the authorities permitting compensation for private persons acting in assistance to law enforcement officers, the appellant, St. Paul Insurance Companies for the City of Hebron, Nebraska, argues quite forcefully that the chief of police at the time of the shooting during the process of arrest was actually an employee of the county and that the appellee Hawkeye Security Insurance Companies should either pay the compensation award or share it proportionately with the city.

The argument made by the appellant overlooks the commands of the specific statutes that govern and control the decision in this case. The police chief of the City of Hebron had the power to arrest all offenders in the same manner as did the sheriff of Thayer County. As a city police chief he had the same powers and the same *duties* of a constable in the making of an *arrest* and in the *preservation* of the peace. This duty is specifically defined in section 29-204, R. R. S. 1943, which provides that it was the duty of the chief of police to apprehend and to bring to justice felons and disturbers of the peace and *"to keep and preserve the peace within their respective counties."* Such officers have the power and duty to execute all proper writs and processes in criminal cases throughout the county in which they reside, and the sheriff of a county has the power to summon all other law enforcement officers in the county to his aid. The specific provisions authorizing and requiring the performance of these duties by the police chief of the City of Hebron are contained in sections 17-118, 23-1704, 29-204, and 29-206, R. R. S. 1943.

By appropriate ordinances of the municipal code of the City of Hebron the powers and duties of the chief of police were generally delegated and imposed. The police chief was entitled to arrest all offenders against the laws of the state or of the city "in the manner as a sheriff or a constable" and the ordinances specifically provided that he "shall have the same power as a sheriff and constable in relation to all criminal matters and

to a process issued by the police magistrate." The ordinances of the city further provided that the police chief shall have the power to arrest any person for violation of any ordinances of the city, or *laws* of the State of Nebraska, and *to take into custody any person* arrested by any other officer of the city or *state*. It therefore is incontestable that the chief of police in this case was operating within the scope of his official employment and that he was performing his statutory duties at the time and place of the arrest south of the City of Hebron when assisting the sheriff in apprehending and taking into custody the two fugitive robbers. The city compensation carrier, therefore, became liable and the contention of the appellant St. Paul Insurance Companies is without merit.

The argument by way of analogy to the decisions permitting compensation to a private person assisting law enforcement officers in the execution of the criminal statutes is not applicable. The chief of police was not operating as a private citizen at the time, but was performing his duties clearly within the command of the applicable statutes and was acting as a public official under the powers and duties delegated to him by the laws of the State of Nebraska and the ordinances of the City of Hebron. The joint employee and pro rata provisions of section 48-129, R. R. S. 1943, are not applicable. There was no provision, agreement, or intention on the part of the county to pay the salary, wages, or fix the terms or hours of employment or service of the city police chief. The only intention that can be gathered from this record is that the sheriff of Thayer County called upon the chief of police to perform his duties required and authorized by the statutes. In the absence of any showing that there was any joint arrangement as to salary, wages, hours of employment, or term of service, there cannot be any joint employment of the chief of police within the meaning of the applicable statute, section 48-129, R. R. S. 1943. Suver-

kubbe v. Village of Fort Calhoun, 127 Neb. 472, 256 N. W. 47.

The contentions of the appellant St. Paul Insurance Companies are without merit, and the judgments of the compensation court and the district court herein are affirmed.

AFFIRMED.

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.
183 N. W. 2d 485

Filed February 5, 1971. No. 37212.

1. **Estates: Perpetuities and Restraints on Alienation.** Where an estate in fee simple is devised, an attempt by the testator to prevent alienation by attaching conditions subsequent is ineffective and void for the reason that the conditions are repugnant to the estate created.
2. **Property: Statutes.** The intent statute, section 76-205, R. R. S. 1943, is a rule of construction and does not have the effect of enlarging, limiting, or modifying any rule of substantive law that existed at the time of its passage or that has thereafter been created.
3. ———: ———. Upon the enactment of the Uniform Property Act, its provisions supersede conflicting provisions of the law of property existing prior to the effective date of the act.
4. **Estates: Perpetuities and Restraints on Alienation.** 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 the breach of the condition, is void as against public policy.
5. ———: ———. Conditions subsequent attached to a fee simple which restrain alienation are void whether such restraint is direct or indirect.
6. ———: ———. The rule against perpetuities has no application where conditions subsequent attached to a fee simple estate restrain alienability, since such conditions subsequent are void. Where conditions subsequent do not limit alienation

and the conditions are otherwise valid, the rule against perpetuities may be applicable.

7. ———: ———. Conditions subsequent to a fee simple title which do not limit alienation and are otherwise valid, are enforcible if they are reasonable and do not affect adversely the marketability of the fee.

8. **Estates: Attorneys at Law.** An estate of a decedent is liable for attorneys' fees for services rendered at the request of a devisee or legatee, even when successful, only when the services preserved the estate, added to its value, or were otherwise beneficial to it.

Appeal from the district court for Seward County: JOHN D. ZEILINGER, Judge. On motion for rehearing. See 185 Neb. 358, 176 N. W. 2d 29, for original opinion. Motion for rehearing overruled. Affirmed as modified.

Samuel Van Pelt, for appellant.

Robert T. Cattle, Jr., for appellee.

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

CARTER, J.

An opinion on the merits of this case was filed on March 27, 1970. Cast v. National Bank of Commerce T. & S. Assn., 185 Neb. 358, 176 N. W. 2d 29. Thereafter a reargument was ordered on motion for rehearing and this opinion is in response to the reargument.

The facts in the case are correctly stated in the first opinion. The question here considered is one of law involving the validity of certain provisions of the will of William J. Webermeier, deceased. The questioned provisions are: (1) That Richard Cast or one of his children within a year after testator's death shall move to and occupy the devised farm as his residence and domicile for a period of 25 years; (2) that the occupant shall within 1 year by appropriate legal action add the name "Webermeier" to his legal name; and (3) that if any of the above conditions are not met as prescribed, presently or in the future, title to the real estate shall revert

to the residuary legatee specified in paragraph VI of the will.

It must be conceded that in earlier times, prior to 1929 at least, conditions subsequent, attached to a devise in fee simple were held to be enforcible by this court. As an example, see Peters v. Northwestern Mutual Life Ins. Co., 119 Neb. 161, 227 N. W. 917, 67 A. L. R. 1311. In 1941, the Legislature enacted the Uniform Property Act which at least constituted a change of policy in certain areas of the real property law of this state. In 1953, this court, in Andrews v. Hall, 156 Neb. 817, 58 N. W. 2d 201, 42 A. L. R. 2d 1239, gave effect to the legislative change in public policy and held: "We do not say that a testator may not create a vested fee simple estate subject to a condition subsequent, or a determinable or defeasible fee. What we do say is that a restriction against alienation of a vested fee simple estate is not any one of these, nor, since it is void, can it be used as the sole basis for the creation of any of these estates. 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. * * * The right of alienation is inherent in the vested fee simple estate and it arises by virtue of the fact that such an estate is created. The nature of estates in fee simple determinable, estates in fee simple subject to a condition subsequent, and estates in fee simple defeasible upon a condition subsequent, are fully discussed in Ohm v. Clear Creek Drainage Dist., 153 Neb. 428, 45 N. W. 2d 117. A perusal of that case will demonstrate that a restriction against alienation of a vested estate in fee simple is no part of, nor incidental to, any one of these estates. Consequently, cases dealing with the creation of recognized common-law estates have no application to a restriction against alienation of a vested fee simple estate."

In the instant case, the provisions in question are conditions subsequent to a fee simple title and have the

effect of restricting alienation and provide for a limitation over for a breach within a period of 25 years; this for the reason that a breach of the conditions subsequent within 25 years would cause the title to go to the residuary legatee under the provisions of the will.

We deem it necessary to again point out the public policy involved in the enactment of the Uniform Property Act. In Ellingrod v. Trombla, 168 Neb. 264, 95 N. W. 2d 635, we said: "The act was drawn primarily to abolish anachronisms in the law of property, to abolish many out-of-date characteristics which have come down to us from the early feudal law of England, and which are out of place in the law of today, and also to correct many characteristics which have crept into the law from improper application of the early law and which can be gotten rid of today only by statutory enactment. * * * The purpose and policy of the Uniform Property Act is to make the law a much more modern and effective instrument in administering the law of property and to free courts and lawyers of the present from being compelled in cases involving the title to real property to wander in a labyrinth of ancient learning. The modernization of our real property law, including antedated provisions that serve no purpose in our modern era, was long overdue when the Legislature enacted the Uniform Property Act into the statutory law of this state in 1941. The power of the Legislature to meet the need is not questioned. Its very purpose was to change the old order insofar as the conveyance of property was concerned. This is evidenced by the terms of the law which it enacted. By section 76-121, R. R. S. 1943, it enjoined upon the courts the duty to construe the act so 'as to effectuate its general purpose to make uniform the law of those states which enact it.' From this it is made clear that the act is to be interpreted, where doubt as to its meaning exists, in conformity with the intentions of the drafters of the act."

The rule that the devise of a fee simple subject to con-

ditions providing for a forfeiture or reverter or limitation over upon breach are void, is the general rule announced by the courts of this country irrespective of the fact that there was no statutory authority for so doing. See the following cases: Newkerk v. Newkerk (N. Y.), 2 Caines' Rep. 345; Wills v. Pierce, 208 Ga. 417, 67 S. E. 2d 239; Pardue v. Givens, 54 N. C. 306; Stansbury v. Hubner, 73 Md. 228, 20 A. 904; Casper v. Walker, 33 N. J. Eq. 35. Where an owner of land in fee simple absolute makes an otherwise effective devise thereof to a named devisee and his heirs but if such devisee or his heirs during a fixed term of years attempt to transfer the land by any means, the land shall go over to another, the forfeiture restraint qualified only as to time is invalid. The first devisee has an indefeasible estate in fee simple. Restatement, Property, § 406, Illustrations 1 and 2, pp. 2397, 2398. In view of the fact that the Uniform Property Act was drafted and promulgated by the American Law Institute as a joint undertaking with the National Conference of Commissioners on Uniform State Laws, it stands to reason that it is intended to be consistent with the Restatement of the Law of Property.

One of the primary incidents of ownership of property in fee simple is the right to convey or encumber it. It is the general rule that a testator may not create a fee simple estate to vest at his death and at the same time restrict its alienation. This is because conditions which restrict alienation are repugnant to the very estate the testator has created. Sections 76-299, 76-2,100, 76-2,101, and 76-2,102, R. R. S. 1943, are cited in our former opinion as supporting the validity of the conditions contained in the will. We point out, however, that the foregoing sections of the statute do not purport to create a new estate nor to expand the existing law on the subject. The intention of the testator is clear from the will. But the intent statute is a rule of construction that cannot have the effect of changing substantive law. "We

reiterate, however, that this intent statute does not have the effect of changing substantive law and is, in fact, declaratory of a rule of construction long adopted by the courts. We have held that it relates only to rules of construction and does not enlarge or limit, or in any way modify, any rule of substantive law that existed at the time of its passage or that thereafter has been created. Stuehm v. Mikulski, 139 Neb. 374, 297 N. W. 595, 137 A. L. R. 327; Majerus v. Santo, 143 Neb. 774, 10 N. W. 2d 608. We adhere to these holdings." Andrews v. Hall, *supra*.

The change of name required by one of the conditions does not appear to play so important a part. This condition does not restrict alienation although it would support a reversion to the residuary legatee for noncompliance under the case of Smith v. Smith, 64 Neb. 563, 90 N. W. 560, which we hereby disapprove due to the enactment of the Uniform Property Act. Here again we have a decision issued before the enactment of the Uniform Property Act. It seems to us that a condition attached to a fee simple title which has for its purpose the satisfaction of a whimsical obsession or an expression of testator's vanity ought not be permitted as a fettering of a fee simple title. Such a condition is unreasonable in that fee titles to real estate are not proper places for trivial conditions evidencing personal whimsy. The coupling of the name provision with the 25-year residence requirement makes both conditions unreasonable, and even irrational. Where a grantor or testator grants or devises a fee simple title, he is not permitted to fetter the title that he created with inconsequential and unreasonable conditions otherwise valid. Such conditions are not favored in the law and they should be strictly construed against the testator or grantor as against a fee simple title. It is true, generally speaking, that a testator may dispose of his property as he pleases by the methods provided by statute and the public policy indicated; but he will not be permitted to do so in

violation of our statutory law and the public policy determined by the Legislature. The conveyance of real estate is of such importance to the state that one will not be permitted to become whimsical and unreasonable after creating an estate recognized by the law, such as an estate in fee simple, by attaching conditions repugnant to the estate created. On the other hand, we do not go so far as to say that all conditions subsequent attached to a fee simple estate are void where alienability is not involved. A condition attached to a fee simple estate, otherwise valid, must be reasonable and not materially affect its marketability. If it materially affects marketability adversely, it is an indirect restraint against alienation.

The writer of this opinion concurred with the former majority opinion on the theory that a direct restraint on alienation was void but that an indirect restraint was not. A majority of this court, including the writer, has come to the conclusion that the law is the same on direct and indirect restraints on alienation. The authorities are not in accord on the question. While much has been written on the subject, we adopt the following as a proper statement of the law: "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. Any provision in a deed, will, contract, or other legal instrument which, if valid, would tend to impair the marketability of property, is a restraint on alienation." Simes and Smith, The Law of Future Interests (2d Ed.), § 1111, p. 4. "In brief, the law is concerned primarily with practical alienabiltiy, not with a theoretical power of alienation." Simes and Smith, The Law of Future Interests (2d Ed.), § 1115, p. 8. We hold that the restraint against alienation in the instant case is void and against public policy and the devisee has an indefeasible estate in fee simple.

There is a contention made that the ultimate decision

in this case must rest in part at least on the rule against perpetuities. We have serious doubts if the rule against perpetuities is of controlling importance in a case where a fee title has been created by a testator on his death subject to conditions subsequent which, directly or indirectly, prevent the alienability of the land constituting the subject of the devise. Where alienability is not involved, the rule against perpetuities may be an important factor. "A further reason is that, other things being equal, society is better off, if property is controlled by its living members than if controlled by the dead. Thus, one policy back of the rule against perpetuities is to prevent too much dead hand control of property. * * * Much that has just been said with reference to the policy of the rule against perpetuities can be applied to other related rules. Thus rules against direct restraints on alienation do prevent dead hand control, and provide a balance between the satisfaction of the desires of the present generation and of future generations to tie up property. However, direct restraints on inter vivos alienation, when applied to interests in specific tangible things, do also tend to take property out of commerce and thus prevent productivity. On the other hand, it would seem that direct restraints on the power to devise have nothing to do with taking property out of commerce, since a devise is not a commercial transaction. Nevertheless, the rules against direct restraints on the power to devise are about the same as those with respect to direct restraints on the power to convey. As was early recognized, a trust for the accumulation of income does not take property out of commerce or render it unproductive. Yet the law restricts it, for much the same reasons as justify the rule against perpetuities." Simes and Smith, The Law of Future Interests (2d Ed.), § 1117, p. 13. Consequently a fee simple estate subject to conditions amounting to a restriction against alienation is void and against public policy whether or not it is barred by the rule against

perpetuities. The creation of a fee simple estate subject to conditions not affecting alienation and otherwise valid, may be unenforcible if violative of the rule against perpetuities or a controlling statute.

The trial court allowed an attorney's fee against the estate of $1,500 for the plaintiff and $1,500 for the defendant. The defendant assigns this as error.

The county court has authority to allow attorneys' fees when the attorney is employed by the executor and rendered services which were necessary to the estate. Attorneys' fees may be allowed to an heir where the litigation resulted in benefits to all the heirs of the deceased. But an estate of a decedent will not ordinarily be held liable for attorneys' fees for services rendered at the request of a devisee or legatee. An estate is liable for attorneys' fees only when the services preserved the estate, added to its value, or were otherwise beneficial to it. In re Estate of Love, 136 Neb. 458, 286 N. W. 381. See, also, In re Estate of Jurgensmeier, 145 Neb. 459, 17 N. W. 2d 155.

The services rendered in the present case preserved no part of the estate nor added anything to the estate. We fail to see where the estate was in any way benefited. It is the duty of the courts to see to it that estates undergoing administration are carefully guarded especially where the interests of incompetents and minor heirs are affected. This is the foundation for the rule that attorneys' fees for services rendered at the request of a beneficiary, even though successful, are payable from funds of the estate only when such services preserved the estate, added to its value, or were otherwise beneficial to it. The allowance of attorneys' fees in the case before us cannot be sustained.

We withdraw that part of the former opinion in this case, to wit, Cast v. National Bank of Commerce T. & S. Assn., 185 Neb. 358, 176 N. W. 2d 29, insofar as it is in conflict with this opinion. We reverse that part of the judgment of the district court awarding attorneys'

fees. The judgment of the district court is affirmed as modified by denying the right of the parties to an allowance of attorneys' fees against the estate in this action.

AFFIRMED AS MODIFIED.

SPENCER, J., dissenting.

I cannot agree with the new approach set forth in the supplemental opinion herein, and adhere fully to our previous opinion.

The basic trouble with the supplemental opinion is the premise on which it is based, that we are dealing with a restraint on alienation of a vested estate in fee simple, and also that this case is controlled by Andrews v. Hall, 156 Neb. 817, 58 N. W. 2d 201, 42 A. L. R. 2d 1239. As set out in the previous opinion, I consider the devise to be a conditional limitation, and the fee a determinable, qualified, or base fee. There is no reversion to the grantor. Rather, here there is a passing over of the property to the residuary trust.

Andrews v. Hall, *supra,* has absolutely no applicability to this case because we are concerned here with a condition of vesting. Even if it did, which I do not concede, as the concurring opinion set out, the restraint at most would be an indirect one, and there cited the general rule that an indirect restraint is invariably valid unless it violates the rule against perpetuities. Simes and Smith, The Law of Future Interests (2d Ed.), § 1116, p. 9.

This conveyance does not violate the rule against perpetuities. But even if it could be construed to do so, only a portion of the condition would be affected and the rest should be enforceable. As set out in the previous opinion, the testator gave his nephew, or his issue if the nephew did not survive, certain property in fee simple absolute. The property involved herein, however, was given *only* to the nephew and conditionally *if, and only if,* the nephew performed, although the testator did provide that if one of the nephew's children performed, the conveyance to the nephew would be operative.

As noted in the previous opinion, most of the states uphold the validity of occupancy requirements or previously devised lands. Contra, there is an early case in North Carolina and a distinguishable case in Georgia. See the annotation on this point in 35 A. L. R. 2d 387.

On the question of name change, this court passed upon that point in Smith v. Smith, 64 Neb. 563, 90 N. W. 560, which I see no reason to overrule. The following from that case is pertinent herein: "That the conditions imposed are reasonable, and such as he was authorized to prescribe, is not questioned, and can not, we think, be challenged on any tenable grounds. 1 Underhill, Wills, sec. 516; 2 Jarman, Wills (Randolph & Talcott ed.), p. 579; Taylor v. Mason, supra; Webster v. Cooper, 14 How. (U. S.), 488, 500; Merrill v. Wisconsin Female College, 74 Wis., 415, 43 N. W. Rep., 104. In such a case it is the duty of the court to construe such provisions in a will, like all other contracts, with a view of carrying out the intention of the testator. St James Orphan Asylum v. Shelby, 60 Nebr., 796, 811." See, also, Restatement, Property, § 437, p. 2547, which states that restraints designed to induce the conveyee to adopt a certain name are normally valid.

I do not agree that public policy requires the result achieved by the supplemental opinion, for the same intent embraced in the will could be effectively accomplished by a trust. However, I realize that obviously the majority of the court are trying to restrict the power of a testator to conditionally limit a conveyance, and it would do no more violence to our law if a like provision in a trust were similarly voided.

With respect to the question of public policy, as evidenced by the Uniform Property Act, as well as the discussion on the purpose and policy of that act, I call attention to the fact that it permits the creation of a possibility of reverter or a right of reentry for a period of 30 years. See section 76-2,102, R. R. S. 1943, which reads as follows: "Neither possibilities of reverter nor

rights of entry or reentry for breach of condition subsequent, whether heretofore or hereafter created, where the condition has not been broken shall be valid for a longer period than thirty years from the date of the creation of the condition or possibility of reverter. If such a possibility of reverter or right of entry or reentry is created to endure for a longer period than thirty years, it shall be valid for thirty years." The statute does not prevent the creation of these future interests. Rather, it only prevents their subsequent reconveyance and limits their creation to 30 years. See section 76-299, R. R. S. 1943, and the words "hereafter reserved" or "hereafter created" in the other sections of subdivision (j).

While the intent statute, section 76-205, R. R. S. 1943, is only a rule of construction, until recently, it has been scrupulously followed in this jurisdiction. I do not feel that we should defeat the obvious intent of the testator herein by subterfuge.

SMITH, J., joins in this dissent.

BOSLAUGH, J., dissenting in part.

I am unable to agree with that part of the majority opinion which holds that all restraints on alienation, whether direct or indirect, are invalid. Both the Restatement of the Law of Property and Simes and Smith, The Law of Future Interests, recognize that some indirect restraints are valid. See, Restatement, Property, §§ 406, 407, pp. 2392, 2415; Simes and Smith, The Law of Future Interests (2d Ed.), §§ 1112, 1115, 1116, pp. 4, 7, 9.

As stated in Simes and Smith: "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 alien-

ability; and, second, the purpose of the restraint in question. * * * 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 restraint may be bad." §§ 1115, 1116, pp. 8, 10. In my opinion the restraint involved in this case is invalid because it fails to satisfy the requirements stated in Restatement, Property, paragraphs (c) and (d) of section 406, pp. 2395, 2396.

ELLA G. MEYER, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF CLIFFORD MEYER, DECEASED, APPELLANT, V. L. D. MOELL, ALSO KNOWN AS DWIGHT MOELL, APPELLEE.
183 N. W. 2d 480

Filed February 5, 1971. No. 37501.

1. **Negligence: Physicians and Surgeons.** In determining what constitutes reasonable and ordinary care, skill, and diligence, on the part of a doctor in a particular community, the test is that which physicians and surgeons in the same neighborhood and in similar communities, engaged in the same or similar lines of work, would ordinarily exercise and devote to the benefit of their patients.
2. **Appeal and Error: Trial: Instructions.** A party requesting instructions on a certain theory cannot be heard to complain on appeal that the trial court gave other instructions on the same theory. The rule is that a party cannot complain of the giving of an instruction in harmony with one which he requested.
3. **Trial: Instructions.** Where the meaning of an instruction is reasonably clear, when construed with other instructions, it is not prejudicially erroneous to give such an instruction.
4. **Appeal and Error: Trial: Instructions.** In deciding whether or not there is error in a particular sentence or a particular phrase of an instruction, it will be considered with the instruction of

which it is a part and all of the remainder of the charge to the jury.

5. **Trial: Evidence.** Generally where evidence is objected to which is substantially identical with evidence admitted and not objected to, prejudicial error will not lie because of its admission.

6. ———: ———. Generally the admission of collateral or cumulative evidence rests within the sound discretion of the trial court.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Affirmed.

Ginsburg, Rosenberg, Ginsburg & Krivosha, R. P. Cathcart, and Bernard Wishnow, for appellant.

Cline, Williams, Wright, Johnson & Oldfather, William B. Rist, and Kevin Colleran, for appellee.

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

WHITE, C. J.

This is an appeal from a jury verdict and a judgment for the defendant in a malpractice action. The errors assigned relate to alleged error in the instructions given by the trial court and in the admissibility of evidence. We affirm the judgment of the trial court.

There is no contention on appeal in this court that the evidence is insufficient to support the verdict and judgment for the defendant. However, as a matter of clarity in the examination of the issues presented, a fairly comprehensive statement of the facts will be given.

