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REPORTS OF CASES

DECIDED BETWEEN

MAY 15, 1971 and FEBRUARY 18, 1972

IN THE

Supreme Court of Nebraska

JANUARY TERM 1971, SEPTEMBER TERM 1971,
AND JANUARY TERM 1972

VOLUME CLXXXVII

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

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IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1971

STATE OF NEBRASKA, APPELLEE, V. WILLIAM RALPH HOLLOWAY, APPELLANT.
187 N. W. 2d 85

Filed May 21, 1971. No. 37356.

1. **Criminal Law: Searches and Seizures: Affidavits.** In passing on the validity of a search warrant, the court may consider only information brought to the attention of the magistrate. For the affidavit of a tip from an informant to be sufficient, the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the articles were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible. Affidavits for search warrants must be tested in a common sense, realistic fashion.
2. ———: ———: ———. A recital of some of the underlying circumstances in the affidavit for a search warrant is essential if the magistrate is to perform his detached function. Mere affirmance of belief or suspicion is not sufficient.
3. **Criminal Law: Searches and Seizures: Trial: Evidence.** The State has the burden of establishing the legal sufficiency of a consent to a search and seizure. The existence and voluntariness of a consent is a question of fact.
4. **Criminal Law: Searches and Seizures.** A consent freely and intelligently given by the proper person may operate to eliminate any question otherwise existing as to the propriety of a search and seizure.
5. ———: ———. Under the circumstances of this case, the defendant had no standing to challenge the legality of the search and seizure.
6. **Criminal Law: Witnesses: Constitutional Law.** In order to deny a claim to the privilege against self-incrimination by a witness,

it must be perfectly clear to the judge from a careful consideration of all of the circumstances in the case that the witness is mistaken and that the answer or answers cannot possibly have a tendency to incriminate.

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

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

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

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

MCCOWN, J.

A jury found William Ralph Holloway guilty of the robbery of a bartender at a tavern in South Omaha, Nebraska. He was sentenced to 10 years imprisonment and this appeal followed.

At approximately 9 p.m., on December 13, 1968, three negro males held up and robbed the bartender and patrons of Little Paul's tavern. The robbers used a sawed-off shotgun and handguns and departed with money and personal effects, including men's and women's billfolds.

The robbery was one of a series of robberies which had occurred in Omaha. The police had been investigating the former robberies on December 12, 1968, and again on December 13, 1968. The police believed that following a robbery, the robbers might go to a brick dwelling at 5425 South 29th Avenue, which was the residence of Christabelle Jenkins.

At approximately 4 p.m., on the afternoon of December 13, 1968, Sgt. Barrett executed a sworn affidavit for the issuance of a search warrant for a 12-gauge sawed-off shotgun, assorted pistols and handguns. The affidavit alleged that the sole and only reasons for his belief that the guns were concealed or kept on the described premises was "information received from an

informant whose information has been reliable in the past." The judge of the municipal court issued a search warrant for the described property, reciting that "the following grounds exist for issuance of a search warrant, to-wit: Reliable information received from an informant whose information has been reliable in the past."

At approximately 6 or 7 p.m., the police began surveillance of the residence of Christabelle Jenkins from a distance of a half block. At approximately 9:15 p.m., the officers in the car heard a police radio report of a robbery at Little Paul's tavern. They left the residence for 15 or 20 minutes. Shortly after the return of the police officers to the front of the Jenkins residence, two negro males came out of the house. They were arrested by other officers some 300 feet east of the residence. The police, with their search warrant, went to the door of the residence. A 15-year-old son of Mrs. Jenkins came to the door. The police showed him the search warrant and he let them in. As they entered, they met the defendant coming down the stairs. He was arrested on the spot. In the front upstairs bedroom, lying on the bed, was a sawed-off shotgun, assorted cards and papers, men's billfolds and ladies' billfolds and purses.

Mrs. Jenkins lived in the house with her four children. She was the sole tenant and they were the only persons who lived in the house. Sgt. Coleman of the police department had been acquainted with her all of her life.

Mrs. Jenkins was not at home at the time the defendant was arrested. She was found at the Workmen's Club. Sgt. Coleman, together with Sgt. Dailey, left the Jenkins house and went to the Workmen's Club. There in the manager's office, Coleman testified that he told her that he had a search warrant for her house and he thought she should come with them. She said he didn't need anything to search her home; that she was willing to let them search. She did not remember whether they had told her they had a search warrant or not.

She rode with the police officers to her home and when they got there, she invited Coleman and Dailey into the house. She told them that she wanted to cooperate. When they entered the home, other policemen were still there. Sgt. Coleman showed Mrs. Jenkins the items on the bed in the upstairs bedroom. She told the police to take whatever was there. Neither the defendant nor the other two men arrested had ever lived in the Jenkins house. One of them had never been in the house before. The defendant had frequently visited her home but she had not given him permission to enter her home at any time that day. There was no evidence as to how the defendant or the other men entered the house.

A motion to suppress the evidence seized in the Jenkins bedroom was heard prior to trial and was denied by the district court. The defendant was found guilty by the jury. He was sentenced to 10 years imprisonment.

The defendant contends that the motion to suppress the seized evidence should have been sustained. He argues first that the search warrant was invalid because the affidavit was unsupported by facts. The State apparently takes the position that all the factual information which the police had might possibly have been submitted to the magistrate outside the affidavit, and, therefore, probable cause should be assumed from the issuance of the warrant.

We think it only necessary to refer to section 29-814, R. R. S. 1943: "A warrant shall issue *only on affidavit* sworn to before the judge or magistrate and *establishing the grounds* for issuing the warrant. * * * It (the warrant) shall state the *grounds* or proper cause for its issuance and the name or names of the persons whose *affidavits* have been taken in support thereof." (Emphasis ours.)

The rule in this state is clear. In passing on validity of a search warrant the court may consider only in-

formation brought to the attention of the magistrate. For the affidavit of a tip from an informant to be sufficient the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the articles were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible. Affidavits for search warrants must be tested in a common sense, realistic fashion. State v. LeDent, 185 Neb. 380, 176 N. W. 2d 21; State v. Waits, 185 Neb. 780, 178 N. W. 2d 774.

The affidavit here recited a bare conclusion. It recited none of the underlying circumstances from which either the informant or affiant had concluded that the shotgun and handguns were located in the residence of Christabelle Jenkins. Neither did the affidavit reveal any of the underlying circumstances from which the officer making the affidavit concluded that the informant was credible or reliable. While it is not necessary that the informant be named, it is necessary that some facts going to establish probable cause be set out. Affidavits for search warrants must be tested in a common sense, realistic fashion. Nevertheless, a "recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police." United States v. Ventresca, 380 U. S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684.

Even if the police collectively may have had sufficient facts to constitute probable cause, none of these underlying circumstances were set out in the affidavit. The inevitable consequence is that the affidavit was insufficient and the search warrant invalid. As long ago as 1933, Mr. Justice McReynolds, speaking for the Supreme Court, said: "Mere affirmance of belief or suspicion is not enough." Nathanson v. United States, 290 U. S. 41, 54 S. Ct. 11, 78 L. Ed. 159.

We do not agree with the defendant that the invalidity

of the search warrant in and of itself automatically makes the evidence seized inadmissible. We believe the evidence establishes a valid consent by the person who had a full right to consent and also establishes the defendant's lack of standing to complain.

We recognize that the State has the burden of establishing the legal sufficiency of a consent. Nevertheless, the existence and voluntariness of a consent is a question of fact. Here Christabelle Jenkins, the only proper person from whom a consent could be appropriately obtained, had known Sgt. Coleman all of her life. She did not even remember whether Sgt. Coleman had told her that he had a search warrant. Sgt. Coleman testified that when he told her he had a search warrant, she advised him he didn't need anything, and that she was willing to let him search her home. She told Coleman she wanted to cooperate and she invited Coleman and Dailey into the house when they arrived.

Even if there were a question as to the timing of the consent compared with the time of initial entry into the house, there can be no question whatever that Mrs. Jenkins specifically authorized and directed the police to seize and take the articles found in a bedroom of her home. A consent freely and intelligently given by the proper person may operate to eliminate any question otherwise existing as to the propriety of a search and seizure. See Maxwell v. Stephens, 348 F. 2d 325 (8th Cir., 1965).

There is no evidence as to how this defendant or either of the other two men got into the house nor as to who brought the articles into the home in the first place. If the consent of Christabelle Jenkins here were held ineffective, it would necessitate holding that the defendant was the only person who could validly consent to a search and seizure of articles found in a house other than his own, where he had no possessory or proprietary interest in either the real property searched or the personal property seized, and no reasonable expecta-

tion of personal privacy from governmental intrusion. We find no support for such a position.

The issue of standing here is inevitably wound up in the issue of consent. Jones v. United States, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697, in effect, extended standing to challenge legality to "anyone legitimately on premises where a search occurs * * *." In Mancusi v. DeForte, 392 U. S. 364, 88 S. Ct. 2120, 20 L. Ed. 2d 1154, the Supreme Court held that standing "depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion." We cannot believe that in either Jones or Mancusi the court intended to extend standing to an interloper or trespasser, nor to one who should have had no reasonable expectation of privacy for himself in the particular area of the "house" involved. Emphatically this is so where the search and seizure involved articles and personal effects which were not the defendant's, but were instrumentalities or fruits of a crime with which the defendant was charged.

Under the facts here, we believe that there was a voluntary valid consent by the proper person, and that the defendant had no standing to challenge the legality of the search and seizure involved.

The defendant also asserts that the court erred in permitting the defense witness, Willie Joseph, to invoke the Fifth Amendment privilege against self-incrimination in response to questions designed to elicit that the witness had pleaded guilty to this particular robbery on the preceding day. The record does not show that a conviction had been entered by the court nor that there were no other charges or counts pending against the witness arising out of this robbery or connected matters.

Under the rule of Malloy v. Hogan, 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653, it "must be perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the an-

swer(s) cannot possibly have such tendency to incriminate." Doubts should be resolved in favor of the witness. The court's action in sustaining the witness' claim of privilege was correct.

The defendant also contends that the court erred in permitting the State to elicit from the defendant on cross-examination, over defense objection and motion for mistrial, the nature of the crime, the date of the conviction, and the sentence received by the defendant on a prior felony conviction. The fact of a prior conviction had been admitted by the defendant on direct examination. In a series of questions and answers extending over more than a page of the record, the State was allowed to elicit, over vigorous objection and a motion for mistrial, the fact that the defendant was convicted of manslaughter in 1963, and that he was sentenced to 4 years imprisonment, the jury being cautioned by the court to disregard the testimony that he was sentenced to 4 years imprisonment. Evidence of prior crimes is ordinarily inadmissible against the defendant. Section 25-1214, R. R. S. 1943, permits an exception as to witnesses generally, but the exception is strictly limited. See Latham v. State, 152 Neb. 113, 40 N. W. 2d 522.

The court is evenly divided as to whether the cross-examination here was harmless or prejudicial error. Under such circumstances, the judgment of the district court must be affirmed.

AFFIRMED.

CARTER, J., not participating.

WHITE, C. J., concurring in result.

I concur in the result reached in this case. The defendant had no standing to raise the issue of the sufficiency of the affidavit of probable cause upon which the search warrant was issued. That portion of the opinion containing a discussion and holding that the affidavit of probable cause was invalid is pure dictum. As such, it is not binding on the court, in my opinion, and

can only serve to becloud similar issues in future cases. The broad principles governing such cases have long since been announced. In my opinion, shadows have been cast upon the validity of the breadth of the holdings in United States v. Ventresca, 380 U. S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684, and the following case of Aguilar v. United States, 363 F. 2d 379, cert. den., 388 U. S. 921, 87 S. Ct. 2119, 18 L. Ed. 2d 1369. Factual color matching of these cases is almost impossible. I feel that necessary steps to do so should be avoided as they would becloud the clarity of approach in future cases. As de Tocqueville reminded us in his classic statement on judicial power when a court goes beyond the necessary pronouncements of the law in the special cases before it, it may perhaps assert a more important influence than that of the judge, but it ceases to represent the judicial power. See, I de Tocqueville, Democrary in America, Judicial Power in the United States, p. 94.

EMIL C. WEBBER, APPELLANT, V. RICHARD A. ANDERSEN ET AL., APPELLEES.
187 N. W. 2d 290

Filed May 21, 1971. No. 37730.

1. **Common Law: Torts: Municipal Corporations.** The common law rule of governmental immunity has not been completely abrogated in this state by judicial pronouncement.
2. **Arrest: False Imprisonment: Municipal Corporations: Libel and Slander.** Actions at law for false arrest, false imprisonment, and libel and slander remain subject to the defense of governmental immunity.
3. **Torts: Pleading.** A general demurrer to a cause of action for negligence must be based on a pleading of facts and not on mere allegations of conclusions of law.
4. **Public Officers and Employees: Municipal Corporations: Negligence.** Public officers are not responsible for acts of subordinate officials, if such subordinates are themselves employees of the government, where there is no negligence on the part of such public officials in employing them, unless the superior

officer has directed or encouraged or ratified such acts, or has personally cooperated therein.

5. **Statutes: Public Officers and Employees: Municipal Corporations: Negligence.** Section 14-605, R. R. S. 1943, was passed for the specific purpose of giving to chiefs of police the powers and responsibilities to enforce the law as that given to sheriffs. It was not for the purpose of making the chief of police liable for the acts of subordinate policemen.

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

John T. Carpenter of Matthews, Kelley, Cannon & Carpenter, for appellant.

Kennedy, Holland, DeLacy & Svoboda, Robert L. Berry, and William Lamson, Jr., for appellee Andersen.

Herbert M. Fitle, James E. Fellows, and John Abbott, for appellee City of Omaha.

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

CARTER, J.

The plaintiff, Emil C. Webber, brought this action in tort to recover damages sustained while confined in the jail of the defendant City of Omaha. The defendant Richard A. Andersen was the chief of police of Omaha and, as such, the senior officer in command of the police department of the City. It is alleged that the police department maintained and controlled the city jail and that its police officers arrested, jailed, and supervised the confinement of the plaintiff in the city jail during the times involved in this action. The City demurred generally to plaintiff's amended petition. The demurrer was sustained and the cause dismissed as to the City. Defendant Andersen moved for summary judgment by his separate motion for summary judgment which was sustained and the amended petition of plaintiff was dismissed as to Andersen. Plaintiff has appealed from the

dismissal of the action as to the City and the grant of summary judgment in favor of Andersen. It will be noted as a matter of clarification that the sustaining of demurrers to the petition as to the defendants Scarpino, Laverty, Abbott, Hammann, Lindblom, Johnson, and Ward have not resulted in the entry of final orders as to them and, consequently, they are not involved in this appeal. By stipulation, the issues as to the City and Andersen were joined in this appeal.

The petition alleges that on or about June 5, 1968, at 12 o'clock midnight, plaintiff was taken into custody without cause and against his will by named police officers of the City of Omaha and conveyed to police headquarters where he was arrested. It is alleged that defendant Andersen was the chief of police of Omaha and the defendant Scarpino a supervisory officer in charge of the patrol officers who picked up the plaintiff and brought him to police headquarters. A judgment was prayed for on the foregoing allegations for false arrest.

In addition to the foregoing, the petition alleges that plaintiff was lodged in jail by defendant policemen where he was held for 5 hours. The cell in which he was placed was already occupied by three belligerent and intoxicated inmates. Defendants Andersen and Scarpino were supervisory officers in charge of the patrol officers and jailers. Plaintiff seeks a judgment against Andersen for false imprisonment.

It is also alleged by plaintiff, in addition to the foregoing, that he was placed in a cell with three intoxicated and rebellious persons who beat him up causing permanent injuries, including the loss of an eye, which will disable, disfigure, and cripple him for the balance of his life. He demands judgment for damages for negligence against the City of Omaha, Andersen, and others, for a substantial amount.

And, lastly, plaintiff alleges that he was logged in, booked, and charged with drunkenness and disorderly

conduct, which charges were without cause or foundation, and constitute a libel and slander against his reputation and person and for which he seeks damages.

To the foregoing petition, the City of Omaha demurred for the reason that the petition does not state facts sufficient to constitute a cause of action and for the further reason that the City is a municipal corporation and, as such, within the doctrine of governmental immunity from suit. It is the sustaining of this demurrer and the resulting dismissal of the action as to the City that affords the basis of this portion of the appeal.

The controlling issue between the plaintiff and the City is the applicability of the governmental immunity doctrine. The parties cite Brown v. City of Omaha, 183 Neb. 430, 160 N. W. 2d 805, and Johnson v. Municipal University of Omaha, 184 Neb. 512, 169 N. W. 2d 286, in support of their respective positions.

In the Brown case, this court held that it has the power to amend the doctrine of governmental imunity in the absence of legislative action to the contrary, recognizing that the legislative process and procedures can be more effectively applied to a comprehensive solution while the court's processes are more effective when directed to specific facts in litigated cases. It suggests a transition by a gradual judicial change by the process of inclusion and exclusion, case by case, and step by step. As a part of this process, the court holds that cities and other governmental subdivisions are not immune from tort liability arising out of the ownership, use, and operation of motor vehicles, and nothing more. At the same time, the court recognizes the superior power and right of the Legislature to legislate on the subject.

In the Johnson case, the court reaffirmed its position in the Brown case in regard to its relation with the Legislature on the question of governmental immunity. In holding that governmental immunity was not a defense in a suit against the Municipal University of Omaha in a case where a pole vaulter was injured when

he fell upon a wooden box which had been negligently placed by the defendant beneath the pole vault standards, the court said: "We now hold that cities, counties, and all other governmental subdivisions, and local public entities of this state, including municipal universities, are not immune from tort liability arising out of a physical condition affirmatively and voluntarily created by the public body on its premises, where the existence of the condition is not reasonably visible or apparent, and where the condition constitutes an unreasonable risk of harm to persons authorized to use and reasonably using the premises for the purposes intended."

In other words, the Brown case holds that governmental immunity is not a defense by a governmental subdivision from tort liability arising out of the ownership, use, and operation of motor vehicles. In the Johnson case, governmental subdivisions are held not to be immune from tort liability arising out of a physical condition affirmatively and voluntarily created on its premises where the condition is not reasonably visible or apparent and creates a risk of harm to persons reasonably using the premises for the purpose intended. This generally denotes the extent of the inroads upon the governmental immunity doctrine permitted by this court by its inclusion and exclusion, case by case, and step by step transition.

It is quite apparent that this court has not wiped out the full scope of the doctrine of governmental immunity. It has attempted only to eliminate governmental immunity in certain areas and then only until such time as the Legislature occupies the field. This court has not eliminated governmental immunity as a defense in actions for false arrest, false imprisonment, and libel and slander. The defense of governmental immunity from actions for negligence has been abrogated in certain types of negligence cases as we have heretofore described. But the legal policy declared appears to be a checkered one intended to fill the void existing prior to legislative action.

We are therefore faced with the problem whether or not the abrogation of the doctrine of governmental immunity should be extended to actions for false arrest, false imprisonment, and libel and slander. We have no decisions of this court that indicate that governmental immunity was to be abrogated as to such actions. Previous cases in which governmental immunity has been denied as a defense bear no resemblance to the three causes of action here being discussed. We conclude that governmental immunity should be, and is, a defense to these types of action. We are influenced by the fact that this is the proper public policy to be adopted because of the enactment in 1969 by the Legislature of a Political Subdivisions Tort Claims Act prohibiting tort claims "except to the extent, and only to the extent, provided by this act," and providing that it "shall not apply to * * * Any claim arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." See §§ 23-2401 and 23-2409(5), R. R. S. 1943.

By his third cause of action, plaintiff alleged negligence in the following respects: That plaintiff was placed in a cell already occupied by three drunken and belligerent inmates by policemen-jailers when they knew or should have known he would be in danger of physical assault and injury; in the failure to remove plaintiff from the cell after he informed them of his fear for his personal safety; in the failure of the jailers to protect him from the attacks of the other inmates of the jail cell; in failing to place plaintiff in a vacant and available cell; in failing to conduct an hourly cell inspection as required by the jail rules; and in failing and neglecting to remove plaintiff from the cell immediately after his injury for medical attention; all of which negligence he asserts is imputed to the City of Omaha.

This cause of action is grounded on negligence. This court has abrogated the doctrine of governmental im-

munity as a defense to certain kinds of negligence actions which we have heretofore discussed. The issue here is whether or not the negligence alleged is one to which the defense of governmental immunity should be abrogated. The proximate cause of the injury sustained by the plaintiff is the criminal assault by the three drunken and belligerent inmates of the jail cell in which plaintiff was confined. It is alleged that the assault and resulting injuries were caused by the failure of the police guards to confine plaintiff in an available, vacant cell; in failing to remove plaintiff to such a cell when he expressed fear of the other inmates; in failing to properly supervise the jail by required inspections; and in failing to promptly remove plaintiff after the assault for the purpose of affording medical attention.

It is not necessary to decide whether or not the governmental immunity doctrine is to be abrogated on the type of negligence involved in plaintiff's third cause of action. The general demurrer was properly sustained on other grounds. It alleges conclusions and not facts which is fatal when attacked by general demurrer.

The proximate cause of plaintiff's injury was the unlawful assault upon him by the three inmates of the cell where he was confined. The assault was committed by third persons, not by the police or jailers. Plaintiff asserts in his petition that the jailers were negligent in failing to confine him in an available, vacant cell. To maintain his cause of action on such ground, plaintiff must plead facts showing negligence by the defendant. It is not negligence, without more, to refuse private accommodations in a jail to each person taken into custody. There must be facts pleaded which show that defendant knew or should have known the risks and dangers which not guarded against amounted to negligence. There was no such pleading here.

Plaintiff alleges that it was negligence on the part of defendant not to remove plaintiff to a vacant cell when he expressed fear of the other inmates. Here again the

plaintiff must plead facts and not a mere conclusion that he was fearful of the other inmates. It is necessary that facts be pleaded which defendant knew or should have known required that plaintiff be removed from the cell to escape a charge of negligence by defendant. It is alleged that defendant was negligent in not making cell inspections in accordance with jail rules. A breach of jail rules affords no basis of an action for negligence unless there are pleaded facts which, if sustained by evidence, constitute a cause of the injury. There are no such facts pleaded here. Plaintiff asserts the defendant was negligent in not removing the plaintiff immediately from the cell for medical treatment. There are no allegations here that such delay, if established, in any manner affected the extent of the injury. The pleaded facts must show a causal relationship to the injury or its extent to constitute actionable negligence. We conclude that the third cause of action as pleaded is demurrable generally even if we assume that negligence, if such there be, was imputable to the City of Omaha.

The plaintiff contends that the trial court erred in granting a summary judgment for the defendant Andersen and against the plaintiff. The undisputed evidence is that Andersen was not present when the incidents occurred affording the basis for plaintiff's action. In fact, the evidence shows that Andersen was not only not present, but he had no knowledge of such incidents until the receipt of reports the next morning, nor is there any evidence that he gave any orders relating to the incidents or in any manner ratified the actions of the policemen or jailers with relation thereto.

In Fidelity & Casualty Co. of New York v. Brightman, 53 F. 2d 161 (8th Cir.), the court stated: "It is well-settled law that public officers are not responsible for acts of subordinate officials, if such subordinates are themselves employees of the government, where there is no negligence on the part of such public officials in employing them, unless the superior officer has directed

or encouraged or ratified such acts, or has personally co-operated therein. (Citing cases.)"

A noted text writer states the rule as follows: "* * * whether or not the subordinate is appointed by him, the public officer is not liable for the subordinate's acts unless he directs the performance of the act complained of or personally cooperates in it. The doctrine of respondeat superior has no application as between a public officer and his subordinates, who are likewise in the public service, unless the officer does direct or countenance the tortious act to be done or cooperates therein. This rule also applies to the tortious acts of policemen and other peace officers, and of municipal employees generally." 4 McQuillin, Municipal Corporations, § 12.226, p. 199.

"A public officer or agent is not responsible for the misfeasances or positive wrongs or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties." Giroux v. Murphy, 88 R. I. 280, 147 A. 2d 465. See, also, Brown v. City of Shreveport (La. App.), 129 So. 2d 540; Martinez v. Cahill, 215 Cal. App. 2d 823, 30 Cal. Rptr. 566; Sarafini v. City and County of San Francisco, 143 Cal. App. 2d 570, 300 P. 2d 44; Jordan v. Kelly, 223 F. Supp. 731. In the last case cited, it is said: "The allegation that the arresting officer was acting under the general supervision, direction and control of the chief of police is not sufficient to render him liable under the statutes and the cases cited."

Plaintiff contends that Andersen is liable under the provisions of section 14-605, R. R. S. 1943, which provides: "The chief of police shall have, in the discharge of his proper duties, like powers and be subject to like responsibilities as sheriffs in similar cases." It is not disputed that a sheriff is responsible for the acts of his deputies. It has been held in other jurisdictions, although it appears to be a case of first impression in this

state, that statutes similar to section 14-605, R. R. S. 1943, were passed for the specific purpose of giving to chiefs of police the same powers and responsibilities to enforce the law as that given to sheriffs and for this limited purpose only.

In discussing this question under a similar provision, the Washington court stated: "Manifestly, the provision which we have quoted was not for the purpose of making the chief of police liable for the acts of policemen. It does nothing more than liken his general duties and obligations to those of the sheriff of King county. If it had been the intention to hold him liable for the acts of policemen, such idea would doubtless have been exactly stated, as has been done in our statutes with reference to sheriffs." Pavish v. Meyers, 129 Wash. 605, 225 P. 633, 34 A. L. R. 561. The holding in Bower v. Davis, 13 Cal. App. 2d 678, 57 P. 2d 574, on the identical issue is to the same effect. The argument that the issue is controlled by section 14-605, R. R. S. 1943, cannot be sustained.

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

AFFIRMED.

SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ.

We concur in the opinion of Carter, J., except that part which holds that the petition failed to state a cause of action in negligence against the defendant City of Omaha.

We are of the opinion that the allegations contained in the third cause of action of the amended petition were sufficient as against a general demurrer and that the demurrer should have been overruled as to that cause of action. We are also of the opinion that, under the circumstances in this case, the question of the applicability of the doctrine of governmental immunity should not be decided upon demurrer, and that the judgment of the district court should be reversed as to the third cause of action against the defendant City of Omaha

and the cause remanded for further proceedings.

PER CURIAM.

Three judges are of the opinion that the judgment of the district court should be affirmed. Four judges are of the opinion that the judgment of the district court should be affirmed except as to the third cause of action against the defendant City of Omaha.

The judgment of the district court is affirmed except as to the third cause of action against the defendant City of Omaha, and as to that cause of action against that defendant the judgment is reversed and the cause remanded for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

DAVID M. GORGES, BY AND THROUGH HIS FATHER AND NEXT FRIEND, FRED M. GORGES, APPELLANT, V. DOBSON BROTHERS CONSTRUCTION COMPANY, A CORPORATION, APPELLEE.

187 N. W. 2d 91

Filed May 21, 1971. No. 37738.

1. **Highways: Negligence.** The duty of a contractor engaged in construction work on a public highway is generally to warn the public that the highway is dangerous to travel.
2. **Highways: Negligence: Contracts.** There is ordinarily no duty upon a contractor engaged in construction work upon a public highway to erect a structure that will prevent a forcible entry into the area of construction.

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

J. L. Krause and William L. Howland, for appellant.

Cline, Williams, Wright, Johnson & Oldfather and Fredrick H. Kauffman, for appellee.

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

BOSLAUGH, J.

This action was brought by Fred M. Gorges, as the father and next friend of David M. Gorges, to recover damages for injuries to David caused by a lawnmower accident that occurred on May 25, 1964. A companion case, No. 37739, is an action by Fred M. Gorges for the medical and hospital expenses incurred and the loss of David's services.

The trial court dismissed the action at the close of the plaintiff's evidence. The plaintiff appeals.

The petition contained two causes of action. The first cause of action alleged that the accident was caused by the negligence of the defendant Dobson Brothers Construction Company.

The record shows that the defendant was constructing a water main along L Street to the south of the Gorges property in Lincoln, Nebraska. As a part of the project the defendant had excavated a trench approximately 3 feet wide and parallel to L Street. The centerline of the trench was 3 feet north of the curb line of L Street and 14 feet south of the property line of the Gorges property. Sod had been removed from an area approximately 18 inches wide along the north edge of the trench.

On May 25, 1964, the pipe had been installed and most of the trench had been backfilled. A part of the trench lying west of the Gorges driveway had been left open because testing, cleaning, and sterilization procedures had not been completed.

The accident happened at about 4:45 p.m. The weather was cloudy but dry. Michael Gorges, one of David's older brothers, had been mowing the lawn west of the driveway and north of the trench. He was using a riding-type power mower equipped with a steering mechanism, a throttle, a forward or reverse lever, and a clutch. The mower cut a swath approximately 18 inches wide. Michael made two rounds with the mower and then stopped near the house to get a drink of water.

David, with his mother's permission, then commenced to mow.

David was within 2 weeks of being 11 years old. He had been instructed by his father in the use of the power mower but had not had much experience in the operation of the mower.

David operated the mower to the south, parallel to the driveway, and then turned west and traveled parallel to the trench. Near the west end of the trench he started to turn to the north when he came upon a wooden stake lying in the grass. He stopped the mower, placed it in reverse, backed to the east and then to the south. One rear wheel of the mower dropped into the trench and then both David and the mower fell into the trench. While trying to protect himself from the mower, which was still running, his right hand struck the blade. The injury resulted in the loss of most of his right hand.

The trench had been open for about 2 weeks. There was a barricade at the west end of the trench, a barricade at the east end of the trench, and a barricade in the street south of the trench. There was no barricade or other protective or warning device on the north side of the trench. David testified that he was "aware the ditch was there" when he was operating the mower parallel with the trench.

The plaintiff alleged that the defendant was negligent in failing to maintain barricades, signs, fences, railings, and watchmen at the excavation; in failing to maintain a covering over the excavation; and in leaving the excavation open longer than was reasonably necessary.

There was no evidence of negligence on the part of the defendant in leaving the excavation open longer than was reasonably necessary. The evidence showed that the testing and sterilization procedures performed by the city were not completed until May 28, 1964, and that the excavation had been left open to facilitate these procedures.

So far as signs and barricades were concerned, the

evidence shows that there were barricades on three sides of the excavation. The accident happened in daylight, the excavation was open and obvious, and David knew about the excavation and was aware of it while he was operating the mower nearby.

Although located north of the curb line of L Street, the excavation was actually situated in L Street. The duty of a contractor engaged in construction work on a public highway is generally to *warn* the public that the highway is dangerous to travel. Carson v. Dobson Bros. Constr. Co., 181 Neb. 287, 147 N. W. 2d 797. Although a barricade should be an obstruction or impediment to travel, there is ordinarily no duty upon the contractor to erect a structure that will prevent a forcible entry into the area of construction. There was no duty upon the defendant to erect such a structure along the north side of the excavation in this case.

Hickman v. Parks Constr. Co., 162 Neb. 461, 76 N. W. 2d 403, 62 A. L. R. 2d 1040, cited by the plaintiff, involved an accident at night in an excavation, not in a street or highway, and not properly protected by lights, barricades, or other warning.

We think the evidence in this case failed to establish any negligence on the part of the defendant that would permit a recovery by the plaintiff and justify submitting the case to the jury.

The second cause of action alleged that the defendant had breached its contract with the city which required the defendant to take reasonable precautions to protect the public from injury. The specifications alleged by the plaintiff in this cause of action were substantially the same as those alleged in the first cause of action. However, there was nothing alleged or proved in regard to the second cause of action which established any greater duty upon the defendant than that imposed by the general law. Thus, there was a failure to create a jury question on this cause of action.

It is unnecessary to consider the other assignments of error.

The judgment of the district court is affirmed.

AFFIRMED.

FRED M. GORGES, AN INDIVIDUAL, APPELLANT, V. DOBSON BROTHERS CONSTRUCTION COMPANY, A CORPORATION, APPELLEE.

187 N. W. 2d 94

Filed May 21, 1971. No. 37739.

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

J. L. Krause and William L. Howland, for appellant.

Cline, Williams, Wright, Johnson & Oldfather and Fredrick H. Kauffman, for appellee.

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

BOSLAUGH, J.

This is an action by Fred M. Gorges to recover the medical and hospital expenses incurred by David M. Gorges and the damages resulting from the loss of his services as a result of an accident on May 25, 1964. It is a companion case to No. 37738, Gorges v. Dobson Bros. Constr. Co., *ante* p. 19, 187 N. W. 2d 91, decided today.

The petition filed in this case contained the same allegations, essentially, as the petition filed in No. 37738, and the cases were consolidated for trial by stipulation. The action was dismissed at the close of the plaintiff's evidence.

The result in this case is controlled by the decision in No. 37738. The judgment of the district court is affirmed.

AFFIRMED.

JACK JOHNSON, A MINOR, BY AND THROUGH G. L. JOHNSON, HIS FATHER AND NEXT FRIEND, APPELLANT, V. MUNICIPAL UNIVERSITY OF OMAHA, APPELLEE.
187 N. W. 2d 102

Filed May 21, 1971. No. 37774.

Negligence: Torts. Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

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

Martin A. Cannon of Matthews, Kelley, Cannon & Carpenter, for appellant.

Thomas A. Walsh of Boland, Mullin & Walsh, for appellee.

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

SMITH, J.

While plaintiff was competing in a pole vault event held by defendant, he fell upon foam rubber on a wooden box to his injury. In this negligence action his petition was dismissed on demurrer. He appealed. We reversed the judgment and remanded the cause, deciding that defendant was subject to suit and liability for negligence. See Johnson v. Municipal University of Omaha, 184 Neb. 512, 169 N. W. 2d 286 (1969). On remand and at the close of all evidence at the trial, the district court dismissed plaintiff's petition. Plaintiff appeals. He asserts the evidence was sufficient to carry the case to the jury.

In May 1967 plaintiff represented Fort Hays College in the pole vault event of a conference track meet in defendant's stadium. With a fiber glass pole furnished by Fort Hays he practiced one vault without enough carry which speed generates. He fell back. The cross-

bar was elevated at 12½ feet for his next vault which would be his first competitive one of the meet. Having run off the ground, he thought the flection of the pole good but the carry insufficient. Falling, he struck the crossbar and a burlap bag whose dimensions were 4 by 6 feet and which contained foam rubber. The bag covered the part of the wooden box nearest the upright and the landing area. The injury happened when he crashed on the bag and the part of the box.

The surface of the box, 2 by 3 feet, lay 17¾ inches above ground, and sacks of foam rubber covered parts of it. The box was one of two supporting the uprights which had base diameters of 17 inches. The uprights stood 12 feet apart at or near the edge of the landing area. The latter was covered with a canvas over a net filled with a piece of foam rubber 4 by 14 by 16 feet. The burlap bag on each box, of course, provided much less protection.

Defendant had built the wooden box and a twin especially to support the uprights. Its officials had seen similar boxes so used elsewhere. The practice, however, was not widespread. At most colleges the uprights then rested on dirt, grass, or concrete. Even so, protective materials were piled around the bases.

The boxes expedited the event and they also eased the work of the officials. A competitor received a preference regarding the horizontal distance from the slideway in which he would rest his pole, forward to a point directly underneath the crossbar. Officials attempted to move the uprights without dislodging the crossbar. They experienced difficulty in stooping and moving the uprights across rough or uneven surfaces. Defendant earlier had laid a slab of concrete for the pole vault event. The slab proved unsatisfactory - too rough and uneven.

The boxes also may have served another purpose. Without them the uprights could accommodate a cross-

bar no higher than 15 feet. The conference record was 14 feet 5¾ inches.

Usefulness of the boxes in light of safety factors at the time was affirmed by three representatives of defendant as follows: Director of athletics, former director and coach, and chairman of the men's physical education department and an official at the event where plaintiff had sustained the injury. It also was affirmed by the track coach of South High School in Omaha.

Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done. Restatement, Torts 2d, § 291, p. 54.

The evidence failed to raise an issue of negligence for the jury. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ARTIS JOHNSON, APPELLANT.
187 N. W. 2d 99

Filed May 21, 1971. No. 37800.

1. **Criminal Law: Guilty Plea.** A plea of guilty must not only be intelligent and voluntary to be valid but the record must disclose the defendant entered his plea understandingly and voluntarily.
2. **Criminal Law: Guilty Plea: Motions, Rules, and Orders: Evidence.** A motion to withdraw a plea of guilty should be sustained only if the defendant proves that withdrawal is necessary to correct a manifest injustice and defendant must establish such ground by clear and convincing evidence.

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

Owen A. Giles, for appellant.

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

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

SPENCER, J.

Defendant, Artis Johnson, appeals from a conviction based on his plea to an amended information charging him with the crime of manslaughter. He alleges that the court below erred in accepting his plea in the absence of any showing that it was freely, voluntarily, and intelligently entered; in failing to make inquiry of him as to the factual basis of his plea; and in overruling his pro se motion to withdraw his plea. We affirm.

Defendant was originally charged with the crime of second degree murder. The case proceeded to trial on that offense. After counsel had passed the jurors for cause the defendant through counsel, pursuant to plea discussions with the prosecution, advised the court that he wished to plead guilty to a charge of manslaughter in accordance with a plea bargain. The prosecution dismissed the charge for second degree murder and filed an amended information charging the defendant with manslaughter. After the defendant entered a plea of guilty to the amended charge of manslaughter, the jury impaneled on the charge of second degree murder was dismissed.

When the defendant was arraigned on the amended complaint he said, "Well, I really want to try it now." He had a conference with his lawyer and the court explained the penalty for second degree murder and the penalty for manslaughter, which was 1 to 10 years. After considerable hedging in an attempt to learn the exact sentence and whether he could still be tried on the original complaint, the following colloquy took place: "THE COURT: Mr. Johnson, we don't want any pleading guilty to anything that we are not guilty of. We have a jury right down the hall and we had them in

the Court Room on the other charge and we were in the course of beginning the trial. If you are not guilty of this charge, I am not going to accept a plea of guilty. I don't want any wishy-washy pleas here. Either you are entering a plea of guilty to manslaughter, waiving your right to a trial by jury, waiving the obligation upon the State to call witnesses against you and prove your guilt beyond a reasonable doubt, so if you have any hesitancy whatsoever as to whether or not you are guilty of this charge, we will enter a plea of not guilty and I imagine the County Attorney's Office will reinstate the charge of second degree murder and we will proceed with the charge of second degree murder. THE DEFENDANT: I will enter this plea of guilty."

The court then explained the nature of the charge to the defendant, and the following occurred: "THE COURT: All right, sir, how do you plead to the charge of manslaughter, guilty or not guilty? THE DEFENDANT: Not guilty. THE COURT: Not guilty? THE DEFENDANT: Yes, sir. MR. FOREHEAD: May I, Your Honor? If you plead not guilty to a manslaughter charge, there is no reason why Mr. Brown won't reinstate the second degree murder charge against you and proceed to try it on that basis. So, if you plead not guilty, we are going to go—we are going to be in the same position before we started to impanel the jury. There will be a second degree charge against you which covers the penalty up to life imprisonment. Now, you are now being asked whether you want to plead guilty to manslaughter, which carries a penalty of from one to ten years. THE DEFENDANT: This is what I was asking when I said not guilty—you said that the charge would go back up, you know, and I don't want that. THE COURT: You misunderstood my question. What I am asking you to do is to plead guilty or not guilty to the charge of manslaughter. THE DEFENDANT: I plead guilty to the charge of manslaughter." Previous to accepting the plea, the court was assured by the prosecution that there was

sufficient evidence to prove the guilt of the defendant beyond a reasonable doubt.

This case is not too different from North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160 (1970), 27 L. Ed. 2d 162, where a plea bargain was upheld and the plea of guilty was ruled valid notwithstanding the defendant's refusal to factually admit the offense charged. As we said in State v. Turner, 186 Neb. 424, 183 N. W. 2d 763, a plea of guilty must not only be intelligent and voluntary to be valid but the record must disclose the defendant entered his plea understandingly and voluntarily. We have no hesitancy in finding that defendant's guilty plea was freely, voluntarily, and intelligently entered. He fully understood that by pleading guilty to manslaughter he was avoiding a trial for second degree murder for which a jury had been impaneled to try him. By virtue of the plea bargain agreement, the original charge was reduced to manslaughter and the jury dismissed. Defendant is obviously attempting to abuse the plea bargaining process. To permit it would seriously weaken and tend to undermine and possibly destroy a beneficial procedure which has been specifically approved by the United States Supreme Court. See, Brady v. United States, 397 U. S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747; North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160 (1970), 27 L. Ed. 2d 162.

It is evident from the record that defendant, who had a previous felony conviction, was anxious to avoid trial on the second degree murder charge, and after the plea bargain was accepted if he could be sure that the State could not reinstate the original charge, wanted to go back on it and to stand trial on the lesser complaint. The court cannot permit such subterfuge.

After accepting the plea and finding the defendant guilty as charged, the court continued the matter for a presentence report. Defendant infers that at the time sentence was pronounced he made an effort to withdraw his guilty plea. The following is the record re-

ferred to by defendant: "THE DEFENDANT: I didn't know I was making a deal to plead. THE COURT: We didn't make any deal at all. I explained to you very carefully what the charge was. What do you mean 'a deal,' a deal to plead? THE DEFENDANT: I wanted the charge broke down, but I didn't know where I wouldn't go to trial. THE COURT: I spent a half hour with you that day going over every aspect of the thing with you, Mr. Johnson. I told you at that time we weren't going to play games on this, the jury was here, you consulted with your counsel, and I went over every detail of this matter with you. Is there anything you want to say in your behalf before sentence is pronounced?" We do not construe this as a motion to withdraw the plea. In any event, however, in a situation such as this, a motion to withdraw a plea of guilty should be sustained only if the defendant proves that withdrawal is necessary to correct a manifest injustice and defendant must establish such grounds by clear and convincing evidence. Defendant has not met this burden.

The judgment is affirmed.

AFFIRMED.

IN RE APPLICATION OF HOWARD MCLEAN COMPANY. HOWARD MCLEAN COMPANY, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, NOW KNOWN AS BURLINGTON NORTHERN, INC., ET AL., APPELLANTS.
187 N. W. 2d 300

Filed May 21, 1971. No. 37827.

1. **Carriers: Evidence.** The lowest rates published or charged, for substantially the same kind of service, are prima facie evidence of a reasonable rate for the services under investigation.
2. **Carriers: Public Service Commissions.** The Nebraska State Railway Commission is empowered to fix joint-line freight rates.
3. ———: ———. In the fixing of rates, the railroads may not give any undue preference or advantage to any particular person or locality, or subject any particular description of traffic to

any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

4. ———: ———. Railroads may not reduce rates to meet competition at one point and refuse to meet it at other points where the circumstances are substantially similar.

5. **Carriers: Public Service Commissions: Appeal and Error.** On appeal from an order of the Nebraska State Railway Commission fixing rates for common carriers, the only questions for determination are whether or not the commission acted within the scope of its authority and whether or not the order entered is reasonable and not arbitrarily made.

Appeal from the Nebraska State Railway Commission. Affirmed.

Mason, Knudsen, Berkheimer & Endacott, for appellant Chicago, Burlington & Quincy Railroad.

Nelson, Harding, Marchetti, Leonard & Tate and J. Max Harding, for appellee.

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

NEWTON, J.

Applicant charges protestants with the maintenance of discriminatory railroad freight rates pertaining to the shipment of potatoes from the Scottsbluff-Mitchell area to Omaha. The Nebraska State Railway Commission found in favor of applicant and ordered a reduction in rates. We affirm the order of the Nebraska State Railway Commission.

Applicant is a dealer in potatoes with large storage facilities in Scottsbluff and Mitchell, Nebraska. Ninety percent of his potatoes are shipped to Omaha, Nebraska, and about 80 percent of this movement is by truck due to a lack of proper railway cars and cheaper truck rates. This area is served by protestant Burlington Northern Railroad, as is also the Chadron, Hemingford, and Alliance, Nebraska, area. Protestant Union Pacific Railroad Company has a line serving Gering, Nebraska, and cars may be switched at Northport from one line to the other.

Single line mileages on the Burlington Northern and joint line on the Union Pacific to Omaha are as follows:

	Single	*Joint*
Hemingford	435.6	432
Alliance	416.5	413
Scottsbluff	481.8	442
Mitchell	491.2	452
Chadron	441.9	442

Present rates per hundred are 35 cents from Hemingford and 43 cents from Scottsbluff. Increases to 37 cents and 46 cents respectively are contemplated. The record indicates that considering differences in distance, rates on potatoes shipped from Idaho to Omaha are proportionately less. Rates were lowered several years ago in the Hemingford area to meet truck competition and, thereafter, competition from the Chicago and Northwestern Railroad. It is undisputed that the truck competition is greater in the Scottsbluff-Mitchell area. It is also undisputed that by the short or joint-line route, additional switching expense of about 3 cents per hundred pounds would be encountered.

It is apparent that protestants' excuse that lower rates in the Hemingford area were justified originally by truck competition is not a valid one as the same competition is greater in the Scottsbluff area. It is also apparent that on a mileage basis, present rates discriminate in favor of the Hemingford area. The Burlington Northern has a choice of handling shipments from the Scottsbluff area direct over the longer route on its own line or making use of short or joint-line facilities with the additional switching expense. A differential in rates between Hemingford and Scottsbluff in excess of 3 cents per hundred pounds would not appear to be warranted. The order of the commission does not allow for any differential whatever but institutes similar rates, i.e. 35 cents, for both areas.

It appears that the existing 8 or 9 cent differential is unjustified and discriminatory. Protestants insist that

the 35 cent rate from Scottsbluff is noncompensatory. The evidence appears to bear this out, but it has not been shown that the same rate installed at Hemingford is compensatory. The circumstances appear to be substantially similar. The lowest rates published or charged, for substantially the same kind of service, are prima facie evidence of a reasonable rate for the services under investigation. See § 75-123, R. R. S. 1943.

Protestants contend that the Nebraska State Railway Commission is without power to fix joint-line rates. Such is not necessarily a result of the order entered but the question may well be considered. Article IV, section 20, Constitution of Nebraska, provides: "* * * The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision." There being no specific legislation to the contrary, this provision is sufficiently broad to authorize the fixing of joint-line rates. In addition, section 75-118, R. R. S. 1943, provides that the commission shall have power to: "(1) Fix all necessary rates, charges and regulations governing and regulating the transportation, storage, or handling of freight and passengers by any common carrier in Nebraska intrastate commerce; * * *." In view of the foregoing, we are inclined to believe that the commission is empowered to fix joint-line rates.

Discrimination in freight rates is forbidden by section 75-126, R. S. Supp., 1969. "In the fixing of rates, the railroads may not give any undue preference or advantage to any particular person or locality, or subject any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. * * *

"Railroads may not reduce rates to meet competition at one point and refuse to meet it at other points where

the circumstances are substantially similar." United Mineral Products Co. v. Nebraska Railroads, 175 Neb. 285, 121 N. W. 2d 492.

There is substantial evidence in the record to sustain the commission's finding of discrimination. This being the fundamental issue presented, we are unable to hold that the order entered is arbitrary or unreasonable. On appeal from an order of the Nebraska State Railway Commission fixing rates for common carriers, the only questions for determination are whether or not the commission acted within the scope of its authority and whether or not the order entered is reasonable and not arbitrarily made. See, Nebraska Limestone Producers Assn. v. All Nebraska Railroads, 168 Neb. 786, 97 N. W. 2d 331; United Mineral Products Co. v. Nebraska Railroads, *supra*.

The order of the Nebraska State Railway Commission is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WAYNE GOHAM, APPELLANT.

187 N. W. 2d 305

Filed May 28, 1971. No. 37744.

1. **Criminal Law: Venue: Appeal and Error.** A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed.
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.
3. **Criminal Law: Kidnapping: Sentences.** The purpose of kidnapping in every instance is to make it possible to commit

some other crime. Its very nature therefore embraces other crimes as well as that of kidnapping. The penalties of kidnapping are intentionally more severe than the other crimes which may be included because of the consequences which often result from its perpetration.

4. **New Trial: Witnesses: Evidence.** It is the rule that a new trial will not be granted on the grounds of newly discovered evidence when the only effect of the evidence is to impeach or discredit the witness.
5. **Criminal Law: Attorneys at Law.** A charge of inadequate representation can prevail only if it can be said that what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the court.
6. **Criminal Law: Indians: Jurisdiction.** The Secretary of the Interior having failed to accept the offer of retrocession embraced in Legislative Resolution 37, Eightieth Session of the Nebraska Legislature, 1969, before it was withdrawn by Legislative Resolution 16, Eighty-second Session of the Nebraska Legislature, 1971, 18 U.S.C.A., section 1162, is still applicable in Nebraska.

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

William G. Line of Kerrigan, Line & Martin and Costello, Porter, Hill, Banks & Nelson, for appellant.

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

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

SPENCER, J.

Defendant Wayne Goham was convicted on an information charging kidnapping and rape, and sentenced to life imprisonment on the former and to a term of not less than 3 nor more than 20 years on the latter. We affirm the convictions but modify the sentence as set out hereafter.

An automobile in which the complaining witness and her companion were riding slid off the road when they

tried to negotiate a slippery, rain-soaked county road in Thurston County. Another car, containing seven Indian occupants, came by and the occupants, for two dollars, helped them to get their car moving. The car was backed down the hill, but after a short descent its progress was stopped by the other car which had passed it and blocked the road. The occupants of that car then approached, opened the door on the driver's side, and pulled the companion of the complaining witness from the car, striking him two or three times. He fled to seek help at an adjoining farm house. Two of the occupants of the other car then forcibly pulled the complaining witness out of her car, dragged her to their own, and drove approximately 2 miles to Big Elk Park, which lies along the Missouri River on the eastern border of and in Thurston County, where she was taken out of that car and raped by each of the seven occupants.

William Cayou, who was one of the seven, testified for the State, identified the defendant as the driver and owner of the car, and as the second of the group to be with the complaining witness in the park. The defendant is a member of the Omaha Indian Tribe. The crimes were committed within the limits of the Omaha Indian Reservation, which is situated within Thurston County. The incident occurred on July 26, 1969. Defendant was tried and convicted in March 1970. On October 24, 1970, while an appeal from the conviction was pending in this court, the Secretary of the Interior published a notice in the Federal Register purporting to accept retrocession of jurisdiction over the Omaha Indian Reservation in Thurston County, Nebraska, purportedly pursuant to an offer of retrocession previously made by the Nebraska Legislature in accordance with 25 U.S.C.A., section 1323.

Defendant sets out seven assignments of error. The first is the denial of defendant's motion for a change

of venue. He contends that "An avalanche of anti-Indian publicity" in Thurston County where the crime took place made it impossible to select a fair jury. The record does not support his contention. Defendant concedes his motion for a change of venue was technically defective in that it sought a change of venue to the district court for Douglas county rather than to an adjoining county, and that it was not supported by affidavits. The voir dire examination of the jurors, which is a part of the record, indicates that 79 prospective jurors were called. While a substantial number of them had heard about the case through the various news media, which is not unusual in a case of this nature, the record does not reflect prejudice existing at the time of the trial, which was 8 months later, to sustain defendant's contention. Defendant was able to secure an impartial jury and passed it for cause. Further, no specific complaint of any nature is made herein as to any bias or improper conduct on the part of the jury or any individual juror.

In State v. Losieau, 174 Neb. 320, 117 N. W. 2d 775, we said: "A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed."

In Dosek v. United States, 405 F. 2d 405, the Court of Appeals for the Eighth Circuit said: "The disposition by a judge of a change of venue motion rests largely in the discretion of the trial court who is the one most familiar with the local situation, and a trial court ruling upon such a motion will be upset only for a clear abuse of discretion." In that case the Court of Appeals emphasized that defendant had not charged or proved that any juror challenged for cause on valid grounds was not excused.

Defendant's second and third assignments of error involve the penalty inflicted on the kidnapping charge.

After the crime was committed but before trial, the Nebraska Legislature amended section 28-417, R. R. S. 1943, to provide that the penalty should be death or imprisonment for not less than 3 nor more than 50 years at the discretion of the jury. The penalty in effect when the crime was committed provided the death penalty or life imprisonment at the discretion of the jury. The penalty inflicted was in accordance with the statute as it existed at the time the offense was committed. In view of our subsequent holding in State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225, the State concedes that the amendment to section 28-417, R. R. S. 1943, which became effective September 19, 1969, should govern the penalty in this case.

In State v. Randolph, *supra,* we said: "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 stat-

ute 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.' "

State v. Randolph, *supra,* which involved the kidnapping statute, section 28-417, R. R. S. 1943, was not released until January 22, 1971. This was several months after defendant's trial in March 1970.

Section 29-2308, R. R. S. 1943, provides: "In all criminal cases that now are, or may hereafter be pending in the Supreme Court on error, the court may reduce the sentence rendered by the district court against the accused, when in its opinion the sentence is excessive, and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

We said in Cryderman v. State, 101 Neb. 85, 161 N. W. 1045, that this statute should be liberally construed in favor of justice. In State v. Hall, 176 Neb. 295, 125 N. W. 2d 918, we construed it to grant authority to permit the reduction of a jury-imposed death penalty to life imprisonment when the circumstances indicated

to us that life imprisonment was an adequate punishment for the offense.

We have no doubt of defendant's guilt herein. The misdirection of the jury as to possible penalties could not be considered a miscarriage of justice because it results from a subsequent construction of the statute involved. A verdict of life imprisonment was a permissible penalty for kidnapping when the offense was committed. This is no longer a penalty under our subsequent holding in State v. Randolph, *supra*. The maximum penalty under the amended statute which became effective September 19, 1969, 6 months before the actual trial herein, is death or imprisonment for not less than 3 nor more than 50 years. We hold the amendatory act may be applied constitutionally to the act herein although committed prior to its passage, because the sentence had not become final because of this appeal.

Pursuant to section 29-2308, R. R. S. 1943, considering all the circumstances and our subsequent holding in State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225, we reduce the penalty on Count I, the kidnapping conviction, from life imprisonment to a term of 35 years.

Defendant's fourth assignment of error is directed to the submission of the kidnapping charge. He relies on People v. Daniels, 71 Cal. 2d 1119, 80 Cal. Rptr. 897, 459 P. 2d 225, and People v. Levy, 15 N. Y. 2d 159, 204 N. E. 2d 842, and argues that the modern trend is away from the use of kidnapping charges for behavior that amounts in substance to robbery or rape. We see no reason to change the controlling rule in this jurisdiction. The victim herein was forcibly taken from the automobile in which she was a passenger and transported at least 2 miles to Big Elk Park where she was forcibly raped. The kidnapping statute, section 28-417, R. R. S. 1943, as it existed when the act was committed, so far as pertinent herein, provides: "Whoever, having for

any of the purposes aforesaid unlawfully carried off or enticed away, decoyed, secreted or imprisoned any person, shall in furtherance of any such purpose, do or threaten to do any injury to the person so carried off, decoyed, enticed away, secreted or imprisoned, such person so offending shall upon conviction suffer death or be imprisoned in the Nebraska Penal and Correctional Complex during the remainder of his natural life at the discretion of the jury." We last interpreted this issue in State v. Tatreau, 176 Neb. 381, 126 N. W. 2d 157, and State v. Salanitro, 176 Neb. 393, 126 N. W. 2d 164, which provide a conclusive answer to defendant's contentions.

Defendant, in his fifth assignment of error, argues that the evidence was insufficient to sustain a conviction of kidnapping. The following testimony of the victim on direct examination illustrates the nature of the force used to effect the kidnapping: "Then they started to pull me out of the car, and I tried to hang on to the steering wheel and force myself against the frame of the car so they couldn't pull me out, and I said just leave us alone, and there was an individual on each side of me, and they pulled me over to their car, and I was kicking and trying to fight with them but they were just too heavy or too big and I couldn't get away from them, and when we got down to their car they tried to push me in the car, and I was very stiff, and they knocked my head against the open door so I was kind of dizzy for a few minutes, and then someone sort of like hit me in the stomach so that I would bend over, and that is when they put me in the front seat of the car, and then I remember kicking someone in the stomach who was pushing me in the car, and then they got in the car and one individual had his hand over my mouth and nose so that I couldn't breathe and I was a little panicky and when he let me go I said I couldn't breathe and I

wanted the window down, so I was sitting on the lap of the person who was by the door and I had my head out of the window all the time to the park. That is where they drove to."

The complaining witness was forcibly removed from her automobile, manhandled, and forcibly taken to a park approximately 2 miles away. We do not agree that this is an insubstantial movement of the victim, as suggested by the defendant. While it may be true that the ultimate objective was the crime of rape, this is of no moment. The purpose of kidnapping in every instance is to make it possible to commit some other crime. Its very nature therefore embraces other crimes as well as that of kidnapping. The penalties of kidnapping are intentionally more severe than the other crimes which may be included because of the consequences which often result from its perpetration. See State v. Tatreau, 176 Neb. 381, 126 N. W. 2d 157.

Defendant's sixth assignment of error is grounded on his contention that an accomplice, William Cayou, falsely testified that no consideration had been promised him for his testimony. This issue was injected by the defendant on his motion for a new trial on the grounds of newly discovered evidence. This evidence concerned some notes written by Cayou to a Charlene Earth while both of them were confined in the county jail. In this respect, we observe that the defendant had been told by Charlene Earth of her conversation with Cayou before his trial, and while defendant may not have had possession of the notes at the time of his trial, he was in possession of the information that Cayou was claiming he had made some type of a deal and was going to testify for the State.

There is no contention and certainly no evidence that the prosecution knowingly used perjured testimony. Even if we were to read into the inferences defendant wishes to make the finding that Cayou committed perjury, which we are unable to do, we still would have no

evidence of the knowing use of perjured testimony by the prosecution. More important, however, we believe the evidence falls far short of showing that any deal was made with Cayou by the prosecution for his testimony. Giving the evidence adduced on the motion every possible inference, it does not go to the question of the truth or falsity of Cayou's testimony, but rather only to the question of Cayou's motive in testifying. It was purely a collateral issue, not having to do with the guilt or innocence of defendant. Its only purpose would be to impeach or discredit the witness.

This court has frequently said that impeaching evidence is not a proper basis for a new trial. See Rains v. State, 173 Neb. 586, 114 N. W. 2d 399, and Fugate v. State, 169 Neb. 434, 99 N. W. 2d 874, in which we said: "It is the rule that a new trial will not be granted on the ground of newly discovered evidence when the only effect of the evidence is to impeach or discredit a witness."

Defendant's last assignment of error alleges that he was denied the effective assistance of counsel because of counsel's consumption of intoxicants. Defendant's counsel was not court appointed but was retained counsel of defendant's own choice. There is no doubt that during the course of the trial, particularly after lunch, defendant's counsel had the odor of liquor on his breath. It is also undisputed that counsel had represented defendant and his family on other occasions and they knew that he used alcoholic liquors during the day. There is nothing apparent from the record which would indicate counsel became so incapacitated that he could not adequately conduct defendant's defense. The evidence falls far short of any indication that counsel's propensity prevented a fair trial. The most it indicates is that counsel consumed liquor on occasions when he was not in court. In any event, this court is not in as good a position as the trial court to decide the issue. The trial court had the opportunity to observe counsel, and

was in a position to know whether counsel's drinking affected his ability to adequately represent the defendant. It is a fact question on which we accept the finding of the trial court. However, we are convinced that if defendant's counsel had come to court so far under the influence of alcoholic liquor that he could not effectively represent the defendant, the trial court would have immediately postponed the trial and held counsel in contempt of court.

As the Eighth Circuit Court of Appeals observed in Hanger v. United States, 428 F. 2d 746: " '* * * a charge of inadequate representation can prevail "only if it can be said that what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the Court." ' " Defendant's showing falls far short of even suggesting this possibility.

Defendant injects the argument that the State of Nebraska has lost jurisdiction over the defendant by reason of retrocession. In 1953 Congress adopted 18 U. S. C. A., section 1162, which, so far as pertinent for discussion of the question raised, provides: "(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

"State or Territory of	Indian country affected
"Alaska	All Indian country within the Territory
"California	All Indian country within the State
"Minnesota	All Indian country within the State, except the Red Lake Reservation

"Nebraska _____All Indian country within the State
"Oregon _____All Indian country within the State, except the Warm Springs Reservation
"Wisconsin _____All Indian country within the State."

In 1968 Congress provided for the voluntary retrocession of the jurisdiction granted by 18 U.S.C.A., section 1162, by passing 25 U.S.C.A., section 1323, which provides: "(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this Section.

"(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal. Pub. L. 90-284, Title IV, § 403, Apr. 11, 1968, 82 Stat. 79."

On April 16, 1969, the Nebraska Legislature adopted Legislative Resolution 37, which, so far as pertinent herein, reads: "Now, Therefore, Be It Resolved By The Members Of The Nebraska Legislature In Eightieth Session Assembled:

"1. That the State of Nebraska hereby retrocedes to the United States all jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska, acquired by the State of Nebraska pursuant to Public Law 280 of 1953, except as provided in paragraph 2 of this resolution.

"2. That the retrocession of jurisdiction contained in paragraph 1 of this resolution shall not apply to any offenses involving the operation of motor vehicles on public roads or highways.

"3. That the Executive Board of the Legislative Council is hereby authorized and directed to take all necessary action to put this resolution into effect, such action to include arrangements with the Department of the

Interior and the department's Bureau of Indian Affairs concerning the assumption of law enforcement responsibilities in the areas of Indian country covered by this resolution."

By Executive Order dated November 21, 1968, the Secretary of the Interior was authorized to accept any retrocession of jurisdiction which was to be effected by publication in the Federal Register. On October 24, 1970, the Secretary caused the following notice to be published in the Federal Register: "Pursuant to the authority vested in the Secretary of Interior by Executive Order No. 11435 (33 F. R. 17339) I hereby accept, as of 12:01 A.M. EST, October 25, 1970, retrocession to the United States of all jurisdiction exercised by the State of Nebraska over offenses committed by or against Indians in the areas of Indian country located within the boundaries of the Omaha Indian Reservation in Thurston County, Nebr. as follows: (Description boundaries omitted) except offenses involving the operation of motor vehicles on public roads or highways which retrocession was tendered and offered by Legislative Resolution No. 37 passed by the Legislature of Nebraska in 80th Regular Session on the 16th day of April, 1969.

"Walter J. Hickel
"Secretary of the Interior."

It is to be noted that the Nebraska Legislative Resolution was to retrocede all jurisdiction over offenses committed by or against Indians in the Indian country located in Thurston County acquired by the State pursuant to Public Law 280 of 1953, except traffic offenses. In the discussion on Legislative Resolution 37, the statement is made that the Commissioner of Indian Affairs had approved the Resolution and had agreed to accept retrocession of all Indian territory in Thurston County, which includes both the Omaha and Winnebago Tribes. The acceptance by the Secretary of the Interior, however, is only a partial acceptance of retrocession of jurisdiction. It is specifically limited to the areas of Indian country

located within the boundaries of the Omaha Indian Reservation in Thurston County. This definitely was not an acceptance of the retrocession offered, which was all of the Indian territory in Thurston County, and in our judgment is completely unauthorized by the terms of the Resolution of the Nebraska Legislature, and so does not constitute an acceptance. The difficulties apparent in trying to exercise jurisdiction in only a part of the Indian territory in Thurston County, which includes both Winnebago and Omaha Indians, are so patent as not to need elaboration. The Nebraska Legislature recognized this problem, and manifested its unwillingness to accept the counter proposal.

On February 1, 1971, the Nebraska Legislature adopted Resolution 16, which provides: "Whereas, the Eightieth Session of the Nebraska State Legislature, 1969, adopted Legislative Resolution 37, relating to the retrocession to the United States of jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska, acquired by the State of Nebraska pursuant to Public Law 280 of 1953; and

"Whereas, the United States has not accepted retrocession in accordance with the terms and provisions of said Legislative Resolution 37,

"Now, Therefore, Be It Resolved By The Members Of The Eighty-second Legislature of Nebraska, First Session:

"1. That the action of the Eightieth Session of the Nebraska State Lgislature, 1969, approving Legislative Resolution 37 is rescinded, and the offer of retrocession therein contained is withdrawn.

"2. That a duly attested copy of the resolution be transmitted by the Clerk of the Legislature to the Secretary of Interior of the United States."

In our judgment, the original resolution of retrocession could not be effective until it was accepted by the federal government. A partial acceptance is not ef-

fective unless and until it is approved by the State. The determination of the extent of retrocession was left to the states by 25 U. S. C. A., section 1323, since the United States is authorized to accept all or any measure of retrocession. The measure of jurisdiction to be retroceded was a matter for the state to determine, and is not dictated in any way by the federal act. The attempted acceptance was not in accordance with the terms of the offer, and was therefore of no force and effect. The offer of retrocession having been withdrawn, 18 U. S. C. A., section 1162, is still applicable in Nebraska.

Having reached the conclusion that retrocession never became effective, it is unnecessary to discuss the questions raised by the parties to be considered in the event we had found retrocession to be effective.

For the reasons given above, the conviction of the defendant on both Counts I and II is affirmed. The penalty on Count I is reduced from life imprisonment to a term of 35 years. The judgment entered is affirmed in all particulars except as noted above.

AFFIRMED AS MODIFIED.

McCOWN, J.

I concur in the affirmance of the convictions. I do not concur in the later disposition.

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

187 N. W. 2d 298

Filed May 28, 1971. No. 37889.

1. **Criminal Law: Sentences.** The habitual criminal act, section 29-2221, R. S. Supp., 1969, does not create a new and separate criminal offense for which a person may be separately sentenced but provides merely that the repetition of criminal conduct aggravates the guilt and justifies greater punishment than ordinarily would be considered.
2. **Criminal Law: Indians: Jurisdiction.** The Nebraska Legisla-

ture having withdrawn its offer of retrocession, 18 U. S. C. A., section 1162, is still applicable in Nebraska.

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

William G. Line of Kerrigan, Line & Martin, for appellant.

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

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

SPENCER, J.

Defendant Dennis Tyndall was convicted under an information charging kidnapping, rape, and with being an habitual criminal. He was sentenced to life imprisonment on the kidnapping count, to a term of 20 years for rape, and to an additional term of 10 years as an habitual criminal. The sentences are to be served consecutively. We affirm the convictions but modify the life imprisonment sentence on Count I (kidnapping), and vacate the sentence for a term of 10 years on Count III (habitual criminal charge).

Defendant, who was a member of the Omaha Indian Tribe, was one of seven Indians involved in the kidnapping and rape incident described in State v. Goham, 187 Neb. 34, 187 N. W. 2d 305. He was tried in October 1970, 7 months after the Goham trial. Reference is made to that case for a recitation of the pertinent facts. As described therein, the complaining witness was forcibly dragged from her car, forced into a car occupied by seven Indians, and taken 2 miles to Big Elk Park where she was forcibly raped by them. The complaining witness identified the defendant as one of the individuals who forced her from her car and as the first one to rape her.

Defendant lists four assignments of error. They are: "The court erred: 1. In failing to vacate the convic-

tion for kidnapping as the alleged kidnapping was incidental to the charge of rape. 2. In imposing a sentence of life imprisonment for kidnapping as the statute in effect at the time of trial provided for a maximum sentence of 50 years for kidnapping. 3. In sentencing defendant to a separate consecutive term of ten years imprisonment for being an habitual criminal. 4. In failing to dismiss all proceedings against defendant for the reason that the court had lost jurisdiction by virtue of retrocession of criminal jurisdiction to the United States."

We adequately discussed defendant's first and second assignments of error in State v. Goham, 187 Neb. 34, 305 N. W. 2d 187. What we said there is fully applicable and controlling herein.

Defendant's third assignment of error must be sustained. The habitual criminal act, section 29-2221, R. S. Supp., 1969, does not create a new and separate criminal offense for which a person may be separately sentenced but provides merely that the repetition of criminal conduct aggravates the guilt and justifies greater punishment than ordinarily would be considered. Gamron v. Jones, 148 Neb. 645, 28 N. W. 2d 403. We accordingly vacate the separate sentence on Count III, the habitual criminal charge.

The fourth assignment of error alleges that the courts of Nebraska have lost jurisdiction herein because of the retrocession of criminal jurisdiction to the United States. The defendant's trial was completed October 15, 1970. The Secretary of the Interior published a notice in the Federal Register purporting to accept retrocession of jurisdiction over the Omaha Indian Reservation in Thurston County, Nebraska, on October 24, 1970. Defendant's motion for a new trial was overruled and he was sentenced on October 26, 1970. The Nebraska Legislature on February 1, 1971, withdrew its offer of retrocession because the United States had not accepted it in accordance with the terms and provisions

of Legislative Resolution 37, adopted April 16, 1969. The resolutions and discussion are more particularly set out in State v. Goham, 187 Neb. 34, 187 N. W. 2d 305. That case determined that the offer of retrocession having been withdrawn, 18 U. S. C. A., section 1162, is still applicable in Nebraska. There is no merit to defendant's fourth assignment of error.

The conviction of the defendant on the three counts herein is affirmed. The sentence on Count III is vacated and the sentence on Count I, for the reasons described in State v. Goham, 187 Neb. 34, 187 N. W. 2d 305, is reduced from life imprisonment to a term of 35 years. In all other respects, the judgment is affirmed.

AFFIRMED AS MODIFIED.

ARMON LOY TODD, JR., A MINOR, BY ARMON L. TODD, HIS FATHER AND NEXT FRIEND, APPELLEE, V. RALPH BOALS ET AL., APPELLANTS.

187 N. W. 2d 284

Filed May 28, 1971. No. 37776.

1. **Master and Servant: Words and Phrases.** The relation of master and servant cannot be defined in general terms with substantial accuracy.
2. **Appeal and Error: Instructions: Trial.** It is prejudicial error for the district court to submit to a jury an essential issue of fact without evidentiary support.

Appeal from the district court for Dakota County: JOSEPH E. MARSH, Judge. Reversed and remanded for a new trial.

Jewell, Otte & Pollock, for appellants.

Cecil W. Orton and Leroy W. Orton, for appellee.

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

SMITH, J.

While plaintiff Armon Loy Todd, Jr., was weeding a

bean field farmed by defendants, Boalses, Todd sustained physical injury accidentally caused by a fellow worker. This resultant action was tried on the theory that Boalses would not be liable if the work group had been an independent contractor. The verdict went for Todd. Boalses appeal. They assert that as a matter of law the group was an independent contractor and that errors in a jury instruction prejudiced them.

On July 17, 1965, the date of the injury, the group comprised Todd, age 15, and 5 other boys, ages 15 and 16. It had begun to form without Todd earlier in the summer. Having weeded a bean field of Leland George under his supervision, the boys moved to the farm of George Stading. He separated them so that those in front weeded with bean hooks. He stationed two with corn knives four feet behind the others to cut weeds that were too large for the bean hooks. Todd pursuant to an agreement with one boy joined the group there. He brought a corn knife furnished by his grandfather. A boy explained its use. After an hour when they completed their work at Stading's farm, the group moved to the Boals farm.

The boys had named no boss, although Vic Russell and Charles Helt "kept things going." Helt had negotiated with Robert Boals, who had desired 4 to 6 boys. Robert had agreed to pay Helt $0.90 an hour each boy worked. Upon their arrival, Robert issued bean hooks but no corn knives. He then drove to the field which lay ½ mile from the farmhouse, the workers following in Russell's automobile. Robert having pointed out the field, departed immediately. Neither Robert nor Ralph exercised any direct control over the group, although Robert warned against carelessness. The latter knew of the corn knives.

The next morning the group returned directly to the Boals field. They spaced themselves as they had done in Stading's field. All except Russell were using corn knives because weeds were thick. Todd, Helt, or both

wandered, and Todd knew they were close together. When he pushed back weed branches to straighten the stem, Helt swung his knife at the weed. The knife struck Todd's hand.

Evidence whether supervision of boys who weeded bean fields was common practice in the county conflicted sharply. Payment to one boy for all work, no withholding of income or social security taxes, and the boys fixing work times were common practice. They were also elements of the Boals transaction.

The relation of master and servant cannot be defined in general terms with substantial accuracy. Control or the right to control is often the chief distinction between the relation of master-servant and of employer-independent contractor. See, Bodwell v. Webster, 98 Neb. 664, 154 N. W. 229 (1915); Restatement, Agency 2d, § 2, p. 12, and § 220(1), comment c, p. 486. In the present case the issue was one of fact.

The district court in instructing the jury on Todd's petition copied this allegation: ". . . when the plaintiff and the other boys first went to the Boals farm they were escorted to the bean field where they were ordered to start work." The "order" in context was referable only to Robert. That part of the allegation wanted evidentiary support.

It is prejudicial error for the district court to submit to a jury an essential issue of fact without evidentiary support. See, Pensyl v. Gibb, 182 Neb. 573, 156 N. W. 2d 27 (1968); NJI No. 2.01. The business relation between Boalses and Todd's group was the crucial issue, and it was close. The instruction constituted prejudicial error.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

PAXTON & VIERLING STEEL CO., A CORPORATION, APPELLANT, V. C. R. BARMORE, DOING BUSINESS AS WESTERN PLAINS MILL EQUIPMENT CO., ET AL., APPELLEES.
187 N. W. 2d 590

Filed May 28, 1971. No. 37794.

1. **Liens: Contracts: Property.** The lien of a materialman for material furnished to a contractor does not depend upon a contract existing between the materialman and the owner. The lien is given because the material furnished was used in the construction of the building or other structure.
2. **Liens: Contracts: Property: Statutes.** Section 52-102, R. R. S. 1943, makes no requirement concerning the contract between the materialman and the contractor. If the contract and delivery, or furnishing under it, is sufficient to create an indebtedness or liability, it is sufficient to create a lien.

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

Swarr, May, Royce, Smith, Andersen & Ross, for appellant.

Yost, Schafersman, Yost & Lamme, for appellees.

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

BOSLAUGH, J.

This is an action to foreclose a mechanic's lien. The plaintiff, Paxton & Vierling Steel Co., is a steel supplier at Omaha, Nebraska. The plaintiff furnished steel to C. R. Barmore, doing business as Western Plains Mill Equipment Co., for the construction of a feed mill at Howells, Nebraska, for the defendants, Lambert F. Pekarek and Ludmilla H. Pekarek.

The plaintiff claims that the amount due under its lien is $3,447.49 plus interest and costs. The trial court found that the plaintiff should have judgment for $162.04 plus interest and costs. The plaintiff appeals.

The record shows that the plaintiff made a written proposal, which was accepted by Barmore, to furnish structural steel for the mill in the amount of $2,360.

The structural steel was to be fabricated in the plaintiff's shop so that it could be erected on the site by merely fastening it together with bolts. The remainder of the steel furnished by the plaintiff was material used in construction of bins, hoppers, and other parts of the mill and was fabricated by Barmore at the site or by another subcontractor. This steel amounted to $3,447.49 and was furnished as and when requested by Barmore. There was no firm agreement as to quantity or price concerning this steel, but it was all furnished at base price plus regular freight.

The first item was furnished March 12, 1968, and the last item October 10, 1968. Most of the steel had been furnished by July 15, 1968. An order consisting of beams, angles, and bars amounting to $39.71 was furnished on September 4, 1968. An order for a length of 4-inch pipe and 24 bars to be rolled into the shape of a ring and amounting to $122.33 was furnished on October 10, 1968. These are the only items which the trial court found could be included in the lien which was filed on November 20, 1968.

The plaintiff contends that the trial court erred in finding that a subcontractor's lien could not be based upon an open account, and that the statutory time for filing a lien ran from the date of each delivery of material.

This case involves material furnished to a contractor by a materialman. There was no contract between the Pekareks and the plaintiff for the steel furnished to Barmore. Section 52-102, R. R. S. 1943, provides that a person who furnishes material to a contractor for the construction of a mill may secure a lien by filing a sworn statement of the amount due from the contractor within 3 months from the furnishing of the material. The statute further provides that the risk of payments made to the contractor until the expiration of the 3 months shall be upon the owner, and that the owner

shall not be liable to action by the contractor until the expiration of the 3 months.

The lien of a materialman for material furnished to a contractor does not depend upon a contract existing between the materialman and the owner. The lien is given because the material furnished was used in the construction of the building or other structure. Rosebud Lumber & Coal Co. v. Holms, 155 Neb. 459, 52 N. W. 2d 313.

The record indicates that the controversy in the district court centered around the nature of the contract between the plaintiff and Barmore. The amended petition alleged that the plaintiff and Barmore had entered into a written contract that had been amended orally to provide for delivery of additional material as necessary. The defendants alleged that each item furnished after the written proposal was upon a new agreement between the plaintiff and Barmore.

Section 52-102, R. R. S 1943, makes no requirement concerning the contract between the materialman and the contractor. If the contract and delivery, or furnishing under it, is sufficient to create an indebtedness or liability, it is sufficient to create a lien. Rosebud Lumber & Coal Co. v. Holms, *supra*; Peters v. Halligan, 182 Neb. 51, 152 N. W. 2d 103; Great Western Mfg. Co. v. Hunter Bros., 15 Neb. 32, 16 N. W. 759. An open account is sufficient. See Walker v. Collins Constr. Co., 121 Neb. 157, 236 N. W. 334. Occidental S. & L. Assn. v. Cannon, 184 Neb. 659, 171 N. W. 2d 166, cited by the Pekareks, involved a contract between an owner and a materialman.

The contract between Barmore and the Pekareks was for the construction of a feed mill. There is no contention that the material furnished by the plaintiff was not used in the construction of the feed mill. The material furnished on October 10, 1968, was used for manhole flanges and covers and for a roof support for the elevator leg. There is no contention that any of the material furnished was to replace defective material or that de-

livery was delayed to extend the time for filing a lien. The evidence rebutted any presumption arising from the length of time intervening between the deliveries on July 15, 1968, and those in September and October.

The Pekareks alleged that they had requested a lien waiver. On June 24, 1968, the plaintiff wrote to the Pekareks stating that Barmore owed $2,845 for material and that the plaintiff would not furnish a lien waiver until all bills were fully paid. The lien was filed on November 20, 1968. On November 23, 1968, the Pekareks took a receipt from Barmore showing payment in full to him.

The record sustains a finding that the plaintiff is entitled to a lien in the amount of $3,447.49 as alleged in its petition. The judgment of the district court is modified to increase the amount of the judgment from $162.04 to $3,447.49, and as modified the judgment is affirmed.

AFFIRMED AS MODIFIED.

DELBERT R. GIFFORD, APPELLEE, V. AG LIME, SAND AND GRAVEL COMPANY, A CORPORATION, ET AL., APPELLANTS.
187 N. W. 2d 285

Filed May 28, 1971. No. 37819.

1. **Workmen's Compensation.** The requirement that objective symptoms of an injury be produced "at the time" of the accident is satisfied if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown.
2. **Workmen's Compensation: Evidence.** The Workmen's Compensation Act does not require that the objective symptoms of an injury produced at the time of the accident be observed by others or that their existence be proved by independent testimony.
3. **Workmen's Compensation: Appeal and Error: Evidence.** On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence.
4. ———: ———: ———. Upon appellate review of a work-

men's compensation case in the Supreme Court, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record.

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

Leamer & Galvin and Wetz & Cosgrove, for appellants.

Ryan & Scoville and P. F. Verzani, for appellee.

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

MCCOWN, J.

The plaintiff recovered a workmen's compensation award in the one-judge workmen's compensation court. The defendants appealed directly to the district court. The district court on trial de novo found in favor of the plaintiff and entered judgment awarding workmen's compensation benefits.

The plaintiff, Delbert R. Gifford, was first employed by the defendant, Ag Lime, Sand and Gravel Company, in 1954. At the time of the injury here, he was employed as a mechanic and heavy equipment operator. On February 10, 1967, the plaintiff was repairing a piece of heavy equipment. He was alone in the defendant's workshop. His testimony was that he lifted a gear weighing between 90 and 100 pounds to place it in the final drive housing of the caterpillar unit. As he lifted the gear he felt a sharp pain in his back at about the belt line. He dropped the gear on the floor and sat down for about 30 minutes. The rest of the day he cleaned up and did light work, but he never completed the work of replacing the gear. When he went home after work, he lay down on the floor and did not eat anything that evening. His wife testified that he complained of his back that night and corroborated his testimony as to his conduct during the evening. He advised his employer of the injury sometime during the same week. He continued to work, but did only

light work thereafter and operated only rubber-tired equipment. The testimony of plaintiff and his wife as to all of the foregoing facts was not contradicted by any other witness.

The plaintiff did not seek medical attention during February and March of 1967, but testified that the pain in his back was getting worse and had started going down a leg. Sometime in April 1967, he went to see Dr. Carney, a chiropractor in Ponca, Nebraska. He saw him once or twice for his back. On April 20, 1967, he went to the Molstad Chiropractic Clinic in Sioux City, Iowa. He had seven or eight treatments to his back there. On May 8, 1967, he went to Dr. Faithe, an M.D. in Ponca, Nebraska. Dr. Faithe thought he had a disc problem and does not recall that he identified the back injury with any specific incident. She suggested that he see a specialist. On May 23, 1967, he went to Dr. Browne, a neurosurgeon in Omaha, Nebraska. The history given to Dr. Browne was that the onset was approximately six weeks before and had been gradual and progressive since. Dr. Browne made no inquiry as to any previous trauma and thought he possibly had a lumbar disc syndrome. He recommended that if his back did not improve in a week or two, the plaintiff should return. On June 16, 1967, plaintiff consulted Dr. Blume, a neurosurgeon in Sioux City, Iowa. The history given to Dr. Blume included the lifting incident on February 10, and also ruled out any previous back pain or injury. The history also included the consultation with Dr. Browne and his diagnosis and recommendation for treatment. Dr. Blume's initial diagnosis was a ruptured disc. Plaintiff was hospitalized for a myelogram on June 23rd, which confirmed the diagnosis. On July 2, 1967, Dr. Blume performed a partial laminectomy and the ruptured discs were removed. Dr. Blume testified that the injury to the plaintiff's lumbar spine was caused by the lifting accident of February 10, 1967. No doctor directly contradicted that opinion and both doctors who

testified on the issue were in agreement that the plaintiff had a permanent injury.

Defendant's challenge to the judgment rests on the contention that the evidence was insufficient and that the plaintiff's testimony was uncertain, inconsistent, contradictory, and differed from previous testimony. Concededly, the plaintiff's memory for detail was poor. We cannot say that his testimony was materially contradictory. Its acceptance rests on the credibility of the plaintiff as a witness. The fact that the plaintiff was alone at the time the injury occurred does not wipe out his own testimony nor the evidence of objective symptoms of injury. The requirement that objective symptoms of an injury be produced "at the time" of the accident is satisfied if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown. The Workmen's Compensation Act does not require that the objective symptoms of an injury produced at the time of the accident be observed by others or that their existence be proved by independent testimony. Schoenrock v. School Dist. of Nebraska City, 179 Neb. 621, 139 N. W. 2d 547.

The vital issue here involves the nature and posture of appellate review in this court in a workmen's compensation case. Some history is appropriate. Since 1935, the workmen's compensation law of Nebraska has provided for an initial hearing before a single judge of the Nebraska Workmen's Compensation Court. An appeal from that judgment may be taken and rehearing had either to the Nebraska Workmen's Compensation Court sitting en banc or to the district court. In either case, the rehearing is de novo and a record is made. If the initial appeal from the one-judge compensation court hearing is taken to the workmen's compensation court en banc, an additional appeal may be taken from that court to the district court. That appeal is based on the record made in the workmen's compensation court and

no new evidence is taken in the district court. An appeal may be taken from the district court to this court, whichever route may have been followed previously.

In an appeal from the workmen's compensation court en banc to the district court, section 48-184, R. R. S. 1943, and its predecessor statutes have provided: "* * * that a judgment, order, or award of the Nebraska Workmen's Compensation Court shall be set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the order or award was procured by fraud, (3) the findings of fact by the court are not supported by the record, or (4) the findings of fact by the court do not support the order or award." That language has remained unchanged since 1935.

Section 48-185, R. R. S. 1943, and its predecessors since 1935, have provided for appeals from the district court to this court in workmen's compensation cases. The relevant portions of Laws 1935, c. 57, § 13, p. 195, originally provided: "Any appeal from the judgment of the district court shall be prosecuted in accordance with the general laws of the state regulating appeals in actions at law * * * a judgment, order, or award of the district court may be modified or set aside only upon the following grounds: (1) That the court acted without or in excess of its powers. (2) That the judgment, order or award was procured by fraud. (3) That the findings of fact are not *conclusively* supported by the evidence as disclosed by the record, and if so found, the cause shall be considered de novo upon the record. (4) That the findings of fact by the court do not support the order or award." (Emphasis ours.) What is contained in both sections 48-184 and 48-185, R. R. S. 1943, was originally a part of the same section. The sections were not separated until 1943.

This court has consistently held that where the initial rehearing is had before the compensation court en banc, then the review in the district court under section 48-184, R. R. S. 1943, is in the nature of an error proceed-

ing and is limited in scope. See, Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N. W. 2d 212; Rapp v. Hale, 170 Neb. 620, 103 N. W. 2d 851.

Under the provisions of section 48-185, R. S. 1943, in its original form, since few findings of fact could be said to be conclusively supported, we said: "As a practical proposition our review here is de novo upon the record." Werner v. Nebraska Power Co., 149 Neb. 408, 31 N. W. 2d 315 (1948). From that point on, in decisions too numerous to cite, we have stated that a workmen's compensation case in this court is considered de novo upon the record.

In 1953, section 48-185, R. S. 1943, was amended by removing the single word "conclusively." The committee statement on L.B. 85 of the 1953 Legislature was: "LB 85 provides that the word 'conclusively' shall be stricken. The committee unanimously agreed that this word shall be stricken from the Section 48-185 because it was unfair to the person appealing a case from the District Court to Supreme Court. That the amount of evidence needed in Supreme Court should not be greater than what is necessary in the District Court, as the Supreme Court decides their cases on the same record that the District Court.

"The committee also felt that it was unfair to the District Court as well as the Supreme Court in that by allowing the word conclusively to remain it changes the measure of evidence the District Court would decide the case on. The four rules set out by Section 48-184, which the District Court is guided to decide the matter and section 48-185 which the Supreme Court uses are and should be practically the same and it would be if the word conclusively was stricken as recommended by the committee."

This important change in section 48-185, R. R. S. 1943, adopted by the Legislature in 1953, has never been acknowledged or discussed by this court. It was apparently not raised. In 1960, this court once more repeated

the language that: "On an appeal from the district court to the Supreme Court in a workmen's compensation case, the case shall be considered de novo except where the findings of fact are *conclusively* supported by the evidence as disclosed by the record." Rapp v. Hale, 170 Neb. 620, 103 N. W. 2d 851. (Emphasis ours.)

On the basis of that case, we continued to state that a workmen's compensation case in this court is considered de novo. Even under that method of consideration, this court developed the rule that if conflicting evidence at the final trial level is resolved by the trial court according to the demeanor and credibility of witnesses, the resulting findings will be considered correct on de novo review in this court. See, Meadows v. Skinner Manufacturing Co., 178 Neb. 856, 136 N. W. 2d 184; Cardenas v. Peterson Bean Co., 180 Neb. 605, 144 N. W. 2d 154.

We think it clear that a reasonable interpretation of section 48-185, R. R. S. 1943, as amended in 1953, is that the standards for modifying or setting aside a judgment or award, and in measuring the findings of fact by the trial court in a workmen's compensation case, are to be the same whether the review is by the district court or by this court. Appellate review in this court requires consideration and review of the record in all cases. That consideration must ordinarily take account of the determination of the trial court or jury as to the factual issues. This is particularly true in dealing with appeals which are in the nature of actions at law. De novo review implies an independent determination of the facts without restriction by any previous factual determinations made in the lower court. While the distinction may be technical, it is nevertheless a vital one. Appellate courts do not ordinarily determine factual issues de novo except when required by statute.

We therefore hold that on appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings

of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence. We also hold that upon appellate review of a workmen's compensation case in the Supreme Court, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record. To the extent that the holdings of Rapp v. Hale, 170 Neb. 620, 103 N. W. 2d 851, and subsequent cases on these issues are in conflict, they are overruled.

The findings of fact of the trial court in this case are supported by the record whether the consideration be de novo or by the statutory standard required under section 48-185, R. R. S. 1943, as amended. The judgment is affirmed. The plaintiff's attorneys are allowed a fee of $750 for their services in this court.

AFFIRMED.

IN RE INTERESTS OF WAYNE FURROW ET AL.
STATE OF NEBRASKA IN RE INTERESTS OF WAYNE FURROW ET AL., APPELLEES, V. LOUISE RANDALL, APPELLANT.
187 N. W. 2d 586

Filed May 28, 1971. No. 37852.

1. **Infants: Statutes.** The child custody statutes of the State of Nebraska are to be liberally construed to accomplish the purposes of serving the best interests of the children involved.
2. ———: ———. Section 43-201 (3), R. R. S. 1943, provides that a neglected child shall mean any child who is in a situation dangerous to life or limb or injurious to the health or morals of such child.
3. **Infants: Statutes: Evidence.** Whether a child is neglected within the purview of the statute is a question of fact and each case must be determined from all of the facts and circumstances of each particular case.
4. **Infants: Parent and Child: Trial: Appeal and Error.** In cases involving child custody determinations in juvenile court and other courts, the findings of the trial court, both as to an evaluation of the evidence and as to the matter of custody, will not

be disturbed unless there is a clear abuse of discretion or the decision is against the weight of the evidence.

Appeal from the separate juvenile court of Lancaster County: W. W. NUERNBERGER, Judge. Affirmed.

Conley & Greenwald, for appellant.

Paul L. Douglas and Janice L. Gradwohl, for appellee State of Nebraska.

Joseph J. Carriotto, for appellee Furrow.

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

WHITE, C. J.

The separate juvenile court of Lancaster County, Nebraska, transferred the custody of Wayne Furrow, age 9, and Jack Furrow, age 6, from their mother, Louise Randall, to their natural father, George Furrow. Louise, the mother, appeals to this court. We affirm the judgment and order of the separate juvenile court transferring the custody to the natural father, George Furrow.

The jurisdiction and action of the separate juvenile court were founded on allegations of neglect by the natural mother under section 43-201 (3), R. R. S. 1943. This statute and similar sections of our juvenile court statutes are to be liberally construed with the end objective of the best interests of the children involved. Jones v. State, 175 Neb. 711, 123 N. W. 2d 633; 42 Am. Jur. 2d, Infants, § 16, p. 21.

George and Louise were married on April 26, 1957. They separated in 1962. Termination of the marriage is obscure, Louise claiming she got a Mexican divorce in August 1965 in a town in Mexico, the name of which she does not remember. There is no evidence in this record of a divorce decree, or of a support or child custody order; nor were any sought to be introduced. Four children had been born to the Furrow marriage. The two oldest, Charles and Roger, are now dead. In 1964

they died of suffocation in an abandoned refrigerator. The refrigerator was in Louise's home. She was separated from George Furrow. The children, then ages 5 and 4 died inside the regrigerator during a period of time when she left the children alone to go across the street to make a telephone call in Dallas, Texas. The circumstances surrounding the short period of time she was separated from these children, how they got into the refrigerator, are not clear from the record. The only witness was Louise. Prior to the death of these children, Louise had threatened to kill them. She also had threatened to sell her children. There was friction between her and her mother who lived upstairs in another apartment in Kansas City. Louise testified in this case that she had stated prior to the children's death she would rather see her children dead than living with her mother and she would rather sell or give away her children than have them in her mother's custody. The evidence establishes almost conclusively that Louise had an unstable personality and that she required psychiatric help. It is undisputed that during her marriage to George Furrow she had threatened to shoot him and, in fact, she did have a .38 caliber pistol in her possession when she was at the Dallas police department after the death of Charles and Roger, described above. She had also attempted suicide.

We now trace the continuity up to the date of April 26, 1970. Louise married Robert Randall in Crocker, Missouri, on October 9, 1965, using the name Louise Silcutt. After marriage to Randall, she joined him in Europe where he was a member of the armed services. She took one boy with her, leaving the other with her mother. Randall was discharged on June 2, 1969. The family went to Kansas City, Missouri, to live. The evidence shows an unstable marital environment, with Randall leaving Louise and the children many different times. The last time he left her was about April 19, 1970, and he returned on April 26, 1970, the date of the

immediate incidents which led to this juvenile court hearing. On that date, the evidence establishes that Randall whipped both Wayne and Jack with a dog leash. Bruises and welts were left on the children and Wayne became unconscious. The occasion for the whipping was the suspicion that the boys had taken some money from the family piggy bank and given some of the money to neighbor children. Randall admitted that the injuries were the result of his "discipline." He also conceded that the punishment he inflicted was extreme. Louise's mother who resided in an apartment upstairs, heard the children screaming during the incident, went to the Randall apartment to investigate, and gave a full description of the boys' injuries. She then called the police and two officers were sent to investigate. The day after the incident Randall terminated his employment and 3 days after the incident Louise left Kansas City with Wayne and Jack at midnight without saying "good-bye" to her mother. The Randalls left Kansas City just prior to the time police officers arrived to take the children into custody. Louise testified the reason she left Kansas City was because of the incident. On arrival in Lincoln, Louise was contacted by the authorities and the present action in juvenile court ensued.

The evidence shows a definite relationship between the main incidents precipitating this action and a continuous history of marital discord, violence, and neglect of the two boys. The evidence shows there had been previous incidents of Randall striking the children severly. Also, there is evidence that Louise let the children become hungry and filthy on occasions; and that she left the children alone after school until she came home from work. The effect on the children is demonstrated in the record. Wayne was in a special school for emotionally disturbed children, and the grandmother, Mrs. Chester, mother of Louise, was paying the tuition at this school.

The statute, section 43-201 (3), R. R. S. 1943, provides that a neglected child shall mean any child "who is in a situation * * * dangerous to life or limb or injurious to the health or morals of such child." In construing this statute, we have held that it should be liberally construed to aid the purpose of its enactment and that whether a child is a neglected child within the statute is a question of fact, and each case must be determined on its own facts. Stanley v. State, 105 Neb. 260, 179 N. W. 1019; Jones v. State, *supra*. An experienced trial judge, after hearing all the evidence, determined that Wayne and Jack were neglected children in that they were in a situation which was dangerous to life and limb and injurious to the health of such children. The evidence clearly sustains this finding. We have held that in cases involving child custody determinations in juvenile court, the findings of the trial court, both as to evaluation of the evidence and to the matter of custody, will not be disturbed unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Jones v. Jones, 183 Neb. 223, 159 N. W. 2d 544; 42 Am. Jur. 2d, Infants, § 43, p. 44.

Besides the actual abuse of the children, the most serious incident being recited in detail herein, there was general evidence of abuse of the children physically and the trial court had the advantage of the evidence showing that the marriage between the Randalls had been a stormy one, with Randall leaving the family home on many occasions. The evidence shows that Wayne was attending a special school because of his developing emotional problems and the evidence further shows that he had been overly aggressive and abusive in his play with other children. The court, in making the findings it did, also had the advantage, so important in cases of this type, of seeing and observing the witnesses, the children, and the parents involved.

Louise's appeal, ably presented by counsel, is primarily based upon an attempt to fragmentize the evidence into

isolated incidents. Then, the argument runs, that each isolated incident is not in itself sufficient to warrant the deprival of the mother to the custody, care, control, and love of her children. The charge of neglect of children is a general one and an examination of what is for the best interests of such children necessarily involves an examination of the continuous conduct and attitude of the responsible parent together with all related circumstances. Ordinarily such an examination does not lend itself to the narrow resolution of guilt or innocence of a specific charge in time and place. Child care is a continuous concept and traditional notions as to formulation of issues in an adversary proceeding must give way to an examination in a larger perspective. It appears, therefore, from an examination of all of the facts and circumstances in this case stretching over a period of time of about 6 years, that the determination of neglect by the trial court was supported by a preponderance of the evidence. The evidence further tends to show that the previous care of these children is having a very serious and substantial effect upon the present and future physical and mental health of these children. It further appears that the evidence as to physical abuse required the court to act summarily in taking the custody of the children from Louise.

The court's decree did not require the transfer of these children for placement with the state or some agency thereof. As to George Furrow, there is no evidence of a valid divorce decree or any child custody order. There is no evidence that the natural father, George Furrow, is not a fit and proper person for the custody of his minor children. The only evidence of neglect was his failure to pay child support. There was no decree requiring this and the evidence is that such support had never been sought by Louise. We also observe that the juvenile court retains a continuing supervisory jurisdiction in this case and may review the circumstances of the care of these children at any time in

the future. It appears that the decision of the trial court transferring the custody of the two boys to the natural father was proper. The trial court's order provided that a review of the matter was to be held by the judge, "upon application of any interested party showing a change in circumstances." We observe that the court did provide for a new hearing on March 26, 1971, and that at that time no motions had been filed by the parties interested requesting a change in the disposition of the custody of these children.

The judgment and order of the separate juvenile court of Lancaster County transferring the custody of the children involved herein to the natural father, George Furrow, are correct in all respects and are affirmed.

AFFIRMED.

JOE SECHOVEC, APPELLANT, V. ERNEST HARMS ET AL, APPELLEES.
187 N. W. 2d 296

Filed May 28, 1971. No. 37862.

1. **Equity: Courts: Judgments.** Where a court of equity has properly acquired jurisdiction in a suit for equitable relief, it will make a complete adjudication of all matters properly presented and involved in the case and ordinarily will grant such relief, legal or equitable, as may be required and thus avoid unnecessary litigation.
2. **Equity: Specific Performance: Judgments: Contracts.** In a suit where specific performance is granted, all damages growing out of defendant's breach of contract are litigable in the specific performance action and separate subsequent actions to recover different elements of such damages for the same breach cannot be maintained.

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

H. E. Hurt, Jr., for appellant.

Edward Asche, for appellees.

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

MCCOWN, J.

This is an action at law for real estate rent. A motion for summary judgment by defendant Harms was sustained and the action dismissed. The issue on appeal is whether or not a former judgment for specific performance was res judicata as to this action. We affirm the judgment of the district court.

In September 1965, the plaintiff as purchaser and the defendants as sellers executed a contract for the sale and purchase of real estate consisting of approximately 40 acres of land in Dodge County, Nebraska. The purchase price was $325 per acre. The closing date was January 1, 1966. The contract price was tendered by the purchaser prior to January 1, 1966. On January 15, 1966, the purchaser's check was returned and the defendant sellers refused to convey. In March 1966, the plaintiff filed suit in the district court for specific performance and deposited a check for the purchase price in the district court. The petition prayed for specific performance "and for such other, further and different relief as may be just and equitable and the costs of this action." Decree for specific performance was entered on May 10, 1967. Performance was had under the decree and possession delivered to the plaintiff. Thereafter on November 6, 1967, plaintiff commenced this separate action at law to recover the reasonable rental value of the real estate for the period possession was denied.

The district court found that all damages growing out of the alleged breach of contract were litigable in the suit for specific performance and were, therefore, res judicata. Summary judgment was entered in favor of defendant Harms and the plaintiff's action dismissed.

Whether it be called an action for rental or an action for damages for delay in performance, the whole foundation for plaintiff's cause of action here rests on the

contract which was required to be specifically performed. The crucial issue is whether full satisfaction of the judgment for specific performance is res judicata in a later separate action at law to recover damages or a money judgment.

It is a basic and long-established principle of equity jurisprudence that where a court of equity has properly acquired jurisdiction in a suit for equitable relief, it will make a complete adjudication of all matters properly presented and involved in the case and ordinarily will grant such relief, legal or equitable, as may be required and thus avoid unnecessary litigation. See, Muff v. Mahloch Farms Co., Inc., 184 Neb. 286, 167 N. W. 2d 73; Ready Sand & Gravel Co. v. Cornett, 184 Neb. 726, 171 N. W. 2d 775.

In an action where specific performance is decreed, courts ordinarily attempt to place the parties in the same position in which they would have been if the contract had been performed at the time agreed upon. Often this has been expressed by holding that upon specific performance the vendor is liable to account for the rents and profits and the vendee for the interest on the purchase price. See Russell v. Western Nebraska Rest Home, Inc., 180 Neb. 728, 144 N. W. 2d 728.

Material facts or questions which were in issue in a former action and were there admitted or judicially determined, and all points which properly belonged to the subject of litigation which might have been brought at the time with reasonable diligence, are conclusively settled by a judgment rendered therein, and such facts or questions become res judicata and may not again be litigated in a subsequent action. See Muff v. Mahloch Farms Co., Inc., *supra*.

Cases relied upon by the plaintiff generally reflect the viewpoint that a suit for specific performance and for damages for delay in performance are two separate causes of action. That view may stem from semantic differences in approach to "damages," or "breach of

contract," as opposed to "specific performance" of contract, or it may stem from the basic differences between equity and law which are still sharply defined in some states. In Nebraska, we have adopted the rule that in a suit where specific performance is granted, all damages growing out of defendant's breach of contract are litigable in the specific performance action and separate subsequent actions to recover different elements of such damages for the same breach cannot be maintained. Waldo v. Lockard, 101 Neb. 797, 165 N. W. 154. In that case, the court stated: "All of the damages growing out of his breach of contract were litigable in the original suit in equity. The law does not permit the complete remedy by specific performance to be split into separate actions for different elements of damages flowing from a single breach of contract."

Whether an action of this kind be treated as in equity or at law or a combination of both, the fundamental reasoning of Waldo v. Lockard, *supra,* remains valid.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EDWARD D. CHRISTIANSEN, APPELLANT.

187 N. W. 2d 303

Filed May 28, 1971. No. 37907.

1. **Witnesses: Trial: Evidence.** Before a witness may be permitted to testify as to testimony of a witness at a former trial, it must be shown that the witness is able to recall and relate the substance of the entire testimony upon the subject or topic involved.
2. **Trial: Evidence.** The admission of incompetent evidence is not prejudicial where the same fact is established by the testimony of the complaining party.

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

A. James McArthur, for appellant.

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

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

BOSLAUGH, J.

The defendant appeals from a conviction for willful reckless driving and operating a motor vehicle while his license had been revoked. The assignments of error relate to the admission in evidence of testimony concerning the county court testimony of a witness now deceased.

The record shows that the defendant and Drew Larson spent a part of the evening of February 20, 1970, drinking beer and riding around in Larson's Pontiac automobile. Later that evening they crossed the Nebraska City bridge and drove into Iowa for the purpose of drag racing.

An Iowa highway patrolman testified that on February 21, 1970, he observed the Larson automobile, which had a defective taillight, about a mile and a half east of the Nebraska City bridge. When the patrolman approached the automobile it accelerated at a high rate of speed toward the bridge. The patrolman turned on his red lights and followed the automobile, at speeds of up to 100 miles per hour, into Nebraska City.

About a quarter of a mile west of the bridge the automobile attempted to turn left but slid into some guard posts beside the road. The automobile then went up Kearney Hill about 3 or 4 blocks, turned to the right, and stopped about 75 feet from the corner. When the automobile stopped, Larson was sitting in the right front seat, the door on the driver's side was open, and a person was running to the left away from the car. The patrolman was unable to identify the person running from the automobile, but Larson identified this person as the defendant.

The principal issue in the case was the identity of the driver of the Larson automobile. The defendant denied that he drove the Larson automobile on February 21, 1970.

The trial in county court took place on March 12, 1970. Drew Larson testified at the trial, but no satisfactory record was made of his testimony. Larson died on June 20, 1970, as a result of injuries sustained in an accident. At the trial in the district court, the State was allowed to prove the former testimony of Larson by the testimony of the Iowa patrolman and a Nebraska patrolman who had been present in the courtroom during the first trial.

The Iowa patrolman and the Nebraska patrolman both testified, over objection, that Larson had testified that the defendant was driving the Larson automobile when it crossed the bridge and entered Nebraska. The defendant contends that the admission of this evidence was erroneous because there was no showing that the witnesses were able to recall and relate the substance of the entire original testimony of Larson.

In Vandewege v. Peter, 83 Neb. 140, 119 N. W. 226, this court held that if it appears that the witness cannot relate the substance of the "entire examination," the evidence is not admissible. The rule is usually stated to require the whole of the testimony on a particular point, issue, subject, or topic. See, VII Wigmore on Evidence (3d Ed.), § 2099, p. 488; 29 Am. Jur. 2d, Evidence, § 762, p. 831; 23 C. J. S., Criminal Law, § 898 b, p. 526; Annotation, 11 A. L. R. 2d 30.

Any error that may have occurred in the admission of testimony by the patrolmen that Larson had testified that the defendant was driving the automobile was not prejudicial. On cross-examination the defendant testified, without objection, that he remembered the testimony of Drew Larson in county court; that Larson had testified that the defendant was driving the automobile when they started for the bridge with the patrol-

man behind them; that the defendant was driving when they crossed the bridge; that the defendant was driving when the automobile came to a stop at the top of the hill; and that the defendant had jumped out of the left door and ran. The admission of incompetent evidence is not prejudicial where the same fact is established by the testimony of the complaining party. Tvrz v. State, 154 Neb. 641, 48 N. W. 2d 761.

The judgment of the district court is affirmed.

AFFIRMED.

SMITH, J., participating on briefs.

SCHOOL DISTRICT OF OMAHA, COUNTY OF DOUGLAS, STATE OF NEBRASKA, ET AL., APPELLEES, V. STATE BOARD OF EDUCATION ET AL., APPELLANTS.
187 N. W. 2d 592

Filed June 4, 1971. No. 37458.

1. **Statutes.** In construing a legislative act resort may be had to the history of its passage.
2. ———. A statute must be given a reasonable construction to accomplish the objectives and purposes of the act.
3. **Statutes: Administrative Law: Appeal and Error.** Unless the statute requires to the contrary, the findings of fact of an administrative board will ordinarily not be set aside unless they are arbitrary, capricious, or unreasonable.
4. **Statutes: Schools and School Districts: Words and Phrases.** Under the provisions of L. B. 448 (sections 79-1330 to 79-1344, R. S. Supp., 1967), the term per pupil cost shall mean a district's current operating expense for the preceding year, as shown in the district's annual financial report, divided by the average daily membership of resident and nonresident pupils for the preceding year, unless the context in which the term "per pupil cost" is used otherwise.
5. **Statutes: Schools and School Districts.** The purpose of L. B. 448 (sections 79-1330 to 79-1344, R. S. Supp., 1967), was to provide a formula for the distribution of state aid to public school districts.
6. ———: ———. The formula for determining the base amount of state aid to the different school districts in the state is

prescribed in sections 79-1333, 79-1334, 79-1336, 79-1337, and 79-1340, R. S. Supp., 1967.

7. ———: ———. The purpose of the limitations set out in section 79-1341, R. S. Supp., 1967 (section 12 of L. B. 448), is to equalize the allocation of funds as between the different school districts in the state.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. On motion for rehearing, reargument granted. See 186 Neb. 170, 181 N. W. 2d 861, for original opinion. Original opinion withdrawn. Reversed and remanded with directions.

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

Leo Eisenstatt and J. Patrick Green of Eisenstatt, Higgins, Kinnamon & Green and William Ross King, for appellees.

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

WHITE, C. J.

This case was previously reported at 186 Neb. 179, 181 N. W. 2d 861. On motion for rehearing we granted reargument. Our previous opinion affirming the judgment of the district court is withdrawn and the judgment of the district court is reversed and the cause remanded with directions.

Under sections 4, 5, 7, 8, and 11 of L. B. 448 (Laws 1967, chapter 514), providing for state aid to public school districts, the total amount of state aid for the School District of Omaha was computed for the school year 1968-69 to be $5,661,999. Under the limitation provisions of section 12 of the act, the State Board of Education limited the amount of aid to the School District of Omaha to $4,165,114. This reduction was required to bring it within the maximum 8 percent increase of the preceding year allowable under subsection (2) of section 12. The state prescribed aid, therefore, was cut in the

sum of $1,496,885. Under the provisions of section 12, the School District of Omaha filed an application for relief because of "undue hardship" as provided for in subsection (2) of section 12. On review the district court determined that section 12 (the limitation section) did not apply. The court ordered the State Board of Education to recalculate the amount of aid to Omaha and to stay further action. The State Board of Education appeals to this court. We reverse the judgment of the district court.

In order to understand this case it is necessary to review the pertinent facts and the sections of the statutes involved and to interpret them in the light of the purposes of the overall scheme and design of L. B. 448. The essential facts are not in dispute. The Legislature did not fully fund the act, and it was stipulated that the Legislature of the State of Nebraska at its 1967 legislative session for the biennium ending June 30, 1969, appropriated the sum of $25,000,000 for distribution among the school districts of the State of Nebraska pursuant to L.B. 448 (Laws 1967, chapter 514), sections 79-1330 to 79-1344, both inclusive, R. S. Supp., 1967.

Section 79-1333, R. S. Supp., 1967, provides that all state financial assistance shall be *based* upon the annual financial reports of such districts as required by section 79-451, R. R. S. 1943, and shall be paid in equal installments on the first day of December and the first day of April of the *following fiscal year.*

Section 79-451, R. R. S. 1943, provides that on or before July 20 the secretary of Class V districts shall deliver to the county superintendent a report showing the whole number of children belonging to the district between the ages of 5 and 21 years.

Also on or before November 1 two reports, one an end of the school year annual statistical summary and one an annual financial report showing number attending school under 5 and over 21 and other information including qualified teacher hours; teacher wages; amount

of money received from the county treasurer and the amount expended; the *number of mills levied for all school purposes;* the amount of bonded indebtedness; and *other facts and statistics as directed by the Commissioner of Education.* Such reports shall be submitted to the State Board of Education by Class IV and V school districts on or before the first day of November of each year. (Omaha is a Class V district.)

Under the provisions of L. B. 448 (sections 79-1330 to 79-1344, R. S. Supp., 1967), *"Unless the context otherwise requires* * * *

"(3) Per pupil cost shall mean a district's current operating expense for the *preceding* year as shown in the district's annual financial report to the State Department of Education, divided by the average daily membership of resident and nonresident pupils for the *preceding* school year." (Emphasis supplied.)

The financial support payable out of the State Foundation and Equalization Fund is provided in the statutes in stated amounts for each of several categories. Deductions are provided for late reports, *failure to levy taxes in prescribed amounts,* etc. The method used in determining the total base amount due Omaha under sections 4, 5, 7, 8, and 11 of the act appears to have been correct.

The act provided comprehensively for school aid in proportionate amounts to every school district in the state. The act also provided for pro rata funding in the event that the Legislature did not fully fund the act.

We are called upon in this case to construe L. B. 448, and in construing a legislative act resort may be had to the history of its passage. Chicago, B. & Q. R.R. Co. v. Amack, 112 Neb. 437, 199 N. W. 724. A proponent of this bill, Senator Jerome Warner, succinctly stated the reasons and purposes, as pertinent to the issues herein, to the Legislature's Committee on Education as follows: "The following constitute my reasons for this bill and the purposes which are sought to be accomplished there-

by: The purpose of LB 448 is to provide a formula for the distribution of state aid to public school districts. *It is a Foundation Equalization Act.* Under the foundation portion every school district in the state would be eligible to receive the amount of money prescribed in the bill on a per pupil basis, * * *. The *equalization* portion is for the purpose of equalizing costs between school districts. To qualify for equalization aid, a school district must levy a minimum of 22 mills if it is a Class 2, 3, 4 or 5 District; 15 mills for Class 1 District and 12 mills for a Class 6 District. The equalization aid is based upon $450.00 per pupil, one through six, $225.00 for kindergarten, $500.00 grades seven and eight and $550.00 for grades nine through twelve or 108% of the previous years per pupil cost whichever is less. These amounts times the respective number of students in average daily membership in each of the grades minus the other sources of income to the district including the amount raised by the minimum mill levy, the foundation aid and other sources of income, the difference between these equals the equalization aid. * * *

"The bill also has a provision for an appeal procedure made to the State Board of Education to *use the current years average daily membership for a school if it has had an increase in the number of students as prescribed in this bill.*

"The bill also provides for the pro-rating of a fund in proportion to what the district would have received of the full amount in the event that the Legislature appropriates less than the amount necessary for full funding of the bill. * * *

"In addition the bill has an over-all limit in the increase in per pupil cost per year which is for the purpose of insuring that any state aid is *used to reduce local mill levy and is not just additional spending by the local district. This is to insure the concept of replacement of local property tax.*" (Emphasis supplied.)

It would unduly lengthen this opinion to fully de-

scribe the background of the different types of grants under the act. We will refer to them as the foundation grant, the incentive grant, and the equalization grant. Pursuant to the data furnished the State Board of Education under the prescribed application forms for the grant, the Omaha calculation appears to be as follows:

Foundation grant, 79-1334		- $ 1,622,761.80
Incentive grant, 79-1340		- 458,862.00
Equalization grant, 79-1336		- $27,626,756.00
plus	79-1337	752,031.25
		$28,378,787.25
less	79-1338	14,057,272.07
		$14,321,515.18

In other words, if L.B. 448 had been fully funded and if the School District of Omaha had not exceeded the 8 percent limitation of section 79-1341, R. S. Supp., 1967 (section 12, L.B. 448), the School District of Omaha would have received $14,321,515.18 in equalization aid. Because the act did not fully fund, the pro rata share funds amounted to $5,661,999. This figure was reduced to $4,165,114 because section 79-1341, R. S. Supp., 1967 (section 12 of the act), provides that the per pupil cost may not increase more than 8 percent above the average cost for the preceding year of 1967-68.

With this background, we approach the first issue of the case. It is whether or not the limitation section, 79-1341, R. S. Supp., 1967 (section 12 of the act), is applicable. "Sec. 12. 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 of this act the following limitation shall apply: Notwithstanding the grant provisions of sections 4, 5, 7, 8, and 11 of this act, funds received under this act, when added to operating funds received from all other sources, shall not exceed the larger of the following amounts:

"(1) The sum necessary to support an increase in

per pupil expenditures which, when added to the increases and decreases of the four preceding fiscal years, results in a mean annual increase in per pupil costs for the five-year period of eight per cent; or

"(2) The sum necessary to support a per pupil cost eight per cent above that of the preceding year; *Provided,* a district which may suffer undue financial hardship because of such limitations, such hardship being a result of an abnormal change in enrollment, depreciation in the value of school properties, alteration of property values within the district, or other abnormalities or emergencies of similar magnitude or consequence may file a written application for relief with the State Board of Education, which may grant whatever relief, if any, it deems appropriate by altering the percentage limitations of this section."

The exact issue in this case involves the distribution of funds for the 1968-69 school year. We feel that it is self-evident and that the "particular year" referred to in the statute means the 1968-69 school year. This appears, from the record, to have been the year considered both by the School District of Omaha and the State Board of Education at the hearing before the State Board of Education, such hearing being instigated by the Omaha School District for the only purpose of securing relief under the hardship issue of the act. The district court, although finding erroneously that section 12 did not apply, did find in its memorandum order after its hearing on appeal that the *particular* year involved in the computation was the 1968-69 school year.

To arrive at the limitation on the amount due the Omaha School District we must determine the per pupil cost. Unless the context otherwise requires, we must take the district's current operating expense for the *preceding* year (1967-68) and divide it by the average daily membership of resident and non-resident pupils for the *preceding* school year (1967-68). The financial support payable for 1968-69 can only exceed by up to 8

percent (section 12, subsection (2)) the sum necessary to support a per pupil cost for 1967-68, the total of which would be the cost per each individual pupil multiplied by the number of pupils.

The district court held that the *actual* per pupil cost meant the *total* per pupil cost for 1967-68. Naturally, the *total* per pupil cost for 1967-68 could not exceed by 8 percent nor any other amount the already determined per pupil cost for 1967-68. The only logical possible conclusion is that *actual* per pupil cost means the *actual* per pupil cost for the *particular* year for which the distribution is being figured, to wit 1968-69. The context requires this construction. If it does not, the word *actual* means nothing and we are saying that the total per pupil cost does not exceed the total per pupil cost, therefore the limitation does not apply because it is not 8 percent more than the per pupil cost. We would be comparing total per pupil cost for 1967-68 with total per pupil cost for 1967-68.

It is elementary that a statute must be given a reasonable construction to accomplish the objectives and purposes of the act. It appears that the limitation section is designed to accomplish equalization of the aid among all the school districts and not permit arbitrary increases in the per pupil cost at the expense of the other school districts in the state. The 8 percent limitation is designed to insure this equalization and it seems to us that such a provision is fundamental to the purposes of the act. A chaotic condition could easily result from permitting an unlimited increase in costs by the different districts in order to secure the maximum aid possible.

The semantical analysis of the language of the different sections of the act supports our conclusion. Any difficulty with reference to the meaning of per pupil cost is eliminated in all of the other sections of the act besides section 12, because each section of the act (except section 12) in itself defines per pupil cost as meaning the per pupil cost in the next preceding year. Under

section 2, 79-1331, R. S. Supp., 1967, the definition of per pupil cost would have required the same interpretation actually spelled out, *unless the context otherwise required.* We note in only one place in the act is the term *"actual per pupil cost in any particular year"* used. We assume that the Legislature, by using a different phraseology in this section of the statute intended to give meaning to the admonition contained in section 2 that per pupil cost might and should be construed in light of the context. As we have pointed out the words *"actual"* and *"particular year"* could only refer in a meaningful sense to a comparison to the years 1968-69.

This act was designed to fit the actual realities of school district financing. It is clear that the amount of the distribution for the *particular* year 1968-69 is *based* upon reports for 1967-68. The reports for 1968-69 will not be filed until after the school year is completed. While the statute does not say that the 8 percent limitation is to be determined by the number of students registered and the budget for 1968-69, that is the only possible source. It would hardly seem logical to say that while payments are to be distributed in December and April of the 1968-69 year they would have to wait until reports for 1968-69 were filed in July and November 1969, following the end of the 1968-69 school year to determine what the actual per pupil cost had been. By October 1968 they will know how many pupils are in school. They will know the amounts of the teachers' salaries. They will have budgeted the amounts needed for all expenses.

To make a rather complex story short, the Legislature told the school districts, in effect, that if they would make a certain minimum levy, provide a certain quality education, the Legislature would appropriate the funds to insure the expense of per pupil cost established in the next preceding year or on the last 5-year average (section 12, subsection (1)). The Legislature also told the school districts that since the total amount they

funded would be divided among all of the school districts in the state they would not permit a sudden or disproportionate increase of their per pupil cost basis. They also sought to enforce the principle that the purpose of state aid was to reduce the local levy and not for the purpose of supplementing it. We therefore hold that the limitation section, section 12, 79-1341, R. S. Supp., 1967, is applicable.

The second issue which was not specifically ruled on by the district court since it held it was not applicable, arises from the following proviso in section 79-1341, R. S. Supp., 1967: "*Provided*, a district which may suffer financial hardship because of such limitations, such hardship being a result of an abnormal change in enrollment, depreciation in the value of school properties, alteration of property values within the district, or other abnormalities or emergencies of similar magnitude or consequence may file a written application for relief with the State Board of Education, which may grant whatever relief, if any, it deems appropriate by altering the percentage limitations of this section." This refers to the 8 percent limitation.

The Omaha School District filed such a written application for relief. It stated that the hardship designations of abnormal change in enrollment, depreciation in value of school properties, and alteration of property values within the district were not applicable. The claim for relief was based upon the last designation to wit "* * * other abnormalities or emergencies of similar magnitude or consequence."

We observe that the computations made by the School District of Omaha in its application for relief under section 12, were on the forms provided it by the State Department of Education. As we have stated the hearing involved solely a request for relief from the 8 percent limitation, section 79-1341, subsection (2), R. S. Supp., 1967. Again, the pro rata funding under the other provisions of the act came to $5,661,999. But the

application of the 8 percent limitation decreased this amount by $1,496,885. Was the action of the State Board of Education arbitrary and unreasonable and does the record support it in denying relief under the hardship clause and enforcing the 8 percent limitation of section 12, subsection (2)? We fail to find in the record any showing or any evidence that the denial was unreasonable, arbitrary, or capricious. The evidence shows, and we agree, that the School District of Omaha, as almost all school districts are, was hard pressed for financial support. The record shows that the State Board of Education agreed that the Omaha School District needed the money and was perhaps suffering from hardship. The record also shows that the State Board of Education received similar applications from some 50 other school districts asking for similar relief. Consequently the State Board of Education properly invoked the equalization principle which is the fundamental provision of the act. It seems clear to us that the board was supported in a finding that the School District of Omaha's hardship was not sufficiently abnormal as to require relief at the expense of the other school districts but was of similar degree and magnitude to those of all of the school districts whose applications have been denied. The burden of proof is upon the applicant for relief and the record is devoid of any showing that the School District of Omaha was being discriminated against. The board voted 5 to 1 to deny the Omaha application. We will not burden this opinon with a detailed recital of the reasons given by the majority of the board. Not only should considerable weight be given to the findings of the State Board of Education under the generalized powers granted to it under this section of the act, but we can find no showing that it acted arbitrarily, capriciously, or unreasonably. We assume that the State Board of Education and its staff had the necessary expertise to study the problems of all of the districts having hardship problems. The term "hardship" in the

context of the meaning, purpose, and the funding of this act can only be reached by a comparative study of the hardship of the other school districts in the state. The board made the determination that the case for hardship of the School District of Omaha was not so abnormal as to be above and beyond that of other school districts and require rectification by an allocation of money which would necessarily have to come from the pockets of the other school districts. It is significant that the School District of Omaha could have eliminated its financial hardship by increasing its tax levy by only 2 mills. Even then there was no reduction in its tax levy which is one of the purposes of the act. Its 1967-68 levy was a fraction over 42 mills and the 1968-69 levy was a fraction over 44 mills. The record shows that Kearney levied 55.09 mills, Grand Island 58.43, Hemingford 94.44, St. Edward 64.63, Merriman 107.48, Valentine 68.04, and Lincoln 55.32. Not without weight is the observation of a board member who stated that if the application of the School District of Omaha were granted then all of the other cases would have to be opened up and again the board would be faced with a problem. Consequently, the limitation section of the statute was followed which in effect is a format for the board to use in determining equality among the various school districts.

For these reasons we hold that section 79-1341, R. S. Supp., 1967, section 12 of L.B. 448 is applicable to the School District of Omaha in this case and that the action of the State Board of Education in denying relief from the 8 percent limitation is sustained by the record and is not arbitrary, capricious, or unreasonable.

The judgment of the district court is reversed and the cause remanded with directions to dismiss the petition on appeal of the School District of Omaha.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting.

The term, "per pupil cost," is defined in section 79-

1331, R. S. Supp., 1967, to mean the current operating expense for the *preceding year* divided by the average daily membership for the *preceding school year.* Thus, the "actual per pupil cost, in any particular year," is by definition the per pupil cost for the year preceding the particular year.

The term is used in only two sections of the 1967 act. There is nothing in the context of the act that requires or justifies a construction that ignores the definition set out in the act.

Section 79-1341, R. S. Supp., 1967, requires a comparison of the *actual* (not estimated) cost for 1967-68 with the total financial support prescribed for 1968-69. Cost on a per pupil basis cannot be compared with total financial support. It is necessary, as the trial court found, to compare total operating cost with total financial support. Since the former does not exceed the latter, the limitation prescribed in the section is not applicable.

The majority opinion suggests that "a chaotic condition could easily result from permitting an unlimited increase in costs by the different districts in order to secure the maximum aid possible." The only districts that could receive increased aid through increased expenditures, under the 1967 act, were those districts in which per pupil expenditures fell below the amounts specified in section 79-1336, R. S. Supp., 1967. Both limitation provisions have now been repealed. See Laws 1969, c. 467, p. 1621.

In my view of the case, it is not necesasry to reach the hardship issue.

McCOWN, J., joins in this dissent.

SMITH and McCOWN, JJ., dissenting.

The majority opinion misconstrues the statute. It gives the issue of undue hardship short shrift. We concur with the dissenting opinion by Boslaugh, J., regarding statutory construction, but we also dissent respecting the hardship issue.

The majority opinion states that the purpose of the

act was to provide comprehensive school aid in proportionate amounts to every school district in the state. We do not so read the text, and these facts cast a shadow over the majority view: In the fall of 1969 Nebraska led all other states in the numbers of operating and nonoperating school districts—1,420 and 400 respectively. See Simon and Grant, U.S. Department of Health, Education and Welfare Digest of Educational Statistics (1970).

We turn to the opening clause of section 12 of the act. The majority opinion insists that 1968-69 is the year for determination of actual pupil cost; yet it uses operating costs and average pupil membership in 1967-68 to make that determination. The approach is incorrect. It appears either to invert the statutory relationship between actual pupil cost and total financial support or to read the opening clause completely out of the act.

We are told that any other construction of the opening clause of section 12 would make the relationship between cost and support every year an invariable. The argument overlooks a fair construction of the statute: Prescribed support for one year would become an item of cost the next year.

Other states have determined school aid in a given year by revenue, costs, and membership in the prior year. See, Mort, Reusser, and Polly, Public School Finance 44-49 and 265; Johns and Morphet, Financing the Public Schools 283 (1960); Zenith School District No. 32 v. Peterson, 81 N. W. 2d 764 (N. D., 1957).

At the hearing before the state board on the issue of undue hardship, the Omaha district appeared by its president, Charles A. Peters, and its superintendent, Dr. Owen A. Knutzen. The board elicited minor instances of inefficiency, and greater inefficiency was probably inherent in a district of that size. One-half of all children in public schools of America attended schools located in 50 districts. Omaha ranked 38th.

Its student membership formed 20 percent of the state total and 90 percent of the Blacks.

The tragic plight of disadvantaged children in large urban school districts across the nation was well known. An urban crisis struck Omaha. In the year of passage of the state aid act one student was killed. Students boycotted schools. The buildings became targets of racial disturbances.

Dr. Knutzen poignantly declared: ". . . the fact of life is that we live today and for these children tomorrow. We cannot undo . . . yesterday . . .. Omaha . . . has 50 percent of all A.D.C. (child welfare) cases in Nebraska . . .. If that doesn't . . . spell human disaster in the consequences of the cost, I don't know what would." The burden of meeting the emergency fell upon the 1968-69 budget. The evidence stood unchallenged.

The technical staff of the Commissioner of Education for Nebraska recommended distribution of the money to Omaha on account of undue hardship. The commissioner, Dr. Floyd A. Miller, concurred, and he conveyed his recommendation to the board.

Sitting on the board was Robert G. Simmons, Jr., a resident of Scottsbluff and a practicing lawyer admitted to the bar in 1941. At the hearing this dialogue occurred: "Peters: . . . But . . . because we attempted to solve the problem, you are saying no . . .. Simmons: The Legislature said that . . . That's the trouble with the Omaha people, you don't realize that you are part of the State of Nebraska."

It is our opinion that this court misconstrues the statute and that the state board acted arbitrarily. We would affirm the judgment of the district court, reaffirming School District of Omaha v. State Board of Education, 186 Neb. 170, 181 N. W. 2d 861 (1970).

CLINTON, J., concurring.

I concur in the majority opinion. I add the following.

At the hearing before the State Board of Education,

both it and the plaintiff school district construed the statute to make section 12 and its limitations applicable to the plaintiff. Its application for relief under the "hardship" provision was founded on the premise that the limitation of the section was applicable. Its appeal to the district court was primarily on that premise.

The legislative intent is to be sought, first of all, within the bounds of the statute itself. Set forth following are: 1. A draft of the statute as it ought to read if the plaintiff's present contention were correct. 2. A draft rewritten in accordance with the practical construction placed upon it by both parties until otherwise interpreted by the trial court, which draft also contains my interpretative comments.

Section 12, if drafted in accordance with the plaintiff's present contention that "actual per pupil cost, in any particular year" means per pupil cost in the year preceding the year for which aid is being computed, would read as follows. The portions in brackets and/or parentheses indicate the changes required by such contention.

> "For a district in which actual per pupil cost [for the year preceding the year for which aid is being computed (or is to be paid)], exceeds the total financial support prescribed [for the year for which aid is being computed (or is to be paid)], by sections 7, 8, and 11 of this act the following limitation shall apply: Notwithstanding the grant provisions of sections 4, 5, 7, 8, and 11 of this act, funds received under this act [in the aid year], when added to operating funds received [in the aid year] from all other sources, shall not exceed the larger of the following amounts:
>
> (1) [Not applicable]; or
>
> (2) The sum necessary to support a per pupil cost eight per cent above that of the preceding

year; Provided, (here follow the hardship provisions)."

If section 12 were rewritten in accordance with the practical construction placed upon it by both parties until otherwise interpreted by the trial court, it would read as follows. Interpolated in brackets are my interpretative comments indicating my analysis of all versions, including that of the statute itself.

"For a district in which the per pupil cost for the year in which aid is being computed (or for which it is to be paid), exceeds the total financial support prescribed by sections 7, 8, and 11 [the foregoing clause under any version of the section can only refer to the year for which aid is being paid], of this act the following limitation shall apply: Notwithstanding the grant provisions of sections 4, 5, 7, 8, and 11 of this act, funds received under this act, [the immediately foregoing clause under any version can only refer to year for which aid is being paid], when added to operating funds received from all other sources [again this clause under any version can refer only to the aid year (and most significantly determination of operating funds must be based upon budget figures and not actual expenditures)], shall not exceed the larger of the following amounts:

(1) [Not applicable]; or

(2) The sum necessary to support a per pupil cost eight per cent above that of the preceding year."

Plaintiff concedes in its brief, page 29, under its theory of a condition precedent, that to read the section literally results in an absurdity. It then proposes to solve the quandry by reading something into the statute that is not there. This is a concession by it, at least, that the section is ambiguous. It therefore must be analyzed to try to determine the legislative intent.

From the analyses of section 12, which I have set forth earlier, it seems apparent to me that where this

section speaks of "actual per pupil cost, in any particular year," it is referring to a cost based upon budget figures for the aid year and a per pupil cost for the year based upon that budget.

I say this because based upon the analyses it is, to me, indisputable that the clause "the total financial support prescribed by sections 7, 8, and 11" necessarily refers to the support for the aid year, for it, by the very context, relates to the phrase "in any particular year". Therefore the phrase "in any particular year" refers to the year for which aid is being computed. The original opinion in this case concedes this.

Even more conclusive, in my judgment, is the relation of the phrase "in any particular year" to the clause "funds received under this act." It obviously refers to funds received in the aid year and that under the statute is "in any particular year."

Then we get to the clause "when added to operating funds received from all other sources." It is apparent that the determination of these funds can be made only with reference to the budget figures. Yet surely the statute is referring again necessarily to "funds received from all other sources" "in any particular year."

The plaintiff's interpretation of the statute necessarily requires that the phrase "in any particular year" be used in the very same sentence to mean both "the preceding year" and "the year for which aid is being computed and funds received" (quotation marks supplied on the last). This obviously cannot be. It necessarily follows that in this section the term "actual per pupil cost" must, because of the context, not be equated with the definition in subsection (3) of section 2.

The three clauses or phrases by the very language of the act refer to matters which are determinable only with reference to the aid year and by the terms of the section all relate back to "any particular year." It seems to me that it follows as night the day that "actual per pupil cost in any particular year" can refer only

to a cost based upon the aid year budget. The one term (used only once) cannot have two meanings in the same sentence.

The uncontradicted evidence is that the plaintiff in its application, exhibit 3, to the State Board of Education for aid computed its estimated per pupil cost for 1968-69 as $494.42. It used that figure to determine the applicability of the limitation of section 12. Total financial support per pupil under sections 7, 8, and 11 would be $465.31 or $476.81. See original opinion, 186 Neb. 178, 181 N. W. 2d 861, 863. The 108 percent of the per pupil cost for 1967-68 was $469.67 and this constituted the limitation for 1968-69. Section 12 did apply to plaintiff.

Additionally we offer the following grounds for reversal. A party may not on review change the theory on which the case was tried or the ground or action of defense relied upon by him below. 5 C. J. S., Appeal & Error, § 1503, p. 863. Before the State Board of Education, its theory was the section 12 limitation applied. In addition, both the State Board of Education and the plaintiff interpreted the section 12 limitation to apply. Contemporaneous construction may be considered by the court. 82 C. J. S., Statutes, § 357, p. 758. See, also, State v. Equitable Life Assur. Soc., 68 N. D. 641, 282 N. W. 411. The case of Zenith School District No. 32 v. Peterson (N. D.), 81 N. W. 2d 764, cited in the dissenting opinion of Judge Smith has no application. The reversal of the judgment of the trial court is required.

ROBERT JOHNSON, APPELLANT, V. EMMETT J. DENNIS, JR., DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

187 N. W. 2d 605

Filed June 4, 1971. No. 37815.

Implied Consent Law: Intoxicating Liquors: Motor Vehicles. A failure to reply to a direct inquiry as to which test should be administered, as provided in the Implied Consent Act, under the circumstances in this case, was equivalent to a refusal to take any of the tests.

Appeal from the district court for Fillmore County: Joseph Ach, Judge. Affirmed.

Walter C. O'Neal, Jr., for appellant.

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

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

BOSLAUGH, J.

The plaintiff, Robert Johnson, appeals from a judgment affirming the order of the Director of the Department of Motor Vehicles revoking the motor vehicle operator's license of plaintiff under the Implied Consent Act. The question presented is whether the evidence is sufficient to sustain the finding by the trial court that the plaintiff refused to submit to the test provided in section 39-727.03, R. R. S. 1943.

The record shows that the plaintiff was arrested by a state patrolman for operating a motor vehicle while under the influence of alcoholic liquor. He was taken to the sheriff's office at Geneva, Nebraska, and advised that he had the right to an attorney and the right to remain silent. He was also advised concerning the Implied Consent Act and asked if he wanted to give the officer a blood or urine sample. The plaintiff replied that he would give a urine specimen and was handed a bottle by the officer. The plaintiff then said he would

not give a urine sample, handed the bottle back to the officer, and asked to call his attorney. The attorney was called and came to the sheriff's office. The officer again asked the plaintiff if he would give a urine sample or a blood sample. The plaintiff's attorney advised the plaintiff to remain silent and the plaintiff made no reply to the inquiry. No further attempt was made to obtain a specimen.

The plaintiff contends that silence is not a refusal and that the plaintiff had not withdrawn his implied consent to a blood test. As we view the record, the plaintiff withdrew his consent to a blood test when he elected to furnish a urine sample. When he changed his mind and refused to give the urine specimen, his refusal to submit to a test was complete.

The plaintiff argues that the officer should have arranged for a physician to come to the sheriff's office so that an attempt could have been made to withdraw a blood sample from the plaintiff's body. The plaintiff's theory is that the officer should have assumed that the plaintiff would allow a blood sample to be taken and that the plaintiff's silence in the face of a direct inquiry could not be considered a refusal.

Section 39-727.04, R. R. S. 1943, provides that the person arrested may choose the test to be performed. Silence in the face of a direct inquiry as to which test should be administered, under the circumstances in this case, was equivalent to an express refusal to submit to any test. See Buda v. Fulton, 261 Iowa 981, 157 N. W. 2d 336, holding total failure to cooperate equivalent to a refusal. See, also, Blattner v. Tofany, 312 N. Y. S. 2d 173, 34 App. Div. 2d 1066; State v. Pandoli, 109 N. J. Super. 1, 262 A. 2d 41; Campbell v. Superior Court (Ariz.), 479 P. 2d 685; DiSalvo v. Williamson (R. I.), 259 A. 2d 671; Clancy v. Kelly, 180 N. Y. S. 2d 923, 7 App. Div. 2d 820.

Mills v. Swanson, 93 Idaho 279, 460 P. 2d 704, cited by the plaintiff, involved a driver who had been injured

and was dazed. The statutory provision regarding a person who is unconscious or otherwise incapable of refusal, section 39-727.05, R. R. S. 1943, was not applicable here.

The evidence sustains the finding of the trial court that the plaintiff refused to submit to the test required by law. The judgment of the district court is affirmed.

AFFIRMED.

WILLIAM LYDICK ET AL., APPELLANTS, V. INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION, APPELLEE.
187 N. W. 2d 602

Filed June 4, 1971. No. 37839.

1. **Insurance: Contracts.** A policy of insurance will be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning.
2. ———: ———. Where an insurance policy limits liability to direct loss or damage, the general rule is that if a windstorm combines with a hazard expressly excluded from the policy coverage to produce the loss, the insured may not recover.

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

J. William Gallup of Schrempp & Bruckner, for appellants.

C. L. Robinson of Fitzgerald, Brown, Leahy, McGill & Strom, for appellee.

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

WHITE, C. J.

This is an action at law by the plaintiffs, William Lydick and James Lydick, upon a policy of insurance issued by the defendant, Insurance Company of North America, to recover the value of certain cattle alleged

to have been destroyed as the direct result of a windstorm. The district court sustained a motion for a summary judgment in favor of the defendant and dismissed the action. On appeal we affirm the judgment of the district court dismissing the action.

There is no genuine issue of fact in this case. The plaintiffs' case rests upon their undisputed testimony. The defendant introduced no evidence. The plaintiffs, William Lydick and James Lydick, are partners involved in farming and in cattle feeding. About 9 or 10 o'clock in the morning on January 2, 1969, James Lydick went to the feed lot to tend to the cattle and found 99 of them dead in a pond located on the feed lot. The wind, at the time the cattle were found in the water, was blowing at a rate of 30 miles per hour with gusts up to 40 to 50 miles per hour as it had been the day before. The plaintiffs testified that the cattle descended into the sheltered area around the ice-covered pond because of the cold and the wind. William Lydick also testified that they never would have gone onto the ice if it had not been covered with snow and if the wind had not been blowing. The cattle broke through the ice into the water before the plaintiff, James Lydick, arrived at the pond, and it was his opinion that this happened in the middle of the night of January 1-2, 1969. Snow had covered the pond all winter since the first snow, but the night of January 1-2, 1969, was the first time any cattle had gone onto the ice.

The weather was extremely cold. The plaintiff, William Lydick, stated that in his opinion it was quite a little below zero; that down the banks and around the pond it was probably 15 to 20 degrees warmer; that the cattle were seeking shelter from the wind and the cold; and that there were 3 or 4 inches of snow on the pond.

As to the immediate cause of the cattle breaking through the ice, the plaintiff, William Lydick, testified as follows: "Q. These cattle, are they willing to go out onto the ice? A. No, these cattle would never have

gone out if it wasn't snow out there. They won't hardly go on ice. The pond at this particular time was covered with about three or four inches of snow, I don't know exactly."

The pertinent provisions of the policy provide: "* * * this Policy is Extended to Insure against *Direct* loss by Windstorm, Hail, Explosion, * * *.

"Provisions Applicable Only to Windstorm and Hail: This Company shall not be liable for loss caused directly or indirectly by *frost* or *cold weather* or *ice* (other than hail), snow or sleet, *whether* driven by *wind* or not. * * *

"This Company shall not be liable for any loss to livestock or poultry caused in whole or in part by *running into streams or ditches* or against fences or other objects, or from smothering; nor for loss as the direct or indirect result of fright, howsoever caused. * * *

"Unless liability therefor is assumed in the form attached to this policy, or by endorsement hereon, this Company shall not be liable for damage to the following property: * * * (e) poultry, horses, mules, cattle, swine and sheep *caused by freezing or smothering in blizzards or snowstorms.*" (Emphasis supplied.)

The undisputed facts in this case automatically place themselves apposite the insuring and exclusionary clauses. At the risk of analyzing the obvious, we observe that the loss of the cattle was not caused *directly* by the wind in the sense that the wind itself damaged the cattle by throwing them to the ground, over a cliff, or causing another object to strike them. The evidence demonstrates that the loss of these cattle was due to a combination of different factors and that the wind was merely one of the prior conditions contributing to the loss.

The policy insures against *direct* loss only. As the trial court cogently observed there were many other antecedent and contributing factors that produced this loss. The important one, of course, was the extreme cold to which the plaintiffs themselves testified, but

for its existence, the loss would not have occurred. It would not have occurred but for the fact that the most convenient and available shelter was in a depression where there was an ice-covered pond; it would not have occurred but for the frozen ice covering the pond; and even more important, it would not have occurred but for the fact that there were 3 or 4 inches of snow which covered the ice so the cattle would be willing to venture on it; nor would it have occurred but for the fact that the ice was too thin to support the weight of the cattle; and the evidence shows that more than 100 head of these cattle gathered at the same time on the thin ice and collectively produced the fall-through into the water that caused their death. Under these circumstances we agree with the district court in holding that the loss, at most, was not directly caused by the wind.

The immediate and direct cause of the loss in this case was the collapse of the ice on which the cattle stood. The cold wind, by maximum inference, merely created an antecedent and preliminary condition which contributed to their wandering upon the snow-covered ice, and thus can only be considered as an indirect cause. In the context of this case the meaning of "direct causation" is defined aptly in Lorio v. Aetna Insurance Co. (La. App.), 220 So. 2d 781, a quite similar case involving an interpretation of a windstorm exclusionary clause. There the court said as follows: "The term 'directly resulting from' has not been heretofore construed by the courts of this state. In so doing, we must give to those words their ordinary significance. 'Directly', as defined in Webster's New Collegiate Dictionary, 1961 edition, means 'In a direct manner, without anything intervening.' 'Intervene' means '1. To enter or appear as an irrelevant or extraneous feature or circumstance; to come (in between). 2. To occur, fall or come between points of time or events.' 'Result' means 'To proceed, spring or arise, as a consequence, effect or conclusion.'

"From the above, we conclude that death 'directly resulting from' some event would mean a death which is caused by or is a consequence of an event and which would have occurred without the existence or intrusion of other causes or conditions unrelated to the original event."

The same conclusion follows from the policy provision which specifically excluded damages caused by cold weather, ice, or snow, whether driven by wind or not. As we analyze the plaintiff's evidence, their entire theory is that the temperature was warmer in the depressed area of the pond since it was sheltered from the cold wind. They testified positively that the cattle would not have sought shelter if the wind had not been cold. They also testified that the cattle would not have ventured onto the ice had it not been covered with snow. It would appear, therefore, from the testimony of the plaintiffs themselves that the cold and the snow were the important, and probably the dominant factors in causing the cattle to wander onto the ice with the resultant collapse of the ice and the drowning in the pond. The general rule is that if a windstorm combines with a hazard expressly excluded from the policy coverage to produce the loss, the insured may not recover. 44 Am. Jur. 2d, Insurance, § 1393, p. 236; Holmes v. Phenix Ins. Co., 98 F. 240; Hartford Fire Ins. Co. v. Nelson, 64 Kan. 115, 67 P. 440; Abady v. Hanover Fire Ins. Co., 266 F. 2d 362.

Summarizing this case, it is clear that the wind itself did not directly harm the cattle; the most that can be said is that the wind and the cold combined as prior conditions to cause the cattle to seek shelter. This was not in itself dangerous except for the pond in the depression. Even then no injury would have resulted had not the pond been frozen and covered with a large accumulation of snow tempting the cattle to venture onto the ice.

It is clear that the loss suffered by the plaintiffs was

not directly caused by the wind and the holding comes within the exclusionary provisions of the policy. The judgment of the district court is correct and is affirmed.

AFFIRMED.

JOHN MARSHALL, APPELLANT, V. COLUMBUS STEEL SUPPLY, APPELLEE.
187 N. W. 2d 607

Filed June 4, 1971. No. 37849.

Statutes: Workmen's Compensation: Attorneys at Law. Applicability of the workmen's compensation statute providing attorney's fees and a penalty for waiting time for delinquent payments turns largely on the facts of each case.

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

Moyer & Moyer, for appellant.

Jewell, Otte, Pollock & Gatz, for appellee.

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

SMITH, J.

An award of the Workmen's Compensation Court en banc denied plaintiff the penalty for waiting time and attorney's fees. On appeal the district court affirmed. Plaintiff appeals.

Plaintiff sustained a compensable injury to his ankle on June 20, 1969. Defendant's compensation carrier paid his medical bills and temporary total disability to October 7 when plaintiff returned to work. On January 21, 1970, plaintiff petitioned the compensation court for relief. He alleged a permanent partial disability to the right foot and leg without specifying a percentage.

Former section 48-121, R. R. S. 1943, then in force, established this schedule: For permanent total loss of use of a foot, 66⅔ percent of daily wages during 150

weeks; for permanent total loss of use of a leg, 66⅔ percent of daily wages during 215 weeks. In all cases involving a permanent partial loss of the use of those members the compensation was to bear such relation to the amounts named as the disabilities bore to those produced by the injuries.

At a hearing before a single judge the compensation court awarded plaintiff $45 a week for 49½ weeks, finding a 33 percent permanent partial disability to the right foot. Defendant failed to appear without any excuse.

On March 11, 1970, defendant applied for a rehearing. After a trial the court en banc decreased the award to $45 a week for 26¼ weeks, finding a 17½ percent permanent partial disability to plaintiff's right foot. It found no penalty or attorney's fees assessable against defendant because a reasonable controversy existed.

An orthopedic surgeon engaged by defendant had reported on February 9, 1970, that plaintiff's injury was a minimal permanent impairment. On March 20 he estimated a 10 percent permanent impairment of the foot which he defined under compensation law to extend from the toes to the knees. Another orthopedic surgeon engaged by counsel for plaintiff found a 25 percent permanent disability of the ankle. Dr. E. N. Heiser, who treated plaintiff at his home in Columbus, did not testify. Brief references to his opinion which were not favorable to plaintiff need not be considered.

Section 48-125, R. R. S. 1943, added a 50 percent penalty for waiting time on all delinquent payments after 30 days' notice. When the employer refused payment, or when he neglected to pay compensation for 30 days after injury, and proceedings were held before the compensation court, the statute allowed the employee a reasonable attorney's fee.

The Legislature intended that an employee would receive payments without delay for trivial reasons. The employer was under a duty to exercise reasonable dili-

gence, but he retained a fair opportunity to a trial of his just controversies. Reasonable certainty of the amount and number of compensation payments was required. See, Gill v. Hrupek, 184 Neb. 436, 168 N. W. 2d 377 (1969); Wheeler v. Northwestern Metal Co., 175 Neb. 841, 124 N. W. 2d 377 (1963); Redfern v. Safeway Stores, Inc., 145 Neb. 288, 16 N. W. 2d 196 (1944); McCrary v. Wolff, 109 Neb. 796, 192 N. W. 237 (1923); Hall v. Germantown State Bank, 105 Neb. 709, 181 N. W. 609 (1921); Osborn v. Omaha Structural Steel Co., 105 Neb. 216, 179 N. W. 1022 (1920). Each case turned largely on its own facts.

In the present case defendant's inexcusable failure to appear before the single judge court weighs heavily. Existence of a reasonable controversy under the circumstances, however, neutralizes neglect on defendant's part.

The cause of plaintiff's justifiable dissatisfaction actually lies elsewhere. Too much litigation which benefits neither employee nor employer is characteristic of the system. Interest in the subject is indicated by the following materials: Report of Judicial Council, 48 Neb. L. Rev. 699 (1968); Report of Committee on Procedure, Nebraska State Bar Association, 43 Neb. L. Rev. 211 (1963); Report of Judicial Council, 42 Neb. L. Rev. 343 (1962); Report of Committee on Legislation, Nebraska State Bar Association, 31 Neb. L. Rev. 307 (1951); Report of Committee on Legislation, Nebraska State Bar Association, 30 Neb. L. Rev. 154 (1950).

It is desirable that the Legislature simplify practice and proceedings in these cases. See Art. V, § 25, Constitution of Nebraska.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MCARTHUR MYLES, APPELLANT.
187 N. W. 2d 584

Filed June 4, 1971. No. 37873.

1. **Criminal Law: Trial: Post Conviction: Attorneys at Law: Appeal and Error.** When an indigent defendant has made known to the court that he desires to appeal his conviction, that appeal must ordinarily be granted at public expense and cannot be defeated either by the court or by lack of action on the part of his attorney.
2. **Criminal Law: Trial: Post Conviction: Pleadings: Evidence.** In a post conviction proceeding, the petitioner has the burden of establishing a basis for relief.
3. **Criminal Law: Post Conviction: Pleadings: Appeal and Error: Evidence.** When a defendant seeks to appeal the original proceedings pertaining to his conviction and fails to show that he is acting in good faith and that the appeal has merit, he has failed to sustain the required burden of proof.

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

Stewart, Calkins, Duxbury & Crawford, for appellant.

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

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

NEWTON, J.

This is a post conviction proceeding. Defendant was tried, convicted, and sentenced on a charge of shooting with intent to kill, wound, or maim. The sentence received has been served but the right of appeal is not moot. See Sibron v. New York (1968), 392 U. S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917.

In his application to the district court, defendant raised the following questions: (1) Denial of the right of appeal; (2) ineffective assistance of counsel; and (3) denial of the privilege against self-incrimination. At the hearing in the district court and on appeal, the only

question presented is that pertaining to the right of appeal, the others having apparently been abandoned. The judgment of the district court is affirmed.

At the time of sentence, defendant's privately retained lawyer stated to the court that he did not wish to represent the defendant further, but that defendant had no funds and wanted a court-appointed attorney to confer with him about an appeal. The court instructed the attorney to file a poverty affidavit and notice of appeal. This was not done although a motion for new trial had been filed and overruled. The attorney testified that defendant was pleased with the light sentence received and directed him not to proceed with the appeal. The record, however, discloses a letter written by the attorney to defendant 53 days before the time for appeal expired in which he stated an appeal was not taken because there were no valid grounds for it. Defendant was confined in the same city where his attorney practiced and doubtless received notice of the failure to appear in time to protect his rights in that regard. He did nothing until more than 5 months later when a motion to vacate the judgment and sentence was filed. Nevertheless, it is well established that when an indigent defendant has made known to the court that he desires to appeal his conviction, that appeal must ordinarily be granted at public expense and cannot be defeated either by the court or by lack of action on the part of his attorney. See, State v. Williams, 181 Neb. 692, 150 N. W. 2d 260; Coffman v. Bomar, 220 F. Supp. 343; Swenson v. Bosler, 386 U. S. 258, 87 S. Ct. 996, 18 L. Ed. 2d 33.

There is another feature of this case which merits consideration. The legislative bodies and the courts of this country have been at great pains to ensure that an indigent defendant in a criminal action shall be afforded opportunities to defend himself equal to those enjoyed by one financially able to provide for his own defense. As frequently happens when attempts are

made to right existing wrongs, the scales, rather than being balanced, are tipped in the other direction. The pendulum swings too far in the opposite direction. One financing his own defense must determine whether an appeal has sufficient merit to warrant the expenditure of his money for appeal costs and attorney's fees. No such worry besets the indigent. His attitude is that even though his case on appeal is completely without merit, the public, not he, must pay for it, and he has nothing to lose. As a result, if counsel advises him that an appeal is useless because it is lacking in merit, he simply demands the appointment of other counsel. Attorneys representing indigent defendants feel that they must appeal all convictions, however lacking in merit, or be charged with a failure to adequately represent such defendants. On evaluating the situation thus created, we find that, almost without exception, every criminal conviction is appealed, including those resulting from pleas of guilty. The net result is that our courts are overburdened and judicial processes clogged with baseless litigation. Judges thus harassed must cope with ever increasing burdens and the demands upon their time are such that they cannot give adequate consideration to those cases which do have a meritorious basis. Of necessity, this adversely affects the defendant who appeals in good faith.

Although it is conceded that our courts are endowed with rule-making powers, some jurisdictions have provided by statute that an appeal shall not be taken except where it is done on a good-faith basis and has some merit. Frivolous appeals are summarily dismissed. It was held in Gershon v. United States, 243 F. 2d 527 (8th Cir., 1957), that a court is not required to grant leave to a defendant to appeal in forma pauperis where it is obvious that the appeal is doomed to futility. See, also, Hayes v. United States, 258 F. 2d 400 (5th Cir., 1958); Ingram v. United States, 315 F. 2d 29 (D. C. Cir., 1962).

In the present instance, defendant simply says he

had wished to appeal his original conviction and was wrongfully denied that right. He does not allege, and the record does not reveal, facts showing meritorious grounds for the appeal, nor does he contend that he was innocent. In a post conviction proceeding, the petitioner has the burden of establishing a basis for relief. See State v. Coffen, 184 Neb. 254, 166 N. W. 2d 593. When a defendant seeks to appeal the original proceedings pertaining to his conviction and fails to show that he is acting in good faith and that the appeal has merit, he has failed to sustain the required burden of proof.

The judgment of the district court is affirmed.

AFFIRMED.

LORABELLE M. HANSON, APPELLEE, V. RICHARD HANSON, APPELLANT.
187 N. W. 2d 647

Filed June 11, 1971. No. 37770.

Divorce: Parent and Child: Appeal and Error: Evidence. The discretion of the lower court with respect to awarding or changing the custody and support of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

Appeal from the separate juvenile court of Lancaster County: W. W. NUERNBERGER, Judge. Affirmed as modified.

Healey, Healey, Brown & Burchard, for appellant.

Donald R. Hays, for appellee.

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

WHITE, C. J.

This is a petition for the modification of a divorce

decree in which the defendant husband now seeks custody of two minor children of the parties, a girl age 10 and a boy 9 years of age. From a decree denying the application, and continuing the custody of the two children to the plaintiff mother under the supervision and direction of the juvenile court, the defendant appeals. We affirm the judgment of the trial court.

In proceedings of this nature we feel that a detailed recital of the evidence would serve no useful purpose. We have reviewed the record and briefly summarize the facts. The gist of the defendant husband's contention is that the plaintiff had engaged in post-divorce sexual relations which require that she be deprived of the custody of her two minor children and that it be transferred to the defendant husband, who has now remarried. There is also evidence in the record that the defendant husband has engaged in post-divorce sexual relations with the plaintiff and that he has been dilatory and failed to pay the child support judgment in the sum of $50 per month for each child. The evidence sustains the trial court's finding that the plaintiff has properly cared for these children and that her conduct has been above reproach except for her sexual conduct with two other men. It also sustains by a preponderance of the evidence that the improper conduct of plaintiff in this respect was not known to the children nor has it adversely affected the children as to their care, education, or training. The evidence affirmatively shows that the plaintiff has provided for the physical needs of her children, has maintained regular employment, and has provided them with appropriate supervision, aided by the supervision of the children's grandmother during the time the plaintiff is working. From the record in this case we come to the same conclusion that the trial court did, that the best interests of the children under all of the circumstances of this case would be served by leaving their custody with the plaintiff at the present time, under the supervision of the chief juvenile pro-

bation officer of the separate juvenile court of Lancaster County. We hold and direct, as the trial court did, that the custody should be under the continual supervision of the juvenile probation officer of Lancaster County who should investigate the care that the children receive and in the event there is default on the part of the plaintiff or that said care appears to be inimical to the best interests of the children then the matter be returned summarily to the court for further hearing.

As we have suggested the cold record before us supports by a preponderance of the evidence the findings and conclusions that the trial court made herein. Particularly appropriate in the context of this case, with the suggestion of the conduct of the mother impinging upon the moral, educational, and physical welfare of the children, is our holding in the recent case of Fisher v. Fisher, 185 Neb. 469, 176 N. W. 2d 667, where in reviewing a trial court's findings in a similar situation this court said as follows: "We have, of course, given weight to the findings and judgment of the trial court. The decision of the trial judge is peculiarly entitled to respect. The court saw all the parties and witnesses; it was in closer touch with the situation than this court which is limited to a review of a written record. While this case is triable de novo in this court, we cannot overlook the fact that the judgment of the trial court is entitled to great weight in determining the best interests of children in custody proceedings." We have further recently said in Jones v. Jones, 183 Neb. 223, 159 N. W. 2d 544, with reference to the scope of judicial review of custody orders by this court as follows: "The discretion of the lower court with respect to awarding or changing the custody and support of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence."

We have considered the nature of the acts conceded

to have been committed by the plaintiff, and the circumstances surrounding the commission of the offenses. As the trial court found they were freely and forthrightly testified to by the plaintiff herself in the course of the trial. We have examined the probable effects of the offenses as they relate to the future welfare of the children and the best interests of the children under all of the circumstances of the case. We agree that the children should remain with the plaintiff, with the provisions for supervision carefully prescribed by the separate juvenile court's decree. We further feel that the enforcement of the decree will be strengthened by adding a provision transferring the legal custody of the children to the separate juvenile court. The close supervision of these children in the home contemplated by the court in its decree requires, at least temporarily, that the court retain power to act summarily herein and at the same time the best interests of the children will be served by giving the plaintiff a further opportunity to demonstrate the reformation of her conduct. We observe further that the court will retain a continuing jurisdiction to return the full legal custody to the plaintiff if and when the court in its judgment determines that circumstances warrant such a disposition.

The judgment of the trial court denying a modification of the decree to change the custody to the defendant is affirmed. The decree otherwise is affirmed except to provide the legal custody of the children be transferred to the separate juvenile court of Lancaster County, Nebraska.

The trial court ordered that each party pay his own costs and attorneys' fees, and we have come to the same conclusion as to costs and attorneys' fees in this court.

AFFIRMED AS MODIFIED.

JOHN CONN, APPELLEE, V. ITL, INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS.
187 N. W. 2d 641

Filed June 11, 1971. No. 37778.

1. **Witnesses: Trial.** A party calling a witness does not vouch for credibility of the witness.
2. **Workmen's Compensation: Evidence.** A workmen's compensation claimant, unaided by presumption, bears the burden of proof that his employment in fact caused a compensable injury.
3. ———: ———. A workmen's compensation claimant with atherosclerosis which was a personal risk and a cause of an otherwise compensable injury may recover under these circumstances: An employment risk greater than that of ordinary nonemployment life was a cause of the injury.

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

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

Orie C. Adcock, for appellee.

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

SMITH, J.

The Workmen's Compensation Court dividing on rehearing decided that a myocardial infarction suffered by plaintiff was compensable notwithstanding preexistence of a sclerotic coronary artery. It found total disability from June 18, 1968, to January 13, 1970, and for an indefinite future time. On appeal the district court affirmed. Plaintiff's employer, ITL, Inc., and its insurer, defendants, appeal. Chief issues concern employment causation and total disability.

On June 17, 1968, plaintiff's duty in defendant's employ was to operate a truck tractor which pulled a semitrailer. Plaintiff also was to distribute the cargo, groceries, at stores of Associated Grocers, "AG," and to help unload the groceries. Age 42, he had been driving

trucks 23 years but only 3 weeks for ITL. That morning he went to an AG warehouse to connect his tractor with a refrigerator semitrailer.

Plaintiff's version of events is as follows: The semitrailer was dollied too high for its kingpin and the nonhydraulic fifth wheel of the tractor to be coupled. Having moved wooden skids into place to elevate the rear of the tractor, plaintiff backed it on the skids. He still could not connect the kingpin and the fifth wheel. He then stepped out of the tractor to crank the dolly in low gear to lower the semitrailer. To do so he had to reach up. He testified: "I couldn't move it and I was putting all my efforts into it and straining and I still couldn't lower the dollies, so I stopped and rested . . . several times. . . . this is where . . . a terrible pain hit me here in the chest which went down through both arms. I couldn't breathe and I was just in a cold sweat . . . and I . . . slid down . . . in next to the drivers on my tractor . . . ."

Plaintiff in his case-in-chief called two other witnesses. One, a catalog expediter for AG, on cross-examination conceded that plaintiff's cranking had appeared no harder than had been usual. Plaintiff completed the coupling and walked unassisted to the coffee room where he first complained of chest pain. The other witness was spotting trailers for AG. According to him plaintiff was rolling down the dollies with nothing unusual appearing.

Plaintiff was taken to the office of Dr. William Gentry, a physician and surgeon, at Gering. Plaintiff narrated a history of no prior illness related to his present condition, of no prior heart attack. He complained of pain in the left chest radiating into both arms, gas, and fullness in the epigastrium. The pain had begun an hour earlier, and it had not ceased. He had experienced frequent episodes of gas associated with dyspnea the last 6 months. The manager of ITL testified that en route to Dr. Gentry's office plaintiff had admitted suffering chest pains the preceding 2 or 3 days.

Having examined plaintiff and administered demerol, Dr. Gentry ordered him confined in the intensive care unit of the West Nebraska General Hospital. He left an order for covmadin and demerol as they were needed. Among the tests taken were electrocardiograph, blood enzymes, and chest X-ray. Electrocardiograms, "EKGs," were obtained on the 17th, 18th, 19th, and 22nd. Blood enzymes, which were tested on the 17th, 18th, and 21st, were normal. The sedimentation rate, which was taken on the 17th, was normal. The chest was fluoroscoped on the 24th. Early EKGs were normal except a slight peaking of the P wave. Subsequent EKGs disclosed a flattening out of the P wave and a condition within normal limits. Plaintiff was discharged from the hospital on June 24.

In the opinion of Dr. Gentry plaintiff had not suffered a heart attack or myocardial infarction. Dr. Gentry diagnosed gouty arthritis and peptic ulcer. The diagnosis rested on the absence of objective evidence of heart injury, elevation of the uric acid, and X-rays of the "upper G.I. tract."

Following removal of his family to Las Vegas, Nevada, plaintiff joined them about July 5, 1968. His chest pain was continuing. One hospital refused to admit him because he could not pay. The county physician subsequently admitted him to Southern Memorial Hospital in Las Vegas, and Dr. John A. DiFiore began treating plaintiff on July 22.

Dr. DiFiore testified by deposition. An internist, he had specialized in cardiology and treatment of cardiovascular diseases for 23 years. He was Governor for Nevada of the American College of Cardiology. Plaintiff had related these complaints and history: Pain high in the substernal area, and at the root and front of the neck, a condition causing shortness of breath and perspiration; a deep ache in the left arm down into the fingers of the left hand; the injury on June 17, 1968; and the hospitalization.

Dr. DiFiore prescribed an anticoagulant, morphine, demerol, a tranquilizer, potassium iodide, atropine, "A.P.C." tablets, milk of magnesia, and seconal. He ordered these tests: Repeated EKGs, blood enzymes, blood chemistries, prothrombin, Lee-White clotting time, chest X-rays, Panel Ten, blood cholesterol, calcium, thyroid, and on May 27, 1969, a coronary arteriogram.

In the opinion of Dr. DiFiore the EKGs obtained in Nebraska were not within normal limits. He presumed that plaintiff had undergone sclerotic changes in the right coronary artery. The arteriogram, 250 feet long, disclosed only one point of abnormality—an occlusion of the artery. Plaintiff had sustained a myocardial infarction that was atypical and caused by the unusual effort in trying to crank the dolly. Dr. Difiore testified: ". . . on 6/17/68 . . . he suffered his first chest pain, which came from the heart as a result of a disturbance of the blood circulation to the heart muscle, and . . . at that time some muscular damage was most likely incurred . . .. I determined . . . that this man had suffered an acute myocardial infarction some time between June 17, '68, and his admission to our hospital . . .. My opinion is that because of the unusual effort . . . on 6/17/68 . . . he suffered acute ischemia to his heart muscle . . ., and because of the ischemia . . ., over a slow process, . . . a myocardial infarction had occurred, all stemming from the unusual effort, again, on 6/17/68." Plaintiff's disability was such that Dr. DiFiore would permit plaintiff to drive a truck but not to lift more than 15 pounds.

Plaintiff was examined on September 9, 1969, at defendants' request by Dr. Otto A. Wurl, who had specialized in cardiology 15 years. Dr. Wurl testified by deposition: Plaintiff had exhibited symptoms of coronary heart disease—atherosclerosis or hardening of the arteries—when the Nebraska hospital had admitted him. Natural progress of the disease process caused the pain plaintiff suffered June 17. A pain may be angina pec-

toris of effort, but an occlusion does not result from any kind of external physical effort. Atherosclerosis ordinarily progresses with age. No evidence of damage to the heart muscle existed on June 17, 1968, and the events that day were not a factor in the subsequent myocardial infarction that plaintiff suffered. Dr. Wurl found plaintiff totally disabled.

Defendants contend that (1) plaintiff in calling the two witnesses vouched for their credibility and (2) their testimony, although it was in conflict with that of plaintiff, bound plaintiff. They cite Lindelow v. Peter Kiewit Sons', Inc., 174 Neb. 1, 115 N. W. 2d 776 (1962); and Bland v. Fox, 172 Neb. 662, 111 N. W. 2d 537 (1961). There are two answers. First, the rule applied only where the contradiction and all other evidence left no question for the trier of fact. Second, a party calling a witness does not vouch for credibility of the witness. See State v. Fronning, 186 Neb. 463, 183 N. W. 2d 920 (1971).

A workmen's compensation claimant, unaided by presumption, bears the burden of proof that his employment in fact caused a compensable injury. See § 48-151 (2), R. R. S. 1943. Such a claimant with atherosclerosis which was a personal risk and a cause of an otherwise compensable injury may recover under these circumstances: An employment risk greater than that of ordinary nonemployment life was a cause of the injury. See Beck v. State, 184 Neb. 477, 168 N. W. 2d 532 (1969).

The evidence supports the finding of permanent disability. See § 48-185, R. R. S. 1943. Plaintiff suffered total disability caused in part by atherosclerosis, a personal risk, and in part by exertion greater than that of ordinary nonemployment life—an employment risk.

The district court allowed plaintiff $500 for services of his counsel. The allowance was not excessive.

The judgment is affirmed. We allow plaintiff $750 for services of his counsel in this court.

AFFIRMED.

CLINTON, J., dissenting.

I dissent respectfully.

Under the provisions of the statute, section 48-151, R. R. S. 1943, the plaintiff must prove by the preponderance of the evidence that he suffered an "injury," which means "only violence to the physical structure of the body and such disease * * * as naturally results therefrom." The terms shall not be construed "to include disability * * * due to natural causes but occurring while the employee is at work, nor to mean *an injury,* disability * * * that is the result of a natural progression of any preexisting condition." (Emphasis supplied.)

In this case it seems clear that the injury must necessarily be the coronary infarction. The majority opinion fairly sets forth the medical evidence, which summarized amounts to this: The initial treating doctor's diagnosis was that claimant did not have an occlusion or infarction on the day of the claimed accident. The treating specialist gave as his opinion that the exertions on the day of the incident lead gradually to the infarction. The nontreating expert gave as his opinion that claimant suffered no infarction on the day alleged and the tenor of his testimony is that an occlusion does not result from external physical effort and in this case there was a natural progression of existing disease. Pain such as the claimant described on the day of the incident may be angina pectoris of effort. There was evidence he had symptoms prior to the day in question. It does not seem to me all this constitutes proof by a preponderance of evidence of an injury "in fact caused by the employment."

Under the statute as amended in 1963 the requirement that the injury be caused by accident was eliminated. This eliminated the accident or the substituted "unusual exertion" requirement which used to exist in some cases. Now in heart cases we talk about a concept of "exertion greater than that of ordinary nonemployment life," which seems to be the equivalent of the

old "unusual exertion" concept which is no longer required, and substitute it as proof of "injury."

The majority opinion comes perilously close to making the employer an insurer in any case where symptoms, such as claimant suffered here, coincide with the exertions of his employment greater than his nonemployment life and disability ultimately occurs. See Beck v. State, 184 Neb. 477, 168 N. W. 2d 532.

I agree that the doctors must say whether the exertion has in fact caused the heart attack, the infarction, "the injury." The conflict of the experts, including that of the original treating doctor, is such that it cannot be said that the claimant has proved that his injury was "in fact caused by the employment." There is no question of credibility of the expert witnesses in this case. What we are called upon to do is solely to judge the expertise of the experts. When we have to do that alone there is no proof by a preponderance of the evidence. Where as here the two specialists testified by deposition, the judgment gets down to measuring the length of the respective pedigrees.

The adoption of pragmatic rules such as exertion greater than that of ordinary nonemployment life in order to obviate the problems of medical proof in cases such as this leads, it seems to me, to further complications. In some cases at least we will be called upon to go into the matter of proof of the exertions of nonemployment life in order to make the necessary comparisons. We already have a pragmatic rule, that is burden of proving by a preponderance of the evidence, given us by the provisions of section 48-151, R. R. S. 1943, and that I believe is sufficient.

WHITE, C. J., and NEWTON, J., join in this dissent.

IN RE 1969-1970 COUNTY TAX LEVY. EVELYN U. WERTH, AND ALL OTHER PROPERTY OWNERS IN THE NONHIGH SCHOOL DISTRICTS OF BUFFALO COUNTY, NEBRASKA, APPELLEE, V. BUFFALO COUNTY BOARD OF EQUALIZATION, APPELLANT.

188 N. W. 2d 442

Filed June 11, 1971. No. 37818.

1. **Taxation: Appeal and Error: Evidence.** The plaintiff taxpayer, appealing under the provisions of section 77-1606, R. R. S. 1943, has the burden of proving that the levy complained of is in fact excessive and illegal.
2. **Taxation: Counties: Schools and School Districts.** The powers of the county board of equalization, under the provisions of the nonresident high school tuition act, are ministerial only and it has no standing to question the discretionary legislative powers of the school district.
3. **Taxation: Constitutional Law: Schools and School Districts.** The true test in setting nonresident high school tuition rates is that laid down in Mann v. Wayne County Board of Equalization, 186 Neb. 752, 186 N. W. 2d 729.
4. **Taxation: Counties: Schools and School Districts.** The county board of equalization must, in determining the mill levy under the provisions of the nonresident high school tuition act, deduct from the total requirements of the fund any balance which remains after all claims for the preceding fiscal year have been paid.
5. **Taxation: Legislature: Schools and School Districts.** Unless the Legislature otherwise provides, funds properly expended by a receiving high school district from state and federal aid are includable in the computation of per pupil costs under the provisions of section 79-4,102, R. S. Supp., 1969.
6. **Taxation: Actions: Parties: Schools and School Districts.** In an action which challenges the legality in whole or in part of the levy made under the provisions of the nonresident high school tuition act, the receiving school districts to which the tuition claims will be paid from the fund are necessary parties.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Reversed and dismissed.

Andrew J. McMullen, for appellant.

Wilson, Barlow & Watson and Kile W. Johnson, for appellee.

Nye, Wolf & Hove, for amicus curiae.

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

CLINTON, J.

This is an appeal by the Buffalo County Board of Equalization from a judgment of the district court for Buffalo County in which the court declared that a portion of the nonresident high school tuition levy as set by the Board for the fiscal year commencing July 1, 1969, and ending June 30, 1970, was excessive and illegal and directing that refunds be made. We reverse the judgment of the trial court and direct dismissal of the petition of plaintiff-appellee.

The plaintiff, a taxpayer residing in a school district which was subject to the levy, had appealed under the provisions of sections 77-1601 and 77-1606 to 77-1610, R. R. S. 1943, from the action of the Board and asked, among other things, that section 79-4,102, R. S. Supp., 1969, be declared unconstitutional and void. The trial court found the statute constitutional. The plaintiff did not cross-appeal but does here argue unconstitutionality. This point has been decided adversely to the plaintiff in Mann v. Wayne County Board of Equalization, 186 Neb. 752, 186 N. W. 2d 729. A reading of that case will be useful in understanding the disposition made on this appeal of other questions raised.

The Board makes nine assignments of error. Two of these it does not argue and these we disregard. The remaining assignments may be condensed as follows: The court erred (1) in receiving any evidence under the plaintiff's petition because the affected receiving high school districts were necessary parties defendant and had not been joined; (2) in holding that the Board had power to change the amount determined to be the proper per pupil cost for nonresident students by the receiving high school districts; and (3) in holding that the levy made by the Board was excessive and contrary to law.

The plaintiff alleged: (1) The levy was made in reliance upon erroneous and unlawful certifications to the Board by the county superintendent of the number of applications received by the superintendent for nonresident high school privileges under section 79-4,105, R. R. S. 1943; that 225 applications had been certified but that 225 applications had not in fact been received by the superintendent prior to July 1, 1969; and that if any applications were submitted after that date they were null and void. (2) A balance on hand of $78,251.90 in the nonresident high school tuition fund on August 29, 1969, had not been deducted in determining the amount required to be raised by the levy and that the failure of the Board to make the reduction was contrary to the provision of section 79-4,104, R. R. S. 1943, as follows: "If a balance remains in the fund after all claims have been paid, it shall not revert to the county general fund but shall remain in the nonresident high school fund and be deducted from the amount levied for the succeeding year." (3) The tuition rates submitted by the school superintendent of the receiving high school districts are in excess of the actual per pupil cost and in violation of the limitations claimed to be imposed by section 79-4,102, R. S. Supp., 1969, which provides in part: "The high school tuition rate for nonresident pupils shall be determined annually by the receiving district on a uniform basis for all pupils but such rate shall in no event be less than the average per pupil cost for the preceding school year determined as provided in subsection (3) of section 79-486."

The trial court incorporated in its decree detailed computations of per pupil cost for each of the seven receiving high school districts and computed a total money requirement for the nonresident high school tuition fund for the year 1969-70 in the amount of $136,372.44. From this the court subtracted the $78,251.90 balance in the fund as of August 29, 1969, and computed the sum of $58,128.54 as the amount needed to be raised by the

levy. In determining per pupil cost, it first divided the estimated income from nonresident high school tuition as shown by the 1969-70 budgets of each of the high school districts by $1,000 (presumably the certified tuition rate), and thus arrived at the number of pupils to be received by each district. However, the record in this case is completely devoid of any evidence to establish: (1) The tuition rate certified by each district; (2) the number of nonresident pupils anticipated by each district; and (3) the total number of pupils certified by the county superintendent to the Board.

In the computation of per pupil cost under section 79-486, R. S. Supp., 1969, the court made adjustments eliminating from the costs of various high school districts the amounts received by each as State Aid and Federal Title I funds. It made this adjustment by using the anticipated amount of such aid as shown in the budgets of each of the school districts, then allocating a portion of this to high school education, and then subtracting this allocated figure from high school education costs. The record is devoid of any basis for this allocation except the relationship of the elementary and secondary education costs of each school as shown in the annual financial reports of the districts for the preceding year as they are on file in the offices of the Department of Education. The plaintiff argues that expenditures of the high school districts paid by state aid and federal funds are not part of the costs of the districts because the plaintiff and others similarly situated "pay money to the Federal Government through income taxes. The same taxpayers contribute to the State General Fund by paying state sales, use, and income taxes. When distributions to the individual high school districts are thereafter made by the United States Government, and by the State of Nebraska from the General Fund, the same taxpayers are entitled to receive the benefits of their taxing burden."

A clear understanding of the statutory plan and pur-

poses of the nonresident high school education statutes contained in sections 79-494 to 79-4,106, R. R. S. 1943, including section 79-4,102, R. S. Supp., 1969, which we will hereafter refer to as the act, is necessary to a determination of some of the issues presented.

Section 79-494, R. R. S. 1943, declares that, subject to the conditions of the act, its purpose is to secure 4 years of high school education for those children whose parents or guardians reside in a high school district which does not have a high school.

Section 79-4,100, R. R. S. 1943, is important. It grants to any high school district the right to refuse admission to any and all nonresident students if the tuition fixed by section 79-4,102, R. S. Supp., 1969, is noncompensatory, or if the pupils are from districts not served at the time of the enactment of the statute or previously; "Provided, that no public high school district may refuse admission to nonresident pupils effective prior to the beginning of the 1963-1964 school year, and effective then, or at the beginning of any school year thereafter, only if notice of its intention to refuse admission to nonresident pupils has been given . . . by October 1 of the preceding year . . . by publication in a legal newspaper . . .; and provided further, that any school district may by public notification prior to October 1 require that the parents or guardians of all nonresident pupils must make application on or before April 1 for admission to the following school term." Previous to the 1963 amendment this section of the statute simply read: "Any public high school district may refuse admission to any or all nonresident pupils."

The effect of the 1963 amendment is that the receiving school district must, if it has not brought itself within the proviso by giving the requisite notice, accept all qualified students who make application prior to the beginning of the school year. There is nothing in the record to show whether or not the receiving districts gave the notices mentioned. It therefore may be that

they are in fact required to accept students making application after July 1 and before the beginning of the school year. A student residing with his parent or guardian who moves into a nonhigh school district after July 1 would, in the light of the clearly expressed legislative purpose, certainly be entitled to the benefit of the act.

Section 79-4,102, as amended by the 1969 Legislature, requires the county superintendent of each county in which there is no county high school, within 30 days of the annual meeting—in nonhigh school districts the annual meeting is held the second Monday in June—to "certify to the county board of supervisors or commissioners the number of qualified pupils whose parents or guardians have applied to the county superintendent for nonresident high school tuition privileges and a list of the school districts which have been approved . . . as schools qualified to grant nonresident public high school education . . .." It is apparent that the purpose of this section is to give the county board of equalization a basis for determining the levy.

Sections 79-4,103 and 79-4,104, R. R. S. 1943, make provisions for payment of tuition to the receiving districts and provide that if funds are insufficient, pro rata payments are to be made. The secretary of the high school district may certify both semesters together if for some reason he fails to certify for the first semester. Section 79-4,104, R. R. S. 1943, provides also for paying with the second semester payment any deficiency in the first semester payment, making up any deficiency for the year by levy in the following year, and, as already noted, if there is a balance of funds on hand it is to be deductible from the levy the following year.

Section 79-4,105, R. R. S. 1943, states: "The parent or guardian of any pupil desiring to take advantage of the provisions of sections 79-494 to 79-4,106 for nonresident high school education shall make application, in writing, to the county superintendent of the proper county

before July 1 each year. Such application must show . . .": (1) The number of the district of the legal residence of the parent or guardian; (2) the number of pupils for whom the privilege is desired; and (3) the high school grade the pupil will enter. It is to be noted that no requirement is made in the statute that notification be given of the identity of the high school district which the student will attend. The Legislature has left this to the option of the student and his parent or guardian.

A careful reading of the statutes above cited clearly shows: (1) All qualified students of districts not having a high school are entitled to nonresident high school privileges subject to the conditions of the act. (2) The receiving high school district makes the determination of the per pupil cost in accordance with the statutory standards and these costs may differ from district to district. See Mann v. Wayne County Board of Equalization, *supra,* p. 758. (3) The student may attend the receiving district of his choice. (4) The receiving district is required to accept any qualified student who applies before the beginning of the school year if it has not brought itself within the proviso of section 79-4,100, R. R. S. 1943, by giving the requisite notice. (5) The county board of equalization, in order to make the requisite levy, has the following information: The tuition rate determined by each of the high school districts and the total number of students who, at the time of the certification, have indicated their intention to avail themselves of the privilege. It is apparent that since the county board of equalization does not necessarily know how many students will come under each rate, there can be no way in which it can determine the precise total amount which will be required by the fund. Because of the fact that under the statutes the high school must receive any qualified student who applies before the term begins, it is evident that neither can the county board of equalization know precisely the total number

of students to be served. The county board of equalization must necessarily deal in approximations just as must the school district in determining its budget requests.

The judgment of the trial court to the effect that the total amount of tax money required is precisely the sum of the products of the number of students who attend each high school district as determined by the July 1 applications, multiplied by the per pupil costs for each district, is not supported by the statutory plan. The Legislature has not required that the information be furnished from which such an exact sum can be determined.

The foundation of the computation of the trial court of per pupil cost and the total money requirements of the nonresident high school tuition fund was its preliminary determination of the number of nonresident pupils who would be in attendance at each receiving high school district. This in turn depended upon an assumed cost certified by each district. Neither of these items appear in the record in this case. The plaintiff has the burden of proving that the school levy was in fact excessive. C.R.T. Corp. v. Board of Equalization, 172 Neb. 540, 110 N. W. 2d 194.

Section 79-4,104, as already noted, provides that if a balance remains in the fund after all claims are paid, this balance remains in the fund and must be considered by the county board of equalization in determining the levy for the succeeding year. The trial court determined that for 1969-70 the amount of $136,372.44 was the total fund need and that a balance of $78,251.90 should be deducted, leaving $58,128.54 to be raised by further taxation. The record shows the following past balances: July 1, 1969, $60,889.19; August 1, 1969, $69,147.45; and September 1, 1969, $78,251.90. The record does not show whether or not all claims against the fund were paid at the date that the levy was made. We cannot assume they were even though under the statu-

tory provisions the last payment should be made on or before July 1. Moreover, there is no evidence in the record to show which balance, if any, the Board took into consideration in making the levy. The record shows only the levy of 6.26 mills, but discloses no evidence whatever as to how it was determined or what amount of money it will raise. The amended judgment of the trial court indicates the amount for which levy was made by the Board was $164,110.81, but there is no evidentiary support for the item. It can be reached by subtracting the $60,889.19 balance from the $225,000 alleged to have been used by the Board, but there is no evidentiary support for the $225,000 figure.