The defendant is a doctor engaged in the practice of medicine in Beatrice, Nebraska. On Friday, November 11, 1966, plaintiff's decedent, Clifford Meyer, sustained serious injuries in a farm accident when his right arm was caught in an unloading elevator on a farm wagon. He was immediately taken by his son to the Lutheran Hospital in Beatrice, Nebraska, where the defendant Dr. Moell, at the time, happened to be attending other patients. Dr. Moell was immediately engaged to treat Meyer. The record shows that the injuries to the right

arm were very severe. They centered around the elbow, with wounds extending in both directions, approximately half-way to the wrist and up into the upper arm half-way to the shoulder. There was an open fracture of the elbow with a dislocation of the elbow joint between the two bones. The radial nerve was exposed and an examination revealed that he had fractures of both bones of the forearm in the upper area. He had a fracture of the large bone in the shoulder area. In addition, Dr. Moell's examination revealed that besides the severe wounds to the right arm, decedent had an irregularity of the heart and his blood pressure was low, which remained low for some time, running as low as 70 systolic; and the doctor found that he was in shock. Treatment was immediately undertaken by Dr. Moell, including the administration of intravenous fluids, blood, and drugs to contract the blood vessels and bring the blood pressure up. The initial examination was completed with the usual X-ray confirmation and the decedent was taken to surgery the next morning. This operation started at 9:15 a.m., took 2 hours and 35 minutes to complete, and consisted of a debridement or cleaning of the wound of all foreign matter and dead tissue. At the conclusion of the operation the wound was thoroughly irrigated and each piece of tissue that remained was inspected to see if it appeared to be normal. Dead tissue was cut away, and any pockets present were opened up and irrigated in order to get the wound in as clean a state as possible at the end of the operation.

The evidence shows that Dr. Moell, after debriding the wound, had to reach a judgment as to the closure of the wounded area. Complicating factors were an exposed nerve, an exposed joint capsule, and an exposed fracture. A factor involved after cleaning the wound and the determination of exposure in this particular case was that there was an open area where the exposed nerve might be affected by its exposure to the air and

also the "joint capsule" could possibly be affected by the same exposure. Dr. Moell came to the conclusion as to the degree of closure in this area, and the deep area was loosely closed with catgut or absorbable sutures. Drains were affixed and the wound was closed. Dr. Moell observed at that time that the tissues which remained after the debridement appeared to be in good condition and there was apparently good circulation in these areas. At the conclusion of the operation a light dressing was placed over the whole area and the arm was placed in a splint.

Subsequently, the deceased was given additional blood transfusions (standard treatment for shock), and medication for pain; and tests were ordered to test his kidney function, which revealed that his blood urea nitrogen (BUN) was elevated. A broad spectrum antibiotic was ordered. This was indicated because of the nature of the accident and the uncertainty of what type bacteria, gram-negative or gram-positive, was present.

Dr. Moell saw decedent the evening of the accident, after the operation, again Saturday morning, checked with the hospital Saturday afternoon, and visited decedent again Saturday evening. At these times his condition appeared to be progressing satisfactorily. On Sunday morning decedent requested that medication for relief of pain be by mouth and he seemed to be feeling better and having less pain. Dr. Moell saw decedent again Sunday evening. At 5 a.m., on Monday, November 14, 1966, following a call from the hospital, Dr. Moell again saw decedent; noted that his blood pressure was dropping; that his pulse was rapid; and that he again appeared to be in shock. Dr. Moell ascertained at that time that there was apparently a complete kidney shutdown, and this being a life-threatening problem, he made the judgment that decedent should be transferred to Lincoln for further or more extensive treatment. Dr. Moell talked to Dr. Webster in Lincoln, an orthopedist, arranged for copies of the hospital records to be made,

and for an ambulance to be called to take decedent to Lincoln. He changed the medication prescribed to conform to the condition he found present and gave a heart support medication, digitalis. An electrocardiogram was ordered, the dressings on the wound were changed about noon on that date, at which time the doctor noted a discoloration of the skin in the wound and an odor to the wound drainage, and determined that further debridement would be required. It appeared at this time that the basic problem was the kidney function.

Decedent was transferred to Bryan Memorial Hospital in Lincoln, Nebraska, on Monday afternoon, arriving at about 5 p.m. From that time on he was under the care of an orthopedic surgeon, an internist, a urologist, a general surgeon, and a radiologist.

It appears from the record that these doctors were uncertain themselves as to why decedent was in shock and why he was suffering from an acute kidney shutdown. After discussing various alternatives and the results of their examinations, they came to a diagnosis of shock, acute kidney shutdown, and a possibility of a gangrene infection. Later that evening the diagnosis of gas gangrene was made at approximately 10 p.m. after dressings were changed by Dr. Webster, the orthopedist, between 9:30 and 10 p.m., and a culture was taken which revealed gas gangrene organisms. Surgical action was immediately taken and decedent's arm was amputated at 11:30 on Monday evening. Death occurred at about 6:50 a.m. the following morning, Tuesday.

Autopsy revealed a previous heart condition which had already been reflected by the electrocardiogram that Dr. Moell had ordered. By autopsy, a substantial enlargement of the heart and sclerosis of the coronary arteries were shown. All of these conditions, according to the opinion medical testimony, could have been affected by the kidney condition and shutdown. The evidence reveals that death was caused by the cardiac condition. There was uncertainty in the medical opin-

ions as to just what conditions contributed to or accelerated the heart condition. One doctor (Frerichs) was of the opinion that the gas gangrene in the wound did not cause the kidney failure in this case since the microscopic sections of the kidney following autopsy did not reveal the findings which would be expected if the kidney failure was caused by gas gangrene.

The evidence shows that gas gangrene is an uncommon condition and seen very rarely by doctors in the geographical area of practice of Dr. Moell. There was testimony that a general practitioner might see one case in 10 years. The condition may develop even with the best of medical care. For the condition to develop, an incubation period of from 24 hours to 3 or 4 days is required. This is a brief summary of the pertinent evidence with respect to the history of the deceased's medical condition and care up until the time of his death.

The expert testimony centers around (1) whether it was negligence on the part of Dr. Moell to close the wound as he did at the time of the original operation, and (2) whether there was failure to examine the wound at different specific times and to give the deceased additional or different antibiotics.

Instructions Nos. 8 and 12 are attacked by the plaintiff, as conflicting and misleading. These instructions are set out as follows:

"*INSTRUCTION NO. 8* * * * By 'negligence' with respect to this lawsuit is meant the doing of some act under the circumstances which a doctor in general practice of medicine in Beatrice or similar localities would not have done or the failure to do some act or to take some precaution which a doctor in general practice of medicine in Beatrice or similar localities would have done or taken."

"*INSTRUCTION NO. 12* * * * The law does not require a doctor absolute accuracy either in his practice or judgment. It does not hold him to the standard of infallibility, nor require of him the utmost degree of

skill known to his profession. It requires of him only that in the practice of his vocation he shall exercise that degree of care, skill and learning ordinarily possessed and used by members of his profession in his or similar localities."

We are required to consider all instructions together, as the trial court told the jury in this case. Instruction No. 11 was also given which stated: "In performing professional services a doctor engaged in general practice must use the skill and knowledge ordinarily possessed and used under like circumstances by members of his profession engaged in the general practice in his or similar localities."

We have no difficulty in discovering precisely what the proper and applicable rule is in Nebraska. In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a doctor in a particular community, the test is that which physicians and surgeons in the same neighborhood and in similar communities, engaged in the same or similar lines of work, would ordinarily exercise and devote to the benefit of their patients. Stohlman v. Davis, 117 Neb. 178, 220 N. W. 247, 60 A. L. R. 658; Mangiameli v. Ariano, 126 Neb. 629, 253 N. W. 871. See, also, the recent pronouncement in Foley v. Bishop Clarkson Memorial Hospital, 185 Neb. 89, 173 N. W. 2d 881. The above rule is the majority rule in most jurisdictions and is in harmony with the Restatement of the Law of Torts. See Restatement, Torts (2d Ed.), § 299A, p. 73 (1965). It is unnecessary to engage in a detailed semantical comparison of the apposite language from these three instructions. It is apparent there is no conflict between the instructions when read together, and they succinctly and properly state the rule. We can see nothing in the somewhat overlapping and repetitive nature of these instructions which could, in any way, possibly mislead the jury. There is no merit to this contention.

Although the plaintiff contends otherwise, it is clear

from an interpretation of instruction No. 8 and instruction No. 11 that the court instructed the jury the doctor must not only possess a certain degree of skill and knowledge but that he must use such skill and knowledge in the particular case at issue.

What we have said disposes of the plaintiff's contention that her requested instructions should have been given. The record reveals that the plaintiff presented and tried this case on the theory of the locality rule. The court properly applied the locality rule to a definition of the term of negligence, to the degree of the standard and skill of a doctor in the community, and to the requirement that he not only possess such knowledge but *use* it in the particular case. A party cannot complain of the giving of an instruction in harmony with the one which he requested. Ballantyne v. Parriott, 172 Neb. 215, 109 N. W. 2d 164; Spani v. Whitney, 172 Neb. 550, 110 N. W. 2d 103. He will not be permitted to change his theory on appeal. Sorter v. Citizens Fund Mut. Fire Ins. Co., 151 Neb. 686, 39 N. W. 2d 276; Crunk v. Glover, 167 Neb. 816, 95 N. W. 2d 135. Error may not be predicated solely upon a particular sentence or phrase, but must appear from a consideration of all of the instruction of which such sentence or phrase is a part, and all of the remainder of the charge to the jury. Leonhardt v. Harimon, 185 Neb. 224, 174 N. W. 2d 926; Zager v. Johnson, 175 Neb. 866, 124 N. W. 2d 390.

Finally, it is the plaintiff's contention that it was error to permit Dr. Porter to testify as to his experience in similar cases, with respect to debridement and closure of wounds, in the locality of Beatrice. It is further contended that it was error to enlarge upon this testimony with demonstrative evidence in the form of colored slides. Her basic contention is that this is collateral evidence, immaterial to the direct issues in the case, and is inadmissible and prejudicial. It is necessary to examine the status of the record on this issue. It reveals that the plaintiff's expert witness, one Dr. Robert Gil-

lespie, testified that *under no circumstances* should any deep wound which has been contaminated be closed. A permissible, if not the clear, inference from his testimony is that the mere act of closing the wound was contrary to the accepted practice in Beatrice and in similar communities. This doctor supported his testimony with a statement that he was a member of the American College of Surgeons and that its Committee on Trauma indicates in its recommendation that a wound when debrided should be left open. In one portion of his testimony he stated that all contaminated wounds should be left open after they have been thoroughly debrided.

To meet this contention Dr. Moell called Dr. Porter who also is a member of the American College of Surgeons and is engaged in the practice of medicine in the Beatrice area and in which Dr. Gillespie is not. The following testimony was permitted by the plaintiff without objection: "There's been some testimony here, Doctor, that under no circumstances should a wound of this type be closed but it should be packed open and the failure to do so constituted a failure to meet the standard of care existing in this area. What is your testimony in this respect? * * * Well, I treat quite a few dirty wounds from automobile accidents and farm accidents and if I have converted a wound from a dirty wound to a clean wound, in my opinion, I have no qualms about putting drains in and closing this wound. And I know many other doctors that do the same." It is clear, since there was no objection or motion to strike with reference to this testimony, that error may not be predicated thereon. State v. Dillon, 175 Neb. 444, 122 N. W. 2d 223; American Oil Co. v. City of Omaha, 182 Neb. 532, 155 N. W. 2d 805.

After this testimony was admitted, Dr. Moell offered the colored slides which were objected to by the plaintiff as collateral evidence and improper impeachment, and she now contends that the overruling of this objec-

tion was error. It is clear that these slides were no more than explanatory of the oral testimony of Dr. Porter. They were offered and received for the limited purpose of permitting the doctor to demonstrate to the jury the kind of dirty wounds that have been treated by loose closure over drains in the practice area of Dr. Moell and the results obtained in those cases. We have held that where evidence is objected to which is substantially identical with evidence admitted and not objected to, prejudicial error will not lie because of its admission. Danner v. Walters, 154 Neb. 506, 48 N. W. 2d 635. The admitted testimony was directly related to and rebutted the probative value of the testimony of the plaintiff's witness, Dr. Gillespie, which emphasized that in contaminated wounds debridement and closure should never be used. Even if the testimony could be considered collateral or cumulative such admission rests within the sound discretion of the trial court. Fitch v. Martin, 84 Neb. 745, 122 N. W. 50; O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123; Horky v. Schroll, 148 Neb. 96, 26 N. W. 2d 396. There is no merit to these contentions. The overall and most important issue tried in this case was the judgment of Dr. Moell in the debridement and closure of a contaminated wound. In light of this fact, it is impossible to see how the admission of this rebutting testimony, directly bearing on what the practice was in the local community, could have been in any respect prejudicial to the plaintiff.

It is unnecessary to examine other assignments of error as they are without merit.

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

AFFIRMED.

DOMINIC COSENTINO ET AL., APPELLANTS, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
183 N. W. 2d 475

Filed February 5, 1971. No. 37623.

1. **Municipal Corporations: Public Works Contracts: Franchises.** A lease-purchase agreement relating to financing of a waste disposal plant and authorized by section 14-365.05, R. R. S. 1943, is not a franchise that violates section 14-811, R. R. S. 1943.
2. **Statutes.** Unless the construction would be inconsistent with the manifest intent of the Legislature, heads supplied in compilation of sections enacted after passage of section 49-802 (8), R. R. S. 1943, do not constitute any part of the law.
3. **Municipal Corporations: Constitutional Law.** A city directing credit to a public purpose with incidental benefit to a private corporation does not violate the constitutional prohibition against the state and its subdivisions lending credit to a private corporation.
4. **Municipal Corporations: Public Works Contracts.** Requirements for competitive bidding are strictly construed against public authorities.
5. ———: ———. Where a process or article is patented, public authorities may specify its use without complying with competitive bidding requirements in these circumstances: The process or article in their judgment possesses such exceptional superiority that it would be a public injury for the authorities not to use it.

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

Guinan & Kolenda and Foulks, Wall & Wintroub, for appellants.

D. C. Bradford of Monsky, Grodinsky, Cohen, Garfinkle & Zweiback, Robert J. Kutak of Kutak, Rock, Campbell & Peters, Herbert M. Fitle, and Peter J. Vaughn of Fraser, Stryker, Marshall & Veach, for appellees.

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

SMITH, J.

Plaintiffs taxpayers attacked agreements concerning

treatment of packinghouse waste in a facility financed by bonds of a private nonprofit corporation. Income to pay the bonds was to be received from the City of Omaha as lessee under a lease-purchase agreement. After trial the district court dismissed plaintiffs' petition. Plaintiffs appeal. They contend that the city (1) granted an invalid franchise, (2) unconstitutionally lent its credit to a private corporation, and (3) failed to comply with statutory requirements relating to competitive bidding.

BACKGROUND

Packinghouses and other industries in Omaha historically discharged raw waste through city sewers into the Missouri River. The method, everyone once thought, was efficient, economical, and beneficial to all.

In 1957 federal authorities cited Omaha for permitting uncontrolled discharge of raw domestic and industrial wastes through city sewers into the river. They held hearings in 1957, 1964, 1966, and 1967. Omaha constructed interceptor sewer systems and the Missouri River Sewage Treatment Plant. The south half of the plant, designed to treat packinghouse and other wastes, was inoperable because it could not process paunch manure.

Paunch manure is the solid materials retained in the first stomach of cattle and sheep. From the Omaha sewers it came mixed with street washings, storm drainage, and other industrial, animal, and human wastes. Engineers in 1964 reported: ". . . paunch manure . . . is a mean and nasty material . . . . Nowhere are successful processes in operation for disposing of this material in urban areas except . . . land fill. . . ." The city rejected the landfill method because of insufficient land and high moisture content of paunch manure. Solution of the problem would be clearly pioneer.

Some in-plant method of substantial treatment of paunch manure had been recommended. Such treatment at a central facility prior to mixture with other wastes in interceptor sewers won approval in 1964 for several reasons. First, packinghouse capital was inade-

quate. Second, central treatment represented overall economy. Third, it obviated important objections to in-plant methods: Difficulties of (1) the city monitoring in-plant units and (2) one malfunctioning in-plant unit forcing a shutdown and bypass of the south half of the Missouri River Sewage Treatment Plant.

The city authorities decided to use a new process patented by Charles Greenfield. He intended not only to process paunch manure satisfactorily but also to recover animal fat which would become marketable animal feed. He testified that this phase of recycling would be profitable. His process was operating on a small scale at several places. Essential variables of the process were within his proprietary knowledge so that its successful operation would require application of that knowledge.

Defendant Carver-Greenfield Corporation held exclusive rights to license patents on the process. It organized a wholly owned subsidiary, defendant Carver-Greenfield Omaha, Inc. Defendant Omaha Pollution Control Corporation was organized as a Nebraska private nonprofit corporation. Its articles of incorporation were not amendable to the extent that they stated a corporate purpose to give the treatment facility to the city after payment of indebtedness.

THE AGREEMENTS

The agreements were made in September 1967. Carver-Greenfield granted Carver-Greenfield Omaha and Pollution Control a royalty free license to process packinghouse wastes through the project. Carver-Greenfield Omaha was to pay royalties on sales of recovered materials, but Carver-Greenfield agreed to subordinate royalties to operational fees and expenses.

The city agreed upon operation of the facility by Carver-Greenfield Omaha for a semiannual fee of $50,000 payable out of revenue from the operation. The term was 10 years renewable for 10 years at the option of the city.

Under the lease-purchase agreement Pollution Control

was to purchase land and construct the facility by issuance and sale of its bonds in the principal sum of $5,500,000. Expenditures were subject to reasonable approval of the city. The city agreed to construct the collecting sewers. Its electors in May 1966 had approved issuance of general obligation bonds in the sum of $1,200,000 for that purpose. The city also agreed to (1) pay premium charges on casualty and liability insurance policies and taxes, (2) operate and maintain the project for a term of 30 years, and (3) pay a basic net rent of $180,000 semiannually commencing the 29th month after sale of the city bonds. Rent and miscellaneous sums were payable by the city to Pollution Control as long as the latter's bonded indebtedness and related items were unpaid. The city had an option to purchase the facility at any time for a price equal to the total of unpaid installments of rent, bond interest, and trust indenture premium. Otherwise, the agreement contemplated transfer of title, subject to rights of Pollution Control, to the facility at the expiration of 30 years to the city.

In the bond indenture Pollution Control covenanted that the lease was valid. It pledged its interest in the lease-purchase agreement, a policy of title insurance, and income from the facility to the trustee for the bondholders. The indenture provided, in event of default, for acceleration of principal and interest and for any action deemed desirable by the trustee to produce revenue.

Packinghouses promised the city to contribute to payment of Pollution Control bonds. The amount was $0.07 to $0.10 a head of beef killed at their Omaha plants each year, the amount varying with salable grease to be obtained during the year. Based on the slaughter rate in 1965, the amount of this annual payment was estimated at $148,000. Municipal surcharges would be removed, but payment of sewer use fees common to all sewer users would be continued.

The city took bids on the sewer construction contracts

financed with proceeds of the sale of its general obligation bonds, but no other competitive bidding occurred in connection with the project.

Pollution Control owned the land upon which Carver-Greenfield was constructing the plant at the time of trial in May 1969. The claim of Greenfield's patents read on the processes or apparatuses included in design of the plant. Pollution Control has paid consolidated real estate taxes to the treasurer of Douglas County. Internal Revenue Service had ruled that interest on Pollution Control bonds would be excludable from gross income under section 103(a) (1) of the Internal Revenue Act of 1954. It considered the bonds an issue on behalf of the city.

THE FRANCHISE ISSUE

Plaintiffs contend that the lease-purchase agreement was a franchise that violated section 14-811, R. R. S. 1943, which required electoral approval of franchises in Omaha, a metropolitan city. The force of the contention depends upon other statutory sections.

Section 14-365.05, R. R. S. 1943, reads: "For the purpose of providing for such sewage disposal plant . . . (a metropoliton city) may also enter into a contract with any corporation . . . to construct and provide the facilities and services as hereinbefore described . . .." Enacted in 1953, the section bears the head "Franchises" supplied in compilation. The head does not affect our interpretation of the text. Section 49-802, R. R. S. 1943, enacted in 1947, reads: "Unless such construction would be inconsistent with the manifest intent of the Legislature, rules for construction of the statutes . . .hereafter enacted shall be as follows: . . . (8) . . . section . . . heads . . . in the statutes . . ., supplied in compilation, do not constitute any part of the law."

Nothing in the text of sections 14-365.01 to 14-365.13, R. R. S. 1943, subjected the lease-purchase agreement to the franchise requirements of section 14-811, R. R. S. 1943. Indeed, section 14-365.13, R. R. S. 1943, with ex-

ceptions immaterial here, provided: ". . . sections 14-365.01 to 14-365.13 shall be independent of and in addition to any other provisions of the laws of the state . . . with reference to sewage disposal plants . . . in metropolitan cities. . . . sections 14-365.01 to 14-365.13 shall not be considered amendatory of or limited by any other provision of the laws of the State . . .."

In order to decide upon the modus operandi of city authority in the transaction, we look at a number of statutory sections. Section 14-365.01, R. R. S. 1943, authorized the city in regard to a disposal plant to make an annual special levy not to exceed one mill on the dollar upon the assessed value of all taxable tangible property within the city. Section 14-365.02, R. R. S. 1943, authorized the city to issue mortgage bonds that imposed no general liability upon the city. No procedure was specified.

Section 14-365.03, R. R. S. 1943, authorized the governing body of the city to make (1) all necessary rules and regulations governing the use, operation, and control of the plant and (2) equitable charges which might take the form of special assessments.

Section 14-365.07, R. R. S. 1943, authorized the city to issue revenue bonds by ordinance passed by the mayor and city council "without any other authority." The section also authorized general obligation bonds, but the city could not issue them without approval of the electors. Section 14-365.05, R. R. S. 1943, which authorized the city to contract with any corporation to construct and provide a waste facility, did not specify any procedure.

The Legislature in 1953 doubtless had in mind the spirit of the Water Pollution Control Act of 1948. Act of Congress, June 30, 1948, c. 758, 62 Stat. 1155. The act generally imposed primary responsibility upon the states for degradation of water quality. It authorized administrative enforcement through judicial orders for abatement. The Legislature has not amended section 14-365.05, R. R. S. 1943, while federal insistence on state compliance

with standards of water quality has grown. See Barry, "The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation." 68 Mich. L. Rev. 1103 (1970).

The parties stipulated: "14. That the Mayor of the City of Omaha and the City Clerk were authorized to execute and attest respectively the lease-purchase agreement . . . by Ordinance . . . duly adopted pursuant to regular Charter procedures on August 22, 1967." We conclude that the lease-purchase agreement was not an invalid franchise.

LOAN OF CREDIT TO A PRIVATE CORPORATION

The Constitution of Nebraska, Article XIII, section 3, prohibits the state and political subdivisions from lending credit to a private corporation. A city directing credit to a public purpose with incidental benefit to a private corporation does not violate the constitutional prohibition against the state and its subdivisions lending credit to a private corporation. See, State ex rel. Beck v. City of York, 164 Neb. 223, 82 N. W. 2d 269 (1957); cf. State ex rel. Johnson v. Consumers Public Power Dist., 143 Neb. 753 at 766, 767, 10 N. W. 2d 784 at 794, 152 A. L. R. 480 (1943). In the present case there was no violation.

ABSENCE OF COMPETITIVE BIDDING

Three agreements, engineering and construction, operating, and lease-purchase, were made without competitive bidding. Section 14-365.08, R. R. S. 1943, required a metropolitan city to advertise for sealed bids and to let a contract for construction of a sewage disposal plant to the lowest responsible bidder.

Requirements for competitive bidding are strictly construed against public authorities. Cullingham v. City of Omaha, 143 Neb. 744, 10 N. W. 2d 615 (1943). In Wurdeman v. City of Columbus, 100 Neb. 134, 158 N. W. 924 (1916), we upheld a contract awarded to the lowest bidder on specifications including patented material.

The patentee, however, had offered to supply the material at the same price to all bidders.

We decline to rule flatly that competitive bidding requirements literally control every situation. Should we do so, we would compel governing authorities at times to act against the public interest. Where a process or article is patented, public authorities may specify its use without complying with competitive bidding requirements in these circumstances: The process or article in their judgment possesses such exceptional superiority that it would be a public injury for the authorities not to use it. See, Wegmann Realty Co. v. City of St. Louis, 329 Mo. 972 at 985, 986, 47 S. W. 2d 770 at 775, 776 (1932); Smith v. City of Seattle, 192 Wash. 64, 72 P. 2d 588 (1937); 10 McQuillin (3d Ed.), Municipal Corporations, § 29.42, pp. 348 to 353 (1966). Similarly, a contract with an operator of a facility may be let without competitive bidding where highly specialized technical skills possessed only by him are required to operate the facility. See Potts v. City of Utica, 86 F. 2d 616 (2d Cir., 1936).

Plaintiffs state that the venture has turned out badly, but the evidence supported the practicability of the Greenfield process, particularly in respect to the quality of the effluent from the Greenfield process. In the particular circumstances, the agreements were not subject to competitive bidding requirements.

Other contentions of plaintiffs are not well taken. The judgment is affirmed.

AFFIRMED.

JOHN A. HOUSAND, APPELLANT, V. MAURICE H. SIGLER, WARDEN, NEBRASKA PENAL COMPLEX, APPELLEE.
183 N. W. 2d 493

Filed February 5, 1971. No. 37668.

1. **Criminal Law: Sentences: Pardons and Paroles. In the absence**

of statute the district court after commitment of a prisoner possesses no authority to set aside the sentence and place the prisoner on probation.

2. **Statutes.** Legislation operates prospectively only unless it clearly indicates retrospective operation.

3. **Criminal Law: Pardons and Paroles.** The Director of Corrections may refuse to release a prisoner for work under section 83-184, R. S. Supp., 1969, notwithstanding a favorable recommendation by the Board of Parole.

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

John A. Housand, pro se.

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

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

SMITH, J.

Petitioner, serving a 3-year sentence imposed January 29, 1969, petitioned on March 23, 1970, for a writ of habeas corpus. He alleged that (1) the district court ought to place him on probation, (2) the Director of Corrections abused his discretion in failing to credit petitioner with time spent in custody prior to sentencing, and (3) the deputy warden failed to release petitioner for work in spite of a favorable recommendation by the Board of Parole. The district court denied the writ on the pleadings.

No statute authorized relief on petitioner's first claim. In the absence of statute the district court after commitment of a prisoner possesses no authority to set aside the sentence and place the prisoner on probation. See Moore v. State, 125 Neb. 565, 251 N. W. 117 (1933).

Section 83-1,106, R. S. Supp., 1969, which became effective August 25, 1969, authorizes the Director of Corrections to allow credit of presentence time in custody on a sentence. It is not by its term retrospective. Legisla-

tion operates prospectively only unless it clearly indicates retrospective operation. Dell v. City of Lincoln, 170 Neb. 176 at 189, 102 N. W. 2d 62 at 72 (1960). We must assume that the district court in petitioner's case considered any time spent in custody when it pronounced sentence.

Section 83-184, R. S. Supp., 1969, authorizes work release upon certain conditions: "When the conduct . . . and conditions indicate that . . . society . . . will be benefited . . ., and upon the recommendation of the Board of Parole . . ., the Director of Corrections may authorize . . ." work release. The director may refuse to release a prisoner for work under the statute notwithstanding a favorable recommendation by the Board of Parole.

The judgment is affirmed.

AFFIRMED.

SPENCER, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. VICTOR JOURNEY, APPELLANT.
183 N. W. 2d 494

Filed February 5, 1971. No. 37713.

Criminal Law: Right to Counsel. The law is clear that an accused person is entitled to counsel at every critical stage of a criminal proceeding.

Appeal from the district court for Buffalo County: NORRIS CHADDERDON, Judge. Reversed and remanded for a new trial.

Charles H. Beatty, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

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

NEWTON, J.

Defendant was charged with failure to make a child support payment and with being a habitual criminal. He has an eighth grade education. His constitutional rights were fully explained to him, including the right to counsel. All were waived and a plea of guilty entered. The defendant having indicated a doubt as to his mental competency, the court stated that it would withhold acceptance of defendant's plea, defer pronouncing sentence, and have him taken to a state hospital for an examination and determination of his mental competency. Defendant was examined and found to be mentally competent. Meantime, he wrote to the trial judge requesting the appointment of an attorney to represent him. The request was summarily denied and defendant was sentenced to 10 years in the Nebraska Penal and Correctional Complex.

Defendant brought a post conviction action and appeals from the judgment denying him relief. He assigns as error the failure of the court to appoint counsel to represent him pursuant to his request. We sustain that assignment and reverse the judgment of the district court.

The law is clear that an accused person is entitled to counsel at every critical stage of a criminal proceeding. See, State v. Ninneman, 179 Neb. 729, 140 N. W. 2d 5; Davis v. United States, 226 F. 2d 834 (8th Cir., 1955).

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

REVERSED AND REMANDED FOR A NEW TRIAL.

SPENCER, J., participating on briefs.

PATRICIA ANN VAN ORNUM, EXECUTRIX OF THE ESTATE OF HAROLD DEVANEY, DECEASED, APPELLANT, V. RICHARD A. MORAN ET AL., APPELLEES.

183 N. W. 2d 759

Filed February 11, 1971. No. 37626.

1. **Negligence: Highways: Motor Vehicles.** One who attempts to cross a street between intersections without keeping a constant lookout for his own safety in all directions of anticipated danger is ordinarily guilty of negligence of such a character as will bar a recovery as a matter of law.
2. ———: ———: ———. The requirement "to look" means to look at a time and place when to look would be effective.
3. ———: ———: ———. Crossing a street between intersections is not limited to a curb-to-curb crossing of the street; it includes crossing from a curb to a safety zone, entering the street and stopping or standing in the line of traffic, and otherwise exposing his person to the flow of vehicular traffic in the absence of an emergency justifying such action.
4. **Appeal and Error: Judgments.** A judgment will not be reversed for error against a party not entitled to succeed in any event.

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

Schrempp, Rosenthal, McLane & Bruckner, and Gill, Dunkle, Beekley & McNally, for appellant.

Pilcher, Howard & Dustin and John R. Douglas of Cassem, Tierney, Adams & Henatsch, for appellees.

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

CARTER, J.

Patricia Ann Van Ornum, executrix of the estate of Harold Devaney, deceased, brought this action against Richard A. Moran, and others, for damages for injuries sustained when Devaney was struck by an automobile driven by Moran on 18th Street between Farnam and Douglas Streets in Omaha. The jury returned a verdict for the defendant and plaintiff has appealed.

Devaney was a bus driver for Greyhound Lines, Inc. On November 16, 1964, at about 5 p.m., his bus was standing in the bus station on 18th Street ready to depart on a trip to Sioux City, Iowa. Traffic was heavy on 18th Street and Devaney's bus and another operated by Henry H. Stock were having trouble entering the street for departure. Stock testified that Devaney entered the street during a 50 to 70-foot gap in the traffic, turned his back partially to the oncoming traffic from the north on the one-way street, and signaled Stock to enter the street from the bus exit. Stock did not attempt entrance to the street. Devaney looked back over his shoulder, saw an automobile immediately upon him, and was immediately struck. Stock saw the automobile license number of the car which proceeded on south without stopping. Devaney sustained injuries when struck by the automobile, damages for which this action was brought.

The witness Stock testified that he was a bus driver for Greyhound and at the wheel of the bus seeking entrance to 18th Street at the time the accident occurred. He testified that Devaney walked into 18th Street and was standing in the middle of the first traffic lane with his back to oncoming traffic when he raised his hand and signaled him to enter 18th Street which he did not do because of oncoming traffic. He saw the automobile strike Devaney, throwing him off the fender, and proceed on south without stopping. He described the automobile as a Dodge or Plymouth station wagon and obtained its license number. He testified that Devaney wore a bus driver's uniform and that he entered the street during a lull in the heavy traffic to protect against traffic while Stock drove his bus into the street.

Devaney suffered serious injuries which continued until his death which was unrelated to the injuries sustained in the accident.

The defendant, Richard A. Moran, testified that he was an owner of the Moran Printing Company, Inc., and

that he devoted his time to that business. Moran Printing was a lessee of the automobile being driven by Moran on November 16, 1964, which was used primarily in the business of Moran Printing. He testified that he left the Moran Printing establishment shortly after 5 p.m., to pick up his daughter on the way home. He testified that he drove to 18th and Farnam Streets from the east and proceeded on west to 19th and Farnam Streets to pick up his daughter. Before reaching the intersection of 18th and Farnam Streets, he stated that a pedestrian stepped in front of his car, jumped on the bumper and pounded on the hood, and dropped off to the side without sustaining any apparent injury. He was unable to describe the man or give any information concerning him. He said it was this incident that he referred to when he told police that he had had an accident in the area. In other words, he stated that he was not on 18th Street on the date of the accident but was on Farnam Street near 18th Street and, consequently, did not hit Devaney or leave the scene of that accident without stopping as alleged.

We do not think it is important in the case as to where the accident occurred since Devaney was guilty of contributory negligence as a matter of law on his own evidence sufficient to bar a recovery. We point out that Devaney, according to his own testimony and that of the eyewitness Stock, walked from the sidewalk into the flow of heavy traffic between intersections and failed to keep a lookout for vehicular traffic coming from the direction that danger could reasonably be expected on the one-way street where they testified the accident occurred.

Moran Printing was made a party defendant because it was the lessee of the automobile driven by Moran and used in the business. Greyhound was made a party defendant because of its right of subrogation to the extent of payments made under the workmen's compensation law. The disposition of the liability claims against

Moran will dispose of the contentions of all parties defendant and we will therefore limit our discussion of the issue to those existing between the plaintiff and Moran.

The plaintiff alleged negligence on the part of Moran asserting that he failed to keep a proper lookout and in failing to have his automobile under reasonable control. In his answer, Moran alleged contributory negligence by Devaney in failing to keep a proper lookout, in moving from a place of safety into the path of Moran's moving automobile, in failing to yield the right-of-way to a moving vehicle between intersections, in crossing a roadway in a congested traffic area between intersections, and in standing in a line of traffic in a congested traffic district.

Assuming that Moran was guilty of negligence as charged, we hold that Devaney was guilty of contributory negligence to a degree sufficient to defeat the action on his own testimony.

The evidence is undisputed that Devaney with full knowledge of the heavy traffic on 18th Street walked into the center of a lane of southbound traffic during a short lull to halt oncoming automobiles to permit a Greyhound bus to move into the traffic flow. Devaney stood in the middle of the first line of traffic. He saw no vehicles in this southbound lane when he entered it and turned his back in the manner heretofore stated in the direction from which traffic was to be expected. He attempted to look back over his shoulder occasionally for traffic but centered his attention on Stock and his bus. He signaled Stock to move his bus out which he did not do because of oncoming traffic. Devaney looked over his shoulder and saw defendant's car right on him in the center of the first lane just before he was struck. It is clear that he deliberately moved from a place of safety into a place of danger to aid Stock in moving his bus into the flow of traffic on 18th Street. This court has said many times that it is negligence more than slight

to place oneself in such a place of danger under such circumstances. Matson v. Dawson, 185 Neb. 686, 178 N. W. 2d 588; Lileikis v. Kudirka, 180 Neb. 742, 145 N. W. 2d 441. It is contended here that Devaney was not "crossing a street" between intersections under the evidence of this case. We think that he was. "* * * one traversing all or a portion of the paved area between the curbs of a city street is 'crossing the roadway' within the meaning of the ordinance and the code sections, even though he is walking from curb to safety zone." Shachunazarian v. Widmer, 159 Cal. App. 2d 180, 323 P. 2d 865. "Term 'crossing' as used in statute and ordinance regulating pedestrians' crossing of street in business district was not intended to be limited to curb-to-curb crossing." Hedges v. Conder (Iowa), 166 N. W. 2d 844.

Plaintiff's counsel argue that the foregoing is not controlling in the present case and that the resolution of the case is governed by the principles declared in Arnold v. Lance, 166 Neb. 834, 90 N. W. 2d 814, and Brenning v. Remington, 136 Neb. 883, 287 N. W. 776. We think these cases are distinguishable and inapplicable. It is true as plaintiff's counsel state that Devaney had stationed himself in the street to direct and stop traffic and prepare to motion Stock to drive his bus into the street because there was a gap in the traffic at that time. He was stationed in a southbound lane of traffic at that time which he thought was clear of moving vehicles approaching from his rear. It is contended that circumstances and necessity may sometimes require police officers, traffic directors, vendors, and other persons to place themselves in the street to carry out their duties and that doing so for necessary purposes does not constitute contributory negligence. In the Lance case, plaintiff was standing 6 feet in front and about a foot to the left of the bus just before the accident and in plain sight of Lance. Plaintiff attempted to avoid injury by stepping in front of the bus to a place of safety. Lance turned sharply in front of the bus in turning off the

street, knowing that plaintiff was standing in his path. This court held that there was no negligence on the part of plaintiff. But that is not this case. In the Remington case, plaintiff was standing in the street beside his parked car when struck by an oncoming vehicle. This was factually held not to be a "crossing the street" between intersections case and constituted no basis for a holding of contributory negligence, particularly within the rule of Doan v. Hoppe, 133 Neb. 767, 277 N. W. 64.

The applicable rule is stated in Carman v. Hartnett, 161 Neb. 576, 74 N. W. 2d 352, as follows: "In the instant case the plaintiff, according to his own testimony, looked in both directions before he started across the street. After he started across, he says, he continued to look north but never again looked to the south. As he approached the center of the street, he should have looked to the south, particularly where it was the more likely source of danger. It was negligence of such a character as will bar a recovery as a matter of law. The proximate cause of the accident was his failure to keep a constant lookout for his own safety in all directions of anticipated danger." In the instant case, the plaintiff's decedent failed to keep a constant lookout for vehicles coming from the north on the one-way street in which he stood according to his own evidence. He was guilty of contributory negligence more than slight and a verdict should have been directed against plaintiff. Alleged errors in the instructions or occurring in the course of the trial are therefore irrelevant, since the jury arrived at a verdict consistent with the directed verdict that should have been granted. Nekuda v. Allis-Chalmers Manuf. Co., 175 Neb. 396, 121 N. W. 2d 819; Knuth v. Singer, 174 Neb. 182, 116 N. W. 2d 291.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ARTHUR TURNER, APPELLANT.
183 N. W. 2d 763

Filed February 11, 1971. No. 37641.

1. **Criminal Law: Guilty Plea.** A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily.
2. ———: ———. The Standards Relating to Pleas of Guilty promulgated by the American Bar Association outline what should be the minimum procedure in the taking of pleas of guilty.

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

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

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

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

SPENCER, J.

This is an appeal from a judgment and sentence of 3 to 5 years in the Nebraska Penal and Correctional Complex on a guilty plea to the charge of uttering a forged instrument on the premise that the record fails to affirmatively show defendant pled guilty voluntarily, understandingly, and intelligently and with full knowledge of the rights he was waiving by his plea. We affirm.

Defendant appeared in district court with his attorney, a member of the staff of the Douglas County public defender's office, and on request was granted leave to withdraw his plea of not guilty and thereupon pled guilty. Defendant is represented in this appeal by another member of the Douglas County public defender's staff.

Essentially, defendant relies on Boykin v. Alabama, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274. Defendant contends that Boykin requires an affirmative showing in

the record that the trial court advised him of his privilege against compulsory self-incrimination as well as his right to confront his accusers before a determination of his waiver of these constitutional guarantees. We do not interpret Boykin so strictly. What Boykin says is that the court cannot presume a waiver of federal constitutional rights from a silent record. That case requires that a plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily. This the present record shows.

If we understand defendant's argument, in his reliance on Boykin, as well as on McCarthy v. United States, 394 U. S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418, which deals with Rule 11 of the Federal Rules of Criminal Procedure, it is his contention that the trial court must direct a defendant's attention to each and every constitutional right and then obtain a separate expressed verbal waiver of each of them before it can find an intelligent and voluntary waiver. This requirement of an item-by-item review of constitutional rights on a guilty plea is a strained and a too extreme construction of those cases.

A plea of guilty embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional. The constitutional rights, both state and federal, involved in such waiver include many others in addition to those mentioned above. As we said in Boykin v. Alabama, *supra:* "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial." And in McCarthy v. United States, *supra:* "A defendant who enters such a plea simultaneously waives several constitutional rights, * * *."

The criteria is whether or not the defendant understands the relevant factors involved in a guilty plea. Before accepting a guilty plea a judge is expected to sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible pen-

alty, and the effect of his plea. Without specifically detailing the exact procedure to be followed, we state that the Standards Relating to Pleas of Guilty promulgated by the American Bar Association outline what should be the minimum procedure in the taking of such pleas.

There was substantial compliance with the American Bar Association standards herein. The trial court specifically asked the defendant if he understood he was waiving his right to a jury trial; if he was aware of the penalty of the offense; whether any promises had been made to him; and whether he had discussed all his rights with his counsel. The court also specifically asked counsel if there was any doubt in counsel's mind that the defendant's action was voluntary and that he understood what he was doing and the consequences of a guilty plea. On two occasions, defendant's counsel assured the court that he had no doubt the defendant's action was voluntary and that the defendant understood what he was doing.

There are many controlling distinctions between this case and Boykin. While defendant in Boykin was represented by counsel, the record is silent as to whether his plea was understandingly made. Nor does the record in Boykin show whether the trial judge even spoke to the defendant or that the defendant had ever counseled with his counsel. Unlike Boykin, the defendant here pled not guilty when arraigned and before trial 4 months later withdrew his not guilty plea and pled guilty. During this period he was represented by counsel.

The court in imposing sentence noted that the presentence report disclosed a lengthy record with other charges, including one for grand larceny still pending. While this is immaterial in this appeal, it may shed light on a reason for a change of plea.

The standard for determining the validity of guilty pleas is enunciated as follows in North Carolina v. Al-

ford, —— U. S. ——, 91 S. Ct. 160, —— L. Ed. 2d ——: "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." In this case the United States Supreme Court held a guilty plea valid although the defendant protested his innocence and stated he was pleading guilty to avoid the death penalty.

We affirm the judgment.

AFFIRMED.

CARTER, J., concurring in result.

I agree with the result in this case. I do not agree with that part of the opinion which supports the result because there was substantial compliance with the American Bar Association standards relating to pleas of guilty. The American Bar Association performs many useful services for the bench and bar, but its work does not rise to the status of legislative acts or judicial holdings. I submit that its committee reports, although finally approved by it, are not authoritative in declaring the law of this state. It is the inference that its standards relating to pleas of guilty are required to be followed that gives rise to this concurrence.

NEWTON, J., joins in this concurrence.

ESTHER SANCHEZ, APPELLEE AND CROSS-APPELLANT, V. CRUZ SANCHEZ, APPELLANT AND CROSS-APPELLEE.
183 N. W. 2d 743

Filed February 11, 1971. No. 37646.

1. **Divorce.** Factors to be considered in an award of alimony or a division of property in a divorce case are the age and health of the parties; their earning ability; their relative conduct leading up to the divorce; the duration of the marriage; the social standing of the parties; the property of the parties and its value at the time of the divorce, its income-producing capacity, the manner in which it was acquired, and the respective contributions that each party has made thereto; the property

of the parties and its value at the time of the marriage; and all other relevant facts and circumstances.

2. **Divorce: Parent and Child.** The amount to be awarded as child support rests within the sound discretion of the court. In each instance it depends upon the needs of the child or children, the financial condition and earning ability of the father, the family standard of living, and all other relevant facts and circumstances.

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

Van Steenberg, Winner & Brower, for appellant.

Byron M. Johnson, for appellee.

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

NEWTON, J.

This is a divorce action. The only issues on appeal involve the allowance or disallowance of child support and alimony. We affirm, as modified, the judgment of the district court.

The parties were married November 1, 1967. They have one child born on June 29, 1969. They separated in October 1969. The cause of the separation and the principal ground for divorce involved defendant's misconduct with another woman. The trial court ordered defendant to pay $125 per month child support, denied alimony, awarded to plaintiff a refrigerator, bedroom set, household goods, and her personal effects. Defendant was awarded the remaining property consisting of a tape recorder, two guns, a power saw, camera, colored T.V. and stereo set, clock, gas stove, a 1969 Dodge automobile, and a 1964 Ford automobile. The automobiles were heavily encumbered and there were also liens against some of the other personal property, including the refrigerator. Defendant was directed to make all payments accruing on the liens, but plaintiff was making the payments due on the refrigerator.

Defendant was steadily employed with an average take-home pay of approximately $360 per month. Plain-

tiff had worked as a presser in a cleaning establishment for a weekly wage of $29. She temporarily lived in a small house owned by her mother, is not working, and receives $55 per month in welfare assistance.

The rules governing situations such as are here presented are well established but not always simple to apply. We have said: "Factors to be considered in an award of alimony or a division of property in a divorce case are the age and health of the parties; their earning ability; their relative conduct leading up to the divorce; the duration of the marriage; the social standing of the parties; the property of the parties and its value at the time of the divorce, its income-producing capacity, the manner in which it was acquired, and the respective contributions that each party has made thereto; the property of the parties and its value at the time of the marriage; and all other relevant facts and circumstances." Gartside v. Gartside, 181 Neb. 46, 146 N. W. 2d 777. We have also said: "No fixed rule has been, or can be established to govern in cases of this kind. In instances where somewhat similar facts to those in this case existed, larger amounts of child support have been granted, and in other, lesser amounts. The question in each case must be decided on its facts. Generally the status, character, and situation of the parties and all the attendant circumstances must be considered, and the amount determined in accordance with the best judgment and sound discretion of the court." Christoffersen v. Christoffersen, 151 Neb. 763, 39 N. W. 2d 535.

In propositions of this nature, with the great variation in circumstances encountered in cases dealing with the problem, much must, of necessity, be left to the sound discretion of the court. Here the parties were married for a comparatively short time; they have little property, but there is a great disparity in their respective earning abilities. This is particularly true at present when the plaintiff has a small child to care for. Were she to seek employment, she would be required to expend much

of her earnings to employ what is commonly termed "a baby sitter." The divorce was occasioned solely by defendant's misconduct; yet, after payment of the $125 for child support, he still retains $235 per month for his own use. At the same time, plaintiff has no income of her own and is dependent upon welfare assistance. The sum of $125 per month for the support of a small child seems high although it is a fact of life that the first child adds more to the family expense than a second or third. The cost of maintaining a home with all its attendant expense is not much greater for two or three than for one. The amount to be awarded as child support rests within the sound discretion of the court. In each instance it depends upon the needs of the child or children, the financial condition and earning ability of the father, the family standard of living, and all other relevant facts and circumstances. See 24 Am. Jur. 2d, Divorce and Separation, § 839, p. 951.

The trial court might well have reduced the sum allowed for child support and made an additional allowance in the nature of alimony. This, it appears, would be the logical thing to do, yet the total sum allowed is not unreasonable. We believe child support payments should be reduced to $75 per month. Plaintiff's cross-appeal requests the allowance of alimony and we find this would be proper. Alimony in the sum of $3,200, payable in semimonthly installments at the rate of $50 per month, is awarded to plaintiff.

The judgment of the district court is affirmed as modified. Plaintiff is allowed the sum of $300 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

THE BEREAN FUNDAMENTAL CHURCH COUNCIL, INC., OPERATING THE CHRISTIAN SUPPLY CENTER, APPELLANT, V. BOARD OF EQUALIZATION, COUNTY OF LANCASTER, ET AL., APPELLEES.
183 N. W. 2d 750

Filed February 11, 1971. No. 37648.

1. **Revenue and Taxation: Property.** Property owned and used exclusively for educational, religious, charitable, or cemetery purposes is exempt from taxation when such property is not owned or used for financial gain or profit to either the owner or user.
2. **Revenue and Taxation: Property: Statutes.** Statutes exempting property from taxation should be strictly construed.
3. ———: ———: ———. One contending his property is exempt from taxation must clearly show that he is within the exemption provided by statute.
4. ———: ———: ———. The burden of proof is upon one claiming property to be exempt from taxation to establish that its predominate use is for one of the purposes set out in section 77-202, R. S. Supp., 1969.
5. **Revenue and Taxation: Property.** It is the exclusive use of property which determines its exempt character. It is the use of property as distinguished from the use of income from the property that determines whether it is exempt from taxation.

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

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

Paul L. Douglas, Floyd A. Sterns, and Robert R. Gibson, for appellees.

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

SPENCER, J.

This is an appeal from an order denying the request of The Berean Fundamental Church Council, Inc., that the inventory and fixtures of its bookstore, Christian Supply Center, be declared tax exempt. We affirm.

The Berean Fundamental Church Council, Inc., hereinafter referred to as appellant, is a nonprofit corpora-

tion with its principal office in North Platte, Nebraska. Appellant owns the property of its 46 churches serving congregations in 7 states. It also owns four religious bookstores, denominated religious supply centers, including the Christian Supply Center, hereinafter referred to as Center, located in Lincoln, Nebraska. One of appellant's principal functions is the promotion of a conservative or fundamental approach to the theological gospels of Jesus Christ. It predicates its claim for exemption herein on its contention that Center is an essential part of the literature ministry of the church. In essence, appellant contends that the sale of its inventory is merely an incident of its primary and dominant purpose to supply its own members with proper religious philosophy, and to evangelize those of a different persuasion.