We hold: (1) There is a complete failure of proof to support the determinations of the trial court. (2) The Board was required to follow the statutory mandate of deducting any balance in the fund after all claims for the preceding year have been paid, but there is no evidence from which it can be determined in this case that the statutory mandate was not followed. (3) The Board ordinarily has no authority to question those matters properly lying within the discretionary legislative powers of the school district, nor to determine, as a quasi-judicial body, the legality or illegality of the budget requirements made by a political subdivision to whom the Legislature has entrusted the legislative power. State ex rel. City of Omaha v. Lynch, 181 Neb. 810, 151 N. W. 2d 278. We can find in the nonresident high school tuition act no indication of an intention on the part of the Legislature to give the Board supervisory powers over the budget requirements of the school districts.

The correctness of the finding of the trial court that state and federal aid to the high school districts must be deducted in determining per pupil cost should be decided. This same issue was made in Mann v. Wayne County Board of Equalization, *supra*, but not decided on the grounds that the evidence did not show whether or not such items had been credited in determining per

pupil cost. There is no evidence here that the plaintiff and others in her situation have, or if they have to what extent, paid these federal and state taxes, but for purposes of this opinion we will assume plaintiff did.

Once a taxpayer has paid a valid tax he has no further interest in the proceeds save and except the same interest as every other taxpayer, namely, to see that the proceeds are used for the purpose for which they were levied. Lindgren v. School Dist. of Bridgeport, 170 Neb. 279, 290, 102 N. W. 2d 599; City of Fremont v. Dodge County, 130 Neb. 856, 266 N .W. 771. Once the tax was levied and collected by the state and federal governments and paid to the high school districts pursuant to the provisions of valid state and federal statutes, the plaintiff had no interest therein such as gave her any standing to claim any special credit therefor. The funds paid to the high school districts became the property of the districts the same as any other taxes lawfully received by them. The Legislature could provide that such amounts not be computed in determining the per pupil cost. It presumably is aware of the existence of the statutes providing state and federal aid. Yet it has made no provision for deducting state and federal aid in computing per pupil cost under section 79-486, R. S. Supp., 1969. Funds received and expended by the high school districts from state and federal aid are, until the Legislature otherwise decrees, part of the per pupil cost.

We do not decide whether an appeal under section 77-1606, R. R. S. 1943, may be taken as a class action.

We next note the Board's assignment of error of absence of necessary parties, viz, the receiving high school districts. These districts must obtain payment of their tuition charges from the fund. If it is insufficient they cannot be paid in full but only pro rata. The rights of these districts are therefore affected for a determination has been made by the trial court that the per pupil costs, which were presumably certified to the county

superintendent, are excessive and to that extent illegal. They could never regain these funds for the judgment of the court, if final and binding, would preclude it. No deficiency would exist for which levy could be made the following year as the statute earlier cited contemplates in the case of a lawful deficiency. We hold that the absent high school districts are necessary parties. § 25-323, R. R. S. 1943; Local Union v. Western Public Service Co., 140 Neb. 186, 299 N. W. 531; Burke Lumber & Coal Co. v. Anderson, 162 Neb. 551, 76 N. W. 2d 630; Cunningham v. Brewer, 144 Neb. 218, 16 N. W. 2d 533; Stevens v. Loomis, 334 F. 2d 775.

In the cases which have previously been before this court in similar matters, including those inaugurated under sections 77-1601 and 77-1606 to 77-1610, R. R. S. 1943, the affected school districts or other municipal subdivisions have been joined as parties. See, State ex rel. City of Omaha v. Lynch, *supra*; C.R.T. Corp. v. Board of Equalization, *supra;* Mann v. Wayne County Board of Equalization, *supra.*

It may possibly be urged that if necessary parties are absent, then it is not logical for this court to decide the case on the merits and that it should therefore only reverse and remand with directions to bring in the necessary parties. Such course under the circumstances here would only multiply litigation. We point out that the reversal and dismissal of the plaintiff's petition does not adversely affect the rights of the absent parties. It merely restores the situation to what it was prior to the commencement of this action. On the other hand, the plaintiff has had her day in court and as to her there has been due process.

REVERSED AND DISMISSED.

CINDY HULL, BY AND THROUGH DAVID HULL, HER NEXT FRIEND, ET AL., APPELLEES, V. ALLSTATE INSURANCE COMPANY, A CORPORATION, APPELLEE, IMPLEADED WITH FARMERS ELEVATOR MUTUAL INSURANCE COMPANY, A CORPORATION, APPELLANT.

187 N. W. 2d 650

Filed June 11, 1971. No. 37822.

Automobiles: Insurance. Where initial permission to use an insured vehicle has been given by one having proper authority to give permission, to the person operating it at the time of an accident, for purposes of liability coverage, such operation is with the express or implied permission of the named insured, even though specific or express terms of the permission given were violated.

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

William B. Craig, for appellant.

Sidner, Svoboda & Schilke, for appellee Hull.

Frederick B. Allan, Jr., and D. Nick Caporale of Schmid, Ford, Snow & Mooney, for appellee Allstate Ins. Co.

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

MCCOWN, J.

This is a declaratory judgment action against two insurance companies to determine which one is liable to an individual who holds a judgment for injuries received in an automobile accident. The sole issue is whether or not there is liability under the omnibus clause of a standard automobile liability insurance policy, when initial permission to use the vehicle was given, but restricted as to use, and the restrictions were violated. The district court determined that there was coverage under the omnibus clause and entered judgment accordingly.

On April 14, 1968, Maynard Mulvey was an em-

ployee of Farmers Union Cooperative Oil Association working out of its fertilizer and bulk plant at Cedar Bluffs, Nebraska. There was a heavy rain that afternoon and work was stopped between 5 and 6 p.m. The manager of the co-op gave Mulvey permission to use the pickup truck to go home and to come back to work in the morning. The manager testified that he had allowed other employees to take vehicles home at night when the weather was bad, but that he had not allowed them to use the vehicles for personal use, and that had been explained to Mulvey. The manager testified that the permission was limited to driving the vehicle to Mulvey's home and returning from home the next morning. Mulvey lived two and a half blocks from the plant. Sometime between 9 p.m. and midnight, Mulvey was involved in the accident out of which the claim and judgment arose. It was stipulated that Mulvey was not within the scope of his employment at the time of the accident.

Farmers Elevator Mutual Insurance Company carried standard automobile liability coverage on the pickup truck owned by the co-op and driven by Mulvey. Allstate Insurance Company insured the other vehicle involved in the accident, and uninsured motorist coverage was included. The plaintiff recovered judgment against Maynard Mulvey for $2,348. The district court found that Maynard Mulvey was an additional insured under the omnibus clause in the standard policy of the Farmers Elevator Mutual Insurance Company; granted judgment against that defendant; and dismissed the action against Allstate Insurance Company.

The appellant tacitly concedes that this court has adopted the initial permission doctrine in Arndt v. Davis, 183 Neb. 726, 163 N. W. 2d 886. The appellant contends, however, that there is some language in that opinion which might indicate that a violation of express instructions, or a violation of specific orders, makes the use of

the vehicle unauthorized and terminates the permission. We cannot agree.

The holding in the Arndt case was foreshadowed by Protective Fire & Cas. Co. v. Cornelius, 176 Neb. 75, 125 N. W. 2d 179. That case recognized the fact that the protection of the public is also involved in automobile liability insurance cases. In view of statutory omnibus clause language, we there held that where initial permission had been given, a later use which deviated from the permitted use was immaterial and the only essential was that permission be given for use in the first instance. See, also, Farm Bureau Ins. Co. v. Allied Mut. Ins. Co., 180 Neb. 555, 143 N. W. 2d 923.

The position of this court on the initial permission doctrine reflects the view that automobile liability insurance is for the benefit of the public as well as insureds. Litigation as to the scope of the permission, the purpose, time, or place of use, and similar issues should not be permitted or encouraged. Of the various doctrines dealing with the issues of permission, this court's interpretation has probably been closest to the "hell or high water" rule. That rule has been stated to be "that if the vehicle was originally entrusted by the named insured, or one having proper authority to give permission, to the person operating it at the time of the accident, then despite hell or high water, such operation is considered to be within the scope of the permission granted, regardless of how grossly the terms of the original bailment may have been violated." 7 Appleman, Insurance Law and Practice, § 4366, p. 308.

In the case before us, there is no dispute that Mulvey had initial permission to use the vehicle. The only dispute is whether that permission should be strictly limited to the exact scope of the use expressly authorized. We find no compelling reasons to constrict our interpretation so rigidly. Where initial permission to use an insured vehicle has been given by one having proper authority to give permission, to the person operating it at

the time of an accident, for purposes of liability coverage, such operation is with the express or implied permission of the named insured, even though specific or express terms of the permission given were violated. Where a named insured has given permission to another to operate an insured vehicle, liability insurance coverage ought not to depend on whether the operator is complying with or violating the conditions or terms placed upon his operation and use of the vehicle by the insured.

The judgment is affirmed.

AFFIRMED.

MARCUS CHERRY, APPELLANT, V. MARVIN A. LOFGREN, BUFFALO COUNTY SUPERINTENDENT OF SCHOOLS, ET AL., APPELLEES.

187 N. W. 2d 652

Filed June 11, 1971. No. 37829.

1. **Appeal and Error: Schools and School Districts.** Where a defeated party undertakes to perfect an appeal from an adverse ruling of the county superintendent of schools and orders a transcript in accordance with section 27-1303, R. R. S. 1943, and the transcript is incomplete or deficient in form, all other requirements having been met, the failure to furnish a proper transcript will not defeat the appeal.
2. **Appeal and Error: Schools and School Districts: Case Overruled.** Lemburg v. Nielsen, 182 Neb. 747, 157 N. W. 2d 381, is overruled.
3. **Appeal and Error: Schools and School Districts.** A duly authenticated transcript of the proceeding to be reviewed must be filed in the district court, but if the required transcript furnished and filed is deficient in form through no fault of the appellant, it should not defeat his right to an appeal.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded.

Ross & Schroeder, for appellant.

Munro, Parker, Munro & Grossart, for appellees.

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

SPENCER, J.

Marcus Cherry appeals from the dismissal of his petition on appeal in the district court. The district court's action is predicated on its determination that a proper transcript of the proceedings before the county superintendent was not filed with the petition on appeal. We reverse.

Appellant filed an adequate praecipe with the appellee county superintendent, requesting a transcript of the proceedings. It included the following: "The transcript of the proceedings should include, but not be limited to, duly authenticated copies of the original papers, pleadings and the final order of the Buffalo County Superintendent of Schools. Petitioner also requests that the transcript incorporate this praecipe here, the notice of appeal and the cost bond on appeal."

The county superintendent furnished the appellee a purported transcript to which the following certificate was attached: "I, Marvin Lofgren, County Superintendent of Schools of Buffalo County, Nebraska; having possession and custody of Buffalo County School District #101 files; hereby certify that this is a true and correct copy of the originals on file in the office of the Buffalo County Superintendent. /s/ Marvin Lofgren."

Plaintiff's petition on appeal and the alleged transcript were filed within the time allowed for appeal. One of the defendants filed a motion to dismiss, alleging among other grounds that a duly authenticated transcript of the proceedings from which appellant is purportedly appealing has not been filed and docketed in the district court as required by sections 27-1303 and 27-1304, R. R. S. 1943. The district court sustained the motion and entered the following order: "Now on this 1st day of September, 1970, this matter came on for decision of the Court. The Court finds that under the cases of Ne-

braska, he is obligated to dismiss the appeal for the reason that proper transcript of proceedings was not filed.

"In making this decision, the Court finds that this is one of those cases where the burden of filing the transcript is upon the appellant and the appellants therefore would have the duty to see that the transcript prepared by the County Superintendent was in correct form.

"This appeal is therefore dismissed."

Appellant on the hearing on his motion for a new trial offered an affidavit of the county superintendent, which so far as material herein, provides: "STATE OF NEBRASKA, COUNTY OF BUFFALO) ss

"I Marvin A. Lofgren, Buffalo County Superintendent of Schools, first being duly sworn deposes and says:

"That the transcript on file with the District Court of Buffalo County, Nebraska, contains duly authenticated copies of all proceedings containing the judgment and final order by the County Superintendent with regard to the petition filed to dissolve School District No. 101 in Buffalo County, Nebraska."

The trial court in dismissing the appeal relied on Lemburg v. Nielsen, 182 Neb. 747, 157 N. W. 2d 381, which places the responsibility for filing a proper transcript directly on the plaintiff in error. In that case, which was an error proceeding, the basic question involved was whether or not a purported transcript not certified to or authenticated by the county superintendent of schools of Howard County vested jurisdiction in the district court. We held that it did not; that it was mandatory that the transcript be properly authenticated and timely filed to vest the appellate court with the subject matter in an error proceeding. This had been the rule in error proceedings.

Previous to 1963, reviews in cases arising under section 79-402, R. S. Supp., 1961, were processed by error proceedings. This section was amended by the 1963

Legislature to provide that any person adversely affected by the changes made by the county superintendent could appeal to the district court. The obvious legislative intent was to simplify the review procedure by providing for appeal.

In School District of Wilbur v. Pracheil, 180 Neb. 121, 141 N. W. 2d 768, we said: "The Judicial Council also suggested Legislative Bill 277 (Laws 1963, c. 138, p. 515) to the 1963 Legislature to provide the procedure for appeal where the statute confers a right to appeal but fails to prescribe the procedure. L.B. 277, which is now section 25-1937, R. R. S. 1943, prescribes not only the manner of taking an appeal to the district court but also provides how the appeal shall be considered."

Subsequently, in Languis v. DeBoer, 181 Neb. 32, 146 N. W. 2d 750, we held: "Any person adversely affected by the changes made by the county superintendent pursuant to section 79-402, R. S. Supp., 1965, may proceed either by appeal or by error pursuant to section 25-1903, R. R. S. 1943."

The instant case is controlled not by Lemburg v. Nielsen, 182 Neb. 747, 157 N. W. 2d 381, as determined by the district court, but rather by Liljehorn v. Fyfe, 178 Neb. 532, 134 N. W. 2d 230. In Liljehorn we held that where the law makes it the mandatory duty of a public officer when requested to do so to provide a certified transcript of the proceedings for the appellant upon the payment of the costs, his failure or neglect to do so will not deprive the appellant of his right to appeal. The appellant herein complied with the law to perfect an appeal and his failure to secure a properly authenticated transcript is not his fault but that of the county superintendent.

We do not agree with the trial court that the appellant has the duty to see that the transcript prepared by the county superintendent is in proper form. It is the duty of the county superintendent to furnish appellant a properly certified transcript. The appellant in ordering a tran-

script is justified in relying upon the presumption that it will be properly prepared and available for him within the proper period for filing according to law. In re Estate of House, 144 Neb. 870, 15 N. W. 2d 56, dealt with a situation where an appellant was given an unsigned transcript by the county judge and filed it within the proper period. In holding that the failure of proper certification could not be charged to the appellant, the court said: "The oversight of the county judge in failing to attach his signature to the certification of the transcript cannot therefore be charged to the appellant and he cannot be deprived of his right to be heard on appeal because of the omission on the part of the county judge."

We here hold that where a defeated party undertakes to perfect an appeal from an adverse ruling of the county superintendent of schools and orders a transcript in accordance with section 27-1303, R. R. S. 1943, and the transcript is incomplete or deficient in form, all other requirements having been met, the failure to furnish a proper transcript will not defeat the appeal.

The application of different rules in error proceedings and appeals is very conducive to misunderstanding and confusion. While we dislike to change a rule so recently reexamined, in retrospect we believe the application of different rules to the filing of authenticated transcripts in appeal and error proceedings is drawing a distinction where none really exists. In all procedures where a public officer is required to furnish an authenticated transcript to the party appealing upon the payment of his costs, the rule should be exactly the same. We now overrule Lemburg v. Nielsen, 182 Neb. 747, 157 N. W. 2d 381, and the cases on which it is predicated, so far as they are in conflict with the rule enunciated herein.

A duly authenticated transcript of the proceeding to be reviewed must be filed in the district court, but if the required transcript furnished and filed is deficient

in form through no fault of the appellant, it should not defeat his right to an appeal.

The proper procedure in instances of this kind is for the appellant to file a request for a diminution of the record and for the district court by proper order to compel the inferior court or tribunal to make or amend the transcript according to law, whether by correcting an evident mistake or supplying an evident omission. In the instant case we observe that the alleged transcript filed herein not only had a deficient certificate but although the affidavit filed by the county superintendent indicates otherwise, there is no judgment or final order by the county superintendent included in it.

For the reasons indicated, the judgment herein is reversed and the cause is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

IN RE FREEHOLDER'S PETITION OF ELIZABETH L. BADER. ELIZABETH L. BADER, APPELLEE, V. DONALD D. HODWALKER ET AL., APPELLANTS.
187 N. W. 2d 645

Filed June 11, 1971. No. 37833.

1. **Pleadings: Appeal and Error.** While a petition may be attacked at any stage of the proceedings on the grounds of its insufficiency to state a cause of action, where the attack is delayed until appeal the pleading will be liberally construed.
2. **Pleadings: Schools and School Districts.** Transfer from a nonaccredited school district to an accredited one states a sufficient reason for transfer.

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

John E. Dougherty, for appellants.

Sampson & Armatys and Perry, Perry & Witthoff, for appellee.

Robert G. Simmons, Jr., for amicus curiae.

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

SPENCER, J.

This appeal by Donald D. Hodwalker and School District No. 9 is from the order of the district court transferring land owned by the appellee Elizabeth L. Bader from School District No. 9 of Merrick County, Nebraska, a Class I school district, and from Grand Island Northwestern School District, a Class IV school district, to School District No. 4 (Central City School District) of Merrick County, Nebraska, an accredited Class III school district. The joint boards of Hall and Merrick counties, consisting of their county superintendents, county clerks, and county treasurers, ordered the transfer. We affirm.

The only issue involved in this appeal is the sufficiency of the petition for transfer to state facts sufficient to confer jurisdiction to make the transfer. The appeal is premised upon the allegation that the petition, as required by section 79-403, R. R. S. 1943, does not state or give any reasons why the land should be transferred from School District No. 9 to School District No. 4. Appellants concede that in all other respects the petition is in proper form.

The issue on the sufficiency of the pleadings was raised by appellants for the first time in their motion for judgment notwithstanding journal entry and motion for new trial. While a petition may be attacked at any stage of the proceedings on the grounds of its insufficiency to state a cause of action, where the attack is delayed until appeal, the pleading will be liberally construed. Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497. We apply that rule herein.

The translocation order herein was dated August 29, 1969. Section 79-403, R. R. S. 1943, was amended during the 1969 legislative session. Legislative Bill 1378 amending said section was passed with the emergency clause,

and became effective August 4, 1969. (Laws 1969, c. 710, p. 2727.) These proceedings, which were initiated August 12, 1969, are controlled by the statute as amended by L.B. 1378. The amended statute, so far as material herein, provides: "Any freeholder or freeholders, person in possession or constructive possession as vendee pursuant to a contract of sale of the fee, holder of a school land lease under section 72-232, or entrant upon government land who has not yet received a patent therefor may file a petition with a board consisting of the county superintendent, county clerk, and county treasurer, asking to have any *tract* of land described therein set off from *any Class I, II or VI school district prior to January 1, 1970, or any time from a nonaccredited Class I, II, III or VI district in which it is situated and attached to an accredited district in the county of the residence of the petitioner or an adjoining county thereto.* The petition shall state the reasons for the proposed change and *shall* show *with reference to the land of each petitioner:* (a) That the land therein described is either owned by the petitioner or petitioners or that he or they hold a school land lease under section 72-232, are in possession or constructive possession as vendee under a contract of sale of the fee simple interest, or have made an entry on government land but have not yet received a patent therefor; (b) that the *land* proposed to be attached has children of school age *who have resided* thereon with their parents or guardians *for not less than forty days prior to filing the petition;* (c) that the land described therein is located in a *Class I, II, III or VI* school district *as provided in this subsection (2),* and is to be attached to an accredited school district *in the county of the residence of the petitioner or an adjoining county thereto;* and (d) that such petition is approved by a majority of the members of the school board or board of education of the district to which such land *is sought to* be attached." (Italics supplied.)

The portion of the above act placed in italics was

added to the statute and established a separate reason to justify transfer of land from one school district to another. Transfer from a nonaccredited school district to an accredited one states a sufficient reason for transfer. The petition filed by the appellee herein stated that the property is in a Class I and Class IV school district and is to be attached to an accredited school district in the county of residence of the petitioner. It therefore states a sufficient reason for the transfer, pursuant to L.B. 1378. Accreditation is becoming increasingly important. A school district which provides education for its children from the kindergarten through high school in accredited schools provides substantial educational advantages over a school district which provides for only part of the education of its children, and all or much of it in nonaccredited schools.

Judgment affirmed.

AFFIRMED.

IN RE FREEHOLDER'S PETITION OF LELAND J. GREVING ET AL. LELAND J. GREVING ET AL., APPELLEES, V. DONALD D. HODWALKER ET AL., APPELLANTS.

IN RE FREEHOLDER'S PETITION OF ROBERT MANNING ET AL. ROBERT MANNING ET AL., APPELLEES, V. DONALD D. HODWALKER ET AL., APPELLANTS.

IN RE FREEHOLDER'S PETITION OF ROBERT E. HUSMANN. ROBERT E. HUSMANN, APPELLEE, V. DONALD D. HODWALKER ET AL., APPELLANTS.

187 N. W. 2d 647

Filed June 11, 1971. Nos. 37834, 37835, 37836.

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

John E. Dougherty, for appellants.

Sampson & Armatys and Perry, Perry & Witthoff, for appellees.

Robert G. Simmons, Jr., for amicus curiae.

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

SPENCER, J.

These appeals, while separately tried, were briefed and argued with Bader v. Hodwalker, 187 Neb. 138, 187 N. W. 2d 645. They involved exactly the same issue presented therein. Our holding in that case is therefore determinative of these appeals. We affirm the respective judgments herein.

AFFIRMED.

LEE POTTS, APPELLEE, V. ROBERT MAHOOD, APPELLANT, IMPLEADED WITH ELIZABETH JOHNSON, APPELLEE.
187 N. W. 2d 655

Filed June 11, 1971. No. 37844.

Statutes: Attorneys at Law: Fees. Under section 25-1801, R. S. Supp., 1969, when the judgment is over $50, the attorney fees are fixed at the sum of $10 plus 10 percent of the judgment in excess of $50.

Appeal from the district court for Antelope County: GEORGE W. DITTRICK, Judge. Affirmed as modified.

McFadden & Kirby, for appellant.

Elmer C. Rakow, for appellee Potts.

Thomas E. Brogan, for appellee Johnson.

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

MCCOWN, J.

This is an action for damages to crops caused by defendant's livestock. The jury returned verdicts for the plaintiff and against the defendant on three causes of action which arose in 1964 and 1966. The verdicts

were for $78.50, $76.80, and $51.20. The jury also returned a verdict in favor of a third party complainant in the sum of $120. The district court entered judgments against the defendant in those respective amounts and later fixed the attorney fees of the successful parties at one-half of the amounts of the respective judgments. The allowance and amount of attorney fees is the only issue on appeal.

Section 25-1801, R. R. S. 1943, provided for the allowance of attorney fees in certain cases. The relevant portion of that section prior to 1967 provided: "Attorney fees, as provided by this section, shall be assessed by the court in a reasonable amount but shall in no event be less than ten dollars, when the judgment is fifty dollars or less, and when the judgment is over fifty dollars up to *one* thousand dollars the *minimum* attorney fee shall be ten dollars plus ten per cent of the judgment in excess of fifty dollars." (Emphasis ours.)

In 1967, the maximum amount of a claim subject to the statute was changed from $1,000 to $2,000 and that change was also reflected in the portion of the statute dealing with attorney fees. In addition, an individual floor amendment deleted the single word "minimum" from the portion of the statute dealing with attorney fees when the judgment is over $50.

The floor debate on L.B. 676 of the 1967 Legislature sheds little light on the understanding or intention of the Legislature when it deleted the word "minimum." There is no explanation as to why the Legislature wished to have attorney fees determined differently simply because the judgment was more or less than $50. Nevertheless, the only reasonable interpretation of the statute as amended is that when the judgment is over $50, the attorney fees are fixed at the sum of $10 plus 10 percent of the judgment in excess of $50. Although the fees allowed here were clearly reasonable, the judgments involved were over $50 in each instance.

The order of the district court dated January 24, 1969,

for determination and allowance of attorney fees should have allowed fees against the defendant on plaintiff's first cause of action at $12.85; second cause of action, $12.68; and fifth cause of action, $10.12. The attorney fee on the third party defendant's first cause of action should have been $17.

The order allowing attorney fees is affirmed as modified as to each of the respective judgments.

AFFIRMED AS MODIFIED.

ENOCH ROBINSON, APPELLANT, V. MAURICE H. SIGLER, WARDEN, NEBRASKA PENAL COMPLEX, APPELLEE.
187 N. W. 2d 756

Filed June 11, 1971. No. 37845.

1. **Criminal Law: Indians: Jurisdiction.** When appellant committed the offense of murder, the State of Nebraska was exercising exclusive jurisdiction over criminal acts in Indian territory in Nebraska.
2. **Statutes: Indians: United States: States.** The Act of Congress, approved August 7, 1882, 22 U. S. Stat. at Large 341, granted the State of Nebraska both civil and criminal jurisdiction of the Indians in Nebraska.
3. **Treaties: Indians: United States: Powers.** The power of Congress over Indian affairs is plenary and cannot be limited by treaty.
4. **Statutes: Indians: United States: Powers: Jurisdiction.** The inherent police power of the states applies both to Indians and to Indian country, except to the extent that the federal government has preempted the field, and therefore the federal government may withdraw from the field and turn jurisdiction back to the states when it chooses to do so.
5. **States: Indians: United States: Statutes: Jurisdiction.** No acceptance of Public Law 280 was required of the State of Nebraska. By its terms it applied to Nebraska, and only the states not specifically mentioned were required to accept its provisions if they wanted to avail themselves of it.

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

Lawrence E. Murphy, for appellant.

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

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

SPENCER, J.

Enoch Robinson, an Omaha Indian who is now serving a life sentence in the Nebraska Penal Complex for murder, appeals from the dismissal of his application for a writ of habeas corpus. The application attacks the jurisdiction of the State to prosecute an Omaha Indian for the murder of another Omaha Indian on the Omaha Indian Reservation in Thurston County, Nebraska. We affirm.

On January 13, 1969, appellant murdered an Omaha Indian in the village of Macy, Thurston County, Nebraska. This court affirmed appellant's conviction for that offense on January 9, 1970. State v. Robinson, 185 Neb. 64, 173 N. W. 2d 443. This was more than 9 months before the Secretary of the Interior published an Order on October 24, 1970, purporting to accept retrocession of jurisdiction of offenses committed by or against Indians within the boundaries of the Omaha Indian Reservation in Thurston County, Nebraska. Appellant's claims are predicated on his theory that the State of Nebraska did not have jurisdiction of his person or of the particular offense involved.

Appellant's first contention, relying on United States v. Kagama, 118 U. S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886), is that the murder of an Omaha Indian by another Omaha Indian within the limits of the Omaha Indian Reservation is a federal offense, exclusively cognizable in the courts of the United States. Without reference as to whether concurrent jurisdiction may have existed prior to the passage in 1953 of Public Law 280, 18 U.S.C.A., section 1162, there is no question that

act withdrew federal jurisdiction over offenses committed in Indian conutry. It specifically granted the State of Nebraska exclusive criminal jurisdiction over Indian country to the same extent such jurisdiction applied elsewhere in the state. When appellant's offense was committed only the State of Nebraska was exercising jurisdiction over criminal acts in Indian territory in Nebraska.

Appellant places some reliance on the old Nebraska case of Ex Parte Cross, 20 Neb. 417, 30 N. W. 428, as a controlling case herein. That case was mere dictum, and obviously no authority for the present question. It is to be noted that the court there did not consider the Act of Congress approved August 7, 1882, 22 U. S. Stat. at Large 341, in which the Secretary of the Interior was authorized by and with the consent of the Omaha Tribe of Indians in open council to convey a portion of the land of the Omaha Indians as therein provided, and to distribute the remaining lands to the individual members of the tribe and certain portions to be held in trust for the tribe as common property.

Section 7 of the Act of 1882 specifically provided: "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, *both civil and criminal*, of the State of Nebraska; and said State shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law." (Italics supplied.) The foregoing statute has never been repealed and applies specifically to Omaha Indians and the Omaha Indian Reservation.

With reference to the claim of appellant that United States v. Kagama, 118 U. S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886), abrogated the effect of this act, we call attention to Hallowell v. United States, 221 U. S. 317, 31 S. Ct. 587, 55 L. Ed. 750, a 1910 case which is premised on the effectiveness of the Act of 1882, and recognized

section 7 of the act as granting civil and criminal jurisdiction to the State of Nebraska over the Omaha Indian Reservation.

Appellant argues that a treaty of March 16, 1854, between the Omaha Tribe of Indians and the United States is controlling herein, and that it cannot be arbitrarily abrogated by Congressional action. It has been consistently held that the power of Congress over Indian affairs is plenary, that it cannot be limited by treaty, and that an Indian treaty may be abrogated by Congress so long as individual rights acquired under the treaty are not destroyed. Lone Wolf v. Hitchcock, 187 U. S. 553, 23 S. Ct. 216, 47 L. Ed. 299. In any event, the Act of 1882 modified the original treaty.

Appellant then argues that Public Law 280, 18 U.S.C.A., section 1162, is unconstitutional as applied to the Omaha Indians. He contends that the act conflicts with three different substantive due process prohibitions: (1) The prohibition against arbitrary legislation; (2) the prohibition against unequal application of a law or unreasonable classification within a law; and (3) the prohibition against vagueness in Congressional legislation. There is no merit to any of these points.

Public Law 280 applied specifically to five states including Nebraska, and excepted certain reservations in three of those states other than Nebraska. However, it also contained a provision giving all other states the right to acquire similar jurisdiction if they so desired. There were reasons which are immaterial for our present discussion why the five states, including Nebraska, were specifically listed. The Indian groups within the five states for the most part were agreeable to the transfer of jurisdiction. The groups opposing such transfer, which had a tribal law and order organization functioning in a reasonably satisfactory manner, at their request were omitted from the transfer.

The United States Constitution contains no direct grant of power to the federal government over criminal

offenses by Indians in Indian country. As stated above, Congress has plenary power over Indian affairs as well as the power to abrogate treaty rights. Consequently, it had the power to grant exclusive criminal jurisdiction to the states, and particularly so when this was done with the concurrence of the Indian groups involved. The inherent police power of the states applies both to Indians and to Indian country, except to the extent that the federal government has preempted the field, and therefore the federal government may withdraw from the field and turn jurisdiction back to the states when it chooses to do so. Appellant has the burden to show just how and why Public Law 280 violates the Constitution of the United States. This he has failed to do.

Appellant's argument is adequately answered in Anderson v. Gladden, 293 F. 2d 463, in which the United States Circuit Court of Appeals for the Ninth Circuit said: "We further agree with the state court's holding on the question of the power of Congress to relinquish this jurisdiction in favor of the states. The power over Indians was deemed not so inherently or exculsively federal as to apply beyond the extent to which the federal government has preempted the field, and the federal government could thus withdraw from the field and turn the subject matter back to the states when it chose to do so."

Appellant then argues that even if we were to find Public Law 280 constitutional, Nebraska never accepted the benefit of its provisions. By the legislation, Congress withdrew from the federal court jurisdiction over crimes affecting Indians on Indian Reservations in five specifically mentioned states. No acceptance was required of those states. The State of Nebraska, being one of them, had either concurrent or residual jurisdiction over the crime of which the appellant had been convicted, and full jurisdiction over such crime was returned to the State of Nebraska on passage of Public Law 280.

Lastly, appellant argues that the Indian Civil Rights Act of 1968 nullified any possible state jurisdiction over the offense herein. By this argument, he is raising the question of retrocession which has heretofore been adequately answered by this court in State v. Goham, 187 Neb. 34, 187 N. W. 2d 305. Unlike Goham, appellant's conviction had become final before the Secretary of the Interior attempted to accept retrocession.

For the reasons given, there is no merit to any of appellant's assignments of error. The judgment of dismissal is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. STEWART W. GREENBURG, APPELLEE.
187 N. W. 2d 751

Filed June 18, 1971. No. 37841.

1. **Constitutional Law: Statutes: Criminal Law.** The constitutional provision that amendatory acts shall contain the section amended does not apply to an independent act which is complete in itself.
2. ———: ———: ———. The constitutional provision is applicable to an act which is not complete in itself, but relates to other existing statutes by changing them in part so that the changes and the existing provisions result in a connected piece of legislation covering the same subject matter.
3. **Constitutional Law: Statutes: Criminal Law: Drugs and Narcotics.** Chapter 197, Laws 1969, declared unconstitutional as in violation of Article III, section 14, Constitution of Nebraska.
4. **Constitutional Law: Statutes: Criminal Law.** Ordinarily, if an amendatory act is invalid, the original statute remains in effect.
5. **Constitutional Law: Statutes: Criminal Law: Drugs and Narcotics.** The reference to section 28-472.03, R. S. Supp., 1969, in section 28-470, R. S. Supp., 1969, is surplusage.

Appeal from the district court for Kimball County: JOHN H. KUNS, Judge. Exceptions sustained.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellant.

Van Steenberg, Meyers & Burke, for appellee.

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

BOSLAUGH, J.

The defendant was charged with possession of one-half pound or more of mixtures or substances containing cannabis in violation of section 28-472.03, R. S. Supp., 1969. The trial court sustained a motion to quash the information on the ground that the law was unconstitutional, and ordered the defendant discharged. The State then obtained leave to docket error proceedings under section 29-2315.01, R. R. S. 1943, to review the order of the district court.

Prior to 1969, cannabis was defined as a narcotic drug, and unlawful possession of cannabis was a felony punishable under section 28-470, R. R. S. 1943. In 1969, the Legislature enacted L.B. 2 (Laws 1969, c. 197, p. 793) which related specifically to cannabis and its resin. Unlawful possession of less than a specified amount of cannabis was made a misdemeanor. § 28-472.04, R. S. Supp., 1969. The act further provided that the penalties provided in sections 28-472.03 and 28-472.04 were to be applicable to all violations of the act and all charges pending on April 11, 1969. § 28-472.05, R. S. Supp., 1969.

It is clear that L.B. 2 amended section 28-470, R. R. S. 1943, by implication. It did not comply with Article III, section 14, of the Nebraska Constitution, which provides that "no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed."

The State contends that the constitutional requirement was not applicable because L.B. 2 was an independent act. It is well established that the constitutional provision is not applicable to an independent act complete in itself. Blair Co. v. American Savings Co., 184 Neb. 557, 169 N. W. 2d 292.

The difficulty with L.B. 2 is that it was not complete

in itself insofar as applicable to the subject matter properly embraced within its title. If it is assumed that the subject matter of L.B. 2 was "marihuana abuse," as suggested by the State, the act cannot properly be considered as complete in itself. Cannabis is still defined as a narcotic drug in subsection (14) of section 28-451 as amended by L.B. 2 (§ 28-451, R. S. Supp., 1969) and is subject to the requirements, restrictions, and exemptions of the Narcotic Drugs Act.

Section 28-472.03, R. S. Supp., 1969, refers to knowing and *unlawful* possession of cannabis. In order to ascertain what is unlawful possession of cannabis, it is necessary to consider the various exemptions contained in the Narcotic Drugs Act. Instead of being an independent act complete in itself, L.B. 2 relates itself to other existing statutes dealing with the same subject matter. As stated in State ex rel. Beal v. Bauman, 126 Neb. 566, 254 N. W. 256: "In truth, the new enactment accomplished nothing of independent nature and its effect is wholly confined to 'changes' of what theretofore existed, with the evident intent of its authors that by the mingling of the new changes with old provisions a connected piece of legislation covering the same and original subject would result."

The State further contends that L.B. 2 worked a repeal by implication, as distinguished from an amendment, and that repeals by implication are not subject to the constitutional requirement. We think that a proper interpretation to the effect of L.B. 2 upon section 28-470, R. R. S. 1943, is that section 28-470 was amended but not repealed by L.B. 2. Section 28-470, R. R. S. 1943, was amended during the 1969 session by L.B. 1385 (Laws 1969, c. 218, p. 839) which became effective more than 3 months after L.B. 2. Section 28-470, as amended by L.B. 1385, provides in part: "Except as provided in sections 28-472.03 and 28-472.04, * * *." § 28-470, R. S. Supp., 1969. The exception inserted in section 28-470 was a legislative recognition of the amendment of section

28-470 by L.B. 2 but not a repeal of the section.

As stated in Chicago, B. & Q. R.R. Co. v. County of Box Butte, 166 Neb. 603, 90 N. W. 2d 72: "The wisdom of the constitutional provision is not a matter for this court to determine. The constitutional limitation placed upon the Legislature in amending existing statutes must be followed, and where, as here, its terms are not complied with, the act is void and of no force or effect."

The finding of the trial court that L.B. 2, including section 28-472.03, R. S. Supp., 1969, was invalid was correct. The remaining question is whether the information should have been quashed and the defendant discharged. Ordinarily, the invalidity of an amendatory act leaves the original statute in force. See State ex rel. Baldwin v. Strain, 152 Neb. 763, 42 N. W. 2d 796.

Section 28-470 as amended by L.B. 1385 (28-470, R. S. Supp., 1969) on its face appears to be inapplicable to any case in which section 28-472.03, R. S. Supp., 1969, is applicable. However, since section 28-472.03, R. S. Supp., 1969, was invalid for any purpose and was as inoperative as though it had never been passed, the reference to section 28-472.03, R. S. Supp., 1969, at the beginning of section 28-470, R. S. Supp., 1969, was surplusage. The result is that the defendant was subject to prosecution under section 28-470, R. S. Supp., 1969, which was in effect on August 20, 1969, the date alleged in the information. The information should not have been quashed and the defendant should not have been discharged.

EXCEPTIONS SUSTAINED.

STATE OF NEBRASKA, APPELLEE, V. ERIC RICHARD SMITH, APPELLANT.

187 N. W. 2d 753

Filed June 18, 1971. No. 37806.

1. **Witnesses: Evidence: Trial. Testimony by an expert witness as to the weight of an exhibit weighed on a laboratory scale was**

admissible without prior evidence as to the accuracy of the scale.

2. **Prosecuting Attorneys: Criminal Law: Trial.** It is the duty of a prosecuting attorney to conduct the trial in such a manner as will be fair and impartial to the rights of the accused, no matter how guilty he may be.
3. **Appeal and Error: Criminal Law: Records: Drugs and Narcotics.** A conviction under section 28-472.03, R. S. Supp., 1969, will be affirmed where the record is sufficient to sustain a conviction under section 28-470, R. S. Supp., 1969.

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

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

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

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

BOSLAUGH, J.

The defendant appeals from a conviction for unlawful possession of one-half pound or more of cannabis. The assignments of error relate to the admissibility of evidence and misconduct of the prosecuting attorney.

There was evidence from which the jury could find that the defendant was observed carrying a sack containing approximately 7 pounds of cannabis from the house at 6611 Franklin Street in Omaha, Nebraska, to the rear of the house at 6607 Franklin Street. About 30 minutes later the defendant was observed removing a part of the contents from the sack which he carried back into the house at 6611 Franklin Street. The defendant testified that the sack had been left in front of the house by a third party and that he had taken it to the rear of the house to place it in a trash container to get rid of it. The defendant denied that he had returned to the sack after placing it in the rear of the house at 6607 Franklin Street. The evidence, although in conflict, was clearly sufficient to sustain the finding of guilty.

William J. Ihm, a chemist employed by the State, was allowed to testify over objection that he had weighed the contents of the sack on a scale in the laboratory and that it weighed 7 pounds 4 ounces. The defendant contends that the foundation for this testimony was inadequate because it was not shown that the scale had been tested and found to be accurate. The contention is without merit.

The defendant obtained leave to cross-examine as to foundation and inquired only as to when the scale had last been licensed. There is no reference to any licensing requirement applicable to laboratory scales, and the defendant made no inquiry as to whether the scale had been tested for accuracy. Another witness had testified previously that he estimated the weight of the sack at around 7 or 8 pounds. The offense was proved if the weight was one-half pound or more. The ruling was within the discretion of the trial court.

The other assignment of error relates to conduct of the county attorney in the trial of the case. The defendant contends that he was prevented from having a fair trial because of the offer of irrelevant evidence and unfair argument to the jury. The items of evidence complained of consisted of questions about the market value of marihuana; a reference to hashish; whether the defendant was the father of a child born out of wedlock who was present in the house at 6611 Franklin Street; and whether the house at 6611 Franklin Street had been under police surveillance. The argument complained of consisted of a statement that the police had not searched the house at 6611 Franklin Street because they were prevented by law from doing so.

Objections by the defendant were sustained to all of the questions except the one relating to hashish and the cross-examination of the defendant as to the market value of marihuana. The answer to the hashish question was conditionally received but there was no subsequent motion to strike. The defendant answered that he

did not know the market value of marihuana, that there were many prices.

The defendant's objection to the argument explaining the failure to search was sustained and the jury was instructed to disregard the comments. As we view the record it does not show that the defendant did not have a fair trial.

It is the duty of a prosecuting attorney to conduct the trial in such a manner as will be fair and impartial to the rights of the accused, no matter how guilty he may be. Rules of evidence and conduct are prescribed to insure that the rights of the accused are maintained.

The evidence and the argument complained of in this case had little or no relevance to the issues, but we are satisfied that the defendant received a fair trial. Each case must be determined on its own facts. Where the defendant has been prejudiced, the conviction will be set aside.

The prosecution in this case was under section 28-472.03, R. S. Supp., 1969, which has been declared unconstitutional. State v. Greenburg, *ante* p. 149, 187 N. W. 2d 751. The defendant was subject to prosecution under section 28-470, R. S. Supp., 1969, for unlawful possession of *any amount* of cannabis. By proceeding under section 28-472.03, R. S. Supp., 1969, the State assumed a greater burden than that imposed by section 28-470, R. S. Supp., 1969.

The trial court advised the jury that cannabis was a narcotic drug and that possession of a narcotic drug was unlawful unless otherwise authorized in the act. The information and the evidence are sufficient to sustain a conviction under section 28-470, R. S. Supp., 1969. Thus, the record is sufficient to sustain the conviction under section 28-470, R. S. Supp., 1969.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION OF AUBREY ALLEN ET AL.
AUBREY ALLEN ET AL., APPELLANTS, V. OMAHA TRANSIT CO., INC., APPELLEE.
187 N. W. 2d 760

Filed June 18, 1971. No. 37991.

1. **Public Service Commissions: Carriers: Powers.** Under Article X, section 7, of the Constitution of Nebraska, and section 75-126, R. S. Supp., 1969, exclusive power and jurisdiction to inquire into allegations or complaints, concerning unjust discrimination in the charging of fares by common carriers, is vested in the Nebraska State Railway Commission.
2. ———: ———: ———. Section 75-126, R. S. Supp., 1969, delegates to the Nebraska State Railway Commission quasi-judicial power to determine the issue of unjust discrimination in the charging of fares by common carriers under the standards therein set out, and vests the Nebraska State Railway Commission with quasi-judicial power to examine the facts and to determine questions of law.
3. **Public Service Commissions: Powers.** Generally, the Nebraska State Railway Commission, in the different aspects of its constitutional functions, exercises legislative, administrative, and judicial powers.
4. **Public Service Commissions: Trial.** Section 75-110.01, R. S. Supp., 1969, requires the Nebraska State Railway Commission to hold a hearing on an application or petition unless it is not opposed and its disposition is made by the use of affidavits.

Appeal from the Nebraska State Railway Commission. Reversed.

James E. McShane and Howard Kaiman, for appellants.

Robert A. Skochdopole and William T. Oakes of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

WHITE, C. J.

The issue in this case is whether the Nebraska State Railway Commission, hereinafter referred to as the Railway Commisison, may summarily deny an application for a reduction of rates without holding a hearing

specifically requested by the applicants senior citizens of Omaha, Nebraska. The Railway Commission denied the application and denied the applicants an opportunity to be heard before the Railway Commission. We reverse the Railway Commission's order for failure to hold a hearing.

The applicants are senior citizens in the City of Omaha, Nebraska, and filed this application before the Railway Commission requesting a special rate for senior citizens over the age of 62 years during specified hours during the week. The proposed fare to be charged was 20 cents per ride with no charge for transfers. It was requested that the rate be instituted for 1 year.

At the outset it should be clearly pointed out that the issue here is not the determination of the merits of such a request or whether such a classification of "senior citizens" over the age of 62 years is a proper one that may or may not be made by the Railway Commission. The specific issue before this court is whether the Railway Commission should have given the applicants an opportunity to be heard. A notice of public hearing on the application was given. Prior to the time of the holding of the hearing according to the notice, and after receiving an opinion from the Attorney General of Nebraska that the Railway Commission was without authority to fix such a classification and to require reduced fares for any special class of passengers, the Railway Commission entered an order on December 7, 1970, dismissing the applicants' application for lack of jurisdiction and subsequently overruled applicants' motion for a hearing according to the terms of the public notice.

At common law, common carriers were required to carry passengers or freight without "unjust" discrimination. Jurisdiction in the Railway Commission to inquire into allegations or complaints about unjust discrimination in the charging of fares by common carriers is founded in the Constitution of Nebraska, Article X, section 7, which states: "The Legislature shall pass

laws to correct abuses and prevent *unjust* discrimination and extortion in all charges of express, telegraph and railroad companies in this state and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture, of their property and franchises." (Emphasis supplied.) In accordance with this section, the Legislature delegated this general constitutional power to inquire into discriminatory rates to the Railway Commission. Section 75-126, R. S. Supp., 1969, provides: "(1) Except as otherwise provided in this section, no common carrier shall:

"(a) Charge, demand, collect, or receive from any person a greater or less compensation for any services rendered than it charges, demands, collects, or receives from any other person for doing a like or contemporaneous service;

"(b) Make or give any undue or unreasonable preference or advantage to any particular person; * * *

"(2) Nothing contained in this section shall prohibit any common carrier from, and no common carrier shall be subject to any fine, penalty or forfeiture, for performing services free or at reduced rates to:

"(a) The United States, the State of Nebraska, or any governmental subdivision thereof;

"(b) Any person transporting property to and from fairs and expositions for exhibition thereat;

"(c) The employees, both present and retired, of such common carrier;

"(d) Any person wherein the object is to provide relief in case of any calamitous visitation;

"(e) Any person transporting property for charitable purposes; or

"(f) Ministers and others giving their entire time to religious or charitable work."

It is clear that exclusive power and jurisdiction to fix the rates of common carriers and to determine all matters with relation to unjust discrimination as to fares and rates is vested in the Railway Commission. It is

further clear that the Legislature has delegated this power by setting up rather precise guidelines, standards, and principles to guide the Railway Commission in its deliberations. The Railway Commission had jurisdiction of the subject matter of the application filed by the applicants, and it appears that in entering the order of dismissal it was exercising its quasi-judicial power to make determinations of fact and law, and enter a judgment disposing of the merits of the application. This observation is necessary in this case because in Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756, we held that the Railway Commission generally exercises legislative, administrative, and judicial powers. It is clear from the nature of the application and the authority sought to be invoked, the power the Railway Commission was exercising here was quasi-judicial or judicial in nature.

From what we have said, it appears clear, therefore, that the Railway Commission did, without holding a hearing, exercise its judicial power to determine the facts and the law and enter a judgment of dismissal.

The precise and only issue presented in this case is whether applicants were entitled to a hearing of some nature before the Railway Commission. We have no doubt, in proper context, that legislative or administrative power may be exercised without the holding of a hearing and an opportunity to be heard. But here the Legislature has properly delegated judicial power to the Railway Commission. It has required the Railway Commission to inquire into and to determine the facts and make lawful disposition of applications of citizens and carriers alike. The application here invoked the Railway Commission's power to determine the facts, to apply the law, and to enter a judgment thereon. The rules and regulations of the Railway Commission itself set up an orderly procedure by which such applications could be made and the matter brought to the attention of the Railway Commission with full opportunity to be

heard either on questions of law or questions of fact, if such there may be. It appears clear that once the judicial or quasi-judicial powers of the Railway Commission are properly invoked, according to the authorized rules and regulations which the Railway Commission itself has promulgated, its judicial power may not be exercised summarily and without hearing the adversary parties to such applications.

We observe that the Attorney General's opinion, which was apparently the basis upon which the Railway Commission acted, does not say that the Railway Commission is without jurisdiction of the subject matter of the act, or that it is barred from holding a hearing on the subject matter of reduced fares for special classes of passengers. It states, in substance, that if the fact allegations are such as in the application, the Railway Commission could not properly reach a final result which would require such reduced fares, because of the specific prohibitions of the applicable statute. But it seems to be clear that the applicants are entitled to a hearing of some nature upon the very issue of whether the facts as stated in the application could warrant relief. We also observe that the summary denial of this application prevents the consideration by the Railway Commission of any possible amendments or qualifications which could bring it within the terms of the statute, and effectively prevents the uncovering of any related or collateral facts that are not recited in the application or considered by the Attorney General in his opinion. The Railway Commission, pursuant to its rules and regulations, did issue a notice and did schedule a hearing in this matter. The applicable statute, section 75-110.01, R. S. Supp., 1969, provides in part: "After notice of an application or petition has been given as provided by the rules for notice, the commission may process the application or petition without a hearing by use of affidavits if the application or petition is not opposed." We observe that the disposition of this application was done without

the use of affidavits and that the application was opposed. The statement in the applicable statute itself demands from the Railway Commission that a hearing be granted under these circumstances. The statute, section 75-110.01, R. S. Supp., 1969, provides that the Railway Commission shall not deny an application or petition of a common carrier until after it has either given the applicant a hearing thereon, or received the applicant's affidavits and made them a part of the record. We therefore hold that the Railway Commission should have held the hearing, already scheduled under its rules and regulations and the notice issued, to enable the parties to appear and present whatever questions of law or issues of fact which the Railway Commission might have determined, at the time of the hearing, were necessary and proper to a final determination of the issues presented.

We observe that the Railway Commission's order summarily denying the hearing effectively prevented a presentation to it of further and additional facts than those alleged in the application and any request for an appropriate amendment to embrace in the application any further facts that the applicants might seek to develop.

We point out that our holding and decision herein is narrow in scope. We do not determine or hold that there is any merit to the applicants' present application of any nature whatsoever. It would appear from the face of the application that it is totally without merit and under the applicable statute applying to the subject matter, that is, common carrier's rates, the Railway Commission is without power to grant reduced rates on the basis of the facts presented. But we do say that the Railway Commission should have held a hearing that it did, in fact, schedule under its own rules and regulations.

The Railway Commission's order denying a hearing is reversed.

REVERSED.

SPENCER, J., dissenting.

The majority opinion herein requires the Nebraska

State Railway Commission to engage in an exercise in futility. At this point in this controversy I can see no escape from the mandatory application of subsection (1) of section 75-126, R. S. Supp., 1969, forbidding discrimination between persons, nor any escape from the conclusion that the application does not contain facts bringing it within the exclusions in subsection (2) of section 75-126, R. S. Supp., 1969.

McCOWN, J., concurring in result.

Both the majority opinion and the dissent assume, either impliedly or implicitly, that the Nebraska State Railway Commission has no power or authority to order the defendant to establish a special rate classification for off-peak periods for persons over 62 years of age. The foundation for that legal conclusion rests on the assumption that any classification of persons for reduced rates, except for those persons described in subsection (2) of section 75-126, R. S. Supp., 1969, is illegal and discriminatory. That conclusion I do not accept.

Two very obvious classifications of persons who are not mentioned at all in section 75-126, R. S. Supp., 1969, are children and students. In the case of children, the "discrimination" is based solely on age. In the case of students, the "discrimination" is based on occupation. There is no dispute on the part of anyone that the Railway Commission has authority over such rates once established, but the argument is that the authority exists only when the carrier voluntarily established the classification. This distinction in interpreting a statute prohibiting discrimination simply doesn't fit. Particularly is this so where the Railway Commission must specifically approve any rates established by any carrier for the carriage of any classifications of persons or property. It seems clear that a classification limited to persons over 62 years of age, and to off-peak periods in time, is not on its face obviously and conclusively unreasonable and unjustified.

The preferences or advantages aimed at by section 75-

126, R. S. Supp., 1969, are only undue or unreasonable ones. A classification of persons which is justified or reasonable ought not to be deemed illegal simply because a carrier has not voluntarily established it.

It is true that the Railway Commission has no authority to order any rate which is not compensatory. That fact remains for evidence, but it should not be predetermined nor should it affect the jurisdiction or the power and authority of the Railway Commission over the establishment of rates and classifications for the carriage of passengers.

STATE OF NEBRASKA, APPELLEE, V. JACK HOLOUBEK, APPELLANT.
188 N. W. 2d 439

Filed June 25, 1971. No. 37708.

1. **Criminal Law: Witnesses: Burglary.** In a prosecution for burglary, a witness who was only a receiver of the stolen property or an accessory after the fact was not an accomplice of defendant.
2. **Criminal Law: Sentences: Statutes.** A sentence imposed within statutory limits will not be disturbed for excessiveness in the absence of an abuse of discretion.

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

Robert C. Vondrasek, for appellant.

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

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

SMITH, J.

A jury found defendant Jack Holoubek guilty of the offense of burglary. The court sentenced him to imprisonment for 5 to 8 years. On appeal he attacks the

sufficiency of the evidence on the ground that an accomplice willfully swore falsely to material matters without corroboration.

The Hinky Dinky Store at 8411 Center Street in Omaha was burglarized October 13 or 14, 1969. Stolen merchandise consisted partly of meat in 2 pound cans and cigarettes. Delivery of the items to that store could be established by distinctive markings on them.

The alleged accomplice was Archie McShannon, owner of a tavern with an expired food permit. He informed on Holoubek and Louis Silvey on October 27, 1969. The substance of McShannon's testimony is as follows: He purchased cigarettes and 30 cans of meat for $60, $20 down, from Holoubek and Silvey at 2:30 a.m., October 14. They told him about breaking and entering a chain store, the method of entry, and difficulty with mud. Those facts, except the connection of Holoubek or Silvey, were corroborated.

Contradictions and evasiveness run through the record of the testimony of McShannon. He delivered 16 cans of meat and 4 packages of Kent cigarettes, with the distinctive markings of the store at 8411 Center Street, to police officers. His explanations of the whereabouts or disposition of the other items were evasive. His reasons for informing were contradictory. His testimony to incriminating statements by Silvey in Holoubek's presence appeared evasive and in part perhaps contradictory. He no doubt could have learned enough details from others to inform falsely against Holoubek and Silvey.

The evidence was clear that McShannon committed no offense worse than an accessory after the fact or a receiver of stolen property. In a prosecution for burglary, a witness who was a receiver of stolen property or an accessory after the fact was not an accomplice of defendant. Cf. §§ 28-201, 28-202, 28-508, and 28-513, R. R. S. 1943; State v. Breaker, 178 Neb. 887, 136 N. W. 2d 161 (1965); Neiden v. State, 120 Neb. 619, 234 N. W.

563 (1931). See 1 Underhill's Criminal Evidence, note 8, § 175, at p. 330 (5th Ed., 1956).

The evidence was sufficient to support the verdict against Holoubek under the general rules of State v. Leary, 185 Neb. 76, 173 N. W. 2d 520 (1970).

Holoubek also asserts that his 5 to 8 year sentence was excessive. The record incorporated no presentence report, but the sentencing hearing in May 1970 imparted two prior felony convictions of Holoubek, then age 37. A sentence imposed within statutory limits will not be disturbed for excessiveness in the absence of an abuse of discretion. State v. Trout, 186 Neb. 477, 183 N. W. 2d 923 (1971). No abuse of discretion appears here.

The judgment is affirmed.

AFFIRMED.

ERNEST ELLIOTT ET AL., APPELLANTS, V. CITY OF PLATTSMOUTH, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

188 N. W. 2d 684

Filed June 25, 1971. No. 37773.

Airports: Municipal Corporations: Words and Phrases. The word "airport" in the clause "any city * * * owning or operating an airport" in the Cities Airport Authorities Act, section 3-502, R. R. S. 1943, means an airport qualified and licensed for public use.

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

Ronald D. Svoboda and Burbridge & Burbridge, for appellants.

Herbert J. Elworth, Paul E. Fauquet, Francis Casey, and Harold R. Lebens, for appellees.

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

McCOWN, J.

This was an action by the individual plaintiffs to enjoin the further operation of an airport authority of the City of Plattsmouth, and to declare the airport authority invalid and nonexistent. After trial, the district court dismissed the plaintiffs' petition and this appeal followed.

The Cities Airport Authorities Act formed the basis for the creation of the authority here. "Any city now or hereafter owning or operating an airport is hereby authorized to create an airport authority * * *." § 3-502, R. R. S. 1943.

The land initially leased by the city in February 1969, had never been used as an airport of any kind. The city did not own or operate any other "airport." The "airport authority" was authorized under resolution dated March 24, 1969. Application for an airport license was not filed by the authority until November 1969, and no license was ever issued until March 27, 1970, when a limited municipal license was issued.

This case is controlled by Bruns v. City of Seward, *ante* p. 658, 185 N. W. 2d 853. The word airport in the clause "any city * * * owning or operating an airport" in section 3-502, R. R. S. 1943, means an airport qualified and licensed for public use. The action of the City of Plattsmouth purporting to create an airport authority was invalid and void.

We do not reach the issues involving appropriations and expenditure of funds.

The judgment is reversed and the cause remanded with directions to enter judgment declaring the airport authority invalid.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. CLARENCE ECKSTEIN, APPELLANT.
188 N. W. 2d 440

Filed June 25, 1971. No. 37854.

Criminal Law: Indictments and Informations: Statutes. An information alleging conduct prohibited generally by one statutory section and specifically by another section charges an offense under the specific section.

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

W. G. Cambridge, for appellant.

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

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

SMITH, J.

An information charging defendant Clarence Eckstein with larceny by bailee of an automobile did not allege the value of the automobile. Upon a plea of guilty Eckstein was sentenced to imprisonment from 3 to 5 years. He appeals. He asserts that the information omitted an essential allegation—specific value of the automobile.

The information charged a violation of section 28-540, R. R. S. 1943. The section concludes that an offender is deemed guilty of larceny in the same manner as if the original taking were felonious. Upon conviction he is to be punished accordingly.

Stealing of an automobile is a separate offense without regard to the amount of its value. It is punishable by imprisonment from 1 to 10 years. See § 28-522, R. R. S. 1943. Grand larceny is punishable by imprisonment from 1 to 7 years. See § 28-506, R. R. S. 1943. The court informed Eckstein the maximum penalty was imprisonment for 7 years.

An information alleging conduct prohibited generally

by one statutory section and specifically by another section charges an offense under the specific section. See, Buthman v. State, 131 Neb. 385, 268 N. W. 99 (1936); Graham v. State, 123 Neb. 63, 241 N. W. 786 (1932); Hogoboom v. State, 120 Neb. 525, 234 N. W. 422, 79 A. L. R. 1171 (1931) (dictum); Halbert v. State, 116 Neb. 1, 215 N. W. 459 (1927); Gragg v. State, 112 Neb. 732, 201 N. W. 338 (1924); Mares v. State, 112 Neb. 619, 200 N. W. 448 (1924) (receipt of stolen automobile); Griffith v. State, 94 Neb. 55, 142 N. W. 790 (1913); Wallace v. State, 91 Neb. 158, 135 N. W. 549 (1912); cf. Kruger v. Brainard, 183 Neb. 455, 161 N. W. 2d 520 (1968); A. L. I. Proposed Official Draft, Model Penal Code, § 1.07(d) (1962).

In Lee v. State, 103 Neb. 87, 170 N. W. 359 (1919), the information charged Lee with larceny of an automobile worth $200, a sum large enough for grand larceny. The court, 3 judges dissenting, reversed his conviction for failure of the jury to find the value of the automobile. On the issue before us Lee illustrates asymmetry in the law. Although it harmonizes with some cases decided prior to 1912, Lee today is a wild recessive.

Specific value of the automobile was not an essential allegation against Eckstein. In so concluding, we are not construing the criminal code retroactively. See Bouie v. Columbia, 378 U. S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).

The other assignments of error, one of which is invalidity of Eckstein's plea, are not well taken. The judgment is affirmed.

AFFIRMED.

CLINTON, J., dissenting.

I dissent respectfully. In prosecution upon charge of larceny by bailee proof of value is an essential element of the crime in order that the court may determine punishment for either grand or petit larceny. There is nothing in section 28-540, R. R. S. 1943, to indicate that the measure of punishment depends upon the nature of the property taken rather than its value.

KENNETH P. SHAMBURG, APPELLEE, V. KENNETH R. FOLKERS, APPELLANT.
188 N. W. 2d 723

Filed July 2, 1971. No. 37749.

1. **Witnesses: Trial: Evidence.** The general rule as to an opinion of a lay witness is that the witness may testify only to facts perceived by his senses and may not give his opinion or conclusion.
2. ———: ———: ———. A lay witness may testify to a relevant opinion based upon facts perceived by him if the opinion is of a kind normally formed by a person constantly and correctly and the witness cannot accurately, adequately, or with reasonable facility describe the fundamental facts upon which the opinion is based. In substance such process is under these circumstances description.
3. ———: ———: ———. It is unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to save error, however, the failure to object to identical or substantially the same incompetent testimony by another witness waives the erroneous ruling in admission of testimony of the first witness.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Healey, Healey, Brown & Burchard, for appellant.

Marti, O'Gara, Dalton & Bruckner, for appellee.

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

CLINTON, J.

This action grows out of a head-on motor vehicle collision which occurred during daylight hours near the crest of a hill on a graveled county road known as the Malcolm-Garland road, which runs in an east-west direction. The plaintiff Kenneth P. Shamburg was driving a 1965 Chevrolet ¾-ton pickup east. The defendant Kenneth R. Folkers was driving a 1967 Mercury west. There were no witnesses to the collision save the parties. Folkers cross-petitioned for his damages. The

jury found for Shamburg on his petition and against Folkers on his cross-petition. Judgment was rendered on the verdict. Folkers appeals.

Two questions are presented on this appeal. Folkers contends that the undisputed physical facts show that the Shamburg pickup was across the centerline of the main traveled portion of the road at the time of the collision and therefore Shamburg's right of action is barred by contributory negligence proximately causing the collision, and that the court erred in permitting over objection a lay witness, Schmieding, to testify to his conclusion that the Folkers vehicle was on the wrong side of the highway. Later in the trial the same question in almost identical language was asked and without objection the second witness gave the same answer.

We affirm the verdict and the judgment.

The evidence on the accident facts was produced by the testimony of the two parties, the investigating highway patrolman, two after the collision witnesses, photographs taken by the patrolman, and a diagram and measurements made by the investigating officer. The oral testimony of each of the parties was such that the jury could have, apart from the physical evidence, found that one or the other was, at the moment of impact and immediately prior thereto, on his own proper side of the road.

The investigating officer made measurements of the width of the road and determined that it was 28 feet wide, measured from points along the edge. He stated that all of the 28 feet except about a tire's width on each side was fit for travel. The two vehicles were impaled upon each other and remained tightly jammed together after the accident. The pickup faced to the north of east and the Mercury to the south of west. There was no marked centerline on the road.

The patrolman made the following measurements. (A) With reference to the Folkers' Mercury: (1) From the north edge of the road to the right front tire, 10 feet 11

inches. (2) From the north edge to the right rear tire, 9 feet 5 inches. (3) From the south edge to the left rear tire, 13 feet 2 inches. (4) From the south edge to the left front tire, 12 feet 3 inches. (B) With reference to the Shamburg vehicle: (1) From the south edge to the right front tire, 10 feet. (2) From the south edge to the right rear tire, 7 feet 8 inches. (3) From the north edge to the left rear tire, 15 feet. (4) From the north edge to the hubcap of the left front wheel, 14 feet. This hubcap was detached but lying against the wheel.

It was raining at the time of and just after the accident. There was no evidence of tire or skidmarks of either vehicle. There is a dispute in the testimony as to whether the full 28 feet of the road width was fit for travel.

Folkers' contention that the undisputed physical facts show that the Shamburg vehicle was over the centerline of the main traveled portion of the highway at the time of impact is founded primarily upon the measurements made by the highway patrolman. Essentially the argument is that these measurements amount to undisputed physical facts and show (if Folkers' evidence of an untravelable portion of the north side is disbelieved), that Folkers' vehicle was over the centerline. These same facts, therefore, because of the overlap in the collision of the vehicles show that the Shamburg vehicle was also over the centerline. Folkers points out the patrolman's statement was that about a tire's width on each side of the highway within the 28-foot measurement was not travelable because of the softness of the edges. Folgers argues therefore that the measurement of 14 feet to the left front wheel of the Shamburg vehicle in itself places the vehicle over the center of the highway. He argues further that the Shamburg vehicle was even more over the centerline at the time of impact because the photographs show that the left front of the Shamburg vehicle is displaced inward. He further argues that this alleged fact is verified because the 14-

foot measurement plus the 10-foot measurement and the width of the Shamburg vehicle is greater than the width of the highway and the difference is the inward displacement of the Shamburg vehicle by the impact.

We hold that the physical facts do not indisputably establish the position of the vehicles at the time of the impact. The measurements, if accepted as absolutely accurate, establish only the location of the vehicles after the impact. There was no undisputed centerline of the main traveled portion of the highway. There were no tire marks showing the paths of either vehicle immediately prior to the impact. The amount and direction of movement after impact cannot be ascertained. The measurements themselves are not undisputed physical facts. The testimony of a witness for each party challenged respectively the 7-foot 8-inch measurement with reference to the Shamburg vehicle and the 9-foot 5-inch measurement with reference to the Folkers vehicle. Neither do the 10-foot and 14-foot measurements to the front tires of the Shamburg vehicle support indisputably Folkers' contention that the Shamburg vehicle was displaced inwardly at the left front or if it was how much. Neither vehicle was aligned parallel to the direction of the highway. They were at an angle thereon. The two points of measurement were not made on the same line. The difference between the sum of the two measurements and the measured highway width therefore do not give an accurate measurement of the width of the vehicle.

Folkers cites several cases decided by this court for the "principle" that where the undisputed physical facts show a vehicle was across the centerline of the road at the time of impact that recovery by the driver of the vehicle is barred by reason of contributory negligence proximately contributing to the collision.

An examination of these cases indicates, for reasons already given, that none of them are applicable here. The measurements and the damage to the vehicles here

do not indisputably demonstrate that the plaintiff's vehicle was north of the centerline of the main traveled portion of the highway at and immediately prior to the impact. It may be observed in passing that the "principle" cited by the defendant is not a principle of law at all, but simply a fact finding by the court in cases in which it felt the verdict was clearly contrary to the evidence and that the verdict should have been directed.

The second assignment of error relates to the failure of the trial court to sustain an objection to a question propounded by the plaintiff in redirect examination of a witness, Schmieding, who arrived at the scene of the accident shortly after it occurred. In order to understand the contentions and the ruling in this connection, it is necessary to summarize what occurred immediately before and after the testimony to which objection was made. The cross-examination of this witness covered, among other things, certain photographs of the road which had been taken a few days after the accident. The witness testified that they showed the road's general appearance and condition in the area of the accident. He also on cross-examination testified that the Shamburg pickup was so close to the south edge of the road that in passing around it he took hold of the pickup to keep from slipping into the ditch. He further testified that he disagreed with the patrolman's measurement that the back end of the pickup was 7 feet 8 inches from the edge of the road. Then on redirect the following occurred: "Q. You didn't measure the distances there yourself, did you, Mr. Schmieding? A. No; I didn't have no rule with me. Q. Your testimony here is based on what you observed; is that correct? A. That's right. Q. And *from* your observations, from what you saw when you first arrived on the scene, can you tell us *which vehicle appeared* to be on the *wrong side* the road? MR. HEALEY: Objected to, calling for a conclusion of the witness. COURT: Overruled. You may answer. Q. Did you understand the question? A. Repeat it once

more, please. MR. BRUCKNER: I will have the court reporter read it back. (Question read back.) A. Well, I would say the Mercury was on the wrong side the road because—You want me to go on, or not?" (Emphasis supplied.)

On recross immediately following the above examination the witness was questioned concerning photographs of the vehicles themselves at the accident scene, and the following occurred: "Do these pictures correctly show where the vehicles were when you were there at the scene? A. Well, they do in a way; and still when you look at some of them it don't look quite like it did to me the day I seen them."

In the light of the context the question does not appear to have been directed to eliciting an opinion for the conclusion of the witness as to the position of the vehicles with reference to the centerline at the time of impact. However, it is readily apparent that the question did call for the conclusion or opinion of the witness as to the position of the vehicles with reference to the centerline after they were at rest. The question itself contained an assumption, viz, that only one of the vehicles was across the centerline of the road. The question did call for a conclusion by the witness, without detailing the reasons therefor, as to "which" car was on the wrong side of the road. The evidence would have supported a finding for the defendant's position that the plaintiff's pickup also was across the centerline at the time of impact. The position of the cars after impact with reference to the imaginary centerline was obviously very important to both parties in connection with their arguments to the jury in support of their respective contentions. The measurements made by the investigating officer were not conclusive of the exact position of the cars with reference to the imaginary centerline. The question obviously was a close one. Under these circumstances we cannot say that to permit Schmieding to give his opinion or conclusion, essentially without

foundation, that only the defendant's car was across the centerline and on the "wrong" side of the road was without prejudice. The opinion of the witness called for by the question was closely related to the ultimate issue in the case, namely, whether one or both cars were across the centerline at impact.

The general rule is that the lay witness is to describe what he has observed. Benson v. Peters, 87 Neb. 263, 126 N. W. 1003; Riggs Optical Co. v. Riggs, 132 Neb. 26, 29, 270 N. W. 667. It cannot be said that this is one of those cases where the opinion is of a kind normally formed by a person constantly and correctly and where he could not accurately and adequately with reasonable facility describe the fundamental facts on which the opinion is based. The opinion in this case was not in substance description. Frazier v. Anderson, 143 Neb. 905, 11 N. W. 2d 764. The plaintiff was not entitled to have this witness' speculative conclusion presented to the jury where measurements and photographs made by others were available and received in evidence. Rickertsen v. Carskadon, 169 Neb. 744, 750, 100 N. W. 2d 852; 32 C. J. S., Evidence, § 546(17), p. 141. We are unable to say from the record that the opinion evidence may not have influenced the verdict of the jury. Its reception would normally be considered prejudicial error. Singles v. Union P. R.R. Co., 174 Neb. 816, 119 N. W. 2d 680; Grantham v. Farmers Mutual Ins. Co., 174 Neb. 790, 119 N. W. 2d 519. However, the failure of the defendant to object to the identical question which was later put to another witness and answered in the same way constituted a waiver of the objection and he cannot now complain. Rakes v. State, 158 Neb. 55, 62 N. W. 2d 273; § 25-1141, R. R. S. 1943.

AFFIRMED.

F. HOYTE FREEMAN ET AL., APPELLEES, V. GEORGE P. ROSE, APPELLANT.
188 N. W. 2d 682

Filed July 2, 1971. No. 37828.

Courts: Equity: Trial: Jurisdiction. Where a court of equity obtains jurisdiction of a cause for any purpose, it may retain it for all and may proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation.

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

George T. Burr, for appellant.

Keith I. Frederick of Schmid, Ford, Mooney, Frederick & Caporale, for appellees.

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

MCCOWN, J.

This is an action in equity to determine the rights of the parties under a written agreement, and to resolve all claims and rights as to the real estate which was the subject of the agreement. The district court found for the plaintiffs and against the defendant and entered decree foreclosing the defendant from any right, title, or interest in the real estate and dismissed defendant's cross-petition. We affirm the judgment of the district court.

The plaintiffs, F. Hoyte and Ina Freeman, were the owners of approximately 100 acres of land located in Sarpy County, Nebraska. Sometime prior to June 1967, the defendant, George P. Rose, approached Mr. Freeman about leasing the land for use as a sod farm. On June 22, 1967, the parties entered into a written lease agreement which also provided for an option to purchase under certain conditions.

The lease was for a period of 4 years commencing

March 1, 1967, and ending February 28, 1971. The lease provided for an annual rental of $23,450, or $335 for each acre of sod cut from the premises, whichever was greater. Rose was to make the rental payments on the 10th day of each month for the sod cut and removed during the preceding month. On February 28 of each lease year, he was to pay any difference between the amount of rent paid for sod cut during the preceding lease year and the minimum annual rental of $23,450. Rose was also required to submit with each month's rental payment, a list stating the name of each person to whom sod had been sold; the address and legal description of land on which the sod was laid; the amount sold; and whether the purchaser had paid for the sod. As sod was cut from the premises, Rose was also required to reseed the ground as soon as practicable so that all portions of the premises should be in a productive state of sod development. At any time subsequent to February 28, 1971, and prior to April 1, 1971, Rose had the option to purchase the land at a price of $150,000, provided he had not been in default of any of the provisions of the lease during its term. In the event he exercised the option to purchase, he was to receive credit on the purchase price in an amount equal to $10,500 for each year of the lease term during which he had performed all of the covenants of the lease.

For the lease year ending February 28, 1968, the defendant paid $3,015. For the lease year ending February 28, 1969, the defendant paid $6,622.50. For the lease year ending February 28, 1970, the defendant made no payments, but the plaintiffs collected $2,501.45 directly from parties who had purchased sod from the defendant. The defendant did not submit to the plaintiffs any list giving the detailed information as to sod sales as required by the agreement.

In the fall of 1969, the defendant recorded the written agreement in the real estate records of Sarpy County and notified the plaintiffs that he was exercising the

purchase option in the lease. The plaintiffs notified the defendant in writing that he was in default and this action followed.

The defendant testified that he had done extensive work on the land to prepare it for use as a sod farm and that he had an oral agreement with the plaintiff, Hoyte Freeman, that any work he had done on the farm would be credited on the guaranteed minimum rental except for the $335 per acre to be paid as sod was cut. Defendant's cross-petition was based on that work as well as damage to his sod business. Plaintiffs' evidence was that they had prepared and seeded the land as a sod farm several years before the inception of the lease, and that there was no agreement with the defendant except the written agreement.

While the evidence was in conflict as to many issues, it was clearly more than sufficient to support the trial court's decree. In an equity case where the trial court is the trier of facts and there is irreconcilable conflict on a material factual issue, 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. See Pickard v. Director of Motor Vehicles, 184 Neb. 13, 165 N. W. 2d 96.

Defendant also complains that his cross-petition for damages was dismissed. Where a court of equity obtains jurisdiction of a cause for any purpose, it may retain it for all and may proceed to final determination of a case, adjudicate all matters in issue, and thus avoid unnecessary litigation. Dixon v. O'Connor, 180 Neb. 427, 143 N. W. 2d 364.

The judgment is affirmed.

AFFIRMED.

HARTFORD ACCIDENT & INDEMNITY COMPANY, A CORPORATION, APPELLEE, V. OLSON BROS., INC., A CORPORATION, APPELLANT, IMPLEADED WITH LOZIER CORPORATION, A CORPORATION, APPELLEE.

188 N. W. 2d 699

Filed July 2, 1971. No. 37842.

1. **Insurance: Pleadings: Actions.** An insurer's duty to defend an action against the insured must, in the first instance, be measured by the allegations of the petition against the insured.
2. **Insurance: Contracts.** A policy of insurance should be considered as any other contract to give effect to the intention of the parties at the time it was made as expressed therein. The language of it should be considered not in accordance with what insurer intended the words to mean, but what a reasonable person in the position of the insured would have understood them to mean.
3. **Insurance: Contracts: Property: Damages.** Exclusion in a liability policy excluding from coverage injury to or destruction of any goods sold by the named insured or work completed by the named insured out of which accident arises eliminates any coverage for injury to or destruction of the product furnished or work completed by the named insured.
4. ———: ———: ———: ———. Under exclusion in a liability policy excluding from coverage injury to goods sold or work completed by the named insured, if defect in the product furnished or work completed by the named insured causes damage to other property, there is coverage for such damage to other property.

Appeal from the district court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Gerald P. Laughlin of Young, Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellant.

Cassem, Tierney, Adams & Henatsch, Charles F. Gotch, and T. J. Stouffer, for appellee Hartford Acc. & Ind. Co.

Abrahams, Kaslow & Cassman, for appellee Lozier Corp.

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

CLINTON, J.

This is an action for a declaratory judgment brought by Hartford Accident & Indemnity Company, the insurer, against Olson Bros., Inc., the insured, and the Lozier Corporation, plaintiff in another action wherein Olson is defendant, to determine the rights of the parties under the terms of an insurance policy issued by Hartford to Olson. The question involved is whether the language of certain "exclusions" in the policy is such that Olson was not afforded coverage in the suit of Lozier against Olson. The trial court determined there was no coverage. Olson appealed. We affirm the judgment of the trial court.

Olson is a roofing contractor. It furnished under contract with Lozier the materials for and constructed and installed in three different stages a roof deck and covering of built-up four-ply paper, asphalt, and gravel on a manufacturing plant belonging to Lozier. The roof in all three stages was of identical materials and construction, consisting of roof deck panels of a wood fiberboard known as "tectum," metal "bulb-tees" which were small "I" beam-like metal strips welded at right angles to the structural roof members at proper distances to support the panel ends, and a gypsum grout which sealed together the bulb-tees and the panels. On top of this deck was laid the paper, asphalt, and gravel. Olson also furnished and installed flashing.

The first stage was completed about April 18, 1963; the second stage about June 21, 1965; and the third about March 24, 1967. Early in 1968 Lozier discovered that the tectum panels of the first two stages had "cupped" or warped so that water stood in each of the panels after rains and the warping caused cracks and check marks to appear in the paper and asphalt which marks or cracks where present generally defined the panel edges. The last stage was beginning to show the same characteristics. The 2-year warranty period of the construction contract had expired.

Lozier on October 20, 1969, brought an action against Olson in which it alleged: The construction of the roof by Olson; that Lozier originally planned to install a conventional steel deck with insulation but upon the recommendation of Olson contracted for the use of tectum; that in discussing the recommendation with Olson, Lozier had pointed out its manufacturing operations involved moisture and heat and the roofing on the plant would have to be satisfactory for these conditions; that Olson orally represented to Lozier a tectum roof would not be affected by moisture and heat and would be satisfactory under the conditions in the Lozier plant; that the representations were made as positive statements of fact with the intent that Lozier should act thereon; that Lozier, believing the representations, relied thereon and on that basis contracted for the roof with Olson; that the representations of Olson were false when made; that the roof was severely affected by heat and moisture involved in the operation of the Lozier plant; that the panels deteriorated and this deterioration was reported to Olson and Olson has failed and refused to remedy the situation; and that Lozier was damaged in the amount of $240,000, "being the fair and reasonable cost of removing said roofing . . . and installing proper roofing thereon."

The plaintiff, Hartford, investigated Lozier's claim and denied Olson coverage under the policy. Hartford then brought this action. Olson counterclaimed for attorneys' fees and expenses in defending Lozier's action. Pending the determination of this suit in the district court, proceedings in Lozier's action against Olson were enjoined.

Hartford's evidence is uncontradicted that there is no damage to property other than the roof and that other physical parts of the building such as steel walls, foundation, etc., are not damaged by the roof deterioration. Olson introduced evidence of a real estate appraiser who testified that the market value of the premises was dam-

aged by reason of the roof deterioration as this was a factor which prospective buyers would consider in making an offer. He also testified that replacement of the roof would restore the market value.

Pertinent policy provisions are the following:

"The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . .

"Coverage B—property damage

"to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

"Exclusions

"This insurance does not apply: . . .

"(k) to bodily injury or property damage resulting from the failure of the named insured's products or work completed by or for the named insured to perform the function or serve the purpose intended by the named insured, if such failure is due to a mistake or deficiency in any design, formula, plan, specifications, advertising material or printed instructions prepared or developed by any insured; but this exclusion does not apply to bodily injury or property damage resulting from the active malfunctioning of such products or work;

"(l) to property damage to the named insured's products arising out of such products or any part of such products;

"(m) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equip-

ment furnished in connection therewith; . . .."

The pertinent definitions of the policy are as follows:

"Definitions . . .

" 'completed operations hazard' includes bodily injury and property damage arising out of operations *or reliance upon a representation or warranty made at any time with respect thereto,* but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. 'Operations' include materials, parts or equipment furnished in connection therewith . . ..

" 'named insured's products' means goods or products manufactured, sold, handled or distributed by the named insured or by others trading under his name, including any container thereof (other than a vehicle), but 'named insured's products' shall not include a vending machine or any property other than such container, rented to or located for use of others but not sold;

" 'ocurrence' means an accident, including injurious exposure to conditions, *which results,* during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured;

. . .

" 'products hazard' includes bodily injury and property damage *arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto,* but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others; . . .." (Emphasis supplied.)

As is to be noted, the policy in question covers what is usually called "products liability" and "completed operations hazard."

The parties apparently agree that the completed roof is the product of the insured, Olson, within the meaning of the policy and that the roof construction is a

completed operation within the meaning of the policy.

Hartford contends that exclusions (l) and (m) eliminate any coverage here as the only damage is to the insured's "product" or "work completed." Olson makes certain contentions with reference to exclusion (k) as it relates to the interpretation of the policy and we will note this later in the opinion.

Olson contends that the burden is upon Hartford to prove facts showing that the risk falls within the exclusions; that the risk is not within the exclusions because the damage is not confined to insured's product or completed work; that the evidence does not show that the damage "arise(s) out of" the insured's work or product; that the phrases "arising out of the product" and "arising out of the work" are ambiguous and susceptible of two constructions, and the one favorable to the insured must be adopted and when this is done the exclusions do not apply; that the damages arise out of reliance upon a false representation made by Olson, i.e., the alleged representations re the qualities of tectum as set forth in Lozier's petition against Olson; and that Hartford's obligation to defend that action must be based upon the allegations of that petition.

The insurer's duty to defend an action against the insured must, in the first instance, be measured by the allegations of the petition against the insured. National Union Fire Ins. Co. v. Bruecks, 179 Neb. 642, 139 N. W. 2d 821. We assume therefore for the purposes of this case that false representations were made.

Let us analyze the language of the insuring provisions of the policy. It is clear that the "damage" which the policy covers must be "caused by an occurrence." If we then relate this language to the allegations of Lozier's petition, we note that the "occurrence" which is the basis of Lozier's claims is the alleged false representation. The "damages" for which recovery is sought is the roof deterioration or damage to the building. (We disregard for the moment the question of whether the damage is

to the insured product or work.) It seems perfectly clear that under the language of the policy the "occurrence," in this case the "alleged representations and reliance" thereon, must have resulted in the physical damage. The deterioration of the panels and the consequent damage clearly was not caused by the representations. It was not caused by reliance upon such representations. It occurred in spite of such representations or reliance thereon. There is obviously no cause and effect relationship between the representations and the deterioration and none is claimed.

The definitions of "completed operations hazard" and "products hazard" both contain the following language: "property damage arising out of . . . reliance upon a representation or warranty." It is apparent the damage does not arise out of reliance on the representations. It occurred not because of reliance on representations, but would have occurred whether or not such representations were made. If Olson made such representations (or warranties) this might make Olson liable to Lozier for the falsity or breach thereof, but the hazard covered is obviously property damage which occurs on account of the reliance as where some other property is damaged or personal injury occurs because of the product failure. If, for example, a representation had been made that the panels had certain weight-bearing characteristics and, not having such qualities, materials resting upon the roof break through damaging persons or property below, the contractor's insurer in this case would be liable for the damage to the property or persons injured, but not for the loss of the panels themselves. The policy provisions in question clearly do not cover the liabilities contained in the usual construction contract warranties.

Olson contends that exclusions (l) and (m) do not apply because the damage is not confined to the product or work, but that there is damage to the premises as a whole by reason of depreciation in its market value

and therefore the exclusions are inapplicable. The evidence is uncontradicted that the defect is confined to the roof itself. No other portion of the building suffered physical damage. It is only physical damage which the policy covers. Further the evidence is uncontradicted that the replacement of the deck and four-ply roof will completely restore the premises both physically and as to market value.

Olson also contends that exclusions (l) and (m) do not apply because the damage does not arise out of the product or work. This contention with reference to the words "arising out of" apparently involves a very subtle distinction. It is that even if the damage is confined to the product yet the damage does not "arise out of" the product or work but out of something outside the product, namely, the heat and moisture from the plant and therefore the exclusion does not apply. It seems clear to this court that Olson's and Lozier's claim is that the damage does arise out of the product, i.e., its inability to withstand heat and moisture from the plant. This is the entire basis of the claim. The strained construction contended for by Olson as against the clear meaning of the language cannot be sustained. Olson cites Aetna Casualty & Sur. Co. v. Ocean Accident & Guar. Corp., 386 F. 2d 413, to the effect that the words: ". . . 'arising out of' means causally connected with, not proximately caused by. 'But for' causation, i.e., a cause and result relationship, is enough to satisfy this provision of the policy.'" We agree with that court's definition of the term, but it does not help Olson. If the allegations of Olson's petition are true, as we must assume they are, then the warping arises out of or is caused by the lack of certain specific qualities in the tectum.

Olson contends that since in exclusions (l) and (m) no reference is made to the words "or reliance on a representation or warranty," and since these words are not referred to in exclusion (k), the damages which result from false representations are not excluded. The

difficulty with the position, however, is that the representations or reliance thereon are not claimed to have caused the damage to the property. What we have already said applies. Exclusions (l) and (m) clearly exclude damage to the product or work. This makes it unnecessary to consider the contention as to exclusion (k).

"A policy of insurance should be considered as any other contract to give effect to the intention of the parties at the time it was made as expressed therein. The language of it should be considered not in accordance with what insurer intended the words to mean, but what a reasonable person in the position of the insured would have understood them to mean." Koehn v. Union Fire Ins. Co., 152 Neb. 254, 40 N. W. 2d 874.

We are not unmindful of the principles that ambiguities must be construed against the insurer and if a policy is fairly susceptible of two constructions and one affords coverage and the other does not then the construction which affords coverage must be adopted. There is no ambiguity in the policy. Complexity is not the same as ambiguity.

Exclusionary provisions such as the ones here involved have been uniformly held by the courts to exclude coverage for damage to the insured's product or work. The language "or reliance on a representation or warranty" is apparently not in the hazard definition clauses in the cases cited, or if it is, it is not mentioned because it is not applicable. This difference, if it exists, does not affect the result for the reasons we have already mentioned. Cases which support the conclusions we reach here are the following: Vobill Homes, Inc. v. Hartford Accident & Indem. Co. (La.), 179 So. 2d 496; Volf v. Ocean Accident & Guar. Corp., 50 Cal. 2d 373, 325 P. 2d 987; Liberty Bldg. Co. v. Royal Indem. Co., 177 Cal. App. 2d 583, 2 Cal. Rptr. 329; Home Indemnity Co. v. Miller, 399 F. 2d 78; McGann v. Hobbs Lumber Co., 150 W. Va. 364, 145 S. E. 2d 476; Kendall Plumb-

ing, Inc. v. St. Paul Mercury Ins. Co., 189 Kan. 528, 370 P. 2d 396; Employers Casualty Co. v. Brown-McKee, Inc. (Tex.), 430 S. W. 2d 21; Bryan Constr. Co. v. Employers' Surplus Ins. Co., 110 N. J. Super. 181, 264 A. 2d 752; Aetna Casualty & Surety Co. v. Harvey W. Hottel, Inc., 289 F. 2d 457; Consumers Constr. Co. v. American Motorists Ins. Co., 118 Ill. App. 2d 441, 254 N. E. 2d 265; Pittsburgh Bridge & Iron Works v. Liberty Mutual Ins. Co., 311 F. Supp. 1079.

In Liberty Bldg. Co. v. Royal Indem. Co., *supra*, the court said in construing exclusions substantially similar to (l) and (m): "This Exclusion means that if the insured becomes liable to replace or repair any 'goods or products' or 'premises alienated' or 'work completed' after the same has caused an accident because of a defective condition, the cost of such replacement or repair is not recoverable under the policy. However, if the accident also caused damage to some other property or caused personal injury, the insured's liability for such damage or injury becomes a liability of the insurer under the policy, and is not excluded. For example, if a contractor builds a house and as a result of an improper mixture of the stucco, water is absorbed into the walls and the stucco cracks and falls off and a child is injured by the falling stucco, the injury to the child would not be excluded under Exclusion (f) but the replacement cost of the stucco would be excluded. Also, if the water absorbed into the walls should reach the interior walls and injure a valuable painting hanging there, the damage to the painting would be recoverable under the policy while the damage to the walls would not."

Olson cites S. L. Rowland Constr. Co. v. St. Paul Fire & Mar. Ins. Co., 72 Wash. 2d 682, 434 P. 2d 725. for its position and we agree that case supports it. There the insured was a general contractor in the construction of a dwelling. The dwelling was substantially damaged by fire because the insured in the course of

construction placed a joist too near a fireplace and the house caught fire and was badly damaged. The insured's policy contained exclusions similar to those we have considered here. That court held, in effect, that only the joist and other portions out of which the accident arose were the insured's product and not the whole house. The insurer was liable for the cost of repairs less whatever was determined finally to be the product. We can find no justification in the policy provisions for the distinction which that court made.

Olson cites Hauenstein v. Saint Paul-Mercury Indem. Co., 242 Minn. 354, 65 N. W. 2d 122. This is one of a number of similar cases in which a supplier's product was incorporated into a structure and because it was defective there was damage to the work into which the product was incorporated. In such case where the policy exclusions were similar to the ones under consideration here, the supplier's insurer was liable for the damage except for the cost of the product incorporated into the other work or products. In the above case, the insured supplied defective plaster to the general contractor. The insurer was liable for labor costs, materials other than the plaster necessary to restore the work, and the loss for use of the building. Dakota Block Co. v. Western Casualty & Surety Co., 81 S. D. 212, 132 N. W. 2d 826, is a similar case. Other such cases are cited in the note at 40 N. Y. U. Law Rev. 1180. See, also, St. Paul Fire & Marine Ins. Co. v. Northern Grain Co., 365 F. 2d 361.

In Shields v. Hiram C. Gardner, Inc., 92 Idaho 423, 444 P. 2d 38, cited by Olson, there was a genuine ambiguity or conflict between the insuring provisions and the exclusions and the court quite properly construed against the insurer. That case is not applicable here.

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

AFFIRMED.

JOHN W. SINNETT AND RONALD E. SINNETT, PARTNERS DOING BUSINESS AS SINNETT BROTHERS CO., APPELLANTS, V. DIAL CONSTRUCTION COMPANY, A CORPORATION, APPELLEE.
188 N. W. 2d 681

Filed July 2, 1971. No. 37882.

1. **Contracts: Damages.** The measure of damages for a breach of contract for specific work at an agreed price is the difference between the stipulated price and the cost of completing the work.
2. **Evidence: Trial: Parties.** Where the evidence is insufficient to sustain a verdict in favor of the plaintiff, it is the duty of the trial court to dismiss the action on the motion of the defendant.

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

Charles Ledwith and Harry Holloway, III, for appellants.

Warren S. Zweiback and Mark L. Laughlin of Monsky, Grodinsky, Cohen, Garfinkle & Zweiback, for appellee.

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

BOSLAUGH, J.

This is an action for breach of contract brought by Sinnett Brothers Co., a partnership, against Dial Construction Company. The trial court dismissed the action at the close of the plaintiff's evidence. The plaintiff appeals.

The evidence shows that on October 5, 1968, the plaintiff and the defendant entered into a contract for the cleaning of apartments that had been constructed by the defendant in Omaha, Nebraska. A written memorandum of the agreement, signed by the parties, provided that it was an "Agreement for complete clean up (ready to move in status) of the new 1 and 2 bedroom apartments at Wentworth and Royal Terrace." The agreement then provided that the plaintiff was to furnish labor only,

described the work to be done, and prescribed the price for the labor.

The plaintiff cleaned 25 apartment units in the Wentworth complex and was paid in full for its work. Apparently, some controversy developed over whether the work was satisfactory. On February 18, 1969, John W. Sinnett, one of the partners, talked with Lewis E. Roberts, one of the defendant's officers, and inquired as to when the additional new apartments would be ready for cleaning. Roberts told Sinnett that the plaintiff would not be allowed to clean the new apartments. The plaintiff then commenced this action to recover the amount that would be due for cleaning an additional 165 apartment units.

The controversy is whether the parties contracted with respect to all apartments that might be constructed at the Wentworth and Royal Terrace sites or only as to apartments that had been completed but not occupied on the date the contract was made. The question cannot be determined by reference to the memorandum agreement and the plaintiff produced no testimony on this issue. Thus, there was a failure of proof on this issue.

There was also a failure of proof in regard to damages. If the contract was one for personal services, the employer was entitled to a reduction for the amount earned from other employment. Ridenour v. Kuker, 185 Neb. 321, 175 N. W. 2d 287. Sinnett testified that he was "at different places all the time" and that it was "very seldom" that he did not have work in the cleaning business. There was no showing as to the amount the plaintiff earned while it might otherwise have been working at the defendant's apartments.

The plaintiff contends that the contract was not one for personal service but was for work that could have been performed by subordinates or employees. Before the plaintiff could recover on this theory, it would have been necessary to show the expense of additional per-

sonnel to perform the work for the defendant while the partnership was performing contracts for other employers. Jewett v. Wilmot, 51 Neb. 700, 71 N. W. 775; Kreamer v. Irwin, 46 Neb. 827, 65 N. W. 885. In the absence of such evidence there was no way to determine the amount of the plaintiff's damages.

Where the evidence is insufficient to sustain a verdict in favor of the plaintiff, it is the duty of the trial court to dismiss the action on the motion of the defendant.

The judgment of the district court is affirmed.

AFFIRMED.

HAROLD A. NELSON ET AL., APPELLANTS, V. R. BELLE ROBERTSON, COUNTY SUPERINTENDENT OF SCHOOLS OF BURT COUNTY, NEBRASKA, APPELLEE.

188 N. W. 2d 720

Filed July 2, 1971. No. 37893.

1. **Statutes.** Statutes pertaining to the same subject matter should be construed together, as if they were one law, and effect given to every provision.
2. **Statutes: Schools and School Districts: Public Officers and Employees.** Statutory plans for the voluntary dissolution of a school district cease to be available when the district becomes subject to a statute requiring its mandatory dissolution by the county superintendent of schools and the provisions of the statute have been invoked.
3. **Statutes.** In construing a statute, effect must be given, if possible, to all its several parts, and no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
4. **Statutes: Schools and School Districts.** The provisions of section 79-486, R. S. Supp., 1969, for the dissolution of school districts may not be invoked until the termination of the fifth school year.

Appeal from the district court for Burt County: MERRITT C. WARREN, Judge. Reversed and remanded.

Bernard T. Pipher and Wilson, Barlow & Watson, for appellants.

Ralph M. Anderson, Jr., and Perry, Perry & Witthoff, for appellee.

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

NEWTON, J.

Plaintiffs challenge the authority of a county superintendent of schools to dissolve a school district and attach its territory to an adjoining district under the provisions of section 79-486, R. S. Supp., 1969. The trial court affirmed the dissolution and merger ordered by the county superintendent of schools. We reverse the judgment of the district court.

Plaintiffs are residents and electors of School District No. 60 of Burt County, Nebraska, a Class I district. Defendant is the county superintendent of schools of Burt County. Prior to March 31, 1970, School District No. 60 had entered into contracts for 5 consecutive years for the instruction of its pupils with School District No. 14 of Burt County, an adjoining Class III district. The five contracts were on file in the defendant's office.

The defendant complied with all the procedural steps required in section 79-486, R. S. Supp., 1969, and on March 31, 1970, prior to termination of the fifth school year, entered an order dissolving School District No. 60 and attaching its territory to School District No. 14. On that date petitions purporting to be signed by approximately 78 percent of the legal voters of School District No. 60 and the board of education of School District No. 62 were on file with the county committee for the reorganization of school districts of Burt County. The petitions requested the dissolution of School District No. 60 and the attachment of its territory to School District No. 62, an adjoining Class I district. No waiver

of the provisions of the statute had been obtained from the State Board of Education.

The questions presented deal with statutory interpretation. Does a county superintendent of schools have authority to dissolve a school district after it has entered into a contract with another school district for the instruction of its pupils for a fifth consecutive year, but before the termination of the fifth school year? Does the filing of petitions with the county committee under section 79-402, R. S. Supp., 1969, suspend the authority of a county superintendent of schools to act under section 79-486, R. S. Supp., 1969?

It will be noted that the statutes of Nebraska provide several methods for the dissolution, merger, and reorganization of school districts. Section 79-402, R. S. Supp., 1969, provides for a voluntary reorganization by petitioning the county committee for the reorganization of school districts. Section 79-426.23, R. S. Supp., 1969, also provides for the voluntary merger of Class I or II districts with other school districts by petitioning the county committee and holding an election. Sections 79-408, 79-408.01, 79-408.02, and 79-420, R. R. S. 1943, provide for the mandatory and involuntary dissolution and merger of school districts which have been reduced in size or area, or in valuation, or have lost population. Section 79-486, R. S. Supp., 1969, provides: "* * * the county superintendent *shall* dissolve and attach to a neighboring district or districts any school district which, for five consecutive years, *contracts for the instruction of its pupils*, * * *." (Emphasis supplied.) This section also requires mandatory action by the county superintendent, with or without the consent of residents of the school district to be dissolved.

It is a cardinal principle that statutes pertaining to the same subject matter should be construed together, as if they were one law, and effect given to every provision. See, State ex rel. Hartman v. Weiss, 181 Neb. 685, 150 N. W. 2d 264; Keller v. State, 184 Neb. 853, 172

N. W. 2d 782. We have before us several statutes providing for the voluntary and involuntary dissolution of a school district. During the years School District No. 60 was contracting with School District No. 14, it could readily have adopted one of the methods for a voluntary dissolution and reorganization. It did not see fit to do so until after contracting for the fifth year.

Had School District No. 60 become depopulated or reduced in area or valuation as contemplated by sections 79-408, 79-408,01, 79-408.02, or 79-420, R. R. S. 1943, it is readily apparent that the Legislature intended it should be mandatory for the county superintendent of schools to dissolve the school district regardless of any belated efforts to effect a voluntary reorganization. In other words, when a situation such as is contemplated by these statutes develops, the mandatory statutes take effect and control the action to be taken to the exclusion of any voluntary system of reorganization which had formerly been available. The same is true with reference to the mandatory dissolution required by section 79-486, R. S. Supp., 1969. The pendency of voluntary proceedings before the county committee cannot and does not serve to delay the mandatory dissolution required by the statute. Statutory plans for the voluntary dissolution of a school district cease to be available when the district becomes subject to a statute requiring its mandatory dissolution by the county superintendent of schools and the provisions of the statute have been invoked.

It remains to be determined whether or not the order of the county superintendent of schools was ineffective because entered prior to termination of the fifth school year. The statute on its face is ambiguous. The provisions of section 79-486, R. S. Supp., 1969, appear to become effective when a school district *"for five consecutive years, contracts* for the instruction of its pupils." (Emphasis supplied.) When has the school district contracted for a fifth year? There can be but one answer.

It so contracted when it executed the contract for the fifth year and filed the contract in the office of the county superintendent of schools. In the absence of a waiver by the State Board of Education, this would indicate that the county superintendent of schools is then compelled to act. The entry into a contract for the fifth year would appear to be the determining and precipitating factor.

There are, however, other provisions of the statute indicating a contrary legislative intent. The statute confers on a district the right to contract for the education of its students in a neighboring district for the full 5-year period. Of necessity this would hold in abeyance the effective date of any order of dissolution until the fifth school year had terminated. Furthermore, the statute contemplates that under certain circumstances a waiver by the State Board of Education of the statutory provision for dissolution may be obtained. True, the county superintendent of schools must recommend the granting of a waiver, but that decision may not be arbitrarily made. There is no restriction as to the time when such a waiver may be obtained nor as to the period which it may cover. It is apparent that if an order of dissolution should be entered, and thereafter a waiver granted, the latter would necessarily supersede the former. These factors are indicative of a legislative intent to defer the mandatory order of dissolution until the close of the fifth school year. To hold that the district may be dissolved immediately after entering into a contract for the instruction of its pupils for a fifth year would nullify these provisions of the statute. In construing a statute, effect must be given, if possible, to all its several parts, and no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. See Balka v. School District No. 53-J, 184 Neb. 706, 171 N. W. 2d 646. The provisions of section 79-486, R. S. Supp., 1969, for the dissolution of school districts may not be invoked until the termina-

tion of the fifth school year. See Bierman v. Campbell, 175 Neb. 877, 124 N. W. 2d 918.

We reverse the judgment and remand the cause to the district court with directions to enter judgment denying dissolution and merger as ordered by the county superintendent.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. JOHN G. GRAY, APPELLANT.
188 N. W. 2d 705

Filed July 2, 1971. No. 37930.

Criminal Law: Guilty Plea. The standard for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.

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

Padley & Dudden, for appellant.

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

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

WHITE, C. J.

The defendant, prosecuted for incest under section 28-906, R. R. S. 1943, challenges the validity of a plea of guilty to the offense and his waiver of the right to counsel. We find these contentions to be without merit and affirm the judgment and sentence of the district court.

The basic standard for determining the validity of a guilty plea was enunciated by this court in State v. Turner, 186 Neb. 424, 183 N. W. 2d 763. In that case, this court stated as follows: "The standard for determining

the validity of guilty pleas is enunciated as follows in North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162: 'The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' "

The failure to appoint counsel for the defendant is challenged. The record reveals that on four different occasions the defendant waived the right to counsel and refused the appointment of an attorney to represent him. He did this twice in writing and twice orally, both before the proceedings in county court on arraignment and in the disposition and sentencing before the district court.

After his arrest the defendant signed a "waiver of right to counsel" which read as follows: "I, John Gray, being over the age of 21, and in sound mind and judgment after being offered a lawyer at the expense of Keith County, Nebraska, to defend me of the charge of incest; and after being advised that such charge constituted a felony, do take these matters into consideration and, therefore, state that I do not wish to be represented by a lawyer and hereby waive my right to counsel." The defendant was brought before the county judge of Keith County and bound over to the district court after telling the county judge that he did not want an attorney or a preliminary hearing. He was properly advised by the county judge as to his right to counsel and that if he could not afford one the court would appoint one and the state would pay for it.

The record reveals that in open proceedings in the district court with the safeguard of the judge conducting the proceedings and observing the defendant, he voluntarily signed the "petition to enter a plea of guilty with right to counsel waived." This petition in pertinent part provided as follows: "(2) I am not represented by an attorney in this matter. However, I understand that I have an absolute right to have an attorney and con-

sult with him in regard to the matter now pending against me and to be represented by counsel in all proceedings in this Court. I further understand that if I do not have funds to employ counsel that the court will appoint competent counsel to represent me and that the fee of such attorney and necessary expense of defense in this court would be paid by the County. * * *

"(4) I believe that I understand the possibility and nature of any defenses I might have in this case. I have been advised that the law provides the following possible punishment, as to Count I, 20 yrs * * *

"(5) I understand that I may, if I so choose, plead 'NOT GUILTY' to any offense charged against me, and that if I choose to plead 'NOT GUILTY' the Constitution guarantees me: (a) the right to a speedy and public trial by jury; (b) the right to see and hear all witnesses against me; (c) the right to use the power and process of the court to compel the production of any evidence, including the attendance of any witnesses in my favor; the right to have the assistance of counsel in my defense at all stages of the proceedings in this court, and if necessary to have the expense of my defense paid by the county; * * *

"(6) I also understand that if I plead 'GUILTY' the court may impose the same punishment as if I had pleaded 'NOT GUILTY', stood trial and been convicted by a jury.

"(7) I declare that no officer or agent of any branch of government (Federal, State, County or City), nor any other person has made any promise or suggestion of any kind to me, or within my knowledge to anyone else, that I would receive a lighter sentence, or probation, or other form of leniency, if I would plead 'GUILTY'. * * *

"(8) With all of the foregoing statements in mind I specifically state to the court that I do NOT want to have an attorney represent me in this matter; I feel that I do NOT want to consult with an attorney about this

case and I specifically WAIVE any and all right to counsel at any and all stages of the proceedings against me in this court, and I respectfully request the court to hear my petition and accept my plea without my being represented by an attorney.

"(9) I know the court will not accept a plea of 'GUILTY' from anyone who claims to be innocent and, with that in mind and because I make no claim of innocence, I wish to plead 'GUILTY' and respectfully request the court to accept my plea, as follows: With respect to the charge in the information, I plead Guilty as to Count I;

"(10) I feel and believe that I understand the statements set forth in the information and in this petition and I declare that I offer the foregoing plea (or pleas) of 'GUILTY' freely and voluntarily and of my own accord."

The record of the proceedings in the district court reveals that the district judge inquired and discovered from the defendant's own lips that he had read the petition; that he understood it; that he was willing to sign it; and that he, in fact, did sign it in front of the district judge in open court. Out of an abundance of caution, the district court then proceeded to examine the defendant herein as to the contents of this document. The verbatim transcript of this proceeding will not be repeated here. It reveals that the defendant completely understood the charge against him, the statute under which he was charged was read to him verbatim, and the terms "licentiously cohabit," "carnal knowledge," and "licentiously" were explained to the defendant and he assured the court that he understood them. He was advised of his right to trial by jury and the necessity for a unanimous verdict of 12 jurors finding him guilty beyond a reasonable doubt. The different elements of the crime were explained to him and the necessity for proof on each one of them, and the defendant indicated that he understood the contends of his statement and

the explanation by the court in full. The court further examined him as to whether he had any questions that he wanted to ask before the plea was accepted. The information was read to him and the defendant, in open court, pleaded guilty to the charge. The court then explained to the defendant as follows: "The Court: By pleading guilty you are telling me that it is true that you did cohabit with Joy Gray, that you did licentiously know her or carnally know her, that you knew that she was your daughter, that you did this in Keith County, Nebraska, on or about the 15th day of September of this year, is that all true?

"The Defendant: Yes, sir."

Challenged with this apparently irrefutable record, the defendant now argues that he was incapable of understanding the proceedings because he only has an eighth grade education. The record reveals that he is 38 years of age, married, father of 9 children, has held responsible jobs in his life, and has held a position as an electronics technician with T.R.W. Company in Ogallala, Nebraska. His job consisted of repairing electronic machines. The record otherwise reveals that the defendant can read and write, and the district court made a general inquiry which revealed that the defendant is possessed with an intelligent general grasp and orientation. For example, on inquiry from the court as to the attitude of his wife towards the commission of this crime, the defendant testified as follows: "THE COURT: The one that you're—I again caution you, you don't have to answer this question, but, is your wife aware of this charge that has been brought against you?

"THE DEFENDANT: Yes, sir.

"THE COURT: What is her attitude?

"THE DEFENDANT: Pure hate."

It is contended by the defendant that the court did not adequately explain the element of proof of penetration, requisite to establishing his guilt to the charge. The court told him that, "By 'carnal knowledge' I am talking

about that you have engaged in carnal copulation, or, what is commonly known as the marital act of sex. Do you understand that?" It would seem obvious, except for the defendant's argument, that a 38-year-old man, appearing in open court, capable of holding a job as an electronics technician, father of nine children, the oldest of whom is 19 years of age, fully understood that penetration was required in the "marital act of sex."

We have examined the other contentions of the defendant and they are without merit. The record reveals that the defendant voluntarily and intelligently waived his right to counsel, and that his plea of guilty represents a voluntary and intelligent choice among the alternative courses of action that were open to him.

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

AFFIRMED.

LEONARD J. MEYER, ADMINISTRATOR, ESTATE OF IVAN A. MEYER, DECEASED, APPELLANT, V. ROY W. LANG, APPELLEE. CONSOLIDATED IN DISTRICT COURT WITH ROY W. LANG, APPELLEE, V. LEONARD J. MEYER, ADMINISTRATOR, ESTATE OF IVAN A. MEYER, DECEASED, APPELLANT.
188 N.W. 2d 692

Filed July 9, 1971. No. 37795.

Evidence: Negligence. The physical facts are sufficient to bar a recovery for negligence only when they indisputably demonstrate that the collision out of which the cause of action arose was not caused by the party charged.

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

Morris J. Bruckner of Marti, O'Gara, Dalton & Bruckner, and Vantine A. James, for appellant.

Healey, Healey, Brown & Burchard and Wellensiek, Morrissey & Davis, for appellee.

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

NEWTON, J.

The basis of this action is an automobile accident. Appellee Roy W. Lang obtained a verdict and judgment in the district court. The principal question on appeal is whether the Lang automobile was on its right half of the highway at the time of the collision. We affirm the judgment of the district court.

The accident occurred near a hillcrest, after dark, on a graveled state highway 27 feet 4 inches in width. Neither party was aware of the other's approach until an instant before the collision. Lang states he took his foot off the accelerator and applied his brakes, but his automobile did not leave any skid marks in its path. The operator of the other vehicle was Ivan A. Meyer who died at the scene of the accident. This car left a skid mark 31 feet 8 inches long extending to the apparent point of collision. This mark was 10 feet 9 inches from the north edge of the highway as was also a gouge mark found 4 feet in front of the skid mark. Lang was going east and Meyer, west. From the point of the gouge mark, the Meyer car left tracks to the northwest and into a ditch. The left track commenced at the gouge mark. Another skip-type skid mark appeared about the width of the space between tires to the north of the 31-foot 8-inch long skid mark. Whether this second skid mark was also made by the Meyer car is disputed and it is not definitely shown to be such.

The Meyer car stopped in the north fence row about 142 feet from the point of collision. The Lang car was apparently stopped in its tracks and swung around until it faced to the west of north. The right-front bumper was 12 feet 4 inches from the north edge of the road and the gouge mark was 4 feet in front of the left front of the Lang vehicle. Photographic exhibits show a short skid mark, possibly 3 feet long, running in a northerly

direction from the right front wheel of the Lang automobile. The collision appears to have occurred between approximately the left 16 inches of the front end of each vehicle. Notwithstanding the evident possibility of other skid marks left by the rear wheels of the Lang automobile as it swung around, there is no evidence of them nor is there any evidence of a skid mark on the south side of the road that could have been made by the Meyer vehicle.

Evidence of Lang and of a passenger in the Meyer car is conflicting as each indicates, although not positively, that he thought the respective vehicle occupied by him was on its right half of the road.

The jury apparently arrived at the conclusion that the Meyer, not the Lang, automobile had crossed the centerline onto the left half of the highway. Appellant insists the physical facts conclusively show this to be erroneous and require reversal. The Lang automobile stopped 1 foot 4 inches across the imaginary centerline and the skid mark of the right front wheel extended some distance farther across the line to the north. If the 31-foot 8-inch skid mark was made by the right wheel of the Meyer car, then the left wheels would have been approximately 2 feet to the south or left of center. It is true that no skid mark was found in that location but that fact is not necessarily conclusive as such marks may be left by a wheel on only one side of an automobile. Likewise, the mark left by the right front wheel of the Lang vehicle obviously resulted after the accident and is not conclusive of its position at the moment of impact. It was stopped and swung around to the northwest when struck. In doing so, it could possibly have been swung across the centerline and left the mark as its momentum continued its swing to the west. In addition, the heaviest debris was found south of the centerline of the highway.

The point at issue is a close one under the facts presented and the circumstances urged by appellant as

ground for reversal present a strong likelihood that the accident may have occurred as appellant contends. Yet, we must bear in mind that the jury is the trier of facts and in a case such as this, we cannot upset the jury's verdict unless the physical facts indisputably demonstrate error. "The physical facts are sufficient to bar a recovery for negligence only when they indisputably demonstrate that the collision out of which the cause of action arose was not caused by the party charged." Riekes v. Schantz, 144 Neb. 150, 12 N. W. 2d 766. See, also, Pruitt v. Lincoln City Lines, 147 Neb. 204, 22 N. W. 2d 651.

Under the circumstances, we do not feel justified in setting aside the verdict of the jury. The judgment of the district court is affirmed.

AFFIRMED.

CECILE A. BENTON, APPELLEE AND CROSS-APPELLANT, V. JOHN M. BENTON, APPELLANT AND CROSS-APPELLEE.
188 N. W. 2d 685

Filed July 9, 1971. No. 37846.

1. **Divorce: Parent and Child: Evidence.** Ordinarily, custody of minor children awarded to their mother in a divorce action will not be disturbed unless by changed circumstances it is affirmatively shown that the mother is an unfit person to have their custody or that the best interests of the children require such action.
2. **Divorce: Parent and Child: Evidence: Appeal and Error.** The trial court's order in child support cases will not be overturned unless there is found an abuse of discretion by the trial court.
3. **Divorce: Parent and Child: Evidence: Courts.** The courts will take judicial notice of the ordinary costs of living and dental, medical, and other familiar costs of living.
4. **Divorce: Parent and Child.** A father is primarily liable for the support of his children independent of the assets of the wife and mother.

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

Lyman & Meister and Howard P. Olsen, for appellant.

Wright, Simmons, Hancock & Hall, for appellee.

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

WHITE, C. J.

The questions in this case are: First, whether the custody of 13-year-old Donna Benton should be taken from her mother and given to the remarried father, John M. Benton, and second, the amount of the child support award.

The father, John M. Benton, has the burden of proof to show by convincing evidence changed circumstances demonstrating the unfitness of the mother, Cecile A. Benton, to have the custody of Donna, or that the best interests of Donna require a change to the father. Van Eperen v. Van Eperen, 182 Neb. 579, 156 N. W. 2d 147; Boyer v. Boyer, 183 Neb. 226, 159 N. W. 2d 546; Packett v. Packett, 184 Neb. 769, 172 N. W. 2d 86. The trial court's finding of Cecile A. Benton's fitness will not be disturbed in the absence of an abuse of discretion. Boyer v. Boyer, *supra*.

It serves no purpose to recite the evidence in detail. Donna is with her mother, a registered surgical nurse in Wichita, Kansas. The mother, who was earning $650 a month at the Scottsbluff hospital, is taking advanced training (anethesiology) to better her income and presently has a reduced income of $250 per month. Despite her work, the mother is with Donna in the evenings and weekends. Donna's school record has improved since being in Wichita, and the record shows she is an intelligent active girl with an interest in music, friends, and normal school activities. The record is devoid of any proof of lack of discipline, immoral or improper environment, or lack of love, food, clothing, or the normal care to which this young girl is entitled. Attempts to prove isolated incidents of unkempt clothing and uncleanliness

are not convincing. Donna is an intelligent and persuasive witness. She wants to be with her mother. She loves her father but he has alienated her with his abusive and obscene reference to her mother, brother, and sister. Cecile has never run her father down. The Wichita welfare department approves and recommends Cecile's home and the care she gives Donna. On the other hand, a similar investigation of John Benton's new home in Ft. Collins, Colorado, is persuasive that the decision to ask for Donna was not Velma's (the present Mrs. Benton) and there is a serious probability of personality conflict, an almost inevitable problem in adjusting to a stepmother. John, the father, has had a serious alcohol problem, and the record is inconclusive as to a recurrence.

Donna has an older married sister, Karla. A large part of the record is devoted to a "collateral" attack on Cecile's care of Karla. The main objections, it seems, are that she went with and married a boy of Mexican descent, married too young, lived in an apartment separate from the mother, and did not go to college. These are all answered by the fact that Karla's husband is a responsible man, working steadily as a foreman on his job, and the marriage is a happy one.

Motivational patterns collateral to the best interests of a child are sometimes discoverable in the acute bitterness of custody disputes. Cecile, here, is obviously a woman of strength and determination. Despite the confining burdens of her home life, she is continuing her training and education and advancing toward a better job. John, with an income of $650 per month, has the financial burdens of a new wife and home. Cecile has had to resort to the court to collect all, or almost all, of the payments she has received. The past due payments of $60 per month are still substantially in default. In fact, the issues as to custody in this case were raised in response to Cecile's latest court effort to collect arrears of child support. We are invited to speculate that John's concern over Donna's food, clothing, and parental guid-

ance was only stimulated by the threat of compulsion to contribute to her care. Cecile's industry and ability in earning up to $650 per month is urged self-righteously, in effect, as a legitimate reason for such conduct and attitude. We have long held that, independent of the assets of the wife, the father is primarily liable for the support of his children. Trautman v. Trautman, 184 Neb. 202, 166 N. W. 2d 415. He may not escape this fundamental human and legal responsibility by remarriage and its consequent financial burdens.

The district court increased the child support award from $60 to $80 per month. Donna is 13 years old now, in junior high school. Judicially noticing the minimal costs of caring for Donna (Trautman v. Trautman, *supra),* under present economic conditions, $80 per month is far less than the actual cost of caring for Donna in any decent and acceptable manner. The burden is still heavy on Cecile, beyond the time and attention required of her. We affirm the increased award of child support in the sum of $80 per month.

Cecile cross-appeals the denial of attorney fees. This case originated as a claim for past due child support. The defeated contentions of John were raised in response. Cecile has had the extra burden of attorney fees to successfully defend these charges. Our cases demonstrate a uniform practice to allow attorney fees to the wife in the absence of unusual circumstances. Trautman v. Trautman, *supra.* Cecile is entitled to attorney fees in district court and in this court. The district court also directed the supervision of the Wichita, Kansas, welfare board over Cecile's home. We find no evidence to support this order and it should be deleted.

The judgment of the district court is modified to allow the plaintiff attorney fees of $300 in the district court and $300 in this court, with costs; the provision as to supervision is deleted; and the judgment as to custody and child support is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. JESSE NARCISSE, APPELLANT.

188 N. W. 2d 715

Filed July 9, 1971. No. 37853.

1. **Criminal Law: Trial: Evidence: New Trial.** Refusal of the trial court in a criminal case to direct the prosecutor to accept an offer by defendant to stipulate to an essential element of the alleged offense ordinarily constitutes no ground for a new trial.
2. **Criminal Law: Trial: Evidence.** Testimony of the alleged victim in a criminal prosecution for sodomy with a human being is insufficient for conviction unless it is corroborated in accordance with rules pertaining to other sexual offenses.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

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

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

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

SMITH, J.

A jury found Jesse Narcisse guilty of sodomy and robbery. He appeals. We note these contentions: (1) The evidence was insufficient to carry the case to the jury. (2) The court denied Narcisse a fair trial in failing to direct the prosecutor to accept a pretrial offer to stipulate to acts of sodomy by someone. (3) The law required corroboration of the victim's testimony, but there was none.

The victim, age 21 and a white student at the University of Nebraska at Lincoln, testified as follows: After a long walk and bowling with a girl friend, the victim was returning afoot and alone to his room at Abel Hall the early morning of June 27, 1970. Near the corner of 22nd and Vine Streets in Lincoln, he was accosted by a black stranger "X," who conversed briefly. The victim,

afflicted with petit mal epilepsy since 1959 and weary, then accepted from "X" the offer of an automobile ride to the hall. Instead "X," accompanied by three other blacks, one of whom was Narcisse, drove to a house unknown to the victim. The automobile was a light color, four-door model, between 1962 and 1965. It might have been a Chevrolet, but the victim was not sure.

"X" induced the victim to enter the house. Narcisse accompanied them. From the end of a brief, harmless conversation in the house to the conclusion of the affair the victim was constantly menaced and fearful of great bodily harm. "X" was wielding a knife. Narcisse was participating willingly. Indeed he began the affair by repeatedly striking the victim around an eye, the sharp blows leaving cuts. "X" and Narcisse proceeded alternately and repeatedly to perpetrate copulation per os and per anus upon the victim. They stole $1 plus from him, and they forced him to write a $35 check payable to "U-Save."

The three men having dressed, "X" drove the automobile to U-Save, a gasoline station. The victim sat on the right front seat and Narcisse on the back seat. At the station the attendant altered the payee to "Crest" because he then was unable to cash the check. An attempt to cash the check at Crest proved unsuccessful. "X" then returned to U-Save where the attendant altered the payee to "U-Save." "X's" purchasing 2 cartons of cigarettes and gasoline enabled the attendant to cash the check. "X", receiving the proceeds, kept $11 and one of the cartons. He gave Narcisse two $5 denomination bills and the other carton. He then drove the victim to Abel Hall at 2:30 a.m., Narcisse remaining in the back seat. When the victim left the automobile, "X" offered him a ring which the victim refused. The victim had been a prisoner of the two blacks approximately 2 hours.

The police were not notified until 10 a.m. At a lineup the victim identified Narcisse, saying he was "almost" certain. Testimony of the victim to times, places, and

descriptions was interspersed with statements such as "I am not sure."

The U-Save attendant, Preston Lapointe, generally corroborated the victim's testimony to events there. The automobile was a 1961 model Impala Chevrolet, four-door, and light brown. Lapointe knew Narcisse by name, and he positively identified him in the lineup as well as at the trial. He observed the victim upon the return from Crest: "He was sitting with his right arm on the panel with the window up . . . sullen. He didn't say nothing. He didn't move. Didn't even look."

Narcisse returned afoot to the station, according to Lapointe, 2½ hours later or at 3 a.m. Having requested Lapointe to call a taxicab, he accepted a ride in an automobile occupied by blacks.

Narcisse, age 19, testified to an alibi. Numerous witnesses, including a white candidate for a Ph.D. degree, the candidate's wife, and a Lincoln police officer corroborated the alibi in part. Times, events, and identification of automobiles, clothing, and Narcisse's hair style were sharply disputed.

Aside from the question of corroboration, the evidence was sufficient for conviction on both counts under State v. Leary, 185 Neb. 76, 173 N. W. 2d 520 (1970).

Narcisse's complaint concerning the prosecutor's refusal to stipulate to sodomy is novel in Nebraska. Stipulations that will shorten a trial without prejudice to the parties facilitate administration. We refer to the policy only to emphasize its irrelevance here. A new trial for defendant in the ordinary case would be a strange sanction for breach of a duty to stipulate.

The acts of sodomy were material to identification of Narcisse by the victim. The evidence may have exposed Narcisse to danger greater than that faced by an accused rapist. See A. L. I., Model Penal Code, 264, 276, and 277 (Tent. Dr. No. 4, 1955). The risk dwindles with better juries and greater understanding of the sexual

deviate. Furthermore, to find reversible error would feed a practice of frittering away public interests in social defense. Refusal of a trial court in a criminal case to direct the prosecutor to accept an offer by defendant to stipulate to an essential element of the alleged offense ordinarily constitutes no ground for a new trial.

The statute defining sodomy does not require corroboration. See § 28-919, R. R. S. 1943. In the absence of statute we have required corroboration of the victim's testimony on charges of rape, assault with intent to commit rape, adultery, incest, and indecent fondling of a minor. See, State v. Gero, 184 Neb. 107, 165 N. W. 2d 371 (1969); Pew v. State, 164 Neb. 735, 83 N. W. 2d 377 (1957); Blue v. State, 86 Neb. 189, 125 N. W. 136 (1910) *(semble);* State v. Witmer, 174 Neb. 449, 118 N. W. 2d 510 (1962); State v. Burton, 174 Neb. 457, 118 N. W. 2d 502 (1962). Under current judicial rules, corroboration generally is sufficient if it covers material facts tending to support testimony of the victim to the principal fact. Pew v. State, *supra.*

"Corroboration requirements are presently common in seduction statutes, occasionally encountered in rape statutes, not usual in legislation dealing with sodomy or indecent exposure. A uniform policy on all sex offenses has a prima facie validity; but Wigmore's attack on *any* such requirement gives one pause in extending it to new areas. In addition, it has been argued that a rigid requirement of corroboration would virtually preclude prosecutions in typical cases of minor sexual assault in dark theaters . . .." A. L. I., Model Penal Code 151 (Proposed Off. Dr., 1962).

On balance testimony of the alleged victim in a criminal prosecution for sodomy with a human being is insufficient for conviction unless it is corroborated in accordance with rules pertaining to other sexual offenses. See Abbott v. State, reversed on rehearing, 113 Neb. 524, 206 N. W. 153 (1925) *(semble).* The evidence tend-

ing to corroborate the victim's testimony was sufficient.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BENJAMIN D. PARROTT, APPELLANT.
188 N. W. 2d 694

Filed July 9, 1971. No. 37855.

Statutes: Intoxicating Liquors: Automobiles: Administrative Law. Tests authorized by statute to be used in determining the alcoholic content present in the body fluid of a person must be performed according to methods approved by the Department of Health.

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

James T. Gleason of Collins & Collins, for appellant.

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

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

NEWTON, J.

The defendant was convicted of driving a motor vehicle while under the influence of intoxicating liquor. Judgment was entered on the verdict and defendant appeals. The question presented is whether or not there was sufficient foundation to sustain the introduction of evidence pertaining to a "breathalyzer" test. We affirm the judgment of the district court.

Tests authorized by statute to be used in determining the alcoholic content present in the body fluid of a person must be performed according to methods approved by the Department of Health. See State v. Fox, 177 Neb. 238, 128 N. W. 2d 576. A police officer testified in detail regarding the testing, preparing, clearing, and use

of the machine which performs the breathalyzer test. He also stated that he had a certificate to operate the machine from the Department of Health, had been instructed in its use by Dr. Bernstein of Creighton University, and was experienced in using it. He was unable to say whether or not he had followed methods approved by the Department of Health, but stated he did follow instructions given by Dr. Bernstein.

Although the issue is a close one, as we view it, the record is sufficient. The witness did testify that he had followed the training and instruction received from Dr. Bernstein and he was authorized to operate the machine by the Department of Health. In addition, Dr. Bernstein testified that in instructing police officers in the use of the machine, he used guidelines set up by the Department of Health. In brief, the officer was instructed in accordance with the methods recommended by the Department of Health; he followed the instructions received, and in so doing, necessarily followed the Department of Health regulations.

The judgment of the district court is affirmed.

AFFIRMED.

SMITH, J., concurring.

The rules of the Department of Health pertaining to breath analysis had been published October 17, 1961, were in force without amendment at the time of trial, and were readily available. Defendant fails to specify any defect in the foundational evidence other than absence of the rules from the record.

The rules were legislative facts. See generally 1 Cooper, State Administrative Law, 175 (1965): 2 Davis, Administrative Law Treatise, § 15.03, p. 353 (1958); Proposed Rules of Evidence for the United States Courts and Magistrates, Revised Draft, Rule 201, Advisory Committee's Note, subdivision (a), 51 F. R. D. 315, at p. 330. The district court may inform itself of legislative facts of agencies under the state Administrative procedures Act by any method it desires. A

party, of course, has a constitutional and statutory right to attack their validity. This court would be mistaken were it to cling to the sporting theory of justice while highway carnage goes on and on.

SPENCER, J., dissenting.

Whether or not the tests actually performed were according to methods approved by the Department of Health on this record is purely speculation and conjecture. I dissent on the basis of State v. Fox, 177 Neb. 238, 128 N. W. 2d 576.

ELMER MINTKEN, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA SURETY COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLEE.
188 N. W. 2d 819

Filed July 9, 1971. No. 37863.

1. **Principal and Agent: Contracts.** An undisclosed principal is ordinarily bound by contracts made on his account by an agent acting within his authority.
2. **Interest: Accounts and Accounting.** A claim is liquidated so as to bear interest where it is determined or readily determinable. It is sufficient if it is ascertainable by computation or a recognized standard.

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

Robert M. O'Gara of Marti, O'Gara, Dalton & Bruckner, for appellant.

George M. Moyer, Jr., of Moyer & Moyer, for appellee.

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

SMITH, J.

Elmer Mintken sued the surety on a grain warehouseman bond for the balance due on an alleged sale of corn by Mintken to the principal. The district court directed

a verdict for Mintken, and it rendered judgment for $4,215, the alleged balance due, without interest to date. Defendant appeals. It contends that the sale was made to one other than the principal. Mintken cross-appeals. He contends that he was entitled to interest from date of delivery of the grain to the principal.

The principal on defendant's bond was Davis Feed and Grain, Inc., of which D. E. Davis was president and his wife, secretary. Davis agreed to purchase Mintken's corn crop of 1966 for $1.27 a bushel. He made no disclosure that he was acting as an agent, and Mintken was unaware of the corporation. Mintken completed delivery of the shelled corn to Davis at the farm on September 13, 1966. Davis deposited it in the corporation elevator without delivering to Mintken or anyone else scale tickets or a warehouseman's receipt. A corporation employee unloaded the grain into the elevator without weighing it. Estimates by Mintken and the sheller fixed the quantity of corn at 4,500 bushels. Davis with his personal check subsequently paid $1,500 on the balance due. The corporation was adjudicated a bankrupt.

D. E. Davis had incorporated his business of trucking, feed salesman, and elevator operator. He was president and his wife was secretary. They destroyed the corporate records after the bankruptcy. The record of her testimony implies that the corporation was an alter ego for Davis and his wife: "Q . . . explain what office you held? A. Secretary, I guess. . . . Q. . . . what became of the corporate records . . .? A. Well, after we took bankruptcy we didn't figure there was any need for the records anymore so they were destroyed. We didn't have any place to keep them so they were destroyed." The evidence was uncontradicted.

An undisclosed principal is ordinarily bound by contracts made on his account by an agent acting within his authority. See, Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315 (1952); Restatement Agency 2d, § 186, p. 420. No exception to the rule existed here.

The bond in suit was conditioned upon the faithful performance by the warehouseman of all provisions of law relating to the storage of grain. The Warehouse Act, sections 88-501 and 88-503(3), R. R. S. 1943, provides: (1) That grain received without payment of the price for 30 days was held in storage and (2) that the depositor was entitled to the protection of the grain warehouseman bond. Regardless of the nature of the transaction in other contexts, Mintken became a person storing grain under the act. The district court correctly imposed liability on defendant for the principal amount of $4,215.

The estimates of the quantity of corn sold by Mintken were correct within 280 bushels. The actions of the Davis corporation blocked an accurate determination of the exact amount.

A claim is liquidated so as to bear interest where it is determined or readily determinable. It is sufficient if it is ascertainable by computation or a recognized standard. Mid States Engineering v. Rohde, 182 Neb. 590, 156 N. W. 2d 149 (1968).

Mintken requests that we modify the judgment to allow interest at the legal rate from date of the last delivery of the corn, September 13, 1966. His claim was not the subject of reasonable controversy within the meaning of Inland Drilling Co. v. Davis Oil Co., 183 Neb. 116, 158 N .W. 2d 536 (1968). We grant the request.

AFFIRMED AS MODIFIED.

G. ROBERT MUCHEMORE, APPELLEE, V. PHILIP E. HEFLIN ET AL., APPELLANTS.
188 N. W. 2d 713

Filed July 9, 1971. No. 37900.

1. **Courts: Equity: Injunction: Damages. A court of equity will not grant injunctive relief unless it be shown that an injury has been or will be suffered by the party seeking such relief.**

2. ———: ———: ———: ———. An injunction will not be granted unless the right is clear, the damage irreparable, and the remedy at law inadequate to prevent a failure of justice.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Reversed and dismissed.

Thomas P. Leary, for appellants.

Larry E. Miller, for appellee.

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

MCCOWN, J.

Plaintiff filed suit for a permanent injunction to require the defendants to dismantle an artificial drain extending from a downspout on defendants' home to a point near the boundary between the two properties. The district court granted the injunction, ordered the removal of the drain, and restoration of the premises to their original condition. We reverse the judgment of the district court.

The residences of the plaintiff and the defendants are located adjacent to each other in a developed area north of Omaha, Nebraska. The defendants' lot is north and west of the plaintiff's lot, and the drainage in the area is from the northwest to the southeast. Approximately 43,000 square feet from three different residential lots, including the defendants, drain naturally onto the plaintiff's lot. The boundary line between those lots and that of the plaintiff ran generally north and south.

On the northeast corner of the defendants' residence, there was a gutter and downspout which carried the run-off from approximately 900 square feet of defendants' roof. In October 1969, the defendants installed a half-tile drain or trough 3 inches deep, and 34 feet long. It was covered with metal strips containing multiple holes, and baffles were installed every 4 feet. The drain ran from the bottom of the downspout to the base of a large tree which grew on the boundary between

plaintiff and defendants. A rock wall extended along the boundary line, running 17 feet south of the tree, and 13½ feet north of the tree. The undisputed testimony was that whatever water reached the end of the drain went both north and south and percolated along the length of the wall.

There is no evidence that any measureable amount of water from the drain ever reached the plaintiff's land. It is undisputed that there had been no damage of any kind from the time the drain was installed until the time of trial, which was almost a year. There was no testimony whatever that the drain installed by the defendants was negligently constructed. There was no qualified testimony that the drain would either increase or decrease the flow or amount of water from the defendants' property to the plaintiff's property. Neither was there any evidence from any qualified witness that the drain would in any reasonable probability cause damage in the future. The plaintiff's evidence may be summarized as reflecting a fear that he might sustain some possible future damage under unusual circumstances. There were no witnesses except the parties themselves, and they were not engineers or drainage experts.

The crucial fact here is that no damage of any kind has occurred, and the evidence is completely speculative as to the cause, as well as the nature and extent, of any possible future damage. It is fundamental that an injunction will not lie if the right thereto is unclear or the damage complained of is nonexistent. State v. Merritt Brothers Sand & Gravel Co., 180 Neb. 660, 144 N. W. 2d 180.

A court of equity will not grant injunctive relief unless it be shown that an injury has been or will be suffered by the party seeking such relief. Muff v. Mahloch Farms Co., Inc., 184 Neb. 286, 167 N. W. 2d 73.

An injunction will not be granted unless the right is clear, the damage irreparable, and the remedy at law

inadequate to prevent a failure of justice. City of Omaha v. Rubin, 177 Neb. 314, 128 N. W. 2d 814.

The record here establishes that the plaintiff has no right to injunctive relief. The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

SMITH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. HAROLD NUSS, APPELLANT.
188 N. W. 2d 708

Filed July 9, 1971. No. 37904.

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

Appeal from the district court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed as modified.

Leo M. Bayer, for appellant.

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

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

SMITH, J.

The question on appeal is whether sentences on guilty pleas to 2 counts against Harold Nuss are excessive. The bill of exceptions incorporates a verbatim record of plea and sentencing hearings, and the presentence report.

Count I charged issuance of an insufficient funds check of $90, and Count II, borrowing of more than $35 by a false statement of financial condition. The court sentenced Nuss to imprisonment: 1 to 2 years on Count I, and 2 to 4 years on Count II, the latter sentence to run consecutively to the former. The maximum statutory punishments were 7 and 5 years respectively.

The loan in Count II had been made in April 1968, for

$3,733.70. The check in Count I was 1 of 10 written in December 1968 and January 1969 for a total of $890. Nuss gave no reason for his conduct, but the checks were written approximately when his offense in Count II was discovered. Nuss then departed for California.

Nuss, age 50 at the sentencing hearing in 1970, had completed 2 years of college. Separation from his wife in 1958 led to divorce in 1960 when their only child was age 15. Nuss' criminal record consisted of 5 prior convictions - 4 misdemeanors and 1 felony. All rested on fraudulent checks. Arrest dates and places of imprisonment were March-April 1956, Nevada; June 1958, Maryland; and 1962, Alaska. On the Alaska conviction Nuss received a discharge after 6 months imprisonment on a 1-year sentence.

At the time of arrest Nuss for 1½ years had been making up displays of fireworks. His employer, a California company, paid him a base salary of $500 a month and a commission of $25 a display. He worked satisfactorily, for the company offered to rehire him. He was not an alcoholic, and no health condition was significant.

This court may reduce the sentence when in its opinion the sentence is excessive. Among the elements, some overlapping, we consider are general and individual deterrence, punishment, and rehabilitation. Each case mainly depends on its own facts.

We modify the 2-to-4 year sentence imposed on Nuss so that it shall run concurrently with the other sentence.

AFFIRMED AS MODIFIED.

LYNCH GUY HOLLAMON, APPELLANT, V. EAGLE RACEWAY, INC., A CORPORATION, ET AL., APPELLEES.
188 N. W. 2d 710

Filed July 9, 1971. No. 37938.

1. **Assumption of Risk: Damages.** Where one, knowing and comprehending the danger, voluntarily exposes himself to it, al-

though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom.

2. ———: ———. One who participates in the sport of stock car racing assumes the ordinary risks of that sport.
3. **Judgments: Evidence: Parties.** Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt, and any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party.
4. ———: ———: ———. Summary judgment is authorized when the moving party is entitled to judgment as a matter of law, it is clear what the truth is, and no genuine issue remains for trial.

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

Johnston, Grossman & Johnston, for appellant.

Cline, Williams, Wright, Johnson & Oldfather, Kevin Colleran, Ginsburg, Rosenberg, Ginsburg & Krivosha, and Frederick H. Kauffman, for appellee Eagle Raceway, Inc.

Joseph J. Cariotto, for appellee Quattrocchi.

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

SPENCER, J.

Plaintiff, Lynch Guy Hollamon, brought this action against Eagle Raceway, Inc., a corporation, and Louis S. Quattrocchi, defendants, for injuries sustained May 1, 1965, at the Eagle Raceway when Quattrocchi's racing car went out of control and catapulted into a spot in the pit area where plaintiff was sitting on a chair beside his own stock car which was participating in the races being held on that date. A motion for summary judgment was sustained, dismissing the action as against Eagle Raceway, Inc., which will hereinafter be referred to as defendant. Plaintiff perfected this appeal. We affirm.

The motion was premised on an anticipatory release executed by the plaintiff, and the assumption of the

risks involved in automobile racing. The order of the district court did not specify the precise basis on which the dismissal was sustained.

The release and waiver of liability agreement was judicially established in Brander v. Eagle Raceways, Inc., a declaratory judgment action docketed at Docket 248, Page 194, in the district court for Lancaster County, Nebraska. That case was an equity action in which a jury was called at plaintiff's request. Among the issues presented was the execution and existence of a waiver and release from liability and indemnity agreement given by plaintiff to defendant. The jury determined that the plaintiff signed the release and waiver of liability and indemnity agreement on May 1, 1965, prior to the races and prior to the accident, naming the Eagle Raceways, Inc., as the party to be released. The waiver of liability and indemnity agreement referred to in the verdict of the jury is the identical release agreement involved herein.

Plaintiff sets out 11 assignments of error. The only issue involved is whether or not the summary judgment was properly sustained and the cause of action properly dismissed as against Eagle Raceway, Inc. The answer depends upon whether there is any merit to either of the two principal issues presented: (1) The effect of the waiver and release agreement; and (2) whether plaintiff assumed the risk of injury.

In consideration of permission to enter upon the track premises operated by the defendant the plaintiff executed the release exonerating the defendant from all liability for injuries, and specifically assuming all risks incident to his presence on the premises. Plaintiff in his reply pleads fraud in the execution of the release. Whether the record sufficiently pierces the plaintiff's allegations is an issue it is not necessary for us to meet herein.

We find that the plaintiff, by participating in the racing program May 1, 1965, as a stock car owner, and entering the pit area as a participant in the racing program,

brought himself within the ambit of the maxim "volente non fit injuria," which means where one, knowing and comprehending the danger, voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom. Munson v. Bishop Clarkson Memorial Hospital, 186 Neb. 778, 186 N. W. 2d 492.

Plaintiff in his brief contends that assumption of risk was not pleaded with sufficient factuality to constitute an issue herein. There is no merit to this contention. The defendant, more than a month before the filing of its second amended answer, had taken plaintiff's deposition exploring the possibility of this defense. Defendant's second amended answer specifically incorporated the defense in paragraph 6. The allegations therein are as follows: "Alleges that any injuries or damages sustained by the plaintiff were the result of risks and dangers which were incidental to the sport of auto racing; that said risks and dangers were known and appreciated by the plaintiff; that the plaintiff voluntarily or deliberately exposed himself to said risks and dangers; and that plaintiff thereby voluntarily assumed the risks of any injuries or damages which he might have sustained." Clearly, this was sufficient to alert plaintiff to the defense of assumption of risk.

The facts, from plaintiff's admissions, show that he was the coowner of an automobile participating in the races on May 1, 1965, sponsored and promoted by defendant. The same day, Louis S. Quattrocchi was driving one of the racing cars entered in the race, and during the course of the first race a malfunction occurred which caused Quattrocchi's automobile to accelerate and to leave the track and catapult into the pit area, injuring plaintiff. The plaintiff's vehicle was parked in a spot reserved for it in the pit area, which was located beyond the oval end of the track which formed the first two turns. Plaintiff's car was parked approximately 150 feet from the

east edge of the track. The pit area was on an incline, and the easternmost or back edge of the pit was about 15 feet above the track, according to plaintiff's estimate. Plaintiff's trailer was parked against the south fence. He was sitting to the rear of his car, almost straight east and perhaps a little south of the roadway leading from the race track to the pit area.

There is no factual dispute that plaintiff knew and appreciated the danger of being in the pit area. Plaintiff's car on previous occasions had generally been in this same area. He was aware that he was directly east of the opening off the first turn while in the pit area. Plaintiff conceded that there are some risks incident to racing, and estimated that if he were to consider racing accidents over the whole racing season they would average one an evening. He stated that he would expect cars to go out of control on occasions, and had considered the possibility of an accident from a car coming into the pit area. While he viewed races from the pits most of the time, he could have gone any place else in the vicinity. There was no restriction confining him to the spot where his car was parked. In this respect, the record is conclusive that the location in the pit area chosen by plaintiff to view the race was the result of his own decision, and was not at the direction or designation of defendant.

One who participates in the sport of stock car racing assumes the ordinary risks of that sport. McCullough v. Omaha Coliseum Corp., 144 Neb. 92, 12 N. W. 2d 639. This includes one present as a participant in the pit area when a car goes out of control and enters the pit area.

Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt, and any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party. Storz Brewing Co. v. Kuester, 178 Neb. 135, 132 N. W. 2d 341, 21 A. L. R. 3d 476. In

this instance, we believe that the defendant has met the test.

It is obvious from plaintiff's admissions that he knew and appreciated the danger inherent in his participation in the racing program; that he voluntarily exposed himself to the danger; and that as a proximate result of the danger he sustained his injuries. There is no material fact issue requiring a jury submission, so summary judgment was properly entered. "Summary judgment is authorized when the moving party is entitled to judgment as a matter of law, it is clear what the truth is, and no genuine issue remains for trial." John Deere Co. v. Van Conet, 185 Neb. 135, 174 N. W. 2d 85.

For the reasons given, the judgment is affirmed.

AFFIRMED.

IN RE FREEHOLDER'S PETITION OF KAUP. FRED B. KAUP ET AL., APPELLEES, V. VIOLET SWEET, APPELLANT.

188 N. W. 2d 891

Filed July 16, 1971. No. 37810.

1. **Statutes: Constitutional Law.** L.B. 1378, Laws 1969, c. 710, § 1, p. 2727, held to be constitutional.
2. **Schools and School Districts: Legislature.** The establishment of school district boundaries is purely a legislative matter.
3. **Schools and School Districts: Statutes: Appeal and Error: Administrative Law.** The courts on appeal cannot deny a change of school district boundaries under a statute enacted after the board entered its order granting a change in school district boundaries under the statute then in effect.

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

Wilson, Barlow & Watson, for appellant.

William W. Griffin, for appellees.

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

CLINTON, J.

This action grows out of an appeal to the district court for Holt County from an order of the board established by subsection (2) of section 79-403, approving a freeholder's petition for change of school district boundaries. The district court affirmed the action of the board except as to one noncontiguous tract.

During the course of the procedures before the board in this matter and three other similar proceedings, appeals in which were tried together in the district court and argued and briefed together in this court, section 79-403, R. R. S. 1943, was amended by the 1969 Legislature. Two amendments are pertinent. L.B. 1378 with the emergency clause became effective August 4, 1969. L.B. 798 with the emergency clause amended L.B. 1378 and became effective September 30, 1969, and then became section 79-403, R. S. Supp., 1969. One of the questions in each of the four cases is which version of the statute is applicable.

In this case the petitioning freeholders requested certain lands described in the petition be transferred from Class I School District No. 22 and Class VI School District No. 25 to Class II School District No. 44. School District 22 is not an accredited grade school district located within accredited high School District No. 25. School District No. 44 is accredited. The petition requesting the transfer was filed with the board August 11, 1969. Notice was published and at a hearing on August 27, 1969, the transfer was approved. It is to be noted that the filing of the petition and the action of the board allowing the transfer all occurred during the time L.B. 1378 was in force.

The appellant makes four assignments of error: (1) Section 79-403, R. S. Supp., 1969 (L.B. 798), should have been held to be controlling; (2) if L.B. 1378 is controlling, then the court should have found that statute unconstitutional because it creates an unreasonable and arbitrary classification in violation of Article III, sec-

tion 18, Constitution of Nebraska, and violates the equal protection clause of the Fourteenth Amendment, section 1, to the Constitution of the United States; (3) the court should have found that the evidence and the petition for transfer did not satisfy the requirments of whichever version of the statute is applicable; and (4) the court should not have permitted more than one tract of land to be transferred. We treat the assignments in order.

As far as is pertinent to the first assignment, the two versions of the statute are as follows: L.B. 1378 provides, ". . . asking to have any tract of land described therein set off from *any* Class I, II or VI school district prior to January 1, 1970, or any time from a nonaccredited Class I, II, III or VI district in which it is situated and attached to an accredited district in the county of the residence of the petitioner or an adjoining county thereto." (Emphasis supplied.) L.B. 798 provides, ". . . asking to have any tract or tracts of land described therein set off from a nonaccredited Class I, II, III or VI district in which it is situated and attached to an accredited district in the county of the residence of the petitioner or an adjoining county thereto."

The basis of the appellant's claim of the applicability in this case of L.B. 798, which was not enacted until after the proceedings on the petition before the board were complete, is not clear. However, it must be that the trial court ought to have applied the later version which was in effect when the case was tried in the district court. This argument must be rejected. The question is one of separation of powers. Establishing school district boundaries is purely a legislative matter. De Jonge v. School Dist. of Bloomington, 179 Neb. 539, 139 N. W. 2d 296; Johnson v. School Dist. of Wakefield, 181 Neb. 372, 148 N. W. 2d 592. In this case the Legislature has delegated that power to the board. The courts can only review the action to see that the statutory requirements are met. The trial court could not act under L.B. 798

as this statute was not in effect when the board acted on the petition. Initial action by the court under L.B. 798 would have been the exercise of a legislative function.

L.B. 1378 authorizes the filing of a petition "asking to have any tract of land described therein set off from *any* Class I, II of VI school district prior to January 1, 1970." (Emphasis supplied.) If, therefore, there is no constitutional impairment of this provision and the other requirements of subsection (2) are met, then both the action of the board and the decree of the court affirming the action of the board were proper.

Is L.B. 1378 unconstitutional because it creates an arbitrary classification or denies equal protection of the law? As already noted, the Legislature has plenary power over the boundaries of school districts. This court has held that the Legislature may act in this matter without the consent or even over the protest of the residents of the districts and may even destroy the districts. De Jonge v. School Dist. of Bloomington, *supra*. It would seem therefore that any claim of a constitutional violation in the exercise of this legislative power must be very clear. In accordance with the usual rule doubts must be resolved in favor of the constitutionality of the statute. Terry Carpenter, Inc. v. Wood, 177 Neb. 515, 129 N. W. 2d 475.

On the matter of classification the argument of the appellant essentially is that granting to landowners, etc., of property on which children of school age reside in Class I, II, and VI districts, accredited or not, the right to transfer land and not permitting the same privilege to persons in Classes III, IV, and V districts (all of which operate both grade and high schools and differ only in population), is essentially arbitrary because, by removing the requirement that the transfer be from a nonaccredited to an accredited district, the Legislature has removed the sole basis which justified the classification and this makes it local or special legislation for the benefit of the individual.

Appellant cites City of Scottsbluff v. Tiemann, 185 Neb. 256, 175 N. W. 2d 74. In that case this court held unconstitutional a statute creating municipal judgeships in a group of cities, the class of which was closed by limiting its operation to those cities having certain population limits as determined by the 1960 census. Assuming but not deciding that the principle there announced may be applicable to school districts, it is not in point here. We take judicial notice of the legislative history of L.B. 1378, as we may. Omaha Nat. Bank v. Jensen, 157 Neb. 22, 58 N. W. 2d 582. That history indicates that the objective of the Legislature in enacting this particular version of section 79-403 was to promote the educational interests of the school children involved by permitting voluntary transfers under appropriate conditions of land on which school children reside to the district where they attend school, and also to encourage and promote the enlargements of districts having a kindergarten through twelfth grade program. It is to be noted that the transfer must still be made to an accredited district. These are certainly legitimate legislative purposes and this court cannot say that the classification complained of will not promote these legitimate aims. McDonald v. Rentfrow, 176 Neb. 796, 127 N. W. 2d 480. In the last-cited case this court said: "A provision in a statute allowing an owner of land in two adjoining school districts to have his property in one district transferred to another district so that his whole unit of property is taxed in the district where his children are to be educated is not an unreasonable classification and is based upon a real and substantial difference in situation." We see no essential difference in the situation in McDonald v. Rentfrow, *supra*, and that involved here.

This and many other courts have said that subject to express constitutional limitations the power of the Legislature over the creation and alteration of school districts is plenary and may be exercised without the con-

sent and even over the protest of the inhabitants of the district. Halstead v. Rozmiarek, 167 Neb. 652, 94 N. W. 2d 37; 78 C. J. S., Schools and School Districts, § 27, p. 663; Board of Education v. Winne, 177 Neb. 431, 129 N. W. 2d 255.

The appellant argues that the time limitation on transfer, to wit: "prior to January 1, 1970," closes the class of persons who may take advantage of the provision. This assumes that no changes could take place in the classes of persons during the period. This is patently a false assumption. Obviously the same arguments could be made in a case where a statute is enacted and shortly thereafter repealed. Such repeal in the absence of a savings clause limits the application of the law to the period of its existence. L.B. 1378 was in fact repealed by L.B. 798 with the emergency clause effective September 30, 1969.

The appellant's contention re the equal protection clause of the United States Constitution is answered by the following language from Hunter v. City of Pittsburgh, 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151, quoted with approval in Halstead v. Rozmiarek, *supra:* " 'Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences.' "

The appellant cited no cases and we have found none in which a statute such as this has been held to have violated any of the constitutional provisions relied upon. We hold that L.B. 1378 was constitutional.

An examination of the record in this case shows that all pertinent requirements of subsection (2) of section 79-403 as amended by L.B. 1378 were complied with.

L. B. 1378 provided for the transfer of "any tract of

land." All the land of the appellees was contiguous except one piece. This the trial court eliminated, apparently holding that to meet the requirements of the statute "any tract" all the land must be contiguous. This we believe was correct. Separation of the land by roads or highways did not constitute more than one tract. See Pischel v. Kreycik, 184 Neb. 332, 167 N. W. 2d 388. The term "tract" imports contiguity. The terms "any land" and "the territory" which were considered in Pischel v. Kreycik, *supra,* did not carry any such implication.

AFFIRMED.

IN RE FREEHOLDER'S PETITION OF CLARK.
FLORENCE G. CLARK ET AL., APPELLEES, V. VIOLET SWEET, APPELLANT.
188 N. W. 2d 889

Filed July 16, 1971. No. 37809.

Schools and School Districts: Statutes: Actions: Administrative Law. A petition to detach land from a school district filed with the board created by section 79-403, R. R. S. 1943, is not a pending action within the meaning of section 49-301, R. R. S. 1943.

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

Wilson, Barlow & Watson, for appellant.

William W. Griffin and Edward E. Hannon, for appellees.

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

CLINTON, J.

This case was tried in the district court for Holt County and argued and briefed in this court together with

Kaup v. Sweet, *ante* p. 226, 188 N. W. 2d 891, and contains similar issues. The result is different, however, because we determnie that L.B. 798, Laws 1969, c. 711, § 1, p. 2732, is the version of section 79-403 which is applicable. In this case the board denied the application and the district court on appeal granted the application. We reverse the judgment of the trial court.

The petitioners sought to transfer land owned by them from Class I School Districts Nos. 22 and 86 and from accredited Class VI School District No. 25, within which districts Nos. 22 and 86 are located, to accredited Class II School District No. 44. This transfer was requested under the provisions of subsection (1) of section 79-403.

Both versions of subsection (1) of section 79-403 contain the following provision: "If the land sought to be transferred pursuant to this subsection *is also situated* in a Class VI school district, the land shall not be set off from such Class VI district unless the requirements of subsection (2) of this section have also been met." (Emphasis supplied.)

In this case, the petition was filed on September 24, 1969, and was denied by the board on October 14, 1969. The petition therefore was filed during the effective dates of L.B. 1378, Laws 1969, c. 710, § 1, p. 2727, but not acted upon until L.B. 798 was in effect.

Subsection (2) of L.B. 798 provides only for transfers from "a *nonaccredited* Class I, II, III or VI district in which" the land is situated. The express language of the act as well as its legislative history clearly indicate that where the Class I district is located within an accredited Class VI district no transfer is permitted unless the requirements of subsection (2) are met. Subsection (2) of L.B. 798 provides for the transfer of land only from a nonaccredited Class VI district. The petitioners themselves asked for transfers both from the Class I districts and the accredited Class VI district. Legislative history of which we take judicial notice also shows that Class I districts located within Class VI districts are

to be treated differently than the Class I district not so located. The legislative purpose seems to have been to protect the territorial integrity of an accredited Class VI district.

The appellant Sweet argues that L.B. 798 is applicable because section 79-403 in all its versions is only a procedural statute and does not grant any substantive rights and that therefore the repeal of L.B. 1378 by L.B. 798 makes the provisions of L.B. 798 applicable. The appellees contend that their "cause of action" accrued with the filing of the petition with the board and that the general savings statute, section 49-301, R. R. S. 1943, preserves their "cause of action" under L.B. 1378.

It seems clear to this court that section 79-403 gives both a right and prescribes procedure. Without section 79-403 in some form the petitioners would have no right at all to affect school district boundaries. The right granted is then substantive as distinguished from adjective or procedural. However, the real question is not so much whether the right given is substantive, but rather is it such a right that once the petitioners have taken the initial steps to implement this right can the Legislature take it away from them?

The term "right" has a "wide scope of meaning in its various legal applications and it has no satisfactory definition or explanation except in connection with some concrete conception of the thing out of which it grows." 77 C. J. S., Right, p. 390. The authorities we have cited in Kaup v. Sweet, *supra,* clearly indicate that the inhabitants of school districts have no vested rights in the territorial integrity of school districts. The power of the Legislature is plenary. Such rights as are granted by the statutes can be terminated by the Legislature up until the time the board had acted and the boundary changes had been actually accomplished. Even then the boundaries could be changed by subsequent legislative act.

The question to be answered then becomes one of de-

termining the kind of right to which section 49-301, R. R. S. 1943, is applicable. What pending actions did the Legislature intend to preserve? Section 49-301, R. R. S. 1943, is as follows: "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."

It is to be observed that the savings act applies to actions pending and causes of action not in suit that have accrued. This court had occasion to construe the general savings act in State ex rel. City of Grand Island v. Union Pacific R.R. Co., 152 Neb. 772, 42 N. W. 2d 867. The court there said: "The word 'actions,' in a legal sense, has been defined as 'a judicial proceeding for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.' Webster's New International Dictionary."

The filing of the petition with the board was not the commencement of a judicial proceeding. When L.B. 1378 was repealed, therefore, there was no judicial proceeding pending. Did the appellees have an accrued cause of action under L.B. 1378 at the time it was repealed? We hold that because of plenary power of the Legislature in school boundary matters they did not. This precise question was before the Supreme Court of Wisconsin in State ex rel. Sanderson v. Amundson, 236 Wis. 523, 295 N. W. 691. The general savings act in that case contained the following language: "or rights of action accrued under such statute before the repeal thereof." In that case the petitioner had made application to have land detached from a school district. The board having jurisdiction had denied the application. The petitioner then appealed to an appeals board as provided by statute. Before the order of the appeals board was entered its function was abolished by the Legislature. The petitioner claimed his cause of action or special proceeding was saved by the general savings statute.

The court held otherwise, saying that the savings statute did not apply and that the proceeding before the appeals board was not an "action" within the meaning of the statute.

Since L.B. 798 was the applicable statute and did not authorize transfers from an accredited Class VI district, the trial court erred in allowing the petition. The judgment of the trial court is reversed and the cause remanded with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

IN RE FREEHOLDER'S PETITION OF WEBER.
EDWARD E. WEBER ET AL., APPELLEES, V. VIOLET SWEET, APPELLANT.
IN RE FREEHOLDER'S PETITION OF BERNT.
DONALD BERNT ET AL., APPELLEES, V. VIOLET SWEET, APPELLANT.
188 N. W. 2d 895

Filed July 16, 1971. Nos. 37811, 37812.

Appeals from the district court for Holt County: WILLIAM C. SMITH, JR., Judge. Reversed and remanded with directions to dismiss.

Wilson, Barlow & Watson, for appellant.

William W. Griffin, for appellees.

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

CLINTON, J.

The result here is governed by the opinion in Clark v. Sweet, *ante* p. 232, 188 N. W. 2d 891.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. DANNY C. HATTEN, APPELLANT.
188 N. W. 2d 846

Filed July 16, 1971. No. 37823.

1. **Constitutional Law: Criminal Law: Federal Practice and Procedure.** The standards applicable to waiver of the right against self-incrimination established by Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, June 13, 1966, do not have retroactive application.
2. **Constitutional Law: Criminal Law: Waiver.** A defendant may waive a constitutional right or guarantee provided it is done knowingly and voluntarily.
3. **Constitutional Law: Criminal Law: Post Conviction: Evidence.** The burden of proof in a post conviction hearing is on the petitioner.
4. **Constitutional Law: Criminal Law: Attorney at Law: Evidence.** An attorney is not to be deemed ineffective to the point of impairment of constitutional rights of client by viewing his advice retrospectively.

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

Paul E. Watts, Michael N. Schirber, Samuel A. Boyer, Jr., and Steve Greenberg, for appellant.

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

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

CLINTON, J.

This is an appeal from a denial by the trial court of a motion under the Post Conviction Act to vacate and set aside a conviction of first degree murder committed in the course of a robbery. We affirm the judgment of the trial court. The petitioner was tried before a jury on July 12 to 19, 1965. A verdict of guilty was rendered and on July 30, 1965, the petitioner, pursuant to the verdict, was sentenced to life imprisonment. In this post conviction proceeding the trial court appointed

counsel and an evidentiary hearing was held.

The motion to vacate is founded upon the allegation of ineffective counsel because such counsel allegedly failed in complete disregard of petitioner's "notice and manifest desire to appeal his conviction and sentence" to perfect an appeal. The motion claims meritorious grounds for appeal, to wit: (a) Evidence used at the trial was obtained as the result of unreasonable searches and seizures in violation of constitutional prohibitions; and (b) the petitioner's constitutional rights against self-incrimination were violated. Mention in this opinion of the specifics of allegations underlying (a) and (b) will be made as required.

At the evidentiary hearing the county attorney to whom a confession had been given was called by the petitioner as a witness. The petitioner himself testified at this hearing and there was offered and received in evidence on behalf of the petitioner a partial transcript, prepared at the request of the petitioner's attorney, of the testimony at the trial before the jury. Chief defense counsel at the trial was called as a witness by the State.

In order to obtain a proper perspective of the issue with reference to the claim of ineffective counsel because of failure to appeal, it is necessary to summarize some of the facts surrounding the trial. The record discloses that the petitioner was taken into custody on the day the offense charged occurred and later that day made a written confession of the crime. Prior to the signing of the confession he signed a waiver in writing as follows:

"WAIVER

"I, Danny Charles Hatten, have been advised by Sheriff Hall of Otoe County, Nebraska, that I am under arrest as a result of the shooting of Ella Snyder of near Talmage, Nebraska, and that there will be charges filed against me in connection with that matter.

"Mr. Hall has advised me that I have a right to remain silent and not answer any questions nor give any information regarding this matter, and that it is my

right not to incriminate myself. He has, also, advised me that I may have legal advice in this matter. All these things Sheriff Hall advised me when I first saw him earlier to day and has again told me at this time.

"I understand my rights to have a lawyer and to remain silent, but I wish to waive them and to give a statement regarding the circumstances of the shooting and other matters.

"I am twenty-five years old and I completed the 11th grade in school and am presently taking a correspondence course to complete my highschool education. I have served six years in the United States Army and got an Honorable Discharge in 1963. I consider myself capable of understanding and considering my rights and I have done so in executing this waiver.

"Signed at Nebraska City, Nebraska, this 27 day of March, 1965, at 7:11 o'clock P.M.

" Danny C. Hatten

"WITNESS:
"Betty Peterson Sharp "

The confession stated, among other things, that the petitioner had been engaged in his current job as a salesman only a few weeks; he had financial problems; on March 26 he received an income tax refund and with a portion of this bought a .22 revolver; "I bought the gun to try to get some money"; on the afternoon of the 26th, he used the gun for target practice and reloaded the gun; and the next morning he started out to sell and the home of a customer where he had earlier been nicely treated and made sales "popped into" his mind. He went to the home. He gave the lady some samples of his wares. She made a purchase and went to get her glasses. When she returned he pulled the gun and forced her to write a check for $200. The victim then went to the other room. He followed her, gun in hand. She sat on the bed and he looked for something to tie her with. She threw a pillow at him. "I thought she

was jumping up and I just pulled the trigger. . . . She laid back on the bed. I knew she had been hit by the way she fell back." He left, taking the check, checkbook, and gift samples with him. He and his car were observed shortly after he left the place. He threw out the checkbook and later the gun. He went to a drugstore, cashed the check, and obtained some money orders. The confesson concluded: "I know this statement can be used as evidence against me and I gave it because I just wanted to get it off my chest."

Trial counsel did not enter the picture until sometime later, apparently on March 29.

The circumstances surrounding the waiver and the confession were thoroughly explored both at the evidentiary hearing and at the trial. This evidence discloses that the actual oral admonitions given petitioner concerning his rights to counsel and to remain silent were more extensive than indicated in the waiver. It discloses he was advised he would be charged with a crime, the nature of which would depend upon the outcome of shooting the victim; that he had the right to an attorney and to remain silent; that anything he said would be reduced to writing and used against him; that all of this took place before interrogation began; that no promise was given nor threats made; and that no coercion of any kind preceded or accompanied the interrogation and confession. The findings of the court as to voluntariness of the confession and that his right to counsel and against self-incrimination were intelligently and voluntarily waived under the constitutional standards prevailing prior to June 13, 1966, the date of the opinion in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, were fully justified. The standards laid down in that case do not apply to convictions prior to that date. Johnson v. New Jersey, 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882.

At the trial the voluntariness of the confession was attacked unsuccessfully.

The trial strategy of counsel was to save the petitioner from the electric chair by admitting the act, but attempting to show, save for the fact that the act was committed in the course of a felony, that the mental state of the petitioner was such that it did not characterize first degree murder and did not deserve the death penalty. This strategy was successful.

The evidence adduced at the evidentiary hearing was primarily directed to the issue of ineffective counsel because of failure to appeal. The evidence on the point clearly justified the trial court's denial of the motion.

Petitioner testified as follows. After trial he discussed the matter of appeal with both his attorneys. They asked him whether he wanted to appeal or not. He told them he wanted to discuss it with his wife and mother. Two days later he notified them he wanted to appeal. He testified that after his confinement in the penal complex he wrote one letter asking the status of his appeal. Counsel did not answer. He wrote a second letter and this time received a reply stating he had signed a waiver of his right to appeal. He did not have copies of his letters or replies. He did not recall signing any papers. He stated he talked to his attorney only twice about the appeal, once during trial and then on July 30, 1965. He stated he never saw him at all between July 19 and July 30, 1965. He acknowledged the signature on the written waiver of appeal as his but he does not know how it got there. The waiver was captioned in the case and is as follows:

"Comes now the defendant herein and on this 17th day of August, 1965, hereby waives his right of appeal in this matter.

"(Signed) Danny C. Hatten

DANNY CHARLES HATTEN"

Counsel who represented the defendant at the jury trial was called by the State. He testified he had five conferences with the petitioner following the jury ver-

dict on July 19, 1965. Those were on July 20, 21, 27, 28, and 30, 1965. This is borne out by copy of the time records submitted in support of claim to the county for services. Counsel testified that at these conferences a new trial and matter of appeal were discussed. The petitioner decided against appeal because the possibility of the death penalty in the event of a second conviction "didn't appeal to the defendant at all." The jury had at one time voted seven to five for the death penalty. On July 27, 1965, the petitioner made his decision not to appeal. After petitioner's commitment to the penal complex, counsel visited him there and it was at this time that the waiver was signed on August 17, 1965. The correspondence with the petitioner was introduced. The first letter from the petitioner was dated August 16, 1966. It did not mention the appeal, but expressed a desire for a conference. This letter was answered on August 19, 1966. The next letter from the petitioner was dated March 25, 1967. It mentioned for the first time the matter of appeal and referred to matters he had found out since being in the penal complex. This letter was answered March 29, 1967.

A defendant may waive a constitutional right or guarantee provided it is done knowingly and voluntarily. State v. Ninneman, 179 Neb. 729, 140 N. W. 2d 5. The evidence clearly supports a knowing and voluntary waiver and the reason appears to have been a desire on the part of the petitioner to avoid the risk of a possible death penalty on retrial. At the time of this waiver the question of a greater punishment on retrial had not yet become a constitutional issue. It was then and apparently still may be a real hazard. North Carolina v. Pearce, 395 U. S. 711, 89 S. Ct. 2072, 23 L. Ed 2d 656; Moon v. Maryland, 398 U. S. 319, 90 S. Ct. 1730, 26 L. Ed. 2d 262. Not yet determined is the question whether a jury may impose a more severe sentence on retrial. Skipper v. Cox, 320 F. Supp. 934.

The petitioner contends that trial counsel should have

appealed and raised the issue of arrest without probable cause and then on retrial would have been in a position to move to suppress, because they were the fruits of an illegal arrest, the confession, and certain documentary evidence taken from the petitioner's car. No evidence was introduced by the petitioner to specifically support the proposition of arrest without probable cause. The testimony in the partial transcript from the trial and that presented at the evidentiary hearing, for reasons already mentioned, namely, the possession and cashing by the petitioner of the victim's check, the purchase of the gun, the presence of the petitioner near the scene shortly after the event, plus the apparent ability of the victim to make a statement before her death, leads to the conclusion that the arresting officers were in possession of information which gave probable cause. Otherwise the almost immediate apprehension of the petitioner cannot be explained. This clearly disposes of the question of illegality of the arrest. State v. Agnew, 184 Neb. 700, 171 N. W. 2d 542; State v. Harding, 184 Neb. 159, 165 N. W. 2d 723; State v. Perez, 182 Neb. 680, 157 N. W. 2d 162.

On question of the validity of search of the automobile in connection with lawful arrest, see State v. Putnam, 178 Neb. 445, 133 N. W. 2d 605, and cases collected at 19 A. L. R. 3d 727, 775. The burden of proof in this post conviction hearing was on petitioner. He did not at the evidentiary hearing explore the circumstances of the search of the auto. The only evidence he introduced on the point was his own statement that he did not consent to the search. If the search was made in appropriate connection with a valid arrest his lack of consent was immaterial. He was arrested at his home. He went there by automobile. It apparently was nearby. More than lack of consent would have to be shown to make the search invalid. All we have said assumes that there was no warrant for the search. The petitioner made no attempt to show that there was no warrant. There is

nothing in the record to indicate that the motions to suppress would probably have succeeded. Petitioner has not shown he was prejudiced. United States v. Maroney, 408 F. 2d 1186.

The petitioner claims his rights against self-incrimination were violated because, after giving his confession, he was taken to the hospital for identification by the victim who was then critically ill from her wounds and who in fact later died. The petitioner's constitutional rights in this connection were not violated. See Stovall v. Denno, 388 U. S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199, where viewing in the hospital was held to be imperative because it was uncertain whether the victim would survive. That case also holds that United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149, and Gilbert v. California, 388 U. S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178, do not have retroactive application. See, also, People v. Gersbacher, 44 Ill. 2d 321, 255 N. E. 2d 429.

The burden of proof was on the petitioner to establish a basis for relief. State v. Rapp, 186 Neb. 785, 186 N. W. 2d 482. The petitioner in this case does not maintain he is innocent. His argument essentially is that if his trial counsel had foreseen future developments of the law and been able to persuade the courts to apply them in petitioner's case, then it would have been much more difficult to convict him or he might possibly have been acquitted. An attorney is not to be deemed ineffective to the point of impairment of constitutional rights of client by viewing his advice retrospectively. Henderson v. Cardwell, 426 F. 2d 150. In addition to waiving his right of appeal the petitioner has also not shown meritorious grounds for an appeal. State v. Myles, 187 Neb. 105, 187 N. W. 2d 584.

AFFIRMED.

IN RE APPLICATION OF PHILIP G. SCHMER. PHILIP G. SCHMER, APPELLANT, IMPLEADED WITH ERNEST LIHS, APPELLEE, V. PAUL ABLER DOING BUSINESS AS CENTRAL TRANSPORT COMPANY, APPELLEE, CLARK BROS. TRANSFER, INC., INTERVENER-APPELLEE.

188 N. W. 2d 696

Filed July 16, 1971. No. 37884.

1. **Statutes: Public Service Commissions: Carriers: Appeal and Error.** The statute governing the transfer of certificates of public convenience and necessity is permissive in terms, not mandatory, and an order of the Nebraska State Railway Commission pertaining to a transfer will be sustained unless it appears to be unreasonable and arbitrary.
2. **Contracts: Public Service Commissions: Carriers: Equity: Specific Performance.** It is generally held that the necessity of obtaining the approval of the Nebraska State Railway Commission to transfer a certificate of public convenience and necessity does not preclude a court of equity from decreeing specific performance of an agreement to transfer such a certificate, subject to approval by the commission.
3. **Contracts: Public Service Commissions: Powers: Carriers.** The Nebraska State Railway Commission does not have authority to determine the validity of contracts for the purchase of certificates of public convenience and necessity.
4. ———: ———: ———: ———. The existence of a dispute regarding the enforceability of a contract for the transfer of a certificate of public convenience and necessity does not deprive the Nebraska State Railway Commission of power to approve the transfer.

Appeal from the Nebraska State Railway Commission. Reversed.

Moyer & Moyer and Nelson, Harding, Marchetti, Leonard & Tate, for appellant.

Ernest Lihs, pro se.

Acklie & Peterson, for appellee.

Kutak, Rock, Campbell & Peters, for intervener-appellee.

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

NEWTON, J.

This is an appeal from orders of the Nebraska State Railway Commission denying an application for transfer of a certificate of public convenience and necessity. The orders of the railway commission are reversed.

One Ernest Lihs, holder of a certificate of public convenience and necessity as a motor carrier, joined with applicant Philip G. Schmer in an application to the railway commissoin for approval of a transfer of the certificate to Schmer. The application states it was made pursuant to an oral agreement for the sale of the certificate to Schmer for a consideration of $2,000. Intervener and protestant objected to the transfer. Subsequently Lihs notified the railway commission he had acted "erroneously" when he joined in the application and no longer desired to transfer the certificate. Thereupon the railway commission denied the application because of the absence of a continuing consent to it by the transferor. Later Lihs asked that his certificate be canceled and an order was entered revoking the certificate. No hearing on the merits of the application was had. Any decision must be based solely on the pleadings filed and the orders of the railway commission.

Where a certificate of public convenience and necessity is not dormant, it may be transferred on approval of the railway commission if the transfer will be consistent with the public interest, will not unduly restrict competition, and if the transferee is fit, willing, and able to perform the service proposed. See Transit Homes, Inc. v. National Trailer Convoy, Inc., 173 Neb. 391, 113 N. W. 2d 638.

The statute governing the transfer of certificates of public convenience and necessity is permissive in terms, not mandatory, and an order of the railway commission pertaining to a transfer will be sustained unless it appears to be unreasonable and arbitrary. See, Transit Homes, Inc. v. National Trailer Convoy, Inc., *supra;* Caudill v. Lysinger, 161 Neb. 235, 72 N. W. 2d 684.

No evidence having been taken, no basis exists for a finding that the elements required for a transfer of the certificate are not present nor was such a finding made. On this record it appears that the transfer might possibly be entitled to approval. To deny it without a hearing ordinarily imports an unreasonable and arbitrary act.

It is generally held that the necessity of obtaining the approval of the railway commission to transfer a certificate of public convenience and necessity does not preclude a court of equity from decreeing specific performance of an agreement to transfer such a certificate, subject to approval by the railway commission. See, Watson Bros. Transp. Co., Inc. v. Jaffa (8th Cir., 1944), 143 F. 2d 340; Lennon v. Habit, 216 N. C. 141, 4 S. E. 2d 339; Royal Blue Coaches, Inc. v. Delaware River Coach Lines, Inc., 140 N. J. Eq. 19, 52 A. 2d 763, 2 N. J. 73, 65 A. 2d 264; 13 Am. Jur. 2d, Carriers, § 93, p. 640.

The railway commission does not have authority to determine the validity of contracts for the purchase of certificates of public convenience and necessity. See Watson Bros. Transp. Co., Inc. v. Jaffa, *supra*.

We have here a situation presented that cannot be resolved by either the railway commission or a court of equity acting alone. Each has exclusive jurisdiction of a portion of the problem presented and one or the other must take the first step toward a solution. A court of equity can require specific performance by the parties but cannot control the discretion of the railway commission. The railway commission can grant permission to the parties to effect the transfer but cannot require it. In this instance, the first step taken by the parties was before the railway commission. The railway commission had jurisdiction to determine the application for a transfer on its merits and if entitled to approval, to enter an order accordingly. This, as previously pointed out, would be an order permissive in nature and the dispute between the par-

ties as to the validity of the contract would remain for resolution by a court of equity. We cannot see that it is material whether the railway commission or the court acts first. The existence of a dispute regarding the enforceability of a contract for the transfer of a certificate does not deprive the railway commission of power to approve the transfer. See Walker v. United States, 208 F. Supp. 388 (1962).

Under the existing circumstances, the order of the railway commission refusing a hearing on the merits of the application, and revoking the certificate pursuant to Lihs' request, are tantamount to, and have the same effect as, a finding that the agreement for a transfer of the certificate is invalid and unenforceable. This is a usurpation of the powers of a court of equity and constitutes an unreasonable and arbitrary disposition of the case.

The question pertaining to approval or disapproval of the application for transfer of the certificate of public convenience and necessity should be determined on its merits, and if approval is given, the interested parties may then apply to a court of equity for a determination regarding the validity of the contract. The orders of the Nebraska State Railway Commission are reversed.

REVERSED.

GARY M. HANSEN, DOING BUSINESS AS HANSEN FLYING SERVICE, APPELLEE, V. ARTHUR J. ABBOTT, APPELLANT.
188 N. W. 2d 717

Filed July 16, 1971. No. 37911.

1. **Accounts and Accounting: Contracts.** An account stated is an agreement, express or implied, between the parties, who have had previous transactions with each other, fixing and determining the amount due from one to the other.
2. ———: ———. In creating an account stated, the minds of the parties thereto must meet and understand that a final ad-

justment of the respective demands of each upon the other is being made.

3. **Accounts and Accounting: Contracts: Debtor and Creditor: Payment.** In the absence of fraud, mistake, or duress, the giving of a check by a debtor to his creditor in payment of his account, without clearly defined reservations, will ordinarily create an account stated.

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

E. A. Anderson and Maupin, Dent, Kay, Satterfield, Girard & Scritsmier, for appellant.

Michael V. Smith, for appellee.

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

NEWTON, J.

This is an action on an account stated. A check, on which payment was subsequently stopped, was given by defendant to plaintiff for the full amount of the account. Plaintiff's motion for a directed verdict was sustained and he recovered judgment. We affirm the judgment of the district court.

Defendant employed plaintiff to repair a severely damaged airplane. There was no preliminary agreement relative to the amount to be charged for making the repairs. The plane was repaired and the adequacy of the repairs is not questioned. An itemized statement of the charges for repairing the plane was forwarded to defendant. Thereafter defendant called at plaintiff's place of business and a copy of the statement was handed to him. Defendant looked the statement over and protested that the bill was "awful high." After some further discussion, defendant made out a check for the full amount of the statement and gave it to plaintiff. A receipt for the payment was then given to defendant. Subsequently defendant stopped payment on the check and this action was instituted.

Defendant has not pleaded, nor does the evidence indicate, that the check was given as the result of fraud, mistake, or duress. It is clear that defendant voluntarily delivered his check with a view to paying his account in full on the basis of the statement tendered, notwithstanding any reservations he may have had regarding its reasonableness. Under such circumstances, does the giving of the check create an account stated?

An account stated is an agreement, express or implied, between the parties, who have had previous transactions with each other, fixing and determining the amount due from one to the other. See, Jorgensen v. Kingsley, 60 Neb. 44, 82 N. W. 104; Bingaman v. Huntley, 139 Neb. 819, 299 N. W. 180.

In creating an account stated, the minds of the parties thereto must meet and understand that a final adjustment of the respective demands of each upon the other is being made. See Martin Milling Co. v. Evelyn, 179 Neb. 31, 136 N. W. 2d 177.

These rules must be applied as of the time of the final transaction between the parties and without reference to a later change of mind by one of them. Without a doubt, the parties, at the time of their discussion and of the exchange of the check and the receipt, were aware that they were then determining, fixing, and settling the amount due with a view to its final adjustment and determination. There was, on the basis of these undisputed facts, positive evidence of an account stated. In Behrens v. Kruse, 132 Minn. 69, 155 N. W. 1065, it is stated: "If the defendant had given a check for this whole account, then under well settled principles this would have operated as an account stated, that is, an agreement that the account was correct. * * *

"While the transaction in this case was not an account stated as to the whole account, it was an account stated as to the items for which checks were given."

Defendant contends that the giving of the check, although admissible as evidence of an account stated, is

not conclusive and will not sustain a directed verdict. Under the circumstances in this case, we must disagree. Defendant was fully aware of all the attendant circumstances and of what he was doing when he gave his check in full payment of the account. There was no mistake, fraud, or similar element involved. The evidence in this respect is clear and undisputed. Certainly, one who freely pays an account, even though he has expressed dissatisfaction with it, does so with the intent to assent to it and with awareness that it is a final determination of all matters involved therein.

In R. L. Polk & Co. v. Strickler (Ill. App.), 107 N. E. 2d 59, it was held: "Where dispute between buyer and seller as to amount to be charged for sale of mailing lists and services was settled by giving of note, the note constituted an account stated and dispute over amount to be charged was no defense to action on note."

In Hammond Lumber Co. v. Richardson Bldg. & Eng. Co., Inc., 209 Cal. 82, 285 P. 851, it is said: "The execution and acceptance of a promissory note for the balance of an unsettled account constitute the stating of an account between the parties."

In Caneer v. Kent, 342 Mo. 878, 119 S. W. 2d 214, it is held: "When parties having mutual matters of account between them growing out of a contract, deliberately account together and state a balance, and the party who, in such accounting is found indebted to the other, pays the debt or gives a written obligation for its payment this settlement is so far conclusive between the parties that it cannot be reopened either at law or at equity, except upon clear proof of fraud, or mistake, or of an express understanding that certain matters were left open for future adjustment." See, also, Wallace v. Crawford, 21 Cal. App. 2d 394, 69 P. 2d 455; Van Voorhis v. Pembroke, 267 N. Y. S. 907, 239 App. Div.143.

The judgment of the district court is affirmed.

AFFIRMED.

RAYMOND S. THOMPSON, III, APPELLEE, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, A BODY POLITIC AND CORPORATE, APPELLANT.
188 N. W. 2d 840

Filed July 16, 1971. No. 37931.