Center is essentially a religious bookstore, selling religious supplies and related items to churches, ministers, lay church leaders, and the general public. The ministers of appellant's denomination use Center to obtain religious materials and supplies. However, exhibit 4 indicates that Center regularly sells to at least 227 churches, embracing more than 17 different denominations. A large proportion of these churches would appear to be adherents of denominations embracing a much more liberal theological doctrine than that espoused by appellant.

Substantially all of the items Center offers for sale are available in a competing religious bookstore in Lincoln, Nebraska. The manager of Center, who is referred to as its minister of literature, is not an ordained minister and had no bookstore experience previous to his present position. Prior thereto, he was employed as a parts manager for a Ford dealer. The inventory of Center was acquired in 1967 for $25,000, with money borrowed for this purpose. The net profits from the operation of the business are used to pay the principal and interest on the money borrowed, and the evidence is

that any excess is and will be used to increase inventory.

Article VIII, section 2, Constitution of Nebraska, provides in part: "The Legislature by general law may exempt * * * property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user. * * * No property shall be exempt from taxation except as provided in the Constitution."

Pursuant to the grant of power, the Legislature has enacted section 77-202, R. S. Supp., 1969, which, so far as pertinent provides: "(1) The following property shall be exempt from taxes: * * * (c) Property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user."

The question presented is whether the property of Center is used exclusively for educational or religious purposes within the ambit of the constitutional grant. We hold that it is not. Statutes exempting property from taxation should be strictly construed, and one contending that his property is exempt must clearly show that he is within the exemption provided by statute. Todd v. County of Box Butte, 169 Neb. 311, 99 N. W. 2d 245. In Nebraska Conf. Assn. Seventh Day Adventists v. Board of Equalization, 179 Neb. 326, 138 N. W. 2d 455, we held: "The burden of proof is upon one claiming property to be exempt from taxation to establish that its predominate use is for one of the purposes set out in section 77-202, R. R. S. 1943."

Center sells educational and religious materials, not only to the adherents of appellant's religious philosophy but also to virtually every Christian denomination within its trade area, as well as to the general public. It puts out catalogues and advertises in newspapers and on the radio in its trade territory to promote the sale of its merchandise. The inventory maintained by Cen-

ter is available, at least by order, from regular commercial outlets. The fact that Center is handling materials of an educational or religious character does not bring it within the ambit of the constitutional grant of exemption. If that were so, every religious bookstore would be entitled to tax exemption.

Center is operating at a profit in direct competition with other bookstores handling educational and religious supplies. While the profit is used to pay off indebtedness and to increase inventory, Center is still a profit-making enterprise. Even if the time may arrive in the distant future when the profit might be available for religious purposes, the situation would not be changed. See Nebraska Conf. Assn. Seventh Day Adventists v. Board of Equalization, 179 Neb. 326, 138 N. W. 2d 455, in which we said: "* * * it is the exclusive use of property which determines its exempt character. It is the use of property as distinguished from the use of the income from the property that determines whether or not it is exempt from taxation."

Appellant urges that the dominant purpose of Center is to promote appellant's particular religious philosophy and to make available selected Christ-centered literature is an integral part of appellant's religious ministry. It urges that this court in the past has given a liberal construction to the terms "educational," "religious," and "charitable," which if followed herein would bring appellant within the statute. While our previous cases may not have limited these words to their strictest possible construction, we are required to apply a rule of strict construction to the statute. Todd v. County of Box Butte, 169 Neb. 311, 99 N. W. 2d 245.

Appellant had the burden of proving its right to the claimed tax exemption. It has not met that burden. The criteria is not what appellant is seeking to accomplish with its property, but rather what is actually done with that property that establishes the nature of its use. Primarily, Center's dominant purpose is to merchandise

religious materials for a profit. The making available of material embracing its particular theological doctrine is incidental to that dominant purpose. Center's fixtures are used to promote the sale of its inventory which is sold for profit in a competitive market. To hold that the exclusive use of Center's property is for educational or religious purposes would require us to close our eyes to the realities of the enterprise. To grant exemption herein would permit every religious-connected, profit-oriented business to avoid taxation while directly competing with like taxpaying enterprises. The evil inherent in so strained a construction, essentially the grant of an indirect subsidy, should be readily apparent.

Judgment affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROENA ANDERSON, ALSO KNOWN AS ROENA IVORY, APPELLANT.
183 N. W. 2d 766

Filed February 11, 1971. No. 37651.

1. **Criminal Law: Sentences: Insane Persons.** Insanity as a bar to the imposition of sentence presents a factual issue for the determination of the court.
2. **Criminal Law: Trial: Insane Persons.** If, after the commission of an offense, it appears that the accused may have become insane, and an examination is had by a psychiatrist who reports that she is presently sane and mentally competent, in the absence of a request therefor, a formal hearing is not required.

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

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

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

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

NEWTON, J.

Defendant was convicted by a jury of the crime of arson. She now complains that there was not a proper determination of her sanity at the time sentence was pronounced. We affirm the judgment of the district court.

Defendant's past evidenced that she was mentally unstable and she had twice been committed to a mental institution for comparatively short periods. That she was sane at the time of her trial is conceded. After her trial and conviction, she threatened to commit suicide while being held in the county jail. On being informed of this situation, the trial court deemed it advisable to transfer her to the State Reformatory for Women and from thence she was taken to the Lincoln State Hospital for examination. The superintendent of the hospital reported that she had twice before been in that institution and that: "Basically she is a somewhat retarded young lady with strong sociopathic tendencies, and a propensity for becoming disorganized under pressure. She becomes angry, hostile, emotionally unstable, and shows an inappropriate affect (sic). At other times she is depressed and anxious. Her impulse control is extremely poor. At the present time she is clinically psychotic.

"Were she to be sentenced at the present time and sent to York, it is our impression that they would not be able to keep her there very long and she would be returned to the Lincoln State Hospital. If she improves to the point where her psychosis is in a state of remission, we would elect to return her to York. Then at the discretion of the court she could be returned for sentencing." Approximately 4 months later, the following report was submitted: "Rowenia Anderson has been psychiatrically evaluated at the Lincoln Regional Center, and at the present time it is considered that she is a fit subject for sentencing." Following this report, sentence was pronounced.

Defendant contends that a full hearing should have been had before a jury or the court on the question of her sanity. Section 29-1822, R. R. S. 1943, provides that when a defendant becomes insane after a verdict of guilty, and before judgment is pronounced, judgment shall be deferred while the insanity continues. No procedure for determination of sanity is prescribed by statute. Defendant maintains that a jury should have been impaneled to determine the question but failed to move for a further hearing before either a jury or the court or to object to the imposition of sentence. She relies on Walker v. State, 46 Neb. 25, 64 N. W. 357. This case is not applicable as it was decided under a former statute which specifically required that a jury be impaneled in such cases. See G. S. 1873, § 454, p. 823. At common law it was for the court to determine whether a defendant was mentally fit to be put on trial or sentenced and the nature of the investigation to be made on the issue of sanity was vested in the sound discretion of the court. See Annotation, 142 A. L. R. 961. In Sedlacek v. Greenholtz, 152 Neb. 386, 41 N. W. 2d 154, this court ruled that insanity as a bar to the imposition of sentence presents a factual issue for the determination of the court. The adoption of section 29-1823, R. S. Supp., 1969, referring to delay in the trial of one mentally incompetent, does not change the common law in such cases but leaves it in the discretion of the court to hold such hearing as it deems necessary. We adhere to the common law rule that when a person becomes insane after the commission of the offense charged, and before judgment is pronounced, such person's fitness to proceed presents a question to be resolved by the court, in the exercise of a sound discretion.

The means employed in resolving the question of sanity is discretionary with the court. "If at any time while criminal proceedings are pending facts are brought to the attention of the court, either from its own observation or from suggestion of counsel, which raise a

doubt as to the sanity of the defendant, the question should be settled before further steps are taken. However, though a hearing on the issue is sometimes said to be obligatory if a reasonable doubt is raised, the doubt referred to is a doubt arising in the mind of the trial judge, as distinguished from uncertainty in the mind of any other person. Hence, except as otherwise provided by statute, the matter of granting an investigation rests in the discretion of the trial court. * * *

"The opinions of experts, if they favor present insanity, may be sufficient to require a formal inquisition; on the other hand, opposite opinions may be sufficient to justify putting the defendant on trial without further inquiry. And the court may order the defendant committed for a reasonable period for treatment and observation with a view to determining whether there is reasonable ground to doubt his sanity." 21 Am. Jur. 2d, Criminal Law, § 65, p. 147. See, also, Annotation, 142 A. L. R. 961. In Coffman v. United States, 290 F. 2d 212 (10th Cir., 1961), following an examination and report by a psychiatrist, it was held: "The court is not compelled to hold a hearing to determine the mental competency of the accused if the report of the psychiatrist does not indicate that the defendant is presently insane or mentally incompetent."

In Hunter v. United States, 323 F. 2d 625 (D. C. Cir., 1963), it was held: " 'Without more, therefore, we are of opinion that, upon the discharge of an accused from the hospital as cured and in the absence of anything showing the invalidity of the certificate of the superintendent, the court is required to proceed with the trial on the suspended criminal indictment, and no further proceedings on the question of sanity are necessary. * * *.' "

In the present instance, an examination of defendant in regard to her mental condition was had, a report received that she was not mentally able to proceed and, a considerable time later, a second report indicating that

there had been a remission of her mental difficulties and that she had been discharged from the hospital. There is nothing in her examination by the court at the time she appeared for sentencing that indicates a then insane condition. The psychiatrist's report was not challenged or questioned and no objection was made to the court's proceeding with the pronouncement of judgment. Under the circumstances, we are unable to perceive any abuse of discretion or prejudice to defendant.

The judgment of the district court is affirmed.

AFFIRMED.

SMITH, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. ALBERT E. WALKER, APPELLANT.
183 N. W. 2d 745

Filed February 11, 1971. No. 37675.

Criminal Law: Sentences: Appeal and Error. It is the function of the district court to impose sentences upon persons convicted of crime in accordance with the applicable statute. In the absence of an abuse of discretion, such a sentence will not ordinarily be disturbed on appeal.

Appeal from the district court for Dundy County: JACK HENDRIX, Judge. Affirmed.

Leon C. Hines, for appellant.

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

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

CARTER, J.

Defendant was charged with forging and uttering a check on March 31, 1970, in Dundy County, Nebraska. Defendant entered a plea of guilty and was sentenced to a term of 4 to 8 years in the Nebraska Penal and Cor-

rectional Complex and to pay a fine of $1. The defendant has appealed.

Defendant assigns as error the failure of the court to consider defendant's drug addiction, the question of defendant's mental condition at the time of sentence, and the excessiveness of the sentence.

The bill of exceptions shows that defendant had competent legal counsel at his preliminary hearing and at all times subsequent thereto. The defendant was fully advised of his legal rights, constitutional and otherwise. He was fully advised of the consequences of his plea of guilty. He informed the court that he desired to plead guilty, that he had not been coerced in any manner, and that his plea of guilty was voluntary on his part. His legal counsel was present and assisted the defendant in the sentencing proceeding. There is no testimony in the record regarding his drug addiction or his mental condition during the proceedings other than statements of himself and his counsel made to the court after the plea and immediately prior to sentence. There was nothing before the court to support a finding of want of criminal intent due to drug addiction, nor anything to indicate that he was mentally incompetent at the time sentence was imposed.

In presenting defendant's position to the court, all of which appears in this record, counsel for the defendant very frankly pointed up the following in behalf of his client: Defendant is a single man, 47 years of age, who has been married to at least one common law wife. He has no children. Defendant's home is in Keyser, West Virginia. His 85-year-old father resides there and is financially unable to render any assistance to the defendant, the statement made being that, "They just don't have a dime." Defendant says that he has had training and experience as a welder and tree trimmer. He admits uttering the check with which he is charged with forging. He knew that the check was forged when he passed it. The rap sheet of the Federal Bureau of

Investigation is in evidence. It indicates that defendant has traveled about the country leaving "no account," "insufficient fund," and forged checks in his wake. He has been convicted of forgery on at least eight different occasions and lesser check offenses too numerous to mention.

Counsel for defendant asserted to the court that defendant was addicted to the use of alcohol and harmful drugs. His use of harmful drugs was so bad that he could not control their use and that he would use "street drugs" without regard to their drug content. It would be fair to say that his addictions to alcohol and harmful drugs and his association with dissolute women had reduced him to the state of a wandering human derelict.

In response, the county attorney did not dispute the foregoing facts and the degrading condition in which defendant now finds himself. He did point up the number of previous convictions and defendant's previous bad record. He contended, however, that the public was entitled to protection against such criminal conduct and a deterrent against the future criminal conduct of this defendant.

The trial court, in considering the sentence to be imposed, was faced with a dilemma: The enforcement of the law on the one hand for the protection of the public and the rehabilitation of the defendant on the other. The defendant asserted a desire to be freed from the addictions with which he was afflicted, but he had neither the finances nor the willpower to accomplish that end. It is evident from the statements of the court that it was a matter of deep concern to him. The court well knew that the restraint of the defendant for a period of 1 or 2 years was not long enough to insure rehabilitation. It appears, also, that the trial court felt that the best chance of rehabilitation of defendant, under the circumstances, was to sentence the defendant to the penal complex for such a period of time as to give the State a reasonable time to effectually treat the defendant

in facilities available to the State. With the foregoing considerations in mind, the defendant was sentenced to 4 to 8 years in the penal complex. The sentence is well within the term fixed by statute. We can find no abuse of discretion by the trial court. We are in accord with the apparent reasoning of the trial court in disposing of a difficult sentencing problem.

The sentence imposed by the district court is affirmed.

AFFIRMED.

SPENCER, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. DAVID CLIFTON WADE, APPELLANT.
183 N. W. 2d 769

Filed February 11, 1971. No. 37686.

Criminal Law: Guilty Plea. This case is controlled by State v. Turner, ante p. 424, 183 N. W. 2d 763.

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

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

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

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

SPENCER, J.

This is an appeal from a judgment and sentence of 1 to 3 years in the Nebraska Penal and Correctional Complex on a guilty plea to a charge of assault with intent to inflict great bodily injury. Defendant premises his appeal on the ground that the record fails to affirmatively show that he pled guilty voluntarily, understandingly, intelligently, and with full knowledge of the rights he was waiving by his plea. We affirm.

Defendant appeared for arraignment with counsel, who waived the reading of the complaint and at the specific direction of the court the information was read in its entirety to the defendant. The court inquired as to whether the defendant understood the nature of the charge, whether or not he understood that the crime carried a penalty of from 1 to 20 years in the Penal Complex, and whether or not he had consulted his attorney about his rights in the matter. The court then asked defendant's attorney if he was satisfied in his own mind that the defendant was aware of the nature and consequences of a plea of guilty to the charge. After an affirmative answer, the court asked whether or not there had been any plea bargaining, and was advised that there had been; that another charge was pending which would not be prosecuted; and that the county attorney would make a recommendation for a sentence of 1 to 3 years. After the defendant's plea, a presentence investigation was made, and then sentence was imposed.

This case presents essentially the same question as that presented in State v. Turner, *ante* p. 424, 183 N. W. 2d 763, which is controlling herein.

Judgment affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GLENN JAMES LINDSAY, APPELLANT.
184 N. W. 2d 583

Filed February 11, 1971. No. 37703.

Criminal Law: Guilty Plea. This case is controlled by State v. Turner, ante p. 424, 183 N. W. 2d 763.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

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

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

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

SPENCER, J.

This is an appeal from a judgment and sentence of 2 to 4 years in the Nebraska Penal and Correctional Complex on a guilty plea to a charge of forgery. Defendant premises his appeal on the ground that the record fails to affirmatively show that he pled guilty voluntarily, understandingly, intelligently, and with full knowledge of the rights he was waiving by his plea. We affirm.

Defendant appeared for arraignment with counsel for the purpose of withdrawing a plea of not guilty on a previous arraignment. The court discussed the situation in detail with the defendant. Actually, the court's examination and discussion with the defendant covers eight pages of the bill of exceptions. While it was a thorough examination, the court did not specifically remind the defendant of his privilege against self-incrimination and of his right to confront and cross-examine his accusers, although the court did, among other things, tell the defendant that if he went to trial he would have his attorney with him during the entire trial representing him and seeing that his rights were protected and that he would be given a fair and impartial trial.

The appeal herein is based on defendant's assumption that the failure of the trial court to specifically ask him if he was waiving his privilege against self-incrimination and the right to confront and examine his accusers presents a record that fails to show that he had full knowledge of the rights he was waiving by his plea.

This case presents essentially the same question as that presented in State v. Turner, *ante* p. 424, 183 N. W. 2d 763, which is controlling herein.

Judgment affirmed.

AFFIRMED.

TERRELL R. WIEKHORST, APPELLEE AND CROSS-APPELLANT, V. RURAL ELECTRIC COMPANY, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE.

183 N. W. 2d 747

Filed February 11, 1971. No. 37756.

1. **Workmen's Compensation.** A claimant who sustains the loss of his right hand and a permanent partial loss of use of his right leg is entitled to compensation under subdivision (1) of section 48-121, R. R. S. 1943, for that proportion of the compensation allowed for total disability as the extent of the loss of use of the two members bears to the total loss of such members.
2. **Workmen's Compensation: Attorney and Client.** Where the employer appeals to the district court from the award of the Workmen's Compensation Court and fails to obtain any reduction in the amount of the award, the district court ordinarily should allow the employee a reasonable attorney's fee.
3. ———: ———. An attorney's fee allowed in a workmen's compensation case is to be taxed as costs against the employer, and may be allowed upon motion at a subsequent term.

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

Martin, Mattoon & Matzke, for appellant.

Van Steenberg, Winner & Brower, for appellee.

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

BOSLAUGH, J.

The plaintiff, Terrell R. Wiekhorst, was employed by the defendant, Rural Electric Company, Inc., as a lineman. On June 17, 1967, while repairing a power line, the plaintiff's right hand and right leg were severely burned when his right hand came in contact with a 7,200 volt line.

The plaintiff was about 12 feet above the ground when the accident happened. He fell to the ground with his belt around the pole. When he regained consciousness his right climbing spur or "hook" was still in the pole and he "couldn't get it loose." As a result of the

injury it was necessary to amputate the plaintiff's right hand.

The sole issue presented by the appeal is a question of fact. The issue is whether the plaintiff sustained a 2-member disability as a result of the accident on June 17, 1967. The compensation court and the district court both found that the plaintiff had sustained a 100 percent loss of use of his right hand and a 2 percent permanent partial disability of his right leg; and that the plaintiff was entitled to compensation under subdivision (1) of section 48-121, R. S. Supp., 1965, for a permanent partial disability of 51 percent. See Paulsen v. City of Lincoln, 156 Neb. 702, 57 N. W. 2d 666, 156 Neb. 872, 58 N. W. 2d 336.

The injury to the plaintiff's right leg consisted of three burned areas on the inner aspect of the leg between the knee and the ankle, and two burned areas on his foot near the arch. These were deep burns, particularly those on the leg, extending into the subcutaneous tissues and possibly the muscles. There is also a calcification over the inner aspect of the plaintiff's right knee. The plaintiff testified that his leg becomes tired and very sore at the knee joint on the inside under the large scar near the joint. The more he uses his leg, the more it bothers him. The burned areas also get dry, peel, and flake off.

There is substantial conflict in the medical testimony in this case concerning the disability to the leg. The four medical witnesses who testified for the plaintiff estimated his disability to be from 2 percent to 15 percent of the right leg. The defendant's medical witnesses found no compensable disability.

Dr. Dorwart estimated the plaintiff's disability at 15 percent. He based his opinion on the deep scarring of the leg, the weakening of the muscles, and the calcification resulting from a sprain of the medial ligament of the knee.

Dr. Maruyama thought there was a torn cartilage in the knee joint that should be repaired surgically. If

that operation were successful, he thought the permanent disability would be 5 percent. He had previously estimated the disability at 2 percent based upon the scarring near the knee joint.

Dr. Claussen estimated the disability at 15 percent of the knee. His opinion was based on the scarring and the calcification at the inner aspect of the knee.

Dr. Ries estimated the disability at 5 percent of the leg. His opinion was based on moderate laxity of the medial collateral ligament of the right knee with calcification at the origin of the inner ligament of the knee joint and some atrophy of the leg.

Dr. Preston was the treating physician and had performed the amputation of the plaintiff's hand. He testified that the plaintiff "carries no significant measurable objective functional loss in his right knee." He further stated that he could not think of anything that the plaintiff "would wish to do or would try to do, that he could not do, by reason of that leg, and it is on this basis that I do not feel that he carries any functional disability of significance in that leg." Dr. Preston thought it was "unlikely" that the calcification in the knee was a result of the accident, and that the plaintiff could still use his leg to climb poles if the scarred areas were properly padded. His testimony is subject to the interpretation that a disability exists, but that he believes it is not of industrial significance.

Dr. Webster testified that he could not find anything that "constituted an actual disability of function of the extremity" from the accident. Dr. Webster thought the calcification near the knee joint was of little significance and he found no atrophy.

Although the medical witnesses differ as to the exact cause of the disability, the preponderance of the evidence shows that the plaintiff has some permanent disability to his right leg as a result of the accident on June 17, 1967. As we view the record, it sustains the finding of the compensation court and the district court

that the plaintiff has a 2 percent permanent partial loss of use of his right leg.

By cross-appeal, the plaintiff contends that the district court should have allowed an attorney's fee to the plaintiff because the defendant failed to obtain any reduction in the amount of the award by the appeal to the district court. Since 1935, the statute has provided that where the employer appeals to the district court from the award of the compensation court and fails to obtain any reduction in the amount of the award, the district court "may" allow the employee a reasonable attorney's fee. § 48-125, R. R. S. 1943. This has been generally construed to mean that the district court should allow an attorney's fee where the employer appeals but fails to obtain a reduction in the amount of the award. See Brokaw v. Robinson, 183 Neb. 760, 164 N. W. 2d 461.

The record in this case does not show that the plaintiff's right to an attorney's fee has been previously determined by the district court. While we are of the opinion that the trial court should allow the plaintiff a reasonable amount for the services of his attorney in that court, it is unnecessary to modify the judgment for that purpose. An attorney's fee is to be taxed as costs and may be allowed upon motion at a subsequent term. See Solomon v. A. W. Farney, Inc., 136 Neb. 338, 286 N. W. 254.

The plaintiff is allowed the sum of $750 for the services of his attorney in this court.

The judgment of the district court is affirmed.

AFFIRMED.

EUGENE BRAVO, APPELLANT, V. STANLEY P. LACZ, APPELLEE.
183 N. W. 2d 924

Filed February 19, 1971. No. 37567

Motor Vehicles: Trial: Witnesses. In an automobile accident case it is not ordinarily prejudicial error for the court to exclude cross-examination of a witness for defendant to prove these facts: The witness made a claim against defendant for damage sustained in the accident, and defendant paid the claim.

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

Tesar, Reefe & Meazell, for appellant.

D. Nick Caporale and John R. Timmermier of Schmid, Ford, Snow & Mooney, for appellee.

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

SMITH, J.

Plaintiff appeals after an adverse jury verdict on his pedestrian-automobile accident claim. He asserts instructional error and unfair restriction of his right of cross-examination.

The accident occurred at or near the intersection of 18th Street and Missouri Avenue, Omaha, on December 22, 1964, at 6 p.m. While plaintiff was walking southward across Missouri Avenue, an automobile operated by Marilyn Covalciuc approaching from the west slowed or stopped for him. An automobile driven by defendant was following the other automobile. The two collided. Defendant's automobile continued forward and struck plaintiff.

The court did not instruct on an ordinance requirement of a horn signal. Absence of a horn signal under the circumstances was not evidence of negligence. There was no error.

The court had ruled that it would exclude certain cross-examination of Marilyn Covalciuc, a witness for defend-

ant. Plaintiff sought only to prove that she had made a claim against defendant for damage sustained in the accident and that defendant had paid the claim. Plaintiff ostensibly was seeking to prove bias. Similar evidence has been held admissible. See Merk v. St. Louis Public Service Co. (Mo., 1957), 299 S. W. 2d 446. It may suggest bias, but without other circumstances, the policy against inquiry into compromise and settlement of a disputed claim controls. In an automobile accident case it is not ordinarily prejudicial error for the court to exclude cross-examination of a witness for defendant to prove these facts: The witness made a claim against defendant for damage sustained in the accident, and defendant paid the claim. See, Shanowat v. Checker Taxi Co., Inc., 48 Ill. App. 2d 81, 198 N. E. 2d 573 (1964); Esser v. Brophey, 212 Minn. 194, 3 N. W. 2d 3 (1942); Rynar v. Lincoln Transit Co., Inc., 129 N. J. Law 525, 30 A. 2d 406 (1943).

The judgment is affirmed.

AFFIRMED.

ERNEST B. WINTROUB, APPELLANT, V. ABRAHAM CATERING SERVICE, APPELLEE.

183 N. W. 2d 741

Filed February 19, 1971. No. 37624.

1. **Food: Warranty: Damages.** A caterer furnishing food for hire impliedly warrants that the food is wholesome and fit for human consumption and is liable for injuries proximately caused by a breach of the warranty.
2. **Food: Damages.** A caterer is not liable for damages caused by a foreign object in food unless the foreign object was in the food at the time the food left the exclusive possession and control of the caterer.

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

Foulks, Wall & Wintroub and David J. Cullan, for appellant.

Cassem, Tierney, Adams & Henatsch and Stephen A. Davis, for appellee.

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

BOSLAUGH, J.

The plaintiff, Ernest B. Wintroub, fractured a tooth when he bit down on an olive pit while eating Steak Diane at a friend's home on January 13, 1968. The food had been prepared and furnished by the defendant, Abraham Catering Service. This action was brought to recover the damages sustained by the plaintiff as a result of the injury.

The jury returned a verdict for the defendant and the plaintiff has appealed. The only question presented is whether the evidence sustains the verdict and judgment for the defendant.

The plaintiff was attending a cocktail supper in honor of his friend's birthday. The food was served from a buffet table. At the north end of the table there was a relish tray containing celery, carrots, radishes, onions, olives, pickled crab apples, and pickled pears. The olives were unpitted green olives. Other food was arranged along the table and at the south end of the table Clyde White, an employee of the defendant, was preparing Steak Diane by frying small portions of steak in a chafing dish. At the end of the table, to the left of White, there was a chafing dish containing the Diane Sauce.

The guests served themselves at the buffet table except for the steak which was placed on their plates by White. There was a serving spoon or ladle in the dish containing the Diane Sauce and the guests placed the sauce on their plates by themselves.

The sauce had been prepared that day by George

Abraham at the defendant's catering kitchen. The sauce consisted of diced vegetables fried in butter with seasoning. Olives were not an ingredient of the sauce and no olives or pits were placed in the sauce during its preparation. The sauce was placed in a container and covered with aluminum foil and a lid. It was delivered by the defendant to the residence where the party was held early that evening. A part of the sauce was then placed in a chafing dish to be heated. As the sauce in the chafing dish was used, the supply was replenished by White from the container in which the sauce had been delivered.

The plaintiff arrived at the party at about 9:30 p.m. He went to the buffet table at about 11:30 p.m. He obtained a plate and was served two or three pieces of steak by White. The plaintiff then placed 2 or 3 spoonfuls of the sauce on his plate by himself. He took no olives or other food except the steak and sauce, and possibly a roll. He then found a place to sit down and commenced to eat. On about the third bite, he bit into the olive pit and injured his tooth. The plaintiff described the pit as a black olive pit, probably the length of a dime, with no meat on it.

The action was brought upon the theory of breach of warranty. The doctrine was held applicable to a restaurant operator in Zorinsky v. American Legion, 163 Neb. 212, 79 N. W. 2d 172, and is equally applicable to a caterer under similar circumstances.

The plaintiff's theory of the case is that the olive pit was in the meat sauce at the time he placed the sauce on his plate and that the meat sauce had been at all times in the exclusive possession and control of the defendant or its employees. This is the basic issue in the case. The plaintiff was required to prove that the olive pit was in the sauce at the time it left the exclusive possession and control of the defendant.

There is no direct evidence as to when or how the olive pit entered the sauce. The plaintiff's evidence

supports an inference that the olive pit was in the sauce at the time it was placed on his plate. The defendant's evidence supports an inference that the olive pit entered the sauce sometime after it was placed in the chafing dish on the buffet table.

White testified that he observed some of the women "nipping" on the olives as they went through the serving line, and that they placed the pits on their plates. It is possible that an olive pit may have rolled off the plate of a guest into the dish containing the sauce, and thus have found its way into the sauce without the defendant being responsible.

We think that it would be too strict a rule to hold the defendant liable as a matter of law for any accidental contamination of the food that might have occurred after the guests had commenced serving themselves at the buffet table. This is not a case where the food was in a sealed container until just before being served, as in Asher v. Coca Cola Bottling Co., 172 Neb. 855, 112 N. W. 2d 252, or where the food was served to the guest by the defendant as in Zorinsky v. American Legion, *supra*.

In this case the jury could find that the food which was supplied by the defendant, other than the steak which was being prepared by White, was not under the defendant's exclusive supervision and control after it was placed on the buffet table. As we view the record, the jury was not required to return a verdict in favor of the plaintiff in this case. We conclude that the evidence is sufficient to sustain the verdict and judgment for the defendant.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEPHEN M. MATEJKA, APPELLANT.
183 N. W. 2d 917

Filed February 19, 1971. No. 37625.

1. **Criminal Law: Indictments and Informations.** Where the elements of a crime or offense defined by statute are set out in an information or complaint, it is sufficient.
2. ———: ———. Where words appear in an information or complaint which might be stricken out, leaving a crime or offense sufficiently charged, and such words do not tend to negative any of its essential averments, they may be treated as surplusage and be entirely rejected.
3. **Criminal Law: Evidence: Witnesses.** Evidence which tends to impeach a witness for the State in a criminal prosecution is ordinarily admissible to discredit the credibility of the witness and the weight to be given to his testimony.
4. **Criminal Law: Trial: Instructions.** It is the duty of the court upon the request of the accused to instruct the jury upon his theory of the case, if there is evidence to support it.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Reversed and remanded.

Warren C. Schrempp and O. William Von Seggern of Schrempp, Rosenthal & Bruckner, for appellant.

Herbert M. Fitle, Gary P. Bucchino, Kent H. Whinnery, John Gutowski, Ray Gaines, Theodore Carlson, Richard Dunning, Joseph Troia, and J. Patrick Mullin, for appellee.

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

CARTER, J.

The defendant was charged with willful reckless driving as defined by section 39-7,107.02, R. R. S. 1943. The jury returned a verdict of guilty and defendant has appealed to this court.

On August 1, 1969, at 4:40 a.m., the Omaha police were informed by a resident at 3634 Monroe Street that an automobile was parked at that point with its tail-

lights blinking and motor running without the observance of anyone in or about the car. A police cruiser responded at about 4:50 a.m. Defendant was asleep in the car. He was awakened and identified and, according to the two investigating policemen, was told to go home. Conversations between the police and defendant ensued during the course of which defendant ran to his car and took off at a high speed. The police gave chase and upon failure to stop the defendant after pursuing him in the area, defendant went south across the Douglas-Sarpy County line and gave himself up to a LaVista policeman.

The two policemen testified that after conversing with defendant he indicated no willingness to go home, that he jumped in his car and sped away, and that defendant refused to stop and evaded them until he crossed the county line in Sarpy County. They testified that defendant drove at speeds in excess of 60 miles per hour within the city of Omaha and ran 11 stop signs during the pursuit. The defendant testified that he was threatened with physical assault by the two policemen and that he sped away in fear of physical harm by the two investigating policemen. The evidence on the above events was conflicting, but the foregoing statement of the issues is sufficient for the purposes of this opinion.

The complaint in the case originally charged the defendant with willful reckless driving on August 1, 1969, at or near 71st and Cornhusker Drive at approximately 5:16 a.m., in Douglas County and within the corporate limits of the city of Omaha. At the close of the State's evidence, defendant moved for a dismissal on the ground that 71st and Cornhusker Drive was shown to be in Sarpy County and outside the corporate limits of the city of Omaha. The evidence shows that the words "at or near 71st and Cornhusker Drive" had been stricken from the complaint during the course of the trial. Defendant contended that the amended complaint was too indefinite and nebulous to sustain a conviction. The

motion for dismissal was overruled by the trial court. The ruling was correct. It is a general rule that where the elements of a crime or offense are set out in an information or complaint, the information or complaint is sufficient. Pauli v. State, 151 Neb. 385, 37 N. W. 2d 717; May v. State, 153 Neb. 369, 44 N. W. 2d 636. Where words appear in an information or complaint which might be stricken out, leaving an offense sufficiently charged, and such words do not tend to negative any of the essential averments therein, they may be treated as surplusage, and be entirely rejected. Hase v. State, 74 Neb. 493, 105 N. W. 253; Frank v. State, 150 Neb. 745, 35 N. W. 2d 816.

The defendant testified that the officers, when they first contacted him, made threats and stated they would "kick the hell" out of him. He claims he fled in fear of bodily harm at the hands of these officers. The officers deny the statements of the defendant. In any event, the police pursued the defendant into Sarpy County. They denied striking the defendant or threatening him in any way at any time. The defendant attempted to impeach the evidence of the officers by the evidence of one or more officers of LaVista and Sarpy County. Objections by the State were sustained and defendant offered to show by an officer of the LaVista police that the officers verbally abused the defendant, kicked him at least six times, threw him into a road ditch, and subsequently approached the LaVista police in an attempt to obtain a mitigation of the effect of their testimony. The evidence should have been admitted for two primary reasons: To impeach the Omaha officers and to show bias and prejudice against the defendant and as corroboration of the fear of bodily harm with which the defendant claims to have been instilled by their conduct. While the State was required to prove the act charged as occurring in the city of Omaha, questions of intent, prejudice, or other misconduct are not necessarily walled in by city limits or county lines. The acts of

the Omaha officers, if true, were a part of the whole incident or transaction and had a bearing on the defense asserted by the defendant. The trial court was in error in not admitting the proffered evidence for consideration of the jury.

The defendant assigns as error the failure of the trial court to instruct the jury on the theory of the defense. There is nothing in the instructions regarding the defense or the necessary elements of such a defense. Instructions were requested and refused which sought to have the theory of the defense submitted to the jury. This was prejudicial error. It is the duty of the court upon request of the accused to instruct the jury upon his theory of the case, if there is evidence to support it. Franz v. State, 156 Neb. 587, 57 N. W. 2d 139. See, also, State v. May, 174 Neb. 717, 119 N. W. 2d 307.

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

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. GARY DAVIS, APPELLANT.
183 N. W. 2d 753

Filed February 19, 1971. No. 37645.

1. **Trial: Instructions: Appeal and Error.** Jury instructions must be considered collectively; and even though a single instruction, if considered alone, might be incomplete, if the charge as a whole correctly states the law the verdict and judgment will not be reversed.
2. ———: ———: ———. The repetition of instructions, or a portion thereof, does not require a reversal unless it indicates that the effect thereof is to mislead or confuse the jury or to give undue prominence to an aspect of the case unfavorable to the party claiming error.
3. **Trial: Instructions.** It is not error to refuse a requested instruction if the court on its own motion has given the substance of such request in the actual charge to the jury.

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

Raymond E. Baker and Noyes W. Rogers, for appellant.

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

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

WHITE, C. J.

This is a criminal prosecution brought under section 28-410, R. S. Supp., 1969, in which the jury returned a verdict of guilty of shooting with intent to wound or maim. Error in the instructions is the sole ground assigned on appeal. We affirm the judgment and sentence of the district court.

Since there is no question presented concerning the sufficiency of the evidence, only a brief recitation of the facts is necessary for the disposition of the issues in this case. About 8 p.m., on November 24, 1969, the defendant, in the company of two brothers and two friends, went to a park in Columbus, Nebraska, in an automobile. The purpose was to settle an argument with an unidentified and unnamed person. On arriving at the park the defendant and several of his friends were approached by a group of young men referred to in the record as the "Scotus" group. An argument, abusive threats, the use of vile and abusive language, and other indications of violence ensued. Some of the members of these two groups were armed with clubs, pipes, and chains. On the approach of the larger "Scotus" group the defendant Davis and his friends returned to the two automobiles available to them. Davis entered the back seat of one of the automobiles, took a pistol from the back seat, held it out the back window, and fired it at an angle toward the ground. After firing the shot, both automobiles of the Davis group left. One bullet either directly or by ricochet lodged in the hand of one Michael Pollard. This incident gave rise to the arrest and prosecution of the defendant Davis.

The crime charged, of course, requires a specific intent. Blackstone v. State, 171 Neb. 155, 105 N. W. 2d 744; 22 C. J. S., Criminal Law, § 32, p. 115. The State and the defendant's counsel agree that the only issue presented here is whether or not the jury was properly instructed as to the requisite specific intent which is required in order to have found defendant guilty as charged of shooting with intent to wound or maim. Boiled down, the defendant contends that the giving of instructions Nos. 8 and 10 withdrew from the jury the material element of a specific intent to wound or maim.

The defendant would have us separately consider instructions Nos. 8 and 10. The law is well settled, however, that no such fragmentation is permissible. All of the instructions relevant to this issue must be construed together. Jury instructions must be considered collectively; and even though a single instruction, if considered alone, might be incomplete, if the charge as a whole correctly states the law the verdict and judgment will not be reversed. State v. Hall, 176 Neb. 295, 125 N. W. 2d 918; Parsons v. State, 61 Neb. 244, 85 N. W. 65.

Instruction No. 3, in pertinent part, states: "Under the information in this case, depending on the evidence, you may find the defendant:

"a. Guilty of maliciously shooting with *intent to wound or maim;* or

"b. Guilty of assault and battery; or

"c. Not guilty.

"The material elements which the state must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime charged, of shooting *with intent to wound or maim,* are:

"1. That the defendant, Gary Davis, did maliciously shoot at Michael Pollard with the *intent to wound or maim;* * * *

"The state has the burden of proving * * * shooting *with intent to wound or maim* necessary for conviction.

"If you find from the evidence * * * defendant guilty

of the crime of shooting *with intent to wound or maim*, * * *.

"On the other hand, * * * it is your duty to find the defendant not guilty of the crime of shooting *with intent to wound or maim.* You shall then proceed to consider the lesser included offense of assault and battery." (Emphasis supplied.)

In instruction No. 8 the court then separately instructed upon the issue of intent as follows: "The *intent* with which an act is done is a *necessary element* as to *the charge* against the defendant. Intent is a mental process and, as such, generally remains hidden within the mind where it is conceived. It is rarely, if ever, susceptible of proof by direct evidence, but may be inferred from outward manifestations, by words and acts of a person, and all the facts and circumstances. It is for you to determine from all of the facts and circumstances in evidence whether or not *the defendant committed the act complained of, and whether at such time he had criminal intent.*" (Emphasis supplied.)

It is clear that numbered paragraph 1 of the required elements set forth in instruction No. 3, separately and specifically required proof of the shooting of Michael Pollard "with the intent to wound or maim." In the further paragraphs of this instruction the court admonished the jury that it must find beyond a reasonable doubt that *every one* of the material elements of the crime of "shooting with *intent to wound or maim*" was necessary for conviction. In this basic instruction the separate element with "intent to wound or maim" appears a total of six times.

Harmonious with instruction No. 3, instruction No 8 relates entirely to the separate element of intent referred to in instruction No. 3. The first sentence of this instruction states: "The intent *with which an act is done* is a necessary element as to *the charge against the defendant.*" At this point it is impossible to draw any other conclusion than that the court was referring to the

specific intent to wound or maim mentioned six times in instruction No. 3. In the further language of instruction No. 8, the standard method of determining intent is given the jury and no quarrel is made with this language. Contrary to the defendant's contention, however, the last sentence of instruction No. 8 specifically again advises the jury, in substance, that it must find (1) that the defendant committed the act complained of, and (2) whether he had the requisite "criminal intent." It is inconceivable that a jury could construe the last portion of the last sentence in instruction No. 8 as referring to any other intent than the one mentioned in the first sentence in which it is specifically said that the intent was a necessary element in the charge against the defendant, which again refers by necessary implication to the "intent to wound or maim" burden of proof in instruction No. 3. We can find no error in the instructions given by the court either individually or when analyzed in context together.

Interwoven in the defendant's main contention is the suggestion that the giving of identical instructions Nos. 8 and 10 would serve to confuse the jury as to the requisite intent involved. This, the defendant argues, because of the court's submission of the lesser offense of simple assault and battery which does not require a specific intent. See, Miller v. Olander, 133 Neb. 762, 277 N. W. 72; Elliott v. Brandt, 164 Neb. 790, 83 N. W. 2d 767; 6 Am. Jur. 2d, Assault and Battery, § 20, p. 24. We feel that the contrary inference must be drawn from this situation. It is clear that the giving of the duplicate instructions Nos. 8 and 10 was a mere inadvertence. If the duplicate instructions were taken by the jury to refer to both offenses, the defendant cannot complain because it would require the jury to find a specific intent as an element of simple assault and battery. Of course this is not the law. See, Miller v. Olander, *supra;* Elliott v. Brandt, *supra.* A defendant cannot complain of an instruction which is more favorable to him than he de-

serves, even though it might be technically inaccurate as to the issues. State v. Swanson, 179 Neb. 693, 140 N. W. 2d 618. The rule is that the repetition of instructions, or a portion thereof, does not require a reversal unless it indicates that the effect thereof is to mislead or confuse the jury or to give undue prominence to an aspect of the case unfavorable to the party claiming error. Robinson v. State, 71 Neb. 142, 98 N. W. 694; Kraft v. Fundum, 175 Neb. 821, 124 N. W. 2d 225. There is no merit to this contention.

It is true that the defendant's requested instruction did contain a separate reiteration of the phrase "at such time he had specific intent to wound or maim." It is not error to refuse a requested instruction if the court on its own motion has given the substance of such request in the actual charge to the jury. State v. Jones, 183 Neb. 133, 158 N. W. 2d 278; State v. McCreary, 179 Neb. 589, 139 N. W. 2d 362; State v. Lewis, 177 Neb. 173, 128 N. W. 2d 610.

The trial court's instructions were free from error, a duplication of instructions was not prejudicial, and the judgment of the district court is correct and is affirmed.

AFFIRMED.

SPENCER, J., participating on briefs.

SHARON SCHRAD, APPELLANT, V. WALTER SCHRAD, APPELLEE.
183 N. W. 2d 922

Filed February 19, 1971. No. 37647.

Divorce: Trial: Dismissal and Nonsuit. Dismissal of the petition of a wife for divorce where, at the trial on cross-examination into extra-marital sexual relations by her, she successfully asserted the privilege against self-incrimination, is correct.

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

Snell & Winkle, for appellant.

Robak & Geshell, for appellee.

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

SMITH, J.

The district court at the close of all the evidence dismissed the petition of plaintiff wife for a divorce. She appeals.

At the trial plaintiff on cross-examination into extra-marital sexual relations by her successfully asserted the privilege against self-incrimination.

Dismissal of the petition of a wife for divorce where, at the trial on cross-examination into extra-marital sexual relations by her, she successfully asserted the privilege against self-incrimination, is correct. The ruling represents an application of the equitable maxim of "clean hands" to a divorce suit. See, Stockham v. Stockham (Fla., 1964), 168 So. 2d 320, 4 A. L. R. 3d 539; Christenson v. Christenson, 281 Minn. 507, 162 N. W. 2d 194 (1968); Franklin v. Franklin, 365 Mo. 442, 283 S. W. 2d 483 (1955).

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LELAND D. FRONNING, APPELLANT.
183 N. W. 2d 920

Filed February 19, 1971. No. 37659.

1. **Witnesses. Credibility of a witness may be attacked by any party, including the party calling him.**
2. **Criminal Law: Appeal and Error. No judgment shall be set aside on the grounds of misdirection of the jury in a criminal case if this court considers that no substantial miscarriage of justice has actually occurred.**

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

George D. McArthur and Harry Russell, for appellant.

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

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

SMITH, J.

A jury found Leland D. Fronning guilty of assault with intent to inflict great bodily injury. Fronning appeals. He contends that (1) the county attorney improperly impeached witnesses for the State, and (2) an instruction relating to beer, marijuana, and "LSD" undermined Fronning's claim of self-defense.

Attending a party of young people at Hastings were Fronning, 7 of his male friends, some Hastings girls, Richard Smith, age 18, his fiance, and two male companions of Smith. The latter 4 were residents of Grand Island and strangers to Fronning and the others when they joined the party. Fronning stood 6 feet tall and weighed 175 pounds. He had wrestled 2 years in high school.

At the party, during an argument and after a push by Smith, Fronning struck Smith on the jaw. Smith slumped or fell to the floor where he lay motionless. Fronning did not think Smith was unconscious. He fell on Smith, striking him three times in the side. He then arose and twice kicked Smith in the face. Fronning was terrified, fearing Smith was armed and influenced by beer and marijuana or "LSD." Smith had been speaking loudly with pretended authority. Fronning conceding existence of a jury question, we have thus far summarized his testimony only.

Some beer was consumed at the party, whose members included minors. Grand Island boys talked about selling marijuana and "LSD," but Fronning alone identified Smith. There is no evidence that anyone possessed

marijuana or "LSD," or that Smith was armed or influenced by drugs.

The State in its evidence-in-chief called Fronning's friends as witnesses. On direct examination the county attorney referred to previous contradictory statements allegedly made by each witness. The references mostly concerned the push by Smith and his unconsciousness prior to Fronning having struck him on the floor. He stated that one witness, a friend of Fronning, was changing his story.

Fronning argues that the references to prior contradictory statements materially strengthened the substantive evidence of the State. The record does not support the argument, and we do not reach it. He relies partly on State ex rel. Meyer v. Sorrell, 174 Neb. 340, 117 N. W. 2d 872 (1962), which in any event is distinguishable in that the declarants were not witnesses.

We have followed the rule that, subject to exceptions like surprise and past recollection refreshed, a party may not test the credibility of his own witness. See Welton v State, 171 Neb. 643, 107 N. W. 2d 394 (1961). Our traditional explanation has been that a party holds out his witnesses as worthy of belief. See Guyette v. Schmer, 150 Neb. 659, 35 N. W. 2d 689 (1949). It is no longer tenable. Parties, including the State, often have no real free choice in selecting witnesses. We abandon the rule; credibility of a witness may be attacked by any party, including the party calling him. See, United States v. Freeman, 302 F. 2d 347 (2d Cir., 1962) (Lumbard, C. J.); McCormick on Evidence, § 38, p. 70 (1954); A. L. I., Model Code of Evidence, Rule 106, p. 117 (1942); Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, Rule 6-07, p. 119 (1969); 3A Wigmore on Evidence, § 904, p. 672 (Chadbourn, Rev. Ed., 1970); Rule 20, Uniform Rules of Evidence (1953).

Instruction No. 12 told the jury that evidence concerning beer, "talking" of marijuana and "LSD" sales,

and misdemeanors went only to credibility. The instruction did not stretch Fronning's slender thread of self-defense. ". . . No judgment shall be set aside . . . on the grounds of misdirection of the jury . . . if the Supreme Court . . . shall consider that no substantial miscarriage of justice has actually occurred." § 29-2308, R. R. S. 1943.

The judgment is affirmed.

AFFIRMED.

CARTER, J., concurring in result.

I am in accord with the result reached in this case. I do not agree with the change made in our traditional rule dealing with the impeachment of witnesses. In the first place, no change in the rules is required in the case before us since the witnesses involved were hostile and subject to impeachment under the existing rule. In the second place, the announced rule is too broad and will create more problems that it eliminates.

I do not disagree that the rule of impeachment is properly subject to reexamination in the light of present-day conditions and the disappearance of the factors on which it was originally based. I do contend that a sweeping change by general terms in an opinion without careful investigation, research, and consideration is not justified where it changes a rule long in force as a fundamental concept of the rules of evidence. A committee appointed by this court is at the present time engaged in drafting a code on evidence which includes the consideration of a new impeachment rule. Any change in the rule should await the recommendations of that committee. The importance of the rule change is deserving of the utmost care in its preparation to effectuate proper limitations of the rule in eliminating the ills necessary to be remedied.

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

STATE OF NEBRASKA, APPELLEE, V. DARWIN GEORGE WORKMAN, APPELLANT.

183 N. W. 2d 911

Filed February 19, 1971. No. 37704.