1. **State: Constitutional Law: Colleges and Universities: Domicile.** A state may constitutionally charge a nonresident a higher tuition rate than that charged a resident.
2. ———: ———: ———: ———. An original durational residency requirement to qualify as a resident for tuition purposes is constitutional.
3. ———: ———: ———: ———. A durational residency requirement for tuition purposes does not constitute a penalty upon the exercise of the constitutional right of interstate travel, and such a requirement should be tested under the traditional equal protection standards.
4. ———: ———: ———: ———. A state has the power to define a resident for purposes of tuition differently than a resident for other purposes.
5. **State: Constitutional Law: Colleges and Universities: Domicile: Statutes.** The test of whether a state statute regulating residency for tuition purposes meets the traditional equal protection standards turns on whether a reasonable basis for classification exists that is related to a legitimate objective of the state.
6. **State: Constitutional Law: Statutes.** In the area of economics and social welfare, a state does not violate the equal protection clause merely because the classifications made by its law are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.
7. **Constitutional Law: Statutes.** A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.
8. **State: Constitutional Law: Colleges and Universities: Statutes: Domicile.** In classifying students for the purpose of charging tuition, the State of Nebraska has the legitimate objective of attempting to achieve a partial cost equalization between those persons who have, and those who have not, recently contributed to the state's economy through employment, tax payments, and expenditures within the state.
9. **State: Constitutional Law: Colleges and Universities: Domicile.** The State of Nebraska has a valid interest in providing lower

tuition charges to those who have demonstrated by a continuous residency of 4 months, independent of school attendance, a bona fide intention of remaining as permanent residents and making a greater contribution to the state's economy and future.

10. **State: Constitutional Law: Statutes.** Section 85-502, R. R. S. 1943, is a valid exercise of legislative power to classify, does not infringe upon rights protected by Article I, section 1 or 3, of the Constitution of the State of Nebraska, or the Fourteenth Amendment to the Constitution of the United States, and is valid and constitutional.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Reversed and remanded.

Cline, Williams, Wright, Johnson & Oldfather and Kevin Colleran, for appellant.

Healey, Healey, Brown & Burchard, for appellee.

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

WHITE, C. J.

The basic questions involved here are: (1) Whether it is constitutionally permissible for the State of Nebraska to charge a higher college tuition fee to nonresidents, and (2) whether it is constitutionally permissible to *require* 4 months *continuous* residence independent of attendance at an institution of learning in this state.

Section 85-502, R. R. S. 1943, in pertinent part provides as follows: "A person shall not be deemed to have established a domicile in this state, for the purpose of sections 85-501 to 85-504, unless:

"(1) Such person is of legal age and shall have actually resided in this state continuously for four months with the intention of making this state his or her permanent residence. * * *

"No such person shall be deemed to have established a residence in this state during the time of attendance at such state institution as a student, nor while in attendance at any institution of learning in this state, * * *." (Emphasis supplied.)

The district court held the last (italicized) sentence of section 85-502, R. R. S. 1943, unconstitutional and severable from the other sections of the statute, thus permitting 4 months of student attendance and residence to satisfy the requirements of the statute. We hold the entire statute constitutional and reverse the judgment of the district court.

At the outset, it is important that we narrow the issues in this case. Since the district court's decision, the United State Supreme Court has affirmed the three-judge federal court decision in Starns v. Malkerson, No. 4-70 Civ. 26 (unpublished) (D. Minn., Sept. 22, 1970), affirmed without opinion, 401 U. S. 985, 91 S. Ct. 1231, 28 L. Ed. 2d 527 (1971). Starns is close to the problem we have here, and as we shall see, is controlling of our holding herein. It now appears, from the briefs and oral argument, that the parties are in agreement a state may constitutionally charge a nonresident a higher tuition rate than that charged a resident. It further appears as undisputed that an original durational residency requirement to *qualify* as a resident for tuition purposes is constitutional. Starns v. Malkerson, *supra;* Kirk v. Board of Regents of University of California, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), appeal dismissed, 396 U. S. 554, 90 S. Ct. 754, 24 L. Ed. 2d 746; Landwehr v. Regents of University of Colorado, 156 Colo. 1, 396 P. 2d 451; *Shapiro v. Thompson, 394 U. S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600;* Dandridge v. Williams, 397 U. S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491.

Nevertheless, the impact of Shapiro must be briefly examined. In it are the germinal seeds of this litigation. The limit of its reach illumines the path of our decision. Shapiro held that a state residency requirement for welfare payments penalized a fundamental constitutional right to interstate travel and that such a classification was not justified by any *compelling* state interest. Foreshadowing the questions raised in this case, in a footnote to Shapiro, the court said: "We imply no view of the valid-

ity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel." Answering this same question (Shapiro's impact) the Starns decision, as affirmed by the United States Supreme Court said: "For the reasons above, we conclude that this is not a case of an infringement of a fundamental right and thus the exacting standards of the compelling state interest test have no application. Unlike *Shapiro,* we find the *one-year durational residence requirement challenged here* does not constitute a penalty upon the exercise of the constitutional right of interstate travel and thus the regulations constitutionally should be tested under the traditional equal protection standards." (Emphasis supplied.)

This holding is directly supported in the cases of Kirk v. Board of Regents of University of California, *supra;* Landwehr v. Regents of University of Colorado, *supra;* Clarke v. Redeker, 259 F. Supp. 117 (S. D. Iowa, 1966), affirmed, 406 F. 2d 883 (8th Cir., 1969), cert. denied 396 U. S. 862, 90 S. Ct. 135, 24 L. Ed. 2d 115; American Commuters Assn., Inc. v. Levitt, 279 F. Supp. 40 (S.D.N.Y., 1967), affirmed, 405 F. 2d 1148 (2d Cir., 1969).

At this point it is clear that: (1) The state has the power to classify students on the basis of residency for the purpose of charging tuition, and (2) to enforce such a classification a state has the power to define a resident for purposes of tuition differently than a resident for other purposes.

The rigid requirements of the "Constitutional Right versus Compelling State Interest" test not being applicable, we narrow the problem to an examination of whether the Nebraska requirement of 4 months continuous residency independent of school attendance,

meets traditional equal protection standards. The test becomes, then, whether a reasonable basis for classification exists that is related to a legitimate objective of the state. Harper v. Virginia State Board of Elections, 383 U. S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169; Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369; Creigh v. Larson, 171 Neb. 317, 106 N. W. 2d 187.

Refined analysis and simplistic logic when applied to the practical impact of a particular classification produces many times an appearance of inequality and discrimination. This is especially true close to the borderlines. But the sharpness of the lines drawn does not create an irrationality of classification or an invidious discrimination. This is particularly true when the sword of legislative policy deals with broad problems of economics and social welfare.

Very recently (1970) in upholding a family maximum versus an ascertained need per individual welfare payment provision, the United State Supreme Court said in Dandridge v. Williams, *supra*, as follows: "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the *classification has some 'reasonable basis,'* it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78, 55 L. Ed. 369, 377, 31 S. Ct. 337. *'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical,* it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago*, 228 U. S. 61, 69-70, 57 L. Ed. 730, 734, 33 S. Ct. 441. *'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.'* McGowan v. Maryland, 336 U. S. 420, 426, 6 L. Ed. 2d 393, 399, 81 S. Ct. 1101." (Emphasis supplied.)

In classifying students for the purpose of charging tuition, the state had the legitimate objective of attempting to achieve a partial cost equalization between those persons who have, and those who have not, recently contributed to the state's economy through employment, tax payments, and expenditures within the state. Such an objective is clearly a "reasonable justification" for the discrimination in tuition. Landwehr v. Regents of University of Colorado, *supra;* Clarke v. Redeker, *supra;* Kirk v. Board of Regents of University of California, *supra;* Starns v. Malkerson, *supra;* American Commuters Assn., Inc. v. Levitt, *supra.*

Starns, recently affirmed by the United States Supreme Court, relies on Clarke v. Redeker, *supra,* a 1966 case, and quotes the holding there as follows: "Although there is no way for this Court to determine the degree to which the higher tuition charge equalizes the educational costs of residents and nonresidents, it appears to be a reasonable attempt to achieve a partial cost equalization. The regulation classifying students as resident or nonresident for tuition purposes is not arbitrary or unreasonable and bears a rational relation to Iowa's object and purpose of financing, operating and maintaining its educational institutions."

In Kirk v. Board of Regents of University of California, *supra,* again relied upon in the affirmed Starns case, the California court said: "This state has a valid interest in providing tuition-free education to those who have demonstrated by a year's residence a *bona fide intention of remaining here and who,* by reason of that education, will be prepared to make a greater contribution to the state's economy and future. Accordingly, we hold that the regulation classifying students as residents or nonresidents for tuition purposes *is not arbitrary or unreasonable and bears a rational limitation to California's objective* and purpose of financing, operating and maintaining its many publicly financed educational institutions of higher learning." (Emphasis supplied.)

An examination of the settled law and the authorities reveals a clear path to our decision. The federal and state courts have sustained full 1-year residency requirements for tuition purposes in Colorado, California, Iowa, New York, and Minnesota (Starns affirmed by the United States Supreme Court). Nebraska only requires 4 months of continuous residency independent of school attendance. Both aspects of the statute bear a reasonable relation to a legitimate state objective. They neither penalize nor infringe on a basic constitutional right. Since this is true, the Legislature may reasonably require that the bona fides of the residence be demonstrated independent of the equivocal nature of mere physical attendance by a nonresident at a school in the state. The requirement of 4 months is surely not so burdensome as to forever bar the establishment of residence for other purposes. In fact, it prohibits not at all the establishment of legal residence for other purposes, primarily a matter of intention. Putting it another way, if a state may adopt such a standard or classification, it may also adopt and require reasonable standards to ascertain and enforce the basic legitimate state purpose.

Most students coming to Nebraska soon before registration come here primarily to attend the university. See, Kirk v. Board of Regents of University of California, *supra;* Clarke v. Redeker, *supra;* Starns v. Malkerson, *supra.* Voting, physical presence, acquisition of housing, or payment of taxes may or may not be indicative of the establishment of a legal residence, which is primarily a question of intent. The acquisition of these various indicia, coupled with an actual residence requirement of 4 months in the state while not attending school, obviously comes much closer to proving the bona fides of intent. The Nebraska statute is reasonably designed to protect a legitimate state interest and to secure the bona fides of the claimed intent regarding the residence of a person coming from another state for

the avowed and immediate purpose of securing the educational facilities of this state and eschewing the facilities of the state of his prior residence.

It may be that the statutory standard is occasionally imprecise and imperfect in its application to the relatively unique circumstances of a particular case, such as is claimed for the plaintiff here. However, as we have seen, this cannot be used as the basis for striking down the tuition classification here. A state is not required by the equal protection clause to choose between attacking every aspect of a problem or making no effort at all. It is enough if the regulation has a rational basis and does not invidiously discriminate. Dandridge v. Williams, *supra.* The last sentence of section 85-502, R. R. S. 1943, and the whole statute in its entirety meet that test.

Finally, we do not think that section 85-502, R. R. S. 1943, deprives the plaintiff of due process of law. The Legislature had the power to act on the subject matter; the power was not exercised in an arbitrary, capricious, or unreasonably discriminatory manner; and the section, being definite, has a reasonable relationship to a proper legislative purpose, that is, to distribute more evenly the cost of operating and supporting the state educational institutions between residents and nonresidents attending those institutions. As such, the section is not in conflict with due process of law. Rein v. Johnson, 149 Neb. 67, 30 N. W. 2d 548 (1947), cert. denied, 335 U. S. 814, 69 S. Ct. 31, 93 L. Ed. 369 (1948); Kirk v. Board of Regents of University of California, *supra;* Starns v. Malkerson, *supra;* Clarke v. Redeker, *supra;* Dandridge v. Williams, *supra;* McGowan v. Maryland, 366 U. S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393.

We therefore hold that section 85-502, R. R. S. 1943, is a valid exercise of legislative power to classify, does not infringe upon rights protected by Article I, section 1 or 3, of the Constitution of the State of Nebraska, or the

Fourteenth Amendment to the Constitution of the United States, and is valid and constitutional.

Various other contentions of plaintiff herein are tangential aspects of the fundamental attacks discussed in this opinion. We have examined all of these contentions and find them to be without merit.

The judgment is reversed and the cause remanded to the district court with directions to enter judgment accordingly.

REVERSED AND REMANDED.

McCOWN, J., dissenting.

The plaintiff, his wife, and children have been bona fide residents of, and domiciled in, Nebraska since September 5, 1967. Those facts are undisputed. It is conceded that a state may charge a nonresident a higher tuition fee than that charged a resident; and that the state may also impose an original durational residence and domicile requirement of at least a year upon those persons coming into the state from other places. Virtually all of the cases cited in the majority opinion support those two undisputed propositions.

The critical part of the statute, which is not fully quoted in the majority opinion, provides: "No person shall be deemed to have established a residence in this state during the time of attendance at such state institution as a student, nor while in attendance at any institution of learning in this state, except in the case of a minor who qualifies as provided in this section."

There is no rational or reasonable basis on which an individual who has been a bona fide resident of and domiciled in this state for the initial time period required by statute, should be denied the right to prove that fact simply because he was in attendance at "any institution of learning in this state," whatever that term connotes. The discrimination is compounded when minors, emancipated and unemancipated, are excepted. The applicable principles are set out in Carrington v. Rash, 380 U. S. 89, 85 S. Ct. 775, 13 L. Ed. 2d 675. In that

case, the Supreme Court overthrew a Texas constitutional provision prohibiting any member of the armed forces of the United States from acquiring a voting residence in the State of Texas so long as he remained in service, even though he might have fulfilled the initial residence requirements applicable to others. There is surely no more justification for arbitrary discrimination against students than against persons in military service, nor is there any more rational basis for it. As applied to a tuition case of this kind, see Newman v. Graham, 82 Idaho 90, 349 P. 2d 716, 83 A. L. R. 2d 492.

The 1971 Legislature recognized the fact that there was no justifiable or reasonable basis for such an arbitrary and invidious discrimination and completely amended section 85-502, R. R. S. 1943, and repealed the former section. L.B. 408 of the 1971 Legislative Session completely removed that part of the statute quoted above and found unconstitutional by the district court; changed the initial residence requirement from four months to one year; completely redefined classifications; and set specific, complete, and objective requirements for proof of residence and domicile. That statute represents a thorough, rational, and reasonable approach to the problems involved.

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

MERVIN D. EVANS, APPELLEE, V. METROPOLITAN UTILITIES DISTRICT OF OMAHA, NEBRASKA, ET AL., APPELLEES, IMPLEADED WITH CITY OF OMAHA ET AL., APPELLANTS.
188 N. W. 2d 851

Filed July 23, 1971. No. 37767.

1. **Statutes: Constitutional Law.** In construing an act of the Legislature, all reasonable doubt must be resolved in favor of constitutionality.
2. ———: ———. If a statute is subject to more than one con-

struction, one of which would make that act constitutional and the other unconstitutional, this court is required to adopt the former.

3. **Statutes: Constitutional Law: Evidence.** The burden of establishing the unconstitutionality of a statute is on one attacking its validity, because statutes are presumed to be constitutional and unconstitutionality must be clearly established.
4. **Statutes.** If the words of a statute are of doubtful meaning they will be interpreted in a manner which will best effect the purposes of the enactment in preference to one which will defeat it.
5. **Statutes: Constitutional Law: Legislature: Taxation: Powers: Utilities.** In order to find a provision of the state Constitution restricts the plenary power of the Legislature to tax the Metropolitan Utilities District, the language of the restriction must be clearly applicable.
6. **Legislature: Powers: Utilities.** A public corporation authorized by the Legislature and organized pursuant thereto to carry out functions that have been determined to be for a public purpose and the general welfare of the people is an arm or branch of the government for this purpose and under the plenary control of the Legislature.
7. **Constitutional Law: Legislature: Powers: Taxation.** The state Constitution is not a grant but rather is a restriction of legislative power. The taxing power vested in the Legislature is without limit except as it may be prescribed by the Constitution itself. Consequently, courts can enforce only those limits which the Constitution clearly imposes.
8. ———: ———: ———: ———. In the proper construction of constitutional provisions, limitations or restrictions upon the power of taxation can never be raised by implication, but the intention to impose them must be expressed in clear, unambiguous language.
9. **Constitutional Law: Municipal Corporations: Words and Phrases.** "Municipal corporations," as that term is used in Article VIII, section 7, Constitution of Nebraska, refers to municipal corporations in the strict and legal sense of those which exercise governmental functions, as distinguished from proprietary functions.
10. **Statutes: Constitutional Law.** Legislative Bill 425 (Laws 1967, c. 47, p. 178) determined to be constitutional.

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

Herbert M. Fitle, Schmid, Ford, Snow & Mooney, Manfred Pieck, and John E. Rice, for appellants.

Cecil S. Brubaker, W. L. Strong, and Merlin E. Remmenga, for appellee Metropolitan Utilities Dist.

Foulks, Wall & Wintroub, for appellee Evans.

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

SPENCER, J.

This appeal is from the sustaining of the motion of Metropolitan Utilities District of Omaha, hereinafter referred to as MUD, for summary judgment determining LB 425 (Laws 1967, c. 47, p. 178), to be invalid and unconstitutional. The original action was brought by plaintiff Evans as a ratepayer of MUD for a declaratory judgment of the constitutionality of LB 425, which bill amended section 14-1041, R. R. S. 1943, and created section 14-1042, R. R. S. 1943. For the purposes of this opinion LB 425 will be used to refer to the above sections. LB 425 requires MUD to pay 2 percent of its gross retail sales to the municipalities which it serves.

The City of Omaha, hereinafter referred to as City, demurred to the petition of plaintiff Evans, which demurrer was sustained in the trial court and affirmed on appeal to this court. See Evans v. Metropolitan Utilities Dist., 184 Neb. 172, 166 N. W. 2d 411. The case then proceeded on the cross-petition of MUD, which asked for a declaration of the unconstitutionality of LB 425 and for an injunction as to future payments thereunder. The defendant City filed an answer to the cross-petition of MUD, asserting the constitutionality of LB 425 and setting forth affirmative defenses of ownership, waiver, estoppel, and laches. The district court found LB 425 to be unconstitutional as violative of Article I, section 3, and Article VIII, sections 1 and 7, of the Constitution of Nebraska, as well as of the Fifth Amendment to the

Constitution of the United States. We determine LB 425 to be constitutional, and reverse.

In 1911 City purchased the Omaha Water Company. In 1913 the Legislature created the Metropolitan Water District of the City of Omaha, and gave it the sole management and control of all waterworks systems in Omaha and adjacent areas. See § 14-1001, R. R. S. 1943. Between 1918 and 1920, City acquired a gas plant by condemnation. In 1921 the Legislature extended the powers of the Metropolitan Water District to include the gas plant acquired by City, and changed the name of the Metropolitan Water District to Metropolitan Utilities District. See § 14-1103, R. R. S. 1943. Since that time, although City has never been reimbursed for expenditures made to purchase and improve the waterworks systems or the gas plant, they have been controlled, managed, and operated by Metropolitan Utilities District.

In construing an act of the Legislature, all reasonable doubt must be resolved in favor of constitutionality. Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729. If a statute is subject to more than one construction, one of which would make that act constitutional and the other unconstitutional, this court is required to adopt the former. Peterson v. Hancock, 155 Neb. 801, 54 N. W. 2d 85. In construing a statute, the court must look to the objective to be accomplished, the evils and mischiefs sought to be remedied, or the purpose to be served, and place on it a reasonable construction which will best effect its purpose, rather than one which will defeat it. City of Grand Island v. Ehlers, 180 Neb. 331, 142 N. W. 2d 770. The burden of establishing the unconstitutionality of a statute is on the one attacking its validity, because statutes are presumed to be constitutional; unconstitutionality must be clearly established; and courts will not pass upon a question of constitutionality unless it becomes necessary to do so. If the words of a statute are

of doubtful meaning they will be interpreted in a manner which will best effect the purposes of the enactment in preference to one which will defeat it. Metropolitan Utilities Dist. v. City of Omaha, 171 Neb. 609, 107 N. W. 2d 397.

MUD was created by the Legislature and given the control and management of the water and gas plants owned by City. As we have said on many occasions, the Legislature has plenary power over MUD. "Plenary" is defined in Black's Law Dictionary (4th Ed.), p. 1313, as: "Full, entire, complete, absolute, perfect, unqualified." The Legislature which created MUD could likewise destroy it by transferring its operation to some other public body.

The district court felt that LB 425 was violative of the following portion of Article VIII, section 1, Constitution of Nebraska: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct." We assume the rationale of the court to be that inasmuch as the Constitution says the necessary revenue for governmental subdivisions shall be raised by taxation, either that the payments required to be made by MUD must be considered to be tax payments, or if not tax payments, they could not be required. There is no merit to either of these contentions. As suggested hereafter, we determine the payments are not tax payments. It is quite apparent under the Nebraska Constitution that the state, as well as any of its political subdivisions, does not raise all of its revenue by means of taxation. What the Constitution says is the "necessary revenue," which would be revenue other than that acquired from other sources. There are many other sources of revenue, such as licenses; permits; fees and franchises; money from loans and bond issues; state and federal grants in aid; income from the use, lease, and sale of property; as well as others.

In 1947 the Legislature enacted LB 58 (Laws 1947, c.

21, p. 111), which became a part of section 14-1041, R. R. S. 1943, and which provided for the payment by MUD to City of a sum equal to 1 percent of the book value after deduction of the depreciation of the plant and distribution system in service within the corporate limits of City, such payments to be in lieu of any license, occupation, or excise tax upon MUD.

LB 425 amended section 14-1041, R. R. S. 1943, to provide that MUD shall pay City a sum equivalent to 2 percent of the annual gross revenue derived from all retail sales of water and gas sold within City, but retained the prohibition on City from levying or collecting any license, occupation, or excise tax upon or from MUD. This same provision was extended to all other municipalities in which MUD operates.

The title of LB 425 was as follows: "An Act to amend section 14-1041, Reissue Revised Statutes of Nebraska, 1943, relating to cities of the metropolitan class; to change the amount metropolitan water and utilities districts shall pay to the metropolitan cities in lieu of license, occupation or excise tax; to provide for such payments to other municipalities as prescribed; and to repeal the original section."

MUD never questioned LB 58 and made all payments required thereunder until the amendment of section 14-1041, R. R. S. 1943, by LB 425. It is evident that the Legislature in requiring the payment to City and the other municipalities involved did not consider the payments as a tax but rather as a payment in the nature of a license, an occupation fee, or an excise tax. In this connection, it is important to note that in State v. Cheyenne County, 127 Neb. 619, 256 N. W. 67, we held constitutional provisions relating to property taxes do not apply to excise taxes and a gasoline tax being an excise tax was not in contravention of the inhibition of Article VIII, section 7, Constitution of Nebraska.

The legislative committee statement on LB 425 states that its purpose is to increase the amount MUD now

pays to the City of Omaha; that the original bill provided for a 4½ percent payment of the annual gross revenue derived from all retail sales of gas sold within City; and that by virtue of a compromise effected between MUD and the Omaha city officials, the bill was revised to add gross revenue derived from retail sales of water, and to reduce the percentage to 2 percent of the annual gross revenue.

Article I, section 3, Constitution of Nebraska, is as follows: "No person shall be deprived of life, liberty, or property, without due process of law." This is the same point which is involved in the reference to the Fifth Amendment to the Constitution of the United States. A sufficient answer to the due process objection is embraced in the following from Rein v. Johnson, 149 Neb. 67, 30 N. W. 2d 548: "As related to legislation, it is generally held that due process is satisfied if the Legislature had the power to act on the subject matter, if that power was not exercised in an arbitrary, capricious, or unreasonably discriminatory manner, and if the act, being definite, had a reasonable relationship to a proper legislative purpose. In other words, if an act of the Legislature is authorized and promulgated by the inherent and reserved constitutional powers of the state, and is enforced with due regard to and observance of the rules established by our system of jurisprudence for the security of life, liberty, and property, it is not in conflict with due process of law. 16 C. J. S., Constitutional Law, § 569, p. 1156."

We are dealing with a public service corporation created by the Legislature over which the Legislature has plenary power. "The rights and franchises of a public corporation never become vested rights as against the state, and its charter constitutes no contract in the sense of the constitutional provision which prohibits the obligation of contracts being violated." United Community Services v. The Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576.

If we accept the premise of MUD that LB 425 is a tax, it is still necessary for MUD to point out the express language prohibiting the Legislature from providing it. In order for the state Constitution to restrict the plenary power of the Legislature to tax MUD, the language of the restriction must be clearly applicable. R-R Realty Co. v. Metropolitan Utilities Dist., 184 Neb. 237, 166 N. W. 2d 746.

In Consumers Public Power Dist. v. City of Lincoln, 168 Neb. 183, 95 N. W. 2d 357, we said: "* * * the rule is clear in this state that a public corporation is not subject to taxation * * * *unless the power to tax is expressly conferred by the Legislature which has plenary power over it.*" (Italics supplied.) Here, even if we were to accept MUD's contention that we are dealing with a tax, it would be a tax levied by the Legislature on a public as distinguished from a municipal corporation. MUD, being the creation of the Legislature, may be taxed or even destroyed by the Legislature.

In United Community Services v. The Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576, we said: "A public corporation, authorized by the Legislature and organized pursuant thereto to carry out functions that have been determined to be for a public purpose and the general welfare of the people, is an arm or branch of the government for this purpose and under the plenary control of the Legislature * * *." In that case, we determined that the Legislature, having plenary power over public corporations, could authorize contributions for public purposes. We said: "While the revenues received by the district in the operations of its business are not public funds in the same sense as those derived from taxation, however, they are public funds collected by the district for certain purposes and the Legislature may, under its control of the district, authorize their expenditure for a public purpose beneficial to such district and those immediately interested therein, but

under the restrictions and limitations imposed on the Legislature by the Constitution."

It is important to remember that the state Constitution is not a grant but rather is a restriction of legislative power. The taxing power vested in the Legislature is without limit, except as it may be prescribed by the Constitution itself. State v. Cheyenne County, 127 Neb. 619, 256 N. W. 67. Consequently, courts can enforce only those limitations which the Constitution itself clearly imposes. Elmen v. State Board of Equalization & Assessment, 120 Neb. 141, 231 N. W. 772. In the proper construction of constitutional provisions, limitations or restrictions upon the power of taxation can never be raised by implication, but the intention to impose them must be expressed in clear, unambiguous language. State v. Cheyenne County, *supra*.

The following from United Community Services v. The Omaha Nat. Bank, *supra*, is of interest herein: "As stated in Oxnard Beet Sugar Co. v. State, supra: 'It is the province of the legislature to determine matters of policy. In appropriating the public funds, if there is a reason for doubt or argument as to whether the purpose for which the appropriation is made is a public or a private purpose, and reasonable men might differ in regard to it, it is generally held that the matter is for the legislature; * * *.'"

The Metropolitan Utilities District often has been referred to as a municipal corporation. More accurately it is merely a public agency or public service corporation created to perform purely proprietary functions in the operation of specific public utilities. The distinction is fully delineated in State v. Cheyenne County, 127 Neb. 619, 256 N. W. 67, as follows: "In Bliss v. Pathfinder Irrigation District, 122 Neb. 203, this court, in discussing the essential difference between a public corporation and a municipal corporation, made the following observations: 'Corporations are generally classed as public and private. While a municipality is a public corporation, it does not

follow that every public corporation is a municipality. In 1 Dillon, Municipal Corporations (5th ed.) 58, sec. 31, the term "municipal corporation" is defined as follows: "A municipal corporation, in its strict and proper sense, is the body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purposes of local government thereof. Municipal corporations as they exist in this country are bodies politic and corporate of the general character above described, established by law partly as an agency of the state to assist in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated." A like definition is found in 43 C. J. 65.'

"The definition in 43 C. J. 65, thus referred to with approval, is as follows: 'A municipal corporation is a legal institution formed by charter from sovereign power, erecting a populous community of prescribed area into a body politic and corporate with corporate name and continuous succession and for the purpose and with the authority of subordinate self-government and improvement and local administration of affairs of state. The foregoing definition presents the logical and practical view of a municipal corporation. It is a brief formula embracing the essential elements and excluding other kindred bodies called quasi corporations. It expressly includes: The body of individuals; the sanction of the sovereign; the definite public purpose; the necessary powers; the charter; and the primary incidents of name and succession. *These are the elements generally recognized as essential to a municipal corporation.* It impliedly excludes parishes, counties, townships, and districts, which are almost municipalities and yet are deficient in some of the essential attributes of a municipal corporation; while it expresses the complex nature of the corporation, whereby it acts as a municipium, and also as a local agency for administering and enforcing the laws of the state.'

"This approved and accepted definition excludes counties from the scope of the term 'municipal corporations,' as employed in section 7, art. VIII of the Constitution, which conclusion is reinforced by the conceded fact that, in Nebraska, 'a county does not possess the double governmental and private character that cities do' (State v. Board of County Commissioners, supra), which is one of the essential attributes of a municipal corporation. It therefore follows that, viewing the constitutional provision under consideration as a limitation of or exemption to the sovereign power of taxation, and giving the term 'municipal corporations' employed therein a fair, reasonable interpretation in the light of the principle that such restriction or limitation can never be raised by implication but the intention to impose them must be expressed in clear, unambiguous language, counties are not embraced therein, are not municipal corporations, and are not entitled to the benefits of the restriction and limitation provided by section 7, art. VIII of the Constitution. See City of Ardmore v. State, 32 Pac. (2d) (Okla.) 728." (Emphasis supplied.)

As the above quotation indicates, a municipal corporation historically and in the strict sense is a political subdivision, organized to exercise governmental powers specifically conferred upon it by the state. MUD exercises no strictly governmental functions. Metropolitan Water District was established in 1913. In March of that year this court filed Henry v. City of Lincoln, 93 Neb. 331, 140 N. W. 664, 50 L. R. A. N. S. 174, involving an action for injuries received in the operation of the Lincoln water works. That case held: "It is no part of the duty of a municipal corporation to engage in a purely business or commercial enterprise. When it seeks and obtains from the legislature permission to engage in such an enterprise, its act in so doing is entirely voluntary on its part, and, while engaging in such business, it is acting in a purely private business capacity, outside of its functions and duties as a municipal

corporation, and is bound by all of the rules of law and procedure applicable to any other corporation or person engaged in a like enterprise." See, also, Cook v. City of Beatrice, 114 Neb. 305, 207 N. W. 518, which, citing the above quotation from Henry v. City of Lincoln, *supra,* held that Beatrice, in maintaining an electric plant and selling current, was outside its governmental functions.

We have heretofore determined that MUD exercises no governmental functions. Metropolitan Utilities Dist. v. City of Omaha, 112 Neb. 93, 198 N. W. 858. We there held: "The construction, operation or maintenance of water and gas plants by municipal corporations is not an exercise of governmental functions, but is rather in the nature of a private enterprise for the convenience, advantage or benefit of the municipality, its inhabitants and property owners."

In Nelson-Johnston & Doudna v. Metropolitan Utilities Dist., 137 Neb. 871, 291 N. W. 558, we said that where the Legislature creates a separate municipal corporation to perform the functions of a city usually regarded as proprietary, such municipal agency is just as much engaged in a proprietary function as if the city were doing it itself.

We interpret the term "municipal corporations," as used in Article VIII, section 7, Constitution of Nebraska, to refer to municipal corporations in the strict and legal sense or those which exercise governmental functions as distinguished from proprietary functions. MUD is a public service corporation exercising only proprietary functions and is not included within the meaning of municipal corporations as that term is used in the Constitution.

MUD has not sustained the burden of proving LB 425 to be unconstitutional. The judgment of the district court sustaining the motion for summary judgment is reversed and the cause is remanded with directions to

dismiss the cross-petiton of MUD.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting.

I do not agree that the charge imposed by section 14-1041, R. R. S. 1943, upon the gross revenue of the Metropolitan Utilities District of Omaha is not a tax. It is clearly a revenue measure. To classify it as something other than a tax is to ignore reality and exalt form over substance.

In a number of cases this court has recognized that the Metropolitan Utilities District of Omaha is a municipal corporation in the broader sense of the term. See, Nelson-Johnston & Doudna v. Metropolitan Utilities Dist., 137 Neb. 871, 291 N. W. 558; Keystone Investment Co. v. Metropolitan Utilities Dist., 113 Neb. 132, 202 N. W. 416, 37 A. L. R. 1507; Metropolitan Utilities Dist. v. City of Omaha, 171 Neb. 609, 107 N. W. 2d 397. The Metropolitan Utilities District performs the functions, both governmental and proprietary, that otherwise would be performed by the City of Omaha in regard to a water and gas system. The district has all the powers granted to cities and villages by the general statutes for the construction or extension of waterworks and other utilities. The district fixes all rates including those for services furnished by a private utility, and its rules and regulations have the force and effect of a city ordinance.

The Constitution provides that: "* * * The Legislature shall not impose taxes on municipal corporations, or the inhabitants or property thereof, for corporate purposes." Art. VIII, § 7, Constitution of Nebraska. Such a provision is generally construed to mean that the Legislature has no power to impose a tax for the ordinary purposes for which taxes are levied by municipalities. 16 McQuillin, Municipal Corporations (3d Ed.), § 44.18, p. 58: Metropolitan Utilities Dist. v. City of Omaha, 112 Neb. 93, 198 N. W. 858; 62 C. J. S., Municipal Corporations, § 194, p. 352.

By section 14-1041, R. R. S. 1943, the Legislature has imposed a tax on one municipal corporation for the benefit of another with no restriction upon the use of the revenue. The statute compels a diversion of utility revenue for non-utility purposes. Its effect is to impose a levy for city purposes upon the ratepayers of the district without regard to their place of residence.

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

STATE OF NEBRASKA, APPELLEE, V. RUDOLPH KLATT, APPELLANT.
188 N. W. 2d 821

Filed July 23, 1971. No. 37850.

1. **Statutes: Criminal Law: Incompetent Persons: Trial.** Under the provisions of section 29-1823, R. S. Supp., 1969, a determination that an accused is mentally incompetent to stand trial is effective as of the date of the determination and operates to suspend criminal proceedings until the disability is removed. It does not invalidate prior proceedings nor constitute a finding or determination that the accused was insane or incompetent to stand trial or assist in his own defense at any prior time.
2. **Evidence: Criminal Law: Incompetent Persons: Trial.** A defendant in a criminal action is presumed sane until the defendant produces evidence of insanity at the time of the alleged crime. If any evidence is produced, the State must then sustain the burden of producing evidence that the defendant was sane at the time of the crime beyond a reasonable doubt.
3. ———: ———: ———: ———. The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support the findings.
4. **Evidence: Criminal Law: Incompetent Persons: Trial: Appeal and Error.** The question of whether the legal sanity of the accused has been established beyond a reasonable doubt at trial is one of fact to be determined by the trial court when a jury has been waived. Where there is substantial evidence to sustain the finding of the trial court on that issue, that determination will not be disturbed on appeal.
5. **Venue: Criminal Law: Incompetent Persons: Trial: Appeal and Error.** A motion for change of venue in a criminal case is ad-

dressed to the sound discretion of the trial court and its ruling will not be disturbed unless a clear abuse of such discretion is shown.

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

Thomas L. Anderson and Leo F. Clinch, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

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

MCCOWN, J.

The defendant, Rudolph Klatt, was charged with murder in the first degree. He waived trial by jury and the case was tried to the court. He was found guilty of murder in the second degree and sentenced to life imprisonment. All issues on appeal involve factual and legal determinations as to the defendant's sanity. We affirm the conviction and sentence.

Some background facts, as well as a summary of the expert testimony on the issue of sanity, may be useful. On Saturday evening, April 29, 1967, at about 10 p.m., the defendant and his favorite half-brother had engaged in a public altercation and scuffle outside a tavern in Anselmo, Nebraska. The defendant left the scene of the scuffle and went to Broken Bow with a woman companion. The half-brother and his wife returned to their rural home near Anselmo and went to bed. They were awakened at about 5 a.m. the next morning by the defendant knocking on their door. Both the half-brother and his wife went to the door. The defendant had a shotgun with him. The brothers engaged in a brief conversation. The defendant started to walk away, then turned and shot his half-brother and killed him. He was arrested some 4 or 5 hours later while eating breakfast in a restaurant in a nearby village.

The evidence was extremely contradictory as to the

extent of the defendant's drinking and intoxication during the entire weekend in which the shooting occurred. The only witness who testified that the defendant was intoxicated at any time close to the time of the murder was his woman companion, who testified at the trial that he was intoxicated at 2 a.m. the morning of the shooting. Several witnesses testified as to the defendant's activities on the evening before, or from the time of the actual shooting to the time of his arrest a few hours later. All of them testified that the defendant did not appear to be intoxicated.

The defendant had been in and out of mental hospitals on several occasions between early 1963 and the fall of 1966. Most of these occasions involved alcoholism. On at least some of the occasions, the doctors noted either schizophrenic tendencies or a paranoid state.

The record of criminal proceedings involving the defendant spanning the period from the spring of 1963 to November of 1966, reveals charges varying from menacing threat, to shooting with intent to kill, interspersed with intoxication, and driving offenses involving intoxication or suspension of driver's license.

Following the defendant's arrest on the morning of April 30, 1967, he was charged with first degree murder. On May 5, 1967, a preliminary hearing was held at which time the defendant was represented by counsel employed by him. He was bound over to the district court and on May 11, 1967, he was arraigned in the district court with his attorney present. The defendant stood mute and the court entered a plea of not guilty. In August of 1967, upon applications both by the defendant and by the State, the court ordered the defendant transferred to Omaha, Nebraska, for psychiatric examination. In Omaha, he was examined by Dr. J. Whitney Kelley and Dr. William F. Giles, psychiatrists; and Dr. Donald Fauth, a psychologist, conducted certain psychological testing.

On October 24, 1967, following the reports of the psy-

chiatrists and their answers to interrogatories submitted by the court, the district court entered an order finding that the defendant was presently incompetent and incapable of standing trial for the charge of murder. The court ordered that further proceedings be deferred and committed the defendant to the State Hospital in Lincoln, Nebraska.

On October 28, 1969, after more than 2 years treatment in the Lincoln State Hospital, two psychiatrists, one of them the acting clinical director of the hospital, advised the district court that the symptoms of whatever psychosis the defendant showed at the time of admission had been in remission for at least 12 months. In answer to specific interrogatories, the two psychiatrists by affidavit certified that the defendant understood the nature and object of the proceedings against him and the possible sentences if convicted. They also certified that he was mentally competent to consult and confer with and aid counsel in a reasonable and rational manner in preparation for trial and at the trial itself. Counsel for the defendant was appointed on October 31, 1969. On December 30, 1969, the district court set March 10, 1970, as the trial date, and ordered the defendant transferred to the Penal and Correctional Complex. On February 13, 1970, the district court granted the request of defendant's counsel to have the defendant transferred to the Hall County jail in Grand Island, Nebraska, for the convenience of counsel in conferring with defendant in preparation for trial. In May 1970, the court overruled pleas in abatement based upon contentions that the defendant's preliminary hearing and arraignment in 1967 were invalid because of the defendant's alleged mental incompetence at that time. A motion for a change of venue was also overruled and thereafter the defendant waived the right to a jury trial. After continuances, the case ultimately was tried to the court without a jury commencing on July 27, 1970, and concluding July 31, 1970.

There was no question but that the defendant shot and killed his half-brother. The only real issues involve his legal responsibility for that act and his mental competence to stand trial. Therefore, we must briefly review the testimony with respect to the defendant's mental condition. Dr. Kelley and Dr. Giles, the psychiatrists who had examined the defendant in September of 1967, testified for the defendant. Based upon the results of Dr. Fauth's psychological testing and their own examinations, they were both of the opinion that the defendant was a chronic paranoid schizophrenic. In their opinions also, he was unable to distinguish between right and wrong at the time of the homicide and was not legally responsible for his acts because of mental illness. They also both felt that drinking would aggravate his condition and that his chances of cure were rather remote. Neither of them had seen the defendant between the time of their examinations in September of 1967 and the time of trial in July of 1970, although they had reviewed his hospital and testing records. Dr. Giles testified that he had not reexamined the defendant, did not have knowledge of his current condition, and, therefore, could give no opinion as to how he was at the time of trial.

Dr. Leonard Woytassek, clinical director of the Lincoln State Hospital, testified for the State. It should be noted here that Dr. Woytassek had first examined the defendant in September of 1965, when the defendant had been committed to the hospital for treatment. At that time, Dr. Woytassek determined that during drinking episodes, the defendant might develop periods of psychosis but that he was not generally psychotic at that time. Dr. Woytassek also had supervised the defendant's treatment for more than 2 years following the commitment in the fall of 1967. He testified that the conclusion of the hospital staff in February 1968, was that the defendant was suffering from a schizophrenic reaction, paranoid type, at that time. He classified the

defendant's schizophrenia as mild. He also testified, in response to a hypothetical question which included a fair summary of all of the facts disclosed by the evidence, that in his opinion the defendant was mentally capable of knowing and understanding his actions and of distinguishing between right and wrong on April 30, 1967. Dr. Woytassek agreed that if the defendant had consumed a substantial amount of alcohol, it would interfere with his ability to know right from wrong and his ability to understand what he was doing.

The defendant contends that the preliminary hearing and arraignment in 1967 were invalid. That contention assumes that the court order of October 1967, finding the defendant mentally incompetent to stand trial at that time, was also final and retroactive, and made all prior proceedings invalid. It is also argued that the opinions of the two psychiatrists which formed the foundation for that order conclusively established the defendant's insanity for all purposes, both at the time of the commission of the crime and thereafter.

It is essential at this point to note that mental unsoundness in a person accused of crime may give rise to two entirely distinct legal problems. One involves the responsibility of the defendant to be punished, which is determined under the legal test of responsibility. The other involves the defendant's mental condition, not at the time of the act charged, but at the time of the criminal proceedings—whether he is presently sane enough to plead or be tried. The tests of responsibility—capacity to know right from wrong, are not the tests which are applied in determining competency to plead or stand trial. The test of mental competency to plead or stand trial is whether the defendant has capacity to understand the nature and object of the proceedings against him; to comprehend his own condition in reference to such proceedings and to make a rational defense. See Weihofen, "Mental Disorder as a Criminal Defense," C. 9, pp. 429 to 431.

Under our statutes, a determination of competence to plead or stand trial is made by the court under the provisions of section 29-1823, R. S. Supp., 1969. That procedure was followed here. The section provides in part: "If at any time prior to trial it appears that the accused has become mentally incompetent to stand trial * * *. The judge of the district court * * * shall have the authority to determine whether or not the accused is competent to stand trial. * * * Should he determine after a hearing that the accused is mentally incompetent to stand trial he shall order the accused to be committed to a state hospital for the mentally ill until such time as the disability may be removed."

The effect of that statute is simply to suspend criminal proceedings during the time an accused is determined by the court to be mentally incompetent to stand trial. The statute neither validates nor invalidates any prior proceedings, nor does the determination of incompetency to stand trial operate retroactively. The court clearly has authority to terminate the suspension in its sound discretion by the same method of factual determination. See State v. Anderson, 186 Neb. 435, 183 N. W. 2d 766.

In this case, defendant's counsel in 1970, prior to trial, obtained a complete transcript of the preliminary hearing held in 1967. At the arraignment held in 1967, the defendant stood mute and a plea of not guilty was entered. Under such circumstances, we find no possibility of prejudice to the defendant's rights. It should be noted too that the affidavits of the two psychiatrists from the Lincoln State Hospital in November of 1969, that the defendant was then competent to stand trial stand uncontraverted. Neither was there any affirmative evidence that the defendant was not competent to stand trial nor assist in his own defense in 1970. In the absence of a showing of the invalidity of the psychiatrists' certificates, the court was required to proceed with the trial in the suspended criminal proceedings.

Under the provisions of section 29-1823, R. S. Supp.,

1969, a determination that an accused is mentally incompetent to stand trial is effective as of the date of the determination and operates to suspend criminal proceedings until the disability is removed. It does not invalidate prior proceedings nor constitute a finding or determination that the accused was insane or incompetent to stand trial or assist in his own defense at any prior time. The pleas in abatement were properly overruled.

The vital question in this case is whether or not the State sustained its burden of establishing that the defendant was sane at the time of the commission of the crime. In this state, a defendant in a criminal action is presumed sane until the defendant produces evidence of insanity at the time of the alleged crime. If any evidence is produced, the State must then sustain the burden of producing evidence that the defendant was sane at the time of the crime beyond a reasonable doubt. See Thompson v. State, 159 Neb. 685, 68 N. W. 2d 267.

The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support the findings. See State v. Newson, 183 Neb. 750, 164 N. W. 2d 211. The issue here is whether there was sufficient evidence to support the verdict of the court sitting in place of a jury. The rule in this jurisdiction is that the primary test is the capacity of the defendant to distinguish between right and wrong at the time of the commission of the offense. The testimony of the psychiatrists in this case was directly contradictory on that issue. So was the evidence as to whether or not the defendant was intoxicated. The testimony of witnesses to the crime itself, as well as to the defendant's appearance and conduct before and after the actual time of the murder, gave the court, sitting as a jury, the opportunity to relate that testimony to the experts' testimony that was given in the case. The question of whether the legal sanity of the accused has been established beyond a reasonable doubt at trial

is one of fact to be determined by the trial court when a jury has been waived. Where there is substantial evidence to sustain the finding of the trial court on that issue, that determination will not be disturbed on appeal. See State v. Newson, *supra*.

The defendant also contends that his motion for a change of venue was improperly denied, and it is asserted that the defendant waived a jury trial as a result of the denial of that motion. The evidence was not convincing that the defendant was unable to obtain a fair trial in Custer County. It should be noted also that trial was finally held more than 3 years after the crime was committed. In any event, the defendant waived a jury trial, and under those circumstances, a refusal to grant a change of venue would not be prejudicial. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed unless a clear abuse of such discretion is shown. State v. Losieau, 174 Neb. 320, 117 N. W. 2d 775.

The remaining assignments of error are without merit. The judgment of the district court is affirmed.

AFFIRMED.

JACK WEBBER ET AL., APPELLANTS, V. CITY OF SCOTTSBLUFF, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.
188 N. W. 2d 214

Filed July 23, 1971. No. 37858.

1. **Annexation: Statutes: Municipal Corporations.** Under section 16-117, R. R. S. 1943, a city of the first class may annex contiguous lands which are urban or suburban in character and which are not agricultural lands rural in character.
2. **Statutes: Municipal Corporations: Ordinances.** Section 16-317, R. R. S. 1943, does not require that the minutes of the meeting of a city council embody the full text of an ordinance enacted thereat, but it is sufficient if the minutes set forth fully the

proceedings thereon showing that statutory requirements were complied with and the ordinance is sufficiently identified therein and is preserved in a volume or file separate from the minutes.

3. **Annexation: Statutes: Municipal Corporations.** The power of a city to annex lands contiguous to the city and which are within the boundaries of a rural fire protection district is not limited by the provisions of section 31-766, R. R. S. 1943.

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

Wright, Simmons, Hancock & Hall, for appellants.

Loren G. Olsson, for appellee.

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

CLINTON, J.

This is an action for a declaratory judgment to have an annexation ordinance of the City of Scottsbluff declared void. The land which is the subject of the annexation is a 43-acre tract owned by the plaintiffs. The date of passage and approval of the annexation ordinance was June 29, 1967. The district court found generally for the defendant City and dismissed the petition of the plaintiffs. The plaintiffs appeal. We affirm the judgment of the trial court.

The plaintiffs make the following claims: (1) The tract annexed was not urban or suburban in character but was agricultural and rural and was therefore not subject to annexation; (2) the annexation ordinance was not validly enacted nor was its enactment proved by competent evidence; and (3) the defendant City failed to comply with the provisions of section 31-766, R. R. S. 1943, relative to the change of boundaries of the City and the rural fire protection district in which the annexed territory was included and that the annexation was void for this reason. Some of these contentions involve subsidiary claims of error in the judgment of the trial court and these will be treated later in the opinion

in connection with the assignment of error to which they pertain.

The evidence shows that the tract in question is trapezoidal in shape but approaches a rectangle of the following approximate dimensions, to wit, 1,015 feet in width and about 1,500 feet in average depth. The record establishes that on the date of the passage and approval of the ordinance, the following uses existed: A shopping center occupied an area of 175 by 425 feet in the southwest corner of the property. The southeast corner was occupied by a large furniture store and a farm supply store with a separate office building for the supply store and a separate heating plant for the furniture store. Approximately two-thirds of the way northerly on the east boundary was a furniture warehouse. Near it and slightly further north was an empty caretaker's residence. In the northeast corner of the tract was the residence of the plaintiffs, an unused chicken house, a shelter for horses, and a barn. The owner kept three horses as a hobby and to show and to pull a wagon to make furniture deliveries as advertising for the store. The barn also housed furniture delivery trucks. North of the shopping center about one-third of the way along the west boundary of the tract was a small metal building, the use of which is not shown. On the tract was a 50,000-gallon water tower with well, well house, and water distribution system by means of which water was furnished to the buildings and businesses on the tract. The remainder of the 43 acres was unoccupied and pasture crop was raised thereon for the horses.

All the southern and eastern boundaries and the south approximately 1,400 feet of the western boundary were contiguous to existing city limits at the time of annexation. The tract was abutted on the south by a city street and on the west by a paved street or road for its full length. The area immediately south of the tract was commercially developed. The area immediately to the west was platted and developed residentially. On

the east side of the tract a strip 150 feet wide was occupied by a church and a National Guard armory. Further east were platted tracts used for ball diamonds, and still further east was a high school with accompanying facilities. Immediately to the north of the tract was a highway and beyond that a tract of land used for farming. Further to the northeast and north were platted residential areas partially developed but not included within the city limits. Also located to the north were medical offices and a site for a developing hospital. To the northwest and separated by undeveloped land were a hospital and an access street, both of which were included within the city limits.

City water mains were located adjacent to the tract. A city sewer crossed the tract from east to west about 730 feet from the southern boundary on an easement provided by the plaintiffs.

The record fully supports the implicit finding of the trial court that the tract in question was urban or suburban in character and not agricultural land rural in character. Plumfield Nurseries, Inc. v. Dodge County, 184 Neb. 346, 167 N. W. 2d 560; Voss v. City of Grand Island, 186 Neb. 232, 182 N. W. 2d 427; Sullivan v. City of Omaha, 183 Neb. 511, 162 N. W. 2d 227.

The plaintiffs contend the annexation ordinance was not validly enacted nor proved by competent evidence because the ordinance does not appear in toto in the minutes of the various meetings pertaining to its adoption.

The record shows that the annexation ordinance bears title as follows:

"An ordinance of the City of Scottsbluff, Nebraska finding that a certain tract of land situated in the Southeast Quarter (SE¼) of Section Fourteen (14), Township Twenty-two (22) North, Range Fifty-five (55) West of the Sixth Principal Meridian, in Scotts Bluff County, Nebraska, contiguous and adjacent to the corporate limits of the City, is urban or suburban in character and not

agricultural land which is rural in character; re-annexing to, and re-including within the corporate limits of, the City such tract of land; providing that the inhabitants shall be entitled to the rights and privileges, and be subject to the laws, ordinances, rules and regulations of the City, and receive substantially the benefits as other inhabitants thereof; repealing ordinance No. 1555 and all conflicting ordinances and parts of ordinances but saving existing rights, claims, causes of action and defenses of the City; separating and saving provisions not declared invalid; and providing for recording and publication of the ordinance, and for its effective date."

The record, as evidenced by minutes duly certified by the city clerk, shows that at a meeting of the city council of the City of Scottsbluff on June 26, 1967, an ordinance, the title of which was as above set forth, was introduced by a member of the council. The minutes of that meeting further state: ". . . and the ordinance was fully and distinctly read. Thereupon Councilman Wallace moved that the ordinance be designated as Ordinance No. 1650, that the title thereof be approved and that the ordinance be made a part of the records in the office of the City Clerk, which motion was seconded by Councilman Thomas." The minutes then show that the vote on the motion was called and recorded and the motion was, by the mayor, declared to have been carried. Certified copies of minutes of the council of a meeting held on June 28, 1967, show the following: "Ordinance No. 1650, which had been fully and distinctly read at the regular meeting of the City Council held on June 26, 1967, was fully and distinctly read a second time."

Minutes of the meeting of the city council on June 29, 1967, show the following: "Councilman Kramer moved that the statutory rule requiring ordinances to be fully and distinctly read on three different days be dispensed with, in the case of Ordinance No. 1650, which motion was seconded by Councilman McKibbon. The

Yeas and Nays were called, the vote was as follows: 'YEAS' Thomas, Kramer, McKibbon, Wallace. 'NAYS' None. Absent: Donahue. The motion to suspend the statutory rule having been concurred in by three-fourths of all members elected to the Council, was, by the Mayor, declared to have carried.

"Whereupon Ordinance No. 1650 was read by title a third time. Councilman Wallace moved that the ordinance be passed as read, which motion was seconded by Councilman Thomas. The Mayor stated: 'The question is, "Shall Ordinance No. 1650 be passed and adopted?" ' The Yeas and Nays were called, and the vote was as follows: 'YEAS' Thomas, Kramer, McKibbon, Wallace. 'NAYS' None. Absent: Donahue.

"The passage and adoption of the ordinance having been concurred in by a majority of all members elected to the Council, the ordinance was, by the Mayor, declared passed and adopted; and the Mayor, in the presence of the Council, signed the ordinance, and the Clerk attested its passage and affixed his signature and the seal of the City thereto."

The record shows that the ordinance signed by the mayor and certified by the city clerk is the original ordinance which was filed in the office of the city clerk following the meeting of June 26, 1967. In the office of the city clerk the original of the ordinance is maintained and fastened in a special file or binder which is kept for the purpose and from which it may be removed by releasing the fastener in some way. In a separate set of ordinance volumes is kept and maintained a true copy of each ordinance, accompanied by a certificate of passage and publication executed by the city clerk and the original of an affidavit of publication by the printer. This is true of annexation ordinance No. 1650, as the record shows.

The plaintiffs contend that any ordinance is not validly enacted unless it is set forth in the minutes in full when introduced and each time it is read, that this is a re-

quirement of the Nebraska statutes and cases, and that minutes of the council so kept are the only acceptable proof of the enactment of the ordinance.

Section 16-317, R. R. S. 1943, provides in part: "The city clerk shall have the custody of all laws and ordinances, *and* shall keep a correct journal of the proceedings of the council." Section 18-1701, R. R. S. 1943, pertains to the matter of destruction of public records and contains this proviso: ". . . the provisions of this section shall not apply to the minutes of the clerk *and* the permanent ordinance and resolution books. . . ." (Emphasis supplied.)

Section 19-1102, R. R. S. 1943, provides in part: "It shall be the duty of every village or city clerk in every village or city having a population of not more than forty thousand to prepare and publish the official proceedings of the village or city board, council or commission within thirty days from any meetings of said board, council . . .." Section 16-405, R. R. S. 1943, provides for the publication of ordinances.

Section 16-403, R. R. S. 1943, provides for the proof of ordinances by the certificate under the seal of the city, for receipt in evidence of ordinances when published in book or pamphlet form purporting to be published by authority of the city; that passage, approval, and publication of an ordinance is proved by a certificate under the seal of the clerk; and that when ordinances are published in book or pamphlet form purportedly under the authority of the city council the same need not be otherwise published.

The opinion of this court is that the above statutes clearly contemplate the keeping of separate ordinance records apart from the minutes and do not require the embodiment of the whole of an ordinance in the council minutes. We hold the procedure followed by the City of Scottsbluff met the requirements of the statutes above referred to. This conclusion is supported by the following cases: Mayo v. Inhabitants of Town of West

Springfield, 260 Mass. 594, 157 N. E. 700; Pure Milk Producers & Distributors Assns. v. Morton, 276 Ky. 736, 125 S. W. 2d 216; Meacham Contracting Co. v. Kleiderer, 146 Ky. 441, 142 S. W. 720.

The following cases cited by the plaintiffs are not in point, to wit: Beverly Land Co v. City of South Sioux City, 117 Neb. 47, 219 N. W. 385 (involving failure to record the vote on the passage of an ordinance); Wightman v. City of Wayne, 144 Neb. 871, 15 N. W. 2d 78 (involving complete absence from the minutes of authorization of a contract); Barrett v. Hand, 158 Neb. 273, 63 N. W. 2d 185 (re modification of minutes by parol evidence); City of Valentine v. Valentine Motel, Inc., 176 Neb. 63, 125 N. W. 2d 98 (involving a nunc pro tunc attempt to supply by parol records of the passage of a resolution under section 17-407, R. R. S. 1943, and the calling and recording of the vote thereon).

The plaintiffs contend that section 16-117, R. R. S. 1943, which authorizes cities of the first class to annex contiguous territory, does not apply to cities such as Scottsbluff which have adopted the city manager plan. This contention is without merit.

Plaintiffs contend that the action of the council in the enactment of the ordinance was void because the city council was not properly elected and qualified; the city councilmen did not furnish proper bond; and that other city officials or employees, to wit, treasurer, clerk, and water commissioner were not validly holding the positions because not elected. We find these contentions to be without merit.

In June of 1965, the city council of the defendant City refused the request of the plaintiffs to zone the property as commercial. Plaintiffs contend that this estops the defendant City from annexing the tract. Plaintiffs cite no authority. We hold their contention in this respect is without merit.

Plaintiffs contend that annexation was improper and void because the benefits to be anticipated by annexa-

tion already existed and were available either by means furnished by plaintiffs themselves or by subdivisions of government other than the defendant City. This contention is without merit.

Plaintiffs contend that the city council of the defendant City had not taken action to implement the annexation by furnishing the benefits as required by law. The evidence does not sustain the contention. If it did the remedy of the plaintiffs would be other than by a declaration of the invalidity of the ordinance. See Plumfield Nurseries, Inc. v. Dodge County, *supra*, at p. 350.

The record discloses that the annexed tract was at the time of the adoption of the annexation ordinance within the boundaries of the Scottsbluff fire protection district and that section 31-766, R. R. S. 1943, had not been complied with. Plaintiffs contend that the annexation is not effective until this has been done. The language of section 31-766, R. R. S. 1943, clearly indicates that annexation is to be accomplished before compliance with section 31-766, R. R. S. 1943, is required. The validity of the council action in annexation in no way depends upon compliance with section 31-766, R. R. S. 1943. This court in effect so held in City of Bellevue v. Eastern Sarpy County S. F. P. Dist., 180 Neb. 340, 143 N. W. 2d 62.

The judgment of the trial court is affirmed.

AFFIRMED.

HIRAM SCOTT COLLEGE, A CORPORATION, ET AL., APPELLANTS, V. INSURANCE COMPANY OF NORTH AMERICA, APPELLEE.
188 N. W. 2d 688

Filed July 23, 1971. No. 37868.

1. **Insurance: Limitations of Actions: Statutes.** A fire insurance policy legally issued in this state which contains a provision requiring suit to be brought within 12 months after the inception of the loss, but which also contains provisions amending any

terms of the policy which are in conflict with state statutes to conform with such statutes, is subject to the limitations set out in section 44-357, R. R. S. 1943.

2. **Judgments: Evidence.** Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party.

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

Wright, Simmons, Hancock & Hall, for appellants.

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

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

MCCOWN, J.

This was an action by the insured to recover on an insurance policy furnishing multiple coverages, including property damage. The particular coverage involved was for direct damage caused by fire and lightning. The property involved was an electric motor which was an integral part of the air conditioning system in the library-science building of the plaintiff college, located in Scottsbluff, Nebraska. The district court sustained defendant's motion for summary judgment and the plaintiff has appealed.

The policy period was October 1, 1965, to October 1, 1968. On September 21, 1968, during an electrical storm, the air conditioning unit in the building ceased operation. On the following morning, when the air conditioning equipment was manually turned on, it would not operate. The college did not sustain a power outage on September 21, 1968, and the only short or blown fuses affected on that date were on the compressor of the air conditioning unit involved. The director of services of the college determined that the air conditioning

season was substantially completed; that the air conditioning equipment was serviced by a company in Denver, Colorado, and checked each spring before the air conditioning season; and determined that it was not necessary to have it serviced twice, under the circumstances.

The following spring, in May 1969, when the air conditioning unit was serviced, it was discovered that an electric motor which was an integral part of the air conditioning system had a hole blown between the phase windings. The only evidence of damage was on the interior of the motor and there was no damage to the windings or any discoloration. In the opinion of at least one expert, the damage was caused by lightning.

The service mechanics replaced the motor, beginning May 18, 1969, and the cost was $3,648.39. Notice of loss was given to the defendant 2 days later on May 20, 1969. The defendant had an electrical engineer examine the damage, but this was not done until September 19, 1969. On January 29, 1970, the defendant notified the plaintiff that an electrical engineer had examined the damage and, from the facts developed, the damage appeared to have been an electrical failure or maintenance problem rather than lightning. On that date, the defendant advised the plaintiff that the claim would not be honored. Plaintiff filed this action on February 27, 1970.

The defendant filed a motion for summary judgment on the ground that the action was not filed within a period of 1 year from the date of the alleged loss and there was no genuine issue as to any material fact "on this issue." Plaintiff filed a cross-motion for summary judgment. The district court granted defendant's motion for summary judgment and plaintiff appealed from that judgment and from the denial of its own motion for summary judgment.

The policy, under Section 5, Statutory Conditions, provided: "No suit * * * shall be sustainable * * * unless commenced within twelve months next after inception

of the loss." The defendant relies on that provision as applied in Rhodes v. Continental Ins. Co., 180 Neb. 10, 141 N. W. 2d 415.

The insurance policy here, however, contains two additional provisions not involved in the Rhodes case. In Section E, Conditions, subsection 10, is the following language: "If by the laws of the state within which this policy is issued it is invalid to require that suit on this policy be commenced within 12 months of loss, then any suit or action on this policy for the recovery of any claim shall be void unless such action, suit, or proceeding be commenced within the shortest limit of time permitted by the laws of such state."

The last page of the 21-page policy provides: "The terms of this policy and forms attached hereto which are in conflict with the statutes of the state wherein this policy is issued are hereby amended to conform to such statutes."

Section 44-357, R. R. S. 1943, provides: "No insurance company shall issue in this state any policy or contract of insurance containing * * * any provision limiting the time within which an action may be brought to less than the regular period of time prescribed by the statutes of limitations of this state, unless otherwise prescribed by this chapter."

While there is no evidence here that the policy of insurance with which we are dealing is, or is not, the New York standard form, we must assume that it is. Since the New York standard form, as reflected in this policy, contains these provisions amending and conforming the policy to state statutes, the Legislature must have intended that such a policy would be subject to section 44-357, R. R. S. 1943, as well as to other conflicting provisions of our statutes. Any other interpretation of these multiple provisions would raise serious constitutional questions.

We therefore hold that a fire insurance policy legally issued in this state which contains a provision requiring

suit to be brought within 12 months after the inception of the loss, but which also contains provisions amending any terms of the policy which are in conflict with state statutes to conform with such statutes, is subject to the limitations set out in section 44-357, R. R. S. 1943.

Section 25-205, R. R. S. 1943, currently provides for a 5-year statute of limitations upon any agreement, contract, or promise in writing. The action here was brought well within the limitation period. Even if a 1-year statute of limitations were applicable, whether the facts here were sufficient to establish that the plaintiff knew, or reasonably should have known, of the loss prior to May 18, 1969, was at the least a material factual issue. The motion of the defendant for summary judgment should have been overruled.

The plaintiff on its appeal from the denial of its own motion for summary judgment contends that where both parties move for a summary judgment, the court is obligated to award summary judgment to one or the other. Plaintiff relies on Lesoing v. Dirks, 157 Neb. 183, 59 N. W. 2d 164. That case involved an interpretation of what constitutes good cause and is limited in its scope.

Section 25-1332, R. R. S. 1943, dealing with summary judgments, provides in part: "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." That fundamental requisite is not present here. One of plaintiff's own exhibits, signed by a representative of defendant, reasonably demonstrates that one expert was of the opinion that the loss here was not caused by lightning nor within the coverage of the policy. The only admission by defendant was that "if the damage was caused by lightning, the policy covers the damage," except as to certain defenses. The cause of the loss was clearly material, and

there was a genuine conflict of fact as to that issue.

We cannot accept the proposition that if counsel for one party inadvertently or mistakenly moves for a summary judgment to which he is not entitled, the opposing party by filing a cross-motion, even though it is also unwarranted, may have the cross-motion granted simply because both parties have moved for summary judgment. Such technical procedural traps are unsupportable. The necessary foundational basis for any summary judgment is the absence of any genuine issue of material fact. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party. Storz Brewing Co. v. Kuester, 178 Neb. 135, 132 N. W. 2d 341. The requirements to sustain a motion for summary judgment are the same whether one party or both parties have moved for summary judgment. To the extent that Lesoing v. Dirks, 157 Neb. 183, 59 N. W. 2d 164, is in conflict, it is overruled. The plaintiff's motion for summary judgment was properly overruled.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SMITH, J., concurring in part.

Plaintiffs attack the constitutionality of section 44-501, R. R. S. 1943. The section incorporates by reference the 1-year period of limitation of the New York standard fire insurance policy. Rhodes v. Continental Ins. Co., 180 Neb. 10, 141 N. W. 2d 415 (1966), motion for rehearing overruled, 180 Neb. 794, 146 N. W. 2d 66 (1966). The majority opinion reaches for the 5-year period prescribed by section 25-205, R. R. S. 1943. According to it, (1) the Rhodes case is distinguishable by two paragraphs of defendant's policy and (2) the statutory con-

struction justifiably allows the court to avoid the constitutional issues.

The two paragraphs of defendant's policy are immaterial in that they do not attempt to decrease the 1-year period. They or their equivalents are present is most policies written in Nebraska. They become a device for the majority opinion to inter the Rhodes case without an autopsy or certificate of cause of death.

I am puzzled by a rule of construction announced in the majority opinion. The rule comes to this: To avoid a decision on the constitutionality of section 44-501, R. R. S. 1943, to the extent that it prescribes the 1-year period, the court simply eliminates the language from the statute.

Construction and application of the 1-year period among the states have not been uniform. See, A. B. A., Section of Insurance, Negligence and Compensation Law, Annotation of the Fire Insurance Policy, 217 (1970); 3 Richards on Insurance, 1876 to 1879 (5th Ed., 1952). We ought not to compound problems by appearing to falter between the 1 and 5 year periods.

I concur that a genuine issue of material fact exists regarding the commencement of the 1-year period.

BOSLAUGH, J., concurring.

This action involved a "School-College Policy" which insured against multiple risks. Although the policy contained a 12-month limitation provision in Section I, Conditions, it also contained the additional provisions set out in the opinion of this court, one of which also is contained in Section I, Conditions, and the other in conditions applicable to the entire policy. It seems to me that the proper interpretation of the policy in suit is that the insurer waived the benefit of the 12-month limitation provision by inserting the additional provisions in the policy, and that Rhodes v. Continental Ins. Co., 180 Neb. 10, 141 N. W. 2d 415, has no application to this case.

RALPH L. POPPERT, APPELLANT, V. BROTHERHOOD OF RAILROAD TRAINMEN ET AL., APPELLEES.

189 N. W. 2d 469

Filed September 3, 1971. No. 37857.

1. **Labor and Labor Relations: Administrative Law: Contracts: Jurisdiction: Actions.** The right of a workman to sue a railroad company for wrongful discharge is not dependent upon prior exhaustion of his administrative remedies under the Railway Labor Act and the collective bargaining agreement, provided he has elected to consider his employment at an end and does not seek reinstatement.
2. ———: ———: ———: ———: ———. The right of a member to sue his union is not dependent upon prior exhaustion of administrative remedies under the Railway Labor Act and the collective bargaining agreement as these procedures have no reference to disputes between the member and the union.
3. **Pleadings: Courts.** It is an abuse of discretion for the trial court to refuse to permit an amendment in furtherance of justice.

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

Robert L. Paulick and Gary L. Thompson, for appellant.

Robert E. O'Connor, Howard E. Coray, Jerome Given, Harry Lustgarten, Jr., and Cronin & Shamberg, for appellees.

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

CLINTON, J.

The plaintiff brought this action in the district court for Hall County against his employer, the Union Pacific Railroad Company, and the defendant unions of which he was a member. The action is founded upon the plaintiff's claimed rights under a collective bargaining agreement which existed between the railroad and the unions and of which the plaintiff as an employee is the

beneficiary. On separate motions by the defendants the trial court dismissed the plaintiff's petition. We reverse the order of the trial court and remand the cause for further proceedings.

In his second amended petition, plaintiff sought money damages for wrongful discharge based upon an allegedly coerced resignation forced upon him on April 26, 1966, by the combined efforts of the defendants. In a fourth cause of action he alleged the resignation to be null and void and that he was entitled to "reinstatement with the Defendant, UP, with all of his seniority rights reinstated."

In separate answers to the second amended petition the defendants denied having coerced the plaintiff into resigning and, among other things, alleged that the plaintiff had voluntarily resigned rather than undergo an investigation by the railroad under Rule 84 of the collective bargaining agreement of criminal charges allegedly filed against him.

Prevoius to the filing of the answers, the plaintiff, in response to a request for admissions made by the defendant railroad, admitted: (1) The existence of Rule 84 which provided for a hearing prior to discipline or dismissal, and for an appeal procedure within the railroad organization; (2) the execution and delivery of a letter dated May 24, 1967, requesting reinstatement; (3) he had made no other appeal, claim, or request; and (4) he had not commenced before the National Railroad Adjustment Board any proceeding involved in the matter presented in his second amended petition for wrongful discharge. In his answers, however, plaintiff specifically denied a request to admit that he had never elected to consider his employment relationship with Union Pacific Railroad Company as having been permanently severed.

On September 14, 1970, the defendant railroad filed the motion to dismiss the plaintiff's action. The reasons stated were: "1. That the Court lacks jurisdiction of the subject matter for the reason that the subject matter of plaintiff's Amended Petition is subject to the ex-

clusive jurisdiction of the National Railroad Adjustment Board. 2. That the Court lacks jurisdiction of the subject matter for the reason that the plaintiff has failed to pursue and exhaust the remedies and procedures required by the collective bargaining agreement and the Railway Labor Act. 3. That the Petition fails to state a cause of action or claim upon which relief can be granted for the reason that Plaintiff failed to comply with the procedural provisions of the collective bargaining agreement within the time limits specified therein and such failure contractually bars his claim."

The defendant unions on September 16, 1970, filed a motion to dismiss based upon identical grounds, but adding: "4. That the plaintiff failed to exhaust his internal remedies pursuant to the collective bargaining agreement, the rules constitution and by laws of the defendant unions."

On October 2, 1970, the plaintiff filed a motion to dismiss his fourth cause of action and to delete from the prayer of his second amended petition the words "together with reinstatement of seniority rights with the Defendant, U. P."

On October 2, 1970, the trial court granted the respective motions of the railroad and the unions and dismissed plaintiff's petition.

The order of the trial court does not give the reason or reasons for its dismissal of the petition of the plaintiff. However the briefs of the parties discuss primarily the following reasons: The court did not have jurisdiction because of the failure of the plaintiff to exhaust the administrative remedies afforded by Rule 84 of the collective bargaining agreement prior to resort to court action; and that because plaintiff had not accepted his employment as terminated but sought reinstatement under his fourth cause, relief is afforded only by the terms of the Railway Labor Act, 45 U.S.C.A., § 153 First (i), and only the National Railroad Adjustment Board has jurisdiction. The defendant unions in addition argue that the area of

dispute has been preempted by federal law and only the federal courts have jurisdiction after exhaustion of administrative remedies, and that plaintiff has not availed himself of remedies afforded by the bylaws and constitution of the voluntary association known as the union.

We will first consider the contention of the defendant unions. We point out that under the provisions of the Railway Labor Act the National Railroad Adjustment Board has no jurisdiction over disputes between employees and the union. Carroll v. Brotherhood of R.R. Trainmen, 417 F. 2d 1025, cert. den. 397 U. S. 1039, 90 S. Ct. 1359, 25 L. Ed. 2d 650. The administrative remedies afforded by Rule 84 do not pertain to disputes between an employee and the union. They lead only to ultimate disposition of an employee-employer dispute before the National Railroad Adjustment Board. See Railway Labor Act, 45 U.S.C.A., § 153 First (i). The defendant unions' contention that compliance by plaintiff with administrative remedies afforded by the collective bargaining agreement is a condition precedent to suit against them has no merit.

The assertion by the defendant unions that the federal courts have exclusive jurisdiction of suits against the unions is made without citation of authority in point. Vaca v. Sipes, 386 U. S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842, cited by the defendant unions, supports by analogy a position contrary to that of the unions. There the Supreme Court of the United States held the state court (Missouri) did have jurisdiction of suit by a member against the union for breach of duty to fairly represent him. The claim of a union member against the union for breach of the union's duty of fair representation is wholly distinct from the right of a member against an employer under the Railway Labor Act. Czosek v. O'Mara, 397 U. S. 25, 90 S. Ct. 770, 25 L. Ed. 2d 21 (1970). An action against the employer and the union for breach of their separate obligation may, however, be joined. Vaca v. Sipes, *supra*. The defendant unions' claims with

reference to remedy afforded by their bylaws and constitution are without foundation in the record. No bylaws or constitution appear. We cannot take judicial notice of the constitution and bylaws of any private organization.

The defendant unions' contentions are without merit and as to them the dismissal was error.

The plaintiff relies upon Moore v. Illinois Central R.R. Co., 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089, where the court held that the right of a workman to sue a railroad for wrongful discharge is not dependent upon prior exhaustion of his administrative remedies under the Railway Labor Act or the collective bargaining agreement. The defendant railroad relies upon Republic Steel Corp. v. Maddox, 379 U. S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580 (1965), a case coming within the purview of the Labor Management Relations Act, where the court held that contract grievance procedures must be exhausted before direct legal redress is sought. That case and others, the defendant railroad says, foreshadow the overruling by the United States Supreme Court of Moore v. Illinois Central R.R. Co., *supra*.

The defendant railroad further says that, even if Moore is still considered to be good law exceptions which have been engrafted upon Moore by such cases as Transcontinental & Western Air, Inc. v. Koppal, 345 U. S. 653, 73 S. Ct. 906, 97 L. Ed. 1325, hold that where state law requires exhaustion of adiministrative remedies the plaintiff still states no cause of action unless he alleges facts to show he has exhausted such remedies. The defendant railroad maintains that Nebraska law requires such exhaustion and cites Crisler v. Crum, 115 Neb. 375, 213 N. W. 366; and Wilber v. Lincoln Aerie, F. O. E., 99 Neb. 428, 156 N. W. 658.

The defendant railroad further states that under the doctrine of Slocum v. Delaware, L. & W. R.R. Co., 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795, and certain cases following it, the plaintiff does not state a cause of action

because where the petition prays for reinstatement it is conclusively indicated that the employee has not elected to consider his employment terminated and exclusive jurisdiction in such instances is with the National Railroad Adjustment Board rather than the courts.

We will first discuss the status of Moore. Despite the attacks made upon Moore by a minority of the United States Supreme Court and others and despite predictions made for its demise, it has not to this date been overruled. In Walker v. Southern Ry. Co., 385 U. S. 196, 87 S. Ct. 365, 17 L. Ed. 2d 294 (1966), the United States Supreme Court was squarely confronted with an opportunity to overrule Moore and did not do so, reiterating the principle that if the employee accepts his discharge as final he may bring a law action in an appropriate state court for money damages without exhausting his administrative remedies. Moore is still being followed. Ferguson v. Seaboard Air Line R.R. Co., 400 F. 2d 473; Belanger v. New York Central R.R. Co., 384 F. 2d 35; McDonald v. Chicago, M., St. P. & P. R.R. Co., 38 Wis. 2d 526, 157 N. W. 2d 553. In Belanger the court denied relief because state law required exhaustion of administrative remedies. Transcontinental & Western Air, Inc. v. Koppal, *supra*, is to the same effect. In McDonald the court granted relief because state law did not require exhaustion of adiministrative remedies. There is no indication in the 1966 amendments to the Railway Labor Act, Pub. L. 89-456, 80 Stat. 208, effective June 20, 1966, of Congressional intent to foreclose an election of remedies. See Florida East Coast Ry. Co. v. Hill (Fla. App.), 233 So. 2d 845.

Defendant railroad asserts the rule that state substantive law relative to the questions of whether administrative remedies must first be exhausted governs is no longer applicable and that federal substantive law now governs and such law requires exhaustion before court action. Defendant railroad cites Republic Steel Corp. v. Maddox, *supra;* and Buchanan v. St. Louis South-

western Ry. Co. (Tex. Civ. App.), 400 S. W. 2d 362 (1966). As we have pointed out, Walker v. Southern Ry. Co., *supra,* seems to be the latest pronouncement of the United States Supreme Court on the subject and Moore is still in good standing.

The next question therefore becomes: Does Nebraska law require exhaustion of administrative remedies as a condition precedent to court action? This court decided that in the negative in Rentschler v. Missouri P. R.R. Co., 126 Neb. 493, 504, 253 N. W. 694, 95 A. L. R. 1. That case was an action by an employee to recover earnings lost because another had been employed in his place in violation of the plaintiff's seniority rights under the collective bargaining agreement. He submitted his claim to arbitration under the agreement and after several hearings, the last of which resulted in a tie vote, he brought the court action. The contention made was apparently that because he had not followed the arbitration procedures to their conclusion he was barred from court action. This court held that if the agreement for arbitration was construed to waive the plaintiff's right to sue then it was contrary to public policy and void. The court pointed to Article I, section 13, Constitution of Nebraska, which says: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." In Sandobal v. Armour & Co., 429 F. 2d 249 (1970), the Eighth Circuit, applying Nebraska law in another suit under a collective bargaining agreement, cited the Rentschler case for the proposition that a refusal to arbitrate in accordance with the terms of the contract is not available as a defense in an action on the contract. Until federal law clearly preempts the field, we feel compelled to follow the above precedents. Administrative remedies, if elected, are exclusive. Union Pacific R.R. Co. v. Price, 360 U. S. 601, 79 S. Ct. 1351, 3 L. Ed. 2d 1460. As previously noted, defendant railroad cites

Crisler v. Crum, *supra,* for the proposition that Nebraska law does require exhaustion of administrative remedies. The case is not in point for it involved a controversy between union members relative to the internal affairs of the union. The court held that the plaintiff must first seek relief under the bylaws of the union before seeking court relief. The situation in Crum is analogous to situations which involve the internal affairs of lodges and churches where the courts seem uniformly to hold that relief must first be sought within the organization. Such a case is Wilber v. Lincoln Aerie, F. O. E., *supra,* also cited by the defendant railroad. The state does not have the same interest in the internal affairs of such organizations as it does in collective bargaining agreements and different public policy considerations apply. We hold that under Nebraska law in an action by an employee for wrongful discharge under a collective bargaining agreement prior exhaustion of administrative remedies is not required.

If the plaintiff had persisted in his request for reinstatement and in not accepting his discharge as final then that was a form of relief which was not within the power of the court to grant for exclusive jurisdiction of the whole matter in such cases is vested in the National Railroad Adjustment Board. Walters v. Chicago & North Western Ry. Co., 216 F. 2d 332; Walker v. Southern Ry. Co., *supra;* Slocum v. Delaware, L. & W. R.R. Co., *supra.* However, in this case, the plaintiff, at the time the order of the court dismissing his petition was entered, had on file, as we have already noted, a motion to dismiss his fourth cause of action and to eliminate the prayer for reinstatement of seniority rights. He had earlier in response to the request for admissions further indicated that he considered his employment as terminated. By these actions, plaintiff in the trial court had indicated a change in theory, and an intention to amend his petition to abandon his claim for reinstatement and to accept his discharge, if such it was, as final. In Walters

v. Chicago & North Western Ry. Co., *supra,* the court indicated that if in the trial court the plaintiff had amended her complaint to eliminate the claim for reinstatement or had made a record in the trial court of a corresponding change in theory, then she would have been entitled to pursue her claim for wrongful discharge. Upon final determination of his suit for damages this action will be res judicata of any other claim plaintiff might have. Under Nebraska statutes plaintiff has an absolute right to dismiss without prejudice. § 25-601, R. R. S. 1943; Duffy v. Cody, 129 Neb. 737, 262 N. W. 828. Under the circumstances here, of course, his abandonment of his claim for reinstatement must be with prejudice, otherwise the dismissal by the trial court of the plaintiff's petition as against the railroad will be affirmed.

There is another reason why the objection of failure to follow administrative remedies is not well taken. If the allegation of the plaintiff's petition that the defendant unions refused to represent the plaintiff and if the allegation to the effect that the defendant railroad and the defendant unions acted in concert to coerce his resignation are true, then resort to administrative remedies may have been futile. See, Glover v. St. Louis-S. F. Ry. Co., 393 U. S. 324, 329, 89 S. Ct. 548, 21 L. Ed. 2d 519; Vaca v. Sipes, *supra.*

One further contention of the defendant railroad should be noted. It claims that since the collective bargaining agreement contains time limitations on implementation of administrative remedies this action is barred by contractual time limitation. Defendant railroad cites several cases in which exhaustion of administrative remedies were held to be a condition precedent to court action and the employee plaintiff had failed to meet the time limits in the administrative remedies. They have no application here. It also cites Breeland v. Southern Pacific Co., 231 F. 2d 576. In that case plaintiff elected to exercise administrative remedies and thereafter waited

longer than the time provided by the agreement before filing suit. The court held he was bound by the limitation in the agreement, his right of action accrued at the time of the discharge, and the action was barred by the statute of limitations on an action on a written contract. In jurisdictions where exhaustion of administrative remedies is not required the state statute of limitations on written contracts applies. Moore v. Illinois Central R.R. Co., *supra,* Union Pac. R. Co. v. Olive, 156 F. 2d 737; Davis v. Rush (Tex. Civ. App.), 288 S. W. 504.

This opinion is not to be taken as expressing any views on the substantive claims of the plaintiff. It is simply a decision that the trial court does have jurisdiction.

Since the preparation of the foregoing portion of this opinion, the Supreme Court of the United States on June 14, 1971, released its opinion in Amalgamated Assn. of St., E. Ry. & M. C. Emp. v. Lockridge, 403 U. S. 274, 91 S. Ct. 1909, 29 L. Ed. 2d 473. In that case the court held in an action by an employee (in a situation where the employee was covered by the National Labor Relations Act) against his union for having wrongfully caused his discharge from his employment by having terminated his union membership by a misapplication of the rules relative to suspension for nonpayment of dues, that the state and federal courts had no jurisdiction. The opinion was grounded on San Diego Building Trades Council v. Garmon, 359 U. S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775. The Supreme Court held that since the union action in procuring the member's dismissal because of nonpayment of dues was arguably covered by the unfair labor practices provisions of the National Labor Relations Act, federal law preempted and the National Labor Relations Board and not the state and federal courts had jurisdiction.

We conclude that Amalgamated Assn. of St., E. Ry. & M. C. Emp. v. Lockridge, *supra,* is not applicable because under the provisions of the Railway Labor Act (which is the federal labor law applicable in this case)

the National Railroad Adjustment Board has no jurisdiction of controversies between the union and its members, Conley v. Gibson, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80, and therefore the preemption doctrine has no application here.

The order of dismissal by the trial court is reversed and the cause remanded for further proceedings consonant with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

McCOWN and BOSLAUGH, JJ., dissent.

DONALD R. HAYS, TRUSTEE, APPELLEE AND CROSS-APPELLANT, V. ROLLIE C. JOHNSON, APPELLEE AND CROSS-APPELLANT, BETTY J. JOHNSON ET AL., APPELLEES, IMPLEADED WITH JOHN McARTHUR ET AL., APPELLANTS.

189 N. W. 2d 475

Filed September 3, 1971. No. 37860.

1. **Wills: Actions: Evidence.** In an action for the construction of a will, extrinsic evidence is admissible to show the attendant circumstances under which the will was made and to enable the court to place itself in the situation of the testator.
2. **Estates: Property: Parties: Partnerships.** Parties claiming an interest in the property of a decedent by reason of an alleged partnership with the decedent are adverse to the decedent and his representatives.

Appeal from the district court for Lancaster County: WILLIAM F. COLWELL, Judge. Affirmed.

A. James McArthur, for appellants.

Christensen, Glynn & Hendricks, for appellee Donald R. Hays.

Kenneth Cobb and J. S. Berry, for appellee Rollie C. Johnson.

Charles S. Reed and William P. Kelley, for appellee Virginia Reller.

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

BOSLAUGH, J.

This is an action to construe the will of Merril R. Reller who died on August 1, 1968. His will was admitted to probate and his estate administered by proceedings in the county court of Lancaster County, Nebraska. The will was executed on June 11, 1968.

The controversy here concerns the Commercial Center which is a tract of land lying north of Cornhusker Highway and west of 40th Street in Lincoln, Nebraska. The Commercial Center includes a large trailer court and a number of business buildings and was valued in the estate proceedings at $322,635. It was purchased by the deceased in 1949.

Paragraph III of the will devised the Commercial Center in trust to Donald R. Hays, subject to terms and conditions set out in the will. This action was brought by Donald R. Hays to obtain a construction of the will in regard to his duties as trustee. The defendants are Virginia Reller, the widow of the deceased; Herbert Reller, Helen Reller, and Carl R. Reller, heirs-at-law of the deceased; and Rollie C. Johnson, Betty J. Johnson, Gordon Reller, Sally A. Hays, John McArthur, and A. James McArthur.

The will provides generally that the Commercial Center shall be held in trust during the life of Virginia Reller and for 5 years thereafter, with the remainder to Donald R. Hays and Sally A. Hays, John McArthur, and Rollie C. Johnson. The will provides what is to be done in the event of a sale of all or part of the Commercial Center and provides for contingent beneficiaries.

Paragraph III (C) of the will provides in part: "The present method of conducting business, rentals and divisions of profits shall be continued as near as practicable and that the share of the profits received therefrom,

now received by Merril R. Reller, shall be paid by the trustee to Virginia Reller, with the express provision that if, at any time, the net rentals and income received by Virginia Reller, after payment of management fees, taxes and upkeep, is less than $1,000.00 per month net to Virginia Reller for a period of three months consecutively, then Virginia Reller may, at her option, require the Commercial Center to be sold, and this power of sale, should above conditions arise, shall be absolute and without question. I specifically provide that so long as the $1,000.00 per month is received by Virginia Reller, whether it come from actual rentals or personal contributions by any of the parties having a surviving interest therein, that the power of sale provided herein not be exercised."

The controversy centers around this part of the will. The language of the will itself is unintelligible in the absence of extrinsic evidence as to the "present method of conducting business, rentals and divisions of profits." Such evidence is admissible to show the attendant circumstances under which the will was made and to enable the court to place itself in the situation of the testator. Davis v. Wirth, 178 Neb. 74, 131 N. W. 2d 718; In re Estate of Dimmitt, 141 Neb. 413, 3 N. W. 2d 752, 144 A. L. R. 704; Little v. Giles, 25 Neb. 313, 41 N. W. 186.

The record shows that after the Commercial Center was purchased by the testator, it was operated by the testator, John McArthur, and Rollie C. Johnson. After 1962, Donald R. Hays participated in its operation. McArthur and Hays were associated with the testator in the practice of law. Johnson worked full time and had the direct management of the trailer court.

The answer filed by the defendants John McArthur and Sally A. Hays alleged that the persons who were active in the management of the Commercial Center had "acquired interest therein in unequal amounts" and prayed that the court "confirm the rights and interests of all of the parties hereto."

The trial court found that the record title to the Commercial Center was in the testator at the time of his death and that the evidence did not show the existence of a partnership composed of the testator, John McArthur, Rollie C. Johnson, Donald R. Hays, Sally A. Hays, or any of them.

The defendants John McArthur and Sally A. Hays have appealed. The plaintiff, Donald R. Hays, and the defendant Rollie C. Johnson have cross-appealed.

To the extent that the plaintiff and any of the defendants claimed any interest in the Commercial Center, other than as beneficiaries under the will of the deceased, their interest was adverse to that of the deceased and his representatives, and their testimony as to transactions and conversations with the deceased was not admissible under section 25-1202, R. S. Supp., 1969. Reitz v. Petersen, 131 Neb. 706, 269 N. W. 811; Gerdes v. Omaha Home for Boys, 166 Neb. 574, 89 N. W. 2d 849.

The remaining evidence does not sustain the appellants' claim in regard to a partnership. There are no partnership records, in the usual sense, for the Commercial Center. There are no books of account, and the Commercial Center had no checking account. A written agreement, dated July 3, 1966, signed by the deceased, John McArthur, Donald R. Hays, and Sally A. Hays was received in evidence. This agreement referred to a partnership engaged in the *operation* of a business known as the Commercial Center. The agreement further provided that legal title to the Commercial Center would remain in the deceased and that he would "maintain in effect a will which preserves the interests of all the remaining partners in the said Commercial Center." The agreement indicates that the deceased may have intended to contribute only the *use* of the property to the alleged partnership and that no other party would acquire any interest in the Commercial

Center except by devise. See Norcross v. Gingery, 181 Neb. 783, 150 N. W. 2d 919.

The evidence shows that Rollie C. Johnson collected the rentals from the trailer court and from some of the tenants in the business buildings and accounted to the deceased monthly. Johnson paid certain expenses out of the rentals, deducted his share of the rentals, and then remitted the balance to the deceased.

The record contains partnership income tax returns filed in the name of the Commercial Center for each year from 1950 to 1967, inclusive. The 1967 return shows a net profit of $25,475.33 with the partners' respective shares of income as follows: The deceased, John McArthur, and Donald R. Hays, $5,095.07 each; and Rollie C. Johnson, $10,190.12. There is no other competent evidence showing that these amounts were actually received or credited to the parties involved. Except for the share of the rentals retained by Rollie C. Johnson and several isolated payments to Mr. and Mrs. Hays, the evidence does not show that anyone other than the deceased ever received any part of the income from the Commercial Center. The evidence shows that the deceased received all of the income except that retained by Rollie C. Johnson and does not show that any of it was actually distributed by him to the others listed in the partnership returns.

The trial court found that there was some evidence of a working relationship in the management of the Commercial Center between the deceased and the appellants and the cross-appellants, but that the evidence would not sustain a finding that there was a partnership or that any of the appellants or cross-appellants were entitled to share in the income from the Commercial Center during the life of Virginia Reller. These findings are sustained by the record.

The trial court found that the trustee should pay the net income from the operation of the Commercial Center to Virginia Reller monthly during her lifetime. In de-

termining the net income the trustee was authorized to deduct all operating expenses, including the remuneration to be paid to Rollie C. Johnson, repairs, taxes, and fees allowed by the county court. The trial court limited expenditures by the trustee for the replacement of machinery, appliances, equipment, fixtures, and other depreciable property to 5 percent of the annual gross income of the Commercial Center. This limitation was intended as a guideline for the trustee and is subject to modification in the event circumstances show that the limitation should be changed.

The trial court directed the trustee to continue to employ Rollie C. Johnson and limited his compensation to an amount not to exceed that received in 1967. This direction is subject to modification in the event of a change in circumstances.

The trustee complains that the trial court improperly restricted his authority to make capital improvements by requiring him to obtain the written consent of Virginia Reller for all such improvements. In Paragraph III(B), the will provides in part that "the trustee shall have the power to authorize capital improvements," and "use such portion of Virginia Reller's income therefrom for capital improvements, if she so agrees in writing." The trial court defined capital improvements as improvements to the real estate as distinguished from replacement of depreciable property, such as machinery and appliances, and ordinary repairs. With this understanding, we think the trial court's interpretation of the will was correct.

The judgment of the district court is affirmed.

AFFIRMED.

CLINTON, J., concurring.

I concur in the result only. The majority opinion seems to say that there is no competent evidence from which a finding could be made that those persons designated as remainderman beneficiaries in the property known as the Commercial Center are entitled under

Paragraph III (C) of the will to share the income from the Commercial Center during the lifetime of Virginia Reller. It further seems to imply that there must have been an actual distribution of income to the partners or credit on books of account in order to support a finding of a partnership in income. With this I disagree.

The filing of partnership income returns from 1950 through 1967 showing the income shares of the partners, together with the agreement of July 3, 1966, executed by Merril Reller and certain of the others, was, in my opinion, sufficient to support a finding that the "present method of conducting business rentals and division of profits" was a partnership in which the remainderman had an income interest.

There is evidence in the record which, if believed, would support a finding that it was not a bonafide partnership. I concur in the result because I believe the trial judge, who observed the witnesses and their manner of testifying, must have concluded on the basis of this evidence that there was in fact no partnership based on services accompanied by actual income sharing.

IN RE ESTATE OF MERRIL R. RELLER, DECEASED. VIRGINIA RELLER, EXECUTRIX OF THE ESTATE OF MERRIL R. RELLER, DECEASED, APPELLEE, V. JOHN MCARTHUR ET AL., APPELLANTS.

189 N. W. 2d 468

Filed September 3, 1971. No. 37861.

1. **Estates: Taxation: Pleadings: Executors and Administrators.** The liability of an estate for inheritance tax may be determined upon the petition of the executrix filed in the administration proceeding.
2. **Estates: Taxation: Evidence: Wills: Property.** Evidence as to the property of the deceased, its value, its distribution under the will, the costs and expenses of administration, and the estate taxes paid by the executrix is sufficient to sustain a determination of the inheritance tax liability of an estate.

Appeal from the district court for Lancaster County: WILLIAM F. COLWELL, Judge. Affirmed.

A. James McArthur, for appellants.

Charles S. Reed, William P. Kelley, and Pierson, Pierson & Fitchett, for appellee.

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

BOSLAUGH, J.

This is an appeal from the judgment of the district court determining the amount of inheritance tax due from the estate of Merril R. Reller, deceased.

The inheritance tax liability was originally determined in the county court of Lancaster County, Nebraska, in proceedings to administer the estate of the deceased. The judgment of the district court was entered on September 14, 1970. From that judgment, John McArthur and Sally A. Hays have appealed to this court. The appellants contend that the pleadings and the evidence do not support the judgment.

The petition filed by the executrix in the district court alleged that the deceased had died testate on August 1, 1968, a resident of Lancaster County, Nebraska; and that the deceased was the owner of property having a value of $2,090,673.98 as shown on an itemized list attached to the petition. The petition prayed that the liability of the estate for inheritance tax be determined. This pleading was sufficient to invoke the jurisdiction of the court. § 77-2018.01, R. R. S. 1943.

On May 25, 1970, this proceeding was consolidated with the action to construe the will of the deceased. As a result, the trial court was able to consider the evidence introduced in both cases in determining the inheritance tax.

The evidence shows the property of the deceased, its value, the distribution made by the will, the costs and expenses of administration, and the federal and state

estate taxes paid by the executrix. This evidence was sufficient to enable the court to determine the inheritance tax due from each of the beneficiaries. The apportionment of estate taxes was proper under section 77-2108, R. R. S. 1943.

The judgment of the district court is affirmed.

AFFIRMED.

O. WILLIAM VON SEGGERN, SPECIAL ADMINISTRATOR OF THE ESTATE OF ELLA JEAN MUMMA, APPELLANT, V. SAM SAIKIN ET AL., APPELLEES.

189 N. W. 2d 512

Filed September 3, 1971. No. 37916.

1. **Torts: Actions: Jurisdiction: Statutes.** Section 1.03 (a) (3) of the Uniform Interstate and International Procedure Act applies when the tortious act or omission occurs in the state even though the resulting injury occurs elsewhere.
2. ———: ———: ———: ———. Section 1.03 (a) (4) of the Uniform Interstate and International Procedure Act authorizes the exercise of jurisdiction when the tortious act or omission takes place without the state but the injury occurs within the state and there is some other reasonable connection between the state and the defendant.

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

J. William Gallup of Schrempp & Bruckner, for appellant.

Michael P. Cavel of Lathrop, Albracht & Dolan, for appellees.

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

SMITH, J.

In this wrongful death action defendant Sam Saikin, a resident of Illinois, appeared specially to object to the

jurisdiction of the court. The district court sustained the special appearance. Plaintiff, O. William Von Seggern, special administrator of the estate of Ella Jean Mumma, appeals. He asserts that two subsections of our "long-arm" statute provided bases for the district court to exercise personal jurisdiction over Sam.

No evidence was offered in district court. Sam Saikin assumed only for purposes of the hearing on his special appearance that the allegations of the petition were true.

The petition states: Von Seggern was acting under letters of administration issued out of the county court of Sarpy County, Nebraska. At different times Sam and Joel Saikin had pursued a course of conduct to separate Ella Jean from her husband, Samuel C., and to effect her death. They made interstate calls to her at Bellevue, Sarpy County. They subsequently traveled in interstate commerce to Sarpy County where they performed "acts . . . leading to the accomplishment of said unlawful and wrongful purpose." As a result, Ella Jean "was induced to travel" to Chicago, Illinois. There on November 5, 1967, the Saikins "willfully, wantonly, maliciously, intentionally and unlawfully" slew her. She died at age 18, intestate, and an inhabitant of Sarpy County. The special administrator commenced this action for the benefit of Samuel C. Mumma as next of kin. See, § 30-809, R. R. S. 1943; S.H.A. ch. 70, § 1 (Ill., 1959).

Von Seggern asserts bases for judicial jurisdiction under section 25-536 (1) (c) and (d), R. S. Supp., 1969, which tracks section 1.03 (a) (3) and (4), Uniform Interstate and International Procedure Act. See 9B U.L.A. 310 (1966). The section of the uniform act provides in part: "(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's . . . (3) causing tortious injury by an act or omission in this state; (4) causing tortious injury in this state by an act or omission outside this state if he . . . engages in any . . . persistent course of conduct . . . in this state; . . . (b)

When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him."

Mobility of population and other social and economic conditions called for expansion of judicial jurisdiction of a state over the person of a nonresident. See Hazard, "A General Theory of State-Court Jurisdiction," 1965 Supreme Court Review, at p. 246 (1965). Statutes and cases relating generally to the expansion have been reviewed. See, Kurland, "The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts," 25 U. Chi. L. Rev. 569 (1958); Leflar, American Conflicts Law, §§ 42 to 44, pp. 79 to 90 (1968); "State-Court Jurisdiction," 73 Harv. L. Rev., at pp. 945 to 947 (1960); "The Virginia 'Long Arm' Statute," 51 Va. L. Rev. 719 (1965).

No one has constructed a table of "minimum contacts" that will always satisfy requirements of due process. The test is fundamental fairness. See, International Shoe Co. v. Washington, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A. L. R. 1057; Stucky v. Stucky, 186 Neb. 636, 185 N. W. 2d 656 (1971) (opinion by McCown, J.); Leflar, American Conflicts Law, at pp. 71 and 78 (1968); Reese and Galston, "Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction," 44 Iowa L. Rev. 249 (1959); 'The Virginia 'Long Arm' Statute," 51 Va. L. Rev. at 728 (1965).

The Commissioners' Note to section 1.03 of the uniform act reads: "Section 1.03 (a) (3) applies when the tortious act or omission occurs in the state even though the resulting injury occurs elsewhere. The state where the tortious act or omission occurs will often be the most appropriate location for the trial of the action. . . . Section 1.03 (a) (4) authorizes the exercise of jurisdiction when the tortious act or omission takes place without the state but the injury occurs within the state and there is some other reasonable connection between the state and the defendant. . . . A sufficient nexus exists

if . . . the defendant . . . in the state carries on some . . . continuous course of activity . . .. It is not necessary that this activity amount to the doing of business. . . . It should be noted that . . . the persistent course of conduct . . . need have no relationship to the act or failure to act that caused the injury. No distinctions are drawn between types of tort actions . . .. The concept of cause of action . . . should be broadly construed to cover an entire transaction so that, when possible, the entire dispute may be settled in a single litigation. Subdivision (b) is designed to prevent assertion of independent claims unrelated to any activity described in subdivision (a) of section 1.03." 9B U. L. A. pp. 311 to 313 (1966).

The phrase "tortious injury" does not necessarily have the same meaning for purposes of jurisdiction and ultimate liability. Cf. Nelson v. Miller, 11 Ill. 2d 378, 143 N. E. 2d 673 (1957) (Schaefer, J.).

The telephone calls and the acts of the Saikins were too remote to bring Von Seggern's cause of action within section 1.03 (a) (3) of the uniform act. Under subdivision (a) (4) Saikins' conduct established a connection with Nebraska, but the connection did not constitute a continuous course of activity. The connection was not reasonable in terms of a basis for jurisdiction over Sam Saikin.

The ruling sustaining the special appearance was correct.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KEITH A. RUSS, APPELLANT.

190 N. W. 2d 621

Filed October 8, 1971. No. 37917.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. On motion to dismiss appeal. Judgment affirmed.

Keith A. Russ, pro se.

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

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

PER CURIAM.

The State moves to dismiss this appeal from a sentence on a charge of burglary. The grounds of the motion are: (1) The defendant's pro se brief was filed out of time and did not comply in any respect with the rules of this court; and (2) the appeal is frivolous; Anders v. California, 386 U. S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493, has been complied with; and no hearing on the merits is required.

The defendant had entered a plea of guilty to the burglary charge and was placed on probation. He was subsequently charged with violation of the terms of the probation and entered a plea of guilty to such

violation and was sentenced on the burglary charge. He was represented by counsel at all stages of the proceedings. He perfected his own appeal while the matter was being considered by his counsel. Writ of error was issued by this court and the transcript and bill of exceptions are before us.

Counsel for the defendant, while the appeal was pending, asked leave of the trial court to withdraw as counsel and complied with Anders v. California, *supra*. The trial court found that an appeal would be frivolous and permitted counsel to withdraw.

Our consideration of the motion has required a careful review of the transcript and bill of exceptions and the claims made in the defendant's pro se brief. We have reviewed the case on the merits. The defendant's claims are without foundation.

JUDGMENT AFFIRMED.

GORDON SHOTWELL, APPELLANT AND CROSS-APPELLEE, V. INDUSTRIAL BUILDERS, INC., ET AL., APPELLEES AND CROSS-APELLANTS.

190 N. W. 2d 624

Filed October 8, 1971. No. 37935.

1. **Statutes: Workmen's Compensation.** As regards subdivision (2) of section 48-121, R. S. Supp., 1965, losses in bodily function are important only insofar as they relate to earning capacity and the loss thereof.
2. ———: ———. Disability is defined in terms of employability and earning capacity rather than in terms of loss of bodily function.

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

Wright, Simmons, Hancock & Hall, for appellant.

Atkins, Ferguson & Nichols and L. M. Hahn, for appellees.

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

NEWTON, J.

This is an action instituted before the Nebraska Workmen's Compensation Court. On hearing before the full compensation court, plaintiff received an award based upon temporary total disability for 149 4/7 weeks, 47½ percent permanent partial disability for 150 2/7 weeks, and 17½ percent permanent partial disability for the rest of his life based upon a two-member disability. The award was affirmed upon appeal to the district court. We affirm the award subject to modification as herein specified.

The accident occurred on March 7, 1966, while plaintiff was employed as a surveyor's rodman by defendant, receiving $94.05 per week. There is no dispute with reference to the employment, the accident, or the nature of the injuries received. Plaintiff was 18 years of age, had recently been graduated from high school, and had taken a short course in welding. He had no fixed occupation, but occasionally painted automobiles. He worked for defendant as a rodman, common laborer, heavy equipment operator, steel tier, and welder.

His injuries consisted of a fractured right ulna at the elbow, multiple fractures of the right foot, a compression fracture of the fifth lumbar vertebra, possible fractures of the first and second lumbar vertebrae, and a fractured right wrist. He gradually lost the hearing in one ear; was subjected to occasional but persistent headaches; and had persistent low back pain, a left foot drop, numbness and atrophy of the left leg, clawing of the toes of the left foot, a deformed right foot with a bony protuberance, difficulty urinating, bowel troubles, curvature of the spine, restriction of back motion and weakness in back, a 10 degree restriction of movement in the right wrist, nervousness, and shakiness. Physical impairment was estimated at 10 percent for the right

foot, 20 to 25 percent for the left leg, and 35 percent for the body as a whole. The conditions mentioned still prevailed more than 4 years after the accident and estimates of physical impairment were based upon plaintiff's condition at that time.

It is undisputed that plaintiff's condition will deteriorate with the passage of time. As one medical expert put it, he will need the services of an orthopedist and urologist for the rest of his life. It is entirely possible that he may become totally disabled. If so, he may seek relief under section 48-141, R. R. S. 1943. We cannot at this time agree with plaintiff's contention that he is presently totally disabled. After recuperating from his injuries, he was unable to find employment in his home area and moved to Portland, Oregon. There he found employment doing electric wiring but was transferred to a painting job as he could not endure the bending over required in the electrical work. Due to adverse effects from paint fumes, he can no longer act as a painter. His employer went out of business and he obtained another job as a welder which did not require bending over. He was still so employed at the time of trial. Due to his physical handicaps, he was paid 50 cents to $1 an hour less than others doing the same work. He also works part-time selling tickets at a nightclub, a position which permits him to sit. It is apparent that due to his youth and determination, he has in some measure rehabilitated himself, but the fact remains that his employability has been severely restricted. He can no longer do heavy common labor, operate heavy equipment, act as a rodman, do types of labor requiring walking, lifting, or bending. In other than a tight labor market, he, as a handicapped worker, will find it difficult to secure employment should he lose his present position.

Losses in bodily function are important only insofar as they relate to earning capacity and the loss thereof. See Nordahl v. Erickson, 174 Neb. 204, 116 N. W. 2d 275.

It is evident that plaintiff still retains a measure of earning capacity and cannot at this time be classified as one totally and permanently disabled. On the other hand, the extent of his bodily impairment is not necessarily synonymous with or determinative of his employability and earning capacity. Disability is defined in terms of employability and earning capacity rather than in terms of loss of bodily function. See Nordahl v. Erickson, *supra*. The record supports the finding that plaintiff sustained a two-member disability amounting to a 25 percent impairment of the left leg and a 10 percent impairment of the right foot. The lower courts averaged this out and concluded that plaintiff had a permanent partial disability of 17½ percent, entitling him to $7.41 per week, after the first 300 weeks, during his life. It was found that physical impairment and disability in the sense of loss of employability and earning capacity were the same. With this we agree. As previously pointed out, the types of employment for which plaintiff was originally fitted have been greatly restricted by his injury and present physical condition.

Under subdivision (2) of section 48-121, R. S. Supp., 1965, plaintiff was allowed the sum of $29.78 each week for 150 2/7 weeks for a 47½ percent permanent partial disability to the body as a whole. It is evident that in considering this feature of the case, the trial court failed to take into consideration several of the bodily ailments suffered by plaintiff. We find that this partial disability amounted to 65 percent and that plaintiff should receive the sum of $40.74 each week for the 150 2/7 week period.

Section 48-120, R. R. S. 1943, provides: "The employer shall be liable for reasonable medical and hospital services and medicines as and when needed, * * * subject to the approval of the compensation court, * * *." The undisputed evidence indicates plaintiff will require medicines, and medical and hospital services in the future as a result of his injuries. If and when such

items are required, they shall, subject to approval by the compensation court, be supplied at defendants' expense. See Gilmore v. State, 146 Neb. 647, 20 N. W. 2d 918.

Subject to the foregoing modifications, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

SPENCER, J., dissenting.

I respectfully dissent. I cannot be a party to a decision which penalizes determination and extreme effort to be self-supporting despite the physical infirmities set out in the majority opinion, which to me constitute permanent disability. In the present day and age, most employees sustaining the plaintiff's disabilities would not attempt to do any type of work and would clearly be found totally disabled.

We have repeatedly held that total disability does not mean a state of absolute helplessness but rather it means the disablement of the employee to earn wages in the same kind of or similar work for which he was trained.

At the time of his injury plaintiff, a partial paraplegic, had worked at and was able to perform a specialty called pin striping; to do heavy common labor; to tie steel as a steel worker; work as a carpenter's helper; to operate heavy equipment; to act as a rodman; and to do any type of labor requiring walking, lifting, or bending. As the majority opinion states, he can no longer do any of these tasks. Since his injury he has tried electrical wiring and painting but is physically unable to perform the tasks that work requires. At the time of the trial he was employed as a spot welder of switch breaker boxes, but due to his physical handicaps was paid less than others doing the same work. He is unable to do lifting of any nature, and is only able to weld work brought to him. While he cannot perform several of the tasks required in his job, probably because of his intense desire to be a useful citizen his present employer has worked out these problems for him, but

most employers would consider him unemployable.

Plaintiff retains a measure of earning capacity solely because of his determination to overcome extreme disabilities. Clearly, plaintiff has sustained a loss of earning capacity equivalent to or greater than that sustained by the claimant in Haler v. Gering Bean Co., 163 Neb. 748, 81 N. W. 2d 152; Nordahl v. Erickson, 174 Neb. 204, 116 N. W. 2d 275; Mead v. Missouri Valley Grain, Inc., 178 Neb. 553, 134 N. W. 2d 243; and Brockhaus v. L. E. Ball Construction Co., 180 Neb. 737, 145 N. W. 2d 341, where we found permanent total disability. For all intents and purposes he is totally disabled. The majority opinion certainly thwarts the beneficent purposes of the Nebraska Workmen's Compensation Act by a highly technical refinement of interpretation.

WHITE, C. J., and MCCOWN, J., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. GEORGE HAYES, APPELLANT.
190 N. W. 2d 621

Filed October 8, 1971. No. 37803.

Criminal Law: Evidence: Trial. Where the classification or degree of a crime depends upon the determination of a certain minimal value of property and there is a market for that type of property, the State must present proof by competent evidence that the market value of the property at the time and place of the crime charged was equal to or exceeded the designated minimal value.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Reversed and remanded for new trial.

Thomas D. Carey and Arnold D. Kenyon, for appellant.

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

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

CLINTON, J.

The appellant was charged with receiving or buying stolen goods, to wit, an air conditioner of the value of $100 or upwards with intent to defraud the owner and the jury returned a verdict of guilty. The sole question presented in this appeal is the sufficiency of the evidence to sustain a finding that the value of the property at the time of the receipt or purchase was of the value of $100 or more.

The value of the goods in question is an essential element of the crime and like all other elements thereof the evidence must be sufficient to support a finding of the necessary value beyond a reasonable doubt.

This and other courts have long held that where value of goods is an element of the crime charged and there is a market for the goods, the value to be proved is the market value at the time and place. Robinson v. State, 107 Neb. 591, 186 N. W. 977; Edmonds v. State, 42 Neb. 684, 60 N. W. 957; Engster v. State, 11 Neb. 539, 10 N. W. 453; Rooney v. State, 51 Neb. 576, 71 N. W. 309; Hogoboom v. State, 120 Neb. 525, 234 N. W. 422, 79 A. L. R. 1171; Brooks v. State, 28 Neb. 389, 44 N. W. 436. Only where there is no market value may present replacement or other similar value be used. State v. Randle, 2 Ariz. App. 569, 410 P. 2d 687; 50 Am. Jur. 2d, Larceny, § 45, p. 209.

The State did not present evidence that there was no market for the goods of the type in question. Its only evidence of value was the testimony of an agent of the owner that his recollection of the purchase price of the item was about $225 and that the owner had had it: "Several years, not quite that long, possibly in the third year of having it or maybe less than that." Testimony as to the purchase price of an item costing $225 about 3 years previously is not sufficient to establish either its market or actual value on the date in question.

This witness further testified over objections that reimbursement received from the insurance company was about "$179.00, or one hundred eighty-some, something like that." And, also, "it was right about $170.00 or possibly slightly more that that." There was no evidence to establish the basis of reimbursement by the insurance company. This evidence was insufficient to establish market value on the date in question. The State relies upon State v. Carroll, 186 Neb. 148, 181 N. W. 2d 436. That case does not sustain the State's position. In that case there was testimony of a qualified witness of the wholesale and retail market value of the property in question at the time of the crime.

We hold that the evidence was legally insufficient to establish the market value of the air conditioner on the date of receipt, or in the alternative that there was no market value for the property and what the actual value was.

The defendant introduced the testimony of a dealer in such items who had examined the air conditioner at the police station. He testified that the market value of the item on the date in question was $50 wholesale and $75 retail. There was therefore competent evidence to sustain the verdict as to the lesser-included offense of receiving stolen property of the value less than $100. § 28-513, R. R. S. 1943.

The jury was not directed to make a specific finding of value in its verdict nor is this required. The defendant did not request an instruction on the lesser-included offense. Since the evidence of value is legally insufficient to sustain a finding of value of $100 or upwards, the judgment of the trial court must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. SAM VIRGILITO, JR., APPELLANT.
190 N. W. 2d 781

Filed October 8, 1971. No. 38015.

1. **Post Conviction: Pleadings: Incompetent Persons.** Bald assertions of insanity, unsubstantiated by a recital of credible facts and unsupported by the record, are wholly insufficient and justify the summary dismissal of a post conviction proceeding.
2. **Post Conviction: Pleadings: Trial.** The Nebraska Post Conviction Act requires that unless the motion and the files and records of the case show that the petitioner is entitled to no relief, the court shall grant a prompt evidentiary hearing, determine the issues, and make findings of fact and conclusions of law with respect thereto.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Reversed and remanded with directions.

Sam Virgilito, Jr., pro se.

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

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

McCOWN, J.

On September 17, 1970, the defendant pleaded guilty to manslaughter and on the same day was sentenced to 5 years imprisonment. In 1971, defendant began this proceeding under the Nebraska Post Conviction Act alleging that he was mentally incompetent to enter the plea of guilty. From an examination of the files and records, the district court found that the defendant was entitled to no relief; that an evidentiary hearing should not be held; and that counsel should not be appointed for the defendant. The motion to vacate sentence was overruled and defendant filed this appeal pro se.

A transcript and bill of exceptions have been filed, certified to contain all evidence, both oral and docu-

mentary. These constitute the "files and records of the case." They show that on April 17, 1970, an information was filed charging the defendant with first degree murder. Counsel was appointed on that date and represented the defendant throughout the proceedings. On April 24, 1970, the court authorized a psychiatric examination of the defendant for the purpose of determining whether he was competent to stand trial. A neuropsychiatric examination of the defendant was made by Dr. C. H. Farrell. His report reveals an extensive history of mental illness. Defendant had been hospitalized, and had been examined by Dr. Farrell on numerous previous occasions. Dr. Farrell's report of May 28, 1970, stated: "It is this examiner's opinion that this man is a chronic mental defective and a chronic schizophrenic. It is also this examiner's opinion that there are times when he has lucid intervals but that he also has many psychotic episodes. There is some doubt as to whether he can aid in his own defense."

On June 3, 1970, after receiving the report from Dr. Farrell, the district court entered an order that the defendant was not competent to stand trial and committed him to the Lincoln State Hospital until such time as his disability might be removed. The record shows that on August 12, 1970, the director of the Lincoln Regional Center submitted to the district court what is referred to as a "letter" or a "certificate" to the effect that the defendant was "now competent to stand trial." There is no copy of this document in the record. There is no evidence as to the data upon which the document was based. There is no other evidence in the record to dispute Dr. Farrell's opinion and diagnosis. No hearing was ever held to determine defendant's competency and apparently the court never entered any order finding the defendant competent to stand trial.

At the time of the arraignment on September 17, 1970, an amended information was filed charging the defendant with manslaughter in Count I, and with first

degree murder in Count II. After the guilty plea to Count I was accepted, Count II was dismissed. The only inquiry as to competence made at the arraignment, plea, and sentencing was to ask the defendant if he felt he was competent to proceed "like they claim you are down at Lincoln," to which he answered: "Okay." The record also shows that the county attorney expressed the hope and recommended to the court that the defendant get "further psychiatric treatment and help."

It is true that bald assertions of insanity, unsubstantiated by a recital of credible facts and unsupported by the record, are wholly insufficient, and justify the summary dismissal of a post conviction proceeding. See Fisher v. United States, 317 F. 2d 352. That rule does not fit the facts here.

The Nebraska Post Conviction Act requires that unless the motion and the files and records of the case show that the petitioner is entitled to no relief, the court shall grant a prompt evidentiary hearing, determine the issues, and make findings of fact and conclusions of law with respect thereto. See § 29-3001, R. S. Supp., 1969.

It is entirely possible that the district judge was aware of ample evidence to establish the defendant's competency to stand trial, but that evidence, if any, does not appear in the record. The record before us clearly establishes sufficient factual basis to require full exploration by the district court.

The order of the district court overruling the motion for post conviction relief is vacated and the cause remanded to the district court with directions to grant a prompt evidentiary hearing on the motion and proceed in accordance with the provisions of the Nebraska Post Conviction Act.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. EDWARD A. CRUSE, APPELLANT.

190 N. W. 2d 629

Filed October 8, 1971. No. 38043.

1. **Post Conviction: Trial: Sentences: Guilty Plea.** The standard for validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among alternative courses of action open to defendant.
2. **Sentences: Notice: Hearing.** A court should not correct an erroneous record of a criminal sentence without affording the parties a hearing.

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

Edward A. Cruse, pro se.

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

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

SMITH, J.

A motion of Edward A. Cruse for post conviction relief was denied without a complete evidentiary hearing. He appeals, asserting involuntariness of his guilty plea and error in the court's correcting the record of his sentence without notification.

The journal of the district court, Judge Krell presiding, on May 1, 1970, set out a sentence of Cruse to imprisonment from 1 to 5 years. On June 2 the court without notification to either party ordered correction of the journal as follows: " 'for a period of 2 to 5 years' as per court's pronouncement from the bench at the time of sentence."

Cruse appeared with counsel on October 19, 1970, on an order to show cause in connection with his post conviction motion. The matter was continued by agreement in order for the court reporter to transcribe his notes. On December 11 the State and Cruse's counsel appeared

before the court, Judge Brodkey presiding. The court reporter's certified verbatim record of the plea and sentencing hearings was received in evidence.

The general standard for validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among alternative courses of action open to defendant. State v. Gray, 187 Neb. 197, 188 N. W. 2d 705 (1971); State v. Turner, 186 Neb. 424, 183 N. W. 2d 763 (1971). Evidence of compliance at Cruse's plea hearing is replete.

A court should not correct an erroneous record of a criminal sentence without affording the parties a hearing. State v. Kortum, 176 Neb. 108, 125 N. W. 2d 196 (1963). Judge Krell did not testify, and no entry in his minute book was offered in evidence.

The reporter's evidence is undisputed that the court three times informed Cruse that the sentence was 2 to 5 years. The error of the court in correcting the journal without notification and hearing was harmless in view of the subsequent proceeding. Cf. Kennedy v. Reid, 249 F. 2d 492 (D. C. Cir., 1957).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS L. RHODES, APPELLANT.
190 N. W. 2d 623

Filed October 8, 1971. No. 38060.

Post Conviction: Evidence. In a post conviction proceeding, the burden of proof is on the petitioner to establish the basis for relief.

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

Douglas L. Rhodes, pro se.

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

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

SPENCER, J.

This appeal from a denial of post conviction relief presents a very narrow issue. Appellant claims the failure of the trial court to advise him of his ineligibility for parole negates his guilty plea. There is no merit to appellant's contention.

On October 26, 1966, appellant, in the presence of his court-appointed counsel, entered a plea of guilty to a check charge and was sentenced for a term of 3 years in the Nebraska Penal and Correctional Complex, said sentence to be served consecutive to and to commence at the expiration of any sentences then being served. Appellant was then returned to California to complete his sentence in that state. In 1970 when he was paroled from the California state prison he was returned to Nebraska to serve his sentence.

Appellant insists his plea was involuntary because he was not told that he would be ineligible for parole under a sentence for a specific term. Appellant is confusing state and federal procedures. This question has been raised under rule 11, Federal Rules, Criminal Procedure, which is not binding on state courts, and there is a decided split of authority among the various Circuit Courts of Appeals on the point. If it were material, we would believe the correct holding would be that noneligibility for parole is not a consequence of a plea of guilty. Rather, it is the consequence of the withholding of legislative grace. See, Smith v. United States, 324 F. 2d 436; Trujillo v. United States, 377 F. 2d 266; and Sanchez v. United States, 417 F. 2d 494.

Under section 83-1,110, R. S. Supp., 1969, appellant is eligible for parole upon the completion of his sentence less the reductions granted to him. Laws 1969, c. 817, § 41, p. 3093. See, also, State v. McMillian, 186 Neb. 784, 186 N. W. 2d 481.

In a post conviction proceeding, the burden of proof is on the petitioner to establish a basis for relief. State v. Coffen, 184 Neb. 254, 166 N. W. 2d 593. This the appellant has failed to do.

The judgment of dismissal is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEROY BULLARD, APPELLANT.
190 N. W. 2d 628

Filed October 8, 1971. No. 38064.

Post Conviction: Judgments. Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States.

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

Leroy Bullard, pro se.

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

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

BOSLAUGH, J.

In 1962, the defendant was charged in separate informations with first degree murder in the death of Jesse Jones and Jesse D. Drake. Later the informations were amended to charge murder in the second degree. The defendant pleaded guilty to both offenses and was sentenced to life imprisonment on each charge. The sentence on the second charge was made consecutive to the sentence on the first charge.

The defendant now seeks to modify the sentence on the second charge so that it will be concurrent with

the sentence on the first charge. The Post Conviction Act does not authorize such relief.

Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States. § 29-3001, R. S. Supp., 1969. No such issue is presented here. See Annotation, 33 A. L. R. 3d 335, at p. 368.

The judgment of the district court denying relief under the Post Conviction Act is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD EUGENE WARNER, APPELLANT.

190 N. W. 2d 786

Filed October 15, 1971. No. 37801.

1. **Criminal Law: Appeal and Error: Evidence.** It is not the province of the Supreme Court to pass on the credibility of witnesses or weigh the evidence in a criminal case.
2. **Criminal Law: Automobiles: Trial.** The possibility that a stolen truck might be abandoned later is not a defense to a charge of auto theft.
3. **Criminal Law: Burglary: Words and Phrases.** A trailer which is used as an office may be the subject of a burglary under section 28-532, R. R. S. 1943.
4. **Criminal Law: Trial: Instructions.** In the absence of a request, the trial court is not required to instruct in regard to lesser included offenses.

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

Frank B. Morrison and Bennett G. Hornstein, for appellant.

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

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

BOSLAUGH, J.

The defendant appeals from convictions for burglary and auto theft. His principal assignments of error relate to the sufficiency of the evidence to sustain the convictions on each charge.

There was evidence from which the jury could find that the office of the Delight Wholesale Company in Omaha, Nebraska, was burglarized at about 2 a.m., on September 1, 1969, and a safe carried away in a 1959 pickup truck stolen from Dwight Godden. The office was equipped with a security alarm which resulted in the police being notified promptly of the break-in.

At 2:17 a.m., a police officer observed the Godden truck traveling north on Thirty-third Street near Lake Street with its headlights turned off and the safe in the back of the truck. The truck was found parked in front of 3224 Willis Avenue a few minutes later. As the police approached, the defendant ran from the left side of the truck. The defendant was then apprehended and taken to the police station.

The truck had been "hot wired" so that it could be operated without an ignition key. A guitar that had been taken from the office of the Delight Wholesale Company was found in the back of the truck, and a pry bar was lying on the right running board. The pry bar fitted into the marks that had been made where the door at the Delight Wholesale Company had been forced.

The evidence which has been summarized, although circumstantial, was sufficient for the jury to find that the defendant had participated in the theft of the Godden truck and the burglary at the Delight Wholesale Company. It is not the province of this court to pass on the credibility of witnesses or weigh the evidence in a criminal case.

The circumstances indicate that the truck was stolen

for the purpose of transporting the safe which was interrupted when the police happened to see the truck with the safe at Thirty-third and Lake Streets. There is nothing in the record to suggest there was any intention to return the truck to its owner. The possibility that the truck might be abandoned after it was no longer needed to haul the safe would not be a defense to the charge of auto theft. See, Sizemore v. State, 5 Md. App. 507, 248 A. 2d 417; State v. Langis, 251 Ore. 130, 444 P. 2d 959; State v. Fairbanks, 140 Mont. 243, 370 P. 2d 497; Crouse v. State, 229 Miss. 15, 89 So. 2d 919.

The office of the Delight Wholesale Company was located in a trailer. The interior, which was 12 feet by 60 feet, had been divided into three offices and a cashier's cage. A fiber glass skirt had been placed around the base of the trailer, and wrought iron stairs erected at the entrance. The trailer was wired for electricity and equipped with a burglar alarm.

The fact that the office was located in a trailer was of no importance under the circumstances in this case. The jury could find that the trailer was in fact a building. Furthermore, section 28-532, R. R. S. 1943, specifically provides that an "office" may be the subject of a burglary.

There was no request for an instruction as to any lesser included offense. In the absence of a request, the trial court is not required to instruct in regard to lesser included offenses. State v. Caha, 184 Neb. 70, 165 N. W. 2d 362.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE SAXON, APPELLANT.
190 N. W. 2d 854

Filed October 15, 1971. No. 37805.

1. **Criminal Law: Guilty Plea.** The standard for validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to defendant.
2. **Criminal Law: Incompetent Persons: Sentences.** No person who as a result of mental disease or defect lacks capacity to understand the proceeding against him shall undergo sentence for commission of an offense so long as such incapacity endures.
3. **Criminal Law: Incompetent Persons: Hearing: Sentences.** It is discretionary with the district court to hold a hearing sua sponte on the mental competency of a defendant to undergo sentence for commission of an offense.
4. **Criminal Law: Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed for excessiveness in the absence of an abuse of discretion.

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

Frank B. Morrison and Bennett G. Hornstein, for appellant.

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

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

SMITH, J.

Lawrence Saxon pleaded guilty, and the district court imposed a consecutive sentence. He appeals. The district court, he contends, erred in failing to hold a hearing sua sponte on his mental competency at the plea and sentencing hearings. Excessiveness of the sentences is also asserted.

On January 26, 1970, Sergeant Holewinski of the Omaha police department arrested Saxon and George Woods in their room. Another officer, Sergeant Volcek,

stood at the entrance. Saxon suddenly grasped a hidden pistol which he aimed at Holewinski, and Woods disarmed the captive. Volcek, in fleeing for assistance, purposely dropped his service revolver in the street near a door of the squad car.

Saxon and Woods, holding Holewinski hostage, ordered him to occupy the driver's seat of the squad car. In the back seat each man pointed a weapon at Holewinski. Volcek approached the car upon demand of the two men, who noted that he was unarmed. At the car he retrieved his service revolver with which he killed Woods. Holewinski's revolver, held by Woods, discharged, and the shot wounded Volcek. Saxon surrendered without firing.

Saxon, age 23, was held in jail until a date subsequent to his plea and sentencing hearing in June 1970. Competency of his private counsel, Samuel P. Caniglia, now a district judge by appointment under the merit plan for judicial selection, is undisputed. He called Saxon's mother to testify, and he introduced reports of two psychiatrists in evidence. He did so, however, to mitigate punishment—not to suggest mental incompetency of Saxon.

Saxon's mother testified that death of the father 9 years earlier had affected the son. Symptoms were withdrawal, absences from school, violent temper, and sudden changes to extreme tranquility.

Dr. J. L. Bodig wrote Caniglia on May 21, 1970, regarding an examination requested by Caniglia: ". . . (Saxon's) thought associations were somewhat loose but he was able to maintain a fairly continuous conversation. There was no evidence of blocking . . .. His sensorium was clear and he is well oriented to time, person, and place. . . . Diagnostically . . . (Saxon) is suffering from a chronic undifferentiated schizophrenic reaction. . . . his interpretation of reality is quite tenuous and undoubtedly at times becomes dissociated from reality. He has marked psychopathic tendencies. . . ."

Dr. C. H. Farrell reported his examination of Saxon on January 29, 1970: ". . . (Saxon) is a chronic psychopathic personality in an inadequate individual who shows no evidence of psychosis at this time. . . . DIAGNOSIS: No evidence of frank psychosis found. Psychopathic Personality."

Saxon had little formal education beyond grade 11. He had been convicted of misdemeanors but no felony. The Air National Guard discharged him honorably.

The information charged four counts respectively as follows: Kidnapping, robbery, use of firearm in commission of felony, and assault with intent to murder. Saxon pleaded guilty to the last three counts, and the prosecution dismissed Count I. The court sentenced Saxon to imprisonment for 25 years on Count II; for 3 to 10 years on Count III, to be consecutive; and for 15 years on Count IV, to run concurrently with the sentence on Count II.

The standard for validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to defendant. State v. Cruse, *ante* p. 331, 190 N. W. 2d 629.

No person who as a result of mental disease or defect lacks capacity to understand the proceeding against him is to undergo sentence for commission of an offense so long as such capacity endures. See § 29-1822, R. R. S. 1943. Cf. Pate v. Robinson, 383 U. S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); Bishop v. United States, 350 U. S. 961, 76 S. Ct. 440, 100 L. Ed. 835 (1956); Model Penal Code, Proposed Official Draft, § 4.04, p. 68 (1962).

It is discretionary with the district court to hold a hearing sua sponte on the mental competency of a defendant to undergo sentence for commission of an offense. State v. Anderson, 186 Neb. 435, 183 N. W. 2d 766 (1971).

On competency the district court might consider not only the psychiatric reports but also the position of Caniglia. He had requested at least one report. His

investigation, reputation, and ability might properly lead a court to conclude that Caniglia had delved into the point. The court, in not holding a competency hearing sua sponte, acted well within its discretion.

The sentences are hard, but the conduct of Saxon after the arrest was grievous. True, he fired no shot, but he initiated the train of events in which Volcek was wounded. Social defense demands special protection for law enforcement officers in line of duty. A sentence imposed within statutory limits will not be disturbed for excessiveness in the absence of an abuse of discretion. State v. Holoubek, 187 Neb. 163, 188 N. W. 2d 439 (1971). There was no abuse here.

AFFIRMED.

VERN E. BOLE, APPELLANT, V. S.M.S. TRUCKING COMPANY, APPELLEE.
190 N. W. 2d 780

Filed October 15, 1971. No. 37896.

1. **Workmen's Compensation: Negligence.** When an employee's injuries are caused by his willful negligence, he may not recover compensation.
2. **Workmen's Compensation: Appeal and Error.** On appellate review of a workmen's compensation case in the Supreme Court, it will not be considered de novo if the findings of fact are supported by the evidence.

Appeal from the district court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Kenneth P. Weiner and Stern, Harris, Feldman, Becker & Thompson, for appellant.

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

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

NEWTON, J.

Plaintiff, a truck driver, was stopped by a deputy sheriff and charged with violating traffic regulations. Although the evidence is conflicting, it is ample to sustain a finding that plaintiff wrongfully assaulted the deputy sheriff and, as a consequence, was shot and received the injuries for which he seeks to recover.

The only assignment of error is in regard to the sufficiency of the evidence to sustain the finding and judgment of the trial court.

When an employee's injuries are caused by his willful negligence, he may not recover compensation. See § 48-110, R. R. S. 1943.

On appellate review of a workmen's compensation case in the Supreme Court, it will not be considered de novo if the findings of fact are supported by the evidence. See Gifford v. Ag Lime, Sand & Gravel Co., 187 Neb. 57, 187 N. W. 2d 285.

The findings of fact and the judgment entered by the trial court are supported by the evidence adduced and the judgment is affirmed.

AFFIRMED.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLEE, V. EARL B. SELDERS ET AL., APPELLANTS.
190 N. W. 2d 789

Filed October 15, 1971. No. 37902.

1. **Insurance: Automobiles: Words and Phrases.** In an automobile liability insurance policy, the word household in an omnibus clause extending the liability available to insured to other members of the household means those who dwell under the same roof and compose a family.
2. **Reformation of Instruments: Equity: Evidence.** Where the evidence, in an action for reformation of a written instrument, is sharply and irreconcilably conflicting, it becomes necessary to apply the well-known rule of equity that the evidence must be

clear, convincing, and satisfactory, and, in consequence, deny a reformation.

3. **Damages: Death: Parent and Child.** The measure of damages in an action for the wrongful death of a minor child is the pecuniary loss which the parent sustains by reason of being deprived of the child's services during his minority and the loss of contributions that might reasonably be expected to be made after reaching his majority.
4. **Damages: Death: Actions.** Medical or funeral expenses resulting from a wrongful death are recoverable as damages in an action under sections 30-809 and 30-810, R. R. S. 1943, when the beneficiaries for whom the action is being brought have paid or have legally obligated themselves to pay such expenses and may be recovered in a separate cause of action.
5. **Statutes: Insurance: Automobiles.** Section 60-509.01, R. R. S. 1943, requires uninsured motorist insurance for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles.
6. ———: ———: ———. It is the purpose of section 60-509.01, R. R. S. 1943, 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. Such provisions are to be liberally construed to accomplish such purpose.

Appeal from the district court for Madison County: MERRITT C. WARREN, Judge. Affirmed in part, and in part reversed and remanded.

George H. Moyer, Jr., of Moyer & Moyer, for appellants.

Deutsch & Hagen and Thomas H. DeLay, for appellee.

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

NEWTON, J.

This is an action under the Uniform Declaratory Judgments Act wherein plaintiff seeks to be relieved of liability under an insurance policy issued to defendant Earl B. Selders. Judgment was entered for plaintiff in the district court. We reverse that judgment in part.

Plaintiff issued to Earl B. Selders a policy of insurance

on an automobile jointly owned by Earl B. Selders and his wife Ila Selders. The policy provided for uninsured automobile coverage but limited persons so insured as follows: "The unqualified word 'insured' means

"(1) the first person named in the declarations and while residents of his household, his spouse and the relatives of either;

"(2) any other person while occupying an insured automobile; and

"(3) any person, with respect to damages he is entitled to recover for care or loss of services because of bodily injury to which this coverage applies."

After issuance of the policy, Earl and Ila Selders separated and lived in separate establishments. A divorce decree was entered awarding the minor children to Ila until further order of the court and requiring Earl to pay for their support. Earl also had visitation privileges. The decree was entered on October 10, 1966, and before it became final, three of the children died as the result of an accident which occurred on February 3, 1967. The children were passengers in an uninsured automobile involved in a one-car accident. The only question presented is whether damages sustained were covered by the policy at the time of the accident. Plaintiff contends that they were not because the children were not then members of their father's household and he was the only named insured.

It is apparent that after the separation of their parents, the children, residing with their mother, were members of her household and had ceased to be members of their father's household as he had moved out and was living elsewhere. "In an automobile liability insurance policy, the word 'household' in an omnibus clause extending the liability available to assured to other members of the household means 'Those who dwell under the same roof and compose a family.'" Andrews v. Commercial Casualty Ins. Co., 128 Neb. 496, 259 N. W. 653.

Defendants have asked for reformation of the policy

to include Ila Selders as a named insured. This was denied in the district court and we concur that defendants are not entitled to reformation. Without attempting to detail the lengthy evidence submitted on this point, suffice it to say that defendants have failed to meet the required burden of proof. "In an action for reformation of a written instrument, the burden rests upon the moving party of overcoming the strong presumption arising from the terms of the written instrument. If the proofs are doubtful and unsatisfactory and if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties.

"Where the evidence, in an action for reformation of a written instrument, is sharply and irreconcilably conflicting, it becomes necessary to apply the well-known rule of equity that the evidence must be clear, convincing and satisfactory, and, in consequence, deny a reformation." Beideck v. National Fire Ins. Co., 139 Neb. 171, 296 N. W. 873. See, also, Du Teau Co., Inc. v New Hampshire Fire Ins. Co., 156 Neb. 690, 57 N. W. 2d 663.

Since Ila Selders was not a named insured and not a member of the household of Earl B. Selders, she is not an additional insured and has no standing such as would permit her to recover under the policy issued by plaintiff. Likewise, the children were not additional insureds and had one been injured rather than killed, such child could not have recovered under the policy. The fact that the children were no longer members of their father's household would appear, at first glance, to bar recovery by the father. We do not so find. The wrongful death statute, section 30-810, R. R. S. 1943, permits recovery by the parents for the wrongful death of an unmarried minor without issue. This ordinarily entails recovery for services and contributions by the minor both before and after attaining majority. "The meas-

ure of damages in an action such as we have before us is the pecuniary loss which the parent sustains by reason of being deprived of the child's services during his minority and the loss of contributions that might reasonably be expected to be made after reaching his majority." Dorsey v. Yost, 151 Neb. 66, 36 N. W. 2d 574, 14 A. L. R. 2d 544. See, also, Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701. This is also true of medical and funeral expenses. "Medical or funeral expenses resulting from a wrongful death are recoverable as damages in an action under sections 30-809 and 30-810, R. R. S. 1943, when the beneficiaries for whom the action is being brought have paid or have legally obligated themselves to pay such expenses and may be recovered in a separate cause of action." Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831.

In view of the foregoing, it is clear that Earl B. Selders was legally entitled to recover damages from the uninsured motorist for the death of his children, assuming, as we must for the purposes of this action, that the uninsured motorist was at fault. The policy commits plaintiff: "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 sustained by the insured; * * *." It then proceeds to define "insured" as hereinabove set forth. The foregoing clause tends to limit recovery for bodily injury to injuries sustained by one insured. We have found that the children were not members of their father's household and therefore not listed as "insured" under provision (1). Provision (2) is not applicable. Provision (3) would appear to be meaningless if limited to injuries sustained by the insureds mentioned in provisions (1) and (2). It apparently was intended to comply with the statutory requirement found in section 60-509.01, R. R. S. 1943, which requires uninsured motorist insurance "for the protection of *persons insured thereunder who are legally entitled to*

recover damages from owners or operators of uninsured motor vehicles, * * *." (Emphasis supplied.) As pointed out, Earl B. Selders, as the father, is legally entitled to recover damages for the death of his children *and he is an insured.* Provision (3) adds an additional category of "insured." It provides not only for recovery for *injuries* sustained by an insured but also for the recovery of other consequential damages which an insured is legally entitled to recover from an uninsured motorist.

It is stated in Sterns v. M.F.A. Mutual Insurance Co. (Mo. App.), 401 S. W. 2d 510, 26 A. L. R. 3d 919: "The consistent tenor of legal authority we have examined, including the hereinabove quoted, and the clear intendment of the compulsory statutes therein referred to, are that *uninsured motorist coverage in its standard form includes indemnity to such survivors of deceased victims of uninsured automobiles as are legally entitled to sue for damages under wrongful death statutes*—without regard to whether the coverage is provided under compulsion by statute or by voluntary contract." This court stated in Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N. W. 2d 133: "A provision, drawn by the insurer to comply with the statutory requirement of uninsured motorist coverage, must be construed in light of the purpose and policy of the statute. Such a provision, drawn in pursuance of a statutorily declared public policy, is enacted for the benefit of injured persons traveling on the public highways. Its purpose 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. Such provisions are to be liberally construed to accomplish such purpose." Statutory requirements must be complied with by insurers and if the policy issued fails in this respect, the statute will be read into the policy. See Protective Fire & Cas. Co. v. Cornelius, 176 Neb. 75, 125 N. W. 2d 179.

As we view the situation, Ila Selders personally has no right to recover from plaintiff. The administrator and administratrix of the estates of the three deceased children have a right of recovery for damages sustained by Earl B. Selders, the father of the children, but are not entitled to recover for damages sustained by the mother Ila Selders. Insofar as the judgment of the district court denied recovery of damages sustained by Earl B. Selders, the judgment is reversed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. PHILLIP RUSSO, APPELLANT.

190 N. W. 2d 853

Filed October 15, 1971. No. 37913.

1. **Criminal Law: Self-Incrimination.** An accused without counsel and in custody for interrogation may effectively waive his privilege against self-incrimination without receiving Miranda warnings.
2. **Criminal Law: Trial.** Among intervals ordinarily to be excluded in computation of time for a speedy trial are delay resulting from (1) other proceedings concerning defendant or (2) a continuance granted at the request or with the consent of defendant.
3. **Criminal Law: Trial: Instructions.** If the court has instructed the jury generally on the law and has not withdrawn any essential issue from consideration by 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 Lancaster County: ELMER M. SCHEELE, Judge. Affirmed.

William L. Walker, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

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

SMITH, J.

An information charged that Phillip Russo during his confinement in the Nebraska Penal and Correctional Complex had assaulted and struck Leo M. Amen. A jury found him guilty. He appeals and assigns errors relating to voluntariness of admissions, right to speedy trial, and a jury instruction on self-defense..

Preliminary to in-custody interrogation of Russo by a lieutenant of the Nebraska State Patrol, on August 28, 1969, the lieutenant commenced to deliver Miranda warnings. Russo, interrupting, spontaneously volunteered that he had struck Amen. Although that evidence differed from testimony by Russo, and no one had taken stenographic notes, it sufficed to support findings by court and jury against him. An accused without counsel and in custody for interrogation may effectively waive his privilege against self-incrimination without receiving Miranda warnings. See, State v. Perez, 182 Neb. 680, 157 N. W. 2d 162 (1968); United States v. Barnhill, 429 F. 2d 340 (8th Cir., 1970).

The offense occurred on August 27, 1969, but trial did not commence until November 2, 1970. The delay was due to (1) hand-lettered motions signed by Russo but not by his counsel, (2) confinement of Russo in a hospital for psychiatric treatment from January to June 1970, and (3) agreement of counsel to a continuance.

Violation of the right to a speedy trial is not necessarily determinable by passage of time alone. Among intervals ordinarily to be excluded in computation of time for a speedy trial are delay resulting from (1) other proceedings concerning defendant or (2) a continuance granted at the request or with the consent of defendant. See A.B.A., Standards Relating to Speedy Trial, § 2.3 (Approved Draft, 1968). Russo was given a speedy trial.

On self-defense, jury instruction No. 8 embodied the

substance of the standard form. See NJI No. 14.33 (1969). Russo argues that State v. Goodseal, 186 Neb. 359, 183 N. W. 2d 258 (1971), which decided the Self-Defense Act of 1969 was unconstitutional, rendered the instruction erroneous. He requested no different instruction. Indeed he does not specify the nature of the asserted error in the court's instruction.

If the court has instructed the jury generally on the law and has not withdrawn any essential issue from consideration by 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. State v. Ford, 186 Neb. 109, 180 N. W. 2d 922 (1970).

The judgment is affirmed.

AFFIRMED.

EVELYN M. MICHAELIS, APPELLEE, V. NORMAN A. MICHAELIS, APPELLANT.
190 N. W. 2d 783

Filed October 15, 1971. No. 37921.

1. **Judgments: Trial: Appeal and Error.** Where a default has been regularly entered, it is within the discretion of the trial court as to whether a default judgment shall be set aside. In the absence of a showing of an abuse of discretion this court will not interfere.
2. **Judgments: Pleadings: Trial.** The facts and circumstances in each case determine whether there has been an abuse of discretion. Among the matters to be considered are the promptness of the motion to vacate, the negligence or want of diligence of the party moving to vacate, and the avoidance of unnecessary delays and frivolous proceedings in the administration of justice.

Appeal from the district court for Gage County: WILLIAM F. COLWELL, Judge. Affirmed.

Mattson, Ricketts, Gourlay & Lewis, for appellant.

Dalke & Carlson, for appellee.

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

BOSLAUGH, J.

The defendant appeals from an order overruling his motion to set aside and vacate a default judgment entered against him in a divorce proceeding.

The action was commenced on September 4, 1968, and a summons was served in person upon the defendant on that date. Answer day was October 7, 1968. On November 19, 1968, counsel for the defendant filed a motion to require the plaintiff to make her petition more definite and certain.

On October 31, 1969, approximately 1 year later, the defendant's counsel asked leave to withdraw as counsel for the defendant, alleging that the defendant refused to answer correspondence or contact his counsel. Leave to withdraw was granted, and a copy of the order was mailed to the defendant at Wymore, Nebraska. On November 4, 1969, the trial court ordered the defendant's motion be set for hearing on November 14, 1969. A copy of this order was mailed to the defendant at Wymore, Nebraska, but the letter was returned to the clerk of the district court endorsed: "Moved & left no address."

The defendant's motion was heard and overruled on November 14, 1969, and the defendant was given through December 4, 1969, to plead further. A copy of this order was mailed to the defendant at Wymore, Nebraska. The defendant admits that he saw a copy of this order on or about December 7, 1969. The letter had been delivered to the home of the defendant's son, Gordon, in Wymore, Nebraska, and was delivered to the defendant personally by Gordon's wife. She testified that she read the order to the defendant at that time.

On December 19, 1969, no further appearance having been made, the trial court found that the defendant was in default and entered judgment granting the plaintiff

a divorce, custody of two minor children, certain property, alimony, and child support.

On June 18, 1970, 6 months later, the defendant filed his motion to vacate and set aside the judgment entered on December 19, 1969.

Where a default has been regularly entered, it is within the discretion of the trial court as to whether a default judgment shall be set aside. Morgan v. Weiner, 173 Neb. 715, 114 N. W. 2d 720. In the absence of a showing of an abuse of discretion this court will not interfere.

The facts and circumstances in each case determine whether there has been an abuse of discretion. Among the matters to be considered are the promptness of the motion to vacate, the negligence or want of diligence of the party moving to vacate, and the avoidance of unnecessary delays and frivolous proceedings in the administration of justice. Commercial Sav. & Loan Assn. v. Holly Development, Inc., 182 Neb. 335, 154 N. W. 2d 510.

The defendant's motion to vacate was not filed until the last day of the 6-month period prescribed by section 42-340, R. R. S. 1943. The defendant, however, testified that he was represented by a lawyer in November and December 1969 and that he talked with his present counsel before Christmas in 1969. The delay in filing the motion to vacate is unexplained in the record.

The defendant claims fraud on the part of the plaintiff in failing to disclose to the trial court that she knew where the defendant was living in December 1969. This contention is based upon a telephone conversation between the parties on November 9, 1969, after the defendant's son had visited him for 3 days in Omaha, Nebraska. Perhaps the plaintiff could have made a more complete disclosure of what information she had as to where the defendant might be living, but the fact remains that the order of November 14, 1969, which was mailed to Wymore, Nebraska, reached the defendant and he knew the contents of the order not later than December 7, 1969.

The order of November 14, 1969, was sufficient notice to the defendant that he would be in default after December 4, 1969, unless a further appearance was made. In the absence of a further appearance the trial court could proceed without additional notice to the defendant.

As we view the record, it fails to show that the trial court abused its discretion in refusing to vacate and set aside the judgment entered by default. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ODELL FORD, APPELLANT.
190 N. W. 2d 787

Filed October 15, 1971. No. 38025.

1. **Criminal Law: Constitutional Law: Evidence.** A conviction obtained through the use of false testimony, known by the State to be such, is in violation of the Fourteenth Amendment to the Constitution of the United States.
2. **Criminal Law: Evidence: Witnesses: Trial.** The resolution of conflicts and inconsistencies in the testimony of a witness is a question of fact for the jury and it is the jury's function to determine which, if any, of the inconsistent statements of a witness is true.

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

Odell Ford, pro se.

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

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

NEWTON, J.

This is a post-conviction proceeding. Defendant charges that his conviction on a charge of manslaughter resulted from perjured testimony knowingly used with the connivance of the court, the county attorney, and

the public defender. The district court denied an evidentiary hearing and dismissed defendant's motion. We affirm the judgment of the district court.

Defendant's entire motion is based on the fact that a witness had made, prior to trial, certain statements conflicting with her testimony. This was known to defendant and his attorney at the time of trial, was brought out on cross-examination of another witness, and the circumstances fully presented to the jury.

A conviction obtained through the use of false testimony, known by the State to be such, is in violation of the Fourteenth Amendment to the Constitution of the United States. See, Napue v. Illinois, 360 U. S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217; Miller v. Pate, 386 U. S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690.

"The resolution of conflicts and inconsistencies in the testimony of a witness is a question of fact for the jury and it is their function to determine which, if any, of the inconsistent statements of a witness is true." 23A C. J. S., Criminal Law, § 1138d, p. 345. See, also, Hynes v. State, 115 Neb. 391, 213 N. W. 347.

In the present case, the conflicting statements of the witness were known to the jury. It was simply a question of credibility which the jury, in full possession of the facts, resolved.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRANCISCO M. JUAREZ, APPELLANT.

190 N. W. 2d 858

Filed October 22, 1971. No. 37892.

1. **Sodomy: Trial: Evidence.** In a sex crime, testimony on direct examination concerning a victim's complaint should be confined to the fact that complaint was made, and the details of the event, including the identity of the person accused, are not

proper subjects of inquiry unless the complaint was a spontaneous, unpremeditated statement so closely connected with the act as to be part of the res gestae.

2. ———: ———: ———. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is generally admissible as an exception to the hearsay rule, whether it be treated as part of the res gestae or as a spontaneous declaration or excited utterance.

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

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

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

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

MCCOWN, J.

The defendant was charged on separate counts with the crimes of sodomy and assault with intent to do great bodily harm. He was found guilty of sodomy by the jury, but the jury was unable to reach a verdict on the assault count. Sentence on the sodomy conviction was entered, and this appeal followed.

The victim was a 15-year-old runaway from the Whitehall Home in Lincoln, Nebraska. He met the defendant, Francisco Juarez, in Omaha on July 1, 1970. The victim accompanied Juarez to a pool hall and later to Juarez' apartment where he spent the night. The victim testified that Juarez committed sodomy upon him that night and on the three succeeding nights. He continued to stay with Juarez. On the evening of July 5, 1970, the victim and the defendant were in the defendant's apartment with another unidentified male adult and two other teenage boys. All of them had removed their clothing except for undershorts. There was some evidence of drinking by the defendant. The boys testified that

at times the defendant kissed and patted their legs and buttocks. Later, the defendant began to beat the unidentified adult, who fled. Still later, defendant began to beat the victim and the two other boys fled. These two notified the police and accompanied them back to the defendant's apartment. The defendant and the victim were in the apartment. The victim was beaten, bleeding, and crying. The officers arrested the defendant and took the victim to a hospital, and later to the police station. The victim made complaints or statements to a police officer at each location. The statements were both made by the victim within an hour and a half to two hours from the time the police found him. To some extent, the statements were in answer to questions of the officers. Both officers testified that the victim was in an emotional or excitable state.

The complaints or statements made by the victim to the officers were essentially summary statements of what crimes were committed, where, when, and by whom. The victim was the first witness at the trial. The two other boys and three police officers also testified. The evidence of these witnesses, while circumstantial as to sodomy, generally corroborated the testimony of the victim in all other respects. The victim's complaints to the police officers were fully consistent with the testimony which he gave at the trial.

The assignments of error center around the admission of the complaints or statements made to the police officers by the victim. The defendant claims that this testimony was inadmissible hearsay and was not a part of the res gestae.

Nebraska has traditionally followed the common law rule that in a sex crime, the fact that complaint was made is admissible but not its details. This rule, while related to exceptions to the hearsay rule, is still grounded on different considerations. Although issues have been intermingled, we have held that in a sex crime, testimony on direct examination concerning a victim's complaint

should be confined to the fact that complaint was made, and the details of the event, including the identity of the person accused, are not proper subjects of inquiry unless the complaint was a spontaneous, unpremeditated statement so closely connected with the act as to be part of the res gestae. See, Peery v. State, 163 Neb. 628, 80 N. W. 2d 699; State v. Chaney, 184 Neb. 734, 171 N. W. 2d 787.

Concepts of res gestae have been indistinct and interpretation has been sometimes confusing. Most of the present exceptions to the hearsay rule evolved from early explanations in terms of res gestae. The obvious trend of the cases is toward a widening of the admission of spontaneous statements and a narrowing of the operation of the hearsay rule.

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is generally admissible as an exception to the hearsay rule, whether it be treated as part of the res gestae or as a spontaneous declaration or excited utterance. See, generally, McCormick, Law of Evidence, § 272, pp. 578 to 584; United States v. Fountain, 449 F. 2d 629 (8th Cir., September 28, 1971); State v. Chaney, *supra;* Rule 8-03(b)(2), Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates.

Determination of admissibility generally rests within the sound discretion of the trial court. See, VI Wigmore on Evidence (3d Ed.), § 1757, p. 166; Roberts v. United States, 332 F. 2d 892 (8th Cir., 1964).

The defendant objected to the police officers' testimony as to the victim's complaints on the ground that it was hearsay. The trial court properly overruled those objections. Even assuming that the foundation for admission of the victim's complaints to the police was inadequate, we cannot see how the testimony prejudiced the defendant. The victim's oral testimony at trial was completely consistent with his out-of-court statements,

and both the declarant and those who heard the statements were subject to cross-examination.

The judgment is affirmed.

AFFIRMED.

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

190 N. W. 2d 861

Filed October 22, 1971. No. 37924.

Trial: Evidence: Witnesses. Where a question is asked of a witness, and his answer, which is responsive to the question, is received without objection, and motion is then made by counsel to strike out such evidence on the ground of its incompetency, it is discretionary with the court whether it will sustain the motion or not.

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

Douglas McArthur, for appellant.

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

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

NEWTON, J.

This is an appeal from a conviction for operating a motor vehicle while under the influence of alcoholic liquors. Defendant asks for reversal on the ground that evidence of a blood test was improperly received. We affirm the judgment of the district court.

The State placed on the witness stand the individual who analyzed the blood sample taken from defendant. The witness was questioned and answered as follows:

"Upon the analysis or analyzing of the sample, what result did you obtain?

"The amount of alcohol in the blood was sixteen hundredths per cent."

No objection was made to the question, but after it had been answered, the defendant moved to strike the answer so that he could interpose the objection that there was not a sufficient foundation shown. The motion was overruled. The State concedes that the statutory requirements for the admission of evidence as to the result of the blood test were not fully complied with. Defendant failed to give any reason or excuse for failure to object before the question was answered.

We believe that courts should not deal arbitrarily with such situations as a lawyer's attention may at times be momentarily diverted or he may for other reasons fail to hear the question asked. No such situation appears here and it is the general rule that a party cannot reserve his objection to a question calling for incompetent testimony until the answer of the witness has been received. It is then discretionary with the court whether it will, or will not, sustain the motion. See, Dunn v. State, 58 Neb. 807, 79 N. W. 719; Combs v. Owens Motor Co., 121 Neb. 5, 235 N. W. 682; State v. Todaro, 131 N. J. Law 430, 37 A. 2d 73; State v. Bryan, 69 Ohio App. 306, 43 N. E. 2d 625; Soucie v. State, 218 Ind. 215, 31 N. E. 2d 1018; Commonwealth v. Doyle, 323 Mass. 633, 84 N. E. 2d 20; People v. Abbott, 47 Cal. 2d 362, 303 P. 2d 730. The present record does not reflect an abuse of discretion.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD HAMILTON, APPELLANT.
190 N. W. 2d 862

Filed October 22, 1971. No. 37927.

1. **Guilty Plea: Venue.** A plea of guilty, voluntarily entered, waives any objection to the overruling of a motion for a change of venue.

2. **Constitutional Law: Bail and Recognizance.** Article I, section 9, Constitution of Nebraska, renders murder a nonbailable offense where the proof is evident or the presumption great.

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

Robert G. Scoville of Ryan & Scoville and P. F. Verzani, for appellant.

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

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

NEWTON, J.

Defendant was charged with murder in the first degree and subsequently entered a plea of guilty to murder in the second degree. He now contends that the plea entered was not voluntary. We affirm the judgment of the district court.

Defendant asserts that two factors render his plea involuntary: First, the denial of a change of venue; and second, the denial of bail. The theory apparently is that these factors overwhelmed this 18-year-old defendant to the extent that, notwithstanding he was in touch with his parents and his attorney, he was thereby induced to plead guilty to the lesser charge. We are at a complete loss to understand how these factors could bring about an involuntary plea. Furthermore, at the time defendant entered his plea of guilty and was sentenced, he assured the court that he fully understood the reduction of the charge to second degree murder and the penalty, was acting freely and voluntarily without any promises or threats, and that he had discussed the matter with his parents and his attorney.

It further appears that in the eyes of the law, defendant was not the victim of any injustice. A plea of guilty, voluntarily entered, waives any objection to the overruling of a motion for a change of venue. See State

v. Burnside, 185 Neb. 234, 175 N. W. 2d 1. Article I, section 9, Constitution of Nebraska, renders murder a nonbailable offense "where the proof is evident or the presumption great." In the present case, the circumstances surrounding the offense not only raised a positive presumption of guilt but were practically conclusive.

We are unable to note any error in the record before us and are necessarily constrained to affirm the judgment of the district court.

AFFIRMED.

LA VERN ZADINA, APPELLANT, V. C. L. WEEDLUN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, ET AL., APPELLEES.
190 N. W. 2d 857

Filed October 22, 1971. No. 37957.

1. **Appeal and Error: Evidence: Courts.** Where there is irreconcilable conflict in the evidence on a material issue, the reviewing court will, in determining the weight of the evidence of the witnesses, consider the fact that the trial court observed them and their manner of testifying and must have accepted one version of facts rather than the other.
2. **Intoxicating Liquors: Implied Consent Law.** The failure of an officer to advise a motorist subjected to a breath or body-fluid test for intoxication that he could obtain an additional test following that administered at the direction of the officer does not excuse the motorist's failure to submit to such test.

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

Barney & Carter, Herbert M. Brugh, and David W. Stempson, for appellant.

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

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

NEWTON, J.

This is an appeal from an order of the district court affirming an order of the Director of Motor Vehicles suspending the motor vehicle operator's license of La Vern Zadina, appellant. The basis of the order was the refusal of appellant to take a body-fluid test subsequent to his arrest for operating a motor vehicle while under the influence of alcoholic liquor. We affirm the judgment of the district court.

Appellant raises two questions. He denies that he was ever requested to take the test. The evidence on this point was conflicting but was sufficient to sustain the finding of the district court. Where there is irreconcilable conflict in the evidence on a material issue, the reviewing court will, in determining the weight of the evidence of the witnesses, consider the fact that the trial court observed them and their manner of testifying and must have accepted one version of facts rather than the other. See Hooper v. City of Lincoln, 183 Neb. 591, 163 N. W. 2d 117.

Appellant also urges that the judgment must be reversed because the arresting officer failed to inform him that he could have a physician of his own choice evaluate his condition and perform additional tests. Section 39-727.04, R. R. S. 1943, provided: "The person tested shall be permitted to have a physician of his choice evaluate his condition and perform or have performed whatever laboratory tests he deems appropriate in addition to and following the test administered at the direction of the law enforcement officer. If the officer shall refuse to permit such additional test to be taken, then the original test shall not be competent as evidence." The statute confers a privilege upon the person to be tested but does not require the officer to inform him of the privilege. The failure of an officer to advise a motorist subjected to a breath or body-fluid test for intoxication that he could obtain an additional test following that administered at the direction of the officer does

not excuse the motorist's failure to submit to such test. See, Kesler v. Department of Motor Vehicles, 1 Cal. 3d 74, 81 Cal. Rptr. 348, 459 P. 2d 900, Cert. Den., 397 U. S. 989; Holland v. Parker, 84 S. D. 691, 176 N. W. 2d 54.

Appellant's contentions are without merit and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEONARD LEO FRANKLIN, APPELLANT.
190 N. W. 2d 780

Filed October 22, 1971. No. 37990.

Appeal and Error: Post Conviction. A defendant who has appealed his conviction cannot secure a second review of the identical propositions advanced in such appeal by resort to a post conviction procedure.

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

Larry W. Myers, for appellant.

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

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

NEWTON, J.

This is an action for post conviction review of a conviction for robbery. Appellant contends that in-court identification evidence was wrongfully admitted due to previous allegedly illegal line-up procedures. We affirm the judgment of the district court sustaining appellant's conviction.

The conviction of appellant was affirmed on appeal to this court. On that appeal the identical issues now relied upon were presented and determined adversely to

appellant. See State v. Franklin, 185 Neb. 62, 173 N. W. 2d 393.

A defendant who has appealed his conviction cannot secure a second review of the identical propositions advanced in such appeal by resort to a post conviction procedure. See, State v. Parker, 180 Neb. 707, 144 N. W. 2d 525; State v. Newman, 181 Neb. 588, 150 N. W. 2d 113.

The judgment of the district court is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

IN RE ESTATE OF VIVIAN M. NEIL, DECEASED. STANLEY R. NEIL, SURVIVING HUSBAND, APPELLANT, V. AUDREY MASTERSON ET AL., APPELLEES.
191 N. W. 2d 448

Filed October 29, 1971. No. 37903.

1. **Adoption: Descent and Distribution: Statutes: Parent and Child.** Adoption and the right to take property by descent or inheritance are strictly statutory and exclusively within the legislative control.
2. ———: ———: ———: ———. Nebraska, recognizing the humanitarian aspects and purposes of the adoption statutes, gives them a liberal rather than a strict construction.
3. ———: ———: ———: ———. Section 43-110, R. R. S. 1943, must be construed together with the statutes of descent and distribution.
4. ———: ———: ———: ———. It is the intention of our statute that the next of kin of adoptive parents shall have the same right to inherit property from an adoptive child as they would from a natural child of said adoptive parents.

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

Henry F. Reimer, Leo M. Williams, Deutsch & Hagen, and Thomas H. DeLay, for appellant.

Burbridge & Burbridge, for appellees.

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

SPENCER, J.

This case involves a question as to the inheritance of that portion of the estate of Vivian M. Neil, deceased, remaining after setting over to the surviving husband the property assignable under sections 30-103 and 30-101(4), R. R. S. 1943. The surviving spouse claims it should be assigned to him rather than to 21 nieces and nephews of the deceased's adoptive mother. The trial court assigned the property to the nieces and nephews. We affirm.

Deceased died intestate in Knox County, Nebraska, May 4, 1967, survived by her husband, the appellant herein, leaving an estate consisting of personal property of a value in excess of $50,000. The decedent, who was predeceased by her adoptive parents, left no issue, nor children of deceased issue, and no adoptive brother or sisters. The only surviving adoptive heirs are the 21 adoptive cousins.

Deceased had been adopted under a decree entered on the 13th day of August 1918. The adoption decree, which was without restriction, changed the name of decedent to Vivian Margery Smith, and provided that she would be entitled to all the rights and privileges, and subject to all the obligations of a child begotten by her adoptive parents in lawful wedlock.

Do adoptive cousins of a deceased inherit the same as cousins of the blood, under section 30-101, R. R. S. 1943? Adoption was unknown to the common law. It is strictly a creature of statute. So, also, is the right to take property by descent or inheritance. Such matters, therefore, are exclusively within legislative control.

The statutes covering adoption and descent and distribution of all of the states of the Union differ to a greater or lesser extent in their provisions. Reference to adjudicated cases from other states with standards

differing from our own are of little value in construing or interpreting the legislative intent and meaning in the enactment of our own statutes. Generally, however, the right of inheritance of the kin and heirs-at-law of predeceased adoptive parents depends upon the rights vested in the adoptive parents. See Annotation, 170 A. L. R. 742.

Our present statute, section 43-110, R. R. S. 1943, covering the legal consequences of an adoptive child, enacted in 1943, replaced the law enacted in 1897. It reads: "After a decree of adoption is entered, the usual relation of parent and child and *all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between such adopted child and the person or persons adopting such child and his, her or their kindred.*" (Italics supplied.) The statute previous to the 1943 enactment had remained unchanged from its adoption in 1897. The pertinent provision for comparison purposes was the following: "Unless the terms and conditions in such consent and petition otherwise provide, the person or persons adopting, and the child adopted shall after adoption, sustain toward each other the usual relation and the adopted child shall have bestowed upon him or her equal rights, privileges and immunities of children born in lawful wedlock, of parent and child, and shall have all the right and be subject to all the duties of that relation, and the parents of such adopted child shall, thereafter stand relieved of all parental duties toward, and all responsibility for, said minor child and shall have no right over it." § 43-109, Comp. St. 1929.

Since 1897, Nebraska has been in the vanguard of those states applying a liberal rather than a strict construction to adoption statutes. In re Estate of Enyart, 116 Neb. 450, 218 N. W. 89, states: "At common law, adoption of heirs or children was unknown. For some time after the enactment of adoption statutes the courts were inclined to their strict construction because they

were said to be in derogation of the common law. Later, the humanitarian aspects and purposes of such statutes were recognized, and the courts generally evinced a disposition to give them a liberal rather than a strict construction. This court has adopted the rule of liberal construction. Ferguson v. Herr, 64 Neb. 659."

The provisions from the statute of descent pertinent to the question presented are the following. Section 30-103, R. R. S. 1943: "(6) the residue, if any, of the personal estate shall be distributed in the same proportions to the same persons as prescribed for the descent of real estate." Section 30-101, R. R. S. 1943, provides that real estate shall descend: "(4) one half to the husband or wife, if there be no children nor the issue of any deceased child or children, surviving; (5) if the deceased leaves relatives of his or her blood, the residue of the real estate of which he or she shall die seized, in the cases above named, when not lawfully devised, shall descend subject to the rights of homestead, in the same manner and to the same persons as hereinafter provided for the descent of real estate of deceased persons leaving no husband or wife surviving; and in the event the deceased leaves no relatives of his or her blood, the residue of the real estate herein provided for shall also descend to the surviving husband or wife."

The following from In re Estate of Enyart, 116 Neb. 450, 218 N. W. 89, is controlling herein: "Much has been said and written upon the natural rights flowing from the ties of kinship, relative to the right of inheritance, but, as we view the question, it is to be determined not as a matter of sentiment but as a matter of law, which has been settled by the law-making power of the state." This language should be read in conjunction with section 43-110, R. R. S. 1943, set out above, particularly the portion italicized.

Appellant's appeal is predicated on his interpretation of the words "blood relative," in the statute of descent. He ignores the language of section 43-110, R. R. S. 1943,

"his, her or their kindred," which must be construed together with the statutes of descent and distribution. Black's Law Dictionary (4th Ed.), p. 1009, defines "kindred" as: "Relation by birth or consanguinity. Relatives by blood." The word "kindred" has a well-established meaning and properly signifies such persons as are related by blood. The language italicized above makes it very evident, particularly in the light of the liberal rather than the strict construction applied in Nebraska to adoption statutes, that it was the legislative intent to provide for reciprocal inheritance rights between the adopted child and the blood relatives of the adoptive parents. This is clearly evident from In re Estate of Taylor, 136 Neb. 227, 285 N. W. 538, in which we said: "The thought back of the Nebraska decisions has been to give exactly the same rights and privileges to an adopted child which a natural child has. One of the rights of a natural child is to inherit from a grandparent through his parent. If the adopted child does not have the right then it has been denied a right or privilege which the natural child has. * * *

"If a grandparent or an uncle, for instance, does not want the child thus adopted to share in his property, it is the easiest thing in the world to cut the child out by a paragraph in his last will. But if such a relative has not availed himself of the opportunity to cut out such person from his estate, it will be understood that the adopted child has the right of representation in exactly the same manner and to exactly the same extent as if such child had been begotten in lawful wedlock. Denton v. Miller, 110 Kan. 292, 203 Pac. 693; In re Cadwell's Estate, 26 Wyo. 412, 186 Pac. 499.

"We hold that the Nebraska statutes, as construed by our decisions, intend that an adopted child shall have the same rights to inherit property that a natural child has; that all the rights and privileges of an adopted child shall be identical with those of a natural child. If our legislature had intended to place any limits upon

such rights and privileges, it could easily have inserted them in the law of descent of property * * *."

We now hold that the language, "all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between such adopted child and the person or persons adopting such child and his, her or their kindred," can only mean that it is the intention of our statute that the next of kin of adoptive parents shall have the same right to inherit property from an adoptive child as they would from a natural child of said adoptive parents.

The judgment of the district court is affirmed.

AFFIRMED.

GORDON E. GANKA, DIRECTOR OF RATES AND SERVICES, NEBRASKA STATE RAILWAY COMMISSION, APPELLEE, V. CHICAGO & NORTH WESTERN RAILWAY COMPANY, CHICAGO, ILLINOIS, APPELLANT.

191 N. W. 2d 438

Filed October 29, 1971. No. 37908.

1. **Public Service Commissions: Carriers.** The Nebraska State Railway Commission is authorized to regulate rates and services and have general control of common carriers within this state as the Legislature may provide by law, and it is not amenable to legislative interruption or limitation of its status or powers except by specific legislation.
2. **Public Service Commissions: Carriers: Appeal and Error.** The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska State Railway Commission. If there is evidence to sustain the findings of the commission, this court cannot intervene.

Appeal from the Nebraska State Railway Commission. Affirmed.

Harry B. Otis of Gaines, Spittler, Neely, Otis & Moore and Christopher A. Mills, for appellant.

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

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

McCOWN, J.

A formal complaint was filed before the Nebraska State Railway Commission charging the railroad with a willful failure to provide reasonably adequate and continuous service on its line from Seward, Nebraska, to Superior, Nebraska. The complaint prayed that a hearing be held and the railroad ordered to repair its facilities and equipment, place its line in a safe operating condition, and provide reasonably adequate and continuous service on the line. After hearing, the commission entered its order requiring the railroad to repair a bridge previously washed out by a flood and to provide at least twice weekly train service from Seward to Superior.

The railroad contends that the power of the commission is circumscribed by statute, and that the enforcement of its orders is limited to those methods and remedies affirmatively and specifically authorized by statute.

The Nebraska State Railway Commission is a constitutional body in this state. A portion of Article IV, section 20, Constitution of Nebraska, provides: "* * * The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

The Legislature has also provided that the commission shall have power to regulate the rates and services of, and exercise general control over, all common carriers. See § 75-109, R. R. S. 1943.

Section 75-401, R. R. S. 1943, provides that the commission shall have and exercise jurisdiction over "the

service, facilities, and equipment of all railroad carriers in this state."

The railroad points to the fact that the commission has a specific statutory right to enjoin a common carrier from operating while its equipment, or the manner of its conduct and management, are in an unsafe and dangerous condition. See § 75-115, R. R. S. 1943. This, says the railroad, establishes the legislative intent to limit the commission's enforcement remedies in such cases to an injunction against operation. We cannot agree.

Our constitutional and statutory provisions make it clear that the commission is authorized to regulate rates and services and have general control of common carriers within this state as the Legislature may provide by law, and it is not amenable to legislative interruption or limitation of its status or powers except by specific legislation. See State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N. W. 2d 502.

At this point, it should be noted also that the Legislature has now removed the foundation stone of the railroad's argument, at least as to future disputes, by amending section 75-115, R. R. S. 1943. That section now affirmatively authorizes the commission not only to enjoin operations of a carrier but to order the carrier to make such reasonable improvements of its service, facilities, and equipment as are necessary. See § 75-115, 1971 Supp.

While the railroad makes the gesture of objection to the sufficiency of the evidence, there is no real question but that the evidence was sufficient to support the order of the commission. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the commission. If there is evidence to sustain the findings of the commission, this court cannot intervene. Ace Gas, Inc. v. Peake, Inc., 184 Neb.

448, 168 N. W. 2d 373. The order of the commission should therefore be affirmed.

After the entry of the order here, the railroad filed an application before the Interstate Commerce Commission for authorization to abandon the railroad line. This matter was not a part of the record before the commission, but has been called to the attention of this court and discussed in the briefs. The commission concedes the proposition that the Interstate Commerce Commission has exclusive and plenary jurisdiction over the abandonment of a branch line of the railroad even though that line is located wholly within a state. See Colorado v. United States, 271 U. S. 153, 46 S. Ct. 452, 70 L. Ed. 878. The commission has suggested that it would be appropriate for this court to modify the order by providing that the railroad need not comply until and unless there is a denial of the application for abandonment now pending before the Interstate Commerce Commission. Because of the nature and posture of an appeal from the commission to this court, we deem it inappropriate for this court to enter a modification of the order. Modification may be made at any time by the commission. In the event the commission fails to enter an appropriate modification or attempts to enforce its order prematurely, these matters may be called to the attention of any court having jurisdiction of the enforcement proceedings.

The order of the commission is therefore affirmed.

AFFIRMED.

DALE JEFFREY, APPELLANT, V. FRED RETZLAFF, APPELLEE.
190 N. W. 2d 436

Filed October 29, 1971. No. 37914.

1. **Assumption of Risk: Words and Phrases.** When one knows that a dangerous condition exists, appreciates its dangerous

nature and deliberately exposes himself to such danger, he assumes the risk of injury from it.

2. **Assumption of Risk: Trial.** Ordinarily, questions of negligence, contributory negligence, and assumption of risk are for the jury. However, where the evidence of assumption of risk is so clear that reasonable minds can reach no other conclusion, a directed verdict for the defendant is proper.

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

Lloyd I. Bevans, William L. Walker, and Earl Ludlam, for appellant.

M. J. Bruckner of Marti, O'Gara, Dalton & Bruckner, for appellee.

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

WHITE, C. J.

In this personal injury action, the district court directed a verdict for the defendant at the close of the plaintiff's evidence and dismissed the case. The plaintiff has appealed. We affirm the judgment of the district court.

At the time of the accident, the plaintiff was a shareholder and an officer employee of J.H.J. Enterprises, Inc., a closely held farm corporation. The defendant, a farmer, was under contract with the corporation to pick, shell, and dry corn. The defendant moved his corn dryer to a farm owned by the J.H.J. Enterprises, and the accident happened in connection with the corn drying operation.

On the morning of the accident, plaintiff arrived on the premises about 8 a.m. and found the defendant attempting to start the tractor. The corn dryer was powered by the defendant's tractor by attaching the power take-off shaft on the tractor to the shaft on the dryer. The defendant had difficulty in starting the tractor and asked the plaintiff to help start it by pulling it

with his truck. The evidence shows that this was an operation that was often necessary with this particular tractor. After starting the tractor, the defendant backed it into the necessary position for connecting the power take-off shaft to the shaft on the dryer. The evidence shows that the power take-off shaft rotated freely while the engine was running, whether or not the power take-off was in gear. The customary procedure in making the hook-up was to stop, take the power take-off out of gear, and then stop the rotation of the shaft by taking hold of the smooth part with the hand. The evidence shows that the plaintiff had observed the defendant doing this on several occasions. On this particular morning, the defendant complained of sore thumbs and asked the plaintiff to make the attachment. At the time of the accident, the defendant was sitting on the tractor and the motor was running.

The plaintiff took hold of the smooth part of the power take-off shaft with his left hand but was unable to stop its rotation. Thinking he could get a better grip, he grabbed the splined part of the shaft with his right hand. Immediately, his glove was caught and his hand whirled around the shaft injuring his thumb so badly that it eventually had to be amputated.

The evidence is undisputed that the plaintiff was 29 years of age, and had lived on a farm and worked with farm machinery for as long as he could remember. He testified he had heard of other people being injured by grabbing a power take-off shaft on the splined end, and concedes he should have known that such an act was dangerous. The evidence indicates, from the testimony of both the plaintiff and the defendant, that the proper method of stopping the shaft was to grasp the smooth portion. Summarizing, the evidence in this case shows that the plaintiff was as fully aware of the danger in grabbing the splined portion of the shaft as the defendant. As recently as Schild v. Schild, 176 Neb. 282, 125 N. W. 2d 900, this court has said: "Ac-

tionable negligence does not exist even if no care is exercised to avert a risk to another person subject to such risk if such risk should have been reasonably apprehended by such other person himself." In the above case, this court said as follows: "The plaintiff had been in possession of knowledge of the situation as well as had the defendant, * * *. The plaintiff was in possession of as much information at the time as was the defendant, and voluntarily, so far as the record discloses, took his position of his own accord and volition. * * * The record indicates without controversy that the plaintiff was as fully informed as to cause as was the defendant."

The rotating gear itself warned of engagement. The plaintiff and the defendant both knew that the twisting action could be generated by either the centrifugal motion of oil in the gear case or the actual tooth engagement of the gears. As we have mentioned, the plaintiff himself was completely aware that the grasping of the smooth portion of the shaft was the only way to avoid the obvious danger of grasping the splined portion of the shaft. The plaintiff charges negligence in the failure of the defendant to disengage the power take-off. There is no evidence in the record to support an allegation or finding that the power take-off was engaged or the defendant had knowledge of it.

We have recently said that when one knows a dangerous condition exists, appreciates its dangerous nature and deliberately exposes himself to such danger, he assumes the risk of injury from it. Disney v. Butler County Rural Public Power Dist., 183 Neb. 420, 160 N. W. 2d 757; Fitchley v. Love-Courson Drilling Co., Inc., 177 Neb. 455, 129 N. W. 2d 515.

Ordinarily questions of negligence, contributory negligence, and assumption of risk are for the jury. However, where the evidence of assumption of risk is so clear that reasonable minds can reach no other conclusion, a directed verdict for the defendant is proper. The evidence in this case clearly shows assumption of

risk sufficient to bar recovery. The plaintiff knew and comprehended the danger of grasping the splined end of the power take-off shaft and deliberately exposed himself to this danger, which was the proximate cause of the injury.

The district court correctly directed a verdict for the defendant and its judgment is affirmed.

AFFIRMED.

BOSLAUGH, J., dissenting.

FARMERS UNION COOP ASSOCIATION, CEDAR BLUFFS, NEBRASKA, APPELLANT, V. COMMERCIAL STATE BANK, CEDAR BLUFFS, NEBRASKA, APPELLEE.
191 N. W. 2d 168

Filed October 29, 1971. No. 37926.

1. **Principal and Agent: Corporations: Bills and Notes.** An agent is not authorized to endorse commercial paper unless otherwise agreed or the endorsement is usually incident to performance of acts that he is authorized to perform for the principal.
2. **Principal and Agent: Corporations: Bills and Notes: Banks and Banking.** If an agent within his authority receives cash for endorsement and delivery of commercial paper payable to the principal, the payer is not responsible for payment of the amount to the principal or its application to the principal's uses.

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

Dale D. Kuhlmann and William B. Craig, for appellant.

Yost, Schafersman, Yost & Lamme, for appellee.

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

SMITH, J.

Defendant bank exchanged cash over the counter for two checks payable to plaintiff corporation. Plaintiff

claimed the proceeds on the ground of unauthorized endorsements by Lester J. Schulz, its general manager. The district court found generally against plaintiff. The question on appeal is whether the court erred in not finding or concluding that plaintiff had not authorized the transactions.

Only three witnesses testified: Raymond D. Grosse, defendant's vice president and cashier; Edward M. Farr, a director of plaintiff since March 1965 and president since 1968 or 1969; and Vern E. Le Grande, a director and secretary-treasurer of plaintiff at the time of trial in 1970.

A trier of fact might reasonably find as follows: The checks, dated in August 1965 and January 1968 for $573.62 and $695.62 were drawn by Fremont Cake & Meal Co. on a bank other than defendant. On each check Schulz stamped the endorsement "Pay . . . (defendant)." The drawee paid in due course.

Plaintiff in operating its business normally kept cash on hand for unspecified purposes. It maintained an active checking account with defendant. Signature cards authorized withdrawals only by Schulz and certain employees in his name. No resolution or by-law restricted or conferred authority other than the title "general manager" upon Schulz. Each month he submitted a written report of some sort to the president. The books of account were audited annually without certification.

Plaintiff discharged Schulz in March 1969 for undisclosed reasons. No shortage was discovered until some time after his death.

Defendant had no record of the transactions; it had not used cash-in or cash-out slips. Grosse, who had transacted no business with Schulz, an acquaintance, testified: ". . . We cashed many checks for this corporate entity . . .. They had their account there.. . . Funds were also withdrawn by them for cash to operate their business.. . . Q. Do you know whether . . . any . . . cashiers, in fact, were making payment in cash on

checks made payable to the co-op, to . . . Schulz? A. No, sir."

An unauthorized signature on commercial paper is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it. U. C. C., §§ 3-404 (1) and 10-102 (2); see former § 62-123, R. R. S. 1943; 5, Part 1, U. L. A., § 23, p. 224 (1943). The law of agency applies. U. C. C., § 3-403; Bailey, Brady on Bank Checks, § 15.15, p. 502 (4th Ed., 1969).

Authority is the power of the agent to effect legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him. Manifestation of consent includes acquiescence from which, in light of the circumstances, it is reasonable for another to infer consent. It may be one of several inferences. Restatement, Agency 2d, § 7 (1958).

An agent is not authorized to endorse commercial paper unless otherwise agreed or the endorsement is usually incident to performance of acts that he is authorized to perform for the principal. If within his authority he receives cash for endorsement and delivery of commercial paper payable to the principal, the payer is not responsible for payment of the amount to the principal or its application to the principal's uses. A payee engaged in business ordinarily should deposit collection items for credit to his account. See, U. C. C., § 3-403(1); Geyer v. The Walling Co., 175 Neb. 456, 122 N. W. 2d 230 (1963); Shriver v. Sims, 127 Neb. 374, 255 N. W. 60, 94 A. L. R. 779 (1934); Bailey, Brady on Bank Checks, § 15.15, pp. 504 to 507; Restatement, Agency 2d, §§ 73, 76, and 165, Comment e (1958).