1. **Criminal Law: Witnesses.** Defendant's issue on the right of confrontation is controlled by State v. Turner, ante p. 424, 183 N. W. 2d 763.
2. **Statutes: Constitutional Law.** Where a statute is susceptible of two constructions, one of which renders it constitutional and the other unconstitutional, it is the duty of this court to adopt the construction which without doing violence to the fair meaning of the statute will render it valid.
3. **Statutes: Legislature.** The Nebraska Legislature may lawfully adopt by reference an existing law or regulation of another jurisdiction, including the United States.
4. **Statutes.** We interpret section 28-486(8), R. S. Supp., 1969, to include those portions of the Federal Food, Drug, and Cosmetic Act which were in existence on June 6, 1967.
5. **Criminal Law: Indictments and Informations: Pleading.** All defects that may be excepted to by a motion to quash an information will be taken to be waived by defendant pleading the general issue.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

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

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

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

SPENCER, J.

This is an appeal from a judgment and sentence of 5 years on a guilty plea for the unlawful possession of a depressant and stimulant drug. Defendant premises his appeal on the unconstitutionality of the statute and also on his assertion that the record fails to affirmatively show defendant pled guilty voluntarily, understandingly, intelligently, and with full knowledge of the rights he was waiving by his plea. We affirm.

Defendant filed a brief herein, based solely on his contention that this case was controlled by Boykin v. Alabama, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274, because the court failed to advise the defendant specifically that by pleading guilty he was waiving his constitutional right to confront and cross-examine his accusers. The record herein sets out a detailed examination by the trial court before accepting a guilty plea, after permitting the defendant to withdraw his previous plea of not guilty. From the record there is no question in our mind but that the defendant knowingly and intelligently entered his plea herein, although the court did not specifically mention the right of confrontation. This phase of the case is controlled by State v. Turner, *ante* p. 424, 183 N. W. 2d 763.

A month after defendant filed his brief herein he filed a supplemental brief asserting for the first time alleged jurisdictional defects and the unconstitutionality of the statute. Defendant now charges that section 28-499, R. S. Supp., 1969, under which he was charged, is unconstitutional because section 28-486(8), R. S. Supp., 1969, defining depressant or stimulant drugs in part defines them with reference to the federal act.

Section 28-499, R. S. Supp., 1969, is as follows: "No person, other than a person described in section 28-497 or 28-498 shall possess any depressant or stimulant drug unless (1) such drug was obtained upon a valid prescription and is held in the original container in which such drug was delivered; or (2) such drug was delivered by a practitioner in the course of his professional practice and the drug is held in the immediate container in which such drug was delivered."

Section 28-486(8), R. S. Supp., 1969, is as follows: "(8) Depressant or stimulant drug shall mean:

"(a) Any drug which contains any quantity of (i) barbituric acid or any of the salts of barbituric acid; or (ii) any derivative of barbituric acid which has been

designated under section 502(d) of the federal act as habit-forming;

"(b) Any drug which contains any quantity of (i) amphetamine or any of its optical isomers; (ii) any salt of amphetamine or any salt of an optical isomer of amphetamine; or (iii) any substance designated by regulations promulgated under the federal act as habit-forming because of its stimulant effect on the central nervous system; or

"(c) Any drug which contains any quantity of a substance designated by regulations promulgated under the federal act as having a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect; * * *."

Section 28-486(11), R. S. Supp., 1969, should be read in conjunction with subsection (8) thereof. It provides: "(11) The term federal act shall mean the Federal Food, Drug, and Cosmetic Act, 52 Stat.1040 (1938), and all amendments thereto, 21 U. S. C. sections 301 to 392."

It is defendant's contention that the incorporation by reference from the federal act is an unconstitutional delegation by the Nebraska Legislature to an administrative officer of its powers to create criminal offenses in violation of Article II, section 1, and Article III, section 1, Constitution of Nebraska. There would be some merit to defendant's contention if we were to construe the statute to include federal regulations or law promulgated or enacted after the passage of our statute. This we do not do. As we said in State ex rel. Meyer v. Duxbury, 183 Neb. 302, 160 N. W. 2d 88: "Where a statute is susceptible of two constructions, one of which renders it constitutional and the other unconstitutional, it is the duty of the court to adopt the construction which, without doing violence to the fair meaning of the statute, will render it valid."

There can be little question but that incorporation by reference is permitted in Nebraska if the incorporation is of an existing law or regulation. See Anderson v. Tie-

mann, 182 Neb. 393, 155 N. W. 2d 322, in which we said: "It is conceded that the Nebraska Legislature may lawfully adopt by reference an existing law or regulation of another jurisdiction including the United States. Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N. W. 2d 227."

We interpret the statute to include those portions of the federal act referred to which were in existence on June 6, 1967, the effective date of section 28-486, R. S. Supp., 1969.

In his brief defendant attacks the constitutionality of section 28-490, R. S. Supp., 1969. This section permits seizure without warrant of certain drugs. The present record fails to disclose any seizure of drugs herein pursuant to that section. There is no motion to suppress or any other indication of such seizure of record. In any event, defendant's plea cured any defect if one was present. In the absence of very unusual circumstances, this court should not go behind pleas of counseled defendants to determine whether some potential evidence may have been unlawfully obtained. On this point, the following from McMann v. Richardson, 397 U. S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763, is very pertinent: "As we said in Brady v. United States, 397 U. S. at —, 90 S. Ct. at 1473-1474, 25 L. Ed. 2d at —, the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute. In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict how the facts, as he understands them, would be viewed by a court. If proved, would those facts convince a judge or jury of the defendant's guilt? On those facts would evidence seized without a warrant be admissible? Would the trier of facts on those facts find a confession voluntary and admissible? Ques-

tions like these cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be. Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.

"That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing. Courts and judges continue to have serious differences among themselves on the admissibility of evidence, both with respect to the proper standard by which the facts are to be judged and with respect to the application of that standard to particular facts."

Defendant was represented at the time of his plea by competent counsel from the same office with which his present counsel is associated.

Defendant further argues: "Sections 28-499, 28-487, and 28-489, R. S. Supp., 1969, making it a felony to merely possess a depressant or stimulant drug, amount to proscriptive action beyond the lawful limits of the state's police power into an area in which there is no legitimate state interest, rendering these provisions violative of the drug possessor's constitutional right of privacy and an imposition upon him of unconstitutional cruel and unusual punishment." This is indeed a novel approach in this jurisdiction. It is defendant's argument that a body of constitutional law is emerging, holding that a state has no legitimate interest in legislating against specific acts of individuals when such acts, however harmful to the individual performing them, have no substantially harmful effect on others. Without citing cases in point on this broad constitutional question, the defendant is in effect contending that the State should not prohibit the possession of narcotics. Without comment on the serious social and moral problem created

by the drug traffic, we point out that defendant is making his contentions in the wrong forum. They might appropriately be addressed to the Nebraska Legislature, but it is the duty of this court to interpret and enforce laws passed by the Legislature if constitutionally valid, which this one is.

Defendant's last assignment of error is to the effect that the district court lacked jurisdiction to accept a guilty plea because the information purporting to charge the defendant failed to contain a distinct allegation of each essential element of the crime as defined by section 28-499, R. S. Supp., 1969. The information adequately alleged the commission of a crime by the defendant. The information, so far as material on this point, reads: "* * * Darwin George Workman * * * did unlawfully possess a depressant or stimulant drug without a valid prescription, and not held in the original container in which such drug was delivered or not delivered by a practitioner in the course of his professional practice, * * *." This is essentially the language of section 28-499, R. S. Supp., 1969, set out above, rearranged to charge the crime involved in that section. In any event, if there were merit to defendant's contention, it would have been waived by his plea of guilty.

Section 29-1812, R. R. S. 1943, provides: "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue."

In State v. Fiegel, 184 Neb. 704, 171 N. W. 2d 643, we held: "All defects that may be excepted to by a motion to quash an information are taken to be waived by defendant pleading the general issue."

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

AFFIRMED.

WHITE, C. J., took no part in the consideration of this case.

McCOWN, J., dissenting.

The issue of constitutionality was raised here. It rests on the ground that the Legislature may not lawfully delegate its power to create criminal offenses to an administrative or executive official or body. In Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N. W. 2d 227, this court held that the Legislature may not lawfully delegate legislative powers to an administrative or executive authority. In that case, the administrative authority was the Department of Agriculture and Inspection of the State of Nebraska. We also held that: "The Legislature cannot delegate its power to create criminal offenses and prescribe penalties to an administrative or executive authority. Such powers are exclusively legislative * * *."

The major impact of the Finigan case on the case here is its holding that in this state all public offenses are statutory and no person can be punished for any act or omission which is not made penal by the plain import of a properly enacted statute.

The majority opinion holds that L.B. 876 of the 1967 Legislative Session relating to depressant and stimulant drugs incorporated by reference those portions of the Federal Food, Drug, and Cosmetic Act "which were in existence on June 6, 1967."

Of course, the Legislature could have incorporated provisions of the federal act as it then existed by reference. The principal specific reference was to section 502(d) (Title 21 U. S. C., § 352). That subsection is headed "Habit forming substances." It includes both narcotic and hypnotic substances. It describes 16 other substances in addition to the barbituric acid referred to in subsection (8)(a) of section 28-486, R. S. Supp., 1969. Most of these come under the category of narcotics. That subsection also authorizes the Secretary of Health, Education, and Welfare by regulation to designate any chemical derivative of the named substances which are found to be habit forming. Subsections (8)(b) and (8)(c) of

section 28-486, R. S. Supp., 1969, also refer to "regulations promulgated under the federal act" and not to any provisions of the act itself. The federal act, of course, authorizes promulgation of regulations by the Secretary of Health, Education, and Welfare.

Section 28-485, R. S. Supp., 1969, declares the legislative purpose to regulate and control the manufacture, distribution, delivery, and possession of depressant and stimulant drugs "as defined in sections 28-458 and 28-485 to 28-4,108." Section 28-458, R. S. Supp., 1969, which was section 25 of L.B. 876, 1967 Legislative Session, specifically gives the Nebraska State Board of Health the power "to determine * * * whether any exempt medicinal preparation possesses addiction-forming or addiction-sustaining liability which, in its opinion, will result in abusive use." The State Department of Health clearly has the authority to make such preparations exempt or nonexempt.

In legislative debate on L.B. 876, Senator Swanson stated: "Senator Carpenter's amendment which was also just read has to do with a particular exemption as far as the sale of codeine is concerned, and also the ability of the state health department to place on the illegal drug list, any drug that might presently be cleared. If they find that it is a depressant or a stimulant, if it is a narcotic that should not be on the cleared list, they now have the authority through his amendment to place it on the illegal drug list." 1967 Legislative Floor Debate, p. 2318.

The definition of "narcotic drugs" adopted by the Legislature in 1969, in section 28-451, R. S. Supp., 1969, provides: "(14) Narcotic drugs shall mean coca leaves, opium, cannabis, isonipecaine, amidone, isoamidone, ketobemidone, every substance neither chemically nor physically distinguishable from them, any other drugs to which the federal laws or regulations relating to narcotic drugs may now or hereafter apply, and any drug found by the Director of Health, after reasonable notice

and opportunity for hearing, to have addiction-forming or addiction-sustaining liability similar to morphine or cocaine from the date of publication of such finding by the director."

Section 28-4,108, R. S. Supp., 1969, also gives the Superintendent of Law Enforcement and Public Welfare the power to make such rules and regulations as are necessary for the effective administration of the act governing depressant and stimulant drugs and specifically gives the authority to "make such rules and regulations conform so far as practicable to those promulgated under the federal act."

Even if it be assumed that the Legislature intended to incorporate portions of the federal act, the only specific portions of the federal act ever mentioned or identified by the Legislature are sections 502(d), 511(d), and 511(f). Section 502(d) has already been discussed. Section 511(d) deals with records to be kept, and section 511(f) deals with the exemption of depressant and stimulant drugs by the secretary. Their corresponding code references are Title 21 U. S. C., §§ 352(d), 360a(d), and 360a(f). The depressant or stimulant drugs exempted by the secretary under section 511(f) of the federal act are specifically exempted from the application of the Nebraska law by section 28-4,105, R. S. Supp., 1969.

At no place in the Nebraska act did the Legislature ever identify any specific regulation under the federal act, either by date or by location, in the federal register. It only referred generally to "regulations promulgated under the federal act." Surely such an indefinite reference to regulations cannot be treated as a valid incorporation by reference, in a criminal statute involving illegal possession, where a sentence of 5 years in prison for a first offense can be given, as it was here. The drug involved in this case, aside from its identification in the information as a "stimulant or depressant drug," was referred to only as "a new-found drug."

The Legislature quite properly assumed the respon-

sibility of adopting statutes to regulate and control the manufacture, distribution, delivery, and possession of depressant and stimulant drugs. That legislative power can and should be exercised for the public health and safety to create criminal offenses and prescribe penalties. Unless our previous decisions are to be overruled, however, all public offenses in this state are statutory and it is clear that the Legislature cannot delegate its power to create criminal offenses to the Director of Health of the State of Nebraska, much less to the Secretary of Health, Education, and Welfare of the United States. A general reference to administrative regulations under the federal Food, Drug, and Cosmetic Act is wholly insufficient to incorporate a specific unidentified regulation into a Nebraska criminal statute by reference. This is particularly true when the date any incorporation is to be effective, as well as the date and identification of the elusive regulation or regulations which are to be incorporated, are completely omitted from the statute which is supposed to incorporate them.

It is not only advisable, but essential, that the deficiencies to which reference has been made here be called to the attention of the Legislature. The statutes involved, insofar as they attempted to delegate to a state or federal administrative agency the power to create criminal offenses by designating a particular drug, not legislatively identified in the statute as being proscribed, was clearly unconstitutional.

STATE OF NEBRASKA, APPELLEE, V. WOODARD NIMRO, ALSO KNOWN AS GREGORY JOHNSEN, REAL AND TRUE NAME UNKNOWN, APPELLEE, GEORGE P. BURKE, APPELLANT.
183 N. W. 2d 769

Filed February 19, 1971. No. 37717.

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

George P. Burke pro se.

Fred J. Hurlburt, for appellee State.

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

NEWTON, J.

This appeal requires a determination of the amount of attorney's fees to be allowed a lawyer appointed by the court to represent an indigent defendant in a criminal case.

We fix the fees to be allowed in the sum of $750 and affirm the judgment of the district court as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. GORDON L. TROUT, APPELLANT.
183 N. W. 2d 923

Filed February 19, 1971. No. 37724.

Criminal Law: Sentences: Appeal and Error. Where a sentence has been imposed within statutory limits, it will not be disturbed in the absence of an abuse of discretion.

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

Paul E. Galter, 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.

SMITH, J.

Defendant pleaded guilty to robbery and to shooting with intent to kill, wound, or maim. The court imposed concurrent sentences of 10 to 20 years. Defendant appeals. He complains that the sentences are excessive.

At the arraignment of defendant for sentencing, the court on its own motion without objection ordered incorporation of the presentence report into the record. The report sets out the following information: Defendant, age 20, stated: ". . . I needed money . . .. The first time I went in that place I got some matches and then later on I went in to get a package of cigarettes and the attendant was alone and it just struck me on the spur of the moment . . . to rob him. I had the gun in my coat pocket. . . . I told the attendant that I wanted the money and that I had the gun. He reached under the counter and came up with . . . a .38 revolver. The police say there was no gun there. I say there was so it just simmered down to this that I would rather shoot him than have him shoot me. I was aiming at his stomach specifically . . .."

A summary of police reports stated: ". . . x-rays (of the victim, Hember) showed . . . a bullet lodged in the lining of his stomach. Doctors felt that the first bullet struck . . . Hember in the front of the abdomen, passed out his right side. The second went through the left forearm, into the abdomen and lodged in the stomach."

Where a sentence has been imposed within statutory limits, it will not be disturbed in the absence of an abuse of discretion. State v. Gamron, *ante* p. 249, 182 N. W. 2d 425 (1970). There was no abuse in the present case.

The judgment is affirmed.

AFFIRMED.

GEORGE SYFIE ET AL., APPELLANTS, V. TRI-COUNTY HOSPITAL DISTRICT ET AL., APPELLEES.
184 N. W. 2d 398

Filed February 26, 1971. No. 37642.

1. **Counties: Hospitals: Constitutional Law.** Questions of public policy, convenience, and welfare, as related to the creation of municipal corporations, such as counties, cities, villages, school

districts, or other subdivisions, or any change in the boundaries thereof, are, in the first instance, of purely legislative cognizance and when delegated to any public body having legislative power, any action in regard thereto does not come within the due process clause of either the state or federal Constitutions.

2. ———: ———: ———. Statutes which provide for the creation of a district to encompass land in two or more counties may constitutionally allow the county board of one of the counties involved to act as the competent tribunal before which the question of setting the boundaries of the district may be heard.

3. ———: ———: ———. It is competent for the Legislature to authorize the creation of governmental agencies for the enforcement of its police power, and clothe county commissioners, supervisors, or any other administrative officers or boards with authority to establish districts for the implementation of such purposes.

4. ———: ———: ———. The fact that bodies of land may extend into two or more counties does not render the Legislature powerless to include contiguous tracts into one district for the more convenient exercise of the police power.

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

Julius D. Cronin and Edward E. Hannon, for appellants.

Philip R. Riley, Jewell, Otte & Pollock, William W. Griffin, Henry F. Reimer, and August F. Schurman, for appellees.

Michael V. Smith, Young, Baird, Holm, McEachen, Pedersen, Hamann & Haggart, and Person, Dier & Person, for amici curiae.

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

WHITE, C. J.

The principal question involved in this case is the constitutionality of the Nebraska Local Hospital District Act enacted by the Sixty-ninth Session of the Legislature in 1959. The particular statutes involved are sections 23-343.20 to 23-343.57, R. R. S. 1943. The defend-

ant, Tri-County Hospital District, was organized under these provisions, comprising portions of Holt, Boyd, and Knox Counties. The district court found that the defendant Tri-County Hospital District was validly created under Nebraska law and that the Nebraska Local Hospital District Act (hereinafter referred to as the Hospital District Act) was constitutional. We affirm the judgment of the district court.

The pertinent portions of the applicable statutes necessary for determination of this appeal are as follows:

"Whenever it shall be conducive to the public health and welfare, a local hospital district may be established in the manner and having the powers and duties provided in sections 23-343.20 to 23-343.47." § 23-343.20, R. R. S. 1943.

"Whenever the formation of a local hospital district is desired, a petition, stating (1) the name of the proposed district, (2) the location of the hospital to be maintained by such proposed district, and (3) the territory to be included within it, which territory should be contiguous, may be presented to the county board of the county in which the land, or a greater portion of the land, in the proposed district is situated." § 23-343.21, R. R. S. 1943.

"Upon receipt of such petition, the county board shall examine it to determine whether it complies with the requirements of section 23-343.21. Upon finding that such petition complies with such requirements, the county board shall set a hearing thereon and cause notice thereof to be published at least three successive weeks in a newspaper of general circulation throughout the area to be included in such proposed district. Such notice shall contain a statement of the information contained in such petition and of the date, time, and place at which such hearing shall be held and that at such hearing proposals may be submitted for the exclusion of land from, or the inclusion of additional land in such proposed district or for modification of the boundaries of the area into which such district shall be divided for the purpose of election

of members of the board of directors." § 23-343.22, R. R. S. 1943.

"After completion of the hearing required by section 23-343.22, the county board shall order such changes in the boundaries of such proposed district or of the areas into which such proposed district is to be divided as it shall deem proper, but no such change shall reduce the total assessed valuation of all taxable property, except intangible property, within such proposed district below three million dollars. The county board shall also order that the question of the formation of such district, as set forth in the petition and any changes therein ordered by the board, shall be submitted to the electors of such proposed district at a special election to be held for that purpose * * *." § 23-343.23, R. R. S. 1943.

"If the county board finds that a majority of the votes cast in the area of the proposed district favor the formation of such proposed district, it shall so declare by resolution entered on its records and forward a copy of such resolution to the county board of each county containing land embraced within such proposed district, and the district shall thereupon be fully organized." § 23-343.24, R. R. S. 1943.

In 1968, under the provisions of the Hospital District Act, a group of citizens representing towns in Boyd County, Nebraska, began a petition drive to form the defendant Tri-County Hospital District. They submitted their petition to the Boyd County board which found that all requirements of section 23-343.21, R. R. S. 1943, were complied with. The boundaries of the proposed district included all of Boyd County, approximately 225 sections of contiguous land in Holt County, and approximately 34 sections of contiguous land in Knox County.

The Boyd County board held a hearing on the matter, found that all conditions required by law had been met, and that the question of the formation of the district should be submitted to the electorate under the provisions of the statute. A special election was ordered to be

held on August 6, 1968. At this election the formation of the defendant Tri-County Hospital District was approved by a majority of the voters. The Boyd County board certified the election results on August 12, 1968. This action was brought in the district court for Boyd County by the plaintiffs for themselves and others contending that the Tri-County Hospital District had been illegally formed and not in compliance with the statute, and that the Hospital District Act as recited above was unconstitutional.

It is not questioned but that it is within the power of the Legislature under the general welfare clause to further the public health, convenience, or welfare by enacting legislation which allows citizens to establish hospital districts which will benefit those living within the proposed district. It is also clear that it is within the Legislature's power generally to delegate the enforcement of such legislation to administrative authorities under proper standards.

Boiled down, the plaintiffs claim that when a statute permits a group of individuals to begin the formation of a public district and outlining its boundaries, there must be a provision for an appropriate tribunal to determine if the lands have been properly included or excluded from the proposed district and second, whether the organization of the district is for the public convenience and welfare. Their argument is drawn from the language of our prior decisions in Anderson v. Carlson, 171 Neb. 741, 107 N. W. 2d 535, 83 A. L. R. 2d 831; Summerville v. North Platte Valley Weather Control Dist., 170 Neb. 46, 101 N. W. 2d 748; and Elliott v. Wille, on rehearing, 112 Neb. 86, 200 N. W. 347. The gist of these cases requires that there be a provision allowing a landowner in the district the opportunity to be heard by a competent tribunal on the question of whether his property has been arbitrarily or unjustly included within the boundaries of the district. We feel that the precise language of section 23-343.23, R. R. S. 1943, recited pre-

viously in this opinion, is a complete answer to such an argument. It seems to us that the language of the Hospital District Act was drawn with the specific requirements of the Summerville, Anderson, and Elliott cases in mind. The procedure provides for a hearing and grants authority to the county board to exclude or include land in the proposed district. This is based upon the testimony to be given by the interested citizens at the hearing as set up in the statute. The use of such a procedure is actually seen in this case. The record reveals that after the notice of hearing, the hearing was held, and at this hearing some Holt County residents asked that their land be excluded from the proposed district. The record reveals that all of these requests were granted.

Plaintiffs also argue that there is no provision for determining whether the district should be formed at all, that is, whether the district is actually for the public convenience and welfare. It is quite difficult to understand the precise nature of the argument the plaintiffs make. It is quite semantical in nature and relies upon the emphasization of the word "shall" in section 23-343.23, R. R. S. 1943. The apposite answer to this argument is that the plaintiffs have ignored the use of the word "may" found in the further provision of section 23-343.20, R. R. S. 1943, which states: "Whenever it shall be conducive to the public health and welfare, a local hospital district *may* be established in the manner and having the powers and duties provided in sections * * *." (Emphasis supplied.) In other words, the board cannot act to establish such a district until it *shall* be conducive to the public health and welfare. It, therefore, appears that no other inference could be drawn from this clear, explicit language of the statute but that the county board is given the power to determine if the proposed district will be conducive to the public health and welfare. Here again the Hospital District Act appears to have been drawn strictly within the

judicial sanctions expressed by this court in State ex rel. Harris v. Hanson, 80 Neb. 724, 115 N. W. 294, on rehearing, 80 Neb. 738, 117 N. W. 412. That case involved the same question as is involved here, namely, the constitutionality of statutes which set up the procedure for the formation of (drainage) districts. In that case section 1 of the drainage district law provided: "Whenever it will be conducive to the public health, convenience or welfare * * * to drain any wet land, * * * then a drainage district may be formed and may proceed as hereinafter provided, for the purpose of inaugurating, constructing, controlling and maintaining said work or works of public improvement." This is almost identical language to section 23-343.20, R. R. S. 1943. Other sections of the act examined in the Hanson case are remarkably similar to the sections of the Hospital District Act recited herein.