Although evidence of Schulz's authority is exiguous, the district court committed no error in declining to find or conclude that plaintiff had not authorized the transactions.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PHYLLIS KILLS SMALL ET AL., APPELLANTS.
191 N. W. 2d 167

Filed October 29, 1971. No. 37943.

Criminal Law: Trial: Evidence. Evidence is sufficient to sustain a verdict of guilty in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt.

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

Lyman & Meister and Howard P. Olsen, for appellants.

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

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

SMITH, J.

A jury found Dorrine Amescua and Wayne Menard guilty of assault with intent to commit robbery. Appealing, they assert insufficiency of the evidence to support the verdicts.

The victim, Thomas Neu, Jr., an epileptic, was visiting in Scottsbluff on May 22, 1970, where Menard, his nephew, resided. The two men, Dorrine, and Phyllis Kills Small, now deceased, during the day were drinking intoxicating liquor excessively. When Neu walked out the rear door of a tavern, these events, according to him and a neighbor lady, occurred. Dorrine, Phyllis, and Menard suddenly attacked him. Menard and Dorrine beat him with their fists. The two women rifled his pockets. The assailants then returned to the tavern, leaving Neu in an injured condition on the ground. The events were unrelated to epilepsy.

Neu crawled to the front sidewalk. There police officers answering a call found him semiconscious with bloody clothing, bloody nose, and a deep slash between two fingers.

Conflicting testimony was given by Dorrine, her husband, Phyllis, and Menard as follows: Neu was ordered out of the tavern for disorderly conduct. The four were helping him out the rear door when Neu suffered an epileptic seizure. Menard unsuccessfully looked for medication by passing his hands over the outside of Neu's pockets. No one hit Neu. No hand went inside any of his pockets.

Evidence is sufficient to sustain a verdict of guilty in a criminal prosecution only when the jury could properly find guilt beyond a reasonable doubt. State v. Leary, 185 Neb. 76, 173 N. W. 2d 520 (1970). The evidence is sufficient to sustain the verdicts against Dorrine and Menard.

The judgments are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DALE T. KIRBY, APPELLANT.
191 N. W. 2d 162

Filed October 29, 1971. No. 37969.

1. **Criminal Law: Right to Counsel.** An accused is not free to manipulate his right to counsel for the purpose of obstructing orderly procedure or other phases of judicial administration.
2. **Criminal Law: Continuances: Due Process.** Not every denial of a request by an accused for a continuance violates due process. The denial may honor due process, although a failure of evidence or a defense without counsel results. The answer must be found in the circumstances, particularly in the reasons presented at the time the request is denied.

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

E. Dean Hascall, for appellant.

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

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

SMITH, J.

A jury found Dale T. Kirby guilty of embezzlement. On appeal he asserts insufficiency of evidence and failure of the court to grant his pretrial request for court appointed counsel.

The information charged Kirby with embezzlement of $6,000 on July 18, 1969, from Martha Badura. Kirby, a practicing lawyer, had been administrator of the estate of Ernestine Litwin, deceased. Martha desired to pay $6,000 on a mortgage foreclosure decree that covered land owned by Ernestine at her death. She issued Kirby a check drawn on the Ashton State Bank and payable to order of Kirby, "Admr.," subject to this direction: "For payment for house." Kirby delivered the check endorsed in blank to the Clarke Bank at Papillion for collection but not for deposit. After payment of the item a cashier's check was issued by the Clarke Bank to Kirby as an individual.

Conversion of the property is undisputed. Prior to arrest Kirby orally admitted to Martha his individual liability. In a civil action by her against him individually to recover the $6,000, he confessed judgment.

Kirby contends that the $6,000 belonged to the administrator, not Martha, and that he therefore converted none of her property. A jury could properly find as follows: Neither party intended that Kirby could properly commingle the $6,000 with estate assets, that distribution of the $6,000 was to be subject to the order of the county court.

Although Kirby's endorsement was effective, it did not relieve him of criminal liability. See U. C. C., § 3-405 (2). We do not decide whether he possessed the property under color of his office. It is enough that ownership was in Martha. See § 28-538, R. R. S. 1943.

On March 6, 1970, Kirby was admitted to bail and

arraigned for plea to the information in district court at Papillion. The court offered to appoint defense counsel at public expense. Kirby declined. He also expressed a desire that the earliest trial date be in the fall term.

On August 27, 1970, at the docket call the court set the case for trial on November 30. By the latter date no one had appeared as counsel for Kirby. He then for the first time moved the court to appoint defense counsel and to continue the case. He said, ". . . my attorney, Francis Casey, . . . had to go to the . . . Hospital, the exact day I don't remember, but recently he stated. He . . . is not physically capable." Kirby also said he had contacted three other lawyers, none of whom were in a position to go to trial on November 30. He concluded: "I would like counsel appointed in any event. And I need a continuation, not only for myself, but if counsel were appointed . . ., it would be almost blank for him to try the case on the same day."

The county attorney objected to the motion on several grounds: Martha Badura had arrived from Ashton, 150 miles distant. Casey had been present in the courthouse without informing the county attorney that he intended to represent Kirby. The court in overruling the motion pointed out that 38 veniremen were waiting. Kirby offered no excuse for the late date of his motion.

An accused is not free to manipulate his right to counsel for the purpose of obstructing orderly procedure or other phases of judicial administration. See United States ex rel. Baskerville v. Deegan, 428 F. 2d 714 (2d Cir., 1970).

Not every denial of a request by an accused for a continuance violates due process. The denial may honor due process, although a failure of evidence or a defense without counsel results. The answer must be found in the circumstances, particularly in the reasons presented at the time the request is denied. See Ungar v. Sarafite, 376 U. S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964).

Kirby's contentions are not well taken. The judgment is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. THOMAS G. H. GUTIERREZ, APPELLANT.
191 N. W. 2d 164

Filed October 29, 1971. No. 37978.

1. **Criminal Law: Constitutional Law: Jury.** A defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn.
2. ———: ———: ———. To be constitutionally impermissible, the exclusion of any given sector of the population from jury duty must be purposeful or intentional.
3. ———: ———: ———. The use of voter registration lists or poll books for jury selection systems is constitutionally permissible.
4. ———: ———: ———. The Nebraska system of selecting jurors is clearly within constitutional limits.
5. **Criminal Law: Trial: Evidence.** Proof that an exhibit remained in the custody of law enforcement and court officers is sufficient to prove a chain of possession.
6. **Courts: Sentences: Probation and Parole.** Whether a defendant be sentenced or placed on probation is a matter within the discretion of the trial court.
7. **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 Lincoln County: HUGH STUART, Judge. Affirmed.

Beatty, Morgan & Vyhnalek and William S. Padley. for appellant.

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

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

NEWTON, J.

Defendant was convicted of selling canabis sativa or marijuana. On appeal he contends there was error in the selection of the jury panel and in the admission in evidence of a bag of marijuana. He further urges that his sentence is excessive. On review of the record, we are constrained to affirm the judgment of the district court.

It is stipulated that the jury panel was selected in the manner provided by law. Slips numbered 1 to 10, inclusive, are placed in a receptacle and one number is drawn by lot. The list of registered voters, or if none, the poll books, are then opened. The name of the registrant or voter which corresponds with the key number drawn, and every tenth name thereafter, constitutes the names of persons comprising the jury panel, subject to deletion of those ineligible to serve or exempt from service. See §§ 25-1627 and 25-1628, R. R. S. 1943. It is said that Mexican-Americans are not properly represented upon the panels so selected yet the proportionate share of the population of the county comprised of Mexican-Americans is not reflected in the record. This failure, together with the fact that no challenge to the array appears, would ordinarily dispose of the question; however, since a constitutional question may be involved, that facet of the problem will also be considered.

A defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn. Swain v. State of Alabama, 380 U. S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759. To be constitutionally impermissible, the exclusion of any given sector of the population from jury duty must be purposeful or intentional. Swain v. State of Alabama, *supra*.

The use of voter registration lists or poll books for jury-selection systems has been repeatedly approved as constitutionally permissible even though the names were

not selected by lot. See, United States v. Butera, 420 F. 2d 564 (1st Cir., 1970); Camp v. United States, 413 F. 2d 419 (5th Cir., 1969); United States v. Caci, 401 F. 2d 664 (2d Cir., 1968).

It is difficult to conceive of a fairer or more practical method of selecting jurors than that used in Nebraska. The names are drawn by lot from lists of voters or registrants. The system is clearly within constitutional limits and renders impossible an intentional exclusion of any element of the population in a state or county where the privilege of voting is open to all who have attained the age required of an elector.

Regarding the admission in evidence of the packet of marijuana, the record reflects its purchase from defendant by a high school boy and that he took it to his home where it was found by his mother who turned it over to a police officer. It was retained in the custody of the police until the police officer produced the exhibit at defendant's preliminary hearing and thereafter it remained in the custody of the court reporter. The packet remained sealed after it came into the possession of the police officer except that he opened it once to remove some of the contents for the purpose of having it tested. Although the witnesses were unable to positively identify the contents as the same as those originally obtained, this fact was established by inference and presented primarily a question of the weight to be given this evidence. Proof that an exhibit remained in the custody of law enforcement and court officers is sufficient to prove a chain of possession. See State v. Bullard, 186 Neb. 709, 185 N. W. 2d 864.

The sentence imposed may, on the record, appear somewhat harsh. The court seriously considered probation, but, due to the defendant's apparent lack of frankness and general attitude, decided against it. The minimum sentence authorized by statute is 2 years. Defendant received an indeterminate sentence of 2 to 3 years. Although the issue is a close one, we cannot say

that the court abused its discretion in denying probation and the sentence imposed, being at about the minimum, leaves little room for reduction. Whether a defendant be sentenced or placed on probation is a matter within the discretion of the trial court. See State v. Swiney, 179 Neb. 230, 137 N. W. 2d 808. Where a sentence has been imposed within statutory limits, it will not be disturbed in the absence of an abuse of discretion. See State v. Trout, 186 Neb. 477, 183 N. W. 2d 923.

Defendant's contentions are lacking in merit and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. VICTOR LEADINGHORSE, APPELLANT.
191 N. W. 2d 440

Filed October 29, 1971. No. 37984.

1. **Sentences: Statutes: Courts: Appeal and Error.** Section 29-2308, R. R. S. 1943, provides that this court may reduce the sentence rendered by the district court against an accused when in its opinion the sentence is excessive, in which event it renders such sentence as may be warranted by the evidence.
2. ———: ———: ———: ———. Where the punishment of an offense created by statute is left to the discretion of the district court to be exercised within certain prescribed limits, a sentence imposed within such limits will not ordinarily be disturbed where there is no abuse of such discretion.

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

Jeffrey L. Orr, for appellant.

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

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

SPENCER, J.

Appellant appeals from a 15-year sentence in the Nebraska Penal and Correctional Complex for the offense of sodomy. The only question raised in the appeal is whether under the circumstances the sentence was excessive. We affirm.

The record would indicate that the offense was forcefully perpetrated on a teen-age boy while both parties were confined in the Buffalo County jail. Appellant at the time was waiting trial on two separate felony offenses, one of which involved assault on a 12-year-old boy. The presentence investigation is a part of the record herein. It indicates that appellant has previously been confined in the Nebraska Penal and Correctional Complex. Under order of the Buffalo County district court on the assault charge, a psychiatric evaluation was made of appellant. The report indicates appellant was considered dangerous and homicidal.

Section 29-2308, R. R. S. 1943, provides that this court may reduce the sentence rendered by the district court against an accused when in its opinion the sentence is excessive, in which event it renders such sentence as may be warranted by the evidence. We have said that where the punishment of an offense created by statute is left to the discretion of the district court to be exercised within certain prescribed limits, a sentence imposed within such limits will not ordinarily be disturbed where there is no abuse of such discretion. See State v. Whitaker, 185 Neb. 57, 173 N. W. 2d 397.

In view of appellant's past record and the presentence information available to the district court, we cannot say that an abuse of discretion has been shown herein. Judgment affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN BOSTON, APPELLANT.
191 N. W. 2d 452

Filed November 5, 1971. No. 37869.

1. **Criminal Law: Insane Persons: Trial.** 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.
2. ———: ———: ———. Except as otherwise provided by statute, the matter of granting a hearing on the issue of competency to stand trial rests in the discretion of the trial court.
3. ———: ———: ———. The means employed in resolving the question of sanity is discretionary with the court.

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

John Boston, pro se.

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

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

WHITE, C. J.

This is a direct appeal from a conviction and sentence for robbery. We affirm the judgment and sentence of the district court.

It is the contention of the defendant that the trial court should have held a hearing for the purpose of determining the mental competency of the defendant to stand trial. On this issue, we recently said in State v. Anderson, 186 Neb. 435, 183 N. W. 2d 766, as follows: "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 defendant was represented by counsel. It does not even appear from the record that the competency of the defendant to stand trial actually was raised. The sole record on the matter shows that on August 10, 1970, at the defendant's request "arraignment is continued until Dr. Farrell indicates whether hospitalization is needed." Even if we were to assume that the defendant did show of record that he thereby raised the question of competency, there is a total absence in the record of any evidence indicative of the lack of competency. More important, if there were an examination by Dr. Farrell and if he made a report to the court, neither of which appear in the record, the record does not show the matter was again raised, either by counsel or by the defendant himself. The transcript and the complete record of the evidence are before us and at no time is there any suggestion of such a contention. As we have said, the matter of granting an investigation or a formal hearing rests within the sound discretion of the trial court. State v. Anderson, *supra*. The defendant, represented by competent counsel, proceeded to trial and never at any time by objection or by any other manner renewed the question of being competent to stand trial. There is no evidence in the record which would sustain a finding that a reasonable doubt as to the defendant's competency was raised and therefore that a hearing was obligatory under the doctrine of State v. Anderson, *supra*. There is no showing in the record or in the proceedings in connection with the sentencing and the motion for new trial which would sustain in any factual

sense the contention that the defendant was incompetent to stand trial at the time and the place he actually did. The defendant's theory seems to be that the mere raising of the question as to incompetency, in his own subjective opinion, produces a reasonable doubt as to his competency and, therefore, the court is required to hold a hearing. This, of course, is not the law as we have announced it in State v. Anderson, *supra*. There is no merit to this contention of the defendant.

By another assignment of error the defendant in a brief pro se apparently contends that he was convicted by the knowing use of perjured testimony. An accomplice of the defendant, William Walter Branch, testified as a State's witness. In substance, Branch stated he was acting of his own free will and he had not made a deal of any kind with the county attorney's office for testifying. Apparently, the defendant's contention is based upon an assumption as a fact that this accomplice testified falsely in denying that he was testifying as a result of a "deal" with the State and also in denying that he was testifying under the threat of additional charges being instituted against him. Whatever the defendant himself may think of this situation, the fact remains that there is absolutely no evidence to support the defendant's assumption. In other words, giving maximum import to the language used by the defendant in asserting this contention, there is absolutely no evidence to support the contention of perjury used, much less showing that it was willfully and knowingly used by the prosecution. There is no merit to this contention.

The defendant complains of the ineffectiveness of his counsel. Apparently, this is based upon the contention that counsel failed to produce and use at the trial a transcript of the testimony at the preliminary hearing. The record shows, however, that defense counsel very ably and successfully, by way of cross-examination, persuaded different witnesses to acknowledge that their identification of the defendant in court was something

short of being absolutely positive. Concessions also were secured as to minor discrepancies between their preliminary hearing testimony and their testimony at the trial. It appears that the introduction of the whole of the preliminary hearing testimony, even if successful, might have been fatal to the defense in this case. There is no merit to this contention.

Assignments of error by the defendant cannot be sustained. The evidence is conclusive as to the defendant's guilt following a sequence of eye-witness identification and apprehension within about an hour after the commission of a robbery.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RAYMOND L. MOSS, APPELLANT.
191 N. W. 2d 543

Filed November 5, 1971. No. 37871.

1. **Criminal Law: Witnesses: Evidence.** A conviction based on eye-witness 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. Each case must be considered on its own facts.
2. **Criminal Law: Right to Counsel.** Counsel for accused is not required to be present at the time of out-of-court photographic identification, regardless of whether the accused is in custody or not.

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

Frank B. Morrison, Bennett G. Hornstein, and Raymond L. Moss, for appellant.

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

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

CLINTON, J.

Defendant was tried and convicted by a jury on charges of sodomy, robbery, and the use of a firearm in the commission of a felony. The occurrences took place in the home of the female victim of the sodomy on the morning of August 8, 1970, between the hours of 6:30 a.m. to 7:30 or 8 o'clock a.m. The robbery occurred when a tradesman victim called at the home to make a delivery while the sodomy was in progress. The defendant was represented in the trial court and in this court by appointed counsel. Defendant has also filed a supplemental pro se brief.

Two assignments of error are made in the brief of counsel for the defendant: (1) The district court committed reversible error in not suppressing the eyewitness identification testimony of State's complaining witnesses after it was established at a pretrial hearing that their in-court identification of the defendant was not independent of their pretrial photographic identification of him involving a police procedure which was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. (2) The district court committed reversible error in not suppressing the eyewitness identification testimony of State's complaining witnesses after it was established at a pretrial hearing that at the time of their photographic identification of the defendant 2 days after the alleged crimes he was in custody and, therefore, entitled to and denied his constitutional right to the presence of counsel at the photographic identification procedure utilized by police as a substitute for a formal lineup.

The court prior to trial held a Wade-Gilbert-Stoval hearing for the purpose of determining whether the

eyewitness identification testimony of the complaining witnesses should be suppressed. At the conclusion of the hearing the trial court found the witnesses' identification of the defendant was independent of their identification by photographs and that their testimony on this point should be admitted.

The record of the pretrial hearing as well as the trial record is before us. This record shows that shortly after and on the day of the occurrence the victim of the sodomy examined a large number of photographs from the police gallery. She picked out one photograph as resembling the perpetrator but made no positive identification. Two days after the occurrence the police, in an apparently unrelated incident, used tear gas to force a person from a house across the street from the witness' home. At that time the defendant came out and the complaining witness positively identified him as the man who had committed the act 2 days earlier. Thereafter the witness examined five photographs which were brought to her home by a police officer. Two of these she identified as the defendant. The witness was in the presence of the accused for an hour to an hour and a half on the day of the occurrence and was in bed with him for a part of that time. At the pretrial hearing she stated that she identified the accused from his having been in her home and that there was no doubt in her mind that he was the man. At the trial the photograph she picked out on the day of the crime (apparently not one of the accused) was introduced in evidence by the defense and the witness acknowledged that it was the photograph she had picked out. She acknowledged she had difficulty identifying Negro males.

The robbery victim testified at the pretrial hearing that on the day of the occurrence he had examined photographs at the police station and had picked out two as being pictures of the man who robbed him. One of these pictures apparently was not of the accused and was offered in evidence by the defense at the trial.

This witness sometime, apparently after the accused was in custody, looked at a series of five photographs brought him by the police and picked out two of these as being the defendant. At the pretrial hearing he was asked if he identified the defendant by virtue of the photographs or from having seen him and he stated: "I recognized him from seeing him up there when he got my money." He testified that he got a good look at the defendant when the accused opened the door at the time of the robbery and also later when the defendant returned to him a watch which the defendant had earlier taken. This witness at the pretrial acknowledged that he reported initially to the police that the robber was about 27 years of age. He was in fact much older. However, one of the defense witnesses testified that the defendant and his teenage son would pass for twins.

Both witnesses identified the accused at trial and at the preliminary hearing. The defendant, a black, was apparently the only black man present on those occasions.

The defense of the defendant was alibi. Two witnesses testified that on the morning of the occurrences he was present in the home of one of the witnesses from shortly after 7:30 a.m.

The defendant's assignment of error No. 1 must be rejected. State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225, governs. There this court, applying pertinent decisions of the Supreme Court of the United States, said: "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 to impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

With reference to assignment of error No. 2, the United States Supreme Court has not yet held that the accused is entitled to have counsel at photographic identification. The defendant relies upon United States v. Zeiler,

427 F. 2d 1305 (3d. Cir.), which holds that he is entitled to counsel at such identification. The Second, Fifth, Seventh, Ninth, and Tenth Circuits have held otherwise. See, United States v. Bennett, 409 F. 2d 888; United States v. Ballard, 423 F. 2d 127; United States v. Fowler, 439 F. 2d 133. Until the United States Supreme Court holds otherwise, we adopt the latter rule.

The defendant's pro se brief attacks in general terms the fairness of his trial, questioning largely the eyewitness identifications, and attacks competence of counsel. The record does not support these claims.

AFFIRMED.

FRANK E. SCARPELLO, JR., ET AL., MINORS, BY MARIAN L. SCARPELLO, THEIR MOTHER AND NEXT FRIEND, APPELLEES, V. CONTINENTAL ASSURANCE COMPANY, APPELLEE, IMPLEADED WITH JOSEPHINE SCARPELLO, APPELLANT.
191 N. W. 2d 444

Filed November 5, 1971. No. 37897.

1. **Judgments: Evidence: Appeal and Error.** As a prerequisite to its examination in this court evidence adduced on a summary judgment hearing must be embodied in a bill of exceptions.
2. **Judgments: Evidence: Pleadings: Appeal and Error.** In the absence of a bill of exceptions in a summary judgment proceeding it is presumed that the evidence sustains the trial court's holding that there was no issue of fact presented by the proceeding; that it was correctly decided; and that the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment.

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

James R. Welsh, for appellant.

Richard L. Edgerton, John J. Respeliers, Thomas D. Carey, and Richard R. Morrison, Jr., for appellees Scarpello.

John R. Barton, for appellee Continental Assurance Co.

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

CLINTON, J.

This is an action for a declaratory judgment which was decided in favor of the plaintiffs on their motion for summary judgment. The defendant appeals. There is in this case no bill of exceptions showing the evidence in the summary judgment hearing. The bill of exceptions was quashed by prior order of this court.

The case involves the adverse claims of the plaintiffs, minor children of Frank Scarpello, deceased, and the defendant, Josephine Scarpello, mother of the deceased, to the proceeds of an insurance policy upon the life of the deceased. This policy is alleged to be one of the assets subject to the jurisdiction of the court in divorce proceedings hereafter mentioned. The plaintiffs claim as beneficiaries designated by order of the court in the divorce proceedings by their mother against Frank Scarpello. Josephine Scarpello sets up her claim in a cross-petition alleging that she had been designated as irrevocable beneficiary of the policy prior to entry of the order in the divorce proceedings. She also alleges facts which if true would make the decree of divorce null and void. Each party in the pleadings denies the factual allegations upon which the other's right of recovery depended.

In this state of the record the following principles are applicable: "As a prerequisite to its examination in this court evidence adduced on a summary judgment hearing must be embodied in a bill of exceptions. . . . In the absence of a bill of exceptions in a summary judgment proceeding it is presumed that the evidence sustains the trial court's holding that there was no issue of fact presented by the proceeding; that it was correctly decided; and that the only issue that will be considered on appeal is the sufficiency of the pleadings to support

the judgment." Jung v. Cole, 184 Neb. 153, 165 N. W. 2d 717. See, also, Blanco v. General Motors Acceptance Corp., 180 Neb. 365, 143 N. W. 2d 257.

"A judgment of the district court brought to this court for review is supported by a presumption of correctness, and the burden is upon the party complaining of the action of the district court to show by the record that it is erroneous. . . . In determining whether or not the pleadings support the judgment, they must be taken as a whole, and construed so as to support the judgment, if capable of such construction. The presumption is that the relief granted is authorized by the pleadings, and the burden is upon him who attacks the judgment to show that it was not." Blanco v. General Motors Acceptance Corp., *supra*.

The judgment of the trial court must be affirmed.

AFFIRMED.

JOHN W. BALLEW, APPELLEE, V. MARGARET ANN BALLEW, APPELLANT.
191 N. W. 2d 462

Filed November 5, 1971. No. 37923.

1. **Marriage: Annulment of Marriage.** In this state, a voidable marriage is legally valid for all civil purposes until its nullity is so pronounced.
2. **Divorce: Evidence.** Where a divorce decree requiring periodic alimony payments contains no provisions as to remarriage, the remarriage of a divorced wife establishes a prima facie case which requires the court to terminate alimony in the absence of proof of some extraordinary circumstance justifying its continuation.
3. **Divorce: Marriage: Annulment of Marriage.** Under a divorce decree providing that alimony payments shall terminate upon remarriage of the wife, the right of the divorced wife to receive such payments is terminated upon remarriage and is not revived by an annulment of her remarriage on grounds which rendered the remarriage voidable.

Appeal from the separate juvenile court of Lancaster County: W. W. NUERNBERGER, Judge. Affirmed.

A. James McArthur, for appellant.

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

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

McCOWN, J.

This is an action to terminate a husband's obligation to make periodic alimony payments required by a divorce decree. The effect of the wife's remarriage and a subsequent annulment of the second marriage are the critical issues. The separate juvenile court modified the divorce decree and terminated the alimony payments.

The husband and wife were divorced and decree entered in the district court for Lancaster County, Nebraska, December 19, 1968. The decree approved and incorporated a settlement agreement between the parties. It required the husband to make monthly payments to the wife "during her lifetime and so long as the wife shall not remarry * * *," and provided that "the obligation of the husband to make periodic payments pursuant to this paragraph shall terminate on the death or remarriage of the wife." On June 30, 1969, the wife and one Aaron L. Unger were married in Lincoln County, Nebraska, under a marriage license obtained in Lancaster County, Nebraska. In July 1969, the wife and her new husband learned of the irregularity in their June marriage occasioned by the variance between the county of issuance of the license and the county in which the marriage occurred. On August 2, 1969, they were again married in Hall County, Nebraska. Thereafter, the wife began proceedings to terminate the marriage, apparently based on misrepresentation. On May 20, 1970, the district court for Lancaster County, Ne-

braska, entered its decree annulling the June and August marriages.

The husband remarried on April 28, 1970. In July 1970, he filed his petition for modification of the original divorce decree to eliminate alimony payments to the wife. On November 2, 1970, the separate juvenile court of Lancaster County entered its decree terminating the alimony payments as of June 30, 1969.

Essentially, the wife argues here that a provision in a divorce decree terminating alimony upon remarriage by the wife is not effective unless and until there has been a valid remarriage. The wife's argument rests on the assumption that when a voidable marriage is annulled, the decree relates back, makes the marriage void as though it had never occurred, and reinstates the original alimony decree. We cannot agree.

The issues have been considered by many courts. The most common basis for decision in this area seems to turn on the distinction between a void and a voidable remarriage. The great majority of courts have held that a wife's voidable remarriage terminates the prior husband's obligation for alimony, and that the termination of a voidable second marriage does not reinstate a right of support from the first husband merely because support is unavailable from the second. See Annotation, 48 A. L. R. 2d 270. For a discussion of policy considerations and current viewpoints, see Flaxman v. Flaxman, 57 N. J. 458, 273 A. 2d 567 (1971). Some states have held that where the second marriage was void as distinguished from voidable, the remarriage did not terminate the obligation of the first husband for alimony. See Johnson County Nat. Bank & Trust Co. v. Bach, 189 Kan. 291, 369 P. 2d 231.

At the very least, the facts in the case at bar establish that the remarriage here was voidable and not void. In this state, a voidable marriage is legally valid for all civil purposes until its nullity is so pronounced. Christensen v. Christensen, 144 Neb. 763, 14 N. W. 2d 613.

It is obvious that where a remarriage is terminated by the death of the husband, or by a decree of divorce, the wife is not entitled to reinstatement of a former husband's obligation to support her, regardless of whether any support is or is not available from the subsequent husband.

We see no reason to distinguish between a decree of divorce and a decree of annulment, at least where the annulment is based on grounds which render the marriage voidable rather than void. The fact that in many cases a wife may have the option of obtaining an annulment or a divorce should not give her a choice between two sources of support. We have held that even where a divorce decree requiring periodic alimony payments contains no provisions as to remarriage, the remarriage of a divorced wife establishes a prima facie case which requires the court to terminate alimony in the absence of proof of some extraordinary circumstance justifying its continuation. Wolter v. Wolter, 183 Neb. 160, 158 N. W. 2d 616.

In the case before us, the decree incorporated a settlement agreement and required alimony payments "so long as the wife shall not remarry" and provided that the obligation to make alimony payments "shall terminate on the death or remarriage of the wife." The wife is presumed to have known and understood the provisions of the divorce decree. There is no showing that she was incompetent or feebleminded, nor that the remarriage which she entered into was in any sense involuntary.

We hold that under a divorce decree providing that alimony payments shall terminate upon remarriage of the wife, the right of the divorced wife to receive such payments is terminated upon remarriage and is not revived by an annulment of her remarriage on grounds which rendered the remarriage voidable.

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

AFFIRMED.

GLADYS M. STEVEN, APPELLEE AND CROSS-APPELLANT, V. EFFIE LOUISE FORD, EXECUTRIX OF THE ESTATE OF LAURENE STEVEN, DECEASED, ET AL., APPELLEES, ANDREW J. MCMULLEN, INTERVENER-APPELLANT AND CROSS-APPELLEE.

191 N. W. 2d 446

Filed November 5, 1971. No. 37925.

1. **Garnishment: Property.** An attempt to proceed in garnishment to reach property that is not subject to garnishment is ineffective for any purpose.
2. **Garnishment: Wills: Property: Liens: Estates.** Where real estate is sold pursuant to a general power of sale contained in a will, a judgment creditor of a beneficiary of the estate has no lien upon the property sold or the proceeds of the sale.
3. **Creditor's Suits: Liens: Judgments: Estates.** A judgment creditor of a beneficiary may bring a creditor's suit to require that the distributive share in the estate be applied toward payment of the judgment.
4. **Creditor's Suits: Liens: Judgments.** A judgment creditor who brings a creditor's suit obtains a lien against the fund from the time of the commencement of the suit.
5. **Creditor's Suits: Liens: Intervention.** A judgment creditor who intervenes in a creditor's suit obtains a lien against the fund from the date of the intervention.

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

Andrew J. McMullen, pro se.

Oscar A. Drake, for appellee Gladys M. Steven.

Thomas Tye, for appellees Ford et al.

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

BOSLAUGH, J.

Gladys M. Steven, the plaintiff, was divorced from Walter J. Steven, the defendant, on September 12, 1952. The plaintiff was awarded alimony in the amount of $22,500 of which $13,100 plus interest was due and unpaid on May 14, 1969.

Laurene Steven died on May 14, 1969. Her will, which was admitted to probate on August 1, 1969, devised a one-fourth interest in her "farm property" to the defendant, Walter J. Steven. On October 20, 1969, an execution was issued on the alimony judgment and an attempt was made to levy on the undivided interest devised to the defendant. A sale of the interest to satisfy the lien of the judgment was enjoined at the suit of the executrix of the estate of the deceased. The will contained a general power of sale, and on December 10, 1969, the property was sold by the executrix.

This action was brought on May 12, 1970, against the defendant and the executrix to require that the defendant's distributive share in the estate be applied on the alimony judgment. On July 31, 1970, the trial court ordered the executrix to pay the amount of the distributive share, $4,265.70, to the clerk of the district court to abide the judgment in the action.

On July 31, 1970, Andrew J. McMullen obtained leave to intervene in the action. The intervener had obtained a judgment in the amount of $6,750 against the defendant on November 25, 1969, and had made an unsuccessful attempt to proceed in garnishment against the executrix.

The trial court found that the defendant's distributive share in the estate should be applied pro rata to the judgments of the plaintiff and the intervener. The intervener appeals, claiming that the district court erred in not ordering the entire share to be paid to him. The plaintiff cross-appeals, claiming that she is entitled to have the entire share paid to her.

The intervener contends that his attempt to proceed in garnishment against the executrix established a right to the defendant's distributive share in the estate which is superior to that of the plaintiff. The distributive share in the estate was not subject to garnishment while it was in the hands of the executrix. American State Bank of Springfield v. Phelps, 120 Neb. 370, 232 N. W. 612.

Consequently, the intervener's attempt to proceed in garnishment against the executrix was ineffective for any purpose.

The plaintiff claims a superior right to the distributive share on the theory that the defendant received an interest in real estate upon the death of Laurene Steven on May 14, 1969; that this interest was subject to the lien of the alimony judgment which was then of record; and that the plaintiff's lien is prior to any right of the intervener based upon his judgment of November 25, 1969.

The will in this case gave the executrix a general power of sale which was exercised. Thus, the plaintiff's judgment did not become a lien upon the interest of the defendant in the estate of the deceased. See, Stalder v. Stalder, 105 Neb. 367, 180 N. W. 566; Arlington State Bank v. Paulsen, 57 Neb. 717, 78 N. W. 303, judgment vacated on other grounds on rehearing, 59 Neb. 94, 80 N. W. 263. Consequently, the plaintiff's right to the distributive share is derived through this action.

The commencement of the action created a lien in favor of the plaintiff against the defendant's distributive share in the estate. Nowka v. Nowka, 157 Neb. 57, 58 N. W. 2d 600; Hilton v. Clements, 137 Neb. 791, 291 N. W. 483; Flint v. Chaloupka, 72 Neb. 34, 99 N. W. 825. The intervener obtained a lien from the date of the intervention. Merchants' Nat. Bank of Omaha v. McDonald, 63 Neb. 363, 88 N. W. 492, rehearing denied 63 Neb. 377, 89 N. W. 770. The plaintiff and the intervener assumed adversary positions and each claimed the entire fund to the exclusion of the other. Under these circumstances, the plaintiff has a prior lien and the entire fund should be applied toward payment of the plaintiff's judgment.

The judgment of the district court is modified to provide that the fund shall be applied toward the pay-

ment of the plaintiff's judgment only. As so modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

CITY OF IMPERIAL, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, V. LARRY RAILE, APPELLANT.
191 N. W. 2d 442

Filed November 5, 1971. No. 37936.

1. **Zoning: Ordinances: Evidence.** 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.
2. **Zoning: Ordinances: Municipal Corporations: Injunctions: Estoppel.** A municipal corporation cannot be estopped from enforcing a valid ordinance, and an injunction is a proper remedy to prevent a continuing violation of a lawful zoning ordinance.

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

Owens & Owens, for appellant.

Curtis & Curtis, for appellee.

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

MCCOWN, J.

The City of Imperial, Nebraska, brought this proceeding against the defendant, Larry Raile, to enjoin him from keeping a structure, occupied as a residence, on his property. The district court granted a permanent injunction against Raile.

The defendant's property was situated within one-half mile of the corporate limits of the City of Imperial. It was zoned as Industrial-1 under a zoning ordinance passed and adopted by the city on August 8, 1966. The city had also adopted the 1955 National Building Code by ordinance on July 12, 1965. In May 1969, Raile purchased and placed what is referred to as a "mobile

home" on his property, and constructed a permanent foundation, porch, and steps.

On May 13, 1969, Raile filed an application for a variance from the zoning ordinance to permit the "erection of residence dwelling classified as a mobile home * * *." On June 5, 1969, the board of zoning adjustment of the city notified Raile that his request for a variance was denied. The vote was 3 to 2 in favor of the request, but lacked the required statutory number of concurring votes. See § 19-910, R. R. S. 1943. Raile did not take any appeal to the district court from the action of the board of zoning adjustment. Such an appeal allows a full review of both law and facts. See § 19-912, R. R. S. 1943.

There is a conflict in the evidence as to conversations had with various city officials as to a building permit, but the evidence is undisputed that Raile did not at any time file any formal or written application for a building permit.

On September 22, 1969, this proceeding was begun and the decree granting a permanent injunction against Raile was entered on July 9, 1970.

The defendant first challenges the validity of the zoning ordinance of the city on the ground that a comprehensive development plan was not adopted by the city council prior to the passage of the ordinance as required by statute. The evidence established that a comprehensive development plan was adopted on the same date as the ordinance. The provisions of section 19-901, R. R. S. 1943, as it existed in 1967, were fully complied with, as the district court found. Even if there were some doubt as to whether a comprehensive development plan in final form was adopted prior to the adoption of the ordinance, the ordinance here was passed in 1966. The statutes in effect in 1966 contained no requirement that a comprehensive plan be adopted by the city council. The requirement was simply that the zoning ordinance or regulations be made "in accordance with a

comprehensive plan * * *." See § 19-903, R. R. S. 1943, Reissue 1954. There is no dispute about the fact that there was a comprehensive development plan. 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. Weber v. City of Grand Island, 165 Neb. 827, 87 N. W. 2d 575.

Other assignments of error based on alleged failures to comply with statutory requirements in the process of adoption of the zoning ordinance were determined by the trial court adversely to the defendant. The trial court's determination was correct.

Raile also asserts that other persons had been granted variances under circumstances similar to his own and that the administration or enforcement of the ordinance as to him was arbitrary, unreasonable, and, consequently, unconstitutional. The evidence offered here was that certain other persons had been given building permits to erect structures for residence purposes in residential zones. Raile contended the circumstances and the structures were similar to his. The evidence established that these structures, with the exception of one temporary situation, were different from the Raile structure in construction as well as appearance. The evidence also established that these structures substantially complied with the building code, while the Raile structure did not meet the requirements of the building code in many respects. The district court specifically found that the other situations involving variances were not "like" situations to that of Raile, and that the application of the ordinance to Raile was not arbitrary or discriminatory. That determination is also supported by the evidence. It may be a denial of equal protection of the law to apply a regulation differently to different persons under the same or similar circumstances. Hillerege v. City of Scottsbluff, 164 Neb. 560, 83 N. W. 2d 76. That rule does not apply here.

Raile also asserts that there are ample remedies at law and that the city's application for injunctive relief is unjustified and improper. Section 19-913, R. R. S. 1943, specifically authorizes a city to utilize the remedy of injunction in addition to other remedies for violation of zoning laws. A municipal corporation cannot be estopped from enforcing a valid ordinance, and an injunction is a proper remedy to prevent a continuing violation of a lawful zoning ordinance. See City of Beatrice v. Williams, 172 Neb. 889, 112 N. W. 2d 16.

We do not find it necessary to pass upon the issue of whether or not the zoning ordinances of Imperial forbid a "higher use" in a lower zone with respect to mobile homes. We point out again that Raile did not appeal from the order of the board of zoning adjustment denying his application for a variance nor did he at any time file any application or written request for a building permit. He voluntarily terminated the procedures for obtaining a variance, and he never commenced a procedure to obtain a building permit. Under such circumstances, he is in no position to complain.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. VINCENT GARZA, APPELLANT.
191 N. W. 2d 454

Filed November 5, 1971. No. 37958.

1. **Criminal Law: Evidence: Appeal and Error.** In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.
2. **Criminal Law: Evidence: Rape.** In a prosecution for rape, corroboration as to the material facts and circumstances which tend to support the testimony of the complaining witness is sufficient.

3. **Criminal Law: Evidence: Trial.** A question which was summary in nature and included a statement as to the ultimate fact, although improper, was not prejudicial where the witness had testified in detail as to the facts constituting the offense.
4. **Criminal Law: Evidence: Witnesses.** A failure to require that the opinion of a medical expert witness be based upon reasonable medical certainty was not prejudicial where the witness had testified as to his objective findings and the answer expressed a positive opinion.

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

Frank B. Morrison and Bennett G. Hornstein, for appellant.

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

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

BOSLAUGH, J.

The defendant appeals from a conviction for forcible rape. The principal assignment of error relates to the sufficiency of the evidence to sustain the conviction.

The prosecuting witness was Gerda E. Galeckas, a high school student, 17 years of age. She testified that after school on September 4, 1970, she went to Glenda Myers' house where she did some drinking and participated in a game in which she removed some of her clothing. She left this house at about 10 p.m. and started to walk home with Arnold Phillips and Ronald Bartlett.

When Gerda was nearly home, an automobile driven by the defendant came by and Gerda and Ronald were invited to go riding. The defendant's brother, Steve Garza, and two other men were in the automobile. Ronald went over to the automobile and talked to the occupants and then came back and asked Gerda if she wanted to go riding. Ronald and Gerda entered the car, and after driving around for about 5 minutes the de-

fendant stopped the car and Ronald left the automobile. The defendant drove away and eventually stopped in Mandan Park. The three other occupants then left the automobile so that Gerda and the defendant were alone in the car.

Gerda testified that the defendant began to kiss her neck and placed his hands on her chest area. When she tried to push him away he struck her side with his fist and said: " 'Next time I will break your jaw.' " The defendant then held Gerda by her left arm and told her to get out of the car. They walked down a trail in the park and the defendant began kissing Gerda again. When she asked him to stop he choked her. When she started to cry out he said: " 'Stop, I will kill you.' " They stopped near a ledge and the defendant asked Gerda what she "had to live for." He then ordered her to remove her blouse. When she asked if she had to, he choked her again. They went on farther down the trail and the defendant ordered her to remove her undergarments. Every time Gerda would ask or say anything the defendant would hit or choke her. The defendant told Gerda to get down on the ground and he then had sexual intercourse with her. They returned to the automobile and she was taken to Glenda Myers' house.

Ronald Bartlett was not at Glenda Myers' house, so Gerda walked over to the Bartlett home. She found Ronald there and the two of them returned to Glenda Myers' house. Gerda's mother found her there at about 8:30 the next morning and took her home. Later Gerda's mother took her to the police station and to the office of Dr. James E. Ryder.

Dr. Ryder testified that he examined Gerda and found 3 linear bruised areas on her neck and several bruised areas on her thighs. He also found abrasions of the labia minora on both sides and a fresh laceration of the hymen but no sperm. Dr. Ryder stated that he thought Gerda

had engaged in sexual intercourse within the last 12 hours.

The defendant testified that he was 28 years of age; that he was not employed; and that he was living with his mother and father. His wife and one child were living in Missouri. He had a previous felony conviction.

The defendant further testified that Ronald Bartlett asked to be taken to Twentieth and Madison Streets so that Ronald could pick up a tape player; that he parked the car in Forest Park in Sarpy County, not in Mandan Park in Douglas County; that he tried to kiss Gerda but stopped when she asked him to leave her alone; and that she said she thought three of the fellows at Glenda Myers' had sexual intercourse with her. The defendant testified that he did not have sexual intercourse with Gerda at any time and that after they left the park he went home.

Vern Pokorski, called by the defendant, testified that he was at Glenda Myers' house at about 6:30 p.m., on September 4, 1970, and again between 9 and 10 p.m. When he returned to the house Gerda was in the basement lying on a bed. Gerda had passed out, and he helped take her outside where she revived. Gerda came back into the house yelling that she was going to get somebody for rape. Gerda then left the house and returned around 11 p.m., saying she was going to get "Garza" for rape.

In rebuttal the State called David Flowers, Marion Breland, and Ronald Bartlett. David Flowers testified that he was at Glenda Myers' house between 8 and 9 p.m., on September 4, 1970. He went downstairs and saw that Gerda and the others were playing some kind of a game. He went back to the living room, and about 5 minutes later Arnold Phillips and Marion Breland brought Gerda up the stairs. Gerda had been drinking and was dazed but was fully dressed. David testified that Gerda did not say anything about being raped or that she was going to get someone for raping her.

Marion Breland testified that he was at Glenda Myers' house on the afternoon of September 4, 1970. Marion testified that there was no sexual activity going on and no talk about sex. He was present in the basement at the time Gerda passed out and he helped take her outside the house. He did not hear Gerda say anything about being raped.

Ronald Bartlett testified that he was at Glenda Myers' house on the evening of September 4, 1970. His testimony was similar to that of David Flowers and Marion Breland as to what took place before he and Gerda left Glenda Myers' house.

Ronald testified that he and Gerda had nearly reached her home when the defendant came by in his car. The car stopped near them and Steve Garza called him over to the car. Ronald said that he did not want to go riding with them but that the defendant asked him to try to get Gerda into the car. Ronald then talked to Gerda and they both entered the car.

Ronald testified that the defendant stopped in Albright Park and that he and the defendant and Steve Garza got out of the car. The defendant told Ronald that they would drive around awhile and then come back for him. Ronald said that he did not say much because he was afraid of the defendant. The defendant then drove off with Gerda in the car. Ronald denied that he had asked the defendant to take him to Twentieth and Madison Streets so that he could pick up a tape recorder. Ronald testified that Gerda came to his house about 1½ or 2 hours after he last saw her at Albright Park. His testimony then corroborated that of Gerda as to what happened after that. Ronald testified that Gerda told him what had happened that evening.

The evidence for the State which has been summarized was sufficient, if believed, to permit the jury to find the defendant guilty of forcible rape. The evidence was in conflict and there were discrepancies in the testimony of some of the witnesses called by the State.

These were matters to be resolved by the jury. In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Sheldon, 179 Neb. 377, 138 N. W. 2d 428.

With respect to corroboration, it is not essential that the prosecutrix be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn. Texter v. State, 170 Neb. 426, 102 N. W. 2d 655.

During the direct examination of the complaining witness, and after she had testified in detail as to what had happened, she was asked a leading question which amounted to a summary of her testimony and a statement as to the ultimate fact that she had been raped by the defendant. An objection that the question invaded the province of the jury, made after the answer had been received and without a motion to strike the answer, was overruled. Although the question was improper, under the circumstances in this case the ruling was within the discretion of the trial court and was not prejudicial to the defendant.

The defendant also complains that Dr. Ryder should not have been permitted to state that he thought the prosecuting witness had sexual intercourse within the last 12 hours because the question did not require that his opinion be based upon reasonable medical certainty. The objection, which was overruled, asserted lack of foundation.

Dr. Ryder had previously testified as to his examination of the complaining witness and the objective findings which he had made. The foundation for testimony as to his opinion was adequate, and his answer expressed a positive opinion not based upon mere possibilities. Al-

though the form of the question may be criticized, there was no substantial prejudice to the defendant under the circumstances.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. JUANELL NEAL ET AL., APPELLEES.
191 N. W. 2d 458

Filed November 5, 1971. No. 38245.

1. **Criminal Law: Statutes.** A crime must be defined with sufficient definiteness to inform reasonable men of what conduct will render them liable to punishment.
2. **Criminal Law: Statutes: Constitutional Law.** In order to meet constitutional standards of due process, a penal statute must be sufficiently clear so that a person of ordinary intelligence has fair notice of what exactly is forbidden conduct under the act.
3. **Criminal Law: Statutes: Constitutional Law: Appeal and Error.** In construing a penal statute this court will give it an interpretation which meets constitutional requirements if it can reasonably be done.
4. ———: ———: ———: ———. A penal statute is presumed to be constitutional and unconstitutionality must be clearly established before this court is authorized to declare it void.
5. **Criminal Law: Statutes.** Section 29-109, R. R. S. 1943, requires that in the interpretation of a penal statute the language of the statute be construed by taking into consideration the context and subject matter relative to which they are employed.
6. **Criminal Law: Statutes: Courts.** In examining a statute to ascertain the intent of the Legislature, a court will not examine an operative provision without likewise examining a provision enumerating exceptions, and the statute shall be considered as a whole, in light of the objects and purposes of the act.
7. **Criminal Law: Statutes: Words and Phrases.** The term "unlawfully" is a word of common usage and as such need not be specifically defined in an instruction or statute.

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

Gordon Gobel, for appellant.

Ray C. Simmons, for appellees.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for amicus curiae.

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

WHITE, C. J.

This is a prosecution for the unlawful possession of marijuana under the provisions of L.B. 326 (sections 28-4,115 to 28-4,142) enacted by the 82nd Session of the Legislature of Nebraska. The district court sustained demurrers to the informations filed against the defendants and ordered them dismissed. The State then obtained leave to docket error proceedings under section 29-2315.01, R. R. S. 1943, to review the orders of the district court. We sustain the exceptions.

The question presented by the parties is the constitutionality of L.B. 326. L.B. 326 is a comprehensive act designed to regulate the use, possession, manufacture, distribution, delivery, and production of drugs and controlled substances. The act generally is patterned after Public Law 91-513, 91st Congress, H. R. 18583, being the federal Comprehensive Drug Abuse Prevention and Control Act of 1970. The defendants were prosecuted under subsection (5) of section 11 of L.B. 326. Subsection (5) and its immediate context, under attack in this case, provide as follows:

"(3) A person knowingly or intentionally possessing a controlled substance, except marijuana, unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this act, shall, upon conviction thereof, be sentenced to a term of imprisonment not less than one year nor more than two years in the Nebraska Penal and Correctional Complex, or a fine of not more than five hundred dollars, or to a term of im-

prisonment in the county jail of not more than six months, or be both so fined and imprisoned.

"(4) Any person knowingly and unlawfully possessing marijuana weighing one pound or less shall, upon conviction thereof, be fined not more than five hundred dollars or shall be sentenced to a term of imprisonment in the county jail of not more than seven days, and shall be held separate and apart from other prisoners, or be both so fined and imprisoned.

"(5) Any person knowingly and unlawfully possessing marijuana weighing more than one pound shall, upon conviction thereof, be sentenced to a term of imprisonment of one year in the Nebraska Penal and Correctional Complex, or shall be fined not more than five hundred dollars, or shall be sentenced to a term of imprisonment in the county jail of not more than six months, or be both so fined and imprisoned.

"(6) If a person is convicted of a violation under this section, as a part of the sentence he shall be required during the period of confinement to attend a course of instruction conducted by the department on the effects, medically, psychologically and socially, of the misuse of controlled substances. He shall also be required to receive medical treatment, while so confined, *for the effect upon him of controlled substances.* If a person is placed on probation, as a condition of probation he shall attend and complete an identical course of instruction conducted by the department and pay a fee of five dollars for the course. As a further condition the person shall be required to receive medical treatment for the effects of controlled substances abuses."

The issue presented by this case is narrow. No dispute appears as to the rationale of the district court's decision. It rests upon the proposition that L.B. 326 fails to define the term "unlawfully" as contained in subsections (4) and (5) of section 11, being the separate penalty provisions of the act for the possession of marijuana. It is asserted, in substance, that since the

term "unlawfully" is not defined in subsections (4) and (5), the statute does not define a crime and, therefore, falls within the prohibition announced by this court in Macomber v. State, 137 Neb. 882, 291 N. W. 2d 674, which holds that no person can be punished in this state for any act or omission which is not made penal by the plain import of the written law.

We agree that a crime must be defined with sufficient definiteness to inform reasonable men of what conduct will render them liable to punishment. State v. Nelson, 168 Neb. 394, 95 N. W. 2d 678; Screws v. United States, 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495. Framed in the constitutional context, L.B. 326 must have given the defendants a fair warning of the conduct which the act prohibited or the defendants would have been denied due process of law. In order to meet constitutional standards of due process, a penal statute must be sufficiently clear so that a person of ordinary intelligence has fair notice of what exactly is forbidden conduct under the act. Bouie v. City of Columbia, 378 U. S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964). We agree that the plain import of the statute, under the doctrine of Macomber v. State, *supra,* must proscribe the conduct sought to be forbidden. As we have recently said, in construing a penal statute this court will give it an interpretation which meets constitutional requirements if it can reasonably be done. State v. Lewis, 184 Neb. 111, 165 N. W. 2d 569; State v. Simants, 182 Neb. 491, 155 N. W. 2d 788. A statute is presumed to be constitutional and unconstitutionality must be clearly established before this court is authorized to declare it void. Evans v. Metropolitan Utilities Dist., *ante* p. 261, 188 N. W. 2d 851. Section 29-109, R. R. S. 1943, of our penal code, requires in the interpretation of a penal statute, that the language of the statute be construed "taking into consideration the context and subject matter relative to which they are employed." It is fundamental that a statute will be examined as a whole in order to ascer-

tain the intent of the Legislature. The fundamental rule of statutory construction, to which other rules of construction must give way, is the ascertainment of the intent of the Legislature. However, in examining the statute to ascertain the intent of the Legislature, a court will not examine an operative provision without likewise examining a provision enumerating exceptions, and the statute shall be considered as a whole, in light of the objects and purposes of the act. Horack, Sutherland Statutory Construction (3d Ed.), § 4703; School Dist. No. 228 v. State Board of Education, 164 Neb. 148, 82 N. W. 2d 8.

The term "unlawfully" is a word of common usage and as such need not be specifically defined in an instruction or statute. State v. Holland, 183 Neb. 485, 161 N. W. 2d 862; Schleif v. State, 131 Neb. 875, 270 N. W. 510; Carrall v. State, 53 Neb. 431, 73 N. W. 939; Hodgkins v. State, 36 Neb. 160, 54 N. W. 86. As a word of common import the word "unlawfully" generally implies that an act is done which is not authorized by law, in other words, an unauthorized act. We have no difficulty in coming to the conclusion that common usage dictates that "unlawfully" means unauthorized by law and, therefore, our examination is directed toward just what is authorized and just what is not authorized by L.B. 326. The defendants would have us examine only subsections (4) and (5) of section 11. However, section 2 of the act defines marijuana as a "controlled substance." Controlled substances may be lawfully in the possession of a person under circumstances that are outlined in sections 5, 6, 7, 8, 9, and 10 of the act.

As we mentioned before, the act is a comprehensive drug abuse prevention and control act following the federal pattern and must be examined as a whole to determine the clear legislative intent. Section 5 of L.B. 326 sets out the totality of circumstances in which possession of controlled substances (marijuana included) is *authorized*. Section 5, subsection (1), requires registra-

tion of those individuals who manufacture, prescribe, distribute, administer, or dispense controlled substances or those who intend to do so. Section 5, subsection (2), describes nonregistrants who may be "lawfully" possessed of controlled substances. In effect, section 5 says that registrants and those nonregistrants under subsection (2) are authorized by law to possess marijuana; i.e., these designated individuals are capable of having lawful possession of marijuana. Section 5, subsection (2), provides specifically as follows: "The following persons shall not be required to register and may lawfully possess controlled substances under the provisions of this act: * * *." Section 5, subsection (2)(c) provides as follows: "An ultimate user or a person in possession of any controlled substance pursuant to a lawful order of the practitioner." Summarizing, the effect of section 5 is to say that registrants and some nonregistrants under subsection (2) are authorized by law to possess marijuana. That is, they alone are capable of having lawful possession of marijuana as pointed out above. It seems to us undisputable that lawful possession is defined in the act itself. It clearly and undisputably informs all who read the act under what conditions a person may possess marijuana. The comprehensive and detailed provisions of the act in connection with the manufacture and the medical and pharmaceutical dispensing of controlled substances make this even more abundantly clear. In other words, a person will either possess marijuana under circumstances authorized by law or he will not. The inference is clear to any person of ordinary intelligence that any other possession than that authorized by the act is unlawful and illegal. It becomes entirely unnecessary to specifically define the negative term "unlawful." The dividing line between authorized possession and unauthorized possession appears irrefutably clear from reading the whole act.

Read in this contextual sequence, section 11 of L.B. 326, under attack here, sets out clearly what is a viola-

tion of the act. The wording of section 11, subsections (1), (3), (4), and (5) makes reference in various patterns of words and phrases to conduct which is authorized by the act. For example, in section 11, subsection (1), is the following: "Except as authorized by this act, it shall be unlawful * * *." In subsection (3), is the following: "A person knowingly or intentionally possessing a controlled substance, * * * except as authorized by this act * * *." The intent of the Legislature in passing L.B. 326, as it concerns marijuana possession, is clear. Therein it is plainly stated under what conditions possession of marijuana is lawful. It is clear that the act considers all other possession to be unlawful if it occurs with knowledge.

The defendants would have us examine subsections (4) and (5) of section 11 of the act alone. Such a fragmentized and myopic approach is not permissible under the fundamental rules of statutory construction. Each part of the section should be construed in connection with every other part or section of the act so as to produce a harmonious whole. It is not permissible to confine an interpretation to the one particular section to be construed. It must be construed with reference to the idea or purpose of the whole instrument. Horack, Sutherland Statutory Construction (3d Ed.), § 4703. See, also, School Dist. No. 228 v. State Board of Education, *supra*.

It is true that it is common practice in legislation to state what is unlawful and follow that with a statement of exceptions. We see no vice or mischief in following the converse scheme of affirmatively stating in a statute those conditions under which possession shall be unlawful.

It is elementary that a statute should not be given an unreasonable or absurd construction. Subsections (4) and (5) of section 11 of the act were plainly intended to draw a dividing line in penalties between the possession of one pound of marijuana, more or less. Sec-

tion 28-470, R. S. Supp., 1969, which would be operative in the event L.B. 326 is declared invalid, provides for a minimum sentence of 2 years in prison for the possession of marijuana, with no distinctions made as to amount. These two subsections of section 11 demonstrate conclusively that the legislative intent was to impose a less harsh penalty. Yet the defendants ask us to reach a construction, based on a fragmentized consideration of the penalty provisions, which would result in a harsher sentence under the former penal statute than L.B. 326 provides. Furthermore, the acceptance of the contention that knowing possession of marijuana is lawful under the provisions of L.B. 326 would render meaningless and absurd the detailed and comprehensive provisions providing for the control, manufacture, prescription of, and pharmaceutical dispensing of marijuana. It is clear from an examination of this whole comprehensive act that detailed and rigid regulations, with strong penalties attached, are provided to limit the possession of the ultimate user to only medical and research purposes, other than that possession necessary in the legal manufacture, production, distribution, and delivery for those purposes.

We have examined the other contentions of the defendants and find them to be without merit. The orders of the district court sustaining the demurrers to the informations were incorrect and the defendants should not have been discharged.

EXCEPTIONS SUSTAINED.

McCOWN, J., concurring in result only.

The court's opinion belabors an issue of constitutionality when that issue was never raised by the defendants, and the opinion does not even intimate that the problem here arose from a patent legislative oversight.

BOSLAUGH, J., joining in concurrence.

ARDEN N. JOHNSON ET AL., APPELLEES, V. NEBRASKA PUBLIC POWER DISTRICT (FORMERLY CONSUMERS PUBLIC POWER DISTRICT), A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

191 N. W. 2d 594

Filed November 12, 1971. No. 37786.

1. **Eminent Domain: Damages: Evidence: Property.** The market value of property includes its value for any reasonable use to which it may be put.
2. ———: ———: ———: ———. The owner may show all reasonable uses to which the lands are adaptable and what the lands are worth in view thereof.
3. **Trial: Attorneys at Law: Appeal and Error.** One may not complain of alleged misconduct of adverse counsel if, with knowledge of such alleged misconduct, he does not ask for a mistrial but consents to take the chances of a favorable verdict.
4. ———: ———: ———. To require a new trial, it must be shown that the alleged improper argument was such as to prejudice the substantial rights of a party.
5. **Eminent Domain: Damages: Evidence.** Evidence in an eminent domain case as to valuation for future uses must be limited to the adaptability of the land that may be reasonably expected in the immediate future.
6. **Eminent Domain: Damages: Evidence: Jury: Witnesses.** The weight and credibility of the testimony of both lay and expert witnesses as to the amount of damages sustained by the landowner is peculiarly of a local nature to be decided by the jury and the verdict will not be overturned if it is based on the testimony.
7. **Eminent Domain: Damages: Evidence: Jury: Property.** The fact that the jury had an opportunity to inspect the property was of significance in determining whether the verdict was excessive.
8. **Eminent Domain: Damages: Evidence: Jury: Appeal and Error.** When evidence in condemnation proceedings is conflicting, the jury's verdict will not be set aside unless clearly wrong. It is not for the reviewing court to decide which testimony the jury should believe.

Appeal from the district court for Fillmore County: JOSEPH ACH, Judge. Affirmed as modified.

Wilson, Barlow & Watson and Ted L. Schafer, for appellant.

Schmid, Ford, Mooney, Frederick & Caporale, for appellees.

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

WHITE, C. J.

In this eminent domain action, the defendant power district appeals from a judgment for the landowner plaintiffs of $28,800, asserting excessiveness of the jury verdict, instructional error, and improper argument to the jury. We affirm the judgment of the district court as modified.

The defendant's seven 2-pole structures (345,000 volt transmission line) were placed on a 150-foot wide easement in cultivated farm land, and cut diagonally for 5,677 feet across the 320-acre generally level, highly improved, single, integrated, unified corn and livestock farm operation of the plaintiffs. The farm is located in the northeast corner of Fillmore County, at or near the junction of York, Fillmore, Seward and Saline counties. Two-hundred and eighty acres are cultivated, and 240 acres are under irrigation. The farm is bordered by three good graveled farm-to-market roads, has 40 acres of hay and pasture, building areas, excellent soil (Hastings silt loam), and supports cattle feeding operations of 350 to 400 head. The 2-pole structures are diagonal to and crossways with all section lines and crop rows and none are on fence lines, next to roadways, or the natural division of fields. The 150-foot easement is broad in scope. Enjoyment by the plaintiffs is subject to unlimited access for survey, additional construction or reconstruction, operation, repairs, maintenance, relocation, etc.

Was there prejudicial error from improper argument of plaintiffs' counsel to the jury? In essence, plaintiffs' counsel argued that the taking prevented the installation of the center-pivot method of irrigation which would increase the corn production of the cultivated

land by 35 to 50 bushels per acre. The argument then proceeded to an opinion relating the monetary value of the increased yield to the value of the land at the time of the taking. The premise of the argument was the increased productivity of the land from center-pivot irrigation installation. It did not assume or relate to any profit figures or analysis of the farming or crop production as a whole. It was not within the prohibition of showing or arguing profits condemned by James Poultry Co. v. City of Nebraska City, 135 Neb. 787, 284 N. W. 273, modified, 136 Neb. 456, 286 N. W. 337.

Three witnesses had testified *without objection* that the farm was adaptable, at the time of the taking, in the immediate future to the use of the center-pivot irrigation system, and testified, again without objection, to an increased corn yield of 35 to 50 bushels per acre from such installation, all of which was prevented by the diagonal power pole structure taking.

We said in Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168, as follows: *"The market value of property includes its value for any reasonable use to which it may be put.* If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which made up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating compensation. *The proper inquiry is, what is its fair market value in view of any reasonable use to which it may be applied and all the reasonable uses to which it is adapted?"* (Emphasis supplied.)

In Pieper v. City of Scottsbluff, 176 Neb. 561, 126 N. W. 2d 865, where evidence as to the price of units of gravel was held admissible, this court said: "The owner may show all reasonable uses to which he thinks the lands are adaptable and *what the lands are worth in view thereof.* If, as a result thereof, there is conflict in whether the lands are adaptable for certain use it is up

to the jurors to determine which of the two views they believe." (Emphasis supplied.)

The plaintiffs' evidence as to greater productivity of plaintiffs' farm through use of the center-pivot system of irrigation was offered and received in evidence without objection by defendant. Under these circumstances error cannot be predicated upon such evidence. State v. Dillon, 175 Neb. 444, 122 N. W. 2d 223; Jensen v. State, 184 Neb. 802, 172 N. W. 2d 607. It therefore follows that error cannot be predicated upon comment and argument by counsel on such evidence and any reasonable inferences therefrom.

We observe that the thrust of the defendant's argument on this point is that counsel's argument fixed a maximum valuation of the damage at $60,000 to $70,000. It argues forcibly that there was no testimony which would support a $70,000 valuation. However, there was testimony and evidence of damage of $64,000. We observe that the court instructed the jury to disregard all statements of counsel which were not supported by the evidence. Even assuming that counsel's argument was in error we fail to see any prejudice. It would appear, since the verdict was less than 50 percent of the estimate of the plaintiffs' expert witnesses and of counsel, that the jury relied on other evidence and reasoning as to valuation. To require a new trial, it must be shown that the alleged improper argument was such as to prejudice the substantial rights of a party. Anderson v. State, 184 Neb. 473, 168 N. W. 2d 383.

Moreover, the defendant did not, *at any time,* move for a mistrial. This is fatal to a complaint that counsel's argument was misconduct. We recently said in Vacanti v. Montes, 180 Neb. 232, 142 N. W. 2d 318, as follows: "One may not complain of alleged misconduct of adverse counsel if, with knowledge of such alleged misconduct, he does not ask for a mistrial but consents to take the chances of a favorable verdict." See, also, Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293; Dunn v. Omaha

& C. B. St. Ry. Co., 139 Neb. 765, 298 N. W. 741; Pieper v. City of Scottsbluff, *supra*.

Error in instruction No. 10 is asserted, chiefly because it is claimed that the jury was limited to a consideration of the center-pivot irrigation system's adaptability.

Since this was a major issue in the evidence in the case, the court quite properly instructed on it. But the court did not limit the jury's inquiry. In this and other instructions the court properly instructed the jury as to the elements of damage and that the jury's inquiry was to determine the fair market value in view of any reasonable use to which the land might be adapted. In cautionary language the court told the jury that it could not speculate as to whether or not the land was adaptable to center-pivot use. It told the jurors they must find from the evidence that it was adaptable to such use prior to the taking; that since the taking it was not adaptable; and that such adaptability affected the market value on July 21, 1969, the date of the taking. It specifically told the jury that such adaptability must be found to be reasonably probable, and not merely possible. It carefully cautioned them that such adaptability must be reasonably expected in the "immediate future" so as to affect market value at the time of the taking. See NJI No. 13.05, and cases cited thereunder. We find no error in the instruction.

We have examined the other contentions of defendant as to error in instructions, and they are without merit. The court properly limited adapted uses of the land to those "reasonably occurring in the immediate future" which would affect market value. (Instructions Nos. 6, 8, and 10.) See, Sump v. Omaha Public Power Dist., 168 Neb. 120, 95 N. W. 2d 209; Pieper v. City of Scottsbluff, *supra*. Defendants requested instruction No. 9, forbidding consideration of reasons special to the owner in valuing the land, which was covered by the court in instruction No. 16. Instructions Nos. 1 and 13 accurately recited the issues and correctly stated the law.

The verdict is attacked as excessive. We are dealing here with a large and valuable integrated farm unit. At a minimum the record supports a valuation of around $500 per acre, and runs as high as $720 per acre. The 150-foot diagonal easement with the present seven 2-pole structures running diagonally for over a mile across the farm is obviously a substantial factor affecting market value. The record supports, almost conclusively, that operation of the present irrigation systems will be materially inconvenienced and impeded in operation. With larger modern machinery and power units, aerial spraying of fertilizer, nutrients, and insecticides, and the large scale movement of tubing and irrigation equipment, the diagonal easement will realistically impair normal ground operations on the farm. Beyond this, the record strongly supports a conclusion that it cannot now be adapted to the use of an irrigation system (center-pivot) substantially increasing productivity. These are but a few of the factors in evidence before us for review.

The testimony as to the center-pivot system is conflicting, although admitted without objection. Much of the rest of the testimony as to inconvenience, interference, and danger as affecting market value is undisputed. A local jury viewed the premises. The jury was properly instructed. It is not contended that the verdict was the result of passion and prejudice. It was well within the range of the conflicting expert testimony as to valuation of damage. The verdict was less than one-half of the valuation testified to by plaintiffs' experts. It invites the suggestion that the jury actually disregarded much of the testimony discredited by the defendant. We are governed by the following rules: The weight and credibility of the testimony of both lay and expert witnesses as to the amount of damages sustained by the landowner is peculiarly of a local nature to be decided by the jury and the verdict will not be overturned if it is based on the testimony. Connor v. State, 175 Neb. 140, 120 N. W. 2d 916; Lansman v. State, 177 Neb.

119, 128 N. W. 2d 569; Iske v. Omaha Public Power Dist., 185 Neb. 724, 178 N. W. 2d 633; Timmons v. School Dist. of Omaha, 173 Neb. 574, 114 N. W. 2d 386; Chaloupka v. State, 176 Neb. 746, 127 N. W. 2d 291. The fact that the jury had an opportunity to inspect the property was of significance in determining whether the verdict was excessive. Iske v. Omaha Public Power Dist., *supra.* When evidence in condemnation proceedings is conflicting, the jury's verdict will not be set aside unless clearly wrong. It is not for the reviewing court to decide which testimony the jury should believe. Connor v. State, *supra;* Timmons v. School Dist. of Omaha, *supra;* Deitloff v. City of Norfolk, 183 Neb. 648, 163 N. W. 2d 586.

The contention that the verdict is excessive and clearly wrong cannot be sustained.

The defendant complains of an allowance under section 76-720, R. R. S. 1943, of an attorney's fee in the sum of $5,000 and an allowance for expert witnesses' fees in the sum of $2,500. The matter of an allowance of an attorney's fee under this statute is discretionary. From the record, it is quite apparent that a portion of the $5,000 attorney's fee allowed was for services rendered in connection with the hearing before the appraisers in county court. The court overruled objections to a showing of these servicess and apparently considered them in making this award. Although we have not categorically so held, it is clear that the statute does not permit an award of an attorney's fee for services prior to the initiation of an appeal in district court. The statute says: "If an appeal is taken * * * and the amount of the final judgment is greater by fifteen percent than the amount of the award * * *." It is clear that the allowance is conditional. The services of the attorney and the expert witnesses must be related to the accomplishment of these conditions precedent as set up by the statute. We have inferentially so held in Anderson v. State, 184 Neb. 467, 168 N. W. 2d 522; Hughes Farms, Inc. v. Tri-State Generation & Transmission Assn., Inc., 182

Neb. 791, 157 N. W. 2d 384. See, also, § 76-720.01, R. R. S. 1943.

Under the circumstances herein we determine that a reasonable fee for the plaintiffs' attorney in the district court is the sum of $4,000. We observe that only one attorney's fee is allowable but there is no prohibition to the assistance of additional necessary counsel depending upon the difficulty, complexity, and the necessary time required to adequately represent the condemnee. In the matter of expert witnesses' fees, the evidence is undisputed. The defendant offered no rebuttal testimony as to the value of the services of the plaintiffs' expert witnesses. The evidence shows that at the time of the hearing the sum of $2,235.21 had been paid to the witness Smith and $529.20 to the witness Licht. The court awarded the sum of $2,500 to the plaintiffs for expert witnesses. We see no abuse of discretion in this allowance. See, Anderson v. State, 184 Neb. 467, 168 N. W. 2d 522; Jensen v. State, 184 Neb. 802, 172 N. W. 2d 607.

The judgment and verdict of the district court in the sum of $28,800 for the plaintiffs is affirmed. The allowance of an attorney's fee in the sum of $5,000 is modified and reduced to the sum of $4,000. The allowance of $2,500 for expert witnesses' fees and expenses is affirmed. Costs of this appeal are taxed to the defendant.

AFFIRMED AS MODIFIED.

JANET J. KOHLER, APPELLEE AND CROSS-APPELLANT, V. FORD MOTOR COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLEE.

191 N. W. 2d 601

Filed November 12, 1971. No. 37796.

1. **Appearances: Parties: Jurisdiction.** An appearance is "general" if the party appearing invokes power of the court on any question other than jurisdiction.
2. **Pleadings: Limitations of Actions.** A cause of action pleaded

by amendment ordinarily relates back to the original pleading for limitation purposes, provided that claimant seeks recovery on the same general set of facts.

3. **Torts: Negligence: Sales: Strict Liability.** A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a person rightfully using the article.
4. **Trial: Evidence: Parties: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict, a party is entitled to a resolution of all the conflicts of the evidence in his favor, and all of the reasonable inferences that can be reasonably deduced from the proof.
5. **Trial: Evidence: Courts: Motions, Rules, and Orders.** The entertainment of a belated motion to strike testimony, no proper objection having been previously made, is discretionary with the trial court.

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

Cassem, Tierney, Adams & Henatsch, Lawrence J. Tierney, Theodore J. Stouffer, and Crites and Shaffer, for appellant.

Bump & Bump, Laurice M. Margheim, and Herbert Resner of Belli, Ashe, Ellison, Choulos & Lieff, for appellee.

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

CLINTON, J.

This is an action by Janet J. Kohler against the Ford Motor Company to recover damages for personal injuries. The plaintiff was very seriously and permanently injured on August 7, 1960, when a 1960 Ford Falcon automobile in which she was a passenger left the highway and overturned. The automobile had been manufactured by the defendant and purchased new by Fred and Mabel Poppe on May 16, 1960, from Eustis Mercantile Company. Warranties which accompanied the sale limited the defendant's liability to replacement of de-

fective parts. At the time of the accident, the automobile was being driven by Lois F. Poppe, a daughter of the owners. Lois was killed in the accident.

The plaintiff's theory of the case is that the sector gear in the steering apparatus of the automobile was defective; and that sometime prior to the accident a tooth of the sector gear broke into two fragments which later caused the steering gear to "lock up" and as a result the automobile left the highway and overturned. Shortly after the accident, agents of the defendant dismantled the steering apparatus of the Falcon. When the housing containing the sector gear was opened it was discovered that one tooth of the sector gear was broken. When the grease was "dumped" out of the housing the two fragments of the broken tooth came out with the grease.

The trial court submitted the case to the jury upon the theory of strict liability in tort which placed upon the plaintiff the burden of proving, insofar as is pertinent on this appeal, only (a) the steering sector gear was defective when it left the manufacturer's hands and (b) that this defect was the proximate cause of the accident and the plaintiff's injuries. The jury awarded plaintiff damages of $325,000.

The defendant appeals and the following issues are before this court for decision: (1) Did the trial court err in overruling a special appearance by the defendant? (2) Was the cause barred by the statute of limitations because an amended petition, filed after the statute had run, presented for the first time the "strict liability" theory? (3) Should the doctrine of strict liability in tort be adopted and held applicable under the facts of this case? (4) If it is to be adopted, was the evidence sufficient to submit to the jury the issues designated (a) and (b) in the preceding paragraph hereof? (5) Did the trial court err in permitting the plaintiff to introduce the testimony of a certain expert witness on

rebuttal? We will treat each issue in the above order. We find for the plaintiff on all issues.

In the original petition filed July 9, 1962, the plaintiff, Mabel Poppe as administratrix of the estate of Lois F. Poppe, and Fred Poppe and Mable Poppe were all joined as plaintiffs and sought damages for their respective claims. The defendant filed a special demurrer which was sustained on the ground of misjoinder of causes of action and of parties plaintiff. The trial court, on motion of the plaintiffs, permitted each to file separate petitions and directed that they be separately docketed. The defendant was directed to answer within 30 days of the filing. No new process was served after the causes were separately docketed. Thereafter the defendant filed a special appearance which was overruled. Later demurrers and answers were filed, each preserving the special appearance. Later, on December 3, 1969, an amended petition was filed. Thereafter on December 16, 1969, the defendant, without preserving its special appearance, filed a motion to dismiss the action because of failure of the plaintiff to comply with a certain pretrial order. This motion to dismiss constituted a general appearance by the defendant and renders moot the issue raised by the special appearance. Abel v. Southwest Cas. Ins. Co., 182 Neb. 605, 156 N. W. 2d 166. This is not to be taken as deciding that the trial court did not have authority to permit separate docketing of the petitions of the plaintiffs while still retaining jurisdiction under the original process. We simply do not need, under the circumstances here, to reach that question. We note, however, that under code procedure the sustaining of a demurrer, even on misjoinder of parties plaintiff, does not bring the action to an end. § 25-854, R. R. S. 1943; 27 C. J. S., Dismissal & Nonsuit, § 63d, p. 418; 67 C. J. S., Parties, § 132a, p. 1135. Section 25-809, R. R. S. 1943, does not appear to be intended as a limitation on the powers of the court.

Plaintiff, in her amended petition filed December 3,

1969, claimed a right of recovery under theories of (1) res ipsa loquitur; (2) breach of express warranty; (3) breach of implied warranty; and (4) strict liability. Each of these is pleaded as a separate "cause of action." Earlier petitions had also been so composed presenting various theories of recovery, each being denominated as a separate cause of action. The defendant contends that the claim of a cause of action based upon strict liability is a new cause of action pleaded by amendment based on a different standard of care and is the equivalent of a new suit so the statute of limitations continues to run until the filing of the amendment, which in this case was more than 5 years after the plaintiff became 21 years of age. The defendant pleaded the statute of limitations in its "answer" to the plaintiff's amended petition. The defendant relies upon Miller v. Werner (Mo.), 431 S. W. 2d 116, wherein the Supreme Court of Missouri held in a suit for malpractice that where the original complaint was founded on negligence of the surgeon in the performance of the surgery, an amendment which sought recovery on the theory of the defendant's failure to obtain the plaintiff's informed consent did not relate back to the filing of the original petition and the statute of limitations therefore barred the action. We do not think that case is applicable here.

The mechanical form in which the plaintiff divided her petition is immaterial on the issue of whether it states one or more than one cause of action. Sedlak v. Duda, 144 Neb. 567, 13 N. W. 2d 892, 154 A. L. R. 490. In this case if the plaintiff has not stated a new cause of action in the amendment it does relate back and the cause is not barred by the statute of limitations. We hold the amendment did not state a new cause of action. The plaintiff had but one. The theory of recovery is not itself a cause of action. A right not to be injured may rest upon more than one ground, but without injury there is no cause of action at all. The general facts upon which the right to recover was based are the same.

Abbott v. Abbott, 185 Neb. 177, 174 N. W. 2d 335; Clark on Code Pleading (2d Ed.), pp. 134, 137, 715; City of Alliance v. Cover-Jones Motor Co., 154 Neb. 900, 50 N .W. 2d 349.

There was no direct eyewitness testimony as to what caused the Falcon automobile to leave the highway. The plaintiff testified that the automobile "started to vibrate" and that it "swerved to the left-hand side of the road." The plaintiff looked at Lois and saw that she had both hands on the wheel, was looking straight ahead, and had a shocked expression on her face. Neither Lois nor the plaintiff said anything to each other at that time.

The Poppe automobile had passed another automobile on the curve west of the scene of the accident. The other automobile was being operated by Geraldine K. Licht and was traveling about 45 miles per hour in an easterly direction. The Poppe automobile was going about 50 miles per hour as it passed the Licht automobile. There was no other traffic nearby.

As the Poppe automobile returned to its own lane, after passing the Licht automobile, Mrs. Licht noticed that "the rear end wobbled like an empty pickup." Mrs. Licht did not notice anything further of an unusual nature until her husband, Walter H. Licht, who was sitting beside her, said: " 'Watch out for the car ahead!' " and " 'Slow down.' " Mrs. Licht testified that she noticed the Poppe automobile wobbled toward the left of the highway, back to the right, and then into the left ditch. The speed of the Poppe automobile was then about 50 or 55 miles per hour.

Mr. Licht testified that after the Poppe automobile had passed them he noticed that "the back end had a tendency to ride a little to the left-hand side." Then, as they were proceeding down the highway, he noticed the Poppe automobile "wobbled slightly," "hit the (right-hand) side of the road a little bit," and then "veered

across the road to the left-hand side, and went over into the ditch."

The highway where the accident occurred was a paved two-lane highway 21 or 22 feet wide with shoulders. The evidence negatives highway defects, oil slicks, automobile hood coming up, collision with animals, etc., as possible causes of the accident. After the accident, one of the rear tires was found to be flat. However, it had not blown out, it had no damage, and when reinflated on the same rim, which after the accident had a large dent on the inner flange, was found to hold air satisfactorily.

There had been no mechanical difficulties of any kind with the Poppe automobile. It had never been repaired and had received only normal maintenance. On the day before the accident it had been driven approximately 250 miles on a trip to South Dakota over winding roads, S curves, and pigtail turns with no difficulty of any kind.

The defendant urges that the trial court erred in submitting the case to the jury upon the theory of strict liability in tort because the doctrine is not the law of this state and should not be adopted as the law of this state. After examination of the many authorities cited by the parties, including pertinent prior decisions of this court, we conclude that the trial court correctly determined the state of the law and was correct in its instruction to the jury which we will hereafter refer to.

The Nebraska case most closely related in principle is Asher v. Coca Cola Bottling Co., 172 Neb. 855, 112 N. W. 2d 252 (1961). In that case this court allowed recovery to a person injured by a foreign substance in a soft drink bottle. The court there said: "When a drink intended for human consumption is marketed in sealed containers, and such drink causes injury to a consumer, it is not necessary in a personal injury action to show that the container was within the physical control of a manufacturer in order to hold a manufacturer under the res ipsa loquitur doctrine. . . . The unexplained pres-

ence of a deleterious substance in a product manufactured and sold in a sealed container for human consumption is evidence of a breach of implied warranty that the product is wholesome and fit for human consumption. . . . A consumer can recover either on the theory of negligence or implied warranty from a manufacturer for injuries resulting from presence of deleterious substance in a product manufactured and sold for human consumption where it is shown that the deleterious substance was present when the product left the manufacturer's control." It is to be noted that here the court lessened the requirements of the res ipsa loquitur doctrine and eliminated the necessity of privity for recovery under the theory of implied warranty.

Earlier the Supreme Court of California, in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P. 2d 436, allowed recovery under similar theories to a person injured by an exploding soft drink bottle. In a separate concurring opinion in that case one of the judges urged as the proper basis of recovery the theory of strict liability in tort. This has come to be the accepted basis of recovery against manufacturers of defective products for injuries to users. We can see no rational distinction between the soft drink bottle cases and the case at hand. What we do here is really no more than announce a clarifying change of label. The courts of numerous, if not most, states have now adopted this doctrine of strict liability in tort. It would be superfluous for this court at this late date to expound the rationale at length or to cite numerous authorities. We refer the reader only to the following: Henningsen v. Bloomfield Motors, Inc., 32 N. J. 358, 161 A. 2d 69, 75 A. L. R. 2d 1, the landmark case, where the facts are substantially similar to those here; Restatement, Torts 2d, § 402A; Prosser, The Fall of the Citadel, 50 Minn. Law Rev. 791, where the leading case and subsequent developments are reviewed; Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P. 2d 897, 13 A. L. R. 3d 1049,

where the fundamental principle is succinctly stated.

We hold that a manufacturer is strictly liable in tort when an article he placed in the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes an injury to a human being rightfully using that product. The efforts of the manufacturer to limit its liability by rules applying to warranties are not effective here. See Greenman v. Yuba Power Products, Inc., *supra*.

The expert testimony in the case, insofar as it is relevant and material here, relates to the two issues of proof previously designated (a) and (b). There is no direct evidence that the steering gear "locked up" causing the accident. The gear turned freely after the accident.

Instruction No. 7 given by the court was in part as follows: "To recover against the defendant, the plaintiff must prove by a preponderance of the evidence: 1. The defendant placed the 1960 Ford Falcon automobile in question on the market for use, and the defendant knew, or in the exercise of reasonable care should have known, that the automobile would be used without inspection for defects in the steering sector shaft; 2. The steering sector shaft was in a defective condition at the time it was placed on the market and left the defendant's possession; 3. The plaintiff was unaware of the claimed defect; 4. The claimed defect was the proximate cause or a proximately contributing cause of any injury to the plaintiff occurring while the automobile was being used in the way and for the general purpose for which it was designed and intended; 5. The defect, if it existed, made the automobile unreasonably dangerous and unsafe for its intended use; 6. The plaintiff sustained damages as the direct and proximate result of the claimed defect; . . .."

Issues 2 and 4 in the above instruction we have heretofore summarized are issues (a) and (b) and to the proof of these two items is directed substantially all of the voluminous expert testimony in the case. We briefly

summarize the testimony as follows: The plaintiff called Dr. Stensaas, head of the Department of Mechanical Engineering of the South Dakota School of Mines. He had conducted experiments upon a 1960 Falcon sector shaft using a Tinius Olsen machine and determined the amount of static pressure required to break the gear tooth in question and then conducted experiments on the steering apparatus to determine whether components of the steering mechanism would give way before sufficient pressure could be applied to the gear itself to make it give way. He found certain parts did give way before the teeth could be damaged. Based upon his examination of the gear tooth fragments from the accident car and the results of his experiments he was allowed to give his opinion that there was a reasonable probability of a defect in the manufacture of the gear in question.

Buddy Taylor, a mechanic and race driver who had built and repaired steering systems on hundreds of cars, worked with Bobby Unser, also a mechanic and a race driver, in the conduct of tests with a Falcon automobile like the Poppe car. They removed the sector shaft from the automobile, broke a tooth off, then broke the tooth in two parts, and then using an adhesive material replaced the tooth in the gear. They then reassembled the steering gear in the car. With Unser driving they took the car onto the highway to see what would happen. They turned the steering gear until the broken tooth dropped into the gear box and then continued to drive. After driving about 50 miles, the steering gear locked, the car left the highway and was damaged. Taylor gave as his opinion that the broken tooth locked the steering mechanism and caused the car to leave the highway. With the aid of an experiment using a mock-up of the steering mechanism, he testified that "it will not lock up necessarily in the same position twice," and in an answer to a hypothetical question

stated "that the tooth locked up the steering" and the car could not then be controlled.

Unser testified to his experience in doing specialized mechanical work and to the experiment that he and Taylor conducted. The gear locked slightly twice before locking up in such a manner that it left the road. He took the steering apparatus apart at the place of the accident and the broken tooth was in the bottom of the gear box. Unser further, after foundation was laid as to his qualifications to determine the difference between a defect in material and a trauma defect, gave his opinion, stating "the sector shaft was probably made improperly at the factory." He gave significance to the fact that the tooth was broken into two parts. He also testified that magnafluxing showed a spiral crack in the sector shaft which had no causal effect as far as the accident was concerned, nor was it caused by it, but simply showed that the sector shaft was defective. He also stated reasons why the accident itself could not have caused the fracture of the tooth.

The defendant called William J. Pfander, one of its quality control engineers, who testified he could determine the causes of breaks in metals. He gave as his opinion that the tooth in question broke from an overload; that there was "nothing abnormal about the fracture"; that the break in the gear was caused in the accident; "That this was a mechanical fracture resulting from impact"; and that there was no "evidence, whatsoever, of any crack that would have in any way resulted from the forging process." He also stated that the damage to the lower control arm would indicate to him there was sufficient force to have caused the tooth to be fractured in an accident. The defendant also called Mr. Lee, a mechanical engineer, who testified generally to the same effect.

In determining the sufficiency of the evidence to sustain a verdict, it must be considered most favorably to the successful party and every controverted fact resolved in

his favor, and he must have the benefit of inferences reasonably deducible from it. Marquardt v. Nehawka Farmers Coop. Co., 186 Neb. 494, 184 N. W. 2d 617. A jury verdict based upon conflicting evidence cannot be set aside unless clearly wrong. Haney v. L. R. Foy Constr. Co., 186 Neb. 528, 184 N. W. 2d 628. Both sides regarded the two key issues previously mentioned as the proper subject of expert testimony. Defendant, however, questioned the qualifications of the plaintiff's experts.

The nature and cause of the gear tooth breaking was clearly a matter for expert testimony as was the question of whether or not the broken gear could catch in the steering mechanism and cause the accident. As noted by McCormick: "An observer is qualified to testify because he has firsthand knowledge which the jury does not have of the situation or transaction at issue. The expert has something different to contribute. This is a power to draw inferences from the facts which a jury would not be competent to draw. To warrant the use of expert testimony, then, two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth. The knowledge may in some fields be derived from reading alone, in some from practice alone, or as is more commonly the case, from both. While the court may rule that a certain subject of inquiry requires that a member of a given profession, as a doctor, an engineer or a chemist, to be called, usually a specialist in a particular branch within the profession will not be required. The practice, however, in respect to experts' qualifications has not for the most part crystallized in specific rules, but is recognized as a matter for the trial judge's discretion review-

able only for abuse." McCormick on Evidence, § 13, p. 28. We find no abuse of discretion here. The evidence on the points in question was sufficient to justify the verdict. Henningsen v. Bloomfield Motors, Inc., *supra*, at p. 409, 75 A. L. R. 2d 35; Elmore v. American Motors Corp., 70 Cal. 2d 578, 75 Cal. Rptr. 652, 451 P. 2d 84, 86, 33 A. L. R. 3d 406; Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P. 2d 168.

In rebuttal the plaintiff called Dr. Bradley, a professor of metallurgical engineering at the Colorado School of Mines, and Dr. Copeland, an associate professor in the same department. Dr. Bradley, after appropriate foundation was laid, gave his opinion that the fracture in the gear tooth of the Falcon was not an impact fracture and that the gear tooth had broken some time prior to impact. Dr. Copeland, after appropriate foundation was laid, testified the defect in the sector gear was a machine gouge in the base of the gear tooth, which would occur during manufacturing. Later a motion to strike this testimony was made upon the basis that it was improper rebuttal. No such objection was made at the time the evidence was admitted.

Assuming but not holding that the timely objection of "improper rebuttal testimony" would have been proper, the refusal to sustain the motion to strike was not error. Entertainment of a belated motion to strike testimony, no objection having been previously made, is discretionary with the trial court. Western Plastics Corp. v. Westinghouse Electric Corp., 184 Neb. 498, 169 N. W. 2d 1.

AFFIRMED.

BOSLAUGH, J., dissenting.

I dissent from that part of the opinion which holds the evidence was sufficient to permit the jury to find that a defect in the steering apparatus of the Poppe automobile, if one existed, was the proximate cause of the accident and the plaintiff's injuries.

Much of the evidence in this case relates to the issue

of whether the steering apparatus of the automobile was defective. There is very little evidence as to what caused the accident in which the plaintiff was injured. There is no direct evidence as to what caused the accident. What evidence there is as to this issue is circumstantial in nature.

Circumstantial evidence is not sufficient to sustain a judgment unless the circumstances proved are of such a nature and so related to each other that the conclusion reached is the only one that fairly and reasonably can be drawn therefrom. Norcross v. Gingery, 181 Neb. 783, 150 N. W. 2d 919. Where several inferences may be drawn from the facts proved, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff may not sustain his position by a reliance alone on the inferences which would entitle him to recover.

The record shows that the plaintiff and Lois Poppe had worked as nurses' aides at Crawford, Nebraska, on the day that the accident happened. They drove to Crawford in the morning and at about 3 p.m., left Crawford to return to Chadron, Nebraska. They were about 8 miles west of Chadron on old U. S. Highway No. 20 when the accident happened. Lois, who was 17 years of age, was driving. The weather was clear and the road was dry. The highway was a 2-lane highway, 21 or 22 feet wide, with shoulders. There was a curve about 1¾ miles west of where the accident happened. Going from Crawford to Chadron the highway curved to the right and turned generally from north to east. From the curve the highway ran in a straight line to where the accident happened. The land was rolling and there were gradual changes in the elevation of the highway.

The trip was without incident until the accident happened. The plaintiff testified that the automobile "started to vibrate" and that it "swerved to the left-hand side of the road." The plaintiff looked at Lois and saw that she had both hands on the wheel, was looking

straight ahead, and had a shocked expression on her face. Neither Lois nor the plaintiff said anything to each other at the time of the accident.

The Poppe automobile had passed another automobile on the curve west of the scene of the accident. The other automobile was being operated by Geraldine K. Licht and was traveling about 45 miles per hour in an easterly direction. The Poppe automobile was going about 50 miles per hour as it passed the Licht automobile. There was no other traffic nearby.