This court held in that case that there was a provision providing for the determination of public health, convenience, and welfare. It said: "It is evidently the intention of the Legislature that such improvement should not be brought about, except that it be for the public health, convenience or welfare. But is it possible that the specific provisions of the act may be complied with and the expressed intention of the legislature defeated? * * * The (county) board is not permitted to take into consideration the private advantage which would be gained by any individual; but, on the other hand, it shall fix the boundaries with a view to promoting the interest of the drainage district, and with a view to doing justice and equity to all persons, and this must necessarily be done with a consideration for the public health, convenience or welfare. Although drainage laws are liberally construed, yet we are of the opinion that a strict construction placed upon this act would not permit us to arrive at any other conclusion. The inference that the county board shall determine the public utility of the proposed improvement is not

only permissible, but a necessary construction to be placed upon the language used. It is the board's imperative duty to act upon the presentation of a proper petition. It is not its imperative duty to fix the boundaries if the organization of the district would not promote the public health, convenience or welfare. * * * The legislature might well have said in express terms that the county board should make a finding that the organization of the proposed vicinity would be of public utility; but the inference is strong, from the language actually used, that it was the intention of the legislature that the district should not be organized, except that the county board could prescribe such boundaries for the proposed district, which, if organized and promoted under the provisions of the act, would in fact promote the public health, convenience or welfare." State ex rel. Harris v. Hanson, *supra.*

It seems apparent to us, under the construction of the Hanson case, that the Legislature intended the appropriate county board should have the power to determine the public health, welfare, and convenience of a proposed hospital district. A contrary construction would be irrational, and it is the duty of this court to give the language of an act a reasonable construction in harmony with the presumption of constitutionality.

Avoiding the necessity for any reexamination of Elliott v. Wille, *supra;* Anderson v. Carlson, *supra;* and Summerville v. North Platte Valley Weather Control Dist., *supra,* it is clear that the present Hospital District Act comes well within the restrictive requirements of these cases construing the due process clause in the Constitution of Nebraska. It is further apparent that the Legislature intended, as a condition precedent to the Hospital District Act, a hearing designed to assure that the Act would only be used exclusively for the public health, welfare, and convenience. A reading of the scheme and design of the whole act further reenforces this conclusion.

Plaintiffs next contend that the Hospital District Act

is unconstitutional because it allows one county board to include territory of a separate county in order to form one contiguous hospital district. Plaintiffs argue this is a "division of county" or an addition of the territory of one county to an adjoining county in violation of Article IX, section 2, of the Constitution of Nebraska. This argument was answered in the case of State ex rel. Sheffer v. Fuller, 83 Neb. 784, 120 N. W. 495, where this court stated: "It is argued that the statute is void in so far as it assumes to authorize the creation of a drainage district within two or more counties; that the proceedings in the case at bar were instituted and carried on in Saunders county, where the greater part of said district is situate, and that, as relator's land is in Cass county, they are void as to his real estate. We have not been cited any authority to sustain the proposition advanced and are not inclined to adopt it. It is competent for the state to authorize the creation of governmental agencies for the enforcement of its police power, and for the legislature to clothe county commissioners, supervisors, or any other administratrive (sic) officer or board with authority to establish a district for the reclamation of swamp, overflowed or wet lands, or lands so subject to inundation as to destroy their utility or to constitute a menace to the public health. The fact that such bodies of land may extend into two or more counties does not render the legislature powerless to include contiguous tracts into one district for the more convenient exercise of the police power." This court's discussion of drainage districts is equally applicable to the formation of hospital districts. The power given the county board in the Hospital District Act is a reasonable provision and does not violate Article IX, section 2, of the Constitution of Nebraska.

It is contended that even if the Hospital District Act is constitutional, plaintiffs should prevail because of certain alleged irregularities in the formation of this particular district. Section 23-343.22, R. R. S. 1943, of the Hos-

pital District Act calls for notice of the county board hearing to be published in the appropriate newspaper at least 3 "successive" weeks. The notice in this case was published in three Boyd County newspapers on June 6, June 13, and June 20, 1968. The hearing was held on June 24, 1968, 18 days after the first publication date. Since this was 3 days short of a full 3 weeks, plaintiffs claim the notice requirement was not fulfilled.

A similar statutory requirement was construed by this court in Johnson v. Richards, 155 Neb. 552, 52 N. W. 2d 737, wherein it was stated: "The statute requires that notice of the time and place of proving a will shall be given by publication in a newspaper designated by the judge of the county court 'three weeks successively, and no will shall be proved until notice shall be given as herein provided * * *.' § 30-217, R. R. S. 1943. Publication of notice sufficient to satisfy the demands of this statute was determined many years ago. The requirement of publication of a notice in a newspaper 'three weeks' is complied with by the publication thereof in a weekly paper on one day of each of three weeks, that is, three successive weekly publications. The notice is complete upon distribution of the last issue of the paper containing the notice though three full weeks have not elapsed since the first publication."

It is therefore clear that the Hospital District Act does not call for a full 3 weeks' period before it is complete. The notice in this case was sufficient, having met all statutory requirements.

Summarizing, the questions of public policy, convenience, and welfare as related to the creation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, such as hospital districts, or any change in the boundaries thereof, are, in the first instance, of purely legislative cognizance, and when delegated to any public body having legislative power, any action in regard thereto does not come within the due process clause of either the state or federal Constitu-

tions. Campbell v. Area Vocational Technical School No. 2, 183 Neb. 318, 159 N. W. 2d 817; Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A. L. R. 257; Ruwe v. School District, 120 Neb. 668, 234 N. W. 789; Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397; Seward County Rural Fire Protection Dist. v. County of Seward, 156 Neb. 516, 56 N. W. 2d 700. This court has long adhered, without deviation, to this statement of general principle. The only remaining question is whether the delegation of this general legislative power comes within the standards and requirements of our earlier decisions pertaining thereto. In essence, then, the creation of a hospital district is a legislative act and no guidelines are constitutionally required beyond the requirement that the county board must find that the district will be conducive to the public health and welfare and set the boundaries after a hearing afforded to all persons interested. It is clear that the purpose of the hearing is not to prove or disprove certain jurisdictional facts, but to provide a forum for interested persons to express their views in aid of the legislative decision to be made on the formation and boundaries of the district. It is further apparent that the Legislature has furnished some guidelines in that the district must have not less than $3,000,000 assessed valuation and the land is to be contiguous. It seems quite apparent, even asuming a strict application of the Summerville, Elliott, and Anderson cases, that the standards in this legislative delegation meet all constitutional standards. The extensive argument of the plaintiffs reciting the possibility of abuse of the powers granted is irrelevant to whether the act comes within the permissible power of delegation by the Legislature. The Legislature has adopted a policy which recognizes that the need for hospital care goes beyond the city, village, or county lines and has enacted the Hospital District Act as a means of implementing this policy. This is clearly within its police powers in the interest of health,

welfare, and convenience. The implementation of this legislation by the delegation to the county board of one of the counties involved is in all respects a reasonable, proper, and constitutional delegation of legislative power in this area. When these requirements are tied in with a provision that the electorate of the proposed district must adopt it by a majority vote it further reenforces the conclusion that such a scheme is constitutionally secure.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DUANE POPE, APPELLANT.
184 N. W. 2d 395

Filed February 26, 1971. No. 37661.

1. **Criminal Law: Former Jeopardy.** The double jeopardy clauses of federal and Nebraska Constitutions do not prohibit successive prosecutions by federal and Nebraska governments in the exercise of concurrent jurisdiction over substantially the same offense.
2. ———: ———. The double jeopardy clauses do not prevent Nebraska fixing higher standards by statute or in the absence of statute, by judicial decision.
3. ———: ———. Whether at common law a federal conviction bars prosecution by Nebraska with concurrent jurisdiction over substantially the same offense depends upon vindication of the public policy of the state.

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

Robert B. Crosby and Wallace M. Rudolph, for appellant.

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

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

SMITH, J.

The district court found defendant Duane Pope guilty on three counts of murder in the first degree. It imposed the penalty of death. On appeal Pope contends that the court erred in overruling his plea of double jeopardy.

The three counts, each naming a different victim, arose from the same conduct which had led to a federal indictment of Pope. Three federal counts charged that (1) Pope on June 4, 1965, had shot and killed the three victims and (2) at the time he had been robbing Farmers State Bank, a federally insured bank at Big Springs, Nebraska. In a federal trial on Pope's pleas of not guilty a jury found him guilty on all counts. It directed punishment by death. Judge Van Pelt, the trial judge, imposed a sentence of death on each of the three counts.

Affirmance of the judgment in Pope v. United States, 372 F. 2d 710 (8th Cir., en banc, 1967) (opinion by Blackmun, J.), was vacated in Pope v. United States, 392 U. S. 651, 88 S. Ct. 2145, 20 L. Ed. 2d 1317 (1968). The vacation rested on a concession that the death penalty provision, Title 18 U. S. C., section 2113(e), like the one in the Federal Kidnapping Act, Title 18 U. S. C., section 1201(a), was unconstitutional. See United States v. Jackson, 390 U. S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968). The case was remanded to the district court for resentencing. Pope v. United States, 397 F. 2d 812 (8th Cir., 1968). On remand Judge Van Pelt in December 1968 resentenced Pope to life imprisonment on each but one of the three counts and to 99 years on the other. The judgment was affirmed. Pope v. United States, 434 F. 2d 325 (8th Cir., 1970).

In the state prosecution on four consolidated informations Pope pleaded not guilty and not guilty by reason of insanity or mental derangement. Trial of issues of guilt was had to the court on the record of testimony at the federal trial, counsel reserving rights to certain ob-

jections. A summary of the evidence at the federal trial appears in Judge Blackmun's opinion for the circuit court.

The double jeopardy clause of the Fifth Amendnment to the Constitution of the United States is applicable to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U. S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). It does not prohibit successive prosecutions by federal and state governments in the exercise of concurrent jurisdiction over substantially the same offense. See Abbate v. United States, 359 U. S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 729 (1959); Bartkus v. Illinois, 359 U. S. 121, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1959); United States v. Synnes, —— F. 2d —— (8th Cir., 1971). Protection of our brand of federalism has necessitated a conservative interpretation of double jeopardy.

Those successive prosecutions are not prohibited by the double jeopardy clause of the Constitution of Nebraska, Article I, section 12. Cf. Marshall v. State, 6 Neb. 120 (1877).

The constitutional provisions set minimum limits. They do not prevent Nebraska fixing higher standards by statute or in the absence of statute, by judicial decision. Cf. Marshall v. State, *supra*. No Nebraska statute bars this prosecution of Pope.

We express no opinion on effects of a former finding of not guilty upon this doctrine of dual sovereignty. Reasons in the name of federalism sustaining a prosecution after a conviction may lose all force when the first prosecution ends in a finding of not guilty. See, Miller, Double Jeopardy and the Federal System, p. 63 (1968); Comments, 75 Yale L. J. 262 (1965); 65 Yale L. J. 339 (1956); Note, 80 Harv. L. Rev. 1538 at 1563 (1967).

Penal sanctions which ideally ought to be scaled may be considered a technique for general deterrence of crime. See, Andenaes, "The General Preventive Effects of Punishment," 114 U. Pa. L. Rev. 949 (1966); Report, Royal Commission on Capital Punishment (1949 to 1953).

Prejudices for or against capital punishment have no place here. The point is this: Whether at common law a federal conviction bars prosecution by the State of Nebraska for substantially the same offense in instances of concurrent jurisdiction depends upon vindication of the public policy of Nebraska. Cf. Marshall v. State, *supra;* Miller, Double Jeopardy and the Federal System, pp. 24, 130, 131 (1968). The disparity between maximum punishments prescribed by the United States and Nebraska for the offenses in question is too great; conviction of Pope under the federal statute did not vindicate the public policy of Nebraska. Cf. Abbate v. United States, *supra*; Bartkus v. Illinois, *supra.*

Pope, age 22 and a college graduate, planned for weeks to rob that bank, to use an automatic pistol equipped with a homemade silencer, to kill everyone in the bank, to commit the perfect crime. The evidence fully supports the findings and sentence of death by the state district court on each of the three counts against Pope. Remaining issues, some of which relate to other counts, are resolved against Pope.

The judgments are affirmed. The sentence of death imposed by the district court shall be carried into execution between 12:01 o'clock a.m. and 11:59 o'clock p.m. on Friday, June 25, 1971.

AFFIRMED.

McCOWN, J., dissenting.

I respectfully dissent. A rigid view of the doctrines involved in our brand of federalism dictates the result expressed in the majority opinion. It expresses no opinion on the effects of a former finding of not guilty upon the doctrine of dual sovereignty. That situation is distinguished from a former finding of guilt and fixing of punishment. The majority justify a second prosecution after a valid former conviction and sentence on the ground that it is a "vindication of the public policy of Nebraska."

The ancient Latin maxim of the common law was

translated: "No one can be twice punished for the same crime or misdemeanor." In the early days of this country, the Supreme Court expressed its understanding of the doctrine of former jeopardy. "The common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted." Ex parte Lange, 85 U. S. (XVIII Wall.) 163 at page 169, 21 L. Ed. 872.

There can be little question that at common law no one could be twice punished for the same offense whether the former trial was by the same jurisdiction or not. The dual sovereignty doctrine emerged as a protection of our distinctive brand of federalism. It is ironic that the federalism inspired by a desire for constitutional guarantees of the rights of individuals should itself provide the reasons for disregarding its own guarantees against double jeopardy.

There have been clear indications that the doctrinal bases of Bartkus v. Illinois, 359 U. S. 121, 79 S. Ct. 676, 3 L. Ed. 2d 684, have been substantially undercut and practically overruled. See, for example, Malloy v. Hogan, 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653; Griffin v. California, 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106; Benton v. Maryland, 395 U. S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707; Murphy v. Waterfront Commission of New York, 378 U. S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678.

In the case before us, the punishment imposed by the federal court amounted to three life sentences for all practical purposes. It is beyond any dispute, therefore, that the prosecuting authority of Nebraska regards death as the only sufficient punishment in this case. The final punishment meted out by the federal court has been deemed insufficient. That sort of interpretation of the doctrine of dual sovereignty puts the federal and state governments in the position of competing with

each other. Each branch of government determines whether the punishment meted out by the other branch of government shall be deemed sufficient and whether the protection against double jeopardy and punishment shall be granted or withheld. That determination rests with the prosecutor and stems from an interpretation of public policy, not from the Constitution nor from the common law.

The public policy of Nebraska ought not to be "vindicated" at the expense of fundamental and traditional concepts of former jeopardy and due process. Common law protections against double jeopardy and punishment, as well as constitutional provisions, ought not to be ignored to justify and preserve a competitive policy of retribution and punishment under our unique form of federal democracy.

ROBERT L. MARQUARDT, APPELLANT, V. NEHAWKA FARMERS COOPERATIVE CO., A CORPORATION, APPELLEE.

184 N. W. 2d 617

Filed March 5, 1971. No. 37628.

1. **Trial: Evidence.** In determining the sufficiency of the evidence to sustain a verdict, a party is entitled to the resolution of all of the conflicts of the evidence in his favor, and all of the reasonable inferences that can reasonably be deduced from the proof.
2. **Appeal and Error: Evidence.** Where the appeal is from a verdict for a defendant in a jury case on a fact question, the preponderance of the evidence must be so clearly and obviously contrary to the finding and the verdict of the jury that it is our duty to correct the mistake.
3. **Trial: Instructions: Negligence.** It is the duty of the trial court to analyze and summarize the different specific allegations of negligence in the pleadings and to succinctly state and submit only the allegations of negligence that are supported by competent evidence.
4. **Trial: Instructions.** Generally, it is an improper practice for a trial court to merely copy the allegation of a party's petition

in his pleadings when submitting the issues to the jury.

5. ———: ———. Instructions must be taken as a whole and construed together, and a construction based upon isolated phrases or sentences should not be permitted.

6. Trial: Evidence. Where evidence is objected to which is substantially identical to evidence admitted and not objected to, or otherwise admissible, prejudicial error will not lie because of its admission into evidence.

7. ———: ———. Under section 25-1215, R. R. S. 1943, when part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other.

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

Cobb, Swartz & Wieland, for appellant.

Baylor, Evnen, Baylor, Curtiss & Grimit and Harold R. Lebens, for appellee.

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

WHITE, C. J.

This is an action for personal injuries arising out of a motor vehicle accident at a highway intersection. From a jury verdict, judgment in favor of defendant, and order overruling motion for new trial, the plaintiff appeals. We affirm the order and judgment of the district court.

The accident occurred at approximately 11:15 a.m. on July 17, 1967, at the intersection of U. S. Highway Nos. 73-75 and the Mynard Road near Plattsmouth, Cass County, Nebraska. The weather was clear and the roads were dry. John Morris, an employee of the defendant Nehawka Farmers Cooperative Company, was driving north along U. S. Highway Nos. 73-75 in a 1958 G.M.C. truck, pulling an anhydrous tank trailer. The truck was owned by the defendant and Morris was within the scope of his employment at the time of the accident. The truck did not have a left-hand rear-view mirror; the tank behind the truck prevented the use of any in-

side mirror; and the right-hand outside mirror was out of adjustment, thus preventing Morris from seeing anything in it. As he neared the Mynard Road intersection, Morris slowed up and used his electric turn signals to indicate a left-hand turn, intending to turn to the west. As he turned left in the intersection, he collided with the plaintiff's 1964 Ford Thunderbird which was attempting to pass him. At the time of the collision, plaintiff, Robert L. Marquardt, was a passenger in the Thunderbird, which he owned. The car was being driven by his son, Robert L. Marquardt, Jr. Plaintiff received personal injuries for which he brought this action, claiming defendant's employee, Morris, negligently caused the collision. Defendant alleged that the proximate cause of the accident was the negligence of the driver of plaintiff's automobile.

The contentions of the plaintiff on appeal are very numerous. We discuss only those assignments of error properly presented and argued. Rule 8a2(2)(3), Revised Rules of the Supreme Court, 1967; Parkhurst v. Parkhurst, 184 Neb. 687, 171 N. W. 2d 243.

The plaintiff contends that the trial court erred in overruling the plaintiff's motion for a directed verdict made at the end of all the evidence. We review the evidence in light of the general rule that where a jury has returned a verdict for the defendant, such defendant is entitled to the resolution of all of the conflicts of the evidence in his favor, and all of the reasonable inferences that can reasonably be deduced from the proof. Beavers v. Christensen, 176 Neb. 162, 125 N. W. 2d 551. In addition to this rule, this court has held that in the posture of this case, where the appeal is from a verdict for a defendant in a jury case on a fact question, the preponderance of the evidence must be so clearly and obviously contrary to the finding and the verdict of the jury that it is our duty to correct the mistake. Schmeeckle v. Peterson, 178 Neb. 476, 134 N. W. 2d 37; Beavers v. Christensen, *supra*. The essence of the plaintiff's contention is

that he claims Morris, the driver, as defendant's agent, was negligent as a matter of law when he was not able to see the plaintiff's car passing him in the intersection. Plaintiff relies on several cases, the basic one of which is Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355. Our holding in the Petersen case stands for the proposition that failure to look before turning left across a public highway *between* intersections is negligence as a matter of law. It is clear that the rule has been expressly limited to turns betwen intersections, where the driver following the turning vehicle least expects such a move. The rule has no application here. The defendant's driver Morris testified that he did not believe any portion of his vehicle was to the left of the centerline before he got to the intersection. There is some question about a conflict between this statement and the one he made prior to the time of trial, but, of course, this was a matter for the jury to determine. The most that can be said is that it was for the jury to determine just what was meant by the possibly conflicting testimony given in this respect.

On the morning in question, Morris had left his employer's elevator to make a pick-up of an anhydrous tank trailer. There was evidence to the effect that he had discovered the missing left-hand rear-view mirror only after he was on the road. He had been forced to use that particular truck since none other was available that morning. At his next stop in a farmer's field, Morris tried to install a replacement mirror he had found in the truck, but it would not fit. He then attempted to move the right-hand mirror to the left but he did not have the proper tools. He was then forced to start back without a left-hand rear-view mirror.

Various evidence was presented to the jury on the effectiveness of the truck's turn signals, the fact that the anhydrous tank trailer had a slow-moving vehicle sign painted on it, the speed at which Morris approached the intersection and then began his turn, and the dis-

tance which the two vehicles traveled after impact. Taken as a whole, the evidence was of such a nature so as to present a jury question. The failure to have a proper functioning rear-view mirror, and the circumstances surrounding it, were at the most a violation of the statute, not negligence per se, and presented a question for the jury under all of the circumstances. The trial court was correct in denying the plaintiff's motion for a directed verdict.

The next contention of the plaintiff is that the trial court did not submit to the jury certain issues of negligence supported by the evidence and properly pleaded by the plaintiff. As we examine this record, the substance of this contention is that the trial court should have submitted to the jury the allegations of the plaintiff's petition in haec verba. This court has consistently condemned such a practice and has placed the duty upon the trial court to properly analyze, summarize, and submit the substance of the numerous allegations of negligence in tort petitions. We have examined the numerous allegations of negligence in the plaintiff's petition, and they are overlapping, repetitious, and contain innuendoes which could be suggestive of prejudice against the defendant. The trial court, in this situation, very properly summarized the allegations of plaintiff's petition that Morris failed to maintain a proper lookout, made a left turn across traffic lanes at a time when it was unsafe to do so, made a left turn prior to reaching the center of the intersection, operated said motor vehicle without clearly visible electric turn indicators, made an unsignaled left turn across the highway, and operated said vehicle without a rear or side-view mirror. We come to the conclusion that the trial court's submission was an accurate, nonrepetitious, and nonoverlapping statement of the issues which fairly submitted the case to the jury. See, Kroeger v. Safranek, 165 Neb. 636, 87 N. W. 2d 221; Davis v. Roosman, 179 Neb. 808, 140 N. W. 2d 639. There is no merit to plaintiff's contention.

Plaintiff next asserts that the import of the trial court's instruction No. 27 was either prejudicial or had the effect of directing the jury to find the plaintiff contributorily negligent. It is true that the trial court's instruction No. 27 once spoke of the negligence of the plaintiff's driver without containing the common qualification, "if any." However, plaintiff has taken the separate allegedly erroneous statement out of the context of the instruction. We have examined instruction No. 27 and a fair reading of it leads to a completely different conclusion than that reached by the plaintiff in his argument. In this same instruction the trial court specifically stated that even though it should find the plaintiff's driver was negligent, if it found that the defendant was guilty of negligence which was a direct and proximate cause of the collision and resulting injuries, the plaintiff was entitled to full compensation. There is nothing in this instruction which withdraws any issue of negligence from the jury. In fact, this same instruction did not use the words "if any you should find" after each mention of or reference to the possible negligence of the defendant.

In addition, instructions Nos. 1, 5, 6, and 7 make it clear that the court was submitting the issue of the negligence of the plaintiff's driver under all of the circumstances at issue in the case. Instructions must be taken as a whole and construed together, and we will not permit an isolated construction based upon semantical fragmentization of any particular instruction. Beranek v. Petracek, 184 Neb. 516, 169 N. W. 2d 275.

The trial court submitted the issue of reasonable speed of the plaintiff's vehicle under all of the circumstances of the case, and submitted the issue of the statutory duty to decrease speed when approaching and crossing an intersection. Plaintiff contends that this section of the statute only applied when another vehicle is approaching and meeting another driver. Turning movements, of course, are complicated and more danger-

ous from any direction when cars are crossing intersections. There is no restriction in the statute that such an instruction would be unreasonable. This court, in effect, has specifically so held. Stillwell v. Schmoker, 175 Neb. 595, 122 N. W. 2d 538.

Plaintiff asserts error in the fact that the trial court refused to instruct the jury, pursuant to his request, that as a matter of law "the most dangerous movement on public streets or highways is the left hand turn." This court has previously used this particular phrase in connection with the discussion and decision in several cases, see, *e.g.*, Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355. We have never held that such a statement is to be regarded as a conclusion of law or one that must be included in an instruction, irrespective of the particular fact situation. It is apparent that the innuendo of the language of this request might create a prejudicial inference of the court's opinion of the facts in the particular case. We also observe that the Pattern Jury Instruction dealing with left-hand turns between intersections, N J I No. 7.11, does not include or permit the use of this phrase. There is no merit to plaintiff's contention.

Plaintiff also claims the trial court erred in admitting into evidence the conversation John Morris had with a police officer immediately after the accident. Over objection, the officer was allowed to repeat this conversation in which Morris told the officer that he had turned on his signals to make a left turn and, as he turned, he heard the squeal of brakes. At that point he said he tried to turn back to the right, but could not avoid the accident. Plaintiff claims this is self-serving hearsay evidence which is not admissible under any of the exceptions to the hearsay rule. Plaintiff is correct in that the testimony was hearsay and, under other circumstances, would be subject to objection. See Hamilton v. Huebner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1. In this instance, however, the evidence was not

prejudicial to the plaintiff in that all of the points in the statement of Morris to the officer were established by means of other evidence which came in without objection. In direct testimony, Morris substantiated every point which the police officer had brought out in his discussion of what had been said at the accident scene.