As the Poppe automobile returned to its own lane, after passing the Licht automobile, Mrs. Licht noticed that "the rear end wobbled like an empty pickup." Mrs. Licht did not notice anything further of an unusual nature until her husband, Walter H. Licht who was sitting beside her, said: " 'Watch out for the car ahead!' " and " 'Slow down.' " Mrs. Licht testified that she noticed the Poppe automobile wobble toward the left of the highway, back to the right, and then into the left ditch. The speed of the Poppe automobile was then about 50 or 55 miles per hour.

Mr. Licht testified that after the Poppe automobile had passed them he noticed that "the back end had a tendency to ride a little to the left-hand side." Then, as they were proceeding down the highway, he noticed the Poppe automobile "wobbled slightly," "hit the side of the road a little bit," and then "veered across the road into the ditch on the other side." A large cloud of dust was thrown up and the Poppe automobile was out of their sight for a short time.

Ed Chamberlain, a deputy sheriff, was called to the scene of the accident. When he arrived the Poppe automobile was in the ditch north of the highway resting on its top and upper right side. He saw there were tracks showing that the right wheels of the automobile had traveled for approximately 225 feet on the right shoulder of the highway; that it then veered across the road to the left for a distance of 100 feet; that as it left the north edge of the pavement it veered a little bit more to

the east and traveled 65 feet until it hit a rut in the ditch; and that it then rolled end over end for a distance of 60 feet and came to rest. Chamberlain saw that one tire was down.

Everett C. Johnson brought the Poppe automobile into Chadron, Nebraska, after the accident. When he arrived at the scene of the accident the automobile was resting on its top and upper right side in the ditch north of the highway. The tire on the left rear wheel was flat, so he changed this wheel before tipping the automobile over onto its wheels. He then raised the front end of the automobile with the wrecker and towed it into Chadron.

After the accident the tire and the rim that had been removed from the left rear wheel of the Poppe automobile were examined. No puncture or other defect was found in the tire which was a tubeless tire. There was a large dent on the inner flange of the rim where the edge was bent inward.

There had been no mechanical difficulties of any kind with the Poppe automobile. It had never been repaired and had received only normal maintenance. On the day before the accident it had been driven approximately 250 miles on a trip to South Dakota over winding roads, S curves, and pigtail turns with no difficulty of any kind.

There is no direct evidence of any kind that the steering gear on the Poppe automobile "locked up" at the time of the accident or at any other time. The evidence is that the steering wheel turned freely after the accident.

Buddy Taylor and Bobby Unser, expert automobile mechanics with racing experience, were permitted to testify at length about experiments they conducted with a similar automobile. They were allowed to demonstrate before the jury that a tooth deliberately broken from a sector gear, which required a force of 20,000 pounds, and then broken into two pieces and replaced in the gear will, on occasion, cause the steering to lock up.

They testified that in driving a similar automobile, with the fragments of a broken tooth contained in the gear, the steering gear locked up 3 times in 50 miles, ultimately causing the automobile to leave the highway.

It is of some significance that in their demonstration it was necessary to turn the steering wheel to its limit and then reverse its rotation in order to produce a lock-up. It is also of significance that when the gear is locked so that it will not turn in one direction, the steering wheel may still be turned in the opposite direction.

At the time of the accident in this case, the automobile was traveling on a portion of the highway that was straight. There is no indication that the steering wheel was turned or being turned in the manner in which the fragments would cause the gear to lock up. The evidence is that the automobile first turned slightly to the right, then to the left, and then back to the right.

On the issue of proximate cause the testimony of Taylor and Unser as to their experiments with a similar automobile went no further than to show that it was possible for a fragment from a broken sector gear to cause the steering mechanism to "lock up" and prevent the steering wheel from being turned in one driection.

No one knows what caused the accident in this case. The burden of proof was on the plaintiff, and before she could recover she was required to prove that the accident was caused by a defect in the steering apparatus. It was not enough to show that it was possible for a defect to cause the accident.

There are several inferences as to causation that can be drawn from the evidence in this case which are opposed to the inference that the plaintiff relies on and which are at least as strong as the inference that the accident was caused by a defect in the steering gear. The "vibration" described by the plaintiff and the "wobbling" of the rear end described by the Lichts is consistent with the flat rear tire which was found after the accident. Lois Poppe was a relatively inexperienced

driver, and it is possible that overcorrection after driving onto the right shoulder of the highway in a moment of inattention resulted in loss of control.

If the proven facts go no further than to give equal support to two or more inconsistent inferences, the evidence is not sufficient to sustain a finding based upon one of the inferences. Sherman v. Lawless, 298 F. 2d 899 (8th Cir., 1962). See, also, Ford Motor Co. v. Mondragon, 271 F. 2d 342 (8th Cir., 1959), holding that the plaintiff cannot recover where the evidence fails to show that it is reasonably probable, not merely possible, that the accident was caused by the alleged defect, and more probable than any other hypothesis based on the evidence.

One other matter requires mention. Taylor was permitted to testify, over objection, that it was his opinion that a broken sector tooth locked up the steering gear and caused the accident. This was an ultimate fact to be decided by the jury upon the basis of the whole evidence and was not a proper subject for expert testimony in this case. Stillwell v. Schmoker, 175 Neb. 595, 122 N. W. 2d 538. Until this case, this court has consistently held such testimony is improper. See, Flory v. Holtz, 176 Neb. 531, 126 N. W. 2d 686; Danner v. Walters, 154 Neb. 506, 48 N. W. 2d 635; Caves v. Barnes, 178 Neb. 103, 132 N. W. 2d 310. I also agree with Judge Smith that the testimony was conjectural and superfluous.

SMITH, J., dissenting.

The circumstantial evidence rule stated in the second syllabus of Norcross v. Gingery, 181 Neb. 783, 150 N. W. 2d 919 (1967), is either misleading or incorrect. See Wolstenholm v. Kaliff, 176 Neb. 358, 366, 126 N. W. 2d 178, 183 (1964), (White, C. J., concurring).

Taylor's testimony to causation touched an ultimate fact, but there I see no reason for an exclusionary ruling. The testimony, however, was conjectural. Furthermore, assuming arguendo the existence of a factual issue of causation, I think the testimony was superflu-

ous. "'. . . whenever the point is reached at which the tribunal is being told that which it is itself entirely equipped to determine without the witness' aid . . ., his testimony is superfluous . . ..'" Sears v. Mid-City Motors, Inc., 179 Neb. 100, 136 N. W. 2d 428 (1965).

I otherwise concur with the dissenting opinion by Boslaugh, J.

NEWTON, J., dissenting.

The evidence shows that the automobile in which plaintiff was a passenger was being operated at a speed of 50 to 55 miles per hour. It is not contended that the brakes were defective, yet the vehicle traveled over 385 feet from the time it first left the paved portion of the highway until it upset. It could readily have been stopped within that distance. Even if we accept *all* of plaintiff's contentions, it is apparent that the sole *proximate* cause of the accident was the failure of the driver to apply the brakes and stop.

STATE SECURITIES COMPANY, A CORPORATION, APPELLANT, V. NORFOLK LIVESTOCK SALES CO., INC., APPELLEE.
191 N. W. 2d 614

Filed November 12, 1971. No. 37922.

1. **Statutes: Constitutional Law: Torts: Actions: Legislature.** Section 69-109.01, R. R. S. 1943, is constitutional. The Legislature may abrogate a right of action for a tort to happen in the future.
2. **Statutes: Auctions and Auctioneers.** An auctioneer to bring himself within the exemptions of section 69-109.01, R. R. S. 1943, must comply with the conditions of said statute.
3. **Statutes: Notice: Security Interest: Words and Phrases.** The term notice in section 69-109.01, R. R. S. 1943, refers to actual notice and does not include the constructive notice afforded by the perfection and recording of a security instrument.
4. **Statutes: Auctions and Auctioneers: Mortgages: Agency.** An auctioneer operating as a market agency under the Federal Packers and Stockyards Act and who sells mortgaged cattle at the request of the mortgagors is not relieved from liability for conversion by the terms of the act.

Appeal from the district court for Madison County: GEORGE W. DITTRICK, Judge. Reversed and remanded.

Hutton, Hutton & Garden, for appellant.

Jewell, Otte, Pollock & Gatz, for appellee.

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

CLINTON, J.

The plaintiff is a licensed lending agency. The defendant is a livestock auction company selling cattle on commission and licensed under the Federal Packers and Stockyards Act of 1921. The action is one for conversion of certain livestock, the property of one Gary L. Apfel, upon which the plaintiff had a perfected security interest. The case was tried by the judge without a jury upon the pleadings and a stipulation of the parties as to the evidence and testimony. There is no dispute as to the facts. The trial court rendered judgment for the defendant. We reverse the judgment and remand the cause.

Apfel caused the cattle to be delivered to the defendant to be offered for sale at public auction. The defendant had no actual knowledge of the plaintiff's security interest and was selling the cattle on commission in the usual course of its business. The plaintiff had no knowledge of the sale; it did not consent to the sale. The stipulation contained the following provision: ". . . there has been, prior to the sale, a full public disclosure of the name of the owner of the livestock by keeping the said name available in the office [of the defendant] to all prospective purchasers and people who inquire."

The defendant contends that it is exempt from liability for conversion under the provisions of section 69-109.01, R. R. S. 1943, and also contends that it is exempt from liability because, as a licensee under the Federal Packers and Stockyards Act, it cannot refuse to serve anyone offering cattle for sale. The plaintiff relies upon

State Securities Co. v. Svoboda, 172 Neb. 526, 110 N. W. 2d 109, and in its amended reply pled (1) the inapplicability of the Federal Packers and Stockyards Act; (2) that section 69-109.01, R. R. S. 1943, is unconstitutional and void in violation of Article I, sections 3, 16, and 25, and Article III, section 18, Constitution of Nebraska; and (3) "That no public announcement was made by the auctioneer at the time of sale of said cattle that the owner thereof was Gary L. Apfel."

The trial court found that section 69-109.01, R. R. S. 1943, was constitutional and afforded protection to the defendant, and that therefore it was unnecessary to consider the other issues raised. It dismissed the plaintiff's petition with prejudice.

Section 69-109.01, R. R. S. 1943, provides as follows: "The auctioneer, who in good faith and without notice of a mortgage thereon, sells personal property at auction, which is in fact subject to a chattel mortgage, for a principal whose identity has been disclosed, in which property the auctioneer has no interest but acts only as an intermediary of the owner is not liable to the mortgagee for any damage sustained as a result of such sale."

The legislative history of this statute indicates that it was enacted as a direct result of the decision in State Securities Co. v. Svoboda, *supra,* where this court held in a 4-3 opinion that an auctioneer who sells mortgaged property at an auction at the request of the mortgagor without the consent or knowledge of the mortgagee converts the mortgaged property and is liable to the mortgagee in conversion for the damages sustained. It clearly appears that it was the legislative intention and the purpose of the backers of section 69-109.01, R. R. S. 1943, to relieve auctioneers of what was deemed the harsh results of the opinion in the Svoboda case. In carrying out this intention, however, the Legislature did not make the exemption of the auctioneer from liability absolute. It laid down in the statute certain conditions for exemption. These are indicated by the statute itself

and are as follows: He must, in selling at public auction (1) act in good faith and without notice of a security interest thereon; (2) sell "for a principal *whose identity has been disclosed*"; and (3) have no interest in the property and act only as an intermediary of the owner. The stipulated evidence indicates quite clearly that the defendant met requirements (1) and (3). It just as clearly appears that it did not under the stipulated evidence meet condition (2) above. Under that provision the auctioneer must be acting for a principal "whose identity has been disclosed." To disclose means: to make known; open up to general knowledge; to reveal in words something that is secret or not known. Webster's Third New International Dictionary, Unabridged, p. 645. It is further to be noted that this statutory language speaks of the disclosure as having been made. The language is: ". . . sells . . . at auction . . . for a principal *whose identity has been disclosed* . . .." This can have no meaning other than that the auctioneer must have made before the sale some kind of public announcement which identifies the owner of the property which is to be sold. It is not for this court, but only for the Legislature, to determine the wisdom, necessity, or effectiveness of such a requirement. The Legislature did not abrogate the rule of State Securities Co. v. Svoboda, *supra*. It provided an exemption only upon compliance with the condition of the statute. We cannot read this condition in question out of the statute. As noted earlier, the stipulated evidence is that the defendant had the identity of the owner available to those who made inquiry and was ready to make disclosure. This does not meet the statutory requirement. The stipulated evidence does not indicate that any disclosure was in fact made. See Dodge v. Blood, 299 Mich. 364, 300 N. W. 121, 138 A. L. R. 322.

The plaintiff asserts that the defendant did not bring itself within the exemption of the statute because of the constructive notice afforded by the recording of the

security instrument. This contention must be rejected. The legislative history of the statute clearly indicates that the term notice in the statute refers to actual and not constructive notice.

The statute in question does not violate any of the constitutional provisions cited by the plaintiff. A person has no property—no vested interest—in any rule of the common law. While rights of property created by the common law cannot be taken without due process, the law as a rule of conduct, may, subject to constitutional limitations, be changed at the will of the Legislature. Mondou v. New York, New Haven & Hartford R.R. Co., 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327. The Legislature may abrogate a right of action for a tort to happen in the future. 16A C. J. S., Constitutional Law, § 643, p. 911; Nadzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A. L. R. 1189; Silver v. Silver, 280 U. S. 117, 50 S. Ct. 57, 74 L. Ed. 221, 65 A. L. R. 939. See, also, Montana Meat Co. v. Missoula Livestock Auction Co., 125 Mont. 66, 230 P. 2d 955.

The plaintiff contends section 69-109.01, R. R. S. 1943, is impliedly repealed by the Uniform Commercial Code. A thorough examination of the code indicates this claim is unfounded.

We next turn to the defendant's contention that because it is a livestock marketing agency licensed under the Federal Packers and Stockyards Act of 1921 it is exempted from liability for conversion under the circumstances here. The act does not by its express terms purport to provide any such exemption. The contention is founded upon the premise that the marketing agency is in the nature of a public utility and required to serve all, and therefore is to be treated differently than an ordinary agent who cooperates in the conversion even though innocently. Most state and federal courts which have had occasion to consider the question have rejected the defendant's position. The rationale is well set forth in a recent decision of the Supreme Court of Mis-

souri in Farmers State Bank v. Stewart (Mo.), 454 S. W. 2d 908, where the principal cases on the point are discussed. This case overruled an earlier Missouri appellate court decision, Blackwell v. Laird, 236 Mo. App. 1217, 163 S. W. 2d 91. See, also, Birmingham v. Rice Bros., 238 Iowa 410, 26 N. W. 2d 39, 2 A. L. R. 2d 1108 (a 5-4 decision with a vigorous dissent); the Annotation at 96 A. L. R. 2d 225; and the cases cited in 1 A. L. R. 2d L. C. S. 192. Sullivan Co. v. Wells, 89 F. Supp. 317 (D. C., Neb.), and a few other cases support a contrary rule.

The judgment of the trial court must be reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL LOWREY, APPELLANT.
191 N. W. 2d 600

Filed November 12, 1971. No. 37934.

1. **Criminal Law: Evidence.** A person charged with a crime may be convicted on circumstantial evidence only.
2. **Criminal Law: Evidence: Jury: Instructions.** The activities of a thief ordinarily are secretive and are not usually carried out in the presence of witnesses. When the commission of the offense is carried out in such a manner, circumstantial evidence is necessarily the only evidence available, and where there are many circumstances pointing to the guilt of the defendant the question is for the jury under proper instructions safeguarding the rights of the defendant.

Appeal from the district court for Richardson County: WILLIAM F. COLWELL, Judge. Affirmed.

Peter B. Beekman, for appellant.

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

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

SPENCER, J.

Defendant Michael Lowrey appeals from his conviction for grand larceny. The sole issue presented is the sufficiency of the evidence to sustain the conviction. We affirm.

Defendant was charged with stealing United States currency of the value of $5,150 from the husband of his grandmother. Five thousand dollars of that sum was in $100 bills; the balance was in $50 bills. The money had been concealed in the trailer home of the victim.

The jury could have determined from the evidence that on the evening of August 4, 1970, defendant did not have sufficient funds to buy cigarettes. Late that evening he was taken to his stepgrandfather's home to sleep in a truck which was parked in that location. The next day he purchased an automobile for $2,800, using 28 $100 bills. Five days later he traded that car for another one, paying an additional $800, in $100 bills. Four other $100 bills are accounted for in the evidence. One of them was given to an associate who was also charged with the same offense. This witness testified that the defendant, in response to a question as to whether he had stolen his stepgrandfather's money, replied that he had stolen a part of it.

The defendant argues that the evidence against him is entirely circumstantial. Even if we were to assume this premise and ignore the admission of defendant to his associate, the evidence is ample to sustain his conviction. A person charged with a crime may be convicted on circumstantial evidence only. State v. Coleman, 186 Neb. 571, 184 N. W. 2d 732.

The following from State v. Ohler, 178 Neb. 596, 134 N. W. 2d 265, is particularly pertinent herein: "A jury, after considering the foregoing circumstances and the

inferences reasonably to be drawn therefrom, had ample evidence from which a finding of guilt could be found under the instructions of the court, informing it of the findings necessary to sustain such a conviction. The activities of a thief ordinarily are secretive and are not usually carried out in the presence of witnesses. When the commission of the offense is carried out in such a manner, circumstantial evidence is necessarily the only evidence available and where, as here, there are many circumstances pointing to the guilt of the defendant, the question is for the jury under proper instructions safeguarding the rights of the defendant. In such a situation the question of the guilt or innocence of the defendant is for the jury."

Judgment affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. DOROTHY B. SANDERS, APPELLANT, V. EVELYN M. DOYLE, APPELLEE.
191 N. W. 2d 545

Filed November 12, 1971. No. 37937.

1. **Parent and Child: Divorce: Infants: Judgments.** Where a parent has forfeited the right to custody of her children and the custody has been awarded to someone other than a parent, ordinarily the fact that the parent is now rehabilitated is not a sufficient change in circumstances to require a change in custody.
2. **Parent and Child: Divorce: Infants.** In determining the custody of children of tender years, the court will give consideration to the fact that the children have formed a natural attachment for a person who has stood in the relation of a parent.
3. ———: ———: ———. Although the preference of children as to custody is not controlling, it is a factor that will be considered by the court.

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

Padley & Dudden, for appellant.

Beatty, Morgan & Vyhnalek, for appellee.

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

BOSLAUGH, J.

This action arises out of a controversy over the custody of two minor children, Gay Lynn Doyle and Louis Ivan Doyle. The district court awarded the custody of the children to Evelyn M. Doyle Kleinow, the defendant. The plaintiff, Dorothy B. Sanders, appeals.

The plaintiff and Ivan F. Doyle were married on February 20, 1954. Gay Lynn Doyle was born on February 11, 1958. Louis Ivan Doyle was born on March 12, 1960. In February 1966, the plaintiff left her husband and children in North Platte, Nebraska, and followed Joe Sanders to Wyoming. There she divorced Ivan F. Doyle on April 18, 1966, and married Joe Sanders on June 8, 1966.

On September 2, 1966, the defendant and Ivan F. Doyle were married. On November 3, 1966, the custody of the two minor Doyle children was awarded to Ivan F. Doyle by the district court. Ivan F. Doyle died on May 18, 1967, as the result of an accident. After his death the children continued to live with the defendant, their stepmother.

On June 5, 1967, the plaintiff commenced this action to obtain the custody of the children. The trial court found that the plaintiff had abandoned the children and forfeited her right to their custody, and awarded the custody of the children to the defendant. The plaintiff filed a motion for new trial but the motion was not heard until October 6, 1969.

On that date the parties filed an application alleging that they had entered into an agreement settling the matters in controversy between them, and requesting that the court approve the agreement. The agreement provided that an appeal from the probate proceeding in county court should be dismissed; that the proceeds of

an insurance policy should be divided ⅓ to the defendant and ⅔ to the plaintiff; that the proceeds from an action arising out of the injury and death of Ivan F. Doyle should be divided ⅔ to the defendant and ⅓ to the children of Ivan F. Doyle; and that the custody of the minor children should be awarded to Orrie Pursel, their maternal grandfather. The trial court approved the agreement, transferred the custody of the children to Orrie Pursel, and overruled the plaintiff's motion for new trial.

Shortly thereafter, Orrie Pursel permitted the children to live in the home of the plaintiff. A motion by the defendant to cite the plaintiff and Orrie Pursel for contempt resulted in their being fined on January 14, 1970.

On February 19, 1970, the plaintiff filed an application for an order permitting the children to live with her while the custody would remain with Orrie Pursel. A cross-application was filed by the defendant requesting that the custody of the children be placed with her. After a lengthy hearing the trial court found that Orrie Pursel was not willing to continue his custody under the order of October 6, 1969; that the plaintiff had forfeited her right to custody; and that the custody of the children should be awarded to the defendant. It is from this judgment that the plaintiff appeals.

The plaintiff contends that since she is the natural mother of the children, she has a superior right to their custody. The plaintiff concedes in her brief that at the time of her separation from Ivan F. Doyle she was unfit to have the custody of the children. She contends, however, that she has now rehabilitated herself and is a proper and suitable person to have the custody of her children.

Where a parent has forfeited the right to custody of her children and the custody has been awarded to someone other than a parent, ordinarily the fact that the parent is now rehabilitated is not a sufficient change in circumstances to require a change in custody. See,

McNeil v. McNeil, 182 Neb. 759, 157 N. W. 2d 185; Pollard v. Galley, 178 Neb. 587, 134 N. W. 2d 261.

The record fully supports the trial court's finding that the plaintiff abandoned her children in 1966. The care of the children then devolved upon the father, Ivan F. Doyle, and the defendant after the marriage on September 2, 1966. After his death on May 18, 1967, the children continued in the care of the defendant until October 6, 1969. During this time a strong attachment formed between the children and the defendant.

In determining the custody of children of tender years, the court will give consideration to the fact that the children have formed a natural attachment for a person who has stood in the relation of a parent. See, Williams v. Williams, 161 Neb. 686, 74 N. W. 2d 543; State ex rel. Cochrane v. Blanco, 177 Neb. 149, 128 N. W. 2d 615.

At the hearing in July 1967, and again at the hearing in July 1970, the children each expressed a definite preference to live in the home of the defendant. Although the preference of the children as to custody is not controlling, it is a factor that will be considered by the court. See, Gray v. Hartman, 181 Neb. 590, 150 N. W. 2d 120; State ex rel. Cochrane v. Blanco, *supra;* Goodman v. Goodman, 180 Neb. 83, 141 N. W. 2d 445.

The defendant is now 47 years of age. Her husband is 49 years of age. They live in a modern home on a farm near Wellfleet, Nebraska. The record sustains a finding that this is a proper and suitable home for the children and that they are loved and well cared for by the defendant and her husband.

The plaintiff is 43 years of age and lives in North Platte, Nebraska. Her husband is employed by the Union Pacific Railroad but is near retirement. His age was stated in the record to be 65, 66, or 69 years. He did not testify at the hearing in July 1970, and it is apparent that he would be able to furnish but little parental guidance and assistance to the children. There is evi-

dence to the effect that the children do not relate with him and develop a nervous condition after living in the plaintiff's home.

The controlling issue in this case is the best interest of the children. The record fully sustains the finding of the trial court that it is in the best interest of the children that they be placed in the custody of the defendant.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALVARO BRAVO ESCAMILLA, APPELLANT.
191 N. W. 2d 548

Filed November 12, 1971. No. 37965.

1. **Criminal Law: Words and Phrases.** 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: Trial: Witnesses.** The asking of improper questions of a witness to which objections are sustained by the court does not constitute prejudicial error in the absence of a showing that defendant was thereby deprived of a fair and impartial trial.
3. **Criminal Law: Trial: Jury: Evidence.** The test by which a jury shall determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt.
4. **Criminal Law: Sentences: Appeal and Error.** Unless an abuse of discretion appears, a sentence imposed by the trial court within statutory limits will not be disturbed on appeal.

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

Alfred J. Kortum, 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.

MCCOWN, J.

A jury found the defendant guilty of the crime of robbery and he was sentenced to the maximum term of 50 years imprisonment.

This is the second time this case has been before this court. The facts are graphically set out in our former opinion. See State v. Escamilla, 182 Neb. 466, 155 N. W. 2d 344. That occasion involved an appeal from a plea of guilty and a sentence of 50 years. This court affirmed the conviction and sentence. Thereafter, in compliance with an order from the Federal District Court, the guilty plea was set aside on constitutional grounds, and the trial to a jury now before us followed. The trial to the jury established and confirmed the facts recited in the previous opinion of this court.

The defendant first complains that the court erred in refusing to instruct the jury as to the offense of assault with intent to inflict great bodily injury on the theory that it was a lesser included offense. The court did instruct the jury as to the lesser included offense of assault with intent to commit robbery but refused to instruct as requested by the defendant. It seems clear that a charge of assault with intent to inflict great bodily injury is not a lesser included offense to a charge of robbery. 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. See State v. Jones, 186 Neb. 303, 183 N. W. 2d 235. Defendant's assertion on this count is without merit.

The defendant next asserts that a motion for mistrial made during the examination of a witness should have been granted. Robert A. Lacy, a police officer, had identified certain items of clothing as being the same ones he had found in the defendant's residence, and that he had sent them to the F.B.I. for examination. The follow-

ing, which constitutes the basis for defendant's assertion of error, then occurred: "Q * * * And how did you happen to go to the apartment, looking for these items? A They were — the items that Alvaro was wearing the night before — Mr. Kortum: (interjecting) We object to this as calling for a conclusion of the witness, and improper, and move for a mistrial. The Court: The objection is sustained. The jury will disregard the answer. Your motion is overruled."

It is clear that any possible error involved here was not prejudicial nor did it influence the jury to reach an improper verdict. Even if the questions were deemed improper, the asking of improper questions of a witness to which objections are sustained by the court does not constitute prejudicial error in the absence of a showing that defendant was thereby deprived of a fair and impartial trial. State v. Country, 184 Neb. 493, 168 N. W. 2d 918. A defendant is entitled to a fair trial but not a perfect one. State v. Kirby, 185 Neb. 240, 175 N. W. 2d 87. We find no error prejudicial to the defendant. If there was any error, it was harmless, was cured by the court's action, and is within the ambit of the quoted rule.

The defendant also contends that the evidence was circumstantial and was insufficient to support the verdict. To the contrary, the evidence of guilt was overwhelming. Except for the fact that the victim was unable to make an eyewitness identification of the defendant because she had been permanently blinded in the course of the crime, this case is about as strong as a case can be where there is no direct eyewitness identification.

The test by which a jury shall determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. Guy v. Doeschot, 183 Neb. 557, 162 N. W. 2d 524. The jury was

so instructed in this case and its determination of guilt is more than amply supported by the record.

The final contention by the defendant is that the sentence was excessive. Deliberately gouging out the eyes of a human being producing permanent blindness reflects a sadistic savage cruelty that is almost unbelievable. The facts and the basis for this court's view on the excessiveness of the sentence here are extensively set out in our former opinion. That view remains unchanged. The presentence investigation report now before the court shows that defendant's criminal conduct has occasioned almost continuous correctional confinement for him since he was 10 years old. It also shows a conviction and sentence for assault with intent to do great bodily injury which occurred since defendant has been in prison on the charge involved here. Unless an abuse of discretion appears, a sentence imposed by the trial court within statutory limits will not be disturbed on appeal. State v. Escamilla, *supra*.

The judgment of the district court is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. KEITH JAY BRATTON, APPELLANT.
191 N. W. 2d 612

Filed November 19, 1971. No. 37866.

1. **Criminal Law: Right to Counsel: Indigents.** The right of an indigent to have counsel does not give him the unbridled right to be represented by counsel of his own choosing.
2. ———: ———: ———. The right of an indigent to counsel cannot be manipulated so as to obstruct orderly procedure in the courts or to interfere with the fair administration of justice.
3. ———: ———: ———. When a defendant becomes dissatisfied with court-appointed counsel, unless he can show good cause to the court for the removal of counsel, his only alternative is to proceed pro se if he is competent to do so.

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

Frank B. Morrison, Stanley A. Krieger, and Keith Jay Bratton, for appellant.

Clarence A. M. Meyer, Attorney General, and Betsy G. Berger, for appellee.

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

SPENCER, J.

Defendant, Keith Jay Bratton, was convicted of robbery and sentenced to an indeterminate term in the Nebraska Penal and Correctional Complex. His court-appointed counsel assigns as error the failure of the trial court to adequately advise defendant of his right to represent himself pro se. Defendant, pro se, additionally assigns as error: (1) That he did not waive a preliminary hearing in the municipal court; (2) that he was not allowed to call defense witnesses; (3) that he was not allowed to impeach a State's witness; (4) that the State purposely and illegally suborned perjury; (5) that the evidence is insufficient to sustain a conviction; and (6) that there were errors in the court's instructions to the jury. We consider first the assignment of error by defendant's court-appointed counsel.

The record as it pertains to defendant's request for appointment of counsel is as follows: On August 10, 1970, the defendant in a poverty affidavit sought "appointment of counsel to represent me and to advise me as to my rights under the law." The public defender was appointed. On August 21, 1970, the defendant, in a handwritten motion, stated inter alia that the defendant "will accept any lawyer appointed by this court, except the public defender office." On September 17, 1970, the day of the trial, previous to impaneling a jury, the court, out of the presence of the jury panel, considered defendant's motion for the appointment of sub-

stitute counsel. Defendant was present with Mr. Carey and Mr. Cullan of the public defender's staff. Defendant advised the court that he did not feel he would be adequately represented by the public defender's office, and stated: "Last Friday I was in the courtroom three times, and on the last occasion Judge—Judge Krell, I believe—*told me that I would be able to represent myself.* I did not have any desire to represent myself, but rather than going in with the Public Defender's Office, I so stated that I would do that, and he instructed the Public Defender, Mr. Cullan, to give me records that he, hisself, now hold, give me duplicate of these records, and Mr. Cullan, he was also instructed, the Public Defender's Office, to make available to me various law books and until this date, I have not received any law books or any assistance as to the method of going about defending myself although I really didn't wish to do it." (Emphasis supplied.)

In response to defendant's allegations, Mr. Carey stated that on the 11th day of September 1970, defendant appeared before Judge Hamilton and said that he wished to represent himself and to discharge the public defender's office, and an order was accordingly entered by Judge Hamilton and trial was set for September 14. On September 14, defendant requested that the public defender's office again be appointed to represent him. On this occasion Mr. Carey was directed to assist Mr. Cullan in defendant's defense, and trial was scheduled for September 17. Both Mr. Carey and Mr. Cullan participated in the trial.

There is general agreement that an indigent defendant is not entitled to select the counsel to be appointed for him. State v. Powell, 277 N. C. 672, 178 S. E. 2d 417 (1971). Neither can his right to counsel be manipulated so as to obstruct orderly procedure in the courts or to interfere with the fair administration of justice. United States ex rel. Baskerville v. Deegan, 428 F. 2d 714, (2d Cir., 1970).

The following language from State v. Fagerstrom, 286 Minn. 295, 176 N. W. 2d 261 (1970), is pertinent herein: "However, the right of an indigent to have counsel does not give him the unbridled right to be represented by counsel of his own choosing. The court is obligated to furnish an indigent with a capable attorney, but he must accept the court's appointee. Although he may ask for a substitution, his request will be granted only if exceptional circumstances exist and the demand seems reasonable."

In order for a defendant to secure substitute court-appointed counsel, he must show good cause to the court for the removal of present counsel. This the defendant failed to do, as is fairly apparent from the recitals above. Many defendants on occasions become dissatisfied with court-appointed counsel but mere dissatisfaction is not grounds for removal of such counsel. When a defendant becomes dissatisfied with court-appointed counsel, his only alternative is to proceed pro se if he is competent to do so. Here, however, it is apparent that defendant wanted counsel, any counsel not a member of the public defender's office. Defendant was adequately informed that he had the right to proceed pro se. When he was given that right on September 11, he later changed his mind. If on September 17, the defendant did not want to proceed with the counsel provided, he had a right to discharge court-appointed counsel and to proceed pro se. He was required to make an unequivocal request to do so. This he did not do. There is no merit to this assignment.

Defendant's pro se assignments of error are equally frivolous. Assignments of error (1) and (6) are not even referred to or mentioned in any manner in defendant's argument. While the municipal court record is not a part of the transcript herein, defendant's own statement would indicate that a preliminary hearing was held.

As to assignment (6), the record indicates that the instructions were submitted to counsel for approval and

after suggested changes were made, the instructions were approved as amended.

On assignment (2), the record indicates that defendant's counsel filed an affidavit requesting process for certain defense witnesses, and the clerk of the district court was ordered to issue such process.

As to assignment (3), defendant testified at the trial, and his version of the affair was before the jury. His counsel did attempt to impeach the complaining witness. Credibility was definitely in issue, with the jury accepting the version of the complaining witness rather than that of the defendant. Assignment (4) is a conclusion which finds no support in the record, nor is there any merit to assignment (5).

Judgment affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HENRY REICHEL, APPELLANT.
191 N. W. 2d 826

Filed November 19, 1971. No. 37874.

1. **Post Conviction: Motions, Rules, and Orders.** The Nebraska Post Conviction Act requires that unless the motion and the files and records of the case show that the petitioner is entitled to no relief, the court shall grant a prompt evidentiary hearing, determine the issues, and make findings of fact and conclusions of law with respect thereto.
2. **Post Conviction: Motions, Rules, and Orders: Pleadings.** A motion for relief under the Nebraska Post Conviction Act must state all grounds which are available to the prisoner as a basis for relief at the time the motion is filed.
3. ———: ———: ———. After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the district court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief.

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

Merritt E. James, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

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

McCOWN, J.

This is a post conviction action involving the right to counsel. The motion to vacate sentence was overruled by the district court without an evidentiary hearing after a review of the records and files in the case.

In 1966, the defendant was found guilty of burglary and found to be an habitual criminal, and was sentenced to 10 years imprisonment. The evidence of prior felonies presented to support the habitual criminal count included a 1958 burglary conviction. The record of that 1958 conviction states: "* * * defendant appears without counsel and after specifically waiving preliminary hearing, service of copy of the information, twenty-four hours in which to plead and right of counsel, said defendant standing at the bar of this court in open court is duly arraigned * * *." The 1966 burglary conviction was appealed to this court and affirmed. See State v. Riley et al., 182 Neb. 300, 154 N. W. 2d 741 (1967). Later the defendant filed a motion for post conviction relief. The alleged grounds for relief involved discovery procedures in the 1966 burglary trial. That post conviction motion was overruled by the district court without an evidentiary hearing and that action was affirmed by this court. See State v. Reichel, 184 Neb. 194, 165 N. W. 2d 743 (1969). The present post conviction proceeding based on the right to counsel issue was commenced June 23, 1970.

The defendant contends that the 1958 record on its face is insufficient to show an intelligent and under-

standing waiver of the right to counsel. The federal cases support that position. See, Gideon v. Wainright, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A. L. R. 2d 733; Burgett v. Texas, 389 U. S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319; Losieau v. Sigler, 406 F. 2d 795 (8th Cir., 1969); Beasley v. Wilson, 370 F. 2d 320 (9th Cir., 1966).

The State suggests that the mere recitation in the record that the defendant waived the right to counsel is sufficient to place the burden of proof upon the defendant to show that he did not intelligently and understandingly waive counsel. Even if we assumed that contention to be correct, no evidentiary hearing was granted at which either the defendant or the State would have been able to produce evidence. Having the burden of proof ordinarily presupposes the right to introduce evidence.

The Nebraska Post Conviction Act requires that unless the motion and the files and record of the case show that the petitioner is entitled to no relief, the court shall grant a prompt evidentiary hearing, determine the issues, and make findings of fact and conclusions of law with respect thereto. State v. Virgilito, *ante* p. 328, 190 N. W. 2d 781.

If the motion for post conviction relief here were the first occasion on which the defendant had sought to challenge this conviction in a post conviction proceeding, we would be forced to require the granting of an evidentiary hearing upon the issues raised here. However, this is the second occasion on which the defendant has sought post conviction relief from the same conviction and sentence, although the grounds now asserted are different. These grounds, however, were available to the defendant at the time of his former motion to vacate conviction and sentence.

There ought to be some final end to litigation in a criminal case. Post conviction procedures come into play only after traditional criminal procedures have been completed. Post conviction remedies are cumulative and are not concurrent with any other remedy. There is

no justification for allowing a prisoner to continue litigation endlessly by piecemeal post conviction attacks on his conviction and sentence.

Section 29-3001, R. S. Supp., 1969, dealing with our post conviction procedure, provides in part: "The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner." We hold that a motion for relief under the Nebraska Post Conviction Act must state all grounds which are available to the prisoner as a basis for relief at the time the motion is filed. After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the district court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief.

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

AFFIRMED.

SPENCER, J., not participating.

MARJORIE J. KANE, APPELLANT, V. UNITED CATHOLIC SOCIAL SERVICES OF OMAHA, INC., APPELLEE.
191 N. W. 2d 824

Filed November 19, 1971. No. 37962.

Infants: Parent and Child: Statutes: Adoption: Acknowledgments. A relinquishment of a child for adoption made voluntarily and in accordance with the provisions of section 43-106.01, R. R. S. 1943, is not revocable.

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

S. J. Albracht and Michael P. Cavel of Lathrop, Albracht & Dolan, for appellant.

John H. Kellogg, Jr., of Hotz, Byam & Kellogg, for appellee.

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

CLINTON, J.

The relator filed in the district court an application for writ of habeas corpus testing the right of the respondent to the custody of and its right to consent to the adoption of the infant son of the relator. The relator, age 22, is the natural mother of the child who was born out of wedlock October 11, 1970. The respondent is a licensed child placement agency under the statutes of the State of Nebraska. On October 21, 1970, the mother executed a relinquishment under the provisions of section 43-106.01, R. R. S. 1943, and delivered custody of the child to the agency. The agency at that time in writing accepted responsibility for the child as required by statute.

The application alleges that relator signed papers without knowing their contents and that the child is being unlawfully held by the agency. There is no real dispute in the evidence. The relator's own testimony, as well as that of the other witnesses, clearly and without dispute shows that she knew the contents and the nature and effect of the relinquishment which she executed at the time she delivered custody of the baby to the agency. The relinquishment in form satisfies the statutory requirements and the evidence shows that it was acknowledged and witnessed in conformity with the statute.

The mother's position, as stated by her attorney during the trial, is that the relinquishment is the fruit of "economic coercion and economic duress" and therefore should not bind her. She acknowledges that no representative of the agency exercised any duress or coercion of any kind or degree to induce her to execute the relinquishment.

The evidence shows that the mother was gainfully

employed until about 3 months before the child's birth when she took a leave of absence from her employment; that her employment was open to her after the birth of her child; that she had an apartment of her own; and, before the child's birth, determined that she would keep the baby and to that end had acquired certain equipment and had made arrangements for someone to care for the child when she returned to work. These plans, the evidence shows, were frustrated because of the exhaustion of her financial resources and because the child's birth resulted in complications which required her to remain away from her employment and to be under a doctor's care for 2 weeks after her release from the hospital. The relator and her baby stayed at the home of relator's parents after she and the baby were discharged from the hospital and up to the time of the execution of the relinquishment. The evidence shows that the relator's parents, particularly her mother, wanted her to relinquish the child for adoption and made known their desires to her, and that the relator's mother made the initial contact with the agency.

In the two discussions which the relator had with agency representatives, one before signing the relinquishment and one at the time of the execution of the relinquishment, the matter of the relator's finances was not discussed. She did not ask for or receive any advice on possible sources of financial aid which might have enabled her to keep the child. At the trial when asked why she gave the child up, she stated: "Because I didn't have any money to take care of him or food or anything." And in reply to the question, ". . . did you see any possibility of feeding the child and caring for the child yourself?" she answered: "No. I didn't know what else to do. . . ." On cross-examination she stated: "I didn't have any other choice."

The relator contends that the respondent had a duty to make inquiry concerning her economic circumstances and to suggest to her ways and means which would have

enabled her to keep the baby. The law places on the placement agency no such obligation.

The second day after the execution of the relinquishment, upon learning from a friend that she could obtain financial assistance and child support from the Department of Welfare, she called the agency and told them she wanted the baby back. The agency did not return the baby although there apparently was some discussion concerning this, the nature of which is not disclosed by the record.

Section 43-106.01, R. R. S. 1943, provides in part as follows: "When a child shall have been relinquished by written instrument, as provided by sections 43-104 and 43-106, . . . to a licensed child placement agency and the agency has, in writing, accepted full responsibility for the child, the person so relinquishing shall be relieved of all parental duties toward and all responsibilities for such child *and have no rights over such child.*" (Emphasis supplied.) This case is governed by the statute and Batt v. Nebraska Children's Home Society, 185 Neb. 124, 174 N. W. 2d 88. The relinquishment if voluntary, as it is here, is not revocable. Stresses, motivations, and circumstances such as are outlined by the evidence are probably present in many cases such as this. Much as we are moved by the mother's evident desire for her child and the unfortunate circumstances which motivated her decision to sign the relinquishment, we have no choice but to affirm the judgment.

AFFIRMED.

GEORGE C. BELEK ET AL., APPELLANTS, V. TRAVELERS INDEMNITY COMPANY ET AL., APPELLEES.
191 N. W. 2d 819

Filed November 19, 1971. No. 37966.

Judgments: Trial: Appeal and Error. The judgment of the trial court in an action where the jury has been waived has the effect

of a verdict of a jury and will not be set aside unless clearly wrong.

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

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

Stephen A. Davis of Cassem, Tierney, Adams & Henatsch, John S. Samson, and Daniel G. Dolan, for appellees.

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

CLINTON, J.

This is a declaratory judgment action. The sole question involved is whether the defendant, Travelers Indemnity Company, insured a certain 1960 Cadillac automobile belonging to the defendant Robert S. Nielsen.

It is claimed that a soliciting agent of Travelers orally agreed in a telephone conversation with Nielsen shortly after the acquisition of the Cadillac by Nielsen to add said vehicle by endorsement to a previously issued policy covering a 1966 Volkswagen owned by Nielsen. Travelers denies such an agreement. The disputed fact issues were tried by the court without a jury. The trial court found in favor of Travelers. We affirm.

Nielsen testified he talked to the agent of Travelers by telephone and explained he had bought the car and wanted liability but not collision coverage on it, and that the agent told him he would take care of it. The agent denied knowledge of any such conversation and expressed his belief that there was no such conversation because if there had been there would have been some kind of follow-up on it. No additional policy or rider was issued. No billing was made for additional premium and none was paid. The evidence shows that Nielsen had purchased various types of insurance from the agency for a number of years and did not always pay specific billings but made payment on account from

time to time on request. The evidence further shows that prior to the alleged conversation Nielsen had been billed for the premium on the Volkswagen by a billing which specifically identified that car. The premium on the Volkswagen had not been paid at the time of the alleged conversation. About 1 month later Nielsen was billed again for the same amount. A month later he was again billed for the same amount plus the premium on a workmen's compensation policy. Nielsen explained that he did not pay specific attention to the contents of the billings. After the accident which gave rise to the coverage question the agent furnished an accident report form to Nielsen and to the plaintiff Belek, who was the driver of the Cadillac at the time of the accident, together with envelopes for mailing. The evidence indicates the accident reports were mailed to Travelers and that Belek at least completed and mailed to the Department of Motor Vehicles of the State of Nebraska Part II of the report. He indicated thereon coverage by Travelers Insurance Company policy No. 008 183 675, which other evidence indicates is the policy on the Nielsen Volkswagen. Following the accident Nielsen obtained a replacement automobile for the Cadillac and called the agent and caused this vehicle to be added to the Volkswagen policy. He was subsequently billed for this and paid the premium thereon. The evidence shows that Nielsen was once employed by an insurance agency and apparently had some familiarity with the conduct of such a business.

The trial court in its findings against the plaintiffs laid considerable weight upon certain aspects of the evidence as indicated by the following findings: "Nielsen indicated that he assumed that he had coverage on the Cadillac until he learned differently after the accident on August 23, 1967. . . . He made this assumption in spite of the notices of March 25 and April 25, 1967, and in spite of the fact that for a period of 6 months he had

received no policy covering the Cadillac and had paid no premium on such a policy."

We believe the facts recited in the court's findings considered in light of Nielsen's knowledge of the insurance business tipped the scales in favor of a conclusion that there had been no agreement to insure the Cadillac. The judgment of the trial court in an action where the jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. American Standard Ins. Co. v. Tournor, 186 Neb. 585, 185 N. W. 2d 267. Section 21-21,157, R. R. S. 1943, provides that when a declaratory judgment proceeding ". . . involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending."

A stipulation was entered into by the parties as follows: ". . . if Anne Hanks, who is an Assistant Division Chief, Department of Motor Vehicles, State of Nebraska, were called to testify, she would testify according to her records that George C. Belek indicated here liability with the Travelers company by virtue of policy no. 8-183-675 at the time of this accident on August 23rd, 1967; that this office, to-wit, the Department of Motor Vehicles, Department of Motor Financial Responsibility, has not received a denial of that policy." The colloquy of counsel surrounding the stipulation indicates that the filing made by Belek refers to the Part II of the accident report referred to in section 60-506.01, R. R. S. 1943. That section reads as follows: "The Department of Motor Vehicles shall, within ten days after receipt of the report of the accident, forward Part II of such report, by United States mail, to the insurance company, if any, named in such report as furnishing liability insurance. Unless express denial of the truth of the statements shown on such Part II is received from the named insurance company by the Department of Motor Vehicles within the time limited by section 60-507 it shall be

presumed, for purposes of Chapter 60, article 5, that such statements are true and such presumption shall be accepted, when applicable, as satisfying the requirements of sections 60-508 and 60-509."

Plaintiffs contend that the filing of the Part II of the accident report with no subsequent denial by Travelers constitutes a conclusive certification that Travelers insured the automobile in question. Plaintiffs cite authorities for this proposition and Travelers cite contrary authorities. In the state of the record in this case we need not decide the question. Section 60-506.01, R. R. S. 1943, provides: "The Department of Motor Vehicles shall, within ten days after receipt of the report of the accident, forward Part II of such report, by United States mail, to the insurance company, if any, named in such report as furnishing liability insurance." The record does not disclose that the Department of Motor Vehicles ever complied with the above provision. Unless this is shown no duty of denial ever arises.

As we read the record there is no contention that Travelers filed an SR-21 under the alternative provisions of the statute contained in section 60-509, R. R. S. 1943, as follows: "Upon receipt of a notice of such accident, the insurance company or surety company which issued such policy or bond shall furnish, for filing with the department, a written notice that such policy or bond was in effect at the time of such accident."

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHNSON KENNETH EVANS, APPELLANT.
191 N. W. 2d 145

Filed November 24, 1971. No. 37790.

1. **Criminal Law: Evidence: Trial.** In-court identification evidence is admissible where such identification is made on a basis independent of a tainted lineup.

2. **Criminal Law: Evidence: Witnesses.** A primary factor in determining whether an independent basis for an in-court identification exists is the opportunity afforded the witness to observe the defendant under circumstances free from taint.
3. **Criminal Law: Evidence: New Trial.** A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown, its determination will not be disturbed.
4. ———: ———: ———. New cumulative evidence tendered in support of a motion for a new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict.
5. ———: ———: ———. A new trial will not ordinarily be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at the trial.

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

Martin A. Cannon of Matthews, Kelley, Cannon & Carpenter, for appellant.

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

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

WHITE, C. J.

Asserting that the eyewitness identification of the defendant was constitutionally defective, the suppression by the State of material evidence, and the excessiveness of the sentence, the defendant appeals from a conviction and sentence for robbery. We affirm the judgment and sentence of the district court.

About 11 a.m. on September 20, 1968, the West Lake Grocery, 4238 Lake Street, Omaha, Nebraska, was robbed. At the time of the robbery the sole occupants of the building were Arthur Haffke, the proprietor, and his son, an assistant, Warren Haffke. At 11 a.m. on that morning two negro men came into the store. They walked in the front door (one "in" and one "out" door),

came up to the counter, and asked where the milk was. The proprietor was behind the check stand. One of the men was tall and one was short. After being advised where the dairy bar was, both proceeded to walk down an aisle to the north side of the store where the milk was. Haffke, because of their conduct and because he smelled whiskey on the breath of the tall man when he talked to him, became suspicious, pulled his gun out from under the counter, and put it in his pocket. They were in the store for a period of 8 to 10 minutes. Haffke, his suspicions aroused, walked down the aisle and kept them under relatively continuous observation in a mirror which was posted so he could observe them across the width of the store. He observed them while they were talking right in front of the dairy bar. They talked for several minutes. At the same time, Warren Haffke, the son who was behind the meat counter directly adjacent to the dairy bar, had them under observation. After observing the two men in the mirror, Haffke walked back to the check stand and waited probably 4 or 5 minutes, at which time the defendant and his companion appeared at the check stand carrying a half gallon of milk. As Haffke opened the cash register he was pushed against the drug rack which was behind him. When he turned around the defendant had his hands in the cash register. Haffke pulled his gun and shot at the robbers as they started running toward the doors. The shorter man was hit and the tall man escaped. Haffke in court positively identified the defendant Evans as the tall man who was in the store and committed the robbery.

Warren Haffke, the son, was behind the meat counter. He saw the two men come into the store and walk to the back of the store where the dairy case was, and observed them during this period of time. From the meat counter he could see right down the aisle to the dairy case. The two men were in front of the dairy case and he observed them while they stood there talking

for perhaps a couple of minutes. At the end of their conversation he saw one man step away from the case and look around the aisles. After doing that he stepped back and walked up the aisle toward the meat counter. He was carrying a half gallon of milk. Warren Haffke's testimony corroborated in detail that of Arthur Haffke, the proprietor. There were some discrepancies, but he testified that there was a tall man and a short man; that the tall man was carrying a half gallon of Roberts milk, the same as Arthur Haffke testified; that the tall man was in front and the short man was behind him; that they went to the checkout stand and while at the checkout stand they were in his direct line of vision; and that he heard the tall man ask for a package of cigarettes and observed the rest of the circumstances as Arthur Haffke had related them. He actually saw the tall man push his father, he saw his father lose his balance, he saw the two men starting to run, and he saw his father shooting at them. Warren Haffke positively and unequivocally identified Evans as the tall man in the store. The argument that there is insufficient evidence to convict the defendant is obviously without merit and one that will not be further discussed.

Defendant's main contention in this appeal is that a new trial should have been granted because subsequent to the events related above, Arthur Haffke, the proprietor, was unable to identify the defendant when two colored pictures were shown to him by a police officer sometime later. Seizing on the fact that the police officer showed the proprietor, Arthur Haffke, a series of colored pictures for the purpose of identification sometime after the commission of the crime, the defendant argues strenuously that under the doctrine of United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149, and other "line-up" cases require counsel's presence, identification by Haffke was constitutionally invalid and impermissible because there was a lack of sufficient foundation to show or permit an independent in-court

identification of the defendant by Haffke. There are two clear answers to this contention: (1) The doctrine of Wade, cited *supra,* is not applicable to photographic identification. State v. Moss, *ante* p. 391, 191 N. W. 2d 543. As that opinion points out the Second, Fifth, Seventh, Ninth, and Tenth Circuits have so held. See, United States v. Bennett, 409 F. 2d 888; United States v. Ballard, 423 F. 2d 127. (2) The doctrine of Wade does not apply to the present case as Arthur Haffke, in the present case, did not identify Evans, the defendant, from the photographs that were shown him. The basic premise of the Wade case is that improper "line-up" identification, without the presence of counsel, suffers from the "dangers inherent in eye-witness identification and the suggestibility inherent in the context of the pretrial identification."

We cannot infer an impermissible suggestiveness from the failure of identification. The foundation for an independent identification is much stronger here than in State v. Cannon, 185 Neb. 149, 174 N. W. 2d 181. We deem it unnecessary to repeat the evidence in detail. Arthur Haffke's testimony as to the defendant being in the store for a period of 8 to 10 minutes, the rather lengthy hesitation at the dairy bar, the incident at the check counter, and the subsequent escape of the defendant, all corroborated in minute detail by the independent observations of Warren Haffke, furnish a foundation to support the admission of testimony as to in-court identification. There is no merit to this contention.

The defendant, on motion for new trial, offered evidence to support his contention that the state *suppressed* the fact that Arthur Haffke, the proprietor, had looked at some colored pictures presented by the police sometime prior to the trial and failed to identify the defendant Evans in one of these pictures. The trial court rejected this contention and we find no abuse of its discretion in this respect. Basically, the argument of the defendant rests upon the contention that there was a failure to

cross-examine the State's witness in this respect. There is no evidence of suppression. On the contrary, the record affirmatively discloses the very area of evidence which the defendant claims was suppressed or concealed. It overlooks the following testimony elicited by cross-examination of the witness Arthur Haffke by defense counsel at the preliminary hearing. It is as follows: "Mr. Carey: You never looked at any photographs of anybody? A. I looked at the photographs, yes. Mr. Carey: Where did you look at the photographs? A. At the store. Mr. Carey: Members of the police department brought those photographs out? A. Yes. Mr. Carey: How many photographs did you look at? A. One—one only—the big fellow. Mr. Carey: Do you recall the name of the police officers who showed that photograph to you? A. No. I can't. Mr. Carey: What did they tell you when they showed you that single photograph? A. They didn't show me a single photograph. He had a whole bunch. He said, 'Is that man in there that pushed you?' and I looked and I said, 'This one fellow that has died his hair yellow down the center here' (indicating). This is the fellow I picked out. Mr. Carey: You did see a photo then of an individual who had a yellow streak down the center of his hair, is that right? A. Yes. Mr. Carey: This same streak was there at the time he came in your store? A. No, not when he walked in the store. Mr. Carey: So you identified him by the streak down the hair? A. No, by his face. I wouldn't know one streak from another. Mr. Carey: So you will concede that the photograph which you observed didn't look exactly like the person you identified? A. Except for the hair-do. Mr. Carey: You indicate that you looked at only one photograph, but that is obviously incorrect. A. No, I looked at the whole bunch. Mr. Carey: But you identified only one man—A. That's right. Mr. Carey: (continuing) As a result of the photographs which you observed? A. That's right. Mr. Carey: How many photographs did you look at?

A. He had several. I don't know. He said, 'Is the man here that pushed you?' and he laid them there and I looked at them." There is no merit to this contention.

In an overlapping argument the defendant again argues that the claimed newly discovered impeachment evidence of Arthur Haffke's identification of the defendant is potent enough so that the court should have granted a new trial. Again, we find no abuse of the trial court's discretion in this respect. As we have pointed out there was no suppression or concealment by the State of this evidence and it is difficult to see how it could be deemed as "newly discovered" evidence. Putting aside rhetoric, the contention simply is that one of the prosecuting witnesses at some time prior to the trial was unable to recognize the defendant in a couple of colored Polaroid pictures taken some time previously. Human error in picture identification is common. But, more important, we observe that the testimony was only impeachment of one of the prosecuting witnesses. The contention that a new trial should be granted ignores the independent and strongly corroborated testimony of the witness, Warren Haffke, which has been recited in more detail heretofore. The translation, by a human being, from the visual physical identification of a defendant at the scene of the crime, into a recognition from a colored Polaroid photograph may indeed be difficult. At most, such impeachment goes to the credibility of the witness and is for the jury. Disparity of likenesses from a photograph, in this case a colored Polaroid, and the actual physical appearance of a human being is a matter of common knowledge. His actual physical identification of the defendant could not have been in any way enhanced by his failure to identify the colored Polaroid photograph. In light of the strong and persuasive in-court identification by Warren Haffke and the detailed independent corroboration by Arthur Haffke's testimony, we cannot hold that this claimed newly discovered evidence by way of impeach-

ment is so potent that it was an abuse of discretion by the trial court to refuse to grant the new trial. We have also stated that a new trial will not ordinarily be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at the trial. These rules were all summarized recently in State v. Wycoff, 180 Neb. 799, 146 N. W. 2d 69, where this court said as follows: "A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown, its determination will not be disturbed. Smith v. State, 169 Neb. 199, 99 N. W. 2d 8; Fugate v. State, 169 Neb. 420, 99 N. W. 2d 868. New cumulative evidence tendered in support of a motion for new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. Wiegand v. Lincoln Traction Co., 123 Neb. 766, 244 N. W. 298; Gates v. State, 160 Neb. 722, 71 N. W. 2d 460; Smith v. Smith, supra. A new trial will not ordinarly be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at the trial. Baskins v. State, 139 Neb. 803, 299 N. W. 188; Ogden v. State, 13 Neb. 436, 14 N. W. 165." See, also, State v. Haynes, 186 Neb. 238, 182 N. W. 2d 199.

The trial court observed and heard the witnesses and observed the defendant in the course of the trial. It was unable to find any error or prejudice sufficient to grant a new trial arising from any failure to prove that one of the prosecution witnesses failed to identify the defendant from pictures taken before the trial. We can find no abuse of discretion in this determination and it is without merit. Eyewitness identification has, throughout history, been subject to possible human error. Nevertheless, discrepancies and errors in identification where there is an adequate foundation, are matters for a jury determination.

The defendant attacks the sentence as excessive. The

presentence investigation of this defendant is a part of the record. It is true that he was honorably discharged from the military service. It is also true that the present crime committed was committed while the defendant was on probation from another offense. It is also true that the present offense, robbery, is a serious crime and involved the actual use of physical violence by the defendant. The maximum sentence is 50 years and the minimum sentence is 3 years. The trial court observed the conduct and demeanor of the defendant and heard the evidence. We are not prepared to say that the trial court abused its discretion in imposing the sentence of 5 to 7 years.

Other contentions of the defendant have been examined and are without merit. The judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN WALKER, APPELLANT.
191 N. W. 2d 817

Filed November 24, 1971. No. 37910.

1. **Criminal Law: Evidence.** A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from the defendant's conduct subsequent thereto.
2. ———: ———. Participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed.
3. **Criminal Law: Evidence: Witnesses: Appeal and Error.** It is not the province of this court to pass on the credibility of witnesses or weigh the evidence in a criminal case.

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

Frank B. Morrison and Bennett G. Hornstein, for appellant.

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

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

BOSLAUGH, J.

The defendant appeals from a conviction for breaking and entering a motor vehicle with intent to commit larceny. The only question presented by the appeal is the sufficiency of the evidence to sustain the conviction.

The record shows that an automobile owned by Frank Wolczak was broken into on August 16, 1970, and a radio removed from the automobile. At the time of the offense the automobile was in a parking lot near the University of Nebraska Medical Center in Omaha, Nebraska, where Wolczak was employed as a security guard. At about 3:40 a.m., Wolczak discovered that the radio had been removed from his automobile and notified the police.

At about 4 a.m. of the same day, Officers Garaczkowski and Sommer were on patrol in the vicinity of Thirtieth and Cuming Streets in Omaha, Nebraska. They observed a black Plymouth automobile proceeding without any lights. As the automobile passed the police cruiser at Thirty-first and Nicholas Streets, the officers noticed that the passengers in the rear seat appeared to be "shuffling around" as if they were putting something down in the back seat. They stopped the automobile just north of the intersection and observed there were some articles on the rear floor of the automobile partially covered by a banket. When the blanket was removed they found the radio taken from the Wolczak automobile, a stereo tape player, 9 stereo tapes, and a pair of surgical nail clippers.

The automobile belonged to the defendant. It was being operated by Leon McBride. Felton Phelps was sitting on the right side of the front seat. Jesse James Davis was sitting on the left side of the rear seat, and

the defendant was sitting on the right side of the rear seat. The radio and other articles were on the floor between Davis and the defendant. The defendant, who was arrested and taken to the police station, did not appear to be intoxicated.

Davis was called by the defendant and testified that he and Phelps had broken into the Wolczak automobile and taken the radio; that the defendant had nothing to do with the breaking and entering of the Wolczak automobile; that the defendant was asleep in the rear seat of the black Plymouth automobile at the time the Wolczak automobile was broken into; and that the defendant did not awaken until the automobile had been stopped by the police. Davis also testified that he had been with the defendant, off and on, from about noon on the preceding day, and that the four were together from midnight until they were picked up by the police.

The defendant testified that he owned the Plymouth automobile; that he and Phelps were together during the evening of August 15, 1970; that Davis and McBride were together and that the four of them got together at about 1 a.m.; that he drank a quart of beer at about 9 or 10 o'clock; that they picked up McBride's girl friend at about 1 a.m. to take her to the hospital; that he remembers nothing after that until he was awakened by the police shining a light in his face; and that he was sleeping because he had been drinking.

The evidence shows that the defendant and his companions had been together for several hours before the crime was committed. It is undisputed that the defendant was present at the scene of the crime. The defendant's automobile was being used to transport the stolen property and the four men were apprehended within a very short time after the break-in had occurred. The defendant's claim that he was sleeping and intoxicated was contradicted by the testimony of the police officers.

A common purpose among two or more persons to commit a crime need not be shown by positive evidence

but may be inferred from the circumstances surrounding the act and from the defendant's conduct subsequent thereto. Miller v. State, 173 Neb. 268, 113 N. W. 2d 118. Participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed. As we view the record, the evidence presented a question for the jury as to the defendant's participation in the offense committed by Davis and Phelps. It is not the province of this court to pass on the credibility of witnesses or weigh the evidence in a criminal case. State v. Warner, *ante* p. 335, 190 N. W. 2d 786.

The judgment of the district court is affirmed.

AFFIRMED.

DOYLE L. HACKER, APPELLANT, V. RAMIRO A. PEREZ, APPELLEE.

192 N. W. 2d 166

Filed November 24, 1971. No. 38014.

1. **Trial: Evidence: Verdict.** In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom.
2. **Automobiles: Negligence.** Conditions affecting the visibility of a motorist impose upon the driver the duty to use a degree of care commensurate with the existing circumstances.
3. **Automobiles: Negligence: Evidence.** Circumstantial evidence is sufficient to sustain a charge of unlawful speed and may be sufficient to overcome direct evidence.
4. **Automobiles: Negligence: Statutes.** The operator of a motor vehicle who would otherwise have the right-of-way under statutory regulations if he operates it at a lawful rate of speed may forfeit the right-of-way if he operates the vehicle at an unlawful rate.

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

Van Steenberg, Winner & Brower, for appellant.

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

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

SPENCER, J.

This is an action to recover damages as the result of a collision at an unprotected intersection of two graveled county roads 6 miles north and 3 miles east of Scottsbluff, Nebraska. Plaintiff, Doyle L. Hacker, appeals from a judgment entered on a jury verdict for the defendant, Ramiro A. Perez. We affirm.

Plaintiff sets out seven assignments of error. However, only one is argued in his brief: The trial court should have directed a verdict for the plaintiff. If the trial court had done so, it would have constituted reversible error.

In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom. Napier v. Pedersen, 175 Neb. 703, 123 N. W. 2d 577.

Plaintiff's son, Rex S. Hacker, about 3 p.m., on June 29, 1969, was driving plaintiff's automobile from the south, approaching the intersection in question. At the same time the defendant was approaching from the west. Rex testified he was traveling 40 to 45 miles per hour and did not decrease his speed as he approached the intersection. He has no recollection of seeing the defendant's automobile.

Defendant testified he was traveling 20 to 25 miles per hour and slowed down for the intersection. He saw no car when he first looked as he approached the intersection but continued to look and finally saw a car approaching from the south. He tried to avoid a collision by applying his brakes and swerving to the north.

The evidence would indicate that from the direction the two cars were approaching, the intersection is almost a blind one. In any event, it is extremely difficult to detect approaching traffic from either the south or the west.

While Rex testified he could not recall seeing defendant prior to entering the intersection, his car left skid marks for 56 feet to the point of impact. Either he saw the defendant's vehicle or realized he was approaching a bad intersection. Defendant's vehicle skidded 22 feet to the point of impact. Defendant's car traveled 18 feet into the intersection, and the front of the car was within 4 feet of the east edge of the intersection. The front of the plaintiff's car was only 2 feet 6 inches into the intersection at the time of impact. Using these measurements and considering as a minimum the admitted speed and reaction time of the participants, we could fairly assume Rex observed the defendant's vehicle when he was at least 100 feet from the intersection, while the defendant observed the plaintiff's automobile approaching when defendant was at least 22 feet from the intersection. Defendant's vehicle was almost across the intersection when Rex entered it because plaintiff's car only traveled 2½ feet to the point of impact.

While Rex testified he was driving 40 to 45 miles an hour, the physical facts, including the extensive damage to the vehicles, would support an inference of a much greater speed. In any event, the speed of an automobile is excessive if it is found to be unreasonable or imprudent under the existing circumstances, even though it may not exceed the applicable statutory limits. Costanzo v. Trustin Manuf. Corp., 176 Neb. 136, 125 N. W. 2d 556. In this respect our law is clear that questions affecting the visibility of a motorist impose upon the driver the duty to use a degree of care commensurate with the existing circumstances. See Thompsen v. Miller, 177 Neb. 530, 129 N. W. 2d 498. As suggested by Costanzo, it is well settled that circumstantial evidence is sufficient to sustain a charge of unlawful speed and may be

sufficient to overcome direct evidence. It is not unreasonable to assume that the jury found Rex was traveling at a speed greater than was lawful and prudent under the conditions which existed at the intersection in question, and consequently did not have his automobile under reasonable control.

Plaintiff assumes because Rex approached the intersection from the right, a verdict must be directed for him. The facts in this case do not undisputedly give him the right-of-way. They present a jury question which was resolved against the plaintiff. The operator of a motor vehicle who would otherwise have the directional right-of-way under statutory regulations if he operates it at a lawful rate of speed may forfeit that right-of-way if he operates the vehicle at an unlawful rate. In so holding, we are not unmindful that section 39-751(2), R. R. S. 1943, was repealed previous to the date of the accident herein. The new statutory section says nothing about forfeiture of right-of-way by unlawful speed, but that holding is inherent in other regulations covering right-of-way. Those rules must be construed within the ambit of lawful operation of motor vehicles. We have said on many occasions the fact that one may have the directional right-of-way does not permit him to proceed in utter disregard of traffic approaching from the left. The rules of the road which are applicable herein are stated and discussed in Costanzo v. Trustin Manuf. Corp., 176 Neb. 136, 125 N. W. 2d 556.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN W. TRAMBLE, APPELLANT.
191 N. W. 2d 822

Filed November 24, 1971. No. 38026.

1. **Criminal Law: Trial: Evidence.** The question of whether a pretrial photographic identification procedure was impermissibly

suggestive must be determined by an evaluation of all the surrounding circumstances.

2. **Criminal Law: Right to Counsel.** There is no right to counsel at a pretrial photographic identification.

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

Frank B. Morrison and Bennett G. Hornstein, for appellant.

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

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

BOSLAUGH, J.

The defendant appeals from a conviction for robbery. The assignments of error relate to pretrial photographic identification of the defendant by the complaining witness.

The record shows that at about 3 a.m., on July 17, 1970, Earl Clare Williams was driving south on Twenty-fourth Street in Omaha, Nebraska, when his car was "curbed" by another automobile. One man reached through the window and grabbed Williams by the collar while the defendant entered the Williams automobile through the right front door and demanded that Williams give the defendant his money, watch, and ring. A third man, carrying a gun, approached the Williams automobile from the rear. After Williams had handed his money, watch, and ring to the defendant, he was told to drive on. He then drove to the police station and reported the robbery.

Williams testified that the defendant was in his automobile for about 3 minutes; that the area was lighted by street lights; that the defendant was a "colored fellow," about 6 feet tall; and that he had a thin face, a goatee with sideburns, and was graying at the temples. At the trial Williams identified the defendant as the man who had entered his automobile and robbed him.

At the pretrial hearing, Williams testified that on the

night of the robbery he was shown about 30 photographs at the police station but did not identify any of them as being a picture of the defendant, the man who had robbed him.

The ring was pawned by the defendant on July 20, 1970, using the alias of "Ted Williams." On July 22, 1970, Earl Clare Williams went to the pawn shop and identified the ring as the one that had been taken from him in the robbery. On the same day he looked at a number of photographs at the police station. He was unable to identify any of them as being a photograph of the defendant. There was one picture that resembled the defendant but the person in the photograph appeared to be younger and heavier than the defendant and was clean shaven. There is some confusion in the record as to this latter photograph but, apparently, it was a photograph of the defendant made in 1961.

The defendant was arrested on the afternoon of July 22, 1970, and placed in a police cruiser. Later, the watch that had been taken from Williams in the robbery was found underneath the seat cushion of the police cruiser in which the defendant had been placed at the time of the arrest.

On July 23, 1970, Williams was notified by the police that "they had the man" and Williams was asked to come to the police station to identify him. When Williams arrived at the station he was advised that the prisoner would not consent to a lineup, and Williams was shown four black and white photographs. Out of this group, Williams correctly identified one photograph as being a picture of the defendant. Williams was then shown a group of five colored photographs. Out of the second group, Williams correctly identified two photographs as being pictures of the defendant.

The defendant contends that the photographic identification procedure followed in this case was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. The question must be determined by an evaluation of all the surrounding cir-

cumstances. Simmons v. United States, 390 U. S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247.

On the first two occasions when photographs were shown to Williams at the police station, the defendant was not in custody. On the third occasion the defendant had refused to participate in a lineup and his refusal stands undenied in the record. Under such circumstances there is no alternative to photographic identification.

The record does not sustain the defendant's contention that the procedure followed was impermissibly suggestive. The photographs which were used on the third occasion were pictures of negro men of reasonably similar appearance. By separating the photographs into two groups, the police lessened the likelihood of misidentification. The photographs were in no particular order within each group, and the top photograph in each group was not a photograph of the defendant.

The defendant's other contention in regard to a right to counsel at the time of a photographic identification was considered and rejected in State v. Moss, *ante* p. 391, 191 N. W. 2d 543. See, also, United States v. Richmond, 449 F. 2d 288 (8th Cir., October 4, 1971).

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES EICKMEIER, APPELLANT.
191 N. W. 2d 815

Filed November 24, 1971. No. 38051.

1. **Criminal Law: Evidence: Trial.** To justify a conviction on circumstantial evidence it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and when taken together must be of such a character as to be consistent with each other and with the hypothesis sought to be established

thereby, and inconsistent with any reasonable hypothesis of innocence.

2. **Criminal Law: Evidence: Trial: Verdict: Appeal and Error.** After a jury has considered the evidence in the light of the foregoing rule 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.
3. **Criminal Law: Evidence: Trial.** When a fact in issue may be explained by the production of an article or object to which testimony relates, it is proper to produce such object or article and exhibit it to the jury.

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

Tye, Worlock, Tye, Jacobsen & Orr, for appellant.

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

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

SPENCER, J.

Defendant, Charles Eickmeier, was convicted of burning his trailer home to defraud an insurer. Defendant argues two assignments of error: The insufficiency of the evidence, and the lack of a proper foundation for the admission of an exhibit. We affirm.

The evidence against the defendant is in the main circumstantial. However, defendant's brother-in-law testified that the defendant had told him he was going to burn down his trailer house. When he told how he expected to do it, the brother-in-law jokingly suggested that he do it like a woman would, by leaving a frying pan on the stove. The fire in this instance appears to have been started by overheating cooking oil in a fry pan, as suggested by defendant's brother-in-law.

In State v. Williams, 183 Neb. 257, 159 N. W. 2d 549, we said: "To justify a conviction on circumstantial evidence it is necessary that the facts and circumstances

essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and when taken together must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence.

"After a jury has considered the evidence in the light of the foregoing rules and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt."

Without reviewing the evidence in detail, we find it does sustain a rational theory of defendant's guilt and is sufficient to sustain his conviction.

Defendant argues no proper and sufficient foundation was laid for the admission of a screwdriver into evidence. The screwdriver was a common 10-inch screwdriver, found in a wastebasket in the trailer. There were some marks on the trailer door tending to indicate that someone had tried to enter the trailer home. The screwdriver exactly fit the marks on the door. It was defendant's position that the trailer had been broken into and the fire started by the intruder. The evidence, however, is conclusive that the door had not been sprung and entrance had not been gained to the trailer by forcing the door. While it could not be proved with certainty that the screwdriver in question actually made the marks, it is indisputable that they were made at least by an exact duplicate of the one in evidence. In any event, when a fact in issue may be explained by the production of an article or object to which testimony relates, it is proper to produce such object or article and exhibit it to the jury. Reizenstein v. State, 165 Neb. 865, 87 N. W. 2d 560.

The judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF STACY AND SHERRY LYNN NAIMIE, CHILDREN UNDER 18 YEARS OF AGE.
MICHAEL P. HEALEY, APPELLEE, V. KAREN SUE NAIMIE, APPELLANT.
192 N. W. 2d 137

Filed December 3, 1971. No. 37941.

1. **Parent and Child: Infants.** Parental rights may be terminated when parents have substantially and repeatedly neglected a child and refused to give it necessary parental care and protection or when a parent is unfit by reason of lewd and lascivious behavior which is detrimental to the health, morals, or well-being of the child.
2. **Parent and Child: Infants: Statutes.** The child custody statutes of the State of Nebraska are to be liberally construed to accomplish the purpose of serving the best interests of the children involved.

Appeal from the separate juvenile court of Douglas County: SEWARD L. HART, Judge. Affirmed.

John S. Samson and Wendell Janssen, for appellant.

Donald L. Knowles, Colleen R. Buckley and Norman Denenberg, for appellee.

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

NEWTON, J.

This is an action instituted in the separate juvenile court of Douglas County, Nebraska, praying that Stacy Naimie and Sherry Lynn Naimie born out of wedlock on February 7, 1969, and February 2, 1970, respectively, be found to be dependent and neglected children and further praying that the parental rights of their 19-year-old mother, appellant herein, be terminated. The court found that the children were dependent and neglected children, terminated the parental rights of the natural parents, and placed the children in the temporary custody of the Douglas County welfare administration for care, education, and maintenance in a suitable foster

home. The only question presented is the sufficiency of the evidence. We affirm the judgment of the separate juvenile court.

The petition, in Count I, alleges as defined in section 43-201 (2), R. R. S. 1943, that the children are dependent, to-wit: "Said children are without proper support and parental care from Karen Sue Naimie, natural mother of said children through no fault of said natural mother who is unable to provide proper support and parental care for the said children."

In Count II, they are alleged to be neglected because their natural mother on five occasions left them in the care of their maternal grandmother with no "arrangement for their care and maintenance," knowing that the grandmother "was incapable of caring for said children because of her ill health."

The evidence reveals that the children were born out of wedlock. The mother identified the father of Sherry but said she did not know who was the father of Stacy. There is other evidence identifying the two fathers. It conclusively appears that neither father has acknowledged his child nor contributed to her support and the judgment of the separate juvenile court terminating their parental rights in the children must be affirmed on the basis of neglect.

The mother, Karen Sue Naimie, was an unmarried woman, 19 years of age. She and the children lived with Karen's mother in a two-bedroom house, also occupied by a brother of Karen's who it appears was mentally unstable. The maternal grandmother was 43 years of age and maintained that she was in ill health due to high blood pressure and consequently unable to care for the children. There is no verification by a doctor of her condition and Karen maintains her mother is simply lazy.

The grandmother's objection to caring for her grandchildren made it impossible for Karen to obtain work although after the children were removed from her custody, Karen still failed to obtain employment over a 5½-month

period. On five separate occasions, from March 7, 1970, through August 1970, Karen left her mother's home without saying where she could be reached or when she would return. She would be gone overnight for one to three days and her whereabouts on all but one occasion remained unexplained. The last such occurrence was on August 27, 1970, and the following day Karen's mother called the Douglas County welfare department and had the children taken away. They have since been in a foster home.

On two occasions Karen left her mother's home and took the children with her. On one occasion she rented an apartment which she occupied for not to exceed one month and was unable to pay the rent in full. While there she was observed in bed with one of the two alleged fathers of her children, a married man. On the other occasion she moved in with Shirley Sweeney who had several children of her own. All of the children were on occasion left in the care of an 11-year-old son of Shirley Sweeney and on one such occasion, an emergency developed requiring hospitalization of the baby Sherry. While the children were in a foster home, Karen called to see them on four occasions. On one such occasion, she was accompanied by a married man she introduced as her boyfriend. There was also evidence that the oldest child Stacy, when first placed in the foster home, had the habit of placing objects between her legs and simulating sexual movements. There is some indication that Karen was "running wild" and Karen herself stated that one of the children's alleged fathers stated: "* * * that if I straightened up and started getting a job he would help me out as much as he possibly could." The evidence recited in this paragraph appears to extend beyond the allegations of the petition but was not objected to.

All witnesses agreed that Karen at all times kept the children clean and adequately fed and clothed and it is not disputed that she loved them.

Section 43-209, R. R. S. 1943, provides for the termination of parental rights under certain specific circumstances. This may be done when parents have substantially and repeatedly neglected a child and refused to give it necessary parental care and protection or when a parent is unfit by reason of lewd and lascivious behavior which is detrimental to the health, morals, or well-being of the child.

In the present instance, it appears that Karen Sue Naimie was not unduly neglectful of her children due to the incidents mentioned in the petition. She always left the children, during her absence, in the care of their grandmother and although the grandmother objected to this, it is apparent that the children were adequately cared for. There is, however, a broader aspect of this case which should not be ignored. The petition contains general allegations of dependency and neglect. It stands unchallenged either in the separate juvenile court or in this court. We deal here with a young mother of two children born out of wedlock. The first was conceived when she was only 17 years of age and the second about 3 months after the birth of the first. A wayward and irresponsible tendency on her part is apparent. That she is continuing this irresponsible conduct is demonstrated by her persistent association with married men, her evident refusal to obtain employment and support either herself or her children, her unexplained absences, and the effect her association with men had on Stacy, the oldest child. Under the circumstances, it appears that Karen Sue Naimie is at present unable or unwilling to give her children proper parental care and protection and that she is unfit by reason of lewd and lascivious behavior which is detrimental to her children's morals to have their custody. The child-custody statutes of the State of Nebraska are to be liberally construed to accomplish the purpose of serving the best interests of the children involved. See State v. Randall, *ante* p. 64, 187 N. W. 2d 586.

We find that the record sustains the judgment of the separate juvenile court and that the judgment should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LYNN M. MOORE, APPELLANT.

192 N. W. 2d 155

Filed December 3, 1971. No. 37979.

1. **Criminal Law: Trial: Evidence.** Evidence of a crime like the one charged against an accused is admissible if it tends to prove a particular criminal intent which is necessary to constitute the crime charged.
2. ———: ———: ———. Whether such other crimes are too remote is determinable by the exercise of judicial discretion, the limits of discretion being set by the facts of each case.

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

Frank E. Piccolo, for appellant.

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

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

SMITH, J.

A jury found Lynn M. Moore guilty in a criminal prosecution for issuance of a no account check. On appeal for error he assigns admission in evidence of two other checks issued by him.

Moore issued the check described in the information upon First Security Bank of Sutherland for $153 on July 5, 1969. He had maintained an account there only from November 1949 to March 1951 when his credit balance fell to nothing.

One of the other checks was issued by Moore on the

First Security Bank for $12.35 on January 1, 1968. The second check, exhibit 7, was drawn by him on that bank for $15 on December 30, 1967. The bank's rejection slip on exhibit 7 indicated insufficient funds by a mark on the slip but with a handwritten notation "N.P. St.".

Evidence of a crime like the one charged against an accused is admissible if it tends to prove a particular criminal intent which is necessary to constitute the crime charged. State v. Mayes, 183 Neb. 165, 159 N. W. 2d 203 (1968). Whether such other crimes are too remote is determinable by the exercise of judicial discretion, the limits of discretion being set by the facts of each case. State v. Rich, 183 Neb. 128, 158 N. W. 2d 533 (1968); United States v. Corry, 183 F. 2d 155 (2d Cir., 1950).

"To prove Intent, . . . including the various non-innocent mental states accompanying different criminal acts, there is employed an entirely different process of thought. The argument here is purely from the point of view of the doctrine of chances,—the instinctive recognition of that logical process which eliminates . . . innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all. . . . similar results do not usually occur through abnormal causes; and the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative . . . (an) innocent mental state . . .; and the force of each additional instance will vary in each kind of offence according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent." II Wigmore on Evidence, § 302, p. 196 (3d Ed., 1940).

Admission in evidence of exhibit 7, at least in light of the bank record of no account, was not prejudicial error. Moore's other contentions are not well taken.

AFFIRMED.

LIDA MAE SCHUMAN, APPELLANT, V. GEORGE F. SCHUMAN, APPELLEE.

192 N. W. 2d 150

Filed December 3, 1971. No. 37980.

Divorce: Appeal and Error. The judgment of the trial court fixing the amount of alimony will not be disturbed on appeal unless good cause is shown.

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

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

Atkins, Ferguson, Nichols and Hahn, for appellee.

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

NEWTON, J.

This is a divorce action in which the only question presented is the propriety of the property settlement awarded to plaintiff by the court. We affirm the judgment of the district court.

Plaintiff and defendant were married on December 30, 1963, and separated on May 27, 1970. Defendant was a farmer 61 years of age at the time of the divorce hearing and had been previously married. It was plaintiff's third marriage and she had two grown sons by a former marriage. At the time of the marriage, plaintiff had assets consisting of a checking account in the sum of $715.59, a certificate of deposit of $10,000, a savings account of $7,080, indebtedness due her from her son Graham Darnell in the sum of $5,000, and a farm subsequently sold for $26,000, totaling $48,795.59. She made further loans to her sons and at the time of the divorce hearing, they owed her respectively $17,500 and $7,000. She had during the marriage made gifts to her sons. One received a credit on his indebtedness of $10,000, reducing it to the $7,000 balance mentioned, and the other received

$10,000 in cash. She had cashed certificates of deposit in May 1970. Out of this she made the $17,500 loan to one son. Her assets, including gifts to her sons, totaled $44,500. All of this property was awarded to her and, in addition, she received monthly support totaling $1,466 and a judgment for $11,000 made a lien on defendant's farm. Under the decree, she has received, including the gifts to her sons, the sum of $56,966, together with minor items of personal property.

At the time of the marriage, defendant owned a 160-acre farm, a bank account of $250, an account receivable of $500, cattle and grain of the value of $15,310, machinery, a horse, and equipment of the value of $9,860, and owed a bank note of $1,000. These assets, less the indebtedness and farm value, amounted to $25,170. At the time of the divorce, he had a bank account of $3,206.42, certificates of deposit of $10,000, cattle and grain valued at $10,753.75, a horse, equipment, and machinery valued at $6,640, or personalty amounting to $30,600.17. In addition, he had the farm the value of which was enhanced by improvements erected or installed during the marriage in the sum of $9,000. The farm, without the improvements, was valued at $23,000. Value of the farm at the time of the marriage does not appear but assuming it was the same, or $23,000, his total assets when married were of the value of $48,170, and when divorced, $62,600.17. The judgment lien on the farm would reduce these assets to $51,600.17.

It appears that plaintiff has received all of the assets she had at the time of her marriage, and, in addition, has received other assets of a value in excess of $8,000. "The judgment of the trial court fixing the amount of alimony will not be disturbed on appeal unless good cause is shown." Passmore v. Passmore, 144 Neb. 775, 14 N. W. 2d 670.

We are of the opinion that plaintiff has been fairly dealt with and that the judgment of the district court

should be affirmed. The allowance of an attorney's fee has not been requested and none is allowed.

AFFIRMED.

EDWARD A. JINDRA, APPELLEE, V. S.M.S. TRUCKING CO., A CORPORATION, ET AL., APPELLANTS.
192 N. W. 2d 139

Filed December 3, 1971. No. 37986.

1. **Motions, Rules, and Orders: Appeal and Error: Continuances.** A motion for a continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed.
2. **Torts: Damages: Evidence.** A person injured by the negligence of another and claiming the right to recover for future pain and suffering and permanent disability can recover for such of the elements as the evidence shows are reasonably certain to be experienced in the future.

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

Deutsch & Hagen and Thomas H. DeLay, for appellants.

George H. Moyer, Jr., of Moyer & Moyer, for appellee.

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

CLINTON, J.

This is an action for property damage and personal injury growing out of a truck and farm tractor collision on a public highway. The plaintiff is the owner and operator of the tractor. The defendants are the owner and driver respectively of the truck. The jury returned a verdict in the amount of $2,745.80 for the plaintiff and the defendants appeal. Ten assignments of error are made but they boil down to two issues which are: (1) Did the trial court abuse its discretion in refusing to

grant the defendants a continuance because of the unavailability of the defendant Nelson as a witness. (2) Was the evidence sufficient to submit to the jury the questions of future pain and suffering and permanent disability. Contingent upon the determination of this issue is the related question of the propriety of the relevant instructions to the jury. We affirm.

On November 19, 1970, 4 days before the trial date, the defendants' attorney filed a motion for a continuance founded upon the unavailability of the defendant Nelson as a witness. The affidavit in support of the motion shows the case was referred to counsel on October 10, 1968, by the insurance carrier of the defendants; at that time the defendant trucking company was bankrupt and had been dissolved, and information was furnished to counsel that Nelson lived at a certain address in Fremont, Nebraska; in September 1969, a letter was mailed to Nelson at his Fremont address notifying him that the case was on the trial list; later during that month counsel was notified by Nelson's mother that he lived in Arizona, that she had heard from him by telephone, and he had stated he would come to testify if his expenses were paid; the case was then continued for various reasons; in October 1970, the insurance carrier began to try to locate Nelson who had moved without leaving an address; efforts to locate Nelson had failed; and apparently at no time had there been any personal communication between counsel and Nelson. The court denied the continuance because it "was not timely filed, that there was no showing that the Defendant, Henry J. Nelson, would or could be present at a later time and for the further reason that said case has been on file since August 19, 1968, and has already been passed for trial through three terms and is the oldest case for trial on the docket * * *." A motion for continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed. White Motor

Co. v. Reynolds, 179 Neb. 91, 136 N. W. 2d 437. We cannot say that there was any abuse of discretion in this case.

The evidence on issue (2) is substantially as follows: The collision caused the plaintiff to bump his head against the tractor cab and he was bounced around in the cab. The plaintiff testified: "Well, I had a bump on my head, and then my shoulder hurts. It hurt then and it still does." He could not work much the next day. He sought medical assistance a couple of months later. He saw the doctor twice. Pills were prescribed. He next consulted a doctor about 2 years later, apparently in preparation for trial. He saw him twice. Before the accident he had no trouble with his neck and shoulder. The shoulder still hurt at trial time. The pain is between the base of the neck and the tip of the shoulder. It interferes with hard work such as "pitch corn, use a fork or shovel or raise something heavy." He has to have extra help on this account.

The physician who examined the plaintiff on the two occasions within a few months before trial was the only medical witness. He testified that X-rays disclosed a very minimal arthritis on the vertebrae of the neck and that he had no opinion as to the cause or whether it antedated the accident. He then testified (seemingly contradictorily) that the accident aggravated the condition. Without objection to foundation or otherwise he then testified: "Q Doctor, do you have an opinion as to whether or not Mr. Jindra will continue to suffer pain as a result of the accident on May 18, 1968? A Yes. Q Would you give us your opinion, please. A Yes, he will. . . . Q And would you describe for the Court and Jury, please, Doctor, what disability that he was experiencing when you last saw him? A He complained to me of the same disability he had at the time of his examination approximately two months earlier, limitation of motion of the left shoulder and pain up into the neck from—shoulder and neck. I found no change." He estimated

the plaintiff's disability at 15 percent of the body as a whole. He further testified that on the occasion of his last examination of the plaintiff he found no change in plaintiff's condition. Again without objection he testified: "Q Doctor, what are the prospects in your opinion, and again within a reasonable medical certainty, for improvement in Mr. Jindra's condition? A I must be guarded; I would expect him to continue to have trouble, but I can't testify that he will," and further stated that as long as plaintiff continued farming it is reasonably medically certain that his disability will continue and he will continue to have pain. On recross examination he stated he could not state the extent of aggravation. On redirect he stated that the limitation of motion in the shoulder has caused "pain and inflammatory changes in muscles" and "the muscles of the neck are tightly packed around the cervical spine, and an injury or a swelling or an irritation of the joints of the cervical spine will in turn cause inflammatory change in the muscles and then they will go into a sort of a spasm: and when they do, the motion of that muscle is limited." Again without objection he testified: "Q Doctor, will you tell the Court and Jury whether or not this limitation of motion to which you have referred in your opinion, again within a reasonable medical certainty, is caused by the injury that Mr. Jindra suffered in the accident on May 17, 1968? A Yes."

The defendants essentially argue that because the doctor testified that he could not state the arthritis preceded the accident there is no basis for the testimony of aggravation and therefore the testimony is legally insufficient. This overlooks the fact that the doctor's testimony was based on his acceptance of the plaintiff's statement as shown by the history he took that the plaintiff had no symptoms prior to the accident and they started at that time. As already noted the plaintiff testified that he had had no prior problems.

The court instructed the jury as follows: "You will

disregard any reference during the trial of this case to any statement about the aggravation of a pre-existing arthritic condition, and you shall not allow any damages for pain and suffering or for disability resulting from any such arthritic condition." The jury could find under the evidence that the plaintiff's symptoms and disability were wholly caused by the accident and the injuries suffered at that time.

The defendants assign as error the refusal of the court to give their requested instruction No. 1. The substance of the requested instruction was given in the instruction quoted above. There is no error here.

The defendants assign as error the giving of the instructions submitting to the jury the questions of future pain and suffering and permanent injury. The doctor's opinion on these points previously referred to and to which no objection was made as to foundation or otherwise was sufficient for these issues to be submitted and to support a finding by the jury that the plaintiff would suffer future and/or permanent pain, suffering, and disability. The testimony of the doctor was not without probative force. The jury was properly instructed that plaintiff could recover for such of these elements as were "reasonably certain to be experienced in the future." This is the test. Boardman v. McNeff, 177 Neb. 534, 129 N. W. 2d 457. The instructions given are those approved by rule of this court. There is no error here.

Defendants assign as error the instruction given by the court on reducing damages for future pain and disability to their present worth. The instruction given was that approved by rule of this court. There is no error here.

AFFIRMED.