It is clear that this evidence in the case was undisputed and the police officer's testimony was merely cumulative at the worst. Where evidence is objected to which is substantially identical to evidence admitted and not objected to, or otherwise admissible, prejudicial error will not lie because of its admission into evidence. Hickman v. Layne, 47 Neb. 177, 66 N. W. 298; Vaca v. State, 150 Neb. 516, 34 N. W. 2d 873; United States v. Crescent Amusement Co., 323 U. S. 173, 65 S. Ct. 254, 89 L. Ed. 160. See, also, Meyer v. Moell, *ante* p. 397, 183 N. W. 2d 480.

The final issue presented by the plaintiff is whether the trial court properly allowed the admission of a written statement made by a witness prior to the trial. Robert Schlichtemeier was an eyewitness to the collision of the two vehicles. Prior to trial, Schlichtemeier made a written statement containing several damaging points against the plaintiff. The statement said that plaintiff's car had passed Schlichtemeier in a no-passing zone just prior to the collision, Schlichtemeier estimating the speed of plaintiff's car at 70 to 75 miles per hour. The statement also contained other points which were generally favorable to defendant's position. Upon cross-examination at the trial, plaintiff's counsel asked Schlichtemeier about this statement, attempting to use it to impeach the testimony of the witness. After plaintiff's counsel had used the statement in this manner, defendant attempted to put the entire statement into evidence. Over plaintiff's objection, the trial court received the exhibit. Plaintiff now claims there was insufficient basis for the introduction of the entire written statement since, in the plain-

tiff's opinion, only a minor portion of it was referred to for impeachment.

Section 25-1215, R. R. S. 1943, as it applies to this case, provides: "When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other." The admission of evidence under this section is within the area reserved to the sound discretion of the trial court. Spani v. Whitney, 172 Neb. 550, 110 N. W. 2d 103. Plaintiff invited the introduction of the written statement and we can find no abuse of discretion by the trial court in determining that the rest of the statement was on the "same subject." There was no prejudicial error in the trial court's ruling.

We have fully explored all of the assignments of error and contentions properly assigned by the plaintiff. We find no prejudicial error in the judgment entered by the trial court in favor of the defendant. The judgment of the trial court is correct and is affirmed.

AFFIRMED.

WILLIAM H. ROGERS, APPELLEE, V. NAVAJO FREIGHT LINES, INC., A CORPORATION, ET AL., APPELLEES, IMPLEADED WITH BEE LINE MOTOR FREIGHT, A CORPORATION, APPELLANT.
183 N. W. 2d 623

Filed March 5, 1971. No. 37656.

1. **Instructions.** A trial court should eliminate immaterial and superfluous matters and submit to the jury by instructions only matters properly to be decided by it in arriving at its verdict.
2. **Master and Servant.** For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible.

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

Larry Welch of McGroarty & Welch, for appellant.

Alfred A. Fiedler of Weinberg & Fiedler, for appellee Rogers.

Cassem, Tierney, Adams, Henatsch & Gotch and Gross, Welch, Vinardi, Kaufman, Schatz & Day, for appellees Navajo Freight Lines, Inc., et al.

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

NEWTON, J.

This is an action to recover for personal injuries. Plaintiff alleges he was injured by reason of the joint negligence of employees of the defendants Bee Line Motor Freight and Navajo Freight Lines, Inc. Verdict and judgment were for plaintiff against Bee Line Motor Freight and for defendant Navajo Freight Lines, Inc. We affirm the judgment of the district court.

Plaintiff was a truck driver for the Graves Truck Line. He called at the dock operated by defendant, and sole appellant, Bee Line Motor Freight, to load freight for his employer. Another truck driver, employed by Navajo Freight Lines, Inc., had parked close by and was engaged in loading a heavy crate weighing approximately 1,000 pounds and which in dimensions was about 20 feet by 4½ feet by 1 foot. The Navajo driver was being assisted by defendant's dock foreman, the rendering of such assistance being a part of his duties. It appears to be the custom for the drivers to also assist one another when requested. The two men were unable to load the crate without further assistance and the foreman requested plaintiff's help. Adjacent to the large crate, not over 6 to 8 inches away, was another crate containing a radiator and weighing about 180 pounds. Plaintiff moved in to assist as requested and with the foreman pushing, the Navajo driver lifting and pulling

the front end, and plaintiff assisting to lift with a dolly, the crate was partially moved into the truck. At that time the crate containing the radiator fell over and fractured plaintiff's leg. This crate measured about 6 feet by 4½ feet by 1 foot.

The evidence as to what caused the crate to fall is circumstantial. The Navajo driver said the front end of the large crate did not move to either side. The foreman said the rear end may have moved an inch or two. This is not indicative that the large crate tipped over the small one, but plaintiff stated he heard the two pieces of wood hit together and no other reasonable explanation is offered to explain the crate falling.

Plaintiff did not allege and does not claim that the accident was the result of a defect or dangerous condition in defendant's premises nor that it was due to any dangerous activity being carried on on the premises. His contention is simply that the defendant's foreman was negligent in failing to maintain a proper lookout, failing to exercise proper control over the large crate to keep it from striking the small one, and failing to use other available machinery and equipment in moving the crate. Contrary to defendant's contention, this is not a case of a licensee or invitee being injured on defendant's premises under the rules governing such cases, but rather a simple case involving ordinary negligence. The trial court was correct in refusing to instruct on defendant's theory. "A trial court should eliminate immaterial and superfluous matters and submit to the jury by instructions only matters properly to be decided by it in arriving at its verdict." Bezdek v. Patrick, 167 Neb. 754, 94 N. W. 2d 482. See, also, Clark v. Smith, 181 Neb. 461, 149 N. W. 2d 425.

In view of the evidence relating to the manner in which the accident occurred, we are constrained to find that a jury question was presented relating to the cause of the accident and the charge of negligence on the part of defendant's foreman.

Defendant also contends that the foreman was acting outside the scope of his employment and became an agent of Navajo when he assisted Navajo's driver. This argument must fall. The undisputed testimony indicates that it was part of the foreman's duties to assist the drivers in loading heavy objects and that both he and the drivers were accustomed to request the assistance of other drivers. In assisting to load the crate, he was engaged in his employer's business and the same is true when he solicited plaintiff's assistance to further his employer's business. "For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible." Niemeyer v. Forburger, 172 Neb. 876, 112 N. W. 2d 276.

Finally, it is contended that the court erred in submitting the question of permanent injuries. Plaintiff's doctor was the only medical expert called. He conceded that X-rays could not reveal any permanent injury to plaintiff's ankle joint but testified that, in his judgment, plaintiff had sustained a 10 percent permanent injury to one leg. He based his findings on the fact that after the fracture had been set, it became slightly displaced which could cause damage to the joint and on the fact that after 3 years, plaintiff still complained of pain and swelling in the ankle. This being the only testimony on the subject, except for that of plaintiff relative to his condition, it appears that a jury question was also presented on this point and the instruction is correct.

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

AFFIRMED.

CARTER, J., dissenting.

The burden of proof is upon the plaintiff in an action for damages based on negligence to prove by a preponderance of the evidence the negligence of the defendant or, in this case, its employee. No act of negligence or breach of duty on the part of defendant's employee is shown or proved, nor does the majority opinion recite any such on the part of Bee Line Motor Freight, Inc., or its employees. Surely the mere happening of an accident, under the circumstances here shown, is not proof of negligence on the part of anyone. I submit that the action fails for want of proof and that no basis exists for submitting the case to a jury. I would reverse the judgment and dismiss the cause of action on the basis that plaintiff failed to prove a cause of action.

SPENCER, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. NEAL SMITH, APPELLANT.
184 N. W. 2d 584

Filed March 5, 1971. No. 37695.

Criminal Law: Guilty Plea. When following a plea of guilty in a criminal action the court finds from the record of an in-court examination of the defendant that his plea was voluntary, was free from coercion, was fairly advised by his counsel, and that his counsel was effective, a subsequent contention that his plea was coerced and his counsel ineffective will not be entertained.

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

Albert T. Reddish, 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.

This is an appeal from a plea of guilty by the defendant to a no-fund check charge under section 28-1212, R. S. Supp., 1969. The defendant contends that his plea of guilty was not voluntary on his part; that it was not knowingly made by him; and that the court did not properly receive the plea of guilty without determining whether there was an appropriate factual basis for it.

The arguments that the defendant makes in this respect are affirmatively refuted by the record. The record reveals that the court, in a very painstaking manner, fully explained to the defendant the nature of his constitutional rights, the effect of a guilty plea, the nature of the punishment provided by law for the offense charged, and then ascertained on a factual basis that the defendant was in fact guilty. See, State v. Sargent, *ante* p. 155, 181 N. W. 2d 449. Besides other references in the bill of exceptions revealing the necessary standard inquiries on this subject, the evidence reveals the following particularly pertinent colloquy between the district judge and the defendant. It is as follows: "Q In fact, the limits are not less than one year nor more than ten years, or imprisoned in the county jail not less than thirty days nor more than six months, or be fined not less than $50.00 nor more than $500.00; do you understand that those are the alternatives that I have, do you understand that? A Yes. Q You understand if you plead not guilty or if a not guilty plea is entered for you, which I would do if you entered no plea at all, you would then have the right to a jury trial, do you understand that? A Yes. Q Do you understand what a jury trial is? A Yes, sir. * * * Q Do you understand that you'd have the right to a speedy public trial if you wanted one? A Yes. Q Do you understand that you'd have the right to compulsory process, and by compulsory process I mean the right to compel the State to issue orders to persons whom you would name, who would then be required to come into court to give testi-

mony for you, at no expense to you, do you understand that? A Yes, sir. Q Do you understand that if there was a trial you'd have the right to face the witnesses who testified against you and to cross-examine them? A Yes. Q And do you understand that you would not have to testify if you didn't want to and that I—and if you wanted me to, I would instruct the jury that nothing was to be taken against you because you failed to testify; do you understand that? A Yes, sir. * * * Q Well, now, you understand, Mr. Smith, that when you plead guilty to this charge, you are saying to me, 'Yes, I did intend to cheat Earl's Conoco when I gave this check.' That's what you are saying when you plead guilty, do you understand that? A Yes. * * * Q And you further understand that you have the right to enter a plea of not guilty to this case, and you have a right to testify if you want to either at a jury trial or a trial to the court, that you didn't have any intention whatsoever to cheat Mr. Gardiner or Earl's Conoco, and that you intended to pick that check up, and if the jury chose to believe you or if I chose to believe you, you wouldn't be found guilty and would be found not guilty, do you understand that? A Yes. Q Now, is it your intention to plead guilty then to this charge, knowing that you have the right to have this issue submitted to a jury or to the court? A I will have my attorney do that. Q It's not his decision, that's your decision. You can't shift that responsibility to him, Mr. Smith. * * * Q Well, this is all well and good, but I want to make sure, Mr. Smith, that you understand— A Yes. Q— That you have a right to plead not guilty if you wanted to, and that the decision to plead guilty is a decision that is made by you; that's your decision, is that right? A Yes. * * * Q Has anybody made any threats or promises or said anything to you at all to get you to come in here to court today to plead guilty to this charge? A No. Q Are you now then prepared to enter a plea to this charge knowing what your rights are as have been explained to you today,

and by your counsel also, on a voluntary basis, is that right? A Yes." During the colloquy, the following questions were asked by the court and answered by the defendant: "Q Have you talked with your attorney Mr. Anderson here about this case? A Quite a bit; yes. Q Have you told him about the facts from your side? A Yes. Q Are you satisfied with the way he has represented you? A Yes."

The record here, including what is above recited, conclusively establishes that the court's acceptance of the plea was in due conformity with all pronouncements in State v. Sargent, *supra;* State v. Turner, *ante* p. 424, 183 N. W. 2d 763; and is in full conformity with the requirements of Boykin v. Alabama, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274. The record in the present case is more than sufficient to sustain the trial court in the acceptance of the plea of guilty and entering the judgment of conviction and sentence.

AFFIRMED.

DONNA D. ANTHONY, APPELLANT, V. HOWARD H. POPPERT ET AL., APPELLEES.
184 N. W. 2d 648

Filed March 12, 1971. No. 37621.

1. **Trial: Instructions.** It is the duty of the district court, on its own motion, to submit to the jury only the issues upon which there are controverted questions of fact which must be determined by the jury in order to properly arrive at its verdict.
2. **Trial: Negligence.** Where the facts adduced to sustain the issue of negligence are such that reasonable minds can draw but one conclusion therefrom, it is the court's duty to decide the question as a matter of law, rather than submit it to a jury for determination.

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

Lovell & Raymond and Robert O. Hippe, for appellant.

Wright, Simmons & Hancock and Larry D. Hall, for appellees.

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

McCOWN, J.

This is an action for personal injuries allegedly sustained by plaintiff as the result of a minor automobile accident. The jury returned a verdict for the defendants and the plaintiff has appealed.

The plaintiff, Donna Anthony, and the defendant, Howard Poppert, were both stopped near a stop sign at the intersection of Railroad Avenue and 20th Street in Scottsbluff, Nebraska, on a dry, clear summer afternoon in August 1967. Plaintiff's car was stopped at the stop sign and the defendant's vehicle was stopped immediately behind the plaintiff. They waited for traffic to clear. Plaintiff then started toward the intersection, proceeded for approximately half a car-length and stopped again for additional traffic. Poppert started forward when he saw the plaintiff proceed; looked to the left and right sides for approaching traffic; did not see the plaintiff stop again; and bumped the rear of plaintiff's car when plaintiff stopped. Plaintiff had a police officer called to the scene. The police officer did not find damage to the vehicles nor could he locate any debris or establish the point of impact. The police officer stated that he did not think there was damage enough to the vehicles to make out a report, but plaintiff asked that a report be made and stated that her neck hurt.

The petition did not allege, and the evidence failed to establish any property damage to either vehicle. There were two passengers in plaintiff's car and one in defendant Poppert's vehicle. Of the five persons in the two vehicles, only plaintiff claimed to have suffered personal injury of any kind. The claimed injury was a sprain or strain in the neck commonly called a whiplash.

injury. In any event, the evidence was such as to raise a definite jury question as to whether the plaintiff suffered any personal injury, and whether the claimed injuries, if any, were the direct and proximate result of this accident.

The defendants' answer to plaintiff's petition was a general denial. There was no allegation nor issue of contributory negligence on the part of the plaintiff. The district court overruled plaintiff's motion to direct a verdict in favor of the plaintiff on the issue of liability and submitted the issue of the negligence of defendant Poppert to the jury, as well as the issues on damages.

The motion for new trial and the assignments of error primarily rest on the contention that the defendant Poppert was negligent as a matter of law and that the issue of his negligence should not have been submitted to the jury.

The evidence as to how the accident occurred was substantially undisputed, although the evidence as to the force of the impact is sharply conflicting. Resolving all inferences in favor of the defendant Poppert, we hold that he was guilty of negligence as a matter of law under the circumstances of this case and that his negligence was the sole proximate cause of this accident. See, Ritchie v. Davidson, 183 Neb. 94, 158 N. W. 2d 275; Stewart v. Ritz Cab Co., 185 Neb. 692, 178 N. W. 2d 577.

The issue of Poppert's negligence and whether that negligence was the proximate cause of the accident should not have been submitted to the jury. As we said in the Ritchie case: "It is the duty of the district court, on its own motion, to submit to the jury only the issues upon which there are controverted questions of fact which must be determined by the jury in order to properly arrive at its verdict."

Instructions numbered 2, 3, and 4 submitted the issue of defendant Poppert's negligence to the jury, spelled out the burden of proof, and the effect of findings, all in the form set out in NJI No. 2.01, pp. 25, 26. The plaintiff

was not entitled to a directed verdict in her favor because there was a jury question as to whether the plaintiff had sustained any injuries as the direct and proximate result of Poppert's negligence and the resulting accident. She was, however, entitled to have the jury instructed that Poppert was negligent in the operation of his automobile; that such negligence was the proximate cause of the accident; and that the plaintiff was not guilty of any contributory negligence. The burden should remain on the plaintiff to prove that she sustained personal injuries; that the accident was a proximate cause of such injuries; and the nature, extent, and amount of the damages. See, NJI No. 2.06, p. 47; NJI No. 2.08, p. 49.

Where the facts adduced to sustain the issue of negligence are such that reasonable minds can draw but one conclusion therefrom, it is the court's duty to decide the question as a matter of law, rather than submit it to a jury for determination. See Stewart v. Ritz Cab Co., *supra*.

Other issues raised by the plaintiff have been considered and are without merit. The motion for new trial was proper and should have been sustained. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

SPENCER, J., dissenting.

I respectfully dissent from the opinion herein because I do not believe that defendant Poppert is guilty of negligence as a matter of law under the circumstances of this case.

At the time the plaintiff was stopped at the stop sign, defendant Poppert was stopped 3 feet behind her. Plaintiff proceeded to move forward and defendant Poppert then took his eyes from her vehicle to look to the left and to the right, or west. Leaving his left foot on the clutch and his right foot on the brake, he permitted his car to roll forward to the stop sign. With no warning and without a signal, and at a place where there is a

question as to whether plaintiff could be expected to stop in the absence of an emergency, the plaintiff came to a sudden stop. The testimony of defendant Poppert, which seems to be supported by the physical facts, is that his automobile lightly tapped the plaintiff's vehicle.

Plaintiff's testimony is that she stopped her vehicle, a 1957 Ford, 1 or 2 inches back from the stop sign, and then proceeded forward out into Twentieth Street; that when she had moved 6 feet she noticed a white vehicle come up over the railroad tracks; and she applied her brakes and stopped again. There is no testimony the plaintiff signaled her intention to stop, nor that it was necessary to stop where she did to avoid a collision with the white car coming over the tracks. Exhibits 5 and 6 indicate that there is no obstruction to vision for traffic coming from the west on Twentieth Street. Exhibit 6 shows that a car proceeding 6 feet from the stop sign would still not be in the right-of-way for the intersection of Railroad Avenue with Twentieth Street.

We have a jury question as to whether defendant Poppert had a reasonable opportunity under the facts of this case to avoid the slight collision with plaintiff's vehicle, and also a question as to whether plaintiff's predicament was not the result of her sudden, wholly unexpected stop. There is a question as to whether defendant Poppert had an opportunity to bring his vehicle to a complete halt before tapping the plaintiff's automobile when plaintiff stopped suddenly and without warning. At the very least, there is present a question as to whether reasonable minds might differ on the question as to whether defendant Poppert exercised due care and caution under the circumstances of the particular situation. To me, a jury question was clearly present. I would affirm the judgment herein.

BOSLAUGH, J., joins in this dissent.

NEWTON, J., dissenting.

I join in the dissent of Spencer, J.

Negligence is ordinarily defined as "doing something

which an ordinary, prudent person would not have done under similar circumstances, or failing to do something which an ordinary, prudent person would have done under similar circumstances."

In this instance, defendant Poppert saw plaintiff start to move out into the arterial highway. He started to follow but before entering the arterial highway, he glanced to the left and right to ascertain that it was clear of oncoming traffic. In the small fraction of time that it took him to do this, the plaintiff unexpectedly stopped a second time and before defendant Poppert could observe what she had done and stop his automobile, he had made slight contact with the rear of plaintiff's automobile. Had plaintiff moved on out into the arterial highway and defendant Poppert followed without looking for approaching traffic, in the event of an accident, he would have been held guilty of negligence as a matter of law. It appears to me that he did no more than what an ordinary, prudent person would have done under the same circumstances and the majority opinion completely overlooks the fact that occasionally accidents can and do happen without negligence on the part of either party. At the very least, these facts are sufficient to present a jury question and the judgment of the district court should be affirmed.

ROBERT ROTHENBERGER, APPELLANT, V. LOWELL WILKS ET AL., APPELLEES.
184 N. W. 2d 626

Filed March 12, 1971. No. 37657.

Trial: Appeal and Error. In an appeal from a judgment in a law action tried by the court without a jury, this court will not disturb findings of fact based on conflicting evidence unless such findings of fact are clearly wrong. The credibility of witnesses and the weight to be given their testimony in such cases are for the trier of fact.

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

C. Morris Gillespie, for appellant.

W. H. Kirwin, for appellee Wilks.

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

SPENCER, J.

This is an action founded in bailment to recover damages to appellant's truck while it was being used, allegedly in the course of the bailment by appellee Larry Rothenberger, purportedly an employee of appellee Wilks. The trial court dismissed the action as to Wilks and rendered judgment against Larry Rothenberger for $350. We affirm.

On October 27, 1967, Robert Rothenberger, hereinafter referred to as appellant, was living in a trailer house owned by him on the Fred Schlager farm, north and east of Minatare, Nebraska, on which Wilks was conducting a sheep feeding operation. His brother, Larry Rothenberger, hereinafter referred to as Larry, and his uncle, Sam Kling, hereinafter referred to as Sam, were living with him. Sam was employed by Wilks in the feeding operation. Larry was employed by Wilks to pile beets on a piecework basis by the acre. This had no connection with the feeding operation and the evidence is undisputed that Larry was paid by Wilks solely for piling beets. The only tool used by him to pile beets was a pitchfork. Larry frequently helped Sam with the feeding, and Sam on occasion helped Larry in the piling of beets. Appellant, who was otherwise employed, also on occasion helped Sam with the feeding operation.

About 3 or 4 days prior to October 27, 1967, Sam contacted Wilks and told him the tractor they were using in the sheep feeding operation had broken down, and asked if it was all right if he used appellant's truck to haul feed. Wilks told him it would be all right, and

bought some oil for the truck. The truck in question, along with two other vehicles owned by appellant, was parked on the farm in the immediate vicinity of appellant's trailer. Larry had permission to use his brother's vehicles, and very frequently used the truck.

The truck was damaged about 5 p.m., October 27, 1967, after Larry had taken it from the premises over a county road adjoining the farm to an intersecting blacktop road. There is no information of any nature in the record as to how the accident happened. Certain pictures of the truck received in evidence indicate the front end came in forcible contact with some object. Both Sam, who was riding with Larry, and Larry were thrown from the truck by the impact. It is Larry's testimony that he left the premises with Sam to go around to the other end of the farm to secure beet tops to feed the sheep the next morning.

The feed yard is in the northeast corner of the farm. The beet field in question adjoins the feed yard. Actually, it had been necessary to harvest beets at that point to place the sheep pens there. The testimony of Wilks as well as that of the owner of the farm indicate that it was not necessary to leave the farm or to use the public road to get from the feed yard to the field where the beet tops were to be loaded. The undisputed evidence is that at least an hour would be required to bring in a load of beet tops and it would have been dark when they were brought in if that was the intention. Wilks' testimony is that he had instructed Sam as well as other sheepfeeders in his employ that they must be away from the feed pens before sundown. He also testified that there were plenty of beet tops piled near the pens for the next morning, and that customarily only a 1-day supply would be hauled in because the tops mold quickly when stacked.

It is unnecessary to a decision herein to reach any of the bailment questions raised by appellant. For the purposes of this opinion we assume bailment. Two ques-

tions are then presented: First, was Larry an employee of Wilks at the time of the accident; and, second, if so, was the damage to the truck sustained within the scope of the bailment?

It is undisputed that Larry was hired by Wilks on a contractual basis to stack beets. He did not use a truck in this work but only a pitchfork. The hauling of beet tops for feed was no part of his employment. That task was within the scope of the employment of his uncle. Wilks did know that Larry and Sam lived together on the farm and occasionally helped each other. The evidence is undisputed that Larry often used the truck in question for his own purposes, and that it was under the control of Larry or appellant. It was used only occasionally in the feeding operation and this when it was necessary to haul feed. Assuming an implied employment relationship, we still must face the question as to whether the damage to the truck occurred within the scope of the bailment.

The question involved is one of fact, which the trial court acting without a jury decided adversely to the appellant. Our law is well established that in an appeal from a judgment in a law action tried by the court without a jury, this court will not disturb findings of fact based on conflicting evidence unless such findings of fact are clearly wrong. The credibility of witnesses and the weight to be given their testimony in such cases are for the trier of fact. Highway Equipment & Supply Co. v. Jones, 182 Neb. 234, 153 N. W. 2d 859. This rule is applicable herein and is controlling.

Judgment affirmed.

AFFIRMED.